



George Butts, Chair
George Butts Law*

Elizabeth Mack, Chair-elect
Locke Lord LLP*

Allene D. Evans, Immediate Past Chair
The University of Texas System*

Neel Lane, Secretary-Treasurer
Akin Gump Strauss Hauer & Feld LLP*

Hon. Marilyn Aboussie
San Angelo

E. Leon Carter
Carter Scholer Arnett Hamada & Mockler, PLLC*

Ricardo G. Cedillo
Davis, Cedillo & Mendoza, Inc.*

Clinton Cross
El Paso*

Dennis P. Duffy
BakerHostetler*

Edward F. Fernandes
Hunton & Williams LLP*

N. Scott Fletcher
Jones Day*

R. James George, Jr.
George Brothers Kincaid & Horton L.L.P.*

Mark K. Glasser
Sidley Austin LLP*

Sean Gorman
Bracewell & Giuliani LLP*

Marcy Hogan Greer
Alexander Dubose Jefferson & Townsend LLP*

Gregory Huffman
Thompson & Knight LLP*

Tommy Jacks
Fish & Richardson P.C.*

Susan Karamanian
George Washington University Law School*

Charles Kelley
Mayer Brown LLP*

Layne Kruse
Norton Rose Fulbright*

Thomas Leatherbury
Vinson & Elkins LLP*

Michael Lowenberg
Gardere Wynne Sewell LLP*

Edmundo O. Ramirez
Ellis, Koeneke & Ramirez, L.L.P.*

Michael Rodriguez
Atlas, Hall & Rodriguez LLP*

David Sharp
Gunderson Sharp, LLP*

Courtney Stewart
DLA Piper LLP (US)*

Allan Van Fleet
McDermott Will & Emery LLP*

Pat Villareal
Jones Day*

Dr. Gregory Vincent
The University of Texas at Austin*

Mark Wawro
Susman Godfrey L.L.P.*

Angela C. Zambrano
Sidley Austin LLP*

J. Chrys Dougherty III, Chair Emeritus
(1915-2014)

* affiliations listed for identification only

October 23, 2015

Sent via Email & Priority Mail

City Rep. Peter Svarzbein
300 N. Campbell
El Paso, Texas 79901
district1@elpasotexas.gov

City Rep. Larry E. Romero
300 N. Campbell
El Paso, Texas 79901
district2@elpasotexas.gov

City Rep. Emma Acosta
300 N. Campbell
El Paso, Texas 79901
district3@elpasotexas.gov

City Rep. Carl L. Robinson
300 N. Campbell
El Paso, Texas 79901
district4@elpasotexas.gov

City Rep. Dr. Michiel Noe
300 N. Campbell
El Paso, Texas 79901
district5@elpasotexas.gov

City Rep. Claudia Ordaz
300 N. Campbell
El Paso, Texas 79901
district6@elpasotexas.gov

City Rep. Lily Limón
300 N. Campbell
El Paso, Texas 79901
district7@elpasotexas.gov

City Rep. Cortney Niland
300 N. Campbell
El Paso, Texas 79901
district8@elpasotexas.gov

RE: City of El Paso Debtors' Prisons

Dear Members of the El Paso City Council:

As organizations dedicated to protecting the constitutional and civil rights of all Texans, we urge you to ensure that the El Paso Municipal Court modifies its policies and practices with respect to the collection of fines and court costs. The City must implement new Municipal Court procedures to end the repeated violations of state and federal law and to treat lower-income El Pasoans with fairness.

As you are aware, the online news outlet *Buzzfeed* recently published the results of its investigation into Texas municipal courts jailing people who are too poor to pay fines and court costs for petty misdemeanors, with a special focus on the El Paso Municipal Court.¹ Their investigation revealed that in many cases, El Paso Municipal Court judges were failing to follow well-established state and federal law. The Texas Code of Criminal Procedure explicitly requires a municipal court judge to make a written determination that a person is not indigent, and has failed to make a good faith effort to pay fines, before jailing that person for failure to pay his or her fines.² Yet the *Buzzfeed* reporters reviewed the case files of 100 individuals jailed for at least 5 days for nonpayment of fines by El Paso Municipal Court judges and did not find evidence of an ability to pay determination in *any* case file.

The El Paso Municipal Court gives people who are too poor to pay fines few options other than jail. Data from the Texas Office of Court Administration show that, of all Texas cities, El Paso has the second-highest number of cases in which fines are resolved through jail credit, with 38,970 fines or courts costs paid through jail stays in FY 2014. During that same year, fines were waived for indigency in only 14 cases, and satisfied through community service in only 233 cases.³ With this lack of options, failure to pay fines is quite common. Data shows that approximately 77,000 El Paso residents—more than 11% of the city’s population—currently have outstanding warrants for their arrest for nonpayment of fines or court costs to the El Paso Municipal Court.⁴

The Court also makes it very difficult for low-income defendants to even enter into a payment plan, requiring that an individual pay 25% of each fine up-front in order to obtain a payment plan, and requiring complete payment over the course of just 90 days.⁵ Under these rules, an individual who owed \$1000 would have to pay \$250 up front, and \$250 on a monthly basis for three months to resolve her fines—amounts that are completely impossible for many lower-income individuals.

¹ Kendall Taggart & Alex Campbell, *Their Crime: Being Poor, Their Sentence: Jail*, BUZZFEED, Oct. 7, 2015, available at <http://www.buzzfeed.com/kendalltaggart/in-texas-its-a-crime-to-be-poor#.bnmEG2Mao> (hereinafter Taggart & Campbell).

² Tex. Code. Crim. Pro. Art. 45.046(a).

³ Tx. Ofc. of Court Admin., Annual Statistical Report, FY 2014.

⁴ Data obtained through open records request to the City of El Paso in October 2015. The data accounts for 318,155 warrants, representing 100,228 individuals, 77,076 of whom have El Paso addresses.

⁵ See El Paso Municipal Court website, <https://www.elpasotexas.gov/municipal-courts/fines-and-payments>, last visited October 19, 2015 (“A 25% initial payment is required-per violation – prior to the issuance of the payment plan. You will have 90 days to pay your fine. If the amount is not paid in full by the end of the 90 day period, an arrest commitment will be issued, and you may be denied vehicle registration and the renewal of your driver's license.”)

People who are too poor to pay ultimately wind up before a judge, and based on interviews given by El Paso Municipal Court judges to the *Buzzfeed* reporters, a denial of these individuals' rights under state and federal law is likely. Two El Paso Municipal Court judges quoted in the article displayed fundamental misunderstandings of the law, claiming that they were under no obligation to ask about a defendant's income before sentencing the defendant to jail.⁶ Along with the Texas statutory requirement that judges conduct such an inquiry, the U.S. Constitution requires that judges inquire into a defendant's ability to pay before sentencing that defendant to jail for failure to pay a debt. The Supreme Court has held that jailing a probationer for failure to pay a fine, without any inquiry into the reasons for his nonpayment and ability to pay, "would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). *Bearden* makes it clear that the court has an affirmative duty to inquire into ability to pay before sentencing anyone to jail for nonpayment. The Supreme Court has also held that a judge cannot impose a jail term, "even for a brief period," if the judge failed to appoint counsel at trial. *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972). To the best of our knowledge, counsel is not appointed to any individual facing jail time for unpaid fines in the El Paso Municipal Court.

Jailing people for unpaid fines, without any inquiry into their ability to pay and without appointing counsel, violates the Constitution and thereby exposes municipalities to liability pursuant to 42 U.S.C. § 1983. A flurry of lawsuits have recently been filed against cities across the United States based on such violations, some of which have already resulted in cities being forced to dramatically alter their policies and procedures around municipal court fine collection.⁷ Other jurisdictions, in response to research uncovering similar practices, have voluntarily reformed their debt collection practices.

El Paso must take steps to address the ongoing constitutional violations in its Municipal Court. Aside from being inhumane and illegal, incarcerating indigent El Pasoans for not paying fines is wasteful and counterproductive. The City is paying an estimated

⁶ See Taggart & Campell ("There's no requirement for us to ask' defendants if they have the money to pay, said Judge [Cheryl] Davis, who sentenced Lane. 'Unless they bring up the fact that they have no money to pay, or that they would rather go on to a payment plan, or they want to do community service, then it's not offered,' she said. . . . 'El Paso city court Presiding Judge Daniel Robledo also said that judges were under no obligation to ask people about their finances — the onus was on defendants to raise the issue.'")

⁷ See, e.g., *Jenkins v. City of Jennings*, 4:15-cv-252 (E.D. Mo. Sep. 16, 2015) (entering order for permanent injunction to overhaul municipal court processes); *Cleveland v. City of Montgomery*, 2:13-cv-732, *Watts v. City of Montgomery*, 2:13-cv-733 & *Mitchell v. City of Montgomery*, 2:14-cv-186 (M.D. Ala. Nov. 17, 2014) (entering injunction enforcement settlement agreement in which city agreed to overhaul court processes). See also *Fant v. City of Ferguson*, 4:15-cv-253 (July 13, 2015) (order denying motion to dismiss as to all counts); *Cain v. City of New Orleans*, 2:15-cv-4479 (E.D. La. Sep. 17, 2015) (motion for preliminary injunction pending); *Foster v. City of Alexander* 3:15-cv-647 (M.D. Ala. Sep. 8, 2015) (motion for preliminary injunction pending).

\$375,000 to jail people for nonpayment of fines⁸—an amount that could surely be better spent. Moreover, El Pasoans who are already financially struggling may lose their employment, lose their housing, fail to pay their bills, and suffer other negative consequences when they are arrested and jailed, making it even less likely that they will be able to pay their fines or contribute to the tax revenue of the city in the future.

We urge the City Council to work with the Municipal Court to develop and adopt a new set of policies and practices for the collection of fines and court costs in the El Paso Municipal Court. As you consider this issue, we offer our expertise on existing legal requirements and best practices. We have attached a set of proposed practices, informed by constitutional principles and well-established law, that the City Council should consider implementing. This list is not intended to be exhaustive, but a starting point for a discussion about the changes that must be made to remedy the ongoing constitutional violations.

Please let us know when you are available to discuss these proposals further. In the meantime, please feel free to contact any of us with questions.

Sincerely,

Mary Mergler

Director, Criminal Justice Project, Texas Appleseed, Austin, TX
mmergler@texasappleseed.net

Ranjana Natarajan

Director, Civil Rights Clinic, University of Texas School of Law, Austin, TX
rnatarajan@law.utexas.edu

Rebecca Robertson

Legal and Policy Director, American Civil Liberties Union of Texas, Houston, TX
rrobertson@aclutx.org

Susanne Pringle

Senior Staff Attorney, Texas Fair Defense Project, Austin, TX
springle@fairdefense.org

⁸ See Taggart & Campbell.

CC: Mayor Oscar Leeser
Mayor's Office
300 N. Campbell
El Paso, TX 79901
mayor@elpasotexas.gov

Hon. Daniel Robledo
Presiding Judge, El Paso Municipal Court
Municipal Court
810 E. Overland
El Paso, TX 79901

Proposed El Paso Municipal Court Policies & Practices For Fine Collection

- 1) **Provide Defendants with Information about Their Rights.** The Court should provide defendants with written information, explained in simple terms understandable to non-lawyers, outlining their rights and their options in lieu of payment of the total fine.
 - a. If the case is filed by complaint rather than ticket and a summons is mailed to defendant, this information should be provided with the summons.
 - b. The Court should proactively advise defendants of this information before accepting a plea, upon sentencing, and at any subsequent appearance concerning enforcement or collection.
 - c. For defendants who pay fines at the clerk's window, kiosk, or elsewhere without seeing a judge, the Court should clearly post this information and provide it in handout form. The information should also be available on the Court's website.

- 2) **Hold an Ability to Pay Hearing Before Setting the Fine Amount.** Before setting the fine amount, the judge should ask the defendant about her ability to pay.
 - a. The judge should consider the defendant's income, dependents, and other significant expenses.
 - b. The judge should presume that a defendant is entitled to alternative sentencing if she receives certain forms of governmental assistance, such as a Section 8 housing voucher, Medicaid, TANF or SNAP food benefits.
 - c. The Court should provide written guidance to judges regarding ability to pay to ensure that income, dependents and expenses are considered appropriately.
 - d. The Court should communicate all determinations of indigency to the Texas Department of Public Safety in cases that involve offenses for which surcharges attach, e.g., driving without a license, driving while license is invalid, and failure to maintain financial responsibility.

- 3) **Assess Alternative Sentences.** After determining defendant's income, the sentencing judge should offer specific alternative sentences for all defendants under a certain income level.
 - a. The Court should provide written guidance to judges regarding waiver of fines, reduction of fines and alternative sentencing, based on ability to pay, and include guidelines according to household income and size, and the income level required for El Paso residents to meet their basic needs.

- b. The judge should reduce fines to be proportionate to each defendant's financial resources.
 - c. The judge should waive court costs and fees as appropriate, based on defendant's circumstances and ability to pay. The Court's written guidance on ability to pay should include guidance on when such a waiver is appropriate.
 - d. The judge should offer community service in lieu of fines for a number of hours that defendant can reasonably complete given her employment, childcare obligations, transportation, disability, and any other factors substantially impairing her ability to perform community service. Before ordering community service, the judge should inquire into the defendant's ability to complete community service without undue hardship.
 - e. In order to make community service possible for individuals to complete, limits should be set on the amount of community service that an individual can be required to complete. These limits should include a maximum total number of community hours, a maximum number of community service hours per week or month (*e.g.*, 8 hours per week or 24 hours per month), and a maximum period for which the community service requirements can endure.
 - f. The judge should offer payment plans in lieu of immediate payment of total fines to persons who lack an ability to pay the full fine at that time. No amount should be required to be immediately payable in order to enter into a payment plan, nor should any additional amount be assessed as a penalty for entering into a payment plan, even if that amount is authorized by law. Payment plan amounts should be low enough so that defendant can still meet all basic needs in addition to paying the monthly installments. The Court should set a cap on monthly payment plan amounts based on household income and size.
- 4) **Make Compliance Simpler.** The Court should take steps to help people comply with its orders and avoid arrest and jail time.
- a. The Court should implement basic steps, like automatic phone calls or text messages, to remind defendants of their court dates.
 - b. The Court should allow defendants to reschedule court appearances when necessary and to appear telephonically when possible.
 - c. The City should implement a program, pursuant to Texas Code of criminal Procedure § 103.0025, enacted by the 84th legislature, that allows individuals who are arrested to pay outstanding fines by credit card or debit card to avoid being booked at the jail. Individuals should not be

booked if they pay a small percentage, e.g., no more than 10%, of the outstanding fines.

- d. The cases of persons with a known inability to pay should not be sent to private collection agencies or law firms for collection. Before sending debts to private collection agencies or law firms, the Court should make a finding of willful failure to pay. Any fee added to a debt sent to collection (customarily 30% of the debt) should be automatically waived if a person is later determined to be indigent.
- 5) **Issue Fewer Warrants.** The Court should reduce its reliance on arrest warrants, and limit the issuance of warrants to situations in which the Court is aware that the failure to pay or comply is willful.
- a. If a defendant fails to appear in municipal court once, the Court should issue a summons for a new court date, rather than an arrest warrant and an additional criminal charge. Only after defendant has failed to appear in court twice should the Court even consider issuing a warrant.
 - b. If defendant has requested a payment plan or community service in the past, or the Court has any other reason to believe that defendant may be indigent, and the defendant fails to make payment plan payments or complete community service, the Court should issue a summons and set a show cause hearing prior to issuing an arrest warrant. The summons should include information about proportionate fines, community service, and payment plans.
 - c. The Court should permit defendants to clear arrest warrants by going to the courthouse and speaking to a clerk or judge to arrange a payment plan or alternative means of satisfying the fine. There should be no threat of arrest if a defendant comes to the courthouse to address or pay unpaid fines or court costs.
 - d. The City should not participate in annual “Warrant Round-Ups” for individuals who have only been convicted of Class C misdemeanors and other traffic offenses.
- 6) **Respect the Right to Counsel.** The Court should not jail defendants who were not represented by counsel in their underlying criminal proceedings, or who did not knowingly, intelligently, and voluntarily waive their right to counsel.
- 7) **Respect the Right of Public Access.** All court proceedings, including jail magistrations, should be open to the public pursuant to the First Amendment of the U.S. Constitution.

- 8) **Impose Jail Terms Sparingly and Only After Complying with Constitutional and Legal Requirements.** The Court should dramatically reduce its reliance on jail as an enforcement mechanism.
- a. Jail should only be used as a last resort for those defendants who willfully refuse to follow the Court's orders.
 - b. Individuals who are booked at the jail for unpaid fines should be brought before a magistrate as soon as possible. If the magistration will not occur within 8 hours of booking, the defendant should be released on a personal recognizance bond and an ability to pay hearing should be scheduled.
 - c. The judge presiding over magistrations, or other judge whom the defendant appears before after being booked, should determine whether the defendant could have paid her fines and still met all her basic needs with her current income. This will require the judge to inquire into and document a defendant's income, dependents, and expenses. The Court's written guidance on ability to pay, referenced above, should inform decision-making on ability to pay. Any defendant under a certain income level, or receiving certain forms of government assistance, should be presumed indigent and unable to pay fines.
 - d. Judges should not jail a defendant who is unable to pay her fines—the full amount or a payment plan installment—unless there has been a finding of willful failure to pay. In addition to income, judges should consider whether the defendant made a good-faith effort to pay the installments.
 - e. Judges should not jail a defendant for failing to satisfy her debts through community service, unless the judge finds that (1) the defendant failed to make a good-faith effort to perform the service, and (2) it would not have been a hardship for the defendant to perform the community service.
 - f. Judges should document their findings at these hearings and those findings should be part of any order entered.