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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Amendments to Fed. R. App. P. 22(b)
and Rule 11(a) of the Habeas Rules

Dear Mr. McCabe:

Thank you for the opportunity to comment on the proposed amendments to Fed. R. App. P 22(b) and Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. These amendments would eliminate the existing requirement that a habeas petitioner file a notice of appeal from any adverse decision before the district court must determine whether a certificate of appealability, pursuant to 28 U.S.C. § 2253(c), should issue. Under the proposed amendments, the district court, instead, would be required to issue or deny a certificate automatically whenever it enters a final decision adverse to a habeas petitioner. Although we share the Committee's goals of expediting habeas proceedings and avoiding unnecessary remands in appeals where no certificate has been issued, we are concerned that proposed amendments would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal.

"Each year, state prisoners file more than 18,000 petitions seeking habeas corpus relief. This constitutes 1 out of every 14 cases filed in the United States district courts." Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S District Courts* (2007) http //www.law.vanderbilt edu/article-search/article-detail/download aspx?id=1639. On average, each petition contains 4 claims for relief. *Id.* at 28. A recent empirical study of nearly 37,000 non-capital habeas petitions filed by state prisoners during 2003 and 2004 establishes that petitioners filed notices of appeal in only 34.8% of decided cases. *Id.* at 53. Thus, under the existing version of Fed. R. App. P. 22(b)(1), district court judges must make a § 2253(c) determination in only 34.8% of cases decided adversely to petitioners.

Under the proposed amendments, however, district court judges would be mandated to make that determination in 100% of cases decided adversely to petitioners, even though empirical data indicates that 65.2% of non-capital habeas petitioners will never file a notice of appeal.

Furthermore, under the proposed amendments, district court judges would be required to make their § 2253(c) determinations without any opportunity for input from petitioners or their counsel. This too imposes potentially needless burdens on district court judges because, in our experience in litigating thousands of habeas corpus cases in the District of Massachusetts, petitioners often narrow the claims on which they seek issuance of a certificate in light of the district court's decision or respondent's objections. The proposed amendments would deprive district court judges of this input and, instead, require them to address all of the claims contained in a petition, even though petitioners -- if given the opportunity -- might voluntarily have withdrawn one or more of those claims.

We also are concerned that the proposed amendments may increase the number of appeals filed by habeas petitioners. Petitioners who might not otherwise have pursued an appeal may, under the proposed amendments, be encouraged to file an appeal because of the district court's issuance of a certificate under § 2253(c)'s very flexible standard. This result threatens to undermine one of the primary goals of the Antiterrorism and Effective Death Penalty Act of 1996, which was to promote the finality of state-court criminal convictions.

There are, we think, less troublesome and burdensome ways to achieve the Committee's goals of expediting habeas appeals and avoiding remands in cases where petitioner fails to obtain a § 2253(c) determination from the district court. No appeal by a petitioner should be entered on the docket of the court of appeals until the district court clerk forwards to the court of appeals clerk a copy of the certificate, notice of appeal, and other parts of the district-court record. This requirement is imposed by the existing language of Fed. R. App. P. 22(b)(1) but, in our experience, rarely followed in practice. Consequently, habeas appeals frequently are docketed in the court of appeals based merely on petitioner's filing of a notice of appeal, without any certificate having been issued by the district court. Stricter compliance with Rule 22(b)(1)'s existing requirements would eliminate this problem, without imposing any additional and potentially unnecessary burdens on district court judges.

In short, we urge the Committee to reject the proposed amendments. The same objectives can be achieved by requiring district court and appellate court clerks to more strictly enforce the existing provisions of Fed. R. App. P. 22(b)(1). We hope these comments will be useful to the Committee and appreciate this opportunity to share our views on these important amendments.

Respectfully submitted,

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