



JUDICIAL COUNCIL OF CALIFORNIA

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TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MARTIN HOSHINO
Administrative Director

CORY T. JASPERSON
Director, Governmental Affairs

April 27, 2016

Hon. Lorena S. Gonzalez, Chair
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, California 95814

Subject: AB 2013 (Jones-Sawyer), as introduced – Fiscal Impact Statement
Hearing: Assembly Appropriations Committee – April 27, 2016

Dear Assembly Member Gonzalez:

AB 2013, if enacted, would create a five-year pilot program to extend the provisions of Penal Code section 991 to misdemeanor defendants not in custody prior to arraignment, specifically requiring the court to determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty of that offense. The bill requires this effort to be piloted in Los Angeles County and five additional counties to be selected by a committee, the members of which are to be selected as follows: one by the California Public Defenders Association, one by the California District Attorneys Association, one by the Judicial Council of California, and two by the Governor. The bill requires the court to determine whether there is probable cause under this section upon a motion by a defendant. The bill's provisions become inoperative on July 1, 2022.

Summary

AB 2013 will result in significant fiscal impacts to the trial courts by adding a new procedural element to misdemeanor matters, adding significant cost and potential delays to already

burdened calendars caused by ongoing budget constraints and a need for judgeships. The costs, which will be considered in greater detail below, include the following:

- Time and resources required for a probable cause hearing for misdemeanor defendants not in custody;
- Possible additional time for evidentiary hearings; and,
- The need for the Judicial Council to implement one or more rules of court to address implementation of AB 2013.

In addition to costs, AB 2013 is likely to result in significant delays to misdemeanor arraignment calendars as a result of the new procedures anticipated by AB 2013.

Fiscal Impacts

More lengthy, and therefore costly, misdemeanor arraignment procedures. AB 2013 would require the courts to determine if there is probable cause for detaining and charging non-custodial misdemeanor defendants. Under current law, only misdemeanor defendants held in custody are entitled to a probable cause determination. (See PEN § 991(a) “If the defendant is in custody at the time he appears before the magistrate for arraignment, and if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate... shall determine whether there is probable cause...”.) According to the Appellate Division of the Superior Court for the State of California, County of Los Angeles decision in *People v. McGowan* (filed 3/27/15 BR 0512013; Airport Trial Court No. 4WA22795), “The constitutional right to a judicial determination of probable cause following arrest has its roots in *Gerstein v. Pugh* (1975) 420 U.S. 103. In that case, the United States Supreme Court held the Fourth Amendment vests an in-custody defendant with the right to have a prompt postarrest determination of whether there is probable cause to believe he or she committed ‘a crime.’” (*Id.* at pp. 114, 119-120.) According to *McGowan*, “[Penal Code] Section 991 protects a misdemeanant from unconstitutional pretrial confinement when there is no probable cause...” (*McGowan* p. 6) Misdemeanor defendants not in custody do not receive probable cause determination hearings since there is no risk of “unconstitutional pretrial confinement” for those defendants.

Practically speaking, probable cause determinations are not made at court hearings for most in-custody misdemeanor defendants. Rather, they are usually made at the time of arrest via electronic law enforcement affidavits that are reviewed and signed by judges at all hours of the day and night, including weekends. The result is that, currently, there is little actual in-court time devoted to probable cause determinations for misdemeanor defendants.

Nevertheless, even if all in-custody misdemeanants were granted in-court probable cause determinations, the percentage of in-custody misdemeanants statewide is only 10 percent.

AB 2013 would require courts to provide in-court probable cause determinations for the remaining 90 percent of a county's misdemeanants.

The implementation of probable cause determinations for non-custodial misdemeanants would add significant time to already impacted court calendars, and the expenditure of court resources (most significantly court personnel costs). A simple, uncontested, non-evidentiary probable cause determination requires about three (3) minutes of court time. Using Fresno as an example¹, there are an estimated 800 misdemeanor arraignments *each week*. Subtracting 10 percent (representing the in-custody population for whom probable cause determinations are already made), there are approximately 720 out-of-custody misdemeanor defendants every week who would be entitled to a probable cause determination should AB 2013 be signed into law. At three minutes per defendant, 36 additional hours would be required to process the same number of defendants, without, per the court in *McGowan*, the advancement or protection of any constitutional right or protection. In dollars, 36 hours of court time is \$30,132 per week. Extrapolated to a 50-week year (due to budget cuts, Fresno among other courts is closed over the course of a year by about two full weeks), the cost is \$1,506,600.

According to the most recent filings data,² there were 318,376 misdemeanors filed in Los Angeles County, a county required to participate in the AB 2013 pilot. Using the same ratio of in-custody to non-custodial misdemeanants (10% to 90%), the total number of probable cause determinations that could be required in Los Angeles per the terms of AB 2013 would be 286,538³. The cost to the court in Los Angeles would be an estimated \$12 million every year.⁴

If just 25% of Los Angeles's noncustodial misdemeanants request probable cause determinations per the terms of AB 2013, the cost to that court would exceed \$3 million each year. With non-custodial probable cause determinations under AB 2013 serving as a proxy for preliminary hearings in which evidence might be heard and a judge could dismiss some or all of the charges

¹ Fresno is a Central Valley county with a population at nearly 1 million people, making it a mid-size county in California.

² See <http://www.courts.ca.gov/12941.htm> "2015 Court Statistics Report, Statewide Caseload Trends, 2004-2005 Through 2013-2014" published by the Judicial Council of California each year. References to misdemeanor filings can be found on page 110.

³ The Superior Court of California, County of Los Angeles reports that its pre-trial in-custody misdemeanor population is actually between 2 and 3 percent, *not* the 10% reported in Fresno. If 97% of LA County's pre-trial misdemeanor population is not in custody and therefore is eligible for a probable cause determination per the terms of AB 2013, the cost could be as high as \$13 million (308,825 people x 3 minutes of court time = 926,475 minutes / 60 minutes per hour = 15,441 hours x \$837 per hour in the time of the judicial officer, appropriate staff and OE&E).

⁴ 286,538 non-custodial misdemeanor probable cause hearings a 3 minutes each = 859,614 minutes / 60 minutes per hour = 14,327 court hours at \$837 per hour for the time of the judicial officer and appropriate court staff = \$11,991,615.

against a defendant, there is reason to believe that many, if not most, defendants would request such hearings.

Looking at Fresno as an example of many of California's mid-size courts, coupled with Los Angeles which is required to participate in the pilot, the fiscal impact of AB 2013 could reach \$17 million per year for California's courts⁵.

The calculations included here represent funds that courts currently spend on access to justice, for example self-help centers, counter clerks, clerks to answer telephones, filing clerks, research staff, and other court operations. Diverting this funding from existing court operations to probable cause determinations for misdemeanor defendants not in custody would have significant impacts on the public's access to justice.

Evidentiary versus non-evidentiary hearings. Adding to the potential costs of AB 2013 should it be enacted into law is the bill's language that may make probable cause determinations for non-custodial misdemeanants evidentiary hearings. AB 2013 would add to the language granting misdemeanor defendants who are not in custody the right to delay a court's determination of probable cause to allow for discovery. Generally speaking, under current criminal procedure, probable cause determinations are neither hearings, nor are they testimonial allowing for discovery. Usually, probable cause determinations rely on arrest records. The addition of language to Penal Code section 991 that provides for discovery in probable cause determinations for defendants not in custody is potentially costly because of the delays that are inherent in discovery motions and the exchange of information between the sides.

The additional time required for discovery and presentation of evidence in addition to the arrest record could require anywhere from 30 minutes to several hours. Any additional time added to the estimated three minutes per probable cause determination exacerbates an already costly proposition.

At current workloads and levels of filings, California's trial courts are underfunded by as much as \$400 million. Additional delays and costs, whether for the expansion of probable cause hearings, or the conversion of probable cause into testimonial hearings, will result in additional backlogs, and the need for additional funding to support California's trial courts.

⁵ Statewide misdemeanors = 915,568 – 10% in custody (91,556) = 824,012. If we assume that LA, which has 35% of the state's misdemeanor filings, plus five other courts will represent approximately 50% of the state's non-custodial misdemeanants who would be entitled to a probable cause determination, the number is halved = 412,006; at 3 minutes per = 1,236,018 total minutes / 60 minutes per hour = 20,600 hours x \$837 per hour in court time (judicial officer time, staff, courtroom, etc.) = \$17.2m annually.

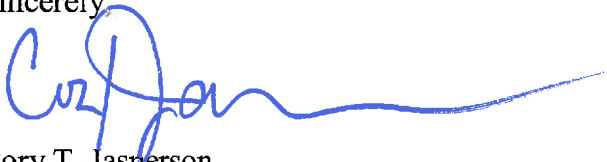
Hon. Lorena S. Gonzalez

April 27, 2016

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Please contact me if you have questions about the information contained in this letter.

Sincerely,



Cory T. Jasperson

Director, Governmental Affairs

CTJ/AL/yc-s

cc: Members, Assembly Appropriations Committee
Hon. Reginald Jones-Sawyer, Member of the Assembly
Mr. Pedro Reyes, Chief Consultant, Assembly Appropriations Committee
Mr. Allan Cooper, Fiscal Consultant, Assembly Republican Fiscal Office
Mr. David Billingsley, Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Consultant, Assembly Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Secretary, Office of the Governor
Ms. Tiffany Garcia, Budget Analyst, Department of Finance
Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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July 28, 2016

Hon. Ricardo Lara, Chair
Senate Appropriations Committee
State Capitol, Room 5050
Sacramento, California 95814

Subject: AB 2013 (Jones-Sawyer), as introduced – Fiscal Impact Statement
Hearing: Senate Appropriations Committee – August 1, 2016

Dear Senator Lara:

AB 2013, if enacted, would create a five-year pilot program to extend the provisions of Penal Code section 991 to misdemeanor defendants not in custody prior to arraignment, specifically requiring the court to determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty of that offense. The bill requires this effort to be piloted in Los Angeles County and five additional counties to be selected by a committee, the members of which are to be selected as follows: one by the California Public Defenders Association, one by the California District Attorneys Association, one by the Judicial Council of California, and two by the Governor. The bill requires the court to determine whether there is probable cause under this section upon a motion by a defendant. The bill's provisions become inoperative on July 1, 2022.

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Fiscal Impacts

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preliminary hearings⁵ in which evidence might be heard and a judge could dismiss some or all of the charges against a defendant, there is reason to believe that many, if not most, defendants would request such hearings.

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⁵ In conversations with the author's office and policy committees, it has been pointed out that the proposed addition of Penal Code section 991.5 (following PEN 991 which states out the procedures for probable cause determinations for in-custody misdemeanor defendants) regarding probable cause determinations for non-custodial misdemeanor defendants is an imperfect procedural vehicle to accomplish the author's goals. Based on the author's stated intention to potentially relieve misdemeanor defendants from the burdens associated with having misdemeanor charges looming while they await trial or plea arrangement, the better approach would be to expand the use of preliminary hearing procedures, currently available to all felony defendants, to non-custodial misdemeanor defendants. Without amending the bill to make this change, we believe that, in addition to the costs stated here, there will be unnecessary but significant procedural confusion within the courts, consuming even more court resources to accommodate motions, hearings, and appeals likely to result from the imprecise use of probable cause determinations. As stated earlier, probable cause determinations are used to determine whether or not there is a sound basis for detaining a defendant prior to a court appearance, which is an unnecessary procedure for a non-custodial defendant.

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Hon. Ricardo Lara

July 28, 2016

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for defendants not in custody is potentially costly because of the delays that are inherent in discovery motions and the exchange of information between the sides.

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Please contact Andi Liebenbaum in my office at andi.liebenbaum@jud.ca.gov or 916-323-3121 if you have questions about the information contained in this letter.

Sincerely,



Cory T. Jaspersen
Director, Governmental Affairs

CTJ/AL/yc-s

cc: Members, Senate Appropriations Committee
Hon. Reginald Jones-Sawyer, Member of the Assembly
Ms. Jolie Onodera, Consultant, Senate Appropriations Committee
Mr. Matt Osterli, Fiscal Consultant, Senate Republican Fiscal Office
Ms. Mary Kennedy, Counsel, Senate Public Safety Committee
Mr. Eric Csizmar, Consultant, Senate Republican Office of Policy
Mr. Daniel Seeman, Deputy Legislative Secretary, Office of the Governor
Ms. Emma Jungwirth, Budget Analyst, Department of Finance
Mr. Martin Hoshino, Administrative Director, Judicial Council of California



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September 9, 2016

Hon. Edmund G. Brown, Jr.
Governor of California
State Capitol, First Floor
Sacramento, California 95814

Subject: AB 2013 (Jones-Sawyer) – Request for Veto

Dear Governor Brown:

The Judicial Council of California respectfully requests that you veto AB 2013 (Jones-Sawyer). In rejecting its predecessor (AB 696, also authored by Assembly Member Jones-Sawyer), you stated that you would consider a small, carefully crafted pilot program to assess the value and necessity of a non-custodial misdemeanor probable cause determination process. Regretfully we must point out that the bill could still cost pilot courts millions of dollars annually to implement.

Summary

AB 2013 would create a three-year pilot program to extend the provisions of Penal Code section 991 to misdemeanor defendants not in custody prior to arraignment, specifically requiring the court to determine whether there is probable cause to believe that a public offense has been committed and that the defendant is guilty of that offense. The bill requires this effort to be piloted in three counties that would be selected by a committee, the members of which would be appointed as follows: one by the California Public Defenders Association, one by the California

District Attorneys Association, and one by the Judicial Council of California. Although only three courts are required to be selected for this pilot project, one of the courts must be a large court which is defined in the bill as a county with a population in excess of 2.6 million people. The bill requires the court to determine whether there is probable cause under this section upon a motion by a defendant. The bill's provisions become inoperative on July 1, 2020.

While the council's primary concern about AB 2013 is the burdens it would place on pilot courts as explained below, the council also has concerns about the selection process for pilot counties. For example, including representatives of entities on the selection committee that are outside of the Judicial Council could be problematic given that the council is in the best position to evaluate which courts would have the best ability to handle the new and likely burdensome process for noncustodial misdemeanants called for by the bill. Moreover, the council believes that the Department of Justice (DOJ) is not in the position to provide information to the Legislature regarding the implementation of the pilot program as the DOJ is unlikely to have the information necessary to conduct such an evaluation

Fiscal Impacts

AB 2013 will result in significant fiscal impacts to the pilot courts by adding a new procedural element to misdemeanor matters, adding significant cost and potential delays to already burdened calendars caused by ongoing budget constraints. The costs, which will be considered in greater detail below, include the following:

- Time and resources required for a probable cause hearing for misdemeanor defendants not in custody;
- Possible additional time for evidentiary hearings; and,
- The need for the Judicial Council to implement rules of court to address implementation of AB 2013.

As a result of the additional time required for probable cause determinations, AB 2013 is likely to result in significant delays to misdemeanor arraignment calendars in the pilot courts.

More lengthy, and therefore costly, misdemeanor arraignment procedures. AB 2013 would require the three pilot courts to determine if there is probable cause for charging non-custodial misdemeanor defendants. Under current law, only misdemeanor defendants held in custody are entitled to a probable cause determination. (See PEN § 991(a)) "If the defendant is in custody at the time he appears before the magistrate for arraignment, and if the public offense is a misdemeanor to which the defendant has pleaded not guilty, the magistrate... shall determine whether there is probable cause..." According to the Appellate Division of the Superior Court for the State of California, County of Los Angeles decision in *People v. McGowan* (filed 3/27/15 BR 0512013; Airport Trial Court No. 4WA22795), "The constitutional right to a judicial

determination of probable cause following arrest has its roots in *Gerstein v. Pugh* (1975) 420 U.S. 103. In that case, the United States Supreme Court held the Fourth Amendment vests an in-custody defendant with the right to have a prompt postarrest determination of whether there is probable cause to believe he or she committed ‘a crime.’” (*Id.* at pp. 114, 119-120.) According to *McGowan*, “[Penal Code] Section 991 protects a misdemeanant from unconstitutional pretrial confinement when there is no probable cause...” (*McGowan* p. 6) Misdemeanor defendants not in custody do not receive probable cause determination hearings since there is no risk of “unconstitutional pretrial confinement” for those defendants.

The percentage of in-custody misdemeanants statewide is approximately 10 percent. AB 2013 would require pilot courts to provide in-court probable cause determinations for the remaining 90 percent of a county’s misdemeanants.

The implementation of probable cause determinations for non-custodial misdemeanants would add significant time to already impacted court calendars, and the expenditure of court resources (most significantly court personnel costs). A simple, uncontested, non-evidentiary probable cause determination requires about three (3) minutes of court time. Using Fresno as an example¹, there are an estimated 800 misdemeanor arraignments *each week*. Subtracting 10 percent (representing the in-custody population for whom probable cause determinations are already made), there are approximately 720 out-of-custody misdemeanor defendants every week who would be entitled to a probable cause determination should AB 2013 be signed into law. At three minutes per defendant, 36 additional hours² would be required to process the same number of defendants, without, per the court in *McGowan*, the advancement or protection of any constitutional right. In dollars, 36 hours of court time is \$30,132 per week. Extrapolated to a 50-week year (due to budget cuts, Fresno among other courts is closed over the course of a year by about two full weeks), the cost is \$1,506,600.

Using the county of Los Angeles for additional calculations, according to the most recent filings data, there were 318,376 misdemeanors filed in Los Angeles County.³ Using the same 10%-to-90% ratio of in-custody to non-custodial misdemeanants as used in the Fresno calculation, the total number of probable cause determinations that could be required in Los Angeles per the

¹ Fresno is a Central Valley county with a population at nearly 1 million people, qualifying it as a medium county for the purposes of AB 2013.

² 720 misdemeanants multiplied by three minutes each = 2,160 minutes divided by 60 minutes in an hour = 36 hours.

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terms of AB 2013 would be 286,538.⁴ The cost to the court in Los Angeles would be an estimated \$12 million per year.⁵

Looking at Fresno as an example of California's mid-size courts, coupled with one small court and Los Angeles (one of the three eligible large courts that would be required to participate in the pilot project per the terms of the bill), the fiscal impact of AB 2013 likely would exceed \$13 million per year for California's courts.⁶

With non-custodial probable cause determinations under AB 2013 serving as a proxy for preliminary hearings⁷ in which evidence might be heard and a judge could dismiss some or all of the charges against a defendant, there is reason to believe that many, if not most, defendants would request such hearings. The calculations included here represent funds that courts currently spend on access to justice, for example self-help centers, counter clerks, clerks to answer telephones, filing clerks, research staff, and other court operations. Diverting this funding from existing court operations to probable cause determinations for misdemeanor defendants not in custody would have significant impacts on the public's access to justice.

Evidentiary versus non-evidentiary hearings. Adding to the potential costs of AB 2013 should it be enacted into law is the bill's language that may change probable cause determinations for non-custodial misdemeanants into evidentiary hearings. AB 2013 would add to the language

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⁶ In LA, the costs could exceed \$12 million annually. The other large courts that qualify for the project are Orange and San Diego. If the panel selects either of these two courts, overall prices to implement AB 2013 will be more in the \$5 million range. In Fresno, the costs are estimated at \$1.5 million. At a small court, costs will reach a half million dollars or more.

⁷ In conversations with the author's office, it has been pointed out that the proposed addition of Penal Code section 991.5 (following PEN 991 which states the procedures for probable cause determinations for in-custody misdemeanor defendants) regarding probable cause determinations for non-custodial misdemeanor defendants is a flawed procedural vehicle to accomplish the author's goals. Based on the author's stated intention to potentially relieve misdemeanor defendants from the burdens associated with having misdemeanor charges looming while they await trial or plea arrangement, the better approach would be to expand the use of preliminary hearing procedures, currently available to all felony defendants, to non-custodial misdemeanor defendants. Without amending the bill to make this change, we believe that, in addition to the costs stated here, there will be unnecessary but significant procedural confusion within the courts, consuming even more court resources to accommodate motions, hearings, and appeals likely to result from the imprecise use of probable cause determinations. As stated earlier, probable cause determinations are used to determine whether or not there is a sound basis for detaining a defendant prior to a court appearance, which is an unnecessary procedure for a non-custodial defendant.

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granting misdemeanor defendants who are not in custody the right to delay a court's determination of probable cause to allow for discovery. Generally speaking, under current criminal procedure, probable cause determinations are neither hearings, nor are they testimonial allowing for discovery. Usually, probable cause determinations rely on arrest records. The addition of language to Penal Code section 991.5 that provides for review of warrants, supporting affidavits, the sworn complaint of the defendant, and "any documents or reports incorporated by reference" for those individuals not in custody is potentially costly because of the delays that are inherent in reviewing the eligible materials.

The additional time required for discovery and presentation of evidence in addition to the arrest record could require anywhere from 30 minutes to several hours. Any additional time added to the estimated three minutes per probable cause determination exacerbates an already costly proposition.

At current workloads and levels of filings, California's trial courts are underfunded by as much as \$400 million. Additional delays and costs, whether for the expansion of probable cause hearings, or the conversion of probable cause into testimonial hearings, will result in additional backlogs, and the need for additional funding to support California's trial courts.

Please contact Andi Liebenbaum in my office at andi.liebenbaum@jud.ca.gov or 916-323-3121 if you have questions about the information contained in this letter.

Sincerely,



Cory T. Jasperson

Director, Governmental Affairs

CTJ/AL/yc-s

cc: Hon. Reginald Jones-Sawyer, Member of the Assembly
Mr. Caliph Assagai, Principal, California Public Defenders Association
Mr. Daniel Seeman, Deputy Legislative Affairs Secretary, Office of the Governor
Mr. Martin Hoshino, Administrative Director, Judicial Council of California