

Supreme Court of Texas

Misc. Docket No. 23-9025

Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster

ORDERED that:

1. Governor Abbott has declared a state of disaster concerning border security in 56 counties in the State of Texas. This Order is issued pursuant to Section 22.0035(b) of the Texas Government Code.

2. The Renewed Emergency Order Regarding Indigent Defense and the Border Security State of Disaster (Misc. Dkt. No. 23-9010) is renewed.

3. To protect the constitutionally and statutorily guaranteed right to counsel of indigent criminal defendants, the following provisions of the Code of Criminal Procedure are modified in the counties affected by the state of disaster concerning border security (“affected counties”) for individuals arrested under Operation Lone Star launched by Governor Abbott on March 6, 2021, and who are brought before magistrates for proceedings under Article 15.17 in facilities designated by the Office of Court Administration (“OCA”) or detained in a Texas Department of Criminal Justice facility approved by the Texas Commission on Jail Standards to house Operation Lone Star detainees.

a. Article 26.04(a) is modified to authorize the Executive Director of the Texas Indigent Defense Commission (“TIDC”) to approve procedures for appointing counsel that differ from an affected county’s procedures, but TIDC may not approve procedures inconsistent with Articles 26.04, 1.051, 15.17, 15.18, 26.05, and 26.052, unless otherwise provided in this Order.

b. Articles 15.17(a) and 26.04(b), (c), and (h) are modified to authorize a magistrate to appoint counsel for an indigent defendant upon request received at a proceeding under Article 15.17.

c. Articles 26.04(a), (d), and (e) are modified to waive the requirements to maintain a public appointment list and to appoint only from

that list if an alternative appointment list is established by TIDC or its designee, and appointments may be made to attorneys from an appointment list established by TIDC or its designee.

d. Articles 26.04(g) and (h) are modified to authorize TIDC to approve and establish an alternative program for appointing counsel.

e. Article 26.04(i) is modified to authorize the appointment of an attorney from any Texas county to represent a felony defendant.

f. Article 26.04(k) is modified to authorize TIDC or its designee to remove any attorney from consideration for an appointment for any reason.

g. Article 26.044 is modified to authorize TIDC as an additional entity permitted to designate an existing governmental entity or nonprofit corporation operating as a public defender's office to provide counsel.

h. Article 26.047 is modified to authorize TIDC as an additional entity permitted to appoint an existing governmental entity, nonprofit corporation, or bar association operating as a managed assigned counsel program to appoint counsel.

i. Should the costs for compensation of court-appointed counsel, investigators, defense interpreters, or experts be paid or reimbursed by the state, Article 26.05 is modified to authorize TIDC to adopt a fee schedule that differs from an affected county's schedule, to authorize TIDC or its designee to approve payments, and to remove any attorney from consideration who is shown to have submitted a claim for legal services not performed by the attorney, and to authorize OCA or TIDC or its designee to make payments.

4. Sections 26.011 and 74.052 of the Government Code are also modified to clarify that the Regional Presiding Judge of an affected county should assign judges to assist with the disposition of cases involving individuals who are brought before magistrates for proceedings under Article 15.17 of the Code of Criminal Procedure in facilities designated by OCA or detained in a TDCJ facility approved by the TCJS to house Operation Lone Star detainees. Section 74.061 of the Government Code is modified to provide that:

a. the salary of a former or retired judge assigned by a Regional Presiding Judge to a constitutional or statutory county court to assist with the disposition of these cases should be paid by the state from the funds appropriated by the Legislature for that purpose in Act of September 2, 2021, 87th Leg. 2nd C.S., ch. 8 (HB 9); and

b. the pro rata amount for the period of time that the judge sits on

assignment to a constitutional county court is based on the maximum salary a district judge may receive from county and state sources under Section 659.012(a) of the Government Code.

5. Subject to constitutional limitations and review for abuse of discretion, all courts in Texas may in any case involving individuals arrested under Operation Lone Star, without a participant's consent:

a. except as this Order provides otherwise, allow or require a participant involved in any hearing, deposition, or other proceeding of any kind—including but not limited to a party, attorney, witness, court reporter, grand juror, or petit juror—to participate remotely, such as by teleconferencing, videoconferencing, or other means; and

b. consider as evidence sworn statements made out of court or sworn testimony given remotely, out of court, such as by teleconferencing, videoconferencing, or other means.

6. In conducting proceedings involving individuals arrested under Operation Lone Star remotely, the court must not:

a. require a lawyer, party, or juror to appear remotely for a jury trial, absent the agreement of the parties; or

b. permit or require a petit juror to appear remotely unless the court ensures that all potential and selected petit jurors have access to technology to participate remotely.

7. Subject to constitutional limitations and review for abuse of discretion, a court may, without a participant's consent, conduct proceedings involving individuals arrested under Operation Lone Star away from the court's usual location with reasonable notice and access to the participants and the public if a visiting judge is assigned to the court.

8. OCA must post in a prominent place on its website the designated facilities in which this Order applies.

9. This Order is effective immediately and expires on July 1, 2023, unless extended by the Chief Justice of the Supreme Court. The affected counties should move swiftly to modify, consistent with this Order and TIDC guidance, any procedures necessary to provide for indigent defense in response to Operation Lone Star. An affected county may request to be exempted from this Order before it expires.

10. The Clerk of the Supreme Court is directed to:

- a. post a copy of this Order on www.txcourts.gov;
- b. file a copy of this Order with the Secretary of State; and
- c. send a copy of this Order to the Governor, the Attorney General, and each member of the Legislature.

11. The State Bar of Texas is directed to take all reasonable steps to notify members of the Texas bar of this Order.

Dated: April 28, 2023.

JUSTICE DEVINE dissents.



Nathan L. Hecht, Chief Justice