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A number of Texas counties are concerned about their vulnerability to attack in light of the recent Fifth Circuit Court of Appeals opinions concerning the Harris County pretrial release practices. Those cases are *O'Donnell v. Harris County, Texas*, 892 F. 3d 147 (5th. Cir. 2018)(opinion on rehearing)(*O'Donnell I*) and *O'Donnell v. Goodheart*, 903 F 3d 220 (5th Cir. 2018)(*O'Donnell II*). In order to allay those concerns, I'd like to first review the factual setting for the Harris County challenge and then review the decisions by the Fifth Circuit.

The Factual Background

For many years, Harris County has by order of the District Courts for felonies and by order of the County Courts at Law for misdemeanors had preset bail schedules for the most common offenses. Harris County has also used the following procedures with respect to the setting of bonds for arrestees: When an officer made an instanter arrest and delivered the defendant to the Harris County jail, the officer was required to fill out and leave an offense report and probable cause affidavit. Prosecutors are on duty 24-7 in their intake section. A prosecutor would review the offense report and probable cause affidavit and immediately determine whether it appeared that a crime had been committed. The prosecutor would decide at that time the appropriate criminal charge to be brought, prepare a charging instrument, and then present that information to a magistrate who was also on duty 24-7. The prosecutor would recommend to the magistrate a bond amount to be set. In theory, the prosecutor could recommend a bond amount that differed from the scheduled amount if the facts justified a deviation up or down. Also in theory, the magistrate could make such a deviation based upon the magistrate's own evaluation of the case.

As found by the federal trial court, deviations from the scheduled bail amounts almost never happened. Furthermore, the trial court found that indigent defendants who did not have the financial means to post the scheduled bail amount were not given an opportunity to make that fact known to the magistrate. In fact, the trial court found that the magistrates routinely told defendants not to talk during their arraignment hearings.

Although, under Texas law a defendant's financial ability to make bail is a factor that is to be considered by a court or magistrate, the trial court found that the Harris County practices ignored this factor.

The *O'Donnell* Trial Court

As result of these practices, the trial court found that indigent defendants who did not have the financial ability to post bail in the scheduled amounts often remained in jail, while more affluent defendants were able to secure their release from custody. The trial court held that the Harris County practices were a violation of federal equal protection guarantees, and entered an injunction requiring the sheriff to release any misdemeanants who alleged that they were too poor to post bail without requiring those defendants to pay any money.

The *O'Donnell* Appeals Court Opinions

The county appealed the trial court's preliminary injunction, and earlier this year, the Fifth Circuit issued its opinion on that appeal. (See, *O'Donnell I*, cited above.) The court noted that with respect to decisions concerning pretrial release there are always two competing interests: the State's interest in making sure that a defendant appears for trial in the case and the defendant's interest in being released from custody in order to help prepare a defense. The court noted that these two conflicting interests are always present, and further noted that neither trumps the other. For this reason, the court held that when defendant claims indigence there must be an individualized weighing of these factors before determining the appropriate amount and form of bail.

The Fifth Circuit rejected the trial court's equal protection rationale and instead held that what is at issue in bail decisions is a due process right to have an individualized review and weighing of all relevant factors. The Fifth Circuit further noted that Texas law contemplates that judges and magistrates will consider all of these factors. Code of Criminal Procedure, Art. 17.15 sets out five rules that are to be followed:

- “1. The bail shall be sufficiently high to give reasonable assurance that the undertaking will be complied with.
2. The power to require bail is not to be used as to make it an instrument of oppression.
3. The nature of the offense and the circumstances under which it was committed are to be considered.
4. The ability to make bail is to be regarded, and proof may be taken upon this point.

5. The future safety of a victim of the alleged offense and the community shall be considered.”

Because the Harris County practice was not considering all of these factors, the Fifth Circuit upheld the entry of a preliminary injunction. However, it reversed, in part, the trial court’s remedy as being too broad. Instead of ordering an indigent defendant to be automatically released (which would say that a defendant’s financial situation trump’s the State’s interest in all cases), the Fifth Circuit ordered that a person claiming indigence must be given a prompt opportunity to provide a sworn affidavit that sets out that defendant’s available financial resources, and requires that such an affidavit must be presented to and be considered by the magistrate within 48 hours after the filing of a criminal charge against such a defendant.

Significantly, the Fifth Circuit did not invalidate the use of preset bail schedules. Instead, it declared that if the county chooses to have such a schedule it must provide “an adequate process for ensuring that there is individual consideration for each arrestee [who attests that they cannot afford the scheduled bail amount].” In order to carry out this requirement, the county is ordered to hold a hearing within 48 hours at which the defendant is entitled to an opportunity to describe evidence in his or her favor. After such a hearing the magistrate can choose to lower the amount of required bail, release the defendant on a personal bond, and impose non-financial conditions on either type of bond (such as drug testing, ignition interlocks, protective orders and GPS monitoring). The magistrate can also decline to lower the bail from the preset amount, but if the decision is not to deviate, the magistrate must provide factual findings in the record for that decision. In sum, the court stated, “The purpose of this requirement is to provide timely protection for the state-created liberty interest in beingailable by sufficient sureties and to prevent the automatic imposition of prescheduled bail amounts without an adequate process for ensuring that there is individualized consideration of whether another amount or condition provides sufficient sureties.”

After remand, the district entered a modified injunction that somewhat tracked the 5th Circuit’s suggested order, but also went beyond it in two important respects. The trial court continued to hold that the county could not detain an indigent defendant any time longer than it detained a defendant who had the means to post a bail amount and held that the county was required to automatically release without money bail any indigent defendant who had not had a review hearing within 48 hours. Fourteen of the county’s sixteen misdemeanor judges took a second appeal to the 5th Circuit, and in *O’Donnell II*, that court rejected both of those sections in the trial court’s modified order. The 5th Circuit reiterated its prior holding that there is no equal protection right to automatic

release because of indigency and stated that a failure to hold an individualized review within 48 hours requires a procedural remedy, not automatic release.

Rulings by Other Courts

Two other court cases have followed the same approach. See, *Dawes v. Dallas County*, ___ F 3d ___, (N. Dist. Tex., No, 3-18-CV-0154-N decided September 20, 2018) in which the federal district court entered an injunction that tracked the 5th Circuit's *O'Donnell* opinions and *Walker v. City of Calhoun*, ___ F 3d ___, (11th Cir., No 17-13139 decided August 22, 2018) in which the court similarly rejected the plaintiff's equal protection challenge and approved a 48 hour period for the city to hold individualized bail hearings for defendants claiming indigency.

The Way Forward After *O'Donnell*

Many counties have preset schedules of bail for their most common offenses. There are at least three (and maybe four) reasons why the adoption of such a schedule may be considered to be appropriate. First, having such a schedule provides guidance for the magistrate for at least the starting point for consideration of an appropriate amount of bail and prevents wild variations in bail amounts based upon which magistrate happened to have the magistration duty that day or that week. Second, having such a schedule helps prevent wild variations in bail amounts that appear to be based upon who the defendant is. Third, having such a schedule allows defendants to bond out of jail much quicker, since those defendants who can afford the scheduled amount do not have to wait in jail until the next day to see a magistrate and have bail set before they can begin making arrangements to post bail. There may also be a fourth reason to have such a schedule and that has to do with the work load for the magistrates. Without a schedule, the magistrate may have to see and have individualized hearings on every single arrestee. With a schedule, defendants who have the means to post the scheduled amount will do so and only the truly indigent defendant will have to have the individualized hearing and assessment.

Whether a county chooses to use a preset bail schedule or not, it is clear under *O'Donnell* that the magistrates setting bail in the county must have an individualized hearing and assessment when a defendant claims indigence with respect to the bail amount. Despite claims to the contrary, *O'Donnell* does not in any way require the wholesale release of defendants on personal bonds. Rather, it simply requires full and fair consideration of individual factors in deciding on the appropriate amount and form of bail. Indeed, a county ought to look closely at the experience of the Harris County misdemeanor courts while the federal trial court's injunction was in effect. According to

the Harris County Office of Court Administration, 50% of defendants released on free bonds under the terms of that injunction subsequently failed to appear in court. It has, in short, been a disaster for the operation of the criminal misdemeanor courts.

I hope that this explanation of the *O'Donnell* line of cases will be helpful as your county considers whether it needs to make changes to its current pretrial release practices.

Yours truly,

A handwritten signature in black ink, appearing to read "Roger Moore". The signature is written in a cursive style with a long, sweeping tail.

Roger Moore