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Alabama Municipal Courts Observation Project Southern District of Alabama

Overview and Goals: In the United States, debtors' prisons were banned under federal law in 1833. A century and a half later, in 1983, the United States Supreme Court affirmed that incarcerating indigent debtors was unconstitutional under the Fourteenth Amendment. The United States Supreme Court in Bearden v. Georgia, 461 U.S. 660 (1983), held that courts cannot imprison a person for failure to pay a criminal fine unless the failure to pay was "willful." Nonetheless, municipal court practices in Alabama and elsewhere often result in defendants being jailed for an inability to pay fines and fees.

In June of 2016, the Civil Rights Enforcement Unit of the United States Attorney's Office for the Southern District of Alabama (USAO-SDAL) embarked on a project to attend and observe a representative sample of municipal courts in our 13-county district, in order to help those courts to analyze the practical and constitutional ramifications of their use of fines and fees. This project furthers the efforts the Department of Justice has taken to ensure constitutional fine, fee and bail practices following its investigation of the Ferguson, Missouri Police Department and Municipal Court. Our goals were to identify practices that raised legal concerns and to educate court personnel regarding applicable legal and constitutional standards. This collegial approach has been effective in raising awareness amongst municipal court judges across the State of Alabama. As a result, a number of courts are reviewing and revising their procedures and policies.

Methodology of Project: Over the summer and fall of 2016, USAO-SDAL personnel, including an Assistant United States Attorney and an Investigator, traveled to or contacted 30 of the 48 municipal courts located in the Southern District of Alabama. Their focus was Baldwin and Mobile Counties, the most populous areas of the District, but they also attended at least one municipal court in each of the thirteen counties in the Southern District of Alabama. Their observations were structured and recorded according to a checklist of issues they developed through legal research and practical observations. This checklist included a range of relevant factors:

- 1) does the court routinely hold ability to pay hearings prior to incarcerating someone for failure to pay;
- 2) does the court employ a "pay or stay" policy regardless of ability to pay;
- 3) are defendants permitted to enter into payment plans if they cannot pay fines and fees on the day they appeared in court;

- 4) are defendants afforded the opportunity to participate in community service to satisfy their court debt if they did not have the money to pay the fines and fees;
- 5) does the court employ a private probation company to enforce probation terms and collect fines and fees;
- 6) does the court set Failure to Appear bonds in the amount of fines and fees owed;
- 7) does the court charge late fees or interest for unpaid fines and fees, and;
- 8) does the court enforce criminal sanctions for the defendants' failure to pay civil debt.

In addition to attending court sessions, the noted USAO-SDAL personnel conducted extensive interviews with court personnel including judges, court clerks, prosecutors, city attorneys, defense attorneys, police officers and court referral officers. Nathan Emmorey, Administrator of the Mobile Municipal Court, has been particularly helpful in walking USAO-SDAL personnel through a number of issues, as has Jay Ross, an attorney who serves as municipal judge in three Mobile County towns. We also met with Sara Zampieren of the Southern Poverty Law Center, who spearheads their effective court reform project, and with Eric Locke and Win Johnson of the Administrative Office of Courts (AOC).

Each court visit was followed up with a letter which included the DOJ "Dear Colleague" letter – sent to state court judges and court administrators around the country on March 14, 2016 to highlight constitutional concerns about municipal court procedures -- and discussed any practices observed that raised concerns. This has led to productive dialogue with several judges. We have now sent the "Dear Colleague" letter and other resources to the remainder of the courts in the Southern District of Alabama.

General Observations on Municipal Courts: In contrast to district and circuit courts, which are part of the Alabama Unified Court System and subject to the oversight of the AOC, municipal courts in Alabama report to their city councils. The AOC has no authority to discipline or sanction municipal court judges or employees. As a result, municipal courts and practices vary from town to town. Some courts prosecute traffic offenses almost exclusively. In another municipality the majority of cases heard involved disputes between perennially feuding neighbors who were charged with offenses such as 3rd Degree Harassment, Trespassing and Domestic Violence. A "Spring Break" docket in a coastal municipality consisted almost exclusively of alcohol-related offenses by college students. Ninety percent of the cases heard in a municipal court in Wilcox County involved driving without a license and/or without automobile insurance.

Municipalities have the option of establishing municipal courts. Municipalities can elect to have misdemeanors prosecuted in district court, but many choose to operate their own courts as a means of generating revenue for the town. From the AOC to municipal judges, our sources of information indicate that raising money, not public safety concerns, is an important reason municipalities operate municipal courts. Ironically, in many instances, the cost of operating a court and jailing offenders outweighs the income generated. Municipal accounting practices

often obscure this equation, as the costs of jail are not always reflected in court budgets. Some municipal court judges believe municipal courts may be on the way out, as more municipalities become cognizant of the actual costs of providing constitutionally adequate due process.

Municipalities also maintain municipal courts for the convenience of defendants, who would otherwise have to travel the sometimes lengthy distances to district court. For example, if Orange Beach did not have its own municipal court, a defendant charged with a violation in that town would have to take a day off work and travel 52 miles to district court in Bay Minette. Municipal judges also are often familiar with local defendants and are thus able to craft more personalized and effective resolutions.

Our task in reaching the municipal courts in our district was made easier because a relatively small number of lawyers run the municipal courts. One attorney, for example, who represents a County Commission, is a municipal court judge in three different courts. Another attorney, is a municipal court judge in one town, the city prosecutor in two other towns, and has a contract to provide indigent defense services in another.

Because these lawyers are in private practice they are acutely aware of their potential liability for any constitutional violations they might commit in operating municipal courts. They are generally knowledgeable about current court reform litigation being pursued by the Southern Poverty Law Center (SPLC), the Equal Justice Initiative (EJI) and other public advocacy groups. As a result of these efforts, many municipal courts are rethinking and revising their practices regarding bond, collection procedures, and alternatives to incarceration. Leading the court reform movement is the City of Mobile and its municipal court administrator Nathan Emmorey, which has established a “rocket docket” to resolve most minor offenses in five to seven days, abolished bond in most instances, streamlined many procedures, and introduced a novel alternative to straight jail sentences.

Observations:

1. **“Pay or Stay”** – The practice of jailing defendants because they are unable to pay fines and court fees - in essence, modern day debtors prison - is a central focus of the DOJ’s efforts to ensure lawful fine, fee and bail practices and of our own survey. In four courts we visited, the judges announced at the outset that defendants must pay all fines and fees by the end of the business day. Two judges explicitly warned that failure to pay would result in immediate incarceration. However, in follow-up discussions, all four judges explained that they do not follow through with this statement. Defendants who cannot come up with the money by the end of the day are placed on a payment plan. Municipal judges are now uniformly aware that a “pay or stay” policy is unconstitutional. Nevertheless, to announce such an unconstitutional policy may discourage individuals from attending court and seeking alternatives to immediate payment, such as community service.
2. **Use of Criminal Process to Collect Municipal or County Debt** – One of the most problematic practices we discovered was the use of criminal process to collect civil debt in certain jurisdictions. Baldwin County, for example, prosecutes failure to pay

the county solid waste bill as a misdemeanor pursuant to Ala. Code § 22-27-3(a)(3). People who are delinquent in payment can be arrested, fined and/or jailed. Baldwin County District Judge Clark Stankoski strongly objects to this practice, and does not impose fines or jail sentences. Court costs, however, increase the amount owed.

Until recently, Chickasaw, Alabama also authorized criminal process to collect civil debt. Failure to pay a water bill or to hook up to water was a misdemeanor with a \$500 fine and \$300 court costs, in addition to the bill. At least one person was jailed in 2015 for inability to pay a water bill. After scrutiny of this practice by our office and the SPLC on September 13, 2016, the Chickasaw City Council repealed the ordinance that made it a crime to live in a house without water.

Indigency Hearings – State law requires courts to conduct indigency, or ability to pay, hearings before incarcerating a defendant for nonpayment of fines and fees. Alabama Rule of Criminal Procedure 26.11(i)(1). In practice, most indigency determinations are based on the defendant's indigency affidavit. Although state law sets forth in detail the factors to consider in determining indigency, many judges apply their own factual assumptions. In one court for example, the judge will not find a defendant indigent unless he is homeless or incarcerated. By contrast, in another town, located in one of the poorest counties in the nation, the court assumes that all defendants are indigent.

3. Bail and Bonds – Bail practices vary widely. The current trend, led by the City of Mobile, is to abolish bonds for all first-time offenses. Defendants are released on their own recognizance (ROR). Several judges complained, however, that such a policy is difficult to enforce, because the lack of a central database for municipal court convictions makes it difficult for the court to determine whether a defendant has any prior municipal convictions.

Many courts, however, set bonds according to the state bond schedule. In some courts, bonds are set by magistrates, rather than judges, and in smaller jurisdictions, bond is sometimes determined by the sheriff. In one court, it appears that all bonds are automatically set at \$1,000, regardless of ability to pay.

Most jurisdictions aim to hold bond determinations within 24 hours, although state law permits up to 72 hours. However, because judges often do not handle bond determinations themselves, there can be a lack of communication between jails and the courts. As a result, some defendants are inadvertently detained for lengthy periods before bond is set or are held on bond even though they do not have the ability to pay. In one court we observed, a defendant unable to make bond had been incarcerated for 26 days because a monthly court setting had been cancelled due to the judge's illness. In According to the AOC, there is at least one current lawsuit against a municipality on these grounds.

4. Late Fees and Interest – Few municipal courts in the Southern District of Alabama impose interest or late fees for unpaid fines and fees. An exception to that is the

Mobile Municipal Court, which refers unpaid fines and fees to the Mobile County District Attorney's Office for collection under the District Attorney's Restitution Recovery Team (DART). DART adds a 30% fee to amounts overdue by 90 days. Similarly, Baldwin County District Court refers its unpaid fines and fees to the Baldwin County District Attorney's Office, which imposes a 30% collection fee.

5. Lack of Communication between Municipal and District/Circuit Courts – The AOC acknowledges that municipal courts do not effectively relay information to district and circuit courts regarding outstanding municipal citations, fines or fees. As a result, Defendants who are incarcerated by state courts for committing felony offenses may have outstanding municipal traffic citations of which the state court is not aware. The state court therefore will not inform municipal courts that an incarcerated defendant will not be able to appear in municipal court as scheduled. Through no fault of his own, a defendant may then miss municipal court appearances, incurring “failure to appear” charges and penalties, and sometimes having his driver's license revoked or suspended.

In addition, the municipal court may put a “hold” on the defendant, who cannot then be released from prison even when he has served his time for the felony. The local municipality that “holds” the defendant has to pay the costs of housing the defendant even though they may not be the municipality that issued the traffic citation.

The AOC has been considering the development of an Electronic Warrant Management System (EWMS) that would create greater accessibility to warrant images and accurate information among criminal justice partners. However, further development of an EWMS has stalled largely due to State budgetary constraints.

6. Failure to Appear Bonds – Although defendants cannot be jailed for failure to pay fines and fees if they are indigent, they can be jailed for failure to appear (FTA) in court to address their failure to pay fines and fees. In these instances, it is a common practice to set bond in the amount of the unpaid fines and fees. This amount can exceed the \$1,000 bond limit in municipal court. Defendants who did not pay fines and fees because they were indigent are similarly unable to pay the bond. The result is incarceration for failure to pay. In one court, we observed five defendants who had been jailed on FTAs for up to 26 days because they could not pay their bonds, which in one case exceeded \$3,000.
7. Court Referral Services – In addition to fines and fees, many municipal court defendants must pay for participation in court-ordered programs such as substance abuse treatment classes, theft intervention, domestic violence classes, anger management and driving/DUI classes. While such classes may be a useful and appropriate requirement, some defendants are required to take more than one program, resulting in snowballing costs that defendants are unable to pay.
8. Private Probation – The Dear Colleague Letter identified concerns regarding the use of by private probation companies that are hired by some municipalities to collect fines and fees. Such companies typically receive percentages of moneys collected or

even add its own fees to the balance owed by the defendant. These contractual relationships have been the subject of private lawsuits raising constitutional concerns similar to what is highlighted in this report. One such company has already pulled out of the state, but another continues to operate.

9. Opening Statement, Advice of Rights – In most larger courts, judges open the court session with a comprehensive statement explaining court procedures and defendants' rights. Many smaller courts omit this statement, leaving defendants uninformed regarding crucial information.

Results: Our court visits and follow-up have successfully educated municipal judges and court personnel throughout the Southern District about constitutional and practical implications of imposing fines and fees. Over half of the courts in the District have received a personal contact and been provided with DOJ's "Dear Colleague" letter. As a result, a number of courts are reviewing and revising their procedures and policies.