

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, Southern District of Texas,
Galveston Division
No. 3:18-cv-00104

**BRIEF OF *AMICI CURIAE* CURRENT AND FORMER DISTRICT, STATE,
AND PROSECUTING ATTORNEYS, AND STATE ATTORNEYS
GENERAL, IN SUPPORT OF PLAINTIFF-APPELLEE**

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INTEREST OF AMICI CURIAE

Amici curiae are current and former elected prosecutors (District Attorneys, State Attorneys, and Prosecuting Attorneys) and current and former State Attorneys General in 44 jurisdictions in 26 states and the District of Columbia across the United States. Amici have all been responsible for promoting public safety in their jurisdictions. They have a strong interest in this case because Galveston County’s practice of failing to appoint counsel at the initial bail hearing offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors, and fails to promote safer communities.¹

¹ No party’s counsel authored this brief in whole or in part, and no person, other than amici curiae’s counsel, funded the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The primary duty of all prosecuting attorneys is not to convict, but to see that “justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, they have a vested interest in maintaining the integrity of the judicial process and protecting the fundamental rights of the accused to have access to counsel. Detention of indigent defendants in Galveston County following initial bail hearings in which they are not represented by counsel undermines the legitimacy and integrity of the criminal justice system and the ability of elected prosecutors to keep communities safe.

The initial bail hearing includes a recommendation by the district attorney concerning the appropriate amount of bail, as well as the magistrate’s consideration of the defendant’s financial condition and the nature and circumstances of the charged offenses. These considerations, which necessarily involve subjective assessments, are not tested through the safeguards of the adversarial process. Defendants should have the right to counsel to address the circumstances and nature of the alleged offenses and to improve the quality of decision-making around detention decisions.

Pretrial detention results in significant adverse consequences for defendants. Even detention of a short duration can disrupt an individual’s employment, access to healthcare and housing, and familial relationships. Individuals that are detained

pretrial are also more likely to be convicted at trial and sentenced to imprisonment, or to plead guilty to secure their release, even in cases of actual innocence.

The untested pretrial detention of indigent defendants poses considerable public safety risks. Studies show that defendants who have been detained pretrial are more likely to be at risk of committing future criminal conduct. By contrast, providing counsel for the defendant at the initial bail hearing improves the quality of these critically important decisions.

More broadly, a system that is perceived as unfair will erode a community's confidence in law enforcement and the justice system and, consequently, undermine cooperation with the legal system. Crimes will go unreported, witnesses will be reticent to come forward, and convictions of the guilty will be harder to obtain.

A subsequent bail review hearing following the initial bail hearing does not mitigate sufficiently the risk to public safety posed by early detention. Moreover, the "anchoring effect" of the initial bail hearing (whereby judges rely on the earlier bail decision as a point of reference to deny bail during the review hearing) increases the likelihood that the bail review hearing will simply result in a decision in favor of prolonged pretrial detention.

Amici urge this Court to affirm the lower court's issuance of an injunction requiring that indigent defendants in Galveston County be provided defense counsel

at initial bail hearings. The lower court correctly concluded that indigent defendants arrested in Galveston County are constitutionally entitled to representation at initial bail hearings. As set forth herein, requiring defense counsel at initial bail hearings is in the interest of justice, will aid in the fair and efficient administration of the criminal justice system, and will promote public safety. As current and former elected prosecutors, our work is enhanced, not encumbered, by the appointment of counsel at all critical stages of a criminal proceeding.

ARGUMENT

I. Fairness and Integrity of Criminal Proceedings Require the Presence of Counsel for the Defendant at the Initial Bail Hearing

A. Prosecutors Have a Duty to Seek Justice, Not Just Convictions

Prosecutors have a duty to ensure the fairness and integrity of criminal proceedings. “The prosecutor’s role transcends that of an adversary,” *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) because he or she is considered “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Stickler v. Greene*, 527 U.S. 263, 281 (1999) (quoting *Berger*, 295 U.S. at 88).

[A prosecutor’s] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger, 295 U.S. at 88. The Texas Code of Criminal Procedure unambiguously instructs prosecutors to obey this principle. “It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.” Tex. Code Crim. P. Art. 2.01.

For *amici*, the importance of what occurs at an initial bail hearing cannot be overstated. As set forth herein, the untested detention of indigent defendants undermines the fairness and legitimacy of the criminal justice system and the credibility of those entrusted to prosecute crimes within it.

Amici have seen firsthand the adverse consequences that can result from unnecessary pretrial detention. In *amici*’s experience, counsel at a defendant’s first court appearance is necessary to avoid arbitrary detention and to advocate in favor of affordable bail or non-monetary conditions of release. This not only mitigates the risk of non-appearance, but also ensures a fair criminal justice system, avoids detention in those cases where (as discussed below) the adverse consequences of pretrial detention simply exacerbate the likelihood of future criminal conduct, and enhances public safety.

B. The Sixth Amendment Ensures Integrity and Fairness in the Criminal Process

The Sixth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, ensures a fair and just criminal process by guaranteeing an accused the right to counsel regardless of ability to pay. U.S. Const.

Amend VI; *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963). The right to counsel has been deemed “indispensable to the fair administration of our adversarial system of criminal justice,” *Maine v. Moulton*, 474 U.S. 159, 168 (1985), serving to protect the “fundamental human rights of life and liberty.” *Johnson v. Zerbst*, 304 U.S. 458, 462 (1932); *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 243-44 (1936) (recognizing the Sixth Amendment as a fundamental constitutional right).

Notably, indigent defendants have the right to counsel at an initial bail proceeding under federal law. *See* 18 U.S.C. § 3006(A)(c) (“A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge . . .”). Section 3006A “furnish[es] counsel and services to those unable to procure them so as to place such criminal defendant in a nearly equal position with a defendant who can pay.” *United States v. Henderson*, 525 F.2d 247, 251 (5th Cir. 1975).

Counsel serves as a critical equalizer within the adversarial process. They ensure that relevant information is presented to the court and advise and guide defendants through the complexities of the judicial process. As such, they protect a defendant’s rights, and improve the quality of decision-making by the court.

C. Bail Hearings are of Great Consequence

Bail hearings are an aspect of the criminal process “that hold significant consequences for the accused,” as the outcome can irrevocably prejudice a

defendant. *United States v. Collins*, 430 F.3d 1260, 1264 (10th Cir. 2005). A bail hearing presents the court's first examination of the nature and circumstances of the alleged offense. Moreover, where a criminal defendant cannot afford bail, he or she is likely to face detention while awaiting trial. See Criminal Justice Policy Program, Harvard Law School, *Moving Beyond Money — A Primer on Bail Reform* 10-11 (2016), available at <http://cjpp.law.harvard.edu/assets/FINAL-Primer-on-Bail-Reform.pdf>. At least thirty percent of inmates awaiting trial have been detained solely as a result of their inability to afford bail. *Id.*

1. *Even short detention has an adverse impact on the defendant.*

Studies have shown that remaining in jail, even for just a few days, has serious detrimental effects on a criminal defendant. See *id.* at 7. Pretrial detention often results in defendants' inability to attend work or earn income while incarcerated, placing them at risk of losing their employment and prolonging their detention. See *id.* Pretrial detention can also jeopardize an individual's access to healthcare and housing, and familial relationships, including child custody and access. See *id.*

Research has shown that low-risk defendants who are detained for the entire pre-trial period were 5.41 percent more likely to be sentenced to jail than those who are released at some point before trial. See Christopher T. Lowenkamp et al., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, 4 (2013),

available at <https://csgjusticecenter.org/wp-content/uploads/2013/12/Investigating-the-Impact-of-Pretrial-Detention-on-Sentencing-Outcomes.pdf> (quoting Laura and John Arnold Foundation, *Pretrial Criminal Justice Research 2* (2013), available at https://cjcc.doj.wi.gov/sites/default/files/subcommittee/LJAF-Pretrial-CJ-Research-brief_FNL.pdf). Even brief detentions increase the likelihood of future criminal behavior and arrest. “As the length of time in pretrial detention increases, so does the likelihood that 12-month recidivism will occur for low-risk defendants” *Id.*

Pretrial detention also has a serious impact on “the prospects of a defendant’s case.” *Id.* A defendant’s ability to prepare for trial is compromised by pretrial detention due to the lack of “ability to gather evidence, contact witnesses, or otherwise prepare [a] defense.” *Barker v Wingo*, 407 U.S. 514, 533 (1972). Individuals that are detained pretrial, even for a short period of time, are “more likely to be convicted, less likely to have their charges reduced, and more likely to be sentenced to jail or prison than their counterparts who were at liberty during the pretrial period.” Mary T. Phillips, New York City Criminal Justice Agency, Inc., *A Decade of Bail Research in New York City*, 115 (2012), available at <https://www.prisonpolicy.org/scans/DecadeBailResearch12.pdf>; ABA Project on Standards for Criminal Justice, *Standards Relating to Pretrial Release—Approved*

Draft, 2-3 (1968) (describing the adverse impact of pretrial detention on a defendant’s case).

Pretrial detention directly correlates to an increase in the risk of non-appearance and post-disposition recidivism. *See* Lowenkamp et al. A study conducted in a Kentucky jail revealed that defendants detained two to three days pretrial were less likely to appear than defendants who had been detained for only one day. *Id.*

2. *Detained individuals are more likely to plead guilty to secure release.*

Pretrial detentions often force individuals to plead guilty, even in cases of actual innocence. In *ODonnell v. Harris County*, the District Court recognized that “thousands of misdemeanor defendants each year are voluntarily pleading guilty knowing that they are choosing a conviction with fast release over exercising their right to trial at the cost of prolonged detention.” 251 F. Supp. 3d 1052, 1107 (S.D. Tex. 2017). When defendants are not represented at their initial hearing, they lose the invaluable benefit of defense counsel’s expertise in making decisions regarding whether to enter into a plea agreement in exchange for release. These circumstances are a direct violation of a defendant’s right to counsel and undermine the legitimacy of the justice system.

D. Prosecutors Have an Interest in Promoting the Safeguards of the Adversarial Process

The initial bail hearing involves a magistrate judge's consideration of the prosecutor's bail recommendation, the defendant's financial condition, and the nature and circumstances of the charged offense. This information, much of which involves subjective assessments on the part of the prosecutor and the court, should be tested through the safeguards of the adversarial process by having defense counsel present at the initial bail hearing before the magistrate renders a decision.

Following an arrest in Galveston County, an intake district attorney reviews and assesses the nature of the charges and prepares a bail recommendation. While the recommendation is made in reliance upon a bail schedule, it first requires the prosecutor to conduct a subjective evaluation of the alleged offense. The Personal Bond Office in Galveston County interviews the defendant and provides an assessment to the court of the defendant's financial condition based on the interview.

Article 17.15 of the Texas Code of Criminal Procedure provides for the consideration of five factors in making a bail determination, including:

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 so 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.

Tex. Code Crim. P. Art. 17.15. These factors clearly necessitate the magistrate's assessment of the charges, as well as the financial condition of the defendant, before making a bail recommendation.

1. *Initial bail hearings involve subjective considerations.*

By the time a defendant appears at the initial bail hearing, a prosecutor's imprimatur is on the case: the intake district attorney has had the opportunity to review the information provided by the arresting officer, conduct an evaluation of the charges, and make a recommendation to the magistrate concerning the appropriate bail amount. Even though the prosecutor relies upon a bail schedule, the prosecutor's evaluation of the charges is subjective, and his or her recommendation has not been reviewed or vetted by the defense.

Allowing the prosecutor's recommendation to be considered by the magistrate without first providing the opportunity for defense counsel to challenge that recommendation and present other facts or circumstance that can enlighten the magistrate's decision at the initial bail hearing undercuts the adversarial safeguards that form the very foundation of our criminal justice system and contravenes a prosecutor's duty to see that "justice shall be done." *Berger*, 295 U.S. at 88.

The Personal Bond Office report to the magistrate and the magistrate's evaluation of the factors set forth in Article 17.15 further underscore *amici's* interest in ensuring defense counsel's presence at the initial bail hearing. In *amici's* experience, defense attorneys are poised accurately to present and, in certain cases, to clarify for the Court, an individual's financial condition, including an individual's occupation and employment status, financial account information, and place of residence. Article 17.15 further requires the magistrate's subjective assessment of factors like the nature and circumstances of the offense, and the future safety of the community and the alleged victim. This requires the magistrate to consider the facts behind the alleged crime – an evaluation that can be undertaken more effectively after hearing from defense counsel.

Allowing the magistrate to make subjective determinations without allowing defense counsel to present the defendant's financial information to the court and to address, if necessary, the circumstances and nature of the alleged offense (an opportunity that the district attorney has already had), undercuts the same adversarial safeguards that are in place to prevent a one-sided presentation of the case.²

² *Amici* also support the presence of the district attorney at these initial hearings as a further mechanism to enhance the quality of the fact finding and resulting decisions—while recognizing that this issue is not before the Court.

2. *Requiring defendants to appear unrepresented at initial bail hearings can create a coercive environment which might result in waiver of important constitutional guarantees.*

When a criminal defendant speaks at an initial bail hearing, it is often to advocate for his or her release. A defendant has further incentive to speak in order, for example, to address the magistrate's assessment of the nature and circumstances of the alleged offense under Article 17.15.

The extraordinary risk to the defendant of speaking without counsel is well-established, as it greatly increases the likelihood of the individual making a self-incriminating statement. Once an individual has made an incriminating statement at a bail hearing, the later appointment of a lawyer to represent the individual would be "a very hollow thing (if), for all practical purposes." *United States v. Wade*, 388 U.S. 218 at 226 (1967); *see also United States v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980) (regarding uncounseled admission of guilt at initial bail hearing).

Defendants should not be coerced by circumstances to speak without counsel before the magistrate. To ensure the integrity of the criminal proceedings, and undoubtedly lessen the risk of self-incrimination without counsel present, *amici* strongly urge the presence of defense counsel at the initial bail hearing.

II. The Presence of Counsel Ensures the Integrity of the Initial Bail Hearing, Engendering Community Trust and Promoting Public Safety

A. Public Safety is Negatively Impacted by Untested Pretrial Detentions

Amici have a strong interest in promoting public safety. “The primary duty of the prosecutor is to seek justice” applying “balanced judgment to increase public safety” with respect for “the constitutional and legal rights of all persons.” ABA Standard 3-1.2 (b)—Functions and Duties of the Prosecutor. Unnecessary pretrial detention detracts from public safety and impedes the administration of justice.

The adversarial safeguards that are already in place are designed expressly to ensure that a right to counsel for the defendant will enhance the quality of the information presented and the integrity of both the process and the resulting decisions. Initial bail hearings for *pro se* indigent individuals can result in arbitrary detentions. Further, such hearings fail to adequately assess which individuals present a flight risk, while allowing the release of others on the arbitrary basis of financial wherewithal, at great risk to public safety. *See e.g.*, Bureau of Justice Statistics *Justice Expenditure and Employment Extracts* (2012).

B. A Subsequent Bail Review Hearing Does Not Sufficiently Mitigate the Harms Caused by an Accused’s Unrepresented Initial Appearance

Though defendant-appellants argue that any harm caused by a *pro se* appearance at the initial hearing is negated because criminal defendants in Galveston County are represented at subsequent bail review hearings within 12 to 24 hours, this is simply not the case. As discussed above, defendants are impacted

significantly and negatively by proceeding with the initial bail hearing *pro se*. Defendants are faced with the difficult decision of either waiving their constitutional right to remain silent or discussing the facts of their case in hopes of securing release. They also lose the opportunity to have counsel address the prosecutor's recommendation and the factors that the magistrate is required to consider in reaching a bail determination. The consequences of detention, including a brief one, are predictive of public safety risks and future recidivism. Moreover, the lower court correctly observed that, "a bail hearing review does not remove the possibility, no matter how slight, that an initial bail determination has an 'anchoring effect' that may make it more difficult to persuade the reviewing judge to modify what has already been ordered." ECF No. 267 at 35. This "anchoring effect" increases the risk that a subsequent bail review hearing, even with counsel present, will only lead to a longer period of detention and exacerbate already substantial public safety concerns.

C. The Perception of Fairness is Critical to Maintaining Public Safety

Preventing relief from an injustice, such as the coercion of a defendant to forsake his constitutional right against self-incrimination in order to secure release from incarceration, undermines a public sense of fairness and confidence in consistently applied legal principles, and therefore imperils public trust and perception of legitimacy. When a community sees the justice system as illegitimate,

members of the community, both victims and witnesses, are less likely to cooperate with law enforcement, to assist in investigations, or to report crimes against them. This dynamic harms *amici*'s ability to build the trust necessary to carry out our mission to protect public safety. A community is not safe if its members cannot trust that they will be treated fairly if they come in contact with the justice system.

CONCLUSION

The district court's judgment and injunction should be affirmed.

Dated: February 14, 2020

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on February 14, 2020, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Ariel S. Glasner
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i) because it contains 3,372 words, as provided by the word count function of Microsoft Word (the word-processing system used to prepare the document), excluding the parts of the brief exempted by Rule 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word (14-point Times New Roman for the body and 12-point Times New Roman for the footnotes).

/s/ Ariel S. Glasner

Ariel S. Glasner