

ACLU-PA Position: **Opposes**

### BILL CONTEXT & HISTORY

Probation was originally intended to serve as an alternative to incarceration. And yet, Pennsylvania's probation system feeds our mass incarceration problem. Pennsylvania has the [second highest](#) percentage of its citizens on probation and parole in the country and the [highest incarceration rate](#) in the northeast. More than [50%](#) of people sent to state prison each year are there for supervision violations and many of the people held in our jails pretrial are incarcerated on probation and parole [detainers](#). Pennsylvania clearly has not only a mass incarceration problem, it has a mass supervision problem.

Last session, Senate Bill 14 ([PN 59](#)) originally proposed several fundamental structural changes to Pennsylvania's broken probation system, but those reforms did not survive the amendment process and SB 14 ([PN 1834](#)) passed the senate at the end of last session.

With the start of a new session, we were hopeful the senate would consider reintroducing at least some of those vital reforms. Unfortunately, [Senate Bill 913 \(PN 1144\)](#) changed little from last session's bill—it fails to address the core problems plaguing Pennsylvania's probation system and would amend current law in ways that **risk making probation worse** in Pennsylvania.

### BILL DETAILS

**SB 913 (PN 1144)** proposes the following changes:

#### **SB 913 would modify some 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.

#### **SB 913 would expand the court's ability to incarcerate people following a probation revocation.**

[Current law](#)<sup>1</sup> allows confinement following revocation if any of the following apply: (1) the person has been [convicted](#) of a new crime (aka, a direct violation); (2) the person's [conduct](#) demonstrates they're likely to commit a crime in the future; or (3) such a sentence is necessary to [vindicate the authority](#) of the court.

#### **'Vindication' provision**

The ability of courts to incarcerate for a probation violation simply to "vindicate the authority of the court" must be removed by any bill that claims to meaningfully reform probation in Pennsylvania. The vindication provision has been used to incarcerate people who have committed technical violations who do not pose a risk of committing a future crime. Striking the 'vindication' language would therefore limit incarceration to only direct violations or instances where a person is likely to commit a crime in the future. Fortunately, SB 913 (PN 1144) strikes this [widely abused](#) vindication provision.<sup>2</sup> That one provision, with the broad discretion it gives judges, is responsible for innumerable sentences of incarceration.

<sup>1</sup> 42 Pa.C.S § 9771(c).

<sup>2</sup> Melamed, S., & Purcell, D. (2020, February 17). [When it comes to probation, Pennsylvania leaves judges unchecked to impose wildly different versions of justice](#). The Philadelphia Inquirer.

Unfortunately, SB 913 effectively *nullifies the benefit of that reform* by introducing a lengthy and convoluted section that grants new authority to incarcerate people for a long list of technical violations. In this case, removing the ‘vindication’ provision turns out to be a hollow victory, since the same people can now be incarcerated with the explicit authority to do so.

### Changes to § 9771 under SB 913 would make it easier for judges to incarcerate people by:

**1 | Striking the conduct provision:** SB 913 preserves the court’s right to incarcerate someone if they have been convicted of a new crime. However, the bill strikes the conduct provision, which permits judges to impose confinement if “the conduct of the defendant indicates that it is likely he will commit another crime if not imprisoned.” This is a critical backstop to prevent incarceration for *all* technical violations. Striking this language from the current statute could have disastrous consequences for people on probation—it *must* remain in current law.

**2 | Weakening the presumption against incarceration:** SB 913 then changes the presumption against incarceration by striking “**SHALL NOT**” incarcerate and replacing it with “**MAY**” incarcerate.

**3 | Creating new authority to incarcerate:** SB 913 then replaces the vindication provision with new explicit authority to incarcerate people in the ways currently permitted under the vindication language. SB 913 grants courts permission to:

**Incarcerate people for new criminal conduct:** Incarceration may be imposed if the technical violation was:

1. Sexual in nature;
2. Involved assaultive behavior or included a credible threat to cause bodily injury to another;
3. Involved possession or control of a weapon;
4. The defendant absconded and cannot be safely diverted from total confinement;
5. There exists an identifiable threat to public safety and the defendant cannot be safely diverted through less restrictive means;
6. 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.

The first three violations above identify conduct that would qualify as **new criminal behavior**. These are framed as technical violations, which suggests they are meant to apply to Daisey Kates hearings.<sup>3</sup> SB 913 is structured to take advantage of these hearings. By introducing a set of “technical violations” that are more properly charged as new offenses, SB 913 opens the door for prosecutors to expand the use of Daisey Kates hearings to incarcerate people based on mere allegations, even if the underlying charges have been dismissed.

**Incarcerate people for purely rule-based technical violations:** SB 913 would allow people to be incarcerated for the most common technical violations without providing meaningful protections, e.g. for “absconding,” which courts typically interpret as any failure to report; and “failure to adhere to programming or conditions.”

**Incarcerate people for ‘public safety’ reasons:** SB 913 inserts a vague, undefined justification for incarceration that doesn’t even require a threat to another person, just “public safety.” Not unlike the ‘vindication’ provision, this violation is ripe for abuse, disparate interpretation, and disproportionate application.

### SB 913 would establish 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 913 (PN 1144) would establish a *different* set of graduated

---

<sup>3</sup> [Commonwealth v. Kates](#) affirmed a practice, referred to as a Daisey Kates hearing, where a person’s probation can be revoked based on new criminal conduct either *before* a trial occurs, or *after* a case is dismissed, as long as the person is not acquitted. This existing practice makes it far easier to revoke probation for a new **alleged** crime by pursuing it via a technical violation, primarily by (1) dramatically lowering the burden of proof from beyond a reasonable doubt to a preponderance of the evidence; and (2) reducing procedural protections.

sanctions that only apply to the list of violations it creates under § 9771(c)(2), which would **mandate** longer periods of incarceration:

Technical violation	SB 913 (PN 1144) “[T]he defendant <b>shall</b> be sentenced as follows:”	§ 9771.1 “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 913’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.

The proposed limitations on incarceration for technical violations are broad and vague. The only way they could meaningfully limit confinement is if they are able to be routinely:

1. Contested at a violation hearing; and
2. Appealed if an adverse ruling occurs.

Both are very unlikely, due to inconsistent legal representation at violations and the lack of formal contested violation hearings.

**SB 913 would permit prolonged incarceration for people in need of drug or mental health treatment.**

SB 913 would permit courts to **incarcerate people beyond the limits** established in the table above. SB 913 would require that people remain incarcerated while they wait to be *evaluated for or to participate in a court-ordered drug, alcohol or mental health treatment program or a problem-solving court*—and waiting periods vary by county. In many instances, it can take months to get an evaluation and be placed in a program or problem-solving court, which means that SB 913 would **allow county-specific wait times for an evaluation and/or placement to dictate how long a person can be incarcerated**. And these delays have only increased during the pandemic. This exception unreasonably allows those most in need of treatment to dangerously languish in jail without it.

**SB 913 would create a convoluted process for judges to review 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 913 (PN 1144) clearly acknowledges this by stating 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 or lessen the conditions of probation.
- Seek information from the Commonwealth, defendant, victim, county probation officer or any other individual or entity to assist in these processes or programs.

**Probation review conferences**

SB 913 (PN 1144) would establish a convoluted process to obtain a “probation review conference.” These ‘review conferences’ do not create anything that is not already available. They would, at most, have a minimal impact, and should not be considered in any way a substitute for probation caps or automatic early termination. Far simpler and more effective means exist to reduce a sentence of probation.

Additionally, this new process appears to presume counsel will be present or engaged, but practice suggests otherwise. Individuals with public defense and court-appointed counsel are presumptively **not represented** during the term of their probation. Representation is poor and sporadic at revocation hearings where a constitutional right to counsel exists. **Creating any additional adversarial hearing processes without a meaningful guarantee of counsel is bad practice and bad policy.**

**Provisions:** If a defendant has successfully completed three years probation for a misdemeanor or five years for a felony, the court will hold a probation review conference within 60 days from the eligibility date based on the criteria below:

- **Earning an earlier review date:** A defendant serving probation will be eligible for a 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 will receive an additional 6 months credit towards the review conference for completing two or more of the above conditions.
- A defendant will earn 2 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 6 months credit from all sources under this section.
- **Probation after parole:** If a defendant served the last 12 months of parole without violation, they are eligible for a 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 probation 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 six months of the probation 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.

## **SB 913 would permit early termination when/if recommended by the probation officer.**

SB 913 (PN 1144) establishes a presumptive process that presumes the court will accept the recommendation of the probation officer, assuming there are no objections to the recommendation offered in the status report.

- **Probation status report:** Within 30 days of a probation review conference, the defendant's probation officer will fill out and submit a probation status report to the defendant, the court, the Commonwealth and any victim registered with either the Pennsylvania Office of Victim Advocate or a county victim witness program. The status report will include:
  - The date the probation office believes the defendant is eligible for a probation review conference.
  - A statement as to whether:
    - The defendant had 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;
      - Involved an identifiable threat to public safety;
      - Involved an intentional and unexcused failure to adhere to recommended programming or conditions on more than three occasions.
    - The defendant absconded.
    - The defendant has committed any other technical violation within the 6 months prior to the probation status report.
    - The defendant was convicted of a misdemeanor or felony while either incarcerated or serving probation.
    - The defendant has completed all treatment of any other program required as a condition of probation.
    - The defendant has paid all restitution owed by the defendant.
  - A description of the defendant's progress on probation and a recommendation that:
    - The defendant's probation be terminated at or before the date the probation office believes the defendant is eligible for a probation review conference;
    - The defendant should continue on probation as previously ordered; or
    - The defendant should continue on probation under different, reduced or increased terms and conditions.
- **Objections to status report:** All parties have 30 days to object or respond to the status report recommendation. If there is an objection, the court will hold a review conference and is responsible for notifying the defendant, the Commonwealth and any victim registered with either the Pennsylvania Office of Victim Advocate or a county victim witness program of the date of the probation review conference.
- **No objections to status report:** If there are no objections to the recommendation in the status report, the probation review conference will be waived and the court will notify the defendant, the Commonwealth, and any victim registered with either the Pennsylvania Office of Victim Advocate or a county victim witness program of the recommendation. The court may enter an order to terminate probation even if the defendant's probation, sentence, or guilty plea was the result of an agreement between the Commonwealth and the defendant.
- **Termination exceptions:** The court "shall terminate" probation at the 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 if the defendant is the active subject of a PFA (protection from abuse order);
  - The defendant has failed to complete all court ordered programs;
  - The defendant has failed to pay all restitution owed.
- If the court does not terminate probation after the 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.

## SB 913 would prohibit extending or revoking probation due to nonpayment of fines, BUT keeps people who owe restitution on probation indefinitely.

Under current law, fines or restitution imposed as a condition of probation must be based on the defendant's ability to pay.<sup>4</sup> <sup>5</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>6</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.

**Fines & costs:** SB 913 offers a **clear prohibition** against punishing people for nonpayment of **fin**es or **costs**: The court may not extend or 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. This offers strong protection against unjustly targeting indigent defendants.

**Restitution:** Rather than protect people who owe restitution, SB 913 (PN 1144) 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:<sup>7</sup>

**Administrative probation:** 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; and no other conditions are permitted. But **SB 913 provides no guidance as to what happens if someone on administrative probation fails to make restitution payments.**

Although 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<sup>8</sup> in jail pending a hearing, where they are (unconstitutionally) denied pre-hearing release either on bail, their own recognizance, or under supervision.

Finally, "administrative probation" does not currently exist in Pennsylvania. Because SB 913 (1) omits restitution from the prohibition against extending or revoking probation for nonpayment of fines and costs, and then (2) creates "administrative probation," SB 913 would **fundamentally alter probation** by establishing an entirely new category of probation for the express purpose of **keeping people on probation indefinitely because they have not paid or cannot afford to pay restitution.**

And denying termination to those who have not paid restitution in full (or denied administrative probation if they haven't paid 50%) is almost certainly unconstitutional.<sup>9</sup>

## Effective date

If enacted, the provisions in this bill would take effect January 1, 2022.

---

<sup>4</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>5</sup> In contrast to fines and restitution, the payment of costs cannot be a lawful condition of probation because costs are essentially a reimbursement to the government for the expense of prosecution—they are "a mere incident to judgment" and "are not part of the criminal's sentence." As a result, a court cannot order that a defendant pay costs as part of their probation. *Commonwealth v. Rivera*, 95 A.3d 913, 917 (Pa. Super. Ct. 2014).

<sup>6</sup> *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

<sup>7</sup> See 18 Pa.C.S. § 1106 (f)—relating to non-compliance with a restitution order.

<sup>8</sup> Melamed, S., & Purcell, D. (2019, December 27). *Everyone is Detained: How probation detainers can keep people locked up indefinitely — even when they haven't committed a crime*. The Philadelphia Inquirer.

<sup>9</sup> See [ACLU-PA FAQs Probation—Payment of Fines, Costs, and Restitution](#).