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January 22, 2004

03-AP-251

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 F.R.A.P. 32.1

Dear Mr. McCabe:

I wish to submit a comment regarding the proposed new Rule 32.1 of the Federal Rules of Appellate Procedure. I urge the committee to decline to adopt the rule for several reasons.

First, as a deputy federal public defender in the Central District of California, I constantly file pleadings in court. I also try to fully serve each of the twenty to forty clients on my caseload at any given time. It is simple to use Westlaw or Lexis to find unpublished decisions. However, it takes much more time to analyze and synthesize these decisions in a coherent manner. Wealthier defendants may be able to use more resources in terms of attorneys or hours to incorporate unpublished decisions into their pleadings. Therefore, I believe that the proposed rule would disadvantage indigent defendants and their counsel.

Second, I believe that the proposed rule would likely slow down the appellate process. For any relatively complicated issue, the court of appeals may require additional time to research and draft an unpublished opinion due to its precedential value. During that time, an indigent client, who is often in custody, will need to wait. Therefore, the rule will prolong any loss of liberty for an indigent defendant in custody, even if that defendant has a potentially meritorious appeal.

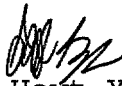
Third, inclusion of unpublished decisions would produce

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great uncertainty with respect to the state of the law on many issues. Because there are relatively few published decisions, it is ordinarily a straightforward task to determine the state of the law on any given issue of criminal law. However, once unpublished decisions are included, the state of law becomes much less clear. In addition, there is a significant possibility that reliance on unpublished decisions, which might not reflect the position of the court of appeals, could result in a proliferation of appeals with borderline merit, which would not serve the interests of the court of appeals or defendants and their counsel.

For these reasons, I ask the Committee to decline to adopt the proposed rule.

Very truly yours,



Hoyt Y. Sze
Deputy Federal Public Defender