PUBLIC INTEREST LITIGATION CLINIC

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United States Judicial Conference
Committee on Rules of Practice and Procedure
Washington, DC 20544

Re: Proposed Amendment to Rule 11 Governing Section 2254 Cases

To the Committee:

Formerly known as the Missouri Capital Punishment Resource Center, the Public Interest Litigation Clinic represents numerous death-sentenced inmates in Missouri and neighboring states. With the help of a grant from the Administrative Office of the U.S. Courts, the Clinic additionally consults other attorneys in capital habeas cases throughout the federal Eighth Circuit, publishes and updates a litigation manual, and produces a bimonthly newsletter detailing the most relevant developments in this ever-changing and highly specialized area of law.

I write with great concern about Proposed Rule 11 Governing Section 2254 Cases, and in particular, the proposed requirement that a district court simultaneously grant or deny a certificate of appealability alongside its ruling on the merits. The concern is particularly weighty in Missouri cases. The Eighth Circuit does not generally present reasons for denying COA applications, even in capital cases. Consequently, a number of Missouri capital inmates have been denied federal appellate review without explanation, including Ralph Davis, David Leisure, Samuel Smith, James Johnson, Michael Roberts and Milton Griffin-El. A seventh such inmate, Darrell Mease, was denied a COA but avoided execution when former Governor Mel Carnahan commuted his sentence upon the in-person request of Pope John Paul II. An eighth capital inmate, Leon Taylor, has been denied a COA by a panel of the Eighth Circuit, and is now in the process of seeking rehearing. (Eight Circuit Case No. 07-2882). Prisoners who are denied appellate review without explanation must then petition for *certiorari* without benefit of a reasoned judgment to attack. The point is simply that a district court's decision to grant or deny a COA carries tremendous and often final consequences. The decision ought to be carefully reached with full and fair participation of the

litigants.

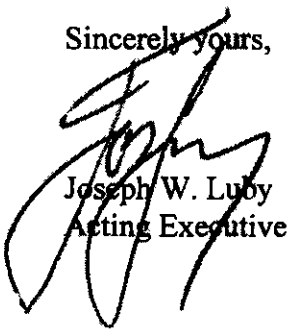
Proposed Rule 11, by contrast, deprives the prisoner of a reasonable opportunity to be heard before the district court makes the weightiest of decisions. It goes without saying that the standard governing issuance of a COA differs from that governing the petitioner's entitlement to relief. Before suffering the denial of a COA, the prisoner should be afforded the opportunity to explain why at least *some* of his or her claims warrant further review. For that matter, capital habeas petitions frequently involve twenty, thirty or even more claims. The very purpose of the COA requirement is to winnow down the case in order to facilitate appellate review. This process should include the participation of the prisoner, who is in the best position to explain to the district court why two, three or four of his or her claims are at least debatable.

Worse still, the proposed rule deprives a petitioner of the opportunity to cite post-petition developments in support of focused arguments that particular claims warrant appellant review. Such intervening developments might include Supreme Court and other federal appellate case law, questionable or challengeable procedural rulings made by the district court (such as denying a hearing or discovery), facts arising from ongoing investigation, and most importantly, the actual reasoning employed by the district court's final order. Indeed, the very standard governing the issuance of a COA asks whether "reasonable jurists would find the *district court's assessment* of the constitutional claims debatable or wrong," or alternatively, whether "jurists of reason would find it debatable *whether the district court was correct* in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphases added). Since a COA rests upon the soundness of the *district court's* reasoning, it is passing strange for the court to deny a COA before the parties even know what the relevant reasoning is, much less before they have the opportunity to comment upon it.

I sympathize with the concerns for delay and remand that appear to motivate the proposed amendment. However, these same concerns could be addressed by fixing a deadline by which the prisoner could apply for a COA after judgment. Possible deadlines might be fifteen days (or half the time for filing a notice of appeal), or perhaps ten days (the time for moving to alter or amend the judgment under Rule 59(e).

I thank the committee for inviting and considering these comments, and hope that they are of assistance.

Sincerely yours,



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