

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Policy Coordination and Liaison Committee
Hon. Marvin R. Baxter, Chair
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DATE: January 23, 2008

SUBJECT: Capital Appeals: Constitutional Amendment Involving Processing of
Capital Cases (Cal. Const., art. VI, § 12) (Action Required)

Issue Statement

The California Constitution authorizes the California Supreme Court to transfer any matter to the Courts of Appeal *except* for appeals from judgments imposing the death penalty. During the past two decades, the growing number of defendants sentenced to death in California has contributed to significant delays in the disposition of capital appeals by the California Supreme Court because of limitations in the resources needed to handle these matters. This delay and ensuing backlog impairs several interests. The interests of both prosecutors and defendants may be frustrated when, in the event of reversal on appeal and remand for retrial long after the original trial, memories fade and witnesses become unavailable. The public's interest in finality and enforcement of the law is impaired by a prolonged appeal process. In addition, some federal courts have raised constitutional concerns about the significant delays between completion of the briefing in automatic appeals and the state Supreme Court's disposition of those cases.

From 1940 until the early 1970s, death penalty appeals constituted roughly 5 to 10 percent of the state Supreme Court's docket. Today, about 20 to 25 percent of the court's time is dedicated to death penalty appeals, and it has remained so for the past two decades. Even at that rate, a backlog of 80 fully briefed capital cases is currently pending before the Supreme Court. Additionally, because of longstanding challenges relating to recruitment of counsel, the Supreme Court has a backlog of about 80 death row inmates without appellate counsel. The Supreme Court is working on improving the recruitment

¹ Portions of this report were taken from materials prepared by Supreme Court staff and approved by that court.

of counsel, but as counsel are appointed in these cases, the Supreme Court will face an even greater backlog of fully briefed capital cases. This situation threatens the state Supreme Court's institutional role of presiding over the development of the law and its ability to grant review in and decide issues of statewide importance arising in civil and criminal matters.

Recommendation

The Policy Coordination and Liaison Committee (PCLC) recommends that the Judicial Council:

1. Sponsor legislation to authorize that a constitutional amendment be placed before the voters to improve the processing of fully briefed appeals of judgments of death. Specifically, the proposal would:
 - Amend article VI, section 12 of the California Constitution to include judgments of death under the existing authority of the Supreme Court to transfer a cause before it to a Court of Appeal; and
 - Amend article VI, section 12 of the California Constitution to prescribe a broader process for Supreme Court review of decisions of the Court of Appeal affirming or reversing a judgment of death, including review for "error affecting the judgment of the court of appeal."
2. Delegate to the PCLC the authority to consider and act on any counter-proposals received subsequent to council action; and
3. Pursue bipartisan legislative authorship.

The text of the proposed legislative constitutional amendment is attached at page 9.

Rationale for Recommendation

The proposed constitutional amendment is designed to ensure the Supreme Court's ability to carry out its primary role of deciding key issues of law and to make the best use of limited judicial branch resources while ensuring fairness and justice in posttrial capital litigation. The proposal is part of an ongoing effort, led by Supreme Court staff working with the capital appellate defense community, to increase staffing at the Office of the State Public Defender and the Habeas Corpus Resource Center in order to address delays associated with the appointment of counsel in these cases.

The growing number of death penalty cases has contributed to delays in the resolution of capital appeals and threatens the ability of the Supreme Court to do its other important, noncapital work. At the same time, it is no longer necessary to require the Supreme Court to decide in the first instance each issue raised in each capital appeal. During the past two

decades, approximately 400 Supreme Court capital opinions, and numerous decisions by the United States Supreme Court, have settled the vast majority of legal questions concerning capital litigation as presently practiced in California. Although capital appeals are very lengthy and time-consuming, they now very frequently present only the application of settled law to specific facts, which is precisely the type of review that the Court of Appeal typically undertakes. Thus the reasons for the Supreme Court initially to review, hold oral argument, and file a written decision in all such matters are no longer compelling, as long as the Supreme Court ultimately reviews each Court of Appeal decision affirming or reversing a judgment imposing the penalty of death not only for ensuring uniformity and answering important questions of law, but also for correcting error affecting the judgment, including whether the Court of Appeal erred in assessing prejudice.

For these reasons, the PCLC recommends that the Judicial Council sponsor legislation to authorize that a constitutional amendment be placed before the voters to authorize the Supreme Court to transfer certain fully briefed capital appeals to the Courts of Appeal. Enactment of these amendments will enable the state Supreme Court to continue playing its essential role of resolving questions of statewide importance in civil and criminal matters.

The PCLC also recommends that if the Judicial Council votes to sponsor this proposal, the council direct staff to pursue bipartisan support in the Legislature, including seeking bipartisan joint authorship for the legislative constitutional amendment. This approach would help ensure that the council's sponsorship is discussed in the context in which it is intended, namely, as a means to achieve process improvements, and not as a partisan policy position in support of or opposition to the death penalty. Bipartisan joint authorship will most clearly demonstrate that the council's advocacy of this change is based on a careful balancing of the need to provide adequate due process protections while appropriately redistributing caseloads to permit the California courts to most effectively perform their constitutional functions.

Alternative Actions Considered

Direct review of capital appeals by the Courts of Appeal. A recent article suggested the state Constitution should be amended to provide for direct review of all capital appeals by the Courts of Appeal. (See Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 So. Cal. L. Rev. 697.) The Supreme Court considered this approach but rejected it, preferring instead to have capital appeals filed in the Supreme Court. This would allow the court to continue, with the assistance of its capital central staff and the capital unit of its clerk's office, to monitor progress of the appeal process and ensure consistency in the disposition of requests for extensions of time to complete record preparation, record correction, and briefing of motions filed.

Federal death penalty appellate procedures. Under federal death penalty statutes and procedures, capital judgments rendered by the federal district courts are appealed to the federal circuit court of appeals and not directly to the United States Supreme Court. Currently, a few dozen federal inmates are on death row. When considering whether to accept full review of a federal appellate court's capital decision, the United States Supreme Court has complete discretion to decline the case even if it believes that the federal appellate court's judgment is incorrect. The Supreme Court considered this approach but rejected it, preferring to provide more substantive review than under the federal scheme. The proposal would require review by the state Supreme Court for *error affecting the judgment*, thereby guaranteeing that no state appellate court affirmance or reversal of a death judgment will stand unless the state Supreme Court determines that result to be legally correct. Accordingly, if the state Supreme Court were to conclude that an appellate court's affirmance or reversal of a judgment might be erroneous, the state Supreme Court would be required to hold oral argument and file a published opinion addressing whatever issues might be involved in the error, even if the state Supreme Court would not otherwise have granted review to address the issues.

"Two automatic appeals" schemes. The Supreme Court reviewed systems under which all capital appeals are heard first by an intermediate state appellate court and then are automatically appealed to the state supreme court. This scheme also was rejected. Research revealed that while this process is in use in Alabama and Tennessee, it has been criticized as inefficient because significant time and resources are required for two rounds of appeals. (See generally Barry Latzer & James Cauthen, *Justice Delayed? The Time Consumption in Capital Cases: A Multistate Study* (March 2007); see also Robert Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California* (1988) 28 Santa Clara L.Rev. 243.) The proposed amendments, permitting the California Supreme Court to transfer its pending and new caseload of capital appeals for decision by the state's intermediate appellate courts, would address that duplication of effort by allowing the Supreme Court, after considering the intermediate appellate court's decision for error affecting the judgment in addition to uniformity and important questions of law, to (1) issue a published order (with published concurring or dissenting opinions, if any), summarily affirming the decision of the Court of Appeal; or (2) issue an order requiring further briefing on all or a limited number of issues, hold oral argument, and issue a decision in writing with reasons stated.

Comments From Interested Parties

An earlier but substantially similar version of the attached proposal was distributed to all administrative presiding justices and clerk/administrators of the Courts of Appeal, all trial court presiding judges and court executive officers, and all Judicial Council members as part of a news release that was issued on November 19, 2007. It also was distributed to the Judicial Council's Administrative Presiding Justices Advisory Committee, the Appellate Advisory Committee, and the Criminal Law Advisory Committee, with a request for their input at meetings that have been held during the last several weeks. Staff

also distributed the proposal via e-mail to policymakers and other interested parties, including Governor Schwarzenegger's legislative affairs secretary, Senate and Assembly leadership, key policy committee members and staff of both parties, the state Department of Justice, the California District Attorneys Association, the California Public Defenders Association, and California Attorneys for Criminal Justice.

Administrative Presiding Justices Advisory Committee. This committee recommended that the Judicial Council sponsor legislation to authorize that a constitutional amendment be placed before the voters, agreeing in concept that the change in procedure could result in a more effective use of judicial branch resources. While it is supportive in concept, the committee has identified concerns about some operational features of the proposal. It has met several times with AOC and Supreme Court staff and is currently participating in discussions to address two issues: (1) the manner in which capital cases are assigned to the appellate courts to ensure an equitable distribution of capital cases among the six appellate districts, taking into account the courts' noncapital as well as capital caseload; and (2) how best to ensure that the Courts of Appeal have adequate staff and judicial resources, including a methodology for determining the appropriate level of new resources, if necessary.

Appellate Advisory Committee (AAC). This committee recommended that the council sponsor this legislative constitutional amendment but requested several technical and clarifying amendments to both the article VI text and the accompanying commentary. All of those amendments have been agreed to by Supreme Court staff and are incorporated in this proposal.

The AAC also expressed concern about the effect this proposal could have on federal habeas corpus proceedings. Currently, approximately 200 inmates are on death row without appointed habeas corpus counsel, and appointments can take six years or more. The federal Antiterrorism and Effective Death Penalty Act requires a defendant to bring a petition for writ of habeas corpus within one year of finality of the direct appeal. (*See* 28 U.S.C. § 2244.) The limitation is tolled, however, if there is a properly filed application for habeas corpus review in state court. If the change were to speed up the appellate process without also addressing the lack of habeas corpus counsel, it may increase the possibility that the federal statute of limitations would expire before a state habeas corpus petition could be filed. The committee believes that a variety of mechanisms might be used to ensure that counsel is appointed in time to file a state habeas petition before expiration of the statute of limitations for a federal habeas corpus petition, and it is working with the Supreme Court staff to address this issue, including developing proposals for new or amended rules of court or published Supreme Court policies.

The AAC has asked that the commentary to the proposal address this issue.

Criminal Law Advisory Committee (CLAC). This committee also was asked to review the proposal and make a recommendation regarding whether the council should sponsor legislation to authorize that a constitutional amendment be placed before the voters. On a closely divided vote, the CLAC recommended that the council sponsor this proposal. The support was tempered, however, by concerns about a number of issues regarding the operational details. There was significant concern about the fact that so many of the major operational aspects of the proposal will have to be developed in California Rules of Court and that much of any value added will depend on the resources available to the Courts of Appeal and on how the Supreme Court chooses to implement and supervise those operational details.

The CLAC also discussed the policy implications of having the Courts of Appeal hear capital cases, with some members expressing discomfort with the idea of six different Courts of Appeal (and numerous three-justice panels) ruling on “whether someone lives or dies.” Members understood that the Supreme Court would review a Court of Appeal’s decision, including correcting errors affecting the appellate court’s judgment, but some argued that this may be a “more superficial” review than capital cases currently receive. Some members were concerned about the magnitude of the proposal and would have preferred to have additional time to consider some of the operational complexities. Some members worried about the effects of a “two-tiered system,” under which the assumed “garden variety” cases would be transferred to the Courts of Appeal, while more complex cases would be heard by the highest court.

Ultimately, however, a majority of committee members agreed with the view that the proposal could, depending heavily on the details of the specific implementation, make good use of limited judicial branch resources and that transfer of some capital appeals to the Courts of Appeal might be a useful change, especially given that the courts are hearing some of the same legal issues today in life-without-parole cases.

Other interested parties. Because the proposal will receive full public hearing and opportunity for input during the legislative process and because of the short time available if the measure is to appear on the November 2008 ballot, the distribution did not specify a comment period for those outside of the advisory committees’ review. Nonetheless, staff has received several comments.

Attorney General Jerry Brown supports the proposal and urges its adoption in order to “expedite the review of capital judgments.”

The California Attorneys for Criminal Justice (CACJ), an organization of private and public criminal defense attorneys, is opposed to the proposal, in part because of the asserted dearth of specifics about how the changes would work, and in part because it disagrees with proceeding in what it characterizes as a piecemeal approach.

The California Public Defenders Association opposes the proposal. On January 31, 2008, the Association wrote to Chief Justice George:

...We recognize that no system of laws is perfect, but respect for the value of human life requires that we must guard against the execution of innocent individuals. That is why our Constitution has long required appeals in death penalty cases to be decided by the California Supreme Court. We are opposed to any attempt to transfer these appeals to the lower courts.

Transferring capital appeals will increase the risk of random and arbitrary executions. The determination of whether a person will live or die should not depend on which panel of three justices is assigned to hear the appeal out of the 104 [sic] appellate justices on the courts of appeal.

And transferring capital appeals will not reduce the time between jury verdict and completion of the appeal process. Under Chief Justice George's proposal, the 25-30 capital appeals to be decided by the courts of appeal would not be in addition to those presently decided by the Supreme Court but would instead free the Court to hear more appeals in civil and other cases. The net result would not increase the number of capital appeals decided each year, it would merely transfer those appeals to lower courts. However well-intentioned the Supreme Court's desire to decide more civil cases may be, it does not justify increasing the risk of unjust or arbitrary executions depending on the vagaries of the appellate panel selected to review the death judgment. ...

The counsel to the Assembly Republican Caucus and one retired judge have commented that it would be preferable to require that five-justice panels of the Courts of Appeal, rather than the usual three-justice panels, hear capital appeals. A five-justice panel would reduce concerns about moving from the seven Supreme Court justices hearing the initial appeal.

The American Civil Liberties Union opposes the proposal because "...Implementing this reform will cost tens of millions of dollars and will be extremely inefficient[,],...lead to greater unfairness and arbitrariness in death sentences and increase the risk of executing the innocent[, and] will not reduce the backlog. ..."

Implementation Requirements and Costs

Implementation and operation of a transfer scheme. If passed by the voters, under article VI, sections 6 and 12(d) of the California Constitution, the Judicial Council would, after a public comment period, provide rules of court governing the timing and procedures for transfer. It is contemplated that interim rules would be ready for implementation immediately on adoption of the amendments, and that based on commentary to the

proposal supplied by the Supreme Court, a transfer scheme under final rules would operate generally as follows:

1. *Transfer to Courts of Appeal.* The Supreme Court will transfer pending appeals arising from a judgment of death to the Court of Appeal for argument and a published decision, unless the Supreme Court determines that it is appropriate to retain the appeal for oral argument and written decision by the Supreme Court. Generally, transfer will occur after completion of briefing. Transfer will be the presumptive action. Typically, the court will retain only those cases that are especially time sensitive or that affect large numbers of cases and hence require very prompt resolution by the Supreme Court, or concerning which, if the matter were pending in the Court of Appeal, the Supreme Court would grant a petition to transfer to itself prior to decision in the first instance. Generally, cases will be transferred to the appellate district from which the trial court judgment arose, but exceptions may be made in order to more evenly allocate workload objectively. In the first few years after the amendment, the Supreme Court may transfer up to approximately 30 fully briefed cases annually, meaning that each of the 105 Court of Appeal justices would receive, for the preparation of an opinion, about one capital case every three and a half years.
2. *Augmentation of staff and judicial resources.* In order to accommodate the workload increase of the Courts of Appeal, it may be necessary to add appellate staff attorney positions in affected appellate court districts. AOC staff is working with the administrative presiding justices and appellate court staff to identify those needs. If necessary, the Chief Justice may assign justices pro tem to the Courts of Appeal (to hear noncapital cases only) and will consider whether the addition of new appellate justice positions should be sought.

Attachments

*Proposed amendments to California Constitution,
article VI, section 12*

(Reflecting changes as of January 24, 2008)*

Sec. 12. (a) The Supreme Court may, before decision, transfer to itself a cause in a court of appeal. It may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another. The court to which a cause is transferred has jurisdiction.

(b) The Supreme Court may review the decision of a court of appeal in any cause.

(c) If the Supreme Court transfers to the court of appeal a cause concerning a judgment of death, it shall review the resulting decision of the court of appeal affirming or reversing that judgment. If the Supreme Court concludes that the decision (1) contains no error affecting the judgment of the court of appeal, (2) presents no need to secure uniformity of decision, and (3) does not require resolution of an important question of law, the Supreme Court may affirm the judgment of the court of appeal in an order published in the Official Reports. Unless the Supreme Court determines that affirmance by order is appropriate, the Supreme Court shall require briefing, hold oral argument, and issue a decision in writing with reasons stated, addressing all or part of the court of appeal's decision.

(ed) The Judicial Council shall provide, by rules of court, for the time and procedure for transfer and for review, including, among other things, provisions for the time and procedure for transfer with instructions, for review of all or part of a decision, and for remand as improvidently granted.

~~(d) This section shall not apply to an appeal involving a judgment of death.~~

* Changes made to the proposed amendment of this section since the proposal was announced November 19, 2007, are as follows:

Sec. 12. (a), third sentence: The proposed phrase after the word "jurisdiction" ("including when a judgment of death has been pronounced") has been deleted.

Sec. 12. (c), second sentence: Subpart (1) has been revised to refer to error affecting the judgment "of the court of appeal." In subpart (3) the proposed word "summarily," preceding "affirm," has been deleted.

Sec. 12 (c), third sentence, has been revised to read as follows: "~~If~~ Unless the Supreme Court determines that ~~summary~~ affirmance by order is ~~not~~ appropriate, the Supreme Court shall ~~order~~ require briefing, hold oral argument, and issue a decision in writing with reasons stated, addressing all or part of the court of appeal's decision."

Commentary
(Reflecting changes as of January 24, 2008)**

1. *Overview*: The state Supreme Court presently has authority to transfer any matter to the Court of Appeal — except for appeals from judgments imposing the death penalty. The proposed amendments would eliminate that restriction while maintaining the Supreme Court’s oversight of all capital appeals. The amendments would (1) ensure that, as at present, the Supreme Court permits no death penalty judgment to be affirmed or reversed unless the court determines that result to be legally correct; (2) allow the court to ensure consistency in the disposition of capital-case issues, including the

** Changes to the Commentary (other than numbering) made since this proposal was announced November 19, 2007, are in the following numbered sections:

1. “*Overview*”: The second and third sentences have been revised to include references to “maintaining . . . oversight of all capital appeals,” allowing the court to “ensure consistency in the disposition of capital-case issues, including the application of harmless error analysis,” and allowing the court to “serve its primary role by resolving significant questions of law” The penultimate sentence has been revised to read as follows: “~~In order to~~To ensure transparency and fairness, in any death penalty appeal in which the Supreme Court ~~summarily~~ affirms by order the judgment of the Court of Appeal, any justice of the Supreme Court may file a published concurring or dissenting opinion.
2. “*Need for these amendments*”: The last sentence has been revised to refer to “corresponding initiatives to enlist the Courts of Appeal in encouraging counsel to agree to represent inmates in capital matters while maintaining current appointment qualification standards. . . .”
5. “*Comparison with other states*”: The last sentence has been added.
6. “*Analogy to and comparison with federal death penalty appellate procedures*”: This paragraph has been added.
7. “*Comparison with ‘two automatic appeals’ schemes*”: In the last sentence, the word “summarily,” preceding “affirming,” has been deleted.
8. “*Previous concerns about increased delay*”: In the last sentence, the phrase, “or accept review in” has been added.
9. “*Implementation and operation of a transfer scheme*”: In part A (“*Transfer to Courts of Appeal*”), the last sentence has been revised to read as follows: “. . . each of the 105 Court of Appeal justices would ~~be assigned~~ receive, for the preparation of an opinion, on average, one capital case every three-and-one-half years.” In part C (“*Timing of, and time for action on, ‘statement of grounds for reversal of the judgment of the Court of Appeal’*”), penultimate sentence, the word “should” has been replaced with “shall.” The last sentence has been revised to read as follows: “. . . either by (1) an order affirming that judgment or (2) requiring briefing, holding oral argument, and issuing a written opinion.” In part D (“*Nature of the Supreme Court’s action on the ‘statement of grounds for reversal of the judgment of the Court of Appeal’*”), subpart (1) has been revised to read as follows: “. . . will not be confined to the considerations set forth in California Rules of Court, rule 8.500(b). The Supreme Court also will review each case for error affecting the judgment, including whether the Court of Appeal erred in any assessment of prejudice, as well as to ensure consistency in the disposition of capital-case issues.” In the first sentence of subpart (2), the word “summarily,” preceding “affirm,” has been deleted. In the second sentence of subpart (2), the word “summary,” preceding “order,” has been deleted. The last sentence has been revised to read: “The rules also will clarify that an summary-affirmance by order issued under these procedures will concern only the judgment of the Court of Appeal, and not necessarily the analysis contained in the decision rendered by that court.”

application of harmless error analysis; (3) permit the court to address discrete issues in capital cases as warranted, by reviewing selected issues of significance to other litigation, just as it does in all other cases; (4) allow the court to serve its primary role by resolving significant questions of law and to devote sufficient time and resources to other important appellate litigation that deserves the court's attention; and (5) promote the public's and the litigants' interests in both fair and reasonably prompt disposition of capital appeals. To ensure transparency and fairness, in any death penalty appeal in which the Supreme Court affirms by order the judgment of the Court of Appeal, any justice of the Supreme Court may file a published concurring or dissenting opinion. The changes are intended to apply retroactively, rendering all pending undecided capital appeals subject to transfer to the Courts of Appeal.

2. *Need for these amendments:* During the past two decades the growing number of defendants sentenced to death in California has contributed to delay in the disposition of capital appeals by the California Supreme Court because of limitations in the resources needed to handle these matters. This delay and ensuing backlog impairs several interests. The interests of litigants — both the prosecution and defendants — can be frustrated when, in the event of reversal on appeal and remand for retrial long after the original trial, memories fade and witnesses become unavailable. The public's interest in finality and enforcement of the law is impaired by a prolonged appeal process. Finally, the ever-increasing backlog of automatic appeals, constituting approximately 20 percent of the court's annual opinion output (up approximately 66 percent since 1985, and approximately 400 percent since 1940-1970), threatens to overwhelm the Supreme Court's docket, impairing its ability to grant review to provide necessary guidance concerning other important issues arising in civil and criminal law. (Compare Uelmen, *The Future of State Supreme Courts as Institutions in the Law*, 72 Notre Dame L. Rev. (1997) 1133, 1135-1136 [reporting that capital appeal opinions by state supreme courts increased more than 30 percent from 5.5 percent of all published opinions in 1985, to 8.3 percent of all published opinions in 1995 — while overall opinion production by the same state supreme courts decreased more than 13 percent].) These amendments to article VI, section 12, together with ongoing initiatives to increase staffing at the Office of State Public Defender and the Habeas Corpus Resource Center in order to address delay associated with the appointment of counsel in these cases — and corresponding initiatives to enlist the Courts of Appeal in encouraging counsel to agree to represent inmates in capital matters while maintaining current appointment qualification standards — are designed to make post-trial capital litigation more efficient, ensure fairness and justice, and at the same time permit the Supreme Court to properly allocate its limited resources.

3. *Changed circumstances have eliminated the need for the Supreme Court to decide in the first instance each issue raised in each capital appeal:* At the same time that the growing number of death penalty cases has contributed to delay in the resolution of appeals and threatened the ability of the Supreme Court to do its other important work,

there no longer is reason to require the Supreme Court to decide in the first instance each issue raised in each capital appeal. During the prior two decades, approximately 400 Supreme Court capital opinions, and numerous decisions by the United States Supreme Court, have settled the vast majority of legal questions concerning capital litigation as presently practiced in California. Although capital appeals are very lengthy and time-consuming, they now very frequently present only the application of settled law to specific facts — the type of review that the Court of Appeal typically undertakes. Thus the reasons for the Supreme Court initially to review, hold oral argument, and file a written decision in all such matters are no longer compelling, so long as the court ultimately reviews each Court of Appeal decision affirming or reversing a judgment imposing the penalty of death not only for uniformity and important questions of law, but also for error affecting the judgment — including whether the Court of Appeal erred in any assessment of prejudice.

4. *Comparison with direct review of capital appeals by the Courts of Appeal:* A recent article suggests the state Constitution be amended to provide for direct review of capital appeals by the Courts of Appeal. (See Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 So.Cal.L.Rev. 697.) Under the present proposal, capital appeals would continue to be filed in the Supreme Court, which, with the assistance of its capital central staff and the capital unit of its clerk's office, would continue to monitor progress of the appeal process and ensure consistency in the disposition of (a) requests for extensions of time to complete record preparation and correction, and briefing, and (b) motions filed. The Supreme Court would have discretion to transfer a capital appeal to the Court of Appeal for oral argument and written decision, subject to subsequent review by the Supreme Court.

5. *Comparison with other states:* The vast majority of the 38 states that have a death penalty statute provide for automatic direct review by the state court of last resort (usually called the state supreme court). Most states, however, have relatively few death penalty judgments each year, and those appeals do not pose a substantial burden on those state supreme courts. By comparison, states in which trial courts regularly have rendered a high number of death penalty judgments have substantial numbers of inmates on death row, which in turn imposes a corresponding burden on state supreme courts that, like those in most jurisdictions, exercise both civil and criminal appellate jurisdiction. California, by far the most populous state, also has by far the highest number of death row inmates. (See U.S. Dept. of Justice, Bureau of Justice Statistics, *Capital Punishment 2005*.) Although the court issues decisions in approximately 23 capital appeals annually, as noted, nearly 400 capital appeals are pending before the Supreme Court. In addition to the large number of pending capital judgments, capital appeals in California pose a special burden because they differ significantly from those in other states: the trials and resulting records are substantially longer; the briefing often is four to ten times longer; and the reviewing court's resulting opinions, which must address and resolve every issue raised each time the court affirms, correspondingly are longer and consume more time

and resources. The proposed amendments, permitting the seven-justice California Supreme Court to transfer capital appeals for decision by the state's intermediate appellate courts, would spread the bulk of the work of resolving capital appeals to the 105 state Court of Appeal justices, ultimately allowing the vast majority of those appeals to be resolved more expeditiously than under the present system, while maintaining review by the Supreme Court for error affecting the judgment as well as for ensuring uniformity and considering important questions of law in each case. The result would be to permit the Supreme Court to devote more resources to its primary function of deciding issues of statewide importance, and settling conflicts of law arising in the Courts of Appeal.

6. *Analogy to and comparison with federal death penalty appellate procedures:* Under federal death penalty statutes and procedures, capital judgments rendered by the federal district courts (trial courts) are appealed to the federal circuit courts of appeal — and not directly to the United States Supreme Court. Currently, a few dozen federal inmates are on death row. When considering whether to accept full review of a federal appellate court's capital decision, the United States Supreme Court has complete discretion to decline to accept the case *even if it believes that the federal appellate court's judgment is incorrect*. The proposed amendments would provide significantly more substantive review than under the federal scheme. The proposal would require review by the state Supreme Court for *error affecting the judgment*, and hence would guarantee that no state appellate court affirmance or reversal of a death judgment will stand unless the state Supreme Court determines that result to be legally correct. Accordingly, if the state Supreme Court were to conclude that an appellate court's affirmance or reversal of a judgment might be erroneous, the state Supreme Court would be required to hold oral argument and file a published opinion addressing whatever issue or issues might be involved in the error, even if the state Supreme Court would not otherwise have granted review to address the issue or issues.

7. *Comparison with "two automatic appeals" schemes:* Systems under which all capital appeals are heard first by an intermediate state appellate court, and then are automatically appealed to the state supreme court — as in Alabama and Tennessee — have been criticized as inefficient, because time and resources are required for two rounds of appeal. (See generally Barry Latzer & James Cauthen, *Justice Delayed? The Time Consumption in Capital Cases: A Multistate Study* (March 2007); see also Weisberg, *Redistributing the Wealth of Capital Cases: Changing Death Penalty Appeals in California* (1988) 28 Santa Clara L.Rev. 243.) The proposed amendments, permitting the California Supreme Court to transfer its pending and new caseload of capital appeals for decision by the state's intermediate appellate courts, would address that inefficiency by allowing the Supreme Court, after considering the intermediate appellate court's decision for error affecting the judgment in addition to uniformity and important questions of law, to (1) issue a published order (with published concurring or dissenting opinions, if any), affirming the decision of the Court of Appeal, or (2) issue an order

requiring further briefing on all or a limited number of issues, hold oral argument, and issue a decision in writing with reasons stated.

8. *Previous concerns about increased delay:* When similar proposals were discussed in the mid-1980s, there was apprehension that three-judge panels of the various appellate court districts might reach conflicting conclusions on similar legal issues, or might unevenly assess prejudicial error, thus triggering frequent “second appeals” before the Supreme Court — and hence there might be *increased* delay in many if not most capital appeals. As noted above, however, in the intervening decades, approximately 400 capital decisions by the California Supreme Court, and numerous decisions by the United States Supreme Court, have settled most legal questions concerning capital litigation. This reduces dramatically the prospect of conflicting or inconsistent application of established law by the Courts of Appeal in capital litigation. It is now reasonable to conclude that a transfer procedure would decrease delay in the disposition of capital appeals, to the benefit of litigants and the public, for the following reasons: (1) Generally, the Court of Appeal will be able to act on such matters more quickly than the Supreme Court. (2) Even in those cases in which the Supreme Court finds it appropriate to order further briefing and argument after decision by a Court of Appeal, the Supreme Court typically will need to address only selected issues, thus saving the Supreme Court considerable time and resources. (3) The Court of Appeal’s written decision will substantially assist the Supreme Court in its own disposition of the matter by focusing the litigants’ and the Supreme Court’s consideration of the issues. Finally, if experience were to show that transfers too frequently produced conflicting or inconsistent applications of law, the Supreme Court could choose to retain or accept review in a greater portion of the cases in order to provide more definitive guidance to the Courts of Appeal.

9. *Implementation and operation of a transfer scheme:* Pursuant to article VI, sections 6 and 12(d), the Judicial Council would, after a public comment period, provide rules governing the timing and procedures for transfer. It is contemplated that interim rules would be ready for implementation immediately upon adoption of the amendments, and that a transfer scheme under final rules would operate generally as follows:

A. *Transfer to Courts of Appeal:* The Supreme Court will transfer pending appeals arising from a judgment of death to the Court of Appeal for argument and a published decision, unless the Supreme Court determines that it is appropriate to retain the appeal for oral argument and written decision by the Supreme Court. Generally, transfer will occur after completion of briefing. Transfer will be the presumptive action; typically, the court will retain only those cases that are especially time sensitive, or that affect large numbers of cases and hence require very prompt resolution by the Supreme Court, or as to which, if the matter otherwise were pending in the Court of Appeal, the Supreme Court would grant a petition to transfer to itself prior to decision in the first instance. Generally, cases will be transferred to the district from which the trial court

judgment arose, but exceptions may be made in order to more evenly allocate workload on an objective basis. In the first few years after the amendment, the Supreme Court may transfer up to approximately 30 fully-briefed cases annually, meaning that each of the 105 Court of Appeal justices would receive, for the preparation of an opinion, on average, one capital case every three-and-one-half years.

B. *Augmentation of staff and judicial resources*: In order to accommodate the workload increase of the Courts of Appeal, it may be necessary to add appellate staff attorney positions in affected appellate court districts. As the cases are distributed to the appellate courts, the Supreme Court will monitor workload and assess whether additional appellate staff are needed. Additionally, the Chief Justice will assign justices pro tem to the Courts of Appeal if needed, and will consider whether the addition of new appellate justice positions should be sought.

C. *Timing of, and time for action on, “statement of grounds for reversal of the judgment of the Court of Appeal”*: In every case in which the Court of Appeal affirms a judgment of death, counsel for the defendant must file a “statement of grounds for reversal of the judgment of the Court of Appeal” or a statement indicating no such grounds exist; and the state must file a similar statement of grounds following reversal of a judgment of death. The statement of grounds will include relevant citations to the record, applicable law, and the Court of Appeal’s opinion. Requirements concerning the length, structure, and content of such statements will be established by rule. In addition, special timing rules will apply. Pursuant to California Rules of Court, rule 8.500(e), petitions for review in noncapital cases are due 40 days after decision (30 days from finality plus 10 days in which to petition for review). The time for filing a statement of grounds for reversal of the judgment of the Court of Appeal affirming or reversing a judgment of death should be longer than that for filing a petition for review of a Court of Appeal decision; a period of 90 days after decision (30 days from finality plus 60 days to file the statement) should be sufficient to prepare the necessary statement. Time for the Supreme Court’s action on a statement of grounds for reversal also should be extended beyond that allowed under the rule for petitions for review in noncapital cases (rule 8.512(b)(1)). There should be no automatic denial provision (as set out in rule 8.512(b)(2)) in the event the Supreme Court fails to act on the statement of grounds for reversal within the time allowed. Finally, in light of the extended timing schedule described above, the revised rules should address the publication of Court of Appeal decisions affirming or reversing death penalty judgments. One option would be to specify that each Court of Appeal decision in a transferred death penalty appeal affirming or reversing a judgment of death shall remain published in the Official Reports even after the Supreme Court orders further briefing and argument. Another option is to delay publication of the Court of Appeal decision until after the finality of the Supreme Court’s action upon the “statement of grounds for reversal of the judgment of the Court of Appeal,” either by (1) an order affirming that judgment or (2) requiring briefing, holding oral argument, and issuing a written opinion.

D. *Nature of the Supreme Court's action on the "statement of grounds for reversal of the judgment of the Court of Appeal"*: Pursuant to proposed amended section 12(c), and as further clarified by rule, the Supreme Court's action upon any "statement of grounds for reversal of the judgment of the Court of Appeal" affirming or reversing a judgment of death will differ from the Supreme Court's normal practice with regard to petitions for review in the following respects: (1) Grounds for ordering further briefing on specified issues, together with argument and a written decision thereon, will not be confined to the considerations set forth in California Rules of Court, rule 8.500(b). The Supreme Court also will review each case for error affecting the judgment, including whether the Court of Appeal erred in any assessment of prejudice, as well as to ensure consistency in the disposition of capital-case issues. (2) If the Supreme Court determines that ordering further briefing on specified issues, together with argument and a written decision thereon, is not required because no error affecting the judgment or other ground for further review is raised in the statement of grounds for reversal of that judgment, the Supreme Court will affirm the Court of Appeal's judgment in an order published in the Official Reports. Such a published order is expressly contemplated by the proposed language of amended section 12; this language will establish that such orders are not governed by article VI, section 14, which provides that "[d]ecisions of the Supreme Court . . . that determine causes shall be in writing with reasons stated." Any justice of the Supreme Court will be permitted to file an opinion expressing his or her dissenting or concurring view, and a rule will provide that such an opinion will be published. The rules also will clarify that an affirmance by order issued under these procedures will concern only the judgment of the Court of Appeal, and not necessarily the analysis contained in the decision rendered by that court.