

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GENERAL ORDER 21-11

Effective August 2, 2021

PLAN FOR IMPLEMENTING THE CRIMINAL JUSTICE ACT OF 1964,
AS AMENDED 18 U.S.C. § 3006A

Pursuant to the Report of the Committee to Evaluate the Performance of the Criminal Justice Act Plan for the District of Massachusetts, presented on April 27, 1993; the April 2009 Report of the Criminal Justice Act Board on Revisions to the Criminal Justice Act Plan; the Guide to Judiciary Policy, Volume 7(A), Appendix 2(A); the Model Plan for Implementation and Administration of the Criminal Justice Act; and the provisions of the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A (“CJA”), the judges of the United States District Court for the District of Massachusetts have adopted the following plan (the “Plan”) for the adequate representation of any person otherwise financially unable to obtain adequate representation. Representation shall include counsel and investigative, expert and other services necessary for an adequate defense [see 18 U.S.C. § 3006A(e)]. Representation will be provided as provided below:

1. Mandatory

Representation must 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 and the government has not objected to the proposed change);
 - 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. § 313;
 - 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 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 that 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 an infraction) for which a sentence to 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 testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or a loss of liberty;
- e. has been advised by the United States attorney or a law enforcement officer 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. § 209.

3. Ancillary Matters

Representation may also be provided for financially eligible persons in ancillary matters appropriate to the criminal proceedings under 18 U.S.C. § 3006A(c). In determining whether representation in an ancillary matter is appropriate to the criminal proceedings, the court should consider whether such 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).

I. PROVISION FOR FURNISHING COUNSEL

A. Federal Public Defender and Private Counsel

This Plan provides for the furnishing of legal services by a Federal Public Defender Organization, supervised by a Federal Public Defender (“FPD”). In addition, this Plan provides for the continued appointment and compensation of private counsel in a substantial proportion of cases. Both the FPD and any lawyer appointed pursuant to this plan must provide high-quality representation consistent with the best practices of the legal profession and commensurate with those services rendered when counsel is privately retained.

B. Allocation of Representation

The court in its discretion will determine whether any party eligible for representation will be represented by the Federal Public Defender Organization or by private counsel. Insofar as practicable, private attorney appointments will be made in at least 35% and up to 55% of the cases. For the sole purpose of allocation of cases as between private attorneys and the Federal Public Defender Organization, a “case” shall be deemed to be each defendant or other individual for whom counsel is appointed under the terms of the Criminal Justice Act, as amended, 18 U.S.C. § 3006A.

II. THE CRIMINAL JUSTICE ACT BOARD

A. The Board

The District Court shall establish a Criminal Justice Act Board (“CJA Board”) consisting of ten private attorneys who agree to serve without compensation, and the FPD, who shall serve *ex officio*. A District Judge, a Magistrate Judge, and the Clerk of the District Court, or the Clerk’s designee, shall be appointed as liaisons with the CJA Board. The CJA Board shall be responsible for:

1. implementing the Mentoring Program described below;
2. annually evaluating applications and recommending to the District Court reappointments and new appointments to the CJA Panel of private attorneys for the Eastern Division of the District of Massachusetts;
3. periodically evaluating applications and recommending to the District Court reappointments and new appointments to the CJA Panels of private attorneys for the Central and Western Divisions of the District;
4. periodically evaluating applications and recommending to the District Court reappointments and appointments to the CJA Panel of private attorneys to provide representation in habeas corpus cases;
5. providing guidance concerning the FPD’s office in response to requests from the FPD and on its own initiative;
6. working with the FPD to provide training programs for CJA Panel attorneys and other members of the criminal defense bar;
7. generally representing the interests of the CJA program in the District;
8. receiving, reviewing and making recommendations to the District Court concerning any comments or concerns regarding: (a) the performance of CJA Panel attorneys, (b) the fairness or functioning of the CJA Panel appointment process, (c) the processing of CJA Panel payment vouchers, or (d) any recurring issues or difficulties encountered by panel members; and
9. annually reporting to the District Court on the performance of the CJA Plan and, if appropriate, recommending revisions to it.

The ten private attorneys on the CJA Board shall be appointed by the District Court to serve staggered three-year terms. Also, at least one member shall be from the Western Division of the District, and at least one member shall be from the Central Division of the District. One member of the Board should be the CJA Panel Attorney District Representative (“PADR”), the Chair of the Board may also be the PADR. The District Court shall designate the Chair of the CJA Board from among these ten members to serve for a two-year term. The Chair may create one or more subcommittees of the CJA Board to handle specific areas of responsibility. The District Court shall also designate the district judge and the magistrate judge to serve as liaisons to the CJA Board. The Clerk of the District Court shall either serve as liaison, or designate a member of the Clerk’s staff to serve as liaison to the CJA Board, and shall provide administrative support to the CJA Board.

CJA Board members shall serve for no more than two 3-year terms. The Chair of the Board (who is currently appointed for 2-year terms as Chair, but 3-year terms to the Board) would have a 3-term limit as Chair (resulting in 6 years total of service as Chair—the same as the total time limit for Board members). The Chair shall be selected by the Court, with input from the Board, and in most circumstances, the Chair will be selected from the existing Board.

The Court may extend the term of a Chair by one additional year to facilitate the search for or transition to a new Chair. When the Court selects a member of the Board as Chair, the six-year limit on Board membership applicable to that member will restart on the date when that member becomes the Chair. Upon the conclusion of a member’s term as Chair, the Court may appoint the former chair to one additional three-year term on the Board to ensure continuity as the new Chair assumes their responsibilities, notwithstanding the general six-year limit on Board service.

The Court may extend the term of the Chair, any or all Board members, and any or all Panel members due to a public health emergency or any similar emergency.

III. FEDERAL PUBLIC DEFENDER ORGANIZATION

A. Establishment

The District Court has determined that the use of a Federal Public Defender Organization, as defined in 18 U.S.C. § 3006A(g)(2)(A), serving the District of Massachusetts, will facilitate the representation of persons entitled to the appointment of counsel under the Criminal Justice Act of 1964, as amended, and that the District of Massachusetts is a district in which at least 200 persons annually require the appointment of counsel, pursuant to 18 U.S.C. § 3006A(a) pertaining to the qualifications necessary to establish such an organization. A Federal Public Defender Organization has been established, with headquarters in Boston, Massachusetts, capable of rendering defense services on appointment throughout the District of Massachusetts.

B. New Hampshire and Rhode Island Branch Offices

The FPD is authorized to establish branch offices in Concord, New Hampshire, to provide defense services on appointment throughout the District of New Hampshire, and in Providence, Rhode Island, to provide defense services on appointment throughout the District of Rhode Island. Such branch offices shall be under the supervision of the FPD for the District of Massachusetts, and

to the extent the caseload in each district permits, and pursuant to the direction of the FPD, the staff of any office shall be available to assist the staff of the other offices.

C. Governing Provisions

The FPD shall operate pursuant to the provisions of 18 U.S.C. § 3006A(g)(2)(A), as well as the Guidelines for Administering the CJA and Related Statutes, promulgated by the United States Judicial Conference pursuant to 18 U.S.C. § 3006A(h).

D. Private Practice

Neither the FPD nor any appointed staff attorney may engage in the private practice of law.

E. Reports and Budget

The FPD shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by the Director, reports of the activities and the financial position and proposed budget of the office. Copies of such reports shall be furnished to the District Court and to the Judicial Council of the First Circuit.

F. Roster of Staff

The FPD shall furnish to the District Court the roster of Assistant Federal Defenders in the FPD's office and shall report any changes thereto to the District Court.

G. Staffing and Recruitment

The FPD's Massachusetts office shall be staffed to accept at least 50% of the appointments in the District annually. Efforts should be made to assure that the FPD and the staff of the FPD's office are both highly qualified and sensitive to the diverse population they represent. This should include efforts to assure that minorities and women are appropriately represented in these positions.

H. Training and Resources

The FPD's office shall take the lead in providing training and educational programs for the CJA Panel and other members of the bar. Such training is important to enhancing the quality of representation of indigents and to making the CJA Panel accessible to able attorneys who have limited federal criminal experience. Training programs for the CJA Panel should take place at least annually, and more frequently to the extent resources permit. Similarly, the FPD's office shall serve as a central repository for materials which may be valuable to members of the CJA Panel, such as legal memoranda on recurring issues and jury instructions.

IV. PANEL OF PRIVATE ATTORNEYS

A. Panel List

The District Court shall approve, and regularly review and revise a list of private attorneys to serve as the CJA Panel for the Central Division, Eastern Division, the Western Division, and the Habeas Panel in the District of Massachusetts, and shall annually approve a list of attorneys to fill the vacancies of those CJA Panel members whose terms have expired. The size of the Panel should be such that each panel member will ideally receive at least four appointments each year. CJA Panel members shall serve for staggered, three-year terms. The CJA Board shall annually solicit and review new applications for the Panel, as possible replacements for the approximately one third of the panel whose term expires each year and shall make appropriate recommendations to the District Court. Incumbent panel attorneys may be reappointed to further three-year terms, but must complete a new application, and shall not be assured reappointment. Nothing in this Plan or the application or selection process shall create a property, contractual or other right relating to the Panel.

B. Criteria for Panel Membership

The minimum criteria for membership on any CJA Panel are that each attorney:

1. be a member in good standing of the bar of the United States District Court for the District of Massachusetts and the bar of the Massachusetts Supreme Judicial Court;
2. have at least five years' experience as a member of any state or federal bar;
3. have sufficient experience to furnish high quality representation to criminal defendants in the District Court;
4. be familiar with (a) the Federal Rules of Criminal Procedure; (b) the Federal Rules of Evidence; (c) the Bail Reform Act of 1984; (d) the Federal Sentencing Guidelines; and (e) such other statutes and rules as may be enacted from time to time with respect to criminal cases in the District Court, including guidelines with respect to electronically stored information discovery production and review;
5. agree to accept appointments in the full range of CJA cases (other than attorneys who are only members of the habeas or other specialized panel);
6. for the Boston panel, agree to take part in the duty day system by accepting at least two duty days per year;
7. register for CM/ECF;
8. agree to comply with the following legal education programs: Panel members are required to complete six hours of criminal defense training each year, preferably with a majority of these hours specific to federal criminal practice. There may be specific trainings sponsored by the Federal Defenders and/or the CJA Board that are mandatory. Mandatory trainings will not be held more than once a year. By accepting appointment to the CJA Panel, panel members agree to attend these trainings. Panel members are required to submit verification of training to ecjamahelpdesk@mad.uscourts.gov;

9. attend eVoucher training for new panel members; and
10. be evaluated for reappointment by considering, among other things the quality of representation they provide, the number of cases they accept or decline, complaints against them, and their participation in training.

C. Application Process

The application process shall be publicized in the Massachusetts Lawyers Weekly and other relevant publications, and local bar associations shall be enlisted in the effort to solicit applications, with particular emphasis on recruiting members of minority groups and women. The Clerk's Office shall notify panel members whose terms are expiring of the need to reapply.

Each revision of a list should seek to assure that the CJA Panel is accessible to newcomers and reflects the diversity of the defendant population and of the bar. The Court will track the relevant characteristics of the applicants and panel members.

D. Mentoring Program

A mentoring program, based in Boston, shall be established by the CJA Board to provide an opportunity for attorneys, who at present lack the experience to serve on the CJA Panel, who apply to work without compensation on CJA cases with members of the Panel who agree to serve as mentors, and with the FPD's office. Applicants to the mentoring program may be accepted from the Western and Central Divisions of the District, but may be required to travel to Boston to participate in the program. Participation in this program would contribute to the development of the qualifications necessary to serve on the CJA Panel, but should not assure automatic future admission to the CJA Panel. In selecting participants for this program, however, consideration should be given to whether an individual would, if eventually made a member, contribute to the diversity of the CJA Panel.

On a case-by-case basis, the Court may allow for compensation for mentees under the CJA Plan at a reduced associate rate with prior authorization by the Court.

E. Special Lists of Panel Attorneys

Based on the recommendation of the CJA Board, the District Court has established a panel of attorneys to represent indigent petitioners in habeas corpus cases, brought pursuant to 28 U.S.C. §§ 2254 and 2255, when the judicial officer exercises discretion to appoint counsel.

The CJA Board may, as part of its continuing evaluation of this Plan, consider the possible need for additional lists, based on foreign language fluency, or expertise in specialized areas of the law, such as immigration matters and sexually dangerous person litigation. The CJA Board may then make appropriate recommendations to the District Court, which may adopt such further lists as it deems appropriate.

F. Record Keeping

The Clerk of the District Court shall maintain a current computerized roster of all attorneys included on the CJA Panel list for the Eastern Division of the District, as approved by the District Court with current office addresses and telephone numbers. The deputy clerk in charge in the Western Division, and the deputy clerk in charge in the Central Division, shall each also maintain a current roster of all attorneys included on the CJA Panel list for such division. Records shall also be maintained by the Clerk of the District Court and his or her deputies in a manner which will permit judicial officers and the CJA Board to monitor the rate of appointments to the FPD's office and to the CJA Panel, and to monitor the distribution of appointments among members of the CJA Panel.

G. Use of Associates and Others

Counsel may use partners or associates when reasonably necessary to provide services efficiently and at the lowest possible cost. The term "associates" may include both a salaried employee and an attorney who shares or uses office space with counsel and whose work on a CJA case is directly supervised by counsel. The Court expects the appointed attorney to perform the majority of work. Counsel may not submit claims for time incurred by an attorney who is not a partner or associate of CJA counsel without prior judicial authorization. All court appearances must be attended by the appointed CJA Panel member, unless specifically excused by the judicial officer. Appointed counsel may claim compensation for services furnished by a partner or associate counsel in accordance with the Guidelines for Administering the CJA and Related Statutes and any guidelines promulgated by the District Court. Associates may bill at a rate equal to 80% of the statutory CJA hourly rate. Associates that are members of the panel may bill at the full CJA rate. If associate hours exceed one-third of the total number of hours claimed, counsel shall file a statement with the voucher addressing why the associate hours incurred were reasonable and necessary to provide the defendant with adequate representation.

Counsel may use paralegals and law students when reasonably necessary to provide services efficiently and at the lowest possible cost. Claims for compensation for the use of such individuals are subject to judicial approval, as they are considered outside services even if they are employed by CJA counsel. Appointed counsel may claim compensation for services furnished by a paralegal or law student in accordance with the Guidelines for Administering the CJA and Related Statutes and the Guidelines for Claims Submitted for Reimbursement Under the Criminal Justice Act.

H. Suspension and Removal of Attorneys from Panel

1. Mandatory Removal

Any member of the CJA Panel who is suspended or disbarred from the practice of law by the bar of any jurisdiction in which such member is admitted, or who is suspended or disbarred from this Court or any federal court, will be removed from the CJA Panel immediately.

2. Discretionary Removal or Suspension

Upon a vote by a majority of its judges, the District Court may remove or suspend an attorney from the CJA Panel, after notice and an opportunity to be heard, for violation of criminal laws, breach of ethical requirements, failure to satisfy the requirements of this plan, gross dereliction of duty, or any other serious matter that is reasonably likely to interfere with or

adversely affect the effective representation of criminal defendants. Prior to any removal or suspension, the judges of the District Court shall solicit and consider the recommendation of the CJA Board.

3. Confidentiality

Unless otherwise directed by the Court, any information acquired concerning any possible disciplinary action, including any complaint and any related proceeding, will be confidential.

4. Notification

Panel Members must notify the CJA Board Chair within 30 days when any licensing authority, grievance committee or administrative body has taken disciplinary action against them, or when a finding of contempt, sanction, or reprimand has been issued against the panel member by any state or federal court. The CJA Board Chair will then immediately notify the Court.

V. APPOINTMENT OF COUNSEL

A. Timing of Appointment

Counsel must be provided to eligible persons as soon as is feasible in the following circumstances, whichever occurs earliest:

1. After they are taken into custody;
2. When they appear before a magistrate or district court judge;
3. When they are formally charged or notified of charges that are sealed; or
4. When a magistrate or district court judge otherwise considers appointment of counsel appropriate under CJA and related statutes.

B. Selection of Counsel - Eastern Division of the District

The judicial officers sitting in the Eastern Division of the District shall appoint counsel for indigent individuals in criminal matters. In general, appointments will be made using a duty day system. Under the duty day system, a member of the CJA Panel and a lawyer from the FPD will be available to accept appointments on each day that the District Court is open. The Clerk's Office will assign a CJA Panel member as CJA duty attorney. The Federal Defender will assign a lawyer from that office to be FPD duty attorney. To the extent practicable, the Clerk's Office shall strive to ensure that duty days are evenly spread among Panel members.

The CJA duty attorney shall be expected to accept appointments to at least one case, but not more than two, if available for the CJA duty attorney, on the day when the CJA Panel member is serving as duty attorney. If multiple cases require appointment of counsel on a single day, and if the CJA and FPD duty attorneys cannot accept appointment to the cases on the particular day, the judicial officer shall appoint counsel for the excess cases from the CJA Panel. Those appointments shall be made to CJA Panel members in accordance with the CJA Assignment Program.

In exceptional circumstances, a judicial officer shall have the discretion to appoint an attorney not on the CJA Panel, or a CJA Panel member other than the duty attorney, in order to

serve the interests of justice, judicial economy, continuity in representation, or if there is some other compelling circumstance warranting such appointment. A record concerning any such exceptional appointment shall be entered in the CJA Assignment Program and reported on the monthly CJA Assignment Audit Report prepared by the Clerk's Office to monitor the performance of the appointment process.

C. Selection of Counsel - Western and Central Divisions of the District

The judicial officers sitting in the Western and Central Divisions of the District shall appoint counsel for indigent individuals in criminal matters. Such appointment shall normally be made from the FPD or from the list of CJA Panel attorneys maintained in each division. The appointing judicial officers shall attempt to provide a fair distribution of appointments among the CJA Panel attorneys. In exceptional circumstances, a judicial officer shall have the discretion to appoint an attorney not on the CJA Panel, in order to serve the interests of justice, judicial economy, continuity in representation, or if there is some other compelling circumstance warranting such appointment. A record concerning any such exceptional appointment shall be entered in the CJA Assignment Program and reported on the monthly CJA Assignment Audit Report prepared by Clerk's Office to monitor the performance of the appointment process.

D. Process of Appointment

In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense as defined in 18 U.S.C. § 1, unless the defendant faces the possibility of loss of liberty), or with juvenile delinquency by the commission of an act which, if committed by an adult would be such a felony or misdemeanor, or with a violation of probation, supervised release, or parole, or for whom the Sixth Amendment to the Constitution requires the appointment of counsel or for whom, in a case in which he or she faces loss of liberty, any federal law requires the appointment of counsel, and the defendant appears without counsel, the judicial officer shall advise the defendant that he or she has the right to be represented by counsel and that counsel will be appointed if the defendant is financially unable to afford adequate representation. Unless the defendant waives representation by counsel in writing, the judicial officer, if satisfied after appropriate inquiry and after a financial affidavit has been executed by the defendant, that he or she is financially unable to obtain counsel, shall appoint counsel to represent the defendant. A defendant may not choose the counsel who shall provide representation, but may state any objection to a counsel whose appointment is under consideration. Appointment of counsel may be made retroactive to include representation furnished pursuant to the Plan prior to appointment. The judicial officer shall appoint separate counsel for defendants having interests that cannot be represented by the same counsel or when other good cause is shown. All statements made by a defendant in requesting counsel or during the inquiry into eligibility shall be either (a) by affidavit sworn to before a judicial officer, a court clerk or his or her deputy, or a notary public, or (b) under oath before a judicial officer. A financial affidavit shall not be considered part of the public record, unless so ordered by the judicial officer, after notice and a hearing.

E. Grand Jury Representation

In order to enhance the number of cases to which the Office of the Federal Public Defender can be appointed and in order to avoid the creation of unnecessary conflicts, the United States

Magistrate Judges and their courtroom deputy clerks shall, except in unusual circumstances, avoid appointing lawyers from the Office of the Federal Public Defender to represent any witnesses in matters pending before a Grand Jury.

F. Scope of Representation

A person for whom counsel is appointed shall be represented at every stage of the proceedings from the initial appearance before the judicial officer through appeal, including ancillary matters appropriate to the proceedings. If at any time after appointment of counsel the judicial officer finds that the person is financially able to obtain counsel or to make partial payment for the representation, the judicial officer may terminate the appointment of counsel or authorize payment as provided in the Criminal Justice Act of 1964, as amended, 18 U.S.C. § 3006A(f), as the interests of justice may dictate. If at any stage of the proceedings in the district court, the judicial officer finds that a person is financially unable to pay counsel whom he or she retained, the judicial officer may appoint counsel as provided in the Criminal Justice Act of 1964, as amended, and authorize payment as therein provided, as the interests of justice may dictate. The judicial officer in the interests of justice may substitute one appointed counsel for another at any stage of the proceedings.

Counsel who represented a defendant in the district court is obligated to continue the representation through the filing of any post-trial motions and the filing of a notice of appeal. Once a notice of appeal is docketed in the Court of Appeals, the continuing obligations of counsel shall be governed by the Local Rules of the United States Court of Appeals for the First Circuit, including the appointment of counsel and changes in representation. A proceeding under 28 U.S.C. § 2255, or other collateral challenge, is not a post-trial motion for these purposes. With leave of court, counsel may also represent a defendant with respect to the placement of a prisoner in the prison system or any related issues. If a former client contacts counsel after representation terminates regarding a matter that may require the assistance of counsel, former counsel is required either to seek leave of court to resume representation, or to advise the client how to request new counsel by contacting the court. Nothing in this provision is intended to create a new right to counsel with respect to post-trial matters where such a right is not otherwise established by law.

VI. PAYMENT FOR REPRESENTATION BY PRIVATE COUNSEL

A. Hourly Rates

Any private attorney appointed under this Plan shall, at the conclusion of the representation or on an interim basis, if authorized by the judicial officer, be compensated at the rate set by the Judicial Conference of the United States for the District, and funded by the Congress of the United States, as provided in 18 U.S.C. § 3006A(d)(1). Such attorney shall be reimbursed for expenses reasonably incurred.

B. Maximum Amounts

The maximum amount of compensation to be paid to a private attorney appointed under this Plan shall not exceed the amounts set forth in 18 U.S.C. § 3006A(d)(2), unless waived by the judicial officer.

C. Exceeding Maximum Amounts

Payment in excess of any maximum amount set forth in 18 U.S.C. § 3006A(d)(2) may be made for extended or complex representation whenever the district judge before whom the representation was rendered, or the magistrate judge, if the representation was furnished exclusively before the magistrate judge, 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 Court of Appeals for the First Circuit or the Chief Judge's designee.

D. Filing Claims

A claim for compensation and reimbursement shall be made to the District Court for representation before the judicial officer. Within 45 days of final disposition, the claimant shall file the claim in the Electronic Voucher System. The Electronic Voucher System incorporates a sworn affirmation specifying the time expended, services rendered, and expenses incurred while the case was pending before the judicial officer, and the compensation and reimbursement applied for or received in the same case from any other source. The judicial officer shall fix the compensation and reimbursement to be paid to the attorney. Absent extraordinary circumstances, the Court should act on CJA claims for compensation and reimbursement within 30 days of submission, and vouchers should not be delayed or reduced for the purpose of diminishing Defender Services program costs in response to adverse financial circumstances.

If the compensation claimed exceeds the maximum amount set forth in § 3006A(d)(2), counsel seeking compensation shall submit to the presiding judicial officer a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case and that the excess payment is necessary to provide fair compensation. Counsel must also file a memorandum justifying associate hours as required by Section IV.G of this Plan. Counsel may file a single memorandum addressing both issues. The memoranda are to be entered in eVoucher as an attachment to the voucher and shall not be docketed in the case file.

E. New Trials

For purposes of compensation and other payments authorized under the Criminal Justice Act of 1964, as amended, and this Plan, an order by a court granting a new trial shall be deemed to initiate a new case.

F. Appeals

If a defendant is convicted following trial or is sentenced following a plea, counsel appointed hereunder shall advise the defendant regarding the right to appeal and of the right to counsel on appeal, including the effect of any appeal waiver, and this obligation shall not be affected or diminished by similar advice given to the defendant by the judicial officer. If a defendant does wish to appeal, counsel shall file a timely notice of appeal and shall continue to represent the defendant unless or until relieved by the Court of Appeals.

G. Review of Vouchers

Vouchers shall be reviewed, approved, and paid promptly, absent extraordinary circumstances. If the judicial officer contemplates reducing the requested compensation, the attorney shall be given an opportunity to justify in writing the amount claimed. This paragraph does not afford any right to a hearing. Voucher reductions should be limited to mathematical errors, instances in which work billed was not compensable, was not undertaken or completed, and instances in which the hours billed are clearly in excess of what was reasonably required to complete the task.

If the Court determines that a claim should be reduced for reasons other than mathematical or technical errors, Counsel may request review by the CJA Voucher Review Committee. The CJA Board shall create this Committee which will be composed of three persons, with staggered 3-year terms. Members shall consist of (1) a current member of the CJA panel, (2) an attorney from the Federal Public Defender Organization, and (3) a private practicing attorney who is experienced in criminal matters (not on the panel). In the event that review of a voucher poses a conflict for a member of the Committee, the member shall recuse and notify the Chair of the CJA Board. The Board will then appoint another attorney experienced in criminal matters to serve for review of the voucher. The Board shall provide notice to the Court regarding the composition of the Voucher Review Committee. If review is requested, the Committee will follow the process described in the Guidelines. The Court will consider the Committee's views and render a final decision not subject to appeal.

H. Guidelines

To ensure proper stewardship of public funds, the District Court may issue guidelines for claims submitted under this plan, and provide copies of those guidelines to the CJA panel and the public. The court will assess ongoing costs and periodically amend the guidelines to encourage effective and efficient representation and appropriate billing practices. See Guidelines for Claims Submitted for Reimbursement Under the Criminal Justice Act. Panel Members shall adhere to the Guidelines.

VII. SERVICES OTHER THAN COUNSEL [18 U.S.C. § 3006A(e)]

A. Upon Request

Counsel for any person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the district judge, or the magistrate judge if the services are required in connection with a matter over which the magistrate judge has jurisdiction, shall authorize counsel to obtain the services requested. The maximum which may be paid to a person for services so authorized shall not exceed the amount set forth in § 3006A(e)(3), exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the district judge, or by the magistrate judge if the services were rendered in connection with a case disposed of entirely before the magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment

is approved by the Chief Judge of the Court of Appeals for the First Circuit or the Chief Judge's delegate.

B. Without Prior Request

Counsel appointed under the Criminal Justice Act, as amended, and this Plan may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed the amount set forth in § 3006A(e)(2) and expenses reasonably incurred, and payment in excess of that amount may not be approved.

C. Federal Public Defender Organization

The provisions of this section do not apply to the Federal Public Defender Organization established by and operating under this Plan.

VIII. RECEIPT OF OTHER PAYMENTS

Whenever the judicial officer finds that funds are available for payment from or on behalf of a person furnished representation under the Criminal Justice Act, as amended, and this Plan, the judicial officer may authorize or direct that such funds be paid to the appointed attorney, to any person authorized to render investigative, expert, or other services, or to the District Court for deposit in the Treasury. Except as so authorized or directed, no appointed attorney may request or accept any payment or promise of payment for providing services or representation to a defendant from any other source.

IX. MISCELLANEOUS

A. 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 District Court, the Clerk, the judicial officers, the Federal Public Defender Organization, and private counsel appointed under the Criminal Justice Act, as amended, and this Plan.

B. Case Budgeting in Non-Capital Representations

The Judicial Conference of the United States encourages case budgeting in non-capital representations that appear likely to become, or have become, extraordinary in terms of potential cost. Courts and appointed counsel should contact the First Circuit Case Budgeting Attorney to discuss whether a case may be appropriate for budgeting, and the procedures for submitting a case budget. See Guide to Judiciary Policy, Vol. 7A. Ch. 2. §§ 230.26.10-20 and Local CJA Reimbursement Guidelines.

C. Compliance with Judicial Conference Guidelines, Plan, and Court Guidelines

The judicial officers, Clerk of the District Court, Federal Public Defender Organization, and private attorneys appointed under the Criminal Justice Act, as amended, and this Plan, shall comply with the provisions of the Judicial Conference’s Guidelines for the Administration of the Criminal Justice Act, this Plan, and any guidelines promulgated by the District Court under this Plan.

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

A. Applicable Legal Authority

The appointment and compensation of counsel in capital cases and the authorization and payment of persons providing investigative, expert, and other services are governed by 18 U.S.C. §§ 3005, 3006A, and 3599, and *Guide*, Vol. 7A, Ch. 6.

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 that may be punishable by death who is or becomes financially unable to obtain representation is entitled to the assistance of appointed counsel 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 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 with selection and appointment of counsel, and legal, practical, and other matters arising in federal capital cases.

5. The federal public defender 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 appointment of counsel.

6. The presiding judge may appoint an attorney furnished by a state or local public defender organization or 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 that the attorney is fully qualified. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or 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 the 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 the appropriate Resource Counsel projects.

11. As early as practicable after appointment, appointed counsel in capital cases shall contact the First Circuit Case Budgeting Attorney to submit an initial case budget that will be subject to modification in light of facts and developments that emerge as the case proceeds. Guide to Judiciary Policy, Vol. 7A, Ch. 6, § 640. Questions about the appointment and compensation of counsel, and the

authorization and payment of investigative, expert, and other service providers in federal capital cases may also 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. Appointment of Trial Counsel in Federal Death-Eligible Cases

1. General Requirements

- a. Appointment of qualified capital trial counsel must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible. See 18 U.S.C. § 3005.
- b. To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, 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 public defender who will consult with Federal Death Penalty Resource Counsel to recommend qualified counsel.
- e. To effectuate the intent of 18 U.S.C. § 3005 that the federal public defender’s recommendation be provided to the court, the judge should ensure the federal public defender has been notified of the need to appoint capital-qualified counsel.
- f. Reliance on a list for appointment of capital counsel is not recommended because selection of trial counsel should account for the particular needs of the case and the defendant, and be based on individualized recommendations from the federal public defender 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 appointment in capital trials to achieve high quality representation together with cost and other efficiencies.

- h. In evaluating the qualifications of proposed trial counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

2. Qualifications of Learned Counsel

- a. Learned counsel must either be a member of this district’s bar or be eligible for admission pro hac vice based on his or her qualifications. Appointment of counsel 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 from outside the district where the matter arises.
- e. The suitability of learned counsel should be assessed with respect to the particular demands of the case, the stage of the litigation, 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 representation in capital cases.

3. Qualifications of Second and Additional Counsel

- a. Second and additional counsel may, but are not required to, satisfy the qualifications for learned counsel, 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 required by the capital representation.
- d. The suitability of second and additional counsel should be assessed with respect to the demands of the individual case, the stage of the litigation, and the defendant.

D. Appointment and Qualifications of Direct Appeal Counsel in Federal Death Penalty Cases (28 U.S.C. § 2255)

1. When appointing appellate counsel, the judge must consider the recommendation of the federal public defender, 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 defendant on appeal.
4. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital appeals to achieve high quality representation together with cost and other efficiencies.
5. 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 appellate counsel must have the requisite background, knowledge, and experience required by 18 U.S.C. § 3599(c) or (d).
7. In evaluating the qualifications of proposed appellate counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
8. In evaluating the qualifications of proposed appellate counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

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

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. In light of the accelerated timeline applicable to capital § 2255 proceedings, prompt appointment of counsel is essential. Wherever possible, appointment should take place prior to the denial of certiorari on direct appeal by the United States Supreme Court.
4. When appointing counsel in a capital § 2255 matter, the court should consider the recommendation of the federal public defender, 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 appointment in capital § 2255 cases to achieve high quality representation together with cost and other efficiencies.
6. Counsel in § 2255 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
7. When possible, post-conviction counsel should have distinguished prior experience in capital § 2255 representations.
8. In evaluating the qualifications of proposed post-conviction counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.
9. In evaluating the qualifications of proposed post-conviction § 2255 counsel, consideration should be given to their commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to effectively represent the interests of the client.

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

1. A financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 is entitled to the 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. When appointing counsel in a capital § 2254 matter, the appointing authority should consider the recommendation of the federal public defender.
4. Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital § 2254 cases to achieve cost and other efficiencies together with high-quality representation.
5. In order 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 motion 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. Counsel in capital § 2254 cases should have distinguished prior experience in the area of federal post-conviction proceedings and in capital post-conviction proceedings.
8. When possible, capital § 2254 counsel should have distinguished prior experience in capital § 2254 representations.
9. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases.

10. In evaluating the qualifications of proposed capital § 2254 counsel, consideration should be given to proposed counsel's commitment to the defense of capital cases, their current caseload including other capital cases, and their willingness to represent effectively the interests of the client.

XI. EFFECTIVE DATE

This plan shall take effect immediately upon its approval by the Judicial Council of the First Circuit, or on August 2, 2021 whichever is later. It shall supersede any previous Plan for Implementing the Criminal Justice Act of 1964 except counsel appointed under any earlier Plan to represent particular defendants shall be authorized to complete the services for which they were appointed and shall be entitled to be paid under the earlier Plan for such services and expenses.

So ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor
Chief United States District Judge

/s/ Leo T. Sorokin
Leo T. Sorokin
United States District Judge

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

/s/ Allison D. Burroughs
Allison D. Burroughs
United States District Judge

/s/ Richard G. Stearns
Richard G. Stearns
United States District Judge

/s/ Rya W. Zobel
Rya W. Zobel
Senior United States District Judge

/s/ Patti B. Saris
Patti B. Saris
United States District Judge

/s/ Mark L. Wolf
Mark L. Wolf
Senior United States District Judge

/s/ Denise J. Casper
Denise J. Casper
United States District Judge

/s/ Douglas P. Woodlock
Douglas P. Woodlock
Senior United States District Judge

/s/ Timothy J. Hillman
Timothy J. Hillman
United States District Judge

/s/ Edward F. Harrington
Edward F. Harrington
Senior United States District Judge

/s/ Indira Talwani
Indira Talwani
United States District Judge

/s/ Michael A. Ponsor
Michael A. Ponsor
Senior United States District Judge

/s/ Indira Talwani
Indira Talwani
United States District Judge

/s/ George A. O'Toole
George A. O'Toole
Senior United States District Judge

/s/ Mark G. Mastroianni
Mark G. Mastroianni
United States District Judge

JUDICIAL COUNCIL
OF THE FIRST CIRCUIT

Entered: July 20, 2021

The First Circuit Judicial Council has voted to approve the United States District Court for the District of Massachusetts' amendment to its Plan for Implementing the Criminal Justice Act of 1964, as Amended 18 U.S.C. § 3006A.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'S. Goldberg', with a long horizontal line extending to the right.

Susan J. Goldberg
Circuit Executive