

Exhibit 1

DECLARATION OF JUDGE DARRELL JORDAN¹

I. Introduction

1. My name is Darrell William Jordan. I was elected by the citizens of Harris County, Texas to serve as Judge of Harris County Criminal Court at Law No. 16. On January 1, 2017, I began my term as Judge of Court No. 16. When I took office, I became a Defendant in the above-captioned lawsuit, which had been filed against the other fifteen judges and my predecessor.

2. Before I joined the legal profession, I joined the Texas National Guard. Today I am a major in the Army Reserves, and as I write this, I have been called up to active duty, serving in Austin until September.

3. Before becoming a judge, I was a criminal defense lawyer. In the eight years before being elected to the bench, I represented over 1,000 clients. 60-70% were misdemeanor cases, most of them in Harris County. As a lawyer, I appeared before each of the other County Criminal Court at Law judges. As a judge, I have continued to observe and be informed of practices of my judicial colleagues. I have seen the impact in the County Criminal Courts of two momentous events in 2017: the preliminary injunction in this case and Hurricane Harvey, both of which led to significant changes to the County's pretrial system. While some of the confusion the Harris County legal system has experienced over the past year was the unavoidable consequence of the worst natural disaster in Houston history, much was self-inflicted by judges who are fixated on seeing that the federal court's order fails.

4. I am familiar with the claims made by Judges 1–13 and 15 (“the Fourteen Judges”) that the preliminary injunction issued in this case “has created a law enforcement and public safety crisis” and that “[r]oughly *half* of all unsecured release bonds issued pursuant to the preliminary injunction have been forfeited because the arrestee failed to appear for his or her court date.” I believe these claims to be false or, at best, misleading.

5. In my opinion, ever since the preliminary injunction went into effect, the Fourteen Judges have taken steps to sabotage the federal injunction and to manipulate the bond-forfeiture statistics to make it look like people released on unsecured bond pursuant to the federal order are failing to appear in droves, and that the federal court order is “wreaking havoc” on the County. In truth, no such thing has happened. The elevated bond-forfeiture rate for people released on unsecured bail, to the extent it exists, is readily explained by the Fourteen Judges' intentional policy decisions, many of which were made by majority vote.

II. Harris County Criminal Court at Law Judges Have Discretion to Decide When to Forfeit Bonds

A. A “Bond Forfeiture” Is Not a “Failure to Appear”

¹ Submitted in *ODonnell v. Harris County*, Case No. 16-cv-01414 (S.D. Tex. 2016), No. 17-20333 (5th Cir. 2017).

6. Before addressing the judges' policies, it is crucial to understand the terminology that the Fourteen Judges are using. The Fourteen Judges report an elevated "bond forfeiture" rate for people released on unsecured bond.²

7. But the term "bond forfeiture" is not the same as "failure to appear." The judges do not cite, let alone analyze, failures to appear. "Bond forfeiture" is merely the rough proxy that the Fourteen Judges use for "failure to appear"—and it is easy to manipulate. It is my understanding that the judges and the County began to track failures to appear after the preliminary injunction went into effect. To my knowledge, however, the Judges and the County have not reported the failure-to-appear rates publicly or in court filings.

8. The bond-forfeiture numbers are manipulable because each individual judge decides when a defendant must appear in court and each of us has complete discretion to decide whether any given instance of non-appearance warrants us entering a "bond forfeiture" into the system. There are no rules governing our decisions as judges about whether and under what circumstances to forfeit a bond.

9. Moreover, there is no requirement that we apply the same policies to people released on surety, cash, unsecured, and personal bonds. And in practice, judges' policies vary depending on the type of bond the person was released on.

10. Texas law is yet another reason that "bond forfeitures" are a very poor proxy for failures to appear. State statutes set forth a number of procedural rights and broad substantive defenses to forfeiture. Surety companies are aware of these laws and, as experienced, routine players in our system, they often hire lawyers to represent them in forfeiture proceedings. Because the statutory defenses are broad, surety companies are often able to evade forfeiture, even when the defendant did in fact fail to appear.

11. As a result of these defenses and surety companies' ability to take advantage of them by hiring lawyers and fighting the forfeiture, the *absence* of a forfeiture of a surety bond does not mean that the person released on that surety bond appeared in court for all of her court appearances.

12. By contrast, people released on unsecured bonds or personal bonds typically do not know that such defenses to forfeiture exist, partly because the judges do not inform them of their rights. So the people who benefit from defenses to forfeiture are overwhelming people released on surety bonds.

13. For these reasons, "bond forfeiture" rates are a very poor proxy for non-appearance rates.

² When a person is released pursuant to the federal court's preliminary injunction order, the bond type is referred to locally as an "unsecured bond." People also sometimes call these bonds "BROR" (which stands for "bail reform ordered release" and is the acronym the Sheriff developed for his computer system when the order went into effect in June 2017) or "Sheriff's bonds." Throughout this declaration, I will use the term "unsecured bond" to describe the bonds issued to people who are released pursuant to the federal court's preliminary injunction in this case.

When a person is ordered released by a judge or magistrate, the bond type is referred to locally as a "personal bond." Personal bonds are also technically unsecured bonds: personal bonds likewise do not require an up-front payment, but the person will be required to pay the unsecured amount if the bond is forfeited.

B. The Judges Have Different Bond-Forfeiture Policies

14. We judges all do things differently in our respective courts. In my court, for example, I do not forfeit a bond if the person appears sometime during the court session (i.e. it is okay if they are not in my courtroom at 9:00 a.m. for the initial docket call). I also do not forfeit a bond if a person misses a court date and then appears the next day or the day after. If I issue a bench warrant for nonappearance and the person subsequently appears in my court voluntarily (without being arrested), I recall the warrant.

15. I have developed these policies and practices for my courtroom because I understand from my many years of working in the system that when people miss court, it is typically for mundane reasons like their car broke down, they did not have money for the bus or a cab, they were unable to arrange child care, they or a family member had a medical emergency, or they simply forgot.

16. Sometimes people must choose between appearing in court for a scheduled court date or attending a medical appointment or a shift at a new job that will be the difference between paying rent that month or being homeless. I would always prefer that person keep their job and reschedule the court date, even if they are not able to call and reschedule the court date in advance. I just ask that they appear and explain the situation to me as soon as possible.

17. In my experience—and especially in misdemeanor court—people charged with crimes do not seek to “evade justice.” Instead, they often lead chaotic lives and are struggling with addiction or to make ends meet. Court dates are not always the greatest emergency for people who are unsure whether they will have shelter that night or food for themselves and their children.

18. My bond-forfeiture policies and practices reflect my understanding of the realities faced by people charged with misdemeanor offenses.

19. Some of my colleagues’ policies and practices are different from mine. Some judges forfeit a bond if someone is even five minutes late to court, i.e. if they do not answer docket call. Indeed, some will forfeit the bond of a defendant who arrives *during* docket call, if her name has already been called. Other judges will not forfeit a bond the first time a person misses court and will “roll over” the case to the next day, giving the person another chance to appear, but will forfeit the bond if the person does not appear the next day. Sometimes judges give people a few days to appear.

20. Because our policies vary widely, a single “bond forfeiture” conveys very little about the failure-to-appear rate. A single bond forfeiture sometimes reflects a single non-appearance, and sometimes it reflects two or more instances of non-appearances. It all depends on the judge and her practices. And some judges do not even follow standard policies for all people in their courtrooms.

21. We also have discretion to schedule court dates in each case whenever we want.

22. Our virtually unbridled discretion to decide how frequently and on what days to schedule court dates, and to decide when to forfeit a bond has provided fertile ground for the Fourteen

Judges to manipulate the failure-to-appear numbers so that it looks like people released on unsecured bonds are failing to appear at much higher rates.

III. The Fourteen Judges Have Used Their Discretion to Generate Inflated “Bond Forfeiture” Numbers for People Released on Unsecured Bond

23. Exercising their discretion to schedule court appearances and decide when to forfeit bonds, the Fourteen Judges have implemented a variety of policies that I believe are designed to inflate the bond-forfeiture numbers for people released on unsecured bonds.

A. Next-day settings for people released on unsecured bonds

24. First, they require people released on unsecured bonds pursuant to the federal court order to appear in court the day after the unsecured bond is granted, even though people released on other types of bonds—including surety, cash, or personal bonds—are typically given an initial court date that is five or seven days after their release from jail.

25. This next-day-court-setting policy matters because it is extremely difficult for people to get to court the day immediately after a bond is granted.

26. One reason people miss the next-day setting has to do with the jail’s processing policies. The Harris County jail routinely releases people onto the streets of Houston very late at night, and even in the early hours of the morning, without money or transportation. These individuals—many of whom cannot afford to live in downtown Houston and do not have reliable transportation—are faced with a choice between sleeping on the sidewalk outside the courthouse so they do not miss their court date, or finding their way home and then trying to get back downtown by docket call. Understandably, many people choose to return home to have a meal, see their family, take a shower, and sleep in their own beds. If they are unable to get back to the courthouse in the morning, they will miss their court date. We who are in charge of these policies directly control and have created these missed court appearances.

27. It is predictable that people who are required to return to court the day after they are granted an unsecured bond struggle to make it there.

28. Although we are not required to forfeit bonds for people who miss these settings, the Fourteen Judges have routinely done so. As a result, many of the bond forfeitures for people released on unsecured bond are attributable to the next-day-setting policy.

29. It is my opinion that the policy of requiring next-day settings for people released on unsecured bonds can chiefly be understood as deliberate manipulation of the bond-forfeiture numbers.

30. The *stated* reason for the next-day settings is apparently that we must comply with a requirement of the Texas Indigent Defense Counsel (“TIDC”) that Judges determine an *incarcerated* arrestee’s eligibility for counsel and appoint counsel within 24 hours of the person’s request for counsel.

31. But if the requirement to appoint counsel within 24 hours of a request is intended to ensure that defendants are provided counsel to argue for release on bail, the requirement of a next-day setting need not apply if the person is released. And even if the requirement must apply, there is no discernable reason to apply different policies to people released on different types of bonds.

32. The TIDC rule appears to be a pretext for a policy designed to make it more likely that people released pursuant to the federal court order will miss court and to inflate the bond-forfeiture numbers for people released pursuant to the federal court order. The purpose is to make it look like there's a catastrophe in Harris County.

33. I find it troubling that, although all of us know about these problems, the Fourteen Judges have never disclosed this information when they have presented the information publicly and to the courts

B. Misinformation About Court Dates

34. People released on unsecured bond have been systemically misinformed of their next-day court settings dates. The new policy of requiring next-day settings for people released on unsecured bond has generated tremendous confusion among jail officials and court employees.

35. In many cases, even though judges set court dates for the day after the bond is issued, jail employees tell the people they release to return to court in seven days, which had been the practice for many years and has continued to be the practice for people released on other types of bonds.

36. As a result, some people released on unsecured bond miss court because they did not even know they were supposed to show up.

37. Despite knowing about the confusion, my colleagues forfeit bonds—and issue new arrest warrants—for people who do not appear at the next-day setting without first inquiring as to the reason the person missed court. The fact of an arrest warrant deters people from subsequently appearing in court after missing a court date; they do not want to be arrested. That is why I have a policy in my courtroom of recalling a bench warrant if someone appears in court. I want to incentivize appearance, even following a missed court date.

38. Despite knowing about this systemic misinformation and confusion, the Fourteen Judges have not disclosed this information to the courts or the public when they have proffered their data concerning bond-forfeiture rates.

C. Confusion Caused by Hurricane Harvey

39. Hurricane Harvey has also contributed to confusion in the court system.

40. When the hurricane struck at the end of August, it flooded the courthouse, and the County had to set up courtrooms in various other locations. My colleagues and I have been sharing

courtrooms, and have presided over our dockets in those shared courtrooms on alternate days and at designated times of day.

41. As a result, some people who knew which date to appear and thought they knew where to go have missed court dates because the times and locations of our dockets were different than they thought.³

42. Despite knowing that this confusion has caused people to miss court, my colleagues forfeit bonds for people released on unsecured bond without inquiring into why they did not appear.

D. Failure to Supervise People Released Pursuant to the Federal Court Order

43. The County and other Judges have also implemented policies that appear designed to funnel people who have the greatest likelihood of non-appearance into the group of people released pursuant to the federal court's order.

44. Since July 1, 2017, the County has used a pretrial assessment tool to determine the amount of "risk" an arrestee poses of not appearing for court. The higher a person's risk score, the more likely it is that, *absent intervention* (such as text message reminders or transportation assistance), the person will not appear. Accordingly, the higher the person's "risk" score, the greater the person's need for pretrial assistance to get to court.

45. Pursuant to the injunction, misdemeanor arrestees are given an opportunity to state how much money they can afford to pay to be released. If a Hearing Officer or a Judge then requires a money bail amount that exceeds the amount the person can afford, the Sheriff converts the secured amount to unsecured and releases the person.

46. Since the injunction went into effect, Hearing Officers and Judges have granted release on personal bond—with supervision by pretrial services and court reminders—to an increasing number of people deemed "low risk" by the pretrial assessment tool.

47. However, they have continued to impose unaffordable money bail amounts as a condition of release for people deemed "high risk" by the pretrial assessment tool. Prior to the injunction, these higher "risk" arrestees would have been detained due to their inability to pay the amount of money required for release. Now, because of the injunction, these arrestees may not be kept in jail due to inability to pay, and the Sheriff releases them—as required—on unsecured bail.

48. Despite knowing that higher risk arrestees will be released on unsecured bond pursuant to the injunction, my colleagues have refused to require basic pretrial supervision and court reminders to the group of arrestees released on unsecured bond. The Fourteen Judges and other Defendants are also refusing to impose non-financial conditions (unless statutorily required) that have been

³ In January 2018, the Houston Chronicle conducted an investigation (though not an exhaustive review) and identified "at least 31 case in which defendants were given wrong information about their court dates; 15 of them forfeited their bonds for failing to appear at the first setting." See Meagan Flynn, *Harris County bail system offers little help to defendants who most need it* (Jan. 22, 2018), available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-bail-system-shortchanges-defendants-12516456.php>.

proven to increase court appearance rates. They therefore know that these arrestees will be released with *no* non-financial conditions or supervision because of their decision only to require a secured financial condition of release that they know the Sheriff will not enforce.

49. At the same time, the County has been providing supervision and court reminders to other arrestees, even though they are less in need of assistance getting to court (according to the County's pretrial assessment tool). All of these practices can dramatically skew success rates for those released on different types of bonds.

E. ICE Custody

50. The federal court's preliminary injunction requires the Sheriff to automatically convert a secured money bail amount that a person cannot afford to an unsecured amount and release the person. If the person is subject to an "ICE detainer," ICE is notified to come and pick up the person from the jail to be transported to a federal immigration detention facility as soon as an unsecured bond is granted.

51. But there is no system in place to adequately facilitate communication between the Harris County court system and ICE. As a result, when people who are in ICE detention do not come to court for their misdemeanor case, my colleagues appear to be forfeiting their bonds.

52. The Texas Observer recently reported that between 5 and 10 percent of forfeitures are attributable to people who did not appear in court because they were in ICE detention.⁴

53. Despite knowing that many people miss court because they are in ICE detention, my colleagues forfeit bonds for people released on unsecured bond without inquiring into why they did not appear.

F. Counting *Bonds Not People*

54. It is also important to note that the Fourteen Judges' statistics purport to identify the number of *bonds* that have been forfeited. (I have no way at this point of independently verifying that the data actually produce the numbers they have been presenting.) But arrestees are given a bond for each open case, and therefore a single missed court appearance can translate to multiple bond forfeitures.

55. To take an example I see in my courtroom, consider a person who is homeless and is repeatedly arrested for trespassing in the location where she sleeps at night. That person will be given a bond each time she is arrested. Since the federal court order went into effect, those bonds are likely to be unsecured bonds. The Judges tend to consolidate court dates for multiple open cases. Thus, that person will typically be required to appear on a single date to address each of the open cases. If the person does not appear at a *single* court date, *multiple* bond forfeitures will be entered: one for each open case.

⁴ Stephen Paulsen, *A Catch-22 in the Crimmigration System in Harris County* (May 8, 2018), available at <https://www.texasobserver.org/a-catch-22-in-the-crimmigration-system-in-harris-county/>.

56. In January 2018, the Houston Chronicle conducted a review of about 125 cases filed in a roughly two-month period. The investigation revealed that 29 defendants (who were described as mentally ill by the public defender's office) accounted for 235 bond forfeitures. *See Flynn, supra* n.2.

57. This means that a relatively small number of people—often people who are chronically homeless or mentally ill—are responsible for many bond forfeitures.

C. What the Data Does Not Show

58. It is important to take a moment to identify specifically what the data the Judges present does *not* show.

59. Most importantly, they do not report the number of people who have missed court dates, or the number of court dates a particular person has missed.

60. In short, the data presented by the other judges and County is fatally flawed and meaningless.

D. Conclusion

61. A few months ago I learned that arrestees who were deemed “high risk” by the County’s new pretrial assessment tool and who were released on unsecured bonds pursuant to the federal court order were being released with no supervision. I immediately contacted Pretrial Services and instructed them to provide supervision to all arrestees assigned to Court 16. I am aware Judge Fields has the same practice in his court. In the other fourteen courts, it is my understanding that those deemed high risk by the County’s pretrial assessment tool and released on an unsecured bond with no conditions are not being supervised.

62. It is my belief that this policy, along with the other policies described in my declaration, explain the elevated bond-forfeiture rate for people released on unsecured bond pursuant to the federal court order. The only explanation for these policies and practices is a win-at-all-costs mentality. The Fourteen Judges claim that defendants released on an unsecured bond pose an intolerable danger to the community. If that statement is true, then it is also true that they have contributed to the risk to the community by refusing to require Pretrial Services to supervise those who they claim pose the highest risk.

63. It is also important to remember that prior to the federal court’s order, people who could not afford to pay money bail were detained until disposition (40% of all misdemeanor arrestees annually) and 85% of them pled guilty in a median of 3.2 days: 67% of those who pled guilty were then released *within one day*, and 83% were released *within five days*, of conviction. At the end of the day, the Judges would prefer to release people *after* conviction, instead of *before*. But they ignore the fact that many of those convictions were coerced guilty pleas from people who desperately wanted to get out of jail and could not afford money bail. Their prior policies did not make our community safer.

64. Based on everything I have observed, there is no reason to believe that the federal court injunction has increased failure to appear rates or caused a public safety crisis. Rather, there is every reason to believe that the numbers cited by the Fourteen Judges are the result of deliberate policy decisions, both acts and omissions.

65. Since February, as ordered by Judge Rosenthal (Doc. 383), I have worked with Judge Fields, and conferred with counsel representing Plaintiffs, to craft a revised preliminary injunction order that conforms to the Fifth Circuit's holdings and the factual record. District Attorney Kim Ogg and Public Defender Alex Bunin support the proposed injunction. The Plaintiffs will not object to its being entered. The County and the Fourteen Judges abandoned the process of working together to create a revised order.

66. Contrary to the Judges' claim, the sky is not falling in Harris County. The current injunction should remain in place while Judge Rosenthal has an opportunity to consider all parties' input on a revised order.

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



Judge Darrell Jordan

May 14, 2018

Date