

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

FEB 11 1971

JAMES R. COONEY, CLERK

IN THE DISTRICT COURT OF THE UNITED STATES

Mildred C. Verret

FOR THE EASTERN DISTRICT OF TEXAS

P L A N
FOR IMPLEMENTATION OF
THE CRIMINAL JUSTICE ACT OF 1964, AS AMENDED

P R E A M B L E

Pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. 3006A, as amended by the Act of October 14, 1970, P.L. 91-447, 91st Cong., 84 Stat. 916, and subject to the approval of the Judicial Council of the United States Court of Appeals for the Fifth Circuit, the United States District Court for the Eastern District of Texas adopts the following amended plan for the adequate representation of any person otherwise financially unable to obtain adequate representation:

(1) Who is charged with a felony or misdemeanor (other than a petty offense as defined in 18 U.S.C. 1(3)), or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation;

(2) Who is under arrest, when such representation is required by law;

(3) Who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, subject to the conditions of 18 U.S.C. 3006A(g) as amended; or

(4) Who is a person for whom the Sixth Amendment to the Constitution requires the appointment of counsel, or for whom, in a case in which he faces loss of liberty, any federal law requires the appointment of counsel.

Representation shall include counsel and investigative, expert, and other services necessary for an adequate defense.

This plan is applicable to each division in the district. It supersedes both the original plan which has been in effect in this district since February 10, 1965, and the amendment approved by the Judicial Council of the United States Court of Appeals for the Fifth Circuit on November 20, 1970.

I. PROVISION FOR FURNISHING COUNSEL

This plan provides for the appointment and compensation of counsel appointed from panels of attorneys designated by the Court, as set out in § II, below.

When requested by this Court, the individual members of the Bar practicing in this district have traditionally represented defendants unable to pay for counsel, without payment or compensation. The compensation authorized by the Criminal Justice Act as amended will not, in many instances reimburse or compensate these attorneys in the accepted sense. Services performed for such persons upon appointment will continue to be performed by the individual members of the Bar primarily as officers of the Court, in keeping with the traditions of the legal profession and with the knowledge and understanding that such services are performed in fulfillment of a professional responsibility; the amount of compensation to be provided will in no respect diminish such responsibility.

II. SOURCES OF NAMES AND PANEL OF ATTORNEYS

This Court has designated a separate panel of attorneys for each of the divisions of the United States District Court for the Eastern District of Texas consisting of lawyers who have been admitted to practice in this Court and who are qualified and competent to provide an adequate representation of persons for whom counsel may be appointed

under the Act. This Court ratifies its existing panel for each division.

Additions to and deletions from each panel of attorneys may be made from time to time by the Court, so that there shall be sufficient names on these lists to provide adequate representation to persons financially unable to obtain adequate representation and to distribute the work fairly among the members of the Bar.

In addition to the copies of the presently existing panels of attorneys, the Court will furnish to each district judge and to each United States magistrate copies of revised panels of attorneys from time to time, as the Court shall deem necessary or appropriate.

III. DETERMINATION OF NEED FOR COUNSEL

A. When Appearing Before a Magistrate or Court in a Criminal Case

In every criminal case in which the party is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor, or with a violation of probation, and appears without counsel, the magistrate or the Court

shall advise the party that he has the right to be represented by counsel throughout the case and that counsel will be appointed to represent him if he so desires and if he is financially unable to obtain counsel.

Whenever the party states that he is financially unable to obtain counsel and desires the appointment of counsel, if the case is then pending before a magistrate, it shall be the duty of the magistrate to inquire into and to make a finding as to whether the defendant is financially able to obtain counsel. If the case is not pending before a magistrate, it shall be the duty of a judge to conduct such inquiry and to make such finding. An appointment may be made retroactive to include any representation furnished prior to such appointment as is otherwise explained in Subsection B infra. The Court or the magistrate shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

All statements made by a defendant in such an inquiry shall be either (1) by affidavit sworn to before a judge, a court clerk, or his deputy, a magistrate, or a

a notary public, or (2) under oath in open court before a magistrate or a judge.

B. Counsel for Person Arrested When Representation Is Required by Law

Where a person arrested has been represented by counsel before his presentation before a judicial officer under circumstances where such representation is required by law, his counsel may subsequently apply to the Court for approval of compensation. If the Court finds such person has been and is then financially unable to obtain an adequate defense, and that such representation was required by law, compensation will be made retroactive to cover out-of-court time expended by the attorney during the arrest period, and in addition cover compensation for services rendered from the time of his initial presentation before a magistrate, or the Court as the case may be. The Court may make retroactive appointment of counsel where such attorney will continue to represent such party in criminal proceedings in this Court. If the person represented is unavailable at the time counsel applies to the Court for approval of compensation for services rendered during the arrest period, the attorney may neverthe-

less submit his claim to the Court for approval based on the arrestee's financial condition and a showing that such representation was required by law. Such retroactive appointments and approval of retroactive compensation may be made by the magistrate in proceedings over which he has jurisdiction.

C. Other Appointments as of Right.

The Court, or the magistrate as the case may be, may proceed as under Subsection A above to make an appointment of counsel for a person (1) for whom the Sixth Amendment to the Constitution requires the appointment of counsel or (2) for whom, in a case in which he faces loss of liberty, any federal law requires the appointment of counsel.

D. Discretionary Appointments

Any person subject to revocation of parole, in custody as a material witness, or seeking relief under 28 U.S.C. 2241, 2254 or 2255, or 18 U.S.C. 4245 may apply to the Court, or the magistrate as the case may be, to be furnished representation. Such application, unless made in open court, shall be in writing and shall be supported by written affidavit of financial inability to obtain represen-

tation. The Court, or the magistrate as the case may be, may approve such representation on a determination that the interests of justice so require and that such person is financially unable to obtain representation.

IV. APPOINTMENT OF COUNSEL

A. The Magistrate

In every criminal case in which a party is charged with a felony or misdemeanor other than a petty offense, or with violation of probation, and appears without counsel before a magistrate, it is the duty of the magistrate not only to advise the party of his right to counsel before the magistrate and throughout the case, but also promptly to appoint counsel to represent the party if the magistrate finds that the party is financially unable to obtain an attorney, unless the party waives his right to be represented by counsel. The magistrate shall similarly proceed in any proceeding as described in Subsection C of Section III above. In proceedings in which the appointment of counsel is discretionary which have been delegated by the Court to him for determination, the magistrate may proceed as described in Subsection D of Section III, above.

The magistrate shall make such appointment from the panel of attorneys for the appropriate division. The party shall not have the right to select his appointed counsel from the panel of attorneys or otherwise.

Counsel appointed by a magistrate shall, unless excused by order of court, continue to act for the party throughout the proceedings in this Court. In the event that a criminal defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right of appeal and of his right to counsel on appeal. If requested to do so by the defendant in a criminal case, counsel shall file a timely notice of appeal, and he shall continue to represent the defendant unless, or until, he is relieved by the District Court or the Court of Appeals. If counsel appointed by a magistrate in any proceeding wishes to be relieved, he shall make written application to the magistrate or judge before whom the case is then pending. Counsel will not be relieved prior to the termination of a case in this Court unless good cause for such relief is shown.

The magistrate before whom a case is pending may, in the interest of justice, substitute one appointed counsel

for another at any stage of the proceedings before him.

If at any time after the appointment of counsel the magistrate finds that the party is financially able to obtain counsel or make partial payment for the representation, he may terminate the appointment of counsel or recommend to the Court that any funds available to the party be ordered paid as provided in 18 U.S.C. 3006A(f). In a minor offense case being tried by him or other proceedings delegated by the Court to him for determination, the magistrate himself may order such payment of funds.

If at any stage of the trial proceedings the magistrate finds that the party is financially unable to pay counsel whom he had retained or to obtain other counsel, the magistrate may make an original appointment of counsel in accordance with the procedure set forth in this Plan, and counsel may claim compensation for services rendered after such appointment.

A claim for compensation and reimbursement of expenses of counsel appointed in a case tried before the magistrate shall be made to the magistrate on the prescribed CJA form. The magistrate shall examine each claim, and make recommendation to the Court as to the amount which the Court should fix

in accordance with the statute and this Plan, unless the matter is concluded before him, in which case the magistrate himself may approve the claim.

Counsel for a defendant in a minor offense--other than a petty offense--case to be tried before the magistrate, and counsel in other proceedings delegated by the Court to the magistrate for determination may, in an ex parte application to the United States magistrate, request investigative, expert or other services if the defendant is financially unable to obtain them. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the magistrate shall authorize counsel to obtain such services on behalf of the defendant. The magistrate may, in the interests of justice and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. A claim for any such services shall be reviewed by the magistrate, and he shall fix the amount to be allowed in accordance with the statute. This authority of the magistrate to authorize the procurement of such investigative, expert or other services,

to ratify such services after they have been obtained, and to fix the amount to be allowed for such services is applicable in minor offense cases being tried by him and in other proceedings delegated by the Court to him for determination. In all other cases he shall, when appropriate, make his recommendation concerning same to the Court.

If a party having a right to counsel is not represented by counsel before the magistrate and waives his right to have appointed counsel, the magistrate shall present to the party a waiver of right to have appointed counsel. If such party executes the waiver, the magistrate shall certify that fact in the record of the proceedings, and the waiver shall be filed in the case file. If such party waives the right to have appointed counsel but refuses to execute such a waiver, the magistrate shall certify that fact in the record of proceedings. If such party admits or the magistrate finds that such party is financially able to obtain counsel but declines to do so, the magistrate shall certify that fact in the record of proceedings.

If the charge against the defendant is a minor offense triable by a United States Magistrate under 18 U.S.C.

§3401, the United States Magistrate shall explain to the defendant that he has a right to trial in the District Court, and shall not proceed to call upon the defendant to plead or undertake to try the case unless the defendant, after such explanation, signs a written consent to be tried before the United States Magistrate which specifically waives both a trial before the District Court and any right to trial by jury that defendant may have. Proceedings shall be taken down by a court reporter or by recording equipment in all preliminary hearings and trials of minor offenses.

B. The Clerk

If counsel has not been appointed by the magistrate or the appointment of such counsel has been terminated by the Court, and the clerk learns from the report of the magistrate, from the United States Attorney, from the party himself, or otherwise, that a party having a right to counsel desires to have counsel appointed for him, then

1. If no affidavit of financial inability to employ counsel has been filed with the clerk, he shall promptly send to the party a form of affidavit, to be filled out by the party and returned to the clerk; or

2. If the notice to the clerk includes an affidavit of such financial inability to employ counsel or as soon as the clerk receives such an affidavit, the clerk shall promptly arrange for the appointment of counsel in the manner provided in Subsection C of this section. If in similar circumstances the clerk is apprised of the fact that a party as described in Subsection D of Section III of this Plan desires to apply for a discretionary appointment of counsel, he shall promptly send such party the appropriate CJA forms to be executed and filed in accordance with said Subsection D of Section III.

C. The Judge

Whenever the clerk presents to a judge of this Court a proposed order for the appointment of counsel for a party entitled as of right to counsel and the judge is satisfied that the party desires counsel and is financially unable to employ counsel the judge shall appoint counsel for him.

If anyone with authority to do so challenges the claimed financial inability of a party to employ a lawyer, the determination of the defendant's right to have appointed

counsel shall be made by a judge of this Court or by a magistrate appropriately designated by this Court.

Whenever it shall appear to the presiding judge at the time of arraignment or at any other time that a party entitled as of right to counsel is not represented by counsel and has not voluntarily waived the assistance of counsel, the judge shall determine whether such defendant is financially able to obtain counsel and, if not, whether he wishes the judge to appoint counsel for him. The judge may also make a discretionary appointment as provided in Subsection D of Section III. If in either situation the judge concludes that counsel should be appointed, such appointment will be made from the appropriate panel.

The appointment of such counsel is the province of the judge. The party shall not have the right to select his appointed counsel from the panel of attorneys or otherwise.

Counsel appointed by a judge shall, unless excused by order of court, continue to act for the party throughout the proceedings in this Court. In the event that a criminal defendant is convicted following trial, counsel appointed

hereunder shall advise the defendant of his right of appeal and of his right to counsel on appeal. If requested to do so by such defendant, counsel shall file a timely notice of appeal, and he shall continue to represent the defendant unless, or until, he is relieved by the Court of Appeals.

A judge may, in the interest of justice, substitute one appointed counsel for another at any stage of any proceeding in this Court.

D. Redetermination of Need

If at any stage of the proceeding a judge, or a magistrate as hereinbefore set out in Subsection A of this section, shall find that a party for whom counsel has not previously been appointed under this Plan but who has retained his own attorney, is financially unable to provide for his continued representation, the judge or magistrate may appoint counsel for such party. The Court will ordinarily not appoint the same attorney.

No appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a defendant, unless such payment is approved by order of court or except under the circumstances set forth in Sub-

section B of Section III, supra.

If at any time after his appointment counsel should have reason to believe that a party is financially unable to obtain counsel or to make partial payment for counsel, he shall advise the Court. The Court will then take appropriate action, which may include permitting assigned counsel to continue to represent the party with part or all of the cost of representation defrayed by such defendant.

In such event, the amount so paid or payable by the party shall be considered by the Court in determining the total compensation to be allowed to such attorney.

V. INVESTIGATIVE, EXPERT AND OTHER SERVICES

A. Upon Request

Counsel (whether or not appointed under the Criminal Justice Act) for a party who is financially unable to obtain investigative, expert or other services necessary for an adequate defense in his case may request such services in an ex parte application before a judge, or before a magistrate if the services are required in connection with a matter over which the magistrate has jurisdiction, or if the judge otherwise refers such application to a magistrate for findings and report. Upon finding, after appropriate inquiry

in such an ex parte proceeding, that the services are necessary, and that the person is financially unable to obtain them, the Court, or the magistrate as the case may be, shall authorize counsel to obtain the services. The judge or the magistrate may establish a limit on the amount which may be expended or promised for such services within the maximum prescribed by 18 U.S.C. 3006A(e)(3).

B. Without Prior Request

A counsel, appointed under the Criminal Justice Act, may obtain, subject to later review, investigative, expert, or other services without prior authorization, if necessary for an adequate defense. The total cost of services obtained without prior authorization, however, may not exceed a maximum of \$150 and expenses reasonably incurred, and no greater amount may be authorized regardless of the number of persons used or the character of services. A sworn application may be made by counsel to the Court, or the magistrate in matters over which he has jurisdiction as hereinabove set out in Subsection A of Section IV, for the ex parte review by the judge or magistrate and for ratification of such expenses. Such expenditures without prior

court authorization are not favored, and in addition to showing that such expenditures were "necessary for an adequate defense" and that the person was financially unable to obtain them, the application for ratification must show why prior authorization could not have been obtained.

C. Necessity of Affidavit

The statements made by or on behalf of the party in support of the request under Subsection A or B, supra, shall be made either by affidavit sworn to before the clerk or other appropriate officer, or under oath in open court.

VI. COMPENSATION

A. Payments to Counsel Appointed under This Plan

Payment of fees and expenses to counsel appointed under this Plan, and payment for investigative, expert and other services incurred pursuant to Section V hereof shall be made in accordance with such rules and regulations and guidelines as have been or may be prescribed from time to time by the Judicial Conference of the United States, and in accordance with the fiscal policies of the Administrative Office of the United States Courts.

B. Schedule of Maximum Fees for Counsel and Other Services

Fees as set out below are hereby prescribed for this district. In filing their claims for compensation, attorneys should keep in mind that these rates are maximum rates and that claims should not exceed an amount deemed reasonable to compensate them for services actually rendered.

1. Maximum Hourly Rate for Counsel. The maximum hourly rate for attorneys shall not exceed \$30 per hour for time expended in court or before a United States magistrate, and \$20 per hour for time reasonably expended out of court or a hearing. In addition, however, such attorney shall be reimbursed for expenses reasonably incurred, including the cost of any necessary transcripts authorized by the Court or its magistrate.

2. Maximum Amounts for Counsel. For representation of a defendant before a magistrate or this Court, or both, the maximum compensation to be paid to an attorney shall not exceed \$1,000 for each attorney in a case in which one or more felonies are charged, and \$400 for each attorney in a case in which only misdemeanors are charged. Representation of a defendant on a new trial shall be considered a separate case, and fees shall be paid on the same basis as on the original

trial.

A maximum of \$250 per attorney is provided by any of the following representations:

a. A post-trial motion made after entry of judgment;

b. A probation revocation proceeding;

c. A parole revocation proceeding;

d. Representing a material witness;

e. Representing a person seeking relief under 28 U.S.C. 2241, 2254 or 2255, and 18 U.S.C. 4245.

3. Waiving Maximum Counsel Fees. Payment in excess of any maximum amount provided in Subpart 2 above may be made for extended or complex representation whenever the court in which the representation was rendered, or the magistrate, if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the Chief Judge of the Fifth Judicial Circuit.

4. Payment for services Other than Counsel.

a. Previously approved services. Where

counsel has received prior authorization for services, the maximum which may be paid per person so authorized shall not exceed \$300 exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the Court, or by the magistrate (if the services were rendered in connection with a case disposed of entirely before him) as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the Chief Judge of the Fifth Judicial Circuit.

b. Services furnished without prior request. The total cost of all services obtained without prior authorization may not exceed a total of \$150 and expenses reasonably incurred. Waiver of such limit is not provided for in this Plan.

VII. Forms

Where standard forms have been approved by the Judicial Conference of the United States or an appropriate committee thereof, and have been distributed by the Administrative Office, such forms shall be used by the court, the clerk, the magistrates, and counsel.

VIII. Effective Date

This Plan as amended this 4th day of February, 1971, shall take effect when approved by the Judicial Council of the Fifth Circuit.


Chief Judge

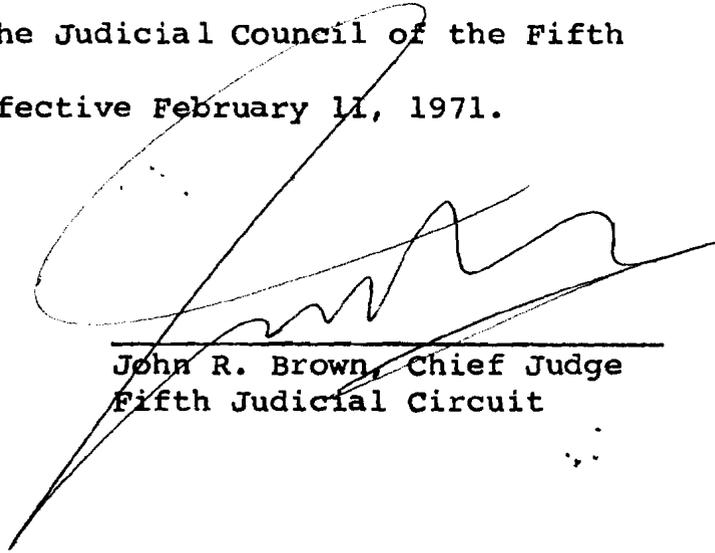

Judge


Judge



Approved by the Judicial Council of the Fifth
Judicial Circuit, effective February 11, 1971.

February 10ⁿ, 1971.



John R. Brown, Chief Judge
Fifth Judicial Circuit