



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.¹ One out of every 34 adults in PA is under community supervision, 36% higher than the national average.² And as the state with the highest incarceration rate in the northeast,³ 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.⁴ The only limit to a probation sentence in PA is the statutory maximum for the crime charged,⁵ 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.⁶ 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.⁷
- **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.⁸ For example, if someone is charged with two first-degree misdemeanors, each which carry a statutory maximum of five years, a judge could sentence that person to a total of ten years of probation. Furthermore, courts are also permitted to sentence people to probation following incarceration, commonly referred to as a "split" sentence.⁹ If a person is convicted of a single criminal incident with multiple charges, a judge can "split" the sentence, giving her 3 to 6 years in state prison followed by 5 years of county probation. From 2004-2014, Pennsylvania has seen a huge spike in the growth of split sentences,¹⁰ further exacerbating the probation problem in Pennsylvania.

¹ U.S. D.O.J. Bureau of Justice Statistics. Probation and Parole in the United States, 2016. NCJ 251148. April 2018, <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

² Kaeble, Danielle, and Thomas P. Bonczar. Probation and Parole in the United States, 2015. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, www.bjs.gov/content/pub/pdf/ppus15.pdf.

³ This rate increased by 16% from 2005 to 2014. Council of State Governments Justice Center. 2017. Justice Reinvestment in Pennsylvania: Policy Framework. New York, NY, https://csgjusticecenter.org/wp-content/uploads/2020/01/6.26.17_JR-in-Pennsylvania.pdf.

⁴ Council of State Governments, Justice Reinvestment in Pennsylvania: Second Presentation, May 18, 2016, <https://csgjusticecenter.org/wp-content/uploads/2020/01/PA-Second-Presentation.pdf>.

⁵ 42 Pa.C.S. § 9754 (a).

⁶ Bureau of Justice Statistics, "Felony Sentences in State Courts," 2009, <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf>.

⁷ 18 USCS § 3583.

⁸ 42 Pa.C.S. § 9754 (a).

⁹ Glaze, Lauren E.; Bonczar, Thomas P. Probation and Parole in the United States, 2010. Bureau of Justice Statistics; Washington, DC: 2011, <https://www.bjs.gov/content/pub/pdf/ppus10.pdf>.

¹⁰ Council of State Governments, Justice Reinvestment in Pennsylvania: Second Presentation, May 18, 2016, <https://csgjusticecenter.org/wp-content/uploads/2020/01/PA-Second-Presentation.pdf>.

- **Required 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 one to two years, probation is no longer an effective way to prevent or reduce crime,¹¹ leaving hundreds of thousands of people to needlessly languish 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, changes current law in ways that risk making probation worse in Pennsylvania, and creates 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 SB 14 for the following reasons:

SB 14 fails to reform any of the fundamental problems of 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.

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 Pa. C.S. 9771](#)), 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 technical violations that are *not* being charged as new cases or are even specific violations of a person's probation order, which may run afoul of the opinion in the recent Pennsylvania Supreme Court ruling in [Commonwealth v Foster](#).

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.**

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 of probation for those who have not paid restitution in full (or denied administrative probation if they haven't paid 50%) are 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

¹¹ 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 that most supervision failures occur within the first 12 months), <https://journals.sagepub.com/doi/abs/10.3818/JRP.12.1.2010.9>.

this new “administrative probation” provision will likely owe restitution not to a human victim, but to a Walmart or CVS.

“Mandatory probation review conferences”: Duplicative and convoluted process masquerading as reform

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. Probation compiles the names, the DA 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. In effect, the law currently 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.

Exempts those in need of drug and mental health treatment from limits to incarceration

Although SB 14 (PN 1819) offers some limits on incarceration for first and second technical violations, the exclusions in the amendment ensure that people in need of drug or mental health treatment will remain incarcerated following a violation. The amendment exempts the limits on jail time for probationers who are incarcerated while pending substance abuse evaluations or participation in treatment programs. In many instances, it takes 2-4 weeks to get an evaluation and another 2 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. This unreasonably allows those most in need of treatment to languish in jail without it.

Questions for legislators

SB 14 raises more questions than it answers, including:

- What is the goal of SB 14 as amended?
- 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 other states have a probation process like this? What have the results been?
- 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? Probation officers? Defense attorneys? Will there be guidelines issued for judges, defense attorneys, and people on probation? Is there funding to assist with training and/or implementation?

SB 14 does not reform probation in Pennsylvania

If the goal is to reduce the amount of time people spend on probation, it is unclear how SB 14 as amended will achieve that goal. It 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. Its 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 can be sentenced.

For these reasons, we urge you to oppose SB 14.