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U.S. DISTRICT COURT
W.D.N.Y. - BUFFALO

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

CRIMINAL JUSTICE ACT PLAN

I. AUTHORITY

Pursuant to the Criminal Justice Act of 1964, ("the CJA"), 18 U.S.C. § 3006A, and the Guidelines for the Administration of the Criminal Justice Act, Volume VII, Guide to Judiciary Policies and Procedures ("the CJA Guidelines"), the judges of the United States District Court for the Western District of New York, adopt this amended Plan for furnishing representation in federal court for any person financially unable to obtain adequate representation in accordance with the CJA.

II. STATEMENT OF POLICY

A. The objective of this Plan is to attain the ideal of equality before the law for all persons. Therefore, this Plan shall be administered so that those accused of crime or otherwise eligible for services pursuant to the CJA will not be deprived, because they are financially unable to pay for adequate representation, of any element of representation necessary to an adequate defense.

The further objective of this Plan is to particularize the requirements of the CJA and the CJA Guidelines in a way that meets the needs of this District.

B. The Court, the Clerk, the Federal Public Defender Organization, and private attorneys appointed under the CJA shall comply with the CJA Guidelines approved by the Judicial Conference of the United States and/or its Committee on Defender Services and with this Plan. The Clerk shall provide each private attorney with a then-current copy of this Plan upon the attorney's first appointment under the CJA or designation as a member of the panel of private attorneys under the Criminal Justice Act ("the CJA Panel" or "the Panel"). The Clerk shall maintain a current copy of the CJA Guidelines for the use of members of the CJA Panel.

III. DEFINITIONS

A. "Representation" includes counsel and investigative, expert, and other services.

B. "Appointed attorney" includes private attorneys, the Federal Public Defender and staff attorneys of the Federal Public Defender's Office.

C. Wherever in this Plan reference is made to the "Court", "Judge" or similar term, such term shall be deemed to include a magistrate judge unless the context requires otherwise.

IV. PROVISION OF REPRESENTATION

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

1. is charged with a felony or with a 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 charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);
4. is under arrest, when such representation is required by law;
5. is entitled to appointment of counsel in parole proceedings;
6. 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;
7. is subject to a mental condition hearing under chapter 313 of Title 18, United States Code;
8. is in custody as a material witness;
9. is entitled to appointment of counsel in verification of consent proceedings pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;
10. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
11. faces loss of liberty in a case and federal law requires the appointment of counsel.

B. Whenever the Court determines that the interests of justice so require, representation may be provided for any financially 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 under 28 U.S.C. §§ 2241, 2254, or 2255;
3. is charged with civil or criminal contempt and who faces loss of liberty;

4. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
5. is proposed by the United States Attorney for processing under a pretrial diversion program;
6. is held for international extradition under chapter 209 of Title 18, United States Code.

V. PROVISION OF COUNSEL

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 Court to advise the defendant of his or her right to counsel. The Court shall appoint counsel promptly if it is found that the defendant is financially unable to obtain an attorney, unless the defendant waives his or her right to be represented by counsel. If a person having a right to counsel seeks to waive his or her right to have appointed counsel, the Court shall make appropriate inquiry regarding such a waiver. If the person admits or the Court finds that the person is financially able to obtain counsel but declines to do so, the Court shall certify that fact in the record of proceedings.

B. This Plan provides for the furnishing of legal services by the Federal Public Defender's Office and for the continued appointment and compensation of private counsel in a substantial proportion of cases. The Court in its discretion will determine whether

a person entitled to representation will be represented by the Federal Public Defender's Office or by a private attorney.

C. A defendant shall not have the right to select his or her appointed counsel from the Federal Public Defender's Office, from the CJA Panel or otherwise. Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before the Court, when they are formally charged or notified of charges if formal charges are sealed, or when the Court otherwise considers appointment of counsel appropriate under the CJA, whichever occurs earliest.

D. 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. When an arrested defendant has been represented by counsel prior to his or her presentation to the Court under circumstances where such representation is authorized by 18 U.S.C. § 3006A(a), counsel may subsequently apply to the Court for approval of compensation. If the Court finds that the defendant has been and is then financially unable to obtain an adequate defense, and that representation was required by law, compensation will be made retroactive pursuant to 18 U.S.C. § 3006A(b).

E. 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 recommend that any funds available to the defendant be ordered paid 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 advise the Court.

If the circumstances warrant, the Court may direct the defendant at any time to reimburse the United States for providing counsel by requiring a lump sum payment or by requiring periodic payments either before or at the conclusion of the case.

The Court should advise the defendant at the time counsel is appointed that it may enter a reimbursement order but failure to so advise the defendant shall not preclude the issuance of such an order.

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

VI. ESTABLISHMENT OF THE FEDERAL PUBLIC DEFENDER ORGANIZATION

A. The Federal Public Defender Organization of the Western District of New York, previously established in this district pursuant to the provisions of the CJA, is hereby recognized as the Federal Public Defender Organization for this district. The

Federal Public Defender Organization shall be capable of providing legal services throughout the district and shall maintain offices in Rochester and Buffalo.

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

C. The Federal Public Defender shall prepare reports of the Organization's activities and its financial position and proposed budget for submission to the Director of the Administrative Office of the United States Courts at the time and in the form prescribed. Copies of the reports shall be furnished to the Court.

VII. ESTABLISHMENT OF THE CJA PANEL

A. The Court shall establish a panel of private attorneys (hereinafter referred to as "the CJA Panel" or "the Panel") who are eligible and willing to be appointed to provide representation under the CJA. Any attorney admitted to practice in the Western District of New York may seek assignment to the Panel by written request to one of the judges. If the judge determines that the attorney has demonstrated competence in criminal law, the attorney shall be added to the Panel by written order. For good cause shown, and after notice and an opportunity to be heard, an attorney may be stricken from the Panel.

B. The CJA Panel shall be large enough to provide a sufficient number of experienced attorneys to handle the CJA case load. Attorneys who serve on the CJA Panel must be members in good standing of the bar of this Court and must have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the Sentencing Guidelines.

C. The Clerk shall maintain a current list of all attorneys included on the CJA Panel, with current office addresses and telephone numbers. The Clerk shall furnish a copy of this list on a quarterly basis to each judge within the district. The Clerk shall also maintain a public record of assignments made to each Panel member.

D. Appointments from the list of private attorneys shall be made by the Court in view of the nature and complexity of the case, an attorney's experience, and geographical considerations. To the extent possible, appointments shall be made among all members of the Panel.

E. If the Court determines that the appointment of an attorney who is not a member of the CJA Panel is in the interest of justice, judicial economy or continuity of representation, or that there is some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA Panel pro hac vice and appointed to represent the CJA defendant. In consideration of preserving the integrity of the Panel selection process such appointments should be made only in exceptional circumstances.

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 appointments.

VIII. DUTIES OF APPOINTED COUNSEL

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

B. Attorneys appointed pursuant to the CJA Panel shall conform to the highest standards of professional conduct, including but not limited to the provisions of the Code of Professional Responsibility of the American Bar Association as adopted by the New York State Bar Association.

C. Counsel appointed by the Court shall continue to act for the CJA defendant throughout the proceedings in this Court, unless excused by order of the Court. Appointed counsel is expected to appear personally at all proceedings, with substitutions or the filing of additional appearances permitted only with leave of the Court. 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.

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 a 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 Court of Appeals.

IX. INVESTIGATIVE, EXPERT AND OTHER SERVICES

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

B. Appointed counsel may obtain, subject to later review, investigative, expert or other services without prior authorization pursuant to 18 U.S.C. § 3006A(e)(2).

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

X. COMPENSATION

A. Payment of fees and expenses to counsel appointed under this Plan (other than to the Federal Public Defender Organization), and payment for investigative, expert and other services incurred, shall be made in accordance with 18 U.S.C. § 3006A(d) and any

other statutory limitations and such rules, regulations and guidelines that 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 in excess of any maximum amount provided by statute or otherwise in the representation of a person, unless such payment is approved by order of Court. Payment in excess of any maximum amount provided by statute or otherwise may be made for extended or complex representation, whenever the Court in which the representation was rendered certifies that the amount of the excess payment is necessary to provide fair compensation, and the payment is approved by the Chief Judge of the Second Circuit or his or her designee.

C. Claims for compensation of private attorneys providing representation under the CJA shall be submitted on the appropriate CJA form to the Clerk's Office. That office shall review the claim form for mathematical and technical accuracy and for conformity with the CJA Plan and, if the claim is correct in form, shall forward the claim form for consideration to the appropriate judge.

XI. PROVISIONS APPLICABLE IN FEDERAL CASES INVOLVING THE DEATH PENALTY

A. "Cases involving the death penalty" and "capital cases" include cases in which the government may seek the death penalty under federal law and cases in which the penalty of death has been imposed by a federal court upon an individual who is seeking to set aside or vacate a conviction or sentence on direct appeal pursuant to 28 U.S.C. § 2255, or by another statutory provision. This shall include prosecutions under 21 U.S.C. § 848 or any other provision of federal law enacted that authorizes the penalty of death. All such cases shall be referred to in this section as "capital cases" regardless of the nature of the proceeding.

B. Due to the complex, demanding, and protracted nature of death penalty proceedings, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or becomes financially unable to obtain adequate representation shall be entitled to timely representation by at least two qualified attorneys. It is presumed that the Federal Public Defender will provide lead counsel in each capital case, unless the Federal Public Defender advises or the Court determines that a conflict of interest or other reason exists to prevent the Federal Public Defender from providing counsel. If the Federal Public Defender is unavailable, appointment shall be made from the CJA Panel membership.

At least one of the attorneys appointed must have been admitted to practice before the United States District Court for the Western District of New York for not less than five years and must have not less than three years' experience in the actual trial of felony

prosecutions before this Court. The Court may waive the above-noted requirements for good cause shown and may appoint an attorney or attorneys whose background, knowledge or experience would otherwise enable him, her or them to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

C. The provisions of this section shall apply at the earliest opportunity. Under these provisions, appointment of trial counsel shall occur no later than whenever 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 Magistrate Judge, 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 government 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 counsel for the defendant has already been appointed or retained and the defendant becomes unable to afford counsel, when the government either withdraws its notice 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, if necessary, substitute counsel. If additional or substitute counsel is appointed, such appointment shall be made sufficiently in advance of trial to permit newly-appointed counsel an adequate opportunity to prepare.

D. If the defendant is convicted and sentenced to death, the Federal Public Defender, after consultation with the defendant and trial counsel, shall recommend to the United States Court of Appeals for the Second Circuit the names of two attorneys with a suggestion that they prosecute any appeal. If attorneys who are not employed by the Federal Public Defender are suggested, the recommendation shall contain a statement of good cause why substitution of counsel is appropriate. At least one of the attorneys appointed must have been admitted to practice in the Court of Appeals for not less than five years and must have had not less than three years' experience in handling appeals in felony cases before the Court of Appeals. Upon the recommendation of the Federal Public Defender, for good cause any attorney may be recommended as appellate counsel if his or her background, knowledge, or experience would otherwise enable him or her to provide proper representation in an appellate capital case, giving due consideration to the severity of the possible penalty and the unique nature of the litigation.

E. With respect to services rendered in federal proceedings, the presiding judge shall set compensation for investigative, expert or other services in an amount reasonably necessary to obtain such services in capital cases, notwithstanding the rates and maximum limits generally applicable to criminal cases. Upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of a defendant in a capital case, the Court shall authorize counsel to obtain such services on behalf of the defendant. Upon a finding that timely procurement of necessary

investigative, expert or other services could not practicably have awaited prior authorization, the presiding judge may authorize such services nunc pro tunc.

Ex parte applications for services, including counsel's time and expense records, shall be heard in camera and the confidentiality of all verbal communications, pleadings, and court orders shall be preserved unless expressly waived by the person represented. Such applications shall be placed under seal and shall be inaccessible to the government without further order of the Court.

F. A non-salaried attorney appointed in a capital case shall be compensated at a rate and in an amount determined by the Court as reasonably necessary to obtain qualified counsel to represent the defendant in proceedings in federal court, without regard to CJA hourly rates or compensation maximums. In the interest of justice and judicial economy, and in recognition of the uniquely difficult nature of capital litigation, the Court shall compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general overhead, to ensure adequate compensation for the representation provided, and to ensure the effective assistance of counsel. The Court shall give due regard to any range of compensation recommended by the Judicial Conference of the United States for representation in capital cases that is in effect at the time that the claim is submitted to the Court. Payment at a rate above such range of compensation may be permitted where appropriate.

The Court shall set the hourly rate of compensation at the time counsel are appointed. Interim billing shall be permitted.

XII. FORMS

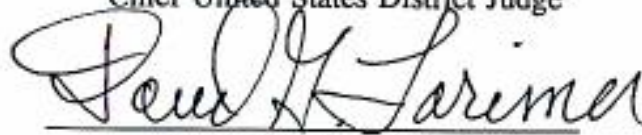
Where standard forms have been approved by the Judicial Conference of the United States, or an appropriate committee thereof, and have been distributed by the Administrative Office of the United States Courts, such forms shall be used by the Court, the Clerk, the Federal Public Defender Organization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

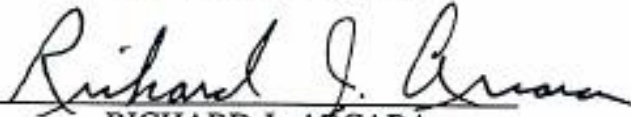
XII. EFFECTIVE DATE

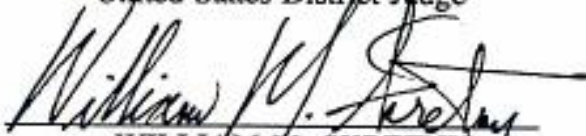
This Plan as amended this 14th day of July, 1993, shall become effective when approved by the Judicial Council of the Second Circuit.

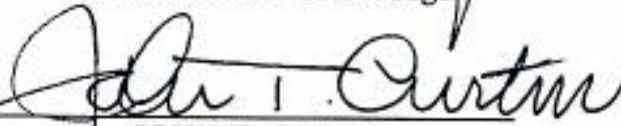
Approved by the Judicial Council of the Second Circuit August 9, 1993

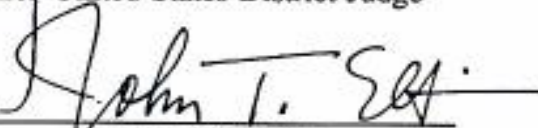

MICHAEL A. TELESCA
Chief United States District Judge


DAVID G. LARIMER
United States District Judge


RICHARD J. ARCARA
United States District Judge


WILLIAM M. SKRETNY
United States District Judge


JOHN T. CURTIN
Senior United States District Judge


JOHN T. ELFVIN
Senior United States District Judge

