



September 4, 2015

Judicial Council of California
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invitations@jud.ca.gov

Dear Members of the Judicial Council:

We are attorneys with the American Civil Liberties Union of Northern California and the law firm of Pillsbury Winthrop Shaw Pittman LLP, respectively. We are writing to provide comments regarding the proposed amendment to Rule 4.105, pursuant to the Invitation to Comment, SP15-06. Prior to its adoption, we submitted comments to Rule 4.105 (*see* May 29, 2015 letter and June 5, 2015 letter) and hereby renew those comments to the extent that they were not incorporated into the Rule.

Below are our comments to the proposed amendments.

Non-Traffic Infractions

We support the expansion of the Rule to apply to non-traffic infractions. As previously noted by others, traffic courts hear numerous types of infractions other than traffic infractions, including “quality of life” infractions that disproportionately affect low-income and homeless people. As with traffic infractions, withholding the right to contest a *non-traffic* citation until the fines, penalty assessments, and other surcharges for the citation are paid in full is a clear violation of due process, equal protection, and other constitutional rights and guarantees. We urge the Judicial Council to adopt this amendment.

Totality of the Circumstances

As we previously commented, Rule 4.105 should be modified to state clearly that in no circumstance will a defendant be denied a trial because of an inability to post “bail.” Although requiring courts to consider whether the imposition of bail would pose an “undue hardship” is a step in the right direction, it does not entirely resolve the constitutional concerns that we raised in our previous comments. (*See, e.g., Southern Union Co. v. U.S.* (2012) 132 S.Ct. 2344, 2350-2351; *People v. Hanson* (2000) 23 Cal.4th 355, 360-363 [criminal fine is a type of criminal punishment]; *Bell v. Wolfish* (1979) 441 U.S. 520, 535; *Kennedy v. Mendoza-Martinez* (1963) 372 U.S. 144, 165-166;

Wong Wing v. U.S. (1896) 163 U.S. 228, 237 [due process prohibits government from imposing criminal punishment prior to an adjudication of guilt]; *United States v. James Daniel Good Real Property* (1993) 510 U.S. 43, 48, 53 [due process generally requires that individuals must receive notice and an opportunity to be heard before the government deprives them of property]; *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821 [fundamental right of access to the courts]; see *Payne v. Superior Court* (1976) 17 Cal.3d 908, 922-923[creating two classes of people: those who can pay to access the courts in infraction cases and those who cannot violates equal protection].)

We further urge the Judicial Council to provide guidance to the courts that would ensure that the proper procedural safeguards are followed with respect to the “totality of the circumstances” and “undue hardship” assessments, including but not limited to providing to defendants notice and the opportunity to be heard.

Application of the Rule to Post-Conviction Matters

We join in the comments by the Western Center on Law & Poverty and other organizations concerning the prepayment of “bail” for those defendants who have failed to pay or to appear. Moreover, as noted above and in our previous comments, there are serious constitutional problems with restricting the ability of defendants to petition the Court for relief from a civil assessment or other penalty, or to contest the underlying infraction, based on their financial capacity to prepay “bail.”

Bail forfeiture

We urge the Judicial Council to develop alternatives to appearing in court that would not involve the prepayment of “bail.” For example, we have been contacted by several people who have encountered significant difficulties and long wait times in obtaining a trial date in person, including in Alameda County. It is antithetical to our system of justice to allow some persons, but not others, convenient access to our courts solely because they have the financial capacity to pay “bail” upfront.

Notice

We urge that the Judicial Council amend the Notice requirement of Rule 4.105 to include language that makes clear that in the circumstances where the court may decide to impose fines and fees for a Vehicle Code infraction, that the defendant has the right to an ability to pay determination. Vehicle Code 42003(c) states in relevant part that, “In any case when a person appears before a traffic referee or judge of the superior court for adjudication of a violation of this code, the court, *upon request of the defendant*, shall consider the defendant's ability to pay.” (emphasis added). This subsection also describes certain procedural due process protections that defendants are entitled to as part of the court’s assessment, including the right to present witnesses and other documentary evidence, the right to cross-examination, and a written statement of the findings by the

court or county officer. It is likely that many indigent or low-income defendants do not avail themselves of these protections simply because they are unaware of this provision of the Vehicle Code. Requiring that courts notify all persons of their statutory rights to an ability to pay assessment would be a small but important step in helping to equalize the playing field.

Thank you for your time and attention to this matter.

Very truly yours,



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/s/

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