



SPONSOR: Sen. Townsend & Rep. Chukwuocha
Sens. Buckson, Hansen, Hocker, Hoffner, Lawson,
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DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE BILL NO. 11

AN ACT CONCURRING IN A PROPOSED AMENDMENT TO ARTICLE I OF THE DELAWARE CONSTITUTION
RELATING TO CRIMINAL PROCEDURES.

1 WHEREAS, an amendment to the Delaware Constitution was proposed in the 152nd General Assembly, being
2 Chapter 283 of Volume 84 of the Laws of Delaware (“proposed amendment”); and

3 WHEREAS, the proposed amendment was adopted by two-thirds of all members elected to each house of the
4 152nd General Assembly; and

5 WHEREAS, following adoption by the General Assembly, the proposed amendment was publicized in accordance
6 with the Delaware Constitution; and

7 WHEREAS, when the 153rd General Assembly concurs in the proposed amendment, the amendment will become
8 part of the Delaware Constitution.

9 NOW, THEREFORE:

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

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

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

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

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

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

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

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

23 1. Reasonably assure the person’s appearance at court proceedings.

24 2. Reasonably assure the protection of the community, victims, witnesses, or any other person.
25 3. Reasonably maintain the integrity of the judicial process, such that the person will not obstruct or
26 attempt to obstruct justice.
27 c. The law designating a felony offense for which a person is potentially not bailable under this paragraph
28 (a)(2) is enacted by an act of the General Assembly that receives the concurrence of two-thirds of all the members
29 elected to each House of the General Assembly.
30 (b) If a law designates a felony offense as potentially not bailable under paragraph (a)(2) of this Section, a law
31 removing that designation must be enacted by an act of the General Assembly that receives the concurrence of two-thirds of
32 all the members elected to each House of the General Assembly.
33 (c) ~~and when~~ When persons are confined before conviction on accusation for ~~such offenses~~ any offense, their
34 friends and counsel ~~may at proper seasons~~ may, on reasonable conditions, have access to them.

SYNOPSIS

This Act is the second 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. The first leg of this constitutional amendment was Senate Substitute No. 1 for Senate Bill No. 11 of the 152nd General Assembly, published in Chapter 283 of Volume 84 of the Laws of Delaware. On passage of this second leg by this General Assembly this amendment will become part of the Delaware Constitution.

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.

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 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.

With the adoption of this Act, 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 Act 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.

This Act, 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. The General Assembly has made the necessary revisions to Chapter 21 of Title 11 through the adoption of Senate Bill No. 12 of the 152nd General Assembly, published as Chapter 473 of Volume 84 of the Laws of Delaware, which was enacted on September 30, 2024, and will take effect 6 months after the enactment of this Act.

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 when the General Assembly amends the Delaware Constitution.

Author: Senator Townsend