Reform death penalty appeals

Allowing state appellate courts to review cases would help ease a huge backlog.

By Ronald M. George

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Thoughtful individuals on both sides of the death penalty debate should be able to agree on one thing: The existing system for handling capital appeals in California is dysfunctional and needs reform. The state has more than 650 inmates on death row, and the backlog is growing.

Recently, my colleagues and I proposed a state constitutional amendment that would address part of the problem by permitting death penalty appeals to be heard by the state appellate courts -- with subsequent review by the state Supreme Court. Under the current system, death penalty appeals (unlike all other cases) are overseen exclusively by the Supreme Court.

Without change, the result is clear: We will have a malfunctioning death penalty system, a state Supreme Court increasingly unable to fulfill its essential role in our governmental system -- or both. Already, the seven justices of the California Supreme Court no longer can handle the state's entire death penalty appeal workload while at the same time fulfilling the court's primary purpose: to consider the 9,000 to 10,000 petitions it receives annually and to hear those cases requiring the resolution of legal issues of statewide importance. Death penalty appeals, of course, are very significant, but they are only one part of the work of the state's highest court.

California's Supreme Court issues 110 to 115 opinions annually, almost twice as many as the U.S. Supreme Court. Typically, these include more than 20 capital appeals. (Another 30 capital-case-related habeas corpus matters also are disposed of each year.) Yet this is only a small portion of the cases that are awaiting our attention. At the moment, nearly 400 capital appeals are pending before the court, about 80 of which are fully briefed and ready for oral argument and decision. About 130 non-death-penalty cases presenting important civil and criminal issues also are pending. 80 of them fully briefed, and the court selects additional cases for review at almost every weekly conference. Only if the state Supreme Court were to defer these other cases could it more quickly address the backlog of capital appeals -- and even then, new death penalty appeals and new legal issues requiring review would continue to pour into the system.

In short, the limited judicial resources of the Supreme Court create a bottleneck that, if the system is not reformed, guarantees years of delay not only in capital cases but in the development of California's law in a rapidly changing world.

Many interests are affected by this. The public, including the families and friends of victims and of those convicted, has a keen interest in finality and enforcement of the law. Unnecessary delay in death penalty cases frustrates the prosecution and the defense, as well as those people and institutions awaiting guidance from the high court's decisions in civil and noncapital criminal cases. Moreover, when a reversal occurs long after judgment, and a retrial is necessary, memories may have faded and witnesses often are unavailable.

The proposed constitutional amendment would continue to require that all death penalty appeals be filed in the state Supreme Court, but would allow the court to spread the capital case workload by transferring some of these cases to the 105 justices who serve in the state's six appellate court districts. The Courts of Appeal now have available almost 30 years of U.S. and California Supreme Court decisions settling the vast majority of issues raised by the reinstatement of the death penalty. Our proposal guarantees that the state Supreme Court will not allow any affirmation or reversal by those appellate court justices to stand unless the state Supreme Court concludes the result is legally correct. Moreover, if any significant legal issues or conflicts in the law arise, the state Supreme Court would agree to review the case, as the court does in all other matters.

This plan guarantees significantly more high court review of capital cases than occurs under the federal death penalty system, in which the intermediate appeals court has the final word in almost every case.

Because we would have a larger pool of justices working on capital cases than we have now, these cases could be heard more quickly and be completed sooner, even with subsequent Supreme Court review. Moreover, the plan also would allow the Supreme Court to direct its attention to the most substantial issues in each capital case with the benefit of the Court of Appeal's opinion and the parties' responses.

The proposed amendment would help relieve these burdens on the state's highest court, but it is only one part of a much-needed comprehensive overhaul. The system will remain badly out-of-balance unless two other issues -- neither requiring a constitutional amendment -- also are addressed: First, we must have funding adequate to provide a sufficient number of prosecution and defense attorneys qualified to handle death penalty appeals and related matters, and for increased staff for the Courts of Appeal to absorb those courts' expanded responsibilities.

Second, death penalty habeas corpus procedures must be reconsidered. In habeas corpus petitions, defendants may argue that factors outside the trial record affected the judgment. Typical claims include ineffective assistance of counsel or improper withholding of information by the prosecution. Other jurisdictions require that habeas corpus proceedings be initiated in the trial courts. In California, we currently require that capital habeas corpus petitions begin in the Supreme Court.

In order to be put before the voters at the November election, the proposed constitutional amendment must be endorsed by two-thirds of the members of our state Assembly and Senate. I have no illusions: Achieving that supermajority may be difficult.
But I hope that concerns for "good government" will win out and that we shall see bipartisan support not only for this proposal but for the necessary funding for counsel and for appropriate changes in the habeas corpus process. With these changes, we shall be able to achieve the right balance in our system, ensure that capital cases receive the careful review they deserve, and enable the California Supreme Court to continue to carry out its essential role in administering civil and criminal justice in our state.

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