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## **Reform Needed in California's Death-Penalty Administration**

### **LETTER TO THE EDITOR**

This article appears on Page 6.

Thank you very much for the excellent coverage of last Thursday's hearing of the California Commission on the Fair Administration of Justice in Sacramento ("George Lobbies Panel on Reforming Death Penalty Appeals," Jan. 11, 2008).

For readers who may not have been following the work of the Fair Commission, for the past two years, the commission has been looking broadly at the causes of wrongful convictions in the criminal justice system. We are now turning our attention specifically to the death penalty: Stated generally, our charge is to study the death-penalty process with an eye to whether it is working in a manner that comports with core values of due process and even-handed justice. We will hold two more hearings on the death penalty, one on Feb. 20 in Los Angeles and another on March 28 in Santa Clara. (See the Fair Commission's Web site, [www.ccfaj.org](http://www.ccfaj.org), for specific times and locations). Sometime later this year, we will issue a final report to the state Senate, with recommendations for reform.

Last week in Sacramento, we heard some rather remarkable testimony. Several witnesses - including Chief Justice Ronald George - suggested that our state's death-penalty system is dysfunctional and in need of basic structural reform. The chief justice put forward a bold and important proposal designed to achieve reform. As I pointed out in my comments at the hearing, the chief's willingness to take a proactive role by submitting this proposal is yet another instance of the extraordinary leadership he has shown on any number of issues affecting judicial administration in this state, such as court unification, court funding and many others that are not as well known.

As the Daily Journal reported, I was one of several commissioners who asked questions about the chief's proposal, though certainly not out of skepticism. I raised two distinct issues. First, I asked how other kinds of cases in the district courts of appeal might be impacted if we begin transferring capital appeals for decision in the first instance to those courts. Capital cases are hugely complex, and the time and attention that must be given to them has created a massive backlog in the Supreme Court, with inevitable impact on the court's ability to process other cases efficiently. I think it is fair to ask whether, by transferring capital cases to the courts of appeal, we are simply shifting that burden into a part of the appellate system where efficient, rapid processing of appeals is just as important as it is in the Supreme Court, some might say more so, because that is where most appellate litigation occurs.

Second, I pointed out that, when the citizens of the state of California adopted the death penalty in its current form, they voted for a scheme calling for automatic appeals in capital cases directly to the Supreme Court. The chief's proposal calls for continued mandatory review by the Supreme Court in all capital cases, but in the form of summary review, without opinion, following review in the Court of Appeal; the court would retain the discretionary power to decide capital cases on a plenary basis (with full briefing, oral argument and a reasoned opinion), thus bringing capital appeals roughly in line with the style of discretionary review that characterizes most of the court's work. My question about this aspect of the chief's proposal was whether summary review by the court can ever serve as an adequate substitute for the system of full Supreme Court review that we now have in all cases. The people voted for a system in which all seven members of the Supreme Court personally decide each death case on a plenary basis; arguably, that reflects the high priority the citizens place on these cases. It seems to me that no system in which the Supreme Court undertakes anything less than full review in every case can ever accomplish the same thing, even where there is review in the Court of Appeal.

Now, to be sure, as the chief pointed at Thursday's hearing, the reality we face today is that there are vastly more death cases on the Supreme Court's docket than anyone could have envisioned 30 years ago, and those cases are choking the Supreme Court's workload. To deal with this, the chief has made the entirely sensible suggestion that the Legislature, by referendum, place a ballot initiative before the people that would authorize the intermediate courts of appeal to share the burden. What the people approved more than 30 decades ago can be changed by another vote of the people. Certainly, that is true, but it also

invites discussion about what else ought to be put before the people for change. While the chief carefully (and understandably) confined his reform proposal to appellate administration of the death penalty, he also pointed out that his proposal is not set in stone. It is meant to mark the beginning of an important dialogue.

Other witnesses presented reform ideas that are perfectly compatible with the chief's proposal. For example, any legislative ballot referendum could reduce the number of "special circumstances" that render murder cases death-eligible (we currently have 33 such "special circumstances"), thus narrowing the universe of homicides that can be charged capitally and ultimately cutting down the volume of capital cases in the system. In other words, rather than deal with the backlog problem in the Supreme Court solely by trying to re-route cases through the appellate system, we might wish to deal with the root of the problem more directly. A number of eminent witnesses testified on this point. Professor Larry Marshall of Stanford Law School, who was particularly eloquent in addressing it, said that narrowing the scope of the death penalty would be the most effective way to bring about reform, but the broader thrust of his comments was inescapable. Marshall testified that we are now at a crossroads with the death penalty in California, and if we are unwilling to pay for the kind of system that is needed to handle capital punishment in a manner that comports fully with our core values of due process and equal protection, it may be that the citizens should be asked the ultimate question: Is the death penalty a luxury we cannot afford?

The Fair Commission has not been charged with addressing the morality of the death penalty, and we will not be doing so. We are concerned solely with the integrity of the process. It would be wholly inappropriate and premature for me to comment here on what the Fair Commission might ultimately have to say about the death-penalty process in California, since we are only at the beginning of our hearings on the subject. Even at this stage, however, one thing can be said for certain: Everyone who testified at last week's hearing agreed that fundamental changes are needed in this state's system of death-penalty administration. I know that I can speak for all of the commissioners in thanking Chief Justice George for his willingness to take a leading role in this important debate about reform.

**Jon B. Streeter, Vice chairman  
California Commission on Fair Administration of Justice**

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