

# ACLU

## Pennsylvania

### MEMORANDUM

**TO:** The Pennsylvania Senate

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** June 29, 2020

**RE: OPPOSITION TO SB 14 PN 1819 (WILLIAMS)**

Pennsylvania has the second highest percentage of its citizens on probation and parole in the country.<sup>1</sup> One out of every 34 adults in PA is under community supervision, 36% higher than the national average.<sup>2</sup> And as the state with the highest incarceration rate in the northeast,<sup>3</sup> Pennsylvania clearly has not only a mass incarceration problem, it has a mass supervision problem.

As filed, [SB 14](#) (PN 59) attempted to address the primary drivers of this problem by proposing several fundamental reforms to Pennsylvania's probation system, including:

- **Capped probation terms:** Pennsylvania is one of just a handful of states that fails to impose a cap on the length of probation sentences.<sup>4</sup> The only limit to a probation sentence in PA is the statutory maximum for the crime charged,<sup>5</sup> which allows judges to place people on probation for years, even decades. Most other states limit the amount of time someone can be sentenced to probation; three years is the national average.<sup>6</sup> Even federal law caps supervised release following imprisonment at five years for major felonies, three years for lesser felonies, and one year for minor felonies and misdemeanors.<sup>7</sup>
- **Prohibited “split” and “stacked” sentences,** which compound the problem of excessive probation terms. Not only does Pennsylvania allow judges to sentence people to years of probation, it permits them to stack those charges consecutively.<sup>8</sup> Furthermore, courts are also permitted to sentence people to probation following incarceration, commonly referred to as a “split” sentence.<sup>9</sup> From 2004-2014, Pennsylvania has seen a huge spike in the growth of split sentences,<sup>10</sup> further exacerbating PA's probation crisis.
- **Automatic termination of probation** after a period of time with no violations or revocation: Studies show that if people reoffend, it typically happens within the first year. And after 1-2 years, probation is no longer an effective way to prevent or reduce crime,<sup>11</sup> leaving hundreds of thousands of people to needlessly languish

<sup>1</sup> U.S. Department of Justice, Kaeble, D., [Probation and Parole in the United States, 2016](#) (2018). Office of Justice Programs, Bureau of Justice Statistics.

<sup>2</sup> U.S. Department of Justice, Kaeble, D., & Bonczar, T., [Probation and Parole in the United States, 2015](#) (2017). Office of Justice Programs, Bureau of Justice Statistics.

<sup>3</sup> This rate increased by 16% from 2005 to 2014. Council of State Governments Justice Center, [Justice Reinvestment in Pennsylvania: Policy Framework](#) (2017).

<sup>4</sup> Council of State Governments Justice Center, [Second Presentation to the Working Group](#) (2016).

<sup>5</sup> [42 Pa.C.S. § 9754 \(a\)](#).

<sup>6</sup> U.S. Department of Justice, Rosenmerkel, R., Durose, M., & Farole, Jr., D., [Felony Sentences in State Courts](#) (2010). Office of Justice Programs, Bureau of Justice Statistics.

<sup>7</sup> [18 U.S.C. § 3583](#).

<sup>8</sup> [42 Pa.C.S. § 9754 \(a\)](#).

<sup>9</sup> U.S. Department of Justice, Glaze, L., & Bonczar, T., [Probation and Parole in the United States, 2010](#) (2011). Office of Justice Programs, Bureau of Justice Statistics.

<sup>10</sup> Council of State Governments Justice Center, [Second Presentation to the Working Group](#) (2016).

<sup>11</sup> James Austin, [Reducing America's Correctional Populations: A Strategic Plan](#), 12 Justice Research Policy 9, 35 (2010) (there is no evidence that extending or reducing the period of probation impacts recidivism, and most supervision failures occur within the first 12 months).

on probation every year in Pennsylvania. Establishing shorter probation terms leads to better rehabilitative outcomes by focusing state and county resources on those who are at the greatest risk of recidivating.

SB 14 was amended in committee, based largely on the amended version of the House bill, [HB 1555](#) (PN 3006). It eliminated some of its most egregiously problematic provisions and retained some of the bill's stronger provisions, including eliminating the ability for judges to incarcerate a person in order to "vindicate the authority of the court," permitting people on probation to travel outside the court's jurisdiction in most circumstances, prohibiting extending probation or incarceration for failure to pay court fines and costs, and limiting the amount of time, in some circumstances, someone can be incarcerated following revocation of probation.

But in exchange for these noted improvements, SB 14, as amended, sacrifices all of the fundamental, structural changes to Pennsylvania's probation system originally proposed by SB 14. It proposes changes to current law that risk making probation worse in Pennsylvania, while creating a convoluted and exclusionary process to terminate probation early—an outcome that is far easier to attain under current law.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 14.**

#### **SB 14 fails to reform any of the structural problems that plague Pennsylvania's probation system.**

SB 14 does nothing to limit the amount of time someone can be sentenced to probation. It continues to permit judges to stack probation sentences and to impose probation "tails"—a term of probation imposed after a period of incarceration. And it fails to provide an automatic, or even efficient, way to terminate probation early.

#### **SB 14 now risks making probation worse in Pennsylvania.**

**Incarceration:** SB 14, as amended, would **make it easier to incarcerate people for technical violations** of probation by changing the presumption for courts to incarcerate following revocation from **SHALL NOT** incarcerate to **MAY** impose incarceration. Under current law ([42 § 9771](#)), courts are strictly prohibited from incarcerating someone for a technical violation unless they are convicted of a new offense or "the conduct of the defendant indicates that it is likely he will commit another crime if not imprisoned." SB 14 strikes this language, but it is a necessary backstop to prevent incarceration for *all* technical violations—it must remain in current law.

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 (or should) be charged as new offenses (*direct violations*), not *technical* violations. 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>12</sup>

**Administrative probation:** This amendment creates "administrative probation" for people who still owe restitution. This amendment would fundamentally alter probation in Pennsylvania by allowing courts to **keep people on probation because they are too poor to pay restitution**. Some states use administrative probation, but those states hold ability to pay hearings as part of that process—Pennsylvania does not. 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**. Unpaid restitution is commonly converted to a civil judgment, enforceable by the court's use of its contempt power. And it's important to note that [Act 145 of 2018](#) amended the restitution statute to grant corporate entities victim status for the purposes of restitution. Many people snared by this new "administrative probation" provision will likely owe restitution not to a human victim, but to a Walmart or CVS.

<sup>12</sup> "[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." [Commonwealth v Foster](#), 214 A.3d 1240, 1243 (Pa. 2019).

**"Mandatory probation review conferences" further convolute an already complex process and only serve to distract from tackling the core problems of our broken probation system.**

At the core of this amendment is a system of "probation review conferences" that are (arguably) established to consider terminations of probation. But Pennsylvania's probation problem is NOT a lack of access to hearings or reviews—it's the excessive time people spend under supervision and/or incarcerated by our archaic probation system. **These "conferences" are a solution in search of a problem.**

Current law allows judges to terminate probation at any time, for any reason, for any offense; and it allows for probation reviews at any time, including by petition of the probationer. And to be eligible for these hearings, all you need is to be on probation. In fact, some counties, like York, have begun to automatically terminate people on probation after two years without violation. County probation compiles the names, the district attorney signs off on the list, and the judge terminates probation—all without a hearing. Compare this to the byzantine maze of eligibility requirements, exclusions, and trip wires contained in a process that only gets a person to a "probation review conference" with no guarantee that probation is terminated. Oddly enough, current law already provides a straightforward off-ramp from probation. By contrast, SB 14 constructs another off-ramp, one that is far less accessible, nearly impossible to navigate, and shot through with exceptions and conditions. This is not only not reform, it's a duplicative, convoluted process that will only help the handful of people who survive its gauntlet.

**SB 14 would permit prolonged incarceration for people in need of drug or mental health treatment.**

Although SB 14 (PN 1819) offers some limits on incarceration for first and second technical violations, the bill includes exemptions that could keep people in need of drug or mental health treatment in jail beyond those limits. SB 14 requires that people remain incarcerated while they wait for a substance abuse evaluation and/or placement in a treatment program. In many instances, it takes 2-4 weeks to get an evaluation and another two weeks to be placed in a program, which means that the bill permits administrative delays in obtaining an evaluation to dictate the number of days a person may 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.

**Questions for legislators.****SB 14 raises more questions than it answers, including:**

- How many other states have a probation process like this? What have the results been?
- How many people will this bill help? How many people will be eligible for a review conference? Are there safeguards to prevent or limit racial disparities after implementation?
- On what data or best practices are the provisions in this bill based? How were they determined?
- Why does this bill copy guidelines from parole ([§ 6138 \(c\) \(1.3\)](#), [§ 6137.1](#))? Why are we treating people on probation like people on parole?
- Regarding implementation of the review conferences—who is responsible for the data collection/tracking of eligibility? People on probation? Probation officers? Defense attorneys? Will there be guidelines issued for judges, defense attorneys, and people on probation? Is there funding for training and/or implementation?

**SB 14 squanders a rare opportunity to meaningfully improve probation in Pennsylvania.**

Any probation reform bill should, at a minimum, either limit probation sentences or reduce the amount of time people spend on probation. If that is the goal, SB 14 (PN 1819) fails to achieve it. SB 14 makes worrisome changes to the current statute that would result in more people incarcerated after violating probation and would keep people on probation indefinitely until they can pay their restitution in full. The bill's only solution to reducing time on probation is a convoluted, duplicative process to get a review hearing. Pennsylvanians on probation don't need access to hearings—they need legislators to limit the amount of time they spend under supervision.

**For these reasons, we urge you to oppose Senate Bill 14.**