

March 20, 2024

The Honorable Andy Brown, Travis County Judge
The Honorable Cliff Brown, Presiding Judge, Travis County Criminal Courts
The Honorable Sally Hernandez, Travis County Sheriff
The Honorable Jeff Travillion, Travis County Commissioner, Precinct One
The Honorable Brigid Shea, Travis County Commissioner, Precinct Two
The Honorable Ann Howard, Travis County Commissioner, Precinct Three
The Honorable Margaret Gómez, Travis County Commissioner, Precinct Four
P.O. Box 1748
Austin, TX 78767

SENT VIA ELECTRONIC MAIL

Re: Urgent Need for Counsel at First Appearance in Travis County

Dear County Judge Brown, Presiding Judge Brown, Sheriff Hernandez,
Commissioner Travillion, Commissioner Shea, Commissioner Howard, and
Commissioner Gómez,

On behalf of the undersigned organizations, we write to share our urgent concern about the ongoing absence of legal representation at initial bail hearings in Travis County. We urge you to develop and implement a plan to provide in-person counsel at first appearance for all people arrested in Travis County as quickly as possible.

While we appreciate that many of you have voiced support for Counsel at First Appearance (CAFA), which is already a constitutional right,¹ there has been little meaningful progress towards ensuring access to counsel at initial bail hearings since the County ended the CAFA pilot program in 2022. Travis County turned down a \$500,000 grant to support CAFA when it ended the short-lived pilot program. Nearly two years later, the county lacks a concrete plan for the timing,

¹ Booth v. Galveston County, No. 3:18-CV-00104 (S.D. Tex. August 7, 2019) (Memorandum and Recommendation), <https://perma.cc/PET6-243M>; and Booth v. Galveston County, No. 3:18-CV-00104 (S.D. Tex. September 11, 2019) (Order Adopting Magistrate Judge’s Memorandum and Recommendation & Preliminary Injunction), <https://perma.cc/E286-6GTC>.

staffing, and logistics of providing counsel. Travis County is falling further behind other major counties, such as Bexar and Harris, that have had CAFA for years.²

The current situation is a crisis that warrants immediate action. Travis County forces scores of people to make an impossible choice each day: remain locked up in jail without the chance to be heard; or argue for their freedom at initial bail hearings without the support of an attorney and risk saying something that can hurt their case. Those who remain locked up may miss medical treatment or lose income, employment, housing, and custody of their children – even if the arrest was a case of mistaken identity or the charges are later dismissed. Pretrial detention poses a particular threat to innocent people because it induces guilty pleas in exchange for liberty at later hearings.

Travis County's failure to provide counsel at first appearance sets up City of Austin magistrate judges to fail. They are asked to conduct magistrations without necessary and constitutionally required assistance of counsel for the accused. Observations from watching magistrations reveal:³

1. Magistrate judges routinely question people without counsel. Judges ask about immigration status, relationships with complaining witnesses, and details about alleged incidents.
2. Uncounseled people routinely make statements that can be used against them, such as assertions about whether they were at the scene of the alleged incident, whether they knew people involved, about their criminal history, or whether they had information about the incident in question.
3. People remain in jail because they lack legal counsel to make arguments on their behalf. Magistrate judges frequently advised those arrested that hiring a lawyer is a key way to secure release from Travis County's custody. In a manner reflective of this usual admonition, one magistrate judge told a group of unrepresented people, "An attorney can come down here and try to convince me or one of the other judges to give you a personal bond that you aren't able to get on your own. A lawyer can advocate on your behalf, based on the unique facts of your case and your situation and try and get you a personal bond."

² Texas Indigent Defense Commission, *Public Defender Primer* (October 2020), <https://www.tidc.texas.gov/media/8d87ba4dc5f2348/public-defender-primer.pdf> (noting Bexar, Cameron, Fort Bend, and Harris provide counsel at magistrations).

³ These observations are supported by a court watching project which has documented magistrations proceedings for hundreds of individuals in the first quarter of 2024.

4. Magistrate judges are disinclined to grant personal bonds in the absence of defense counsel. One person arrested for a minor offense told a magistrate judge, “I have work I've gotta go to... I just got the job... I could lose my job within a day... I could lose my job today for all I know...when I'm getting on the right track and I don't do drugs and don't drink alcohol, and don't do none of that and I'm getting back on the right track, it's kind of frustrating...” The magistrate judge advised the person to discuss the possibility of obtaining a personal bond through their attorney, based on their employment. They also informed the unrepresented person that it would likely be at least four days before they could speak with their attorney.
5. People are left without legal representation to ensure fundamental fairness of the proceedings. Hearings relied on inadequate virtual communication, often with poor visibility or audibility. Some unrepresented people were expected to communicate with a magistrate judge through a camera pressed against a cell door or its food port. On one occasion, a magistrate judge was unable to see or hear the unrepresented person during the virtual; they did not verify the accused person was even present. Magistrate judges sometimes relied on correctional officers’ personal assessment of whether people in detention were capable of hearing, understanding, or responding. And unrepresented people and magistrate judges alike regularly struggled to hear and understand each other through virtual technology.
6. Black and Latino or Hispanic people appear to be overrepresented among those magistrated, relative to the overall population of Travis County.

The uncounseled nature of Travis County's initial court proceedings is even more alarming given Texas’ new deportation scheme created by S.B. 4. The law allows magistrate judges, who are not trained in immigration law, to order the removal of noncitizens from the United States as early as a first appearance. It is critical that people facing the immigration-related offenses created by S.B. 4 have access to counsel and adequate language access services during initial bail hearings, where they could be subject to potentially coercive offers to "agree" to removal and thus waive critical rights. Failure to provide counsel would undermine the Supreme Court precedent in *Padilla v. Kentucky*, which found that counsel is required to correctly advise the accused on the immigration consequences of a plea; an "agreement" to a removal order "in lieu of" prosecution, which carries immediate and potential long-term consequences for individuals and their families, is equally urgent.

Action is needed now. We issue this call to action during the week of Gideon Day – the celebration of the right to counsel and the anniversary of the United States Supreme Court's seminal decision in *Gideon v. Wainwright* – because in Travis County, the constitutional right to counsel has not yet been fully actualized.

Sheriff Hernandez, Presiding Judge Cliff Brown, County Judge Andy Brown, Commissioners – we are looking to you to develop and implement a plan to provide in-person counsel at first appearance for all people arrested in Travis County as quickly as possible.

Thank you.

Sincerely,

Advocates for Social Justice Reform
American Civil Liberties Union of Texas
American Civil Liberties Union Criminal
Law Reform Project
Austin Area Urban League
Austin Lawyers Guild
Austin Justice Coalition
Austin Community Law Center
Austin Tan Cerca de la Frontera
The Bail Project
Black Lives Matter NBTX
Center for Constitutional Rights
Equity Action
The Foundation for the Austin Sanctuary
Network
Grassroots Leadership
Hansen & Taylor, PLLC
Immigrant Legal Resource Center
Lincoln Goldfinch Law
Nonviolent Austin
PODER

Social Action Council, First UU Church of
Austin
Statewide Leadership Council
Texas Advocates for Justice
Texas Appleseed
Texas Antipoverty Project
Texas Center for Justice and Equity
Texas Civil Rights Project
Texas Fair Defense Project
Texas Harm Reduction Alliance
Texas Immigration Law Council
Texas Jail Project
Texas Poor People's Campaign
Texas Unitarian Universalist Justice
Ministry
Texas Women's Justice Coalition
Vera Institute of Justice
VOCAL-TX
The Wren Collective
Woori Juntos

cc: Travis County Criminal District Court Judges
Travis County Criminal Court at Law Judges
Honorable Sherry Statman, Presiding Judge, City of Austin Municipal Courts