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JUDICIAL COUNCIL OF
CALIFORNIA
ADMINISTRATIVE OFFICE
OF THE COURTS
Public Information Office
455 Golden Gate Avenue
San Francisco, CA 94102-3688
www.courtinfo.ca.gov

415-865-7740

Lynn Holton
Public Information Officer

Supreme Court Proposes Amendments To Constitution in Death Penalty Appeals

Proposed Amendments Would Permit Transfer of Capital Appeals from Supreme Court to Courts of Appeal

San Francisco—Chief Justice Ronald M. George today announced that, after months of study and consideration, the justices of the California Supreme Court unanimously have endorsed a proposal to seek amendment of California Constitution, article VI, section 12, to permit transfer of capital appeals from the Supreme Court to the Courts of Appeal.

The Constitution presently grants the state Supreme Court 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 and are designed to:

- (1) promote the public's and the litigants' interests in both fair and reasonably prompt disposition of capital appeals;
- (2) through a broadened review process, ensure that, as presently, the Supreme Court allows no death penalty judgment to be affirmed or reversed unless the court determines that result to be legally correct; and
- (3) permit the Supreme Court to devote its limited time and resources to significant capital issues and to other important appellate litigation.

The Chief Justice has had positive discussions concerning the proposal with the Administrative Presiding Justices of the six Courts of Appeal, and will further address the issue with them in a meeting on December 3, 2007. In the meantime, the Chief Justice is asking the Judicial Council to expeditiously consider the transfer proposal and to assist in the development of a Legislative Constitutional Amendment for placement on the November 2008 General Election ballot.

(more)

The Court separately is considering corresponding proposals to (1) modify and improve capital-related habeas corpus procedures and (2) increase the number of counsel qualified and willing to accept appointment in capital proceedings.

A copy of the draft capital appeal transfer proposal, with commentary, is attached.

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

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, including when a judgment of death has been pronounced.

(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, (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 summarily affirm the judgment of the court of appeal in an order published in the Official Reports. If the Supreme Court determines that summary affirmance is not appropriate, the Supreme Court shall 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.~~

Comments

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 and thereby (1) promote the public’s and the litigants’ interests in both fair and reasonably prompt disposition of capital appeals; (2) ensure that, as presently, the Supreme Court allows no death penalty judgment to be affirmed or reversed unless the court determines that result to be legally correct; (3) permit the Supreme Court to devote sufficient time and resources to other important appellate litigation that deserves the court’s attention; and (4) allow 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. In order to promote transparency and fairness, in any death penalty appeal in which the Supreme Court summarily affirms 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.

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 counsel-appointment efforts, 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.

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.

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.

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.

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), 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.

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 a greater portion of the cases in order to provide more definitive guidance to the Courts of Appeal.

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:

(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 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 be assigned, for the preparation of an opinion, on average, one capital case every three-and-one-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. 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.

(3) *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 should 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 summarily affirming that judgment or by holding oral argument and issuing a written opinion.

(4) *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: (A) 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); instead, the Supreme Court additionally will review the matter for error affecting the Court of Appeal's judgment — including a determination whether the Court of Appeal erred in any assessment of prejudice. (B) 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 summarily affirm the Court of Appeal's judgment in an order published in the Official Reports. Such a published summary 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 a summary affirmance 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.