

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

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MARANDA LYNN ODONNELL, et al.)	
)	
Plaintiffs,)	
)	
v.)	Case No. 16-cv-01414
)	(Consolidated Class Action)
HARRIS COUNTY, TEXAS, et al.)	The Honorable Lee H. Rosenthal
)	U.S. District Judge
Defendants.)	
_____)	

EXPERT REPORT OF DR. STEPHEN DEMUTH

Materials Reviewed: Data produced by Defendants in this case; Expert Analysis of Dr. Stephen Demuth filed in the Fifth Circuit, May 23, 2018 (Dkt. 402-4); Declarations of Ed Wells, filed in the Fifth Circuit on May 3, 2018 (Dkt. 402-8) and May 21, 2018 (Dkt. 402-5); Declaration of Judge Natalie Fleming, filed in the Fifth Circuit on May 21, 2018 (Dkt. 402-6).

I. 92 percent of misdemeanor cases¹ are released prior to disposition (as compared to 66 percent pre-injunction)

1. More than 11,000 people have been released pursuant to this Court’s preliminary injunction order since it went into effect on June 6, 2017, according to information provided by counsel for the Sheriff.

2. From January 1, 2015 until January 31, 2017 (the “pre-injunction” period), 66 percent of misdemeanor cases were released on some type of bond after arrest. Those releases sometimes occurred several days or weeks after arrest.

¹ The findings in this report (unless otherwise noted) exclude cases subject to holds or concurrent felony charges. They also use “case” as the unit of analysis, rather than “person. The pre-injunction percentages presented in this report differ slightly from those presented in my second rebuttal expert report (Dkt. 242), because the prior analyses used “person” as the unit of analysis, and the findings presented here and in my recent report submitted to the Fifth Circuit use “case” as the unit of analysis. Both analyses are accurate. The main reason for using “case” instead of “person” is to preserve data. Using “person” results in the deletion of concurrent charges (cases) through a process that requires the selection of a primary case for the purposes of analysis. Also, the County has traditionally reported forfeiture rates using “case” as the unit of analysis. Regardless, the results are substantively the same.

3. Between June 7, 2017 and April 30, 2018 (the “post-injunction” period), 92 percent of misdemeanor cases were released before disposition. These releases typically occurred within 24 hours.²

II. A greater proportion of misdemeanor cases now avoid conviction³

4. Among cases released prior to disposition, pre-injunction:

- a. 46 percent resulted in a guilty plea.
- b. 41 percent were dismissed.
- c. 11 percent resulted in deferred adjudication.
- d. Released cases resolved in a median of 125 days.

5. Among cases detained at disposition, pre-injunction:

- a. 81 percent resulted in a guilty plea.
- b. 16 percent were dismissed.
- c. 2 percent resulted in deferred adjudication.
- d. Detained cases resolved in a median of 3.3 days.

6. Overall, among all cases disposed pre-injunction:

- a. 58 percent resulted in a guilty plea.
- b. 33 percent were dismissed.
- c. 8 percent resulted in deferred adjudication.
- d. The median time to disposition was 78 days.

7. Overall, among all cases disposed post-injunction:

- a. 47 percent resulted in a guilty plea.
- b. 46 percent were dismissed.
- c. 6 percent resulted in deferred adjudication.
- d. The median time to disposition was 69 days.⁴

8. Detained cases pre-injunction vs. cases released on unsecured bond post-injunction:⁵

- a. Pre-injunction detained cases (*supra* ¶ 5; reproduced here for convenience):
 - i. 81 percent resulted in a guilty plea.

² From January 1, 2015 until January 31, 2017, 61 percent of all misdemeanor cases, *including* those with holds and pending felony charges, were released on some type of bond after arrest. Between June 7, 2017 and April 30, 2018, 87 percent of all misdemeanor cases, *including* those with holds and pending felonies, were released after arrest.

³ This analysis pertains only to cases that have been resolved.

⁴ One reason the median time to disposition for post-injunction cases is shorter is that a smaller percentage of post-injunction cases have resolved.

⁵ Although not perfectly comparable, it is not unreasonable to assume that most unsecured bond cases would have been detained at disposition pre-injunction because people released on unsecured bond post-injunction are people who cannot afford to pay the secured money bail amount required for release, as were the vast majority of people detained at disposition pre-injunction.

- ii. 16 percent were dismissed.
- iii. 2 percent resulted in deferred adjudication.

b. Post-injunction, cases released on unsecured bond:

- i. 57 percent result in guilty pleas.
- ii. 38 percent were dismissed.
- iii. 5 percent resulted in deferred adjudications.

9. These numbers show that, post-injunction, a much greater proportion of cases are being released prior to disposition: 92 percent of cases, as compared to 66 percent pre-injunction. As a result, a much greater proportion of all cases post-injunction have avoided conviction: 52 percent, as compared to 41 percent pre-injunction. And, a much greater proportion of all cases are dismissed post-injunction: 46 percent, as compared to 33 percent pre-injunction. Moreover, among the group of indigent arrestees whose cases were most likely to have been detained at disposition under the pre-injunction system, many more cases resulted in dismissals and many fewer resulted in guilty pleas.

10. These findings support what other research shows, which is that people who are released after arrest have better case outcomes: they are less likely to be convicted primarily because they are less likely to plead guilty.

III. A greater percentage of misdemeanor cases take several months to resolve

11. Cases now take longer on average to resolve, likely because detained arrestees are not coerced into resolving their cases at or near first appearance in order to gain their freedom.⁶

12. **Among released cases, post-injunction (92 percent of cases):** the median time from arrest to disposition was 90 days.

13. **Among released cases, pre-injunction (66 percent of cases):** the median time to disposition was 131 days.

14. **Detained cases pre-injunction vs. cases released on unsecured bond post-injunction:**⁷

- a. Pre-injunction detained cases resolved in a median of 3.3 days.
- b. Post-injunction cases released on unsecured bond resolved in a median of 73 days.

⁶ Some cases may be dismissed because individuals had multiple charges and pled guilty to some of the charges, in exchange for dismissal of the others.

⁷ A notable comparison can be made between the median time from arrest to disposition for pre-injunction detained cases and the median time from arrest to disposition for post-injunction cases released on unsecured bonds. Although not perfectly comparable, it is not unreasonable to assume that most unsecured bond cases would have been detained at disposition during the pre-injunction period.

15. This analysis shows that the median time to disposition for released cases post-injunction (90 days) is roughly comparable to the median time to disposition for released cases pre-injunction (131 days). However, a direct comparison between the two time periods cannot be made because the amount of time that elapsed from the beginning of the pre-injunction period until April 30, 2018 (more than three years) is greater than the amount of time that elapsed in the post-injunction period that I analyzed from June 6, 2017 and April 30, 2018 (about eleven months). In other words, the median time-to-disposition post-injunction is necessarily shorter than the median time-to-disposition pre-injunction because the post-injunction period covers a shorter amount of time than does the pre-injunction period. Pre-injunction cases have had a much longer time to resolve.

IV. People released on unsecured bond are not evading justice

16. The data show that a greater percentage of cases released on unsecured bonds since June 7, 2017 had been resolved as of April 30, 2018, than had cases released on any other type of bond. Among cases filed post-injunction:

- a. 57 percent of unsecured bond cases were resolved by April 30, 2018.
- b. 50 percent of personal pretrial bond cases were resolved by April 30, 2018.
- c. 40 percent of surety bond cases were resolved by April 30, 2018.
- d. 34 percent of cash bond cases were resolved by April 30, 2018.
- e. 32 percent of early presentment cases were resolved by April 30, 2018.

17. These percentages will all increase over time: they include cases filed up through the end of April. Considering the 90-day median time to disposition for 92 percent of cases, these rates of resolution make sense.

18. It may therefore be useful to consider only those cases filed in June 2017. Among those cases, as of April 30, 2018:

- a. 79 percent of unsecured-bond cases had been resolved.
- b. 77 percent of personal-pretrial bond cases had been resolved.
- c. 76 percent of surety-bond cases had been resolved.
- d. 71 percent of cash-bond cases had been resolved.

19. In other words, misdemeanor arrestees are not evading justice, and in fact a slightly greater proportion of people released on unsecured or personal bonds in June 2017 had resolved their cases as of April 30, 2018, as compared to people released on surety or cash bonds that same month.

20. These percentages are consistent with the results of my analysis of cases filed in other post-injunction months. I chose to examine cases filed four and seven months after the injunction went into effect (those filed in October 2017 and January 2018). I chose January 2018 as the latest month I analyzed because a greater proportion of cases filed more recently than January will not have been resolved by April 30, 2018. And I chose two months that were relatively evenly spaced from when the injunction went into effect.

21. Among cases filed in October 2017, as of April 30, 2018:
 - a. 63 percent of unsecured bond cases had been resolved.
 - b. 60 percent of personal pretrial bond cases had been resolved.
 - c. 59 percent of early presentment cases had been resolved.⁸
 - d. 54 percent of surety bond cases had been resolved.
 - e. 49 percent of cash bond cases had been resolved.

22. Among cases filed in January 2018, as of April 30, 2018:
 - a. 40 percent of unsecured bond cases had been resolved.
 - b. 39 percent of personal pretrial bond cases had been resolved.
 - c. 32 percent of early presentment cases had been resolved.
 - d. 23 percent of surety bond cases had been resolved.
 - e. 18 percent of cash bond cases had been resolved.

V. The Judges' next-day-setting policy disproportionately affects people released on unsecured bond

23. According to the Judges' local rules (as explained in Dkt. 402-6 ¶ 14 (a)–(d)), anyone who is booked into the Harris County Jail must be scheduled for a court date on the next business day, even if the person is booked and then immediately released.

24. Judge Fleming states that the next-day-setting policy is facially neutral. However, the data show that it disproportionately affects people released on unsecured bond.

25. I conducted two separate analyses that show the disproportionate effect of the next-day-setting policy on people released pursuant to the injunction.

- a. First, in the report I filed in the Fifth Circuit, Dkt. 402-4, I presented analysis showing that, for people released on unsecured bonds pursuant to the injunction between June 7 and December 31, 2017, the median time between bond-approval and first-setting was one day. For people released on cash or surety during the same period, the median time between bond-approval and first-setting was five days. *Id.* ¶¶ 13–14.
- b. Second, in response to Judge Fleming's assertion that the policy is neutral because it affects everyone who is "booked" into the jail, I analyzed whether the likelihood of being booked varies by bond type. It does. To conduct this analysis, I considered data for arrests between June 7, 2017 and September 13, 2017 (which are the only booking data I had been given as of June 8, 2018, when I completed my analysis for this report). I was able to examine what percentage of cases were booked into the jail by the type of bond on which they were released. **I found that the likelihood of being booked varies by bond type, and people released on**

⁸ "Early presentment" did not appear in the data as a "bond type" until September 2017.

unsecured bond are more likely than people released on any other bond type to have been booked into the jail prior to release. My analysis shows that:

Bond type	Percent of cases released that were booked
Unsecured	93%
Personal pretrial	81%
Early presentment	57%
Surety	51%
Cash	43%

26. This analysis shows that the next-day-setting policy—and the challenges it poses to people who must appear in court so soon after release—disproportionately affects people released on unsecured bonds.

27. People released on unsecured bonds are, by definition, resource-constrained. My analysis also shows that this group of people, on average and as compared to people released on other bond types, pose a greater risk of not appearing in court absent interventions like text-message reminders and transportation assistance. Dkt. 402-4 ¶¶ 10–11. The next-day-setting policy adds yet another *obstacle* to court appearance for a group of people who should be receiving *more support* than the average arrestee to be successful in making court appearances.

28. Appearing in court so quickly after release is challenging, at best. Being arrested is traumatic and disorienting. Losing one’s liberty, being handcuffed, and being confined to a jail cell cause a severe disruption to a person’s life, even if the deprivation of liberty is for a relatively short period of time. A person needs time after the deprivation ends to get her affairs back in order. The arrestee might not have slept, bathed, or eaten. Pretrial detention disrupts employment and family responsibilities and upsets financial and social arrangements. To make a next-day appearance a person must very quickly plan transportation and reschedule employment and child care duties, among other things that are especially difficult for people with limited resources and challenging life circumstances.

29. It is likely that the next-day-setting policy contributes to a higher rate of nonappearance for people released on unsecured bond pursuant to the injunction, both because it is difficult logistically to appear so soon after being released from jail, and because quicker and more frequent court settings increase the opportunity for nonappearance, all else equal. *See* Dkt. 402-4 ¶ 15 (“The data show that people released on unsecured bonds are scheduled, on average, for more court settings than are people released on surety bonds, and that those court settings are scheduled closer in time for people released on unsecured bonds as compared to surety bonds.”).

30. Changing the next-day-setting policy for people who are booked would level the playing field across bond types and is necessary for an apples-to-apples comparison of nonappearance in court.

VI. Bond-forfeiture rates vary widely among the courts

31. Ed Wells states that “the forfeiture rates for secured bonds and unsecured Sheriff’s Bonds are substantially similar across all 16 Courts.” Dkt. 402-5 ¶ 9. Mr. Wells appears to be reviewing the same data I am, but characterizing it differently.

32. For example, Court 4 has a personal bond forfeiture rate of 19.2 percent compared to a forfeiture rate of 28.9 percent in Court 1. That means that the forfeiture rate for personal bonds in Court 1 is 51 percent higher than the forfeiture rate for personal bonds in Court 4.

33. Other examples of what I consider to be wide variations include:

- a. A 12 percent forfeiture rate for surety bonds in Court 5, as compared to a 4.2 percent forfeiture rate for surety bonds in Court 1. That means that the forfeiture rate for surety bonds is nearly three times higher in Court 5 than in Court 1.
- b. A 29.4 percent forfeiture rate for unsecured bonds in Court 2, as compared to a 48.1 percent forfeiture rate for unsecured bonds in Court 5. That means that the forfeiture rate for unsecured bonds is 64 percent higher in Court 5 than in Court 2.

34. Because cases are randomly assigned to courtrooms, I would expect the forfeiture rates to be more similar across courtrooms. The fact that they are *not* the same suggests that the judges have their own individual policies, including their own individualized criteria for “find[ing] grounds to excuse [a] failure to appear.” Dkt. 402-5 ¶ 4; *see also* Dkt. 402-6 ¶ 7.

35. Perhaps the reason Ed Wells and Judge Fleming assert that the rates are consistent across courts is because we are dealing with relatively low rates that, at first glance, appear relatively close together. But, consider the following scenario, which is based on the forfeiture rates for Courts 2 and 5 during the January through April 2018 period: Court 2 released 194 arrestees on unsecured bond in a four-month period. If that rate continues, Court 2 will release 582 people on unsecured bond in a one-year period. Let’s assume Court 5 will release the same number of people (582) on unsecured bond in a one-year period. Of the 582 people released in Court 2, *171 people* will have their bonds forfeited. Of the 582 people released in Court 5, *280 people* would be forfeited. I would rather be assigned to Court 2.

36. There is other evidence in the data that the judges have different practices for dealing with nonappearances: Court 2 and Court 10 apparently *revoke* bonds, instead of *forfeiting* bonds, when people do not appear and the nonappearance is not excused. The data show the following:

- a. Court 2 has a 4.3 percent bond-forfeiture rate for personal bonds.
- b. Court 10 has a 3.6 percent bond-forfeiture rate for personal bonds.

- c. The other fourteen judges have bond-forfeiture rates for personal bonds that range from 19.2 percent to 28.9 percent.
- d. Upon further examination of the data, I realized that Courts 2 and 10 have much higher bond *revocation* numbers for personal bonds than other courts.
- e. Court 2 *revoked* 16.5 percent of bonds.
- f. Court 10 *revoked* 19.3 percent of bonds.
- g. When you add forfeitures to revocations in Court 2 and Court 10, the combined “failure” rate (20.8 percent for Court 2 and 23 percent for Court 10) is within the forfeiture rate for the other judges.
- h. What this data suggests is that Courts 2 and 10 are choosing to *revoke* personal bonds when people do not appear (and the nonappearance is not “excused”) instead of *forfeiting* personal bonds when people do not appear.
- i. The discretion to enter either a bond forfeiture or a bond revocation in the computer system in response to non-appearance is another reason that the County’s and Judges’ bond-forfeiture data are not a reliable proxy for failure-to-appear.

37. My prior analysis showed that some judges treat people released on surety bonds more leniently than people released on unsecured or personal bonds when it comes to the bond-forfeiture decision. Dkt. 402-4 ¶ 8(a)-(d). I reported that there are numerous cases in which people released on unsecured bonds had their bonds forfeited even though they appeared in court, and numerous cases in which people released on surety bonds missed court but never had their bonds forfeited. *Id.* ¶ 8(a)-(b). My analysis also showed that people released on unsecured bond who missed their first two scheduled court dates were much more likely to have a bond forfeiture entered than were people released on surety bonds. *Id.* ¶ 8(c)-(d).

VII. “Bond forfeitures” are not a useful proxy for “failures to appear”

38. Ed Wells states that “[b]ond forfeiture rates are a reliable proxy for failure-to-appear rates,” Dkt. 402-5 ¶ 4, and that bond-forfeiture rates “represent” failure-to-appear rates, *Id.* ¶¶ 11–14. But it is impossible to make that assertion without either (a) tracking failures to appear or (b) explaining whether and when judges “find grounds to excuse the failure to appear.”

39. The Defendants have stated that they do not reliably track actual failures to appear. Dkt. 402-5 ¶ 4; Dkt. 402-6 ¶ 7. And, as I described above, the data show that judges have different practices relating to whether they enter a forfeiture or excuse failures to appear in different circumstances.

40. I do not find it particularly surprising that the judges apply different standards to decide whether there are “grounds to excuse,” Dkt. 402-5 ¶ 4; Dkt. 402-6 ¶ 7, a particular nonappearance. They are exercising judicial discretion. A judge’s *job* is to make decisions about blameworthiness, dangerousness, and practical issues and then exercise judgment and discretion to determine conditions of release, impose a sentence, revoke probation, or resolve whatever other matter is before them. We know that some judges are harsher and less forgiving than others in a variety of

contexts (e.g. sentencing and decisions about probation revocation). That is what data show in all jurisdictions across time when it comes to a wide range of discretionary decisions that judges have the power to make.

41. It therefore makes sense that the bond-forfeiture rates vary among the judges. Whether a bond is forfeited depends on that particular judge's *discretionary judgment* as to whether there exist "grounds" to "excuse" the person's nonappearance in light of whatever factors the judge is made aware of and sees fit to consider. The judges' discretion to make a decision to forfeit a bond or not given an instance of nonappearance is reflected in the variations among bond-forfeiture rates.

42. If some judges are less forgiving of people released on unsecured bonds than of people released on other types of bonds, then it will also be more likely that a bond forfeiture will be entered for a person released on unsecured bonds who does not appear as compared to someone released on another type of bond who does not appear.

43. Because the bond-forfeiture decision hinges on judicial discretion, it is important to use an objective and standardized metric for nonappearance. An objective and standardized system for tracking court settings and whether a person appeared or did not appear at each setting would not affect a judge's discretion to forfeit a bond because of nonappearance. But it would allow a comparison of non-appearance rates by bond type and would make the system more transparent.

44. Without an objective and standardized system for recording court settings and instances of non-appearance, it is impossible to know how closely bond-forfeiture rates align with actual failure-to-appear rates.

45. It is also important to note that other jurisdictions, including Washington, D.C., have very low non-appearance rates for people released on unsecured bail or non-financial conditions. These jurisdictions use strategies like text-message notifications and appropriate supervision to help people make it to court. And they give people more time after release before requiring them to appear in court for their first hearing.

46. Based on my experience and my evaluation of the data and the representations of the Defendants, Harris County and the Judges do not seem to understand that the goal of a pretrial system is to mitigate risks of nonappearance so that the maximum number of presumptively innocent people can be released prior to trial. The County should be developing systems and procedures that help "riskier" arrestees be successful on release. Instead, their practices punish people who are more likely to have difficulty getting to court. There is no dispute that people released on unsecured bonds in Harris County are more likely, on average, to not appear absent any services or supervision, based on data from the County's pretrial assessment tool. That means that the County should be providing the kind of supervision and court reminders necessary to assist these individuals. Instead the County is releasing them without supervision or reminders and

erecting barriers to their success (e.g., requiring them to appear in court the day after being released from the jail, often in the middle of the night).

VIII. Bond-forfeiture rates for unsecured bonds are higher than bond-forfeiture rates for secured bonds in Judge Jordan’s and Judge Fields’ courtrooms—as in all of the judges’ courtrooms—because the people released on unsecured bond have a very different risk profile than people released on secured bonds

47. The forfeiture rates are much higher for unsecured bonds than surety bonds in all courts, including in Judge Fields’ and Judge Jordan’s courts, as Judge Fleming notes. Dkt. 402-6 ¶ 11(b). But this disparity is to be expected *because the risk profiles of the two groups are completely different*.

48. Data from the County’s pretrial assessment tool shows that the average “FTA score” (i.e. the score reflecting the likelihood that a person will “fail to appear” in court) for people released on unsecured bonds is 2.6, while the average “FTA score” for people released on surety bonds is 1.6. In other words, the average risk score for people released on unsecured bonds is 63% higher than the average risk score for people released on secured bonds.

49. People released on unsecured bonds need assistance, such as court reminders, transportation help, or pretrial services to mitigate their greater likelihood of not appearing. But, as my prior analysis showed, individuals released on unsecured bond are *less likely* to receive supervision. The available information suggests that they are being set up to fail. Dkt. 402-4 ¶ 10–11.

50. In fact, many arrestees who are recommended for release on *personal bonds*—which come with supervision and conditions—are being denied personal bonds and subsequently are released on *unsecured* bonds, without supervision. For example, among people who completed pretrial assessment, the County’s pretrial assessment tool recommended personal bonds for 58% of the people who were ultimately required to pay unaffordable bail and, as required by the injunction, subsequently released on unsecured bonds. This shows that the Hearing Officers and Judges are not following the recommendations made by the pretrial assessment tool.⁹ Because of Defendants’ policies, the decision to ignore the risk assessment tool means that Defendants funnel people who otherwise would have received pretrial supervision into a category of people who Defendants have chosen not to provide any supervision for. Appearance rates would likely improve if people released on unsecured bonds received the same pretrial support that people released on personal bonds are receiving.

⁹ It is also possible that some of the people recommended for personal bonds who are released on unsecured bonds are released because of the 24-hour requirement.

IX. Recommendations for addressing non-appearance

51. The County should provide two-way text-messaging reminders to all people who are released after arrest. People released on unsecured bond need support in order to be successful and most of them were considered eligible for a personal bond, which could include supervision. In particular, the County should ensure that the people who are most in need of court reminders or other assistance to be successful on pretrial release are receiving that support.

52. The County should eliminate the next-day court setting for people who are released from jail, regardless of whether they are “booked.”

53. The County should reliably track court settings and whether a person appeared or did not appear so that it can begin to accurately assess its system. The County should work with Judges to develop a set of principles that provide guidance for how to consistently assess when a non-appearance constitutes an official failure-to-appear (“FTA”) with the goal of minimizing the forfeiture of bonds for FTAs that are not willful.

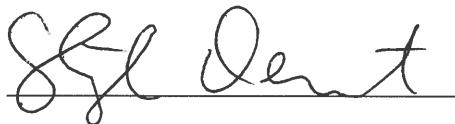
54. The County should provide feedback to Judges and Hearing Officers on a regular basis showing how they compare to each of the other Judges and Hearing Officers on 1) the percentage of cases in which their personal bond decision differs from the risk assessment tool recommendation, 2) the percentage of cases receiving each of the different bond types, and 3) the percentage of each bond type that are forfeited or revoked.

55. The County should work with the Judges, Hearing Officers, and pretrial services staff to develop a set of policies to maximize liberty while also maximizing court appearance. High forfeiture rates represent a challenge to be overcome through creative systemic solutions that mitigate risk and increase appearance, not a failure for which there is no remedy other than detention.

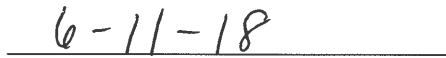
X. My analysis is ongoing

56. I am continuing to receive new data, and my analysis is ongoing.

I declare under penalty of perjury that the foregoing is true and correct to the best of my ability.



Stephen Demuth, Ph.D.



Date