



SPONSOR: Sen. Townsend & Sen. Henry & Rep. J. Johnson &  
Rep. Potter  
Sen. McDowell; Reps. Baumbach, Keeley

DELAWARE STATE SENATE  
149th GENERAL ASSEMBLY

SENATE BILL NO. 221

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 Article I, § 12 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, be bailable by sufficient sureties, except as  
5     follows:

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

7           (2) For other felony offenses, if all of the following apply:

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

9           b. The proof is clear and convincing that no condition or combination of conditions other than detention  
10     will reasonably assure the person's appearance in court when required, or protect the safety of any other persons or  
11     the community, or prevent the person from obstructing or attempting to obstruct justice.

12           c. The law defining the felony offense circumstances under which a person is not bailable meets both of  
13     the following:

14           1. Is enacted by an act of the General Assembly that is separate from an act that creates or amends  
15     the felony offense circumstances.

16           2. Receives the concurrence of two-thirds of all the members elected to each House of the General  
17     Assembly.

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

## SYNOPSIS

This Act is the first leg of a constitutional amendment that modernizes the Delaware Constitution's bail provision and clarifies the power of the General Assembly and the Courts to define certain felony offenses for which, or circumstances under which, pretrial release on bail may not be available.

Upon enactment of the second leg of this constitutional amendment, Article I, § 12 of the Delaware Constitution 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 only crimes for which bail must be withheld are capital murder, where the evidentiary proof is positive and presumption of the accusation great, and other felony offenses determined by and under procedures prescribed by law where the evidentiary proof 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 another person or the community, that the person will appear for future proceedings, or that the detention is necessary to prevent the person from obstructing justice.

The proposed change to permit a person charged with a non-capital crime to be held without bail will not take effect until the General Assembly revises Chapter 21 of Title 11 of the Delaware Code to prescribe by law the circumstances and procedures under which detention without bail may occur. With this change, though, Delaware can move forward 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 extreme cases, pretrial detention without bail.

Under current Delaware law, the only circumstance in which a person might be detained without bail is when the person is charged with capital murder. This Act would have no effect on bail procedures and standards in capital cases. The fact that bail can be withheld only in capital cases, however, is inconsistent with the evidence-based and informed decision-making that the General Assembly looked to adopt through the Justice Reinvestment Act and the findings and ongoing work of our Supreme Court's Access to Justice Commission.

At present, a Delaware state court judge cannot order pre-conviction 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 can result in dangerous defendants with wealth being able to obtain release even if they pose a risk of harm to the public or a specific person, such as a witness or victim. This Act is one step toward completing a pretrial release-detention continuum that requires specific evidence-based release-detention decisions.

Any legislation subsequently enacted or court procedures adopted under this Act requires a court's individualized, fact-governed decision-making regarding detention in order to pass muster under the United States and Delaware State Constitutions. And, under this Act, any statute defining offenses for which, or circumstances under which, a person can be subjected to pretrial detention without bail must be enacted by an act of the General Assembly that is separate from an act that creates or amends the offense or circumstances and receives the concurrence of a two-thirds majority of each House of the General Assembly.

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