UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

Aaron Booth, on behalf of himself and all others similarly situated, Plaintiff, v. Galveston County *et al.*, Defendants.	Civil Action No. 18-cv-0104

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INUNCTION REQUIRING COUNSEL AT INITIAL BAIL HEARINGS

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NATURE AND STAGE OF PROCEEDING

This lawsuit challenges Galveston County's two-tiered justice system, which imposes wealth-based pretrial detention without providing a meaningful hearing or defense counsel. The Court has held as a matter of law that the Defendant Felony Judges are Galveston County policymakers for post-arrest practices, and that the Sixth Amendment right to counsel requires representation at initial bail hearings. ECF No. 151 (Mem.) at 28–29, 38–39. The Court has also held a hearing and oral arguments on Plaintiff's first preliminary injunction motion, which seeks an order requiring that Galveston County's unaffordable secured bail orders be issued consistent with equal protection and due process. ECF Nos. 190 (Hr'g Tr.), 202 (1st Arg. Tr.), 203 (2d Arg. Tr.). The Court's decision on that motion is pending.

This second preliminary injunction motion seeks an order requiring Galveston County to provide counsel at any hearing where bail is set.

ISSUES TO BE RULED UPON

Whether Plaintiff is entitled to an injunction requiring appointment of counsel at bail-setting hearings because he has demonstrated (1) a substantial likelihood of success on the merits of his Sixth Amendment claim, (2) a substantial threat of irreparable injury if the Court does not order the County to provide counsel, (3) that the threatened injury if the injunction is denied outweighs any harm that will result from ordering the County to provide counsel, and (4) that requiring counsel will not disserve the public interest. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

SUMMARY OF ARGUMENT

The Court has ruled that an initial bail hearing is a critical stage of prosecution. Defendants do not dispute that this ruling applies to the bail review hearing the County now conducts after magistration. But the Felony Judges and the District Attorney assert that this ruling does not apply to magistration, which is the initial bail hearing.

This motion is unopposed by Galveston County, which bears the cost of providing counsel. The Commissioners' Court has recognized the harm that results from uncounseled magistration and applied for a grant to establish infrastructure for providing counsel at magistration. That application was blocked by the Felony Judges, all of whom refused to sign it, despite this Court's ruling that counsel at an initial bail hearing is a constitutional right. The Felony Judges now oppose this motion based on the lack of infrastructure to provide counsel at magistration—a problem of their own making. The District Attorney likewise opposes this motion, arguing that counsel at magistration will prompt him to choose to send prosecutors to magistration as well. But this voluntary burden cannot outweigh the harm to arrestees. Without counsel, arrestees are deprived of any realistic chance to defend themselves.

The oppositions on file do not cite any legitimate reason for revisiting this Court's earlier legal rulings. They do not rebut Plaintiff's evidence that providing counsel at magistration improves both fairness *and* efficiency. The Court should grant this motion and enforce arrestees' Sixth Amendment right to counsel at initial bail hearings.

ARGUMENT

I. Plaintiff Is Likely to Succeed on the Merits of His Sixth Amendment Claim

Plaintiff is substantially likely to succeed on the merits of his Sixth Amendment claim. The Court has ruled as a matter of law that initial bail hearings are a critical stage of prosecution for purposes of the Sixth Amendment right to counsel, Mem. at 28–29; and that the Defendant Felony Judges are Galveston County policymakers for post-arrest practices, *id.* at 38–39. It is uncontested that the Felony Judges' official policy does not provide counsel at initial bail hearings. Galveston County Indigent Defense Plan (2016), Ex. J at 5–6, 19; Amended Galveston County Indigent Defense Plan (2018), Ex. KKK at 3, 18. Notably, Galveston County has not opposed this motion.

The Felony Judges and the District Attorney nevertheless argue against success on the merits by reiterating arguments briefed in their motions to dismiss and asking this Court to revisit previously decided questions of law. The Court should decline because (1) the Court's earlier rulings are the law of the case, (2) the Court's original ruling that initial bail setting is a critical stage of prosecution was correct, and (3) the Court's original ruling that Felony Judges have final policymaking authority was correct.

A. The Court's Ruling on Legal Questions Raised by Defendants' Motions to Dismiss is Law of the Case

The Court has ruled as a matter of law that "[t]here can really be no question that an initial bail hearing should be considered a critical stage of trial." Mem. at 28. The Court has also held as a matter of law that the Defendant Felony Judges are Galveston

County policymakers for post-arrest practices.[1] *Id.* at 38–39. Contrary to the Defendants' assertions, the law of the case doctrine is well-settled and applicable here. *See generally* Wright & Miller, 18B Fed. Prac. & Proc. Juris. 2d § 4478–4478.1.

The law of the case doctrine is common sense: "[W]hen a court decides upon a rule of law, that decision should continue to govern the issues in subsequent stages of the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815–16 (1988). The doctrine creates a "strong presumption of finality" in order to advance the "sound public policy that litigation should come to an end." *United States v. Lawrence*, 179 F.3d 343, 351 (5th Cir. 1999) (quoting *United States v. Mendez,* 102 F.3d 126, 131 (5th Cir. 1996)). A party overcomes the presumption of finality if the court becomes "convinced that its prior decision is clearly erroneous and would work a manifest injustice." *Pepper v. United States*, 562 U.S. 476, 506–07 (2011).

Defendants have not carried their burden to overcome a presumption of finality; in fact, Defendants have hardly raised new legal arguments, nor have they meaningfully rebutted Plaintiff's evidence with their own. The Court should not revisit its prior rulings.

B. Initial Bail Hearings are a Critical Stage of Prosecution

Defendants have not identified any reason for the Court to reconsider its ruling. The Felony Judges' arguments consist entirely of discussion of *Rothgery v. Gillespie*

[1] The Felony Judges and the District Attorney contest that these rulings were rulings as a matter of law. But they also concede that the critical stage analysis, *see* ECF No. 236 (DA Opp.) at 7–12, and the identity of the final county policymaker, ECF No. 234 (FJ Opp.) at 10, are strictly questions of law. The Court's sole reference to facts was a citation to Professor Colbert's data, which merely "underscored" the Court's legal conclusions, Mem. at 28. In any case, the data remain uncontested.

County, 554 U.S. 191 (2008), two opinions dismissing pro se prisoners' *Rothgery* claims,[2] and two state court cases concerning the right to counsel at hearings where bail was not set.[3] ECF No. 234 (FJ Opp.) at 11–16. The District Attorney similarly relies on cases that do not involve a bail hearing,[4] ECF No. 236 (DA Opp.) at 17–24, and argues that *Rothgery* does not require appointment of counsel at magistration or otherwise alter the character of magistration, *id.* at 8, 10–12, 17. The Court has already rejected these arguments.

1. Initial Bail Hearings Meet the Two-Pronged Test for a Critical Stage

The Court's prior ruling reflects what a proper critical stage analysis looks like. The Court considered (1) whether an initial bail-setting hearing has the potential to prejudice the defendant,[5] and (2) whether counsel is necessary to avoid that prejudice.[6]

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[2] These are dismissals of pro se prisoners' arguments that *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2009), requires counsel at magistration. The claim Plaintiff raises here is a more developed argument and depends on interpretation of other Supreme Court cases. *Compare Kennedy v. Bexar Cnty.*, No. 16-ca-262, 2016 WL 1715200, at *2 (W.D. Tex. Apr. 27, 2016) (dismissing pro se prisoner's claim, which was a simple argument that *Rothgery* was violated by lack of counsel at magistration); *Mortland v. Hays Cnty. Cmty. Supervision & Corrs. Dep't*, No. 12-ca-488, 2013 WL 1455657, at *3 (W.D. Tex. Apr. 8, 2013) (same).

[3] *Green v. State*, 872 S.W.2d 717, 722 (Tex. 1994) (en banc) ("[T]he record does not establish that bail was set at the [hearing in question]."); *O'Kelley v. State*, 604 S.E.2d 509, 564 (Ga. 2004) ("O'Kelley was taken before a magistrate judge . . . . [B]ail could only be set by a superior court judge . . . .").

[4] *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991) (concerning probable cause hearings); *Gerstein v. Pugh,* 420 U.S. 103 (1975) (same); *Green*, *supra* n.3 (concerning a hearing where bail was not set); *Gilley v. State*, 418 S.W.3d 114 (Tex. Crim. App. 2014) (concerning *in camera* examination of a witness).

[5] Mem. at 27–28 (citing *Bell v. Cone*, 535 U.S. 685, 695–96 (2002); *United States v. Ash*, 413 U.S. 300, 311 (1973); *McAfee v. Thaler*, 630 F.3d 383, 391 (5th Cir. 2011)).

[6] *Id.* (citing *Rothgery*, 554 U.S. at 212 n.16; *Ash*, 413 U.S. at 311; *McAfee*, 630 F.3d at 391). The Court also cited other examples of critical stages as useful examples, *id.* at 28 (citing *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (preliminary hearings); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (arraignments); *Missouri v. Frye*, 566 U.S. 134, 139 (2012) (plea negotiations)); and quoted approvingly from a recent district court case discussing appointment of counsel at bail-setting hearings in Louisiana, which noted the high risk that bail-setting hearings can prejudice defendants, as well as the necessity of counsel to protect defendants from that prejudice. *Id.* (quoting *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018)).

Accord United States v. Wade, 388 U.S. 218, 237 (1967) (holding critical stage analysis turns on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice").

While the District Attorney acknowledges this test,[7] he attempts to undermine this analysis by asserting that critical stages must be "trial-like confrontations." DA Opp. at 12–13. But this phrase does not mean that a critical stage must look like a mini-trial. It means that denying counsel at a critical stage can irreparably prejudice the trial itself. *Id.* at 311 (describing historical expansion of right to counsel "when new contexts appear presenting the same dangers that gave birth initially to the right itself."). This Court has already determined that initial bail hearings meet this test. Mem. at 27–28 (holding that initial bail hearings are "trial-like confrontations" because they "hold significant consequences for the accused") (quoting *Rothgery*, 554 U.S. at 212 n.16; *Bell v. Cone*, 535 U.S. 685, 695–96 (2002)). Critical stages do not require the presence of a prosecutor or any legal proceeding remotely resembling a trial: law enforcement's recording of a defendant's conversation with an informant, *Massiah v. United States*, 377 U.S. 201, 206 (1964); witness identification at a lineup, *Wade*, 388 U.S. at 231; and a formal plea offer, *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012); are all critical stages.

The Court's determination is now further bolstered by Plaintiff's unrebutted empirical evidence. Even if the Court credited the revised bail procedures, Ex. JJJ, as a

[7] The District Attorney block-quotes a test asking whether the defendant's rights are prejudiced and whether counsel could have helped avoid that prejudice. DA Opp. at 22 (citing *Gilley*, 418 S.W.3d at 120 (quoting Wayne R. LaFave *et al.*, 3 Criminal Procedure § 11.2(b) at 50 (3d ed. 2013))).

formally announced, permanent policy change,[8] magistration would still pose a substantial risk of irreparable prejudice. A bail review hearing does not remedy the prejudice that results from the "anchoring effect" of the bail amount ordered at magistration,[9] or the harm of being forced into an early, critical criminal proceeding without counsel, and consequently struggling to establish a strong relationship to facilitate investigation in the most important hours following arrest.[10] A bail review hearing does not remedy the harm caused by unnecessary pretrial detention pending the bail review hearing.[11] A bail review hearing does not remedy the harm caused by uncounseled statements at magistration.[12] And under the revised bail procedures, many arrestees do not receive a bail review hearing at all.[13]

The District Attorney's two main citations are unpersuasive.[14] The first, *Rojas v. City of New Brunswick*, held that the "setting of bail certainly is a 'critical stage' in the

[8] Which the Court should not do, because the County has not met its burden to demonstrate voluntary cessation. Pl.'s Letter Br. Re: Revised Bail Procs. at 1, ECF No. 174; 1st Arg. Tr. 10:17–12:16, 13:22–14:4; Pl.'s First Proposed Findings ¶¶ 101–08, ECF No. 201.

[9] Pl.'s Second Proposed Findings ¶¶ 25–26, ECF No. 241 (collecting evidence).

[10] *Id.*. *E.g.*, Colbert Tr. 113:4–22 ("[I]f there's one thing that lawyers for poor people and low-income people have learned over the years, building trust and gaining a client's confidence requires an enormous investment of—of commitment, of energy, of showing, of demonstrating that you truly are fighting on behalf of this individual. . . . [A] lawyer[ ] is going to continue to represent that person or will pass it on—the information on to the next lawyer, who already has information, who already knows who has to be investigated, which witnesses need to be spoken to. . . . Gaining a lawyer's representation, at the initial appearance, not only benefits the individual in terms of liberty, but it means that that person has somebody who is going to present a formidable opposition to the state and to the prosecution.").

[11] Pl.'s Second Proposed Findings ¶¶ 21–24 (collecting evidence).

[12] *Id.* ¶ 27 (collecting evidence).

[13] Pl.'s First Proposed Findings ¶ 88 (outlining categories of arrestees who do not get a bail review hearing).

[14] The remainder of the District Attorney's cases cited as the "split of authority in the nation" are dismissals of pro se prisoner cases, *Kennedy*, *supra* n.2; *Boyer v. Director*, 12-cv-0167, 2015 WL 5616322, at *4 (N.D. Tex. Aug. 7, 2015), *adopted by* 2015 WL 5666757 (N.D. Tex. Sept. 22, 2015); cases about stages other than bail hearings, *Styron v. Johnson*, 262 F.3d 438, 447 (5th Cir. 2001) ("The transfer of Styron's case was an administrative matter and not a

criminal proceedings." *Rojas*, No. 04-cv-3195, 2008 WL 2355535, at *16 (D.N.J. June 4, 2008) (quoting *State v. Fann*, 239 N.J. Super. 507, 520 (1990)). The *Rojas* court nevertheless declined to order counsel at initial bail hearings based on the "practical consideration[]" that doing so would delay bail setting. *Id.* at 16. The Court should not follow *Rojas*. First, there is no precedent supporting the court's "practical considerations" analysis. *Id.* at *16 (quoting *Fann*, 239 N.J. Super. at 520). Second, there is no evidence in this case that providing counsel would delay magistration. To the contrary, this Court has ample evidence that Galveston County is capable of providing counseled hearings within 24 hours of arrest.[15]

Second, the Eleventh Circuit's nonbinding decision in *United States v. Mendoza-Cecelia*, 963 F.2d 1467, 1473 (11th Cir. 1992), concerned an arrestee who offered an admission of guilt at his initial bail hearing. This is one of the major risks that makes an initial bail hearing a critical stage. Yet the Eleventh Circuit rejected the defendant's Sixth Amendment claim, holding that "initial appearance is largely administrative" and "the bail hearing is not a trial on the merits." *Id.* at 1473. By erroneously focusing solely on the similarities between the initial appearance and an actual trial, the *Mendoza-Cecelia* court incorrectly failed to ask, as required by *Wade*, what prejudice can result from an

'critical' proceeding."); *Boyer*, 2015 WL 5616322, at *4 (failing to mention bail at all and dismissing pro se prisoner's complaint that the entirety of his pretrial "period" was a critical stage); and a non-precedential out-of-circuit case that offers just one sentence of analysis. *Farrow v. Lipetzky*, 637 F. App'x 986, 988 (9th Cir. 2016) ("Nor did the preliminary bail determination made at the initial appearance render that hearing a critical stage.").

[15] Pl.'s First Proposed Findings ¶ 87.

uncounseled bail hearing. Again, contrary to the District Attorney's suggestion,[16] this analysis does ask whether bail hearings look like a mini-trial. The analysis asks whether denying counsel at the bail hearing can irreparably prejudice the outcome of the case. The answer is clear: it is uncontested that lack of counsel at an initial bail hearing results in unnecessary pretrial detention, which, as Plaintiff has previously briefed,[17] results in worse case outcomes. The *Mendoza-Cecelia* court did not consider this prejudice, likely because in the federal system, judges cannot set unaffordable bail or order pretrial detention without appointing counsel and holding a hearing with robust procedural protections. 18 U.S.C. § 3142(f)–3142(i). By contrast, Galveston's revised procedures continue to allow magistrates to set unaffordable bail that results in pretrial detention. When magistrates do so intentionally—*i.e.*, when magistrates expressly set bail above what an individual affirms she can afford—arrestees are detained for up to 48 hours awaiting a bail review hearing. When magistrates do so unintentionally—*i.e.*, when magistrates set bail that an individual affirms she can afford but she ultimately cannot—arrestees are detained *indefinitely* without any bail review hearing. And on top of the harm of pretrial detention, both the Fifth and Eleventh Circuits have held that there is no remedy for uncounseled inculpatory statements at a bail hearing. *Mendoza-Cecelia*, 963 F.2d at 1476 ("Greenberg's admission of guilt to the magistrate judge was therefore properly admitted into evidence.") (citing *United States v. Dohm*, 618 F.2d 1169, 1174 (5th Cir. 1980) (en banc) (permitting uncounseled admission of guilt at initial bail hearing

[16] DA Opp. at 10 ("[T]he bail hearing is not a trial on the merits in which the guilt of the accused is adjudicated.").

[17] Pl.'s First Proposed Findings ¶¶ 42, 55; Pl.'s Second Proposed Findings ¶¶ 21–25.

into evidence at trial). This reality dramatically undercuts the District Attorney's argument that a subsequent habeas petition remedies prejudice resulting from a bail hearing.

Far from an "unsupported expansion of the Sixth Amendment" imposing an "amorphous and all-encompassing obligation," FJ Opp. at 16–17, the Court reasoned from binding Supreme Court precedent and persuasive appellate and district court cases to conclude that initial bail hearings are a critical stage of prosecution. None of the Defendants' arguments undermine the Court's analysis.

2. Initial Bail Hearings as a Critical Stage are Consistent with *Rothgery*

Defendants reiterate their argument that the Court's prior ruling is inconsistent with *Rothgery*, 554 U.S. at 195. The Court has already considered and rejected this argument. Mem. at 29.

C. Felony Judges Have Final Policymaking Authority to Provide Counsel at Magistration

The Felony Judges challenge the Court's ruling that they are final policymakers for post-arrest practices in Galveston County. They make two arguments: one reiterating their rejected argument under *Ex parte Clear*, 573 S.W.2d 224, 229 (Tex. Crim. App. 1978) (en banc), and another that municipal policymakers are determined by state law. Plaintiff has previously briefed the *Ex parte Clear* argument,[18] and has argued himself that policymakers are determined by state law.[19]

[18] Pl.'s Omnibus Prelim. Inj. Reply at 12–13, ECF No. 120.

[19] Pl.'s Omnibus Opp. to Mots. to Dismiss at 33, ECF No. 111; Pl.'s Omnibus Prelim. Inj. Reply at 18.

The Felony Judges contend, however, that because policymakers are determined by state law, the Court must disregard the Indigent Defense Plan. The Court could do so, and Plaintiff would still prevail: state law plainly grants the Felony Judges final policymaking authority for the County.[20] The Plan specifically states that it is enacted "pursuant to the Fair Defense Act" and that it constitutes "standing rules and orders" issued en banc by the Felony Judges. It is an uncontested exercise of the Felony Judges' power under the Fair Defense Act—specifically, Article 26.04 of the Texas Code of Criminal Procedure—to "adopt and publish written countywide procedures for timely and fairly appointing counsel for an indigent defendant" by "local rule."[21] And the authority to "adopt local rules," as has been briefed at length elsewhere,[22] is granted to the Felony Judges under Section 74.093 of the Texas Government Code. There is no reason for the Court to disregard this valid exercise of statutory authority to assist its interpretation of state law. *Cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1987) (plurality opinion) ("[T]he identification of policymaking officials . . . is not a question of fact *in the usual sense*.") (emphasis added).

[20] As the Court has already ruled, the core policymaking authority at issue in this case is codified in the Court Administration Act, Subchapter D, Administration by County: "The district and statutory county court judges in each county shall, by majority vote, adopt local rules of administration. The rules must provide for: assignment, docketing, transfer, and hearing of all cases, subject to jurisdictional limitations . . . [and] designation of court divisions responsible for certain matters . . . . The rules may provide for . . . other strategies for managing cases that require special judicial attention . . . and any other matter necessary to carry out this chapter or to improve the administration and management of the court system and its auxiliary services." Tex. Gov't Code § 74.093 (subsection labels omitted).

[21] Galveston County Indigent Defense Plan (2016), Ex. J at 1, 3.

[22] Pl.'s Omnibus Opp. to Mots. to Dismiss at 35; Pl.'s Prelim. Inj. Reply at 12.

II. Class Members Will Suffer Irreparable Harm in the Absence of an Injunction

Defendants premise their irreparable harm argument on their assertion that an initial bail hearing is not a critical stage. This argument both overlooks the Court's prior and misunderstands the irreparable harm analysis. As a threshold matter, while Defendants argue that the Court's decision on whether the bail setting hearing is a critical stage in a criminal proceeding is not decided, as discussed *supra* at 5–6 & n.1, this is simply not the case: the Court has decided the issue and it is the law of the case. By focusing on the critical stage question as part of the irreparable harm analysis, Defendants essentially reargue the merits in an effort to minimize the very real and substantial harm resulting from the violation of Plaintiffs' Sixth Amendment rights.

Notably, Defendants do not dispute the harms from a lack of counsel at magistration—nor could they, since the County essentially concedes these harms in a formally approved grant application. Galveston County Commissioners' Court Minutes & Grant Application for Counsel at Magistration (May 4, 2018) at 5, Ex. UUU ("Grant Application").[23]

Rather than argue that no irreparable harm occurs, Defendants argue that the irreparable harm does not occur long enough, or frequently enough, to establish a need

[23] In an attempt to minimize these concessions, the Felony Judges have provided an affidavit claiming that one sentence in the application should have stated that Plaintiff "alleges those who can afford to pay bond able to leave jail prior to adjudication and those who cannot afford it to stay in jail." Affidavit of Jessica Tyler at 26–27, ECF No. 234-1. Amending one sentence in the grant application does not address the remainder of the document, which states that arrestees who are released pretrial have better case outcomes, and representation at magistration would lead to reduction in bond amounts, more personal recognizance bonds, and an overall decrease in incarcerative sentences. Grant Application, Ex. UUU. In any case, the Commissioners' Court formally approved the grant application as written.

for class-wide relief. These arguments fail. The Sixth Amendment violation alone is sufficient to demonstrate irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (holding that a constitutional violation "for even minimal periods of time, unquestionably constitutes irreparable injury."); *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) ("[M]ost courts hold that no further showing of irreparable injury is necessary.") (quoting 11A Wright & Miller, Fed. Prac. & Proc. Civ. 3d. § 2948.1).

In addition, it is uncontested that the Sixth Amendment violation in this case results in unnecessary pretrial detention pending a bail review hearing. "Even temporary unconstitutional deprivations of liberty" suffice to establish irreparable harm. *Pugh v. Rainwater*, 483 F.2d 778, 782–83 (5th Cir. 1973), *rev'd in part on other grounds sub nom. Gerstein v. Pugh*, 420 U.S. 103 (1975). The Court should not rely on the informal, post-litigation implementation of bail review hearings to moot the need for preliminary relief. But even if the Court credited the revised bail procedures as a formal policy change, they permit up to 48 hours of pretrial detention before a counseled bail review hearing. Revised Bail Procedures at 4, Ex. JJJ. The harms of pretrial detention accrue quickly in that period.[24] And arrestees who do not receive bail review hearings face unnecessary pretrial detention for even longer than 48 hours.

[24] Pl. First Proposed Findings ¶¶ 40–42; Bunin Decl., Ex. RRR ¶ 9 ("In over 33 years as an attorney, I have seen clients lose jobs within 24 hours, fail to graduate, and have their parental rights terminated, all because they were stuck in pretrial detention.").

Other irreparable harm results from the Sixth Amendment violation at magistration, even when counseled bail review hearings are held within 24 hours as the Defendants claim. There is significant potential for inculpatory statements to be made at Galveston magistrations. *See United States v. Wade*, 388 U.S. 218, 237 (1967) (holding critical stage analysis turns on "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice") (emphasis added). Magistrates inform arrestees of their right to remain silent in a perfunctory manner, recited quickly among a list of other rights and without a warning that their statements at magistration are recorded. Recordings of May 2017 Magistrations, Ex. M, Attachs. 1–5; Additional Video Recordings of Magistration and Bail Review Hearings, Ex. LL.[25] Remaining silent at magistration carries a high risk of detention under pre-set bail in an unaffordable amount.[26] The inadequacy of the advisement of the right to remain silent, together with the pressure an arrestee understandably feels to advocate for their own release, create an unacceptable risk that uncounseled statements under these circumstances are involuntary. *United States v. Newell*, 315 F.3d 510, 519 (5th Cir. 2002) (requiring that waiver of constitutional rights be "voluntary" and "done with sufficient awareness of the relevant circumstances and the likely consequences"). Even for those arrestees fortunate enough to get a bail review hearing, there is no remedy for uncounseled inculpatory statements at magistration.

[25] *Cf.* Deposition Transcript: Michael Young at 157:7–9, Ex. FFFF ("I do not think it's appropriate to advise someone of critically important constitutional rights in a rapid and perfunctory manner.").

[26] Pl.'s First Proposed Findings ¶¶ 17–24.

A bail review hearing also suffers from the anchoring effect a prior bail determination has on a reviewing court, which makes it difficult to obtain a lower, affordable amount or to obtain release. Colbert Decl. ¶ 18, Ex. QQQ; Bunin Decl. ¶ 31, Ex. RRR. Defendants contest this evidence by asserting that these witnesses' opinions are unsupported, without confronting the witnesses' considerable experience with the effects of uncounseled bail hearings.[27] Defendants have not rebutted these opinions with evidence of their own.

III. Harm Resulting From Deprivation of the Right to Counsel Outweighs the Administrative Burden of Providing Counsel

The balance of harms compares the burden on the plaintiff of the status quo to the burden on the respective defendants of an injunction. Galveston County, which would fund any provision of counsel ordered by the Court, does not oppose an injunction requiring counsel at any bail determination, including the initial bail determination at magistration. The Court may therefore disregard any fiscal harms to the County argued by the Felony Judges and District Attorney.

The only two defendants who oppose an injunction are the Felony Judges and the District Attorney. By any metric, the hardship class members suffer from being denied counsel far outweighs any harm to these Defendants. The Felony Judges could simply formalize the requirement in the Indigent Defense Plan or issue a standing order. The

[27] Professor Colbert's opinion is buttressed by forty-five years of experience and research which includes representation at bail review hearings. Colbert Decl. ¶¶ 5–10, Ex. QQQ. Mr. Bunin's rests on data from Harris County, Bunin Decl. ¶ 31 ("When I reviewed the results the total changes were in less than five percent of cases."), as well as his thirty-three years of experience representing criminal defendants and managing public defenders offices. *Id.* ¶ 6.

District Attorney would suffer even less harm, as he concedes his office would not even have a role implementing the injunction. Both Defendants attempt to salvage their opposition by asserting economic hardships on behalf of the non-opposing County. They also distort the hardships to class members from representation at magistration and exaggerate the administrative burden. The Court should reject these arguments.

A. Defendants Have Not Rebutted Plaintiff's Evidence That Providing Counsel at Magistration Would Result in Net Savings to the County

The Felony Judges first cite deposition testimony from Plaintiff's witness Alex Bunin, the chief public defender in Harris County, Texas, that the Harris County budget doubled from providing defense counsel at magistration. FJ Opp. at 24. But the Felony Judges have not offered any evidence supporting the claim that Galveston's budget would similarly increase, and, in any event, Galveston County does not object.

Conversely, the Felony Judges do not dispute the potential cost savings resulting from counsel increasing the number of individuals released at magistration, rather than delaying release until the bail review hearing. *E.g.*, Young Tr., Ex. FFFF at 202. The District Attorney implies that these savings would be insignificant, since only 8% of individuals booked into the jail required bail review hearings. DA Opp. at 12. Nonetheless, the undisputed evidence demonstrates that counsel could significantly reduce even the 8% of people who currently receive bail review hearings, thus largely eliminating the need for the additional hearing.

But the District Attorney's 8% estimate understates the number of people who would benefit from counsel at magistration. Galveston County does not grant bail review

hearings to those who swear they can afford either the full bail amount or 10% of the bail amount set—depending on the type of bail ordered—or those who refuse the financial interview. These class members may nonetheless remain in jail on unaffordable bail because they mistakenly assess their ability to pay; accurately assess their ability to pay 10% of the total bail to a bond agent, but cannot secure a bail bond; or refuse the financial interview from fear, distrust, or a misunderstanding of the interview's purpose.[28] The District Attorney's 8% calculation excludes these individuals.

Counsel is essential to avoid either erroneously detaining individuals who cannot actually make bail, or erroneously excluding them from bail review hearings. Counsel can argue for a personal (unsecured) bond or nonfinancial conditions; help clients more accurately assess their ability to pay (for example, by verifying potential financial sources, such as family); argue for a secured bond set at the client's ability to pay, rather than the 10% required to obtain a surety bond; and present evidence and argument at magistration on an individual's ability to pay bail, even if the individual has refused the financial interview with Pretrial Services.[29]

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[28] One fix would be to provide a hearing to *all* arrestees still detained under secured bail 12 hours after magistration, and exclude the 10% calculation, because release at a 10% rate is not guaranteed. Availability of that rate is controlled by a private bail bondsman, not the court.

[29] *E.g.*, Bunin Decl. ¶ 13 ("[("[L]awyers highlight the individual characteristics that do not always lend themselves to a rote description in a pretrial report. A pretrial report noting that a defendant works as a janitor is not the same as a proffer by counsel that he or she will not be paid again for two weeks and has no immediate access to money."); Colbert Tr. 109:13–110:10 ("Many defendants are wishful about their ability to pay and, oftentimes, they will exaggerate what they believe others will do or what they believe they, themselves, are capable of doing, while inside of jail. The defense lawyer will actually pinpoint the financial needs of the individual and will be able to make an argument that informs the court that this person receives a disability check of $900 a month, say, and will specify where that money is going. And so while the defendant may have said, "I can make $100 bail," there is no $100 in that budget. So a defense lawyer is able to provide much more accurate information than somebody who's completing a form, who may not be as forthcoming, because it's quite embarrassing when you don't have money, and so it may be a number that the person hopes somebody will come forward with, but it turns out to be a number that's far beyond the individual's ability to post.").

B. There is No Evidence that Counsel Would Be Ineffective or Delay Magistration

The Felony Judges' arguments also mischaracterize the harms to class members by asserting that providing access to counsel prior to magistration may force arrestees to miss magistration and wait until the next scheduled proceeding. FJ Opp. at 25. The Felony Judges relatedly contend that this delay is unjustifiable because defense counsel will rarely call witnesses for bail hearings. *Id.* As an initial matter, the Felony Judges do not conduct magistration and have asserted that they do not control what happens at magistration. They further fail to articulate how they would be harmed if magistrations, even if occasionally delayed beyond 12 hours, still occur within 24 hours under Galveston's current system or within the 48 hours allocated under Texas law.

Notwithstanding these omissions, this argument is meritless. Michael Young establishes that, even where defense counsel does not call witnesses, they can still perform a meaningful investigation by interviewing the client, contacting potential witnesses, and identifying facts to mitigate any criminal history. Young Tr. 69–70. Young and Bunin also provide undisputed testimony that such an investigation can occur in under 30 minutes, severely undermining Defendants' position that allowing individuals access to counsel will delay magistrations.

Bunin and Young's testimony also refutes the District Attorney's assertion, DA Opp. at 37, that counsel cannot provide effective representation in the window before

magistration.[30] Thus, in situations where counsel has met with the client and is prepared for magistration, yet the conference occurs within the 3-hour window required by the proposed injunction, counsel and the client could decide to waive the access requirement and proceed to magistration.[31]

C. Defendants Have Not Identified Actual Administrative Burdens

Defendants also raise a variety of arguments concerning supposed administrative burdens. First, the Felony Judges themselves reference Michael Young's testimony to assert that appointing counsel would require magistrates to be available twenty four hours a day. Young's testimony establishes no such thing. Young was discussing magistration in Bexar County. Young Tr. 9–10. Galveston County magistrations occur twice a day at 7:00 a.m. and 7:00 p.m. Magistrates and defense counsel would simply need to be available during those times. Indeed, Young said he would prefer Galveston's approach of setting particular times of the day, since he finds staffing the proceedings at all times of the day burdensome. Young Tr. 74.

Second, both the Felony Judges and District Attorney assert that an injunction would require district attorneys to attend magistration. But the District Attorney concedes that, because he would not be subject to the injunction, attending magistration would be

[30] The Felony Judges claim that Bunin stated "it would not be possible to do a conflict check before counsel is designated." FJ Opp. at 27. Again, this mischaracterizes the record: while Bunin does state that public defenders in Harris County do not conduct conflicts checks prior to bail-setting hearings, Bunin Tr. at 17:15–23, he at no point suggests conflict checks would be unworkable under a system which appoints private counsel, such as Galveston County. In fact, the difficulties Bunin (and Young) described in performing conflict checks are peculiar to institutional defender offices that must confirm whether any member of their office has represented or currently represents a client's co-defendant. Because Galveston County appoints private counsel to magistration, rather than a public defender office, it would not encounter these problems, as individual attorneys could more easily assess their conflicts.

[31] Young Tr. 195:3–19 (agreeing that he waives clients' rights, with their consent, when doing so is in their interest).

entirely within his discretion. The District Attorney cannot convert a voluntary response to an injunction against third parties into a hardship from the injunction. Defendants' position is puzzling, given that there is nothing stopping district attorneys from attending magistration now. As the District Attorney states, he must represent the state in all proceedings. DA Opp. at 36. *Rothgery* makes clear that magistration initiates criminal proceedings with or without the District Attorney. It necessarily follows that magistration initiates criminal proceedings whether or not the public defender is present.

The District Attorney's position reveals the wealth-based discrimination at the heart of this case. The District Attorney traditionally chooses not to attend magistration, despite full knowledge that those who can afford bail will be released regardless of their actual risk of flight or danger. Yet the District Attorney *does* attend bail review hearings, which are reserved for individuals who are too poor to afford bail. This practice reveals a belief that only those who cannot make bail pose a sufficient risk to warrant his office's involvement; dangerous arrestees who can make bail never face the District Attorney's opposition. The District Attorney's position is plainly discriminatory. *Cf. Schultz v. State*, 330 F. Supp. 3d 1344, 1364 (N.D. Ala. 2018) (finding similar system in Cullman County, Alabama discriminatory because "not all criminal defendants who pose a real and present danger to the public are indigent, but Cullman County detains only indigent criminal defendants who pose a real and present danger to the public. Dangerous defendants with means enjoy pretrial liberty."); *See also Bearden v. Georgia*, 461 U.S. 660, 671 (1983) (rejecting Georgia's "naked assertion that a probationer's poverty by itself indicates he

may commit crimes in the future and thus that society needs for him to be incapacitated.").

Third, the District Attorney also posits that, if his office chose to attend magistration, it would convert each magistration into an adversarial proceeding, prolonging the proceedings and requiring more magistrates and jail staffing. DA Opp. at 35–36. This argument is unpersuasive. By his own calculations, the District Attorney has consented to magistrates releasing 92% of arrestees. It stands to reason that prosecutors would agree to release for a similar bulk of arrestees if they attended magistration—declining even to make an appearance in uncontroversial cases, as in Bexar and Harris Counties—and would only contest a small minority of cases. Young Tr. at 58-60, 68. Prosecutors' presence at magistration would have little impact on current staffing or the time in which arrestees are released, particularly given that having both the defense and prosecution present at magistration would almost certainly reduce the need for subsequent bail review hearings. Regardless, it is the County, not the District Attorney, who would fund additional magistrates or jail personnel, and the County has not opposed the requested injunction.

Fourth, even though the Felony Judges disavow involvement with magistration, they contend that Plaintiff's proposed injunctive relief is "unworkable." The Judges ignore Plaintiff's argument that Galveston County already has the infrastructure in place to provide bail review hearings that, according to the County, almost always occur within 24 hours after arrest. Henry Tr. 209:22–211:17, Ex. HH. Indeed, the Felony Judges' claim the proposed relief is "unworkable" is in fact a claim about alleged administrative

burdens on the County—which has not objected—none of which outweigh the serious and irreparable harm arrestees face under a system that is prejudicing their case and stripping them of fundamental rights.

The Felony Judges' argument relies almost entirely on mischaracterizations of testimony by Bunin and Young. FJ Opp. at 26. For example, the Felony Judges allege Bunin testified in his deposition that a "three-hour lead time before the bail-setting hearing would be unworkable." FJ Opp. at 27. But the testimony cited by the Felony Judges actually says that attorneys require a "sufficient" amount of time to speak with defendants prior to the hearing, not that a rule setting a lead time would be "unworkable" in Galveston County. Bunin Tr. at 64:5–12, Ex. EEEE.

The Felony Judges also allege "there is no jurisdiction to magistrate arrestees who are on warrant for a felony offense" and that Young "confirmed" this in his declaration and deposition. FJ Opp. at 27. However, the Felony Judges provide no citation to Young's declaration and their sole citation to his deposition states only that defenders in Bexar County do not represent such arrestees under the limited scope representation program for the mental health docket. Young Tr. at 86:7–12. Neither Young nor Bunin claim there is no jurisdiction over persons on warrant for felony offenses. *Compare* Texas Benchbook, Ex. GGGG at 114, 116 (describing a magistrate's duties to "adults and juveniles arrested [] under the authority of a warrant": "Set the amount of bail . . . [and] Set conditions of bail" (citing Tex. Code Crim. Proc. Art. 15.17(a), 17.40(a))); Young Tr. 195:20–196:20 (describing Bexar County felony judges' designation of a magistrate to hear writs contesting bail amounts set by another magistrate), 199:25–201:4 (describing

arrestee excluded from limited scope representation program who was arrested under warrant in error; defense counsel present to represent other arrestees nevertheless caught the error, called a judge, and arranged for her release).

Finally, the Felony Judges claim the proposed injunction is unworkable because it requires the County to keep track of basic information about arrestees and the reasons they have been denied bail. FJ Opp. at 28. But there is no evidence showing that this burden will fall on the Felony Judges' or District Attorney's shoulders. And the County already maintains all or most of this information in conducting its bail review hearings and, as such, any theoretical burden of collecting additional information would be minimal and surely outweighed by the harms that would result from failing to collect such information about arrestees.

IV. Providing Counsel is in the Public Interest

The Felony Judges and District Attorney also allege that providing arrestees with counsel would not serve the public interest because it would prolong pretrial detention. FJ Opp. at 28; DA Opp. at 39. They note in particular that Plaintiff's proposed injunctive relief requests that defense counsel be permitted at least three hours of lead time to consult with arrestees in order to prepare for their bail-setting hearing. DA Opp. at 36. But the argument is entirely speculative: Defendants do nothing to show that such relief would actually delay magistration or that the benefits of having counsel at initial bail-setting would not outweigh whatever additional delay, if any, from conferring with counsel. Moreover, under Galveston County's current policy, arrestees are only entitled to counseled bail review within 48 hours after their arrest. That such reviews may in

some cases informally occur sooner than the required two days—but certainly not sooner than three hours—does little to address the fact that persons are unnecessarily detained under the County's policies solely because of their inability to afford release.

The District Attorney further alleges that providing every arrestee with "the gift of counsel" would be adverse to the public interest because it would "contradict[] Texas law which requires the appointment of counsel to those who cannot afford to hire an attorney, not to every arrestee." DA Opp. at 32 (citing Tex. Code Crim. Pro. art. 1.051 and 26.04(a)). There is no contradiction: the statutes the District Attorney cites require the appointment of counsel for indigent defendants but do not speak to the appointment of counsel for other arrestees. As explained *supra*, the Court has already ruled as a matter of law that initial bail hearings are a critical stage of prosecution for purposes of the Sixth Amendment right to counsel. Mem. at 29. "It is always in the public interest to prevent the violation of a party's constitutional rights." *ODonnell*, 251 F. Supp. 3d 1052, 1159 (S.D. Tex. 2017) (citation omitted). For all the reasons discussed above, the public interest weighs heavily in favor of protecting arrestees' right to counsel at magistration.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter his proposed injunction requiring counsel at magistration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I filed this motion via the ECF system, which serves this motion on all counsel of record.

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