



## MEMORANDUM

**TO:** Pennsylvania House Judiciary Committee

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

**DATE:** October 19, 2020

**RE: OPPOSITION TO SB 14 PN 1834 (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.<sup>4</sup>

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 prohibiting judges from incarcerating a person to "vindicate the authority of the court," permitting travel outside the court's jurisdiction in most circumstances, and prohibiting extending or revoking probation for failure to pay court fines and costs. But in exchange for these noted improvements, SB 14, as amended, sacrifices all of the fundamental, structural changes to Pennsylvania's probation system it originally proposed. Read our [bill summary](#) and our [bill comparison chart](#).

**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 broken probation system**

As originally 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:

- **Caps on probation terms:** Pennsylvania is one of just a handful of states that [fails to impose a cap](#) on the length of probation sentences.<sup>5</sup> The only limit to a probation sentence in PA is the [statutory maximum](#) for the crime charged,<sup>6</sup> which allows judges to place people on probation for years, even decades. Most other states limit the amount of time ([five years or less](#)<sup>7</sup>) someone can be sentenced to probation. Even [federal law](#) caps supervised release from one to five years, depending on the offense.<sup>8</sup>

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<sup>1</sup> 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>.

<sup>2</sup> 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](http://www.bjs.gov/content/pub/pdf/ppus15.pdf).

<sup>3</sup> 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](https://csgjusticecenter.org/wp-content/uploads/2020/01/6.26.17_JR-in-Pennsylvania.pdf).

<sup>4</sup> Schiraldi, V., *The Pennsylvania Community Corrections Story*, Columbia Justice Lab, April 25, 2018, <https://justicelab.columbia.edu/sites/default/files/content/PACommunityCorrections4.19.18finalv3.pdf>.

<sup>5</sup> Reynolds, Carl, et. al. 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>.

<sup>6</sup> 42 Pa.C.S. § 9754 (a).

<sup>7</sup> Reynolds, Carl, et. al.

<sup>8</sup> 18 U.S.C. § 3583.

- **Prohibiting “split” and “stacked” sentences:** Not only does Pennsylvania allow judges to sentence people to years of probation, [current law](#) allows them to stack probation terms consecutively (back to back) and to sentence people to probation following a prison/parole term, 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 the probation problem in Pennsylvania.
- **Requiring 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,<sup>11</sup> leaving hundreds of thousands of people to needlessly languish on probation every year in Pennsylvania.

## SB 14, as amended, risks making probation *worse* in Pennsylvania

### 1 | Makes it easier for judges to incarcerate people for technical violations.

Under [current law](#),<sup>12</sup> 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; but SB 14 eliminates this backstop. As amended, SB 14 also changes the presumption for courts to incarcerate following revocation from **SHALL NOT** incarcerate to **MAY** impose incarceration 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](#).

### 2 | Increases the length of time people can be incarcerated for technical probation violations.

As amended, SB 14 is **more punitive than current law**, because it actually **increases** the graduated limits on incarceration for technical violations above what is [currently provided](#) for under the law:<sup>13</sup>

- For a first technical violation: SB 14 increases incarceration from 3 days to 14 days;
- For a second technical violation: SB 14 increases incarceration from 7 days to 30 days;
- For a third or subsequent technical violation: SB 14 eliminates the 14 day limit and allows a judge to incarcerate someone up to the maximum incarceration available for the underlying crime.

It is critical to note that the law [currently limits](#) incarceration to **21 days** for a fourth *or any subsequent violations*, which effectively places a hard cap on incarceration for technical violations at 21 days. So, SB 14 not only increases the length of incarceration for the first and second technical violations, it **eliminates the cap on incarceration entirely**, beginning at the third violation.

### 3 | Requires those in need of drug or mental health treatment to remain incarcerated.

As amended, SB 14 excludes people in need of drug or mental health services from its incarceration limits. People waiting for an evaluation or admission to a treatment program must remain incarcerated. But in many instances, it takes 2–4 weeks to get an evaluation and another 2 weeks to be placed in a program — and those wait times are even longer due to delays caused by COVID-19. This means that SB 14 allows these arbitrary administrative delays to dictate the number of days a person is forced to stay in jail.

### 4 | Allows judges to keep people who owe restitution on probation indefinitely.

Although unpaid fines and restitution are commonly converted to civil judgments, enforceable by the court’s use of its contempt power, SB 14 allows judges to deny termination for unpaid restitution and creates “administrative probation” for people who have paid at least half the restitution owed. [Note that [Act 145 of 2018](#) granted [corporate entities](#) victim status for the purposes of restitution.] “Administrative probation” offers a significant

<sup>9</sup> 42 Pa.C.S. § 9721 (a).

<sup>10</sup> 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>.

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

<sup>12</sup> 42 Pa.C.S. § 9771 (c).

<sup>13</sup> 42 Pa.C.S. § 9771.1 (g).

reduction in supervision requirements, but it's **still probation**. 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](#) pending a hearing, where they are ([unconstitutionally](#)) [denied pre-hearing release](#) either on bail, their own recognizance, or under supervision. And while some states have “administrative probation,” those states hold ability to pay hearings as part of that process — Pennsylvania does not. As a result, this provision would fundamentally alter probation in Pennsylvania by **allowing courts to keep people on probation indefinitely, including those who are too poor to pay restitution**. And denying termination of probation for those who have not paid restitution in full (or denied administrative probation if they haven't paid 50%) is almost certainly unconstitutional.

### **SB 14 creates a convoluted, exclusionary process to terminate probation masquerading as reform**

At the core of the amended version of SB 14 are “mandatory probation review conferences” — required hearings that are intended to consider terminations of probation. Some claim this process offers “soft caps” on probation by setting the [eligibility](#) for hearings at 5 years for felony offenses and 3 years for misdemeanor offenses. It's unclear what problem this process is intended to fix. 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 14 goes to great lengths to underscore what the law [currently allows](#) — that judges may 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 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. 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 riddled 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.

### **Questions for legislators**

SB 14 raises more questions than it answers, including:

- On what data or best practices are the provisions in this bill based?
- How many other states have a probation process like this?
- Regarding implementation of the review conferences — who is responsible for collecting/tracking and confirming eligibility for and progress towards a hearing? Probation officers? Defense attorneys? Will there be eligibility and process guidelines issued for judges, defense attorneys, and people on probation? Will funding be made available to assist with training and/or implementation?
- Under the bill's provisions, approximately how many people currently on probation would be eligible for a review hearing? Approximately how many will have their probation terminated? Are there racial and/or income disparities among those who are estimated to be eligible and/or released from supervision?

### **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 does nothing to limit the amount of time someone can be sentenced to probation. It continues to permit judges to stack and split probation sentences. It fails to provide an automatic, or even efficient, way to terminate probation early. And it changes current law to allow more people to be incarcerated for longer 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, exclusionary process to get a review hearing — an outcome that is far easier to attain under current law. Pennsylvanians on probation don't need access to hearings, they need legislators to limit the amount of time they are sentenced to it.

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