

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

RUSSELL, et al.	)	
	)	
Plaintiffs,	)	
	)	Case No. 4:19-cv-00226
v.	)	(Class Action)
	)	The Honorable Lee H. Rosenthal
HARRIS COUNTY, TEXAS, et al.	)	U.S. District Judge
	)	
Defendants.	)	
	)	

**PLAINTIFFS’ MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION REGARDING EXECUTIVE ORDER GA 13**

Governor Abbott’s Executive Order GA 13, issued on Sunday, March 29, violates the Equal Protection and Due Process Clauses of the U.S. Constitution because it purports to suspend various laws and to suspend state judicial powers in order to prohibit individualized consideration of non-financial release of many pretrial arrestees. *See Ex. A.* The text of the Order purports to block release of presumptively innocent individuals even if state judges conclude that there is no individualized basis for their pretrial detention—but only for those who cannot pay. The order thus permits release of any and all arrestees, including those charged with the *most* serious offenses, as long as they are required to pay money, but would remove the power of state judges on an individualized basis to even consider non-financial release for many arrestees. The result is the automatic pretrial detention of the indigent without any individualized process—exactly what the Fifth Circuit recently struck down in *ODonnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018).

Plaintiffs seek emergency relief enjoining Defendants from enforcing the Order against them until a full hearing on the matter can be held. *Plaintiffs seek this relief only as to the narrow portion of the Order that purports to bar state judges from making individualized determinations.*

## **I. The Terms of the Executive Order**

On Sunday, March 29, 2020, Texas Governor Greg Abbott issued Executive Order GA 13, purporting to suspend various state laws that protect federal and state constitutional rights. The Order also purports to bar local officials and the state judiciary from enforcing those state or federal rights and to bar state court judges from making individualized determinations of pretrial release.<sup>1</sup>

The relevant effect of the Order in this case is that the Order purports to require anyone currently charged with a crime involving “violence” and anyone with a prior conviction at any time in the past for a crime involving “violence” (regardless of the current charge), to pay secured money bail as a condition of pretrial release regardless of any individualized proceedings or findings by a state court judge. *See* Dkt. 39-1.

The Order does not define or give guidance for different local officials or judges across the state to determine what categories would be encompassed by the term “violence,” and indications are that implementation of different views of this vague term would be chaotic and unpredictable.<sup>2</sup> Regardless of this uncertainty, the language of the Executive Order encompasses broad categories of people, including, for example, any person arrested for the most minor non-violent offense (say, simple drug possession) who was convicted three decades ago of a qualifying offense (say,

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<sup>1</sup> The relevant text of the Order, Dkt. 39-1, is as follows:

- Article 17.03 of the Texas Code of Criminal Procedure, and all other relevant statutes and rules relating to personal bonds, are hereby suspended to the extent necessary to preclude the release on personal bond of any person previously convicted of a crime that involves physical violence or the threat of physical violence, or of any person currently arrested for such a crime that is supported by probable cause. I hereby order that no authority should release on personal bond any person previously convicted of a crime that involves physical violence or the threat of physical violence, or any person currently arrested for such a crime that is supported by probable cause.
- Article 17.151 of the Texas Code of Criminal Procedure is hereby suspended to the extent necessary to prevent any person’s automatic release on personal bond because the State is not ready for trial.

<sup>2</sup> Wildly disparate understandings of similar terms in federal sentencing guidelines and statutes have necessitated an entire wing of federal court and Supreme Court common law jurisprudence and the creation of “the categorical approach,” even though those federal provisions offer more narrowing guidance than the Executive Order.

misdemeanor battery), or any presumptively innocent person with no prior criminal record at all who is currently arrested for the first time on unproven allegations.

For all of the people in these broad categories, the Executive Order *requires* their pretrial detention if they cannot pay for release because it purports to suspend state laws authorizing state courts to release people on “personal bonds” after individualized hearings.<sup>3</sup> The Order further purports to make such pretrial detention indefinite by suspending relevant speedy trial provisions of Texas law that ordinarily would require release of a person if the state is not ready for trial. Preliminary data from Defendants suggest that this language is being read by the District Attorney to block the release of a significant percentage of the Plaintiff class without monetary payment. Crucially, the Executive Order would invalidate even Judge Ritchie’s March 20 Order, Dkt. 32-6, requiring prompt release of people charged with a small number of the least serious offenses that the parties discussed with this Court at the March 29, 2020 hearing.

Moreover, the Executive Order purports to bar *each of the more than twenty state court judges in Harris County* who hear felony cases (and all local, state, and county judges who hear all types of cases across Texas) from making individualized determinations based on state and federal law that arrested individuals may be safely released on non-financial conditions of release.

To be clear, the Governor’s edict suspends these laws and judicial powers only to the extent they allow for release of the indigent. The Order would allow the release of *anyone* who can pay, no matter what threat local police believe the person to pose, but bar the release of similarly situated people who cannot pay, even if a state judge determines on an individualized basis that

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<sup>3</sup> A personal bond is an unsecured bond that allow a person to be released without making an up-front payment if the person agrees to pay an amount of money if the person does not appear.

the person cannot afford to purchase release but poses no safety or flight risk, or that less restrictive conditions would meet the government's interest in court appearance or community safety.<sup>4</sup>

Blocking state judges from releasing the indigent after making individualized judicial determinations of danger and flight risk is not only unconstitutional, but dangerous. What the Governor appears to have intended was to block blanket release on personal bond by local governments (not state judges) *based on* the COVID-19 pandemic of people otherwise validly detained—that kind of blanket release order had been contemplated by local Harris County officials and others around Texas.<sup>5</sup> The *actual* language of the Order, however, not only bars that kind of blanket release, but it bars the state judiciary from *considering and ordering release even after individualized consideration*—an unprecedented threat to the federal Constitution.

The Order suspending constitutional rights is therefore projected to dramatically expand local jail populations at a time when the medical and scientific community is concluding that widespread death and disease can only be averted by doing the opposite.<sup>6</sup> The Order came on the

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<sup>4</sup> The Order asserts that state judiciary somehow supports the suspension of its own powers. But the order omits the portion of the Texas Judicial Council's March 26 Guidance that encourages judges to consider "the health risks to arrestees and their families and communities, and the burdens on communities from increased detentions," and reminds judges to "[d]etermine bail on an individualized determination for each defendant consider the factors set out in [Texas Code of Criminal Procedure Article 17.15]." Court Operation Guidance, Issued 3/26/2020, <https://www.txcourts.gov/media/coronavirus-covid-19-court-operation-guidance/>

<sup>5</sup> Even that kind of more limited order would have flagrantly violated the Texas Constitution, which nowhere gives the Governor the power to limit the power of the judiciary or to suspend criminal laws that protect constitutional rights let alone to suspend the Texas Constitution, which is the effect of the Executive Order's prohibition on personal bonds for specific categories of people. *See* Tex. const. art. 1 § 11. This is not the forum for litigating the separate state-law illegalities in the Order, although some Texas judges immediately announced that they would not comply with it. *See* Ryan Autullo, Statesman, *Abbott order limits efforts to prevent coronavirus spread in jails, judges say* (March 31, 2020), <https://www.statesman.com/news/20200331/abbott-order-limits-efforts-to-prevent-coronavirus-spread-in-jails-judges-say>.

<sup>6</sup> *See* Dkt. 32-1 at 7 (letter from Texas physicians stating, "If we wait, or simply perform half measures, we will have an absolute disaster on our hands."); *id.* at 6 ("An outbreak would case a surge of hospital referrals, which would overwhelm a system that is not equipped for a surge[.]"); *id.* at 5 (letter from Dr. Esmaeil Porsa, M.D., MPH, and CEO of Harris Health, stating that even a "limited outbreak of COVID-19 in the Harris County Jail has the potential to overwhelm our already overburdened hospital system," and "could leave many vulnerable people in our community without access to care"); Dkt. 32 at 1–2 (public statement by Sheriff Gonzalez that the jail has limited medical services, and COVID-19 will "spread like wildfire" once it hits (which is has)); *see also, e.g.*, Ex. B (In re: Covid-10 Pandemic, No. ADM2020-00428, Order of the Supreme Court of Tennessee at Nashville (Mar. 25, 2020)); Ex. C (Memorandum

same day that this Court expressed grave concern about the situation and encouraged the parties to work as quickly as possible to avert disaster at the Harris County jail and purports to remove the individualized tools that state judges and County officials might have used to do so.

## **II. Argument**

### **A. Standard of Review**

A preliminary injunction is warranted if the movant demonstrates: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The same factors apply to a Motion for Temporary Restraining Order. *Whole Woman’s Health v. Paxton*, 265 F. Supp. 3d 813, 818 (W.D. Tex. 2017). Plaintiffs satisfy each of these requirements.

### **B. Plaintiffs Are Likely to Succeed on the Merits**

The Executive Order suspending state laws and suspending individualized judicial powers violates several federal Constitutional requirements: (1) that no individual’s fundamental bodily liberty be deprived prior to trial unless pretrial detention is necessary for public safety or to prevent flight from prosecution; (2) that no individual may be detained prior to trial solely because the person cannot make a monetary payment, and (3) that all pretrial detention determinations be individualized and made after appropriate safeguards.<sup>7</sup> The latter two of these principles were the entire basis of the Fifth Circuit recent unanimous decision affirming this Court’s holdings on the

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from Chief Justice Beatty of the Supreme Court of South Carolina to Magistrates, Municipal Judges, and Summary Court Staff, RE: Coronavirus (Mar. 16, 2020)); Ex. D (Michigan Governor Gretchen Whitmer Executive Order 2020-29 (COVID-19) (Mar. 29, 2020)).

<sup>7</sup> The Order flagrantly violates other provisions of state law and the Texas Constitution not addressed in this lawsuit.

same issues in *ODonnell*. 892 F.3d at 160 (explaining that the “constitutional defect in the process afforded was the *automatic* imposition of pretrial detention on indigent misdemeanor arrestees”); *id.* at 163 (requiring a “case-by-case evaluation of a given arrestees’ circumstances,” and “notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decisionmaker”). And each of these three federal constitutional principles has been extensively briefed by Plaintiffs in their existing application for a Temporary Restraining Order and Preliminary Injunction, which they incorporate here, *see* Dkt. 32, Dkt. 44.

A few examples illustrate the application of the Order:

- Under the order, any person charged with possession of less than 1 gram of cocaine, who has a twenty-year-old conviction for misdemeanor threats, will be prohibited from receiving non-financial release. If the person cannot pay, the person will be detained, even if a state judge holds a hearing and determines on an individualized basis that the person poses no danger to the community and no risk of flight.
- A person charged with felony assault based only on probable cause, who has no prior convictions, will be required to pay secured money bail as a condition of release no matter what any state judge determines. If the person cannot pay, the person will be detained—even if a judicial officer concludes at an individualized hearing that alternative non-financial conditions of release would be sufficient to serve the government’s interests in public safety and court appearance.
- The Order would permit the automatic and immediate release, pursuant to a secured bail schedule, of any person accused of sexual assault, even if the person had prior convictions for sexual assault, so long as the person could pay, and without any individualized judicial hearing at all.

The Order thus *requires*, as a *categorical* matter, pretrial detention for certain groups of arrestees, contrary to *ODonnell*. *See* 892 F.3d at 160, 163. It will require the detention of people who could be safely released pending trial on less-restrictive conditions, even as similarly situated people with access to cash will go free. It will do all of this regardless of what any state judge concludes at an individualized hearing.

To summarize, Plaintiffs’ constitutional claims have both substantive and procedural aspects. *See, e.g.*, Dkt. 32 at 22–24; *Washington v. Harper*, 494 U.S. 210, 220 (1990) (explaining

the interaction between claims that share substantive and procedural aspects). Substantively, Plaintiffs' claims flow from two lines of precedent. First, equal protection and due process forbid jailing a person solely because of her inability to make a payment. *ODonnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018); *Bearden v. Georgia*, 461 U.S. 600, 665 (1983); *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978); *Frazier v. Jordan*, 457 F.2d 726, 728 (5th Cir. 1972). Second, due process protects a "fundamental" right to pretrial liberty. *United States v. Salerno*, 481 U.S. 739, 750 (1987). The two substantive constitutional rights at issue cannot be infringed unless the government demonstrates that wealth-based pretrial detention is necessary to protect public safety or prevent flight from prosecution. Procedurally, the Constitution requires the government to provide individualized safeguards to protect the accuracy of the substantively required determinations. *Harper*, 494 U.S. at 228; *ODonnell*, 892 F.3d at 157.

The Executive Order evades the findings and safeguards required for pretrial detention. The Supreme Court has held: "In our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). But the automatic, categorical detention of many impoverished people required by the Order is not an "exception" at all, let alone a "carefully limited" one. As Plaintiffs explained in their prior briefing, the Arizona Supreme Court and *en banc* Ninth Circuit have repeatedly struck down on due process grounds much more narrowly focused laws requiring categorical pretrial detention. Dkt. 32 at 29.

The Court need not reach most of Plaintiffs' arguments to bar the enforcement of the Order to the extent it removes individualized discretion from state judges to consider non-financial release and order such release where appropriate. Although this case involves issues broader than *ODonnell*, this automatic detention of the indigent that resulted from the failure to exercise judicial discretion was already at the core of *ODonnell*.

The Executive Order includes an exception clause that allows consideration of release “on an individualized basis for health or medical reasons.” Dkt. 39-1 at 4. This provision does not save its constitutionality, and further exacerbates the procedural due process violation implicated by the Order. This provision purports to prohibit release of people who pose no danger or flight risk if there is not an “individualized,” “health or medical” reason to release them, even if a judge holds an individualized hearing and concludes that their pretrial detention serves no government interest and that the state law, Texas Code of Criminal Procedure art. 17.15 factors do not warrant a secured bond. That is the exact violation alleged in this case and found in *ODonnell*. And it does so only for the poor. Again, the exact violation alleged in both cases. If interpreted as written, this clause would therefore prevent release of people the U.S. Constitution requires be released and prevent state judges from applying and weighing the factors listed in Article. 17.15, if an individualized weighing of those factors required release without monetary payment. This is exactly what the Texas Judicial Council just admonished state judges against. *See supra* note 4.

Further, the Order would then place on presumptively innocent pretrial detainees the burden to prove that there was some “individualized” reason *relating to* “health or medical” issues that they must be released. If the person could not prove that they had some special health or medical reason requiring their release, they would be detained regardless of individualized finding that they should not be detained under either state or federal law. And, moreover, in Harris County, even prior to the pandemic, people detained could not obtain such an individualized hearing for *two to four weeks*. Dkt. 32-4 at 8–9. The Constitution requires the government always to bear the burden that detention of presumptively innocent people is justified.



For all of the reasons set forth in Plaintiffs' first Motion for Temporary Restraining Order and Preliminary Injunction, *see* Dkt. 32, and supplemental brief, Dkt. 44, Plaintiffs are likely to succeed on the merits of this Motion. Plaintiffs fully incorporate that briefing herein.

**C. Plaintiffs Face Irreparable Harm, and the Balance of Harms and Public Interest Weigh in Their Favor**

Plaintiffs have extensively briefed the enormous and ongoing irreparable harm flowing from their continued pretrial detention at a facility exploding in contagion without necessary medical supplies, and why the public interest and balance of harms weigh strongly in their favor. *See* Dkt. 32, 44. Plaintiffs fully incorporate their briefing herein. Plaintiffs therefore seek an injunction prohibiting the County and Sheriff from enforcing the Order against them.

**III. Conclusion**

Plaintiffs move this Court for a temporary restraining order prohibiting enforcement of the Executive Order as applied to Plaintiffs insofar as the Order is interpreted to bar state judges from making individualized determinations that non-financial conditions of release are appropriate.

This relief will preserve the status quo of existing state law and provide some chance of preserving the existing status quo of Plaintiffs' physical health and lives pending full briefing on this Motion and expedited hearing in front of this Court, for which Plaintiffs request an expedited briefing schedule.

Date: April 1, 2020

/s/ Alec Karakatsanis

/s/ Elizabeth Rossi

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**CERTIFICATE OF SERVICE**

I certify that on April 1, 2020 a true and correct copy of this document properly was served on counsel of record via electronic filing in accordance with the USDC, Southern District of Texas Procedures for Electronic Filing.

*/s/ Elizabeth Rossi*

\_\_\_\_\_  
Elizabeth Rossi

FILED

03/25/2020

Clerk of the  
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

IN RE: COVID-19 PANDEMIC

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No. ADM2020-00428

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**ORDER CONTINUING SUSPENSION OF IN-PERSON COURT PROCEEDINGS  
AND EXTENSION OF DEADLINES**

On March 13, 2020, in response to the COVID-19 pandemic, the Chief Justice of the Tennessee Supreme Court declared a state of emergency for the Judicial Branch of Tennessee government and activated a Continuity of Operations Plan for the courts of Tennessee. See Tenn. Const. Art. VI, § 1; Tenn. Code Ann. §§ 16-3-501 to 16-3-504 (2009); Moore-Pennoyer v. State, 515 S.W.3d 271, 276-77 (Tenn. 2017); Tenn. Sup. Ct. R. 49. This state of emergency constitutes a “disaster” for purposes of Tenn. Sup. Ct. R. 49 and Tenn. Code Ann. § 28-1-116. In light of ongoing concerns, the Tennessee Supreme Court hereby continues the suspension of in-person court proceedings and the extension of deadlines as set forth in this order. We again emphasize that the local and state courts of the State of Tennessee are open and will remain open under all circumstances, subject to the provisions of this order.

Under the constitutional, statutory, and inherent authority of the Tennessee Supreme Court, we adopt the following provisions. All in-person proceedings in all state and local courts in Tennessee, including but not limited to municipal, juvenile, general sessions, trial, and appellate courts, shall be suspended from the close of business on Friday, March 13, 2020, through Thursday, April 30, 2020, subject to the exceptions below.

Exceptions to this suspension of in-person court proceedings include, but are not limited to:

- Proceedings necessary to protect constitutional rights of criminal defendants, including bond-related matters, preliminary hearings for incarcerated individuals, and plea agreements for incarcerated individuals
- Proceedings related to relief from abuse, including but not limited to orders of protection
- Proceedings related to statutory order of protection hearings after entry of an ex parte order as necessary to satisfy any due process concerns

- Proceedings related to emergency child custody or visitation orders
- Proceedings related to the voluntary surrender of parental rights
- Settlements involving a minor or a person with a disability
- Department of Children’s Services emergency matters related to child safety, placement, permanency, or federal funding for children in foster care
- Proceedings related to petitions for temporary injunctive relief
- Proceedings related to emergency mental health orders
- Proceedings related to emergency protection of elderly or vulnerable persons
- Proceedings directly related to the COVID-19 public health emergency
- Other exceptions as approved by the Chief Justice

The presiding judge or the designee of the presiding judge of each judicial district is authorized to determine the manner in which in-person court proceedings for the exceptions listed above are to be conducted. Other exceptions to the suspension of in-person court proceedings must be approved by the Chief Justice. Any permitted in-court proceedings shall be limited to attorneys, parties, witnesses, security officers, and other necessary persons, as determined by the trial judge. Judges and their staff shall ensure that social distancing and other such measures are strictly observed. For purposes of implementing procedural matters during this time, the provisions of Rule 18(c) of the Rules of the Tennessee Supreme Court are suspended to allow judges to issue general orders.

Judges are charged with the responsibility of ensuring that core constitutional functions and rights are protected. Additionally, court clerks are charged with ensuring that court functions continue. See Tenn. Code Ann. §§ 18-1-101 (2009); 18-1-105 (Supp. 2019). Nevertheless, all judges and court clerks should minimize in-person contact by utilizing available technologies, including alternative means of filing, teleconferencing, email, and video conferencing.

Any Tennessee state or local rule, criminal or civil, that impedes a judge’s or court clerk’s ability to utilize available technologies to limit in-person contact is suspended through Thursday, April 30, 2020. See, e.g., Tenn. R. Civ. P. 43.01. With respect to plea agreements for non-incarcerated individuals, this suspension expressly applies to those provisions of Tenn. R. Crim. P. 11 which otherwise would require the proceeding to be in person in open court. See, e.g., Tenn. R. Crim. P. 11(b)(1) and (2), 11(c)(2)(A).

The presiding judge or the designee of the presiding judge of each judicial district shall develop a written plan to affirmatively address issues regarding the incarceration of nonviolent offenders in furtherance of efforts to reduce the jail population, including but not limited to bond reductions or eliminations, deferred sentences, and suspended sentences. The presiding judge or the designee of the presiding judge of each judicial district shall submit its plan to the Administrative Office of the Courts by the close of

business on Monday, March 30, 2020, absent an extension granted by the Chief Justice.

Judges' offices and court clerks' offices may limit in-person contact with the public during the period of suspension, but must remain functional. If it becomes necessary to close judges' or court clerks' physical offices during the period of suspension, these offices shall remain accessible by telephone, email and fax to the extent possible during regular business hours. If available, drop boxes should be used for conventionally filed documents.

This order expressly encourages and does not prohibit court proceedings by telephone, video, teleconferencing, email, or other means that do not involve in-person contact. This order does not affect courts' consideration of matters that can be resolved without in-person proceedings. Although some non-emergency matters will need to be rescheduled, judges are to continue to resolve matters that do not require in-person court proceedings. Court clerks are to work cooperatively and at the direction of the presiding judge of each judicial district to fulfill the clerks' obligation to facilitate continuing court function.

Deadlines set forth in court rules, statutes, ordinances, administrative rules, or otherwise that are set to expire during the period from Friday, March 13, 2020, through Tuesday, May 5, 2020, are hereby extended through Wednesday, May 6, 2020. Statutes of limitations and statutes of repose that would otherwise expire during the period from Friday, March 13, 2020, through Tuesday, May 5, 2020, are hereby extended through Wednesday, May 6, 2020. See Tenn. Code Ann. § 28-1-116 (2017). Deadlines, statutes of limitations, and statutes of repose that are not set to expire during the period from Friday, March 13, 2020, through Tuesday, May 5, 2020, are not extended or tolled by this order.

With regard to notarizing documents at this time, attorneys and judges are encouraged to utilize the "Online Notary Public Act," Tenn. Code Ann. § 8-16-301, et seq., and the regulations promulgated by the Secretary of State at Sec. of State, Tenn. R. and Reg. 1360-07-03-.01. Additionally, with regard to court filings, declarations under penalty of perjury may be used as an alternative to a notary.

Given the increasing economic issues caused by this pandemic, no judge, clerk, or other court official shall take any action to effectuate an eviction, ejection, or other displacement from a residence during the effective dates of this order based upon the failure to make a rent, loan, or other similar payment absent extraordinary circumstances as determined by a judge in a court of competent jurisdiction. Nothing in this order affects the obligations, terms, or conditions for payment under existing contracts. Judges also are encouraged to work with court clerks and local law enforcement to develop policies severely limiting or eliminating any new garnishments during this time.

Orders of protection and temporary injunctions that would otherwise expire during the period from Friday, March 13, 2020, through Tuesday, May 5, 2020, are hereby extended through Wednesday, May 6, 2020.

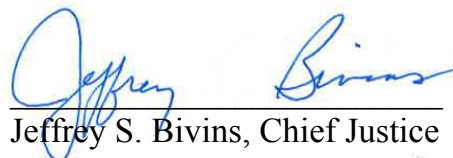
This order applies statewide to all courts and court clerks' offices except administrative courts within the Executive Branch and federal courts and federal court clerks' offices located in Tennessee.

Under the terms of this order, the courts of Tennessee remain open, consistent with the Judicial Branch's obligation to mitigate the risks associated with COVID-19. Judges should work with local law enforcement and other county officials to ensure that, to the extent possible, courthouses remain accessible to carry out essential constitutional functions and time-sensitive proceedings.

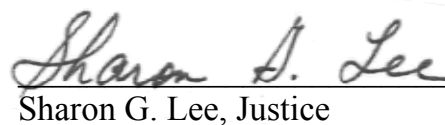
This order is intended to be interpreted broadly for protection of the public from risks associated with COVID-19.


It is so ORDERED.

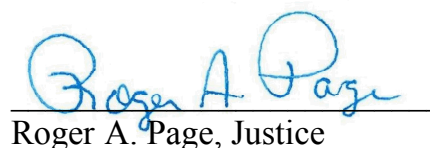
FOR THE COURT:

  
Jeffrey S. Bivins, Chief Justice

  
Cornelia A. Clark, Justice

  
Sharon G. Lee, Justice

  
Holly Kirby, Justice

  
Roger A. Page, Justice

## Court News ...

# The Supreme Court of South Carolina

DONALD W. BEATTY  
CHIEF JUSTICE

POST OFFICE BOX 3543  
SPARTANBURG, SOUTH CAROLINA 29304-3543

### MEMORANDUM

**TO:** Magistrates, Municipal Judges, and Summary Court Staff

**FROM:** Chief Justice Beatty

**RE:** Coronavirus

**DATE:** March 16, 2020

As the number of coronavirus cases has increased in South Carolina, and a state of emergency has been declared, the South Carolina Judicial Branch continues to consider all aspects of court operations.

As the situation continues to develop, we will provide further information and direction if and when circumstances so warrant. In the meantime, please review the following directives for your courts.

- All jury trials are postponed. Non-jury trials and other hearings may continue to be held, but only attorneys, their clients, and necessary witnesses will be allowed to appear.
- All roll calls and any other large gatherings such as traffic court are cancelled until further notice.
- If you deem it necessary to curtail operations beyond the scope of this memorandum, courthouses should remain available for the following critical functions:
  - Acceptance of filings and payments (including bonds)
  - Emergency hearings (including, but not limited to: restraining orders, orders of protection, bond revocation/modification, and vacating of bench warrants)
  - Transmission of necessary information to SLED and/or NCIC
  - Compliance with the Financial Accounting Order
- Any person charged with a non-capital crime shall be ordered released pending trial on his own recognizance without surety, unless an unreasonable danger to the community will result or the accused is an extreme flight risk.
- Bench warrants for failure to appear shall not be issued at this time.
- At a minimum, bond hearings should be held at least once per day.
  - The court shall continue to conduct probable cause determinations if a defendant is arrested and incarcerated on a Uniform Traffic Ticket.
  - The bond court shall continue to unseal bench warrants, or inform defendants of right to counsel and new court dates, and vacate bench warrants.
  - Victim's rights must be upheld. A victim advocate/notifier must be available for bond hearings.
  - If a defendant has been in jail as a pre-trial detainee for the maximum possible sentence, the court shall convert the bond to a personal recognizance bond and release the defendant.
- Court dates may be rescheduled as is necessary and prudent.
- To the extent possible and circumstances warrant, hearings that can be held by video may be held remotely. Telephonic hearings may be held remotely as a last resort.
- Counties/municipalities with orders in place whereby the Chief Magistrate may appoint magistrates to serve as municipal judges should do so as necessary if the current municipal judge(s) becomes unable to hold court.
- If a magistrates court temporarily closes, there should be adequate signs posted directing persons to the nearest other magistrates court(s) within the county where filings and payments may be



tendered. The court should include this information on its voicemail and website/social media if possible.

- The courts must maintain a 24-hour judge on-call schedule and provide it to jails and law enforcement. Amend the schedule as necessary.

The SCJB's Crisis Management Team will continue to monitor this situation and provide further information as received. We remain committed to the safety of the state court system and to the public. Thank you for your assistance in implementing these measures.

THE OFFICE OF

# GOVERNOR GRETCHEN WHITMER



WHITMER / NEWS / EXECUTIVE ORDERS

## Executive Order 2020-29 (COVID-19)

### EXECUTIVE ORDER

#### No. 2020-29

#### Temporary COVID-19 protocols for entry into Michigan Department of Corrections facilities and transfers to and from Department custody;

#### temporary recommended COVID-19 protocols and enhanced early-release authorization for county jails, local lockups, and juvenile detention centers

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.


On March 10, 2020, the Michigan Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401-.421, and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31-.33.


The Emergency Management Act vests the governor with broad powers and duties to “cop[e] with dangers to this state or the people of this state presented by a disaster or emergency,” which the governor may implement through “executive orders, proclamations, and directives having the force and effect of law.” MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of emergency, “the governor may

promulgate reasonable orders, rules, and regulations as he or she considers necessary to protect life and property or to bring the emergency situation within the affected area under control." MCL 10.31(1).

To mitigate the spread of COVID-19, protect the public health, and provide essential protections to vulnerable Michiganders who work at or are incarcerated in prisons, county jails, local lockups, and juvenile detention centers across the state, it is reasonable and necessary to implement limited and temporary COVID-19-related protocols and procedures regarding entry into facilities operated by the Michigan Department of Corrections and transfers to and from the Department's custody; to recommend limited and temporary COVID-19-related protocols and measures for county jails, local lockups, and juvenile detention centers; and to temporarily suspend certain rules and procedures to facilitate the implementation of those recommendations.

Acting under the Michigan Constitution of 1963 and Michigan law, I order the following:

1. The Michigan Department of Corrections (the "Department") must continue to implement risk reduction protocols to address COVID-19 ("risk reduction protocols"), which the Department has already developed and implemented at the facilities it operates and which include the following:
  - a. Screening all persons arriving at or departing from a facility, including staff, incarcerated persons, vendors, and any other person entering the facility, in a manner consistent with guidelines issued by the Centers for Disease Control and Prevention ("CDC"). Such screening includes a temperature reading and obtaining information about travel and any contact with persons under investigation for COVID-19 infection. 
  - b. Restricting all visits, except for attorney-related visits, and conducting those visits without physical contact to the extent feasible.
  - c. Limiting off-site appointments for incarcerated persons to only appointments for urgent or emergency medical treatment.

- d. Developing and implementing protocols for incarcerated persons who display symptoms of COVID-19, including methods for evaluation and processes for testing, notification of the Department of Health and Human Services (“DHHS”), and isolation during testing, while awaiting test results, and in the event of positive test results. These protocols should be developed in consultation with local public health departments.
  - e. Notifying DHHS of any suspected case that meets the criteria for COVID-19 through communication with the applicable local public health department.
  - f. Providing, to the fullest extent possible, appropriate personal protective equipment to all staff as recommended by the CDC.
  - g. Conducting stringent cleaning of all areas and surfaces, including frequently touched surfaces (such as doorknobs, handles, light switches, keyboards, etc.), on a regular and ongoing basis.
  - h. Ensuring access to personal hygiene products for incarcerated persons and correctional staff, including soap and water sufficient for regular handwashing.
  - i. Ensuring that protective laundering protocols are in place.
  - j. Posting signage and continually educating on the importance of social distancing, handwashing, and personal hygiene.
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- k. Practicing social distancing in all programs and classrooms—meaning a distance of at least six feet between people in any meeting, classroom, or other group.
- Minimizing crowding, including interactions of groups of 10 or more people, which may include scheduling more times for meal and recreation to reduce person-to-person contact.

2. To mitigate the risk of COVID-19 spreading in county jails, strict compliance with the capacity and procedural requirements regarding county jail overcrowding states of emergency in the County Jail Overcrowding Act ("CJOA"), 1982 PA 325, MCL 801.51 et seq., is temporarily suspended. While this order is in effect, all actions that would be authorized under the CJOA in the event of a declaration of a county jail overcrowding state of emergency are authorized and shall remain authorized without regard to any reduction in jail population or any other such limitations on the duration of authorization imposed by the CJOA.
  
3. Anyone authorized to act under section 2 of this order is strongly encouraged to consider early release for all of the following, so long as they do not pose a public safety risk:
  - a. Older people, people who have chronic conditions or are otherwise medically frail, people who are pregnant, and people nearing their release date.
  
  - b. Anyone who is incarcerated for a traffic violation.
  
  - c. Anyone who is incarcerated for failure to appear or failure to pay.
  
  - d. Anyone with behavioral health problems who can safely be diverted for treatment.
  
4. Effective immediately, all transfers into the Department's custody are temporarily suspended. Beginning seven (7) days from the effective date of this order, and no more than once every seven (7) days, a county jail or local lockup may request that the director of the Department determine that the jail or lockup has satisfactorily implemented risk reduction protocols as described in section 1 of this order. Upon inspection, if the director of the Department determines that a county jail or local lockup has satisfactorily implemented risk reduction protocols, transfers from that jail or lockup will resume in accordance with the Department's risk reduction protocols. The director of the Department may reject transfers that do not pass the screening protocol for entry into a facility operated by the Department.
  
5. Parole violators in the Department's custody must not be transported to or lodged in a county jail or local lockup unless the director of the Department has determined that such

county jail or local lockup has satisfactorily implemented risk reduction protocols as described in section 1 of this order.

6. The State Budget Office must immediately seek a legislative transfer so that counties may be reimbursed for lodging incarcerated persons that would have been transferred into the Department's custody if not for the suspension of transfers described in section 4 of this order.

7. Juvenile detention centers are strongly encouraged to reduce the risk that those at their facilities will be exposed to COVID-19 by implementing as feasible the following measures:

- a. Removing from the general population any juveniles who have COVID-19 symptoms.
- b. Eliminating any form of juvenile detention or residential facility placement for juveniles unless a determination is made that a juvenile is a substantial and immediate safety risk to others.
- c. Providing written and verbal communications to all juveniles at such facilities regarding COVID-19, access to medical care, and community-based support.
- d. To the extent feasible, facilitating access to family, education, and legal counsel through electronic means (such as telephone calls or video conferencing) at no cost, rather than through in-person meetings.



8. Unless otherwise directed by court order, for juveniles on court-ordered probation, the use of out-of-home confinement for technical violations of probation and any requirements for in-person meetings with probation officers are temporarily suspended.

9. This order is effective immediately and continues through April 26, 2020 at 11:59 pm.

Given under my hand and the Great Seal of the State of Michigan.



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

RUSSELL, et al.	)	
	)	
Plaintiffs,	)	
	)	Case No. 4:19-cv-00226
v.	)	(Class Action)
	)	The Honorable Lee H. Rosenthal
HARRIS COUNTY, TEXAS, et al.	)	U.S. District Judge
	)	
Defendants.	)	
	)	

**PROPOSED ORDER**

The Plaintiffs’ Motion for Temporary Restraining Order is GRANTED. Defendants are temporarily enjoined from enforcing Executive Order GA 13 against the Plaintiffs Class to the limited extent that the Executive Order purports to remove the authority of state judges to order release of Plaintiffs on personal bonds in their judicial discretion.

This temporary Order is valid for a limited period of 14 days or until further order of the Court, and the Court’s ruling is subject to change based on a more fully developed record at the preliminary injunction proceedings.

Ordered this \_\_\_ day of \_\_\_\_\_, 2020.

\_\_\_\_\_  
Hon. Lee H. Rosenthal District Judge