DOJ Asks 11th Cir. to Strike Down Cash Bail System

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The Obama administration is asking a federal appeals court to declare that it's unconstitutional to keep people locked up for minor crimes just because they're too poor to afford bail.

A bail scheme that doesn't take into account an individual's ability to pay violates the equal protection and due process requirements of the Fourteenth Amendment because it punishes people for their poverty, according to an amicus brief filed Aug. 18 by the Justice Department in the U.S. Court of Appeals for the Eleventh Circuit.

The intervention signals a growing movement to reform a system that critics say keeps poor people incarcerated after they're arrested for petty offenses just because they can't come up with a cash bond.

Defenders of the system point out that bail is expressly permitted by the U.S. Constitution and argue that chaos will ensue if communities are forced to release all arrestees just because they say they can't afford to pay a cash bail.

'Pedestrian Under the Influence.'

"No person should be put in jail for a petty crime just because they can't afford to pay a money bail," Phil Telfeyan, co-founder of the Washington, D.C.-based Equal Justice Under Law told Bloomberg BNA.

"People are being told 'if you're rich enough to pay this amount, you can walk, if you're not, you're stuck in jail,' " Telfeyan said.

EJUL and the Southern Center for Human Rights are representing a group of indigent defendants who were arrested for committing misdemeanors in Calhoun, Ga.

The lead plaintiff in the class action, Michael Walker, was arrested for being a "pedestrian under the influence." He then languished in jail for days because he couldn't afford $160 in bail, according to his complaint.

Walker's lawyers argue that the use of a fixed bail schedule violates the Fourteenth Amendment's Equal Protection Clause if the scheme doesn't take into account the defendant's individual circumstances—such as flight risk, danger to the community and ability to pay.

Liberty is the norm in our system of justice, and detention before trial must be the limited exception, Telfeyan said.

On Jan. 28, a federal district judge in the Northern District of Georgia agreed, granted class action status and issued a preliminary injunction that prohibits the city from keeping misdemeanor arrestees in custody for any amount of time "solely because the arrestees cannot afford a secured monetary bond."

The city's appeal is now before the Eleventh Circuit. Oral argument has not been scheduled yet, Telfeyan said.

Definition of 'Excessive.'

Those defending the money bail system argue that the Justice Department's constitutional argument is flawed because bail is expressly permitted under the Eighth Amendment and is only disallowed if the amount is "excessive."

"As a textual matter, the Eighth Amendment pre-supposes the permissibility of monetary bail," according to an amicus brief filed by former U.S. Solicitor General Paul D. Clement, who is now with Kirkland & Ellis LLP, Washington.

The Fourteenth Amendment only requires that distinctions based on wealth be rationally related to a legitimate government purpose, Clement argues in his brief, and Calhoun's bail system is "eminently rational" because it is geared to making sure the accused shows up for trial.

"If plaintiff's theory were correct, the Eighth Amendment would read: 'no bail shall be required,' " the brief adds.

Clement is representing the American Bail Coalition, the Georgia Association of Professional Bondsmen and the Georgia Sheriffs' Association.

More No-Shows?

"The purpose of bail is to assure the presence of the accused in court," Michele Hanisee, the president of the Los Angeles County Deputy District Attorneys, told Bloomberg BNA.

"This assertion that it is unfair to detain a person charged with a crime pre-trial based 'solely' on their inability to pay bail begs the question—who would be in custody if they could pay the bond?" Hanisee asked.

"Bail amounts should be fair," she added. "But that fairness should extend to victims of crime and society, not just to the accused."

Hanisee predicted that getting rid of cash bail would mean that more defendants won't show up for arraignment and trial, pointing to California's experience in the wake of Proposition 47, which reduced many felonies to misdemeanors and led to more defendants being released on their own recognizance.

"When Prop. 47 reduced a significant number of felony offenses to misdemeanors, one of the early impacts was that failures to appear in court soared in 40 of the 58 counties surveyed earlier this year," Hanisee said in follow up remarks e-mailed to Bloomberg BNA.

Other Developments

According to Telfeyan, cities and counties in Alabama, Kansas, Louisiana, Missouri, and Mississippi have either agreed to settle or have been ordered to stop using secured bail as a condition of pretrial release for petty offenses.

San Francisco tried to settle a similar suit by adopting a pretrial risk assessment algorithm that purports to answer many of the concerns about jailing indigents for petty offenses, but EJUL declined to settle, saying the new algorithm doesn't go far enough because not every arrestee would be eligible for pre-arraignment release.

Multijurisdictional Assault

EJUL has filed 11 lawsuits challenging pretrial bail systems in nine different states, Telfeyan said.

"Cities in seven of those suits have settled and agreed not to continue using money bail as a de facto order of pretrial detention and have embraced a cite-and-release system for low-level and victimless crimes," he added.

Still, Telfeyan said there is more work to be done.

"There are approximately 500,000 people locked up today simply because they're too poor to pay their money bail," Telfeyan said.

Clement's brief disagrees with that characterization.

Defendants who can't post bail aren't being detained because they're poor, he said in his brief. They're being held because the government has probable cause to charge them with a crime "and because society has an interest in securing their appearance at trial."

Others Weigh In

The momentum for bail reform got a shot in the arm Sept. 1 when a panel of the Third Circuit criticized a bail system in Pennsylvania that forces low-risk defendants to remain in jail just because they can't afford bail while awaiting trial (*Curry v. Yachera*, No. 15-1692, 2016 BL 286194 (3d Cir. Sept. 1, 2016); see related story this issue).

Affirming the dismissal of an indigent detainee's malicious prosecution suit, the court in dicta took the opportunity to decry a system where "access to wealth" dictates whether a defendant will be freed pending trial.

The court pointed to data collected in New York City that suggested that 54 percent of those jailed while awaiting trial were only being held because they couldn't afford bail of $2,500 or less.

"Those unable to pay who remain in jail may not have the 'luxury' of awaiting a trial on the merits of their charges; they are often forced to accept a plea deal to leave the jail environment and be freed," the court said.

Rep. Ted W. Lieu (D-Calif.) on Feb. 24 introduced H.R. 4611, the No Money Bail Act, which would prohibit the use of paid bail in federal criminal cases.

Both the American Bar Association and the Cato Institute have also filed amicus briefs in the Walker case, urging the Eleventh Circuit to strike down the fixed bail system used in Calhoun.

A special task force commissioned by the Arizona Supreme Court recommended in a report released in August that the state replace its current bail system with a scheme that puts more emphasis on a defendant's ability to pay.

Equal Justice Under Law, Washington, and the Southern Center for Human Rights, Atlanta, are representing the class action plaintiffs.

Carlock Copeland & Stair LLP, Atlanta, and Brinson Askew Berry Siegler Richardson & Davis LLP, Rome, Ga., are representing Calhoun.