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Re: Constitutionally Mandated Services under the U.S. and Pennsylvania Constitutions – Criminal Defense Lawyers both Public and Private and the Governor’s Business Closure Order

I write to address a matter of constitutional urgency. Thank you for providing this letter and attachment to the Governor.

By way of introduction my name is Theodore Simon and I have been a practicing criminal defense attorney in Philadelphia, Pa. since 1974 for some 46 years. In addition, I am a past president of the National Association of Criminal Defense, the largest criminal defense organization in the United States comprising of approximately 8500 direct members and over 40,000 members through its national network of affiliates. I am also the president of Jenkins Law Library, the official law library of Philadelphia, and the oldest law library in the United States.

<https://www.nacdl.org/People/TheodoreSimon>

I write due to the Governor’s most recent proclamation and business closure order, which by its terms does not include any manner of legal services as a life sustaining business (or exception thereof). While perhaps unintended such a designation fails to recognize the constitutionally mandated role of criminal defense lawyers, both public and private pursuant to the Fifth and Sixth Amendment to the U.S. Constitution and the similarly corollary provisions of the Pennsylvania Constitution including but not limited to Article 1, Section 9.

While the Pennsylvania Courts have principally closed, the Supreme Court was clear in its directive to all President Judges that as they implement the order it must be done “...with full consideration of the necessary

adjudication of constitutionally essential functions” and further permitting actions, “... so long as the President Judge's approach remains consistent with requirements of the United States and Pennsylvania Constitutions.” P. 4-5

The Pennsylvania Supreme Court has carved out and identified many necessary functions of the Court and they will continue to hear those matters. It is a wide-ranging group of matters, and include but are not limited to: emergency bail review and habeas proceedings, Gagnon I hearings (probation violation), bench warrants, juvenile delinquency detention, temporary protection from abuse, matters involving irreparable harm, as well as preliminary arraignments and bail setting, preliminary hearing for incarcerated individuals, emergency protection from abuse, and any function the President Judge deems “essential consistent with constitutional limitations.” See, Supreme Court Order attached.

Those individuals many of whom are indigent and therefore in need have and constitutionally entitled to representation by counsel. Some of those individuals are represented by private counsel, sometimes by appointed private counsel, and at other times, through representation by public defenders. As well individuals have the constitutional “right to choice of counsel” and many defendants are entitled to and choose to be represented by private criminal defense counsel. Whether or not a defendant is indigent in order for the criminal justice system to perform its mandated essential functions, it is respectfully submitted that the Governor should carve out an exception for both private and public defenders so as to permit those accused individuals to receive their constitutionally mandated representation.

Additionally, while all Pennsylvania **federal courts** (Eastern, Middle and Western District Courts) have issued separate orders principally directed to continuing jury trials, all have made provision for the continuation of constitutionally mandated functions. And for those individuals they are entitled to their fundamental constitutionally protected right to counsel.

With all due respect to assure each and every person accused of their constitutional right to the effective assistance of counsel, I urge the Governor to modify his business closure order and carve out an exception for attorneys engaged in both private and public criminal defense practice.

I am available to further discuss this matter and provide additional information so as to assure that the Governor may consider and recognize the fundamental and constitutional rights implicated by his order, and as such, carve out an exception for “constitutionally mandated services.”

Sincerely,

s/ Theodore Simon

Theodore Simon