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03-AP-386

Peter G. 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

SENT BY FACSIMILE

Re: Proposed Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

I write in opposition to proposed FRAP 32.1. I have been the Executive Director of this office since June of 2002. Prior to that I was Chief Trial Attorney under Judy Clarke for ten and one-half years. For thirteen years I was in private practice specializing in state and federal criminal defense and for eight years a county public defender.

I closely reviewed the proposed change and studied the stated pros and cons. From my perspective, the cons clearly outweigh the pros. My thoughts are as follows.

Maintaining a consistent and predictable body of case law is of great value to me as a practicing appellate lawyer. Reliance on cases that have been designed by the Circuit to be of precedential value allows for this consistency. So called "unpublished decisions" are designed for the specific parties of that case and, therefore, do not contain a detailed review of the unique facts and circumstances that would be needed for others to understand the reason for the result. I have enough trouble getting my mind around the existing universe of decisions designed for my understanding.

Those seeking this change (largely institutional and governmental agencies) suggest that it is important to utilize as precedential the rationale of individual unpublished opinions. I believe that if the rationale of these decisions is persuasive, there is nothing that prevents an advocate from making the same argument without need of the citation. Under existing rules, a party can seek to have the unpublished decision published. I understand this is rarely sought.

Even with my experience, I find the work needed to research appellate submissions is difficult and time consuming. For the CJA lawyer or the private practitioner who has limited

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time and budgets, the effect of this rule change would be dramatic. It would drastically and negatively impact indigent or near indigent parties. The *pro per* prisoner, with no internet access, would be clearly disadvantaged in relation to the already greatly advantaged Department of Justice.

If unpublished decisions could be cited as precedent, I imagine judges would have to greatly adjust their approach to what are now the great majority of opinions. Two possibilities come to mind. Judges could decide that since these decisions would now be available for citation, much more time would have to be devoted to them. In a time where cases before the courts are increasing, and the need for timely decisions, especially where incarcerated people are effected, is clear, this would only make the problem worse. The other possibility is for the court to simply issue "affirmed" or "reversed" orders. This would clearly deprive the advocates any understanding of why they won or lost. Much more importantly in my practice, individual people facing long prison sentences would have no understanding that the court considered or valued their position on appeal. They say "justice delayed is justice denied." They should also say that "justice unexplained is justice denied."

For these, and I'm sure many other reasons submitted by those more knowledgeable articulate that I, the rule should not be forced on the Circuit Courts.

Very Truly Yours,

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