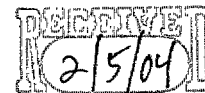


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January 26, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: *Comment Regarding Proposed FRAP 32.1*

Dear Mr. McCabe:

I write to offer my comments on the proposed amendment of FRAP 32.1 to allow citation to unpublished opinions.

I have practiced law for 28 years in Atlanta, Georgia. My practice is limited to criminal cases and I regularly represent criminal defendants in matters before the Eleventh Circuit Court of Appeals.

I am concerned about the potential effect of such a rule on my ability to effectively represent my clients before the Circuit Court of Appeals. I respectfully disagree with the Committee Notes to the effect that citations to unpublished opinions should be permitted because "parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value." The problem with this proposition is that cases, even though they are unpublished and their use is discouraged under various rules¹ are nonetheless treated differently than other sources. This problem is compounded by the reality that unpublished opinions are often written without a full explanation of the relevant facts or any detailed legal analysis.

1. See Eleventh Circuit I.O.P. 5 to Eleventh Cir. R. 36-1: "Reliance on unpublished opinions is not favored by the court."

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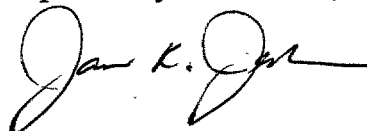
As an example, I recently appeared before the Eleventh Circuit to argue a complex criminal appeal. The central legal issue involved the scope of the enterprise element under the RICO statute, 18 U.S.C. § 1962. I was asked by the panel to distinguish the facts in an unpublished Sixth Circuit opinion, which had been cited, but not discussed, by the Government in its brief. I had not addressed the case in Appellant's reply brief because the case involved no issue related to the scope of a RICO enterprise. The extremely short opinion contained only a perfunctory exposition of the facts. The paucity of the facts enabled the Government to cite the case as precedent for the application of RICO to a prostitution enterprise, while at the same time made it impossible for me to distinguish.

Since the case relied on by the Government and raised in oral argument a member of the Court was a *pro se* § 2255 petition involving claims of double jeopardy and ineffective assistance of counsel by a federal prisoner who had entered a plea of guilty, it is little wonder that the case contained minimal factual exposition or legal analysis. Nonetheless, this case's role in oral argument (at least time-wise) eclipsed discussion of numerous published opinions of the Circuit which subjected the legal principle in question to detailed factual and legal analysis.

In short, if citation to unpublished opinions is permitted, the Courts will have to find a whole new way of writing these opinions, or attorneys will constantly be placed in unfair circumstances, trying to distinguish unpublished opinions; which may be unfairly cited, while at the same time depriving the opposing party of the basic information necessary to distinguish the case.

Thank you for taking the time to consider my comments. If you have any questions or I can provide any further information, please do not hesitate to contact me.

Respectfully submitted,



James K. Jenkins

JKJ/mkf