

No. 19-40785

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Aaron Booth, on behalf of himself and all others similarly situated,
Plaintiff - Appellee

v.

Galveston County; Honorable Kerry Neves; Honorable Lonnie Cox; Honorable
John Ellisor; Honorable Patricia Grady; Honorable Anne B. Darring; Honorable
Jared Robinson; District Attorney Jack Roady,
Defendants - Appellants

On Appeal from the United States District Court
For the Southern District of Texas, Galveston Division

**BRIEF FOR HARRIS COUNTY PUBLIC DEFENDER,
HARRIS COUNTY JUDGE LINA HIDALGO,*
HARRIS COUNTY COMMISSIONER RODNEY ELLIS, PRECINCT 1*
AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case, so that the judges of this Court may evaluate potential disqualification or recusal.

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Date: February 14, 2020



KATHRYN KASE

**In capacity as elected officials and not on behalf of Harris County government.*

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INTEREST OF *AMICUS CURIAE*

The Harris County Public Defender’s Office is a department of Harris County, Texas.¹ It represents adults facing felony and misdemeanor charges, and juveniles charged in delinquency cases. In July 2017, Harris County Commissioners Court approved funding for representation of all persons arrested in Harris County at their initial appearances pursuant to TEX. CODE CRIM. P. ART. 15.17. At those hearings – which occur 24 hours a day, 365 days a year – magistrates set bail.

Harris County Judge Lina Hidalgo is the county executive, and the head of Harris County’s governing body, called the County Commissioners Court. Rodney Ellis is the Harris County Commissioner for Precinct 1, which contains the northeastern portion of Friendswood, a city in both Harris and Galveston counties.

Harris County borders Galveston County, whose largest cities, League City and Friendswood, straddle both counties. Both are less than 10 miles from the Harris County cities of Houston, Webster and Seabrook. It can be a matter of fate whether a person is arrested and charged in one county or the other.

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal

¹ The opinions and assertions in this brief are not the official position of Harris County, Texas, which would require a majority vote by Harris County Commissioners Court.

defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of thousands of direct members and up to 40,000 with affiliates. Its members are private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The issues presented by the lack of representation of accused persons in Galveston County at bail hearings are representative of the problems created by lack of counsel nationwide at this critical stage of criminal proceedings.

NACDL has a particular interest in assuring that accused persons are represented by counsel at critical stages of criminal proceedings where the absence of counsel will affect the accused's right to a fair trial. NACDL has particular expertise in regards to pre-trial release issues. The Association co-authored defender bail manuals for New Jersey, Colorado, Wisconsin and Harris County, Texas. Additionally, NACDL has trained defenders regarding the unique challenges of

representing individuals in pretrial bail proceedings in Colorado, New Jersey, Mississippi and Harris County. Because persons detained pre-trial are more likely to enter guilty pleas, be sentenced to incarceration, and receive longer sentences than their similarly situated peers who are released on bond pre-trial; the ability to have counsel help secure release has a very real impact on fair trials. Results from community bail funds that secure the release of persons who could not otherwise afford to obtain their release on bail, show that 50% of those persons' cases are dismissed; showing that release on bail is important to prevent the pressure to enter inappropriate guilty pleas. NACDL has an abiding concern that all persons accused are represented by counsel any time their liberty is at stake; thus, assuring counsel at all critical stages of criminal proceedings.

Amicus Curiae have relevant experience that will assist this Honorable Court of Appeals.

SUMMARY OF ARGUMENT

A determination of bail, pursuant to TEX. CODE CRIM. P. ART. 15.17, at a defendant's initial appearance, is a critical stage of trial requiring the assistance of counsel. The district court's findings and conclusions aptly support this proposition.

An unrepresented defendant before a magistrate at first appearance has the untenable choice of speaking on her own behalf for release – and possibly saying something that may later be used against her – or lose that opportunity to advocate for freedom by remaining silent. Once that first bail determination has been made, the chance of changing it, particularly to lower bail, significantly diminishes. That loss of liberty has a direct detrimental effect on a defendant's outcome at trial.

In support, *Amicus Curiae* will offer its current relevant experience and data, some of which were previously accepted as fact by another United States District Judge and a panel of this Honorable Court of Appeals.

ARGUMENT

A. Precedent Supports the Ruling Below.

In *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 213 (2008), the United States Supreme Court found that the Sixth Amendment right to counsel attaches in Texas at an initial appearance pursuant to TEX. CODE CRIM. P. ART. 15.17. The assistance of counsel is then required at any “critical stage” of trial. *Id.*, at 212. A critical stage of trial is whenever counsel’s assistance is necessary to assure a meaningful defense. *United States v. Wade*, 388 U.S. 218, 225 (1967).

Appellants argue that *Rothgery* also implied that an initial bail determination is not a critical stage of trial. That is wrong. Walter Rothgery sued Gillespie County, Texas, because it took the county six months to appoint him a lawyer. A minimal investigation of Rothgery’s criminal history by his appointed counsel then quickly exonerated him of being a felon in possession of a firearm. *Supra*, 196-97. As the district court recognized below, *Rothgery* never raised the issue of lacking an attorney to argue bail and therefore the Supreme Court never addressed it. ROA. 6011.

In fact, no United States Court of Appeals has previously reached the exact issue that a state or county must provide counsel at an initial bail hearing.² That is

² The trend in other state courts has been to find a bail hearing is a critical stage of trial. That was adequately briefed by Appellee.

probably because federal courts hear criminal proceedings in which the presence and appointment of counsel at a detention hearing is mandated by statute. 18 U.S.C. §3142 (f)(2)(B).

Absent a class action lawsuit, it is virtually impossible for individual state court defendants to successfully appeal harm at trial resulting from pretrial detention. Actual prejudice is difficult to attribute because causation between pretrial detention and an unfavorable disposition—while statistically significant³—is hard to show in any particular case. *See e.g., Mickens v. Taylor*, 535 U.S. 162 (2002) (requiring specific showing of harm).

The Memorandum and Recommendation adopted by the district court below, accurately describes how to apply the “critical stage” analysis to this case:

To assess whether a bail hearing is a “critical stage” of a criminal prosecution, the Court must first inquire as to whether counsel would be needed to help a defendant cope with complex legal problems raised during such a hearing. The answer is a no-brainer. Unrepresented defendants, especially those that have had no experience in the criminal justice system, are in no position at an initial bail hearing to present the best, most persuasive case on why they should be released pending trial. A lawyer would unquestionably provide invaluable guidance to a criminal defendant facing a bail determination. ROA. 6004.

That legal analysis is sound and should be upheld. An initial bail hearing is a critical

³ Paul Heaton *et al.*, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711 (2017) (“Heaton Study”).

stage of trial requiring the assistance of counsel, and that defect cannot be remedied by a review of that determination, even hours later. As described below, it will affect the entire case, through disposition and beyond.

B. Facts Support the Ruling Below.

Appellants have challenged the statements provided by two Texas public defenders and a law professor – about the likelihood of self-incrimination by unrepresented defendants and the failure of bail reviews to provide adequate due process – because each allegedly is unfamiliar with Galveston County’s procedures and practices. [“No credible evidence supports either conjecture.” *Attorney General of Texas’s Brief*, p.2]. The problem with Appellants’ criticism is that these points have already been accepted by courts in this Circuit.

In *ODonnell v. Harris County*, 251 F.Supp.3d 1052 (S.D. Tex. 2017), Hon. Lee Rosenthal, Chief Judge of the Southern District of Texas, made extensive factual findings, all of which were adopted by a panel of the United States Court of Appeals for the Fifth Circuit. *ODonnell v. Harris County, Texas*, 882 F.3d 528, 549 (5th Cir. 2018) (“[W]e AFFIRM the district court’s findings of fact.”). Many of those facts are relevant to this case.

1. Harris and Galveston Counties are Comparable.

ODonnell concerned Harris County, Texas. Appellants have attempted to

distinguish Harris County because it is larger than Galveston County. That may be a distinction, but it is one without a difference. For purposes of applying these facts, size does not matter.

More important, is continuity. According, to any map of Texas, Harris and Galveston counties share a border. Galveston County's largest municipality, League City, straddles that border. It is estimated that in 2019, it had 106,244 residents. <http://worldpopulationreview.com/us-cities/league-city-tx-population>, more than twice as many as the City of Galveston. The City of Friendswood also occupies both counties and is almost the same in population as the City of Galveston. The Harris County cities of Webster and Seabrook are within 10 miles of League City. The outer limit of the City of Houston (the Nation's fourth largest), is less than five miles from League City.

Residents of Harris County regularly travel to the beaches and marinas of Galveston County. Galveston County residents regularly shop and attend events in Harris County. Approximately 40 percent of the Galveston County workforce commutes to Harris County. Jolie McCullough, "Long Way Home: Census Details Texas Commutes," *The Texas Tribune* (Aug. 27, 2015). It is often a quirk of fate whether persons in the population-dense portions of southern Harris County and northern Galveston County are arrested and charged in one county or the other.

Appellants treat these as if they were separate countries instead of contiguous counties.

2. The Findings in *ODonnell* are Relevant.

Because of the continuity between the two counties, Judge Rosenthal’s findings in *ODonnell* are all the more relevant. She wrote:

The record contains 2,300 recordings of misdemeanor probable cause hearings before the Hearing Officers. The recordings begin in March 2016—before the lawsuit was filed—and continue through early November 2016. Pls. Ex. 2. The court has reviewed many hours of footage. The results are consistent and support this court's findings and conclusions. Two hearings are illustrative. The court chooses them not because they are extreme examples of any particular feature, but because they appear pretty ordinary. Neither hearing is procedurally unusual.

ODonnell, supra at 1097. In other words, she did not need to describe every video. These two examples represented the ordinary hearing. In both, the defendants spoke to the magistrate despite warnings to remain silent because each had facts he wanted the magistrate to know. *Id* at 1098-99. Warnings not to speak are meaningless to persons who are standing before the only official who can allow them to go home, especially when they are provided no one else for advice. Or, as Judge Rosenthal stated, “The absence of counsel adds to the difficulty.” *Id* at 1097-98.

However, self-incrimination is only half of the problem. Defendants with important relevant information that the magistrate should hear are prevented from

speaking, either by order or through their own inability to articulate the information. “Defendants who try to speak are commanded not to, shouted down or ignored.” *Id.*, at 1098.

3. Bail Reviews do not Work.

O'Donnell also addresses the Appellants’ remedy in Galveston County – bail reviews. Prior to the addition of counsel at the 15.17 hearings, Harris County tried bail reviews in which defendants had lawyers:

On February 9, 2017, the County Judges amended the County Rules of Court to provide first appearance settings for all misdemeanor arrestees booked into the County Jail the next business day after booking, “regardless of whether the defendant has been released from custody.” *Id.* Rule 4.1.2. At this first appearance, the County Judge must “review conditions of release, bail amount set, and personal bond decision and modify if good cause exists to do so.” *Id.*

However, this was not a cure. “The record shows that County Judges adjust bail amounts or grant unsecured personal bonds in fewer than 1 percent of the cases.” *Id.* at 1131. That includes bail reviews, even though they were mandated by local rule to cure that very problem. “One County Judge testified that in his experience as a former criminal defense attorney, seeking a bail reduction before a County Judge was formally available, but practically futile.” *Id.* at 1102.⁴

⁴ One should remember that in evaluating the “anchoring effect” of Galveston’s initial bail determination, the reviewing magistrate is not only affected by first judicial decision made, but the preceding application of a strict bail schedule by the District Attorney.

Appellants also claim there is no showing of harm caused by Galveston's bail review procedure. However, aside from the stark statistical example above – that almost no bail determinations were changed upon review in Harris County – there is a direct correlation between remaining in custody and more punitive outcomes for defendants. Judge Rosenthal relied heavily on the analysis of the Heaton Study, a peer-reviewed empirical analysis of 380,689 misdemeanor cases filed in Harris County before public defenders were provided at 15.17 hearings. *O'Donnell, supra* at 1106. The article stated:

The basic message from the analysis of conviction is that accounting for preexisting differences in detainees and releasees is important, but even after controlling for a fairly wide range of relevant characteristics, pretrial detention remains a sizeable predictor of outcomes. (underlining added).

Heaton Study, supra at 746. The study showed defendants who stay in jail pretrial are more likely to remain in jail upon disposition and for longer sentences:

The table demonstrates that nearly all of the difference in convictions can be explained by higher plea rates among those who are detained, with detainees pleading at a 25% (13 percentage points) higher rate than similarly situated releasees. We also find that those detained are more likely to receive jail sentences instead of probation. In our preferred specification, those detained are 43% (17 percentage points) more likely to receive a jail sentence and receive jail sentences that are nine days longer than (or more than double that of) nondetainees. This estimate of the impact of pretrial detention includes in the sample those without a jail sentence, so it incorporates both the extensive effect on jail time (those detainees who, but for detention, would not have received a jail

sentence at all) and the intensive effect on jail time (those who would have received a jail sentence regardless but whose sentence may be longer as a result of detention). Those detained are both less likely to receive sentences of probation and receive fewer days of probation (including, once again, both the extensive and intensive margin).

Id at 747.

4. Harris County does what Galveston Claims it Cannot.

According to statistics from the Texas Indigent Defense Commission, the Harris County Public Defender's Office represented 59,561 persons at the 15.17 hearings in FY 2018 and 49,050 in FY 2019. The reduction appears to be because of a rule change by the Harris County Criminal Courts at Law, making most misdemeanors eligible for release on personal bonds (i.e., unsecured bonds), without a hearing.

The Meadows Mental Health Policy Institute of Dallas is completing a comprehensive assessment of the Harris County Public Defender's Office.⁵ Part of the report will address the office's bail division, representing persons at 15.17 hearings. In initial findings, Meadows reviewed 115 of those hearings.

The study found that assistant public defenders succeeded in urging magistrates to impose personal bonds (unsecured), in 54 percent of cases, even though assistant district attorneys opposed personal bonds in 90 percent of all cases. Overall, defense

⁵ A final report is expected in March 2020.

recommendations gave magistrates a basis to moderate extremely high bail requests by the prosecution. Assistant public defenders also affected the process in other ways.

Assistant public defenders were able to answer defendants' questions prior to hearings, thus eliminating the type of interruptions Judge Rosenthal identified prior to the provision of counsel at the hearings. Those lawyers were able to answer questions from the magistrates, which expedited the procedure and maintained the focus upon issues of the defendants' individual circumstances regarding bail. They were also able to provide the magistrates information that was in addition to that from law enforcement, prosecutors, deputy district clerks or pretrial services. Last, they were able to prevent defendants from making statements against their own interest that would be recorded on video and potentially used against them later in court.

The study recorded many of the points that assistant public defenders were able to argue on defendants' behalf. Those included low pretrial risk assessment scores,⁶ the need for mental or physical health treatment; that defendants were employed; that they were a local residents with strong community ties; that they had places to live that were not associated with the alleged offenses or victims; that there were relatives or caretakers to make sure they appeared and complied with conditions; and that they

⁶ Harris County employs the Laura and John Arnold Foundation's Public Safety Risk Assessment.

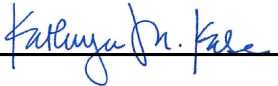
had the means and ability to get to court. There is no reason why this same procedure would not work in Galveston County on a smaller scale.

CONCLUSION

The district court's finding that an initial bail hearing, pursuant to TEX. CODE CRIM. P. ART. 15.17, is a critical stage of trial for which the assistance of counsel is required by the Sixth Amendment, is supported by law. The experience and data from Harris County are equally persuasive about its basis in fact. This Honorable Court of Appeals should affirm the district court's preliminary injunction order.

DATE: February 14, 2020

Respectfully submitted,



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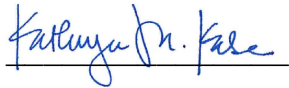
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was filed electronically on February 14, 2020, and will, therefore, be served electronically upon all counsel.

A handwritten signature in blue ink, reading "Kathryn M. Kase", is written over a horizontal line.

Kathryn Kase

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,264 words, excluding the portions exempted by Rule 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X5 in 14-point Times New Roman font.

Date: February 14, 2020



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