



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: January 28, 2020

RE: OPPOSITION TO SENATE BILL 773 P.N. 1468 (KILLION)

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose SB 773 (PN 1468) for the following reasons:

SB 773 mandates surveillance of people before they have been convicted of a crime

SB 773 was [amended](#) on the Senate floor to create a newly established “24/7 sobriety monitoring program.” In addition to being applicable to probation and parole, this amendment requires monitoring people with two prior DUI offenses **as a condition of bail**. In other words, a court can sentence a person to continuous monitoring, tantamount to virtual detention, before they have been convicted of a crime. This raises grave concerns surrounding how this program might undermine the presumption of innocence granted to people pre-conviction as well as the erosion of pre-trial due process protections.

SB 773 imposes mandatory consecutive sentences and further expands penalties

In our 2019 report, [More Law, Less Justice](#), we trace how, over the past four decades, the PA legislature has become a bipartisan offense factory, as members of both political parties churn out hundreds of new crimes and penalties that unnecessarily expand our crimes code. Each year, legislators draft hundreds of redundant crime bills that duplicate existing law or add unnecessarily harsh new penalties. Our criminal code has become an expansive and irrational web of overlapping offenses. When the PA code was created in 1972, it established 282 offenses and suboffenses. By 2010, that number increased to 636. Today, there are more than 1,500 offenses and suboffenses.¹ This unrelenting expansion effectively diverts power away from judges into the hands of prosecutors and police, contributing to ever-greater incarceration of hundreds of thousands of Pennsylvanians.

The steady addition of new and expanded offenses in the crimes code has real world consequences. Prosecutors use duplicative offenses to overcharge defendants, coercing them into giving up their right to a public trial. Prosecutors use this leverage to force defendants to accept plea bargains in the vast majority of all criminal cases. Expanding penalties, especially during a time when crime has dropped to historic lows, is a misguided approach to criminal justice policy.

Many of the new penalties in SB 773 were *already increased for the same offenses in 2018*. SB 773 increases the grading for an accident resulting in bodily injury, serious bodily injury or death for a person with two prior offenses from a first-degree misdemeanor to a third-degree felony. It increases the penalties for refusing breath or chemical testing for those with two or more prior offenses from a third-degree felony to a second-degree felony for three prior offenses, and a first-degree felony for four or more prior offenses. And for those with a third or subsequent offense, SB 773 also requires courts to impose these penalties as a mandatory sentence to be served consecutive to any other sentence imposed by the court.

¹ ACLU of Pennsylvania, *More Law, Less Justice*, October 2019, <https://www.aclupa.org/en/publications/more-law-less-justice>

Lest anyone argue that the legislature has failed to hyper-penalize DUI offenses, in **2018 ALONE**, the General Assembly created 9 new penalties and 1 new offense for DUI-related charges², including:

- Driving while operating privilege is suspended or revoked, 75 Pa.C.S. 1543 (b)(ii) (makes a second violation a summary offense punishable by 90 days' incarceration);
- Makes a third offense a misdemeanor of the third degree, punishable by a year in prison, 75 Pa.C.S. 1543 (b)(iii);
- Homicide by vehicle while driving under the influence, 75 Pa.C.S. 3735 (a)(1)(II) (makes the unintentional death of another person while under the influence of alcohol a felony of the first degree if previously guilty of another DUI and implements consecutive mandatory minimum sentences of three, five, and seven years depending on prior offenses);
- Aggravated assault by vehicle while driving under the influence, 75 Pa.C.S. 3735.1(a.1) (creates mandatory minimum of two years confinement);
- Accidents involving death or personal injury while not properly licensed, 75 Pa.C.S. 3742.1 (creates a new suboffense by expanding the definition from anyone who caused an accident that resulted in injury or death to anyone who acted with negligence that contributed to causing an accident that resulted in injury or death, and added two new penalties to this new suboffense — a misdemeanor of the third degree if injury results and a misdemeanor of the second degree if death results);
- Makes it a felony of the third degree punishable by seven years incarceration for anyone who violates section 3802 and has previously been convicted of homicide by vehicle, 75 Pa.C.S. 3803(a)(3);
- Makes the refusal to submit to a breathalyzer or blood test a felony of the third degree punishable by seven years, if the individual has two or more prior offenses under this statute, 75 Pa.C.S. 3803(b)(4.1);
- Adds an additional penalty, increasing the penalty from a misdemeanor of the first degree to a felony of the third degree, punishable by seven years incarceration, if an individual violates this statute, has a minor in the vehicle, and has two or more prior offenses, 75 Pa.C. S. 3803(b)(5).

SB 773 risks punishing people who are too poor to pay monitoring costs

SB 773 requires that defendants "shall pay" the monitoring costs, but only permits that courts "may authorize the county" to pay if the defendant is unable. At the very least, counties must be required to pay the costs if the defendant cannot, or else the defendant cannot be punished for not paying.³ This is already legally required, as the Constitution prohibits punishing a person for nonpayment.⁴ It is also required by [Pa.R.Crim.P. 706](#), which the Superior Court explained applies even to costs imposed pretrial.⁵

Additionally, *when* does the defendant have to pay? Is this a "pay as you go" structure? If so, then the legislature is setting up an administrative nightmare for the local courts and counties. It is **unconstitutional** to not refund someone for costs associated with a criminal prosecution if the defendant is not convicted.⁶ Thus, if the charges are dismissed, or will no longer be prosecuted, or anything else that does not lead to a conviction for a DUI, the defendant would be **constitutionally entitled to a refund**. The court and counties would have to keep track of what s/he had paid and refund those expenses.

For these reasons, we urge you to oppose Senate Bill 773.

² [Act 2018-153](#)

³ **We would recommend the following changes to § 3818 (c):** Determination and costs to be paid.--The individual shall pay for all costs associated with the 24/7 sobriety monitoring program, including administrative and operating costs or costs associated with any required devices or technologies, **only if the court determines that the defendant has the present ability to pay those costs.** If ~~the court determines that the defendant does not have the present ability to pay those costs, it shall~~ **may** authorize the county to finance costs associated with the 24/7 sobriety monitoring program if the court, ~~at any time, determines the individual lacks the financial ability to pay all or part of costs associated with a 24/7 sobriety.~~ **The defendant shall be liable to pay these costs only upon conviction of an offense for which the 24/7 sobriety monitoring program is authorized.**

⁴ Parrish v. Cliff, 304 A.2d 158, 162 (Pa. 1973)

⁵ Commonwealth v. Dennis, 164 A.3d 503, 509 (Pa. Super. Ct. 2017)

⁶ Nelson v. Colorado, 137 S. Ct. 1249 (2017)