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03-AP-179

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January 26, 2004

Peter B. McCabe, Secretary  
Committee on Rule of Practice & Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, N.E.  
Washington, D.C. 20544  
Fax No. (202) 502-1755

Dear Mr. McCabe:

I am writing to express my serious concerns about any revision of Rule 32.1 of the Federal Rules of Appellate Procedure to permit the citation of unpublished rulings. In short, the extraordinary time required to evaluate all of these rulings fully would be highly impracticable given the nature of my practice as a deputy federal public defender. I also believe that a revision would lead to further appellate rulings that simply affirm or deny the ruling below given the burdens imposed on our overburdened bench. Such rulings provide little guidance to counsel, and illuminate nothing for the defendant who is adversely impacted by an appellate ruling in a criminal matter.

As a trial deputy in the Central District of California, I handle a very large case load of complex criminal matters. I am in court rooms, meeting with detained clients, and interviewing witnesses, during a substantial portion of the work week. The balance of my time week is consumed by a wide array of other matters given the large and varied nature of the cases that we handle. As a general matter, I spend weekends and evenings keeping abreast of legal developments in the areas of criminal and constitutional law.

The prospect of attempting to evaluate unpublished opinions, in addition to those that are officially published, creates the risk that I could miss a relevant ruling and be uninformed of a pertinent legal development in my area of practice. Were that the case, a potential Sixth Amendment problem could arise -- a matter that all capable criminal defense attorneys strive to ensure does not occur. The consequences of a violation of a defendant's right to effective representation are, unfortunately, well known. In addition to wrongful convictions of persons charged with crimes, ineffective assistance of defense counsel may give rise to *habeas corpus* claims, and often, very protracted subsequent litigation.

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In addition to the preceding concerns, I am troubled by the prospect of an amendment to the rules which would increase the burdens on the appellate bench. Given the time required to craft officially published rulings, the proposed amendment could lead to an increase in rulings that simply affirm or deny lower court rulings. This would give counsel little guidance in determining whether or not to seek further relief. It also would poorly serve individual defendants in criminal cases, with respect to whom the inquiry is not only "what did they do in my case?" but also, "why?".

In light of the preceding, I hope that unpublished opinions will remain unciteable in our courts. Thanks in advance for your consideration of my views regarding this important issue.

Very truly yours,



EVAN A. JENNESS  
Deputy Federal Public Defender