

The Right to Liberty

Why We Should Vote Down the Constitutional Amendment Limiting Bail in Criminal Cases

By David Raybin

Originally published in the Tennessee Bar Journal, September/October 2026. [View the original article at the Tennessee Bar Association.](#)

Besides arrest, bail is the most important decision made today in the criminal justice system. This November, Tennessee voters will be asked to approve an amendment to the state Constitution that would restrict pretrial bail in criminal cases.

Makes sense. Don't let "them" out on the street pending trial. That is, until the "them" is your cousin, your child or you.

The proposal is being sold as a straightforward public-safety measure: keep dangerous people off the streets while they wait for trial. That sounds simple, and that is exactly why it is politically effective. But like many simple slogans, it conceals a much more complicated and troubling reality.

At first glance, the amendment may seem like common sense. Nobody wants to see a violent offender released and then commit another serious crime before trial. Everyone understands the instinct to protect victims, witnesses and the public from further harm.

But the question before voters is not whether public safety matters. Of course it does. The real question is whether Tennessee should rewrite its Constitution to weaken a long-standing liberty guarantee based on the worst cases, the broadest fears and the assumption that pretrial detention is harmless when it is anything but.

Bail is not supposed to be punishment. It is supposed to be a mechanism that assures a defendant's appearance in court while preserving the presumption of innocence. Under current law, Tennessee already gives judges the ability to consider criminal history, prior failures to appear, employment, community ties and other relevant factors when deciding whether a defendant should be released and under what conditions. In other words, the system already allows for individualized decision-making. The proposed amendment does not fill a gap so much as enlarges the government's power to keep people in jail before they have been convicted.

That distinction matters. A person accused of a crime is still presumed innocent. That principle is not a technicality. It is one of the core promises of American justice. The proposed amendment would move Tennessee further away from that principle by making detention before trial easier for a broader category of offenses.

Once liberty is taken away before guilt is established, the loss is immediate and often devastating. People lose jobs. They lose housing. They lose child custody arrangements. They lose access to transportation, medical care and the support systems that keep their lives intact. Even if they are eventually acquitted, the damage is not erased.

The language of the amendment is especially concerning because it is not as narrow as many voters may assume. Supporters can point to a short list of very serious crimes, such as murder and rape. But the text also contains a broader category that reaches any offense for which a convicted defendant would have to

serve at least 85 percent of the sentence before release. That is a much wider net than the ballot pitch suggests. It includes offenses that voters may not have considered violent in the ordinary sense and offenses that can arise from ambiguous facts, bad judgment, or tragic accidents. The problem is not just the “advertised” crimes. The problem is the hidden reach.

That hidden reach should concern every voter. A person involved in a bar fight could find himself accused of aggravated assault if another person suffers a serious injury. A negligent driving case could be elevated to criminally negligent homicide. What? These crimes are serious but seldom require a presumption against pretrial bail.

A person later found not guilty could still spend months, or longer, sitting in jail because the Constitution was changed to permit pretrial detention in a much larger class of cases. This is not a minor procedural tweak. It is a major shift in how Tennessee treats liberty before trial.

Supporters of the amendment will likely respond that judges would still retain discretion and would still have to state their reasons on the record. That answer is not enough. A requirement to explain a detention decision does not make the decision less burdensome. It does not lessen prosecutorial leverage. And it certainly does not restore the time, employment, family stability or reputation lost by a person who is jailed before trial and later acquitted.

Transparency is useful. It is not a substitute for a narrow rule.

The amendment also threatens to intensify a problem that has long troubled the criminal justice system: the pressure to plead guilty in order to get out of jail. Pretrial detention changes case dynamics in a profound way. A defendant who is sitting in custody may decide that pleading guilty is the fastest, cheapest and least painful way to regain freedom, even when the evidence is weak or the charge is overstated. In that way, detention becomes leverage. It is no longer just a way to ensure appearance in court; it becomes a bargaining chip. That is not a healthy foundation for justice.

Research has repeatedly shown that detained defendants are more likely to plead guilty and do so more quickly than released defendants. That should trouble anyone who believes criminal cases should be decided on evidence rather than on the pressure of confinement. If a constitutional amendment increases the number of people who feel forced into plea deals simply to get out of jail, then the amendment is not just protecting the public. It is changing the outcome of cases before the merits are fully tested in a jury trial.

The public-safety argument, though emotionally powerful, is still incomplete. The fact that some released defendants commit new crimes does not prove that a sweeping constitutional amendment is the right solution. There will always be tragic cases. There will always be hard calls. But public policy cannot be built around the most extreme examples alone. Most people released before trial appear in court as required. Most do not commit another violent crime while awaiting their day in court. The justice system should be designed for the ordinary case, not rewritten around the rare catastrophe.

There is also a practical question that lawmakers and voters should not ignore: who pays for all of this? More pretrial detention means more people in jail, more staffing pressure, more medical costs, more overcrowding and more strain on local governments.

County jails do not operate on slogans. They operate on budgets. And when the state expands the number of people who can be held before trial, the costs do not disappear just because the fiscal note is narrow or the state claims no new expense. Those burdens are likely to fall on sheriffs, counties and local taxpayers asked to pay for a new jail.

That is another reason to be skeptical. A constitutional amendment should not be sold as a safety measure while quietly shifting costs downward to local governments that will have to absorb the real-world consequences. If the state wants to fund more jail space, more court resources or more pretrial services, that is a serious policy conversation. But changing the Constitution to authorize more detention before trial is a blunt and expensive way to solve a problem that may not be solved by mass detention.

There is a better way. Tennessee can preserve judicial discretion, strengthen pretrial supervision, improve court appearance systems and focus on moving serious cases more quickly. Faster investigation, faster indictment and faster trial are better public-safety tools than simply holding more people in jail and hoping the extra detention produces better outcomes. If the goal is to prevent violence, the answer is not automatically more confinement. It is smarter case management and more reliable enforcement of existing rules.

In the end, the case against this amendment is not that public safety should be ignored. It is that public safety should not be used as a reason to weaken constitutional protections that have served as an important check on pretrial detention. The proposal is broader than many voters may realize. It increases the risk of over-detention. It puts more pressure on defendants to plead guilty. It shifts costs onto local governments. And it does all of this before any trial has taken place.

That is why voters should reject it. A Constitution is a restriction on government overreach; it should protect liberty first and permit detention only where truly necessary. This amendment moves in the opposite direction.

ABOUT THE AUTHOR



DAVID RAYBIN has practiced criminal and civil rights law in Nashville for 50 years. He is the author of the three-volume treatise, *Tennessee Criminal Practice and Procedure*. Raybin is a 1973 Order of the Coif graduate of the University of Tennessee (now Winston) College of Law. After graduation, he served as an assistant state attorney general for three years and then as an assistant district attorney for seven years. After his service with the government, he joined what was then Hollins Wagster and Yarbrough. Following the reorganization of the firm, Raybin is now the senior partner of Raybin and Weissman.

[Original Tennessee Bar Association article](#)