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Rep. Chukwuocha & Rep. Longhurst
Sens. Ennis, Gay, Lockman, Lopez, Paradee, Pettyjohn,
Poore, Richardson, Sokola, Sturgeon, Walsh; Reps.
Dukes, Heffernan

DELAWARE STATE SENATE
151st GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 11

AN ACT PROPOSING AN AMENDMENT TO ARTICLE I, § 12 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 ~~prisoners shall~~ persons shall, before conviction, beailable 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 other than detention
11 will reasonably assure the person's appearance when required, reasonably assure the safety of any person or the
12 community, or prevent the person from obstructing or attempting to obstruct justice.

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

SYNOPSIS

This Act is the first leg of a constitutional amendment that will modernize the bail provisions within the Delaware Constitution and clarify the power of the General Assembly to define either certain offenses for which, or circumstances under which, pretrial release on bail may not be available.

The current provision allowing that only “capital offenses” are 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, other crimes that the Framers intended to include as those for which bail might be restricted no longer are.

Today, 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.

This Act is one step toward completing a pretrial release-detention continuum requiring specific evidence-based detention decisions that seek to maximize public safety and minimize pretrial detention for those less serious crimes for which it is not required.

Upon enactment of the second leg of this constitutional amendment, § 12 of Article I of the Delaware Constitution as proposed 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 and presumption of the accusation great, and other identified felony offenses determined by and under procedures prescribed by law where the evidentiary proof for the need of detention is clear and convincing.
- (3) Ensure that one condition precedent to bail being withheld in non-capital cases is a finding that no bail condition or combination of bail conditions other than detention will assure the safety of any person or the community, that the person will appear for future proceedings, or that the detention is necessary to prevent the person from obstructing or attempting 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 detention hearing in a non-capital case until the General Assembly revises Chapter 21 of Title 11 of the Delaware Code and the General Assembly and courts “prescribe by law” the specific felonies, 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 favorably recommended by authoritative sources including the National Conference of State Legislatures, the National Conference of Commissioners on Uniform State Laws, 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 under the passage of the second leg of 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 State Constitutions.

Author: Senator Townsend