



SPONSOR: Sen. Townsend & Rep. Chukwuocha  
Sens. Hansen, Sokola; Rep. Minor-Brown

DELAWARE STATE SENATE  
152nd GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1  
FOR  
SENATE BILL NO. 11

AN ACT PROPOSING AN AMENDMENT TO ARTICLE I OF THE DELAWARE CONSTITUTION RELATING TO  
CRIMINAL PROCEDURES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members  
elected to each house thereof concurring therein):

1 Section 1. Amend § 12, Article I of the Delaware Constitution by making deletions as shown by strike through and  
2 insertions as shown by underline as follows:

3 § 12. Right to bail; access to accused.

4 Section 12. (a) All persons, before conviction, shall be bailable by sufficient sureties, ~~unless for~~  
5 except as follows:

6 (1) For capital offenses when the proof is positive or the presumption ~~great;~~ great.

7 (2) For other felony offenses that the General Assembly expressly prescribes by law when all of the following  
8 apply:

9 a. The proof is positive or the presumption great.

10 b. The proof is clear and convincing that no condition or combination of conditions of release will do all  
11 of the following:

12 1. Reasonably assure the person's appearance at court proceedings.

13 2. Reasonably assure the protection of the community, victims, witnesses, or any other person.

14 3. Reasonably maintain the integrity of the judicial process, such that the person will not obstruct or  
15 attempt to obstruct justice.

16 c. The law designating a felony offense for which a person is potentially not bailable under this paragraph

17 (a)(2) is enacted by an act of the General Assembly that receives the concurrence of two-thirds of all the members  
18 elected to each House of the General Assembly.

19           (b) If a law designates a felony offense as potentially not bailable under paragraph (a)(2) of this Section, a law  
20 removing that designation must be enacted by an act of the General Assembly that receives the concurrence of two-thirds of  
21 all the members elected to each House of the General Assembly.

22           (c) ~~and when~~ When persons are confined before conviction on accusation for ~~such offenses~~ any offense, their  
23 friends and counsel ~~may at proper seasons~~ may, on reasonable conditions, have access to them.

#### SYNOPSIS

This is a substitute for Senate Bill No. 11. Like Senate Bill No. 11, this Act is the first leg of a constitutional amendment to modernize the bail provisions within the Delaware Constitution and clarify the power of the General Assembly to enumerate certain felony offenses for which, or circumstances under which, pretrial release on bail may not be allowed. And, like Senate Bill No. 11, any statute designating a felony offense for which a person can be subjected to pretrial detention without bail must be enacted by an act of the General Assembly that receives the concurrence of a two-thirds majority of each House of the General Assembly.

This Act differs from Senate Bill No. 11 by providing that if a law designates a felony offense as potentially not bailable under this Act, a law removing that designation must also be enacted by an act of the General Assembly that receives the concurrence of two-thirds of all the members elected to each House of the General Assembly.

The current constitutional provision providing that only “capital offenses” are potentially not bailable first appeared in its present form in the Delaware Constitution of 1792. At that time, “capital offenses” included many more offenses than the term does today. For example, manslaughter, rape, robbery, burglary, and assaults with weapons were capital offenses, and therefore included as crimes for which a court could order pretrial detention. Thus, over time, certain crimes that the Framers included as potentially not bailable are currently bailable.

Presently, a Delaware state court judge cannot order preventive detention in any non-capital case. Instead, the judge can only attempt to set the bail so high that a defendant cannot make it, which means that any defendant, no matter how dangerous and no matter the circumstance, can obtain release if the defendant can fund the bail—even if that defendant poses a certain flight risk or a known threat of harm to the public or to a specific person, such as a witness or victim.

Like Senate Bill No. 11, this Act is one step toward completing a pretrial release-detention continuum requiring specific evidence-based detention decisions that seek to maximize public safety while minimizing pretrial detention for those for whom detention is not required.

Specifically, this Act, like Senate Bill No. 11, will do all of the following:

- (1) Retain the express declaration of a general right to have bail set in a criminal case.
- (2) Provide that the crimes for which bail may be withheld are capital murder, where the evidentiary proof is positive or presumption of the accusation great, and other specifically identified felony offenses determined by and under procedures prescribed by law where the evidentiary proof is positive or presumption of the accusation great.
- (3) Ensure that an additional condition precedent to bail being withheld in non-capital cases is a finding by clear and convincing evidence that no condition or combination of conditions of release will reasonably assure the person’s appearance at court proceedings, reasonably assure the protection of the community, victims, witnesses, or any other person, and reasonably maintain the integrity of the judicial process, such that the defendant will not obstruct or attempt to obstruct justice.

This constitutional amendment, by itself, would not allow that a person charged with a non-capital crime could be held without bail. Rather, no person could be subject to a preventive detention hearing in a non-capital case until the General Assembly revises Chapter 21 of Title 11 of the Delaware Code to prescribe by law the specific felony offenses, circumstances, and procedures under which detention without bail may occur.

With this change, though, Delaware can progress toward the type of modern bail system that has been increasingly adopted by our sister states through amendment of their state constitutions, when needed, and the development of statutory procedures that provide, in appropriate cases, pre-trial detention without bail. And this change does so by adopting the standards recommended by authoritative sources including the National Conference of State Legislatures, the Uniform Law Commission, the National Center for State Courts, the American Bar Association, and the numerous state legislatures and

court systems that have studied pretrial detention and retained or incorporated them in their own state constitutions and laws.

Any legislation subsequently enacted or court procedures adopted to implement this constitutional amendment would have to require individualized, fact-governed decision-making by any court considering preventive detention to pass muster under the United States and Delaware Constitutions. Senate Bill No. 12, as introduced, is intended to do this.

This Act requires a greater than majority vote for passage because § 1 of Article XVI of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend the Delaware Constitution.

Amending the Delaware Constitution requires not only the passing of the changes in this Act, but also passage of the same changes after the next general election by the next General Assembly.

Author: Senator Townsend