August 23, 2016

SENT BY OVERNIGHT MAIL AND EMAIL

Judicial Council of California
Attn: Leadership Services Division, Special Projects Office
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RE: Public Comment to Futures Commission Session of Aug. 29, 2016

Dear Futures Commission:

Back on the Road California ("BRC") is a coalition of civil rights and legal services organizations that assists low-income Californians in traffic court proceedings. For the past several years, we have advocated for systemic change at the state and local levels against policies and practices that prohibit low-income people from driving simply because they cannot afford to pay massive court fines, fees, and surcharges. We previously submitted comments to the Futures Commission (the "Commission") regarding items on its agendas for the December 8, 2015 and July 22, 2016, meetings.

We want to thank the Commission for continuing to explore ways to reduce the financial burden of traffic tickets and fees on low-income Californians and the harms caused by the suspension of their drivers' licenses due to non-payment. While the Statewide Traffic Ticket Amnesty Program has proven to be a helpful tool in reducing the collateral damage caused by traffic fines and fees, the program is limited in whom it serves and is temporary (end date of March 2017). Furthermore, its implementation continues to be very problematic. Ten months into the amnesty program, our organizations have seen only a relatively modest number of clients whose drivers' licenses have been restored. More fundamentally, the amnesty program does not address the root problem of funding our court system through fines and fees, and using license suspension as a debt collection tool.

We hope that our written comments will continue to assist the Commission in its work which is so vital to access to justice in California. The following comments address three of the August 29 agenda items: Concept 1 (Fines and Fees: Judicial Discretion and Court Adjudication), Concept 2 (Reduce Certain Non-Serious Misdemeanors to Infractions) and Concept 4 (Decriminalize Traffic Infractions and Move to an Alternate Forum).

Concept 1: Fines and Fees: Judicial Discretion and Court Adjudication

BRC agrees with the Commission working group that a defendant's ability to pay must be considered when assessing any fine, fee, or assessment and we support with qualification the four specific proposals of Concept 1. We address each proposal in turn.

1) **Increasing judicial discretion to strike, modify, or waive criminal fees and civil assessments based on a defendant's ability to pay.**

The Commission working group concluded that judges have discretion to waive or reduce fines but that their ability to do so for fees and assessments is limited. As an initial matter, we believe that these add-on fees and assessments should be eliminated entirely. As the working group comments note, the total add-ons for a base fine of $100 can be nearly $400. However, if the courts are going to continue imposing these add-ons, it is our position that judges have the discretion, if not constitutional duty, to adjust and modify legal financial obligations depending on a person's ability to pay, regardless of statutory mandates. To the extent that the Commission believes that the relevant governing statutes must be modified to allow waiver of the fees, we point the Commission to Penal Code Sec. 1464(d), which provides:

> *(d) In any case where a person convicted of any offense, to which this section applies, is in prison until the fine is satisfied, the judge may waive all or any part of the state penalty, the payment of which would work a hardship on the person convicted or his or her immediate family.*

BRC recommends that the Commission support the passage of similar provisions to all statutes that impose similar fees, penalties, and assessments.

Moreover, we note that even where a statute explicitly provides the courts with discretion, it is our experience that judges often do not properly exercise that discretion. For example, the Vehicle Code does not bar waivers or reductions in assessments for failure to appear (FTA) or failure to pay (FTP). The civil assessment statute governing sanctions for FTAs and FTPs states that an assessment of "up to $300" may be imposed. Yet, it is the experience of many of our clients that judges fail to exercise discretion in the following ways:

- First, there is no individualized determination of whether a civil assessment is appropriate, or what the appropriate amount should be. Many courts automatically impose the full $300 civil assessment when someone fails to pay or appear. A review of court forms and website information from the different counties indicates that this is a widespread problem throughout the State. A blanket $300 assessment constitutes a failure to exercise judicial discretion and violates the Legislature's intent that the imposition of the assessment and the assessment amount be discretionary. It is our position that until a defendant's ability to pay is known, no dollar amount for FTA or FTP assessments should be imposed. Instead, we believe that a notice should be mailed to defendants regarding the FTA or FTP and the need to contact the court to resolve the matter. The notice should be sent by USPS certified mail, return receipt should be

requested since many of our low-income clients move frequently or live in housing with problematic mail delivery, and it should be sent to the address on file with the DMV if that has been updated since the citation date. We frequently hear that clients never received the court's notice. Courts should also develop systems of electronic communication and sent notices by email and text message to improve the chances that defendants receive notices and courts receive revenue. Finally, we believe that all civil assessments and failure to pay penalties should be waived if and when the court waives the underlying fines and fees.

- Second, in our experience, there are no consistent and/or meaningful ability to pay standards throughout the court system. As set forth in our forthcoming comments to the Judicial Council's proposed rule 4.107, the Judicial Council should establish a comprehensive system for determining an individual's ability to pay under which there is a rebuttable presumption of inability to pay if a defendant is on means-tested public benefits or has an income at or below 250% of the federal poverty level. If a defendant does not fall within those parameters, but still has difficulty paying, the court should determine ability to pay based on income and other factors, such as the amount of the defendant's other debts and the local cost of living. Judges and other qualified and trained court personnel should be able to access a schedule set by the Judicial Council of fine/fee reduction/waiver amounts and payment amounts based on income or a presumed inability to pay. The Judicial Council schedule should require courts to offer alternatives to payment, such as installment plans or community service, so long as those alternatives are also tailored to a defendant's ability to pay, physical capabilities, and any other relevant life circumstances. Please see our forthcoming comments to Judicial Council proposed rule 4.107 for a full discussion.

2) Establishing an alternative means to pay fines, fees, and assessments, accessible 24 hours a day

Our coalition fully supports efforts to simplify and make more accessible the fine/fee payment process, including 24/7 availability and online access. As such changes are being made, we caution that there should be no assumption that everyone will have the ability to pay upfront the entire amount owed. Court personnel and websites should provide meaningful opportunities to request waiver or reduction of fines and fees, with the ability to present relevant income information and other information needed to determine ability to pay at those locations. Court websites should set up auto-payment tools to increase ease of payment for court users and increase chance of collection by courts. No additional fees should be added for processing payments; such add-ons raise questions about legality and fairness. Information technology improvements in this area could greatly simplify the work of court personnel, court users, and legal aid programs assisting clients on resolving their unpaid tickets.

We also recommend that the courts support a change to the time limit on payment for traffic school so that low-income defendants can use traffic school as other defendants do to avoid exorbitant insurance costs. Currently, full payment of traffic school fines and fees must be made

within 90 days. However, for low-income defendants, it is often not possible to pay the full amount on that timeline. Inability to access traffic school decreases the number of drivers who can afford insurance, and therefore is detrimental to Californians broadly.

3) Allowing conversion of fines, fees, and civil assessments to jail or community service.

Jail

The Commission's proposal to permit defendants to serve jail time to work off fine amounts reverses the Judicial Council's progress in working to ensure that people in the traffic court and criminal system are not punished simply for being poor. The suggestion that a person should submit herself to incarceration simply because she cannot afford to pay a traffic ticket or criminal fine, where someone with adequate income may avoid that circumstance entirely, is deeply discriminatory and perpetuates the existence of "debtors' prisons." It is particularly distressing given the exorbitant fines and fees levied for traffic violations and other infractions and in the context of racial bias in traffic enforcement.[1] Holding a person accountable for violating the law is one thing, but holding someone accountable through jail time for inability to pay outrageous assessments and surcharges is contrary to any notion of justice. It is also entirely illogical for the county to waste the $125 or more per day it costs to incarcerate someone, especially when that is in lieu of any fine collection. Further, the Commission is aware of the research that even short periods in jail can lead to a host of long term negative consequences, especially for persons whose offense is at the lowest end of criminal malfeasance. BRC opposes all such efforts to convert fines to jail time.

Unfortunately, people across California do end up serving some time in jail for failing to pay an infraction citation, especially for municipal offenses.[2] Courts should take every action to prevent people from serving jail time related to traffic and infraction offenses. While the efforts to reduce incarceration are underway, courts should create easier pathways for people to have their fines entirely dismissed if they spent any time incarcerated on such minor offenses.

Community Service

The BRC does support community service, with parameters.

First, community service should only be considered after appropriate fine/fee waivers/reductions have been considered. It would be illogical to develop procedures to reduce the financial burden on low-income defendants yet require them, should they opt for community service, to "work off" the entire amount of unadjusted fines and fees. Furthermore, neither community service

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[1] BACK ON THE ROAD COALITION, STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA (2016), *available at* http://ebclc.org/backontheroad/problem/.

[2] This happens most commonly through Veh. Code § 14601.1: Driving with a Suspended License.

programs nor payment plans should become a means to impose greater penalties on the poor by, for example, imposing onerous user fees or interest to participate in these alternatives.

Second, setting an hourly rate, even if minimum wage or more, creates the risk that people with large amounts of outstanding debt will be bound to work without pay for an unreasonable amount of time. If an hourly rate is set, it should be at least set at the minimum wage in the local city or county, there should be limits on the number of hours required per month, and after a certain number of months, the remaining balance should be forgiven.

Third, for defendants with conflicting obligations, particularly employment or with other life stressors due to poverty, flexibility should be the guiding principle. Low-income people have multiple stressors in their lives, many of which are related to their very survival. No court action should exacerbate these stressors. Weekend or evening community service should be possible. Defendants should be encouraged and enabled to propose their own community service sites. For instance, one of our clients was able to do his community service at his local church; another at a community-based non-profit. Such flexibility strengthens community ties and stabilizes individuals' lives. Community service credit should also be available for hours spent in job training, drug or mental health treatment, education, securing or providing child care, or participating in other approved public interest or personal improvement activities.

Fourth, the courts should allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. Defendants who demonstrate good cause to waive community service should be eligible to have their community service obligation waived. Good cause can mean a disability, a defendant's (or his dependent's) physical or mental illness, lack of proper transportation, lack of adequate childcare, or other circumstances that would prevent someone from completing their community service.

Our coalition applauds the working group for noting the problematic practice of not permitting a defendant to perform community service in lieu of a civil assessment and of judges denying community service if someone chooses traffic school or if the defendant is employed full time. Community service, with appropriate restrictions, should be available to pay *any* debt arising from traffic court.

Our coalition supports the concept of allowing defendants the automatic right to convert fines and fees to community service and allowing requests to be accepted at the clerk's window and online. However, the wording of the working group's proposed one-time restriction is unclear. Its proposal is acceptable if it refers to fines and fees related to a single traffic citation. However, should a defendant receive in the future other traffic fines and fees, s/he should be allowed once again to request conversion to community service.

4) Creating an alternative method to facilitate the conversion of fines, fees, and civil assessments to jail or community service.

In administering the recommended community service system, court should consider contracting with local non-profits to place defendants in community service and monitor their performance. This is already done in some counties; for example, San Francisco City and County has Project 20 (http://sfpretrial.com/project20/). The same nonprofit also runs Project 22 serving Alameda County (http://sfpretrial.com/project22oakland/). Currently, there are agencies in 40 counties that are members of the California League of Alternate Service Providers (CLASP) (http://claspca.org/wp-content/uploads/2015/02/2015-CLASP-Directory.pdf). BRC believes that non-profit organizations can deliver a better, more tailored service to defendants. However, in no case should this service include arranging jail terms to "pay" fines or fees or as a consequence for failing to complete community service.

Concept 2: Reduce Certain Non-Serious Misdemeanors to Infractions

We commend the Commission's proposal to reclassify misdemeanors as infractions. Other than the considerable savings to the courts, prosecutors, and public defenders, such reclassification would help reduce the number of individuals, primarily low-income, with criminal records. Presumably these reclassified infractions would not enter into the NCIS database, and jail and probation for these violations would be eliminated. However, these benefits come at a cost, most seriously, no right to an attorney or jury trial. Thus, we support the working group's proposal to give defendants the option of having the charge brought as a misdemeanor in order to avail themselves of these procedural protections. It is also important that the defendant be given counsel at arraignment since the prosecutor could choose to charge as a misdemeanor at that time.

We also support the Commission's proposal to give the court, and not just the prosecutor, the discretion to charge a misdemeanor as an infraction. Generally, we also support the goal to promote consistency by providing parameters for the exercise of discretion in making the charging decision. However, the factor relating to the "prior criminality of the offender" should be stricken. Given the well-known racial bias in arrests and prosecutions,[3] using this factor could aggravate such bias and result in people of color being charged with misdemeanors with greater frequency than are whites because of their greater involvement with the criminal justice system in the past. Finally, in order to encourage use of this charging option to reduce unnecessary criminalization, we also recommend that there be a presumption that an eligible offense be charged as an infraction, unless the prosecutor makes a showing that the lesser charging is not warranted based upon the suggested factors.

The working group proposes that "an infraction under this new language should be punishable by a fine that reflects the severity of the offense," but ultimately the fundamental purpose of a criminal (or in the case of an infraction quasi-criminal) penalty should be rehabilitation of an

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[3] BACK ON THE ROAD COALITION, STOPPED, FINED, ARRESTED: RACIAL BIAS IN POLICING AND TRAFFIC COURTS IN CALIFORNIA (2016), *available at* http://ebclc.org/backontheroad/problem/.

individual more than punishment. Use of the traffic school option (with a reduction in the administrative costs) should be expanded. The Commission should also consider alternatives to traffic school that are rehabilitative. Ultimately, fines must not be so severe as to trap people in cycles of debt and poverty.

Finally, we recommend expanding the list of eligible misdemeanors to include misdemeanors for simple possession of drugs and low level property crimes. We also recommend allowing prosecutorial discretion for the misdemeanors that are deemed "serious" in nature, rather than classifying them in all cases as misdemeanors. Currently, the Commission is contemplating exceptions for certain serious misdemeanors that are punishable by a maximum term not exceeding six months. The decision to prosecute as an infraction or a misdemeanor should be determined on a case-by-case basis.

Concept 4: Decriminalize Infractions

Our coalition strongly agrees that there are significant benefits to decriminalizing infractions but, as the working group notes, there are pitfalls to avoid as criminal procedure provides important constitutional protections typically absent from civil proceedings. Anything which lessens the burden of a criminal record is, on its face, worthy of consideration but it must preserve an individual's rights and not lead to a greater volume of "convictions," albeit civil, which might result in even greater financial penalties. We shall consider in turn selected subparts of the "goals and strategies" section.

Law enforcement authority to stop a motorist

At the December 8, 2015, Commission meeting, our coalition expressed support for the Commission's interest in moving the processing of tickets to a non-criminal forum. We argued at that time that reclassifying misdemeanors as infractions would create an opening to delegate enforcement to personnel who are not Peace Officers, as is now the case with enforcement of parking violations. As we wrote then:

> *Studies have shown that people of color are more likely to have their persons and vehicles searched under "reasonable suspicion"*[4] *and more likely to have force – sometimes deadly force – used against them*[5] *than are their white counterparts. These stops typically are initiated because of some alleged violation of a minor traffic law. Taking this abused tool out of the hands of law enforcement and giving it to lower level administrative traffic code enforcers could do much to alleviate this problem.*

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[4] *See* ALPERT, GEOFFREY P., ET AL., PEDESTRIAN AND MOTOR VEHICLE POST-STOP DATA ANALYSIS REPORT: PREPARED FOR THE CITY OF LOS ANGELES (2006), at Appendix Table D5-D8, *available at:* http://www.analysisgroup.com/uploadedfiles/content/insights/cases/lapd_data_analysis_report_07-5-06.pdf (describing LAPD data from 2003-2004 indicating that blacks and Hispanics are more likely than whites to be patted down, frisked, searched, and told to exit their vehicles after they are stopped).

[5] *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEP'T (2015), *available at* http://www.justice. gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf.

The working group states that "California law enforcement officers will have comparable authority under a civil model to stop and temporarily detain a motorist for a suspected civil violation as exists under current criminal law." We have a serious concern that police officers will be even more likely to stop and detain motorists for civil infraction violations than they have been for criminal violations, since civil law does not the same level of constitutional protection required in the criminal context. The Commission should work with the Legislature and other necessary agencies to transfer power to enforce moving violations from law enforcement to lower level administrative officers. However, if police officers are going to continue to enforce moving violations, the law must make clear that law enforcement should enforce these civil statutes *as if* they were criminal statutes, meaning with the same protections that are associated with criminal sanctions.

Failure to appear and default judgment

The civil assessment and license suspension sanctions that accompany a failure to appear or failure to pay a traffic citation excessively punish people for being poor. We therefore strongly support moving to a system in which these sanctions are no longer levied. We also agree with the working group that the process for setting aside a default judgment should be "intuitive, user-friendly and simple." Therefore, the process for seeking to set aside a default judgment should be far easier than current process for waiving an FTA or FTP. In addition, in the civil system, it will still be critical for the court to provide defendants with meaningful notice and an opportunity to be heard on their ability to pay. This means at a minimum that the notice must include information about the availability of an ability to pay determination and the alternatives available to the defendant such as installment plans or community service. Unless language on initial tickets and so-called courtesy notices is vastly improved, there will continue to be a significant number of low-income defendants failing to appear because they're unaware of alternatives to full payment, such as community service. In addition, courtesy notices (which should be required) should be sent certified mail, return receipt requested. Without a signed return receipt, there should be no time limit on when someone can seek to set aside a default judgment.

Burden of proof at trial

Our coalition believes that the civil system should maintain the beyond a reasonable doubt standard that has long been the norm in adjudicating traffic court cases. It is far easier to continue with this familiar standard. Furthermore, so long as moving violations continue to be enforced by sworn peace officers, constitutional rights would be at risk with use of the lower "clear and convincing" standard.

Role of judge and law enforcement in adjudication

The discussion here gives even greater urgency to our comments immediately above regarding the burden of proof.

Trial by Written Declaration

We strongly disagree that a trial by written declaration should deprive someone of the opportunity for an in-court hearing. It is a reasonable assumption that defendants who opt for a trial by declaration do not request a trial *de novo* if they lose absent an egregious judicial error. However, if they were forced to waive their in-court hearing as a condition of trial by declaration, they might reasonably opt for an in-person trial in order to preserve the right to challenge serious errors. This could very well result in more in-person trials than is the case today, ironically putting a greater burden on the courts.

Conclusion

The Back on the Road Coalition is grateful for this opportunity to once again comment on Commission working group concepts. We hope the Commission's work will ultimately reduce the stigma of criminalization and the financial burden on our state's most marginalized populations. We look forward to continued collaboration with the Judicial Council.

Sincerely,

Members of the Back on the Road CA Coalition

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