



MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: December 10, 2021

RE: OPPOSITION TO SB 913 PN 1144 (BAKER)

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 not only has 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. Ultimately, 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.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose Senate Bill 913.

SB 913 fails to reform any of the structural problems that plague Pennsylvania's probation system.

SB 913 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 913 would expand and codify the court's power to incarcerate following a probation revocation.

[Current law](#)¹ 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.

¹ [42 Pa.C.S § 9771\(c\)](#).

Fortunately, SB 913 (PN 1144) strikes this [widely abused](#) vindication provision.² That one provision, with the broad discretion it gives judges, is responsible for innumerable sentences of incarceration. However, SB 913 then effectively *nullifies the benefit of this reform* by introducing a lengthy and convoluted section that codifies the authority to incarcerate people for a long list of technical violations. Consequently, 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 | Weakening the presumption against incarceration: SB 913 strikes the strong presumption against incarceration (“the court **shall not** impose a sentence of total confinement upon revocation...”) and replaces it with “**may**” incarcerate.

2 | Striking the conduct provision: SB 913 then 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.” To be sure, this provision is far too vague. But the focus on “conduct” provides a critical backstop that prevents incarceration for mere technical violations.

3 | Explicitly codifying the authority to incarcerate for technical violations: Finally, SB 913 replaces the vindication provision with new explicit authority to incarcerate people in ways currently permitted under the vindication language. SB 913 grants courts permission to incarcerate people for technical violations that are:

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.

Incarcerating people for new criminal conduct: 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.³ Arrests (not just convictions) for new criminal conduct are considered violations of probation. And even though an arrest for an alleged criminal offense is not a conviction, Pennsylvania permits prosecutors to ask the court to revoke an individual’s probation based on an arrest alone. SB 913 is structured to take advantage of these hearings, which permits courts to proceed with a probation revocation hearing *prior to a trial* on the new criminal charges and with a lower standard of evidence. By introducing a set of “technical violations” that are more properly charged as new offenses, SB 913 would codify the use of Daisey Kates hearings to incarcerate people based on mere allegations, even if the underlying charges have been dismissed.

Incarcerating 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.” It is an exception so broad that it swallows the rule. And not unlike the ‘vindication’ provision, this violation is ripe for abuse, disparate interpretation, and disproportionate application.

Incarcerating 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. “Intentional and

² 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.

³ [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 at revocation hearings.

unexcused failure to adhere” is basically the definition of a technical violation. This provision would now explicitly grant courts permission to incarcerate people for more than three technical violations. Is there a time limit? Is it more than three technical violations within a year or over a 5-year (or longer) probation term? Is it more than three violations of the same condition? Or is it more than three violations of any number of different conditions?

SB 913 would establish a parallel set of graduated sanctions for certain technical violations.

Currently, courts are permitted to adopt much more restrictive limits to incarceration for technical violations under the “swift and certain” program under § 9771.1. SB 913 (PN 1144) would establish a *different, parallel* set of graduated 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 shall 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.

Creating a parallel set of graduated sanctions raises two significant concerns:

1. SB 913’s sanctions would likely disincentivize judges from adopting the graduated sanctions under the swift and certain program (§ 9771.1); and
2. SB 913’s use of “shall be sentenced” under § 9771 would likely control and as a result, may, in fact, **prohibit** courts from adopting the swift and certain program.

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 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.^{4 5} Nonpayment of fines or restitution is a technical violation of probation *only if* the defendant has the

⁴ See § 9763(b)(10); *Commonwealth v. Melnyk*, 548 A.2d 266, 268 (Pa. Super. 1988) (explaining that restitution imposed under § 9754 (now § 9763) cannot exceed the defendant’s ability to pay).

⁵ 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).

ability to pay and has willfully refused to pay.⁶ 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 **finances or costs**: The court may not extend or revoke probation 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:⁷

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](#)⁸ 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](#).⁹ 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.

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. And to be eligible for these hearings, all you need is to be on probation.

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

SB 913 (PN 1144) would establish a convoluted process to obtain a “probation review conference” after 3 years for a misdemeanor and 5 years for a felony. 3 and 5 years were originally proposed as the outside limits for hard caps—these limits are far too long to wait for an initial review. All available data on probation shows that

⁶ [Bearden v. Georgia](#), 461 U.S. 660, 672 (1983).

⁷ See [18 Pa.C.S. § 1106 \(f\)](#)—relating to non-compliance with a restitution order.

⁸ Melamed, S., & Purcell, D. (2019, December 27). [Everyone is Detained: How probation detainees can keep people locked up indefinitely—even when they haven't committed a crime.](#) The Philadelphia Inquirer.

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

supervision is increasingly ineffective after 1 to 2 years.¹⁰ Why wait so long for a review? Why not provide the first review at 12, 18, or even 24 months?

These ‘review conferences’ do not create anything that is not already available under current law. 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. And the “incentives” offered under SB 913 fail to reduce time on probation; they merely reduce the time until a defendant reaches the 3- or 5-year review conference.

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. SB 913 would create a new byzantine maze of eligibility requirements, exclusions, and trip wires that only gets a person to a “probation review conference” with no guarantee that probation is terminated. **This is not only not reform, it’s a duplicative, convoluted process that will only help the handful of people who survive its gauntlet.**

Questions for legislators.

- What specific problems with PA’s probation system does this bill aim to remedy?
- On what data or best practices are the provisions in this bill based? How were they determined?
- 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?
- How many people will be eligible for administrative probation?
- 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 probation officers, judges, defense attorneys, and people on probation? Is there funding for training and/or implementation?

SB 913 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 913 (PN 1144) fails to achieve it.

SB 913 would make worrisome changes to the current statute that will likely 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 913.

¹⁰ See Columbia University Justice Lab, [The Pennsylvania Community Corrections Story](#) (April 2018); Pew Charitable Trusts: [States Can Shorten Probation and Protect Public Safety](#) (December 2020); [Comprehensive Policies Can Improve Probation and Parole](#) (April 2020) and Council of State Governments, [50-State Report on Public Safety](#), among many others.