ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania House Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 26, 2022

RE: OPPOSITION TO SB 814 P.N. 1178 (YUDICHAK)—"Wilding's Law"

Bill summary: SB 814 (PN 1178) would create two new, duplicative offenses under 18 § 5104:

1. § 5104.2—A new offense prohibiting evading police arrest or detention on foot. If a person suffers serious bodily injury as a direct result of violating this section, the offense is graded as a felony of the third degree. If a person dies as a result, the grading is increased to a felony of the second degree. All other offenses under this section are graded as second-degree misdemeanors.
2. § 5104.3—A new offense of harming a police animal while evading arrest or detention (§ 5104.2), resisting arrest (§ 5104), or disarming a law enforcement officer (§ 5104.1). If the police animal suffers bodily injury, the offense is graded as a second-degree misdemeanor and if the animal dies or suffers serious bodily injury, it is graded as a third-degree felony.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 814.

Prosecutors didn't need SB 814 to charge three teens in the death of a police officer.

SB 814 has been referred to as Wilding's Law, named in honor of a Scranton police officer who died after falling from a retaining wall while in pursuit of three teens suspected of a robbery. Introducing legislation in response to this terrible tragedy would suggest that there were no charging options available to the Lackawanna County district attorney. That, however, was not the case. Prosecutors didn't need SB 814; they had all the tools they needed to charge three teenagers in the death of officer Wilding. Each one was charged with second-degree murder and second-degree murder of a law enforcement officer. Ultimately, all three pleaded guilty to robbery and **third-degree murder** and sentenced to 9-18 years in prison.

Moreover, prosecutors already have other tools available to them without creating a duplicative offense under SB 814. **Evading arrest or detention on foot** could currently be charged under:

- 18 § 5126—Flight to avoid apprehension, trial or punishment, which makes it a crime to "move or travel within or outside this Commonwealth with the intent to avoid apprehension," graded as either a third-degree felony or second-degree misdemeanor.
- 18 § 5104—Resisting arrest, which *already* makes it a crime to prevent a lawful arrest and is currently graded as a misdemeanor of the second degree.
- And, of course, Pennsylvania permits use of force (including deadly force) to prevent the escape of a person who has been arrested (18 § 508).

SB 814 could criminalize the lawful right to refuse to engage with law enforcement.

Pennsylvanians have well-established constitutional rights protecting them against unreasonable government "seizures" under the Fourth Amendment of the U.S. Constitution[1] and Article 1, § 8 of the Pennsylvania Constitution.[2] But where the law draws the line between an encounter, a detention, and an arrest is a complex, nuanced, and frequently contested one. And it is this terrain that SB 814 complicates, if not exploits.

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[1] U.S. CONST. amend. IV.
[2] PA CONST. art. I, § 8.

SB 814 defines evading arrest or detention on foot as when a "... person knowingly and intentionally flees on foot from a public servant attempting to lawfully arrest or detain that person." **There are two significant concerns with how this offense is drafted / defined: (1) SB 814 inserts a new offense into the already muddled terrain of police encounters; and, (2) the culpability requirements in the bill are dangerously unclear.**

Police encounters

Pennsylvania law recognizes three categories of police encounters[3] distinguished by whether a person has been "seized" within the meaning of the Fourth Amendment:[4] (1) mere encounter; (2) investigatory detention; and (3) custodial detention or arrest. Whether a particular interaction with law enforcement is considered a mere encounter, an investigatory detention, or an arrest is complex and often contested in appellate courts.[5] That said, there are some established distinctions between these interactions:

1. **Mere encounter:** During a "mere encounter" (or request for information), police may approach anyone in public to talk to them. A mere encounter requires no particular suspicion of criminality because it is consensual and doesn't require a person to stop or respond.[6] As a result, people enjoy the strongest constitutional protections under the U.S. and Pennsylvania constitutions. **During a mere encounter, people have every right to ignore, walk, or run from a police officer without saying a word**.[7]
2. **Investigative detention:** An investigative detention subjects a person to a stop and a period of detention, but does not involve the same coercive conditions as an arrest. Therefore, an investigative detention requires that a police officer have reasonable suspicion that a crime has occurred[8] and the person is involved.[9] **If police detain a person to *investigate*, and the person flees, police do not necessarily have probable cause to arrest**.[10]
3. **Custodial detention or arrest:** A formal arrest, of course, requires probable cause. And because "custodial detention" arises when the "conditions and/or duration of an investigating detention become so coercive as to be the functional equivalent of arrest,"[11] it, too, must be supported by probable cause.[12]

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[3] "[W]e note that Fourth Amendment jurisprudence has led to the development of three categories of interactions between citizens and the police." *Commonwealth v. Ellis*, 541 Pa. 285, 293-94 (Pa. 1995).

[4] "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544 (1980).

[5] "We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop…[T]here will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment." *Florida v. Royer*, 460 U.S. 491, 506-7 (1983).

[6] "A "mere encounter" (or request for information) need not be supported by any level of suspicion, but it carries no official compulsion to stop or to respond." *Commonwealth v. Douglass*, 372 Pa. Super. 227, 238 (Pa. Super. Ct. 1988). Also see *Florida v. Bostick*, 501 U.S. 429, 437 (1991): "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."

[7] "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Florida v. Bostick*, 501 U.S. 429, 437 (1991). Also see *Commonwealth. v. DeWitt*, 530 Pa. 299, 307-8 (Pa. 1992): "We would be hard pressed to find that flight, in and of itself, constitutes reasonable suspicion of criminal conduct."

[8] *See Berkemer v. McCarty*, 468 U.S. 420 (1984); *Terry v. Ohio*, 392 U.S. 1 (1968).

[9] "To maintain constitutional validity, an investigative detention must be supported by a reasonable and articulable suspicion that the person seized is engaged in criminal activity and may continue only so long as is necessary to confirm or dispel such suspicion." *Commonwealth v. Strickler*, 563 Pa. 47, 757 A.2d 884, 889 (2000).

[10] "Flight, in and of itself, does not constitute probable cause to arrest." *Commonwealth v. Jeffries*, 454 Pa. 320, 323, 311 A.2d 914, 916 (1973). Also see *United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012): "Our holding today reiterates that unprovoked flight, without more, can not elevate reasonable suspicion to detain and investigate into the probable cause required for an arrest. Rather, a person whom police approach is free to avoid a potential encounter with police by leaving the scene, and the rate of acceleration of the person's gate as s/he leaves away is far too ephemeral a gauge to support a finding of probable cause, absent some other indicia of involvement in criminal activity."

[11] "Detention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessary to trigger the traditional safeguards against illegal arrest." *Dunaway v. New York*, 442 U.S. 200 (1979).

[12] "We note that the term "custodial detention" has generally been used by the United States Supreme Court to describe incidents in which the police do not verbally inform a suspect that he is under arrest, but rather, undertake actions which result in the conditions of the detention becoming so coercive as to amount to the functional equivalent of a formal arrest...We find this distinction, however, to be

The most perilous problem with SB 814 is its inclusion of "detention" in the definition of the offense. First, the bill fails to provide any definition of "detention." Second, because the lines between (1) a mere encounter and investigative detention and (2) investigative detention and arrest are context-specific, SB 814 would risk inviting "public servants" (yet another term not defined in the bill) to arrest someone who might have a lawful right to walk away from a police officer. The bill exploits the average person's lack of familiarity with what their rights are when encountering law enforcement and only makes this minefield more hazardous by adding a new criminal offense to it. "Detention" should be eliminated from SB 814 entirely.

Furthermore, it's important to note that the offense created by SB 814 creates a circular logic. Legally speaking, flight, in and of itself, neither establishes reasonable suspicion for a detention nor probable cause for arrest.[13] But should SB 814 be enacted, the ***flight itself could retroactively justify the stop***. Worse, if police fail to find enough evidence to establish probable cause following a detention, SB 814 establishes the flight itself as a separate offense, a crime that is distinct from the one the officer is investigating.

There is little doubt that SB 814 would be used to target or threaten young Black men and other people of color, who may be constitutionally entitled to ignore or refuse to engage with a police officer, with a criminal offense.

Culpability requirements: knowledge and intent

The culpability requirements in SB 814 are dangerously unclear. Again, the offense it creates is defined as when a "... person ***knowingly and intentionally*** flees on foot from a public servant attempting to lawfully arrest or detain that person" (emphasis added). But to which elements of the offense does the "knowingly and intentionally" apply?

- Does the "knowingly and intentionally" only require that a person know they are fleeing on foot?
- Does it require that a person knows they are fleeing from a "public servant"? If so, why doesn't SB 814 define what a "public servant" is? And why doesn't SB 814 require that the public servant be in uniform and/or announce themselves?
- Does the bill require that a person knows that the public servant is "attempting to lawfully arrest or detain" them? If so, SB 814 not only presumes a person knows that there is an "attempt" being made to arrest or detain them, but it predetermines—as part of the statute—that the arrest or detention is *lawful*, an assumption that has not been established or proven.

SB 814 would charge people with felonies who did not intend to harm a police animal or whose actions did not even directly result in the injury of the animal.

SB 814 creates a second duplicative and unnecessary offense. **Harming a police animal** could currently be charged under:

- 18 § 5548—Police animals, which makes it a third-degree felony for a person to intentionally or knowingly taunt, beat or strike a police animal under § 5548(a). And under § 5548(b), it is a second-degree felony for a person to intentionally or knowingly injure or kill a police animal.
- 18 § 5534—Aggravated cruelty to animals, which punishes intentional torture, abuse, or neglect that causes serious bodily injury to or the death of an animal as a third-degree felony.
- 18 § 5533—Cruelty to animals, which already grades reckless (but not intentional) abuse of an animal causing bodily injury or imminently risking serious bodily injury as a second-degree misdemeanor.

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purely semantic since in either case the seizure of the suspect must be supported by probable cause." *Commonwealth v. Ellis*, 541 Pa. 285, 294 n.3 (Pa. 1995).

[13] "We would be hard pressed to find that flight, in and of itself, constitutes reasonable suspicion of criminal conduct." *Commonwealth. v. DeWitt*, 530 Pa. 299, 307-8 (Pa. 1992); "Flight, in and of itself, does not constitute probable cause to arrest." *Commonwealth v. Jeffries*, 454 Pa. 320, 323, 311 A.2d 914, 916 (1973).

SB 814 would create a new offense when a police animal suffers bodily injury (M2) or when a police animal dies or suffers serious bodily injury (F3) if the defendant is engaged in any one of three different offenses: (1) evading arrest or detention (created by SB 814); (2) resisting arrest (§ 5104); or (3) disarming a law enforcement officer (§ 5104.1).

Using the passive voice here to define a criminal offense begs numerous questions: Suffers injury by whom? Under what conditions? Is intent to harm the animal required in order to be charged with a felony offense? SB 814 seems to hold a person criminally culpable when a police animal happens to be injured or killed while the person is evading or resisting arrest or disarming an officer. There is not even a requirement that the injury was a "direct result" of the defendant's actions.

By way of contrast, felony injury to a police animal under § 5548 requires that the person "knowingly and intentionally" harmed the animal. **SB 814 does not require knowledge or intent (mens rea) nor does it even define how the animal was injured or by whom.** Because this provision requires no specific intent to injure or kill a police animal, it effectively functions as a strict liability crime or worse, the felony murder rule, infering the necessary intent to harm the animal from the intent to commit the underlying offense. This is an egregious expansion of current law.

The duplicative and unnecessary crimes created by SB 814 would add to the tsunami of criminal offenses that arm police officers with more offenses to enforce (often selectively) and allow prosecutors to stack charges against defendants to use as leverage to force plea bargains. Its ill-defined provisions would create a toxic recipe for dangerously broad charges, opening a Pandora's box of expanded police power to punish people for harm they neither intended nor committed. And most alarming, SB 814 risks criminalizing the lawful right to refuse to engage with law enforcement—an open invitation to round up young Black men and other people of color who may be legally ignoring or walking away from a police officer.

For these reasons, we urge you to oppose Senate Bill 814.