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Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

I am the Federal Public Defender for the Northern District of California and have held that office for over 16 years. I have practiced federal criminal law in district courts within the Ninth Circuit for 32 years.

I am responding to the invitation of the Rules Committee for comment on a proposed amendment to Rule 32.1 of the Federal Rules of Appellate procedure that would permit litigants to cite non-published opinions for their persuasive value. I am opposed to the amendment because a citation rule: 1) is an inappropriate subject for a national rule; 2) will not improve the reliability of judicial decision making; 3) places an unnecessary burden on the Criminal Justice Act purse and tilts the playing field against pro se litigants and small firm practitioners; and 4) creates a potential judicial remedy - affirmance or reversal without opinion - that is worse than the problem the rule was intended to solve.

Rules restricting the citation of non-published opinions are in place in a majority of state and at least four federal circuit courts. What fits a court with a small bench and caseload such as the First Circuit does not fit a large court such as the Ninth Circuit where almost 85% of last year's 5,000 decisions were unpublished. The non-citation rule of the Ninth Circuit has been the subject of considerable study and discussion by attorneys throughout our circuit. They believe that our present rule is the best fit for our situation. There is no compelling reason to require the Ninth Circuit to change its rule. The Justice Department's complaint that its appellate lawyers face inconsistent local rules is a chimeral concern. There is nothing more difficult about understanding or abiding by the non-citation rule than any other local circuit rule.

Summary dispositions are not published for a reason. They are intended to resolve the case without a full recitation of the factual record and limited legal discussion. They are not intended to provide reasoned guidance to the bench and bar. In fact, many of the unpublished decisions of the Ninth Circuit are not authored by judges but by central staff lawyers who make a brief presentation before a panel of judges to gain their approval. The persuasive value of such

opinions is properly low and should not improve merely because the proposed rule would permit them to be cited.

Poor and pro se litigants and counsel in small firms do not have the access to computerized databases that provide unpublished decisions. They will be at a disadvantage when litigating against government or large firm lawyers who have such access. Lawyers appointed under the Criminal Justice Act will be required to research all circuits' unpublished opinions. The cost of the electronic research and the time invested in it will be borne by the Criminal Justice Act. This additional expense at a time when the judiciary is laboring under financial restrictions is not justified by the slight persuasive value of the cases the research produces.

Finally, judges faced with investing time they do not have in drafting and editing non-published opinions will consider merely affirming or reversing summary disposition cases without opinion. Under the present system, the parties at least get a written decision which they would lose as an unintended but all too possible consequence of the proposed rule.

I am grateful for the opportunity to comment on the proposed rule.

Sincerely,

Barry J. Portman

BARRY J. PORTMAN
Federal Public Defender

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