

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
RICHARD SHEPPARD ARNOLD UNITED STATES COURTHOUSE
500 WEST CAPITOL AVENUE, SUITE D-469
LITTLE ROCK, ARKANSAS 72201-3325

J. LEON HOLMES
UNITED STATES DISTRICT JUDGE

(501) 604-5380
FAX: (501) 604-5389

MEMORANDUM

TO: Ad Hoc Committee to Review the Criminal Justice Act Program

FROM: Leon Holmes on behalf of the Eastern District of Arkansas

DATE: February 4, 2016

The judges of the Eastern District of Arkansas believe that the Criminal Justice Act works effectively in our district. The federal public defender's office is staffed with a group of lawyers who are qualified for the job, competent, zealous in representing their clients, and professional in their manner toward the court and opposing counsel. Likewise, the CJA panel consists of 44 lawyers, most of whom have several years of experience in criminal defense work and who are competent, zealous, and professional. Like the lawyers in our federal public defender's office, our panel lawyers also provide effective representation to their clients. We believe that, as a general rule, defendants in our district who receive counsel through the Criminal Justice Act are represented as well as, and often better than, they would be represented if they retained counsel.

The members of the CJA panel are chosen by a committee that consists of a district judge, a magistrate judge, the clerk of court, the federal public defender, and a representative from the CJA panel. Our CJA panel representative, Ms. Arkie Byrd, has the following comment:

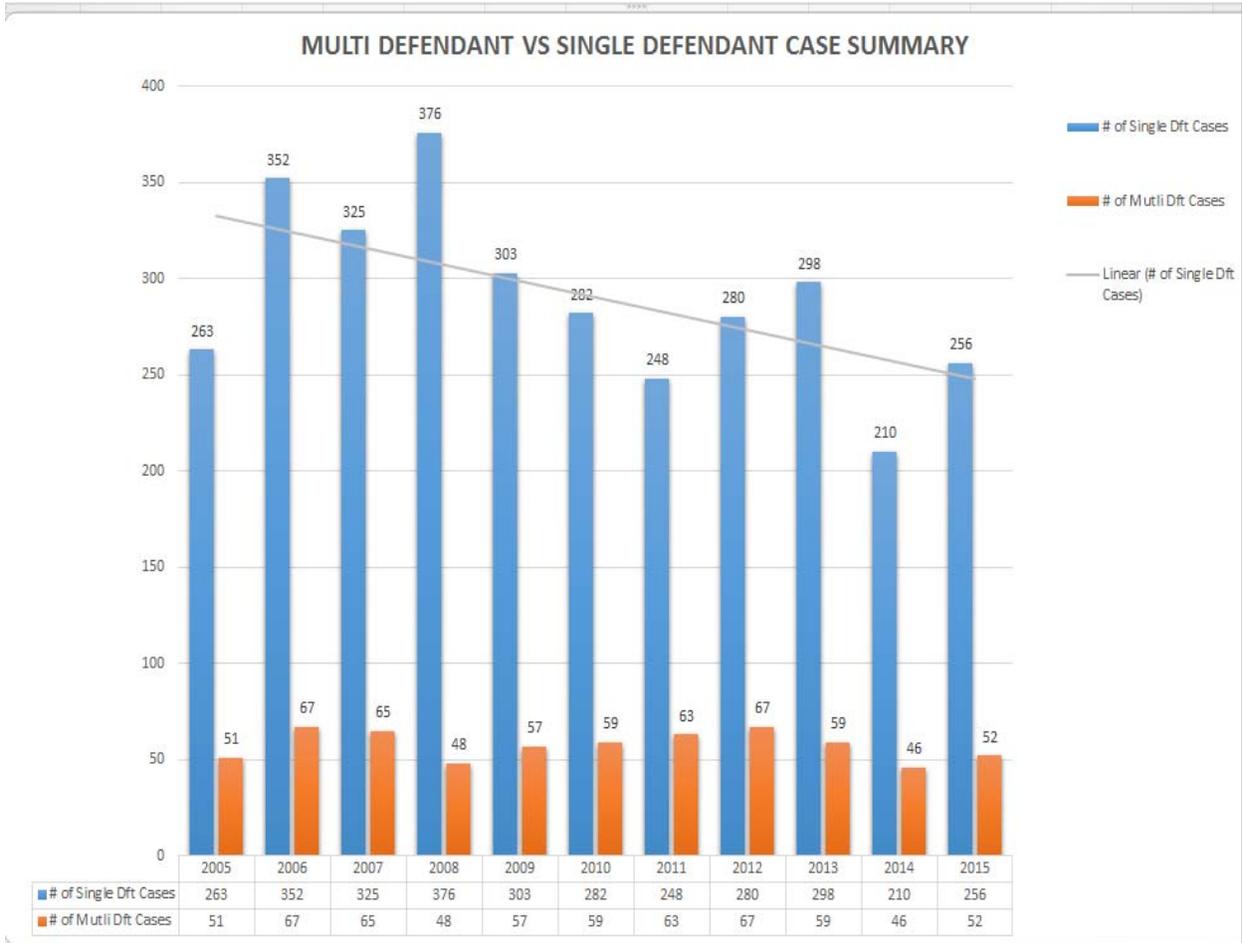
In the Eastern District of Arkansas, the Chief Judge (Brian Miller) sits on the CJA Committee and is very engaged in the selection process of applicants to be CJA members. Judges in the Eastern District of Arkansas, as all judges have unfettered discretion in approving of panel member compensation. In addition, prior approval is required for panel members to retain investigators, experts and other professional service providers.

Currently, there are 6 assistant defenders in the federal public defender's trial unit, and 4 assistant defenders in the capital habeas unit. Presently, there are 411 cases open in the trial unit, which accepts appointment on all federal criminal cases where there is no conflict and where the defendant qualifies for appointed counsel. Once appointed on a case, the federal public defender's office represents the defendant from the pretrial stage to the appellate process and sometimes beyond. Presently, there are 390 active CJA appointments in our district.

The number of Criminal Justice Act appointments, their division between the federal public defender and the CJA panel, and information pertinent to the cost of that representation is provided on the following chart:

U.S. District Court Eastern District of Arkansas							
Calendar Year	CJA Payments			FPD Payments	Appointments		
	Vouchers Paid	Amount Paid	Average	FPD Expenditures (Capital & Non-Capital)**	CJA	FPD	Total
2011	208	\$ 1,127,476	\$ 5,421	\$ 6,339,133	227	285	512
2012	247	\$ 1,188,934	\$ 4,813	\$ 6,466,064	271	270	541
2013	261	\$ 1,290,715	\$ 4,945	\$ 5,098,401	202	253	455
2014	176	\$ 878,325	\$ 4,990	\$ 5,147,452	302	230	532
2015	196	\$ 1,184,346	\$ 6,043	\$ 5,003,713	298	220	518
Total	1,088	\$ 5,669,795	\$ 5,211	\$ 28,054,763	1,300	1,258	2,558
<i>Note: CJA Payments include all attorney payments (capital & non-capital), experts and transcripts . Vouchers Paid is the number of attorney vouchers so that average approximates cost of representation. ** FPD actual expenditures - was approximately \$900K lower than budgeted amount.</i>							

Our CJA plan initially contemplated that 75% of the appointments would go to the federal public defender, but the proliferation of multi-defendant cases, many of which have 30 or 40 defendants, have made that impossible inasmuch as the federal public defender can represent only one defendant in each such case.¹ The following spreadsheet reflects the history of multi-defendant cases in our district.



¹ The state courts in the county in which our court primarily sits has two separate public defender offices, one of which is the primary public defender and the other of which takes cases in which the primary public defender has a conflict. Some consideration might be given to whether a similar system might be used by the federal courts.

In addition to the appointments listed in the chart above, the following chart shows the appointments for alleged supervised-release violations for the past three years:

Calendar Year	FPD	CJA SR Only
2013	50	8
2014	55	4
2015	59	6

As this chart indicates, 90% of the appointments on supervised release go to the federal public defender rather than a member of the CJA panel. The federal public defender also provides counsel to defendants about minor changes in supervision conditions, which are often agreed.

These two charts do not include capital habeas cases. Our federal public defender has a capital habeas unit that currently handles 21 active post-conviction cases. Altogether, the capital habeas unit has been appointed on 32 death habeas cases and 1 federal death penalty section 2255 action. Of the 12 cases that the capital habeas unit has closed over the years, there have been 4 executions, 2 natural deaths, 2 transfers, 2 commutations, and 2 new trials granted. Our district has the only capital habeas unit in the Eighth Circuit, and that unit has accepted appointments on death habeas cases out of Nebraska, South Dakota, and Missouri, in addition to the Eastern and Western Districts of Arkansas.

On the training issue, our CJA panel representative comments:

Defender services has offered a range of services that CJA Panel Members can access from trial skills seminars to seminars designed to make panel members proficient in the use of technology in servicing their client base. The Defender Services website is user friendly and has a range of information that is accessible to Panel Members to support their representation of defendants in federal court.

This Committee's study necessarily implicates the competing interests of, on one hand, providing adequate representation for each defendant who is ordered to pay the costs of defense, and, on the other hand, the need for fiscal responsibility.

One judge in our court asks that I include the following comment for the Committee's consideration:

My sense is that, even given the public service component, the hourly rates for CJA panel lawyers are a bit low. If current funding is going to be reallocated, or if Congress appropriates new money, then I would favor an increase in those rates.

I would add that the limits on expenditures for investigators and experts can, in some cases, create difficulties for defense counsel. While retention of experts and investigators is not an issue in most

cases, it can be in some cases, particularly in complex cases involving financial crimes or, for instance, prosecutions under the Controlled Substances Analogue Act.

Our CJA panel representative has the following comment:

At present, CJA members, as of January 1, 2016, are compensated at a rate of \$129.00 per hour for non-capital cases. Also as of January 1, 2016, the maximum compensation for felony non-capital cases is \$10,000.00. There is of course a gross disparity of resources in relationship to the United States Attorney. The U.S. Attorney does not have to seek approval of the district court judge to retain the services of expert witnesses. It is still in the discretion of the district court judge whether to approve the hiring of investigators and other experts in any given case. The district court judge has the final approval authority for any expert vouchers, as well. It is my opinion that the rate of \$129.00 per hour is inadequate for panel attorneys given the cost of practice and the cost of living that has become more uniform across the United States. In many instances, defense counsel reach a point where they are working for “free.”

I have heard fewer and fewer complaints regarding voucher cutting in the Eastern District of Arkansas. In addition, many of the district court judges (I’m not sure all are doing this) are providing specific detailed reasons for why a voucher is cut. This has not always been the practice among some of the district court judges.

As of January 1, 2016, the CJA Panel for the Eastern District of Arkansas moved to the E-voucher System. I’m not sure to what extent many of the panel attorneys have had experience with the voucher review and approval process, now that we have the E-voucher System. Personally speaking, I have submitted two bills under the E-voucher and I find that the time of voucher review and approval process has diminished considerably and that the compensation has been transmitted within anywhere from a week to two weeks after submission and approval of the CJA voucher. The E-voucher System, based on my limited experience, is much more efficient than the prior system and it is hoped that other members of the Panel will have that same experience.

One judge of our Court suggested that this Committee consider means by which greater scrutiny could be employed with regard to the issue of whether defendants qualify financially for appointment of counsel. Presently, at plea and arraignment the defendant will complete a financial affidavit and, based upon that affidavit, a decision will be made as to whether to appoint counsel. Because of the importance of the right to counsel and the need for prompt appointment, any doubts about whether counsel should be appointed usually are resolved in favor of appointing counsel. In some instances, information developed at trial or reported in the presentence report may indicate that the financial affidavit did not give a full and complete picture of the defendant’s financial condition. In some instances, a defendant may have financial resources sufficient to contribute to paying for legal representation but not enough to retain counsel without assistance. In the present system, no distinction is made between defendants who cannot make any payment for legal representation and

defendants who could contribute to paying for legal representation but who lack sufficient resources to retain counsel without assistance. In other words, the present system does not distinguish between defendants who need free legal representation and those who need a subsidy in order to obtain legal representation; all defendants who cannot afford to retain counsel are given free legal representation.²

The judge who expressed these concerns suggested that this Committee should consider alternatives such as whether to require that some defendants who receive appointed counsel should be required to contribute toward paying for that representation. A defendant's contribution could be in the form of a co-pay or a stop-loss and might be based on a sliding scale whereby defendants at the lowest levels of income would receive appointment of counsel at no charge but as the income moved up the scale, the co-pay or stop-loss would increase. The Committee might also consider whether defendants should be required to enter into a contract promising to repay the cost of counsel in the event that it is later determined that the financial affidavit failed to give a complete and accurate picture of the defendant's financial condition.

As indicated above, our district is located in a state that still provides for capital punishment. We have nine pending capital habeas cases. Attachment 1 is a short procedural history of each of the pending death penalty cases. In descending order, the years since the defendant was initially charged in those cases are: 22 years, 20.5 years, 17 years, 16 years, 15 years, 11 years, 11 years, 9 years, and 8 years. It has been 10 years since Arkansas carried out an execution. Not all of this delay, by any means, is attributable to proceedings in federal court.³ Regardless of the reasons for the delays, the fact is that capital litigation, from the commencement of the prosecution in state court until the final conclusion of all post-conviction remedies, is extraordinarily lengthy. The length of time between commencement of a case and the final conclusion of all post-conviction litigation reflects a system that is dysfunctional and is in need of some repair. Those repairs may not be within the province of this panel, inasmuch as they have to do with our federal system with dual sovereigns, the mandate to both state and federal courts to ensure that each defendant receives the full benefit of all constitutional rights, the concern that every decent person should have to ensure that no innocent person is executed, and the interpretation of the relevant constitutional and statutory provisions by the supreme court. Nevertheless, if the cases in our district are typical of cases across the country, the system by which capital cases are adjudicated in state and federal courts needs some review to determine whether there may be alternatives that are both more efficient and fair.

² The standard is inability to pay the costs of defense, which is not the same as indigency or destitution. *Museitef v. United States*, 131 F.3d 714, 716 (8th Cir. 1997).

³ Excluding one case in which the defendant waived his rights to post-conviction relief in state court, the average time from the date the state prosecutor filed the information until the defendant filed his federal habeas petition is 9.375 years. Additional delay in state courts often occurs when the federal court stays the federal action and holds it in abeyance while the defendant returns to state court to exhaust remedies there.

Pending Death-Penalty Cases

Jackson v. Norris, No. 5:34-cv-405-SWW. Alvin Jackson was charged with capital murder in November 1995; he was sentenced to death in June 1996. The Arkansas Supreme Court affirmed in October 1997. And the Supreme Court affirmed the denial of post-conviction relief in April 2003. Jackson filed his federal habeas petition in October 2003; response was filed January 2005. The Court dismissed the petition in January 2007. In November 2007, the Eighth Circuit reversed and remanded the case for consideration of Jackson's procedurally-defaulted *Atkins* claim. In January 2009, the Court granted summary judgment to Respondent based on the existing record; an evidentiary hearing wasn't necessary. In August 2010, the Eighth Circuit remanded the case for an *Atkins* hearing. On remand, attorney schedules and discovery delayed the hearing. An *Atkins* hearing was held in October and December 2011. The parties filed post-hearing briefs in March 2012.

Delay: Twice remanded on *Atkins* issue

Years since charge filed: 20.5 years

Current status: Active

Roberts v. Norris, No. 5:04-cv-4-RGK. Karl Roberts was charged with capital murder in 1999; and he was sentenced to death in May 2000. He signed a waiver of his right to appeal and pursue post-conviction remedies. In April 2003, the Arkansas Supreme Court upheld the waiver and affirmed Roberts' conviction and sentence. An execution date was set for January 6, 2004. Hours before his execution, the Court (Judge George Howard, Jr.) granted a stay to allow time to seek habeas relief; the Court later granted an extension. Roberts filed his federal habeas petition in July 2004; the Court granted an indefinite stay of execution. A habeas response was filed in November 2004; a traverse was filed in March 2005. In March 2007, the case was reassigned to Judge Richard G. Kopf. In June 2007, the Court granted Roberts' request to file briefs on the issue of stay and abeyance. Following briefing, the Court, in December 2007, granted Roberts' motion to stay and abey the case while Roberts exhausted his state remedies. The latest status report, dated January 2016, states that Roberts has appealed the circuit court's finding that he was competent to waive post-conviction relief; and that he filed his Reply Brief with the Arkansas Supreme Court in December 2015.

Delay: Ten years in abeyance while in state court

Years since charge filed: 17 years

Current status: Stayed

Rankin v. Kelley, No. 5:06-cv-228-JM. Roderick Rankin was charged with three counts of capital murder in 1994; he was sentenced to death in 1996. In July 1997, the Arkansas Supreme Court denied relief on all but one issue; the Court remanded for a hearing on a suppression issue. In October 1999, the Supreme Court affirmed Rankin's conviction and sentence. And the Supreme Court affirmed the denial of post-conviction relief in February 2006. Rankin filed his federal habeas petition in September 2006; response was filed January 2007. In July 2009, the Court granted Rankin's motion to stay and abey the case

based on claims of new evidence and intellectual disability. In May 2011, the Arkansas Supreme Court denied Rankin's motion to recall the mandate and/or reinvest jurisdiction in the trial court without a written opinion. The federal habeas case was reactivated, and Rankin filed an amended habeas petition in November 2011; a response was filed in February 2012. Judge James Moody retired; and the case was transferred to Judge Jay Moody in March 2014. In November 2015, the Court granted Rankin's motion to file a memorandum of law.

Delay: Two years in abeyance while in state court

Years since charge filed: 22 years

Current status: Active

Isom v. Hobbs, No. 5:11-cv-47-JLH. Kenneth Isom was charged with capital murder, attempted capital murder, residential burglary, aggravated robbery, and rape in 2001; he was sentenced to death in December 2001. In February 2004, the Arkansas Supreme Court affirmed. And the Supreme Court affirmed the denial of post-conviction relief in December 2010. Isom filed his federal habeas petition in March 2011; a response was filed in July 2011; and a traverse was filed in October 2011. In April 2012, Isom suffered a stroke; and the Court granted Isom's motion to temporarily stay the proceedings. On Isom's motion, the Court lifted the stay in November 2012. In April 2013, the Court granted Isom's request to have his habeas petition stayed and held in abeyance while he returned to state court. The Court stated that it couldn't be certain whether the state court would deny Isom's post-conviction filing on procedural grounds of untimeliness. In May 2015, the Arkansas Supreme Court granted Isom's application to return to circuit court to pursue *coram nobis* relief. Isom has filed his *coram nobis* petition in circuit court; a hearing was held in December 2015.

Delay: Three years in abeyance while in state court

Years since charge filed: 15 years

Status: Stayed

Anderson v. Kelley, No. 5:12-cv-279-DPM. Justin Anderson was charged with capital murder in 2000; he was sentenced to death in January 2002. In April 2004, the Arkansas Supreme Court affirmed the conviction but remanded for resentencing. Anderson was again sentenced to death; and the Supreme Court affirmed in November 2006. And the Supreme Court affirmed the denial of post-conviction relief in November 2011. Anderson filed his federal habeas petition in July 2012; a response was filed in November 2012; and a traverse was filed in April 2013. In October 2014, the Court denied Anderson's request to stay the case while he exhausted state remedies; the Court granted a *Trevino* hearing on diminished capacity claims. Discovery has been ongoing; and the hearing is scheduled for February 2016.

Delay: None

Years since charge filed: 16 years

Status: Active

Springs v. Hobbs, No. 5:13-cv-5-JLH. Thomas Springs was charged with capital murder and two counts of aggravated assault in January 2005; he was sentenced to death in November 2005. In December 2006, the Arkansas Supreme Court affirmed. And the Supreme Court affirmed the denial of post-conviction relief in May 2012. In January 2013, Springs filed his federal habeas petition; a response was filed in April 2013; and a traverse was filed in October 2013. In June 2014, the Court denied Springs' motion for judgment on the pleadings; and granted a *Trevino* hearing on ineffectiveness claims based on attorneys' failure to pursue mental illness claims. The Court ordered the parties to submit a report on discovery requests and deadlines. The parties filed a joint report on September 4, 2014. No hearing is scheduled.

Delay: None

Years since charge filed: 11 years

Status: Active

Decay v. Kelley, No. 5:15-cv-203-KGB. Gregory Decay was charged with two counts of capital murder in 2007; and he was sentenced to death in April 2008. The Arkansas Supreme Court affirmed in 2009. And the Supreme Court affirmed the denial of post-conviction relief in September 2014. In June 2015, Decay filed his federal habeas petition; a response was filed in December 2015. Traverse due May 9, 2016.

Delay: None

Years since charge filed: 9 years

Status: Active

Marcyniuk v. Kelley, No. 5:15-cv-226-JM. Zachariah Marcyniuk was charged with two counts of capital murder and sentenced to death in 2008. The Arkansas Supreme Court affirmed in May 2010. And the Arkansas Supreme Court affirmed the denial of post-conviction relief in June 2014. Marcyniuk filed his federal habeas petition in July 2015; a response was filed in December 2015. Traverse due April 29, 2016.

Delay: None

Years since charge filed: 8 years

Status: Active

Sales v. Kelley, No. 5:15-cv-248-BSM. Derek Sales was charged with capital murder and aggravated robbery in 2005; he was sentenced to death in May 2007. The Arkansas Supreme Court affirmed in December 2008. And the Supreme Court affirmed the denial of post-conviction relief in November 2014. Sales filed his federal habeas petition in July 2015. Response due February 8, 2016.

Delay: None

Years since charge filed: 11 years

Status: Active