

No. WR-91,936-01

In The Court of Criminal Appeals of Texas

IN RE THE STATE OF TEXAS EX REL. KIM OGG,

Relator

v.

FOURTEENTH COURT OF APPEALS, AT HOUSTON

Respondent

**BRIEF OF RESPONDENT BELOW, HON. DARRELL JORDAN,
PRESIDING JUDGE, COUNTY CRIMINAL COURT NO. 16**

VINCE RYAN
HARRIS COUNTY ATTORNEY

SETH HOPKINS
Assistant County Attorney
State Bar No. 24032435
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5141
Seth.Hopkins@cao.hctx.net

ATTORNEY FOR
HON. DARRELL JORDAN

IDENTITIES OF PARTIES AND COUNSEL

Relators

Kim Ogg, District Attorney of Harris
County, Texas, representing the State
of Texas

Relators' Counsel

Kim Ogg
500 Jefferson Street, 6th Floor
Houston, Texas 77002

John David Crump
500 Jefferson Street, 6th Floor
Houston, Texas 77002

James Sims
500 Jefferson Street, 6th Floor
Houston, Texas 77002

Respondent

Fourteenth Court of Appeals
301 Fannin Street
Houston, Texas 77002

Respondent Below

Hon. Darrell Jordan, Presiding Judge, County Criminal Court No. 16
1201 Franklin Street, Suite 1900
Houston, Texas 77002

Counsel for Respondent Below

Seth Hopkins, Assistant County Attorney
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, Texas 77002

Real Party in Interest

Jacob Straughan

Counsel for Real Party in Interest

Mark Thiessen

733 E. 12 ½ Street

Houston, Texas 77002

Carmen Roe

440 Louisiana Street, Suite 1115

Houston, Texas 77002

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TO THE HONORABLE COURT OF APPEALS OF TEXAS:

SUMMARY OF THE ARGUMENT

Art. I, § 10 of the Texas Constitution and the Sixth Amendment of the United States Constitution guarantee anyone accused of a crime the right to a speedy and public trial. *Stiles v. State*, 596 S.W.3d 361, 367 (Tex. App. 2019), *petition for discretionary review refused* (Aug. 19, 2020); *Barker v. Wingo*, 407 U.S. 514, 535, 92 S. Ct. 2182, 2194, 33 L. Ed. 2d 101 (1972).

One of the consequences of the COVID-19 pandemic is that jury trials have been suspended for much of the last 10 months, and accused men and women such as Jacob Straughan have been unable to have the charges against them adjudicated. This leaves them in legal limbo and unable to move on with their lives.

To assist the State with its docket, Mr. Straughan was willing to waive his constitutional right to a jury trial and accept the consequences of a bench trial. The State refused, invoked its power to veto a defendant's request for bench trial under Tex. Code of Crim. Proc. Art. 1.13, and demanded that Mr. Straughan wait indefinitely until a jury was available—even on his misdemeanor charges. Under the Supreme Court's Emergency Orders, the trial court suspended Tex. Code Crim. Proc. art. 1.13 and granted Mr. Straughan's request for a bench trial so the justice system could begin to work again.

This is precisely the scenario anticipated by Tex. Gov. Code § 22.0035(b) and the Texas Supreme Court when it authorized trial judges to suspend certain statutes and rules during the pandemic. The trial court's decision not only protects the constitutional rights of the accused, but also the integrity of the criminal justice system. The Fourteenth Court of Appeals addressed all preserved issues and properly denied Relator's petition for writ of mandamus. The Respondent below respectfully requests that this Court do the same.

ARGUMENT

I. The COVID-19 pandemic jeopardizes criminal defendants' fundamental right to a speedy trial, the State's ability to prosecute cases, and the courts' ability to manage their dockets.

A. Governor Greg Abbott, Harris County Judge Lina Hidalgo, and the Texas Supreme Court recognized the risks of in-person gatherings during the pandemic and issued disaster declarations and orders.

On March 11, 2020, Harris County Judge Lina Hidalgo issued a Declaration of Local Disaster for Public Health Emergency, which has been extended and is still in effect. On March 13, 2020, Governor Greg Abbott issued a Declaration of State of Disaster, certifying under Section 418.014 of the Texas Government Code that COVID-19 poses an imminent threat of disaster for all counties in the State of Texas.¹ That declaration has also been extended and is still in effect.

¹ Office of the Texas Governor, Proclamations, <https://gov.texas.gov/news/category/proclamation> (last accessed Dec. 13, 2020).

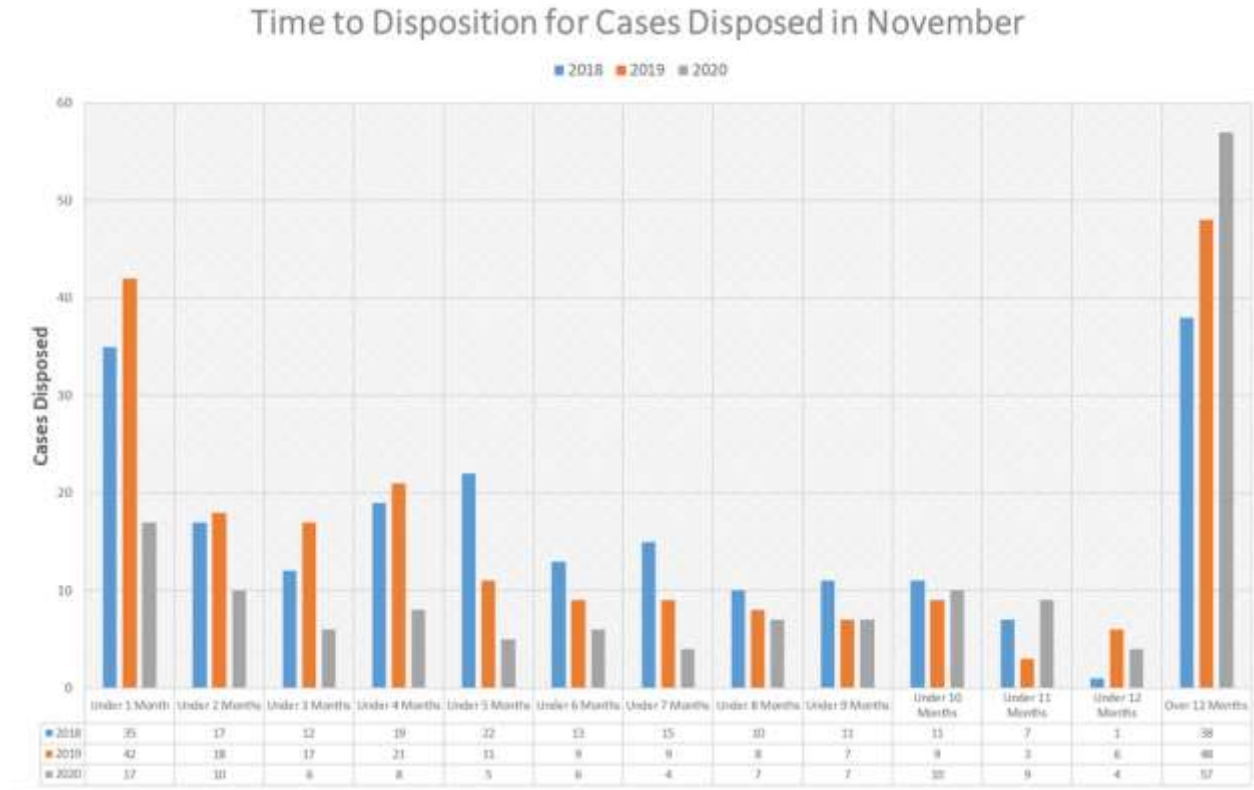
On March 13, 2020, the Texas Supreme Court issued its First Emergency Order Regarding the COVID-19 State of Disaster. (Writ of Mandamus Appendix 3 at Exhibit 4, pp. 23-26). That Order has been extended several times, and at the relevant time, the Supreme Court's Seventeenth Emergency Order Regarding the COVID-19 State of Disaster was in effect. (Writ of Mandamus Appendix 3 at Exhibit 5, pp. 27-32).

The Supreme Court Orders prohibit lower courts from conducting in-person proceedings or holding jury trials, except under strict guidelines issued by the Office of Court Administration. (Writ of Mandamus Appendix 3 at 27, § 4). As discussed below, the Order also permits a trial court to modify or suspend statutes or rules as necessary to assure the justice system continues to function during the pandemic.

B. The COVID-19 pandemic has caused a significant backlog of cases in Harris County that is incongruent with the Sixth Amendment and Art. I, § 15 of the Texas Constitution.

As a result of these declarations and orders, the criminal trial courts of Harris County nearly ceased to operate early in the pandemic and are operating at diminished capacity today. While the County's ability to administer justice has slowed, people are still being arrested, and Harris County has a backlog of criminal cases. (Appendix 1). Judge Michael Fields, who is presiding over Harris County Criminal Court No. 16 while Judge Jordan is on military duty, explains that in the

last 12 months, the number of pending cases has increased 130% from 1,800 to 2,336. In the last two years, the number of cases pending more than 12 months has increased 150% from 38 to 57. This data is represented by the following table:



This is only one court. Thousands of people in Harris County have had their lives disrupted with criminal charges, but are unable to exercise their constitutionally protected right to a jury trial. The pandemic and backlog of cases is incongruent with the Sixth Amendment to the United States Constitution and Art. I, § 10 of the Texas Constitution, which guarantee an accused the right to a speedy trial. U.S. Const. amend. VI; *Barker v. Wingo*, 407 U.S. 514, 515, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). It is well established that long trial delays,

especially for misdemeanors and other minor offenses, often cause serious prejudice to those accused. *Id.*

Recognizing that his right to a jury trial might be delayed for months—if not years—even on simple misdemeanor charges, Mr. Straughan filed a Motion for Speedy Trial and a Written Waiver of Jury and Request for a Bench Trial on June 10, 2020. The trial court held an oral hearing where Mr. Straughan’s counsel expressed concern about the inability to conduct a jury trial and requested a bench trial instead. The trial court granted the request over the State’s objection.

To be clear, the trial court is not only concerned about Mr. Straughan’s right to a speedy trial, but for the entire Harris County criminal docket. Each case that remains on the docket prevents another case from being heard, and as the courts fall further behind, the State will soon be forced into the Hobson’s choice of either maintaining charges against people with no hope of giving them a speedy trial, or dismissing meritorious charges for violating the Sixth Amendment.

C. The Texas Supreme Court exercised its authority under Tex. Gov. Code § 22.0035 and suspended juries and permitted courts to modify any court procedures to cope with the pandemic.

The Supreme Court’s Seventeenth Emergency Order provides trial courts great flexibility to maintain their dockets and protect the constitutional rights of those accused during the pandemic. This authority derives from Texas Government Code § 22.0035(b), which permits the Supreme Court to “modify or suspend

procedures for the conduct of **any** court proceeding affected by a disaster during the pendency of a disaster declared by the governor.” (emphasis added). (Writ of Mandamus Appendix 3 at Exhibit 5, pp. 27-32).

The Supreme Court’s Order stopped jury trials, paused most civil statutes of limitations, and imposed a duty on all Texas judges to continue operating their dockets while doing everything possible to minimize the number of in-person meetings. In particular, the Order states:

3. Subject **only to constitutional limitations**, all courts in Texas may in any case, civil or criminal—and must to avoid risk to court staff, parties, attorneys, jurors, and the public—**without a participant’s consent**:
 - a. . . . **modify or suspend any and all deadlines and procedures, whether prescribed by statute, rule, or order**, for a stated period ending no later than September 30, 2020...

(Writ of Mandamus Appendix 3 at Exhibit 5, page 27 § 3)(emphasis added).

Further, the Order prohibits jury trials unless five specific conditions are met. The third condition requires “. . . **the consent of all parties to the case . . .**” for a jury trial. (Writ of Mandamus Appendix 3 at Exhibit 5, page 29, § 8 (c)) (emphasis added).

If a criminal defendant chooses not to consent to a jury trial because of a sincerely held concern about COVID-19, he is effectively denied his constitutional right to a speedy trial. That not only violates his constitutional rights, but also

impairs the State’s ability to prosecute the case (which is subject to dismissal) and further compounds the trial court’s COVID-related backlog.

The State recognizes that the Supreme Court’s order “reflects the reality of the significant disruption that the pandemic is currently causing to the orderly administration of regular court duties.” (Writ of Mandamus at 9). Part of that disruption is that criminal dockets have slowed to a crawl, and jury trials are difficult—if not impossible—to schedule.

The only thing preventing Mr. Straughan from having his day in court is Tex. Code of Crim. Proc. art. 1.13, which gives the State the power to veto Mr. Straughan’s choice to have a bench trial. The Supreme Court’s Order clearly permits this procedural article to be modified during this emergency—a fact that is reinforced by the Supreme Court’s decision to now require consent of all parties for a *jury* trial, whereas art. 1.13 requires consent of all parties for a *bench* trial.

II. Tex. Gov. Code § 22.0035 was a proper delegation of power to the Texas Supreme Court.

The State also challenges the Supreme Court’s authority to permit a trial court to waive Code of Criminal Procedure art. 1.13 by claiming that it is clearly entitled to mandamus relief because it has an absolute right to prevent a defendant from having a bench trial under Texas Code of Criminal Procedure art. 1.13, and that the Texas Supreme Court lacked authority to suspend article 1.13. Specifically, the State contends “[a] criminal defendant has no constitutional right

to a bench trial, and it is only by the grace of the Legislature that a defendant may obtain one.” (Writ of Mandamus at 7).

None of the cases cited by the State occurred during a pandemic, or under circumstances where there was a long term, systemic inability for the courts to have jury trials. None of the State’s cases occurred at a time when the Supreme Court issued an order requiring that all parties consent to a *jury* trial. The State’s principal case is *State ex rel. Turner v. McDonald*, 676 S.W.2d 371 (Tex. Crim. App. 1984), in which this Court held the State has an interest in the “method of trial of criminal accusations.” However, this “interest” in preventing an accused from having a bench trial is a creature of statute—not an endowed right. *State ex rel. Turner v. McDonald*, 676 S.W.2d 371, 373 (Tex. Crim. App. 1984) (“As a matter of ‘right,’ the State technically has none to trial by jury, and Respondent is correct that due process and due course of law are guarantees to citizens and not governments or their agents.”)

The pandemic requires trial courts to allocate resources in an environment where jury trials are scarce, if not impossible. In doing so, they are required to weigh two sets of competing interests. On one hand is a criminal defendant’s indisputable constitutional right to a speedy trial, his choice to have a bench trial, and a court’s duty to regulate its docket so other defendants’ cases are heard. Those

three important interests far outweigh the State’s secondary interest in exercising a legislative grant of power to veto a defendant’s request for a jury trial.

To the extent the State contends that the Supreme Court lacked the authority to suspend article 1.13, that issue has been decided. The Texas Supreme Court has repeatedly upheld the legislature’s ability to delegate its power to other branches during the COVID pandemic. Most recently, in *Abbott v. Anti-Defamation League Austin, et al.*, for example, the Supreme Court upheld Governor Abbott’s authority to suspend portions of the Election Code. *Abbott v. Anti-Defamation League Austin, Sw., & Texoma Regions*, No. 20-0846, 2020 WL 6295076 (Tex. Oct. 27, 2020). Tex. Gov’t Code § 22.0035 is a similar delegation of powers—this time to the judicial branch to regulate the administration of justice.

The State also argues that Tex. Gov’t Code § 22.0035 does not permit the suspension of Tex. Code Crim. Proc. Art. 1.13 because it applies only to “procedures *for the conduct* of any court proceeding.” The state contends that the “conduct” of a court proceeding applies only to matters of court decorum. However, that is clearly not the case, and it is undisputed that the § 22.0035 permits the suspension of deadlines, in-person requirements, and other substantive matters. It certainly permits a court to accept an accused’s request to have his case promptly adjudicated at a bench trial.

III. The harms the state complains about do not exist in this case.

Finally, the State ominously warns that some judges might take advantage of the pandemic and suspend other safeguards. It complains that even before the pandemic, “litigants could enter into different courtrooms and be held to the whims of whatever trial judge they happened to get.” Now, the State claims, judges are not required to follow the “safety-net” of statutory law and “can selective ignore whatever inconvenient ‘procedural’ statute they want for whatever reason they want.” (Writ of Mandamus at 16).

Certainly, a trial judge could abuse these powers and attempt to trample on the constitutional rights of a party, but that is not the case at bar. This is a case where a defendant asks for a prompt trial to answer the State’s charges against him. A prosecutor’s duty is to seek justice, and nothing could be more consistent with that duty than to permit the accused his day in court.

CONCLUSION AND PRAYER

The COVID-19 pandemic has fundamentally changed our criminal justice system, which is why the Texas Supreme Court permitted trial judges the flexibility to suspend statutes and rules which hinder the administration of justice during this emergency. Respondent, the Fourteenth Court of Appeals, addressed all preserved issues and properly denied Relator’s petition for writ of mandamus.

Respondent below, the Honorable Darrell Jordan, respectfully requests that this petition for writ of mandamus also be denied.

Respectfully submitted,

VINCE RYAN
HARRIS COUNTY ATTORNEY

/s/ Seth Hopkins
SETH HOPKINS
State Bar No. 24032435
Assistant County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 755-5141

ATTORNEY FOR
RESPONDENT BELOW

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this document was produced on a computer and printed in a conventional typeface no smaller than 14-point, except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Tex. R. App. P. 9.4. Relying on the word count of the computer program used to prepare this document, it contains 2,313 words, excluding the portions listed in Tex. R. App. P. 9.4(i)(1).

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2020, a true and correct copy of the foregoing instrument was served by electronic filing and electronic mail on Relators, through their counsel of record.

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATION

I have reviewed the response and concluded that every factual statement is supported by competent evidence included in the appendix.

/s/ Seth Hopkins
SETH HOPKINS

INDEX TO THE APPENDIX

TAB NO. DESCRIPTION

1 Declaration of the Hon. Michael Fields

APPENDIX 1

No. WR-91,936-01

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

IN RE THE STATE OF TEXAS EX REL. KIM OGG

AFFIDAVIT OF HON. MICHAEL FIELDS

Before me, the undersigned authority, personally appeared JUDGE MICHAEL FIELDS, who, being by me duly sworn, deposed as follows:

“My name is Michael Fields, and I serve in place of the Honorable Darrell Jordan as judge of Harris County Court at Law No. 16 while Judge Jordan is deployed abroad with the Army Reserves. I am over the age of 18, have never been convicted of a crime of moral turpitude, and am of sound mind and qualified to make this affidavit. As presiding judge of Harris County Court at Law No. 16, I am familiar with the effects the COVID-19 pandemic has had on our court and the County’s criminal justice system.

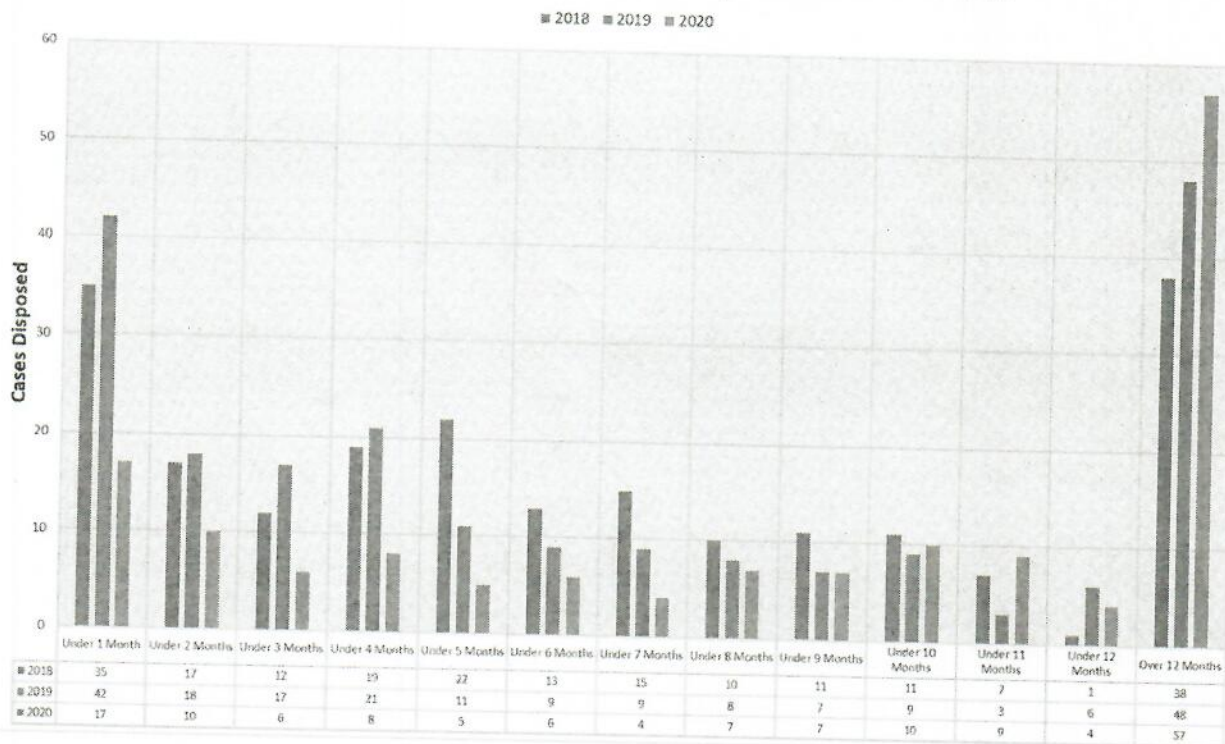
For much of the last 10 months, jury trials have either not been permitted, or have occurred at a drastically reduced rate due to restrictions imposed by county, state, and federal authorities to reduce the spread of COVID-19. Our courts nearly ceased to operate early in the pandemic and are operating at diminished capacity today.

While the administration of justice has slowed, arrests and charges against residents of Harris County continue. This has resulted in men, women, and children being unable to have the charges against them adjudicated, which leaves them in legal limbo and unable to move on with their lives.

In 2018, Harris County Criminal Court No. 16 had 1,714 cases pending on the last day of November. In 2019, that increased slightly to 1,800 case. On the last day of November, 2020, our court had 2,336 pending cases—an increase of 130% in the last 12 months, and the number continues to increase each month.

Further, these cases are lingering longer than ever before. In 2018, there were only 38 cases awaiting trial more than 12 months. Now, there are 57 cases—a 150% increase. This data is represented by the following table:

Time to Disposition for Cases Disposed in November

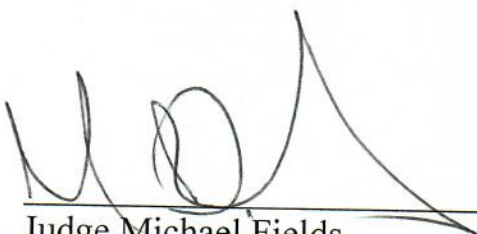


I am aware that Jacob Straughan requested a bench trial, the State opposed it under Tex. Code Crim. Proc. art. 1.13, and Judge Jordan invoked The Texas Supreme Court’s Emergency Orders permitting him to suspend article 1.13. I believe this is precisely the scenario anticipated by the Supreme Court when it drafted its Emergency Orders regarding COVID-19.

I believe that permitting criminal defendants to choose to have bench trials during the pandemic not only protects their constitutional rights, but also the rights of all other defendants on my docket. If the courts are not able to catch up with a nearly one-year backlog due to COVID-19, I believe the State will soon be forced into the Hobson’s choice of either maintaining charges against people with no hope of giving them a speedy trial, or dismissing meritorious charges.

Further, Affiant sayeth not.”

Signed on 12/18/20



 Judge Michael Fields

SWORN TO AND SUBSCRIBED before me on DEC 18 2020

Notary Public, State of Texas
Printed Name:
My Commission Expires:



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Andrea Mintzer on behalf of Seth Hopkins
Bar No. 24032435
andrea.mintzer@cao.hctx.net
Envelope ID: 49101661
Status as of 12/28/2020 9:16 AM CST

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
John DavidCrump		crump_john@dao.hctx.net	12/18/2020 3:45:33 PM	SENT

Associated Case Party: Fourteenth Court of Appeals

Name	BarNumber	Email	TimestampSubmitted	Status
Christopher Prine		christopher.prine@txcourts.gov	12/18/2020 3:45:33 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Dan McCrory		mccrory_daniel@dao.hctx.net	12/18/2020 3:45:33 PM	SENT

Associated Case Party: Jacob Straughan

Name	BarNumber	Email	TimestampSubmitted	Status
Carmen Roe		carmen@carmenroe.com	12/18/2020 3:45:33 PM	SENT
Mark Thiessen		mark@thetexasrialattorney.com	12/18/2020 3:45:33 PM	SENT

Associated Case Party: Hon. Darrell Jordan

Name	BarNumber	Email	TimestampSubmitted	Status
Hon. Darrell Jordan		darrell_jordan@ccl.hctx.net	12/18/2020 3:45:33 PM	SENT
Seth Hopkins		seth.hopkins@cao.hctx.net	12/18/2020 3:45:33 PM	SENT