UNITED STATES DISTRICT COURT
FILED
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MICHAEL J. ROEMER, CLERK
WESTERN DISTRICT OF NY

CRIMINAL JUSTICE ACT PLAN

I. AUTHORITY

Pursuant to the Criminal Justice Act of 1964 and the Guidelines for the Administration of the Criminal Justice Act, the United States District Court for the Western District of New York adopts this Plan for furnishing representation to any person eligible for such assistance in accordance with the CJA.

II. DEFINITIONS

A. The term "CJA" means the Criminal Justice Act of 1964,18 U.S.C. § 3006A.

B. The term "Guidelines" means the Guidelines for the Administration of the Criminal Justice Act, Volume VII of the Guide to Judiciary Policies and Procedures, as promulgated by the Judicial Conference of the United States.

C. The term "Court" means the Judges of the United States District Court for the Western District of New York.

D. The term "District" means the geographical boundaries of the United States District Court for the Western District of New York.

E. The term "Plan" means the Criminal Justice Act Plan for the United States District Court for the Western District of New York as stated herein.

F. The term "Judge" means a United States District Judge, Senior District Judge and Magistrate Judge of the Court, unless stated otherwise.

G. The term "Committee" means the Panel Selection Committee as established by the Plan.

H. The term "Person(s)" shall mean any natural person or corporation.

I. The term "Representation" includes legal counsel and investigative, expert and other services.

III. STATEMENT OF POLICY

A. It is the policy of the Court that the purposes of the CJA shall be fully achieved so that all persons eligible to obtain representation in criminal proceedings shall receive such assistance and that accused persons shall have the assistance of counsel including services as necessary to provide an adequate defense. The Plan shall be administered in accordance with the Guidelines as adopted and amended by the Judicial Conference of the United States.

B. The Court, Clerk of the Court, the Federal Public Defender's Office and any attorney appointed under this Plan shall comply with the Guidelines and this Plan. The Clerk shall provide each member of a Panel, established under this Plan, or any other attorney appointed as counsel under the CJA and this Plan with a then current copy of this Plan. The Clerk shall maintain a current copy of the CJA Guidelines for use by any Panel member.

IV. PROVISION OF REPRESENTATION

A. Representation shall be provided for any financially eligible person who:

(1) is charged with a felony or Class A misdemeanor;

(2) is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. §5031;

(3) is under arrest, when such representation is required by law;

(4) is charged with a violation of probation, parole, or supervised release, or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of probation, parole or supervised release;

(5) is subject to a mental competency hearing under Chapter 313 of Title 18 of the United States Code;

(6) is in custody as a material witness;

(7) is charged with a capital offense or is seeking to set aside or vacate a death sentence under 28 U.S.C. §§ 2254 or 2255;

(8) is entitled to appointment of counsel, to verify consent pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;

(9) is the subject of a federal grand jury subpoena and risks self-incrimination, loss of liberty or contempt of court;

(10) is the subject of federal law enforcement investigation and faces a substantial risk of federal charges;

(11) is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or

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

B. Whenever a Judge determines that the interest of justice requires it, representation may be provided for a eligible person who:

(1) is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized;

(2) is seeking relief, other than to set aside or vacate a death sentence, under 28 U.S.C. §§2242, 2254 or 2255; or

(3) is proposed by the United States Attorney for processing under a pretrial diversion program.

V. FEDERAL PUBLIC DEFENDER ORGANIZATION

A. The Court finds that the Federal Public Defender's Office of the Western District of New York, previously established in this District pursuant to the CJA, is an effective component in the provision of legal assistance in this District as required by the CJA and Guidelines, and shall continue to provide such services to eligible persons in this District under the CJA Guidelines and the Plan. The Federal Public Defender's Office shall be capable of providing representation throughout the District and shall maintain offices in Buffalo and Rochester, New York.

B. The Federal Public Defender shall be responsible for the supervision and management of the Federal Public Defender's Office. It will be the responsibility of the Federal Public Defender to designate the staff attorney who will handle a case assigned to that office.

C. The Federal Public Defender shall comply with all reporting and other duties, including reports of the Office's activities, financial condition and budgets as required by the Administrative Office of the United States Courts and as provided in the Plan. Copies of such reports shall be furnished to the Court.

VI. ASSIGNMENT OF FEDERAL PUBLIC DEFENDER AND PRIVATE COUNSEL UNDER THE PLAN

Legal services to eligible persons shall be provided by both the Federal Public Defender's Office and private counsel who are appointed from the Trial Panel and from the Emeritus Panel as established under the Plan. It is the Court's intention that private counsel from the Trial and Emeritus Panels will be assigned as counsel in a substantial portion of cases.

VII. ESTABLISHMENT OF PANEL SELECTION COMMITTEE

A. Membership

A Panel Selection Committee shall be established by the Court. The Committee shall consist of seven members as follows:

(1) four experienced Trial or Emeritus Panel members of the District, at least one of whom is a member of the Trial Panel - two from the Buffalo division and two from the Rochester division;

(2) two Judges of the Court; and

(3) the Federal Public Defender.

The private bar members of the Committee shall serve without compensation and at the pleasure of the Court. One of the four private attorney members of the Committee shall be the representative of the District to the National Conference of CJA Attorneys. The Federal Public Defender for the District shall be a permanent member of the Committee and shall serve as its secretary. The Committee shall select its own chairperson. The Committee may be expanded from

time to time, at the discretion of the Court. Unless otherwise stated in this Plan, "the Committee" refers to the entire Committee or the Committee's designated subcommittee or representative.

B. Duties of the Committee

The Committee shall meet at least once each calendar year to consider business pertinent to the administration of the Plan as determined by the Committee or as requested by the Court. Such business may include reviewing applications for admission to the Trial and Emeritus Panels ("the Panels") as established by the Plan. As applications are received, the Committee shall review the qualifications of all such applicants, and recommend, for approval by the Court, those applicants meeting the criteria established by the Plan for admission to the Panels. The Committee may interview any applicant at its discretion. The Committee shall also review, at least once annually, the operation and administration of the Panels, and recommend to the Court any changes deemed necessary or appropriate by the Committee regarding the appointment process and management of the Panels, including removal of an attorney as a member of either Panel, and the general operation of the Plan. The Committee shall also report to the Court as to the continued availability and qualifications of Panel members to accept appointments, and consider such other matters as are referred to the Committee by the Court.

VIII. ESTABLISHMENT OF THE TRIAL PANEL

A. Eligibility

Any attorney who seeks appointment as a member of the Trial Panel must be admitted to practice before the Court and the United States Court of Appeals for the Second Circuit and be in good standing. All applicants must demonstrate a commitment to provide high quality representation to those individuals eligible for their services, commensurate with those services rendered when counsel is privately retained. Polk County v. Dodson, 454 U.S. 312, 318 (1981)("Once a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.").

Each applicant must certify that he or she has read and can demonstrate knowledge of the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the Federal and Second Circuit Rules of Appellate Procedure, the United States Sentencing Guidelines, the Bail Reform Act of 1984, the Local Rules of Criminal Procedure and standing Orders, the Guidelines for the Administration of the Criminal Justice Act, the Rules of Civility, and this CJA Plan.

Each applicant shall have also tried at least two felony cases to verdict in either state or federal court. Alternatively, an applicant must have appeared as defense counsel of record in at least two federal felony cases from initial appearance or arraignment through sentencing and have other significant trial experience as determined by the Committee. Unless specifically permitted by the Court, applicants shall have their principal place of business within the Western District of New York.

B. Probationary Period

In the Committee's discretion, it may be recommended to the Chief Judge that applicants with limited trial or federal criminal practice experience be accepted to the Trial Panel and placed on probation through completion of the first three cases assigned to them. During their first year, the probationary Panel member shall attend all training programs presented by the Federal Public Defender's Office, except for good cause shown, and shall participate in the mentoring program outlined in section XV of this Plan. Probationary Panel members will be eligible for the regular assignment of cases unless the judge requesting the assignment indicates that the matter would not be appropriate for assignment to a probationary Panel member. The Committee shall be notified by the Panel member upon completion of his/her third probationary assignment. After consultation with the assigned mentor, the Committee will review and recommend to the Court either elevation to non-probationary status, a continuation of probation for a specific length of time, or removal from the Panel.

C. Application for Trial Panel Membership

An attorney who wishes to serve on the Trial Panel under this Plan must submit a written application for Trial Panel Membership and must provide the names of at least one defense attorney, Judge and prosecutor with whom the attorney has dealt, as references. This requirement applies to all attorneys without regard to any previous assignment under the existing CJA Plan. Application forms for Trial Panel membership shall be available from the Clerk of the Court and the Federal Public Defender's Office. Applications shall be submitted to the Federal Public Defender, who shall promptly forward all applications to the chairperson of the Committee. The Committee shall forward each application to the Chief Judge with a written recommendation for acceptance, acceptance with probation, or rejection.

D. Disputes

Any disputes regarding appointment to or continued service on the Trial Panel will be determined by the Chief Judge.

IX. EMERITUS PANEL

The Committee will also recommend to the Court a list of highly experienced attorneys who are willing to serve as CJA counsel on cases deemed appropriate to supplement the depth of the Panel. The Emeritus Panel will be comprised of attorneys who are not part of the regular rotation of CJA appointments, but who are willing to serve the Court on cases requiring specific experience and expertise. Emeritus attorneys must be admitted to practice before the Court and the United States Court of Appeals for the Second Circuit and be in good standing. Emeritus attorneys must demonstrate proficiency equivalent to the annual training requirements of the regular CJA Panel attorneys.

X. APPOINTMENT OF COUNSEL

A. In every case in which appointment of counsel pursuant to 18 U.S.C. § 3006A and this Plan is authorized, it is the duty of the Judge to advise the person of the right to counsel. The Judge shall appoint counsel promptly if the person is financially unable to obtain adequate counsel, unless the person waives his/her right to be represented by counsel.

B. In all cases in which a person qualifies for appointment of counsel, the Court may direct the Federal Public Defender's Office to appoint counsel from the CJA Panel. The Court may specify that the attorney assigned be a probationary or non-probationary member of the Trial Panel, or an Emeritus Panel attorney. Under special circumstances, the Court may appoint directly a particular member of the bar of the Court. Such special circumstances may include cases in which the Judge determines that the appointment of a particular attorney is in the interest of justice, judicial economy or continuity of representation, or in the case of any other compelling circumstance.

C. In the absence of the aforementioned special circumstances, the appointing Judge will immediately notify the Federal Public Defender's Office of the need for appointment of counsel.

D. Personnel from the Federal Public Defender's Office, upon receiving notice of the appointment, shall immediately obtain from the appointing Judge all relevant information, such as the nature of the charge, the location of the accused, the date and time of the next scheduled court appearance, and the presence of an ethical conflict of interest precluding the Federal Public Defender's Office from accepting the appointment.

E. If the decision is made to refer the case to a Panel attorney, the Federal Public Defender's Office will promptly select a Panel attorney and contact that attorney to determine his/her availability for appointment.

F. The Federal Public Defender's Office shall take all reasonable steps to ensure that counsel is appointed expeditiously, that appointments from the Panel are fairly distributed among all members of the Panel, and that information concerning the continued availability of counsel for appointment is maintained. It is the policy of the Court to seek a balanced distribution of appointments among all the members of the Panel.

G. The Court and the Federal Public Defender's Office shall each maintain a list of attorneys eligible for appointment as members of the Panel, with office addresses, email addresses and telephone numbers for each attorney. A regularly updated copy of this list shall be provided to each Judge and each Committee member. In addition, the Federal Public Defender shall provide each Committee member with an annual statement containing the number of cases in which persons were assigned to the Federal Public Defender's Office or CJA counsel, and the number of cases assigned to each Panel member.

H. Counsel appointed to represent a person in custody shall make contact with that person as soon as possible after being advised of the appointment. Counsel shall not accept an appointment if unable to meet expeditiously with a client in custody.

I. A defendant shall not have the right to select a particular attorney from the Federal Public Defender's Office, or from the Trial or Emeritus Panels.

J. Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they first appear before the Court, or when the Judge otherwise considers appointment of counsel appropriate under the CJA, whichever occurs first.

K. The determination of eligibility for representation under the CJA is a judicial function to be performed by the Court after making appropriate inquiries concerning the person's financial condition.

L. If, at any time after the appointment of counsel, the Court finds that the defendant is financially able to obtain counsel or make partial payments for the representation, the Court may terminate the appointment of counsel or direct that any funds available to the defendant be paid, in a lump sum or by periodic payments, as provided in 18 U.S.C. § 3006A(f). 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 so advise the Court.

M. At any stage of the criminal proceedings, upon finding that the person is financially unable to continue to pay retained counsel, the Court may make an appointment of counsel in

accordance with the general procedure set forth in this Plan. This proviso does not, however, relieve retained counsel from either his/her contractual obligations under the retainer agreement or his/her obligations under the Rules of Professional Responsibility. Also, this proviso does not alter the mandate of the Local Rules which requires leave of Court to withdraw once a notice of appearance has been entered.

N. Counsel appointed by a Judge shall, unless excused by order of the Court, continue to act for the represented party in all court proceedings and other matters for which counsel was assigned. 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 on appeal unless or until counsel is relieved by the Court of Appeals. Counsel must also comply with all rules regarding appeal including, where appropriate, the preparation of a writ of certiorari and advice to a defendant regarding the right to proceed pro se.

O. 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.

XI. INVESTIGATIVE, EXPERT AND OTHER SERVICES

Counsel, whether or not appointed under this Plan, for a party who is financially unable to obtain investigative, expert or other services necessary for an adequate defense, may request such services by ex parte application to a Judge, as provided in 18 U.S.C. § 3006A(e) and any applicable guidelines established by the Judicial Conference of the United States. Upon finding that such services are necessary for adequate representation, and that the person is financially unable to obtain them, the Judge shall authorize counsel to obtain the services.

XII. COMPENSATION

A. The Court will look to the *Guide to Judiciary Policies and Procedures*, Volume VII, *Guidelines for the Administration of the Criminal Justice Act* (*Guideline*) for guidance in matters of attorney compensation, expenses and the cost of experts and outside services.

B. Rates

The hourly rates of compensation, as set by Congress, are designated and intended to be maximum rates, and will be treated as such and shall be the rate of compensation unless, after consideration of the qualifications of the attorney and the relative difficulties encountered in

presenting the case, the Court deems a different rate appropriate. If a rate other than the statutory maximum rate is set by the Court, the Court shall promptly notify the Clerk's office. Charges in excess of the statutory case compensation maximum shall only be sought in complex or extended cases.

C. Case Budgeting

A case budget must be submitted to the Court, *ex parte*, in representations that appear likely to become extraordinary from a cost perspective. "Extraordinary" means a representation in which attorney time is expected to exceed 300 hours, or total expenditures for counsel and services in addition to counsel (e.g., experts, interpreters, investigators, travel expenses) are expected to exceed $30,000 on behalf of an individual CJA defendant.

D. Claims

(1) Submission of Claims

A claim for compensation and reimbursement must be made promptly after the conclusion of the criminal proceeding. Each claim must be made using the appropriate CJA form as designated by the Administrative Office of the United States Courts, specifying the time expended, services rendered and actual expenses incurred, along with the amount of any compensation and reimbursement applied for or received in the same case from any other source. The Court will, in each instance, fix the total compensation and reimbursement to be paid to the attorney. All claims shall be submitted to the Clerk of the Court. In cases where representation is furnished exclusively before a United States Magistrate Judge, the claim shall be determined by the Magistrate Judge who shall fix the compensation and reimbursement to be paid. In all other cases, claims shall be determined by the District Judge who presided in the matter.

(2) Notice of Reduction of Claim

If the Court determines that a claim should be reduced, appointed counsel should be provided: (a) prior notice of the proposed reduction with a brief oral or written statement of the reason(s) for it; and, (b) an opportunity to address the matter by affidavit or by any other fashion directed by the Court. However, notice need not be given to appointed counsel where the reduction is based on mathematical or technical errors. The Court also has the option to refer matters to the Committee by confidential memorandum to investigate, report and recommend on any voucher issue.

(3) Excess Claims

Payment in excess of the statutory case maximum for compensation to be paid to an attorney may be made for extended or complex representation when supported by a written request from counsel submitted on the appropriate CJA form. This submission must set forth the reason for excess payment. The Court must certify that such payment is necessary, and the amount of the excess payment must be approved by the Chief Judge of the Court of Appeals for the Second Circuit, or his or her designee.

XIII. CONTINUING LEGAL EDUCATION

A. The Federal Public Defender's Office shall regularly schedule and conduct continuing legal education programs for Panel attorneys for the purpose of enhancing their professional knowledge and skills. The Federal Public Defender's Office shall present at least two training programs each calendar year, one of which will cover the fundamentals of federal criminal defense practice, including sentencing law and practice under the federal sentencing guidelines. These programs will be conducted within the District, at a nominal cost to attendees.

B. Each Trial Panel member shall be required to attend at least one of the annual training programs presented by the Federal Public Defender's Office, or, in the alternative, complete a minimum of six hours of federal criminal defense continuing legal education offered by a bona fide continuing legal education program each year, at his or her own expense, as a condition of maintaining membership on the Panel. Panel members or applicants for Panel membership must certify, on or before January 1st of each year, on forms available at the Federal Public Defender's Office, that they have satisfied the continuing legal education requirements as stated herein.

XIV. REMOVAL FROM THE TRIAL OR EMERITUS PANEL

A. Mandatory Removal

Any member of the Trial or Emeritus Panel who is suspended or disbarred from the practice of law by the state court before whom such member is admitted or who is suspended or disbarred from this Court, shall be removed immediately from such Panel.

B. Discretionary Removal

(1) Automatic Disciplinary Review

There shall be an automatic disciplinary review of any CJA Panel member in each of the following circumstances:

a. When any public form of discipline has been taken against the Panel member by any licensing authority, grievance committee, or administrative body; or

b. When a finding of contempt, sanction or reprimand has been issued against the Panel member by any state or federal court.

c. **Notice.** In the case of any of the circumstance outlined in Part XIV(A) or (B)(1), the Panel member must immediately notify the Chair of the Committee of the background and nature of the action that has been taken against him or her.

(2) Complaints

a. **Initiation**. A complaint against a Panel member may be initiated by the Committee, a judge, opposing counsel, another Panel member, a member of the Federal Public Defender's Office, a client or any other concerned person. A complaint need not follow any particular form, but it must be in writing and state the alleged deficiency with specificity. Any complaint should be directed to the Chief Judge. The Chief Judge shall then determine whether further investigation by the Committee is necessary.

b. **Notice**. If the Chief Judge directs the Committee to conduct an investigation, the Panel member against whom a complaint is lodged must be notified of the specific allegations against him or her, unless the Court orders otherwise.

c. **Response**. A Panel member against whom a complaint is lodged may respond in writing and shall, if so directed, appear before the Committee or subcommittee thereof.

d. **Protective Action**. Prior to disposition of any complaint, the Committee may recommend temporary removal of the Panel member from any pending case, or from the Panel, and may take any other protective action that is in the best interest of the client or the administration of this Plan.

e. **Review and Recommendation**. After investigation, the Committee may recommend:

i. Removing the attorney from the Panel;

ii. Limiting the attorney's participation to particular types or categories of cases;

iii. Directing that the attorney complete specific CLE requirements before receiving further Panel appointments;

iv. Limiting the attorney's participation to handling cases which are directly supervised or overseen by another Panel member or other experienced practitioner;

v. Any other appropriate remedial action;

vi. Dismissal of the complaint.

f. **Final Disposition by the Court**. The Committee will forward its recommendation to the Chief Judge for consideration and final disposition. The Chief Judge may take any action deemed appropriate, whether or not recommended by the Committee.

g. **Confidentiality**. Unless otherwise directed by the Court, any information acquired concerning any possible disciplinary action, including any complaint and any proceeding concerning it, shall be confidential.

h. None of these procedures should be deemed to create a proprietary interest in being or remaining on the Panel. Roth v. King, 449 F.3d 1272 (D.C.Cir. 2006).

(3) Re-application

Any attorney removed from the Panel may reapply one year after removal provided the requirements of Section VIII(A) of this Plan are satisfied.

XV. MENTORING PROGRAM

A. If requested by the Committee, a Trial or Emeritus Panel member shall serve as a mentor to probationary Panel members. Attorneys of the Federal Public Defender's Office will also serve as mentors. A mentor will make himself/herself available to answer questions of and provide advice to a probationary Panel member regarding cases currently assigned to the probationer. The mentor may also allow the probationary Panel member to observe and to participate in, if appropriate, all aspects of a federal criminal case, including client conferences, decisions concerning defense strategy, motion and trial preparation, and court appearances, including hearings and trials.

B. Trial and Emeritus Panel members will be expected to agree to reasonable mentoring requests and endeavor to involve the probationary Panel member as closely as possible in the substance of the representation. The Committee shall establish standards for the administration of this program.

XVI. APPOINTMENT OF COUNSEL AND CASE MANAGEMENT IN CAPITAL CASES

A. Applicability and Purpose

The provisions set forth in this section shall govern in all capital cases. For the purposes of this section, "capital cases," or "cases involving the death penalty," are those criminal cases in which the death penalty may be or is being sought by the prosecution, as well as proceedings under 28 U.S.C. §§ 2254 or 2255 seeking to vacate or set aside a death sentence, motions for a new trial, direct appeal, application for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

The provisions of this section shall be implemented by the presiding judge at the earliest opportunity in any potential capital case.

B. Trial Counsel

(1) General Requirements

Due to the complex, demanding, and protracted nature of death penalty proceedings, a defendant who is or has become financially unable to obtain adequate capital representation and who applies for appointment of counsel at government expense shall be entitled, as required by 18 U.S.C. § 3005, to the assignment of at least two attorneys who meet the qualifications set forth in this section. At least one of the attorneys appointed to represent the defendant shall be learned in the law applicable to capital cases and, when applicable, qualified as pursuant to 21 U.S.C. §§ 848(q)(5) or 848(q)(6).

In cases where two or more defendants are to be tried jointly, the presiding judge shall appoint separate teams of counsel for each defendant. One member of the team shall be designated lead counsel and the other member(s) shall be identified as assistant counsel.

(2) Qualifications of Lead Counsel

To be eligible for appointment as lead counsel in a capital case, an attorney must:

a. be a member of the bar of this Court, or must be admitted to practice *pro hac vice* based on his or her qualifications;

b. have at least ten years experience in the field of federal criminal defense practice;

c. have prior experience as sole or lead defense counsel in the trial of no fewer than three serious and complex felony cases that were tried to completion in federal court;

d. have exemplary prior experience as defense counsel in a state or federal capital case;

e. have completed at least ten hours of approved continuing legal education in the defense of capital cases, and at least fifteen hours of approved continuing legal education focusing on federal criminal defense; and

f. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to the defense of capital cases.

(3) Qualifications of Assistant Counsel

To be eligible for appointment as assistant counsel in a capital case, an attorney must:

a. be a member of the bar of this Court, or be admitted to practice *pro hac vice* on the basis of his or her qualifications;

b. have at least five years experience in the field of federal criminal defense practice;

c. have prior experience as defense counsel, demonstrating adequate proficiency in connection with serious and complex felony cases;

d. have completed at least five hours of approved continuing legal education in the defense of capital cases, and at least fifteen hours of approved continuing legal education focusing on federal criminal defense; and

e. have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to the defense of capital cases.

(4) Special Appointments: Discretionary, Additional, Stand-by, or Substitute Counsel

The presiding judge may, for good cause, appoint attorneys who do not meet this section's requirements, but whose background, knowledge, or experience would otherwise enable them to effectively represent a defendant in a capital case, provided that lead counsel for each defendant shall have distinguished prior experience as defense counsel in a capital case, as required by Subsection XVI(B)(2) of this section.

Pursuant to 21 U.S.C. §§ 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case.

Where the defendant has retained counsel, the presiding judge may appoint additional, stand-by or substitute counsel in order to ensure the adequate representation of the defendant. Appointment of additional, stand-by or substitute counsel may take place during any stage in the proceedings.

C. Appointment Procedures

(1) Appointment of Capital Trial Counsel

Appointment of trial counsel shall occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible, unless the government issues written notice at or before the initial appearance before the presiding judge that the government will not seek the death penalty, or unless the judge orders that death is not an applicable punishment upon conviction. Where the government's written notice that it will not seek the death penalty is later permitted to be withdrawn, the provisions set forth in this Section shall be implemented as soon after the withdrawal of the notice as practicable. Where the current charge is not death eligible, but the underlying facts in a case may permit the subsequent filing of a death eligible criminal charge, the Court shall specifically inquire of the government whether it is considering a future charge. Where the government advises that such future charge is possible or fails to affirmative state it will not bring such charge, capital counsel shall be appointed.

Before the appointment of counsel is made in a capital case, the judge presiding over the initial proceedings shall inform the Federal Public Defender for the Western District of New York that a capital case is pending and that counsel is needed. The Federal Public Defender shall provide the judge with the names of at least two attorneys who meet the guidelines for counsel in capital cases, as set forth in Section XVIII (B)(2).

The presiding judge shall either accept or reject the submitted names, and shall notify the Federal Public Defender of the decision. In the event that a recommendation is not accepted, the presiding judge shall consult with the Federal Public Defender to identify qualified counsel.

The Court may appoint counsel in advance of formal charges being filed if it learns of a potential capital case prior to charges being filed or arrests being made. In order to protect the rights of an individual who is the subject of an investigation

in a capital case, the presiding judge may assign interim counsel at his or her own initiative, or upon the request of any interested party.

(2) Appointment of Additional or Substitute Counsel

In cases where counsel has been retained or appointed before the government filed notice of its intent to seek the death penalty, the appointment of additional or substitute counsel is permitted once the government files notice of intent to seek the death penalty. Appointment of additional or substitute counsel shall be made sufficiently in advance of trial to permit newly-appointed counsel an adequate opportunity to prepare.

(3) Appointment of Counsel on Appeal

The attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. Once appointed, the attorney shall represent the defendant in every subsequent stage of available judicial and executive proceedings, unless replaced for good cause by a similarly qualified attorney.

At least one attorney appointed on appeal 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 that court in felony cases, pursuant to Section 848(q)(6) of Title 21, U.S.C.

(4) Appointment of Counsel in Post-Conviction Proceedings

In the interests of justice and judicial economy, unless precluded by a conflict of interest, presiding judges are urged to continue the appointment of state post-conviction counsel, if qualified under Section XVIII (B)(2), when the case enters the federal system.

(5) Conflicts of Interest

In the event that the Federal Public Defender's Office cannot aid in the selection of counsel without creating a conflict of interest, the duties of that Office under this section shall be completed by the Chair of the CJA Panel Selection Committee for the Western District of New York, in consultation with the Office of

Defender Services of the Administrative Office of the United States Courts, pursuant to Section 3005 of Title 18, U.S.C.

(6) Termination of Appointment

a. If, following the appointment of counsel in a capital case, it is determined that the death penalty will not be sought, the Court may consider the question of the number of counsel and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disruption of the proceeding, the Court may continue the appointments or reduce the number of appointed counsel.

After considering the need to fairly compensate appointed counsel, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the Court may continue to pay the previously approved rate, or prospectively reduce the rate.

b. Should a defendant in a capital case be convicted, regardless of whether he or she is sentenced to death, counsel shall continue representing the defendant on appeal, unless removed by the presiding judge or the Court of Appeals for the Second Circuit.

D. Initial Status Conference and Case Management Schedule

(1) In all identified capital cases, the presiding judge shall promptly conduct an initial status conference to ensure the effective management of the case, including the appointment of counsel pursuant to this section. A representative of the Federal Public Defender's Office shall be present at this conference.

(2) Upon the return or unsealing of an indictment in a capital case, the Court shall schedule a status conference to discuss issues and concerns related to the death penalty authorization process conducted by the Department of Justice. Among other matters, the conference should address the scheduling of the defendant's submissions to the United States Attorney, the meeting between the defense and the United States Attorney, and discovery that may be necessary before the defense can make any submission to the Court.

(3) If the Attorney General's authorization decision delays the deadlines set in the Court's schedule, the Court may find that the Attorney General's death penalty notice issue did not provide the defense with reasonable time to prepare for trial, as required by 18 U.S.C. § 3593(a).

(4) In order to expedite compliance with this section, counsel shall become familiar with the United States Department of Justice protocol, practices, and procedures in capital cases.

E. Assessment of Costs and Fees

(1) Counsel

Counsel appointed pursuant to this section shall be compensated at a rate determined by the presiding judge to be reasonably necessary for qualified counsel to provide adequate representation in a capital case. At the time counsel are appointed, the Court shall set an hourly rate of compensation pursuant to 21 U.S.C. § 848(q)(10)(A).

(2) Investigative, Mitigation, Expert and Other Services

Upon finding that investigative, mitigation, expert or other services are necessary for the adequate representation of a defendant in a capital case, the presiding judge shall authorize counsel to obtain such services on behalf of the defendant and shall set the rate of compensation in consideration of the statutory limits.

Pursuant to the provisions of this section and the Criminal Justice Act, an interpreter shall be appointed to assist counsel if counsel is not fluent in the capital defendant's native language.

The presiding judge may authorize investigative, mitigation, expert or other services, even if the services have already been obtained.

(3) Confidentiality

Petitions for the payment of costs and fees, including the time and expense records of counsel, shall be heard *ex parte* and *in camera*. The petitions shall be placed under seal and shall be inaccessible to the prosecution and the public, absent court order or written waiver by the defendant, until disposition of the petition.

F. Procedures for Compensation

(1) Compensation for Investigative, Mitigation, Expert and Other Services

Pursuant to 21 U.S.C. § 848(q)(10)(B), fees and expenses for investigative, expert, and other services in excess of $7,500 must be certified by the presiding judge in order to provide fair compensation for services of an unusual character or duration. The amount of any excess payment must be approved by the Chief Judge of the Second Circuit Court of Appeals (or an active circuit judge to whom the Chief Judge has delegated this authority). The $7,500 threshold applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

(2) Forms

Claims for compensation and reimbursement of expenses for services in death penalty proceedings should be submitted on CJA Form 30, "Death Penalty Proceedings: Appointment and Authority to Pay Court Appointed Counsel," and CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services."

(3) Review of Vouchers

Absent extraordinary circumstances, judges should act upon Panel attorney and other compensation claims within 30 days of submission.

(4) Interim Billing and Payment

In the interest of justice and judicial economy, interim billing and payment shall be allowed and encouraged for counsel, experts and other services.

(5) Case Budgeting

The presiding judge and Panel members shall follow the budgeting procedure outlined in Section 6.02(F) of the *Guide to Judiciary Policies and Procedures: Appointment of Counsel in Criminal Cases*.

G. Other Considerations

(1) Emergency Court Contacts

In all capital cases where the death penalty has been authorized, the Clerk of the Court shall devise and implement a system for contacting the presiding judge, counsel for the parties, the United States Marshal for the Western District of New York or his representative, and the warden of the penal institution where the defendant is awaiting execution.

(2) Stays

Upon the filing of a notice of appeal, motion for reconsideration, habeas corpus petition, or other such action which has the practical effect of challenging a sentence of death, the presiding judge shall issue a stay of execution pending final disposition of the matter, accompanied by any necessary findings. The Clerk shall immediately notify all parties, and the state or federal authorities responsible for implementing the defendant's sentence of death, of the stay. If notification is oral, it shall be followed by written notice. Unless vacated or modified, the stay will continue in effect until the expiration of all proceedings available to and elected by the defendant, including review by United States Supreme Court, unless otherwise ordered by the Court. The District Court shall grant a prompt hearing as required by 28 U.S.C. §§ 2254 & 2255 and, as required by 18 U.S.C. § 3595(a) and 21 U.S.C. § 848(q)(1), the review in capital cases shall have priority over all other cases. The Clerk shall send notice to the parties and the state or federal authorities responsible for implementing the defendant's sentence of death when the stay imposed by this provision is no longer in effect.

(3) Pre-Bail Interviews

CJA Counsel, or interim counsel appointed pursuant to this section, shall be present at each pre-bail interview with the defendant, and any other interview conducted by the United States Probation Office or any other office.

(4) Access to Defendant

In light of the heightened necessity for attorney-client consultation in a capital case, the United States Marshals Service shall cooperate in providing counsel adequate access to the defendant.

XVII. FORMS

Where standard forms have been approved by the Judicial Conference of the United States, or an appropriate committee thereof, and have been distributed by the Administrative Office of the United States Courts, such forms shall be used by the Court, the Clerk, the Federal Public Defender's Office and appointed counsel.

/s/ William M. Skretny
WILLIAM M. SKRETNY
Chief U.S. District Judge

/s/ Richard J. Arcara
RICHARD J. ARCARA
U.S. District Judge

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
U.S. District Judge

/s/ John T. Curtin
JOHN T. CURTIN
Senior U.S. District Judge

/s/ Michael A. Telesca
MICHAEL A. TELESCA
Senior U.S. District Judge

/s/ David G. Larimer
DAVID G. LARIMER
Senior U.S. District Judge

Approved by the Judicial Council of the Second Judicial Circuit and filed in the District Court on June 18, 2010.