

## **RESOLUTION ANALYSIS**

C.S.S.J.R. 44  
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Criminal Jurisprudence  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Currently, the Texas Constitution has few exceptions for cases in which judges can deny bail outright. Defendants have the right to a release before their trial unless they are charged with capital murder or have repeated charges for violent offenses. In certain cases, violent offenders are able to make bail while low-level offenders who pose little to no threat to public safety are not able to make bail. Unfortunately, current options for denying bail pending trial effectively require a full trial on the merits at the time bail is denied and are rarely utilized. C.S.S.J.R. 44 seeks to protect Texans by providing a process for a judge or magistrate to deny bail to defendants charged with major offenses if that denial is determined to be necessary to protect public safety and ensure a defendant's appearance in court as required. Additionally, C.S.S.J.R. 44 requires a judge or magistrate to impose the least restrictive conditions of bail that may be necessary to ensure the person's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this resolution does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this resolution does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **ANALYSIS**

C.S.S.J.R. 44 proposes an amendment to the Texas Constitution to require a judge or magistrate in setting bail to impose the least restrictive conditions, if any, that are necessary to reasonably ensure the accused person's appearance in court as required and the safety of the community, law enforcement, and the victim of the alleged offense.

C.S.S.J.R. 44 authorizes a judge or magistrate to deny bail to a person accused of committing a major offense pending trial if the judge or magistrate determines by clear and convincing evidence after a hearing that bail and conditions of release are insufficient to reasonably manage a specific risk of the person's wilful nonappearance in court in violation of a requirement or to the safety of the community, law enforcement, or the victim of the alleged offense. The resolution prohibits a judge or magistrate from denying a person bail except after a hearing held not later than 72 hours after the person's arrest. The resolution requires the judge or magistrate to appoint counsel to represent the person at the hearing if counsel does not enter an appearance to represent the person before the hearing. A hearing is not required to release a person on bail.

C.S.S.J.R. 44 requires a judge or magistrate who denies a person bail in accordance with these provisions to prepare a written order that includes findings of fact and a statement explaining

the judge's or magistrate's reason for the denial. The resolution requires a judge or magistrate, for purposes of determining whether clear and convincing evidence exists to deny a person bail, to consider the factors required to be considered by a judge or magistrate in setting bail under general law, including statutory law governing criminal procedure, and apply those factors to the particularized facts and circumstances of the offense and any criminal episode during which the offense occurred. The resolution expressly prohibits these provisions from being construed to limit any right a person has under other law to contest a denial of bail or to contest the amount of bail set by a judge or magistrate or to require the presentation of testimonial evidence before a judge or magistrate makes a bail decision with respect to a person to whom these provisions apply.

C.S.S.J.R. 44 defines "major offense" as follows:

- murder, if the person intentionally or knowingly caused the death of an individual;
- aggravated assault, if the person used or exhibited a deadly weapon during the commission of the assault and assaults an individual the person knows is a public servant:
  - while the public servant is lawfully discharging an official duty or wearing a distinctive uniform or badge indicating the person's employment as a public servant; or
  - in retaliation for or on account of an exercise of official power or performance of an official duty as a public servant;
- aggravated sexual assault, if the person used or exhibited a deadly weapon during the commission of the assault;
- aggravated robbery, if the person used or exhibited a deadly weapon during the commission of the robbery; or
- continuous trafficking of persons.

#### **ELECTION DATE**

The constitutional amendment proposed by this joint resolution will be submitted to the voters at an election to be held November 7, 2023.

#### **COMPARISON OF SENATE ENGROSSED AND SUBSTITUTE**

While C.S.S.J.R. 44 may differ from the engrossed in minor or nonsubstantive ways, the following summarizes the substantial differences between the engrossed and committee substitute versions of the resolution.

Both the engrossed and the substitute authorize a judge or magistrate to deny bail to a person accused of continuous trafficking of persons. However, the other offenses to which that authorization applies differ. Whereas the engrossed authorized a judge or magistrate to also deny bail to a person accused of committing a sexual offense punishable as a first-degree felony or a violent offense, defined as murder; aggravated assault, if the accused used or exhibited a deadly weapon during the commission of the assault; aggravated kidnapping; or aggravated robbery, the substitute limits the applicability of that authorization to a person accused of committing a major offense, including continuous trafficking of persons or:

- murder, if the person intentionally or knowingly caused the death of an individual;
- aggravated assault, if the person used or exhibited a deadly weapon during the commission of the assault and assaults an individual the person knows is a public servant:
  - while the public servant is lawfully discharging an official duty or wearing a distinctive uniform or badge indicating the person's employment as a public servant; or
  - in retaliation for or on account of an exercise of official power or performance of an official duty as a public servant;

- aggravated sexual assault, if the person used or exhibited a deadly weapon during the commission of the assault; or
- aggravated robbery, if the person used or exhibited a deadly weapon during the commission of the robbery.

Both the engrossed and the substitute authorize a judge or magistrate to deny bail to an applicable person pending trial if the judge or magistrate determines by clear and convincing evidence after a hearing that bail and conditions of release are insufficient to protect the safety of the community, law enforcement, or the victim of the alleged offense. However, the substitute establishes that this authorization may alternatively be based on clear and convincing evidence that bail and conditions of release are insufficient to reasonably manage a specific risk of the person's wilful nonappearance in court in violation of a requirement, whereas the engrossed established that this authorization may alternatively be based on clear and convincing evidence that requiring bail and conditions of release is insufficient to reasonably ensure the person's appearance in court as required.

The substitute includes provisions that were not in the engrossed that do the following:

- prohibit a judge or magistrate from denying a person bail except after a hearing held not later than 72 hours after the person's arrest;
- require the judge or magistrate to appoint counsel to represent the person at the hearing if counsel does not enter an appearance to represent the person before the hearing; and
- establish that a hearing is not required to release a person on bail.

The engrossed and the substitute both require a judge or magistrate for purposes of determining whether clear and convincing evidence exists to deny an applicable person bail to consider the factors required to be considered by a judge or magistrate in setting bail under general law. However, the substitute additionally requires the judge or magistrate to apply those factors to the particularized facts and circumstances of the offense and any criminal episode during which the offense occurred, which the engrossed did not require.

While the engrossed prohibited its provisions from being construed to require any testimonial evidence before a judge or magistrate makes a bail decision with respect to an applicable person, the substitute prohibits its provisions from being construed to require the presentation of testimonial evidence before the judge or magistrate makes such a decision.