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Committee On Rules Of Practice And Procedure
Of The United States Judicial Conference
Washington, DC 20544

07-CR-010

Re: Comment To Proposed Rule 11,
Rules Governing Section 2254 Cases In The United States District Courts

To The Committee:

Currently an Assistant Federal Public Defender in Nashville, Tennessee, I have litigated federal habeas corpus cases since 1989 and have trained attorneys on habeas corpus procedure in general, and certificates of appealability in particular. Recently, I assisted Vanderbilt Law Professor Nancy King as a member of the Advisory Committee for her 2007 Report *Habeas Litigation In U. S. District Courts*.[1] Having had nearly two decades of experience in federal habeas corpus proceedings, I would like to express my concern about Proposed Rule 11 to the *Rules Governing Section 2254 Cases In The United States District Courts*

Proposed Rule 11 provides that a United States District Judge, upon entering a "final order adverse to the petitioner" must simultaneously "either issue or deny a certificate of appealability." I see flaws in this proposed process that arise from two sources: (1) It is the petitioner who bears the burden of showing entitlement to a certificate; (2) Such entitlement is governed by a standard that differs from the standard for granting habeas relief.

The standards for securing habeas relief and for securing a certificate of appealability (COA) are distinct.[2] The COA inquiry does not ask whether the petitioner wins, but whether the district court's denial of relief is either debatable among reasonable jurists or wrong,[3] or whether the issues are

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[1] Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Nat'l Ctr. for State Courts, *Final Technical Report: Habeas Litigation in U S. District Courts* (2007).

[2] *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003).

[3] *Miller-El*, 537 U S. at 338; *Slack v McDaniel*, 529 U.S. 473, 484 (2000).

adequate to deserve further consideration.[4] The COA standard is such, because "After all, when a COA is sought, the whole premise is that the prisoner has already failed in th[e] endeavor" of demonstrating entitlement to relief.[5]

The burden of making the COA showing, however, lies with the petitioner.[6] To make that showing, the petitioner must perform analysis which differs from his or her argument for relief on the merits. While a district court's ruling on the merits is governed by circuit and Supreme Court precedent, otherwise non-precedential rulings from other courts (including other circuits, district courts, and possibly state courts) may properly inform the district court's COA determination. In practice, I have seen how decisions from such courts can demonstrate that reasonable jurists have decided an issue differently.[7] In addition, actual COA determinations on identical or similar issues by other federal courts are relevant to a district court's COA determination, though such COA determinations (especially from other circuits) would simply not be relevant to the district court's merits ruling.

I see the following practical problems with Proposed Rule 11:

1. The essence of due process is the right to be heard following notice.[8] Proposed Rule 11, however, would deny the petitioner the opportunity to meet his or her burden of showing entitlement to a certificate under *Slack* and *Miller-El*. Indeed, where a petitioner has argued for relief and is awaiting a decision, there is no opportunity (or need) to research or brief how the district court's denial of relief is wrong or debatable. That need only arises if the district court actually denies relief. Were the district court to deny a certificate when denying relief under the proposed rule, the petitioner is not (and by definition cannot be) given notice and opportunity to be heard on his or her entitlement to a COA. The Committee ought not approve a rule that denies a petitioner the fundamental opportunity to be heard.

2. Proposed Rule 11 also portends complications in many situations, given the complexity of many habeas corpus cases. Experience teaches that most cases involve multiple claims, and different claims are often denied on different grounds – on perhaps one

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[4] *Slack*, 529 U.S. at 484; *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

[5] *Miller-El*, 537 U.S. at 337, *quoting Barefoot*, 463 U.S. at 893 n 4.

[6] *Miller-El*, 537 U.S. at 338 ("The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."); *Slack*, 529 U.S. at 484.

[7] *See e.g., Garrott v United States*, 238 F.3d 903, 905 (7th Cir. 2001)(per curiam)("We think, however, an issue may be deemed 'substantial' if other courts of appeals disagree with this circuit's approach.").

[8] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

or more procedural grounds (statute of limitations, procedural default, non-exhaustion) and/or on the merits. Under the proposed rule, the district court would receive absolutely no input about applying *Slack* and *Miller-El* to different claims, which may be denied on differing grounds. This lack of input increases the likelihood of error in the district court's COA assessment.

3. Significantly, under new Rule 11, unless the district court actually grants the certificate when denying relief, a petitioner's first opportunity to research, brief, and argue entitlement to a certificate will be in the court of appeals. This is inefficient, especially where Congressional intent has been that district courts make the COA determination in the first instance.[9] The Advisory Committee appropriately notes that the COA determination should be made "when the issues are fresh." While Proposed Rule 11 would require prompt rulings, such rulings risk being not fully informed, unless the district court independently undertakes additional research necessary to make the COA determination. As a practical matter, one would hardly expect busy district courts, upon denying relief on the merits based on Supreme Court and circuit precedent, to assume the additional burden of analyzing case law from other circuits, districts, and states which, as noted *supra*, properly inform the COA determination. Even so, it is clear that the first fully briefed application of *Slack* will occur in the court of appeals. The court of appeals, however, is obviously less familiar with a case than the district court. Again, this increases the likelihood of inaccuracy in the COA determination. Because the district court is in the best position to make the COA determination, the rules should insure that the district court makes a fully informed COA assessment in the first instance. Proposed Rule 11 does not insure this

To guarantee a more fully informed yet efficient COA process in the district courts, I would suggest that Proposed Rule 11 be modified as follows:

1. If the district court wishes to grant a certificate of appealability on a particular claim when it denies relief, the district court should be allowed to do so. In situations where the district court grants a COA, there is no harm to the petitioner in granting a COA without hearing from the petitioner. This will also obviate any further briefing of issues that the district court acknowledges satisfy *Slack*.

2. If the district court denies relief, however, the petitioner should be allowed a time certain (such as the time in which to file a motion to alter or amend under Fed.R.Civ.P. 59) in which to specifically ask for a certificate of appealability on any issues that have not already received a certificate when relief was denied. In fact, one judge in our district routinely issues similar types of orders upon the denial of habeas relief, requiring the

[9] *See e.g*, *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)(en banc)(detailing history of district courts initially considering applications for certificates of appealability or probable cause to appeal).

petitioner to file a COA application within a certain period of time.[10] This particular practice has undoubtedly assisted the district court, and it has guaranteed the petitioner the right to be heard.

By allowing the petitioner a reasonable time to research and brief the issues for the district court, any new rule would not suffer from the various deficiencies noted *supra*: It would allow the district court to rule while the issues are fresh, the COA proceedings would still be expedited, and the court in the best position to address the entitlement to a COA (the district court) will be allowed to make an informed decision with input from the petitioner.

Such a rule, I believe, satisfies the concerns of the Advisory Committee, increases the accuracy of the COA determination, and insures fundamental fairness to the petitioner. It is also a practice which has effectively existed in the First Circuit since 1999. See 1st Cir.R. 22.1(a)(petitioner should promptly file application for certificate of appealability in district court, and district court must thereafter state issues on which certificate is granted); D.Me.R. 83.10 (petitioner should promptly apply for certificate from district judge who refused the writ); D.P R. R 83.9 (same).

I would therefore propose that the Standing Committee consider, as an alternative, a rule similar to the following, which accommodates the competing concerns.

Rule 11 Certificate Of Appealability

(a) When the judge enters a final order adverse to the petitioner, if the judge independently determines that a claim raised by the petitioner involves a substantial showing of the denial of a constitutional right, the judge shall issue a certificate of appealability on any such claim(s), stating the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2).

(b) If, when entering a final order adverse to the petitioner, the judge does not grant a certificate of appealability as to any particular claim under subsection (a), the petitioner shall have ___ days from the entry of the final order to file with the district court a separate application for certificate of appealability. In any such application, the petitioner shall identify and/or brief those claims upon which the petitioner seeks a certificate under 28 U.S.C. §2253(c)(2). No such application is required.

(c) After the filing of a separate application under subsection (b), or if no such application is filed within the time allowed by that subsection, the judge shall

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[10] *See e g , Strouth v. Bell*, M.D.Tenn.No. 3:00-cv-00836, R. 122 (Feb. 4, 2008); *Caldwell v Lewis*, M.D.Tenn. No. 2:05-cv-00004, R. 72 (Jan. 10, 2008); *Pinchon v Myers*, M.D.Tenn.No. 3:01-cv-00237, R. 67 (Nov. 28, 2007); *Franks v Lindamood*, M.D Tenn.No. 1:06-cv-00018, R. 25 (Oct. 16, 2007); *Bell v. Bell*, M.D.Tenn.No. 3:95-cv-00600, R. 128 (Mar. 25, 2004).

promptly rule on the petitioner's entitlement to a certificate of appealability on remaining claims, and must either issue or deny a certificate. If granting a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2).

I hope these comments are of assistance to the Committee. Thank you for your consideration.

Very truly yours,

Paul R. Bottei

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