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February 13, 2003

03-AP-358

VIA FACSIMILE AND U.S. MAIL
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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed new FRAP 32.1

Dear Mr. McCabe:

I am writing this letter to provide you with input regarding the above-referenced matter. At the outset, I would like to provide you with some information regarding my background, experience and practice. I have been practicing nearly seventeen years, primarily in criminal defense in both the State and Federal Courts, including the Ninth Circuit Court of Appeals. I have been on the CJA panel both in Nevada and for the Circuit for over ten years, and currently serve as the Nevada representative to the National CJA Conference. I recently completed my three year term as a lawyer representative to the Ninth Circuit and the Federal District Court for Nevada, serving as co-chairperson for my last year. I believe I am intimately familiar with federal criminal procedure, both on the trial and appellate levels, and am confident that I speak on behalf of the CJA panel attorneys here in Nevada. Given this experience, I hope you will seriously consider my input on this very important issue.

We adamantly oppose the adoption of the proposed new FRAP 32.1 prohibiting the circuits from preventing citation to unpublished opinions. While our objections are numerous, let me point out but a few of them. Our primary objection is based upon the burden this rule would place on the Panel Attorney. The vast majority of the panel attorneys in Nevada are either sole practitioners, or in firms with less than three people. I would guess that a majority of the unpublished decisions that are issued are done so in criminal cases. Undoubtedly, the prosecution would cite to these thousands of unpublished decisions, most in their favor, thereby requiring the panel attorney to review and research these opinions in order to adequately and competently defend their clients. The fees and costs to the CJA fund would increase accordingly,

thereby taxing an already overburdened budget. CJA lawyers simply do not have the resources to deal with the vast changes this rule would have to the defense of indigent clients, resources which are readily available to the federal prosecutor.

Additionally, in my experience, unpublished decisions are unpublished for good reason. Often times in criminal cases, they are not well-reasoned and frequently contain insufficient factual and procedural background to permit useful analysis. Thus, allowing the prosecution to cite to these decisions, most (if not all) of which are in their favor, would be patently unfair and put the CJA panel attorney at an even greater disadvantage than they already are.

These decisions also allow the court to readily dispose of the many appeals which have minimal legal merit, yet nonetheless must be raised on behalf of the indigent client. Their precedential value is likewise minimal given this lack of background and analysis. My fear is that in response, the Circuit will simply issue one line opinions denying the appeal, and the criminal defense attorney will be left to speculate to the client the reason the appeal was denied. At least with the unpublished decision, even if the analysis and background are minimal, I can surmise for the client the reason for the dismissal. The one line denial will not allow this.

Finally, keeping abreast of current case law is already an onerous task taking into consideration the explosion of cases after the advent of the Sentencing Guidelines. Allowing the parties to cite to unpublished decisions will only increase this difficult burden, considering that most CJA panel attorneys have little or no support staff, let alone paralegals who could help in this endeavor. All things considered, this proposed rule change is simply a horrible idea.

I urge you to permit this issue to be decided by each Circuit. Do not adopt a blanket rule allowing for the citation of unpublished decisions.

Sincerely,

Daniel J. Albregts, Esq.

DJA/kl