

## RESOLUTION 02-01-2008

### DIGEST

#### Capital Appeals: Transfer of Review From Supreme Court to Courts of Appeal

Amends California Constitution, article VI, section 12 to allow the Supreme Court to transfer review of death penalty cases to the appellate courts.

### RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

#### History:

No similar resolutions found.

#### Reasons:

This Resolution amends California Constitution, article VI, section 12 to allow the Supreme Court to transfer review of death penalty cases to the appellate courts. This resolution should be disapproved because it runs counter to CDCBA's position on the death penalty, would not address the backlog on death penalty cases, and could render the death penalty unconstitutional.

This resolution states its goal is to streamline the death penalty appeals process, so that prisoners on death row can be executed more quickly. CDCBA has lobbied for the repeal of the death penalty. This resolution increases the likelihood that a prisoner would be executed before CDCBA's efforts at repeal are successful.

Further, the backlog in death penalty appeals appears to stem from lack of adequate appointed counsel (see *People v. Sheldon* (1994) 7 Cal.4th 1136, 1139 ["It took more than three and one-half years from the date of judgment on remand to secure appellate counsel[.]"], rather than from congestion at the Supreme Court level. (Alarcon, *Remedies For California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 607, 805) ["Since January 1, 1989, the California Supreme Court has filed its decisions in death penalty matters within ninety days of oral argument."] [citing letter from Chief Justice George].)

Finally, by removing one of the key substantive and procedural protections afforded to death row inmates, the resolution could render California's death penalty unconstitutional. The California Supreme Court has repeatedly pointed to the Constitutional provision mandating Supreme Court review of death penalty cases in upholding California's death penalty regime against Eighth Amendment challenges. (See, e.g., *People v. Demetrulias* (2006) 39 Cal.4th 1, 44 [California's use of the death penalty "as regular punishment for substantial numbers of crimes" does not violate the Eighth Amendment, because "administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art VI, § 11; [Pen. Code] §§ 190.1-190.9, 1239, subd. (b).)"].)

This resolution would impact California Constitution article VI section 11 (granting jurisdiction over death penalty appeals to the Supreme Court) and California Rules of Court, rules 8.600-8.642.

This resolution is identical to legislation proposed by Chief Justice George that has since been withdrawn.

## TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Article VI, section 12 of the California Constitution to read as follows:

- 1     § 12  
2             (a) The Supreme Court may, before decision, transfer to itself a cause in a court of  
3     appeal. It may before decision, transfer a cause from itself to a court of appeal or from  
4     court of appeal or division to another. The court to which a cause is transferred has  
5     jurisdiction, including when a judgment of death has been pronounced.  
6             (b) The Supreme Court may review the decision of a court of appeal in any cause.  
7             (c) If the Supreme Court elects to transfer to the court of appeal a cause concerning  
8     a judgment of death, it shall review the resulting decision of the court of appeal affirming  
9     or reversing that judgment. If the Supreme Court concludes, after consideration of written  
10    argument by counsel, that the decision (1) contains no error affecting the judgment, (2)  
11    presents no need to secure uniformity of decision, and (3) does not require resolution of an  
12    important question of law, the Supreme Court may summarily affirm the judgment of the  
13    court of appeal in an order published in the Official Reports. If the Supreme Court  
14    determines that summary affirmation is not appropriate, the Supreme Court shall hold oral  
15    argument and issue a decision in writing with reasons stated, addressing all or part of the  
16    court of appeal's decision.  
17             (ed) The Judicial Council shall provide, by rules of court, for the time and  
18     procedure for transfer and for review, including, among other things, provisions for the  
19     time and procedure for transfer with instructions, for review of all or part of a decision, and  
20     for remand as improvidently granted.  
21             (d) ~~This section shall not apply to an appeal involving a judgment of death.~~

(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** San Diego County Bar Association

## STATEMENT OF REASONS:

Existing Law: Provides an automatic review by the California Supreme Court of all death penalty judgments.

This Resolution: Would allow capital appeals to be transferred to the Courts of Appeal.

The Problem: The justices of the California Supreme Court have unanimously endorsed a proposal to amend the California Constitution to permit transfer of capital appeals from the Supreme Court to the Courts of Appeal. During the past two decades, the growing number of defendants sentenced to death in California has contributed to a delay in the disposition of capital

appeals by the California Supreme Court. The delay impairs the interest of the litigants because, in the event of reversal, the memories of witnesses have failed or the witnesses have become unavailable. The public's interest in finality and enforcement of the law is impaired by a prolonged appeal process. Finally, the backlog of automatic appeals, constituting 20 percent of the Supreme Court's annual output, threatens to overwhelm the docket, impairing its ability to grant review to provide necessary guidance on other important issues.

At the same time, there is no longer a reason 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. Capital appeals very frequently present only the application of settled law to specific facts, the very type of review that the Courts of Appeal typically undertake. The reasons for the Supreme Court initially to review, hold oral argument, and file a written decision in each such matter is no longer compelling as long as the Supreme Court ultimately reviews each of the Court of Appeal decisions not only for uniformity and important questions of law, but for error affecting the judgment.

When similar proposals were discussed in the mid-1980s, there was a concern that panels of the various appellate courts might reach conflicting conclusions on similar legal issues or might unevenly assess prejudicial error, thus triggering frequent "second appeals" before the Supreme Court and leading to an increased delay. However, in the intervening decades, most legal questions concerning capital litigation have been resolved. It is reasonable to conclude that a transfer procedure would decrease delay in the disposition of capital appeals because: (1) the 105 justices of the Courts of Appeal will be able to act more quickly than the single panel of the Supreme Court; (2) even where the Supreme Court finds it appropriate to order further briefing and argument after decision by a Court of Appeal, it will typically need to address only selected issues; and (3) the Courts of Appeals written decisions will substantially assist the Supreme Court in its own disposition by focusing consideration of the issues.

#### **IMPACT STATEMENT:**

This resolution would affect statutes and rules dealing with the handling of capital appeals, including the California Rules of Court, Rules 8.600 through 8.642.

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**RESPONSIBLE FLOOR DELEGATE:** Howard Wayne

#### **COUNTERARGUMENTS**

##### **THE BAR ASSOCIATION OF SAN FRANCISCO**

The Bar Association of San Francisco is concerned that the Supreme Court's proposal to amend the Constitution to allow the transfer of capital appeals to lower courts is flawed in many ways, as brought out during hearings in January 2008 in Sacramento before the California Commission for the Fair Administration of Justice. Details of the budgetary impact of the proposal had not

been analyzed, yet the Chief Justice conceded that more funding would be required even though the Governor had not committed to sources of funding or amounts. Delays in the processing of appeals are well-documented but have little to do with the Supreme Court's management of its docket. Due to inadequate funding of appellate counsel, it takes between four to five years on average for appointment of a lawyer for a condemned prisoner on direct appeal. Appointment of counsel in the habeas proceedings which more often than not inevitably follow usually takes even longer, as conceded by the Chief Justice. According to the California Public Defenders Association, too many death sentences are imposed at trial because the State has reneged on its promise and statutory obligation under Penal Code §987.9 to pay for attorneys' fees, investigation, experts and other expenses at trial, and reimbursements to counties ended about twenty years ago, leaving individual counties to pay for these costs or cut corners when they don't have the money, making it difficult to prepare capital cases properly and supporting claims of ineffective assistance of counsel on appeal. Furthermore, it is important to realize that the proposal would affect only about 25 to 30 cases per year and would not result in more capital appeals being decided, rather it would transfer capital appeals to the courts of appeal so that the Supreme Court would be able to handle more civil cases. The proposal would not reduce the time between jury verdict and completion of the capital appeals process. Finally, there must be concern about the lack of uniformity in the decision of capital appeals issues if capital appeals issues were decided by three judge panels scattered around the state, rather than by the Supreme Court.

#### **ORANGE COUNTY BAR ASSOCIATION**

The resolution should be disapproved because, when the death penalty was allowed to resume in 1977, courts were required to provide for the mandatory review of death penalty cases. The implication was that a state's highest court would conduct the review. The courts were seeking to avoid the "arbitrary and capricious" application of the death penalty by having each under mandatory review. Transfer of cases to the Courts of Appeal could return us back to "arbitrary and capricious".

The death penalty, when applied, should not be left to 104 justices of the Court of Appeal who review these cases in a random and arbitrary manner. We must insure that an innocent individual should never be at risk of execution. That is why our Constitution has required that death penalty cases be reviewed by the highest court in the state. 124 individuals over recent times have had their death sentences overturned. It is obvious mistakes are made. Transferring these cases to the lower courts could lead to misapplication of the death penalty.

The transfer of these cases seems to be an attempt by the Court to hear more civil cases. While the review of death penalty cases involves an inordinate amount of the Court's time, there is no more important case than the hearing of a case involving the possible execution of a defendant. This is not to minimize the importance of civil cases but to highlight the necessity of giving capital cases the most serious attention. This is simply an attempt to shed workload on the part of the Supreme Court. It will not reduce the time the appeal takes; it only changes the identity of the individuals who hear the case.

This resolution in no way addresses the backlog of capital cases to be reviewed. The number of special circumstances in which the death penalty is applied creates numerous opportunities for

the penalty to be applied. In addition, the Supreme Court has failed to address the number of pending appeals in which counsel has been unable to be provided.

In fact, it takes four or five years for an individual to be appointed counsel. It is an enormous undertaking for an attorney to handle a death penalty case as the Court does not properly fund these cases and, in fact, lawyers many times have to pay investigators, experts, and other expenses out of pocket