

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA



PLAN FOR THE ADEQUATE
REPRESENTATION
OF DEFENDANTS PURSUANT TO THE
CRIMINAL JUSTICE ACT OF 1964,
AS AMENDED

2021

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PLAN FOR THE ADEQUATE REPRESENTATION
OF DEFENDANTS PURSUANT TO THE
CRIMINAL JUSTICE ACT OF 1964, AS AMENDED

I. AUTHORITY.

- A. Pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, as amended (CJA), and the Guidelines for Administering the CJA and Related Statutes (CJA Guidelines), Volume 7, *Guide to Judiciary Policy*, the United States District Court for the District of South Dakota adopts the following plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with the CJA.
- B. The objective of this Plan is to attain the ideal of equality before the law for all persons. Therefore, this Plan will be administered so that those accused of a crime or otherwise eligible for services pursuant to the CJA shall be provided effective representation necessary to an adequate defense even though they are financially unable to pay.

II. PROVISION OF REPRESENTATION.

- A. Mandatory. Representation must be provided to an applicant found to be financially eligible and who:
1. is charged with a felony or with a Class A misdemeanor;
 2. is a juvenile alleged to have committed an act of juvenile delinquency as defined in 18 U.S.C. § 5031;
 3. is charged with a violation of probation, or faces a change of a term or condition of probation (unless the modification sought is favorable to the probationer and the government has not objected to the proposed change);
 4. is under arrest, when such representation is required by law;
 5. is entitled to appointment of counsel in parole proceedings;
 6. is charged with a violation of supervised release or faces modification or enlargement of a condition, or extension or revocation of a term of supervised release (unless the modification sought is favorable to the releasee and the government has not objected to the proposed change);

7. is subject to a mental condition hearing under 18 U.S.C. §§ 4241-4248;
8. is in custody as a material witness;
9. is seeking to set aside or vacate a death sentence under 28 U.S.C. §§ 2254 or 2255;
10. is entitled to appointment of counsel in verification of consent proceedings pursuant to a transfer of an offender to or from the United States for the execution of a penal sentence under 18 U.S.C. § 4109;
11. is entitled to appointment of counsel under the Sixth Amendment to the Constitution; or
12. is faced with loss of liberty in a case and federal law requires the appointment of counsel.

B. Discretionary. Representation may be provided whenever the court determines that the interests of justice so require representation for any financially eligible person who:

1. is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized;
2. is seeking relief, other than to set aside or vacate a death sentence under 28 U.S.C. §§ 2241, 2254, or 2255;
3. is charged with civil or criminal contempt and who faces loss of liberty;
4. has been called as a witness before a grand jury, a court, the Congress, or a federal agency or commission that 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 criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty;
5. is proposed by the United States Attorney for processing under a pretrial diversion program;
6. is held for international extradition under 18 U.S.C. §§ 3181-3196;
7. has standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute and who has been represented by counsel appointed under 18 U.S.C. § 3006A in connection with a related criminal case.

- C. Ancillary Matters. Representation may also be furnished for financially eligible persons in ancillary matters appropriate to the proceedings pursuant to 18 U.S.C. § 3006A. Examples of ancillary proceedings can be found in the CJA Guidelines, § 210.20.30.

III. APPOINTMENT OF COUNSEL.

A. Appointments in General.

1. Right to Court-Appointed Counsel. Unless a person entitled to court-appointed counsel waives representation, the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, must appoint counsel to represent the person.
2. Determining Financial Eligibility. In determining whether the defendant is financially unable to obtain counsel, the court may act upon statements made by the defendant (a) under oath in open court, (b) by sworn affidavit, or (c) other information the court deems reliable. The personal appearance of the defendant is not required.
3. Retroactive Appointment. An appointment may be made retroactive to include any appropriate representation furnished prior to appointment.
4. Separate Counsel. The court must appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.
5. Additional Counsel. The court may appoint more than one counsel to represent a defendant when good cause is shown.
6. Continued Right to Counsel. A judicial officer may at any time, if satisfied after appropriate inquiry that a defendant is financially unable to obtain counsel, appoint counsel to represent the defendant, even though the defendant has previously waived appointment of counsel.
7. Timely Appointment of Counsel. Counsel shall be provided to eligible persons as soon as feasible after they are taken into custody, when they appear before a United States magistrate judge or judge, when they are formally charged or notified of charges if formal charges are sealed, or when a United States magistrate judge or judge otherwise considers

appointment of counsel appropriate under the CJA, whichever occurs earliest.

B. Federal Capital Prosecutions.

1. Number of Counsel. Pursuant to 18 U.S.C. § 3005, a person charged with a federal capital offense is entitled to the appointment of two attorneys, at least one of whom must be learned in the law applicable to capital cases. Under 18 U.S.C. § 3599(a)(1)(B), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. In federal capital prosecutions, the court will consider the recommendation of the Federal Public Defender.
2. Standards for Representation in Capital Cases. In the representation of clients in federal capital cases and in federal capital habeas cases, appointed counsel should (1) use as a guide the February 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the 2008 Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, and (2) consult with the Federal Death Penalty Resource Counsel Project or with the Federal Capital Habeas Project (2255 Project), or with the Habeas Assistance and Training Counsel Project available through the Office of Defender Services, Administrative Office of the United States Courts.

- C. Habeas Corpus Proceedings. Under 18 U.S.C. § 3599(a)(2), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. §§ 2254 or 2255 is entitled to appointment of one or more qualified attorneys. Due to the complex, demanding, and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel.

IV. RESPONSIBILITIES UNDER THIS PLAN.

A. Federal Public Defender.

1. Establishment. The Federal Public Defender's Office for the District of South Dakota has been established under the CJA and is recognized as the Federal Public Defender

organization for this district. The Federal Public Defender organization will be capable of providing high quality legal services throughout the district and will maintain offices in Rapid City, Pierre, and Sioux Falls, South Dakota.

2. Supervision of the Defender Organization. The Federal Public Defender will be responsible for the supervision and management of the Federal Public Defender organization. The Federal Public Defender will be appointed in all cases assigned to that organization for subsequent assignment to staff attorneys at the discretion of the Federal Public Defender.
3. Coordination With the CJA Panel.
 - a. The Federal Public Defender will provide training sessions for members of the CJA panel at least annually.
 - b. The Federal Public Defender or a designee will serve on the Panel Selection Committee in each division of the district.
 - c. The Federal Public Defender will assist the court, the clerk of court's office, and the CJA Panel Representative in implementing the provisions of the CJA plan.
 - d. The Federal Public Defender will assist the CJA Panel Representative in fulfilling the responsibilities described in Section IV(B) of the CJA plan.

B. CJA Panel Attorney Representative.

1. Terms. The Panel Representative will serve a three-year term and may serve additional terms if the representative is willing to continue to serve and to play an active role as the representative.
2. How Panel Representative is Chosen. The Federal Defender advises the Chief District Judge when a local panel attorney should be appointed as the district's Panel Representative, or that the term of the current Panel

Representative may be extended. The Chief District Judge selects and appoints a Panel Representative or extends the term of the current Panel Representative. The Federal Defender provides the name and contact information of the Panel Representative to the Office of Defender Services, Administrative Office of the United States Courts.

3. Responsibilities of the Panel Representative. The Panel Representative will:
 - a. Attend the National Conference of CJA Panel Attorney District Representatives and be an active participant in the conference.
 - b. Serve as a liaison between the CJA panel and
 - (i) the Federal Defender organization;
 - (ii) the court in this district; and
 - (iii) the Office of Defender Services, Administrative Office of the United States Courts.
 - c. Actively participate in panel attorney matters in the district by:
 - (i) communicating regularly with local panel attorneys about panel attorney issues, training needs, and case administration;
 - (ii) communicating regularly with the district court and the Federal Public Defender about local panel attorney issues and following up on action items arising from the annual CJA Panel Representative conferences;
 - (iii) communicating regularly with the assigned Defender Services Advisory Group (DSAG) Panel Representative about national panel attorney issues and needs;
 - (iv) assisting in the planning for training events for the district's CJA panel attorneys; and
 - (v) serving on or recommending a local panel attorney to serve on the Panel Selection Committee in each division, the district's Federal Practice Committee and committees in the district affecting the operation of the CJA plan.
 - d. Work generally toward improvement of the quality of representation as well as the conditions under which panel attorneys provide representation.

C. Clerk of Court.

1. Administration. The clerk of court is responsible for the administration and maintenance of the CJA Panel List.
2. Application Forms. The clerk of court will make application forms for membership on the CJA Panel available upon request.
3. Management of Attorney List. The clerk of court will maintain a current list of all attorneys included on the panel, in addition to maintaining a record of case assignments to the CJA Panel.
4. CJA Forms and Voucher Processing. The clerk of court is responsible for reviewing all CJA payment voucher forms for accuracy prior to submission to a judicial officer for approval.
 - a. The clerk of court must promptly process for payment all CJA vouchers submitted for reimbursement.
 - b. The clerk of court must notify counsel of all errors or omissions on any CJA voucher so corrections can be made in a timely manner.
5. Reports. The clerk of court must maintain records and produce such reports as required by the Administrative Office of the United States Courts, the district court, and the Panel Selection Committee for each division.
6. Deposit of Funds. The clerk of court must promptly deposit into the Treasury any amount a defendant tenders as ordered by the court for reimbursement of CJA representation.

V. SELECTION OF COUNSEL; PANEL OF ATTORNEYS.

- A. Establishment of a CJA Panel. The existing, previously established CJA panel of attorneys who are eligible and willing to be appointed to provide representation under the CJA will serve pending selection of an updated panel by the CJA Panel Selection Committee in each division.
1. Appointments. Private attorneys from the CJA panel will be appointed to a substantial proportion of the cases in which the defendant is determined by the court to be financially eligible for representation under the CJA. "Substantial" is

defined as approximately 25 percent of the appointments under the CJA annually throughout the district.

2. Composition of CJA Panel.

- a. Approval. The court in each division will establish a panel of private attorneys who are eligible and willing to be appointed to provide representation under the Criminal Justice Act.
- b. Size. Subject to review by the court, the size of the panel will be determined by the Panel Selection Committee (Committee) for each division. The Committee is established pursuant to Section V(B) of this Plan. The panel must be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that CJA panel members will receive an adequate number of appointments to maintain their proficiency in federal criminal defense work. An attorney who seeks to be added to the CJA panel must complete an application, which is available from the clerk of court.
- c. Eligibility. Attorneys who serve on the CJA panel must be members in good standing of the federal bar of this district and have demonstrated experience in, and knowledge of, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence, the local rules of this court, standard operating procedures, and federal sentencing law, including the advisory Sentencing Guidelines.
 - (i) Quality of Representation. Attorneys must demonstrate a commitment to provide high quality representation to those individuals eligible for their services, commensurate with those services rendered when counsel is privately employed.
 - (ii) Continuing Education. Attorneys are encouraged to attend a minimum of four hours of continuing legal education programs on federal criminal law every two years. Attorneys are encouraged to attend the annual CLE conducted by the Federal Public Defender's Office.
- d. Equal Opportunity. All qualified attorneys are encouraged to serve on and will be eligible for

membership on the CJA panel without regard to an attorney's race, ethnicity, gender, age, or disability.

- e. Special Appointment Panel. The court in each division will establish a list of highly experienced attorneys who are willing to serve as CJA counsel on complex, difficult, or multi-defendant cases to supplement the depth of the panel. The Special Appointment Panel will be comprised of attorneys who are not part of the regular rotation of CJA appointments but who are willing to serve the court on cases requiring specific experience and expertise.
- f. Application. Application forms for membership on the CJA panel will be made available, upon request, by the clerk of court. Completed applications must be submitted to the clerk of court, who will transmit these materials to the Chair of the Panel Selection Committee in the division where the applicant practices.
- g. Mandatory Removal from CJA Panel. A member whose license to practice law in the state has been suspended or revoked or whose good standing in the bar of the federal district court has been suspended or revoked will be automatically removed from the panel.
- h. Discretionary Removal. The court in each division has the authority to monitor the performance of panel attorneys and to remove a member from the panel when the quality of legal representation being provided is deemed by the court to be unsatisfactory. The court may remove an attorney from the panel for unsatisfactory representation, a violation of the local rules of the court, an ethical violation, or other appropriate reason. If the court determines that an attorney should be removed from the panel, the attorney should be provided (a) prior notice of the removal with a brief oral or written statement of the reason(s) for it, and
(b) an opportunity for counsel to address the matter. The court in its discretion may remove an attorney from the panel without prior notice if circumstances require immediate removal.

B. Panel Selection Committee.

1. Membership. The court, through a judicial officer in active service in each division of the district, will establish a Panel Selection Committee for each division consisting of no less than two nor more than six attorneys and at least one judicial officer in active service.
2. Committee Chair. Each Committee will annually select its own chair. The chair will report the Committee's activities to the court as needed or as requested by the court.
3. Duties.
 - a. The Committee in each division will
 - (i) Panel Oversight.
 - (a) Create an application process and application form for distribution by the clerk of court.
 - (b) Annually evaluate and report its views to the Chief District Judge.
 - (c) At least twice a year, evaluate new applications for membership, and make recommendations to the Chief District Judge to ensure that applicants meet the criteria for membership on the CJA panel.
 - (d) Annually furnish information to the Chief District Judge regarding recruitment efforts undertaken by the Committee in furtherance of the Equal Opportunity statement in Section V(A)(2)(d) of this plan.
 - (ii) Work with the Federal Public Defender and the CJA Panel Representative to:
 - (a) Provide training programs for the CJA panel attorneys and other members of the criminal defense bar;
 - (b) Recruit and train less experienced attorneys as potential panel members;
 - (c) Develop policies for the internal governance of the CJA panel in each division as requested by the court.
 - (iii) Receive, review, and make recommendations to the court concerning any comments or complaints regarding:

- (a) The performance of CJA panel attorneys in the division;
 - (b) The fairness or functioning of the CJA panel appointment process; and
 - (c) The processing and payment of CJA vouchers.
- b. Any time the number of vacancies significantly decreases the size of the CJA panel in a division, such that it affects the ability of the panel to provide adequate representation to indigent defendants under the CJA, the Committee may solicit applications to fill the vacancies, convene a special meeting to review the qualifications of the applicants, and recommend prospective panel members to the court for approval.

C. Selection for Appointment.

1. Maintenance of CJA Panel and Distribution of Appointments. The clerk of court must maintain a list or automated program which contains pertinent data for all attorneys included on the CJA panel in each division. Panel members are responsible for keeping all contact information current. The clerk of court will maintain a record of CJA panel attorney appointments by division and statistical data reflecting the number of total appointments, appointments by attorney name, and allocation of appointments between the Federal Public Defender's Office and the CJA panel in each division.
2. Method of Selection. Attorneys from the CJA panel in each division will be selected by the court for appointment as counsel based upon considerations of availability, experience, continuity of representation, judicial economy, equal distribution of workload among the panel members, and other factors. The goal of this procedure is a fairly balanced distribution of appointments and compensation among the members of the CJA panel in the division, and a high quality of representation for each CJA defendant.
3. Special Consideration. If the need arises in any case, the court may consider appointing qualified counsel from outside the division or the district.

VI. DURATION AND SUBSTITUTION OF APPOINTMENTS.

- A. Duration and Substitution. Counsel appointed for a defendant must represent the defendant at every stage of the proceedings from the time of initial appointment through appeal, including ancillary matters appropriate to the proceedings, unless the appointment is terminated by the district court or by any appellate court in which an appeal is pending. The court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.
- B. Appeals. In the event a defendant is convicted by guilty plea or at trial, counsel must advise the defendant of the right to appeal and of the right to counsel on appeal. If requested to do so by the defendant, counsel must file a timely notice of appeal and must continue to represent the defendant unless, or until, relieved by the appellate court.
- C. Change in Defendant's Financial Eligibility.
 - 1. If at any stage of the proceedings the court finds that the defendant is financially unable to pay counsel who had been retained, the court may appoint an attorney to represent the defendant in the interests of justice.
 - 2. If at any time after the appointment of counsel the court finds that the defendant is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of counsel or direct payment by the defendant in an amount fixed by the court to the clerk of court for deposit in the Treasury as reimbursement for the cost of CJA representation. No appointed attorney may request or accept any payment or promise of payment for the representation of a CJA client.

VII. PAYMENT FOR REPRESENTATION BY PANEL ATTORNEYS.

Compensation. A panel attorney appointed to represent a defendant will be compensated at the rate allowed for the time reasonably expended on the representation and will be reimbursed for actual expenses reasonably incurred consistent with the applicable rules, regulations, or statutes.

- A. The court will look to the *CJA Guidelines* for guidance in matters of attorney compensation, expenses, and the cost of experts and outside services.
1. Rates. Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, the designated hourly rates of compensation are maximum rates established under the Criminal Justice Act. In fixing fair compensation, the court will consider the nature, duration and complexity of the case, and the difficulties encountered in providing high quality representation. Charges in excess of the statutory maximum may only be sought in complex or extended cases.
 2. Case Budgeting. A case budget must be submitted through eVoucher to the court, *ex parte*, in representations that appear likely to become extraordinary in terms of potential cost. “Extraordinary” means a representation in which attorney hours are expected to exceed 300 hours or total expenditures for counsel and services in addition to counsel (e.g., experts, interpreters, investigators, travel expenses) are expected to exceed \$45,000 on behalf of an individual CJA defendant. Reviewing judges should give due weight to the case-budgeting attorney’s recommendations in reviewing vouchers and requests for expert services and must articulate their reasons for departing from those recommendations.
 3. Services Other Than Counsel. Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an *ex parte* application through eVoucher. Upon finding that the services are necessary, and that the defendant is financially unable to obtain them, the court will authorize counsel to obtain the services. The court will, in each instance, determine the reasonable compensation for the services and direct payment to the organization or person who rendered them. Authority to exceed the statutory maximum for services other than counsel must be obtained before the services are rendered.
 4. Changes to Defendant’s Eligibility for Service. If at any time after counsel has been authorized to obtain investigative, expert or other necessary services for a defendant the court finds that the defendant is financially able to obtain such services or to make partial payment therefore, the court may terminate the authorization of such services or authorize or

direct payment by the defendant in an amount fixed by the court, either to the person or organization who rendered such services, or to the clerk of court for deposit in the Treasury as reimbursement of CJA services. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for assisting in the representation of a defendant.

5. Claims. A claim for compensation and reimbursement must be made within 45 days after the conclusion of the CJA appointment unless good cause is shown for a later submission. Each claim must be made following the instructions in the *CJA eVoucher User Guide*. Duplicate claims for time spent in common on more than one CJA representation must not be submitted. The court will, in each instance, fix the compensation and reimbursement to be paid to the attorney. In cases where representation is furnished exclusively before a United States Magistrate Judge, the claim must be submitted to the magistrate judge who will fix the compensation and reimbursement to be paid. In all other cases, claims will be submitted to the district judge or appellate court that presided in the matter.
6. Reductions and Independent Review Process
 - (a) When contemplating a voucher reduction, the court will provide to appointed counsel a prior notice of the proposed reduction with a brief oral or written statement of the reason(s) for it. However, notice need not be given to appointed counsel where the reduction is based on mathematical or technical errors.
 - (b) If counsel indicates that the reduction is not contested, or if no response is received within ten days, the reduced voucher will be processed.
 - (c) If counsel responds and provides information justifying the claimed time or expense, the voucher will be approved as submitted.
 - (d) If after reviewing counsel's response submitted pursuant to subsection (c), the presiding judge reduces the voucher, counsel may seek review of the reduction to the Chief District Judge or his or her designee within ten days. If the Chief District Judge or his or her designee is the presiding judge who reduced the voucher, counsel may seek review by the Senior Active District Judge or his or

her designee within 10 days. Deadline extensions may be granted for good cause shown.

- (e) If the reviewing judge or his or her designee finds the request for review to be meritorious, the voucher will be processed for the appropriate amount.

7. Excess. Claims for payment in excess of the statutory maximum for extended or complex representation must be supported by a written request from counsel setting forth the reasons justifying excess payment. After review, the court will certify to the Chief Judge of the Circuit that an amount of excess payment is necessary to provide fair compensation. Claims for payment above the maximum amount must be approved by the Chief Judge of the Court of Appeals for the Eighth Circuit or his or her designee. There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.
8. Expenses. With regard to the payment of certain expenses, counsel must comply with the provisions of FED. R. CRIM. P. 17(b) regarding the issuance of subpoenas. Counsel must receive court approval for transcripts, investigative, expert or other services by submission of an eVoucher authorization request. With regard to mileage expenses, the number of miles and the origination and destination of travel must be submitted as part of the supporting documentation. Copies of receipts must be provided for all travel expenses and other expenses in excess of \$50. Overnight travel outside of the District of South Dakota must be preapproved by the court.
9. Record Keeping. Appointed counsel must maintain contemporaneous time records for all work performed, including work performed by associates, partners, and support staff, as well as expense records, for all vouchers and claims for compensation and reimbursement submitted to the district court or any appellate court. Such records, which may be subject to audit, must be retained for seven years after approval of the final voucher for an appointment.

B. Reports; Vouchers and Claims for Payment; Forms.

1. Reports. The clerk of court must submit a report of every appointment of counsel and authorization of other services

in this district to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify.

2. Vouchers and Claims for Payment. Upon approval by the court, all electronic vouchers and claims for compensation and reimbursement of expenses must be promptly processed for payment and information retained in this district for filing purposes.
3. Forms. The court may use, where appropriate, such standard appointment and electronic voucher forms as may be prescribed by the Director of the Administrative Office of the United States Courts.

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EIGHTH CIRCUIT JUDICIAL COUNCIL

ORDER

I hereby certify that the Eighth Circuit Judicial Council has approved the amended Criminal Justice Act Plan for the District of South Dakota which was adopted by the court on September 19, 2019.


Millie B. Adams
Circuit Executive

St. Louis, Missouri
August 25, 2021

cc: Judicial Council Members
Chief Judge Roberto Lange
Matthew Thelen, Clerk of Court
Jason Tupman, Acting Federal Public Defender
Administrative Office

Approval was given by the Defender Services Committee (CJA).

JCO 3198