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CALIFORNIA ACADEMY OF APPELLATE LAWYERS

By Electronic Filing

August 18, 2020

California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Eisenberg v. Court of Appeal for the Third Appellate District*
Docket No. S269691
Amicus Letter Supporting Issuance of Order to Show Cause

Honorable Justices,

The California Academy of Appellate Lawyers writes to urge the Court to issue an order to show cause on this original writ petition so it may address the merits. It does so pursuant to California Rules of Court, rule 8.500(g). The Academy believes this case warrants this Court's substantive review, but expresses no views on its merits, including the parties' dispute as to the propriety of public interest standing in this case.

1. Interest of the Academy

The Academy's members are more than 100 experienced appellate practitioners whose common goals include promoting and encouraging sound appellate procedures that ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in the law affecting appellate litigation.

Each of the parties to this dispute is, or is represented by, a member of the Academy and those members recused themselves from our deliberations in this case. No party, attorney for a party, or judicial member has played any part in our decision to file this letter or in preparing it.

2. Questions Presented

Mr. Eisenberg's petition asserts that Code of Civil Procedure section 44 and federal due process principles, as expressed in *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1555–1558 & fn. 11 and *U.S. ex rel. Green v. Washington* (N.D. Ill. 1996) 917 F.Supp. 1238, 1277, require that criminal appeals be given calendar preference over all civil matters. (Petn. at p. 15.) In particular, the petition asserts that calendar preference applies from the filing of an appeal to its resolution and, in particular, from the time parties complete briefing until a matter is resolved. (Petn. at p. 16.)

In an email to the **Daily Journal**, which we attach to this letter for the Court's convenience,¹ Administrative Presiding Justice Raye concedes that priority is required for criminal appeals, but appears to interpret it to apply when a matter is ready for argument, rather than when it is fully briefed. He writes:

Our caseload is such that many criminal cases must wait in line behind other criminal cases before being assigned to an attorney and judge for the preparation of an opinion. [¶] We do not place cases on calendar until a tentative opinion is prepared and the parties request oral argument or we set it for argument without a request.

Justice Raye and the Third District's Preliminary Informal Response contends (at pp. 7–15) that Code of Civil Procedure section 44 is directory rather than mandatory and (at pp. 18–23) that the federal due process cases develop a standard to be applied to the specific facts of individual cases and that Mr. Eisenberg lacks standing to assert that standard.

Thus, the legal issues the Petition presents would seem to be these:

Is public interest standing appropriate in this case?

Is the calendar preference for criminal appeals provided by Code of Civil Procedure section 44 mandatory or directory? May it be enforced by writ of mandate?

¹ The email also appears on the **Daily Journal**'s website here: https://s3.documentcloud.org/documents/20984049/eisenberg-reply-final-july-6-21_.pdf > (as of Aug. 18, 2021).

Does that statute, together with federal due process principles, require a Court of Appeal to prefer such appeals in initial pre-argument decision-making, as well as argument, or only as to argument?

Of course, the Petition presents factual issues, too.

3. These Questions Merit this Court's Review

How our appellate courts should manage their criminal caseloads is, of course, of vital interest to the Academy, our clients, and the public. Guidance to the Courts of Appeal on application of the requirements of state statute and the federal Constitution is appropriate, as no one can achieve an objective that is not clearly articulated. Thus, the questions merit resolution.

The Petition seeks a writ of mandate directed to the Third District Court of Appeal. (Petr. at p. 13.) The familiar authorizing statute provides that such a writ “may be issued by any court to any inferior tribunal.” (Code Civ. Proc. § 1085, subd. (a).) The Third District is “inferior” only to this Court. Thus, it would seem this Court alone can grant the requested relief.

Moreover, the Academy respectfully asserts that it is appropriate that this Court articulate the law which must govern the performance of the Courts of Appeal. While the leadership and management of those Courts is, of course, left in the first instances to the Justices and Administrative Presiding Justice of each Court, this Court is best positioned to promote accountability in the judiciary with best regard for the separation of powers fundamental to our democracy. (Cal. Const., art. III, § 3.) It also serves judicial independence, as judicial leadership on problems of public concern can eliminate pressure for solutions from the other branches. (E.g., *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 644 [“An impartial and independent judiciary is indispensable to our legal system. Of equal importance is public confidence in the independence and integrity of the judiciary, because the effective functioning of our legal system is dependent upon the public’s willingness to accept the judgments and rulings of the courts. (Cal. Code Jud. Conduct, com. to canon 1.) As a consequence, California judges must act in accordance with high standards of conduct that foster the utmost trust of the public.”].)

Document received by the CA Supreme Court.

4. Conclusion

Expressing no view of this dispute's merits, the Academy respectfully urges this Court to issue an order to show cause on the Petition so that it may address the important legal questions the Petition raises. This Court is the only agency that

can issue the relief sought and is best positioned in our tripartite democracy to oversee the performance of judicial functions.

Respectfully submitted,

CALIFORNIA ACADEMY OF
APPELLATE LAWYERS
AMICUS CURIAE COMMITTEE



Michael G. Colantuono, Chair (No. 143551)
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Attachment

Eisenberg Reply

I have not previously responded to allegations made by Jon Eisenberg. The allegations were made to the Commission on Judicial Performance and while Mr. Eisenberg chose to share his complaint with the news media, I thought it best to restrict my response to the Commission, believing as I did that the Commission could sort through the various accusations, some overblown and some not, and act appropriately.

I have decided that his latest claims, set forth in a petition to the Supreme Court, are of a different sort. His claims are simply wrong. He claims the Third District is “systemically” denying statutory calendar preference for many criminal appeals. Not so. There are a multitude of statutes providing calendar preferences for various categories of cases, and other priorities are established by motions in individual cases. There is no “systemic” denial of calendar preferences. Preferences are accorded when mandated.

Perhaps, what Mr. Eisenberg fails to appreciate is the volume of cases handled by our court. According to Mr. Eisenberg, “once a criminal case is fully briefed, it must be placed on the next available oral argument calendar—which in most Courts of Appeal usually means three or four months later.” There is no basis for Mr. Eisenberg’s rule. Our caseload is such that many criminal cases must wait in line behind other criminal cases before being assigned to an attorney and judge for the preparation of an opinion.

We do not place cases on calendar until a tentative opinion is prepared and the parties request oral argument or we set it for argument without a request. Mr. Eisenberg complains about 278 appeals purportedly denied calendar preference since 2018. Nearly 3,000 criminal appeals were filed with our court during that period of time, each of which was accorded calendar preference. We could not comply with Mr. Eisenberg’s suggested timeline without a substantial increase in personnel.

Mr. Eisenberg claims a decade-long practice of failing to accord calendar preference commenced with my appointment as presiding justice in September 2010. He claims to have found only two criminal appeals that were “prejudicially delayed” during the two years preceding my appointment. I personally reviewed Judicial Council reports dating back to 1999 documenting the time to filing opinions in criminal appeals from close of briefing or notice of appeal. I cannot assess Mr. Eisenberg’s claim of “prejudicial delay” but the Judicial Council reports would not support a claim that delays increased following my appointment.

Finally, I am disappointed with Mr. Eisenberg’s claim that the systemic failures of which he complains were “presaged” by testimony I delivered before a legislative committee four decades ago on behalf of a measure supported by the Attorney General. I was doing my job as a staff member speaking on behalf of the Attorney General and don’t recall the bill, which would have apparently eliminated appeals as a matter of right in criminal cases. Mr. Eisenberg seems to suggest my remarks reflect a bias which lingers and led me to be hostile to calendar preferences for criminal appeals. Nothing could be further from the truth.

PROOF OF SERVICE

*Jon B. Eisenberg v. Court of Appeal for the
Third Appellate District, et al.*
Supreme Court of California Case No. S269691

I, Maria Valdez, declare:

I am a resident of the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action. My address is 790 E. Colorado Blvd., Suite 850, Pasadena, CA 91101. On August 18, 2021, I served the documents described as:

AMICUS LETTER

on the interested parties in this action, via the method indicated, addressed as follows:

Jon B. Eisenberg
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Healdsburg, CA 95448

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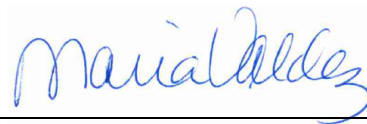
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I declare under penalty of perjury that the foregoing is true
and correct, and that this declaration was executed on August 18,
2021, in Pasadena, California.



Maria Valdez

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