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MEMORANDUM

To: Judges, United States District Courts
United States Magistrate Judges
Federal Public/Community Defenders
District Court Executives
Clerks, United States District Courts
Chief Probation Officers
Chief Pretrial Services Officers
Circuit CJA Case-Budgeting Attorneys

From: Honorable Cathy Seibel
Chair, Defender Services Committee

Honorable Edmond E. Chang
Chair, Criminal Law Committee

RE: RIGHT TO COUNSEL AT INITIAL APPEARANCE **(INFORMATION)**

In most districts—but not all—criminal defendants have the assistance of counsel from the start of the initial appearance, and their counsel meet with and interview their clients prior to the initial appearance. We write to bring attention to the need for consistency in ensuring that criminal defendants have the assistance of counsel during their initial appearances.

The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, the Federal Rules of Criminal Procedure, and Judicial Conference policy require courts to provide access to counsel for individuals accused of crimes at the earliest opportunity. Section 3006A(c) directs that a "person for whom counsel is appointed shall be represented at every stage of the proceedings from his *initial*

appearance … through appeal," § 3006A(c) (emphasis added), and Criminal Rule 44(a) contains the same instruction, Fed. R. Crim. P. 44(a) (a "defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal").[1] "A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, whichever occurs earliest." *Guide to Judiciary Policy (Guide)*, Vol. 7A, Ch. 2, §§ 210.40.10, 220.10.

The Department of Justice recently issued a directive to all Assistant United States Attorneys requiring that "prosecutors must recognize that 'a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding [including] initial appearance,' except where 'the defendant waives this right.'" *Justice Manual* § 9-6.110 (Jan. 2023) (quoting Fed. R. Crim. P. 44 and citing § 3006A(c)).

To enable defense counsel to provide meaningful representation *during* the initial appearance, it is vital that the attorney be permitted to meet and confer with the defendant *before* the initial appearance. This meeting is essential to enable defense counsel to advocate effectively for their client consistent with the legal standard outlined in 18 U.S.C. § 3142(f) of the Bail Reform Act and the needs of the particular case. "It is important to ensure that defendants are provided the opportunity to consult with an attorney at the earliest stage of criminal proceedings, before any decisions, or even discussions, regarding release or detention occur." Federal Judicial Center, BAIL REFORM ACT OF 1984 (4th ed. 2022) at 44. The Model Plan for Implementation and Administration of the Criminal Justice Act ("*Model CJA Plan*") permits "representation provided prior to appointment." *Guide*, Vol. 7A, Ch. 2, Appx. 2A, § V.D.[2]

Courts that do not currently ensure that every defendant has active representation by counsel during the initial appearance must comply with the governing statute and rules. Coordination meetings with local stakeholders—including the Federal Public or Community Defender Organization, CJA Panel Attorney District Representative, United States Attorney's Office, Pretrial Services and Probation Officers, and U.S. Marshals Service—will assist courts in addressing the logistics of ensuring that every defendant has access to counsel before or from the beginning of their initial appearance hearing. In recent years, coordination meetings in various districts have resulted in successfully providing early appointment of counsel. Administrative Office staff are available to provide examples and solutions.

If you have any questions related to the appointment and payment of counsel at initial appearances, please contact the AO's Defender Services Office, Legal and Policy Division at 202-502-3030.

cc: CJA Panel Attorney District Representatives

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[1] Rule 5(d)(2) requires that "the judge must allow the defendant reasonable opportunity to consult with counsel" during the initial appearance.

[2] The CJA Form 20, which is incorporated into the eVoucher system, allows a court to enter *nunc pro tunc* dates so that CJA panel attorneys can be paid for representational work performed before the appointment order is entered.