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Criminal Appeals in California

AT THE general election in November, 1936, the people of California will vote upon a constitutional amendment which proposes a fundamental change in the appellate court system of the state insofar as it relates to criminal appeals. Discussion of this proposal has raised many questions regarding the relative economy and efficiency of the present system of handling criminal appeals and a need was felt for factual data which might serve as a basis for judging the results of the present system and the consequent need for improvement or change. To obtain such facts the Judicial Council of California sponsored a study by the present writer, which covered in detail every criminal appeal filed in the state during the six-year period July 1, 1929–June 30, 1935.[1] Some of the more significant findings of this study concerning the volume of criminal business, the results of criminal appeals and the tune taken on appeal constitute the subject matter of this article.

Before presenting these findings, however, a brief description of the present California appellate court system and the changes proposed by the constitutional amendment is necessary. The California Constitution provides that the appellate courts of the state shall consist of a supreme court of seven justices and district courts of appeal consisting of such number of divisions having three justices each as the legislature shall determine.[2] While three district courts of appeal are mentioned in the constitution, the legislature is granted the power to create other district courts of appeal or divisions.[3] In 1929 a Fourth District Court of Appeal was created by the legislature.[4]

The criminal jurisdiction of these appellate courts is allocated as follows: The supreme court has jurisdiction in all criminal appeals where judgment of death has been rendered, and also has the power to bring up for further hearing and determination any cause heard by any district court of appeal. The district courts have jurisdiction in all

[1] The report of this study will be published in full in the forthcoming SIXTH BIENNIAL REPORT OF THE CALIFORNIA JUDICIAL COUNCIL, Part II.

[2] CAL. CONST. art. VI, §§ 2 and 4a.

[3] CAL. CONST. art. VI, § 4a.

[4] Cal. Stats. 1929, c. 691.

criminal appeals arising from prosecutions by indictment or information, except where judgment of death has been rendered. Both the supreme court and the district courts have the usual powers of issuing writs of *mandamus, certiorari,* prohibition, *habeas corpus, etc.*[5]

The four district courts serve districts which vary considerably in size and population. The first district court of appeal, which sits in San Francisco, composed of two divisions, serves a district which covers nine counties and contained 27 per cent of the population of the state in 1930.[6] The second district court of appeal, also composed of two divisions, sits in Los Angeles. Four counties containing 42 per cent of the state's population make up this district.[7] The third district court of appeal has one division and sits in Sacramento. Although this district embraces a huge territory of thirty-five counties, it contains but 14 per cent of the state's population.[8] The fourth district court of appeal is made up of one division, but sits each year for one term in three cities, Fresno, San Bernardino, and San Diego. The Fresno section includes the counties of Fresno, Kern, King, and Tulare; the San Bernardino section, the counties of Inyo, Orange, Riverside, and San Bernardino; and the San Diego section, the counties of Imperial and San Diego. These ten counties have 17 per cent of the population of the state.

Under the proposed constitutional amendment a separate court of criminal appeals would be created, which would succeed to the criminal appellate jurisdiction of both the supreme court and the district courts of appeal as it exists at present. This new appellate court would be composed of five judges and would hold regular sessions in Sacramento, San Francisco, Los Angeles, and Fresno, and at any other place which it might prescribe. The supreme court would have the power to transfer from the court of criminal appeals for further determination only those cases in which the court of criminal appeals had directly passed upon the validity of a law and in these cases its review would be strictly limited to passing upon the validity of the law in question.

The study of criminal appeals which the writer undertook was designed to cast some light upon the problem raised by this rather far-reaching proposal to transfer the appellate jurisdiction in criminal ap-

[5] CAL. CONST. art. VI, §§ 2 and 4b.

[6] The nine counties in the first district are: Alameda, Contra Costa, Marin, Monterey, San Benito, San Francisco, San Mateo, Santa Clara and Santa Cruz.

[7] The four counties in the second district are: Los Angeles, San Luis Obispo, Santa Barbara and Ventura.

[8] The thirty-five counties in the third district are: Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Madera, Mariposa, Mendocino, Merced, Modoc, Mono, Napa, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Sonoma, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo and Yuba.

peals from the present supreme court and four district courts of appeal to one court of five judges. Briefly described, the procedure of the study was as follows: A detailed schedule was drawn up on which was recorded for each case information concerning the nature of the appeal, the dates and result of each step of the prosecution and trial in the superior court, every recorded entry made in the process of carrying on the appeal and its date, the final decision, its length and many other facts that appeared in the records. The sources of this information were the registers of each appellate court, wherein were recorded the date and nature of each procedural step of the appeal, and the original transcripts of the case on file in the appellate court, which furnished all the details of the case in the superior court. This data was then analyzed and synthesized to present the picture of what occurred in criminal appeals in California during the years 1929-1935.

THE VOLUME OF CRIMINAL APPEALS

During the six-year period 1929-1935 the following criminal actions were filed in the appellate courts of California:

	District Courts of Appeal	Supreme Court	Total
Defense Appeals from Judgment and Conviction	1173	62	1235
Hearing Granted in Supreme Court of Cases Decided in District Courts of Appeal	—	62	62
Defense Appeals from Orders or Motions Made After Conviction Became Final	67	4	71
People's Appeals, Taken in Course of Regular Criminal Prosecution	39	—	39
People's Appeals Taken from Order Granting Writ of *Habeas Corpus*	16	—	16
Habeas Corpus Applications	532	232	764
Other Original Proceedings	13	6	19
Applications for Executive Clemency (Docketed last three years only)	—	125	125
Total Actions Filed	1840	491	2331

The above figures show a total of 2331 filings during the six-year period, composed of 1840 criminal proceedings filed in the district courts of appeal and 491 in the supreme court.

These filings consisted of several different types of proceedings. The first line of the table shows 1235 appeals by the defendant from judgment and conviction. The 62 appeals shown in the supreme court are those appeals in death penalty cases which occurred during the six-year period. These appeals constitute the type of proceedings generally conceived of by the term "criminal appeal," that is, an appeal taken by the defendant in an effort to avoid conviction for crime.

The 62 cases shown in line two as having been granted a hearing

in the supreme court are those cases which had in a sense a double appeal and are really counted twice in the figures presented. This many of the original 1235 defense appeals from judgment resulted in a supreme court hearing after decision in the district court of appeal.

There were 71 appeals by defendants which were taken from orders or motions made after conviction,[9] including 43 appeals from orders denying the defendant's motion to set aside and vacate the judgment, 10 appeals from orders revoking probation and 18 appeals from orders denying a motion to correct the judgment or denying a motion for a writ of *coram nobis*. Many of these 71 appeals were made after the defendant had served a substantial portion of his sentence, and in some instances they were second or even third appeals of a defendant whose conviction had been affirmed on his first appeal. These cases do not represent the normal type of appeal, in which the aim of the defendant is to secure a reversal of the original judgment and conviction.

There were 39 people's appeals taken under section 1238 of the Penal Code, which describes the grounds for appeal by the state in the ordinary criminal prosecution. Of these, twenty represent appeals taken from judgment for the defendant on demurrer, eleven, appeals from orders granting the defendant a new trial, and eight, appeals from orders arresting judgment or granting probation or reducing the degree of the charge. In addition there were sixteen people's appeals taken from an order granting the defendant a writ of *habeas corpus* as provided for in section 1506 of the Penal Code.

The second largest group of filings are original *habeas corpus* applications, which account for one-third of all filings. The miscellaneous group of nineteen original filings include applications for bail or for a writ of probable cause, and several cases in which a dismissal order was entered at the request of a county clerk to clear his records where an appeal was taken in the superior court but no papers were ever filed in the appellate court. Executive clemency applications filed in the supreme court represent cases of persons who have been convicted of felony at least twice and who under Article X of the Constitution can not be granted executive clemency by the governor unless a favorable recommendation has been made by the supreme court. These applications were not entered in the register of the supreme court until 1932 and so represent only three years of filings.

It would be erroneous to take the 2331 total filings in the appellate courts as a representative measure of the amount of work performed by these courts. Many appeals are never prosecuted by the defendant further than the point of filing of the transcripts in the appellate court.

[9] CAL. PEN. CODE § 1237(3).

Such appeals, which are eventually dismissed for lack of prosecution, or affirmed on motion of the Attorney General under section 1260 of the Penal Code, do not require any work on the part of the court beyond the original recording of the filing by the clerk and the minute order of the court dismissing or affirming the appeal. Likewise a large number of *habeas corpus* applications are summarily denied and do not represent any effort on the part of the judges beyond that of looking over the application and reaching the conclusion that it has no merit. In order to measure the amount of business that is actually handled by the appellate courts, appeals that do not reach the point of decision on their merits and *habeas corpus* applications that are summarily denied should be excluded. This has been done in the following tabulation which shows the actual number of proceedings filed which required action on the part of the appellate courts.

	District Courts of Appeal	Supreme Court	Total
Defense Appeals from Judgment and Conviction	884	58	942
Hearing Granted in Supreme Court of Cases Decided in District Courts of Appeal	—	62	62
Defense Appeals from Orders or Motions Made After Conviction Became Final	35	3	38
People's Appeals, Taken in Regular Courts of Criminal Prosecution	27	—	27
People's Appeals from Order Granting a Writ of *Habeas Corpus*	14	—	14
Original *Habeas Corpus* Proceedings	239	75	314
Other Original Proceedings	3	—	3
Applications for Executive Clemency (Docketed last three years only)		125	125
Total Actions	1202	323	1525

In order to show the approximate annual number of cases handled by the appellate courts the yearly average of the six-year figures just presented is shown below. With respect to the applications for executive clemency heard by the supreme court the annual average is based on a three-year period only.

	District Courts of Appeal	Supreme Court	Total
Defense Appeals from Judgment and Conviction	147	10	157
Hearing Granted in Supreme Court of Cases Decided in District Courts of Appeal	—	10	10
Original *Habeas Corpus* Proceedings	60	12	72
All Other Appeals	13	1	14
Applications for Executive Clemency	—	42	42
Total Actions	220	75	295

Summarizing the criminal work of the courts of appeal these data show that defendants take annually an average of 157 appeals from

conviction which result in a decision on the merits in the appellate courts. Ten of these or about one-sixteenth are granted a hearing by the supreme court after decision by the district court of appeal. In addition about 14 other appeals are decided each year, half of these being appeals taken by defendants after conviction became final and half appeals taken by the people. The appellate courts issue writs of *habeas corpus* after application in about 72 cases a year. The supreme court has to give consideration to an average of 42 executive clemency cases each year.

It would appear from these facts that the proposed criminal court of appeal would have for its total yearly business less than 180 appeals to decide and about 72 original proceedings to act upon. The proposed amendment fails to transfer to the new court the supreme court's constitutional duty to make a recommendation to the governor in certain executive clemency cases.

Certain appellate court officials and judges have estimated that a *habeas corpus* proceeding consumes on the average about one-half the time and energy spent by the court in the average criminal appeal. A similar estimate was made for the time required by the supreme court in handling an executive clemency application. Using these general estimates the total work of the appellate courts can be expressed in terms of appeals. The district courts of appeal seem to be handling in terms of total business the equivalent of 200 appeals a year, while the supreme court handles the equivalent of 48 appeals a year. Since executive clemency cases count for the equivalent of 21 appeals a year in the supreme court, and this business is not transferred to the new court of criminal appeals under the proposed amendment, it is apparent that the supreme court would still be left with nearly one-half of the duties it performs in criminal cases. Further, in view of the fact that the amendment allows the supreme court to hear cases decided by the new court of criminal appeal in which the validity of a law was involved it would seem that the new court would not offer much relief to the supreme court in taking over its criminal jurisdiction.

Another comparison that is of interest in considering the proposal to establish a new court of criminal appeal is the relative amount of criminal and civil business now handled in the appellate courts. The data upon which this comparison is based were taken from the *Fourth* and *Fifth Biennial Reports of the Judicial Council of California*, covering the four-year period from July 1, 1930 to June 30, 1934. Appendix P in each Judicial Council report gives the volume of judicial business filed in the supreme court and Appendix Q the volume of business filed in the district courts of appeal.

These sources show a total of 4,413 appeals filed in the district courts

of appeal during the four-year period, of which 906 were criminal appeals. In the same period there were 2,096 appeals filed in the supreme court, of which 51 were criminal appeals. From this information it appears that about one out of every six appeals filed in California is a criminal appeal. The original proceedings filed in this same period were 1,532 in the district courts, of which 352 were criminal proceedings, and 653 in the supreme court, of which 162 were criminal proceedings. It is seen, therefore, that about one out of each four original proceedings filed is a criminal proceeding. From these figures it can be concluded that probably less than twenty per cent of the total business handled in the California appellate courts were appeals and proceedings arising out of criminal cases. The fact that many appellate judges have stated that the average criminal appeal is much more simple and requires much less time and energy in determination than the average civil appeal, suggests that the volume of criminal business in the appellate courts, in terms of time and energy, probably accounts for even less than one-sixth of the total efforts required of the appellate courts.

This is further illustrated by a comparison of the amount of space devoted to criminal and to civil opinions in the printed reports of the California appellate courts. During the years 1929 to 1935 there were issued approximately 28,000 printed pages of decisions by the district courts of appeal, of which some 3500 pages were devoted to decisions in criminal cases.[10] During the same period of time the supreme court published approximately 10,000 pages of decisions, of which some 700 pages were devoted to criminal cases.[11] The space devoted to criminal decisions amounted to thirteen per cent of the total pages published by the district courts of appeal and seven per cent of the total pages published by the supreme court.

It has already been shown that the appellate courts issue annually about 180 decisions in criminal appeals, and that they act on about 72 *habeas corpus* cases. A check on the written opinions in *habeas corpus* cases revealed that only in about 24, or one-third the annual number of cases acted upon, were there written decisions which amounted to one-third or more of a printed page in length. On the basis of the past six years this would mean that the total number of written decisions which would be issued by a court of criminal appeal would be approximately 200 a year. Written opinions in criminal appeals are relatively short. A sampling of the printed decisions in criminal appeals revealed that average length in the district courts of appeal was $2\frac{2}{3}$ pages (excluding the head note) while the average length of a printed opinion of a criminal appeal in the supreme court was $4\frac{1}{2}$ pages.

[10] California Appellate Decisions, Vols. 60 to 85, inclusive.
[11] California Decisions, Vols. 78 to 91, inclusive.

Of further interest in the study of criminal appeals are the criminal appeal rates and their geographical distribution. During the six-year period under consideration, when the appellate courts received 1235 defense appeals from judgment and decided 942 of these on their merits, there was a total of 44,842 felony convictions in the state.[12] This means that in approximately 27.5 cases out of each 1000 convictions an appeal was filed and in each 21 cases out of 1000 convictions the appeal was carried to final determination on its merits. Geographically, however, the number and rate of appeals varies over a wide range, as is indicated by the following data which show the total number of convictions, the number of appeals and the appeal rate in the nine counties that furnished as many as 25 appeals during the period 1929-1935.

County	Total Felony Convictions 1929-35	Defense App. From Conv. Filed 1929-35	Appeals per 1000 Fel. Conv.	Def. Appeals Decided on Merits	Appeals Decided per 1000 Fel. Conv.
Alameda	2,696	57	21.1	43	15:9
Fresno	1,204	43	35.7	35	29.1
Los Angeles	19,307	637	33.0	482	25.0
Orange	870	28	32.2	20	23.0
Sacramento	1,288	42	32.6	31	24.1
San Bernardino	784	35	44.6	30	38.3
San Diego	1,901	51	26.8	38	20.0
San Francisco	4,137	93	22.5	72	17.4
San Joaquin	1,351	27	20.0	17	12.6
All other counties	11,304	222	19.7	174	15.4
Total State	44,842	1235	27.5	942	21.0

Four of the nine counties shown furnished less appeals in ratio to total felony convictions than the ratio for the whole state. San Joaquin County showed the lowest rate of appeals with Alameda, San Francisco, and San Diego counties also having comparatively low rates. San Bernardino County had the highest proportion of appeals, with Fresno, Los Angeles, Sacramento and Orange counties next in order. It is apparent that the smaller counties furnish proportionately fewer criminal appeals than do the more populous counties; so few in fact that only the nine counties shown filed as many as 25 appeals during the six-year period covered by the study. Moreover, the table below which groups these data by appellate court districts shows that over two-thirds (70.6%) of the total criminal appeals filed were from the second and fourth districts, which embrace the southern half of the state. This area contained 58 per cent of the population of the state in 1930.

The number of appeals in California is not great. With less than three per cent of those convicted of felonies in the state even filing an appeal, and with only two per cent actually carrying their appeals

[12] Compiled from the BIENNIAL REPORTS OF THE CALIFORNIA JUDICIAL COUNCIL.

through to final decision on the merits, it cannot be assumed that the California courts are overburdened with a large number of unjustified appeals.

The geographical distribution of appeals filed and decided according to the appellate districts was as follows:

	Per cent of State Population	Def. No. Appeals Filed	Per Cent	No. App. Decided on Merits	Per Cent
1st District	27.4	187	15.1	149	15.8
2nd District	41.5	644	52.1	486	51.6
3rd District	14.5	176	14.3	131	13.9
4th District	16.6	228	18.5	176	18.7
Total	100.0	1235	100.0	942	100.0

JUDGMENT ON APPEAL

An analysis of judgment on appeal has been made of the defense appeals from judgment and conviction, as these represent most accurately what the lawyer and the layman consider as criminal appeals. There were originally 1235 defense appeals from judgment filed between 1929 and 1935. Of this number 942 were decided on their merits and 293 resulted in a dismissal or an affirmance on motion under section 1260 of the Penal Code. Approximately one-fourth (24%) of all defense appeals filed, therefore, were abandoned or failed to be carried through to a decision on the merits.

Judgment on appeal may result in a reversal, an affirmance or modification of the original judgment in the superior court.[13] If judgment is reversed without ordering a new trial the defendant is discharged in the lower court.[14] If a new trial is ordered, the status of the case returns to the point at which it stood before the original trial which resulted in a conviction.

The 942 defense appeals which resulted in a final judgment on the merits were decided as follows:

	District Courts of Appeal	Supreme Court	Total
Affirmed	779	57	836
Reversed	105	1	106
Total Appeals	884	58	942

The above figures show the decisions by the respective appellate courts. It will be recalled, however, that there were 62 cases decided by the district courts of appeal which were granted hearings in the supreme court for further determination. In 18 of these the supreme court materially changed the decision of the district court of appeal.

[13] CAL. PEN. CODE § 1260.
[14] CAL. PEN. CODE § 1262.

In 12, the district court judgment of reversal was changed to an affirmance. In six, the district court judgment of affirmance was changed to a reversal. This makes a net total of six changes from reversal to affirmance so that the final figures on judgment on appeal in the 942 cases became 842 affirmed and 100 reversed or a percentage of 10.6 reversals in those appeals decided on the merits.

Judgments which resulted in a modification of the lower court judgment have been included in these figures as affirmances for the reason that in no case of a modification was the defendant freed from his conviction of crime. Modification takes the form either of an affirmance on some counts and a reversal on others where the defendant is convicted on several counts, or of a reduction in the degree of the crime of which the defendant was convicted.

It has already been pointed out that there were 44,842 felony convictions during the period 1929 to 1935. With a total of 100 of these convictions reversed on appeal during this same period, it appears that approximately only two defendants in each 1000 had their convictions set aside through the process of appeal. Many reversals on appeal, moreover, result in a new trial of the defendant so that it can not be assumed that even two defendants in each 1000 convicted avoid conviction through an appeal. In this study it was possible to check the superior court records for subsequent proceedings in 51 cases out of the 100 reversed. Of this number 31 defendants were subsequently acquitted or the charges were dismissed, while the other 20 were subsequently convicted. If this ratio holds for the total number of reversals, it would seem that only 60 persons out of 44,800 originally convicted of a felony avoided a conviction because of an appeal. This amounts to one defendant out of each 746 convicted.

These data on the disposition of criminal appeals, arranged by county of origin for those counties in which there were 25 or more appeals are shown in the table below.

County—	Total Appeals	Dismissed or Affirmed on Motion	Per Cent Dismissed or Affirmed on Motion	Final Decisions on Merits			
				Total	Affirmed	Reversed	Per Cent Affirmed
Alameda	57	14	24.6	43	41	2	95.4
Fresno	43	8	18.6	35	34	1	97.1
Los Angeles	637	155	24.3	482	424	58	88.0
Orange	28	8	28.6	20	16	4	80.0
Sacramento	42	11	26.2	31	29	2	93.6
San Bernardino	35	5	14.3	30	29	1	96.7
San Diego	51	13	25.5	38	37	1	97.4
San Francisco	93	21	22.6	72	67	5	93.1
San Joaquin	27	10	37.0	17	16	1	94.1
All Other Counties	222	48	21.6	174	149	25	85.6
Total	1235	293	23.7	942	842	100	89.4

TIME ELEMENT IN CRIMINAL APPEALS

The most frequent criticism of the handling of criminal cases on appeal is that too great a period of time elapses before final determination of a case; that this period, when added to that required for the preliminary procedure of bringing the case to trial and reaching the point of conviction, offers a further means of postponing beyond any reasonable limits the sentence or judgment of conviction and punishment.

The fact that a case is appealed does not, of course, indicate that the defendant is avoiding the judgment of which he is convicted. In a large number of cases a defendant sentenced to prison is committed and starts to serve his sentence regardless of the fact that an appeal has been taken. If he obtains a writ of probable error he is, in most cases, confined to the county jail during the period of the appeal, and if his conviction is affirmed he is committed to prison to commence his sentence. The fact that there are only about twenty-seven appeals out of each thousand convictions shows the small number of defendants who take appeals, and the fact that in over ninety per cent of these appeals the judgment is affirmed indicates that even though considerable time is taken on appeal the defendants seldom escape the penalty imposed upon them. It would seem, therefore, that the factor of time consumed in the determination of an appeal is of little consequence from the standpoint of whether or not a defendant suffers the penalty imposed upon him. However, from the standpoint of both the public and the defendant in the matter of reaching a final determination of the case and definitely settling the status of the judgment, it is important that the time taken on appeal be kept to a minimum and all unnecessary delay be avoided.

In view of this fact, it is essential in a study of criminal appeals to obtain and analyze thoroughly exact information on the time element. The individual case schedule used in this study provided for the recording of the date of every procedural step taken, from the judgment in the trial court to judgment on appeal. In the preparation of the time data it was necessary to compute approximately twenty different time intervals for each case to complete the analysis of every phase of appeal.

In general there are three main steps in the process of carrying through a criminal appeal to the point of decision; first is the preparation of the record of the proceedings in the trial court and the filing of this record with the court of appeal. The responsibility for this step rests with the officials of the county in which the appeal is taken. The second main step is that of bringing the case to the point of submission in the appellate court. In this part of the proceedings the responsibility rests largely upon the parties to the appeal, but in part upon the court itself in the enforcement of its rules for the filing of briefs and the

hearing of argument. The third main step constitutes the reaching of a final decision by the appellate court. The responsibility for this action, of course, rests wholly with the court.

Of these three general divisions of the appellate process it will be seen that only the final one rests solely with the court of appeal. Each of these general steps must be completed in order before the succeeding phase can be commenced. This means that the general responsibility for the time consumed in carrying an appeal through to completion does not rest with any one party alone or with the court alone but is distributed among several groups of persons who can act with a certain amount of independence in the matter of time taken, subject to the general rules laid down by statute or by the appellate courts themselves. It is essential, therefore, in any attempt to determine responsibility for any delay in the appellate process generally to study separately the time consumed in each of these three steps of the appeal.

The first step is that of the preparation of the record. According to the rnles of procedure for criminal appeals,[15] two transcripts are prepared by the county officials. The first or clerk's transcript is in effect the judgment roll and contains the certified copies of the indictment or information, the minutes of the court proceedings, the verdict and judgment, all written motions made before the court, and all written instructions requested but denied or modified. After notice of appeal is given, the clerk is to prepare this transcript and forward it to the appellate court to which the appeal is taken within a period of fifteen days. The second required transcript is known as the reporter's transcript and contains the verbatim record of the testimony at the trial or such parts of it as are requested by the appellant.

In California the defendant may take an appeal either by announcing in open court at the time of the judgment that he appeals from it or by filing a written notice of appeal with the clerk of the court within two days after rendition of the judgment.[16] It is interesting to compare this California rule with the data presented in Mr. Orfield's recent article, *Procedure of Appeal in Criminal Cases*.[17] In this article it is stated that the time in which an appeal must be taken in the various states ranges from a few days to a year or two. The *American Law Institute Code of Criminal Procedure* provides that an appeal may be taken within sixty days after judgment.[18] Even in England, which has a reputation for the expeditious handling of criminal appeals, a period of ten

[15] See RULES OF THE SUPREME COURT AND DISTRICT COURTS OF APPEAL OF THE STATE OF CALIFORNIA, Rule II.

[16] CAL. PEN. CODE § 1239.

[17] (1936) 24 CALIF. L. REV. 403.

[18] CODE CRIM. PROC. (Am. L. Inst. 1930) § 429.

days is granted to the defendant within which to appeal.[19] It would seem therefore that California allows less time than most other jurisdictions for the taking of an appeal.

Appellate court rules provide that after notice of an appeal is given the defendant must within five days file with the clerk of the trial court an application stating in general terms the grounds of the appeal and the points on which the appellant relies, and designating the portions of the phonographic reporter's notes to be transcribed in support of the points raised. The court is required to issue the formal order for the transcripts of the notes within two days after the application, but if the order is not made, the notes shall be transcribed without such an order. The reporter is given twenty days after the filing of this application to file with the clerk the original transcript and three legible copies of the testimony requested. These transcripts are typewritten. The original transcript is delivered to the court for its approval and copies are given to the defendant and to the prosecuting attorney. Unless there are objections from either party the judge shall certify the transcript within five days. If there are objections the court shall expeditiously hear and determine these and if the transcript is incorrect shall make the necessary corrections. When the transcript has been certified by the court and redelivered to the clerk it shall be immediately transmitted to the appellate court and thereupon become a part of the record.

Under this procedure prescribed by the rules of the appellate court, the maximum time after judgment in which to file the record in the appellate court would be about thirty days, composed of the following maximum sub-periods: two days after judgment for giving notice of appeal; five days after notice of appeal for making application for a reporter's transcript; twenty days after application for presenting the transcript; five days after the transcript has been presented, unless there are objections, for certification of the transcript by the court and presumably auother two or three days for filing the transcript with the appellate court.

In the 1235 defense appeals from judgment filed in the appellate courts from 1929 to 1935, the average time consumed between the pronouncement of judgment by the superior court and the filing of the reporter's transcript in the court of appeal was forty-four days. This average was divided as follows: twenty-four days between pronouncement of judgment and the filing of the transcript by the reporter with the clerk; seventeen days between the filing of the completed transcript by the reporter and certification by the judge, and an average of three days from certification to filing of the transcript in the appellate court.

[19] CRIMINAL APPEAL ACT (1907) § 7.

While a maximum period of thirty days was expected for this interval in the usual appeal, in only one-fourth of all appeals filed did the time fall within this limit. It required a thirty-eight day period to file the reporter's transcript in the first fifty per cent of the cases and a fifty-one day period for the first seventy-five per cent of the cases filed.

Since the responsibility for the time taken in this step of the appellate procedure rests largely with the county officials, it is of interest to compare the counties on the basis of this time interval. The following table shows the average time consumed in this interval and each of its three subdivisions for the nine counties in which there were as many as twenty-five filed.

County—	Number of Cases	Average Time Judgment to Appellate Court Filing	Average Time Judgment to Reporter's Transcript Filed with County Clerk	Average Time Filing with County Clerk to Certification by Judge	Average Time Certification to Filing in Appellate Court
Alameda	57	47	31	13	3
Fresno	43	42	23	17	2
Los Angeles	637	44	23	19	2
Orange	28	30	20	8	2
Sacramento	42	50	20	29	1
San Bernardino	35	43	23	16	4
San Diego	51	36	20	11	5
San Francisco	93	33	22	10	1
San Joaquin	27	61	42	11	8
Other Counties	222	49	28	16	5
Total State	1235	44	24	17	3

The data show a wide variation between counties in the average time consumed in this step of the procedure and in each of the subdivisions. For the entire step from judgment to transmission of the transcripts the range was from an average of thirty days in Orange County to sixty-one in San Joaquin. The average time between judgment and the completion of the reporter's transcript ranged from twenty days in Sacramento and San Diego counties to forty-two days in San Joaquin County. From the completion of the transcript to its certification by the judge took an average of eight days in Orange County and twenty-nine days in Sacramento County. In most counties the transmission of the transcript was made to the appellate court within a period of two to four days.

After the transcripts have been filed in the appellate court the second step of the appeal is to bring it to the point of submission for decision. This is usually accomplished by the filing of briefs and the hearing of argument. The rules provide that the appellant shall file his opening brief within ten days after the filing of the last transcript. The respondent is then given ten days within which to file his brief and the appellant an additional five days in which to file a reply brief. If these rules were strictly followed all briefs would be filed within a twenty-five day period

after the filing of the reporter's transcript. The time analysis for this phase of the appeal in the cases covered by this study which were decided on their merits showed that it was the exception rather than the rule for briefs to be filed within the time limits prescribed by the court rules.

The average time taken between the filing of the reporter's transcript and the point at which the case was ready for submission was eighty days for the 884 cases decided in the district courts of appeal and 148 days for the fifty-eight death penalty cases decided by the supreme court. In no district or court was the time interval for this phase of the appeal within the expected 25-day period in even ten per cent of the cases.

In the usual course of an appeal three briefs are filed; the appellant's opening brief, the respondent's brief, and appellant's reply brief. Because argument is waived in a majority of criminal appeals, the time taken in getting the case ready for submission is largely confined to the filing of these briefs. For the cases decided in the district courts of appeal, the average time between the filing of the reporter's transcript and the filing of the opening brief was thirty-five days. For the death penalty cases in the supreme court the average for this interval was seventy-three days. In not more than twenty-five per cent of the cases was the opening brief filed within the ten days provided for in the rules.

The time interval elapsing between the filing of the opening brief and the filing of the respondent's brief averaged twenty-seven days in cases decided by the district courts of appeal and thirty-five days in death penalty appeals in the supreme court. Here too in not over one-fourth of the cases was the respondent's brief filed within the allotted time of ten days.

In those cases in which an appellant's reply brief was filed, the average time in the district courts of appeal was eighteen days after the filing of the respondent's brief and in the supreme court death penalty cases thirty-four days, although the rules provided for a five-day interval in this particular step. Reply briefs were filed in about two-thirds of the appeals decided.

Relatively few criminal appeals are argued in California. In only 247 cases of 884 decided in the district courts and in only twenty-five of the supreme court death penalty decisions were there arguments of any kind. The time between the filing of the reporter's transcript and the hearing of argument averaged fifty days in the district courts of appeal cases and 121 days in the supreme court death cases.

The third and final stage in the progress of an appeal is the actual decision of the court after the case has been submitted. Insofar as the proposed constitutional amendment seeks to speed up the appellate

process, it must be this part of the procedure at which it is directed, for it is only this phase that is entirely within the control of the appellate courts. Contrary to a rather general assumption that there is a large amount of delay at this point in the disposition of criminal appeals, the facts found in this study showed that the average time between the point at which a case was ready for submission and the actual date of the public decision was forty-six days in the district court of appeal cases; ninety-six days in death penalty cases heard by the supreme court. Considerable variation was found between the different districts and courts in the time taken to decide a case. In three of the six courts or divisions of the district courts of appeal the cases were decided in an average time of thirty days or less, and it was noted that in at least two of the other three courts which took longer periods of time the interval was being shortened in the last two years covered by the study.

In the following table these data on time intervals have been summarized. The table shows the average time between superior court judgment and decision on appeal for both the district court cases and the supreme court death penalty cases and shows the relative proportion of time which is consumed in each of the three stages on appeal. The average time taken on appeal in the ordinary criminal cases decided by the district courts of appeal is 170 days or five and two-thirds months; twenty-six per cent of this time is taken in getting the record before the appellate court; forty-seven per cent is taken in bringing the case to the point of submission, and only twenty-seven per cent of the total time is consumed by the court in reaching a final decision. Death penalty appeals decided by the supreme court took on the average about ten months. Approximately eighteen per cent of this time was spent in getting the record of the court of appeals, exactly fifty per cent in getting the cases ready for submission, and thirty-two per cent of the time by the court in reaching a decision.

	884 District Court of Appeal Cases		58 Supreme Court Death Penalty Cases	
	Average Time in Days	Per Cent of Avge. Time	Average Time in Days	Per Cent of Avge. Time
Total Time from Superior Court Judgment to Decision on Appeal	170	100.0	296	100.0
I. Time from Superior Court Judgment to Filing of Reporter's Transcript	44	25.9	52	17.6
II. Time from Filing Reporter's Transcript to Point of Submission	80	47.0	148	50.0
III. Time from Date at Which Ready for Submission to Decision	46	27.1	96	32.4

From the facts presented above on the time taken by the courts to decide criminal appeals after submission, the idea that a large amount of delay exists in this part of the procedure would seem to be a misconception. When half of the district courts of appeal can finally decide cases within an average of thirty days and steps are being taken by the other district courts to speed up their decisions it would hardly seem that the time taken to decide appeals involves much unnecessary and unjustified delay. This does not imply that improvements could not be made in the present administration of criminal appeals in California through the adoption of improved practice and procedure; particularly in the earlier stages of appeal changes could be made which would materially speed up the hearing of appeals, but such reforms are matters of administration and court rule which can take place just as well within the present appellate court system as within a new judicial structure.

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