ETHICS IN MUNICIPAL COURT – A BRAVE NEW WORLD?

THE BIG PICTURE

"Ethics in Municipal Court" is about as broad as any topic in municipal law as any other so addressing such a broad topic can be challenging. This is particularly true when the audience varies from those who wouldn't be caught dead in a municipal court to those that practice in court on a regular basis. Layered on top of this breadth is the fact that some municipal court practitioners are salaried and others are paid by the hour or by the trip. Each of those practitioners may encounter a unique set of ethical dilemmas. The same can be said for some of the differences encountered with a court of record as opposed to a non-record court (*see e.g.*, Local Government Code 30.00006(g) concerning dual employment[1]). New rules from the legislature, like the decriminalization of truancy and a push for county wide uniformity for handling those cases, along with changing social pressure bring to the front new issues, or, perhaps new ways to look at old issues. Some issues can be both political and ethical – having no practical, let alone easy, answer (*e.g.* how do you handle issues related to a municipal judge who is overstepping judicial authority – can your part time prosecutor also practice criminal defense – or even act as a municipal judge in a neighboring city, particularly with the increased use of multi-agency task forces?). Serious questions with both practical and ethical consequences.

Although some would argue differently, there are serious ethical concerns over dual employment of a court clerk as a municipal judge. In such cases it is difficult to see how a court clerk can work with defendants as they come to the window and not learn factual information that may taint decisions that a judge would make at a later trial. Even more

[1] If a municipal judge in a court of record accepts employment with the same city in which she serves, the judicial office is automatically and immediately vacated. In a court that has not been created as a court of record and operates under Texas Government Code Chapter 29, each situation must be examined on a case-by-case basis. In deciding whether a city employee may serve as a municipal court judge, a city must be careful to consider the fact that judges operate not only under state law, but also under their own canons of ethics, known as the Code of Judicial Conduct. These rules are clarified by opinions published by the attorney general and the State Commission on Judicial Ethics. For example, the attorney general found in a 2004 opinion that neither Article XVI, Section 40, of the Texas Constitution nor the common law doctrine of incompatibility prohibited a city finance director from serving as a temporary municipal judge in the same city. However, the opinion specifically pointed out that the Commission on Judicial Conduct would be the only body authorized to examine the judicial ethics issues that might be involved with such an appointment. Tex. Att'y Gen. Op. No. GA-199 (2004). One such opinion held that a city attorney may not simultaneously serve as the municipal judge for that city. Comm. on Jud. Ethics, State Bar of Tex., Op. No. 173 (1994). The commission concluded that a municipal judge serving as the city attorney for the same city would violate several provisions of the Code of Judicial Conduct, including canons stating that a judge must "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and that a judge may be paid only if the source of such payment does not give the appearance of impropriety. Id., citing Tex. Code of Jud. Ethics, State Bar of Tex., Canon 1; Canon 4I. While that opinion was specific to the office of city attorney, many of the arguments regarding the appearance of impropriety could be applied to many, if not all city employees.

problematic, from an ethical perspective, is the line between budget, city management and the clerk, as opposed to judicial decisions that must be free of such consideration.

The ethical issues for prosecutors are probably more familiar – if for no other reason than there are "rules" governing their behavior. New discovery rules and duties (the Michael Morton law) may raise some ethical issues as the volume of cases handled by municipal courts wasn't really taken into consideration when the law was passed. Some municipal courts handle cases through both criminal and civil enforcement, each means with its own ethics – and more so if both means are used concurrently.

Municipal courts, of which there are 926 state wide (109 more than JP Courts), are different than the other state courts as we see, as a general rule, far more *pro se* defendants – especially at trial - than other state courts. One must also consider that municipal courts see many of their citizens, both as defendants and jurors. The perception held by those citizens can easily reflect on the entire city.

One would like to think that with all of the available education (*e.g.*, see the Texas Municipal Courts Education Center: www.tmcec.com) that all of our municipal courts would operate as they should. Unfortunately, that is not necessarily the case. I shook my head when I read, earlier this spring, that a defendant, upon request, was refused a trial by jury for a handicapped parking violation – even though that particular violation (as with all violations in Texas Transportation Code Chapter 681) is a criminal violation. The Constitution guarantees a right to trial by jury for all criminal charges – there are no exceptions for certain charges, lack of court resources, or any of the other "excuse" that may be raised by a particular court, judge or prosecutor. What was not clear from the article was who made the decision. Is this an ethical issue? Section 3.09 of the Texas Disciplinary Rules of Professional Conduct is the "Special Responsibilities of a Prosecutor."[2] One of special responsibilities is "not initiate or encourage efforts to obtain

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[2] **Rule 3.09. Special Responsibilities of a Prosecutor**
The prosecutor in a criminal case shall:
(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited

from an unrepresented accused a waiver of important pre-trial, trial or post-trial right" Is this a city attorney problem? What if you are only a city attorney hired or prosecutor hired on a per issue basis? If not *ab initio*, at what point does derogation of rights become an ethical issue? Whose ethical issue is it? If you are a hired counsel do you ever get involved in these issues?

With the increase of private companies taking on parking citations, school bus stop signals, and, in my opinion – what is likely to raise the greatest constitutional and ethical issues related to municipal courts – police officers taking credit card payments in their cars for *capias pro fine* warrants, new ethical issues are arising. Taking payment at the roadside may be expedient, and the State will certainly benefit from the increased revenue, but ethical issues may come into play. The same applies to the other technologies. It is not their existence that is problematic, but how such technologies are applied and how oversight is accomplished.

Use of these technologies also sets up the potential for inverse discrimination, as economic status, particularly with respect to roadside collection, may be the determining factor as to who goes to jail and who drives away. Further, with the increased focus on indigents roadside payments may well provide more "unfavorable" fodder for the media. In this regard look at the Letter to Courts (included with this paper) penned by the Department of Justice (in part a response to the Ferguson episode), wherein they state: "(7) Courts must safeguard against unconstitutional practices by court staff and private contractors." If your city hires a private contractor to collect fines – who is responsible for overseeing that a defendant's constitutional rights are not violated? Does the responsibility fall on the city attorney or city prosecutor? What if you are hired (in either position) as outside counsel?

It has been said that:

> Municipal courts are created in the image of the incorporated towns and cities they serve. These courts are created, in part, to administer the laws, codes and ordinances of their particular locale. From all appearances municipal courts are the bastard child of the legal system. They are obviously important to the community but it seems that no one wants to take oversight responsibility. In fact, the general opinion of most is that they are run as nothing more than a "profit center" for the city they serve.

That's painting with a very broad brush, but our current society has a penchant for doing so – to most a municipal court in one city and state is just the same as one in another. You may not think this important, but recent events (think Ferguson) have resulted in increased media (and other) scrutiny on municipal courts. The morning headlines is not

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from making under Rule 3.07

the place to learn that your municipal court may be violating someone's constitutional rights. The roadside collection of fines certainly has the penchant for raising this impression, as does treatment of indigents and persons with mental disabilities.

What is the focus of your municipal court? Does the Court have a focus – either stated or unstated? Why this is important – or how is it related to ethics? Do the standards change? Recently there has been increase scrutiny by the media, and others (again, think of Ferguson, Missouri). What was accepted in the past may not be so acceptable in the future (*see, e.g.* the attached Department of Justice letter).

Is the contour of the legal and ethical duty "do justice" changing? Here's the rub. It has been said that the old definition of ethics and morals fits a different era. Today it's personal. It is not a standard to which one is encouraged to conform for one's own, or society's benefit. Rather, it is about what makes one feel good. By this non-standard standard, one can easily change one's sense of what is moral as they might a suit of clothes or a pair of shoes and suffer no societal condemnation because that "moral code," such as it is, exists only for the individual. Those shocking headlines that seem to change everything in an instant generally aren't born out of a single incident, but arise out of a slowly, unnoticed, progression where the line of practiced ethical decisions no longer matches the current moral standard of the societal moment.

PROSECUTORIAL PRACTICE

Our judicial system is based on an adversarial process. The applicable Texas Disciplinary Rules of Professional Conduct govern (or at least provide the minimal contours) candor owed to the tribunal and opposing counsel (plus a few special considerations for prosecutors). The model established by these Rules in not necessarily a great fit for the bulk of municipal court prosecution involving *pro se* defendants and juveniles (let alone dealing with persons having developmental or mental disabilities). The hard-nosed behavior directed to an obstreperous defense attorney if applied to an unsophisticated pro se defendant or juvenile may well lead to being "so eager to win" that you lose sight of "seeing that justice is done" and done properly.

Consider:

> For example, you have a jury trial set two weeks out. You are informed that the officer no longer works for the city and will not be available for trial. Before you can do anything, the defense attorney – who happens to be a real pain, not just to you, but the entire court staff – calls and wants to discuss a favorable deferred disposition. Do you jump on it, or tell him that the officer is no longer employed by the City and you were just about to dismiss the case? What if the defendant, who is *pro se*, makes the call to

change his plea? What if you discover the lack of a witness at trial, but the defendant failed to show up for trial? Under the same scenario, what about the facts when the officer is available, but has no recollection of the stop or the defendant (and a video does not exist). How do you handle each of the above?

For the prosecutors that are hired by the hour or trip (or for City Attorney whose municipal courts use such part time prosecutors) how, if at all, does the cost to the city effect prosecutorial duties? How do Rules 1.04[3] (Fees) and 3.02[4] (Minimizing the burdens and delays of litigation) fit with contract employment as a prosecutor taking into consideration the primary duty not to convict but to see that justice is done (Code of Criminal Procedure 45.201)? Put another way, how do you balance economics with ethics?

Consider:

> For example, a contract prosecutor who is paid per court appearance has a court setting for an assault case involving a victim, a witness, and a police officer who investigated the offense and wrote the citation. On the day of trial, you are informed the police officer will not be available, but the other witnesses will be in attendance. Do you proceed to court, or ask for a reset for the case? Do you reach a different conclusion if the police officer is present, but the witness is not?

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[3] **Rule 1.04. Fees** (partial)
(a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable.
(b) Factors that may be considered in determining the reasonableness of a fee include, but not to the exclusion of other relevant factors, the following:
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

[4] **Rule 3.02. Minimizing the Burdens and Delays of Litigation**
In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

> Attorney works for a law firm who has a contract with the city to prosecute its Class C misdemeanors and city code violations in its municipal court and is paid per hour. Attorney is assigned a case where the defendant has committed one city code violation involving his property but the property is now up to code. Is it a violation of TDRPC for the attorney to prosecute the case by billing many hours as opposed to attempting to resolve the case before trial and billing fewer hours? When should budget become a consideration?

Handling moving violations that involve commercial drivers is another area that raises ethical issues. Even though it has been more than fifteen years that commercial drivers have been ineligible for any type of deferred disposition, some still look for a way around the law. If one is looking for a way around the law is it because you think that it is unfair to hold a commercial driver (who may be driving a loaded vehicle weighing at least 35 times that of an average car) to a higher standard? How does this square with the duty to uphold the constitution and laws of the State? Perhaps it is an economic issue because commercial drivers have nothing to lose by requesting a trial thus increasing the operational costs (in time and money) for your municipal court. Wouldn't it be more prudent to agree to refile as a non-moving violation – a win/win for everyone? Within the ambit of the Rules of Disciplinary Procedure can you accept a guilty plea to a charge you know the defendant did not commit?

Handling CDL drivers can also raise the "who's the boss" issue. Say you live in a city that houses a couple of large trucking operations. These operations provide significant benefit (taxes and otherwise) to the City. A new city council member wants you to give the drivers some breaks, perhaps dismissing moving violations in lieu of a plea to a Failure to Appear. Are there serious ethical issues? Remember when you step into the court room, your client is not the City – it is the "State of Texas." The complaint reads Defendant vs. State of Texas. Even though you are paid by the City, as is the Judge, the court, and its staff, your duty is to the State.

Consider:

> You receive a call from a defense attorney who you know also takes civil cases representing injured plaintiffs calls to discuss his client's case. He wants to know what you can offer. Since his client is under 21 and his citation is a DUI, minor (having had a previous minor in possession) – you tell him a deferred is off the table. He then tells you that PD roughed him up during his arrest – but if you dismiss the charge, he will dismiss the civil suit he just filed. What do you do?

Part, but definitely not all, of the answer to this "not so" hypothetical also lies with "who's the boss." The citation is in the name of the state, not the city.

MENTAL ILLNESS AND DISABILITY

Due, in part, to the nature of cases heard by municipal courts (*such* as, thefts up to $100, public intoxication, assaults and other public nuisances) a number of cases will involve persons that are either developmentally challenged or suffer with mental illness. In fact, since the 2015 Legislature doubled the jurisdictional limits (from $50.00 to $100.00) the number of petty cases is increasing. In some cities there is an increased focus on panhandling, sleeping under bridges, and other "societal" crimes. This increases the likelihood that a particular municipal court will be working with people who have mental illness, even severe mental illness.

In some respects this is a societal problem, but historically society has not effectively dealt with the issues. In fact it would not be unfair to say that presently, with respect to mental illness, we are somewhat close to where we were 20 centuries ago. Back then people with physical and mental disabilities hung out around the outer edges of the cities (or around their gates) seeking alms. Society "progressed" to jails, insane asylums, and institutionalization. Starting around 1970 institutionalization ended, but mental health care did not pick up the slack. As a result many of these individuals are back on the streets (and, disproportionately in the jails) – not altogether different than what existed 20 centuries ago. When dealing with persons with mental illness, what are our ethical duties, if such exist? A municipal court (or any other court, or even government) can't fix deep seated social problems, but they can exacerbate them. It is at this juncture, taken along with our duty to "do justice" that ethical issues may arise.

Consider:

> Attorney begins bench trial on a theft charge. Defendant, who is 18 years old, was charged with stealing a puppy – that he was pushing in a baby carriage. Shortly into the trial, it becomes obvious that, among other issues, the Defendant has greatly diminished capacity, and does not understand the proceedings, nor what he has been charged with. What do you do? Where is the balance between justice and conviction?

There are no easy answers to such situations. Anarchy is certainly not good, society depends on some order. On the other hand we don't want to punish people who are unable, either mentally or fiscally, to handle simple problems.

THE IMMEDIATE FUTURE - THINGS TO THINK ABOUT

The only constant in life is change, and with the advent of computer technology, that adage can be rewritten as "the only constant in life is rapid change." Legal institutions are more resistant to change, and most of the time change occurs slowly and gradually. There are times when change occurs rapidly – so rapidly that it can become divisive – for

years. Our municipal courts are not immune to any of this. Bias and prejudice, along with its corresponding ethical duties, in the new world may be quite different than we thought it used to be (or maybe not). Think about events of the last two years. Same sex marriage is the law of the land – and municipal judges in Texas can now conduct marriages. Does your court/judge conduct weddings? What is the take on same sex weddings?

Part of the current fallout from same sex marriage is use of bathrooms by persons who identify as trans-gender. In municipal court we see all kinds, and they are not necessarily the innocent faces portrayed by the media. For example, what do you do with the person who comes out of prison – looking very much like the gang-banger who went in – but now claims is trans-gender and wants to use the womens' bathroom? Where do we, or for that matter society, draw the ethical line – particularly with respect to protecting other members of society (from both real and perceived danger).

There are other issues on the horizon that municipal courts, in particular, will need to confront. The same type of ideological advocacy that is pushing gender issues is pushing to create a new "protected" class of citizens – indigents. There is no question that since at least 1971, when the U.S. Supreme Court opined in *Tate v. Short* (401 U.S. 395 (1971), case arising out of Texas) that for fine only offenses you cannot unwillingly place a defendant in jail to satisfy a fine. The issue that will be faced in the near future will be how far down the line does this reasoning apply. How much information, for example, does the officer have on hand when making an arrest on a *capias pro fine* (for a more in depth discussion see, *Sorrells v. Warner*, 1994 U.S. App. LEXIS 41508, 5th Cir. April 28, 1994)?[5]

Consider:

> Defendant pleads guilty to a citation for running a stop sign. Defendant enters into a payment plan, but fails to make payments. A *capias pro fine* is issued. After arrest, Defendant claims indigency.

[5] The Constitution prohibits a state from imposing a fine as a sentence and then automatically converting the fine to a jail term if an indigent defendant cannot immediately make payment in full. Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). Tate, however, recognized that there is no "constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses to do so or neglects to do so". Id. at 400. Imprisonment is a proper enforcement method if the defendant is unable to make the payment despite reasonable efforts to satisfy the fines by using alternative methods. Id. at 400-01. Further, Tate is based on an assumption that the defendant has appeared before the court and asserted [11] his indigency. See Garcia v. City of Abilene, 890 F.2d 773, 776 (5th Cir. 1989). The exhibits attached to Sorrells's complaint reflect that Sorrells never personally advised the county officials of his indigence, but that he merely contested the legal validity of the capiases issued.8Link to the text of the note Therefore, Reeves did not unlawfully arrest Sorrells under the clearly established law because Sorrells had failed to assert his indigence in response to the orders to pay the fines.

Same facts, but upon release Defendant is able to pay cash to release his 2014 vehicle from impoundment (on which he seems to be capable of making $400.00 per month payments)? Does this change anything?

Defendant pleas and accepts community service. Never turns in hours and is arrested on a *capias pro fine*. Have the issues changed?

Defendant was issued two citations, one for running a stop sign, and one for a code violation. Defendant did not appear on time and two citations for failure to appear were issued. Defendant pleads not guilty to the four charges, but does not appear for a hearing. Two more FTA's are issued. This Defendant works, coming to court costs him hours and money. He is not legally indigent. Do the stacked FTA's create ethical issues? What if, in order to avoid more loss of work, the Defendant just pleads guilty to all 6 citations and enters into a payment plan. Is there a point where the number of citations create a constitutional issue?

If your municipal court is handling truancy cases under the new laws ethical issues could arise concerning the appointment of an *ad litem* or attorney. Most municipal courts are not set up, nor budgeted, to handle the appointment of an attorney, let alone an *ad litem*. Chapter 65 of the Texas Family Code contains the new truancy court procedures.

Sec. 65.061 of the Texas Family Code sets out the appointment of an *ad litem*, when a parent or guardian is either not available, incapable, or unwilling to make decisions "in the best interest of the child:"

(a) If a child appears before the truancy court without a parent or guardian, or it appears to the court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this chapter, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings.

(b) An attorney for a child may also be the child's guardian ad litem. A law enforcement officer, probation officer, or other employee of the truancy court may not be appointed as a guardian ad litem.

(c) The court may order a child's parent or other person responsible to support the child to reimburse the county or municipality for the cost of the guardian ad litem. The court may issue the order only after determining that the parent or other responsible person has sufficient financial resources to offset the cost of the child's guardian ad litem wholly or partly.

Although one can read this as the sole responsibility of the court – that is the Judge – best practices dictate that a well thought through policy should be developed, particularly given that the capability of a parent or guardian is one of the considerations (in other

words mental health is an issue). Notice also the positive requirement for a finding of financial resources before costs of an *ad litem* may be assessed. The reality is, given the entire statute, the truant kids making to the hearing stage will more than likely require the appointment of an *ad litem* (paid for by the court). Are ethical issues involved?

A child alleged to have engaged in truant conduct is entitled to a jury trial. The jury trial entitlement is waivable, but can a child (without proper counsel of a parent or *ad litem*), keeping in mind that the child is not making a decision to attend school, make a properly informed decision to waive this right? Can this same child conduct such a trial without counsel? Does the court's budget even play a role?

With respect to these new truancy laws (and others) it may be a good idea to remember that passing laws does not change human behavior….so ethics – and acting on them – are important!!

One last thought that is related to "Big Data" and the potential fallout from its rapidly expanding existence. In admonishing defendants with respect to deferred disposition, most would tell them that if you complete the terms of the disposition, your case is dismissed and it won't be on your record. The question though, in the age of big data, is this really true? From the perspective of your driving record nothing has changed. With respect to insurance companies, and other records, that guarantee does not exist. This could, at some point, be a real issue for those charged with theft and family violence. Third parties are constantly mining municipal courts, and their third party software vendors, for useable information. Useable information is anything that can be sold – arrests – even without conviction – for theft or family violence – is saleable information. Employers are constantly on the lookout for ways to test the veracity of applications for employment. With respect to insurance companies, a series of deferred dispositions (without a driving course) could justifiably result in an increased premium. Big data is big business. Admonishments will need to reflect modern reality.

CONCLUSION

Final question: Is there an ethical duty to make sure your municipal court does not harm the community?

Remember, only God knows your heart, the rest of us can only judge you by your actions!!

U.S. Department of Justice

Civil Rights Division

Office for Access to Justice

Washington, D.C. 20530

March 14, 2016

Dear Colleague:

The Department of Justice ("the Department") is committed to assisting state and local courts in their efforts to ensure equal justice and due process for all those who come before them. In December 2015, the Department convened a diverse group of stakeholders—judges, court administrators, lawmakers, prosecutors, defense attorneys, advocates, and impacted individuals—to discuss the assessment and enforcement of fines and fees in state and local courts. While the convening made plain that unlawful and harmful practices exist in certain jurisdictions throughout the country, it also highlighted a number of reform efforts underway by state leaders, judicial officers, and advocates, and underscored the commitment of all the participants to continue addressing these critical issues. At the meeting, participants and Department officials also discussed ways in which the Department could assist courts in their efforts to make needed changes. Among other recommendations, participants called on the Department to provide greater clarity to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices. Accordingly, this letter is intended to address some of the most common practices that run afoul of the United States Constitution and/or other federal laws and to assist court leadership in ensuring that courts at every level of the justice system operate fairly and lawfully, as well as to suggest alternative practices that can address legitimate public safety needs while also protecting the rights of participants in the justice system.

Recent years have seen increased attention on the illegal enforcement of fines and fees in certain jurisdictions around the country—often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions.[1] Typically, courts do not sentence defendants to incarceration in these cases; monetary fines are the norm. Yet the harm

[1] *See, e.g.*, Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015), http://www.justice.gov/crt/about/spl/documents/ferguson_findings_3-4-15.pdf (finding that the Ferguson, Missouri, municipal court routinely deprived people of their constitutional rights to due process and equal protection and other federal protections); Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (reporting on fine and fee practices in fifteen states); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), *available at* https://www.aclu.org/files/assets/InForAPenny_web.pdf (discussing practices in Louisiana, Michigan, Ohio, Georgia, and Washington state).

caused by unlawful practices in these jurisdictions can be profound. Individuals may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community[2]; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape.[3] Furthermore, in addition to being unlawful, to the extent that these practices are geared not toward addressing public safety, but rather toward raising revenue, they can cast doubt on the impartiality of the tribunal and erode trust between local governments and their constituents.[4]

To help judicial actors protect individuals' rights and avoid unnecessary harm, we discuss below a set of basic constitutional principles relevant to the enforcement of fines and fees. These principles, grounded in the rights to due process and equal protection, require the following:

(1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;

(2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;

(3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;

(4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;

(5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;

(6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release; and

(7) Courts must safeguard against unconstitutional practices by court staff and private contractors.

In court systems receiving federal funds, these practices may also violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, when they unnecessarily impose disparate harm on the basis of race or national origin.

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[2] Nothing in this letter is intended to suggest that courts may not preventively detain a defendant pretrial in order to secure the safety of the public or appearance of the defendant.

[3] *See* Council of Economic Advisers, Issue Brief, *Fines, Fees, and Bail: Payments in the Criminal Justice System that Disproportionately Impact the Poor*, at 1 (Dec. 2015), *available at* https://www.whitehouse.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf (describing the disproportionate impact on the poor of fixed monetary penalties, which "can lead to high levels of debt and even incarceration for failure to fulfil a payment" and create "barriers to successful re-entry after an offense").

[4] *See* Conference of State Court Administrators, 2011-2012 Policy Paper, *Courts Are Not Revenue Centers* (2012), *available at* https://csgjusticecenter.org/wp-content/uploads/2013/07/2011-12-COSCA-report.pdf.

As court leaders, your guidance on these issues is critical. We urge you to review court rules and procedures within your jurisdiction to ensure that they comply with due process, equal protection, and sound public policy. We also encourage you to forward a copy of this letter to every judge in your jurisdiction; to provide appropriate training for judges in the areas discussed below; and to develop resources, such as bench books, to assist judges in performing their duties lawfully and effectively. We also hope that you will work with the Justice Department, going forward, to continue to develop and share solutions for implementing and adhering to these principles.

1. Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty." *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). Accordingly, the Supreme Court has repeatedly held that the government may not incarcerate an individual solely because of inability to pay a fine or fee. In *Bearden*, the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-73; *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that state could not convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (holding that an indigent defendant could not be imprisoned longer than the statutory maximum for failing to pay his fine). The Supreme Court recently reaffirmed this principle in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), holding that a court violates due process when it finds a parent in civil contempt and jails the parent for failure to pay child support, without first inquiring into the parent's ability to pay. *Id.* at 2518-19.

To comply with this constitutional guarantee, state and local courts must inquire as to a person's ability to pay prior to imposing incarceration for nonpayment. Courts have an affirmative duty to conduct these inquiries and should do so sua sponte. *Bearden*, 461 U.S. at 671. Further, a court's obligation to conduct indigency inquiries endures throughout the life of a case. *See id.* at 662-63. A probationer may lose her job or suddenly require expensive medical care, leaving her in precarious financial circumstances. For that reason, a missed payment cannot itself be sufficient to trigger a person's arrest or detention unless the court first inquires anew into the reasons for the person's non-payment and determines that it was willful. In addition, to minimize these problems, courts should inquire into ability to pay at sentencing, when contemplating the assessment of fines and fees, rather than waiting until a person fails to pay.

Under *Bearden*, standards for indigency inquiries must ensure fair and accurate assessments of defendants' ability to pay. Due process requires that such standards include both notice to the defendant that ability to pay is a critical issue, and a meaningful opportunity for the defendant to be heard on the question of his or her financial circumstances. *See Turner*, 131 S. Ct. at 2519-20 (requiring courts to follow these specific procedures, and others, to prevent unrepresented parties from being jailed because of financial incapacity). Jurisdictions may benefit from creating statutory presumptions of indigency for certain classes of defendants—for example, those eligible for public benefits, living below a certain income level, or serving a term of confinement. *See, e.g.*, R.I. Gen. Laws § 12-20-10 (listing conditions considered "prima facie evidence of the defendant's indigency and limited ability to pay," including but not limited to "[q]ualification for and/or receipt of" public assistance, disability insurance, and food stamps).

2. Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees.

When individuals of limited means cannot satisfy their financial obligations, *Bearden* requires consideration of "alternatives to imprisonment." 461 U.S. at 672. These alternatives may include extending the time for payment, reducing the debt, requiring the defendant to attend traffic or public safety classes, or imposing community service. *See id.* Recognizing this constitutional imperative, some jurisdictions have codified alternatives to incarceration in state law. *See, e.g.*, Ga. Code Ann. § 42-8-102(f)(4)(A) (2015) (providing that for "failure to report to probation or failure to pay fines, statutory surcharges, or probation supervision fees, the court shall consider the use of alternatives to confinement, including community service"); *see also Tate*, 401 U.S. at 400 n.5 (discussing effectiveness of fine payment plans and citing examples from several states). In some cases, it will be immediately apparent that a person is not and will not likely become able to pay a monetary fine. Therefore, courts should consider providing alternatives to indigent defendants not only after a failure to pay, but also in lieu of imposing financial obligations in the first place.

Neither community service programs nor payment plans, however, should become a means to impose greater penalties on the poor by, for example, imposing onerous user fees or interest. With respect to community service programs, court officials should consider delineating clear and consistent standards that allow individuals adequate time to complete the service and avoid creating unreasonable conflicts with individuals' work and family obligations. In imposing payment plans, courts should consider assessing the defendant's financial resources to determine a reasonable periodic payment, and should consider including a mechanism for defendants to seek a reduction in their monthly obligation if their financial circumstances change.

3. Courts must not condition access to a judicial hearing on prepayment of fines or fees.

State and local courts deprive indigent defendants of due process and equal protection if they condition access to the courts on payment of fines or fees. *See Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (holding that due process bars states from conditioning access to

compulsory judicial process on the payment of court fees by those unable to pay); *see also Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 502 (M.D. Ala. 1976) (holding that the conditioning of an appeal on payment of a bond violates indigent prisoners' equal protection rights and "'has no place in our heritage of Equal Justice Under Law'" (citing *Burns v. Ohio*, 360 U.S. 252, 258 (1959)).[5]

This unconstitutional practice is often framed as a routine administrative matter. For example, a motorist who is arrested for driving with a suspended license may be told that the penalty for the citation is $300 and that a court date will be scheduled only upon the completion of a $300 payment (sometimes referred to as a prehearing "bond" or "bail" payment). Courts most commonly impose these prepayment requirements on defendants who have failed to appear, depriving those defendants of the opportunity to establish good cause for missing court. Regardless of the charge, these requirements can have the effect of denying access to justice to the poor.

4. Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950); *see also Turner*, 131 S. Ct. at 2519 (discussing the importance of notice in proceedings to enforce a child support order). Thus, constitutionally adequate notice must be provided for even the most minor cases. Courts should ensure that citations and summonses adequately inform individuals of the precise charges against them, the amount owed or other possible penalties, the date of their court hearing, the availability of alternate means of payment, the rules and procedures of court, their rights as a litigant, or whether in-person appearance is required at all. Gaps in this vital information can make it difficult, if not impossible, for defendants to fairly and expeditiously resolve their cases. And inadequate notice can have a cascading effect, resulting in the defendant's failure to appear and leading to the imposition of significant penalties in violation of the defendant's due process rights.

Further, courts must ensure defendants' right to counsel in appropriate cases when enforcing fines and fees. Failing to appear or to pay outstanding fines or fees can result in incarceration, whether through the pursuit of criminal charges or criminal contempt, the imposition of a sentence that had been suspended, or the pursuit of civil contempt proceedings. The Sixth Amendment requires that a defendant be provided the right to counsel in any criminal proceeding resulting in incarceration, *see Scott v. Illinois*, 440 U.S. 367, 373 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), and indeed forbids imposition of a suspended jail sentence on a probationer who was not afforded a right to counsel when originally convicted and sentenced,

[5] The Supreme Court reaffirmed this principle in *Little v. Streater*, 452 U.S. 1, 16-17 (1981), when it prohibited conditioning indigent persons' access to blood tests in adversarial paternity actions on payment of a fee, and in *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996), when it prohibited charging filing fees to indigent persons seeking to appeal from proceedings terminating their parental rights.

see Alabama v. Shelton, 535 U.S. 654, 662 (2002). Under the Fourteenth Amendment, defendants likewise may be entitled to counsel in civil contempt proceedings for failure to pay fines or fees. *See Turner*, 131 S. Ct. at 2518-19 (holding that, although there is no automatic right to counsel in civil contempt proceedings for nonpayment of child support, due process is violated when neither counsel nor adequate alternative procedural safeguards are provided to prevent incarceration for inability to pay).[6]

5. Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections.

The use of arrest warrants as a means of debt collection, rather than in response to public safety needs, creates unnecessary risk that individuals' constitutional rights will be violated. Warrants must not be issued for failure to pay without providing adequate notice to a defendant, a hearing where the defendant's ability to pay is assessed, and other basic procedural protections. *See Turner*, 131 S. Ct. at 2519; *Bearden*, 461 U.S. at 671-72; *Mullane*, 339 U.S. at 314-15. When people are arrested and detained on these warrants, the result is an unconstitutional deprivation of liberty. Rather than arrest and incarceration, courts should consider less harmful and less costly means of collecting justifiable debts, including civil debt collection.[7]

In many jurisdictions, courts are also authorized—and in some cases required—to initiate the suspension of a defendant's driver's license to compel the payment of outstanding court debts. If a defendant's driver's license is suspended because of failure to pay a fine, such a suspension may be unlawful if the defendant was deprived of his due process right to establish inability to pay. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) (holding that driver's licenses "may become essential in the pursuit of a livelihood" and thus "are not to be taken away without that procedural due process required by the Fourteenth Amendment"); *cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (upholding revocation of driver's license after conviction based in part on the due process provided in the underlying criminal proceedings); *Mackey v. Montrym*, 443 U.S. 1, 13-17 (1979) (upholding suspension of driver's license after arrest for driving under the influence and refusal to take a breath-analysis test, because suspension "substantially served" the government's interest in public safety and was based on "objective facts either within the personal knowledge of an impartial government official or readily ascertainable by him," making the risk of erroneous deprivation low). Accordingly, automatic license suspensions premised on determinations that fail to comport with *Bearden* and its progeny may violate due process.

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[6] *Turner*'s ruling that the right to counsel is not automatic was limited to contempt proceedings arising from failure to pay child support to a custodial parent who is unrepresented by counsel. *See* 131 S. Ct. at 2512, 2519. The Court explained that recognizing such an automatic right in that context "could create an asymmetry of representation." *Id.* at 2519. The Court distinguished those circumstances from civil contempt proceedings to recover funds due to the government, which "more closely resemble debt-collection proceedings" in which "[t]he government is likely to have counsel or some other competent representative." *Id.* at 2520.

[7] Researchers have questioned whether the use of police and jail resources to coerce the payment of court debts is cost-effective. *See, e.g.*, Katherine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 505, 527-28 (2011). This strategy may also undermine public safety by diverting police resources and stimulating public distrust of law enforcement.

Even where such suspensions are lawful, they nonetheless raise significant public policy concerns. Research has consistently found that having a valid driver's license can be crucial to individuals' ability to maintain a job, pursue educational opportunities, and care for families.[8] At the same time, suspending defendants' licenses decreases the likelihood that defendants will resolve pending cases and outstanding court debts, both by jeopardizing their employment and by making it more difficult to travel to court, and results in more unlicensed driving. For these reasons, where they have discretion to do so, state and local courts are encouraged to avoid suspending driver's licenses as a debt collection tool, reserving suspension for cases in which it would increase public safety.[9]

6. Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.

When indigent defendants are arrested for failure to make payments they cannot afford, they can be subjected to another independent violation of their rights: prolonged detention due to unlawful bail or bond practices. Bail that is set without regard to defendants' financial capacity can result in the incarceration of individuals not because they pose a threat to public safety or a flight risk, but rather because they cannot afford the assigned bail amount.

As the Department of Justice set forth in detail in a federal court brief last year, and as courts have long recognized, any bail practices that result in incarceration based on poverty violate the Fourteenth Amendment. *See* Statement of Interest of the United States, *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC, at 8 (M.D. Ala., Feb. 13, 2015) (citing *Bearden*, 461 U.S. at 671; *Tate*, 401 U.S. at 398; *Williams*, 399 U.S. at 240-41).[10] Systems that rely primarily on secured monetary bonds without adequate consideration of defendants' financial means tend to result in the incarceration of poor defendants who pose no threat to public safety solely because they cannot afford to pay.[11] To better protect constitutional rights while ensuring defendants' appearance in court and the safety of the community, courts should consider transitioning from a system based on secured monetary bail alone to one grounded in objective risk assessments by pretrial experts. *See*, *e.g.*, D.C. Code § 23-1321 (2014); Colo. Rev. Stat. 16-

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[8] *See*, *e.g.*, Robert Cervero, et al., *Transportation as a Stimulus of Welfare-to-Work: Private versus Public Mobility*, 22 J. PLAN. EDUC. & RES. 50 (2002); Alan M. Voorhees, et al., *Motor Vehicles Affordability and Fairness Task Force: Final Report*, at xii (2006), *available at* http://www.state.nj.us/mvc/pdf/About/AFTF_final_02.pdf (a study of suspended drivers in New Jersey, which found that 42% of people lost their jobs as a result of the driver's license suspension, that 45% of those could not find another job, and that this had the greatest impact on seniors and low-income individuals).

[9] *See* Am. Ass'n of Motor Veh. Adm'rs, *Best Practices Guide to Reducing Suspended Drivers*, at 3 (2013), *available at* http://www.aamva.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3723&libID=3709 (recommending that "legislatures repeal state laws requiring the suspension of driving privileges for non-highway safety related violations" and citing research supporting view that fewer driver suspensions for non-compliance with court requirements would increase public safety).

[10] The United States' Statement of Interest in *Varden* is available at http://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/02/13/varden statement_ of_interest.pdf.

[11] *See supra* Statement of the United States, *Varden*, at 11 (citing Timothy R. Schnacke, U.S. Department of Justice, National Institute of Corrections, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM, at 2 (2014), *available at* http://nicic.gov/library/028360).

4-104 (2014); Ky. Rev. Stat. Ann. § 431.066 (2015); N.J. S. 946/A1910 (enacted 2015); *see also* 18 U.S.C. § 3142 (permitting pretrial detention in the federal system when no conditions will reasonably assure the appearance of the defendant and safety of the community, but cautioning that "[t]he judicial officer may not impose a financial condition that results in the pretrial detention of the person").

7. Courts must safeguard against unconstitutional practices by court staff and private contractors.

In many courts, especially those adjudicating strictly minor or local offenses, the judge or magistrate may preside for only a few hours or days per week, while most of the business of the court is conducted by clerks or probation officers outside of court sessions. As a result, clerks and other court staff are sometimes tasked with conducting indigency inquiries, determining bond amounts, issuing arrest warrants, and other critical functions—often with only perfunctory review by a judicial officer, or no review at all. Without adequate judicial oversight, there is no reliable means of ensuring that these tasks are performed consistent with due process and equal protection. Regardless of the size of the docket or the limited hours of the court, judges must ensure that the law is followed and preserve "both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal quotation marks omitted); *see also* American Bar Association, MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rules 2.2, 2.5, 2.12.

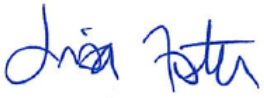
Additional due process concerns arise when these designees have a direct pecuniary interest in the management or outcome of a case—for example, when a jurisdiction employs private, for-profit companies to supervise probationers. In many such jurisdictions, probation companies are authorized not only to collect court fines, but also to impose an array of discretionary surcharges (such as supervision fees, late fees, drug testing fees, etc.) to be paid to the company itself rather than to the court. Thus, the probation company that decides what services or sanctions to impose stands to profit from those very decisions. The Supreme Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987). It has expressly prohibited arrangements in which the judge might have a pecuniary interest, direct or indirect, in the outcome of a case. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (invalidating conviction on the basis of $12 fee paid to the mayor only upon conviction in mayor's court); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) (extending reasoning of *Tumey* to cases in which the judge has a clear but not direct interest). It has applied the same reasoning to prosecutors, holding that the appointment of a private prosecutor with a pecuniary interest in the outcome of a case constitutes fundamental error because it "undermines confidence in the integrity of the criminal proceeding." *Young*, 481 U.S. at 811-14. The appointment of a private probation company with a pecuniary interest in the outcome of its cases raises similarly fundamental concerns about fairness and due process.

* * * * *

The Department of Justice has a strong interest in ensuring that state and local courts provide every individual with the basic protections guaranteed by the Constitution and other federal laws, regardless of his or her financial means. We are eager to build on the December 2015 convening about these issues by supporting your efforts at the state and local levels, and we look forward to working collaboratively with all stakeholders to ensure that every part of our justice system provides equal justice and due process.

Sincerely,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division



Lisa Foster
Director
Office for Access to Justice

Sorrells v. Warner, 1994 U.S. App. LEXIS 41508

Copy Citation

United States Court of Appeals for the Fifth Circuit

April 28, 1994, Filed

No. 93-8025 Summary Calendar

Reporter
1994 U.S. App. LEXIS 41508

KEVIN SORRELLS, Plaintiff-Appellant, versus HOWARD S. WARNER, II, ET AL., Defendants-Appellees.

Notice:

RULES OF THE FIFTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History:

Appeal from the United States District Court for the Western District of Texas. (A 91 CA 688 **[1]** SS).

Sorrells v. Warner, 1994 U.S. App. LEXIS 10512 (5th Cir. Tex., Apr. 28, 1994)

Judges: Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

Opinion by: E. GRADY JOLLY

Opinion

E. GRADY JOLLY, Circuit Judge: *

This is a civil rights action challenging various actions taken by Hayes County, Texas, and its officials in connection with the prosecution of Kevin Sorrells for a speeding violation. The district court dismissed the action and we affirm.

I

Kevin Sorrells 1 filed this civil rights action against County Judge Howard Warner, Constable Billy Reeves, and Hays County, Texas, alleging that he was illegally arrested and detained for his failure to pay outstanding fines resulting from his conviction of the offenses of speeding and failure to appear for which he was fined $150 plus costs of $80 for each offense. Sorrells's convictions were affirmed on appeal, and he filed a petition for discretionary review, which was denied. The appellate mandate was sent to **[2]** the Hays County Clerk on October 20, 1989.

The trial judge in the speeding and failure to appear cases issued two capiases for Sorrells's arrest in January 1990, stating that Sorrells had failed to pay the fines and costs due and directing any peace officer to place Sorrells in jail until the fines and costs were paid or legally discharged. According to Sorrells, however, these documents were not in the form required by Texas law.

On July 23, 1991, Sorrells was advised of the outstanding warrants for his arrest on the two 1987 convictions. He wrote Judge Howard Warner, the presiding Judge of the Hays County Court, and inquired about the amount of fines due and a payment plan. Sorrells contends that he was indigent at the time but he did not mention this in his letter to Judge Warner.

Constable Billy Reeves went to the law office of Dan Sorrells (Kevin's father) on July 26, 1991, and advised the elder Sorrells of his intent to arrest Kevin under the two outstanding warrants. Reeves indicated to Dan Sorrells that he was aware that an indigent cannot be arrested for a "fine only" offense but that he was going to arrest Kevin anyway because that was what Judge Warner had ordered him to do. Kevin was out of town, however, and the arrest was not effectuated at that time.

[3] Kevin Sorrells wrote Judge Warner a second letter inquiring about the amount of money due under each capias and enclosed a $50 money order to be applied to the fines. Judge Warner responded that it was necessary to pay the full amount due for each offense. Sorrells filed a motion to quash the capias on July 31, 1991, and also sent a letter to Constable Reeves, advising him that it would be illegal to arrest him under the capiases and that Sorrells had filed a motion to quash the documents.

Reeves arrested Sorrells on August 5, 1991, pursuant to the instructions of Judge Warner and subsequently filed **[4]** charges of avoiding and resisting arrest against Sorrells.[2] The court determined that Sorrells was entitled to credit of $50 for each day served, which satisfied the fines due for the speeding and failure to appear offenses. Sorrells made bond on the charges of avoiding and resisting arrest and was released from custody.

The defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that Warner and Reeves were entitled to judicial and qualified immunity, and that Sorrells failed to allege grounds to impose municipal liability. Sorrells then filed an amended complaint adding as defendants the district attorney and another county judge, who was to preside over his case involving the charge of resisting arrest.[3] The defendants then filed a second motion to dismiss, which the district court granted, except as to Sorrells's claim seeking to enjoin his prosecution for the resisting-arrest charge.

Following a bench trial on the remaining claim, the district court denied Sorrells's request for injunctive relief and entered a final judgment, decreeing that Sorrells was entitled to take nothing. Sorrells timely appealed.[4]

II

This court reviews de novo a trial court's dismissal of a complaint for failure to state a claim upon which relief can **[6]** be granted.[5] Giddings v. Chandler, 979 F.2d 1104, 1106 (5th Cir. 1992). The dismissal may be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." Id. (internal quotation and citation omitted). "In making this determination, [the Court] accept[s] the well-pleaded allegations in a complaint as true." Id. (citation omitted).

A

On appeal, Sorrells argues that Judge Warner is not entitled to immunity because he was performing a ministerial function in issuing the capias and acted outside the scope of his jurisdiction. "Judicial officers are absolutely immune **[7]** from liability for damages unless they act without jurisdiction." Dayse v. Schuldt, 894 F.2d 170, 172 (5th Cir. 1990).

The Hays County Court has jurisdiction in criminal cases involving misdemeanors. See Tex. Govt. Code Ann. § 25.0003, § 25.1072, (West 1988) and § 26.045(a) (West 1989). A county judge has the authority to issue all writs necessary for the enforcement of the jurisdiction of the county court. Id. at § 25.0004. Based on Sorrells's allegations, Warner possessed subject-matter jurisdiction over his case.[6]

Accepting Sorrells allegations against Warner as true, the actions taken by the judge were subject to judicial immunity. Therefore, the district court did not err in dismissing the complaint against Warner.

B

Sorrells next **[8]** argues that Hays County is not immune from suit because it pays the constable, who has no supervisor, and who, according to Sorrells, illegally arrested him.

A county can be held liable for injuries under 42 U.S.C. § 1983 only if an official policy or governmental custom caused the deprivation of constitutional rights. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 690-94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). "The power to make and enforce policy . . . is marked by authority to define objectives and choose the means of achieving them." Rhode v. Denson, 776 F.2d 107, 109 (5th Cir. 1985), cert. denied, 476 U.S. 1170, 106 S. Ct. 2891, 90 L. Ed. 2d 978 (1986).

A Texas constable is not "given the discretion, or range of choice, that is at the core of the power to impose one's own chosen policy." Id. The fact that a constable has the discretion to make arrests under certain circumstances does not constitute policymaking authority. Id.: see also Merritt v. Harris County, 775 S.W.2d 17, 24-25 (Tex. Ct. App. 1989) (county constables are not policymaking officials of county government when performing their narrowly circumscribed duty of executing a writ of execution).

Sorrells's complaint alleges that Constable Reeves was acting at the direction of the county judge in arresting Sorrells and does not reflect that Reeves had the authority to establish the county's policy for arresting individuals who failed to pay a fine. Therefore, the county cannot be subjected to liability **[9]** as a result of Constable Reeves' service of the capias.

Sorrells further argues that Hays County can be held liable because it has a policy of failing to attach a copy of the judgment, sentence, or order to a capias, of failing to make a finding of probable cause, and of not following the directions of the mandate of the court of appeal. These allegations also do not operate to open the county to liability because, even if the capiases did not technically comply with the state procedural law, the Constitution is not violated simply by a technical violation of state procedural law.[7] See Lynch v. Cannatella, 810 F.2d 1363, 1372 (5th Cir. 1987) (public officials do not forfeit their right to immunity by violating a statute or regulation that does not give rise to a constitutional right).

C

Sorrells further argues that Constable Reeves is not entitled to immunity because he knew that Sorrells was indigent at the time of the arrest and that an indigent should not be jailed for failure to pay **[10]** a fine and because he knew that the warrants were invalid on their face.

In considering a defendant's claim of qualified immunity, the court must initially determine whether the plaintiff has alleged a violation of a clearly established constitutional right. King v. Chide, 974 F.2d 653, 656 (5th Cir. 1992). If the plaintiff has alleged a constitutional violation, the court must then determine the reasonableness of the officer's conduct. Id. at 657. The objective reasonableness of the officer's conduct must be measured with reference to the clearly established law at the time of the incident in question. Id.

The Constitution prohibits a state from imposing a fine as a sentence and then automatically converting the fine to a jail term if an indigent defendant cannot immediately make payment in full. Tate v. Short, 401 U.S. 395, 398, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971). Tate, however, recognized that there is no "constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses to do so or neglects to do so". **Id. at 400**. Imprisonment is a proper enforcement method if the defendant is unable to make the payment despite reasonable efforts to satisfy the fines by using alternative methods. **Id. at 400-01**. Further, Tate is based on an assumption that the defendant has appeared before the court and asserted **[11]** his indigency. See Garcia v. City of Abilene, 890 F.2d 773, 776 (5th Cir. 1989). The exhibits attached to Sorrells's complaint reflect that Sorrells never personally advised the county officials of his indigence, but that he merely contested the legal validity of the capiases issued.[8] Therefore, Reeves did not unlawfully arrest Sorrells under the clearly established law because Sorrells had failed to assert his indigence in response to the orders to pay the fines.

Further, the argument that Sorrells's arrest was illegal because Reeves knew that he was contesting the legality of the warrants and that the warrants were invalid on their face is also meritless because, as previously discussed, even if the capiases were technically not in compliance with state law, the arrest was not unconstitutional if Reeves reasonably believed that there was probable cause to arrest Sorrells. The capiases, which were issued by a judicial officer, directed the constable to arrest Sorrells because he had failed to pay his fine. Therefore, it was reasonable for Reeves to determine that he had probable cause to effect the arrest.

For the reasons stated above, the judgment is

AFFIRMED.

Footnotes

Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes

needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

(1) After the notice of appeal was filed, Dan Sorrells, appellant's counsel and father, filed a motion for substitution of party because of the death of Kevin Sorrells on October 5, 1993. Counsel states that he and his wife, Gladys Sorrells, are the only heirs of Kevin Sorrells who has never been married and has no children. Sorrells states that there is no necessity for an administration of the decedent's estate and that none is contemplated. Pursuant to Rule 43(a) of the Federal Rules of Appellate Procedure, the requested substitution is proper and this motion is granted.

(2) According to Reeves's affidavit and report, when he arrested Sorrells, Sorrells's mother threatened him with a shovel and Sorrells escaped. Sorrells was later captured with assistance from the county canine unit.

(3) Sorrells also sought to enjoin the prosecution of the outstanding charges against him, which **[5]** was denied by the district court. Although the record is not clear as to the status of that charge at the time the appeal was filed, it is clear that the request to enjoin those proceedings was mooted by Sorrells's death.

(4) Before the trial, Sorrells filed a motion for reconsideration. Although the district court did not directly address this motion, Sorrells reurged his arguments that he was illegaly arrested at the conclusion of the trial. Although the district court did not directly address Sorrells's motion for reconsideration, the court's remarks at the hearing and the entry of the final judgment dismissing the action by implication reflected the court's decision to deny Sorrells's motion. See Lapeyrouse v. Texaco, Inc.., 670 F.2d 503, 504-05 (5th Cir. 1982)(although practice is not favored, in some instances entry of final judgment has effect of overruling motions pending at time that judgment is entered).

(5) One of Sorrells's issues on appeal is whether the district court erred in declining to consider his response to the defendants' motion. Sorrells's response to the motion was filed in the record, and it is not clear whether the district court disregarded or was unaware of the pleadings. The defendants suggest that the responses were not timely filed under the local rules and, therefore, that it was within the court's discretion to disregard the pleadings. Because review of the ruling on the motion to dismiss is de novo. Sorrells will not be prejudiced on appeal by the district court's failure to consider his responses.

(6) Sorrells's reliance on Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988), to support his argument that Warner's actions were ministerial in nature and, therefore, not subject to immunity, is misplaced. In Forrester, the court held that a judge was acting in an administrative capacity in demoting and discharging an employee. 484 U.S. at 229. Warner's actions in directing the constable to arrest Sorrells for the failure to pay the fines are clearly different from the judge's actions in Forrester and were not administrative in nature. Instead, Warner was exercising a judicial function necessary to conclude the criminal proceeding.

(7) Sorrells's assertion that his arrest was illegal because it was without probable cause could have stated a constitutional violation but, according to his complaint, the judicial official made a determination that there was probable cause for Sorrells's arrest.

(8) He even advised Judge Warner that he would pay the total amount due upon the court's notifying him of the total amount due. Upon receipt of notification of the total amount due, Sorrells filed a motion to quash the capias based on defects in the document, and the fact that he was entitled to monetary credit for time served in jail. Even then, he did not assert his indigence in the motion to quash. Nor did Sorrells's letters to Constable Reeves or to the district attorney advise the officials of his indigent status. The only allegation in Sorrells's complaint indicating that Reeves (or any defendant) had any knowledge that Sorrells was contending that he was indigent was Reeves's discussion with Sorrells's father with respect to the impropriety of arresting an indigent in a fine-only **[12]** case. This representation by Sorrells's father, however, was insufficient in the light of Sorrells's personal failure to assert his indigency to the court or county officials.

SUPREME COURT MENTAL HEALTH PRECEDENT AND ITS IMPLICATIONS (9/09)

By Mary Ann Bernard, J.D., author of the current NCCUSL proposal for a Model/Uniform Commitment Law.

I. PRECDENTS: COMMITMENT AND TREATMENT STANDARDS (in chronological order):

Jackson v. Indiana, 406 U.S. 715 (1972). Held: mentally ill criminal defendants who are incompetent to stand trial cannot be indefinitely committed on that basis alone. The nature and duration of civil commitment must bear a reasonable relationship to the purpose of the commitment.

O'Connor v. Donaldson, 422 U.S. 563 (1975). Mentally ill plaintiff was confined without treatment for 15 years. Held: states cannot constitutionally confine, "without more," a person who is not a danger to others or to himself. The latter category includes the suicidal and the "gravely disabled," who are unable to "avoid the hazards of freedom" either alone or with the aid of willing family or friends. 422 U.S. at 575 and n.9. As the plaintiff received no treatment, the Court expressly reserved the question "whether the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much and what kind of treatment would suffice. . . . " Id. at n.10. The Court has never revisited this issue. http://laws.findlaw.com/US/422/563.html

Addington v. Texas, 441 U.S. 418 (1979). Plaintiff, who disputed his dangerousness, was indefinitely committed based on a history of mental illness, threats, and several in-hospital assaults. Held: jury instruction requiring "clear and convincing evidence" that plaintiff required commitment "for his own welfare and protection, or the protection of others" was constitutionally adequate.

Youngberg v. Romeo, 457 U.S. 307 (1982). Mentally retarded, assaultive plaintiff challenged his right to treatment but not the propriety of his commitment. Held: there is a constitutional right to the minimally adequate training/habilitation that an appropriate professional would consider reasonable to ensure safety and freedom from undue restraint. The constitutional standard is lower than malpractice standard, requiring only that professional judgment be exercised.

Rennie v. Klein, 483 U.S. 1119 (1982). Case involving involuntary administration of psychiatric medications to mentally ill plaintiff remanded for reconsideration in light of the "professional judgment" standard in Youngberg v. Romeo.

Washington v . Harper, 494 U.S. 210 (1990). Held: mentally ill state prisoner prone to violence without medication has no constitutional right to competency hearing and court approval of forced medication using a "substituted judgment" standard. Sufficient due process for forced medication order was provided by hospital committee consisting of psychiatrist, psychologist and hospital official not currently involved in inmate's diagnosis and treatment. "Substituted judgment" standard rejected as ignoring State's legitimate interest in treating prisoner where medically appropriate for the purpose of reducing his dangerousness. Proposed alternatives of physical restraints or seclusion rejected as risky and having more than de minimis costs to valid penological interests.

Olmsted v. L.C., 527 U.S. 581 (1999). Held: Title II of the ADA requires services provided in the "most integrated setting appropriate to" the needs of the disabled, considering available resources.

II. PRECEDENTS: DEFINING MENTAL ILLNESS and DANGEROUSNESS

Zinermon v. Burch, 494 U.S. 113 (1990). Psychotic individual "voluntarily" committed for treatment. Held: U.S. Constitution prohibits "voluntary" commitments where patient is incapable of informed consent. Dualing dicta: On the one hand, wrongly characterizes O'Connor v. Donaldson as holding that "there is no basis for confining mentally ill persons involuntarily 'if they are dangerous to no one and can safely live in freedom,'" 494 U.S. at 134. On the other, accepts without comment a state standard that defines grave disability very loosely, permitting involuntary commitment for individuals whose "neglect or refusal to care for themselves threatens their well-being," Id . (emphasis added).

Kansas v. Hendricks, 521 U.S. 346 (1997). Held: civil commitment of pedophile by jury trial immediately following his release from prison did not constitute double jeopardy , ex post-facto lawmaking or violation of substantive due process, where petitioner admittedly posed current danger to children. It was immaterial that pedophile was not mentally ill, as "we have traditionally left to state legislatures the task of defining terms of a medical nature that have legal significance" and "have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others." Holding modified in Kansas v. Crane, 534 U.S. 407 (2002): "[T]here must be proof of serious difficulty in controlling behavior. . .viewed in light of such features of the cases as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself. . . sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case. . . . " 534 U.S. at 412-413.

Sell v U.S, 539 U.S.166 (2003) Psychotic dentist threatened a witness, refused medications needed to make him competent to stand trial for Medicaid fraud, and stalked a nurse while hospitalized. Lower courts disagreed whether dentist was dangerous. Supreme Court assumed he was not dangerous because of procedural posture, but was plainly unhappy about the assumption. Held: 1) courts should first consider authorizing medications on alternative grounds, such as dangerousness, to avoid the question posed; 2)Eighth Circuit erred in holding that medication may be forced solely to force trial competence, without considering whether medications would affect fairness of trial, obviate an already lengthy confinement, or ameliorate future dangerousness.

III. IMPLICATIONS FOR LAW:

Though the extent of states' power to commit mentally ill persons on a "need for treatment" basis remains unclear, the Supreme Court will allow the states considerable leeway in defining mental illness, "danger to self or others" and "gravely disabled."

IV. STANDARDS THAT ARE CONSTITIONAL and POLITICALLY FEASIBLE:

1. Precise definitions for "danger to self or others" and "grave disability." State statutes do not generally define these terms, which have acquired working definitions in many states that are sending the mentally ill to prison or to their graves. "Danger to self or others "should not require proof of something that hasn't yet happened, an impossible standard that leads to death or to incarceration for past

conduct, which is easier to prove. A definition of “dangerousness” that encompasses past history, recent dangerous conduct/threats, and a statement that “the individual’s current stated intentions and demeanor are not determinative of dangerousness” could correct the tendency of treatment personnel to refuse to treat the mentally ill who claim to be safe. Similarly, “gravely disabled” should not per se exclude those who have survived on the street, however precariously. This is an irrational standard, since those already dead from suicide or exposure are not in the group seeking treatment. The broad Florida standard for “gravely disabled “ set forth in Zinermon, supra, or something akin to it, would be a vast improvement over the status quo.

2. Early Intervention. Where a mentally ill individual has established a pattern of decompensating and becoming dangerous when off medications, it is in both the patient’s interest and the public interest to intervene early. Minnesota has an early intervention statute, and there are probably other examples.

3. Meds , not Jail. A fortiori, if society can jail a mentally ill individual for past conduct, it can constitutionally treat him during a period that does not exceed the normal criminal sentence. (Treatment generally requires days or weeks, not months.) Mental health courts, at least in California, are criminal courts that handle only repeat, serious offenders. Local prosecutors ought to have a civil option for first and minor offenders who admit their crimes but may be mentally ill. Defining “dangerousness” to include state law crimes of assault, terroristic threats, property damage etc. would avoid the whole problem of predicting the future by allowing past conduct to provide a basis for commitment for diagnosis and treatment, with release contingent on medication compliance.

. Special Treatment for Juveniles. Pushing standards away from “dangerousness” to “need for treatment” would offend some civil libertarians and push NCCUSL into uncharted constitutional waters, see O’Connor v Donaldson, supra. To avoid the ideological fight and test the constitutional waters, NCCUSL should consider creating a “need for treatment” standard for juveniles only. Both the states’ parens patrie powers and the rationale for intervention are stronger in this context. Early onset is often a sign of a very serious mental illness, the progression of which may be mitigated through prompt, early treatment. [ii] Since mania often presents as rage in juveniles, who may not yet be diagnosed, they end up jailed all too often. Why wait until they are dangerous to diagnose and treat them? Schools and colleges could initiate treatment when relatives—often mentally ill themselves—do not. Ideally, “juvenile” would be defined to extend to age 25 or so, capturing the average onset age for schizophrenia, the most serious mental illness.

If a “need for treatment” standard proves helpful and constitutional for juveniles, it could later be extended to adults at the option of individual states.

Other Significant Supreme Court Cases

Souder v. Brennan (Patient-workers of non-federal hospitals, homes, institutions for mentally retarded or mentally ill individuals are entitled to minimum wage and overtime compensation)

Jurasek v. Utah State Hospital (State hospital can forcibly medicate a mentally ill patient who has been found incompetent to make medical decisions if the patient is dangerous to himself or others and the treatment is in the patient's medical interests)

In the Matter of Guardianship of Richard Roe III (Substituted judgement by courts per ward's preferences, if ward were competent)

Rogers v. Okin (Committed mental patients are assumed competent to make treatment decisions in non-emergencies) Full case: http://laws.findlaw.com/US/457/291.html

Lessard v. Schmidt (commitment occurs only when person poses imminent danger to self or others) Full case: http://laws.findlaw.com/US/414/473.html

Wyatt v. Stickney (Patient has constitutional right to individual treatment)

Riese v. St. Mary's Hospital and Medical Center (antipsychotic drugs cannot be administered to involuntarily committed patients in non-emergency situations)

Jurasek v. Utah State Hospital (State hospital can forcibly medicate a mentally ill patient who has been found incompetent to make medical decisions if the patient is dangerous to himself or others and the treatment is in the patient's medical interests)