JUDICIAL COUNCIL OF THE FIFTH CIRCUIT

PLAN FOR REPRESENTATION ON APPEAL
UNDER THE CRIMINAL JUSTICE ACT

SECTION 1. PURPOSE OF THE PLAN

The Criminal Justice Act of 1964, 18 U.S.C. § 3006A, provides for representation of any person financially unable to obtain adequate representation. The Judicial Council of the Fifth Circuit hereby adopts this Plan to implement the Act's provisions in cases before the court. The plans adopted by the district courts within the Fifth Circuit apply to cases on appeal to the extent they are consistent with this Plan.

SECTION 2. DEFINITIONS

A. "The Act" – the Criminal Justice Act of 1964, as amended.

B. "Death penalty proceedings" – federal capital prosecutions under Title 18 or 21 of the United States Code, direct appeals in cases in which a death sentence was imposed, and collateral proceedings under 28 U.S.C. §§ 2254 and 2255 challenging a capital conviction and/or death sentence.

C. "This Plan" or "the Plan" – Plan adopted by the Court of Appeals for the Fifth Circuit for representation under the Criminal Justice Act.

D. "Representation" – counsel, investigators, experts, and other services necessary for adequate legal representation under the Plan.

SECTION 3. RIGHT TO COUNSEL

A. Mandatory Appointment

Any financially eligible person is entitled to appellate representation by appointed counsel if the district court appointed counsel pursuant to 18 U.S.C. § 3006A(a)(1) or (2), or if the district court appointed counsel for a financially eligible person seeking to set aside or vacate a death sentence under 28 U.S.C. § 2254 or 2255. The court of appeals shall appoint counsel for any financially eligible person in an appeal from any proceeding listed in section 3006A(a)(1)(a)-(j) who was not represented by appointed counsel in the district court and who requests appointment of counsel on appeal.

B. Optional Appointment

If the court of appeals determines that the interest of justice requires, the court may appoint counsel on appeal for a financially eligible person who has been convicted of a Class B or C misdemeanor or of an infraction for which a sentence to confinement has been imposed, or who is seeking relief from a sentence other than a death sentence under 28 U.S.C. § 2241, 2254, or 2255.

SECTION 4. ELIGIBILITY FOR REPRESENTATION

A. Determination of Financial Eligibility

The court of appeals determines a person's eligibility for appellate representation under the Act based on his or her overall financial inability to hire an attorney, in keeping with Congress' intent in passing the Act. A person for whom counsel is appointed may have to pay a portion of the fees to the clerk of the court of appeals if the court determines he or she has sufficient resources to make a partial payment. The clerk will administer the funds according to the guidelines established by the Judicial Conference.

The court of appeals may accept without further inquiry the district court's finding that the person is financially eligible for appointment of counsel. If a party moves for appointment of counsel under the Act for the first time on appeal, the clerk will direct the party to execute an affidavit demonstrating his or her financial inability to hire an attorney. The clerk will then submit the papers and evidence to the court for appropriate action.

If the court of appeals finds, at any time, that a party who had retained counsel has become financially unable to pay the attorney, it may appoint counsel and authorize payment pursuant to §§ (b), (c), and (d) of the Act.

B. Eligible Person Not Represented in District Court

The clerk of the court of appeals will notify a person who was not represented by counsel in the district court of the right to have an attorney appointed if the person is financially unable to hire one.

SECTION 5. APPOINTMENT OF COUNSEL

A. Attorneys Eligible for Appointment

The court of appeals will select counsel for appointment under this Plan from:

- panels of attorneys designated or approved by the district courts of the Fifth Circuit;
- a Federal Public Defender Organization;
- a Community Defender Organization approved by a district court plan and authorized to provide representation under the Act; or
- any other organized program the court of appeals has approved that provides attorneys to represent financially eligible persons on appeal.

Any judge of the court of appeals may appoint competent counsel not included in the above categories if the interest of justice requires.

In keeping with § (a)(3) of the Act and the directives of the Judicial Conference, at least 25% of all appointments must be to members of the private bar.

B. Continuation of District Court Appointment

Counsel appointed under the Act by the district court shall continue to provide representation on appeal unless relieved by court order. The court of appeals or the district court may relieve counsel of this obligation only by written order. The order must also appoint a substitute counsel, unless the party waives counsel and asks to proceed pro se, or retains counsel. The court of appeals may make any appointment retroactive so that counsel's prior representation is included. Counsel shall be eligible to be compensated for such prior representation. If counsel appointed by the district court remains as counsel on appeal, the court of appeals will send a form to counsel continuing his or her representation.

If appointed counsel wishes to be relieved from further representation by the court of appeals, he or she must file with the clerk of the court of appeals a motion stating the reasons. Counsel must continue to represent the party on appeal until relieved by court order.

If a party represented by appointed counsel wishes the court of appeals to relieve counsel and appoint new counsel, he or she must file with the clerk a legible motion asking for that relief. The clerk will submit the motion to the court of appeals for ruling.

Counsel may be relieved upon a showing that there is a conflict of interest or other most pressing circumstances or that the interests of justice otherwise require relief of counsel.

C. Cases with Multiple Parties

The court of appeals shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

D. Appointment of Multiple Counsel

In an extremely difficult case where the court of appeals finds it in the interest of justice, it may appoint an additional attorney for a party. Each attorney is eligible to receive the maximum compensation allowed under the Act. The court of appeals must include in its order of appointment the specific finding that the appointment of an additional attorney in a difficult case is necessary and in the interest of justice.

SECTION 6. DUTIES OF APPOINTED COUNSEL

Appointed counsel must inform the client of the right to appeal to the court of appeals and to seek certiorari review in the Supreme Court without prepayment of fees and costs, giving security, or filing the affidavit of financial inability specified by 28 U.S.C. § 1915(a).

In cases proceeding under the Act, appointed counsel must file CJA Form 24 with the district court to obtain the reporter's transcript of testimony at government expense. Counsel should submit transcript authorization requests and CJA 24 payment vouchers through the district court CJA eVoucher system.

Appointed counsel has a duty under *Anders v. California*, 386 U.S. 738 (1967) to advise the court of appeals if he or she concludes the appeal has no arguable merit, and to request to withdraw.

If asked by his or her client, appointed counsel must provide a copy of any motions or briefs filed on the client's behalf in the appeal. Counsel must also forward the client a copy of the court of appeals' decision when issued. The clerk will provide counsel an extra copy of the decision for that purpose.

Appointed counsel must appear for oral argument unless the court of appeals directs otherwise. An associate attorney, not appointed under the Act, may not present oral argument except in the most pressing and unusual circumstances.

Promptly after the court of appeals' decision issues, appointed counsel must advise the client in writing of the right to seek further review by filing a petition for writ of certiorari with the United States Supreme Court. If the client asks that counsel file a petition, counsel must do so in a timely manner. If counsel believes filing a petition would be futile, he or she may move the court of appeals to be relieved of the obligation. The court of appeals also may act *sua sponte* to relieve counsel of any further representation.

SECTION 7. PAYMENT OF CLAIMS FOR COMPENSATION & EXPENSES

A. General Guidelines

In all appeals under the Act, the court of appeals may authorize compensation for services and reimbursement for expenses reasonably incurred on appeal, within the limitations of the Act, by any person appointed under the Plan. The court of appeals is cognizant that the hourly rates of compensation in the Act are intended as maximum, not standard, rates. Total compensation for representation on appeal may exceed the amount fixed in the statute or by the Judicial Conference only in cases involving extended or complex representation. In such cases, the chief judge or his or her designee must certify that the case involves extended or complex representation and the amount certified is necessary to provide fair compensation.

No one appointed under the Act may accept any payment from or on behalf of the person represented in the court of appeals without prior authorization by a judge of the court of appeals. All authorized payments are subject to the directions contained in the court of appeals' order and the provisions of § (f) of the Act.

Appointed counsel is also expected to be familiar with the payment policies of the Fifth Circuit.

B. Compensation

1. Non-Death Penalty Cases

Limitations on maximum compensation shall be as prescribed in 18 U.S.C. § 3006A(d)(2) for non-capital cases.

Appointed counsel may claim compensation for services furnished by a partner or an associate within the maximum compensation allowed by the Act, as long as appointed counsel takes the lead

in preparation of the brief and presentation of oral argument, if allowed. Only appointed counsel may claim compensation for in-court services and associated travel expenses.

If the court of appeals substitutes one attorney for another, the total compensation for both attorneys may not exceed the statutory maximum for one defendant unless the chief judge or his or her designee certifies that the case involves extended or complex representation and the amount certified is necessary to provide fair compensation. Vouchers for the previously appointed attorney's services may be approved consistent with the provision for interim payments. (See Section 7.D, below).

2. Death Penalty Proceedings

a. Appellate Capital Proceedings

Capital cases, whether on direct appeal or on appeal in habeas proceedings under 28 U.S.C. § 2254 or § 2255, should be budgeted in consultation with the circuit CJA case budgeting attorney. Counsel requesting budget approval shall file the request by motion with the court. All budgets and vouchers for attorneys' and service providers' fees in capital cases are reviewed by a member of the court.

b. District Court Capital Proceedings

Capital cases, whether federal capital prosecution or habeas proceedings under 28 U.S.C. § 2254 or § 2255, should be budgeted in consultation with the circuit CJA case budgeting attorney as soon as practicable after counsel is appointed. The budget must be submitted for the district court's review and, once approved by the district court, must be forwarded to the chief judge of the Circuit or his or her designee for approval. Counsel shall submit a supplemental budget in consultation with the case budgeting attorney as soon as it becomes apparent that fees will exceed the budgeted amount. Supplemental budgets must be submitted for the district court's review and, once approved by the district court, must be forwarded to the chief judge of the Circuit or his or her designee for approval.

Requests for approval of service providers in excess of the statutory maximum in 18 U.S.C. § 3599(g)(2) require the approval of the chief circuit judge. A court approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized.

3. Petition for Writ of Certiorari

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

4. Maximum Hourly Rates

Counsel may be compensated at rates authorized by the Judicial Conference pursuant to 18 U.S.C. § 3006A(d)(1) for non-capital cases and pursuant to 18 U.S.C. § 3599(g)(1) for capital cases. Hourly compensation rates in non-capital cases shall not exceed the rate and effective date set forth

in § 230.16 of the Guide to Judiciary Policy. Hourly compensation rates in capital cases shall not exceed the rate and effective date set forth in § 630.10.10 of the Guide to Judiciary Policy.

5. Authorization and Payment for Expert and Other Services

CJA counsel may arrange for services necessary to the representation, including paralegal, law clerk, interpreter, and translator. Up to $1,000 per case, excluding expenses, may be expended without prior authorization, subject to subsequent review. Once the $1,000 case limit is reached, prior authorization is required for any expenditure.

C. Requesting Compensation

Unless the court has approved interim payments, counsel shall file all voucher claims via the Fifth Circuit eVoucher system no later than 45 days after final disposition of the case, unless good cause is shown for the delay. "Final disposition" is the later of: (a) the date the decision becomes final or the appeal is otherwise terminated, if no petition for certiorari will be filed; (b) the date a petition for certiorari is granted or denied; or (c) the date an order is filed granting counsel permission to withdraw if the defendant will proceed *pro se* or has retained counsel.

D. Interim Payments and Case Budgeting

1. Interim Payments

Interim compensation in non-capital cases may be authorized on motion request filed *ex parte* and under seal with the court.

2. Case Budgeting

Case budgeting is appropriate in *all* capital cases and complex or extended non-capital representations that appear likely to become or have become extraordinary in terms of potential cost (ordinarily, a representation in which counsel expects to exceed 300 hours). If the court determines that case budgeting is appropriate either on its own or upon request of counsel, counsel must submit a proposed budget for court approval, subject to modification in light of facts and developments that emerge as the case proceeds.

Counsel should consult with the Circuit CJA Case Budgeting Attorney in preparation of a budget.

E. Travel and Reimbursable Expenses

1. Travel

Counsel will be reimbursed for a maximum of one and one-half days for travel and travel expenses for oral argument. All travel requiring overnight accommodations, air travel, or more than 4 hours driving time – round trip – must be authorized in advance in writing.

2. Reimbursable Expenses

Counsel are expected to be familiar with the Fifth Circuit expense reimbursement policies. The court of appeals will reimburse appointed counsel for the following expenses incurred in the course

of providing representation under the Act:

a. Travel Expenses

Air Transportation – the court will approve air transportation for counsel at government employee rates. Upon counsel's request, the Office of General Counsel and Mediation will provide the necessary information at the time the case is scheduled for oral argument so that counsel may arrange the travel without incurring any out-of-pocket expense. If counsel makes travel reservations personally, reimbursement will be for actual airfare only up to the amount that could have been obtained at the government employee rate.

Automobile – the rate per mile cannot exceed the current government authorized rate for official travel. The amount claimed cannot exceed that authorized for air fare at the government employee rate, except in an emergency or other unusual circumstance. In such a case, counsel must provide an explanation. Parking, ferry, bridge, road, and tunnel fees are reimbursable.

Local Transportation – counsel must use the most economical means of local transportation possible (e.g., airport shuttle, if available) and may claim actual expenses.

Meals and Lodging – counsel may claim the actual expenses incurred for meals and lodging. Expenses should be in line with the limits for federal employees, which can be obtained from the Office of General Counsel and Mediation.

b. Miscellaneous Expenses

Photocopying – counsel may claim actual expenses not to exceed $ .25 per page and must submit a copy of the bill. If counsel does photocopying in-house, he or she may claim actual expenses not to exceed $.15 per page.

Briefs – counsel may claim actual cost for preparing briefs, subject to the photocopying limits above. Reimbursement will be for a maximum of 15 copies, except if the case is heard en banc, where reimbursement will be for 23 copies.

Courier and Other Special Service – counsel must attach an explanation for using services, except in capital cases. Briefs, motions, and other documents whose filing can be anticipated in advance should be prepared in time to permit the use of less expensive services, and excessive charges for shipping will not be reimbursed.

Overnight shipping charges will only be reimbursed in capital cases.

Other Expenses – counsel may claim actual expenses for such things as postage, telephone calls, brief supplies, and the like. Counsel should use the most economical means for expenses.

F. Non-reimbursable Expenses

General office overhead, personal items, and nonlegal personal services for the person represented, filing fees, services of process, and printing costs are non-reimbursable.

A person represented under the Criminal Justice Act is not required to pay filing fees or costs, or

give security therefor, nor must he file the 28 U.S.C. § 1915(a) affidavit, for an appeal.

G. CJA Billing Records

Appointed counsel must maintain contemporaneous time and expense records for all work performed. Records must describe the date, the hours expended, and a description of the work performed. All time records are subject to audit and must be retained for three years after approval of the voucher. Failure to keep contemporaneous time records in support of the fees claimed may result in a reduction to the voucher or denial of payment where compensability questions and/or reasonableness of fee requests cannot be substantiated.

SECTION 8. IMPLEMENTATION

The court of appeals, by rule, internal operating procedure, or court policy, may delegate any of the duties set out in this Plan to a single judge, the clerk of court, or a deputy clerk.

This Plan becomes effective on June 5, 2025.