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03-AP-390

February 13, 2004

Via Facsimile (202) 502-1755

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

Re: Proposed Fed. R. App. P. 32.1

Dear Mr. McCabe:

I write to oppose the adoption of the proposed new Fed. R. App. P. 32.1, which would require the Courts of Appeals to allow citation to non-published dispositions as precedents. I am currently the Chief of the Capital Habeas Unit for the Federal Public Defender for the District of Nevada, and in that capacity I directly litigate, or supervise others in litigating, over thirty habeas corpus proceedings arising from judgments of death imposed by Nevada courts. I also served as a law clerk and staff attorney for the Nevada Supreme Court from 1979 to 1981. This experience underlies my opposition to the proposed rule.

Capital habeas proceedings involve extensive and complicated bodies of law, including federal civil procedure, habeas corpus procedure, state criminal law and procedure, and federal constitutional law on both general criminal issues and specific capital issues. Briefing in these cases, both in the district courts and courts of appeals, is already lengthy and requires discussion and analysis of a large body of published precedents. See Ninth Circuit Rule 32-4 (allowing longer briefs in capital cases). Allowing citation to unpublished dispositions will only increase the burden on the courts and counsel for both sides. A responsible attorney will feel compelled to research masses of routine unpublished dispositions which do not clarify any disputed point of law, on the off-chance that there may be some helpful language lurking in them. That effort - - both researching unpublished dispositions and producing arguments based on them - - comes at a substantial cost in time and effort. In my view, it is not a responsible use of scarce funds under the Criminal Justice Act, 18 U.S.C. § 3006A, or under the capital-specific provisions, 21 U.S.C. § 848(q)(10), to pay for that time. The use of time and funds in the Federal Public Defender's Office for that task is equally

unjustifiable, since it can only reduce the amount of resources available for dealing with the serious issues in the case. Further, opposing counsel in our cases is normally the Nevada Attorney General's Office, and, because of Nevada's current budget difficulties, that office is already understaffed. It would put an additional burden on the states - - essentially an unfunded mandate - - to require such state agencies to divert time from the serious issues in the case to this sort of unproductive research and briefing.

Courts and counsel are already drowning in the unrelenting flood of published decisions. I previously practiced in California, where the sheer volume of published Court of Appeal and Supreme Court decisions makes writing a brief more a question of eliminating citation to multiple published authorities than of finding additional ones. The last thing that courts, counsel and litigants need is a huge increase in the volume of routine dispositions that have to be reviewed in the course of litigation.

My experience as a law clerk also leads me to believe that any benefit anticipated from making non-published dispositions citable as authority will be illusory. I can personally attest that many of my memoranda - - although they were the best that I, as a neophyte, could do at the time - - were not the products of mature judgment and practical experience, and would not be what I would write today. Nevertheless, the court often adopted them as the basis for unpublished dispositions, because the result was what the court perceived as the appropriate one; and the details of the legal analysis were either routine or undisputed, the factual situation was eccentric and unlikely to recur, or the decision was unlikely to affect the rights of anyone other than the particular litigants before the court. If all of those dispositions had been required to be as complete as published opinions, the process of appellate review in the Nevada Supreme Court (which at that time processed almost a thousand appeals per year, with a court composed of five justices) would have been materially delayed.

The current Ninth Circuit rule adequately addresses any concern about consistency of decisions that may underlie the proposed rule. Ninth Circuit Rule 36-3(b)(iii) allows citation of an unpublished decision "in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders." This rule ensures that, if a real conflict in a circuit's jurisprudence develops because of a material difference in treatment of similar cases between a court's published decisions and its unpublished dispositions, the litigants can bring that conflict to the court's attention and seek to have it resolved by the court. See Fed. R. App. P. 35(a)(1) (en banc consideration when "necessary to secure or maintain uniformity of the court's decision"); Ninth Circuit Rule 35-1. This limited citation rule accommodates the legitimate interest in maintaining uniformity of decisions and addressing a material conflict which may arise in an unpublished disposition, without forcing courts and litigants to act as if every infinitesimal difference in language in unpublished dispositions creates a conflict in the circuit's jurisprudence.

I urge the Committee not to impose this entirely unnecessary burden on our already overburdened system of justice.

Yours truly,

Michael Pescetta
Assistant Federal Public Defender

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