



## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

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

**DATE:** November 12, 2021

**RE: OPPOSITION TO HB 1587 P.N. 1761 (BROWN)**

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 1587.**

### Bill Summary

In addition to imposing archaic, harmful, and demonstrably ineffective mandatory minimum sentences, [HB 1587](#) proposes flatly unconstitutional changes to our bail system that are astonishingly hostile to the principles that undergird our criminal legal system, specifically those that protect the presumption of innocence and prohibit punishment before trial. It is especially distressing to see these principles under attack in the PA legislature, since it was William Penn, jailed four times pretrial for being a Quaker, who authored Pennsylvania's bail language that became the model for almost every state constitution adopted after 1776.

For the offenses enumerated in HB 1587, this bill would:

- Eradicate the constitutional requirement for pretrial release and permit pretrial punishment without any finding of guilt;
- Create an unconstitutional mechanism for automatic pretrial detention;
- Unconstitutionally shift the burden from the Commonwealth to the accused, requiring defendants to prove their future innocence to avoid being imprisoned;
- Violate due process protections against detaining people for probation or parole violations; and
- Violate the separation of powers between the legislature and judiciary by interfering with the PA Supreme Court's long-standing, unitary authority to create rules governing bail.

Additionally, HB 1587 would:

- Revert to ineffective, expensive, and outdated practice of mandatory minimum sentences. In this bill's iteration, it would force judges to sentence people to prison for 2, 5, or 10 years or more for possessing a gun, based on their prior or current convictions for other crimes.
- In some instances, it appears the imposition of a mandatory sentence may be illegal, especially where the minimum of 10 years would exceed the statutory maximum of the offense(s) to which it applies.

### Mandatory minimums

**Current law:** In Pennsylvania, people with prior convictions for certain felony offenses are prohibited from possessing a gun—regardless of where, when, or how the prior offense was committed, and regardless of the sentence for that prior conviction. State *and* federal convictions disqualify people from gun possession.<sup>1</sup> And possessing a gun with a prior felony record is currently a first degree felony and already carries a sentence enhancement under the state's sentencing guidelines.<sup>2</sup>

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<sup>1</sup> [18 Pa.C.S. § 6105](#).

<sup>2</sup> 204 Pa. Code [§ 303.10](#) and [§ 303.17\(a\)](#)

**What HB 1587 does:** HB 1587 identifies prior felony convictions that trigger an enhanced sentence, which are listed in [Pa.C.S. § 6105\(b\)](#). But many of the offenses under § 6105(b) do not require the possession of a firearm—such as convictions for drug possession, DUI, theft, or receiving stolen property.

HB 1587 would create a new section under [Title 42](#),<sup>3</sup> § 9712.2, to establish mandatory minimum prison sentences for people who are convicted of possessing a gun with a prior felony record as follows:

If the person is convicted of possessing a gun with a prior felony record AND:	Mandatory minimum
Has 1 prior conviction for possessing a gun with a prior felony record within the last 5 years, excluding any time the person spent in prison.	2 years
Has 2 or more prior convictions for possessing a gun with a prior felony record within the last 5 years, excluding any time the person spent in prison.	5 years
Has 1 prior conviction for an offense listed in § 6105(b) within the last 5 years, excluding any time the person spent in prison.	5 years
Has 1 prior conviction for possessing a gun with a prior felony record AND 1 prior conviction for a felony listed in § 6105(b) within the last 5 years, excluding any time the person spent in prison.	10 years
Has 2 or more prior convictions for possessing a gun with a prior felony record AND 1 prior conviction for a felony listed in § 6105(b) within the last 5 years, excluding any time the person spent in prison.	10 years

If the person knowingly and physically possessed a gun, whether concealed or visible, AND:	Mandatory minimum
Is convicted of a crime of violence, <b>simple assault</b> , or certain offenses involving intimidation of or retaliation against witnesses or public officials, <sup>4</sup> <b>AND</b> <ul style="list-style-type: none"> <li>■ Has a prior conviction for an offense listed in <a href="#">§ 6105</a> within the last 5 years, excluding any time spent in prison, <b>OR</b></li> <li>■ Was on probation, parole, or bail when the current offense was committed.</li> </ul>	10 years
Is convicted of <i>any</i> crime resulting in death or serious bodily injury, <b>AND</b> <ul style="list-style-type: none"> <li>■ Has a prior conviction for an offense listed in <a href="#">§ 6105</a> within the last 5 years, excluding any time spent in prison, <b>OR</b></li> <li>■ Was on probation, parole, or bail when the current offense was committed.</li> </ul>	2 years or half of the statutory maximum, <i>whichever is greater</i>

**Why it matters:** Decades of research has shown that mandatory minimum sentences:

- [Don't work](#); they fail to deter crime or decrease recidivism, including in [Pennsylvania](#), where the invalidation of numerous mandatories in 2015 has had [no measurable effect](#) on crime rates;
- [Drive mass incarceration](#);
- Exacerbate and create [racial disparities](#) in the criminal legal system;
- Usurp [judicial discretion](#) and give unreviewable power to prosecutors, since mandatory minimums function as both a charge **and** a sentence;
- Incur unjustifiable [costs](#) and [waste valuable resources](#) better spent on prevention or other interventions.

If the goal of HB 1587 is to deter gun crimes and improve the safety of Pennsylvania communities by imposing sentences that decrease recidivism, are equitable and tailored to the case at hand, it fails on every front.

Additionally, HB 1587 may impose illegal mandatory sentences that exceed an offense’s statutory maximum penalties. It will also impose unreasonably punitive sentences, like incarcerating someone for 10 years if they had a prior conviction for a simple assault, are currently on probation, and get caught with a gun.

<sup>3</sup> [42 Pa. C.S. Chapter 97](#) (Sentencing).

<sup>4</sup> These include crimes of violence listed in Title 42 under [§ 9714\(g\)](#); and Title 18 under [§ 2701\(a\)\(2\)](#) (simple assault); [§ 4952](#) (intimidation of witnesses or victims); [§ 4953](#) (retaliation against witnesses or victims); [§ 4953.1](#) (retaliation against prosecutors or judges); [§ 4958](#) (retaliation, intimidation, or obstruction in child abuse cases).

## Bail

The bail provisions under HB 1587 apply to every person arrested for committing a misdemeanor or felony while possessing a gun and who has previously, within 5 years, been convicted, or adjudicated as a juvenile, of an enumerated offense. These 38 offenses, listed in [6105\(b\)](#), *include but are not limited to*: criminal trespass, burglary, aggravated assault, unlawful restraint, and theft unlawful taking. For those who fit into this broad category, HB 1587 prohibits:

1. Release on recognizance
2. Unsecured monetary bail
3. Monetary bail

HB 1587 still permits nominal bail and release on conditions under [Rule 524](#).<sup>5</sup> In other words, anyone with a prior burglary or aggravated assault conviction whom the police arrest for a crime committed with a firearm will effectively be ineligible for most forms of pretrial release and will likely be incarcerated.

### **HB 1587 is unconstitutional for the following reasons:**

**1 | HB 1587 would destroy the constitutional presumption of innocence, eradicate the constitutional requirement for pretrial release, and permit pretrial punishment without any finding of guilt.**

**Current law:** [Art I, § 14](#) of the PA Constitution guarantees the broad right to pretrial release for people accused of crimes. There are only three exceptions to this rule—three situations that allow a judge to deny bail and imprison the accused: (1) if the person is charged with a capital offense; (2) if the person is charged with an offense punishable by life in prison; or (3) if there is “no condition or combination of conditions other than imprisonment” that would reasonably protect public safety. To satisfy these requirements, the Commonwealth must provide “proof that is evident or presumption great.”

In other words, only after the satisfaction of a high burden of proof, similar to clear and convincing evidence, may a judge deny the accused their pretrial freedom. As the Pennsylvania Supreme Court recognized, “the Constitution of the Commonwealth mandates all persons have a right to be released on bail prior to trial in all cases except those” persons who are not bailable.<sup>6</sup> These bedrock constitutional provisions reflect “(a) the importance of the presumption of innocence; (b) the distaste for the imposition of sanctions prior to trial and conviction; and (c) the desire to give the accused the maximum opportunity to prepare his defense.”<sup>7</sup>

**What HB 1587 does:** HB 1587 overturns the constitutional presumption of innocence and eliminates the constitutional guarantee of pretrial release for anyone with an enumerated prior conviction now accused of possessing a firearm while committing crime. HB 1587 upends the high standard of proof required, “proof evident or presumption great” a judge must satisfy to revoke bail, and would make “reasonable suspicion” sufficient. It creates a modified “great presumption” of dangerousness of a person upon “reasonable suspicion” that the defendant possessed a gun during the course of a felony or misdemeanor offense.

In other words, **HB 1587 would effectively remove the high burden on the state required to take away a person’s liberty and would replace it with the same low burden necessary for a cop to stop someone on the street to question them about a crime.**

**Why it matters:** It is hard to overstate how seismic this change is. HB 1587 denies the right to bail or release under a “reasonable suspicion” standard that violates both the state and federal constitutions. HB 1587 would require that an MDJ only need reasonable suspicion that the accused poses a threat of danger in order to trigger automatic detention. It does not even require a finding of “probable cause” that the person committed the offense.

<sup>5</sup> [234 Pa. Code Rule 524](#) – Types of Release on Bail.

<sup>6</sup> [Commonwealth v. Truesdale](#), 296 A. 2d 829, 831 (Pa. 1972).

<sup>7</sup> *Id.* at 834-35.

## 2 | HB 1587 creates an unconstitutional mechanism for automatic pretrial detention.

**Current law:** Under [Article I, Section 14](#) of the PA Constitution, in order to deny bail and imprison someone accused of a crime, a judge must make an *individualized determination* that is “no condition or combination of conditions other than imprisonment” that would reasonably protect public safety.

**What HB 1587 does:** HB 1587 creates certain categories of defendants who are presumed to be dangerous and defines those categories as falling within the “public safety” exception to bail under Section 14. HB 1587 then instructs MDJs to **automatically** determine “the proof is evident or presumption great” that people who fit these criteria are a threat to public safety and as a result, must be denied bail and detained.

**Why it matters:** HB 1587 would create an unprecedented and unconstitutional framework for automatic pretrial detention. For the first time, the legislature would be identifying a list of alleged offenses that would *automatically jail the accused*. Again, in order to deny bail and imprison someone accused of a crime, a judge must make an *individualized determination* that there truly is “no condition or combination of conditions other than imprisonment” that would protect public safety. **Without that individualized assessment, HB 1587 is unconstitutional.**

## 3 | HB 1587 unconstitutionally shifts the burden from the Commonwealth to the accused, requiring defendants to prove their future innocence to avoid being imprisoned.

**Current law:** [Article I, Section 14](#) of the Pennsylvania Constitution protects the accused by establishing a presumption of release pretrial. In other words, the constitution makes it difficult for the state to imprison people who haven’t been convicted of a crime. This fundamental principle protects the bedrock presumption of innocence. In order to deny releasing someone on bail, the Commonwealth must prove—by **clear and convincing evidence**—that the accused poses a threat to public safety.<sup>8</sup>

**What HB 1587 does:** HB 1587 eliminates the clear and convincing standard of evidence required to deny bail and imprison the accused and instead merely requires **reasonable suspicion**. Under HB 1587, the Commonwealth must only demonstrate that there is **reasonable suspicion** that the accused has committed the offense or committed the offense while prohibited from possessing a firearm as a condition of release. And even if reasonable suspicion exists that someone *must* be detained, HB 1587 nevertheless gives an MDJ discretion to release the accused *if the defendant* can persuade the MDJ by a **preponderance of the evidence** that they do not pose a threat of danger to an individual or the community.

**Why it matters:** HB 1587 upends the constitutional presumption of release and turns the burden of proof on its head. Under HB 1587, the state no longer bears the burden of proof to justify the detention of the accused. Instead, the burden shifts to the accused person to somehow prove, by a preponderance of the evidence, that she does not pose a danger. Even if a defendant can meet this Orwellian standard of being forced to prove a negative (i.e., providing sufficient evidence that they do not pose a future threat), the MDJ *still* does not have to release the defendant on bail, since HB 1587 indicates that an MDJ “may” release the defendant, but is not required to do so.

## 4 | HB 1587 violates due process protections against detaining people for probation or parole violations.

**Current law:** In order to detain someone for an alleged probation or parole violation, due process under the [14th Amendment](#) and the standards established by the U.S. Supreme Court decision in [Gagnon v. Scarpelli](#) (1973)<sup>9</sup> require a finding of **probable cause** at a hearing.

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<sup>8</sup> See *Commonwealth v. Talley*, 250 A.3d 468 (Pa. 2021) (granting Petition for Allowance of Appeal from the Superior Court on the question of whether: “Is the Commonwealth required under Art. I, [S]ection 14 of the Pennsylvania Constitution to produce clear and convincing evidence at a bail revocation hearing in order to meet its burden of proof that there is “no condition or combination of conditions other than imprisonment that will reasonably assure the safety of any person and the community when the proof is evident or presumption great?”)

<sup>9</sup> [Gagnon v. Scarpelli](#), 411 U.S. 778 (1973).

**What HB 1587 does and why it matters:** HB 1587, however, lowers the standard needed to justify detention from probable cause to **reasonable suspicion**. In so doing, it violates long-standing due process protections against detaining people for alleged supervision violations.

**5 | HB 1587 violates the separation of powers by running roughshod over the PA Supreme Court's long-standing, unitary authority to create rules governing bail and creates erroneous and unfounded interpretations or alternate realities of our constitution.**

**Current law:** Under [Art V § 10](#) of the PA Constitution, the Pennsylvania Supreme Court has exclusive power to create general rules governing court practice, including bail. Through the Pennsylvania Rules of Criminal Procedure, the PA Supreme Court created clear guidelines and rules mandating how judges set bail.<sup>10</sup>

**What HB 1587 does and why it matters:** HB 1587 violates the separation of powers between the legislature and judiciary by changing the way judges set bail—criteria established by the Pennsylvania Supreme Court (under its authority to regulate court practice) and enumerated in the Pennsylvania Rules of Criminal Procedure (Rules 520-529). In particular, HB 1587 violates rules [520](#),<sup>11</sup> [523](#),<sup>12</sup> and [524](#).<sup>13</sup>

1. [Rule 520](#) follows the Pennsylvania Constitution and mandates that “bail before verdict shall be set in all cases as permitted by law.” As discussed above, HB 1587 eliminates the constitutional right to pretrial release.
2. [Rule 523](#) sets forth a list of criteria an MDJ must consider when determining “whether to release a defendant, and what conditions, if any, to impose.” HB 1587 nullifies those criteria and any consideration by only requiring **reasonable suspicion** that the defendant committed a certain offense or is currently on probation, parole, or bail with conditions that prohibit possessing a firearm.
3. [Rule 524](#) (comment) states that “No condition of release, whether non-monetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.” By limiting the types of bail, HB 1587 violates Rule 524, which contains no such exceptions, and allows all types of bail in all types of cases and promotes pretrial incarceration.

Although the bill makes reference to [42 Pa.C.S. § 5702](#) to suggest that somehow the legislature has previously delegated bail rule-making authority to the court and can thus take it back at any time, unfortunately, that is just not how it works.

**HB 1587 defines possession so broadly that bail could be denied for anyone within arms-length of a gun.**

**Current law:** In PA, someone can be convicted of possessing a firearm in two ways: (1) for actual possession, which means the defendant was carrying, holding or touching the gun; or (2) for constructive possession, which means it was in the defendant’s “conscious dominion”—in other words, not in the defendant’s physical possession, but with the intent and the power to control the gun.<sup>14</sup>

<sup>10</sup> For example, in [Commonwealth v. Hann](#), 81 A.3d 57, 65 (Pa. 2013), the Court explained that “the General Assembly has given this Court the exclusive authority to impose rules concerning the administration of bail,” and went on to note that Article V, Section 10(c) gives the Supreme Court the exclusive “power to prescribe general rules governing practice, procedure and conduct of the courts ... and the administration of all courts,” suggesting that it already views matters of bail as falling within its inherent constitutional authority. Under the authority in Section 10(c), “All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.”

<sup>11</sup> [234 Pa. Code Rule 520](#) – Bail Before Verdict.

<sup>12</sup> [234 Pa. Code Rule 523](#) – Release Criteria.

<sup>13</sup> [234 Pa. Code Rule 524](#) – Types of Release on Bail.

<sup>14</sup> See [Commonwealth v. Heidler](#), 741 A.2d 213, 215–16 (Pa. Super. 1999) (Noting, “Pennsylvania courts have held that where another person has equal access to the area where illegal contraband or weapon is found, the defendant cannot be said to have either the power to control or the intent to control such contraband or a weapon per se.”)

**What HB 1587 does:** For a denial of pretrial freedom, HB 1587 would only require the Commonwealth meet the low threshold of “reasonable suspicion” that a person possessed a gun and previously committed one of the enumerated offenses (or committed the offense while prohibited from possessing a gun as a condition of release).. In other words, **someone could be incarcerated merely for being *charged with*—not convicted of—being near a gun.**

**Why it matters:** Anyone with a prior conviction arrested near someone with a gun could be held without bail. Take, for instance, a situation where a gun is found inside a car with multiple passengers, each of whom is capable of grabbing the gun but none of whom are actually touching it. The “reasonable suspicion” standard established by HB 1587 would mean that everyone of the passengers could be held without bail. These accused people could be indefinitely incarcerated until trial.

**For these reasons, we urge you to oppose House Bill 1587.**