



THE ATTORNEY GENERAL OF TEXAS

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March 23, 1977

The Honorable Lynn Nabers
Chairman
Committee on Criminal
Jurisprudence
House of Representatives
P. O. Box 2910
Austin, Texas 78769

Letter Advisory No. 124

Re: Constitutionality
of proposed amendment to
article 44.04, Code of
Criminal Procedure.

Dear Chairman Nabers:

You have requested our opinion as to the constitutionality of House Bill 221, presently pending before the 65th Legislature. That bill proposes to amend article 44.04 of the Code of Criminal Procedure to grant a trial court discretion to deny bail pending appeal to a criminal defendant when the punishment assessed does not exceed 15 years' imprisonment. The bill would also authorize the denial or revocation of bail pending appeal in certain circumstances upon a finding that the defendant has committed a crime while released on bail posted for that case. You have submitted for our consideration both the original bill and a similar-committee substitute.

Article 44.04(d) presently provides that a defendant on bail when trial commences "shall remain on such bail . . . until his conviction has become final, either through his failure to obtain a new trial or to perfect or pursue an appeal or through final affirmance," when the punishment assessed is less than 15 years' confinement. After conviction, however, the trial court may increase or decrease the amount of bail. *Id.* A defendant whose punishment exceeds 15 years' confinement is to be placed in custody and his bail considered discharged immediately. Code Crim. Proc. art. 44.04(h).

House Bill 221 proposes to give the trial court, pending appeal from any felony conviction where the punishment does not exceed 15 years' confinement, discretion to

deny bail . . . and admit the defendant to custody, permit the defendant to remain at large on the bail previously acquired, or, if not then on bail, admit him to reasonable bail until his conviction becomes final.

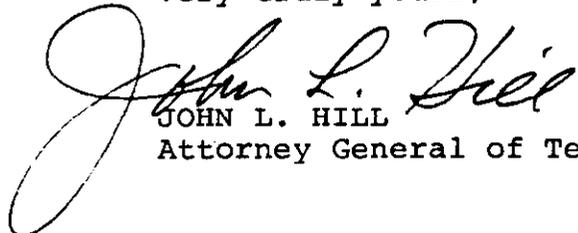
Section 1 (proposed amendment to Code Crim. Proc. art. 44.04, §1(c)). The trial court would retain its present power to increase or decrease the amount of bail pending appeal. The proposed section 2 of article 44.04 would permit the trial court to deny or revoke bail upon finding by a preponderance of the evidence that the defendant committed an offense while on bail posted for the case on appeal. The original bill permits such bail denial or revocation if the offense committed while on bail was a felony or misdemeanor involving moral turpitude. The committee substitute permits bail denial or revocation only if the case on appeal and the offense committed while on bail are classified as felonies. The committee substitute also requires additional findings by the trial court that no amount of bail will reasonably assure the defendant's presence or that the defendant, if released on bail, will pose a danger to another person or to the community. The committee substitute further provides that the court shall reinstate the defendant's original bail pending appeal if the charge against the defendant for the second felony is dismissed or if the defendant is adjudicated not guilty of the second offense.

You ask whether House Bill 221 or the committee substitute unconstitutionally infringe a defendant's right to bail. We believe that House Bill 221 and its committee substitute are constitutional. No absolute right to bail pending appeal exists under either the United States Constitution, Ballard v. Texas, 438 F.2d 640 (5th Cir. 1971); United States ex rel. Fink v. Heyd, 408 F.2d 7 (5th Cir. 1969), cert. denied 396 U.S. 895; Sellers v. Georgia, 374 F.2d 84 (5th Cir. 1967), or the Texas Constitution. Ex parte Bitela, 452 S.W.2d 501 (Tex.Crim.App. 1970); Ex parte Nielssen, 446 S.W.2d 882 (Tex. Crim.App. 1969); Ex parte McBride, 2 S.W.2d 267 (Tex.Crim.App. 1928). We do not, therefore, believe that the provisions of House Bill 221 or its committee substitute allowing a trial court to deny bail on appeal violate either the United States or Texas Constitution.

You also express concern that House Bill 221 does not provide for an appeal from the ruling of a trial court. We note that the present article 44.04 of the Code of Criminal Procedure likewise provides no appeal from the decision of a trial court relative to bail pending appeal. The Court of Criminal Appeals has nonetheless recognized its obligation to review such decisions when challenged by way of an application for writ of habeas corpus. See Mayes v. State, 538 S.W.2d 637 (Tex.Crim.App. 1976). House Bill 221 does not purport to alter this right of review by way of petition for writ of habeas corpus.

We do not, therefore, perceive any constitutional defect in the proposal to grant a trial court discretion to deny bail pending appeal in certain cases. Of course, the denial or the amount of bail in individual cases may be subject to challenge as an abuse of discretion. See Ex parte Schroeder, No. 53,670 (Tex.Crim.App. Feb. 2, 1977); Ex parte Lanham, 459 S.W.2d 850 (Tex.Crim.App. 1970); Ex parte Meador, 248 S.W. 348 (Tex.Crim.App. 1923). A defendant might also raise constitutional objections to a discriminatory denial of bail. See Sellers v. Georgia, 374 F.2d 84 (5th Cir. 1967). The likelihood of such constitutional challenges should, however, be greatly diminished under the additional guidelines and procedural protections afforded by the committee substitute for House Bill 221.

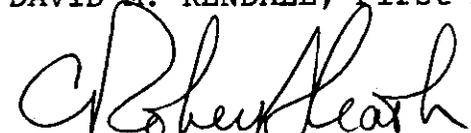
Very truly yours,


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APPROVED:



DAVID M. KENDALL, First Assistant



C. ROBERT HEATH, Chairman
Opinion Committee