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EASTERN DISTRICT OF CALIFORNIA

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

IN RE:)
)
ADOPTION OF CRIMINAL JUSTICE)
ACT PLAN)
_____)

GENERAL ORDER NO. 582

Pursuant to the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A, the attached Criminal Justice Act Plan was adopted by the judges of the Eastern District of California and approved by the Judicial Council of the Ninth Circuit on July 27, 2017.

IT IS SO ORDERED.

DATED: August 1, 2017

FOR THE COURT:



Lawrence J. O'Neill, Chief Judge
United States District Court

**CRIMINAL
JUSTICE ACT PLAN**

**FOR THE
EASTERN DISTRICT
OF
CALIFORNIA**

CRIMINAL JUSTICE ACT PLAN

FOR THE EASTERN DISTRICT OF CALIFORNIA

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STATEMENT OF POLICY

The objective of the Criminal Justice Act Plan for the Eastern District of California (CJA Plan) is to attain the constitutional ideal of equality before the law for all persons. This CJA Plan shall be administered so those accused of a crime, or otherwise eligible for services, are not deprived of their right to counsel due to any lack of financial resources. The CJA Plan shall be administered so all eligible persons receive timely appointed counsel. The CJA Plan must be administered so appointed counsel's services meet the legal profession's best practices, are cost-effective, and protect the defense function's independence in order that the rights of individual defendants are protected and enforced. This CJA Plan satisfies requirements of the United States Constitution, amend. VI, the *Criminal Justice Act* (CJA) (18 U.S.C. § 3006A), the *USA Patriot Improvement and Reauthorization Act of 2005* (18 U.S.C. § 3599), *Judicial Council of the Ninth Circuit – Criminal Justice Act Policies and Procedures*, dated October 20, 2016 and the *Guide to Judiciary Policy (Guide)*, Volume 7A, in a way best meeting the Eastern District of California's needs.

I. AUTHORITY

Under the CJA (18 U.S.C. § 3006A) and the *Guide*, Volume 7A, the Judges of the United States District Court for the Eastern District of California (the Court) adopt this CJA Plan, as approved by the Ninth Circuit, to furnish representation in the Eastern District of California's federal court for any person financially unable to obtain representation required or entitled to by law.

II. COMPLIANCE

The Court, its Clerk, the Office of the Federal Defender for the Eastern District of California (FD-CAE), and private attorneys appointed under the CJA must comply with this CJA Plan, any General Orders issued by this District's District Judges pertaining to this CJA Plan, 18 U.S.C. § 3006A, and the *Guide*, Volume 7A as approved by the Judicial Conference of the United States or its Defender Services Committee.

The Court will post on the Court's website a current copy of the CJA Plan and any related General Orders. The FD-CAE's CJA Panel Administrator will provide new CJA counsel, upon that attorney's designation as a CJA counsel or upon their first appointment to the Panel, a current copy of this CJA Plan and any related General Orders thereon. The Panel Administrator shall also maintain a current copy of the CJA Plan, General Orders relating to the CJA Plan, and the *Guide* for CJA Panel member use.

III. DEFINITIONS

- A. **“Representation”** includes counsel and investigative, expert, and any other necessary services.
- B. **“Appointed Attorney”** is an attorney designated to represent a financially eligible person under the CJA and this CJA Plan. Such attorneys include private attorneys and FD attorneys.

- C. **“CJA Administrator”** is a person(s) from the FD-CAE, designated by the Federal Defender, to administer the CJA Panel.

IV. ELIGIBILITY FOR CJA REPRESENTATION

A. Subject Matter Eligibility

1. Mandatory

Representation shall be provided for any financially eligible person who:

- a. is charged with a felony or with a Class A misdemeanor;
- b. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;
- c. is charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer, the government has not objected to the proposed change, and the probationer has waived their right to counsel);
- d. is under arrest, when such representation is required by law;
- e. is entitled to appointment of counsel in parole proceedings;
- f. is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;
- g. is subject to a mental condition hearing under 18 U.S.C. § 4241 et seq;
- h. is in custody as a material witness;
- i. is seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or § 2255;
- j. is entitled to appointment of counsel in verification of consent proceedings in connection with a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;
- k. is entitled to appointment of counsel under the Sixth Amendment to the United States Constitution; or
- l. faces loss of liberty in a case and federal law requires the appointment of counsel.

2. Discretionary

Whenever a District Judge or Magistrate Judge determines the interests of justice so require, representation may be provided for any financially eligible person who:

- a. is charged with a petty offense (class B or C misdemeanor or infraction) for which a sentence of confinement is authorized;
- b. is seeking relief under 28 U.S.C. §§ 2241, 2254, or 2255 other than to set aside or vacate a death sentence;
- c. is charged with civil or criminal contempt and faces loss of liberty;

- d. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, and there is reason to believe, either prior to or during such testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
- e. had been advised by the United States Attorney or a law enforcement officer of the likelihood that federal criminal charges may be filed or that they are the target of a grand jury investigation;
- f. is proposed by the United States Attorney for processing under a pretrial diversion program; or
- g. is held for international extradition under 18 U.S.C. § 3181 et al.

3. Ancillary Matters

Whenever a District Judge or Magistrate Judge determines the interests of justice so require, representation may be provided for financially eligible persons in ancillary matters appropriate to the criminal proceedings, pursuant to 18 U.S.C. § 3006A(c). The following is a non-exhaustive list of reasons the Court might consider representation is reasonably necessary:

- a. to protect a constitutional right;
- b. to contribute in some significant way to the defense of the principal criminal charge;
- c. to aid in preparation for the trial or disposition of the principal criminal charge;
- d. to enforce the terms of a plea agreement in the principal criminal charge;
- e. to preserve the claim of the CJA client to an interest in real or personal property subject to civil forfeiture proceeding under 18 U.S.C. § 983, 19 U.S.C. § 1602, 21 U.S.C. § 881, or similar statutes, which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f); or
- f. effectuate the return of real or personal property belonging to the CJA client, which may be subject to a motion for return of property under Fed.R.Crim.P. 41(g), which property, if recovered by the client, may be considered for reimbursement under 18 U.S.C. § 3006A(f).

B. Financial Eligibility

1. Presentation of the Accused for Financial Eligibility Determination

a. Duties of Law Enforcement

Upon arrest, and where the defendant has not retained or waived counsel, federal law enforcement officials must promptly notify,

telephonically or electronically, the FD-CAE of an individual's arrest in connection with a federal criminal charge.

Law enforcement agency employees should not participate in completing the financial affidavit or seek information concerning financial eligibility from a person arrested or requesting counsel appointment.

b. Duties of the United States Attorney's Office

- i. Upon an Indictment's return or unsealing of a criminal information's filing, and where the defendant has not retained or waived counsel, the United States Attorney or their designee will promptly notify, telephonically or electronically, the FD-CAE.
- ii. Upon issuing a 'target letter,' and where the individual has not retained or waived counsel, the United States Attorney's Office (USAO) should promptly notify, telephonically or electronically, the FD-CAE. If the USAO knows of an actual or potential conflict between the target and the FD-CAE, the USAO should promptly notify the CJA Panel Administrator or the Federal Defender. The USAO should also let the CJA Panel Administrator know if any CJA Panel lawyers have a conflict in representing the individual.
- iii. USAO employees should not participate in completing the financial affidavit from a person requesting counsel appointment.

c. Duties of the Pretrial Services Office

- i. The Judicial Conference recognizes the importance of counsel's advice for persons subject to Bail Reform Act proceedings, 18 U.S.C. § 3141 et seq., before being interviewed by a pretrial services or probation officer. Accordingly, the FD-CAE shall be given a reasonable period of time within which to contact a person subject to 18 U.S.C. § 3142 proceedings. During this reasonable period of time, the pretrial services office shall not contact that person. Thereafter, the pretrial services officer will not conduct the pretrial service interview (PSI) of a financially eligible defendant without counsel present unless that defendant waives their right to counsel or otherwise knowingly consents to a PSI without counsel.
- ii. When the Court has appointed counsel or designated the FD-CAE for appointment before the initial appearance, the pretrial services officer will provide counsel notice either telephonically or electronically, and will provide a reasonable opportunity for

counsel to attend the defendant's PSI before the initial pretrial release or detention hearing.

- iii. Pretrial Services Office employees should not participate in completing the financial affidavit or seek information concerning financial eligibility from a person requesting counsel appointment. This should not be construed as prohibiting the usual information gathering regarding the detention hearing.

d. Duties of the Office of the Federal Defender

- i. In cases where the FD-CAE may be appointed, the FD-CAE will immediately investigate and determine whether an actual or potential conflict exists. If such conflict exists, FD-CAE will promptly notify the CJA Panel Administrator to facilitate CJA Panel counsel appointment.
- ii. When a person indicates they are financially unable to retain counsel, whenever practicable, the FD-CAE will:
 - (a) discuss with the person their right to appointed counsel,
 - (b) assist their completing a financial affidavit (Form CJA 23) , if counsel appointment seems likely, and
 - (c) arrange to have their matter promptly presented before a Magistrate Judge or District Judge to determine financial eligibility and counsel appointment.

2. Factual Determination of Financial Eligibility

- a. In every case where 18 U.S.C. § 3006A(a) and related statutes authorize counsel appointment, the Court must advise the person they have a right to be represented by counsel throughout the case and, if so desired, the court will appoint counsel to represent the person when they are financially unable to obtain counsel.
- b. The completed financial eligibility affidavit (Form CJA 23) should reflect relevant information bearing on the person's financial eligibility for appointed counsel.
- c. Determining eligibility for representation under the CJA is a judicial function performed by the Court after making appropriate inquiries concerning the person's financial eligibility. Other court employees, the CJA Panel Administrator or the FD-CAE may be designated to obtain or verify facts relevant to the financial eligibility determination.
- d. In determining whether a person is "financially unable to obtain counsel," one should consider the cost of providing the person and

- their dependents with life's necessities, the cost of securing pretrial release, asset encumbrance, and the likely cost to retain counsel.
- e. The initial eligibility determination must be made without considering a person's family's financial ability to retain counsel unless their family indicates a willingness and ability to do so promptly.
 - f. Any doubts about a person's eligibility should be resolved in the person's favor. Erroneous eligibility determinations may be corrected at a later time.
 - g. If, at any time after the counsel appointment, a judge finds a person provided representation is financially able to retain private counsel or make partial payments towards the appointed representation, the judge may either terminate the counsel appointment or direct the defendant to contribute by paying the Court as provided in 18 U.S.C. § 3006A(f).
 - h. If, at any stage of their proceedings, a judge finds a person can no longer financially pay retained counsel, the Court may appoint counsel in accord with this CJA Plan's procedures.

V. TIMELY APPOINTMENT OF COUNSEL

- A.** Eligible persons must receive appointed counsel as soon as feasible. This means as soon as possible after they are taken into custody, when they appear before a judicial officer, when they are formally charged or notified of the charges if formal charges are sealed, or when a judicial officer otherwise determines appointed counsel is appropriate under the CJA or this CJA Plan, whichever occurs earliest.
- B.** Counsel appointment may be made retroactive to include representation provided prior to the judicial officer's formal appointment.

VI. PROVIDING REPRESENTATION SERVICES

A. Office of the Federal Defender and Private Counsel

This CJA Plan provides for representation by the FD-CAE, for appointment and compensation of private counsel from a CJA Panel list approved by the Court and maintained by the CJA Panel Administrator, and, in limited circumstances, other private attorneys, in cases authorized under the CJA and related statutes.

B. Panel Administration

Administration of the CJA Panel in the Eastern District of California is hereby delegated and assigned to the FD-CAE.

C. Case Apportionment

Whenever possible, CJA Panel attorneys should be appointed in a substantial proportion of the cases where the Court determines a person is financially eligible for representation under the CJA and this CJA Plan. “Substantial” in this context means at least twenty-five percent (25%) of the annual CJA appointments.

D. Number of Counsel

More than one attorney may be appointed in any case to represent one person when the Court determines the representation or case is extremely complex or difficult.

E. Capital Cases

The guidelines and procedures for capital case representation services where the defendant (i) is charged with a crime that may be punished by death, or (ii) is seeking to vacate or set aside a death sentence in 28 U.S.C. §§ 2254 or 2255 proceedings, are set forth in this CJA Plan’s section XIV.

VII. OFFICE OF THE FEDERAL DEFENDER

A. Establishment

The FD-CAE was established in this district pursuant to the CJA and is responsible for appointed defense services throughout this District. The FD-CAE shall maintain full-time staffed offices in Sacramento and Fresno, and a seasonally/part-time staffed office in Yosemite National Park.

B. Supervision

The Federal Defender is responsible for supervising and managing the FD-CAE. Accordingly, the Federal Defender will be appointed to all cases assigned to the organization for subsequent assignment to staff attorneys at the Federal Defender’s discretion. The Federal Defender will continually monitor office staff workloads to ensure high quality representation for all clients.

C. Standards and Professional Conduct

The FD-CAE shall provide high quality representation consistent with the legal profession’s best practices, commensurate with services rendered by privately retained counsel. The FD-CAE must conform to the highest standards of professional conduct, including, but not limited to,

1. California laws and rules for lawyers practicing in California to include the California Rules of Professional Conduct and the California Business and Professions Code, §§6000 *et seq.*,

2. the American Bar Association's *Model Rules of Professional Conduct*, and *Defense Function* Criminal Justice Section standards, and
3. the *Guide*, Volume 2, Part A, Chapter 4, *Code of Conduct for Federal Public Defender Employees*.

D. CJA Panel Management and Training

The Federal Defender shall designate CJA Panel Administrators for Sacramento and for Fresno and shall be responsible for their supervision. The CJA Panel Administrator shall be responsible for the systematic distribution of cases to and management of the CJA Panel subject to provisions of the CJA, the *Guide* and this CJA Plan's provisions. The Federal Defender, in coordination with the CJA Panel Administrators and the CJA Panel Attorney District Representative(s), shall assess the Panel attorneys' training needs and will provide them training opportunities and other educational resources.

VIII. CJA PANEL COMMITTEE

A. Establishing a CJA Panel Committee

1. **CJA Panel Committee Composition.** CJA Panel Committees in Fresno and Sacramento (CJA Committee) were established after consulting with the Federal Defender and the District Judges for the Fresno and Sacramento divisions. A Separate CJA Attorney Panel has been established and is administered by the Magistrate Judge in Redding. Each CJA Committee shall consist of:

- two experienced CJA Panel members,
- two experienced criminal law practitioners who are not CJA Panel members – the CJA Committee is encouraged to include in one of these positions a county public defender from an office within the respective divisions,
- an experienced attorney from the FD-CAE, and
- the CJA Panel Attorney District Representative and the CJA Panel Attorney District Representative elect.

The Federal Defender or their designee shall serve as the permanent CJA Committee chairperson. The CJA Panel Administrator shall serve as the permanent CJA Committee secretary.

2. **Term.** CJA Committee members shall serve terms of three years and may be extended for unlimited additional terms. Vacancies will be filled by remaining CJA Committee members' recommendation with the Chief District Judge's approval. The Federal Defender, CJA Panel Administrator, and CJA Panel Representative are members for as long as they hold those titles.

3. **Meetings.** The CJA Committee shall meet at least twice a year and at any other time the Chief District Judge requests the CJA Committee meet and consider an issue.
4. **Quorum and Decision Making.** CJA Committee decisions shall be by majority vote. The secretary is not a voting member of the CJA Committee. A quorum of four voting committee members shall be necessary to conduct business.

B. CJA Committee Duties

1. **Reviewing Panel Membership.** At least once a year, the CJA Committee shall examine applicant qualifications for CJA Panel membership and recommend the Chief Judge approve those attorneys deemed qualified and reject the applications from those attorneys not recommended for the CJA Panel. The CJA Committee shall recommend whether applicants should be on the A, B or C general panel list, on the post-conviction panel list (for direct appeals and noncapital habeas appeals), or both. Please see definition of panel A, B and C on page 11, IX.C.3.

The CJA Committee shall consider whether applicants attended the free training sessions the FD-CAE regularly provides for the CJA Panel. For CJA Panel reappointments, the CJA Committee will consider how many appointments the member accepted or declined in the past year. The CJA Committee may also solicit input from the legal community concerning the quality of representation applicants provided.

The CJA Committee shall strive to create and maintain a diverse CJA Panel of the highest caliber federal criminal defense practitioners from our community. All qualified attorneys shall be encouraged to participate in furnishing CJA case representation without regard to race, color, religion, veteran status, sex, sexual orientation, gender identification or expression, age, national origin or disabling or medical condition.

2. **Annual Report.** Annually, in the first quarter of each year, the CJA Committee shall review the CJA Panel operation and administration for the preceding year. The CJA Committee Chairperson shall report its findings and recommendations to the Chief Judge. This report should include the current CJA Panel size and whether it should grow or not, efforts made to recruit qualified and diverse CJA Panel attorneys, and any recurring issues or difficulties CJA Panel members or their CJA clients encountered. The CJA Committee shall consult with the CJA Panel Administrator and the CJA Panel Representative in preparing this report.
3. **Removal from the Panel.** The CJA Committee shall follow the procedures set forth in Section IX of this CJA Plan and recommend to the Chief District Judge removing any CJA Panel member who:

- a. fails to satisfactorily fulfill their CJA Panel membership requirements during their service term, including failing to provide high quality representation to their CJA clients, or
- b. has engaged in other conduct such that their continued CJA Panel service is inappropriate.

4. Mentoring. The CJA Committee shall appoint CJA Panel members to serve as mentors to new, less experienced members of the CJA Panel. CJA Panel member mentor arrangements are voluntary.

IX. CJA PANEL MEMBERSHIP

The CJA Panel attorneys must provide high quality representation consistent with the legal profession's best practices and commensurate with those services rendered by privately retained counsel. CJA Panel attorneys are also expected to conform to the highest professional conduct standards, including, but not limited to:

- i. California laws and rules for lawyers practicing in California to include the California Rules of Professional Conduct and the California Business and Professions Code, §§6000 *et seq.*, and
- ii. the American Bar Association's *Model Rules of Professional Conduct*, and *Defense Function* Criminal Justice Section standards.

A. Approving CJA Panel Members

The existing, previously established CJA Panel of attorneys eligible and willing to accept CJA court appointments is hereby recognized. For future CJA Panel appointments, the CJA Committee through its Chairperson will recommend attorney CJA Panel membership to the Chief District Judge for their approval.

B. Panel Size

The CJA Panel size will be determined by the CJA Committee based on CJA Panel member caseloads and activity and by case filings, subject to the Chief District Judge's review. The CJA Panel must be large enough so its members can accept approximately 25% of all counsel appointments in the District, yet small enough so CJA Panel members will each receive an adequate number of appointments to maintain their federal criminal defense work proficiency.

C. CJA Panel Qualifications for Membership

- 1. Applications.** Application forms for CJA Panel membership are available online from the FD-CAE website. They may also be obtained directly from the CJA Panel Administrators.
- 2. Eligibility.** New applicants practicing at least three years with federal criminal law experience will receive membership preference. CJA Panel applicants must:

- a. be members in good standing of the California State Bar, the Eastern District of California bar, and the 9th Circuit Court of Appeals;
- b. for the general panel, applicants must maintain a primary, satellite or shared office in this district - this requirement does not apply to post-conviction panel applicants; and
- c. possess strong litigation and writing skills, and demonstrate proficiency with the Federal Rules of Evidence, the Federal Rules of Criminal Procedures, the Federal Rules of Appellate Procedure, federal sentencing procedures, the Bail Reform Act, and this District's Local Rules.

3. Panel Appointment Types. CJA Panel memberships are divided into two categories.

- a. One category is the post-conviction panel, which is further divided into attorneys for direct appeals, habeas representations, and habeas appeals.
- b. The second category is the general panel appointed on all other matters. The general panel is further subdivided into the:
 1. "A List" made up of the most experienced panel members eligible for appointment in all cases, including the most complex and difficult cases;
 2. "B List" for CJA Panel members eligible for all other case appointments types; and
 3. "C list" consisting of less experienced CJA Panel members eligible for misdemeanor appointments, witnesses, and relatively simple felony case appointments.

Capital case appointment procedures are contained in section XIV of this CJA Plan.

CJA members may be appointed to accept more than one category of representations.

4. Panel Terms. Attorneys shall serve as a CJA Panel member for three years unless otherwise designated by the CJA Committee and approved by the Chief District Judge. CJA Panel General Panel C List attorneys shall serve an initial one-year term. Attorneys are eligible for unlimited additional terms. The CJA Panel Administrator will notify CJA Panel members, before their term expires, of the need to apply for CJA Panel reappointment. Panel members who do not reapply when their term expires will be dropped from the CJA Panel. Voluntary CJA Panel resignations, before term expiration, should be in writing directed to the CJA Panel Administrator or the Federal Defender.

5. CJA Panel Membership Appointment. After considering the CJA Committee recommendations, the Chief District Judge will determine whether to approve CJA Panel membership appointments or reappointments. The Chief District Judge will send the written decision back to the CJA Committee. The Federal Defender will notify all the applicants of the outcome.

6. Training. CJA Panel members are expected to attend mandatory training sessions offered by the FD-CAE.

7. Removal from the CJA Panel.

- a. Mandatory Removal.** Any CJA Panel member suspended or disbarred from the practice of law by any state court before whom such member is admitted, or who is suspended or disbarred from the Eastern District of California will be immediately removed from the CJA Panel.
- b. Automatic Disciplinary Review.** The CJA Committee will meet and conduct an automatic disciplinary review of any CJA Panel member against whom any state bar has issued a sanction or reprimand, or any CJA Panel member sanctioned or found in contempt by any federal or state court judge. Panel members must promptly self-report such events to the CJA Panel Administrator or the CJA Committee Chairperson.
- c. Discretionary Disciplinary Review.** A complaint against a CJA Panel member may be initiated by the CJA Committee, any federal judge of the district, another panel member, a defendant, or an FD-CAE lawyer. A complaint need not follow any particular form, but it must be in writing, not anonymous, and state the alleged deficiency with specificity. Complaints should be directed to the CJA Committee which will determine whether a full disciplinary review is necessary.
- d. Disciplinary Review Procedures.**
 - i. Reviewing Body.** The CJA Committee may conduct the review before the full committee or may designate a subcommittee for this purpose.
 - ii. Notice.** If the CJA Committee conducts a disciplinary review, it will notify the CJA Panel member of the specific allegations under review.
 - iii. Response.** A CJA Panel member under review may respond to the allegations in writing and may request to appear before the CJA Committee.
 - iv. Protective Action.** Prior to deciding the matter, the CJA Committee may recommend the CJA Panel member's suspension or removal from any pending appointed case or from the CJA Panel, and may take any other protective action, acting in the best interest of the client or the CJA Plan's administration, pending the outcome of this review. The Federal Defender, or their designee, may take any temporary protective action, acting in the best interests of the appointed clients of the panel member or the CJA

Plan's administration, pending the outcome of a review by the Committee as a whole.

- v. **Review and Recommendation.** After investigation and review, the CJA Committee may recommend closing the matter with no further action, or may recommend appropriate remedial action which might include:
 - removing the attorney from the panel,
 - limiting the attorney's participation to particular categories of cases,
 - directing the attorney to complete specific training before receiving further panel appointments,
 - assigning the attorney an experienced panel attorney as a mentor,
 - directing the attorney to attend counseling for substance abuse issues, or
 - any other appropriate remedial action.
- vi. **Final Disposition by the Court.** The CJA Committee will forward its recommendation to the Chief District Judge for consideration and final approval.
- vii. **Confidentiality.** Unless otherwise directed in the final disposition, information concerning the complaint, the disciplinary review, and the disposition will be kept confidential by the CJA Committee to the extent possible.

None of these procedures creates a property interest in being on or remaining on the CJA Panel.

X. CJA PANEL APPOINTMENTS

A. Appointment List

The CJA Panel Administrator will maintain a current list of all CJA Panel attorneys with current office addresses, email addresses, and telephone numbers. This list will also indicate the CJA Panel lawyer's eligible representation categories.

B. Appointment Procedure

CJA Panel member case appointments will ordinarily be made on a rotational basis. In a complex or otherwise difficult case, or in a case that would benefit from particular talents (such as a foreign language or expertise in a certain subject area), the CJA Panel Administrator may appoint counsel outside of the normal

rotation. The CJA Panel Administrator might also vary from the rotation because CJA Panel members indicate, for whatever reason, they are unable to accept new cases for a period of time, to get counsel appointed expeditiously when the situation warrants, or when CJA Panel counsel has a large number of continuing representations still pending.

C. Appointing Attorneys Not on the CJA Panel

When a judge of this District finds special circumstances to exist, an attorney not on this District's CJA Panel may be appointed to represent a defendant on an ad hoc basis, provided the attorney has the experience level and knowledge that otherwise would qualify the attorney for CJA Panel membership. Reasons for such an appointment may include cost and time efficiencies, for example, if an attorney has previous experience with the particular defendant from a prior, concurrent or related civil or administrative representation. The Court must report such appointments to the CJA Panel Administrator. An attorney appointed under this provision is expected to adhere to the same rules and procedures as a CJA Panel attorney. An attorney appointed under this provision will be compensated at the same rate and subject to the same rules as a CJA Panel attorney.

D. Appointing CJA Panel Counsel Previously Retained

It may happen that CJA Panel counsel who was retained by a person requests to be appointed on a criminal case or investigation in this District. When that occurs, the judicial officer must consult with the CJA Panel Administrator or the Federal Defender. In determining whether or not to grant this request, the judicial officer should consider how long the attorney has been working with the now-financially eligible person, the nature of their fee agreement, and whether the attorney previously made such a request.

XI. CJA PANEL MEMBER DUTIES

A. Standards and Professional Conduct

1. CJA Panel members must provide high quality representation consistent with the legal profession's best practices and commensurate with those services rendered by privately retained counsel.
2. Attorneys appointed under the CJA must conform to the highest standards of professional conduct, including, but not limited to:
 - a. California laws and rules for lawyers practicing in California to include the California Rules of Professional Conduct and the California Business and Professions Code, §§6000 *et seq.*, and

- b. the American Bar Association's *Model Rules of Professional Conduct*, and *Defense Function Criminal Justice Section* standards.
3. Once counsel is appointed under the CJA, counsel will continue the representation until:
 - the matter, including the appellate process is complete,
 - substitute counsel has been appointed and counsel has been relieved,
 - an order is entered allowing the client to proceed pro se, or
 - the appointment is otherwise terminated by court order.
4. In complex non-capital representations likely to become extraordinary in terms of cost, the case may be referred to the Ninth Circuit Case Managing Attorney (CMA) by any stakeholder (Judge, appointed attorney, CJA Administrator, etc.) for case budgeting. Case budgeting is optional if the representation is expected to, or does, exceed \$50,000. Any such representation which is expected to exceed \$100,000 must be referred to the CMA by the appointed attorney for case budgeting. All capital cases must be budgeted. See section XIV for more capital case information.
5. CJA Panel members must consult with the Ninth Circuit Case Managing Attorney or with the National Litigation Support Team before contracting for discovery related services (such as scanning or OCR-ing documents) exceeding \$10,000.
6. CJA Panel members must submit their final billing within 90 days after the Court files judgment or terminates the representation. Submissions after 90 days must be accompanied by a statement justifying the delay and may result in reductions or nonpayment.
7. If, at any time after appointment, CJA Panel counsel has reason to believe a client is financially able to retain or make partial payments for counsel, and CJA Panel counsel's information source is not protected as a privileged communication, CJA Panel counsel will advise the court.
8. In no circumstance may appointed CJA counsel require, request, or accept any payment, promise of payment, or any other valuable consideration for representation, unless, for some extraordinary reason, such payment is approved by Court order.
9. CJA Panel members must immediately notify the Federal Defender or the CJA Panel Administrator, in writing, if they are disbarred, suspended, sanctioned, or reprimanded by the Bar of any State. CJA Panel members must also notify the Federal Defender or the CJA Panel Administrator, in writing, within 30 days, if they are sanctioned or found in contempt by any state or federal court judge.

B. Training and Continuing Legal Education

1. CJA Panel attorneys are expected to remain current with developments in federal criminal defense law, practice, and procedure.
2. CJA Panel attorneys are expected to attend trainings sponsored by the FD-CAE on a regular basis.
3. CJA Panel attorneys must know and comply with procedures related to eVoucher and procuring investigative, expert and other services necessary for efficient and effective representation.

C. Facilities and Technology Requirements

1. CJA Panel attorneys must have and maintain facilities, resources, and technological capability to effectively and efficiently manage assigned cases.
2. CJA Panel attorneys must comply with electronic filing and eVoucher requirements.
3. Please see the Federal Defender's website for the current minimum technology requirements for CJA Panel attorneys.

XII. CJA PANEL ATTORNEY COMPENSATION

A. Policy

Providing fair compensation to appointed counsel is a critical component of the administration of justice. CJA Panel attorneys must be compensated for time expended in court and time reasonably expended out of court, and reimbursed for expenses reasonably incurred.

B. Payment Procedures

1. Compensation claims must be submitted on the appropriate CJA form through the eVoucher system.
2. The CJA Panel Administrator will review the claim for mathematical and technical accuracy and for conformity with the *Guide*, Volume 7A and, if correct, will forward the claim for consideration and action by the presiding judge.
3. Absent extraordinary circumstances, the court should act on CJA compensation claims within 30 days of submission. Vouchers should not be delayed or reduced to diminish Defender Services program costs as a response to adverse financial or budgetary circumstances.
4. A presiding judge may, in their sound discretion, approve interim vouchers on a case-by-case basis.

5. Voucher Review. Any judge in this district may at any time informally request a voucher review from the CJA Panel Administrator or the Federal Defender or their designee. If this informal review process does not resolve the judge's concerns and the judge, for reasons other than mathematical errors, intends to authorize payment for less than the compensation amount CJA Panel counsel claimed, then the judge or their chambers will notify CJA Panel counsel of the potential voucher reduction and give counsel an opportunity to provide additional information or documentation relevant to the voucher and the concerns raised by the judge before cuts to the voucher are made.

XIII. INVESTIGATIVE, EXPERT AND OTHER SERVICES PROCURED BY PANEL COUNSEL

A. Authorization

Counsel for a person financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request such services in an *ex parte* application to the court as provided in 18 U.S.C. § 3006A(e)(1), regardless of whether counsel is appointed under the CJA. Upon a finding that the services are necessary and the person is financially unable to obtain them, the Court must authorize counsel to obtain the services.

B. Requests for Funds

Requests to authorize funds for investigative, expert, and other services must be submitted in an *ex parte* application to the Court using the eVoucher system and must not be disclosed except with the consent of the person represented or as required by law or the policies set forth in the *Guide*, Volume 7A.

C. Service Provider Rates

Counsel must comply with rates and rules contained within the *Guide*, Volume 7A; General Order No. 575 (regarding limits on services provided without pre-authorization); the *Judicial Council of the Ninth Circuit Criminal Justice Act Policies and Procedures* adopted on October 20, 2016, Appendix 2; the *CJA Policy and Review Committee Recommendations* as approved by the Chief Judge of the Eastern District of California on February 1, 2017 (regarding paralegals and investigators); and the *Memorandum Request to Deviate from the new CJA Policies and Procedures Regarding Interpreter Service Providers in the Eastern District of California* as approved by the Judicial Council of the Ninth Circuit on April, 7, 2017. Copies of these policies will be provided to new panel members, are available on the FD-CAE's website, and can be electronically provided, upon request, by the CJA Panel Administrator.

D. Associate Attorneys

It is the Eastern District of California's policy to encourage using associate attorneys, consistent with the *Guide*, to assist with representations upon the presiding judge's prior approval. The purpose of this policy is to reduce costs and to enlarge the pool of potential CJA Panel applicants. Associate attorneys should not, however, be used to make substantive court appearances or to advise clients. The encouraged use of associate attorneys is for tasks such as substantive research and writing under the supervision of the appointed attorney who is ultimately responsible for all work-product.

E. Engagement Letters

Eastern District of California CJA Panel attorneys are required to use an engagement letter when hiring service providers. A sample letter can be found in the *Judicial Council of the Ninth Circuit Criminal Justice Act Policies and Procedures* adopted on October 20, 2016, Appendix 3, page 34.

F. Services Obtained by Person Represented by Retained

Pursuant to 18 U.S.C. § 3006A(e), upon an ex parte application, the Court may authorize a person represented by retained counsel to obtain investigative, expert, or other services. The Court shall assess the defendant's financial eligibility by requiring submission of a financial eligibility affidavit (Form CJA 23) and may also request a copy of the legal services contract or other documentation deemed informative to the application. If the request is granted in full or in part, retained counsel shall make funding requests and submit vouchers for payment through eVoucher. Retained counsel shall use engagement letters for service providers funded in this manner (see XIII.E., above) and inform third parties of the proper billing practices for submission of vouchers. All funding requests and vouchers made pursuant to this provision are subject to the same reasonableness review as any CJA request or voucher.

XIV. APPOINTMENT OF COUNSEL AND CASE MANAGEMENT IN CJA CAPITAL CASES

A. Applicable Legal Authority

Appointing and compensating counsel in capital cases, and authorizing use and payment of persons providing investigative, expert, and other services, are governed by 18 U.S.C. §§ 3005, 3006A, and 3599; the *Guide*, Vol. 7A, Ch. 6; Eastern District of California Local Rule 191; and, in Fresno, the *Guide to Case Management and Budgeting in Capital Habeas Cases Eastern District of California, Fresno Division*.

B. General Applicability and Appointment of Counsel Requirements

1. Unless otherwise specified, the provisions set forth in this section apply to all capital proceedings in the federal courts, whether those matters originated in a district court (federal capital trials) or in a state court (habeas proceedings under 28 U.S.C. § 2254). Such matters include those in which the death penalty may be or is being sought by the prosecution, motions for a new trial, direct appeal, applications for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings under 28 U.S.C. §§ 2254 or 2255 seeking to vacate or set aside a death sentence, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.
2. Any person charged with a crime punishable by death who is or becomes financially unable to retain representation is entitled to appointed counsel assistance throughout every stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, competency proceedings, and proceedings for executive or other clemency as may be available to the defendant. *See* 18 U.S.C. § 3599(e).
3. Qualified counsel must be appointed in capital cases at the earliest possible opportunity.
4. Given the complex and demanding nature of capital cases, where appropriate, the court will utilize the expert services available through the Administrative Office of the United States Courts (AO); Defender Services Death Penalty Resource Counsel projects (“Resource Counsel projects”) which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project; and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). These counsel are death penalty experts who may be relied upon by the court for assistance in selecting and appointing counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.
5. The Federal Defender or their designee should promptly notify and consult with the appropriate Resource Counsel projects about potential and actual federal capital trial, appellate, and habeas corpus cases, and consider their recommendations for appointing counsel.

6. The presiding judge may appoint an attorney furnished by a state or local public defender organization, legal aid agency, or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief provided the attorney is fully qualified. Such appointments may be in place of, or in addition to, appointing a federal defender organization, a CJA Panel attorney, or an attorney appointed *pro hac vice*. See 18 U.S.C. § 3006A(a)(3).
7. All attorneys appointed in federal capital cases must be well qualified, by virtue of their training, commitment, and distinguished prior capital defense experience at the relevant stage of the proceeding, to serve as counsel in this highly specialized and demanding litigation.
8. All attorneys appointed in federal capital cases must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases.
9. All attorneys appointed in federal capital cases should comply with the American Bar Association’s *2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Guidelines 1.1 and 10.2 et seq.), and their *2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.
10. All attorneys appointed in federal capital cases should consult regularly with their appropriate Resource Counsel projects.
11. Questions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO Defender Services Office, Legal and Policy Division Duty Attorney at 202-502-3030 or via email at ods_lpb@ao.uscourts.gov.

C. Appointing Trial Counsel in Federal Death-Eligible Cases

1. General Requirements

- a. Appointing qualified capital trial counsel must occur no later than when a defendant is charged with a federal criminal offense where the death penalty is possible. See 18 U.S.C. § 3005.
- b. To protect the rights of an individual who, although uncharged, is the subject of a federal death-eligible case investigation, the Court may appoint capital-qualified counsel upon request, consistent with Sections C.1, 2, and 3 of these provisions.
- c. At the outset of every capital case, the court must appoint two attorneys, at least one of whom meets the qualifications for “learned counsel” as described below. If necessary for adequate

representation, more than two attorneys may be appointed to represent a defendant in a capital case. *See* 18 U.S.C. § 3005.

- d. When appointing counsel, the judge must consider the recommendation of the Federal Defender or their designee, who will consult with Federal Death Penalty Resource Counsel to recommend qualified counsel. *See* 18 U.S.C. § 3005.
- e. To effectuate 18 U.S.C. § 3005's requirement that the Federal Defender's recommendation be provided to the court, the judge should ensure the Federal Defender has been notified of the need to appoint capital-qualified counsel.
- f. Relying on a list for capital counsel appointment is not recommended because trial counsel selection should account for the particular case's and defendant's needs, and be based on individualized recommendations from the Federal Defender or their designee in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects.
- g. Out-of-district counsel, including Federal Defender Organization staff, who possess the requisite expertise may be considered for capital trial appointment to achieve high quality representation together with cost and other efficiencies.
- h. In evaluating proposed trial counsel's qualifications, the Court should consider counsel's commitment to defending capital cases, their current caseload including other capital cases, and their willingness to effectively represent the client's interests.

2. Learned Counsel Qualifications

- a. Learned counsel must either be a member of this district's bar or be eligible for admission *pro hac vice* based on their qualifications. Counsel appointment from outside the jurisdiction is common in federal capital cases to achieve cost and other efficiencies together with high quality representation.
- b. Learned counsel must meet the minimum experience standards set forth in 18 U.S.C. §§ 3005 and 3599.
- c. Learned counsel should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high quality representation.

- d. “Distinguished prior experience” contemplates excellence, not simply prior experience. Counsel with distinguished prior experience should be appointed, even if meeting this standard requires appointing counsel outside the district where the matter arises.
- e. Learned counsel’s suitability should be assessed considering the case’s particular demands, the litigation stage, and the defendant.
- f. Learned counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time required by the capital representation.
- g. Learned counsel should satisfy the qualification standards endorsed by bar associations and other legal organizations regarding the quality of capital case representation.

3. Second and Additional Counsel Qualifications

- a. Second and additional counsel may, but are not required to, satisfy the learned counsel qualifications, as set forth above.
- b. Second and additional counsel must be well qualified, by virtue of their distinguished prior criminal defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation.
- c. Second and additional counsel must be willing and able to adjust other caseload demands to accommodate the extraordinary time capital representation requires.
- d. Second and additional counsel suitability should be assessed considering the individual case’s demands, the litigation stage, and the defendant.

D. Direct Appeal Counsel in Federal Death Penalty Cases Appointment and Qualifications

- 1. When appointing capital appellate counsel, the judge must consider the recommendation of the Federal Defender or their designee, who will consult with Federal Capital Appellate Resource Counsel to recommend qualified counsel.
- 2. Counsel appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial.
- 3. Each trial counsel who withdraws should be replaced with similarly qualified counsel to represent the death-sentenced defendant on appeal.

4. Out-of-district counsel, including Federal Defender Organization staff, who possess the requisite expertise may be considered for capital appeal appointments to achieve high quality representation together with cost and other efficiencies.
5. Capital appellate counsel, between them, should have distinguished prior experience in federal criminal appeals and capital appeals.
6. At least one of the attorneys appointed as capital appellate counsel must have the requisite background, knowledge, and experience required by 18 U.S.C. § 3599(c) or (d).
7. In evaluating proposed capital appellate counsel's qualifications, the Court should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of capital case legal representation.
8. In evaluating proposed capital appellate counsel's qualifications, the Court should consider their commitment to defending capital cases, their current caseload including other capital cases, and their willingness to effectively represent the client's interests.

E. Post-Conviction Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255) Appointment and Qualifications

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2255 is entitled to appointment of fully qualified counsel. *See* 18 U.S.C. § 3599(a)(2).
2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing at least two attorneys.
3. Considering the accelerated timeline applicable to capital § 2255 proceedings, prompt counsel appointment is essential. Wherever possible, appointment should occur before the United States Supreme Court denies certiorari on direct appeal.
4. When appointing counsel in a capital § 2255 matter, the Court should consider the recommendation of the Federal Defender or their designee, who will consult with the Federal Capital Habeas § 2255 Project.
5. Out-of-district counsel, including Federal Defender Organization staff, who possess the requisite expertise may be considered for capital § 2255 case appointments to achieve high quality representation together with cost and other efficiencies.

6. Counsel in § 2255 cases should have distinguished prior experience in federal post-conviction proceedings and capital post-conviction proceedings.
7. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.
8. In evaluating proposed post-conviction counsel's qualifications, the Court should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of capital case legal representation.
9. In evaluating proposed post-conviction § 2255 counsel's qualification, the Court should consider their commitment to defending capital cases, their current caseload including other capital cases, and their willingness to effectively represent the client's interests.

F. Counsel in Federal Capital Habeas Corpus Proceedings (28 U.S.C. § 2254 and Local Rule 191) Appointment and Qualifications

1. A financially eligible person seeking to vacate or set aside a death sentence under 28 U.S.C. § 2254 proceedings is entitled to appointment of qualified counsel. *See* 18 U.S.C. § 3599(a)(2).
2. Due to the complex, demanding, and protracted nature of death penalty proceedings, the Court should consider appointing at least two attorneys.
3. Pursuant to Eastern District of California Local Rule 191, the Eastern District Selection Board (Board), as approved by the Chief District Judge, will be the appointing authority for § 2254 matters. The Board shall be comprised of the Federal Defender or their designee, the Executive Director of the California Appellate Project, the Executive Director of the Habeas Corpus Resource Center, the State Public Defender, and a member of the California State Bar.
4. Out-of-district counsel, including Federal Defender Organization staff, who possess the requisite expertise may be considered for capital § 2254 case appointment to achieve cost and other efficiencies together with high quality representation.
5. For federal counsel to avail themselves of the full statute of limitations period to prepare a petition, the Court should appoint counsel and provide appropriate litigation resources at the earliest possible time permissible by law.
6. Unless precluded by a conflict of interest, or replaced by similarly qualified counsel upon motion by the attorney or by the defendant, capital § 2254 counsel must represent the defendant throughout every subsequent

stage of available judicial proceedings and all available post-conviction processes, together with applications for stays of execution and other appropriate motions and procedures, and must also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant. *See* 18 U.S.C. § 3599(e).

7. Capital § 2254 case counsel should have distinguished prior experience in federal post-conviction proceedings and capital post-conviction proceedings.
8. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
9. In evaluating proposed capital § 2254 counsel's qualifications, the Court should consider the qualification standards endorsed by bar associations and other legal organizations regarding the quality of capital case legal representation.
10. In evaluating proposed capital § 2254 counsel's qualifications, the Court should consider proposed counsel's commitment to defending capital cases, their current caseload including other capital cases, and their willingness to represent effectively the client's interests.

XV. EFFECTIVE DATE

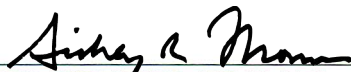
This Plan will become effective when approved by the Judicial Council of the Ninth Circuit.

ENTER FOR THE COURT ON THIS 27th DAY OF July, 2017.



HON. LAWRENCE J. O'NEILL
CHIEF JUDGE, EASTERN DISTRICT OF CALIFORNIA

APPROVED BY THE JUDICIAL COUNCIL OF THE NINTH CIRCUIT ON THIS
27th DAY OF JULY, 2017.



HON. SIDNEY R. THOMAS
CHIEF JUDGE, NINTH CIRCUIT COURT OF APPEALS