

SUBJECT: Amending the constitution to allow denial of bail in some circumstances

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 6 ayes — Collier, K. Bell, Cason, Cook, Murr, Vasut

3 nays — Crockett, Hinojosa, A. Johnson

WITNESSES: For — Andy Kahan, Crime Stoppers of Houston; Richard Jankovsky, DPS Officers Association; Rick Hill, Justices of the Peace and Constables Association of Texas; Derek Cohen, Texas Public Policy Foundation; Kasey Allen; Doug Deason; (*Registered, but did not testify*: Greg Glod, Americans For Prosperity; Nicholas Chu, Justices of the Peace and Constables Association; Justin Keener, Libre Initiative; Joseph Scaramucci, McLennan County Sheriffs Office; Tom Maddox, Sheriffs Association of Texas; Drew Lawson, Texans for Lawsuit Reform; Megan Herring, Texas Association of Business; Mia McCord, Texas Conservative Coalition; Cindi Castilla, Texas Eagle Forum; John Wilkerson, Texas Municipal Police Association; Jason Vaughn, Texas Young Republicans)p

Against — John A. Convery, David Gonzalez, and Michael Gross, Texas Criminal Defense Lawyers Association; (*Registered, but did not testify*: Nick Hudson, American Civil Liberties Union of Texas; Chas Moore, Austin Justice Coalition; Linda Nuno, Dem Party; Scott Miller, Financial Casualty & Surety; Rene Perez, Libertarian Party of Texas; Gage Gandy, Ken W. Good, and Glenn Meeker, PBT; Shea Place, Texas Criminal Defense Lawyers Association; Amelia Casas, Texas Fair Defense Project; Emily Gerrick, Texas Fair Defense Project; Mary Sue Molnar, Texas Voices for Reason and Justice; John Clark; Deana Johnston; Elias Lang Cortez; Zoe Russell)

On — David Slayton, Texas Judicial Council; Jonathan Copeland; Michael Fields

BACKGROUND: Texas Constitution Art. 1, sec. 11 and Code of Criminal Procedure (CCP)

art. 1.07 state that all prisoners shall be bailable unless accused of a capital offense when proof is evident.

Other provisions in the Texas Constitution allow judges and magistrates to deny bail in certain situations. District judges have discretion, under Texas Constitution Art. 1, sec. 11a, to deny bail if a defendant is accused of:

- a felony and has been convicted of two prior felonies;
- a felony committed while on bail for a prior indicted felony;
- a felony involving a deadly weapon after a conviction for a previous felony; or
- a violent or sexual offense committed while on probation or parole for a previous felony.

Under Texas Constitution Art. 1, sec. 11b, judges or magistrates may deny bail to those accused of an offense involving family violence if the accused had been released on bail on those charges and the bond had been revoked or forfeited because the accused violated a condition of the bond related to the safety of the victim or community.

Texas Constitution Art. 1, sec. 11c allows bail to be denied if a judge or magistrate determined at a hearing that the arrestee had violated certain protective orders. Bail can be denied if a person:

- violates an emergency protective order issued after an arrest for family violence;
- violates an active protective order issued by a court in a family violence case, including a temporary ex parte order that had been served on the person; or
- engages in conduct that constituted an offense of violating any of these court orders.

Sec. 11a defines "violent offense" as: murder; aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault; aggravated kidnapping; or aggravated robbery.

"Sexual offense" is defined as: aggravated sexual assault; sexual assault; or indecency with a child.

DIGEST:

CSHJR 4 would amend the Texas Constitution to expand the conditions under which judges and magistrates would be authorized to deny bail and would establish procedures for when bail is denied in the cases.

Authorized to deny for certain violent, sexual offenses. Individuals accused of committing a violent or sexual offense or of committing continuous trafficking of persons could be denied bail pending trial if a judge or magistrate determined that requiring bail and conditions of release were insufficient to reasonably ensure the person's appearance in court as required or the safety of the community, law enforcement, or the victim of the alleged offense.

A judge or magistrate who denied bail under these provisions would be required to prepare a written order that included findings of fact and a statement explaining the reason for the denial.

Required to deny for capital murder, certain sex offenses. Judges or magistrates would have to deny bail pending trial, unless certain conditions were met, for those accused of committing capital murder or of committing a sexual offense involving a victim younger than 17 years of age.

Bail would not have to be denied if a judge or magistrate determined by clear and convincing evidence that, based on the existence of extraordinary circumstances, the judge or magistrate was able to set bail and conditions of release sufficient to reasonably ensure the person's appearance in court and the safety of the community, law enforcement, and the victim of the alleged offense.

Judges and magistrates who denied bail in accordance with this section would be required to prepare a written order that included findings of fact and a statement explaining the reason for the denial.

Other provisions. In both the circumstances in which bail may be denied and those under which it would have to be denied, the provisions could not be construed to:

- limit any right a person had under other law to contest a denial of bail or to contest the amount of bail set by a judge or magistrate; or
- require any hearing or procedure, not otherwise required by the bill or by general law, before a judge or magistrate made a bail decision.

"Violent offense" and "sexual offense" would have the meanings established under Texas Constitution Art. 1, sec. 11a.

The proposed constitutional amendment would be submitted to the voters at an election on November 2, 2021. The ballot proposal would read: "The constitutional amendment authorizing the denial of bail under some circumstances to a person accused of a violent or sexual offense or of continuous trafficking of persons, and requiring the denial of bail to a person accused of capital murder or a sexual offense involving a victim younger than 17 years of age under most circumstances."

SUPPORTERS
SAY:

CSHJR 4 would protect Texans, save lives, and result in fair bail decisions by expanding the circumstances under which judges and magistrates could deny bail. Currently, bail can be denied and defendants detained pre-trial in only very limited circumstances. Bail decisions under the current system have resulted in high-risk and dangerous defendants with financial means released out on the streets before their trial. This has resulted in tragedies such as the 2017 killing of Department of Public Safety trooper Damon Allen, who was shot during a traffic stop by someone who had been released on bail despite being a repeat offender with a violent past.

CSHJR 4 would address this situation by allowing bail to be denied in cases of violent offenses, sexual offenses, and offenses for continuous human trafficking and by requiring bail to be denied for capital murder and sex offenses involving someone younger than 17. Under current law, judges sometimes feel strongly that someone accused of these serious

crimes is dangerous and should be kept in detention pretrial but have limited tools to address the situation. While judges might attempt to keep those accused of these crimes in jail by setting high bail, defendants with resources can obtain release.

The Texas Constitution long has recognized that there are exceptions to the requirement that bail generally should be made available to criminal defendants. CSHJR 4 would be in line with current constitutional provisions by allowing bail denial in justifiable circumstances for the most heinous crimes, including violent and sexual offenses, continuous human trafficking, and sex offenses with child victims. The resolution also would be in line with other states that allow pre-trial detention for non capital crimes.

CSHJR 4 would give judges and magistrates a tool to use when they deemed necessary. Judicial discretion would remain because in both situations addressed by the resolution bail could be set under certain circumstances. Judges and magistrates would be able to make decisions that were fair while considering bail and conditions of release in the context of the safety of the public, victim, and law enforcement and the defendant's appearance in court. The bill would impose transparency when judges and magistrates denied bail by requiring written findings of fact about why bail was denied.

CSHJR 4 would work with other legislation on bail approved by the House this session to result in better qualified magistrates with more tools making informed, fair bail decisions.

**CRITICS
SAY:**

CSHJR 4 would be too broad an expansion of when bail could be denied and would erode the tenet that bail is presumed and should not be denied except in the most limited cases. Pretrial detention should be a rare exception, not something available or mandated for multiple crimes that could be first-time offenses. While current law allows pretrial detention in some cases, it is generally focused on cases in which defendants have multiple felonies or there are other extraordinary circumstances.

CSHJR 4 could result in detention before trial for some defendants, regardless of the strength of the evidence in the case or the defendant's threat or flight risk. The purpose of requiring bail is to ensure public safety and a defendant's appearance at trial, not to punish someone for an alleged offense. These defendants are presumed innocent, and detaining them pretrial inverts that presumption.

The offenses for which bail could be denied under CSHJR 4 are too broad and include lower level felonies, some of which carry potential punishments of only a few years and could involve defendants with no criminal history. Under the resolution, those accused of a crime could be locked up years waiting for a trial that could result in a term of less time than they waited for trial. Allowing bail denial for a broad group of offenses could perpetuate or introduce unfair disparities for communities that have been historically disenfranchised or overly impacted by the criminal justice system.

The standards that CSHJR 4 would set for allowing bail for specific offenses would be vague and unfair to defendants. Determinations, even in cases in which bail denial is discretionary, should have to be made by a high burden of proof. Judges and magistrates have pretrial tools under current law for defendants accused of serious crimes, including electronic monitoring, house arrest, drug and alcohol testing, or other restrictive conditions on bonds. CSHJR 4 could infringe on judicial discretion as judges and magistrates could feel pressure to deny bail to defendants who fit certain circumstances. This could increase populations in county jails, straining their resources.

NOTES:

According to the Legislative Budget Board, the cost for publishing the resolution would be \$178,333.