



## MEMORANDUM

**TO:** Pennsylvania Senate Judiciary Committee

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** April 5, 2022

**RE: OPPOSITION TO SB 110 PN 82 (BARTOLOTTA)**

**Bill summary:** [SB 110](#) (PN 82) would amend Title 18 to create a new offense of drug delivery resulting in serious bodily injury, graded as a **second-degree felony**, punishable by up to 10 years incarceration. Serious bodily injury ([18 § 2301](#)) is defined as an injury which creates a “substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” In addition, SB 110 mandates that the Pennsylvania Commission on Sentencing create a sentencing enhancement based on whether the “controlled substance was administered, dispensed, delivered, given, prescribed, sold or distributed in exchange for any direct or indirect remuneration or consideration.”

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose SB 110.**

**SB 110 is broad and duplicative, allowing prosecutors to overcharge for one alleged drug offense.**

**SB 110 is duplicative:** The delivery, sale, and distribution of controlled substances is already covered by possession with intent to deliver (PWID) under [35 P.S. § 780-113\(30\)](#).

- PWID offenses are currently graded as felonies, often carrying decades of incarceration penalties.<sup>1</sup>
- And the Sentencing Guidelines provide further clarification on the grading and [severity of offenses](#) under the Drug Code.<sup>2</sup> The severity of a PWID offense (indicated by the offense gravity score or OGS) is one of the factors used to determine the amount of time a judge should sentence someone to prison. Importantly, the OGS varies by the weight of a drug, which means that the guidelines already attempt to punish high-level dealers more severely than those selling smaller amounts, such as those who deal in order to support their own habit. Most of the offense gravity scores for possession with intent to deliver are at the high end of the scale (with 1 being the least severe and 15 the most severe). This is especially true for possession with intent to deliver fentanyl, where the score ranges from 8-14, making the sale of fentanyl the equivalent in severity to the sexual abuse of children, manslaughter, and kidnapping at the low end; human trafficking in the mid-range; and at the high end, the OGS for sale of fentanyl is equivalent to murder, rape of a child, and using weapons of mass destruction.

Furthermore, the Crimes Code **already contains offenses** that could be charged if/when a defendant is also accused of serious bodily injury in conjunction with felony charges under possession with intent to deliver:

- If the concern behind SB 110 is to punish dealers who cause death, **drug delivery resulting in death**, currently considered criminal homicide under [§ 2506](#), is punishable by up to 40 years incarceration.
- **Aggravated assault:** “*Attempting to cause serious bodily injury to another, or causes such injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life*” already covers serious bodily injury under aggravated assault in [§ 2702](#)—a **first-degree felony** that carries up to **20 years incarceration**.

<sup>1</sup> [35 P.S. § 780-113\(40\)\(f\)](#), (n), and (o).

<sup>2</sup> [24 Pa. Code § 303.15](#) (Drug Act Offenses).

- **Reckless endangerment:** If a person “recklessly engages in conduct which places or may place another person *in danger of death or serious bodily injury*,” they can be charged with a second-degree misdemeanor under [§ 2705](#) that carries up to 2 years incarceration.

People convicted of possession with intent to deliver currently face lengthy state prison terms. And if serious bodily injury is an alleged element of the crime, prosecutors can charge the defendant with multiple offenses, including drug delivery resulting in death or assault and reckless endangerment.

**SB 110 is broad:** SB 110 casts a broad net over **all drug delivery offenses** that could result in serious bodily injury. And because every single person who takes heroin, cocaine, fentanyl, or any other drug, runs the risk of serious bodily injury (weakened hearts, scarred arms, overdose), it effectively permits double charging anyone accused of drug delivery with a identifiable seller with a second-degree felony. And that would be **in addition** to charges under (1) existing felonies for PWID; and (2) penalties for assault or reckless endangerment under Title 18. Creating duplicative offenses only further increases prosecutors’ coercive pressure, a dangerous trend we repeatedly underscore in our [More Law. Less Justice](#) reports.

**The new offense created by SB 110 would not be covered by current immunity protections for those who report an overdose, further jeopardizing those struggling with addiction.**

The [Drug Overdose Response Immunity Act](#)<sup>3</sup> provides protection from prosecution for people who report a drug overdose to 911, other law enforcement, or a healthcare facility. This protective measure was passed in as [SB 1164](#) in 2014, with unanimous, bipartisan support, and co-sponsored in the senate by Senators Lisa Baker, Vincent Hughes, Judy Schwank, Kim Ward, and Gene Yaw and signed into law by Governor Corbett. This act saves lives.

However, the Immunity Act only prevents prosecution for charges within the [Drug Code](#).<sup>4</sup> Because SB 110 creates a new drug delivery offense under a different part of the statute,<sup>5</sup> it would not be covered under the immunity protection. And SB 110 does not propose an amendment to the Immunity Act to cover the new offense it creates.

Perhaps this is intentional. But because the offense created by SB 110 is so broad, if a fellow user reports a potential overdose or adverse drug response, they could, at a minimum, face a second-degree felony charge. From a public health perspective, we want to encourage reporting of potentially fatal adverse drug reactions. If the legislature is serious about not wanting people to overdose, it should not jeopardize those who seek drug-related medical care for another by making them liable for a felony if the person they take to the hospital suffers serious body injury.

SB 110 doubles down on a “solution” that does not work. The legislature and Sentencing Commission have steadily increased criminal penalties for drug offenses (especially those involving fentanyl), and yet overdoses continue to rise. Despite a veritable avalanche of data and research showing that increased treatment and support are far more effective at saving lives and managing addiction, the legislature continues to ratchet up criminal penalties that don’t work. Furthermore, many people sell drugs to support their own habit, so the distinction between dealer and user is often non-existent. SB 110 doesn’t go after the kingpins, it punishes those struggling with addiction—first, by creating a broad and duplicative offense that permits overcharging defendants and second, by making it more dangerous to report a potential overdose.

**For these reasons, we urge you to oppose SB 110.**

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<sup>3</sup> [Act 139 of 2014](#), enacted into law at [35 P.S. § 780-113.7](#).

<sup>4</sup> [Controlled Substances, Drugs, Device, and Cosmetic Act](#).

<sup>5</sup> SB 110 would create a new offense under [Title 18 Chapter 27–Assault](#)—unlike almost all other PWID offenses (possession with the intent to deliver), which are enumerated under [35 P.S. Section 780-113\(30\)](#).