



Feb 3, 2022

To: Representative Bynum, Co-Chairs Power and Noble and Members of the House Committee on Judiciary

From: Autumn D. Shreve on behalf of Anne Munsey, Senior Deputy Public Defender, OPDS

Re: HB 4135- Technical analysis

I. HB 4135 would eliminate the crime of Attempted Delivery.

Currently (under *Hubbell*), there are three crimes involving controlled substances of increasing seriousness with increasing penalties:

- 1) Possession
- 2) Attempted Delivery
- 3) Delivery

Possession captures the person who uses drugs.

Attempted Delivery captures the person who is planning to distribute drugs to another.

Delivery captures the person who actually distributes drugs to another person.

That structure accurately captures the harm to society. Possession harms the user; delivery harms many people. But an attempted delivery is less harmful than a completed delivery. Just as an attempted murder is less harmful than a completed murder, or an attempted theft is less harmful than a completed theft, planning to distribute drugs is less harmful than if the drugs are actually distributed.

Consequently, a completed delivery should be more severely punished than the mere attempt. That is currently the case. An “attempt” is punished under ORS 161.405 as one class lower than the completed crime.

HB 4135 would eliminate that distinction and punish an attempted delivery just as severely as a completed delivery.

II. Even though the crime of delivery has always included an “attempted transfer,” the statute was only intended to capture completed deliveries.

Delivery is defined as an “actual, constructive or attempted transfer.”

An actual delivery occurs when the defendant hands the drugs to another person.

A constructive delivery occurs when the defendant causes the drugs to be transferred to another person, either through an intermediary, or by leaving the drugs for another person to pick up.

An attempted transfer occurs when the defendant has done what he needs to do to relinquish control of the drugs or he is trying to do so, but his effort is foiled.

Including an “attempted transfer” within the definition of a completed delivery allows police to interrupt a drug buy before the drugs have actually changed hands. In that situation, the delivery is already occurring.

An “attempted transfer” was never meant to capture the person who was merely intending to deliver the drugs in the future but had not yet done so. That is punished by the crime of Attempted Delivery.

III. HB 4135 is a backdoor attempt to increase the punishment for possessing drugs.

The legislature recently has gone to a great deal of trouble to decrease the punishment for the possession of drugs and to focus on treatment. See Ballot Measure 110 (2020) (decriminalizing possession of certain drugs and providing for addiction treatment); Ballot Measure 91 (2014) (legalizing marijuana).

Re-defining the very serious crime of Delivery to include “the possession of a controlled substance with intent to transfer to another person” simply re-elevates the crime of possession.

Although it requires the state to prove that the person “intended” to transfer the drugs to another person, proving “intent” is very tricky.

Ordinarily, the state proves intent by the person’s actions. One can infer that a person intended to murder or assault another because he did so. One can infer that a person intended to steal something because he did so.

HB 4135 would require the state to prove a person’s intent to deliver in some other way, because under the added definition of delivery, the person HAS NOT delivered any drugs.

If the person admits that he intended to deliver the drugs that he possessed, as did the defendant in *Boyd*, the proof is easy. However, that was not true in cases that followed *Boyd*. In those cases, the state proved intent by the fact that the person possessed “more than a user amount” of drugs. But what is a “user amount”? One dose, five doses, ten doses? What if the person buys all of his heroin for the week at once? What if he buys a month’s supply? That does not mean that he intends to deliver it to anyone else. And different people consume different amounts of drugs. A serious addict needs a much larger dose than a new user. Sometimes the state proved intent by the fact that the drugs were packaged into smaller amounts.

But a user might purchase multiple packages of drugs if that is how they were sold. And possession of a scale is also considered evidence of intent to deliver. But a user may possess a scale to weigh what is he buying, or if he does not purchase his drugs pre-packaged, he will need to divide them into individual doses for himself. The proof of intent becomes extremely murky and subjective without an act to prove it.

And when proof becomes more subjective, minorities and underprivileged people are more severely impacted. **HB 4135 would allow police to arrest anyone who possesses drugs, so long as they can come up with some theory to infer that the person intends to transfer them to another person. That is how HB 4135 silently increases the punishment for possession of drugs after the legislature has worked so hard to reduce it.**

IV. The crime of Delivery punishes the sharing of drugs as well as the sale of drugs.

Nothing about the crime of Delivery requires a sale. A person is guilty of delivery any time they give drugs to another person.

Consequently, a person who possesses more than a user amount of drugs and a scale in the company of friends could be convicted of delivery under HB 4135.

V. This issue is currently before the Oregon Supreme Court—the state has filed a petition for review in *Hubbell*. We do not yet know the effects of *Hubbell* because we only have one case decided under the new opinion. We need to see how *Hubbell* is applied before we know whether it needs fixing, and if so, how.