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January 26, 2004

Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544
Fax: 202-502-1755

Re: Proposed FRAP 32.1

Dear Mr. McCabe:

I am writing to express my opposition to the proposed amendment to FRAP 32.1 that would permit citation of unpublished opinions. I have practiced as a deputy federal public defender in both the United States Court of Appeals for the Ninth Circuit and district courts within that circuit for over twenty years.

I believe there are a number of reasons it would be unwise to permit citation of unpublished opinions. One is that it would place a much greater strain on both judicial and lawyer resources. Judges would have to spend much more time on the cases in which unpublished opinions are issued because they presumably would want to create a much better product if it is something that could be cited. Lawyers would have to spend much more time on their legal research in both the courts of appeals and the district courts because they would have to review, have to consider citing, and have to carefully analyze a multitude of unpublished opinions in addition to the published opinions. Since unpublished opinions greatly outnumber published opinions, this would exponentially increase the amount of time spent on legal research.

This would not be a reason to reject the proposed rule if unpublished opinions were something that would contribute to better legal analysis, since better legal analysis is more important than expense. But, there are several reasons why citing unpublished opinions would not contribute to better legal analysis. One is that these opinions are often so summary that it is

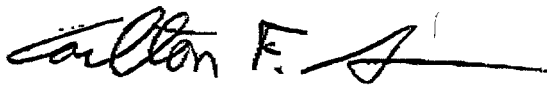
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difficult to discern the full rationale underlying the holding. This makes them not only less useful but more dangerous, for they can be affirmatively misinterpreted. Second, the opinions are far less carefully written, and this also makes them potentially subject to misuse and misinterpretation. The bottom line is that they contribute very little to legal analysis, and what little they contribute is as likely to be negative as positive.

Finally, there may be issues of fairness. Unpublished opinions are readily available only on computer databases such as Lexis and Westlaw. While attorneys in Federal Public Defender and United States Attorney offices have access to these resources, I expect that some private criminal defense attorneys, including some on indigent defense panels, do not. This means that allowing citation to unpublished opinions will provide an arrow -- actually, a number of arrows -- in the quivers of prosecutors and some defense attorneys while leaving some of their opponents far less well-armed (though "well" may be an inaccurate characterization of unpublished opinions).

In sum, proposed FRAP 32.1 is a very bad idea. I would urge your committee to reject it.

Sincerely,



Carlton F. Gunn
Senior Deputy Federal Public Defender

CFG:dpe

N:MCCABE.LTR