



Texas Criminal Defense Lawyers Association

July 7, 2020

The Honorable Chief Justice Nathan L. Hecht
Supreme Court of Texas
Via fax 512-463-1312 and email Nathan.Hecht@txcourts.gov

Dear Chief Justice Hecht:

I am writing on behalf of the Texas Criminal Defense Lawyers Association (TCDLA), the nation's largest state organization of criminal defense attorneys. TCDLA is a non-profit, voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and to the constant improvement of the administration of criminal justice in the State of Texas. We currently have a membership of over 3,300 attorneys across the state.

TCDLA respectfully asks that the Supreme Court of Texas amend its Eighteenth Emergency Order, Misc. Docket No. 20-9080 to require the consent of the parties before any trial court judge proceeds with a jury trial between now and September 1, 2020. This would restore the status quo from the Court's Seventeenth Emergency Order, Misc. Docket No. 20-9071. Attached please find a resolution of TCDLA's Board of Directors and Executive Committee detailing our request.

We do not stand alone in calling for the consent clause to be reinstated. I have spoken with multiple elected district attorneys across the state. Many believe the consent clause of the Seventeenth Emergency Order should be restored. Although we trust that numerous trial judges will act responsibly during the height of the COVID-19 pandemic, we are concerned that some judges will press forward with criminal jury trials over the objection of the parties. The results could be disastrous.

TCDLA has made its position clear to the Office of Court Administration, and I am personally available to discuss TCDLA's resolution with any member of this Honorable Court. We recognize that trial judges normally do not need the consent of parties in order to stage a trial. These are not normal times, however, and the pandemic in Texas is worse this summer than it was when the Texas Supreme Court originally included a consent provision in its Seventeenth Emergency Order.

Thank you for your kind consideration. TCDLA hopes to hear a response from this Honorable Court in short order, as time is of the essence.

Respectfully submitted,

Grant M. Scheiner
Board Certified - Criminal Law
Texas Board of Legal Specialization
President - Texas Criminal Defense Lawyers Association, 2020-21

CC: Justice Green, Justice Guzman, Justice Lehrmann, Justice Boyd, Justice Devine, Justice Blacklock, Justice Busby, Justice Bland, and Clerk Blake Hawthorne.

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TCDLA founded in 1971

A RESOLUTION

THE BOARD OF DIRECTORS AND THE EXECUTIVE COMMITTEE THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION

WHEREAS, in its Eighteenth Emergency Order, Misc. Docket No. 20-9080, issued June 29, 2020, the Supreme Court of Texas approved criminal trials to occur via teleconferencing, videoconferencing, or other means. The Order approves remote participation of parties, attorneys, witnesses, court reporters, and jurors. It does not require the defendant in criminal trials to consent to a jury trial and in fact contemplates such trials even in the face of the defendant's opposition;

WHEREAS, one of the most venerable and cherished institutions in American jurisprudence is the jury. This is particularly so in criminal cases, as enshrined in both the Sixth Amendment of the Federal Constitution and Article I, Section 15 of the Texas Constitution;

WHEREAS, it is universally recognized that a cross-section of the community is the best composition of a jury panel as such a mixture of people bring the community's conscience to the courtroom. If the jury speaks for the community, it ought to be comprised of a fair cross-section of that community. In fact, the Supreme Court of the United States long ago, in *Theil v. So. Pacific Co.*, 328 U.S. 217 (1946) and *Fay v. New York*, 352 U.S. 261 (1947), spoke to the importance of a jury comprised of a fair cross-section of the community from which it was drawn;

WHEREAS, according to the Centers for Disease Control (CDC) the novel coronavirus (COVID-19) has infected over 2.8 million people in America as of July 6, 2020;

WHEREAS, COVID-19 has killed over 130,000 Americans. The positive test rate for COVID-10 in the United States is currently 7.4%;

WHEREAS, with over 200,000 cases of COVID-19 as of the date of this Resolution, the State of Texas is one of the hardest-hit states in the nation;

WHEREAS, the positive test rate for COVID-19 in Texas has climbed to 13.9%—the fifth highest percentage of any state in the nation;

WHEREAS, COVID-19 hospitalization rates in Texas have trended upward: Hidalgo and Starr county hospitals are at full capacity; the city of Houston's ICU beds are at 102% capacity;

WHEREAS, on July 2, 2020, in recognition of the magnitude of the COVID-19 crisis, Governor Abbott issued Executive Order GA-29, mandating the wearing of face masks in public places in all Texas counties with 20 or more COVID-19 cases;

WHEREAS, on July 2, 2020, Governor Abbott issued a Proclamation Amending Executive Order GA-28, prohibiting gatherings of 10 or more people unless county officials approve of such gatherings;

WHEREAS, the CDC reports members of racial and ethnic minority groups are at a markedly increased risk of contracting COVID-19, requiring hospitalization because of COVID-19, and dying from COVID-19. Specifically, Black people are five times more likely to require hospitalization than Whites; Hispanic or Latino persons are four times more likely to require hospitalization than Whites;

WHEREAS, if minorities are more heavily impacted by COVID-19, they may not have the ability to appear for jury duty or, even if they do have the ability, they will be disinclined to risk doing so. This would result in jury panels that do not represent a fair cross-section of the community;

WHEREAS, the CDC reports, as of June 25, 2020, that 8 out of 10 COVID-19-related deaths have been among adults over 65 years old. Consequently, the CDC continues to recommend those who are over 65 years old limit their interactions with people as much as possible;

WHEREAS, if the elderly are encouraged to stay inside, they also will not be able to participate on juries;

WHEREAS, schools across Texas (notably in Houston, Dallas, Fort Worth, Austin, El Paso, Corpus Christi, Lubbock, and Amarillo) are considering fully or partially closing public schools and shifting to at-home, online distance teaching and learning;

WHEREAS, according to the Texas Education Agency, over 5 million children are enrolled in public schools in Texas. If schools shift fully or partially to online learning, millions of Texas parents will have to stay home to monitor and care for their children;

WHEREAS, if parents are responsible for monitoring, caring for, and teaching their school-age children, they will be tied to their homes and unable to serve on juries they otherwise would qualify for. This would result in jury panels that do not represent a fair cross-section of the community;

WHEREAS, losing minorities, elderly people, parents, vulnerable people, and others from jury panels will deprive the accused in criminal cases of their constitutional right to a jury of their peers comprised of a fair cross-section of the community;

WHEREAS, there is no system that any Texas county can employ in staging criminal jury trials that will adequately safeguard the health and safety of all participants in a criminal jury trial as well as protect the constitutional and procedural rights of the accused;

WHEREAS, the criminal justice system involves not only jurors selected from the community but also the accused, the accused's defense team, the prosecutorial team, the judge, the judge's staff, the courthouse staff, the jailers, any witnesses, all of these peoples' families, and a litany of others;

WHEREAS, conducting jury trials during the pandemic will, at a minimum, cause some people to become ill and possibly die;

WHEREAS, defense attorneys, prosecutors, and judges are always free to agree on methods for conducting jury trials and possibly waiving certain rights of the accused—but only when ALL PARTIES agree to go forward with a jury trial;

NOW, THEREFORE, IT IS RESOLVED by the Board of Directors and the Executive Committee of the Texas Criminal Defense Lawyers Association that the Supreme Court of Texas modify its Eighteenth Emergency Order, Misc. Docket No. 20-9080, to require the consent of all parties to the case before any portion of the trial is conducted.

HEREBY RESOLVED this the 7th day of July, 2020.

The Board of Directors and the Executive Committee of the Texas Criminal Defense Lawyers Association.