ACLU Pennsylvania

# HB 1555 Analysis | Filed vs. Amended

Pennsylvania has the second highest percentage of people on probation and parole in the U.S. and, unlike most states, allows judges to place people on probation indefinitely for years, even decades. As filed, HB 1555 proposed numerous reforms to stem the tide of mass supervision in PA, including limits on probation sentences. As amended, HB 1555 unravels all those reforms and in some cases, makes the system worse. At the core of the amended bill is a system of "mandated 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. Current law already allows judges to terminate probation at any time, for any reason, for any offense. Pennsylvania doesn't need more hearings, we need a better probation system.

### As amended, HB 1555 does include two good reforms:

1. Eliminates the requirement that a person on probation cannot frequent "disreputable places" or visit "disreputable persons" (associating with people who have criminal records).
2. Eliminates the ability for judges to incarcerate a person in order to "vindicate the authority of the court."

## The ACLU of Pennsylvania opposes HB 1555 (PN 3006) for the following reasons:

### HB 1555, as amended, eliminated several of the original bill's reforms entirely, including:

1. Caps that limit the total amount of time someone can be sentenced to probation.
2. Good time credit: An incentive-based system that permits early termination of probation for probationers who comply with the conditions of their probation.
3. Earned time credit: An incentive-based system that created earned reduced time on probation for the successful completion of probation conditions and completion of a degree, certificate, or training program.
4. Enhanced due process protections that limit how long a person can be detained for failing to appear at a preliminary hearing on a technical violation or while waiting for the hearing to happen.
5. Prohibited courts from imposing one sentence of probation consecutive to (back to back) another sentence of probation.
6. Retroactive resentencing for those over-sentenced for probation violations.
7. Permission for probationers to travel outside the court's jurisdiction (i.e., the county).

### HB 1555 includes two provisions that are likely unconstitutional:

1. Retains the current ability of probation officers to conduct warrantless searches, but **eliminates the requirement that probation officers must establish reasonable suspicion** before conducting a personal or property search of someone under their supervision.
2. Permits courts to terminate probation if someone owes restitution without considering their ability to pay.

### HB 1555 includes one provision that is likely illegal:

1. Allows courts to decide whether a defendant can use any prescription drug, even if it is prescribed by a doctor and there is no evidence that the defendant is abusing it, including those on MAT, medical marijuana, pain management, or any other medication.

### And HB 1555 contains several provisions that make Pennsylvania's current probation process worse:

1. In addition to the above-mentioned problems—unconstitutional searches if a person is under supervision, keeping people on probation if they are too poor to pay restitution, and allowing judges to prohibit probationers from taking prescribed medication—HB 1555 also:
2. Changes current law, which ***mandates against*** courts incarcerating people following probation revocation, and instead ***recommends incarceration*** for a series of undefined offenses. It also permits courts to incarcerate someone with more than three technical violations—more punitive than current law.
3. Establishes "mandatory probation review conferences" that could result in **more** incarceration by creating hearings where none were required before.
4. Adds new language to a condition of probation that may criminalize the failure to pay child support.

# HB 1555 Comparison | **Filed (PN 1937) vs Amended (PN 3006)**

## Eliminated Reforms

*The provisions below were reform measures originally proposed in HB 1555 and have been entirely eliminated in the amended version of the bill.*

### Early termination (good time credit)

**Under current law,** Pennsylvania's probation system offers no incentives for those who comply with the conditions of their probation, namely the opportunity to have their probation terminated early. Research suggests that using positive incentives for compliance, and not just punitive sanctions for violations, reduces recidivism rates; incentives should be used four times as often as sanctions "to enhance individual motivation toward positive behavior change and reduced recidivism."[1]

**As filed,** HB 1555 eliminated punitive and counter-productive conditions that increase recidivism and replaced them with an incentive-based system that permitted early termination of probation for compliant probationers:

- When a person completes one half of the original probation sentence or two years, whichever is later, the court must review the person's record and would be permitted to reduce or terminate the period or conditions of probation, as long as the person is not delinquent in paying fines, costs, and restitution (provided they have the ability to pay and have willfully refused to do so) and has completed court-ordered counseling or treatment.
- If the court does not terminate probation, the court must review the person's record every two years after that, unless the person is later convicted of a felony or misdemeanor.

**As amended,** HB 1555 eliminates early termination for compliance, an important pillar of the original bill.

### Earned time credit

**Under current law,** there are no provisions that allow earned credits to reduce the amount of time someone is sentenced to probation.

**As filed,** HB 1555 created earned credits for successful completion of probation and education:

- For every calendar month that a person complies with probation conditions, the term of probation would be reduced by 14 days.
- This earned time credit would not apply to people who must register as sex offenders, but it would apply retroactively, starting with the date the person went on probation.
- People on county probation would be able to earn 90 days off their term of probation if they earn a high school diploma or GED or successfully complete a certified vocational, technical, or career education or training program.

**As amended,** HB 1555 creates a faux "earned time" credit system that would only grant people on probation the potential to receive a probation review hearing 6 months (for misdemeanors) or 12 months (for felonies) earlier than they otherwise might have had. Even this "incentive" comes with a series of requirements and restrictions that make it more difficult for people to get an earlier hearing, effectively thwarting the purpose of the incentives-based system provided for in the original bill as filed.

**WHY IT'S NOT REFORM:** As amended, HB 1555 creates a faux "earned credit" system—it does nothing to permit a person to earn credit that shortens the term of their probation. All it does is make a person "eligible" for their hearing 6 or 12 months earlier than they would otherwise be. It **does not** limit or reduce the amount of time a person spends on probation. And in order to get an accelerated hearing, successful completion of the following activities must be approved by the PA Commission on Crime and Delinquency: vocational or occupational license, certificate, registration, or permit; certified vocational, technical, or career education or training program. It is unclear why this additional layer of bureaucracy is necessary (beyond producing the documentation of completion) and why/how the PCCD is the appropriate "approver" of completing these requirements.

## Due process protections

**Under current law,** due process requirements for probation revocation hearings are addressed under 234 Pa. Code Rule 708 and in the case of *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct., 1756, 36 L.Ed.2d 656 (1973). Due process requirements include: a speedy revocation hearing; a preliminary hearing to establish if probable cause exists; timely written notice; disclosure of evidence against the probationer; an opportunity to be heard and present witnesses; the right to cross-examine; a neutral and detached hearing body; and a written statement by the fact finders as to the evidence they relied on and the reasons for revoking probation.

A probationer who has violated probation or parole is entitled to two hearings: The first hearing (Gagnon I) determines whether there is probable cause that the violation occurred and puts the individual on notice of the charges, which is also known as the "detainer" hearing. The second hearing (Gagnon II) determines whether sufficient facts exist to justify revocation, also known as the violation of probation (VOP) hearing. At this hearing, probation violations must be proven by a preponderance of the evidence. The defendant has the right to be present at the hearing and to be represented by counsel.

**As filed,** HB 1555 created enhanced due process requirements for revocations of probation based on technical violations, including:

- A preliminary hearing to decide if there is probable cause for the technical violation;
- Limits on how long a person can be detained for failing to appear at a preliminary hearing on a technical violation or while waiting for the hearing to happen;
- A final revocation hearing for a technical violation, held before the sentencing judge;
- The right to have a lawyer at a preliminary hearing and at a final revocation hearing for a technical violation;
- Within 10 days of receiving a sentence for a technical violation, the right to make a motion to modify that sentence.

**As amended,** HB 1555 removes the due process protections proposed in the original bill.

## Consecutive sentences

**Under current law,** 42 Pa. C.S. § 9721(a) allows an order of probation to be imposed consecutively.

**As filed,** HB 1555 prohibited courts from imposing one sentence of probation consecutive to (i.e., back to back) to another sentence of probation.

**As amended,** HB 1555 eliminates the prohibition against stacking probation sentences.

## Retroactivity

**Under current case law,** there is a long history of retroactive legislation in Pennsylvania.[2] From the earliest days of the Commonwealth, the prohibition against retroactive criminal laws did not apply to statutes affecting the substantive rights of an accused ***where the law benefited the accused***."[3] To be constitutional, a retroactive law need only meet the "minimal burden" of being "'a legitimate legislative purpose furthered by rational means.'"[4] And where legislation contains a specific and explicit statement that it is to be applied retroactively, it is constitutional if it does not restrict or destroy an existing vested right.[5]

**As filed,** HB 1555 permitted retroactive resentencing for those over-sentenced for probation violations[6]:

- The bill allowed people to petition for resentencing if their probation was revoked and they are currently imprisoned for that probation violation, and their prison sentence for the probation violation was longer than the statutory maximums permitted in HB 1555.
- The person could only petition for such a resentencing once, unless new grounds arise for a second petition later on, but were not known to the person when s/he filed the first petition.

**As amended,** HB 1555 eliminates retroactivity entirely and therefore fails to address the hundreds of thousands of people currently under supervision in PA.

# Positive Reform

- As amended, HB 1555 eliminates the ability for judges to incarcerate a person in order to "vindicate the authority of the court." This vague and subjective provision has long been abused by some judges to justify incarcerating people on probation for practically any reason.

# Mixed Reform

*Provisions in the amended bill that include both good and bad changes.*

## Conditions of probation

**Under current law,** 42 Pa. C.S. § 9754(c) includes 14 conditions of probation — none of which are crimes in and of themselves. And many of these conditions are outdated, impractical, or so vaguely worded that violating them is difficult to avoid. Technical violations of one or more of these conditions of probation often results in incarceration.

**As filed,** HB 1555 made changes to two vague and counterproductive conditions of probation:

- Eliminated the requirement that a person cannot go to "disreputable places" or visit "disreputable persons" (i.e. associating with people who have criminal records).
- Qualified the prohibition against traveling out of the jurisdiction of the court (i.e., in the same county) without permission by permitting travel outside the court's jurisdiction unless it is shown by clear and convincing evidence that the person traveled to permanently avoid supervision.

**As amended,** HB 1555:

- **Good:** Eliminates the requirement that a person cannot go to "disreputable places" or visit "disreputable persons."
- **Bad:** Reinstates requirement that people on probation may not travel outside the jurisdiction of the court.
- **Bad:** Adds new language to a condition of probation: "To meet his family responsibilities, including consideration of child care responsibilities and limitations." This appears to reference child support payments, which are civil family court matters and not part of criminal proceedings. By making this a condition of probation, the amended bill could ***criminally*** sanction someone for not paying child support.

# Provisions that make PA's current probation process worse

## Warrantless searches without reasonable suspicion

**Under current law,** 42 Pa.C.S. 9912(d) requires that in order to conduct a lawful search, a probation officer must have reasonable suspicion that a probationer possesses contraband or other violation.

**As filed,** HB 1555 made no changes to search and seizure standards for personal or property searches by probation officers.

**As amended,** HB 1555 would retain the current ability of probation officers to conduct warrantless searches, but it would eliminate the requirement that probation officers must establish reasonable suspicion before conducting a personal or property search of someone under their supervision.

**WHY IT'S WORSE:** As amended, HB 1555 would grant unprecedented search and seizure permissions to probation officers, exposing people on supervision (and those residing with them, including children, friends, or family members who may—or may not—be on probation) to arbitrary, unpredictable, and groundless searches of their persons or property. Such a provision would almost certainly be found unconstitutional under both Pennsylvania[7] and U.S.[8] case law.

## Ability to pay restitution

**Under current law,** 42 Pa.C.S. § 9754 authorizes courts to impose payment of fines or restitution as a condition of probation. Any restitution imposed as a condition of probation must be based on the defendant's ability to pay.[9] Courts must not impose financial obligations that exceed the defendant's means while the defendant is on probation or they risk defeating the rehabilitative goal of probation.[10]

**As filed,** HB 1555 did not include any restrictions on termination of probation based on failure to pay restitution.

**As amended,** HB 1555 prohibits a court from terminating probation if someone still owes restitution without considering their ability to pay. The amended bill creates the fiction of "administrative probation" where a person only reports once a year so long as they still owe restitution. It doesn't matter whether they only have to report once a year, a person on probation is in constant jeopardy of arrest and detention. Provisions that deny termination of probation for those who have not paid restitution in full (or who are denied administrative probation if they haven't paid 50% of their restitution) need to include ability to pay language; otherwise, we are guaranteeing that anyone too poor to pay restitution is denied termination/ administrative probation.

**WHY IT'S WORSE:** As amended, HB 1555 would make current law worse by forcing poor people to stay on probation indefinitely, which is both illegal and unconstitutional.

## Prescribed medication/medical marijuana

**Under current law,** Pennsylvania's Medical Marijuana Act (2016) allows people with serious medical conditions to use medical marijuana after registering with the state and obtaining a doctor's certification. The law protects patients from arrest, prosecution, or penalty and prohibits them from being denied any right or privilege for using marijuana.

**As filed,** HB 1555 ensured that people would not be given imprisonment for a technical violation for testing positive for marijuana if the person has a medical marijuana identification card.

**As amended,** HB 1555 allows courts to prohibit people on probation from taking their prescribed medication. While the amended bill first declares "a court may not, as a condition of probation, prohibit the lawful possession or use of a prescribed medication, including medical marijuana," the exception that follows permits a court to do precisely that. The exception notes that if the court "determines that a prohibition or use of a lawfully prescribed medication is necessary" the *court may prohibit a person on probation from taking such medication*. This prohibition applies not only to medical marijuana but to ***any*** prescribed medication.

**WHY IT'S WORSE:** As amended, HB 1555 would allow courts to decide that a defendant cannot use any prescription drug, even if it is prescribed by a doctor and there is no evidence that the defendant is abusing it. This would grant courts the right to act as doctors, overruling clinical decisions made by psychiatrists, oncologists, etc. Such a dangerous exception would expose all those on MAT, medical marijuana, pain management, or any other medication to the risk that their probation judge may, at any point, prevent them from taking their prescribed medication.

*NOTE: The ACLU-PA is currently litigating a case in Lebanon County where a judge used his "discretion" to prohibit people on probation with a medical marijuana license from using their medication. This is the exact kind of decision that HB 1555 as amended would permit.* [Press release] [Complaint] [Prelim injunction order]

## Caps on probation sentences

**Under current law,** 42 Pa. C.S. § 9754(a) allows people to be sentenced to a term of probation that can last up to the maximum sentence for an offense. In other words, a person facing 20 years in prison could also receive a 20-year probation sentence. Moreover, probation can be extended indefinitely if someone fails to comply with their conditions of probation. Thus for many people, probation translates into a life sentence of government control. Pennsylvania is only one of a handful of states that doesn't limit probation terms—in fact, most states cap probation at just three to five years.

**As filed,** HB 1555 created statutory maximums on the lengths of probation sentences by:

- Capping probation terms for felonies at 5 years
- Capping probation terms for misdemeanors at 2 years

**As amended,** HB 1555 removes the probation caps and instead provides for a **"mandatory" probation review** 5 years into supervision for a felony and 3 years into supervision for a misdemeanor. **These review hearings are not caps**—the amended bill only provides the possibility of a review conference at 3 years for misdemeanors and 5 years for felonies, *which can be taken away completely for technical violations*. Furthermore, it is unclear how these hearings even work. There are no guidelines that determine who orders the "mandatory probation review conference" and, more importantly, who has the power to cancel it due to one of the exceptions: is it the court? The probation officer? Does the defendant have a right to object?

**WHY IT'S NOT REFORM**

**These probation review hearings are NOT caps — they aren't even soft caps, presumptive caps, or rebuttable caps. The hearings still permit the court to sentence someone to decades of probation.** Even holding this "mandatory" hearing is so riddled with exceptions[11] that it makes the hearing itself, and the termination of probation, unlikely.

**Numerous exceptions to the hearings:** In order to even get a probation review hearing, the amended bill requires that an individual be free of technical violations for 1.5 years prior to the hearing, which essentially creates punitive sanctions for non-crimes like technical violations. In many counties, the failure to pay costs and supervision fees constitute technical violations, so courts would never have to conduct these hearings for those who can keep up with their payments. This section is extremely problematic, as it completely

undermines any suggestion of a cap. Moreover, with the due process safeguards proposed in the original bill, it means that being late to a meeting, etc. in the year and a half leading up to the probation review conference can prohibit someone from getting their probation review conference, which is exactly the practice that we are aiming to avoid.

**As amended, HB 1555 includes vague and overly broad exceptions that prevent termination of probation.** For example, the court can choose not to terminate probation at these hearings because:

- The person is an "identifiable threat to public safety." What does this mean? How is this defined? This standard is far too vague and allows the judge to refuse to terminate for almost any reason.
- The person hasn't completed "all treatment or other programs" or the court otherwise "finds that termination would substantially jeopardize the rehabilitative needs of the defendant." Again, how is this defined? Who determines the rehabilitation needs of the defendant? This provision enables the court to make paternalistic and subjective judgments that a defendant is better off on probation (for "rehabilitation").

**WHY IT'S WORSE:** Currently, courts are permitted to "at any time terminate continued supervision" 9771(a) and "probation may be eliminated or the term decreased without a hearing." 9771(d). Hearings are only required, *as a result of the due process protections,* whenever a person's probation may be revoked and their liberty is at stake.

As amended, HB 1555's "mandatory probation review conferences" create hearings where none were required before. This could result in **more** incarceration. Hauling someone in front of a tribunal, without guaranteeing representation by counsel, for a mandatory review to provide them with the slight chance that a judge may terminate their probation, also exposes them to the potential for probation revocation, incarceration and or a new sentence, should the judge determine after the hearing that they were not complying with the terms of their probation. One of the reasons why probation is so problematic in the first place is the incessant exposure to supervision and the potential for incarceration. These hearings would only make this worse.

**WHY IT'S WORSE:** These hearings make little, if any, difference in practice than the current system. But it is made **even more punitive by the graduated sanctions which allow someone to be incarcerated for more than three technical violations**. In other words – 1 technical violation in the 1.5 years leading up to the hearing and you completely lose the opportunity for a hearing (it's not just taken into consideration at the hearing, you don't get a hearing at ALL) and after 3 violations over any period of time on probation, you can be incarcerated.

## Incarceration following revocation

**Under current law,** 42 Pa. C.S. 9771 provides *some* protections against incarceration following probation revocation. The current statutory language mandates that the court **SHALL NOT** impose total confinement following probation revocation unless the defendant has (1) committed a new crime; (2) the conduct of the defendant indicates that it is likely he will commit another crime if not imprisoned; or (3) such a sentence is necessary to vindicate the authority of the court.

In Pennsylvania, probation violations carry unusually weighty consequences. If a person is released from prison early on parole and then commits a violation, the worst that can happen is that he has to serve his "back time," or the unserved portion of his original sentence. But if that person is also sentenced to probation, he's in a far more tenuous position. In response to any violation, a judge could sentence him to up to the maximum term allowed for the original offense, which would be far longer than any jail time a judge might typically impose to begin with.

**As filed,** HB 1555 created statutory maximum terms of imprisonment for revocations of probation:

- Courts would not be permitted to give people sentences of total confinement unless they committed a new felony or misdemeanor, OR no other kind of supervision or treatment would reduce the likelihood that the person would commit new crimes. If confinement is imposed, it would be limited as follows:
  - Up to 7 days for a third technical violation
  - Up to 15 days for a fourth technical violation
  - Up to 30 days for fifth and subsequent technical violations.
- For people convicted of new felony or misdemeanor offenses, courts may use any alternatives to incarceration that were available at the time of the person's original sentencing.
- For people convicted of a new misdemeanor offense, courts may incarcerate someone for up to 90 days.

**As amended,** HB 1555 eliminates the prohibition against incarceration following revocation for a technical violation and instead ***recommends*** incarceration for a host of technical violations, including failure to report and failure to complete recommended programming or conditions. The amended bill allows for 1.5 months for certain types of first technical violations and 2.5 months for certain types of second technical violations. The first violation allows incarceration for up to 14 days and the second for up to 30 days, already too long, especially considering that it allows for an additional 30 days (so 44 days total of incarceration) on the first violation and 45 days (75 days of total incarceration) on the second violation if the technical violation was sexual in nature, assaultive behavior, involved possession of a weapon, or is a **public safety risk.** These are for violations that are *not* being charged as new cases and while the categories may sound egregious, they allow for more innocuous, unproven allegations to result in incarceration for any crime that is:

- Sexual in nature (since a code section isn't referenced, public urination could be considered sexual in nature);
- Any assaultive behavior (unproven allegations that someone gestured their arms in such a way as to push someone else without ever making contact);
- Any violation that involves the use *or possession* of any weapon (almost anything can be classified as a weapon. And this doesn't require unlawful possession of the weapon, so someone with a properly registered weapon who has gained permission to have it could still be reincarcerated under this section);
- A public safety risk (which can be pretty much anything).

**WHY IT'S WORSE:** As amended, HB 1555 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. Moreover, it essentially renders the originally proposed graduated sanctions moot, since almost any behavior can fit into one of the vague and overly broad exceptions.

**WHY IT'S WORSE:** Under current law, before a court may incarcerate someone for a technical violation, it must find that "the conduct of the defendant indicates that it is likely he will commit another crime if not imprisoned"—this is a necessary backstop to prevent incarceration for ALL technical violations and must remain in current law. But the amended bill strikes this language from the current statute and then goes on to allow for incarceration for certain technical violations. It permits officers (probation and/or law enforcement) to allege unsubstantiated technical violations without any proof / evidence (which could never survive the scrutiny and burdens of proof required of a new charge) in order to re-incarcerate people on technical violations. And, absent the due process provisions (which have been taken out), it allows for reincarceration without any appropriate safeguards.

Moreover, these provisions are **more punitive than current law because the graduated sanctions allow a court to incarcerate someone for more than three technical violations**. In other words – 1 technical violation in the 1.5 years leading up to the review hearing and you completely lose the opportunity for a hearing (it's not just taken into consideration at the hearing, you don't get a hearing at ALL) and after 3 violations over any period of time on probation, you can be incarcerated.

# Endnotes

[1] Eric J. Wodahl, 35 Brett Garland, Scott E. Culhane and William P. McCarty, Utilizing Behavioral Interventions to Improve Supervision 36 Outcomes in Community-Based Corrections, 38 Crim. Justice & Beh. 386, 400 (2011) (finding that a four-to-one ratio between rewards and punishments promotes highest success rates on community supervision).

[2] The PA legislature has enacted a number of retroactive bills, including, but not limited to: Clean Slate Law, Act 56 of 2018, applies retroactively to permit certain criminal defendants to petition to seal or expunge criminal records, affording them rights that did not exist at the time of their conviction; Act 58 of 2019—retroactively expanded the extraterritorial jurisdiction of Pennsylvania law enforcement when participating in dual federal-state task forces; Act 20 of 2003 —retroactively changed the method of assessing and imposing tax liens. Affirmed constitutional by Iacurci v. County of Allegheny, 115 A.3d 913, 914 (Cmwlth. Ct. 2015); Act 1 of 1996—retroactively permitted recovery of attorney's fees in tax lien cases. Affirmed constitutional by Konidaris v. Portnoff Law Associates, Ltd., 953 A.2d 1231, 1233, 598 Pa. 55, 59 (2008); Act 1 of 1995—retroactively loosened restrictions for filing claims under the Worker's Compensation Act. Affirmed constitutional by Bible v. Com., Dept. of Labor and Industry, 548 Pa. 247, 249 (1997).

[3] *Commonwealth v. Childs*, 2014 WL 10788813, at *3 (Super. Ct. 2014) (citing, e.g., *Commonwealth v. Duane*, 1 Binn. 601 (Pa. 1809) (emphasis added); "Pennsylvania's rules of statutory construction clearly provide that the General Assembly may give retroactive effect to legislation." *Commonwealth v. Hunt*, 2019 WL 4783495, at *3 (Super. Ct. 2019) (citing 1 Pa.C. § 1926).

[4] *Estate of Fridenberg v. Commonwealth*, 613 Pa. 281, 33 A.3d 581, 591 (2011) (quoting General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992)).

[5] Bible v. Com., Dept. of Labor and Industry, 696 A.2d 1149, 1151, 548 Pa. 247, 252 (1997).

[6] *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780 (1977) does not prevent retroactivity of the provisions in HB 1555. *Sutley*'s rationale does not apply to changes that go to the conditions of probation or methods of executing an order of probation, which are not "final" because they are necessarily contingent, conditional, and subject to change after sentence is imposed. The Pennsylvania Supreme Court made this clear in *Commonwealth v. Nicely*, 536 Pa. 144, 638 A.2d 213 (1994). A probation order is not "a judgment of sentence as that term is construed for purposes of procedure." *Id*. (quoting *Commonwealth v. Vivian*, 426 Pa. 192, 231 A.2d 301, 305 (1967)). Accordingly, there is "no violation of the separation of powers doctrine" under *Sutley* in a retroactive change to the conditions of probation mandated by the legislature. *Id*. at 218. *See also Dial v. Vaughn*, 733 A.2d 1, 3 (Comm. Ct. 1999) (finding in a case challenging changes to probation conditions that the *Sutley* "rule does not … preclude legislative enactment that changes the manner of executing the sentence").

*Nicely* governs the retroactivity of HB 1555. The proposed law does not change the underlying judgment of sentence, which could implicate *Sutley*; instead, it changes the method by which courts' supervisory power over probationers is exercised. Probationers have always had the power to petition the court for early termination of supervision or a change to the conditions of supervision, and the courts have always had the power to grant or deny such requests. *See* 42 Penn. C. § 9771(a) ("The court may at any time terminate continued supervision or lessen or increase the conditions upon which an order of probation has been imposed."). HB 1555 imposes a new method for the exercise of that ongoing power by creating a regular review process, imposing certain due process protections, and forbidding the extension of probation terms beyond a set time. Even the bill's "earned time" mechanism and the statutory limit on the term of probation do nothing more than create a definite standard to govern a determination—when probation should terminate—that previously was left to the court's sole discretion. These and other provisions of HB 1555 constitute a change to the "manner of executing a sentence" that is interlocutory in nature, *Dial*, *supra*, and not the mandated reopening of a final judgment of sentence that was rejected in *Sutley*.

[7] The Pennsylvania Supreme Court in *Commonwealth v. Pickron*, 634 A.2d 1093 (Pa. 1993), found warrantless searches of probationers without reasonable suspicion are unconstitutional under the Fourth Amendment, but left room to argue that it could be constitutional if a statutory framework was in place. The Court's primary concern in *Pickron* was that, absent a statutory or regulatory framework, parolees and probationers would be subjected to searches based on unfettered discretion of parole and probation officers. As explained in *Commonwealth v. Wilson*, 67 A.3d 736 (Pa. 2013), the current statute requiring reasonable suspicion apparently was adopted in response to *Pickron.* Also related is *Commonwealth v. Parker*, 152 A.3d 309 (2016); 42 Pa.C.S.A. § 9912(d)(2) (which requires reasonable suspicion for a probation (or parole) officer to conduct a warrantless search) and (d)(3) (which requires prior supervisor approval if no exigent circumstances exist).

[8] The U.S. Supreme Court did allow a state to implement a system that replaced probable cause with "reasonable grounds" for warrantless administrative searches of probationers' homes. See *Griffin v. Wisconsin*, 483 U.S. 868 (1987). However, the Court rested its opinion on the fact that the searches were carried out pursuant to a state regulation that itself satisfied the Fourth Amendment's reasonableness requirement. The amendment here says probation officers "may conduct a search of the offender or the offender's property without a warrant or reasonable suspicion," which would likely not meet the 4th Amendment's reasonableness grounds.

[9] *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). If a court imposes a payment amount that exceeds the probationer's ability to pay, then any "rehabilitative purpose of the order is disserved, especially where the restitution payment is a condition of probation, for in such a case the defendant is told that he will not be imprisoned only if he somehow satisfies a condition he cannot hope to satisfy." *Commonwealth v. Fuqua*, 407 A.2d 24, 26 (Pa. Super. Ct. 1979).

[10] 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. The threshold question of whether nonpayment is willful comes from *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), as it would violate the "fundamental fairness" protected by the Fourteenth Amendment to punish defendants solely because they lack the ability to pay. Without such a finding, the defendant has not committed a technical violation of probation or parole. See *Commonwealth ex rel. Powell v. Rosenberry*, 645 A.2d 1328, 1331 (Pa. Super. Ct. 1994). Without a finding of willfulness, no violation has occurred and the defendant therefore cannot be incarcerated or have the length of probation extended. See *Commonwealth v. Smalls*, CP-46-CR-0005242-2013, 2018 WL 4112648 at *2 (Montgomery Co. Ct. Pa. Com. Pl. Aug. 7, 2018). In fact, the *Rosenberry* court explicitly overturned a trial court's decision to extend the defendant's parole both because the order was untimely *and* because the trial court did not make the requisite findings. As that court explained, a defendant "need not be on parole to pay his fine, and the Commonwealth need not keep him on parole to insure payment. The Commonwealth could have collected the fine in any manner provided by law, see 42 Pa.C.S. § 9728(a), including holding Powell in contempt for failure to pay his fine." See *Rosenberry*, 645 A.2d at 1331.

[11] The exceptions are: the court may not terminate probation unless a person has successfully completed treatment and other required programs; the court may not terminate probation if the court finds the defendant still has "rehabilitative needs"; the court may not terminate probation if the person still owes restitution; and the court may not terminate if the person on probation poses a threat to public safety or has an active PFA (protection from abuse order).