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To: Appellate Court Committee

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Re: Priority on Appeal

The Courts of Appeal are statutorily required to give preference to criminal and juvenile appeals (and certain civil appeals, such as those involving the elderly or ill) in processing and deciding their caseload. The severe funding cuts that have hit the courts in the last few years have therefore resulted in a dramatic slowdown or even temporary halt of decision-making in regular civil appeals. Such delays cause understandable frustration and often outright hardship for civil litigants.

Members of the appellate bar commendably are attempting to devise solutions to this situation. The current proposal is to eliminate the statutory priority for criminal cases in which the defendant is not in custody. Although I fully support the goal of empowering the courts to decide civil cases at an acceptable rate, I do not agree this radical change would be an appropriate response.

Sources of priority

Criminal cases: Code of Civil Procedure section 44 provides:

> Appeals in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign shall be given preference in hearing in the courts of appeal, and in the Supreme Court when transferred thereto. All these cases shall be placed on the calendar in the order of their date of issue, *next after cases in which the people of the state are parties*.

(Emphasis added; see *Abdullah B. v. Superior Court* (1982) 135 Cal.App.3d 838, 844 ["[a]dult criminal appeals receive priority because they are cases 'in which the people of the state are parties,'" citing Code Civ. Proc, § 44].)

Juvenile cases: Welfare and Institutions Code section 800, subdivision (a), provides a juvenile delinquency appeal has "precedence over all other cases in the court to which the appeal is taken." A parallel provision is in Welfare and Institutions Code section 395(a)(1) for juvenile dependency appeals and in Code of Civil Procedure section 45 for appeals from orders freeing a minor from parental custody or control

Case-specific urgency: Within the framework of statutory priorities for general classes of case (e.g., criminal, juvenile, civil), individual cases – of *any* class – may warrant special priority because of a particular urgency. California Rules of Court, rule 8.240 sets out a process for requesting calendar preference (an expedited appeal). The rules permit the making of individualized decisions like that, but they do not and may not reorder the statutory priorities in any fundamental way. (See Cal. Const., art. VI, § 6(d) [rules must be consistent with statute]; see following section on meaning of priority.)

Meaning of "priority"

The fact criminal and juvenile cases have "priority" does not mean courts may hear *only* those cases. Statutory priorities are general principles for ordering a court's business, not rigid, absolute rules for assigning an exact numerical "score" to each case. Room for individualized judicial judgment is essential.

In *People v. Engram* (2010) 50 Cal.4th 1131, the Supreme Court rejected the contention that the Riverside County superior court violated Penal Code section 1050, the trial court analog of Code of Civil Procedure section 44,[1] by declining to assign late-stage criminal cases to family law, probate, calendaring, and other specialized departments. It noted the superior court had already made considerable efforts to handle its criminal caseload and defer ordinary civil cases, but that many civil cases also involved urgent matters, such as those involving families and children.

Engram pointed out that the judiciary has inherent power to ensure it fulfills its constitutional mandate as a separate and independent branch of government:

> It is well established, in California and elsewhere, that a court has both the inherent authority and responsibility to fairly and efficiently administer all of the judicial proceedings that are pending before it, and that one important element of a court's inherent judicial authority in this regard is "the power .

[1]Penal Code section 1050 gives preference to criminal trials. Although *Warren v. Schechter* (1997) 57 Cal.App.4th 1189, 1198-1199, found the rationale of Code of Civil Procedure section 36 on trial preference for the ill, elderly, etc., to be applicable on appeal, that approach seems unnecessary for criminal appeals in light of section 44.

> . . to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance."

(*People v. Engram*, *supra*, 50 Cal.4th at. p. 1146.) This is a constitutionally based authority, on which statute may not so completely infringe as to supplant altogether "a court's discretion to control the order of business before it in order to protect and safeguard the rights and interests of all litigants with matters before the court, and to promote the fair and efficient administration of justice." (*Id*. at pp. 1148-1149; see also *Lorraine v. McComb* (1934) 220 Cal. 753, 756 [if statute on granting continuances were interpreted as imposing inflexible and obligatory restriction on court's authority, its constitutionality would be questionable].)

The recent severe constriction of appellate resources thus does not preclude hearing any civil cases at all. To the contrary, the courts have a responsibility to *all* litigants before them. It is appropriate (indeed essential in the long term) to continue deciding civil cases. The civil decisional process would unavoidably be at a slower rate than that for priority cases, perhaps with occasional suspension when the backlog of priority cases reaches a critical mass, but it must go on nevertheless. And rule 8.240 gives an "out" for individual civil cases with immediate urgency.

Should statutory priority for criminal cases be confined to defendants in custody?

The proposal before the Appellate Court Committee would amend Code of Civil Procedure section 44 to eliminate priority for criminal appeals in which the defendant is not in custody. It would subordinate other statutorily prescribed priorities to those cases, thus reversing the current preference for juvenile cases.[2] The assumption is, apparently,

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[2]Any effort at lowering juvenile cases on the priority ladder is likely to run into fierce opposition. The Fourth District, Division One, has been the state's leader in expediting such cases. (See *In re Phoenix H.*, 2007, D050304, formerly published at 152 Cal.App.4th 1576, superseded by grant of review and affirmed in *In re Phoenix H.* (2009) 47 Cal.4th 835.) As the California Supreme Court has said, in dependency proceedings the State's interest in expeditiousness is unusually strong: a child cannot be adopted until the parent's appeal is over, and "[t]here is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home,' . . . especially when such uncertainty is prolonged." (*In re Sade C.* (1996) 13 Cal.4th 952, 988, quoting *Lehman v. Lycoming County Children's Services* (1982) 458 U.S. 502, 513-514; see also Cal. Rules of Court, rule 8.416 on fast-track juvenile cases; Code Civ. Proc, § 45 [exceptional good cause required to continue child custody case].)

that priority for criminal cases is for the most part based on a concern for minimizing the potential for unjust incarceration. While that concern is of course vital, it is not the only reason for preference.

First, criminal cases are part of a larger group – those in which the "people" are a party, as section 44 phrases it. Even while acknowledging that a peaceable society always requires a workable system for resolving private disputes, the Legislature has established a justifiable priority for cases affecting the public as a whole. Criminal cases involve all "people." The public has an acute interest in ensuring the system of criminal justice operates reliably, both to protect itself from crime and to shield individuals from the unjust use of governmental power. The public, the prosecution, and the defendant all have a interest in obtaining prompt appellate review and guarding the ability to retry the case if necessary. Victims and their families have an interest in finality, as well.

Second. from a defendant's viewpoint, custody is not the only effect of a criminal conviction:

> *Probation:* Persons on probation often face many restrictions on their basic liberties, such as freedom of movement and association. (See *People v. Brandao* (2012) 210 Cal.App.4th 568.) Often a condition of probation is waiver of the right to be secure against unreasonable searches and seizures. (*People v. Bravo* (1987) 43 Cal.3d 600.) Probationers may be subjected to drug and alcohol testing and curfews. Numerous other facets of life may be affected, even the ownership of pets (*People v. Olguin* (2008) 45 Cal.4th 375). Many probationers face incarceration if the court finds even a non-criminal violation of probation.
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> *Collateral consequences:* A criminal conviction carries a stigma that may make it difficult to secure employment or housing. It may result in the loss of civil rights, such as the right to vote or drive or hold certain public jobs or serve on a jury. It may result in revocation of a professional license or ineligibility for certain occupations, subject the defendant to deportation, increase later sentences, and be used in civil commitment proceedings (*People v. Vasquez* (2001) 25 Cal.4th 1225). (See *Sibron v. New York* (1968) 392 U.S. 40, 55-56, and *Carafas v. LaVallee* (1968) 391 U.S. 234, 237-238 [collateral consequences of convictions].)
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> *Just waiting:* Even if the defendant is facing no custody and no restrictions during appeal, prompt resolution is often important to him or her. The period of appeal is a kind of limbo, during which the defendant will find it difficult to make plans about relationships, employment, housing, etc., because those arrangements will be disrupted if the appeal results in affirmance and the defendant is abruptly incarcerated after years of waiting.

Even assuming the *defendant* is happy with and benefits from waiting, the prosecution and public, and arguably any victims, have a stake in not prolonging the appeal. If, for example, the defendant has been granted bail pending appeal, extending the appeal period would delay execution of sentence, leaving the defendant at large – possibly for years if the appeal has low priority. Such a situation would greatly extend the length and costs of community supervision and potentially reduce the deterrent value of the criminal law.

For all of the above reasons, custody as a measure of urgency is under-inclusive and fails to account for a number of relevant factors. Other problems with the proposal include:

Little impact: Giving priority only to defendants in custody solves very little in the way of appellate court congestion. In the great majority of felony appeals, the defendants *are* in custody; that is a dominant reason they appealed.

Costs: The proposal would impose possible costs. The Court of Appeal and/or appellate counsel (all of whom are publicly funded in most appeals) would have to monitor the defendant's current custody status to determine the case's priority. For defendants out of custody they would have to follow cases on their records over a much longer time – at public expense.

Irrelevance in many cases: Custody, especially immediate custody, is often not at stake in felony appeals. Many criminal appeals challenge only some of the counts, or a small part of an otherwise long sentence, or credits toward release in the far future, or restitution orders or other fees. Even if they challenge the conviction as a whole, a reversal almost always means a new trial, not complete release.

Possible approaches

For the reasons given, I think it would be unwise to upset the current statutory priorities. They have existed for decades[3] and, with the flexibility noted by *Engram*, seem to have worked effectively. There are too many unforeseeable, likely undesirable, consequences to tampering with the system or trying to set before-the-fact, necessarily oversimplified, and simultaneously over- and under-inclusive rules about what is urgent or not. Individual judgments by courts are crucial, within the broad policy principles set out by statute.

[3]The priority in section 44 for cases in which the "people" are a party was enacted, under a different number, in 1887.

I think it would be better to work within the existing structure than to alter it, to address this hopefully short-term problem. The courts are trying very hard to juggle competing needs and achieve the fairest balance within an increasingly inadequate financial framework. The bar can help:

• It must continue to lobby for appropriate funding for courts.

• To protect clients, attorneys can inform the courts of any special needs of litigants and seek calendar preference if (but *only* if) reasonably necessary..

• It can help streamline the process on the bar's end by educating and encouraging attorneys to follow rules, prepare adequate records, present clearly defined issues, avoid needless collateral maneuvering, promote settlements where appropriate, etc.

• The bar can be alert for inefficiencies in the rules and operations of the system and help address them.

I commend the SDCBA for its efforts to find solutions for the current dilemma. ADI would be happy to work with it in this process.