

Cause No 20-0291

TEXAS CRIMINAL DEFENSE §
LAWYERS ASSOCIATION §
Et al. §
v. §
GREG ABBOTT, §
Et al §

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, it has a nationwide membership of thousands of direct members and up to 40,000 with affiliates. Its members are private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files

numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. The independence of judges, separation of powers, the presumption of innocence, equal protection under the law, the provision of due process in criminal proceedings and the prohibition on cruel and unusual punishment are of great importance in a system that is fair and worthy of trust.

Amicus seeks leave to file this brief statement of concerns regarding Executive Order GA-13. The issues presented by Texas Governor Greg Abbot's Executive Order GA-13 of March 29, 2020 impact the above concerns in a negative manner. It seeks to order that Texas judges may not release persons to personal bonds where the person has previously been convicted of a crime that involves physical violence or the threat of physical violence or of a person currently arrested for such a crime; that is supported by probable cause. Leaving aside the vague terms of this executive order, it encroaches on the function of the courts to determine whether persons should be released on personal bond, whether they

should be released on electronic monitoring, or should be released on a cash or surety bond with conditions.

It does not prohibit release of this same class of described persons on cash or surety bail. Therefore, it appears to place restrictions for release on the poor over those for those of greater means without any rational relationship to a distinguishing important governmental purpose. Thus, those previously convicted of the defined crimes or currently charged with those crimes can obtain release; while those without the economic means to post a cash or surety bail cannot obtain release. *Cf. Schilb v. Kuebel*, 404 U.S. 357 (1971) [imposing administrative fees on persons released on cash bail must bear rational basis to government purpose to comply with equal protection].¹ With the current COVID 19 pandemic extant in our local jails, this also exposes the class of poor persons with the circumstances outlined in GA13 to the risk of contracting the disease in violation of the eighth amendment to the United States Constitution. Because it subjects persons merely accused of offenses and those with meager economic means to more

¹ Charging an administrative fee for those posting cash bail bore a rational relationship to the cost of administering the cash bail program.

harsh conditions pre-trial than those who have the means to post cash or surety bail bonds, it results in those who cannot afford to post bail, but who might otherwise qualify for release under the personal recognizance provisions for release, to exposure and suffering from COVID 19 when they would not otherwise. As explained in *Montano v. Orange County*, 842 F.3d 865 (5th Cir. 2016) detaining persons under conditions that expose them to the threat of disease violates the eighth amendment of the United States Constitution.

Further, the right to suspend rules of Criminal Procedure and other laws affecting the administration of criminal justice has been reserved to the Texas Supreme Court and the Court of Criminal Appeals by the Texas Legislature, where the Supreme Court cannot act. See Texas Government Code 22.0035. Thus, GA-13 appears to also encroach on the authority and powers of the Texas Supreme Court and the Court of Criminal Appeals.

In the Bexar County Jail, an inmate with COVID 19 is charged with a felony offense of violence, for example. His continued restraint in the Bexar County Jail endangers himself, other detainees, and the employees

working at the Bexar County Jail.

<https://www.ksat.com/news/local/2020/04/11/2nd-inmate-at-bexar-county-jail-tests-positive-for-covid-19-sheriffs-office-says/> He has been in custody since March 17, 2020, almost a month, before he tested positive for COVID 19. This suggests that he cannot afford release on cash or surety bail and was exposed to the disease while in custody. While those similarly situated can gain release on bail so long as they can afford it. Therefore, GA-13 does not appear to bear a rational relationship to its stated purpose of protecting the public from violent persons.

The novel corona virus (COVID-19) is a rapidly spreading pandemic that has no cure, no known treatment, and no vaccine. Persons throughout the nation with specialized knowledge in the CDC, the U.S. Attorney General, and Sheriffs have described that persons in jails and prisons are vulnerable to COVID-19 and that CDC requirements and government ordered restrictions cannot be fully implemented in the jail and prison facilities. The coronavirus is a particular threat to prison populations generally because of the circumstances of confinement and the inmates' close proximity to each other. See generally,

<https://www.prisonpolicy.org/virus/virusresponse.html>

<https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3> .

The Bureau of Prisons stated that “the densely packed nature of prisons ‘creates a risk of infection and transmission for inmates and staff.’” <https://www.nytimes.com/2020/03/17/us/coronavirus-prisons-jails.html>

March 26, 2020 Memorandum for Director of Bureau Prisons, Subject: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic. And the Attorney General of the United States has declared an emergency in the Bureau of Prisons, calling for hastened release for persons vulnerable to COVID 19.

“The CARES Act now authorizes me to expand the cohort of inmates who can be considered for home release upon my finding that emergency conditions are materially affecting the functioning of the Bureau of Prisons. I hereby make that finding and direct that, as detailed below, you give priority in implementing these new standards to the most vulnerable inmates at the most affected facilities ...” Memorandum of Attorney General William Barr, April 3, 2020.

The International Association of Chiefs of Police told ABC news that police are scaling back arrests for low-level offenses to limit officer exposure. <https://abcnews.go.com/US/coronavirus-outbreak-changing-us-criminal-justice-system/story?id=69757440> Sheriff David Mahoney, with the National Sheriffs’ Association, is working with local, state, and

federal partners “to decrease the number of people who are physically arrested and brought to jail.” <https://abcnews.go.com/US/coronavirus-outbreak-changing-us-criminal-justice-system/story?id=69757440>

For persons in custody in prisons, President Trump is considering issuing an Executive Order to release elderly inmates in federal prisons. <https://www.businessinsider.com/trump-consider-coronavirus-executive-order-federal-prisons2020-3> One of the reasons for this is because the elderly is a high-risk group for contracting coronavirus and also is a high-risk group for serious complications from the virus. *Id.*

The state of disaster declared by Governor Abbott and the national emergency declared in all fifty states by the President of the United States because of the coronavirus, give great cause for concern about those held in custody in close quarters without the ability to provide for their own self-care. This counsels in favor of release in the appropriate case. *See e.g.* Order of Judge Biery releasing a person with a immunocompromised disorder (multiple sclerosis) who he had not previously released post-conviction for an economic crime in *U.S. v. Alfaro*, SA-18-CR-0879 (1)-FB (W.D.Texas 2020).

“While Mr. Alfaro deserves to go to prison for his crimes, he does not deserve the death penalty in the local jail.” Id.

Correctional systems around the country have been granting compassionate releases under the circumstances presented by the COVID 19 pandemic. For example, after an investigator at a jail facility died from the coronavirus and an officer and inmate contracted the disease, the New York City Board of Correction worked to release all persons at high risk of infection. Closer to home, Sheriff Ed Gonzalez, who oversees the third largest jail system in the country, in Harris County, Texas, is seeking the compassionate release of hundreds of vulnerable detainees.

“Jails and prisons are fertile ground for the spread of infectious disease,’ Gonzales said, noting that his staff has worked hard to curb an outbreak by addressing hygiene and health concerns. ‘My nightmare scenario is that an outbreak happens at the county jail.’

But he said standards implemented in the general community are impossible to follow or hard to do in a jail. ‘Our criminal justice system must become more aggressive in granting compassionate releases,’ he said.”

<https://www.houstonchronicle.com/news/houston-texas/houston/article/harris-county-sheriff-gonzalez-jail-inmate-release-15143578.php>

As Houston Sheriff Gonzalez noted, above, it is difficult, if not impossible, to apply the same standards and protocols applicable in the community at large to the restrictive requirements of a custodial setting. For example, social distancing is not practical, isolation is impossible (there is not enough room and solitary confinement has been determined to be the equivalent of torture²), and hand sanitizer is contraband in the prison setting. Cleaning supplies are not readily available to all inmates in the prison facility. Nor can the facility be kept adequately disinfected as a practical matter because of the daily mass movement of inmates to maintain the prison and take care of daily necessary duties. These decisions are uniquely in the province of Texas judges hearing each individual case.

² Solitary confinement is a punishment for violent behavior while in custody. It is to be used for a very short time, a day to a few days, commensurate with the violent infraction under consideration. Its use here would constitute cruel and unusual punishment and would be psychologically damaging to Ms. Patterson. Some medical authorities have equated it with torture because of its negative psychological effect. Arrigo, Bruce A.; Bullock, Jennifer Leslie (December 2008). "The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units". *International Journal of Offender Therapy & Comparative Criminology*. 52 (6): 622–640; ; Metzner JL, Fellner J.J *Am Acad Psychiatry Law*. 2010;38(1):104-8; Kysel, Ian (October 2012). Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons in the United States (PDF).

Under the circumstances presented by the COVID 19 pandemic and the Texas Criminal justice system, GA 13 violates the separation of powers, interferes with judicial independence, violates equal protection and due process of law, and constitutes cruel and unusual punishment for those who cannot afford cash or surety bail who otherwise qualify for release on personal bond.

Respectfully submitted,

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NACDL

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