

### ACLU-PA Position: **Oppose**

#### Bill summary

[Senate Bill 14 \(PN 1834\)](#) eliminates all of the fundamental, structural changes to Pennsylvania’s broken probation system [originally proposed](#) by SB 14 ([PN 59](#)). It does nothing to reduce the amount of time people can be sentenced to probation. Worse, it makes changes to current law that would result in more people incarcerated for technical violations and would keep people on probation indefinitely until they can pay their restitution in full. Its only solution to reducing time on probation is a convoluted, exclusionary process to get a review hearing—an outcome that is far easier to attain under current law.

#### Bill details

[SB 14 \(PN 1834\)](#) proposes the following changes:

##### Modifies the conditions of probation.

- Requires that the court consider physical child care responsibilities in setting terms of probation.
- Includes vocational training as an acceptable condition in addition to a specific employment or educational initiative.
- Limits the ability of the court to restrict the travel of the defendant unless there is a specific identifiable and foreseeable reason for restricting the travel due to concerns the defendant will abscond or commit another crime while complying with the applicable requirements and provisions of the Interstate Compact for Adult Offender Supervision and the Adam Walsh Child Protection and Safety Act.

##### Makes it easier for judges to incarcerate people following a probation revocation.

Thankfully, SB 14 (PN 1834) does prohibit judges from incarcerating people to “[vindicate the authority of the court](#).” That one provision, with the wide discretion it gives judges, is responsible for innumerable sentences of incarceration. Unfortunately, SB 14 effectively *nullifies the benefit of that reform* by replacing it with a similarly broad and vague provision that allows judges to incarcerate when “there exists an identifiable threat to public safety, and the defendant cannot be safely diverted from total confinement through less restrictive means.”

SB 14 also eliminates the current [presumption against incarceration](#) following revocation by changing the permission from **SHALL NOT** to **MAY** impose incarceration, making it easier for judges to incarcerate people after revoking probation. Striking this language from current statute would be disastrous—it serves as a critical backstop that prevents incarceration for *all* technical violations.

SB 14 then **expands the court’s power to incarcerate** for a series of “technical” violations, including violations that are “sexual in nature,” “a credible threat to cause bodily injury,” or “involved assaultive behavior”—actions that would (*should*) be charged as new offenses (*direct* violations), not *technical* violations:

- The court **may not** revoke probation and impose the underlying sentence unless the defendant has been convicted of another crime.
- The court **may impose** incarceration if the defendant committed a technical violation that was:
  - Sexual in nature;
  - Involved assaultive behavior or included a credible threat to cause bodily injury to another;
  - Involved possession or control of a weapon;
  - The defendant absconded and cannot be safely diverted from total confinement;
  - There exists an identifiable threat to public safety and the defendant cannot be safely diverted through less restrictive means;

- Intentional and unexcused failures to adhere to programming or conditions on more than three occasions and the defendant cannot be safely diverted through less restrictive means.

These provisions would allow district attorneys, probation officers, and judges to use *uncharged* and *unsubstantiated allegations* of criminal misconduct—without a conviction—to establish a violation for which someone could be incarcerated. Permitting incarceration for “technical” violations that are not being charged as new cases or even as specific violations of a person’s probation order, would likely violate the Pennsylvania Supreme Court’s ruling in [Commonwealth v Foster](#).<sup>1</sup>

### Establishes a separate set of graduated sanctions for certain technical violations.

The “swift and certain” sanctions program under [§ 9771.1](#) currently limits the amount of time a person can be incarcerated for technical violations. But SB 14 (PN 1834) establishes a *different* set of graduated sanctions that only apply to the list of violations it creates under § 9771(c)(2), which would permit longer periods of incarceration:

Technical violation	<a href="#">SB 14 (PN 1834)</a> “[T]he defendant shall be sentenced as follows:”	<a href="#">§ 9771.1</a> “The court shall impose a term of imprisonment of:”
1st violation	A maximum period of 14 days (+30 days)*	Up to 3 days
2nd violation	A maximum period of 30 days (+45 days)*	Up to 7 days
3rd violation	3rd or subsequent violation: “Any sentencing alternatives available at the time of initial sentencing.”**	3rd violation: Up to 14 days
4th or subsequent violation	N/A	Up to 21 days

\*For a technical violation that was sexual, assaultive, involved possessing a weapon, or created an identifiable threat to public safety, the court may add up to **30 extra days** for a 1st violation and up to **45 additional days** for a 2nd violation.

\*\*[§9771.1](#) caps incarceration for the fourth or *any subsequent violations* at 21 days. SB 14’s parallel structure **increases incarceration limits** for the first 2 violations and **entirely eliminates the cap for 3 or more violations**, which means people can be incarcerated up to the maximum penalty for their underlying offense for a third or subsequent violation.

Furthermore, SB 14 would permit courts to incarcerate people beyond these limits in order to allow a defendant to either be *evaluated for* or *to participate in* a court-ordered drug, alcohol or mental health treatment program or a problem-solving court. Excluding people in need of drug or mental health treatment ensures they will remain incarcerated while awaiting an evaluation or treatment—and waiting periods vary by county. This means that SB 14 would **allow county-specific wait times for a drug or mental health evaluation or placement in a treatment program to dictate how long a person can be incarcerated.**

### Creates a parallel, convoluted process for judges to terminate probation.

Under [current law](#), judges may already terminate probation at any time, for any reason, for any offense; and it allows for probation review hearings at any time, including by petition of the probationer. SB 14 (PN 1834) clearly underscores this ability by ensuring that nothing in the bill should be construed to:

- Prevent a defendant from petitioning a court for early termination of probation or modification of the terms and conditions of probation as otherwise permitted by law.
- Prohibit the court from eliminating or decreasing the term of probation.
- Diminish the court’s ability to, at any time, terminate probation or lessen the conditions of probation; or to create or administer a process or program which seeks to terminate probation or lessen the conditions of probation.

<sup>1</sup> See [Commonwealth v Foster](#), 214 A.3d 1240, 1243 (Pa. 2019) “[W]e conclude that the VOP [violation of probation] court must find, based on the preponderance of the evidence, that the probationer violated a specific condition of probation or committed a new crime to be found in violation. Absent such evidence, a violation of probation does not occur solely because a judge believes the probationer’s conduct indicates that probation has been ineffective to rehabilitate or to deter against antisocial conduct.”

**Mandatory probation review conferences:** SB 14 (PN 1834) establishes a convoluted process to obtain a “mandatory probation review conference.” If a defendant has successfully completed three years probation for a misdemeanor or five years for a felony, the court shall hold a mandatory probation review conference within 60 days from the eligibility date based on the following criteria:

- **Earning an earlier review date:** A defendant serving probation shall be eligible for the mandatory probation review conference six months sooner for successfully completing any of the following:
  - A high school diploma or GED;
  - An associate’s degree;
  - A bachelor’s degree;
  - A masters or other graduate degree;
  - Vocational or occupational license, certificate, or program; or
  - Any other condition approved by the court at sentencing that substantially assists the defendant in leading a law-abiding life or furthers the rehabilitative needs of the defendant.
- A defendant serving time for a felony shall receive an additional 6 months credit towards the review conference for completing two or more of the above conditions.
- A defendant shall earn two months credit for every 6 consecutive calendar months served on probation without a violation, and for every 6 consecutive calendar months where the defendant works at least 80 hours per month or completes at least 80 hours per month community service, not to exceed a total of six months credit from all sources under this section.
- **Probation after parole:** If a defendant served the last 12 months of parole without violation, they shall be eligible for a mandatory review conference 12 months sooner than otherwise eligible.
- **Ineligibility:** Several factors can render a person ineligible for a probation review conference.
  - Review conferences are not available to the following:
    - Those convicted of a sex offense;
    - Those convicted of a crime of violence;
    - Those convicted of domestic violence.
  - A person is ineligible if they committed one of the following technical probation violations within 9 months of the eligibility date of the mandatory review conference:
    - Sexual in nature;
    - Involved assaultive behavior or included a credible threat to cause bodily injury to another;
    - Involved possession or control of a weapon;
    - The defendant absconded and cannot be safely diverted from total confinement;
    - There exists an identifiable threat to public safety and the defendant cannot be safely diverted through less restrictive means;
    - Involved intentional and unexcused failure to adhere to programming or conditions on more than three occasions and the defendant cannot be safely diverted through less restrictive means;
    - If the person is ineligible for a scheduled review conference as a result of a technical violation listed above, then if all other conditions are satisfied, a probation review conference will be held 9 months after the date that the technical violation occurred.
  - A person is ineligible if they commit any technical violation within 6 months of the mandatory review conference.
    - If the person is ineligible for a scheduled review conference as a result of a technical violation, then if all other conditions are satisfied, a probation review conference will be held 6 months after the date that the technical violation occurred.
  - A person is ineligible if they were convicted of a misdemeanor or felony offense committed while either incarcerated or serving probation.
- **Termination exceptions:** The court shall terminate probation at the mandatory review conference unless it finds by a preponderance of the evidence that:

- The conduct of the defendant creates an identifiable threat to public safety including consideration of being the active subject of a PFA (protection from abuse order).
  - The defendant has not successfully completed all court ordered programs.
  - The defendant has failed to pay the total restitution.
- If the court does not terminate probation after the mandatory review conference, the defendant will receive a detailed letter on the court's findings and be eligible for another conference no later than 12 months after the first.

### Creates “administrative probation” that allows people to remain on probation indefinitely.

Despite three decades of consistent case law, attorneys and judges frequently misunderstand the legal principles regarding extending and revoking probation for nonpayment of fines or restitution.<sup>2</sup> Under current law, any restitution imposed as a condition of probation must be based on the defendant's ability to pay.<sup>3</sup> Nonpayment of fines or restitution is a technical violation of probation *only if* the defendant has the ability to pay and has willfully refused to pay.<sup>4</sup> Any procedure that permits courts to extend probation or otherwise punish defendants who have failed to pay will unquestionably disproportionately impact the poorest defendants.

To be sure, SB 913 offers a **clear, unambiguous prohibition** against punishing people for nonpayment of fines:

- The court may not extend probation; revoke probation; or impose a sanction under §9771.1 solely due to nonpayment of fines or costs unless the court finds that the defendant is financially able to pay the fines and has willfully refused to do so.

However, this provision should have included nonpayment of restitution as well. Instead, SB 14 (PN 1834) creates a mechanism to allow judges to keep people who owe restitution on probation indefinitely (even though unpaid restitution is commonly converted to a civil judgment, enforceable by the court's use of its contempt power):

- If **termination of probation is denied solely due to the failure to pay restitution**, the court shall order the defendant to administrative probation if the defendant has paid at least 50% of the restitution or if the court determines that the defendant has made a good faith effort to pay. Administrative probation requires:
  - Supervision contact once a year.
  - Updated contact information on change of residence or employment.
  - Payment of balance of restitution.
  - No other conditions are permitted.

While this may seem like a reasonable reduction in supervision requirements, as long as a person is on probation **of any kind**, if they violate a probation rule or get charged with a new offense, they can be [detained indefinitely](#) in jail pending a hearing, where they are ([unconstitutionally](#)) [denied pre-hearing release](#) either on bail, their own recognizance, or under supervision. And while some states have similar provisions for “administrative probation,” those states hold ability to pay hearings as part of that process—Pennsylvania does not. This provision would fundamentally alter probation in Pennsylvania by **allowing courts to keep people on probation indefinitely, including those who are too poor to pay restitution**. And denying termination of probation for those who have not paid restitution in full (or denied administrative probation if they haven't paid 50%) is almost certainly [unconstitutional](#).

### Effective date

If enacted, the provisions in this bill would take effect January 1, 2021.

<sup>2</sup> See [ACLU-PA FAQs Probation–Payment of Fines, Costs, and Restitution](#).

<sup>3</sup> See [§ 9754\(c\)\(11\)](#); [Commonwealth v. Melnyk](#), 548 A.2d 266, 268 (Pa. Super. 1988) (explaining that restitution imposed under § 9754 cannot exceed the defendant's ability to pay).

<sup>4</sup> [Bearden v. Georgia](#), 461 U.S. 660, 672 (1983).