ACLU Pennsylvania

MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: April 2, 2021

RE: OPPOSITION TO HOUSE BILL 521 P.N. 1020 (STEPHENS)

HB 521 (PN 1020) would create an invasive, continuous monitoring program ordered and enforced by the state and administered by private vendors for those with even a single DUI conviction and no prior offenses. It permits courts to impose surveillance not only as a condition of probation and parole but also pretrial — as a ***condition of bail***. HB 521 would punish people too poor to pay monitoring costs and would radically change the conditions of ARD, requiring defendants to waive their due process rights in order to define admission to ARD as a prior conviction for the purpose of triggering mandatory minimum penalty enhancements.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 521.

HB 521 allows invasive surveillance and monitoring by government and private vendors.

HB 521 (PN 1020) would permit courts to impose a "substance monitoring program" that would permit the use of one or more of the following: a continuous alcohol monitoring device; remote breath testing device; random drug testing or any other controlled substance monitoring technology or device as determined by the court.

Surveillance and monitoring may be imposed for those with one DUI conviction and ***no prior offenses*** not only as a condition of probation or parole, but ***as a condition of bail***. In other words, a court can sentence a person to continuous monitoring, equivalent 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, HB 521 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 monitoring will place on counties. Counties 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.

HB 521 will punish people who are too poor to pay monitoring costs.

HB 521 requires that defendants "shall pay" all monitoring costs. At the very least, bill language should change "shall pay" to "may" pay costs. Counties **must be required** to pay costs if the defendant cannot[1] — or else the defendant cannot be punished for not paying. This is already required, as the Constitution prohibits punishing a

[1] The underlined language should be added to (c) Determination and costs to be paid in HB 521: If the court orders an individual to participate in a substance monitoring program, the individual shall pay for costs associated with the individual's participation in the substance monitoring program, including costs associated with any required device or technology, 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 authorize the county to finance costs associated with the substance monitoring program. The defendant shall be liable to pay these costs only upon conviction of an offense for which the substance monitoring program is authorized.

person for nonpayment. The Pennsylvania Superior Court held it **unconstitutional** to deny individuals equal treatment in the criminal justice system based on wealth[2] and is also required by Pa.R.Crim.P. 706, which the PA 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.

HB 521 requires constitutionally questionable criteria for admission to Accelerated Rehabilitative Disposition (ARD) for DUI offenses and further restricts a defendant's right to trial.

Accelerated Rehabilitative Disposition (ARD) in Pennsylvania is a type of pretrial intervention that offers first-time offenders the ability to expunge that charge from their record upon successful completion of rehabilitation and supervision. The primary purpose of ARD is rehabilitative; the secondary purpose "is the prompt disposition of charges, eliminating the need for costly and time-consuming trials or other court proceedings."[5] While admission to ARD is at the broad discretion of county district attorneys, there are eligibility requirements, including that it was a first offense within ten years and no one was seriously injured or killed as a result. It is also available only to those who can afford to pay the ~$2500 application fee.

Importantly, placement on ARD does not constitute a conviction. In fact, those who successfully complete ARD can answer "no" on job applications to questions that ask whether they have been convicted of a crime. ARD is a pretrial disposition of certain cases—an agreement to complete a rehabilitation program in lieu of criminal charges. As such, ARD does not require an admission of guilt by the defendant and does not require the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty.

With this in mind, the Pennsylvania Superior Court recently decided a case, *Commonwealth v Chichkin*,[6] that is at the heart of HB 521's ARD provisions. The question before the court was whether a prior acceptance of ARD constitutes a prior conviction for the purposes of imposing mandatory penalty enhancements for a second offense. The Superior Court held that it was unconstitutional for the Commonwealth to use a defendant's past acceptance and completion of ARD as a prior conviction, as no conviction has occurred. Convictions not only require a judge or jury to find a defendant guilty beyond a reasonable doubt, they also require due process for the defendant. As such, the Court found that because a defendant does not have to admit guilt and the Commonwealth is not required to prove the defendant's culpability beyond a reasonable doubt, a defendant's prior acceptance of ARD does not qualify as a "prior conviction."[7] In other words, it is wrong to presume a person is guilty of a crime for simply completing the ARD program.

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[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] 234 Pa. Code, Chapter 3.

[6] *Commonwealth v. Chichkin*, 2020 Pa. Super 121, No. 3475 EDA 2018.

[7] From the *Chichkin* decision: "[T]he treatment of an ARD acceptance conclusively as a prior offense, resulting in enhanced punishment with a mandatory minimum sentence, offends both substantive and procedural due process. [...] [W]e conclude the particular provision of 75 Pa.C.S. § 3806(a), which defines a prior acceptance of ARD in a DUI case as a 'prior offense' for DUI sentencing enhancement purposes, **offends the Due Process Clause and is therefore unconstitutional**. We thus further conclude Appellants' constitutional rights were violated when the trial court increased their sentences based solely upon their prior acceptances of ARD, absent proof beyond a reasonable doubt that Appellants committed the prior offenses.[...] Accordingly, if the Commonwealth seeks to enhance a defendant's DUI sentence based upon that defendant's prior acceptance of ARD, it must prove, beyond a reasonable doubt, that the defendant actually committed the prior DUI offense. Any lesser standard would violate due process concerns." (*emphasis added)*

HB 521 attempts to "fix" this ruling by amending the criteria for admission to ARD by requiring a defendant to:

- Admit that the Commonwealth's evidence would prove beyond a reasonable doubt the individual violated Section 3802;
- Agree that the admission may be used as a prior conviction for the purpose of increasing the grading and penalty for a subsequent offense; and
- Voluntarily waive the defendant's right to challenge the use of ARD as a prior conviction.

The intent of HB 521 is, of course, to define admission to ARD as an admission of guilt and then **use that admission of guilt to count as a prior conviction** in order to trigger the mandatory penalty enhancements[8] for prior convictions. This creates significant and problematic outcomes, including (but not limited to) the following:

1. It remains constitutionally questionable whether these "admissions" and waivers of fundamental due process rights are sufficient enough to legally satisfy the commonwealth's burden to prove guilt beyond a reasonable doubt. In other words, admission to ARD — even under HB 521's criteria — is still not considered a conviction and a defendant merely "admitting" that it is, doesn't make it so.
2. HB 521 weaponizes ARD against those who fail to complete the program. Presumably, these admissions will not adversely affect someone who successfully completes ARD. But for those who fail to complete ARD, typically due to inability to pay the cost of the program, it permits district attorneys to further thwart the right to trial by obtaining a "conviction" without actually having convicted anyone of anything.
3. Advocates for these criteria may argue that without these requirements, district attorneys will simply stop admitting people to ARD. And while that may be within a district attorney's discretion to unilaterally refuse to admit people with first-time offenses, it flies in the face of the public interests that ARD was established to serve — the opportunity for rehabilitation and record expungement for those with first-time offenses AND saving the commonwealth time, money, and resources prosecuting these cases. Unilaterally denying ARD costs both the defendant **and** the commonwealth — tantamount to cutting off the state's nose to spite the defendant's face.

HB 521 (PN 1020) proposes an expansion of invasive state surveillance, administered by private entities, that extends even to those who have not yet been convicted of any crime. It threatens to unconstitutionally punish people who cannot afford to pay the cost of this surveillance. And HB 521 asks legislators to acquiesce to prosecutorial threats regarding the use of ARD — either adopt provisions that subvert a defendant's constitutional due process rights and relieve the state of its burden to produce evidence and prove guilt beyond a reasonable doubt or district attorneys will unilaterally deny all ARD applications. This trade-off would mangle one of the few existing avenues for second chances in our criminal legal system in order to trigger mandatory penalty enhancements and further restrict the already vanishing right to trial.

For these reasons, we urge you to oppose House Bill 521.

[8] 75 Pa. C.S. §3802–§3804.