



MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 19, 2020

RE: OPPOSITION TO SENATE BILL 773 P.N. 1771 (KILLION)

It comes as no surprise that the ACLU-PA opposes a bill that increases criminal penalties, enhances offense grading, and imposes mandatory sentences. We do. This bill would impose mandatory consecutive sentences for DUI offenses and, astonishingly, would charge a person with prior DUI offenses with a **first-degree felony** for...refusing to take a breath or chemical test, joining those accused of murder, rape, or kidnapping. But our opposition to this bill is not limited to its expansion of the crimes code. SB 773 would also mandate an invasive, continuous monitoring program ordered and enforced by the state and administered by private vendors — an alarming expansion of government and corporate surveillance.

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

SB 773 mandates invasive surveillance and monitoring by the government and private vendors

[SB 773](#) (PN 1771) would mandate a “substance monitoring program,” removing all discretion from the courts, that would include one or more of the following: a continuous alcohol monitoring device; a remote breath testing device; or random drug testing or any other controlled substance monitoring technology or device as determined by the court.

This program would be mandated for those on **probation and parole** as well as for 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 — but even more invasive — 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 pretrial due process protections. In addition, SB 773 would entirely prohibit people — pretrial — from imbibing alcohol *in any amount*. Alcohol is still legal. The government can prohibit someone from using *illegal drugs* and the government can prohibit people from *operating a vehicle*. But the government should NOT be permitted to prohibit a person from imbibing ALL alcohol BEFORE being convicted of a crime.

These concerns are compounded by the incredible burden this kind of mandatory monitoring will place on counties, which will be forced to bear the costs of longer terms of probation supervision, increased monitoring of those on probation, increased costs of county detention and incarceration, and the cost of the monitoring itself if a defendant cannot afford to pay for the mandated surveillance, assuming this program does not unconstitutionally punish people who cannot afford the monitoring costs.

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, that “may” must be a “shall.”¹ Counties **must be required** to pay the costs if the defendant cannot — or else the defendant cannot be punished for not paying.

¹ For example: “THE COURT ~~MAY~~ SHALL ORDER THE COUNTY TO FINANCE COSTS ASSOCIATED WITH THE SUBSTANCE MONITORING PROGRAM IF THE COURT, AT ANY TIME, DETERMINES THE INDIVIDUAL LACKS THE FINANCIAL ABILITY TO PAY COSTS ASSOCIATED WITH THE INDIVIDUAL'S PARTICIPATION IN A SUBSTANCE MONITORING PROGRAM.”

This is already constitutionally required, as the Constitution prohibits punishing a person for nonpayment, and the Superior Court has explained that it is **unconstitutional** to deny individuals equal treatment in the criminal justice system based on wealth.² It is also required by [Pa.R.Crim.P. 706](#), which the Superior Court explained applies even to costs imposed pretrial.³

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.⁴ 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. To avoid this outcome, the bill should specify that any costs associated with a substance monitoring program must be paid only *after* conviction.

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.⁵ 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. And at the risk of repeating ourselves, mandatory sentences are ineffective, costly, and even further erode the discretionary power of judges while hyper-expanding the power of prosecutors.

For those with two or more prior offenses, SB 773 (PN 1771) would require courts to impose penalties as a **mandatory sentence** to be served consecutive to any other sentence imposed by the court. SB 773 also 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. And it significantly increases the penalties for refusing breath or chemical testing for those with:

- Two prior offenses: remains a third-degree felony;
- Three prior offenses: increases from a third-degree felony to a second-degree felony; and
- Four or more prior offenses: increases from a third-degree felony to a **first-degree felony**.

To be clear: This provision would charge someone with four or more prior offenses with a FIRST DEGREE FELONY for refusing a test. First, someone with four or more prior offenses is likely in need of *treatment*. Second, while four or more prior offenses is very serious, this enhancement is not triggered by inflicting serious bodily injury or death, but by *refusing a test*. First degree felonies are charged for the most serious crimes: murder, rape, kidnapping, and the like. This enhancement is, quite frankly, beyond excessive and absolutely unjustifiable.

SB 773 also strictly limits Accelerated Rehabilitative Disposition (ARD) for DUIs. Currently, ARD does not require an admission — this new provision would make ARD more akin to a non-contest plea, where the defendant agrees to the evidence the Commonwealth presents before they can be admitted into ARD. As a result, ARD becomes an admission of guilt. And SB 773 then **uses that admission of guilt to count as a prior offense** in order to trigger all the penalty enhancements for prior offenses included in the bill.

² Parrish v. Cliff, 304 A.2d 158, 162 (Pa. 1973); Commonwealth v. Melnyk, 548 A.2d 266, 268 (Pa. Super. Ct. 1988) (preventing a defendant from participating in ARD due to indigence would “deprive the petitioner of her interest in repaying her debt to society without receiving a criminal record simply because, through no fault of her own, she could not pay restitution. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment”)

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

⁴ Nelson v. Colorado, 137 S. Ct. 1249 (2017)

⁵ ACLU of Pennsylvania, *More Law, Less Justice*, October 2019, <https://www.aclupa.org/en/publications/more-law-less-justice>

And 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 charges⁶, 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);
- Aggravated assault by vehicle while driving under the influence, 75 Pa.C.S. 3735.1 (a.1) (creates a mandatory minimum of two years confinement);
- 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);
- Accidents involving death or personal injury while not properly licensed, 75 Pa.C.S. 3742.1 (creates a new sub-offense 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 sub-offense — 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).

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

⁶ [Act 2018-153](#)