

No. S257844

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**IN THE SUPREME COURT  
FOR THE STATE OF CALIFORNIA**

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PEOPLE

*Plaintiffs-Respondents,*

vs.

KOPP

*Defendants-Petitioners.*

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After a Published Opinion  
of the Fourth Appellate District, Division One  
Case No. D072464

On appeal from Decision by the  
State of California, San Diego County  
Case No. SCN327213

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**APPLICATION TO FILE AMICI CURIAE BRIEF**

and

**[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF  
PLAINTIFFS-RESPONDENTS,**

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**CERTIFICATE OF INTERESTED PARTY**

Pursuant to Sections 8.208(e) and 8.488 of the California Rules of Court (“Rule”), Public Defender and Civil Rights Amici certify that they know of no other person or entity that has a financial or other interest in this case.

February 19, 2021

By: /s/ Brandon Greene  
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By: /s/ Asher Waite-Jones  
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Document received by the CA Supreme Court.

## **APPLICATION TO FILE AMICI CURIAE BRIEF**

Pursuant to California Rules of Court, Rule 8.200(c), proposed Public Defender and Civil Rights Amici American Civil Liberties Union (“ACLU”) Foundation of Northern California, East Bay Community Law Center (“EBCLC”), Contra Costa Public Defenders Office (“CCPD”), California Public Defenders Association (“CPDA”), San Francisco Public Defender’s (“SFPD”), and The Office of the State Public Defender (“OSPD”) (collectively, “Public Defender and Civil Rights Amici”) respectfully request leave to file the accompanying [Proposed] Amici Curiae Brief in Support of Defendants-Petitioners.

Public Defender and Civil Rights Amici are comprised of nonprofit Civil Rights organizations and Public Defender’s Offices.

**ACLU** is a nationwide nonprofit, nonpartisan organization with over 1,500,000 members dedicated to the defense of the guarantees of individual rights and liberties embodied in the state and federal Constitutions. The ACLU of Northern California is one of three California affiliates of the ACLU. It has a longstanding interest in preserving the constitutional rights of persons involved in the criminal justice system in California and has often submitted amicus briefs in cases raising such issues.

**EBCLC** is the largest provider of free legal services in Alameda County. EBCLC represents indigent residents of Alameda County in a wide variety of criminal and civil cases, including post-conviction dismissals and petitions to vacate criminal, traffic, and municipal fines and fees. All of EBCLC’s clients are living in poverty, and a vast majority of clients

identify as Black and/or Latinx.

EBCLC is also a nationally renowned teaching clinic of UC Berkeley School of Law. EBCLC staff attorneys and clinical instructors provide close supervision and teaching to hundreds of law student interns per year. EBCLC staff also provide Mandatory Continuing Legal Education trainings on a wide variety of topics, including fines and fees, to a national audience.

Courts have granted EBCLC leave to appear on numerous cases, including *People v. Dueñas* (2019) 30 Cal.App.5th 1157, a case in the second appellate district regarding the provision of Ability to Pay petitions in criminal court.

The **CPDA** is the largest association of criminal defense attorneys and public defenders in California, with more than 4,000 members. The CPDA is an important voice of the criminal defense bar. CPDA has been a leader in continuing legal education for defense attorneys for almost 40 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, Criminal Law Specialization Education, and Appellate Law Specialization Education. The CPDA is one of only two organizations deemed by the Legislature to be an “automatically” approved legal education provider. (Bus. & Prof. Code, §6070.5, subd. (b).)

The courts have granted CPDA leave to appear as amicus curiae in numerous important California cases. (*See, e.g., People v. Albillar* (2010) 51 Cal.4th 47 (sufficiency of the evidence in a gang-related prosecution);

*Barnett v. Superior Court* (2010) 50 Cal.4th 890 (post-trial discovery); *Galindo v. Superior Court* (2010) 50 Cal.4th 1 (pre-prelim discovery); *People v. Lenix* (2008) 44 Cal.4th 602 (comparative juror analysis for first time on appeal), *People v. Nelson* (2008) 43 Cal.4th 1242 (DNA evidence in a cold-hit case); *Chambers v. Superior Court* (2007) 42 Cal.4th 673 (Pitchess procedures); *People v. Sanders* (2003) 31 Cal.4th 318 (search could not be a reasonable “parole search” without knowledge of the suspect's parole status); *Manduley v. Superior Court* (2002) 27 Cal.4th 537 (no separation of powers violation by the direct filing of juvenile cases in the criminal court); *Morse v. Municipal Court* (1974) 13 Cal.3d 149 (mandate issued to compel consideration of diversion).) CPDA has also served as amicus curiae in the United State Supreme Court. (*See, e.g., California v. Trombetta* (1984) 467 U.S. 479 (the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense); *Monge v. California* (1998) 524 U.S. 721 (double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency).)

CPDA is also involved in legislative solutions. Members of the CPDA Legislative Committee and our lobbyists attend key state Senate and Assembly committee meetings on a weekly basis, and CPDA takes positions on nearly every bill relating to criminal justice.

The **CCPD** is dedicated to providing vigorous, client-centered advocacy to indigent persons accused of crimes in Contra Costa County. CCPD represents its clients in all stages of trial litigation, including ability

to pay fines and fees hearings, and in certain post-conviction proceedings such as expungements. CCPD's Black and Latinx clients are overrepresented in the criminal justice system relative to the county's population demographics.

The **SFPD** office accepts appointments in more than 25,000 cases per year in felony, misdemeanor, and juvenile courts. The San Francisco Public Defender has provided dedicated and passionate legal representation to people who are charged with a crime and unable to afford an attorney for nearly 100 years. Its mission is to protect and defend the rights of its clients through effective, vigorous, compassionate, and creative legal advocacy. Its client base is deeply impacted by criminalization and incarceration and is primarily comprised of low-income people of color.

The **OSPD** often represents clients saddled with significant fines and fees that severely burden their lives and the lives of their families. OSPD's clients are universally indigent and its condemned clients have been barred from working while incarcerated, making it impossible to pay off their criminal debts. As OSPD's clients are disproportionately from minority backgrounds, the impact of these fines and fees falls disproportionately on historically disadvantaged communities.

This application is timely under Rule 8.200(c)(1) of the California Rules of Court.

In accordance with California Rules of Court, Rule 8.200(c)(3), no party or counsel for any party in the pending appeal authored this brief in whole or in part, and no party or counsel for any party in the pending

appeal made a monetary contribution intended to fund the brief's preparation or submission. No person or entity other than counsel for the proposed Civil Rights Amici made a monetary contribution intended to fund the preparation or submission of this brief.

### **STATEMENT OF INTEREST OF AMICI**

The ACLU of Northern California, EBCLC, the CCPD, the SFPD, and the OSPD have a significant interest in the subject matter of this appeal. The ACLU of Northern California engages in impact litigation and legislative advocacy in the areas of racial and economic justice. EBCLC, the CCPD, the SFPD, and the OSPD represent hundreds and thousands of low-income Black and Latinx clients who have been harmed by criminal legal system fines and fees. The CDPA is made up of hundreds of criminal defense attorneys and public defenders across the state. Indigent defendants represented by Amici and other public defenders statewide would be beneficially impacted by fines and fees being set relative to defendants' income levels, as discussed in this brief.

This brief is not offered to restate respondents' arguments but rather to provide an additional perspective with regard to the ways in which criminal administrative fees exacerbate the economic conditions of mostly low-income Black and Brown defendants. In addition, this brief provides the perspective of legal service providers and public defender's offices regarding the economic conditions of their clients and why a presumption of indigency for public defender clients is the most fair, equitable and efficient process. Proposed Public Defender and Civil Rights Amici are

well-positioned to offer this analysis. As public defender offices, the CCPD, SFPD, OSPD, and CDPA's members see thousands of clients who face extremely high conviction-related fines and fees. EBCLC represents clients with high criminal administrative fines and fees after conviction and witness the daily devastation these fees cause in their lives and the lives of their family members.

No party, or counsel for any party, in this matter has authored any part of the accompanying [Proposed] Amici Curiae Brief, nor has any person or entity made any monetary contributions to fund the preparation or submission of this brief.

#### **STATEMENT OF THE CASE**

Jason Samuel Hernandez and Christi J. Kopp were convicted of numerous felonies. (*People v. Kopp* (2019) 38 Cal.App.5th 47, 55.) Besides significant prison time, Hernandez was sentenced to:

[A] restitution fine of \$10,000 under Penal Code Section 1202.4, subdivision (b); a court security fee of \$120 under Penal Code Section 1465.8; an immediate critical needs account fee of \$90 under Government Code Section 70373; a criminal justice administrative fee of \$154 under Government Code Section 29550.1; a drug program fee of \$615 under Health and Safety Code Section 11372.5; and a lab analysis fee of \$205 under Health and Safety Code Section 11372.5. The court also ordered but stayed a parole revocation restitution fee of \$10,000 under Penal Code section 1202.45. (*Id.* at 93-94.)

Hernandez and Kopp appealed. In supplemental briefing, Hernandez, argued, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 242 Cal.Rptr.3d 268, that he did not receive his due-process guaranteed



ability to pay hearing, and so his case must be remanded to the superior court for this assessment. (*Kopp, supra*, 38 Cal.App.5th at 57.) On appeal, the Fourth Appellate District determined that Hernandez and Kopp were entitled to ability to pay hearings under due process for certain administrative fees. (*Id.* at 95-96.) The court also determined that some punitive fines may be objected to under the Excessive Fines Clause of the Constitution, but that ability to pay was merely one factor in determining the excessiveness of the fine. (*Id.* at 96-98.) Finally, the court held that the burden of proof lay on the defendant to prove inability to pay. (*Id.* at 96.) This petition for review followed.

#### **ISSUE PRESENTED**

This Court limited the issues on review to the following two questions. First, this Court must determine whether a court must consider a criminal defendant's income level and/or ability to pay before imposing and/or executing upon criminal fines, fees, and assessments. Second, if so, does the prosecution or the defense bear the burden of proof regarding the defendant's ability to pay?

For the reasons stated herein, Public Defender and Civil Rights Amici urge this Court to hold that a criminal defendant must be given an ability-to-pay hearing before imposing and/or executing upon criminal fines, fees, and assessments. We also ask this Court to hold that, at least with respect to public defender clients, inability to pay is presumed and the prosecution bears the burden of proving defendant's ability to pay.

For all of the reasons set forth above, Civil Rights and Public

Defender Amici respectfully request that they be granted leave to file the accompanying [Proposed] Amici Curiae Brief.

February 19, 2021

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**TABLE OF CONTENTS**

TABLE OF CONTENTS ..... 11

TABLE OF AUTHORITIES..... 12

INTRODUCTION ..... 15

ARGUMENT ..... 15

I. Due to Systemic Racism, Poor People of Color – Particularly Black and Latinx People – are Disproportionately Represented in the Criminal Legal System. .... 15

II. Public Defender Clients and their Families Cannot Afford the High Cost of Criminal Legal System Fines and Fees. .... 18

A. Public Defender Clients and their Families Live in Poverty. .... 18

B. Criminal Legal System Fines and Fees are Incredibly Costly. .... 19

C. Public Defender Clients Struggle to Obtain Post-Conviction Employment, Which Impacts their Ability to Pay Back Fines, Fees, and Court-Ordered Debt. 22

III. Criminal Fines and Fees Plunges Poor, Black, And Latinx People and Families into Crisis, Forcing Public Defender Clients and their Families to Choose Between Housing, Food, Education, Employment, and Paying off Court Ordered Debt. .... 28

IV. Due Process and the Conservation of Judicial Resources Demand that there be a Presumption of Indigence for at least Public Defender Clients..... 32

CONCLUSION ..... 35

CERTIFICATE OF WORD COUNT ..... 36

EXHIBIT A ..... 37

PROOF SERVICE..... 39

Document received by the CA Supreme Court.

**TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b>Statutes</b>	
Cal. Gov. Code § 27706 .....	18, 32, 33
Cal. Penal Code § 1203 .....	32
Cal. Veh. Code § 4461 .....	21
Cal. Veh. Code § 21352 .....	21
<b>Other Authorities</b>	
Associated Press, <i>The industry behind prisons profits, even during the coronavirus outbreak</i> , LOS ANGELES TIMES (May 9, 2020) .....	23, 24
BD. OF GOVERNORS OF THE FED. RESERVE SYS., <i>Report on the Economic Well-Being of U.S. Households in 2017</i> (2018) .....	20
CAL. DEP’T OF CONSUMER AFFAIRS, <i>DCA Boards &amp; Bureaus</i> (last accessed Nov. 20, 2020) .....	27
CAL. DEP’T OF FAIR EMPLOYMENT AND HOUSING, <i>Criminal History in Employment</i> (last accessed Feb. 8, 2021) .....	26
CAL. DEP’T OF MOTOR VEHICLES, <i>Driving Under the Influence (DUI)</i> (last accessed Nov. 20, 2020) .....	22
Calmatters, <i>Here Are The 2020 Bills Gov. Newsom Rejected Or Signed Into California Law</i> , CAL. PUB. RADIO (Oct. 1, 2020) .....	21
Cody Tuttle, <i>Snapping Back: Food Stamp Bans and Criminal Recidivism</i> , COLLEGE PARK UNIV. OF MARYLAND (2018) .....	31
COUNTY OF L.A. CHIEF EXECUTIVE OFFICE, <i>REPORT BACK ON ADDRESSING FINES AND FEES ASSOCIATED WITH CRIMINAL JUSTICE SYSTEM INVOLVEMENT (ITEM NO. 10, AGENDA OF APRIL 16, 2019)</i> (Dec. 13 2019) .....	33
Dena Herman, ET AL., <i>Food Insecurity and Cost-Related Medication Underuse Among Nonelderly Adults in a Nationally</i>	

Document received by the CA Supreme Court.

<i>Representative Sample</i> , AM. J. OF PUB. HEALTH 105(10) (2015) 48-59 .....	31
Devah Pager, <i>The Mark of a Criminal Record</i> , 108 AM. J. OF SOCIO. 937-975 (2003) .....	24, 25, 32
E. Ann Carson, <i>Prisoners in 2019</i> , U.S. DEP'T OF JUST. (Oct. 2020).....	17
CNTY. OF NAPA, <i>Eligibility for a Public Defender</i> (last accessed Feb. 8, 2021).....	18, 32, 33
Elizabeth Hinton, <i>An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice SYSTEM</i> , VERA INST. OF JUST. (May 2008).....	15
HIGBEE & ASSOCIATES, <i>Protecting Your Professional License When Accused of a Crime in California</i> (last accessed Nov. 20, 2020) .....	26, 27
Janet Reno ET AL., <i>Contracting for Indigent Services, Special Report</i> , BUREAU OF JUST. ASSISTANCE (Apr. 2000) .....	15, 32
JUDICIAL COUNCIL OF CAL., <i>Uniform Bail and Penalty Schedules</i> (2019) .....	21
LEGAL AID AT WORK, <i>Rights of Job Seekers with Criminal Records</i> (last accessed Feb. 8, 2021).....	26
Lucius Couloute & Daniel Kopf, <i>Out of Prison &amp; Out of Work: Unemployment among formerly incarcerated people</i> , PRISON POLICY INITIATIVE (July 2018).....	24, 25, 32
Maanvi Singh, <i>California's incarcerated firefighters face dangerous work, low pay and COVID-19</i> , HIGH COUNTRY NEWS (July 15, 2020) .....	23
Nathaniel Lewis, <i>People's Policy Project, Mass Incarceration, New Jim Crow, Class War, or Both?</i> , PEOPLE'S POL'y Project (Jan. 2018) .....	16, 19
Nico Savidge, <i>Ban the Box: California law gives strong protections, but some businesses don't heed them</i> , THE MERCURY NEWS (May 29, 2019) .....	26, 27

Press Release, Debt Free Justice Cal., Governor Signs Historic Bill Repealing Unjust Criminal Fees in California Providing Much Needed Relief to Californians (Sept. 21, 2020) ..... 20, 27

S.F. FIN. JUST. PROJECT, *Criminal Justice Administrative Fees: High Pain for People, Low Gain for Government* (Apr. 24, 2019) ..... 29

SACRAMENTO SUPER. CT., *Petition Information and Instruction Sheet* (Jan. 1, 2021) ..... 32

Saneta deVuono-powell ET AL., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. (2015)..... 18

Tara Gamboa-Eastman, *The Problem with Probation: A Study of the Economic and Racial Impact of Probation Fees in California*, HARVARD KENNEDY SCHOOL (June 26, 2018)..... 29

Theresa Zhen & Brandon Greene, *Pay or Prey: How the Alameda County criminal justice system extracts wealth from marginalized communities*, EAST BAY COMMUNITY LAW CTR. (Oct. 2018)..... 17, 19, 20, 33

U.S. CENSUS BUREAU, *Measuring Household Experiences During the Coronavirus Pandemic* (last accessed Aug. 20, 2020) ..... 31

Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017)..... 23

White Paper, Cal. Health Pol’y Strategies, LLC., *Supporting the Prison & Jail Reentry Population – A Strategy for Reducing Unsheltered Homelessness in California* (March 2019) ..... 30

WHO PAYS?, *Key Findings* (last accessed Feb. 8, 2021)..... passim

Yaphet GETACHEW ET. AL., *Beyond the Case Count: The Wide-Ranging Disparities of COVID-19 in the United States*, THE COMMONWEALTH FUND (Sept. 10, 2020) ..... 17

## INTRODUCTION

[Proposed] Public Defender and Civil Rights Amici write to illuminate this Court regarding the racial and economic harms to our clients, when assessed exorbitant criminal legal system fines and fees. We urge this Court to find that all fines and fees assessed against criminal defendants without an ability to pay determination are unconstitutional. We also ask this Court to find that at least public defender clients are presumptively indigent, and that the prosecution bears the burden of proving public defender clients' ability to pay.

## ARGUMENT

### **I. Due to Systemic Racism, Poor People of Color – Particularly Black and Latinx People – are Disproportionately Represented in the Criminal Legal System.**

The continued existence and administration of the criminal legal system is inextricably tied to the large gaps in privilege, wealth, and access amongst the haves and the have-nots.<sup>1</sup> Due to past and current systemic racism and oppression, these gaps are stratified by race.<sup>2</sup>

By some estimates, a minimum of 60 percent and a maximum of 90 percent of all criminal cases involve indigent defendants.<sup>3</sup> A 2018 report from the People's Policy Project found that the Black and White wealth gap

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<sup>1</sup> Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2008), available at: [for-the-record-unjust-burden-racial-disparities.pdf](#).

<sup>2</sup> *Id.*

<sup>3</sup> Janet Reno ET AL., *Contracting for Indigent Services, Special Report*, BUREAU OF JUST. ASSISTANCE (Apr. 2000), available at: <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

is the primary factor in disproportionate incarceration rates.<sup>4</sup> The study sought to determine the statistical significance of race and class in four scenarios:

- 1) Whether or not men aged 24-32 years have ever been to jail or prison;
- 2) Whether or not men are jailed after being arrested;
- 3) Whether or not men have spent more than a month in jail or prison; and
- 4) Whether or not men have spent more than a year in jail or prison.<sup>5</sup>

The study found that class was the most statistically significant in each category except for whether or not men have spent more than a year in jail.<sup>6</sup> The study also found that the wealth stratification across race was persistent.<sup>7</sup> 42 percent of black men were in the lowest class group versus just 15 percent of white men; and 24 percent of white men were in the highest class group, versus just 8 percent of black men.<sup>8</sup> Because the wealth gap is racially stratified and because the effects of race are so profound, the study also found that racially disproportionate rates of incarceration would exist even if the economic gaps were flattened.<sup>9</sup>

The findings of the People's Policy Project remain salient. As of 2019, Black and Latinx Americans were disproportionately represented in

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<sup>4</sup> Nathaniel Lewis, *People's Policy Project, Mass Incarceration, New Jim Crow, Class War, or Both?*, PEOPLE'S POL'Y PROJECT (Jan. 2018), available at: <https://www.peoplespolicyproject.org/wp-content/uploads/2018/01/MassIncarcerationPaper.pdf>

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*



state and federal prisons.<sup>10</sup> In 2019, more than 1 percent of all Black Americans were serving time in a state or federal prison.<sup>11</sup> This rate was 5 times the rate of White Americans and 2 times the rate of Latinx Americans.<sup>12</sup> These disparities persist across age and gender.<sup>13</sup> The rate of imprisonment for men was 13 times the rate of women.<sup>14</sup> Black men are incarcerated at 5.7 times the rate of White men, while Black women are incarcerated at a rate 1.7 times the rate of White women.<sup>15</sup> Black men ages 18-19 had the highest incarceration rate of all.<sup>16</sup>

The racial wealth gap also remains pernicious, particularly in California.<sup>17</sup> In Alameda County, the median household income for a White family is \$99,868, for a Latinx family is \$68,850, and for a Black family is \$50,061.<sup>18</sup> Due to the COVID-19 pandemic and the resulting economic crisis, Black and Latinx families are plunged even further into illness and poverty.<sup>19</sup>

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<sup>10</sup> E. Ann Carson, *Prisoners in 2019*, U.S. DEP'T OF JUST. at 10 (Oct. 2020), available at: <https://www.bjs.gov/content/pub/pdf/p19.pdf>.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 16.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See, e.g., Theresa Zhen & Brandon Greene, *Pay or Prey: How the Alameda County criminal justice system extracts wealth from marginalized communities*, EAST BAY COMMUNITY LAW CTR. at 15 (Oct. 2018), available at: [https://ebclc.org/wp-content/uploads/2018/10/EBCLC\\_CrimeJustice\\_WP\\_Fnl.pdf](https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf).

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Yaphet Getachew ET. AL., *Beyond the Case Count: The Wide-Ranging Disparities of COVID-19 in the United States*, THE COMMONWEALTH FUND (Sept. 10, 2020), available at:

## **II. Public Defender Clients and their Families Cannot Afford the High Cost of Criminal Legal System Fines and Fees.**

### **A. Public Defender Clients and their Families Live in Poverty.**

The public defender represents only indigent clients who are not able to afford an attorney.<sup>20</sup> Though income guidelines vary from office-to-office, many public defender clients are in dire financial straits. According to a study by the Ella Baker Center on the impact of fines and fees on incarcerated people and their loved ones, 38 percent of respondent families with incarcerated loved ones had an annual income of less than \$15,000.<sup>21</sup> 24 percent of families had an annual income between \$15,000 and 25,000.<sup>22</sup> 26 percent of families made between \$25,000 and \$50,000 per year.<sup>23</sup>

Brendon Woods, the Public Defender in Alameda County found that:

From an analysis of a random sample of 152 financial statement forms, the average monthly income of the clients represented by the public defender was \$966. More than half

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[https://www.commonwealthfund.org/publications/2020/sep/beyond-case-count-disparities-covid-19-united-states?gclid=Cj0KCQiA6t6ABhDMARIsAONIYyw1Q\\_DA2IXrxwTbi6DMHTuJKgBMZFYXtMImxrnZybYsm2Ko4iAWNgEaAqOEEALw\\_wcB](https://www.commonwealthfund.org/publications/2020/sep/beyond-case-count-disparities-covid-19-united-states?gclid=Cj0KCQiA6t6ABhDMARIsAONIYyw1Q_DA2IXrxwTbi6DMHTuJKgBMZFYXtMImxrnZybYsm2Ko4iAWNgEaAqOEEALw_wcB)

<sup>20</sup> Cal. Gov. Code § 27706(a). *See also, Eligibility for a Public Defender*, CNTY. OF NAPA, available at: <https://www.countyofnapa.org/1811/Eligibility-for-a-Public-Defender> (last accessed Feb. 8, 2021).

<sup>21</sup> Saneta deVuono-powell ET AL., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. (2015), available at: <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

of those who qualified for indigent defense services were unemployed.<sup>24</sup>

A recent study completed by counsel for Amici at the Contra Costa Public Defender showed similar numbers.<sup>25</sup> From a random sample of 82 financial income forms, the average monthly income of public defender clients was \$843.<sup>26</sup> Roughly 70 percent of surveyed clients were unemployed.<sup>27</sup>

**B. Criminal Legal System Fines and Fees are Incredibly Costly.**

America is in the midst of a national conversation regarding criminal legal system fines and fees, and their disproportionate racialized impact on low-income Black and Latinx individuals, families, and communities. As above, because of racially discriminatory policing and prosecution practices – which disproportionately target low-income Black and Latinx communities – the vast majority of people affected by the criminal legal system in California and nationwide are people of color.<sup>28</sup> Most people affected by mass incarceration are also low-income; the American Bar Association estimates that anywhere from 85 percent to 95 percent of criminal defendants are represented by the public defender.<sup>29</sup>

Despite the fact that public defender clients are low-income, they are consistently assessed extremely high criminal fines and fees, with no

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<sup>24</sup> Zhen & Greene, *supra* n.17, at 15.

<sup>25</sup> Ex. A, Garrido Decl., CCPD.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g.,* Lewis, *supra* n.4.

<sup>29</sup> Zhen & Greene, *supra* n.17.

consideration of their income level and ability to pay back this debt. According to a recent federal report, roughly half of Americans would struggle to pay for an emergency costing \$400 or more.<sup>30</sup> In California, “the average conviction-related costs [...] are \$13,607.”<sup>31</sup> Due to the above-mentioned racial wealth gap, these legal system costs are more burdensome on Black and Latinx families. For example, in Alameda County, because the average yearly income for a White family is twice what it is for the average Black family, it would take nearly twice as long for the average Black family to pay back criminal legal system debt than it would for the average White family.<sup>32</sup>

In response to the disproportionately racialized harms of criminal fines and fees, in September 2020, California became the first state in the country to repeal 23 certain criminal administrative fees, including probation and public defender fees.<sup>33</sup> These 23 fees alone represent over 16 billion dollars of debt to individuals.<sup>34</sup> Because of the disproportionate criminalization of people living in poverty, these fees only resulted in about

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<sup>30</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., *Report on the Economic Well-Being of U.S. Households in 2017* at 1 (2018), available at: <https://www.federalreserve.gov/publications/files/2017-report-economic-well-being-us-households-201805.pdf>.

<sup>31</sup> Zhen & Greene, *supra* n.17.

<sup>32</sup> *See, id.*

<sup>33</sup> Press Release, Debt Free Justice Cal., Governor Signs Historic Bill Repealing Unjust Criminal Fees in California Providing Much Needed Relief to Californians (Sept. 21, 2020), available at: <https://www.law.berkeley.edu/wp-content/uploads/2020/09/California-Governor-Signs-Historic-Bill-Abolishing-Unjust-Criminal-Fees-9-21-20-.pdf>.

<sup>34</sup> *Id.*

\$65 million dollars of actual revenue; a less than a 1 percent collection rate statewide.<sup>35</sup>

Elimination of these 23 fees is an important first step in remedying the financial devastation caused by criminal legal debt, but it does not alone eliminate the harm. Numerous other exorbitant fines and fees harm public defender clients every day, saddling them with debt they cannot afford. For example, California Vehicle Code Section 4461, subdivision (b) makes it a misdemeanor to improperly use a disabled placard. A conviction under this section comes with a fine of \$250, a State penalty assessment of \$250, a County penalty assessment of \$175, a DNA penalty assessment of \$125, a Court penalty assessment of \$125, a surcharge of \$50, an EMS penalty assessment of \$50, an EMAT penalty assessment of \$4, and numerous other fines and fees, for a total of \$1100 in fines and assessments alone.<sup>36</sup>

Many convictions have other, non-court-related costs. For example, a conviction for Driving Under the Influence of Alcohol (DUI) under California Vehicle Code Section 21352(a) or (b) has a base fine of \$390 and costs a total of \$1674, with the addition of other related fines and assessments.<sup>37</sup> A DUI conviction also results in a suspended license, for which defendants must enroll in prohibitively expensive DUI classes,

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<sup>35</sup> See, e.g., Calmatters, *Here Are The 2020 Bills Gov. Newsom Rejected Or Signed Into California Law*, CAL. PUB. RADIO (Oct. 1, 2020), available at: [https://laist.com/2020/10/01/here\\_are\\_the\\_2020\\_bills\\_gov\\_newsom\\_rejected\\_or\\_signed\\_into\\_california\\_law.php](https://laist.com/2020/10/01/here_are_the_2020_bills_gov_newsom_rejected_or_signed_into_california_law.php).

<sup>36</sup> JUDICIAL COUNCIL OF CAL., *Uniform Bail and Penalty Schedules* at 42 (2019), available at: <https://www.courts.ca.gov/documents/2019-JC-BAIL.pdf>.

<sup>37</sup> *Id.* at 48.

obtain expensive high-risk insurance, pay license reinstatement fees, and sometimes install a costly ignition interlock device (IID) in their vehicle.<sup>38</sup> Exorbitant court fees act as a barrier for public defender clients to take DUI classes, and the obtain the safety devices that would help support them and other motorists on the road.

High court fines and fees, set without consideration of the defendants' ability to pay them, thus take a tremendous financial toll on public defender clients and their families, and have a negative impact on public safety generally.<sup>39</sup>

**C. Public Defender Clients Struggle to Obtain Post-Conviction Employment, Which Impacts their Ability to Pay Back Fines, Fees, and Court-Ordered Debt.**

**1. Incarcerated People Work Long Hours for Extremely Low Wages and are Unable to Make Payments on Court-Ordered Debt.**

Incarcerated people are not given a reprieve from criminal court fines and fees, despite having little-to-no earning potential. Fines and fees are consistently deducted from jail and prison Inmate Trust Accounts, leaving incarcerated people with small amounts of money or no funds at all. Particularly during the COVID-19 pandemic, when jails and prisons are hotspots for infection, access to funds is crucial for purchasing safe food,

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<sup>38</sup> CAL. DEP'T OF MOTOR VEHICLES, *Driving Under the Influence (DUI)*, available at: <https://www.dmv.ca.gov/portal/driver-education-and-safety/dmv-safety-guidelines-actions/driving-under-the-influence/> (last accessed Nov. 20, 2020).

<sup>39</sup> *See, e.g., WHO PAYS?, Key Findings*, available at: <http://whopaysreport.org/key-findings/> (last accessed Feb. 8, 2021).

medical supplies, and cleaning materials.<sup>40</sup>

While incarcerated people can work while in jail and prison, the wages for these jobs are incredibly low. According to a 2017 report on prison wages, incarcerated people in California make anywhere from 8 cents to 37 cents per hour for “non-industry” jobs, and from 30 cents to 95 cents per hour for “jobs in state-owned industry.”<sup>41</sup> During “fire season,” the state employs incarcerated people to fight California’s wildfires; “in exchange for extremely dangerous work, prisoners earn time off their sentences and are paid between \$2 and \$5 a day, plus \$1 per hour when they are on a fire.”<sup>42</sup>

Setting fines and fees consistent with incarcerated public defender clients’ inability to pay would allow incarcerated people to spend what little money they make on food and safety supplies.<sup>43</sup> Importantly, it would also aid California jails and prisons in their efforts to stop the spread of COVID-19 by more effectively allowing incarcerated people to protect themselves

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<sup>40</sup> Associated Press, *The industry behind prisons profits, even during the coronavirus outbreak*, LOS ANGELES TIMES (May 9, 2020), available at: <https://www.latimes.com/world-nation/story/2020-05-09/coronavirus-us-prisons-pandemic-inmate-work-programs>.

<sup>41</sup> Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL’Y INITIATIVE (Apr. 10, 2017), available at: <https://www.prisonpolicy.org/blog/2017/04/10/wages/>.

<sup>42</sup> Maanvi Singh, *California’s incarcerated firefighters face dangerous work, low pay and COVID-19*, HIGH COUNTRY NEWS (July 15, 2020), available at: <https://www.hcn.org/articles/climate-desk-wildfire-california-incarcerated-firefighters-face-dangerous-work-low-pay-and-covid19#:~:text=In%20exchange%20for%20extremely%20dangerous,to%20%24100%20million%20a%20year>.

<sup>43</sup> See, e.g., Associated Press, *supra* n.40.

from disease.<sup>44</sup>

**2. Once Released from Incarceration, Former Public Defender Clients Struggle to Find Employment Due to the Collateral Consequences of Criminal Convictions, and They Struggle to Pay Back Court-Ordered Debt.**

People with criminal convictions, particularly public defender clients, face high barriers to employment even after their sentences are served.<sup>45</sup> Barriers to employment, entrenched poverty, the racialized impact of mass incarceration, and implicit racial biases by employers creates a dire situation for public defender clients fighting to earn enough income to meet their basic needs and pay off outstanding court ordered debt.<sup>46</sup>

A 2018 study by the Prison Policy Initiative found that “formerly incarcerated people are unemployed at a rate of over 27 percent – higher than the total U.S. unemployment rate during any historical period, including the Great Depression.”<sup>47</sup> This is roughly 5 times higher than the unemployment rate for the general population.<sup>48</sup> Though many employers express willingness to hire formerly incarcerated people, the actual callback and hiring statistics to not bear this out,<sup>49</sup> and huge numbers of formerly

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<sup>44</sup> See, e.g., Associated Press, *supra* n.40.

<sup>45</sup> Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POLICY INITIATIVE (July 2018), available at:

<https://www.prisonpolicy.org/reports/outofwork.html#recommendations>.

<sup>46</sup> *Id.* See also, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOCIO. 937-975 (2003), available at:

<https://scholar.harvard.edu/pager/publications/mark-criminal-record>.

<sup>47</sup> Couloute & Kopf, *supra* n.45.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*



incarcerated people remain unemployed, despite being statistically more likely to be “active” in the labor market than their peers.<sup>50</sup>

The unemployment rate for formerly incarcerated people is not spread evenly among racial identity groups.<sup>51</sup> Numerous studies show that a Black male applicant without a criminal record is less likely to receive callbacks and job offers than a White male applicant with a criminal record.<sup>52</sup> The racial bias illustrated in these studies is consistent with national unemployment statistics.<sup>53</sup> White men without criminal records have a 4.3 percent unemployment rate, while formerly incarcerated White men have an 18.4 percent unemployment rate.<sup>54</sup> Black men without criminal records have a 7.7 percent unemployment rate, while formerly incarcerated Black men are unemployed at a 43.6 percent rate.<sup>55</sup> White women without criminal records are unemployed at 4.3 percent, while 23.2 percent of formerly incarcerated White women are unemployed.<sup>56</sup> Comparatively, Black women without criminal records are unemployed at 6.4 percent, while 35.2 percent of formerly incarcerated Black women are unemployed.<sup>57</sup>

California has numerous protections for formerly incarcerated people, but these do not sufficiently alleviate racially biased employment

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *See, e.g., id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

issues.<sup>58</sup> Starting January 1, 2018, the Fair Chance Act prohibited most California employers from “ask[ing] about the criminal record of job applicants before making a job offer.”<sup>59</sup> The Act applies to employers with five or more employees, and does not apply to positions where a background check is required by law, positions within a criminal justice agency, nor positions as a farm labor contractor.<sup>60</sup> The Act allows employers to conduct a criminal background check after making a job offer, and employers can rescind job offers based on the criminal background check after going through a process including notifying the applicant and giving them an opportunity to provide additional information, conducting an individualized assessment, and then sending a written notice of the final denial, including information about the applicant’s right to complain to The Department of Fair Housing and Employment (DFEH).<sup>61</sup>

The Fair Chance Act was a significant advance supporting formerly incarcerated people obtaining employment, but the Act’s numerous restrictions make it ineffective for many people seeking employment.<sup>62</sup>

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<sup>58</sup> See, e.g., Nico Savidge, *Ban the Box: California law gives strong protections, but some businesses don’t heed them*, THE MERCURY NEWS (May 29, 2019), available at:

<https://www.mercurynews.com/2019/05/29/ban-the-box-california-law-gives-strong-protections-but-some-businesses-dont-heed-them/>.

<sup>59</sup> CAL. DEP’T OF FAIR EMPLOYMENT AND HOUSING, *Criminal History in Employment*, available at: <https://www.dfeh.ca.gov/criminalhistory/> (last accessed Feb. 8, 2021).

<sup>60</sup> LEGAL AID AT WORK, *Rights of Job Seekers with Criminal Records*, available at: <https://legalaidatwork.org/factsheet/criminal-records/> (last accessed Feb. 8, 2021).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Savidge, *supra* n.58. See also HIGBEE & ASSOCIATES, *Protecting Your Professional License When Accused of a Crime in*

First, the Act does not apply to numerous employment positions, nor does it apply to licensing boards, where many formerly incarcerated people must apply in order to receive an occupational license to even be able to apply for certain positions.<sup>63</sup> These licenses and the occupational licensing boards control many California industries, including the practice of law, barbering, acupuncture, working with vulnerable populations such as children and the elderly, and many more.<sup>64</sup> These boards are empowered to conduct background checks, and to prevent people with criminal convictions from obtaining the necessary occupational licenses to practice their chosen profession.<sup>65</sup> The Act also empowers employers to rescind offers of employment after conducting a minimal process, which often happens in practice.<sup>66</sup>

Further, this Act is only as good as compliance, which is lacking.<sup>67</sup> Between January 1, 2018 and May 29, 2019, the DFEH “received more than 300 complaints alleging violations of the law,” only three of which were closed for lack of evidence.<sup>68</sup> Employment law nonprofits, such as Legal Aid at Work, report that many people “have encountered the kinds of

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*California*, available at: [https://www.recordgone.com/articles/professional\\_licenses.htm](https://www.recordgone.com/articles/professional_licenses.htm) (last accessed Nov. 20, 2020).

<sup>63</sup> *Protecting Your Professional License When Accused of a Crime in California*, *supra* n.62.

<sup>64</sup> *See, e.g.*, CAL. DEP’T OF CONSUMER AFFAIRS, *DCA Boards & Bureaus*, available at: [https://www.dca.ca.gov/about\\_us/entities.shtml](https://www.dca.ca.gov/about_us/entities.shtml) (last accessed Nov. 20, 2020).

<sup>65</sup> *See*, Debt Free Justice Cal., *supra* n.33.

<sup>66</sup> Savidge, *supra* n.58.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

questions the law was written to stop.”<sup>69</sup> DFEH Director Kevin Kish himself reported that:

In some cases [...] businesses wrote in postings on job sites that they would not accept applicants with felony records. In other cases, supporters of the law say, businesses asked about criminal histories earlier in the application process than the law allows, or rejected applicants without considering whether their offense had anything to do with the job they are seeking [...].<sup>70</sup>

Difficulty finding employment post-conviction places public defender clients in an increasingly precarious financial position.<sup>71</sup> Setting fines and fees relative to what public defender clients can pay would allow them to focus on reentering society and meeting their basic needs, rather than paying back exorbitant court-ordered debt.<sup>72</sup>

### **III. Criminal Fines and Fees Plunges Poor, Black, And Latinx People and Families into Crisis, Forcing Public Defender Clients and their Families to Choose Between Housing, Food, Education, Employment, and Paying off Court Ordered Debt.**

Criminal legal system fines and fees have a tremendous and disastrous financial impact on public defender clients and their families.<sup>73</sup> Public defender clients are burdened with enormous financial costs attached to criminal system involvement.<sup>74</sup> These costs include statutory fines, debt from cash bail to obtain pretrial release, probation fees, public defender

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *See generally, Key Findings, supra* n.39.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

fees, fees for drug testing, and numerous others.<sup>75</sup> Findings have shown “The average debt burden for just the three most common [probation] fees in California is more than \$3,600, alone.”<sup>76</sup> In some counties, these fees can exceed \$5000.<sup>77</sup> Public defender clients must struggle to pay back this substantial debt while also caring for their own and their family’s basic needs, and facing increased barriers to employment and housing.<sup>78</sup> Their families also bear the financial burdens of the criminal legal system.<sup>79</sup> According to a report by the Ella Baker Center, families paid an average of \$13,607 in court-related costs.<sup>80</sup> Eighty-three percent of those responsible for paying these costs were women.<sup>81</sup> The report found that, “1 in 5 families across income levels [...] had to take out a loan to cover these costs.”<sup>82</sup>

Rising costs of housing statewide, decreased capacity of halfway houses and reentry housing programs, conviction-based restrictions in public housing programs and shelters, and criminal court debt create nearly

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<sup>75</sup> S.F. FIN. JUST. PROJECT, *Criminal Justice Administrative Fees: High Pain for People, Low Gain for Government* (Apr. 24, 2019), available at: [https://sfgov.org/financialjustice/sites/default/files/2020-04/Hig%20Pain%20Low%20Gain%20FINAL\\_04-24-2019\\_1.pdf](https://sfgov.org/financialjustice/sites/default/files/2020-04/Hig%20Pain%20Low%20Gain%20FINAL_04-24-2019_1.pdf).

<sup>76</sup> Tara Gamboa-Eastman, *The Problem with Probation: A Study of the Economic and Racial Impact of Probation Fees in California*, Harvard Kennedy School (June 26, 2018), available at: [https://wclp.org/wp-content/uploads/2018/06/TheProblemWithProbation\\_GamboaEastman\\_ForWCLP\\_Final.pdf](https://wclp.org/wp-content/uploads/2018/06/TheProblemWithProbation_GamboaEastman_ForWCLP_Final.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* See generally, *Key Findings*, *supra* n.39.

<sup>79</sup> *Key Findings*, *supra* n.39.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

insurmountable barriers for public defender clients to obtain housing post-conviction.<sup>83</sup> A 2019 White Paper by the California Health Policy Strategies found that an estimated 70 percent of the unsheltered homeless people in San Diego, Los Angeles, and Orange Counties had a history of incarceration.<sup>84</sup> 28 percent of unsheltered homeless people in these counties were recently released from jail or prison, and 13 percent of were on probation or parole.<sup>85</sup>

Issues with housing related to criminal court fees also harm public defender clients' families. According to a report by the Ella Baker Center, families are often "the primary resource for housing, employment, and health needs of their formerly incarcerated loved ones."<sup>86</sup> But as a result of conviction-barring programs, "nearly 1 in 5 families [...] faced eviction, were denied housing, or did not qualify for public housing once their formerly incarcerated family member returned."<sup>87</sup>

Exorbitant criminal legal system fines and fees can also have a disastrous impact on public defender clients' and their families' ability to provide for other basic needs, like food.<sup>88</sup> Food insecurity, caused by poverty and exacerbated by criminal legal system debt, has negative

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<sup>83</sup> White Paper, Cal. Health Pol'y Strategies, LLC., Supporting the Prison & Jail Reentry Population – A Strategy for Reducing Unsheltered Homelessness in California (March 2019), available at: <https://calhps.com/wp-content/uploads/2019/04/Homeless-Council-White-Paper-3-19-2019.pdf>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Key Findings, supra*, n.39.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

impacts on health, increasing the prevalence and severity of diet-related disease such as type 2 diabetes, heart disease, stroke, and some cancers.<sup>89</sup> Hunger is also harmful to reentry outcomes; studies have proven that lacking access to basic needs can increase recidivism rates by up to 58 percent.<sup>90</sup>

Not only does criminal legal system debt cause hunger for public defender clients, but it can also cause hunger and resulting harm to their children.<sup>91</sup> Food insecurity is particularly prevalent amongst Black and Latinx families with children.<sup>92</sup> Children of incarcerated people, including public defender clients, are even more likely to go hungry.<sup>93</sup> According to a report by the Ella Baker Center, nearly 65 percent of polled families became unable to pay for their basic needs when a member of their household goes to prison; 70 percent of those families were raising children.<sup>94</sup>

For many low-income people, public defender clients included, education represents the possibility of self-betterment and movement out of poverty.<sup>95</sup> For public defender clients with criminal legal system fees,

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<sup>89</sup> Dena Herman, ET AL., *Food Insecurity and Cost-Related Medication Underuse Among Nonelderly Adults in a Nationally Representative Sample*, AM. J. OF PUB. HEALTH 105(10) (2015) 48-59.

<sup>90</sup> Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, COLLEGE PARK UNIV. OF MARYLAND (2018).

<sup>91</sup> *Key Findings, supra*, n.39.

<sup>92</sup> U.S. CENSUS BUREAU, *Measuring Household Experiences During the Coronavirus Pandemic*, available at:

<https://www.census.gov/householdpulsedata> (last accessed Aug. 20, 2020).

<sup>93</sup> *Key Findings, supra*, n.39.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

dreams of education can be dashed due. According to a study by the Ella Baker Center, “while 67 percent of formerly incarcerated survey participants reported that they wanted to return to school, only 27 percent were able to.”<sup>96</sup>

Finally, criminal legal system fines and fees can have a devastating effect on reentry prospects, including employment.<sup>97</sup> California State Law mandates that certain convictions be dismissed on the defendant’s petition after the successful completion of probation.<sup>98</sup> Post-conviction dismissal means that most private employers will not be able to see the conviction on a background check. However, in many courts, failure to pay fines and fees, including an inability to pay fines and fees, can result in a denial of a post-conviction dismissal petition.<sup>99</sup> Denial of a 1203.4 dismissal can mean fewer employment prospects, and increased difficulty reentering into society.<sup>100</sup>

#### **IV. Due Process and the Conservation of Judicial Resources Demand that there be a Presumption of Indigence for at least Public Defender Clients.**

Across California, the vast majority of criminal defendants are eligible for public defender services.<sup>101</sup> In order to qualify for public

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<sup>96</sup> *Id.*

<sup>97</sup> Pager, *supra* n.46. *See also*, Couloute & Kopf, *supra* n.45.

<sup>98</sup> Cal. Penal Code 1203.4.

<sup>99</sup> *See, e.g.*, SACRAMENTO SUPER. CT., *Petition Information and Instruction Sheet* (Jan. 1, 2021), available at: <https://saccourt.ca.gov/criminal/docs/1203-4-dismissal-process.pdf>.

<sup>100</sup> Reno, *supra* n.3.

<sup>101</sup> Cal. Gov. Code § 27706(a). *See also*, *Eligibility for a Public Defender*, *supra* n.19.



defender services in California, clients are screened for financial eligibility at the outset of their criminal cases.<sup>102</sup> As noted above, the public defender represents only clients who are extremely indigent, and not able to afford an attorney.<sup>103</sup> For instance, in Alameda County, clients had an average monthly income of \$966, and more than half of those who met income guidelines for indigent defense services were unemployed.<sup>104</sup> In Contra Costa County, clients had an average monthly income of \$843, and roughly 70 percent of clients were unemployed.<sup>105</sup>

Currently, there is no uniformity amongst judges applying ability to pay case law.<sup>106</sup> As a result, individuals face a variety of outcomes depending on which judge hears their case, and it is very difficult for defense attorneys to advise their clients about the likely outcomes of ability to pay hearings.<sup>107</sup> In Los Angeles County:

[A] defendant in one courtroom could receive a complete waiver of fines and fees, while a similarly situated defendant in a courtroom down the hall could be assessed hundreds of dollars. Some judges require defendants to complete a full financial evaluation with a county financial evaluator before even considering granting a waiver or reducing a defendant's financial obligations because of an inability to pay. Other

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<sup>102</sup> Cal. Gov. Code § 27706(a). *See also*, *Eligibility for a Public Defender*, *supra* n.19.

<sup>103</sup> Zhen & Greene, *supra* n.17.

<sup>104</sup> *Ibid.*

<sup>105</sup> Ex. A, *supra* n.25.

<sup>106</sup> *See* COUNTY OF L.A. CHIEF EXECUTIVE OFFICE, REPORT BACK ON ADDRESSING FINES AND FEES ASSOCIATED WITH CRIMINAL JUSTICE SYSTEM INVOLVEMENT (ITEM NO. 10, AGENDA OF APRIL 16, 2019) at 55 (Dec. 13 2019), available at: [http://ebclc.org/wp-content/uploads/2020/03/121319.B101299.Fines-and-Fees.bm\\_.pdf](http://ebclc.org/wp-content/uploads/2020/03/121319.B101299.Fines-and-Fees.bm_.pdf).

<sup>107</sup> *Ibid.*

judges require counsel to provide an overview of a defendant's income sources and obligations in open court before entertaining a fee waiver. Some judges simply refuse to make ability to pay findings or grant fee waivers in any situation.<sup>108</sup>

Judges' nonuniform application of ability to pay case law results in arbitrarily different outcomes for similarly situated cases, despite public defender screening processes that ensure clients have similar financial circumstances.<sup>109</sup> Unfortunately, whether or not a client has their legal financial obligations waived depends mostly on the judge who hears the case, not on the client's particular circumstances.

Ability to pay hearings also consume judicial resources.<sup>110</sup> Given the initial financial screening by the public defender office, it is duplicative, and a waste of court and parties' time and resources to conduct ability to pay hearings for all criminal defendants during or after sentencing.<sup>111</sup> Regardless of whether these hearings are held during sentencing hearings or scheduled for a separate date, they take up valuable time on busy court calendars.<sup>112</sup> They also pose the danger of humiliating clients who may be subjected to public discussions of their poverty in open court.<sup>113</sup>

Criminal defendants, particularly those represented by the public defender, should be presumed indigent, and the District Attorney should have the burden to rebut the presumption of indigence. Adopting a

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

presumption of indigence would preserve judicial resources, decrease the chance of arbitrary outcomes, and protect criminal defendants against duplicative and disruptive inquiries.<sup>114</sup>

### CONCLUSION

For the reasons stated above, Civil Rights and Public Defender [Proposed] Amici respectfully request this Court to find that all criminal fines and fees assessed against a defendant without an assessment of the defendant's ability to pay are unconstitutional. We further ask this Court to rule that at least public defender clients are presumptively indigent, and that the prosecution bears the burden of proving ability to pay.

February 19, 2021

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION OF  
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<sup>114</sup> *Ibid.*

## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520 (c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Proposed Amici Curiae Brief, counsel certifies that the text of this (including footnotes) was produced used 13-point type and contains 4,685 words. This includes footnotes but excludes the tables required under Rule 8.204(a)(1), the cover information required under Rule 8.204(b)(10), the Certificate of Interested Entities or Persons required under Rule 8.208, the Application to File Amici Curiae Brief required under Rule 8.200(c)(1-3), this certificate, and the signature blocks. *See* Rule 8.204(c)(3).

February 19, 2021

By: /s/ Brandon Greene  
Brandon Greene

By: /s/ Asher Waite-Jones  
Asher Waite-Jones

*Attorneys for Amici*

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# EXHIBIT A

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## DECLARATION OF DIANA GARRIDO

I, Diana Garrido, declare the following:

1. I am a licensed attorney in California, in good standing, and have been a California Bar member since June 2006. I am employed as a Deputy Public Defender at the Contra Costa County Public Defender's Office.

2. My office represents persons charged with crimes in Contra Costa County who cannot afford to hire an attorney. Prior to accepting representation, we interview potential clients to determine their financial eligibility for our services.

3. I reviewed a random sample of financial forms for eighty-two new clients my office accepted during December 2020 and January 2021. The clients' average monthly income was \$843.00. Fifty-seven of the clients were unemployed.

4. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: February 19, 2021

Respectfully submitted,  
/s/ Diana Garrido  
Diana Garrido

Deputy Public Defender

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**PROOF SERVICE**

I, Tara Coughlin, am over the age of 18, employed in San Francisco, California, and not a party to this action. My business address is 39 Drumm Street, San Francisco, California 94111.

I further declare that I served:

- 1. APPLICATION TO FILE AMICI CURIAE BRIEF**
- 2. [PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFFS-RESPONDENTS**

by electronic service VIA TrueFiling on February 19, 2021 to the email addresses listed below:

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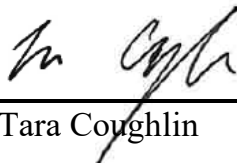
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I declare under penalty of perjury that the foregoing is true and correct.

February 19, 2021

  
\_\_\_\_\_  
Tara Coughlin

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