



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 15, 2022

RE: OPPOSITION TO HOUSE BILL 521 P.N. 3502 (STEPHENS)

[HB 521](#) (PN 3502) 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. HB 521 would establish constitutionally questionable requirements for payment and would permit courts to impose surveillance not only as a condition of probation and parole but also pretrial—as a **condition of bail**. Finally, the bill would require a mandatory sentence of 60 days in jail for a first offense for driving without a valid license and would permit judges to impose determinate sentences of incarceration for up to 90 days for minor, fines-only traffic violations.

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 would allow invasive surveillance and monitoring by government and private vendors.

HB 521 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.

First, the monitoring provision under HB 521 is overly broad. It could require a monitoring device to be worn **at all times**, despite the fact that it’s imposed presumably to prevent driving while intoxicated.

Second, 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.

Third, and most alarming, HB 521 would allow judges to impose surveillance and monitoring 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.

These concerns are compounded by the 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 would establish constitutionally questionable requirements to pay monitoring costs.

HB 521 requires that defendants “shall pay” all monitoring costs. But *when* does the defendant have to pay? It is **unconstitutional** to not refund someone for costs associated with a criminal prosecution if the defendant is not convicted.¹ Thus, in any outcome that does not result in a DUI conviction, the defendant would be **constitutionally entitled to a refund**. The court and counties would have to keep track of what they had paid and then 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.

At the very least, the bill language should change “shall pay” to “may” pay costs. Counties must be required to pay costs if the defendant cannot; or else the defendant cannot be punished for not paying.² This is already required, as the constitution prohibits punishing a person for nonpayment. The Pennsylvania Superior Court held it **unconstitutional** to deny individuals equal treatment in the criminal justice system based on wealth³ and is also required by [Pa.R.Crim.P. 706](#), which the PA Superior Court explained applies *even to costs imposed pretrial*.⁴

HB 521 would require a mandatory sentence of 60 days in jail for driving without a valid license.

In attempting to fix the unconstitutional vagueness of penalties for driving with a suspended or revoked license,⁵ HB 521 sets the mandatory sentence at 60, rather than 90, days of incarceration for a **first offense** of driving without a valid license. But 60 days is still far too long and overly punitive. Driving without a valid license is substantially different from DUI and other offenses that involve driving in a reckless manner and endanger public safety. A mandatory sentence of 60 days in jail, without affording courts the ability to impose a punishment based on individualized circumstances, is needlessly severe. Courts should have the discretion to impose lower sentences when appropriate.

HB 521 would permit incarceration for up to 90 days for minor, fines-only traffic violations.

In general, Pennsylvania requires that sentences be **indeterminate**,⁶ where the minimum term can be no greater than half of the maximum term.⁷ This requirement ensures that judges have discretion to impose sentences based on individualized circumstances. Exceptions to this rule should be few and far between. However, HB 521 would permit a **determinate sentence**⁸ of up to 90 days in jail for any summary offense under the [Motor Vehicle Code](#) (MVC). Many summary offenses in the MVC carry fines-only sentences, but the changes made by HB 521 would allow judges to impose determinate sentences of incarceration, rather than just fines, for minor summary violations.

HB 521 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 require people to pay the cost of this surveillance pretrial and invites overly punitive jail sentences for minor traffic offenses.

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

¹ [Nelson v. Colorado](#), 137 S. Ct. 1249 (2017).

² The underlined language should be added under (c) Determination and costs to be paid: 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.

³ [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”).

⁴ [Commonwealth v. Dennis](#), 164 A.3d 503, 509 (Pa. Super. Ct. 2017).

⁵ See [Commonwealth v. Eid](#), 249 A.3d 1030 (Pa. 2021), which held that the penalty provisions of [75 Pa. C.S. § 1543\(b\)](#) were unconstitutionally vague.

⁶ An “indeterminate” sentence gives judges the ability to impose case-specific sentences from a range of permissible penalties.

⁷ [42 Pa.C.S. § 9756\(b\)\(1\)](#).

⁸ A “determinate” sentence for a particular offense requires the court to impose a sentence already determined by the legislature.