Written Comments Received for
January 15, 2013, Trial Court Funding Workgroup Meeting

Item No.	Name and Title	Affiliation	Topic	Date of Receipt
1	Patrick J. McKinley	Attorney	Elimination of Jury Trials for Misdemeanors	January 6, 2013
2	Teresa J. Schmid	Attorney and Public Policy Consultant	Workgroup Scope and Progress	January 10, 2013

From: Patrick Mckinley [cats2roses@aol.com]
Sent: Sunday, January 06, 2013 1:04 PM
To: TCFWG
Subject: Trial Court Funding- a suggestion
Attachments: California should amend the California Constitution to only allow jury trials in criminal cases for felony offenses.doc

Dear Ms. Patel-
I am enclosing as an attachment a cc of an article I wrote for the local Santa Barbara Lawyer publication some months ago.
I firmly believe that eliminating jury trials for misdemeanors- something that is clearly constitutional to do - would go a long way to solve the trial court congestion problem.
I request that the attachment be sent on to members of the working group if this is possible.

With kindest regards from Santa Barbara,

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End Jury Trials in Misdemeanors

In California a defendant in a felony or a misdemeanor criminal case is entitled to a jury trial- of 12 persons, and a unanimous verdict in order to convict or acquit. (1) Such defendants are also entitled to a free lawyer if they cannot afford a lawyer.

No documentation should be needed to convince us that there is a severe financial crisis facing all levels of government. One way to save an enormous amount of money and time, and to provide numerous other benefits, would be to eliminate the right to a jury trial in misdemeanor cases carrying no more than a 180 day sentence. This is permitted under the United States Constitution. (2) If California were to eliminate the right to a jury trial in criminal cases not involving more than 180 days in jail it would not be alone: the States of Nevada, Arizona, Louisiana, New Jersey, a major part of the New York Courts, the District of Columbia and Federal prosecutions in all 50 states do not have jury trials in such cases. (3) Why not California?

Only a few months ago this publication published an article containing the fact that there is no jury trial for Federal misdemeanors, something that has always been the case, and the historical fact that there has been hardly a ripple of dissatisfaction with this shows that such a system can and does work everywhere in the United States in the Federal system. (4)

This article will discuss the benefits of eliminating jury trials for such misdemeanors. California could, and should, also eliminate unanimous verdicts and approve jury size of less than 12. Both are constitutional. (5)

In Baldwin v. New York, 399 U. S. 66 (1970) the defendant was convicted of "jostling" (an anti pick-pocket misdemeanor) and sentenced to one year in jail in a New York City Criminal Court. The Supreme Court reversed because the penalty exceeded 6 months of imprisonment, but reaffirmed as a settled rule that the Federal Constitution does not prohibit a state from denying a jury trial to defendants facing 6 months or less in jail. (6)

The Court in Baldwin added some historical background to the issue by commenting that "…with few exceptions, crimes triable without a jury in the American States since the late 18th century were also generally punishable by no more than a six-month prison term." Id. At 399 U.S. 71, n 12. The Court added that at the time Duncan (7) incorporated the 6th Amendments right to a jury to the states, only three states denied a jury trial for crimes with a penalty that exceeded six months, and that since Duncan two of the three [Louisiana and New Jersey] either lowered the penalty or amended the statute so as to continue to use bench trials instead of a jury in these less than 6 month misdemeanors.

Baldwin also stated:

> "…the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps

> than a judge or panel of judges, but who, at the same time, are less likely to function or appear as but another arm of the Government that has proceeded against him" (8)

In Baldwin the Supreme Court took note of the fact that, at that time, California provided a jury trial for traffic cases, and this was most certainly true. When this author first started prosecuting cases as a Deputy District Attorney (in Bakersfield- Kern County) it was not at all unusual for a jury to be summoned and cases tried for these minor traffic cases. Unbelievably as it may seem now, I tried 4 such jury trials in a single day once! California eliminated this expensive and time wasting practice right after the Baldwin case was decided. (9)

In Lewis v. U.S., 518 U.S. 322 (1996) a mail handler for the US Postal Service was prosecuted for two counts of opening mail and removing money- both with a maximum sentence of 6 months. The Court said that multiple counts with no more than 6 months per count do not require a jury trial. The Court said that unless the legislature has authorized additional penalties so severe to the possible 6 months sentence the offense will still not be considered "serious" for the purpose of requiring a jury trial. This is significant as there are many additional penalties for certain offenses, including driving license consequences, immigration consequences etc. But these have not been sufficient to require a jury trial in the cases where these issues have arisen.

The same day the Supreme Court decided Baldwin it decided Williams v. Florida, 399 U.S. 78 (1970), a case holding that a 6 person jury is permitted under the Federal Constitutions Sixth Amendment. This is also something California can look at for less serious felony cases.

Where are we now?

The State of Nevada has for years not provided jury trials for misdemeanors carrying a penalty of 6 months or less. Neither does the federal government grant a jury trial to such cases, as well as other states. Why not California in today's day and age of budget problems? In Blanton v. City of Las Vegas, 489 U.S. 538 (1989) the Supreme Court upheld Nevada law providing that a defendant in a drunk driving trial is not entitled to a jury. The same is true for all misdemeanors in Nevada, so long as the penalty does not exceed 6 months. This includes misdemeanor domestic violence cases. One has to look far and wide for a criticism of this practice in Nevada and other jurisdictions, with an internet search finding a comment against it in a criminal defense attorneys post- but certainly no outcry of the injustice that has resulted in this practice in Nevada, Arizona, New Jersey, New York and in the Federal Courts.

In Arizona there is no right to a jury trial for many misdemeanor offenses. That State looks to the maximum penalty as the primary indicator of whether the offense is serious enough to require a jury trial, rejecting drivers license suspensions as making an otherwise 6 months sentence "serious". (10) In other cases Arizona will require a jury

based on the maximum penalty and other significant consequences (sex registration following a conviction)

Thus most of the area bordering on California and for all federal misdemeanors in California and throughout the United States, there is no jury trial in most cases. Is there even anecdotal evidence that these States or the Federal Courts are somehow less faithful to the Constitution etc?

We pay our judges a decent wage and trust them with deciding all kinds of things- just what is so wrong with a judge deciding whether someone was trespassing, drag racing, committed a battery, wrote a bad check, was drunk, or drove with a BA over 0.08? These judges make decisions affecting huge amounts of money, decide custody and visitation will contests, corporate issues, complicated land use issues, and a full panoply of criminal decisions that often involve a long time in prison and include the death penalty. They surely can be tasked with deciding misdemeanors fairly without the justice system suffering. It is a fact that many people are found not guilty in traffic court here in Santa Barbara, so it has not become a foregone conclusion that the absence of a jury will result in a finding of guilty.

We have @ 3,000 misdemeanor drunk driving cases a year in the entire Santa Barbara County- from Carpentaria to Santa Maria. Almost all of those cases are filed, and almost all of those defendants plead guilty. Of those that go to trial @ 8.5 out of 10 will be found guilty, with the remainder being either a hung jury or an acquittal. Think of the time and money saved if just these cases were removed from jury trial consideration.
In Santa Barbara County in 2010 the Superior Court saw 14,682 misdemeanor cases filed county wide, including 2989 misdemeanor drunk driving cases, as well as an additional 39 drunk driving cases filed in Juvenile court against defendants under the age of 18

Small Steps

There is no requirement to appoint counsel (Here in Santa Barbara the Public Defender) (11) if the penalty for the offense does not involve jail time. Scott v. Illinois, 440 U.S. 367 (1979). Thus, when California made simple possession of marijuana an infraction early this year, the result was to eliminate public funding for the lawyer for the person charged with possession, and, with the fine remaining at $100 there is no right to a jury trial, as the offense is an infraction. No court appearance is even required and no arrest record attaches to the defendant, potentially saving the State of California a huge amount of money in costs. The same would be even more so if jury trials were eliminated for misdemeanors carrying no more than a 6 month sentence.

Penal Code Sec 19.6 provides that a person charged with an infraction is not entitled to a jury trial. Traffic defendants and small time pot possessors do not get a free lawyer and no jury trial. Has the world really suffered? There are @ 6 million tickets issued in California every year. One might ask what our courts would look like if free lawyers and

jury trials were allowed in such cases, where only a fraction of them asking for a trial would bring the criminal and the civil system to its knees.

Under Penal Code Sec 17(d) a number of minor misdemeanor cases can be filed by the District Attorney as an infraction; e.g, disturbing the peace, unlicensed drivers, some alcohol offenses, trespass, gambling, and other minor matters. The District Attorney can and does file such cases as infractions, thus eliminating the jury requirement and the payment of the defendant's lawyer if they are indigent. These are small steps- the time is ripe for a major change in the way we operate our misdemeanor handling of cases.

Penal code Sec. 17 (b) allows the District Attorney to file most of the felony offenses in the Penal code as a misdemeanor, with the maximum sentence being one year in jail. These cases would be unaffected by the proposed change. However, legislative changes that would set the maximum jail time at no more than 6 months would fold such cases in to the rule that no jury would be permitted.

Immediate Impact of the Proposed Change

THE JURY

In your typical misdemeanor case a lot happens before a panel or two of prospective jurors file in to the courthouse. They were sent questionnaires, filled them in, mailed them back, been exempted etc then finally getting a postcard—not to show up—but to be "on call" and to call in the night before for a two week period. No one who has been called for jury duty thinks that the system is efficient. There are delays as there is no courtroom because of another misdemeanor trial, or the lawyer is engaged in another trial, thus the juror's life is put "on hold" for a few weeks- often with none of them being called at all. In a felony case this is not only required, but worth it. Not for a misdemeanor- not in today's economic times.

For those called for jury duty on misdemeanor cases there are the following items that would be eliminated if only a court trial were permitted: no lost time, no lost wages, no time wasted waiting for court to start or for the judge to decide a law and motion matter, and no time lost because one of the attorneys is busy in another department; no time spent on jury challenges: no time spent on "Wheeler" motions (12): no time spent on voir dire; no time taking excuses; no mistrial because of an inappropriate question or answer. Finally, there would be no hung juries, and cases would be over after one trial.

Superimposed on this is the fact that jurors do get paid—not much—but they do get paid, and there is a cost over and above their check as someone has to process these payments, and those doing the processing are being paid by the taxpayers. The same is true of the individual county employees processing the jury applications, preparing the panels, etc. There is money to be saved from the Jury Commissioner to the Auditor.

Finally there is the added cost in the Sheriffs Department providing the security and processing these jurors as they enter and leave the courthouse- something we have all

seen mushroom recently from the bygone days of 8 different ways to enter the historic courthouse, unimpeded by any checkpoint of any kind.

IMMEDIATE COST SAVINGS

It would not be just jury fees/processing costs that would see a dramatic reduction in costs to the taxpayer.
Instead of a 3-4-5 day or longer misdemeanor trial these case would start and finish on time and with tremendous cost savings. Law enforcement witnesses get paid for being "on call" while they wait to be called for testifying in court. They are often issued a subpoena for the trial date, but no one knows when the testimony will start, thus the monetary clock starts running---and it can run for days and weeks as misdemeanor trials get continued day to day because of the unavailability of a courtroom, or one of the lawyers. These officers get paid for being in court also, and with no jury the testimony itself would take much less time. This is a tremendous amount of money that can be saved statewide.
-There would be a dramatic drop-in the number of misdemeanor cases set for jury trial. This would mean less cases at the settlement conference, less cases to be tried and less free lawyers, less prosecuting lawyers, and less judges would be needed to processes these cases. The cost including benefits of a single prosecutor/public defender will approach $130,000 for most newly admitted lawyers.

Fewer judges would be needed as trials would take hours not days or weeks.

We would not need to spend millions on a new court building over where Hayward's once stood. This kind of money could be used for other things- for example, fixing the US101 potholes, which, when one drives from Carpentaria to Goleta will result in your CD player bouncing so many times you cannot tell if you are listening to Beethoven or Lady Gaga.

Less cases with less time translates in to less witness fee payments, less time spent in front of the jury by a few self styled "drunk driving" specialists, who pride themselves in demonstrating over days and days how much they know about the BA devices, less witness coordinator time and money being spent, no time spent for jury deliberations and the security that must be provided, and, as mentioned above, no more hung juries.

There will be no more separate trials for co-defendants because of Aranda(13) issues, joinder issues, or all other law and motion issues involving the jury (e.g., pre trial publicity).

There would be more pleas at arraignment, and settlement would be increased, often without multiple continuances. In "protest' cases where the defendants often just want a forum to voice their displeasure over some issue- these cases would no longer drag an entire department down for weeks at a time. Look for example how Vandenberg protest cases are handled as opposed to the simplest misdemeanor case in Santa Barbara. Just a

few years ago a simple disturbance of the peace /resisting arrest charge at a local bar resulted in a trial lasting weeks.

If law enforcement is not in court waiting they can be on patrol- making all of us safer and cutting response time down. The same would be true for experts from the Santa Barbara Regional lab, ER doctors from Cottage or Marian, and civilian witnesses- some of whom in misdemeanor theft case have to close their business to come to court to testify.
Less cases going to jury trial in misdemeanor cases will result in less time being spent on witness coordination, less subpoenas being issued and served, and less phone calls to the witness coordinator for case status etc.
Defense attorneys would have a set date and time for the trial- making their time better used and their witness coordination problems dramatically lessened.
Fewer continuances would result- and most cases are continued again and again and again.

IS THERE A DOWNSIDE?

Penal Code Sec. 647 (f) cases- Public Intoxication. There are a huge number of such cases, and for people under the age of 21 there are drivers license consequences that follow a conviction. In the past an attempt was made to not reduce these cases to an infraction. This was often done so as to allow students who are drunk but under 21 to retain their license. Even a casual look at the situation in Isla Vista on any given school weekend, and especially at Halloween, shows that the problem of alcohol fueled crime, including serious sexual assault, has continued unabated. If such cases were tried to a judge and not a jury, real consequences would soon follow, with the resultant deterrent effect, both there, and on the State Street corridor. Trying to hang tough and not allow plea bargains in such cases failed because of the impact of the huge number of such cases being set for jury trials following the institution of the policy, which had to be quietly abandoned because of the jury trial cost and impact on the system. The defendants were not concerned with a possible jail sentence as much as they were about their driver's license consequence. With the proposed change it is a certainty that many – but not all, of these defendants would be found guilty, fined and suffer drivers license consequences. After all – these are individuals who are not allowed to drink alcohol in any event. This would go a long way to helping to control the alcohol fueled crime problems mentioned above.

There will be little or no impact on custody of defendants in such cases. This is because of jail overcrowding- a fact that results in huge portions of jail sentences being reduced to keep the jail population under the cap imposed by our Superior Court. In other words, these defendants are not going to jail anyway in almost all cases. If they do get small jail sentences they still do not go to jail—they pick weeds at Lake Cachuma or do other community service. Even those who do get real jail time get out early because of jail overcrowding- and the more dangerous defendants are the ones who are kept in jail, not minor misdemeanor defendants.

Look at the impact on the ability of the Superior Court to get civil cases out to trial if these misdemeanor cases and their court time were eliminated. Even now one can see efforts being made to streamline the civil trials- including a one day experiment where the time for testimony is limited to a few hours—all in an effort to move these cases along. The removal of these misdemeanor cases would open these courts to the civil caseload, resulting in quicker justice and dispositions.

When California eliminated a jury trial for traffic matters there were complaints and wailing that this would result in wholesale conviction of traffic defendants in California (We have millions of tickets issued annually) This has not been the result.(14)

Nor is there significant evidence that the elimination of jury trials in misdemeanors has resulted in gross injustice in the other jurisdictions where this has been the law for many years. Yes, there are criminal defense attorney blogs/ads on the internet complaining about it- but they almost always ignore the analysis of the legal issue involved in the Supreme Court precedents, instead complaining about biased and politically appointed judges etc. running roughshod over these non-jury defendants. There is no significant evidence of this regarding our Federal judges, and the courts of these other States. When a change is suggested that will not assist criminal defendants in their quest for an acquittal etc there will always be those claiming it will result in a criminal justice calamity. Thus, strong opposition to the 1990 Crime Victims Justice Reform Act(containing a provision to allow hearsay at felony preliminary hearings) (15), the 1982 Victims Bill of Rights(applying Federal search and seizure law to the courts of California), and the 1986 Crime Victims for Court Reform –the entity spearheading the successful effort to recall Justices Bird, Grodin and Reynoso. None of the disaster scenarios suggested have ever come to pass. In the case of former Chief Justice Bird, one would be hard pressed to find too many lawyers let alone civilians who could even name the current Chief Justice, or any other member of our Supreme Court.

Finally- look at our juvenile courts in California. They handle thousands of serious felony and misdemeanor cases every year, all without a jury, as none is required.(16) Again, there is no discernable outcry that our Superior Court Judges have been rubber stamps for the prosecution in such cases.(18)

Yes- it is true that some defendants will be found guilty by the judge in a court trial who might have gotten an acquittal- or a hung jury from the jury. In Duncan (19) itself the Supreme Court was dealing with a court trial conviction of a Black defendant convicted of slapping a white victim following a confrontation spawned by a segregation order. But on balance the time has certainly come to abandon the expensive and time consuming jury trial in misdemeanor cases not involving more than 180 days in jail.(19)

Footnotes.

1. Cal. Const Art I, Sec 16, 24
2. Duncan v. Louisiana, 391 U.S. 145 (1968)

3. A defendant in the New York City Criminal Court (not the whole State) facing a term of less than 180 days is not entitled to a jury trial. See N.Y. Crim. Proc. Law Sec 340.40(2); Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (upholding Nevada law that does not allow a jury trial in misdemeanor cases not involving a penalty of more than 180 days (in Blanton, a charge of drunk driving); See Baldwin v. New York, 399 U.S. 66, 71 (1970) (discussing Louisiana and New Jersey) ; U.S. v. Merrick, 459 F.2d 644 (1972) (District of Columbia)
4. M. Clarke, "Santa Barbara's Federal Court" Santa Barbara Lawyer, Nov.2010, p.7
5. Williams v. Florida, 399 U.S. 78 (1970)
6. Baldwin v. New York, 399 U.S. 66, 72 (1970)
7. Duncan v. Louisiana, 391 U.S. 145 (1968)
8. Baldwin, supra at 72
9. Calif. Penal Code Sec 19.6: "A person charged with an infraction shall not be entitled to a jury trial"
10. Derendal v.Griffith, 209 Ariz. 416, 104 P3d 147 (2005) (drag racing)
11. The Office of the Public Defender in Santa Barbara has for years been staffed by extremely competent and dedicated lawyers. I would cringe sometime when the family of a defendant would discharge the public defender in exchange for a private family lawyer- one who did not know the difference between Aranda and Miranda, and who had no clue about the normal disposition of a case. We also have been blessed for years with an outstanding criminal defense bar. In no way should this article be seen as an attack on these dedicated and professional members of our local Bar.
12. People v. Wheeler, 22C3d 258 (1978)(permitting a judicial inquiry into a peremptory challenge to a juror for group bias, and the defendant need not be a member of the suspect class to make such a challenge)
13. People v. Aranda, 62 cal 2d 518 (1965) (requiring separate trials or two juries for co-defendant cases involving a non-testifying co-defendants statement implicating both defendants)
14. When I was employed at the Assistant District Attorney I fielded numerous complaints from officers in traffic court, about the frequency of acquittals. In some cases there was a legal issue that could be addressed, but in general there was nothing that could, or should, be done about a finding of not guilty.
15. Prior to this hearsay was not permitted during a preliminary hearing—thus in a stolen car case you had to produce the victim whose car was stolen and the officer who caught the defendant, often in another county and sometimes another state; in a routine felony bad check case I would periodically have half of the Vons checkers waiting in the hallway to testify at a preliminary hearing to establish the charge, since hearsay was not permitted. Millions of dollars and an immeasurable amount of time have been saved by this one simple change, all with no loss of fairness and despite doomsday predictions from those who opposed it.
16. McKeiver v. Pennsylvania, 403 U.S. 528 (1971)
17. In 2010 the two Juvenile court judges (in Santa Barbara and Santa Maria) handled 1,983 criminal petitions for misdemeanors and felony offenses—all without a

jury, and in addition they handled the arraignment, all pre-trial matters, detention hearings etc as well as the trials.

18. Duncan v. Louisiana, 391 U.S. 145 (1968)(despite the testimony of 4 of the defendants friends as opposed to the two Caucasian witnesses)
19. We are talking about a very small number of misdemeanor cases that actually do go to trial- 12 last year in Santa Barbara (as confirmed by both the Superior Court and the District Attorney) and 21 in Santa Maria-Lompoc (Superior Court statistics). Three out of four defendants were found guilty county wide, with the remaining being acquittals or hung juries. In addition, as has been the case for years, the Superior Courts in the North County tried their misdemeanor cases with an average of slightly over two days, while in Santa Barbara the average time was more than 4 days. But make no mistake; removing the jury trial aspect of the 17,000 plus misdemeanors filed every year will have a dramatic and immediate effect on the processing of these cases, from arraignment, to settlement, and to trial.

From: Teresa Schmid [n7jxz@pacbell.net]
Sent: Thursday, January 10, 2013 5:04 PM
To: TCFWG
Subject: Public Comment
Attachments: T Schmid Public Comment 1-10-13.pdf

Attached is a written comment for print consideration. No speaking time is requested.

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Public Comment to the Trial Court Funding Workgroup

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Comment Summary

The Trial Court Funding Workgroup continues to struggle with the task of examining the effectiveness of the courts' administrative structure in fulfilling the goals, expectations and intent of the 1997 unification legislation. Implicit in that task are these questions: First, if court administration has *not* been effective, what action will it have to take to restore access to justice in California in light of the state's current and future budgetary constraints? Second, if the judiciary does not take that action, how will the executive and legislative branches respond?

Comment

The Workgroup has the monumental task of reviewing and reporting upon the fulfillment of goals set for the courts in the Trial Funding act of 1997, which established unification of the court system. The minutes of the Workgroup's meetings to date and the agenda for the February 19, 2013 meeting present a pattern of administrative retrospection and justification. If the goals of unification have been met, then the resulting report, due in April 2013, will provide a valuable model for other states.

But the Workgroup also needs to consider the possibility that consolidation is not a success and to cope with that alternate reality. First of all, it is not clear from the articulation of the Workgroup's mission as to what constitutes the courts' "administrative structure" from the perspective of Governor Brown and the legislature. While the roles of the Judicial Council and the Administrative Office of the Courts are sufficiently differentiated within the judiciary, other entities will deem the failure of either to be the failure of both. No amount of internal review, reporting, or restructuring will insulate either from the effects of that failure.

Of all the resources available to policymakers, one of the most important is the work product of internal, nonpartisan research departments such as California's Legislative Analyst's Office. In a report dated September 28, 201, the LAO concluded that the goals trial court realignment had not been met and why.

Today Governor Brown published his 2013-2014 Governor's Budget Summary. Through the Workgroup, the Governor is providing the courts with a window of opportunity to frame a strategy for self-determination. But the window is closing. How will the executive and legislative branches respond if the judicial branch does not produce a viable and specific action plan to achieve the goals, expectations, and intent of court consolidation? It is prudent for the Workgroup to review the LAO's report and address the LAO's three recommendations to enhance and complete trial court realignment:

- ✓ Shift Responsibility for the Trial Court Employee Personnel System to the State.
- ✓ Establish a Comprehensive Trial Court Performance Assessment Program.
- ✓ Establish a More Efficient Division of Responsibilities Between the Administrative Office of the Courts and Trial Courts

These may or may not provide the solutions the Workgroup needs. But they do provide a well-reasoned point of departure. Surely the Workgroup's deliberations will proceed more smoothly when they reach a starting point.