# Recent Bail Litigation in North Carolina & the United States

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September 2023

This paper summarizes significant state and federal bail cases filed or decided between January 2018 and August 2023. North Carolina officials may wish to pay particular attention to the federal *Allison v. Allen* case. Although litigation still is ongoing, the parties entered into a consent decree that requires substantial additional pretrial procedures, such as a prompt first appearance, counsel, and consideration of ability to pay before a secured bond may be imposed. In other federal courts, the law is evolving. For example, in the Texas federal courts, the *ODonnell* decision resulted in a sweeping consent decree, only to be overruled on abstention grounds by a later decision. In other state courts, *Humphrey*, decided by the California Supreme Court, provides significant protections to defendants. The same broad relief sought in that case does not appear to have been presented to other state appellate courts, though some litigation is ongoing.

## North Carolina Federal Cases

*Allison v. Allen*, No. 1:19-cv-01126, (M.D.N.C. 2019). *Allison v. Allen* was filed in November 2019 in the U.S. District Court for the Middle District of North Carolina. Plaintiffs who were incarcerated in the Alamance County, North Carolina jail alleged that judicial officials and the sheriff unconstitutionally "implement[ed] and employ[ed] policies and practices that imprison people on unaffordable money bail".[1] The parties agreed to the entry of a consent order in May 2020.[2] Under the order, individuals who are in custody must have a hearing on pretrial release conditions within forty-eight hours,[3] be provided counsel at their first appearance,[4] and have their ability to pay taken into consideration by the judicial official determining conditions,[5] among other provisions. The parties presented arguments on motions for summary judgment in March 2023; the decision from the court is pending.

## Other Federal Cases

*ODonnell v. Harris County*, 892 F.3d. 147 (5th Cir. 2018), and *Daves v. Dallas County, Texas*, 64 F.4th 616 (5th Cir. 2023). In the *ODonnell* case, arrestees in Harris County, Texas, brought a class action suit under 42 U.S.C. § 1983 against the county judges and sheriff, alleging unconstitutional detention based on their lack of ability to pay secured bonds imposed in their misdemeanor cases. The district court granted the plaintiffs' motion for preliminary injunction and ordered the defendants to follow various

[1] Complaint at 2, *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. Nov. 12, 2019), ECF No. 1.
[2] Consent Order for Preliminary Injunction, *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. May 8, 2020), ECF No. 56. *See also* Jessica Smith, *Lessons from the Alamance County Bail Litigation*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (9/23/2020), https://nccriminallaw.sog.unc.edu/lessons-from-the-alamance-county-bail-litigation/.
[3] Consent Order for Preliminary Injunction at 3, *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. May 8, 2020), ECF No. 56.
[4] *Id.* at 5.
[5] *Id.* at 3. Ability to pay factors include eligibility for indigent defense counsel; housing situation; student status; income below federal poverty guidelines; eligibility for federal and state public assistance programs; and incarceration within the six months prior to the hearing. *Id.* at 4.

conditions, including conducting bail hearings within twenty-four hours after arrest.[6] On appeal, the Fifth Circuit vacated the injunction for being overbroad, and remanded the case to the district court.[7] After several appeals regarding the injunction, the parties submitted a consent decree, which was approved by the district court judge in November 2019.[8] Per the agreement, misdemeanor arrestees must be released on personal bond or on non-financial conditions unless certain exceptions apply, such as having committed a new offense while on pretrial release.[9] Any person not released must receive a hearing within forty-eight hours after arrest.[10] Additionally, all persons must be represented by counsel at the bail hearing.[11] However, in *Daves v. Dallas County, Texas,* the Fifth Circuit overruled *ODonnell*, holding that the federal courts should have abstained from adjudicating the case.[12] *Daves* also held that Texas SB 6,[13] which restructured bail procedures in the state, rendered the plaintiffs' challenge to the Dallas County bail system moot.[14] As of the writing of this paper, however, the *ODonnell* consent decree remains in effect.

*Schultz v. Alabama*, 42 F.4th 1298 (11th Cir. 2022). In February 2017, arrestees in Cullman County, Alabama filed a class action lawsuit in federal district court alleging wealth discrimination and due process violations in the county's bail procedures, specifically, the practice of detaining individuals who could not afford to post surety or property bonds.[15] The U.S. District Court Judge granted plaintiffs' motion for preliminary injunction and ordered defendants to amend the bail practices and procedures. The defendants appealed to the Eleventh Circuit. On appeal, the court found that the county's bail practices passed rational basis review and afforded defendants due process.[16] The court distinguished the case from *ODonnell* (above) and declined to hold that bail determinations are required within forty-eight hours; the court also found that the county's practice of making bail determinations within

[6] *ODonnell v. Harris County, Texas,* No. 16-1414, 2017 WL 1735453 at *1 (S.D. Tex. April 28, 2017), *vacated by ODonnell v. Harris County,* 892 F.3d 147 (5th Cir. 2018).
[7] *ODonnell v. Harris County*, 892 F.3d 147, 165 (5th Cir. 2018). *See also ODonnell v. Harris County, Texas,* No. H-16-1414, 2018 WL 11363372, slip. op. at *1 (S.D. Tex. June 18, 2018), *amended by ODonnell v. Harris County, Texas*, 321 F.Supp.3d 763, 765-66 (S.D. Tex. June 29, 2018).
[8] Consent Decree at 1-2, *ODonnell v. Harris County, Texas et al,* No. 4:16-cv-01414 (S.D. Tex. Nov. 21, 2019), ECF. No. 708.
[9] *Id.* at 17.
[10] *Id.* at 18.
[11] *Id.* at 19.
[12] *Daves v. Dallas County, Texas*, 64 F.4th 616, 631 (5th Cir. 2023).
[13] The Damon Allen Act, S.B. 6, 87th Leg., 2d Sess. (Tx. 2021).
[14] *Daves*, 64 F.4th at 634.
[15] *Schultz v. State*, 330 F.Supp.3d 1344, 1348 (N.D. Ala. 2018), *rev'd, Schultz v. Alabama*, 42 F.4th 1298, 1135 (11th Cir. 2022).
[16] 42 F.4th at 1335. This process includes a hearing, notice of that hearing, and an opportunity to be heard. Defendants also have the opportunity to have bond modified "upon a show of good cause." *Id.*

seventy-two hours was not facially unconstitutional.[17] The petition for writ of certiorari to the U.S. Supreme Court was denied on June 12, 2023.[18]

*Mitchell v. Doherty*, 37 F.4th 1277 (7th Cir. 2022). Detainees in Winnebago County, Illinois, filed a § 1983 claim against the chief circuit judge, the sheriff, and the county alleging that defendants violated their Fourth Amendment rights by failing to hold bail hearings within forty-eight hours after their arrests.[19] Affirming the lower court's decision granting the defendants' motion to dismiss, the Seventh Circuit held that the Fourth Amendment does not require a bail hearing within forty-eight hours of arrest.[20]

*Ross v. Blount*, No. 2:19-cv-11076 (E.D. Mich. 2019). In April 2019, pretrial detainees in the Wayne County, Michigan jail filed a class-action lawsuit alleging unconstitutional, wealth-based detention practices in the district's pretrial bail and arraignment procedures. On July 12, 2022, the parties entered into an agreement that revised the district's bail practices. The agreement includes provisions for judicial officials to make findings based on an individual's ability to pay;[21] to determine whether that payment would create "manifest hardship";[22] and, if cash bail is ordered, to make an individualized assessment that the accused poses a danger to any person or that their risk of non-appearance "cannot be managed by Non-Cash Release Conditions."[23]

## State Cases

*In re Humphrey*, 482 P.3d. 1008 (Cal. 2021). The California Supreme Court, on its own motion, granted review of a lower court's decision to address the constitutionality of the state's money bail system. The court held that a person cannot be kept in custody simply because they cannot afford bail, noting that "[t]he common practice of conditioning freedom on whether an arrestee can afford bail is unconstitutional."[24] The court further held that "where a financial condition is nonetheless necessary, the court must consider the arrestee's ability to pay the stated amount of bail — and may not effectively detain the arrestee solely because the arrestee lack[s] the resources to post bail."[25] The court reasoned, in part, that the state's interest in public safety is not addressed by detaining arrestees based on income; rather, judicial officials should consider whether nonfinancial conditions, such as electronic monitoring or house arrest, are sufficient for ensuring public safety and protecting the interests of victims.[26]

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[17] *Id.* at 1328 (noting that "…the forty-eight-hour window within which the Supreme Court has mandated probable cause determinations to be held, and which the Fifth Circuit imported into the bail context, serves a fundamentally distinct purpose from the setting of bail" and that "[u]ltimately, where the constitutional line must be drawn is a question for a separate case. Here, we simply must determine whether the seventy-two-hour deadline before us is facially unconstitutional, and we are satisfied that it is not.").
[18] *Schultz v. Alabama,* 42 F.4th 1298 (11th Cir. 2002), *sub nom. Hester v. Gentry,* No. 5:17-cv-00270 (N. D. Ala. March 3, 2023), *cert. denied,* 143 S.Ct. 2610 (Mem) (2023).
[19] 37 F.4th at 1279. Defendants were held in custody for 48 to 68 hours before bail hearings were held. *Id.* at 1278.
[20] *Id.* at 1289.
[21] Exhibit Final Agreement at 6, *Ross v. Blount*, No. 2:19-cv-11076, (E.D. Mich. July. 12, 2022), ECF. No. 51-1.
[22] *Id.*
[23] *Id.* at 8.
[24] 482 P.3d at 1012.
[25] *Id.* at 1013 (internal quotes omitted).
[26] *Id.* at 1020.

*DuBose v. McGuffey*, 195 N.E.3d 951 (Ohio 2022). In this habeas case, the Supreme Court of Ohio held that "the trial court unlawfully set the bail amount so high so as to ensure that [the defendant] could not get out," which was unconstitutionally excessive.[27] The defendant was charged with two counts of murder and other felonies. He was arrested in Las Vegas, Nevada and waived extradition back to Ohio. Defendant's bail was initially set by the trial court at $1.5 million, then reduced to $500,000, and then raised back to $1.5 million after statements were made by the victim's family at a bail hearing. Defendant appealed. The state court of appeals reduced his bail to $500,000 and set other nonfinancial conditions.[28] The supreme court held that the court of appeals did not err in reducing defendant's bail. It noted that bail is intended to assure a defendant's appearance in court and that the court of appeals did not disregard the safety of the victim's family in reducing bail. It stated:

public safety is not a consideration with respect to the *financial* conditions of bail. In making this statement, we do not minimize the importance of the safety concerns of the victim's family in this case. We merely recognize, as did the court of appeals, that…public-safety concerns may be addressed by imposing nonfinancial conditions, such as restrictions on travel and association, completion of alcohol- and drug-abuse treatment, and orders of no contact with witnesses in the case.[29]

Noting that the statement from the victim's family was unsworn and did not articulate concrete reasons for their fear,[30] the court held that the intermediate appellate court did not err by declining to increase bail in light of the statement.

*State v. Halverson*, 329 So.3d 276 (La. 2021). In this criminal case, the defendant was charged with negligent homicide and several other felonies and misdemeanors. His bail was set at $485,000. The Supreme Court of Louisiana found that decision to be unconstitutional.[31] According to the statutory bail factors, the defendant's ability to pay must be considered.[32] In applying this and other statutory factors, the court found that defendant's bail should not exceed $200,000.[33] The court reversed and remanded for defendant's bail to be lowered to less than $200,000.

*State v. Pan*, 291 A.3d 82 (Conn. 2022). In this criminal case, the Supreme Court of Connecticut held that a reasonable bail is not necessarily one that the defendant can afford. The defendant was charged with murder and the trial court judge issued a warrant for arrest, with bail set at $5 million cash or surety bond.[34] After a three-month manhunt, the defendant was apprehended in a different state, using an alias and in possession of several cell phones, nearly $20,000, and his father's passport.[35] At arraignment, the trial court judge raised the defendant's bond to $20 million, noting that in spite of the defendant's lack of a criminal record, the defendant's actions indicated that he may be a flight risk and a risk to community safety. On appeal, the court affirmed the trial court's decision, noting that the

[27] *Dubose v. McGuffey*, 195 N.E.3d 951, 960 (Ohio 2022).
[28] *Id*. at 954.
[29] *Id.* at 957 (emphasis in original).
[30] *Id.* at 960.
[31] 329 So.3d at 277.
[32] *Id.* at 278; *see also* La.C.Cr.P. art 316(4).
[33] 329 So.3d at 278.
[34] *State v. Pan*,291 A.3d 83, 88 (Conn.2022).
[35] *Id.*

protection against excessive bail does not equate to a right to a bail amount that the defendant can afford. The court said the case was "a paradigmatic example of one in which a bond amount that is so high that it might well be beyond the ability of the defendant to afford is nevertheless reasonable, even if the high amount effectively serves as the denial of bond."[36]

*DeWees v. State*, 180 N.E.3d 261 (Ind. 2022). In this criminal case, the Supreme Court of Indiana held that evidence-based practices used to set bail "**enhance**, rather than restrict, the broad discretion entrusted to our trial courts when executing bail. What's more, a trial court can and **should** exercise that discretion to protect against the risk of flight or potential danger to the community."[37] The defendant was charged as an accomplice to burglary. The pretrial risk assessment tool used in connection with bail decisions rated defendant in the "moderate" category in terms of flight risk and nonappearance. Subsequently, the defendant discovered that she was incorrectly scored and moved for a bond reduction. Her motion was denied and she appealed. On appeal, the supreme court found that there was sufficient evidence supporting the trial court's denial of bond reduction, noting that an "evidence-based assessment…is no substitute for a judicial determination of bail but is merely supplemental to all other evidence informing the trial court's decision."[38]

*Urquidi, et al. v. City of Los Angeles et al.,* No. 22STCP04044 (Cal. Super. Ct. L.A. Cnty. 2023). In November 2022, after the California Supreme Court's *Humphrey* decision (above), detainees in Los Angeles County jails filed a class action lawsuit in the county superior court against county and city officials, challenging the constitutionality of the use of bail schedules.[39] In Los Angeles County, bail is set at a fixed amount based on the charges filed. Plaintiffs alleged that using the schedule, without consideration of other factors such as ability to pay, creates a "wealth-based detention system" that is not narrowly tailored to achieve the government interests of preventing crime or ensuring appearance at future court dates.[40] Defendants argued that the enforcement of the bail schedule is allowed per the authority of the superior court and the California legislature.[41] On May 16, 2023, Judge Lawrence Riff granted plaintiffs' motion for preliminary injunction, which prevents the use of "any form of secured money bail schedule that requires or has as its effect that…detention is determined by an arrestee's ability to pay money bail."[42] The superior court then revised the county's bail determination procedures. Effective October 1, 2023,[43] pretrial release determinations in Los Angeles county will be based on "Pre-Arraignment Release Protocols" that favor non-financial release conditions for non-serious, non-

[36] *Id.* at 98.
[37] 180 N.E.3d at 263.
[38] *Id.* at 270.
[39] Press Release, *Civil Rights Groups File Lawsuit Challenging Los Angeles County's Bail Schedule Policy,* PUBLIC JUSTICE – DEBTORS' PRISON PROJECT (Nov. 14, 2022), https://www.publicjustice.net/civil-rights-groups-file-lawsuit-challenging-los-angeles-countys-bail-schedule-policy/.
[40] Memorandum Decision and Order on Motion for Preliminary Injunction at 3, *Urquidi v. City of Los Angeles,* No. 22STCP04044 (Cal. Super. Ct. L.A. Cnty. 2023).
[41] *Id.* at 9.
[42] *Id.* at 57.
[43] News Release at 3, *Nation's Largest Trial Court Unveils Safe and Fair Pre-Arraignment Release Protocols for Non-Violent, Non-Serious Felonies and Misdemeanors,* SUPER. CT. OF CAL., CNTY. OF LOS ANGELES, (July 18, 2023) https://www.lacourt.org/newsmedia/uploads/14202371814442523NRSAFEANDJUSTPRE-ARRAIGNMENTPROTOCOLS.pdf

violent felonies and misdemeanors.[44] The new protocols list the eligible non-serious, non-violent felonies and misdemeanors and their suggested release conditions, and focuses the bail determination on a defendant's risk to the community and potential nonappearance in court.[45] This means that many defendants arrested for non-violent, non-serious felonies and misdemeanors may not be held in custody prior to arraignment.[46] High-risk defendants (e.g., those who may not appear in court) will be brought before a magistrate, who will make individualized determinations of non-financial release conditions.[47] The procedures for determining pretrial release conditions for defendants arrested for serious and violent offenses remain unchanged—the judicial official may set financial conditions of release if deemed necessary.[48]

*Rowe v. Raoul,* ___ N.E.3d ___, 2023 WL 4566587 (Ill. 2023). In this civil case, the state's attorney and sheriff of Kankakee county, Illinois sued the Attorney General, the Governor, and the Illinois House and Senate leaders, alleging that the pretrial release conditions of Illinois' SAFE-T Act[49] and Follow-Up Act[50] violated the Illinois constitution.[51] The Acts, which eliminate cash bail for certain non-violent charges, were set to take effect on January 1, 2023.[52] However, in December 2022, a county circuit court judge found that the pretrial release provisions of both acts were unconstitutional.[53] While the appeal was pending, the supreme court granted a supervisory order which paused the pretrial release provisions of both Acts.[54] In an opinion released on July 18, 2023, the Illinois Supreme Court reversed the decision of the circuit court, reasoning that the acts are similar to historical changes to the bail statutes,[55] are within the powers of the legislature to enact,[56] and do not offend the Illinois constitution.[57] The Illinois Supreme Court lifted the pause on implementation and circuit courts are to begin following the procedures on September 18, 2023.[58]

*Farella v. Anglin*, No. 5:22-cv-5121, 2023 WL 5005384 (W.D. Ark. Aug. 5, 2023). In this civil case, indigent defendants filed a class action lawsuit against the Executive Director of the Arkansas Public Defender Commission and Benton County's Chief Public Defender, alleging that their constitutional rights were violated when the public defender's office failed to provide counsel at initial bail determination hearings.[59] The defendants moved to dismiss based on grounds similar to the defendants in bail cases nationwide—sovereign immunity; failure to state a claim; and, in the

[44] *Id.* at 2.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 3.
[49] 2020 Ill. Legis. Serv. P.A. 101-652 (WEST).
[50] 2022 Ill. Legis. Serv. P.A. 102-1104 (WEST).
[51] *Rowe v. Raoul,* ___N.E.3d ___, 2023 WL 4566587 (Ill. 2023) at *2.
[52] 2020 Ill. Legis. Serv. P.A. 101-652 (WEST).
[53] *Rowe v. Raoul,* ___N.E.3d ___, 2023 WL 4566587 (Ill. 2023) at *1.
[54] *Rowe v. Raoul,* ___N.E.3d ___, 2023 WL 4566587 (Ill. 2023) at *10.
[55] *Id.*
[56] *Id.*
[57] *See id.*
[58] *Id.*
[59] Memorandum Opinion and Order, *Farella v. Anglin*, No. 5:22-cv-5121, 2023 WL 5005384 (W.D. Ark Aug 5, 2023) at *3.

alternative, lack of standing.[60] The federal district court denied those motions.[61] As of this writing, no further filings have been made.

[60] *Id. See also, e.g,* Memorandum of Law in Support of Judicial Defendants' Motion for Summary Judgment at 25-27 *Allison v. Allen*, No. 1:19-cv-01126 (M.D.N.C. July 7, 2022), ECF No. 100.
[61] Memorandum Opinion and Order, *Farella v. Anglin*, No. 5:22-cv-5121, 2023 WL 5005384 (W.D. Ark. Aug 5, 2023) at *39.