

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA**

730 Hugo L. Black United States Courthouse  
1729 5th Avenue North  
Birmingham, Alabama 35203

**R. DAVID PROCTOR**  
United States District Judge

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February 4, 2016

Dear Judge Cardone and fellow Committee members:

Pursuant to your request, I am submitting these written comments in advance of my anticipated testimony on February 18, 2016 in Birmingham, Alabama. I am writing in my capacity as a United States District Judge for the past twelve years and as the Northern District of Alabama Court's Liaison to the CJA Panel Committee for the last two to three years. Prior to becoming a federal judge, I practiced as a civil defense attorney for fifteen years and had significant experience in the federal courts.

Please allow me to recognize and thank Chief Magistrate Judge John E. Ott for his assistance in contributing materials and information for use in this submission. Judge Ott was appointed to the court in 1998, and now serves as the Chief Magistrate Judge. Prior to his appointment, Judge Ott served as an Assistant United States Attorney in the Northern District of Alabama for fifteen years. He began as a prosecutor in the criminal division of the Office and held the positions of Deputy Chief and Chief of the Criminal Division and Executive Assistant United States Attorney with oversight responsibility for litigation. Judge Ott will be speaking on a February 19 panel. He has provided the information set forth below regarding the Federal Death Penalty Resources Counsel.

**I. The Northern District of Alabama – An Introduction**

Let me begin by providing some historical background concerning our court. The Territory of Alabama was established March 3, 1817, although Alabama was not admitted as a

state until December 14, 1819. The District of Alabama was created April 21, 1820. On March 10, 1824, the District was separated into the Northern and Southern Districts of Alabama. The Middle District was created on February 6, 1839. Court sessions for our District are held at Anniston, Birmingham, Decatur, Florence, Huntsville, and Tuscaloosa. The court is divided into four jury areas and seven divisions.

We currently have eight judgeships. There are currently two vacancies on the court. Six of our judgeships have duty stations in Birmingham, one in Huntsville and one in Tuscaloosa. We have five magistrate judges, four of whom work in Birmingham and one in Huntsville.

[An interesting side note about our court which may be of particular interest to the judges on the Committee: Alabama Northern is the only remaining court under GSA's building management delegation program which began in March 1988. Birmingham, Miami, and a court building in West Palm Beach were the three buildings in the initial program. The delegation program was abolished by Judicial Conference in 2007, but in response to pleas from the judges of this district, Birmingham was allowed to continue its delegation. In our capacity as building manager in Birmingham, the court has operated the Hugo L. Black U.S. Courthouse at well below GSA's estimated operating expenses. We have maintained the building's operating systems, accomplished routine maintenance, anticipated and performed system repairs, and most importantly, been responsive to the needs of the building's occupants and guests. Because it is more efficient, we run the HVAC system 24/7 to the extent required to maintain the comfort of occupants. The building delegation is a "WIN/WIN" for the AO and our local court.]

## **II. Our FDO and CJA Panel – A History and Snapshot**

Although the 1970 amendment to the CJA allowed for the establishment of federal public defender or community defender organizations, the Northern District of Alabama continued to rely exclusively on individual CJA panel attorneys for another three decades. After substantial deliberation, and with the strong leadership of our former Chief Judge, the Honorable Sharon Blackburn, our court voted to adopt a federal defenders office. Our Federal Defenders Office was established in 2011. We continue to enjoy the services of our first and only federal public defender, Kevin Butler. Kevin has a highly trained and experienced staff filled with talented professionals. I will leave it to Mr. Butler to further introduce his staff and office to you. The services provided by Mr. Butler's office are augmented by our CJA panel. Magistrate Judge Putnam is providing you more detailed information about our CJA Panel. I would be remiss, however, if I did not highlight the Regular Assessment of the Defender Services Program that was recently completed by the Administrative Office of the United States Court's Defender Services Office ("DSO"). (See Attachment A). As the DSO's report concluded:

### **Findings and Recommendations**

This district's CJA plan follows the Model CJA Plan and the Vera Institute recommendations fairly closely. The district is working to update their plan, as well as currently working through a re-application process. This reflects the district's commitment to keeping their plan and panel up to date.

Finally, DSO appreciates the court's efforts to refresh and diversify its panel, and the development of the new application process. As the court has acknowledged, the diversity of the panel can be improved. Many who were interviewed noted that the district is making affirmative outreach efforts to recruit more diverse attorneys to the panel through this process.

(Attachment A at pp. 4-5).

The following information reflects our court's experience with direct criminal case filings since 2005.

1. From 2005 to 2015, the United States Attorney has filed 5,714 criminal cases involving 6,837 criminal defendants in the United States District Court for the Northern District of Alabama.

2. From 2005 to 2015, the court made 4,732 CJA appointments.

3. In 2012, the Northern District of Alabama's Federal Public Defender's Office began operation, and on August 1, 2012, the court began appointing defendants to the Federal Public Defender's Office. Since August 1, 2012, through 2015, the court has made 1105 appointments to the Federal Public Defender's Office.

4. From 2005 to 2015, the court has paid 4,980 CJA20 vouchers for a total of \$16,227,845.62. The year-by-year numbers are as follows: These numbers DO NOT include capital cases.

2005	487	\$1,276,964.97
2006	508	\$1,267,450.52
2007	630	\$1,695,902.48
2008	504	\$1,481,188.79
2009	555	\$1,678,315.60
2010	442	\$1,608,944.11
2011	546	\$1,986,747.76
2012	530	\$1,897,617.54
2013	315	\$1,398,373.99
2014	229	\$1,035,140.30
2015	234	\$ 904,199.56

### **III. Review and Analysis of Death Penalty and Other Select CJA Issues in the Northern District of Alabama**

Below I address select issues related to the CJA, including death penalty litigation.

**a. Our Court’s Use of eVoucher**

Alabama Northern was a “pilot” court for eVoucher, an exceptional automated CJA payment program developed locally in the District of Nevada; our go-live date was 10-1-13. eVoucher is to paper CJA vouchers as computers were to typewriters. It is an outstanding automated program that provides a random-attorney-assignment program, consistently accurate voucher calculation, interaction with the AO’s payment system, and assignment and case management reports, all in a perpetual electronic record. Audits of eVoucher have produced no flaws in security or inaccuracies of payments. eVoucher provides attorneys with a free electronic voucher processing payment which can be used on any mobile device. The program offers access to many reports that help the court manage the CJA panel’s assignments and vouchers. It also allows attorneys to track and report CLE credit to the courts.

**b. Judiciary’s Role in Case Budgeting for Capital Cases**

There have been recent proposals to divest the judiciary of case budgeting responsibilities in capital cases. I strongly disagree with those suggestions. The judiciary understands the issues and work involved in these cases and is in a far better position than a bureaucrat to manage case budgeting. Perhaps my colleague, Judge Fred Moreno, put it best (and I have taken this from his written submission provided to the Committee in connection with his testimony at the Miami hearing):

*Thanks to the efforts of members of the judiciary, along with staff from the Administrative Office of the Courts, court appointed lawyers are now compensated at today’s rate of \$127 to \$129 per hour and \$181 to \$183 per hour for capital work. The success of Congressional approval for those rates is due exclusively to the efforts of the federal judges who were persistent and persuasive with members of Congress....*

*This leads to the issue of the fairness of voucher review of both attorneys and experts and the role of judges in the appointment of counsel. First, it is unfair to criticize the fact that judges appoint lawyers and oversee the payment of the taxpayer funds to compensate them. After all, federal judges routinely appoint class counsel and approve their fees as well as approve fees in many other civil cases when they represent prevailing parties. Should we not trust the same federal judges to be fair in the context of taxpayers' money in criminal cases? To replace those judges with a "judicial administrator", probably a fellow criminal defense attorney, would lead to cronyism and increase bureaucratic costs.*

Further, case budgeting cannot be fairly and adequately performed without an understanding of the peculiar needs of a particular case. Cookie cutter and one-size fits all approaches do not work.

**c. Staffing of Capital Habeas Cases**

One of our court's chief concerns regarding the CJA involves the formula and policies implemented by the AO related to the staffing and allocation of law clerks working on death penalty habeas cases. In my view, and the view of others, the policies do not allow local court units the flexibility to properly staff death penalty habeas cases and the formula does not account for the resources necessary to adequately handle those cases. The solution to this problem does not lie solely in re-examining or reengineering the formula (although that should indeed be done). Rather, in addition, I propose that we adopt policies that permit local court units the authority and discretion to determine how to staff death penalty positions at their court rather than relying exclusively upon a formula developed by the AO. District courts should be given the option to reallocate personnel dollars to fund death penalty law clerk positions. In considering this proposal, there are a few things we must keep in mind.

**i. Handling Section 2254 Capital Habeas Case Consumes a Tremendous Amount of District Judge's and Law Clerk's Time, and Often Consumes the Death Penalty Law Clerk**

Our death penalty law clerks's experience has been that the effective handling of a typical capital habeas case requires about three to four months of a law clerk's exclusive time. That is, it requires that amount of time for the clerk to analyze all of the claims and issues in a habeas corpus petition, organize the voluminous record, and draft an opinion for the district judge to review. There are several reasons for this extensive time commitment.

First, the sheer size of the federal habeas pleadings and state court record is enormous. The typical habeas corpus petition filed in the district court is more than one hundred pages long, and often contains scores of claims, each of which must be addressed by the court. (Note: By the time such a case reaches the circuit court, the issues generally are limited and well defined. That is not the case at the outset of a capital habeas case in the district court). Usually, the State's response is at least half as many pages as the petition. As part of its response, the State is required to produce the state court record on direct and collateral review. That record is almost always delivered to us in three to four (or more) boxes. On average that material deals with 10-15 years of litigation at the state level and all that entails. In addition to the boxes of material, the State submits its supporting brief and the petitioner thereafter files a reply brief. Taken together, the habeas pleadings and briefs, all opinions on direct and collateral review, as well as all post-conviction petitions and appellate briefs, must be organized into a unified system that allows for accurate and repeated referencing, cross-referencing, and citation. The entire state court trial record and post-conviction record must be thoroughly read and earmarked so that it too can be

easily referenced, analyzed, and cited in connection with the claims and issues raised by the parties.

All of this organizational work must be done for several reasons. It assists the court in weeding out issues that are not seriously disputed by the parties and clarifies those that are genuinely disputed. To be sure, capital litigation is a full contact contest. At least related to the initial petition filed in the district court, all issues are fully litigated and generally there are no concessions or stipulations. The court cannot automatically rely on the parties' adversarial representations of disputed facts, procedural history, or prior disposition of a claim. And, in many instances, the state court's acknowledgment and resolution of the claims has been less than ideal. In short, a law clerk cannot begin to tackle the organization and writing of what is often a two hundred plus page opinion without first having intimate knowledge of the claims, issues, procedural history, and the state court record – as well as the ability to reference, cross-reference, and cite to all of those in an efficient manner. More importantly, the unified system of organizing the pleadings and pertinent record is then available to the district judge who must have all those materials when reviewing a proposed Memorandum Opinion or any other pertinent orders.

Second, and independent of the foregoing, to be truly of service to a district judge, a clerk assigned to a death penalty habeas case must be able to not only recognize the constitutional, statutory (28 U.S.C. § 2254) and procedural issues presented, but also fully appreciate the various, unique lenses (Rules Governing Section 2254 Cases) that must be utilized in reviewing those claims. This requires the clerk to be conversant with substantive and procedural legal rules and appreciate the interplay between those. And to do that, a clerk should be well versed in such matters as the multitude of substantive but discrete ineffective assistance of counsel claims that

can arise, the proper standard(s) of review related to legal and factual determinations, and be equipped to spot issues regarding how to handle the evidence in the record (old or new), and whether discovery or an evidentiary hearing should be granted.

Changes in these areas of law are not uncommon. Moreover, often a “single” claim contains layers of issues and those issues require research in the constitutional, statutory, and procedural arenas, as well as the interplay between those, in order to analyze the issues raised in a petition, and to correctly resolve it. Thus, the grant or denial of a claim is usually the result of a complex spider web of research and decision-making.

Third, all of this work must be reflected in a well-organized, properly supported, and comprehensive Memorandum Opinion. Before we uphold a death sentence, or if we grant habeas relief in connection with one, the State, the petitioner, and the public have a right to a full explanation of why we have decided the case in a certain way. In addition, such an opinion is of assistance when the case comes before the Court of Appeals or the Supreme Court.

One option would be for a judge to utilize a career or term clerk to accomplish this research and writing. However, in my view, often there are substantial downsides to that plan. First, as noted above, the clerk would essentially be taken off any substantial work on other cases for a period of up to 3 to 4 months. Second, our current clerks in particular are not suited to handle the rigor and complexities of capital habeas petitions. The work can be most efficiently and effectively performed by a death penalty clerk.

When a district qualifies for only a single death penalty clerk, but has ten recent (and sixteen pending) capital habeas cases, that puts an undue strain on that single clerk. In fact, we have recently reassigned one of our clerks because -- quite frankly -- she burned out working in

that one person shop and handling alone these difficult and detailed cases. Our Clerk of Court does a wonderful job of managing our personnel. We have positions budgeted that it is unnecessary to staff, and we routinely return large amounts of money to the AO related to unused personnel budget dollars on an annual basis. We advocate a system that allows our court (and others) the discretion, within a proper framework, to reallocate some of those personnel dollars to a need such as that presented by our capital habeas caseload.

Practical experience in criminal law and the peculiarities of capital habeas proceedings should be highly prized in filling the position of a clerk who works on death penalty cases. Such a clerk is required to figuratively climb a mental Mount Everest all day, every day, for months on end, on the same case. And once the work on that case is accomplished, the clerk must and then turn around and immediately begin on the next case, and do the exact same thing. In our district, a clerk needs to be able to conduct these tasks alone, as we do not have a death penalty unit. While there may be a part-time or full time death penalty clerk in Alabama, there are differences in the manner in which judges handle such matters and it is difficult to regularly throw ideas back and forth due to inherent complexity of a particular problem. Frankly, it is more efficient to gear down and work the puzzle out. Likewise, there are many death penalty clerks in this Circuit, as well as nationally, but the fact of the matter is that each state in this circuit handles these matters differently and must look to different state law for resolution of similar issues. These differences become even more pronounced outside of this circuit, as evidenced by our discussions with Fifth and Ninth Circuit death penalty clerks.

**ii. Our Court, along with Courts in the Ninth, Eleventh and Fifth Circuits, is Particularly Affected by a High Number of Death Row Inmates in Our Various States**

The following charts demonstrate the high number of death row inmates in Alabama, along with other states in the Ninth, Eleventh, and Fifth Circuits. I have highlighted those three circuits because they, by far, have the most death row inmates in the nation and states found in those circuits impose the highest number and percentages of death penalty sentences. To the best of my knowledge, the following statistics for inmates on death row are correct as of October 1, 2015 (except where noted). They are from the Death Penalty Information Center ([www.deathpenaltyinfo.org](http://www.deathpenaltyinfo.org)). Any deviation since October 1, 2015, due to execution or exoneration, of an individual is noted. I have also provided information about the number of district judges available in each state (and by district) to handle these claims. I think this snapshot shows that Alabama has a large ratio of death row inmates to district judges serving on our courts. This is particularly relevant as challenges to the states' methods of execution (*e.g.*, three-drug protocols) continue to be mounted.

State populations were taken from the U.S. Census Bureau's population estimate as of July 1, 2015.

Statistics on active federal district judge positions are from the United States Courts' listing of authorized district court judgeships as of 2014 (*see* <http://www.uscourts.gov/judges-judgeships/authorized-judgeships>).<sup>1</sup>

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<sup>1</sup> Current district court vacancies are as follows: seven in the Ninth Circuit (three in C.D. Ca.; and one each in D. Haw., D. Idaho, D. Nev., and W.D. Wash.), nine in the Eleventh Circuit (two each in M.D. Ala., N.D. Ala., M.D. Fla.; and one each in N.D. Fla., S.D. Fla., and N.D. Ga.), and ten in the Fifth Circuit (one each in the E.D. La., W.D. La., and W.D. Tex.; two each in the N.D. Tex. and S.D. Tex.; and three in the E.D. Tex.). Five additional vacancies from the relevant jurisdictions (one each in N. D. Tex., S.D. Ala., and N.D. Fla., and two in W.D. Wash.) will occur between May 1, 2016 and November 7, 2016, due to judges retiring or assuming senior status.

**Ninth Circuit** (exclusive of Guam and Northern Mariana Islands):

<b>State</b>	<b>Number of Death Row Inmates</b>	<b>Number of Active Federal District Judge Positions in State (by District and <i>in toto</i>)</b>
Alaska	n/a	<b>3 total</b>
Arizona	125	<b>13 total</b>
California	743	14 (N.D.), 6 (E.D.), 28 (C.D.), 13 (S.D.) = <b>61 total</b>
Hawaii	n/a	<b>4 total</b>
Idaho	10	<b>2 total</b>
Montana	2	<b>3 total</b>
Nevada	78	<b>7 total</b>
Oregon	35	<b>6 total</b>
Washington	9	4 (E.D.), 7 (W.D.) = <b>11 total</b>
<b>Total</b>	<b>1002</b>	<b>110</b>

**Eleventh Circuit:**

<b>State</b>	<b>Number of Death Row Inmates</b>	<b>Number of Active Federal District Court Judge Positions in State</b>
Alabama	195 <sup>2</sup>	8 (N.D.), 3 (M.D.), 3 (S.D.) = <b>14 total</b>
Florida <sup>3</sup>	396 <sup>4</sup>	4 (N.D.), 15 (M.D.), 18 (S.D.) = <b>37 total</b>
Georgia	77 <sup>5</sup>	11 (N.D.), 4 (M.D.), 3 (S.D.) = <b>18 total</b>
<b>Total</b>	<b>668</b>	<b>69</b>

**Fifth Circuit:**

<b>State</b>	<b>Number of Death Row Inmates</b>	<b>Number of Active Federal District Court Judge Positions in State</b>
Louisiana	83	12 (E.D.), 3 (M.D.), 7 (W.D.) = <b>22 total</b>
Mississippi	48	3 (N.D.), 6 (S.D.) = <b>9 total</b>
Texas	258 <sup>6</sup>	8 (E.D.), 12 (N.D.), 19 (S.D.), 13 (W.D.) = <b>52 total</b>

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<sup>2</sup> The total number of inmates as of October 1, 2015 was 196. Alabama executed one inmate in early 2016.

<sup>3</sup> The status of Florida's death row inmates is currently questionable after the U.S. Supreme Court's ruling in *Hurst v. Florida*. And, presently, the Florida Supreme Court has before it the issue of what to do with Florida death row inmates.

<sup>4</sup> Florida executed two inmates and exonerated one inmate since October 1, 2015, when the death row population totaled 399.

<sup>5</sup> The total number of inmates as of October 1, 2015 was 80. Georgia executed three inmates since then.

<sup>6</sup> Texas executed 5 inmates since October 1, 2015, when the death row population was 263.

<b>Total</b>	<b>389</b>	<b>83</b>
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As the chart above reflects, there are substantially fewer judges in the Eleventh Circuit available to handle large numbers of capital habeas cases.

### **iii. Our District's Pending Capital Habeas Cases**

From 2005 through 2015, our court received 43 capital habeas petitions. We currently have 16 pending death capital habeas cases. None of those are stayed.

1:07-0518 Davis v. Allen  
 1:07-1276 Williams v. State of Alabama 2  
 1:14-1313 Stewart v. Thomas  
 2:10-2218 Clemons v. Sharp  
 2:13-0154 Miller v. Thomas  
 2:13-0557 Smith v. Thomas  
 2:13-1142 Broadnax v. Thomas  
 2:14-2252 Musgrove v. Thomas  
 2:15-0384 Smith v. Sharp  
 2:15-1694 Marshall v. Dunn 10  
 3:07-474 Burgess v. Allen  
 3:10-2066 Maxwell v. Allen  
 4:08-869 Jenkins v. Allen  
 4:10-2223 Windsor v. Allen  
 4:13-2150 McWorter v. Thomas  
 7:14-1814 Perkins v. Thomas

Of these 16 cases, nine have been filed within the last three years, and two more have recently been reassigned on the occasion of one of our judges taking senior status. In addition, at least two of our older cases are back in our court on remand from the Eleventh Circuit. As already noted, these cases consume an inordinate amount of the court's time. Courts should be given the flexibility to allocate resources to most effectively and efficiently handle these time consuming and unique cases.

**d. The Federal Death Penalty Resource Counsel**

The Federal Death Penalty Resource Counsel are an invaluable resource to local counsel who do death penalty work. These counsel are cognizant of the current state of the law in an ever-evolving area. They bring practical experience to these cases and, oftentimes, are familiar with the Department of Justice lawyers assigned to prosecute capital cases. Resource Counsel provide local counsel with expertise in a multitude of areas unique to federal capital prosecutions, appeals, and post-conviction proceedings. By way of example, they (1) help counsel formulate a case budget; (2) provide sample motions, jury questionnaires and jury instructions (which vary among circuits); (3) maintain a library of suggested jury questionnaires, past verdict forms, past transcripts, and briefs, which are extremely valuable; and (4) assist in locating and vetting experts. Their role in a particular case will vary depending on the need or request for assistance. They may act merely as a consultant or they may enter notices of appearance and actively participate in the defense. Resource Counsel are valuable to the local court for the recruitment of qualified counsel in capital cases and for evaluating panel attorney budgets in capital cases. They also train other local counsel so they can become “learned” in this complex and unique area of the law.

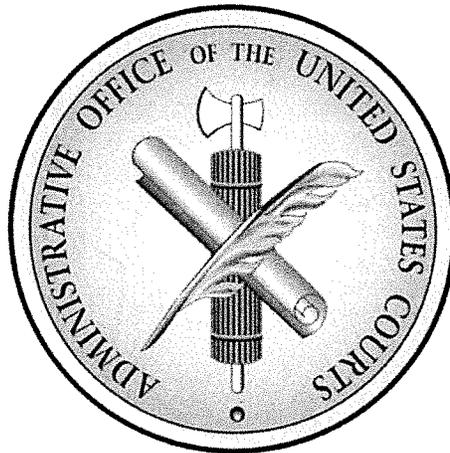
I hope you find this information helpful and look forward to seeing you on February 18.

Sincerely,

R. David Proctor  
United States District Judge

Attachment A

**DEFENDER SERVICES OFFICE**  
**Administrative Office of the United States Courts**



**Regular Assessment of the Defender Services Program**

**for the**

**NORTHERN DISTRICT OF ALABAMA**

**Assessment Completed: August 18 to 20, 2015**

**Reported: October 16, 2015**

## **THE DEFENDER SERVICES OFFICE ASSESSMENT PROGRAM**

The Defender Services Office (DSO), Administrative Office of the United States Courts (AOUSC), regularly reviews, consults, and reports on the operations and administration of the defender services program in each federal judicial district through its assessment program. An assessment of each district is conducted approximately every four years and examines both the federal defender organization (FDO)<sup>1</sup> and the panel attorney program. The primary goal of the assessment program is to ensure that the defender services program in each district is administered in accordance with applicable statutes and Judicial Conference policies, and is consistent with policies or practices endorsed by the Judicial Conference's Committee on Defender Services. The DSO assessments help ensure that FDO supervisory structures, record keeping systems, personnel management procedures, communication channels, segregation of duties, and operational processes are implemented correctly.

The general scope of the assessment of the FDO is defined by a comprehensive checklist of administrative procedures, processes, and records that are reviewed and evaluated by a team. This checklist is included with each assessment report (with annotations reflecting the relevant policy citations) and presents the results of the review of each item. In addition to reviewing documents and systems, staff interviews are conducted to determine whether AOUSC policies and procedures are effectively implemented.<sup>2</sup>

Assessment of the panel attorney program begins with a review of each district's written plan for the composition, administration, and management of its panel. A comprehensive checklist is used to compare the various elements and requirements contained in the district CJA plan with those endorsed by the Committee on Defender Services in the "Model Plan for the Composition, Administration and Management of the CJA Panel" (Model Plan).<sup>3</sup> Interviews with the chief district judge, panel administrators, and representative panel attorneys are conducted to determine whether various policies and procedures are effectively implemented. In addition, online questionnaires regarding

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<sup>1</sup> All but three districts (the Southern District of Georgia, the Eastern District of Kentucky, and the District of the Northern Mariana Islands) have established an FDO. In the three districts without an FDO, the panel attorney program is relied upon exclusively to address the need for appointed counsel. Accordingly, assessments of those districts focus entirely on the panel attorney program.

<sup>2</sup> The assessment is not a financial audit. Audits are conducted separately through contracts managed by AOUSC's Office of Audit. Documents relating to financial management are reviewed during the assessment process for the limited purpose of determining whether the organization has implemented systems that adequately monitor expenditures, and has maintained records as required by various policies of the judiciary and defender services program. Similarly, an evaluation of the quality of the substantive legal work of either the FDO or the panel attorney program is not part of the assessment.

<sup>3</sup> The Model Plan is contained in the *Guide to Judiciary Policy*, Volume 7, Part A, Appendix 2B.

panel administration, training, and voucher payments are provided to all district panel attorneys several weeks prior to the on-site assessment.

The completed assessment report for a federal public defender organization (FPDO) is provided to the chief judge of the appropriate circuit and to the federal public defender.<sup>4</sup> For a community defender organization (CDO), the report is provided to the board of directors and the executive director/federal defender. A separate report with the assessment of the panel attorney program for each district is provided to the appropriate chief district judge.

DSO performed a regular cyclical assessment of the management and administrative operations of the FPDO and the CJA Panel Attorney Program for the Northern District of Alabama which included an on-site visit from August 18, 2015 through August 20, 2015. The team was led by Tim Lavan, Program Analyst, DSO Program Operations Division (POD), who was accompanied by Jeremy Simmons, Attorney Advisor, DSO POD; Mark Ganely, Computer Systems Administrator from the Western District of Pennsylvania; and Eugene Weekley, Administrative Officer (AdO) from the Northern District of West Virginia. As part of the assessment, members of the team interviewed Federal Public Defender (FPD) Kevin Butler, and visited the offices in Birmingham and Huntsville, Alabama. Team members also met with Judge David Proctor, Magistrate Judge T. Michael Putnam and Judge Sharon Blackburn (of the Defender Services Committee). Panel Attorney Representative Brent Bloomston was interviewed as well as three other attorneys who are members of the district's panel. The assessment team also met with Sharon Harris, the district's clerk of court to discuss CJA voucher processing and the districts use of eVoucher.

In advance of the on-site visit, the team reviewed responses to voluntary surveys completed by FPDO employees and by individual members of the CJA panel – both of which were designed to provide the recipients with an opportunity to share their views about the delivery of defender services within their district.

This was the first assessment of this defender office as it first started taking cases in 2012.

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<sup>4</sup> Several federal defender organizations are responsible for the management and oversight of more than one federal district. In those instances, the relevant circuit and federal defender receive the assessment reports for all districts within the FDO's responsibility.

**ASSESSMENT OF THE CRIMINAL JUSTICE ACT (CJA) PANEL PROGRAM**  
**FOR THE**  
**NORTHERN DISTRICT OF ALABAMA**

**History and Overview**

The Northern District of Alabama's CJA plan was approved by the Eleventh Circuit Judicial Council on March 1, 2013. A new plan is being considered now which will incorporate minor changes. Also, a new CJA panel membership application form and application process has also been approved by the district and is currently being implemented. The plan contains provisions that establish who shall be represented, a CJA Administrative Committee to oversee the makeup of the CJA panel, the qualifications for membership on the panel, how panel members are appointed to cases, and the requirements and obligations of panel attorneys as well as a provision for panel attorney training. The plan sets a specific size range for the CJA panel of 30 to 75 members.

The CJA Administrative Committee is established by the court. It consists of an active district judge, a magistrate judge, the panel representative and the Federal Public Defender and three to five attorneys "admitted to the bar of the Court and selected and appointed by the Court."

The team interviewed Brett Bloomston, the district's CJA panel attorney representative, and reviewed responses to an online questionnaire provided to every panel attorney in the district. Mr. Bloomston was focused on the current state of the panel and the re-application process that the committee is planning to implement this fall. The assessment team agreed that this process has the potential to improve the makeup of the panel by allowing less experienced panel members to apply to work with a mentor and by allowing the committee to screen current members. The plan requires panel members re-apply every three years. This upcoming application period will be the first such process since the current plan was adopted. The CJA panel attorneys that the team met with expressed frustration with the fact that the number of appointments offered to each panel attorney has decreased significantly with the establishment of the new defender office and a general decline in cases filed within the district.

**Composition**

The plan allows all attorneys admitted to practice in the Northern District of Alabama to apply to be members of the CJA General Panel of Attorneys. Within the CJA General Panel plan there are two defined panel tiers: Tier One and Tier Two. Attorneys accepted to the panel are to be placed on one of the two tiers.

The CJA Panel currently has 33 attorneys, reduced from 40 attorneys in 2012. The district is monitoring the number of attorneys and caseload to make sure that each attorney has an opportunity to maintain proficiency in criminal defense.

### **Management, Administration, and Training**

The clerk of the court is responsible for the management of the CJA panel. This includes voucher processing, selecting panel attorneys for appointments, and maintaining relevant CJA directory lists and appointment records. The district was an early adopter of Nevada's eVoucher system. Clerk Harris expressed her satisfaction with the system and explained how it is used for both case assignments and for voucher processing. The court has a local rule that any voucher reductions be followed by an opportunity for the attorney to respond. CJA panel attorneys reported that the district court's voucher processing is timely, and payment is received in what they considered a reasonable amount of time.

The CJA plan requires appointments from the panel be made on a random basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical and timing considerations. The court usually seeks to appoint the AL-N FPDO before considering a CJA panel attorney. The AL-N FPDO accepts every case that does not involve a conflict of interest. When possible, the office accepts the client facing the most serious charges or consequences in multi-defendant indictments.

The Northern District of Alabama FPDO holds multiple CLE trainings for CJA panel attorneys. The panel attorneys who responded to the electronic survey all rated the training programs as "excellent" or "good." The FPD regularly forwards legal updates and invitations to in-house training programs. The assessment team was given a copy of a recent eight page case impact memorandum created by the FPDO related to Johnson v. United States which was distributed to all panel attorneys in the district and posted on the FD website. CJA panel attorneys reported that the staff attorneys from the AL-N FPDO are available to brainstorm cases and answer questions.

### **Findings and Recommendations**

This district's CJA plan follows the Model CJA Plan and the Vera Institute recommendations fairly closely. The district is working to update their plan, as well as currently working through a re-application process. This reflects the districts commitment to keeping their plan and panel up to date.

Finally, DSO appreciates the court's efforts to refresh and diversify its panel, and the development of the new application process. As the court has acknowledged, the diversity of the panel can be improved. Many who were interviewed noted that the district is making affirmative outreach efforts to recruit more diverse attorneys to the panel through this process.

### **CONCLUSION**

The assessment team appreciated the opportunity to visit Northern District of Alabama to conduct a review of the FDO and the CJA panel attorney program. The team recognizes the preparation and efforts on the part of the FPDO, the AdO, and the other defender office employees who allowed the team to interview them about their office and their work. The team is also grateful to the CJA panel representative and panel members who volunteered their time to meet with us on-site, participate in the survey, and provide their input to the assessment team. In addition, the team appreciated meeting with the judges in the district and the clerk who shared their views on indigent defense services provided by the FDO, the CJA Panel, and the CJA plan of the Northern District of Alabama.

# DEFENDER SERVICES OFFICE

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## Checklist of Model Plan and VERA Institute Recommendations

District of AL-N

Attachment

Date 8-28-15

## REVIEW OF CRIMINAL JUSTICE ACT AND PANEL ATTORNEY (CJA) ADMINISTRATION PLANS AND PRACTICES

The purpose and scope of this checklist is to compare whether local CJA District Plans are achieving the goals of 18 U.S.C.3006A, the Model Plan for the Composition, Administration and Management of the CJA Panel, the Guide to Judiciary Policy and the practices recommended by "Good Practices for Federal Panel Attorney Programs - A Preliminary Study of Plans and Practices" by the Vera Institute of Justice.

The Model Plan is intended to provide guidance in the establishment and operation of the Panel of private attorneys required under subsection (b) of the Criminal Justice Act, 18 U.S.C. § 3006A. Provisions in the Model Plan may either be incorporated into the existing District Plan for the Implementation of the Criminal Justice Act or promulgated as a supplement to that Plan by local rule.

This is intended to be used as a tool for the district court's to review their CJA plans when considering changes or modifications. A check in the "No" column does not indicate a finding that requires a correction, but instead a notation where there is a local plan that differs from the Criminal Justice Act, or the best practices identified by the Model Plan, *the Guide to Judiciary Policy* and the practices recommended by the Vera Institute of Justice and the Defender Services Office in the commentary to the Model Plan.

	YES	NO	COMMENTS
1. Is there a written plan for furnishing representation for indigent people charged with federal crimes? 18 U.S. Code § 3006 A.A Date plan was approved by the circuit court: <u>3/1/13</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
2. Does the district have a new CJA plan currently being considered for adoption?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
3. Does the plan call for the federal or community defender office to administer the panel? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
4. Does the plan call for an independent court employee to administer the panel? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
5. Does the plan require the court to establish a panel of private attorneys, who are eligible and willing to accept appointments, to provide representations under the Criminal Justice Act? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(1)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
6. Does the plan call for CJA appointments to be made "as soon as feasible?" <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2A (2)(B)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
a. Does the plan define "as soon as feasible" to mean "when they are formally charged or notified of charges if formal charges are sealed?" <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2A (2)(B)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
b. Does the plan define "as soon as feasible" to include initial appearance? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2A (2)(B)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<i>in practice</i>
c. Does the plan define "as soon as feasible" to include the pretrial services interview?  (VERA pg 11)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	

	YES	NO	COMMENTS
7. Does the plan direct law enforcement or pretrial services to inquire about a person's ability to pay for counsel so as to promptly put the court on notice about the potential request for appointed counsel? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(2)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 13
8. Does the plan call for the court to periodically fix the size of the panel? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(2)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 8
9. Does the plan call for the size of the panel to provide a sufficient number of experienced attorneys to handle the CJA caseload while being small enough to ensure members will receive a sufficient number of cases to maintain their proficiency? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(2)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
10. Does the plan allow for appointment of attorneys <i>pro hac vice</i> who are not members of the CJA panel when it is in the interest of justice, judicial economy, for continuity of representations or compelling circumstances? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(3)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
11. Does the plan have an equal opportunity provision? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(4)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
12. Does the plan address diversity as a goal? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(4) and Commentary by the Defender Services Committee</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
13. Does the plan have fixed terms for attorney membership before review for reappointment to the CJA Panel? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(5)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
14. If there are no fixed terms, does the plan allow for post admission review of panel attorneys after selection, absent a complaint? VERA 10, pg 8	<input type="checkbox"/>	<input type="checkbox"/>	NA
15. Does the plan provide for a formal screening process of attorney applicants? VERA pg 9	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P5, 4.9
16. Does the plan provide for a committee on panel selection to be established by the court? If yes: <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
a. Does the selection committee include a district judge? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(1)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
b. Does the selection committee include a magistrate judge? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(1)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
c. Does the selection committee include a CJA Panel attorney? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(1)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
d. Does the selection committee include the federal or community defender? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(1)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Yes. Maybe in updated plan

	YES	NO	COMMENTS
e. Does the Plan state that the composition of the selection committee should aim to reflect the diversity of the district with regard to race, color, religion, sex, age, national origin or disabling condition? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(A)(4) and Commentary by the Defender Services Committee</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
f. Does the selection committee review the operation and administration of the panel over the preceding year at its meetings? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
g. Does the selection committee periodically inquire as to the continued availability and willingness of each panel member to accept appointments? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
h. Does the committee provide the court with information as to the composition of the panel with respect to race, color, religion, sex, age, national origin or disabling condition? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(B)(2)(c)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
17. Does the plan call for a CJA training panel for attorneys without the requisite experience to participate in panel cases in second chair or another capacity? If yes: <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(C)</i>	<input type="checkbox"/>	<input type="checkbox"/>	New plan will.
a. Does the plan clearly state that service on a training panel is not a requirement for membership? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (1)(C)</i>	<input type="checkbox"/>	<input type="checkbox"/>	?
18. Does the plan require prior federal criminal practice, knowledge and experience as a prerequisite to membership? VERA pg 10/11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
19. Does the plan specify an applicant must have a certain number of federal or state criminal jury trials to qualify for admission? VERA pg. 10	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
20. Does the plan require CJA panel attorneys to attend mandatory training at defender offices or qualifying approved federal criminal practice training conferences? VERA pg 11	<input checked="" type="checkbox"/>	<input type="checkbox"/>	pg
21. Does the plan require the clerk of court or panel administrator to maintain a list of all attorneys included on the CJA Panel, with current office and email addresses, telephone numbers? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	B. + panel is managed through E. Douchet.
22. Does the plan require the clerk of court or panel administrator to maintain information regarding the qualifications and experience of each panel attorney? If yes: <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
a. Does the plan call for the clerk of court or panel administrator to distribute this list to each district and magistrate judge in the district? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	

	YES	NO	COMMENTS
23. Does the plan call for the clerk of court or panel administrator to maintain a public record of assignments to private counsel, and statistical data reflecting the proration of appointments between attorneys from the federal public or community defender office and Panel attorneys? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(A)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Can be accessed from eVoucher
24. Does the plan call for CJA appointments to be made on a rotational basis? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
a. Does the plan provide for the court's discretion to make exceptions to the rotation due to the nature and complexity of the case, an attorney's experience, and geographical considerations? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
b. Does the plan provide for exceptions to the rotational basis in the event of emergency or cases that arise during weekend, holidays or other times when the clerk's office is closed? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
c. Does the plan call for the presiding judge to notify the clerk of court or panel administrator of out of sequence appointments? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (2)(B)</i>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
25. Does the plan address causes and procedures for removal from the panel? If yes: <i>VERA pg28</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 10 + 13
a. Does the plan address any reasons for mandatory removal from the panel? <i>VERA pg28</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 13
b. Does the plan provide for discretionary removal from the panel? <i>VERA pg28</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
c. Does the plan provide a process for reapplication to the panel after mandatory or discretionary removal? <i>VERA pg28</i>	<input type="checkbox"/>	<input type="checkbox"/>	
26. Does the plan provide direction on how to submit vouchers for compensation to the clerk of court or the federal or community defender? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (3)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 7
a. Does the plan state the clerk of court, panel administrator or the defender office will review the voucher for mathematical and technical accuracy and conformity with the Guidelines before forwarding it to the presiding or magistrate judge? <i>Guide to Judiciary Policy, Vol. 7A, Appx. 2B (3)</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	P 7
b. Does the plan provide a timeline for processing vouchers? <i>VERA pg3</i>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

	YES	NO	COMMENTS
27. Does the plan provide CJA attorneys with notice and an explanation of a proposed voucher reduction? If yes: VERA pg3	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
a. Does the plan allow CJA attorneys a process to address reductions? VERA pg3	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
a. Does the process involve a review committee? VERA pg 14	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
b. Does the plan require the process of review remain with the presiding judge? VERA pg 14	<input type="checkbox"/>	<input checked="" type="checkbox"/>	
28. Does the plan allow CJA attorneys a process to address denial of expert, investigative or paralegal services?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	PT8 - expert