



MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: September 27, 2023

RE: OPPOSITION TO SB 838 P.N. 1113 (BAKER)

Pennsylvania not only has a mass incarceration problem, it has a mass supervision problem. Probation was originally intended to serve as an *alternative to incarceration*. But PA's probation system operates like a hamster wheel, where people get re-sentenced on the same offense over and over again, making them spend years under burdensome conditions, until they inevitably violate one or more of those conditions. Violating probation then results in more time on probation and/or or incarceration—*the very outcome probation was intended to avoid in the first place*.

Legislation should slow the revolving door between probation and prison, not accelerate it. Unfortunately, [Senate Bill 838](#) not only fails to meaningfully reform our broken probation system, it 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 838.

SB 838 fails to reform any of the structural problems that plague PA's probation system.

- ✘ **Limiting probation terms:** Nearly all the problems baked into PA's broken probation system could be remedied by limiting the amount of time someone can be sentenced to probation. In Pennsylvania, the only limit to a probation sentence is the statutory maximum for the crime charged,¹ which allows judges to place people on probation for years, even decades. But **SB 838** does not cap probation terms, does not prohibit stacked (consecutive) probation sentences, and does not prohibit split sentences (imposing a probation "tail" to be served *after* incarceration).
- ✘ **Reducing probation terms:** The failure to cap probation sentences means that people can be sentenced to years, even decades on probation. In the absence of caps, the next priority reform should be to reduce the amount of time people spend on probation. The longer someone spends on probation, the greater the likelihood they'll violate probation. **SB 838** fails to provide an *automatic*, or even efficient, way to terminate probation early. Additionally, many states reduce the *length of a probation sentence* upon completion of educational or vocational achievements. SB 838 includes similar "incentives," but SB 838 only permits those achievements to be used to reduce the amount of time before a person is eligible for a probation review conference, with no guarantee of termination.
- ✘ **Restricting the ability to revoke and/or incarcerate:** Probation can be revoked for technical violations (breaking a rule that in itself is not a crime), which can result in a judge imposing a new probation sentence or incarceration. **SB 838** would explicitly *permit revocation and incarceration* for basic and routine technical violations and would make it easier to revoke probation for a new alleged crime by pursuing it via a technical violation.

¹ [42 Pa.C.S. § 9754 \(a\)](#).

SB 838 would change current law in 4 ways that risk making probation worse in Pennsylvania.

The above critiques of SB 838 could arguably be considered an attempt to make the perfect the enemy of the good. However, our primary opposition to SB 838 is rooted in the ways in which it threatens to make probation worse in PA. As such, rather than focusing on recommendations to improve the bill, **the following objections to SB 838 seek to reduce the harm the bill will likely create.**

1 | SB 838 would create ‘debtors’ probation,’ trapping people too poor to pay restitution on probation.

Under current law:

- Fines or restitution² imposed as a condition of probation must be based on the defendant’s ability to pay.³ ⁴ 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.*⁵ Currently, probation is routinely terminated even when defendants still owe restitution. Unpaid restitution is commonly ordered as a civil judgment, enforceable by the court’s use of its contempt power.⁶

What SB 838 does:

- **Creates ‘administrative probation’ for people who owe restitution:** SB 838 would place a defendant on administrative probation if they have paid at least 50% of the restitution owed or made a good faith effort to pay. Under SB 838, administrative probation provides for reduced supervision (reduced check-ins; requirement to make restitution payments; requirement to update contact information or change of residence or employment; and no supervision fees).

Why this would make probation worse in PA:

- **Likely unconstitutional:** Because SB 838: (1) omits restitution from the provision that prohibits extending or revoking probation for nonpayment of fines and costs,⁷ and then (2) creates “administrative probation,” SB 838 would **fundamentally alter probation** by establishing an entirely new category of probation for the **sole purpose** of keeping people on probation because they have not paid restitution. And denying termination to those who have not paid restitution in full (or denied administrative probation if they haven’t paid 50%) without an ability to pay hearing⁸ is almost certainly unconstitutional.⁹
 - SB 838 as filed would have addressed part of this problem, but the bill was amended in Senate Judiciary to prohibit termination for those who owe restitution, **regardless of their ability to pay.**

² In 2018, [Act 145](#) was amended to define **corporate entities as ‘victims’** for the purposes of restitution. As a result, SB 838 would require many people to remain on probation due to restitution owed to a *corporation, not a human victim*. In fact, a recent report by ALC Court Watch, [Probation in Allegheny County](#), found that **Walmart, Giant Eagle, Home Depot, Rite Aid, Target, and even Duquesne University and UPMC** are some of the most common “victims” owed restitution by Allegheny County residents, despite the fact they carry insurance to cover losses.

³ See [42 Pa.C.S. § 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).

⁴ 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).

⁵ [Bearden v. Georgia](#), 461 U.S. 660, 672 (1983).

⁶ See [18 Pa.C.S. § 1106 \(f\)](#)—relating to noncompliance with a restitution order.

⁷ **Recommended change:** “9771 (b.1) Nonpayment of fines, or costs or restitution.--Notwithstanding subsection (b), the court may not extend the period of probation, may not impose a brief sanction under section 9771.1 and may not revoke an order of probation solely due to nonpayment of fines, ~~or costs~~ or restitution unless the court makes a finding on the record that ~~finds, with respect to the payment of fines,~~ the defendant is financially able to pay ~~the fines~~ and has willfully refused to do so.”

⁸ See [42 Pa.C.S. § 9730 \(b\)](#) for determining ability to pay.

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

[A01299](#) to PN 934 made the following change to 9774.1 (f)--Termination of probation: The court “shall terminate probation unless the court finds that: *** (iii) by a preponderance of the evidence that the defendant has failed to pay the total restitution owed by the defendant ~~and the court finds that the defendant is financially able to pay restitution.~~”

- **Fails to address violations of administrative probation:** ‘Administrative probation’ is *still probation*. Although the terms of administrative probation may seem like a reasonable reduction in supervision requirements, SB 838 fails to offer the court any guidance for how to address the following:
 - SB 838 limits administrative probation to last “for the remaining balance of the defendant’s probation sentence.” But restitution obligations do not vanish at the end of a probation sentence. What happens if someone still owes restitution when they reach the end of their probation term? If the answer is for the court to enter unpaid restitution as a civil judgment, then why not just require that to begin with? *Why require people to be under criminal supervision just to make payments?*
 - Administrative probation only requires a few conditions, one of which is that a defendant pay the remaining restitution. But what happens if someone misses one (or more) payments? **Missing a payment would be considered a technical violation of administrative probation.** There is nothing in SB 838 that prevents the court from revoking probation for a technical violation (e.g., nonpayment of restitution) and then imposing a new term of probation, thereby **trapping people in an endless cycle of probation-revocation-more probation (or worse, incarceration)**. At the very least, SB 838 should require an **ability to pay hearing** to determine whether a missed payment was due to a refusal to pay or inability to pay.¹⁰

2 | SB 838 would make it easier to incarcerate someone for mere allegations of misconduct.

Under current law:

- Current law already includes a strong presumption against incarceration after revocation (for any violation) under [9771 \(c\)](#): “The court *shall not impose a sentence of total confinement upon revocation* unless it finds that: (1) the defendant has been convicted of another crime; or (2) the conduct of the defendant indicates that it is likely that he will commit another crime if he is not imprisoned; or (3) such a sentence is essential to vindicate the authority of the court.”

What SB 838 does:

- **Repeals—but replaces—bad practice:** SB 838 eliminates all of the current language of 9771 (c), including a [widely abused provision](#) that allows judges to incarcerate people in order to “vindicate the authority of the court.” But then SB 838 explicitly creates **new authority to incarcerate** people who have committed certain technical violations—some of which are so common that they would apply to the vast majority of people on probation in PA, others are indecipherable from alleged direct violations (new offenses) and are therefore confusing to list as “technical” violations.

Why this would make probation worse in PA:

- **Creates a presumption of guilt for technical violations, making it easier to incarcerate someone, even if they are found not guilty of new charges:** Under current law,¹¹ arrests (not just convictions) for

¹⁰ **Recommended language:** “(h) Failure to pay restitution--If the defendant fails to make a restitution payment, the court shall proceed under section [9730 \(b\)](#) of Title 42 (relating to procedures regarding default) to determine if the defendant is financially able to pay the restitution and has willfully refused to do so.”

¹¹ [Commonwealth v. Kates](#) affirmed a practice, referred to as a Daisy 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)

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 838 is structured to take advantage of these hearings, making it easier to revoke probation and incarcerate someone for a new alleged crime by pursuing it via a technical violation. This avoids the "hassle" of securing a conviction for a new offense, allowing people to be **locked up for uncharged allegations** of criminal misconduct, even if the underlying charges have been dismissed or if the defendant has been found **not guilty**.

- **May be interpreted to recommend incarceration:** By enumerating a list of technical violations that warrant revocation and incarceration, judges may interpret the list of violations under SB 838 as recommendations to revoke and/or incarcerate.

3 | SB 838 excludes defense counsel from all probation review proceedings.

Under current law:

- Currently, the only circumstances in which a person's probation sentence can be modified to extend the period of probation, increase the terms, or impose additional conditions, is at a violation of probation hearing (also known as a Gagnon II or VOP hearing).¹² At these hearings, defendants have the right to legal counsel in order to dispute or object to any of the evidence presented regarding an alleged violation. If a probation officer recommends modifying a probation sentence for the worse, it is done only after the court finds a violation of probation has occurred. However, before the judge may order any new sentence, the defendant's legal counsel is able to argue against any modification of sentence and provide alternatives to the probation officer's recommendations.

What SB 838 does:

- **Excludes a defendant's attorney from the entire review process:** SB 838 would require that probation status reports, notifications of review conferences, and notifications of determinations be sent to the judge, the district attorney, the defendant, and the victim. But inexplicably, SB 838 excludes the defendant's attorney from each step of this process.¹³

Why this would make probation worse in PA:

- **Violates constitutional due process protections by allowing new conditions to be added to probation without so much as a hearing and without notice to counsel or representation by counsel:** Determinations at probation review conferences under SB 838 dangerously function like hearings. Probation status reports—*which are not required to be sworn testimony*—include recommendations by the probation officer regarding whether the terms of the probation be terminated, or continued. If the probation officer recommends continuation, they also recommend whether "the defendant should continue on probation under different, reduced or increased terms and conditions." This report is not provided to the defendant's lawyer. There is no hearing ordered. If no one registers an objection to the recommendations, the recommendations go into effect, meaning that without a hearing, and without a lawyer present to explain the terms or to argue on the defendant's behalf, the terms of probation can be increased. **Legally, this qualifies as an additional sentence, with additional consequences, in violation of the constitutionally protected right to representation.**

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.

¹² [234 Pa. Code Rule 708](#).

¹³ **Recommended change:** Add "the defendant's last counsel of record" as a party that receives probation review status reports and notifications.

4 | SB 838 would grant victims access to defendants' protected personal information.

Under current law:

- Victims have numerous protections under the [Crime Victims Act](#), including the [right to be notified](#) regarding a defendant's transfer, release, escape, other custody changes, [and more](#). However, victims do not have the right to access a defendant's confidential information and courts do not currently consider victim input at early termination hearings.

What SB 838 does:

- **Requires sharing a defendant's confidential and protected information with victims:** SB 838 would require that victims receive a defendant's probation status report. Status reports include protected information, like criminal history records, financial information, custody arrangements, and mental health and drug treatment compliance / progress updates, among other data.
- **Requires probation departments be responsible for victim notification at every step:** Victim notification is largely the responsibility of district attorneys and the Office of Victim Advocate. Shifting this obligation to probation departments is not only unfairly burdensome, **it's also impossible, as probation departments have no access to victim information and therefore no ability to provide notifications**. Furthermore, any suggestion that probation officers would (or should) be responsible for redacting protected information from status reports prior to victims receiving them is presumptuous at best. And at worst, such an expectation is reckless, especially without an explicit statutory requirement to redact those records, coupled with training and funding to properly perform those redactions.

Why this would make probation worse in PA:

- **Threatens defendants' privacy rights:** Granting victims access to probation status reports, which include sensitive data, would jeopardize a defendant's legal privacy protections. Furthermore, disseminating such information would violate CHRIA ([Criminal History Record Information Act](#)), and therefore **would be illegal** to share with victims. Additionally, status reports **are not required to be sworn testimony**, which means hearsay and other unsubstantiated claims may be included in the reports.
- **Invites victims to "provide input or otherwise respond to" probation status reports:** SB 838 would permit victims to review and respond to the defendant's status report. With no insight into the defendant's time spent under supervision or expertise to assess it, victims could potentially derail an opportunity for early termination. This would not only undermine the purpose of SB 838's review conferences, but would create yet another step in an already log-jammed process—one that exceeds what courts currently permit or solicit prior to deciding whether to terminate probation early.

Real probation reform is happening at the county level and at the PA Commission on Sentencing.

The PA Commission on Sentencing recently adopted the [8th Edition Sentencing Guidelines](#). Using data, best practices, and input from numerous stakeholders, these new guidelines recommend [limiting all probation sentences to two years](#), and up to 30 months when aggravating circumstances exist.¹⁴ In York County, the [county probation department](#) and [district attorney's office](#) cooperate to automatically terminate probation at 2 years or at the halfway mark of the person's probation sentence for those with no violations and all conditions met. And the [Philadelphia district attorney's office](#) has issued guidance that prosecutors will consent to an early termination of probation petition at 6 months for misdemeanors and 18 months for felonies for most charges, as long as the defendant remains free of a new conviction during that time.

¹⁴ PA Commission on Sentencing, [Proposed 8th Edition Sentencing Guidelines](#). Also see the recommended maximum sentences for probation on the new [Sentencing Matrix](#).

As the primary driver of Pennsylvania's probation problem, any meaningful reform legislation must **limit** the amount of time people can be sentenced to probation. In the absence of probation caps, there must be alternative ways to **reduce** the length of probation sentences. And meaningful **restrictions** on revocations for technical violations are essential, as they perpetuate the hamster wheel of probation that begins with probation being revoked and lead to lengthy extensions of a person's probation sentence or incarceration for weeks, months, even years. Finally, reform measures should **avoid further complicating** an already convoluted process. If the goal is to incentivize better behavior, then incentives should be **clear and easy to follow** and therefore attainable. Changes that are too complex or burdensome, unnecessary or duplicative, or narrowly or exclusively defined, make successful implementation less likely and reform measures largely meaningless.

Unfortunately, SB 838 accomplishes few of these reform benchmarks. It squanders a rare opportunity to meaningfully improve probation in Pennsylvania while threatening to exacerbate the problems that drive its dysfunction.

For these reasons, we urge you to oppose Senate Bill 838.