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THE CRISIS OF VOLUME IN CALIFORNIA'S APPELLATE COURTS:

A REACTION TO *JUSTICE IN THE BALANCE* 2020 AND A PROPOSAL TO REDUCE THE NUMBER OF NONMERITORIOUS APPEALS*

*Justice William F. Rylaarsdam***

I. INTRODUCTION

This paper reviews and evaluates the recommendations pertaining to the future of the appellate courts contained in the 1993 report of the Commission on the Future of the California Courts¹ and a report to the Commission prepared by Professor J. Clark Kelso.² The author believes that California's intermediate appellate courts face a

* This paper is based on a thesis submitted in partial fulfillment of the requirements for the degree of LL.M. in the judicial process at the University of Virginia School of Law. Portions of Parts II and III with 1995-96 figures appear in Hon. William F. Rylaarsdam, *The Future of California's Appellate Process: The 2020 Commission*, CAL. LITIG., Spring/Summer 1998, at 4.

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1. COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, *JUSTICE IN THE BALANCE 2020* (1993) [hereinafter *JUSTICE IN THE BALANCE 2020*].

2. J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433 (1994).

“crisis of volume,” and both the Commission and Professor Kelso have failed to recommend the type of drastic changes in appellate procedure that are essential for these courts to continue to perform their constitutional duties.

The author recommends that an alternative form of appellate review be adopted which would permit the courts to resolve obviously nonmeritorious criminal and juvenile appeals in a more summary fashion, without the present requirements for oral argument and a full written opinion in all such cases.³ The provisions of California Penal Code section 1237.5⁴ now require the trial judge to issue a “certificate of probable cause” before a criminal defendant may appeal from a conviction following a plea of guilty or *nolo contendere*.⁵ The author believes these provisions should be amended to require such a certificate before any criminal defendant or any party who suffers an adverse judgment in juvenile court may appeal from a judgment or postjudgment order. The trial judge should issue the certificate under an “arguable issue on appeal” standard, while the appellate court should review denied certificates by way of a petition for leave to appeal, the denial of which would not require oral argument or a written opinion. It is unclear at this time whether such a change would require an amendment to the California Constitution.

II. THE REPORT OF THE COMMISSION

A. *The Commission's Optimistic View of the Future*

In 1993, after two years of study, a commission created by then California Chief Justice Malcolm Lucas issued its report recommending significant changes in dispute resolution for California litigants, both in the courts and in private venues, over the next several decades.⁶ The Commission on the Future of the California Courts, composed of a distinguished panel of business and labor leaders, law enforcement representatives, lawyers, and trial and appellate judges, entitled its report *Justice in the Balance 2020*.⁷ The report represents

3. See *infra* notes 87-89 and accompanying text.

4. CAL. PENAL CODE § 1237.5 (West Supp. 1998).

5. See *id.*

6. See JUSTICE IN THE BALANCE 2020, *supra* note 1, at 40-53.

7. See *id.* at ii-iii.

an extensive evaluation of both civil and criminal litigation processes in California, and contains over 200 recommendations and strategies.⁸ Specifically, the Commission suggests that these measures, if adopted, will streamline and economize dispute resolution in future years, while recognizing what Commission Chairman Robert R. Dockson noted in his letter of transmittal as being the “issue that underscores virtually every other area in the report, and that is the critical importance of justice.”⁹

Despite the merit of many of the Commission’s recommendations, the section of the report dealing with the appellate courts¹⁰ fails to propose the more drastic changes that are essential to permit California’s intermediate appellate courts to continue to fulfill their functions. Also, the report fails to recognize the “crisis of volume” which is about to overwhelm the California appellate courts. This approaching crisis demands changes far more drastic than those suggested by the Commission.

Justice in the Balance 2020 paints an unrealistically rosy picture of California’s appellate courts by the year 2020:

In 2020 new methods of dispute resolution and the emergence of a truly multidimensional justice system have had a significant impact on appellate justice. Because disputants tend to be more directly involved in resolving their disputes they tend to be more satisfied with the results and thus less likely to appeal them. Appellate justice continues to embrace the search for appropriate and effective alternative dispute resolution techniques.

Flexible process is the rule, not the exception, in 21st-century appellate justice. In the waning years of the last century, constitutional, statutory, and rule-based impediments to flexibility in the appellate process were eliminated. Briefs, arguments, and written opinions are now seen and heard only where genuinely needed. More effective communication among the appellate and trial courts, the federal bench, and the legislative and executive branches has

8. *See id.* at ii.

9. *Id.*

10. *See id.* at 163-172.

created new harmonies in the drafting and interpretation of the law.

Technological integration is a hallmark of multidimensional justice. Appellate transcripts are on-line; motions and briefs are submitted electronically; justices often hear

arguments via interactive video media; the Appellate System Network gives justices access to all public and private materials¹¹

Assuming all the predicted wonders of technology come about—if not in the now rapidly waning days of the century, then in the following decades—the Commission’s recommendations fail to address a basic problem which will persist: the inability of a relatively fixed number of judicial and staff personnel to cope with ever-increasing caseloads. Although technological innovations will help, the fact remains that, whether on screen or on paper, records must still be read, briefs studied, cases and statutes researched, and opinions written. The limitations imposed by the human mind in accomplishing these tasks will limit the additional efficiencies technology will bring to the appellate process.

The Commission predicts that in another twenty-five years, “[b]riefs, arguments, and written opinions [will be] seen and heard only where genuinely needed.”¹² Yet, the Commission fails to tell us on what basis it concluded that human nature and the culture of the legal profession will suddenly change, parties become less litigious, lawyers less motivated to file meritless appeals, and convicts less persistent in seeking cost-free appellate relief, even in the face of certain failure. Commenting on this Pollyanna-ish view of the future, Professor Gerald F. Uelman notes that the Commission’s report proposes

a severe outbreak of collective myopia in which the chief ingredient for reform is more of the same ingredients. The Commission envisions a future populated by really smart judges and really cooperative lawyers, a world in which the legislature has apparently been suspended and the initiative

11. *Id.* at 163.

12. *Id.*

process abolished. In short, the future is a mythical place where appellate litigation is declining because the law has been "settled" and litigants are largely satisfied with the justice meted out in the trial courts.¹³

B. The Problem of Meritless Appeals

The limitation of "[b]riefs, arguments, and written opinions" to those cases "where genuinely needed,"¹⁴ as predicted by the Commission, will not come about by merely wishing it. If we can devise procedures to accomplish this salutary goal, significant efficiencies are possible. As explained below, present procedures, which result in all appeals being given "full dress treatment" by the California intermediate appellate courts, are the single most significant bar to efficiency.¹⁵ This "full dress treatment" results from the requirements for oral argument and a full written opinion in Article VI, Section 14 of the California Constitution, as interpreted by the California Supreme Court.¹⁶ Even if appeal as a matter of right were retained, deletion of the requirements for oral argument and full written opinions would permit the California appellate courts to manage cases on a differential basis, similar to the method now practiced in the federal appellate courts.¹⁷

Rules permitting early screening of nonmeritorious appeals, particularly in the area of criminal and juvenile law, may reduce appellate workloads by as much as 50%.¹⁸ If implemented, such rules

13. Gerald F. Uelmen, *Creating an Appetite for Appellate Reform in California*, 45 HASTINGS L.J. 597, 598 (1994).

14. *See supra* note 11 and accompanying text.

15. *See infra* notes 87-89 and accompanying text.

16. *See infra* notes 87-89 and accompanying text.

17. *See, e.g.*, FED. R. APP. P. 34(a); 9TH CIR. R. 36-1.

18. *See* Robert Ablon, 'Routine' Case Sparks Change in Law and 3rd District Rules, THE RECORDER, June 10, 1997, at 1. When inquiring whether counsel wishes to have an oral argument, the Third District classifies cases as "routine" when it has reviewed the briefs and concluded that affirmance in an unpublished opinion (i.e., one which merely restates existing law) is indicated. *See id.* The article quotes Justice Puglia, the district's presiding justice, as indicating that 80% of criminal appeals and 15% of civil appeals fall into this category. *See id.* at 4. Since over 60% of all appeals are in criminal proceedings, *see infra* notes 32-36 and accompanying text, the courts' ability to resolve 80% of these cases in a more summary fashion would have a dramatic impact

would permit the California Courts of Appeal to operate efficiently and expeditiously for many years to come, with little or no increase in personnel. Such a change would require the abolition of "full dress" appeal as a matter of right in these cases.

Procedures can be devised to eliminate the current requirement that appellate courts engage in the kind of "make-work" involved in processing obviously nonmeritorious appeals, while preserving all constitutional protections to which litigants are entitled. Only the adoption of such procedures will have a significant impact on appellate workloads. It is therefore unfortunate that the Commission concluded "[t]he appeal as of right should be retained."¹⁹ The appeal "as of right" cannot be justified where a high percentage of appeals are, if not frivolous, obviously without merit.

As the problem of meritless appeals is particularly grave in the area of criminal and juvenile appeals, the procedural changes recommended here address only those cases. This is not to suggest all civil appeals are meritorious. However, because civil litigants bear the cost of their appeals, economic restraints make the problem of obviously nonmeritorious appeals in civil cases far less significant. Civil litigants tend to be more careful in selecting cases to appeal, as illustrated by the ratio between superior court judgments and appeals in civil as compared to criminal cases. For example, in 1996-97, there were 20,541 general civil dispositions after trial in California superior courts,²⁰ and 7,963 notices of appeal in such cases.²¹ During the same period, there were 7,258 criminal dispositions after trial in superior courts,²² and 8,818 notices of appeal in criminal cases.²³

on the courts' workload.

19. JUSTICE IN THE BALANCE 2020, *supra* note 1, at 171.

20. See 1 JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, 1998 COURT STATISTICS REPORT, at 47 tbl.6 col.(D) (1998) [hereinafter 1998 COURT STATISTICS REPORT].

21. See *id.* at 107 tbl.2.

22. See *id.* at 52 tbl.9 col.(C).

23. See *id.* at 107 tbl.2. The excess of appeals over dispositions after trial results from appeals that may be filed from postjudgment orders. For example, a criminal defendant who pleads guilty may appeal from the sentence imposed. See CAL. PENAL CODE §§ 1237, 1466(a)(2) (West Supp. 1998). In addition, a defendant who pleads guilty may appeal from an earlier denial of a motion to suppress evidence. See *id.* § 1538.5(m). Likewise, appeals in civil cases may be from postjudgment orders, such as orders awarding costs or attorneys' fees,

Although both civil and criminal appeals include some appeals from orders other than judgments after trial, civil appeals represent 39% of dispositions after trial, compared to 121% for criminal appeals. Yet this is probably not the whole story; litigants settle or otherwise abandon a significant percentage of civil appeals before the record is even prepared, while there is generally no basis for such settlement or abandonment in criminal appeals.

III. THE "CRISIS OF VOLUME"

The Commission's report notes that "[i]n 1991-92, the 88 justices of the Court of Appeal were faced with 21,628 new contested matters (246 per justice), an increase of 20 percent per justice—37 percent system-wide—over 10 years earlier. Projecting future dockets on a straight-line basis, the Court of Appeal will, by 2020, see 40,617 filings per year."²⁴ The Commission predicts, however, that by the year 2020, "[m]any or most disputes will be resolved through mediation or other forms of assisted negotiation, early neutral evaluation, and other consensual processes from which there is no right of appeal,"²⁵ and therefore "the appellate court dockets of 2020 may be significantly more manageable than those of 1993."²⁶ Whether this optimistic forecast is reasonable for civil cases is beyond the scope of this paper. Alternative dispute resolution is growing; civil filings in superior courts have been decreasing;²⁷ and, since we may presume a rather direct correlation between civil filings in superior courts and appeals to intermediate appellate courts, it may not be unreasonable to assume civil appeals will decrease unless there is a change in this trend.

or may be from judgments entered without trial, such as orders of dismissal or summary judgments.

24. JUSTICE IN THE BALANCE 2020, *supra* note 1, at 164.

25. *Id.* at 165.

26. *Id.*

27. General civil filings in California Superior Courts declined from 258,934 during 1986-87 to 186,423 during 1996-97, representing a 23% reduction in civil filings. See JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, 1998 ANNUAL REPORT, at 109 tbl.5 col.(B) [hereinafter 1998 ANNUAL REPORT]; 1998 COURT STATISTICS REPORT, *supra* note 20, at 45 tbl.5 col.(B).

Still, this assumed correlation is not a given. The author is not aware of studies that disclose the types of cases being diverted to alternative dispute resolution, as compared to those which continue to be filed in superior courts. Anecdotal evidence, however, suggests that the bulk of cases presently resolved through arbitration and other alternative dispute resolution mechanisms are the smaller cases. It is not unreasonable to assume that such cases, where the parties have less money at stake, would be less likely to be appealed. Also, although there has been a significant decrease in civil filings in California superior courts, the number of trials has actually increased. During 1986-87 there were 3,022 civil jury trials in California superior courts,²⁸ while there were 3,351 during 1996-97,²⁹ an increase of 10%. After-trial dispositions of all "general civil" cases decreased by 8% during the same period, from 22,147³⁰ to 20,541.³¹ The decrease in civil filings is unlikely to result in a significant decline in civil appeals, at least in the short run, because a significant proportion of appeals are presumably from judgments after trial. In addition, appellate courts have seen a substantial increase in appeals, at least anecdotally, after the grant of summary judgment.

Well over 60% of all appeals are in criminal or juvenile cases³² and nearly all of these appeals involve felonies.³³ Hence, the availability of alternative dispute resolution mechanisms, which the Commission predicts would take these cases out of the court system, is extremely limited.³⁴ It is therefore unreasonable to project a

28. See 1998 ANNUAL REPORT, *supra* note 27, at 112 tbl.7 cols.(C), (G).

29. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 48 tbl.7 cols.(C), (G).

30. See 1998 ANNUAL REPORT, *supra* note 27, at 111 tbl.6 col.(D).

31. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 47 tbl.6 col.(D).

32. In 1996-97, a total of 16,881 records were filed in California's intermediate appellate courts. Of these, 10,494 were criminal and juvenile cases. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 24 tbl.4 cols.(B), (D), (E).

33. In California, infractions and misdemeanors are prosecuted in the municipal courts. See CAL. PENAL CODE § 1462 (West Supp. 1998). Appeals from misdemeanor convictions are addressed to the appellate departments of the superior courts. See *id.* § 1466. However, where a defendant is charged with a felony but is subsequently only convicted of a misdemeanor, an appeal is made to a court of appeal. See *id.* § 1235 (West 1982).

34. The Commission does suggest alternatives that would reduce criminal prosecutions: "selective decriminalization of nonviolent property offenses;

decrease in criminal appeals, absent major structural changes. In 1986-87, there were 5,093 criminal appeals in California.³⁵ In 1996-97 there were 8,610 such appeals,³⁶ an increase of 69%. Assuming a similar increase over the succeeding decade, California's appellate courts would be faced with over 13,000 criminal appeals in 2007.

This is not the first time California's appellate courts have confronted a crisis of inadequate resources in the face of a rapidly increasing caseload. In 1981, the California Assembly Judiciary and Criminal Justice Committees conducted hearings to consider changes in appellate processes to confront the increasing backlogs in appellate resolutions.³⁷ At that time, the legislators already perceived criminal appeals to be the primary problem.³⁸ They made and discussed a number of proposals for changes in criminal appellate procedure, some of which are addressed below; none of these proposals were adopted. Instead, the legislature created eighteen additional appellate judgeships, a 23% increase in the appellate judiciary, and subsequently provided an appellate court budget that permitted an increase in staff attorneys to assist the judiciary.³⁹ Since that time, the legislature has made additional small increases in the appellate judiciary and has continued to increase the ratio between appellate judges and staff attorneys.⁴⁰ However, these increases in appellate

greater use of diversion programs; and community-based criminal justice." JUSTICE IN THE BALANCE 2020, *supra* note 1, at 145. However, recent trends tend towards criminalization rather than decriminalization, *see id.* at 146-47; diversion programs are of limited use when dealing with felonies; and "community-based criminal justice" is more likely applicable to misdemeanors than to felonies.

35. See 1998 ANNUAL REPORT, *supra* note 27, at 89 tbl.5 col.(E). The figures presented here and in the succeeding footnote reflect contested superior court dispositions concerning criminal records on appeal filed.

36. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 24 tbl.4 col.(D).

37. See *Court of Appeal Efficiency: Hearing Before the Assembly Judiciary and Criminal Justice Comms.*, Assembly doc. 1981, no. 945 (Cal. 1981) [hereinafter *Court of Appeal Efficiency*].

38. See *id.* at 9-10, 27-29, 33-36, 42-44, 45-48, 50-59, 60-67, 80-81, 90-116.

39. See Act of Sept. 29, 1981, ch. 959, 1981 Cal. Stat. 3643.

40. In 1989-90, there were 2.93 staff attorneys per justice; by 1996-97, the number of staff attorneys per justice had increased to 3.28. See Memorandum from the Administrative Office of the Courts (March 18, 1998) (on file with the *Loyola of Los Angeles Law Review*) [hereinafter Administrative Office Memorandum].

personnel have failed to keep pace with the increase in the appellate caseload.⁴¹

Continued increases in appellate court personnel are neither desirable nor politically feasible.⁴² Alterations in the procedures by which the appellate courts consider and decide criminal and juvenile appeals can and should be made. After discussing the limitations which presently prevent the courts of appeal from adopting more efficient procedures, the remainder of this paper will discuss and evaluate an alternative procedure to enable appellate courts to handle a larger volume of criminal and juvenile cases without impairing the fairness of the process.

IV. EVALUATION OF ALTERNATIVE PROCEDURES

Professor J. Clark Kelso prepared a report, which was subsequently published, for the Commission on the Future of the California Courts.⁴³ This report appears to form the basis for the Commission's recommendations pertaining to appellate courts. The report discusses and evaluates most of the procedures that have periodically been suggested to deal with increasing appellate workloads. Professor Kelso discusses suggestions for the intermediate appellate courts under the following headings:

- (1) Increase the Number of Appellate Justices or Staff or Both;⁴⁴
- (2) Decrease the Number of Appeals;⁴⁵
 - a. Providing Economic Deterrents to Appeal;⁴⁶
 - b. Increasing the Number of Discretionary Appeals;⁴⁷
 - c. Increasing the Use of the Superior Court Appellate Department;⁴⁸
 - d. Reducing the Need for Appeals;⁴⁹

41. See *supra* note 32 and accompanying text.

42. See *infra* notes 57-60 and accompanying text.

43. See Kelso, *supra* note 2.

44. *Id.* at 442-43.

45. *Id.* at 443.

46. *Id.* at 443-45.

47. *Id.* at 445-47.

48. *Id.* at 447.

49. *Id.* at 447-50.

In addition, Professor Kelso makes a number of excellent suggestions regarding the appellate process itself, which are beyond the scope of this paper.⁵⁰ The remainder of this paper will evaluate Professor Kelso's recommendations under each of the above-noted headings. The author agrees with much of what Professor Kelso states, but disagrees particularly with his evaluation of the desirability of providing for discretionary appeals in certain criminal and juvenile cases.

A. Increasing the Number of Appellate Justices or Staff or Both

1. Increasing the number of justices

Professor Kelso notes that the number of majority opinions each appellate court justice authored averaged 127 in 1991-92.⁵¹ During the most recently reported fiscal year, 1996-97, this average rose to 148.⁵² Professor Kelso quotes Professors Carrington, Meador, and Rosenberg, who advise that "[i]n the absence of special circumstance, no state appellate court operating at the first level of review should be asked or permitted to make more than 100 dispositions on the merits per judgeship per year."⁵³ A panel of three justices decides each case. Therefore, under the Carrington, Meador, Rosenberg standard, each appellate justice would be responsible for the resolution on the merits of some 300 cases per year. Based on actual figures in California for 1996-97, this number presently averages almost 450 cases per justice,⁵⁴ because this is an average, many appellate justices actually carry even heavier caseloads. For example, in

50. They include suggestions for greater efficiency in the following areas: preparation of the record for appeal, preparation and filing of adversary briefs, determination as to whether the appeal qualifies for special treatment, argument before the panel of judges, application of an appropriate standard of appellate review, and communication of the court's opinion to the public. *See id.* at 457-86.

51. *See id.* at 441.

52. *See* 1998 COURT STATISTICS REPORT, *supra* note 20, at 16 fig.3.

53. Kelso, *supra* note 2, at 441 (quoting PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 230 (West ed., 1976)).

54. This figure is based on 13,355 written opinions and 88 justices. *See* 1998 COURT STATISTICS REPORT, *supra* note 20, at 110 tbl.5; Administrative Office Memorandum, *supra* note 40.

the author's division, the third division of District IV, five justices issued 852 opinions in 1996-97,⁵⁵ over 170 each. This means that, on average, each justice in this division was responsible for over 500 opinions.

Using a standard of 105 opinions per justice per year, Professor Kelso projected that, absent changes in the appellate process, 125 justices would have been needed by 1995 and 200 additional appellate judgeships by the year 2020.⁵⁶ Thus, based on Professor Kelso's projections, the California Court of Appeal, if adequately staffed and absent procedural changes, should have more than 300 justices by 2020. Even maintaining the present average of 148 opinions per justice would require at least a doubling of the appellate judiciary over the next twenty-five years.

An increase in appellate judgeships to keep pace with increasing workloads is not likely to be politically feasible. As early as October 1981, the California Assembly's Judiciary and Criminal Justice Committees recognized that the legislature must consider methods other than a continuous increase in appellate judicial positions to deal with ever-increasing appellate caseloads.⁵⁷ In 1995-96, total expenditure for the California Court of Appeal—then consisting of eighty-eight justices and their staffs—was over \$73 million, excluding funds courts paid to counsel appointed to represent indigent criminal defendants.⁵⁸ Disregarding inflation, an increase to 200 justices would raise the cost to nearly \$200 million. Allowing for only a modest inflation of 2% per year, this figure rises to almost \$250 million, or \$330 million if the cost of counsel appointed to represent indigents is included. Using Professor Kelso's estimate of the need for 300 appellate justices,⁵⁹ these figures rise to \$375 million and almost \$500 million, respectively.

The California legislature is not likely to increase appellate court budgets to this extent. Experience teaches that, even where the number of positions was increased from time to time, such increases were always in response to an already developed crisis of backlogs and

55. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 110 tbl.5.

56. See Kelso, *supra* note 2, at 442.

57. See *Court of Appeal Efficiency*, *supra* note 37, at 6.

58. See Administrative Office Memorandum, *supra* note 40.

59. See Kelso, *supra* note 2, at 442.

rarely adequate to respond to the actual increase in workload. Courts are subject to the "less government" philosophy, which now affects our public institutions at all levels to the same extent as all other arms of government.

Aside from the political realities, an ever-expanding intermediate appellate court is not desirable from a policy standpoint. In the process of deciding cases, the court performs another equally important function: it shapes the law. In doing so, the court should devise clear rules that not only guide the trial courts but also teach prospective litigants what their rights and duties are, thus limiting the need for litigation in the first place. Uncertainty in the law feeds the need for litigation and appeals. As California's intermediate appellate court has grown in size, its rule-setting function has weakened. Criticism is already mounting that the court is turning into a babble of voices failing to provide clear guidance to trial courts and litigants.⁶⁰

Although *stare decisis* compels California trial and intermediate appellate courts to follow the decisions of the California Supreme Court,⁶¹ the decision of one court of appeal panel is not binding on another panel. This is true whether the panel resides in the same appellate district or another, or even in the same division.⁶² In the face of conflicting court of appeal decisions, a trial court is free to choose which precedent to follow, even if one of the conflicting decisions originated in an appellate district other than the one where the trial court sits.⁶³ A rule requiring court of appeal panels to follow the decisions of other panels is not necessarily desirable, as this would tend

60. See, e.g., Kelso, *supra* note 2, at 490-92; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 297-334 (1996).

61. See, e.g., *People v. Greenwood*, 182 Cal. App. 3d 729, 734, 227 Cal. Rptr. 539, 542 (1986); *Orange County Water Dist. v. City of Riverside*, 173 Cal. App. 2d 137, 165-66, 343 P.2d 450, 465 (1959).

62. See, e.g., *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4, 235 Cal. Rptr. 396, 400 n.4 (1987); *Los Angeles Police Protective League v. City of Los Angeles*, 163 Cal. App. 3d 1141, 1147, 209 Cal. Rptr. 890, 893 (1985).

63. See *McCallum*, 190 Cal. App. 3d at 315 n.4, 235 Cal. Rptr. at 400 n.4. When a novel issue first arises, it frequently and desirably results in a "debate" between several panels before a final resolution is reached. Such a "debate" between the different panels tends to improve the quality of the ultimate resolution of the issue.

to create a rush to judgment when novel issues arise.⁶⁴ Whether desirable or not, if there is a further increase in the appellate judiciary, the present state of California law pertaining to *stare decisis* will necessarily result in an increased uncertainty in the law. Such uncertainty not only increases the demand for the courts' services but also reflects negatively on the public's perception of judicial legitimacy.

2. Increasing the number of staff attorneys

Professor Kelso recommends increasing the number of staff attorneys assigned to the court of appeal.⁶⁵ The Commission adopted this recommendation: "[b]efore increasing the number of Court of Appeal justices, the Legislature should increase the court's staff resources."⁶⁶ As of 1996, there were 289 staff attorneys assisting 88 justices in the California Court of Appeal⁶⁷ or 3.3 attorneys per justice. Typically, two or three attorneys work directly with the justice; others work as "central staff" and as "writ attorneys." Those employed in the latter capacities review and make recommendations pertaining to petitions for extraordinary writs. In some divisions, they also perform a screening function and draft opinions in what are determined to be "routine" cases. Whether attorneys work under the immediate supervision of the justice to whom they are assigned or as "central staff," the justices of the court issue all its decisions. Thus, the three justices who ultimately issue the opinion remain responsible for the product. In order to carry out their responsibilities, the justices must devote time to each opinion to check the record, briefs, research, and conclusions drawn, and to edit the final product.

Under a system in which a single justice may be responsible for as many as 500 opinions per year, staff attorneys obviously must perform almost all of the original work. Most judicial time is spent reviewing staff attorneys' work. However, the present system at least allows justices some time to do the original work on cases they consider of particular significance. Increasing the number of staff

64. Perhaps such a rule could work if combined with a provision for some form of *en banc* review at the court of appeal level.

65. See Kelso, *supra* note 2, at 443.

66. JUSTICE IN THE BALANCE 2020, *supra* note 1, at 169.

67. See Administrative Office Memorandum, *supra* note 40.

attorneys per justice would necessarily decrease judicial participation in the very process required of them. Although an increase in staff assistance to the appellate judiciary may be necessary and inevitable, there is substantial literature critical of this development in appellate jurisprudence and the resulting "ghostwriting" of opinions by anonymous bureaucracies.⁶⁸

B. Decrease the Number of Appeals

Absent changes in appellate procedure to increase appellate court productivity, the only alternative to expanding the number of appellate justices, staff attorneys, or both, is to devise strategies to reduce the number of appeals. In this regard, Professor Kelso discusses four proposals: (1) providing economic deterrents to appeal; (2) making more appeals discretionary; (3) reassigning some appeals to the superior courts' appellate departments; and (4) reducing the likelihood of trial court error, thereby reducing the need for appeals.⁶⁹

1. Economic deterrents to appeals

There exist built-in economic deterrents to meritless civil appeals. Litigants bear the costs associated with such appeals, and generally a well-informed litigant will avoid incurring such costs to pursue a meritless appeal. As an additional economic deterrent to meritless appeals, the legislature should consider adopting the British system, whereby the losing party pays the winner's attorneys' fees.⁷⁰ Professor Kelso suggests that, as a further disincentive, the legislature might consider a rule requiring the losing party to reimburse the court for its costs.⁷¹ An evaluation of these suggestions, all of which appear to have merit, is beyond the scope of this paper.

The situation pertaining to economic disincentives is very different with respect to criminal appeals. Because most criminal defendants are indigent, the state pays their attorneys' fees.⁷² There is

68. See, e.g., Richman & Reynolds, *supra* note 60, at 287-88.

69. See Kelso, *supra* note 2, at 443-50.

70. See Charles W. Branham III, Note, *It Couldn't Happen Here: The English Rule—But Not in South Carolina*, 49 S.C.L. REV. 971, 973-75 (1998).

71. See Kelso, *supra* note 2, at 444.

72. In 1996-97, California appellate courts were budgeted over \$44 million

no economic disincentive to the pursuit of a criminal appeal, no matter how unlikely its success. The ratios between appeals and judgments after trial in criminal cases (121:100),⁷³ and in civil cases (39:100)⁷⁴ well illustrate this difference in economic incentives. A further indication is the fact that only 6% of criminal appeals result in reversals, while 25% of civil appeals are resolved in favor of the appellant.⁷⁵ As noted in *Justice in the Balance 2020*:

[t]he absence of any economic disincentive to appeal, combined with the incentive of avoiding a criminal conviction, results in a high rate of appeal, notwithstanding a low reversal rate. An economic penalty levied against either appointed counsel or the indigent appellant for filing a good faith but losing criminal appeal is both impractical and probably unconstitutional.⁷⁶

There have been proposals to provide disincentives to criminal appeals. Under British law, a now-abolished procedure empowered the appellate court to increase the sentence of a criminal appellant upon a finding that the appeal lacked merit.⁷⁷ However, such a rule probably would not satisfy the due process requirements of the United States and California constitutions.⁷⁸ During the previously discussed 1981 assembly committees hearing, one sanction suggested for the filing of a non-meritorious appeal was a reduction in the amount of time credited to a convicted defendant for “good behavior.”⁷⁹ Again, this raises constitutional issues beyond the scope of this paper. At the same hearing, Professor Myron Moskowitz presented a proposal—first made by Professors Carrington, Meador, and Rosenberg—that all convicted felons be given a sum of money which

to pay counsel to represent indigent criminal defendants. See JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, 1998 ANNUAL REPORT II, at 62 (1998).

73. See *supra* Part II.B.

74. See *supra* Part II.B.

75. See Kelso, *supra* note 2, at 445 (citing information for 1991-92).

76. JUSTICE IN THE BALANCE 2020, *supra* note 1, at 170.

77. See Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 579 (1969).

78. “It is probably constitutionally impossible to deter appeals by providing effective punishment for those who abuse the process.” *Id.* at 574.

79. See *Court of Appeal Efficiency*, *supra* note 37, at 42.

they could use either to help pay for their appeal or for personal expenditures.⁸⁰ Considering all of the expenses associated with criminal appeals, he estimated that a payment of \$200 to each convicted felon for this purpose would save the state some \$4 million annually if criminal appeals were reduced by 20%.⁸¹ He estimated that a 50% reduction would result in saving more than \$12 million annually.⁸² These are 1980 figures and perhaps a \$200 payment would now have a less significant impact on criminal appeals. However, at today's costs, a payment of \$500 or even \$1,000 per convicted felon would likely have a significant impact on the number of criminal appeals filed and result in substantial savings. The problem with this economically sound proposal is entirely political. The legislators considering Professor Moskowitz' proposal were unanimous in noting that the idea of giving a convicted felon a "bounty," in the words of Assemblyman Richard Robinson, would "result [in a situation where] those individuals that were stupid enough to vote for the bill would not be around to vote for the next reapportionment plan."⁸³

2. Diverting appeals to the superior court

Professor Kelso also suggests that "[d]iverting select court of appeal cases to the superior court appellate department stands out as one of the most likely responses to increasing court of appeal caseloads."⁸⁴ The Commission which prepared the 2020 report did not accept this proposal. Its weakness is illustrated by Professor Kelso's recognition that, although such a strategy would lessen the caseload in the appellate courts, "[s]imply transferring appeals from the court of appeal to another tribunal would effect no net savings—and would thus be unjustifiable—unless the other tribunal could handle the cases more speedily or accurately."⁸⁵ Professor Kelso also notes that, "the appellate department of a superior court, which is

80. *See id.* at 53-59, 107-11. Professor Moskowitz noted that this scheme was originally proposed in PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 91-95 (West ed., 1976). Under this proposal, the defendant, by accepting the money, would forever waive the right to appeal or seek post-conviction relief.

81. *See Court of Appeal Efficiency*, *supra* note 37, at 109.

82. *See id.*

83. *Id.* at 56.

84. Kelso, *supra* note 2, at 447.

85. *Id.*

staffed by trial judges who might have direct access to the trial court's file, could handle appeals more speedily and accurately when the issues are limited to questions of trial procedure under established law, repetitive application of certain statutes, or exercise of trial court discretion."⁸⁶ However, access to trial court files is not a significant problem for appellate courts.

The proposal to have certain appeals handled by the appellate department of the superior court merits further consideration. The constitutional requirement for written opinions, which creates most of the appellate workload, does not apply in appeals from the municipal courts to the appellate department of the superior court.⁸⁷ If the California Constitution permitted the appellate departments of the superior courts to handle appeals resulting from certain convictions in the superior court, the appellate system could obtain significant efficiencies.⁸⁸ At a minimum, cases that are filed as felonies in superior courts but result in misdemeanor dispositions and civil judgments in amounts within the jurisdiction of the municipal court would seem to be ideal candidates for such a change.⁸⁹ If, however, as suggested below, strategies can be adopted to permit appellate courts to likewise resolve certain criminal and juvenile cases without written opinions, little by way of efficiencies will result from the mere transfer of the workload to another segment of the California judiciary.

86. *Id.*

87. "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated." CAL. CONST. art. VI, § 14. The rules pertaining to decisions of the appellate departments of the superior courts do not contain a similar provision: "The judges of the appellate department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest." CAL. CT. R. 106.

88. Such a change may require an amendment to the California Constitution. See CAL. CONST. art. VI, § 11 (stating "[C]ourts of appeal have appellate jurisdiction when superior courts have original jurisdiction").

89. Since few appellate judiciary department opinions are published, the "Tower of Babel" effect resulting from an increase in the appellate system would be minimized. See *supra* Part IV.A. Also, to the extent an increase in the judiciary would be required, adding trial court judges may be more politically feasible than increasing the number of justices on the California appellate courts.

3. Reduced trial error

Professor Kelso also suggests that “[t]he best way to lighten the appellate caseload is to reduce the need for and number of trials and diminish errors committed in those trials.”⁹⁰ As to criminal trials, as previously noted, it is unlikely their number will diminish.⁹¹ The remainder of the quoted sentence suggests that trial error drives appeals.⁹² This is not true for criminal appeals; if it were, the reversal rate would far exceed the 6% previously noted.⁹³ The convicted felon who has no disincentive to file an appeal will file one in nearly all cases, regardless of trial error.

4. Discretionary appeals

We are thus left with the final strategy discussed by Professor Kelso: increasing the proportion of appeals subject to discretionary review.⁹⁴ However, both Professor Kelso and the Commission rejected this suggestion.⁹⁵ The Commission notes: “The appeal as of right should be retained.”⁹⁶ In the author’s opinion, California’s appellate system cannot afford the luxury of retaining appeals as a matter of right in all instances. The Legislature should consider alternatives, including writ review in lieu of appeals in certain types of cases or for certain issues, such as issues raised by postjudgment motions.⁹⁷ This paper does not purport to consider all such possibilities. Instead the author will propose a strategy for discretionary appeals in criminal and juvenile cases. The article will further

90. Kelso, *supra* note 2, at 447-48.

91. *See id.* at 444-45.

92. *See id.* at 448.

93. *See supra* note 75 and accompanying text.

94. *See Kelso, supra* note 2, at 445-47.

95. *See id.* at 446-47.

96. JUSTICE IN THE BALANCE 2020, *supra* note 1, at 171.

97. California Code of Civil Procedure section 904.1(b) provides that an appeal may be taken from an order made after an appealable civil judgment. *See CAL. CIV. PROC. CODE* § 904.1(b) (West Supp. 1998). These appeals involve issues such as cost bills and attorney fees, matters that lend themselves readily to writ review. California Penal Code section 1237 permits appeals from “any order made after judgment, affecting the substantial rights of the party.” *CAL. PENAL CODE* § 1237(b) (West Supp. 1998). These appeals typically involve sentencing issues, which likewise lend themselves to writ review. *See id.* § 1237(a).

attempt to demonstrate how adopting such a strategy, while preserving the due process and other constitutional rights of criminal and juvenile court litigants, can alleviate the workload problems of California's intermediate appellate courts.

V. DISCRETIONARY APPEALS

A. *The Requirement for Written Opinions and Oral Argument*

Article VI, Section 14 of the California Constitution provides: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."⁹⁸ Each appeal is a "cause."⁹⁹ Courts have interpreted the phrase "writing with reasons stated" to require a full written opinion summarizing the relevant facts and generally dealing with each issue the parties raise on appeal.¹⁰⁰ Courts of appeal are therefore precluded from summarily disposing of appeals, no matter how obviously without merit.¹⁰¹

The California Supreme Court has held that parties to a "cause" are also entitled to oral argument.¹⁰² At times, oral argument is extremely useful. Members of the court may have questions after studying the briefs, and argument presents an opportunity for counsel to answer such questions. If novel issues of law or novel applications of existing law are involved, oral argument permits counsel to focus the discussion and assist the court's understanding. However,

98. CAL. CONST. art. VI, § 14.

99. See *Funeral Dirs. Ass'n v. Board of Funeral Dirs.*, 22 Cal. 2d 104, 106, 136 P.2d 785, 786 (1943); *Metropolitan Water Dist. v. Adams*, 19 Cal. 2d 463, 468-69, 122 P.2d 257, 259-60 (1942).

100. See *Moles v. Regents of Univ. of Cal.*, 32 Cal. 3d 867, 871, 654 P.2d 740, 742, 187 Cal. Rptr. 557, 559 (1982); *People v. Brigham*, 25 Cal. 3d 283, 285-86, 599 P.2d 100, 101-02, 157 Cal. Rptr. 905, 907 (1979).

101. Although the author has not exhaustively researched this issue in sister states, the requirement for a full written opinion in all cases may be unique to California jurisprudence.

102. See *Moles*, 32 Cal. 3d at 871, 654 P.2d at 742, 187 Cal. Rptr. at 559; *Brigham*, 25 Cal. 3d at 285-86, 599 P.2d at 101-02, 157 Cal. Rptr. at 907-08; *Countrywide Home Loans, Inc. v. Superior Court*, 54 Cal. App. 4th 828, 831-32, 62 Cal. Rptr. 2d 899, 901-02 (1997). Oral argument may be waived. The author is not aware of any published statistics but it is his experience that argument is waived in approximately 20% of civil cases and in approximately half of all criminal and juvenile cases.

in most instances oral argument adds little to the court's understanding of the issues. Many lawyers merely repeat the arguments contained in their briefs or insist upon reading a prepared statement that should have been contained in their briefs. Although the author is not aware of any studies concerning the amount of time spent by appellate judges preparing for and hearing oral argument, in his own experience as an associate justice of the court of appeal, the time probably amounts to 15% of the justices' workload, at least half of which is unnecessary.

With respect to petitions for extraordinary writs, a different rule applies.¹⁰³ A petition for such a writ does not create a "cause."¹⁰⁴ Thus, the court may summarily dispose of such a petition without requiring a response from the other party, without hearing oral argument, and without issuing an opinion.¹⁰⁵ In 1996-97, the appellate courts received 8,879 such petitions;¹⁰⁶ during the same period, 849 such petitions were resolved by written opinion.¹⁰⁷ Thus,

103. See *Funeral Dirs. Ass'n*, 22 Cal. 2d at 105-07, 136 P.2d at 786-87. Under California Code of Civil Procedure section 904.1 and California Penal Code section 1235, generally only judgments, postjudgment orders, and a limited number of specified trial court orders are appealable. See CAL. CIV. PROC. CODE § 904.1 (West Supp. 1998); CAL. PENAL CODE § 1235 (West Supp. 1998). California procedure does not provide for interim appeals. See CAL. CIV. PROC. CODE § 904.1. However, prejudgment orders issued by the trial court are subject to discretionary review by way of petitions for writs of prohibition or mandate. See *id.* In addition, the court hears petitions for writs of habeas corpus, certiorari, and supersedeas. See *id.*

104. Cf. *Funeral Dirs. Ass'n*, 22 Cal. 2d at 106, 136 P.2d at 786 (finding a court's initial action in issuing or declining to issue a prerogative writ on ex parte application does not constitute the determination of a "cause").

105. See *Countrywide*, 54 Cal. App. 4th at 831-32, 62 Cal. Rptr. 2d at 901-02. Once such an order to show cause or alternative writ issues, the matter is fully briefed by the parties, oral argument is heard, and the court issues a written opinion.

106. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 24 tbl.4 col.(F).

107. See *id.* at 25 tbl.5 col.(F). The high rate of summary denial does not necessarily reflect an equally high percentage of petitions that fail to raise meritorious issues. Petitions for extraordinary writ are frequently denied on the basis that the issues raised may be preserved for later review on appeal. See *Ordway v. Superior Court*, 198 Cal. App. 3d 98, 101 n.1, 243 Cal. Rptr. 536, 537 n.1 (1988); cf. *Omaha Indem. Co. v. Superior Court*, 209 Cal. App. 3d 1266, 1273, 258 Cal. Rptr. 66, 69 (1989) (suggesting that a court of appeal is in a "better position to review a question when called upon to do so in an appeal instead of by way of a writ petition").

approximately 90% of these petitions were denied without opinion. During the same period, 13,061 appeals were fully briefed in the courts of appeal,¹⁰⁸ and 13,928 appeals were resolved by written opinion.¹⁰⁹

The author is not aware of any studies indicating the amount of judicial and staff attorney time devoted to the resolution of petitions for extraordinary writs, as compared to appeals. However, the author's experience would suggest the total amount of time devoted to the resolution of such petitions represents no more than 10 to 15% of the courts' workload.

B. Processing Appeals and Petitions for Extraordinary Writs

Procedures for the internal handling of appeals and petitions for extraordinary writs undoubtedly vary between different divisions of the California Court of Appeal.¹¹⁰ However, the basic process is probably fairly uniform. The author will therefore describe the procedures within his own division and chambers to demonstrate why courts can resolve petitions for an extraordinary writ much more efficiently than appeals, without sacrificing just results.

After an appeal is fully briefed, the justice who has been designated as the "author" receives the briefs and record. The two other justices assigned as panelists on the case also receive copies of the briefs. At that time, unless the parties have filed a waiver, the case is

108. See 1998 COURT STATISTICS REPORT, *supra* note 20, at 18 tbl.1 col.(D).

109. See *id.* at 25 tbl.5 col.(B).

110. Professor Kelso describes the process involved in an appeal:

[A]n appeal typically involves the following steps: (1) the trial court clerk prepares a record from the lower court transcript; (2) counsel prepare and file adversary briefs; (3) in an initial review, the appellate court determines whether the appeal qualifies for special treatment (e.g., settlement programs, decision without oral argument, denial of review, or alternative disposition in discretionary appeals); (4) counsel argue orally before a panel of three or more judges; (5) the appellate court reaches a decision (which includes pre-argument analysis, a post-argument conference, and collegial drafting of the opinion or opinions); and (6) the appellate court publicly releases its opinion.

Kelso, *supra* note 2, at 457. By referring to "decisions without oral argument, denial of review, or alternative disposition in discretionary appeals," Professor Kelso obviously is referring to generic appellate courts. The California appellate courts do not have the authority to resolve cases on these bases.

set for oral argument, approximately three months hence. The designated author reviews the briefs, often formulates tentative positions and, in most instances, assigns the case to a staff attorney.¹¹¹ The justice either discusses the case and his or her tentative positions with the staff attorney or writes a memorandum to the attorney. The staff attorney studies the briefs, reviews relevant portions of the record, conducts legal research, and may in the course of this process confer with the author. The staff attorney then prepares a summary.¹¹² The author reviews the summary and may refer back to the briefs, record, and legal research as needed. Based on this review, the author may make changes in the summary or direct the staff attorney to make such revisions.

Approximately one week before oral argument,¹¹³ the other two justices on the panel receive copies of the summary. During the week preceding the argument, each of the three justices reviews the summary, the briefs, and the record as needed, and may review the legal research. They may assign some of these tasks to an attorney on their staff. During this period, the justices may confer informally with the author or staff attorney concerning questions raised by the summary. They may also indicate reservations or disagreement with either the conclusions reached or the reasoning contained in the summary. At times, changes are made to the summary based on these discussions.

111. Most justices will select a few cases on which they do all or most of the work themselves. However, the process in those cases is essentially the same as described.

112. The "summary" contains a statement of the relevant facts, summarizes and analyzes the arguments of the parties, reflects the staff attorney's own research, and usually concludes with a specific recommendation. The summary may point to issues that should be addressed at oral argument. Frequently, the summary functions as a draft opinion.

113. Most, perhaps all, districts and divisions invite counsel to waive oral argument. Oral argument is waived in a significant percentage of criminal and a small percentage of civil appeals. *See supra* note 102. When oral argument is waived, the internal procedure is simplified and the author and staff attorney proceed immediately to the drafting of an opinion. Although a memorandum will rarely first circulate among the panel members in an attempt to obtain the views of the other panel members on a particular issue, generally no summary is prepared in these cases.

After oral argument, the justices on the panel discuss the case. They may agree that the analysis and conclusions of the summary are correct, negotiate changes, or infrequently, fail to reach a consensus. Based on this discussion, the author then instructs the attorney who prepared the summary to write an opinion. After the opinion is prepared, the author reviews it and may make further changes. Upon approval by the author, a staff member other than the staff attorney who prepared the opinion again shepardizes all cited cases and verifies quotations. When these tasks are completed, the author signs the opinion and forwards it to one of the panel members. This panel member in turn studies the opinion and, frequently, suggests changes to the author. After the second panel member signs the opinion, it is forwarded to the third panel member and the process is repeated. Finally, when all three have signed the opinion, it is filed.¹¹⁴

Although many of these steps may be abbreviated in the case of an obviously meritless appeal, each step in this process is nevertheless required, including the preparation of a written opinion summarizing the facts and addressing each issue raised. Such steps are not necessary with petitions for extraordinary writs.¹¹⁵ Upon receipt of such a petition, it is immediately assigned to a staff attorney who reviews it and prepares a memorandum summarizing the facts and contentions, together with an evaluation as to whether the petition is potentially meritorious. These memoranda are distributed to the three justices who have been designated as that month's "writ panel." Each of them reviews the memoranda and, if necessary, all or portions of the petition and accompanying record.

Once a week the writ panel meets with the writ attorneys to discuss the petitions. At the writ conference, the justices decide

114. When oral argument has been waived, the author and staff will not prepare a summary but will immediately prepare a draft opinion. The other steps in the process are essentially the same. After the court files the opinion, the losing party will frequently file a petition for rehearing. Such petitions are rarely granted but, based on the petition, amendments to the opinion may be prepared.

115. It should be noted that, unlike most jurisdictions, California courts are quite liberal in granting writ review from nonappealable interlocutory orders. See DANIEL J. MEADOR ET AL., *APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL* 70-74 (Michie Co. ed., 1994).

whether the petitions are arguably meritorious.¹¹⁶ If not, the presiding or acting presiding justice signs an order denying the petition. If the justices determine that the petition is arguably meritorious, they issue an order requesting that the other party or parties file an informal letter response, usually within a matter of days. After receipt of the letter response, the justices again discuss the petition at the writ conference. If, after reviewing the informal response, they decide that the petition is not arguably meritorious, they deny the petition by issuing a simple order. On the other hand, if they decide that the petition may be meritorious, they order the parties to fully brief the issues,¹¹⁷ the matter is placed on the oral argument calendar,¹¹⁸ and a process identical to the preparation of an appeal, including the preparation of a summary and eventual opinion, takes place.

Appellants' opening briefs could be subjected to the same or a similar procedure. Particularly in criminal and juvenile appeals, lack of arguable merit is frequently obvious as soon as the opening brief is read. Yet the prosecutor must file a respondent's brief, to which appellant usually files a reply. The court is then required to give "full dress treatment" to the appeal, including oral argument and preparation of an opinion summarizing the relevant facts and explaining why each of the issues raised in the appeal is without merit. A major increase in the efficiency of the appellate courts would result if the courts were permitted to treat the appellant's initial brief as a "Petition for Leave to Appeal," which could be denied summarily if it failed to demonstrate arguable merit. In the next section, the author

116. Because a petition for extraordinary writ is an equitable procedure, the petitioner must demonstrate that there is no adequate remedy at law. *See generally* *Ross v. Board of Educ.*, 18 Cal. App. 222, 122 P. 967 (1912). Appeal is generally an adequate remedy at law. *See Brock v. Superior Court*, 29 Cal. 2d 629, 638, 177 P.2d 273, 278 (1947); *McAneny v. Superior Court*, 150 Cal. 6, 9, 87 P. 1020, 1021-22 (1906). A high proportion of petitions, though raising arguably meritorious issues, fail to demonstrate that the issue cannot ultimately be resolved on appeal and are therefore denied for failure to show an adequate remedy at law.

117. This takes the form of either an order to show cause or an alternative writ.

118. On occasion, the court will not hear oral arguments, and after receiving the briefs, the court will issue a peremptory writ as authorized by *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171, 178-80, 681 P.2d 893, 897-98, 203 Cal. Rptr. 626, 630-31 (1984).

will propose a less drastic change which could nevertheless increase appellate court efficiency.

C. *The Certificate of Probable Cause*

Since 1965, California Penal Code section 1237.5¹¹⁹ has required that a defendant wishing to appeal from a plea of guilty or admission of a probation violation obtain a "certificate of probable cause" from the trial court.¹²⁰ This requirement was an obvious response to frivolous appeals following guilty pleas. The procedure prescribed by the code requires a defendant to "file[] with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings."¹²¹ Based on this statement, the trial court determines whether there is probable cause for a meritorious appeal. Absent such a certificate, no appeal is permitted. This procedure was held to be constitutional.¹²² There is no requirement for such a certificate of probable cause when a defendant is convicted after a trial.

The "probable cause" requirement for the issuance of the certificate does not mean that the trial court must conclude that its own decision is probably reversible.¹²³ As noted in *People v. Ribero*,¹²⁴ "[s]ince the trial court cannot properly be put in the position of commenting adversely on its own rulings, the Legislature could not have intended such a meaning. Rather the test that must have been intended to apply is whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion."¹²⁵ In

119. CAL. PENAL CODE § 1237.5 (West Supp. 1998).

120. There are exceptions to the requirement and it does not apply to pre-plea search and seizure issues or to any issues which arise post-plea. *See People v. Panizzon*, 13 Cal. 4th 68, 74-75, 913 P.2d 1061, 1064-65, 51 Cal. Rptr. 2d 851, 855-56 (1996).

121. CAL. PENAL CODE § 1237.5(a) (West Supp. 1998).

122. *See People v. Davis*, 255 Cal. App. 2d 907, 909, 64 Cal. Rptr. 1, 2-3 (1967).

123. *See People v. Ribero*, 4 Cal. 3d 55, 63 n.4, 480 P.2d 308, 313 n.4, 92 Cal. Rptr. 692, 697 n.4 (1971).

124. *Id.*

125. *Id.*

People v. Holland,¹²⁶ the California Supreme Court noted that the only basis for denial of the certificate is a determination that there is "no possible legal basis" for the appeal,¹²⁷ and the trial court must issue the certificate whenever the appeal is "arguably meritorious."¹²⁸

When a defendant has demonstrated the existence of a non-frivolous issue, a denial of the certificate constitutes an abuse of discretion.¹²⁹ In the face of such a denial, a defendant may petition the court of appeal for a writ of mandate.¹³⁰ Thus, a defendant *can* obtain appellate review. Yet, it is only in those cases where the appellate court disagrees with the trial court and determines that a defendant presents an "arguably meritorious" issue that the appellate court is required to invest its resources in a full-blown appeal, complete with oral argument and a detailed written opinion. If the appellate court agrees that the issue raised is not "arguably meritorious," it merely denies the petition with a simple order to that effect.

The California Supreme Court has limited the effectiveness of section 1237.5¹³¹ by holding that, once the trial court certifies an issue as "arguably meritorious," an appellant may raise additional issues in the court of appeal.¹³² The language of the statute permits such an interpretation; it merely provides that "[n]o appeal shall be taken . . . from a judgment of conviction upon a plea of guilty or *nolo contendere*, or a revocation of probation following an admission of violation,"¹³³ in the absence of the certificate, and does not limit the issues that may be raised upon such an appeal.¹³⁴ For the statute to fully accomplish its purposes, the author recommends adopting an amendment limiting the issues on appeal to those certified by the trial

126. 23 Cal. 3d 77, 588 P.2d 765, 151 Cal. Rptr. 625 (1978).

127. *Id.* at 84, 588 P.2d at 768, 151 Cal. Rptr. at 628.

128. *Id.* "It is not the trial court's responsibility to determine if there was an error in the proceedings. The trial court's sole objective is to eliminate those appeals 'having no possible legal basis' by refusing to issue a certificate of probable cause." *Id.*

129. *See id.*

130. *See In re Brown*, 9 Cal. 3d 679, 683, 511 P.2d 1153, 1155, 108 Cal. Rptr. 801, 803 (1973).

131. CAL. PENAL CODE § 1237.5 (West Supp. 1998).

132. *See People v. Hoffard*, 10 Cal. 4th 1170, 1178, 899 P.2d 896, 900, 43 Cal. Rptr. 2d 827, 831 (1995).

133. CAL. PENAL CODE § 1237.5.

134. *See id.*

judge as "arguably meritorious." Again, where the trial judge certifies one issue but refuses to certify another issue, a defendant should be permitted to seek appellate review of the denial by way of a petition for writ of mandate.¹³⁵

California courts have held that the requirement for the certificate of probable cause does not apply to orders made following the plea,¹³⁶ because the statute applies only to "a judgment of conviction upon a plea of guilty or *nolo contendere*, or a revocation of probation following an admission of violation."¹³⁷ Such issues frequently involve contentions concerning the propriety of the sentence imposed. Extending the certificate requirement to such post-plea issues would be particularly useful. If the trial court fails to recognize an arguable issue with respect to such a contention, writ review can readily resolve the issue in most instances. The trial court itself is in the best position to correct sentencing errors.

It is further the author's opinion that defendants should be required to obtain a certificate of probable cause from the trial court before being permitted to file any appeal in a criminal or juvenile proceeding. This requirement should be conditioned upon the trial court finding the issue raised to be "arguably meritorious" and be combined with writ review from the denial of such a certificate.¹³⁸ This would permit the appellate courts to resolve criminal appeals expeditiously while still safeguarding the parties' rights.

135. See *supra* note 131 and accompanying text.

136. See *People v. Lloyd*, 17 Cal. 4th 658, 666, 951 P.2d 1191, 1195, 72 Cal. Rptr. 2d 224, 228 (1998); *People v. Cotton*, 230 Cal. App. 3d 1072, 1079, 284 Cal. Rptr. 757, 761 (1991). The recently decided *People v. Lloyd* contains an interesting dissent by Justice Brown wherein she complains that "[f]or the past 30 years, we have suffered with the consequences, struggling repeatedly - and unsuccessfully - to articulate the scope of the certificate of probable cause requirement, now riddled with ill-defined exceptions and exceptions to exceptions." *People v. Lloyd*, 17 Cal. 4th at 667, 951 P.2d at 1196-97, 72 Cal. Rptr. 2d at 229-30 (Brown, J., dissenting).

137. CAL. PENAL CODE § 1237.5.

138. Then Senior Assistant Attorney General Vance Raye, now an Associate Justice of the California Court of Appeal, suggested a similar procedure, without reference to writ review, during the 1981 hearing of the Assembly Judiciary and Criminal Justice Committees. See *Court of Appeal Efficiency*, *supra* note 37, at 47-49 (statement of Vance Raye, Senior Assistant Attorney General).

California Penal Code section 1237.5 should be amended to make the issuance of a certificate of probable cause a condition precedent for the filing of an appeal, not only, as now, where the defendant has pleaded guilty or admitted to a probation violation,¹³⁹ but also after trial. Such a certificate should be issued when the trial court determines a defendant has an arguable position on appeal with respect to specific issues to be identified in the certificate. Upon the issuance of such a certificate, a defendant would proceed with an appeal under the present procedures, limited to those issues identified in the certificate. The amendment should further provide that, upon denial of such a certificate, or upon the refusal of the trial court to designate specified issues, a defendant may petition the appellate court for leave to appeal or to add issues to the appeal.

The standard for the grant of such petitions should be whether a defendant has an arguable position with respect to the issues sought to be raised on appeal; if so, the petition should be granted and the defendant would proceed with an appeal under the present procedures, except the defendant's petition would serve as appellant's opening brief. If the appellate court considered it appropriate, it could invite the Attorney General to file an informal response before deciding whether to grant the petition. The proposed procedure should provide sufficient time to permit defendant's trial counsel to confer with appellate counsel, and to prepare those portions of the record relevant to issues identified in the petition for leave to appeal.¹⁴⁰

In addition, it should be emphasized that the proposed standard for the issuance of a certificate of probable cause and the grant of a petition for leave to appeal differ significantly from the standard for both the grant of petitions for review in the California Supreme Court¹⁴¹ and for the grant of petitions for certiorari in the United

139. CAL. PENAL CODE § 1237.5.

140. As such petitions will be issue-specific, records may not need to be as extensive as they now are, thus saving the costs associated with the preparation of a complete record in each case. Additional savings will be realized in that the attorney general will only need to prepare briefs in those cases where the court determines there are arguable issues on appeal. As long ago as 1981, the Attorney General estimated its costs for the preparation of respondent's briefs averaged more than \$2,000 per case. *See Court of Appeal Efficiency, supra* note 37, at 45.

141. *See* CAL. CT. R. 29.

States Supreme Court.¹⁴² Applicants for certificates of probable cause and petitioners for leave to appeal would not have to demonstrate the importance of the question or the probable success of their appeal, but merely that the issue or issues proposed are “arguably meritorious.”

D. Proposed Amended Statute

The author proposes Penal Code section 1237.5 be amended to read as follows:

§ 1237.5 APPEAL BY DEFENDANT UPON JUDGMENT OF CONVICTION OR REVOCATION OF PROBATION.

(a) No appeal shall be taken by the defendant from a judgment of conviction or any post-conviction order of the court, including a revocation of probation, unless either:

- (1) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk; or
- (2) The court of appeal has granted defendant’s petition for leave to appeal.

(b) The trial court shall issue a certificate of probable cause when the following conditions have been met:

- (1) the defendant has filed, in the trial court, a statement, executed by both defendant and his or her attorney, under oath or penalty of perjury, identifying specific issues and showing with respect to such issues reasonable grounds justifying an appeal, and
- (2) the trial court has determined that any issue or issues so identified is or are arguably meritorious.

(c) The certificate of probable cause shall identify those issues that the court has determined to be arguably meritorious.

(d) The court of appeal shall grant a petition for leave to appeal when it determines that any issue or issues identified by defendant is or are arguably meritorious.

- (1) Such a petition shall be executed by counsel, except as provided in subsection (f) hereof.

142. See SUP. CT. R. 10.

(2) The order granting the petition shall identify those issues that the court of appeal has determined to be arguably meritorious.

(e) No petition for leave to appeal may be filed in the court of appeal unless defendant has first filed a statement in the trial court requesting that court to execute and file a certificate of probable cause with respect to the same issue or issues raised in the petition for leave to appeal.

(f) Counsel's execution of the statement requesting issuance of a certificate of probable cause and counsel's execution of the petition for leave to appeal shall constitute counsel's certification that the specified issues are arguably meritorious. If a defendant wishes to assert issues that his or her counsel does not deem arguably meritorious, the portion of the statement or petition dealing with those issues shall be executed solely by defendant.

(g) The appeal shall be limited to those issues as to which either the trial court has filed a certificate of probable cause or the court of appeal has granted leave to appeal.

(h) The Judicial Council shall issue such rules as are necessary to implement this section.

(1) Such rules shall provide for the appointment of appellate counsel to assist indigent defendants in the preparation of the statement requesting issuance of the certificate of probable cause or the petition for leave to appeal and allow time for the preparation of a record, if needed in the preparation of the statement.

(2) Such rules shall also provide that a petition for leave to appeal may be deemed to be appellant's opening brief if the petition is granted.

A similar statute should be enacted in the Welfare and Institutions Code to govern appeals in juvenile cases.

E. Constitutional Issues

California Constitution, Article VI, Section 11 provides that the "courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by

statute.”¹⁴³ Because the criminal and juvenile cases which are the subject of this paper all originate in superior court, we must consider whether the proposal here presented requires an amendment to the California Constitution or whether the proposed statutory change would be sufficient.

In *People ex rel. Davidson v. Perry*,¹⁴⁴ the California Supreme Court noted, well over 100 years ago, that the legislature did not have the power to abridge the constitutionally conferred jurisdiction of the appellate court.¹⁴⁵ Thirty five years later, in *In re Sutter-Butte Bypass Assessment*,¹⁴⁶ the Court reiterated this position.¹⁴⁷ Then Article VI, section 4 of the California Constitution provided *inter alia* for appellate jurisdiction “on appeal from the superior courts . . . in all cases at law which involve the . . . legality of any tax, . . . assessment, etc. . . .”¹⁴⁸ An act of the legislature, which authorized the issuance of bonds by a drainage district, provided for review by a three-judge panel in the superior court and specified “no appeal from the judgment given and made by said court shall be had.”¹⁴⁹ The court held: “[T]he legislature cannot by the creation of a new remedy deprive this court of its constitutional grant of appellate jurisdiction . . .”¹⁵⁰ It has thus long been settled that a statute may not deprive the appellate courts of their power of review.

However, this does not answer the question. Writ review is also appellate review,¹⁵¹ but is it a constitutionally valid substitute for a “full dress” appeal? The California Supreme Court recently addressed this issue in *Powers v. City of Richmond*.¹⁵² There, the court was confronted with a statute providing that actions under the Public

143. CAL. CONST. art. VI, § 11.

144. 79 Cal. 105, 21 P. 423 (1889).

145. *See id.* at 108, 21 P. at 424. The facts of *Perry* bear an interesting resemblance to the seminal U.S. Supreme Court case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

146. 190 Cal. 532, 213 P. 974 (1923).

147. *See id.* at 536-37, 213 P. at 975-76.

148. *Id.* at 536, 213 P. at 975 (citing CAL. CONST. art. VI, § 4).

149. *Id.* at 535 (citing Act of May 27, 1919, ch. 520, § 8, 1919 Cal. Stats.).

150. *Id.* at 537, 213 P. at 976.

151. Appellate jurisdiction includes review by writ. *See Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 572 (1833).

152. 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995).

Records Act,¹⁵³ though tried in superior court, are not appealable but instead are “immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ.”¹⁵⁴

Although the *Powers* Court upheld the provision in a 5-2 opinion, no majority agreed on the basic issue of whether the constitutional right to an appeal was satisfied by a provision for writ review.¹⁵⁵ Appellants contended that the “constitutional right of appeal necessarily includes the rights to oral argument, a decision on the merits, and a written opinion explaining the basis of the appellate court’s decision.”¹⁵⁶ Justice Kennard, who wrote the lead opinion, joined by Justices Baxter and Werdegar, disagreed and opined that the statute did not violate the “appellate jurisdiction” provision of Article VI, Section 11.¹⁵⁷ She noted that the constitutional provision “serves to establish and allocate judicial authority, not to define or guarantee the rights of litigants. Indeed, the provision nowhere mentions direct appeals or a ‘right of appeal.’”¹⁵⁸ She defined constitutionally conferred appellate jurisdiction broadly to include writ review.¹⁵⁹

In his concurring opinion, Justice George, joined by Justice Arabian, agreed that, with respect to “*claims brought under the California Public Records Act*,” the statute was constitutional.¹⁶⁰ The concurrence based its conclusion on the time sensitive nature of claims under the Act and the fact that, if normal appellate procedures were followed, the resulting delays would largely frustrate the Act’s purposes.¹⁶¹ Thus, while recognizing that “the state Constitution generally has *not* been interpreted to require that appellate review of a

153. See CAL. GOV’T CODE §§ 6250-6259 (West 1995).

154. *Id.* § 6259(c).

155. *Powers*, 10 Cal. 4th at 91, 893 P.2d at 1162, 40 Cal. Rptr. 2d at 841.

156. *Id.*

157. See *id.* at 92, 893 P.2d at 1163, 40 Cal. Rptr. 2d at 842.

158. *Id.* at 91, 893 P.2d at 1162, 40 Cal. Rptr. 2d at 841.

159. See *id.* at 92, 893 P.2d at 1163, 40 Cal. Rptr. 2d at 842.

160. *Id.* at 115, 893 P.2d at 1178, 40 Cal. Rptr. 2d at 857 (George, J., concurring).

161. See *id.* at 117-18, 893 P.2d at 1179, 40 Cal. Rptr. 2d at 858 (George, J., concurring).

superior court decision *invariably* proceed by direct appeal,"¹⁶² Justice George was careful to note a danger inherent in following the lead opinion to its logical conclusion:

[T]he lead opinion's reasoning very well could be understood to permit the Legislature *totally* to transform the California Court of Appeal from an appellate tribunal whose duties generally involve the resolution of cases in which litigants have a direct appeal 'as a matter of right'—and in which most decisions must be rendered 'in writing with reasons stated' (CAL. CONST. art. VI, § 14)—into an appellate court whose jurisdiction consists *entirely* of writ review and as to which the court has no obligation to resolve *any* of the cases before it by a written decision setting forth the reasons for its ruling. . . . I believe there is ample reason for this court to be extremely cautious before embracing an interpretation of the pertinent state constitutional provision that would permit such a major revision of the state's appellate process to be made by the Legislature.¹⁶³

Justice Lucas' dissent, joined by Justice Mosk, after an exhaustive review of the history of the relevant constitutional provisions, concluded that Article VI, section 11 provides litigants a right to a full appeal from all judgments of the superior court.¹⁶⁴ These justices would accept the writ review without precluding the dissatisfied party from subsequently filing an appeal if the writ review were summarily denied.¹⁶⁵

The California Supreme Court has another pending case dealing with the same issue. It has granted a petition for review in *Leone v. Division of Medical Quality*.¹⁶⁶ There the court of appeal dealt with

162. *Id.* at 123, 893 P.2d at 1183, 40 Cal. Rptr. 2d at 862 (George, J., concurring).

163. *Id.* at 116, 893 P.2d at 1178-79, 40 Cal. Rptr. 2d at 857-58 (George, J., concurring).

164. *See id.* at 174, 893 P.2d at 1218, 40 Cal. Rptr. 2d at 897 (Lucas, J., dissenting).

165. *See id.* at 183, 893 P.2d at 1224, 40 Cal. Rptr. 2d at 903 (Lucas, J., dissenting).

166. 57 Cal. App. 4th 1240, 67 Cal. Rptr. 2d 689 (1997) (*review granted* Dec. 23, 1997). Under California procedure, once review is granted, the opinion of the court of appeal no longer has precedential value and will not be

a new statutory scheme dealing with physician discipline.¹⁶⁷ When the Division of Medical Quality of the Medical Board of California imposes such discipline, the physician can challenge the determination by filing a petition for mandamus in the superior court.¹⁶⁸ Until 1996, the denial of such a petition was subject to an appeal to the court of appeal. In order to expedite the process, the legislature provided, effective January 1, 1996, that such review will be solely by way of a writ petition.¹⁶⁹ In *Leone*, the Appellate Court held that the statute violated the right of appeal granted by Article VI, Section 11.¹⁷⁰ The California Supreme Court granted a hearing.¹⁷¹ Even under Justice George's view, as expressed in his concurring opinion in *Powers v. City of Richmond*,¹⁷² a plurality of the court may well uphold the statute in view of the need for speedy resolution.¹⁷³ However, in light of the change of personnel since *Powers* was decided, the case may also clarify the court's view with respect to changes such as those proposed in this paper.

VI. CONCLUSION

The portion of the report of the Commission on the Future of the California Courts, *Justice in the Balance 2020*, dealing with the intermediate appellate courts, paints far too rosy a picture of the future facing these courts. The report makes unwarranted assumptions about changes in the legal culture and fails to recognize that its predictions of decreasing appeals, at least insofar as they pertain to criminal and juvenile cases, lack a factual basis. The reality is that unless drastic changes are made in appellate procedures, California's Court of Appeal will be overwhelmed by an ever-increasing number of appeals.

included in the permanent reports. See CAL. CT. R. 976(d); *Quintano v. Mercury Casualty Co.*, 11 Cal. 4th 1049, 1067, n.6, 906 P.2d 1057, 1068, n.6, 48 Cal. Rptr. 2d 1, 12, n.6 (1995).

167. See *Leone*, 57 Cal. App. 4th at 1240-41, 67 Cal. Rptr. 2d at 689-90.

168. See CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1998).

169. See CAL. BUS. & PROF. CODE § 2337 (West 1990 & Supp. 1998).

170. See *Leone*, 57 Cal. App. 4th at 1295, 67 Cal. Rptr. 2d at 694.

171. See No. S065485, California Supreme Court Minutes 5 (Dec. 23, 1997) in 4 California Official Reports (Feb. 3, 1998 Advance Sheets).

172. 10 Cal. 4th 85, 893 P.2d 1160, 40 Cal. Rptr. 2d 839 (1995).

173. See *id.* at 115-24, 893 P.2d at 1178-84, 40 Cal. Rptr. 2d at 857-63 (George, J., concurring); *supra* notes 125-36 and accompanying text.

There are two primary conditions driving the increasing workload of the appellate courts: the impossibility of devising disincentives to meritless criminal and juvenile appeals and the requirement that the court give "full dress treatment" to all appeals, regardless of their merit, including hearing oral argument and writing a complete opinion citing relevant facts and addressing each issue raised in the appeal. Although some other strategies considered by the Commission may tend to alleviate the upcoming "crisis of volume" in California's appellate courts, none of them will have the dramatic impact required to enable these courts to continue to fulfill their functions. A number of proposed strategies beyond the scope of this paper should be considered. These include, for example, using appellate commissioners, review by petition for extraordinary writ in lieu of appeal in certain classes of cases, transferring appellate review of certain classes of cases to the appellate departments of the superior court, and awarding attorneys' fees to successful appellants in civil cases.

The volume of criminal and juvenile appeals, which represent a large share of the work of the appellate courts, can be decreased significantly if procedures are adopted to permit meritless criminal and juvenile appeals to be resolved without the requirement for oral argument and detailed opinions in such cases. One strategy that would aid in the reduction of such meritless appeals is to permit the appellate court to deny the appeal summarily upon review of appellant's opening brief. A less drastic strategy is an expansion of the "certificate of probable cause" procedure of California Penal Code section 1237.5.¹⁷⁴ That statute now requires that, before an appeal may be taken from a judgment of conviction following a guilty plea, the trial judge certify that there are nonfrivolous grounds for an appeal.¹⁷⁵ Denial of the certificate is reviewable in the appellate court by way of an efficient writ proceeding.¹⁷⁶ The author recommends amending the statute to apply to all criminal and juvenile appeals, a change that would reduce the workload of California's intermediate

174. CAL. PENAL CODE § 1237.5 (West Supp. 1998).

175. *See id.*

176. *See People v. Holland*, 23 Cal. 3d 77, 84-85, 588 P.2d 765, 768-69, 151 Cal. Rptr. 625, 628-29 (1978); *see also In re Brown*, 9 Cal. 3d 679, 683, 511 P.2d 1153, 1155, 108 Cal. Rptr. 801, 803 (1973).

appellate courts. The proposed amendment to section 1237.5 would have the following characteristics:

- The right to appeal in criminal and juvenile cases would be conditioned upon the trial court issuing a “certificate of probable cause.”

- The certificate would specify the issues which are “arguably meritorious” on appeal.

- The appeal would be limited to the issues so specified.

- Denial of the certificate or denial to certify a specific issue would be reviewable by petition for leave to appeal in the appellate court, using the same “arguably meritorious” standard.

- Upon denial of the petition for leave to appeal, the appellate court would neither be required to hear oral argument nor to issue an opinion.

- Upon issuance of a certificate of probable cause or upon grant of the petition for leave to appeal, the appeal would go forward under present procedures, including oral argument and a full written opinion, limited to the issues identified in the certificate or the order granting leave to appeal.

- Procedures should include a provision for the appointment of appellate counsel and the preparation of a record in connection with the proposed procedures.

It is unclear at this time whether the procedural changes proposed may be accomplished by means of a statutory amendment or whether such a change would also require an amendment to California’s Constitution. A case now pending in the California Supreme Court may answer this question.

