

Cause _____

EX PARTE JOSE LUIS ROMERO § IN THE 230TH DISTRICT COURT
 §
 § HARRIS COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS

Comes now Jose Luis Romero, Applicant, by and through his counsel, and pursuant to Articles 11.05 and 11.08 of the Texas Code of Criminal Procedure and Article 1, Section 12 of the Texas Constitution, files this Original Petition for Writ of Habeas Corpus to be granted release from the Harris County Jail based on the accumulation of earned time credits. Due to his accumulated credits, Mr. Romero should have been released on May 20, 2020. He has been denied release illegally because the Harris County Sheriff is detaining him pursuant to an illegal and unconstitutional executive order purporting to suspend the right to release on earned time credit. In support of this Petition, Mr. Romero would show the following:

JURISDICTION

1. This court has jurisdiction over Mr. Romero’s application for writ of habeas corpus pursuant to Articles 11.05 and 11.08 of the Texas Code of Criminal Procedure.
2. Mr. Romero is currently being illegally restrained in the Harris County Jail, which is overseen by the Harris County Sheriff, pursuant the Sheriff’s determination that he is subject to an executive order issued by the Governor of Texas.

BACKGROUND

A. Mr. Romero has been illegally detained since May 20, 2020, when he should have been released due to earned good time and trustee credit.

3. On February 12, 2020, Mr. Romero was convicted of theft under \$1,500, third offense and sentenced to ten months in the county jail pursuant to Texas Penal Code section 12.44(a). At sentencing, Mr. Romero’s court-appointed lawyer told him that if he behaved in jail he would accumulate earned time credit and be released on May 20, 2020. Counsel for Mr. Romero based his advice on the Harris County Sheriff’s Office’s known policy of providing jail credit of 3 days for every 1 day that a person is incarcerated if that person works as a trustee in the jail.
4. Mr. Romero did behave well in jail and served as a trustee. He accumulated enough good time credit and trustee credit to qualify for release on May 20, 2020. Even now, the Harris County Sheriff’s Office website continues to list May 20, 2020 as Applicant’s “out date.” See Exhibit A.

5. Mr. Romero was not released on May 20, 2020.
6. Mr. Romero's wife, Vanessa Ruiz, believed he was going to be released from the jail on May 20, 2020. On the evening of May 20, 2020, Ms. Ruiz called the Harris County Jail to find out why she had not heard anything about her husband's release. She was informed that Mr. Romero would instead be released on December 26, 2020, due to Executive Order GA-13.
7. The Governor issued Executive Order GA-13 on March 29, 2020, over a month after Mr. Romero was convicted. Under GA-13, "Article 42.032 of the Texas Code of Criminal Procedure, and all other relevant statutes and rules, are hereby suspended to the extent necessary to preclude the grant of commutation of time for good conduct, industry, and obedience to achieve the release of any person who has previously been convicted of or is currently serving a sentence for a crime that involves physical violence or the threat of physical violence." *See* Exhibit B.
8. The phrase "crime that involves violence or the threat of violence" is not defined in GA-13. However, Ms. Romero was told that because her husband had a past conviction for attempted possession of a firearm by a felon, GA-13 would prevent him from being released on his earned time credit.
9. The Harris County Sheriff appears to not only be denying release on good time credit under Tex. Code Crim. Proc. Art. 42.032, but also trustee credit under Tex. Code Crim. Proc. Art. 43.101.
10. Mr. Romero was never warned that his work as a trustee and his earned good time credit would not actually accelerate his release.

B. Mr. Romero requires urgent release from custody due to family obligations and health risks.

11. Mr. Romero urgently needs to be released from jail. He has had trouble receiving medical treatment while in jail, and his family desperately needs him to return home. *See* Exhibit C.
12. Mr. Romero has three minor children, ages seven, four, and one. School has been canceled for all three children. Because of this, his wife has had to stop working as many hours in order to take care of them. With Mr. Romero in jail, neither parent can provide financially for their children.
13. Working as a trustee in the Harris County Jail put Mr. Romero's health at risk. He began experiencing COVID-19 symptoms of fever, sore throat, runny nose, loss of sense of taste, and difficulty breathing shortly after he was assigned to work in a unit with diagnosed cases.
14. Soon after, Mr. Romero's entire unit was placed in quarantine. About a month ago, Mr. Romero tested positive for COVID-19.
15. While in quarantine, Mr. Romero has had difficulty accessing medical care.

16. Mr. Romero was supposed to have three teeth extracted before he turned himself into the jail. While serving his sentence, he has experienced severe tooth pain and believes they may be infected. He spent three weeks submitting medical requests before a nurse finally came and spoke to him through his door. She said they could not do a medical visit with him until they had figured out what to do about COVID-19. He still has not been treated or even assessed for his dental issues.
17. Mr. Romero suffers from Graves' Disease, an autoimmune disorder that causes hyperthyroidism and requires medication and frequent monitoring. He is supposed to have his blood levels tested every two to three weeks. He has not had a test in about two months, and has been requesting a new test for weeks to no avail. In addition, Mr. Romero's medication dosage has been reduced while he has been in jail, despite his protests.
18. Mr. Romero's father passed away in March, when Mr. Romero was detained in the Harris County Jail. He was not permitted to say good-bye to his father.
19. Mr. Romero has not received a new face mask in over a month.
20. Due to his family obligations and health risks, Mr. Romero filed a motion for early release on March 20, 2020. This Court did not rule on that motion.
21. Mr. Romero has already been held a week past his scheduled release date of May 20, 2020. He should not be illegally detained any longer.

ARGUMENT

22. The only reason Mr. Romero remains incarcerated today is because the Harris County Sheriff's Office is following Executive Order GA-13, issued by Governor Abbott to prevent people from being released on good time during a public health crisis and the Sheriff has determined that Mr. Romero is subject to the Order. If GA-13 had not been issued, Mr. Romero would have been released on May 20. Because the executive order does not apply to Mr. Romero, and in any case GA-13 is *ultra vires* of the Disaster Act and unconstitutional by its own terms, Mr. Romero is entitled to immediate release.

A. Mr. Romero is not subject to the Executive Order.

23. The Harris County Sheriff determined that Mr. Romero was subject to the Executive Order's prohibition on release for earned time credit because he was convicted of "attempted felon possession of a firearm" in 2010. This categorization is wrong. "Attempted felon in possession of a firearm" is not an offense "involv[ing] physical violence or the threat of physical violence;" attempting to possess a firearm does not physically harm anybody or involve the threat of harm.

B. Executive Order GA-13 exceeds the Governor's authority under the Disaster Act.

24. Section 418.016(a) of the Disaster Act only allows the Governor to "suspend the provisions of any *regulatory statute* prescribing the procedures for conduct of state business . . . if

strict compliance with the provisions . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster.” (emphasis added).

25. The Code of Criminal Procedure provisions at issue cannot be deemed “regulatory.”
26. The term “regulatory statute” is straightforward. It does not encompass *all* Texas laws but rather only those that fall under the purview of state agencies and the Executive Branch. *See* Tex. Gov’t Code § 418.0155 (requiring the governor’s office to compile a list of regulatory statutes and rules that may require suspension, and enabling a “state agency” that would be impacted by suspension to review the list and advise).¹ This protects the Disaster Act from running afoul of separation of powers, since such state agencies are under the control of the Executive Branch.
27. The substantive provisions of the Code of Criminal Procedure are not regulatory statutes; suspending them is not within the Governor’s “regulatory authority” to act during a disaster. Had the Legislature meant to authorize the Governor to suspend any law, it would have said so rather than limiting the Governor’s suspension power to “regulatory statute[s] prescribing the procedures for conduct of state business or the orders or rules of a state agency.” Tex. Gov’t Code § 418.016(a).
28. None of the additional statutes cited by GA-13 include the authority to suspend or rewrite any law as the Governor sees fit: The Governor’s executive orders during times of disaster have the “force and effect of law,” Tex. Gov’t Code § 418.012, but only to the extent that they are authorized under the Disaster Act and Texas Constitution. And while the Governor has emergency authority to “control ingress and egress to and from a disaster area,” under Tex. Gov’t Code § 418.018(c), this cannot possibly authorize the rewriting of criminal laws.
29. The Executive Order exceeded the Governor’s authority under the Disaster Act and is therefore *ultra vires*.

B. Executive Order GA-13 is an unconstitutional suspension of laws by the Executive Branch.

30. Article 1, Section 28 of the Texas Constitution states: “No power of suspending the laws of this state shall be exercised, except by the Legislature.” This section’s clear language prohibits the Governor from suspending any part of the Texas Code of Criminal Procedure.
31. Nor are the suspension powers delegable. Between 1845 and 1874, previous versions of Article I, Section 28 of the Constitution read: “No power of suspending laws in this state shall be exercised, except by the legislature, *or its authority*.” *Arroyo v. State*, 69 S.W. 503, 504 (Tex. Crim. App. 1902) (emphasis added). The delegation clause was subsequently removed from the current Texas Constitution.
32. The Supreme Court of Texas has explained that because our “present Constitution omits at the end of this section the words, ‘or by its authority,’ which words were in that section of all former Constitutions... it must be held (whatever may have been the power of the

¹ No provisions of the Code of Criminal Procedure are on the list compiled by the governor’s office. *See* Exhibit D.

Legislature under former Constitutions) that that body cannot now delegate to a municipal corporation or to any one else authority to suspend a statute law of the state.” *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 294–95 (1911) (citation omitted).

33. Because this provision provides unequivocally that only the Legislature may suspend laws, the question of whether Article 1, Section 28 has been violated typically hinges on whether a particular act was actually a suspension of laws. *See, e.g., Sproles v. Binford*, 286 U.S. 374, 397 (1932) (considering whether a regulatory statute granting the Texas Highway Commission the power to grant exceptions for trucks carrying excess weight on state highways constituted an unconstitutional delegation of suspension power); *Scoggin v. State*, 773 S.W.2d 320, 321 (Tex. Crim. App. 1989) (considering whether a statute concerning officers’ uniform code constituted an unconstitutional delegation of the suspension power, since officers could effectively choose to not enforce sections of the penal code by not wearing their uniforms).
34. In this case, GA-13 states that articles of the Code of Criminal Procedure (as well as related statutes) are “hereby suspended” five separate times. By explicitly claiming to suspend these statutes, there is no ambiguity concerning whether the Order is an attempt to suspend laws. Therefore, GA-13 is in clear conflict with Article 1, Section 28 of the Texas Constitution.

C. Executive Order GA-13 violates the Separation of Powers doctrine.

35. Executive Order GA-13 violates the “explicit prohibition against one government branch exercising a power attached to another.” *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001). Exceptions to the constitutionally-mandated separation of powers may “never [] be implied in the least; they must be ‘expressly permitted’ by the Constitution itself.” *Fin. Comm’n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013).
36. The Legislature “possesses the sole authority to establish criminal offenses and prescribe punishments,” *Vandyke v. State*, 538 S.W.3d 561, 573 (Tex. Crim. App. 2017). The Governor’s powers have “never extended so far that he may presume to exercise or substantially interfere with the Legislature’s prerogative to make, alter, and repeal laws, let alone define criminal offenses or fix punishment for those offenses.” *Id.*
37. Executive Order GA-13 suspends “Article 42.032 of the Texas Code of Criminal Procedure, and all other relevant statutes and rules... to the extent necessary to preclude the grant of commutation of time for good conduct, industry, and obedience to achieve the release of any person who has previously been convicted of or is currently serving a sentence for a crime that involves physical violence or the threat of physical violence.” *See* Exhibit B. This infringes on the Legislature’s sole authority to prescribe punishments and therefore violates the Texas Constitution.

PRAYER FOR RELIEF

WHEREFORE, Applicant Jose Luis Romero respectfully requests that the Court grant this application for writ of habeas corpus under Articles 11.05 and 11.08 of the Texas Code of Criminal

Procedure and Article 1, Section 12 of the Texas Constitution, and order his immediate release from the Harris County Jail.

May 27, 2020

By  _____

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No.

EX PARTE

X IN THE 230TH DISTRICT

X COURT OF

X

X

X

JOSE LUIS ROMERO

X HARRIS COUNTY, TEXAS

**Order Granting Relief on the Application for Writ of Habeas Corpus and
Declaring Executive Order GA-13 Unconstitutional, Unlawful and Null
and Void**

BE IT REMEMBERED that on this day came to be considered Jose Luis Romero's ("Applicant") Application for Writ of Habeas Corpus.

On July 29, 2019, Mr. Romero was arrested on an outstanding warrant from 2014 for Theft- third offense, a state jail felony. Relying on his attorney's advice that he would be eligible for release due to earned time credit for good time and trustee work, in May, on February 12, 2020, Mr. Romero pled guilty and was sentenced to ten months in the Harris County Jail. Counsel for Mr. Romero based his advice on the Harris County Sheriff's Office's known policy of providing jail credit of 3 days for every 1 day that a person is incarcerated if that person works as a trustee in the jail.

Applicant earned time credit because he served as a trustee when he was incarcerated in the Jail, and accordingly Applicant's scheduled release date was May 20, 2020. But before Mr. Romero could be released on commutation for his earned time credit, on March 29, 2020, the Governor issued Executive Order

GA-13 (“Executive Order” or “GA-13”). As applicable here, the Executive Order purports to “preclude the grant of commutation of time for good conduct, industry, and obedience to achieve the release of any person who has previously been convicted of or is currently serving a sentence for a crime that involves physical violence or the threat of physical violence.” Order at 2-3. The Sheriff determined that Mr. Romero had “previously been convicted of ... a crime that involves physical violence or the threat of physical violence” and did not release Mr. Romero from the jail when he reached his accrued time.

The Harris County Sheriff’s Office website continues to list May 20, 2020 as Applicant’s “out date.” Applicant’s wife believed he was going to be released from the jail on May 20, 2020. On the evening of May 20, 2020, Ms. Ruiz called the Harris County Jail to find out why she had not heard anything about her husband’s release. She was informed that Mr. Romero would instead be released on December 26, 2020, due to Executive Order GA-13.

All jail stays are traumatic for the people detained, but Mr. Romero’s has been especially so. Mr. Romero suffers from Graves Disease, an autoimmune disorder that makes him especially vulnerable to COVID-19. He also was supposed to have three tooth extractions before he turned himself in. He has not received proper medical treatment while in jail. Mr. Romero also contracted COVID-19 while incarcerated. Additionally, Mr. Romero’s father passed away in March, while Mr. Romero was confined in the Harris County Jail, and he was

unable to say goodbye.

On May 27, 2020, Applicant applied for a writ of habeas corpus challenging the legality and constitutionality of the Executive Order that the Sheriff has found bars his release. Applicant argued that the Executive Order does not apply to him, and in any case exceeds the statutory and constitutional limitations of the Governor's powers by suspending criminal laws, including Article 42.032, the law that affords the Sheriff discretion to release people on good time credits, with no authority under the Disaster Act and in violation of the suspension of laws and separation of powers clauses of the Texas Constitution.

The Court agrees with Applicant.

The Court finds that Applicant continues to be detained in the Harris County Jail because the Harris County Sheriff has determined that the Executive Order bars Applicant from being released on schedule from his accrued time.

The Court finds that Applicant was previously convicted of “attempted felon in possession of a firearm,” a felony offense that the Harris County Sheriff has categorized as a crime “involv[ing] physical violence or the threat of physical violence” under the Executive Order.¹

¹ The Court finds that categorization is wrong; “attempted felon in possession of a firearm” is not an offense “involv[ing] physical violence or the threat of physical violence.” Thus, Mr. Romero should be released on his earned time credit on that basis. But even if the Executive Order were to apply,

The Court concludes the governor acted outside his legal authority in issuing the Executive Order, including by suspending the Code of Criminal Procedure provisions relating to release for good time and other credits. The Texas Disaster Act of 1974 permits a Governor during a declared disaster to suspend “the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.” Tex. Gov’t Code § 418.016(a). The provisions of the Texas Code of Criminal Procedure targeted by GA-13, including Tex. Code Crim. Proc. Art. 42.032 and related provisions, pursuant to which Mr. Romero should have been released on May 20, are not “regulatory statute[s]” and may not be suspended under the suspension authority or any other authority granted to the Governor under the Disaster Act. The Governor’s attempt to do so is therefore *ultra vires*.

It is for good reason that the Disaster Act does not grant the Governor such unlimited suspension authority: it would be unconstitutional to do so. The suspension of laws is strictly the province of the Legislature under art. I, § 28 of the Texas Constitution, which states that “[n]o power of suspending laws in this State shall be exercised except by the Legislature,” and which the Executive

as detailed *infra* it is *ultra vires* and unconstitutional and cannot bar Mr. Romero’s release.

Order violates. Further, by attempting to usurp this exclusive legislative authority, the Executive Order also violates art. 2 § 1 of the Texas Constitution, which provides for the separation of powers among the three branches of government and states that “no person... being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”

To the extent the Governor’s Executive Order purports to suspend provisions of the Texas Code of Criminal Procedure, including Art. 42.032 “and all other relevant statutes and rules” relating to release on commutation for good time and other credits, the Executive Order is hereby declared unconstitutional and *ultra vires*. GA-13 violates well-established separation of powers principles and exceeds the Governor’s emergency powers. Specifically, GA-13 violates the Tex Const. art. I, § 28 (suspension of laws power exclusive to the Legislature), art. 2 § 1 (separation of powers), and exceeds the Governor’s authority under the Texas Disaster Act of 1974. Accordingly, GA-13 is *ultra vires*, unconstitutional, and null and void. The Governor acted outside of his legal authority in issuing Executive Order GA-13 and it is not binding on this Court or the Sheriff.

Accordingly, having considered the arguments of the applicant, by and through the applicant’s counsel, the Court ISSUES a writ of habeas corpus and now ORDERS the Harris County Sheriff to release Applicant from custody on commutation due to accumulation of earned time credit.

SIGNED this ___day of _____, 2020,

Judge Presiding