

TEXAS FAIR DEFENSE PROJECT

What is required in a Texas bail hearing?

Background: Harris County litigation

- Prior to litigation filed in May of 2016, Harris County hearing officers used a bail schedule to automatically impose secured bail amounts on defendants without any consideration of the person's ability to pay that bail or any consideration of what conditions - including alternatives to money bail - might be appropriate to ensure that the defendant appeared in court and the safety of the community was protected.
- Bail would be set at a "hearing" at which the defendant had no meaningful opportunity to speak. As a result, Harris County detained thousands of people accused of a crime, but not yet found guilty, every year. People routinely accepted a guilty plea in exchange for time served and release from jail rather than fight their case.
- In May of 2016, attorneys at Susman Godfrey, Civil Rights Corps, and Texas Fair Defense Project filed a lawsuit on behalf a young woman and a class of similarly situated people who had been accused of misdemeanors and were being held in jail pretrial because they could not afford bail. The District Court issued a preliminary injunction against Harris County's pretrial practices in April of 2017. *ODonnell, et al. v. Harris County*, 251 F.Supp.3d 1052 (S.D. Tex 2017). Most of the injunction was upheld on appeal to the Fifth Circuit.
- The Fifth Circuit in *ODonnell, et al. v. Harris County*, 892 F.3d 147 (5th Cir. 2018) described the impact of the equal protection violations in Harris County's pretrial bail system:

"[T]ake two misdemeanor arrestees who are identical in every way— same charge, same criminal backgrounds, same circumstances, etc.— except that one is wealthy and one is indigent. Applying the County's current custom and practice, with their lack of individualized assessment and mechanical application of the secured bail schedule, both arrestees would almost certainly receive identical secured bail amounts. One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart."

- The Fifth Circuit in *ODonnell* upheld the District Court's findings that Harris County's automatic imposition of secured bail against people accused of a misdemeanor without a consideration of an individual's ability to pay or alternatives to secured bail violated Equal Protection. *Daves v. Dalles County* extended the requirements of an individualized hearing to people accused of felonies.

After ODonnell, and Daves, counties **cannot**:

- Automatically impose pretrial detention via secured bail; or
- Purposefully detain a defendant pretrial who would otherwise be eligible for release by setting monetary bail beyond what the defendant can afford to pay without meaningful consideration of alternatives.

Counties **must**:

- Conduct individualized hearings, with notice to defendants about what is at issue at the hearing and an opportunity to present and refute evidence.
- Consider a person's ability to pay any potential amount of money bail at this hearing.
- Ensure that the hearings include an actual back and forth between the magistrate and the defendant and that the magistrate makes an individualized determination of what is an appropriate release decision and conditions for each person in front of them.
- Ensure that the magistrate states on the record what "evidence [the magistrate] relied on to find that a secured financial condition is the only reasonable way to assure the arrestee's appearance at hearings and law-abiding behavior before trial."
- Conduct these hearings within 48 hours of arrest.

Further, counties **should**:

- Ensure that magistrations and other hearings at which bail is considered are open to the public either in person or through live streaming technology.