

MEMORANDUM

TO: The Pennsylvania Senate

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: June 27, 2023

RE: OPPOSITION TO SB 838 P.N. 946 (BAKER)

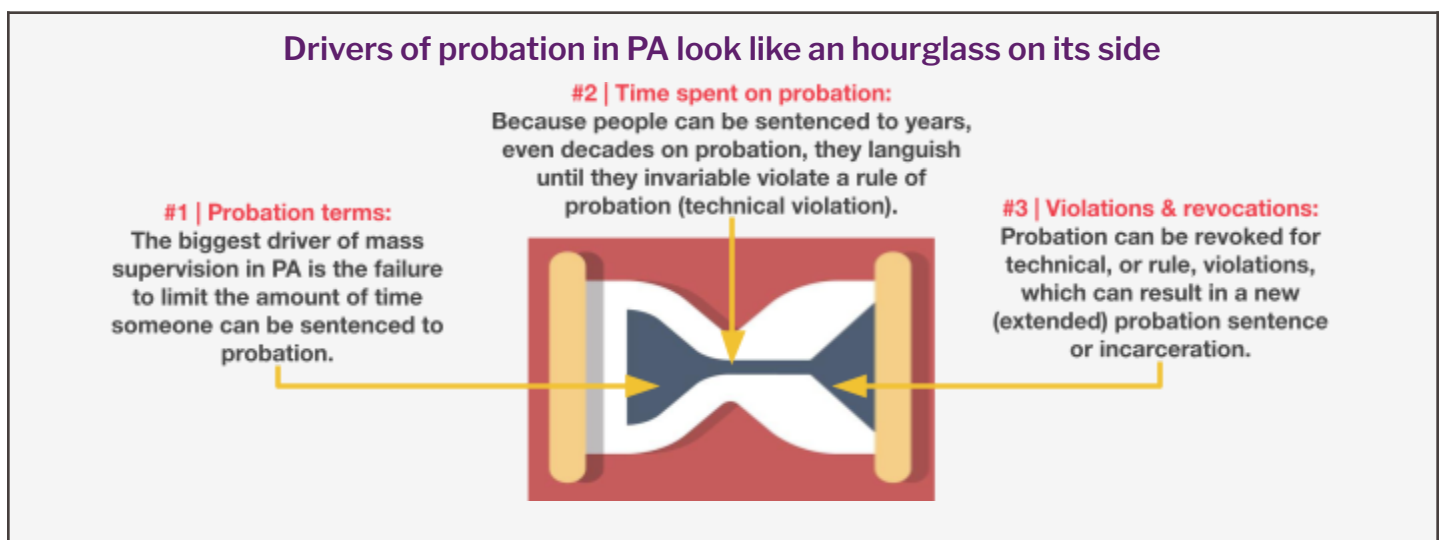
Probation was originally intended to serve as an **alternative to incarceration**. Pennsylvania has the [second highest](#) percentage of its citizens on probation and parole in the country and the [highest incarceration rate](#) in the northeast. More than [50%](#) of people sent to state prison each year are there for supervision violations and many of the people held in our jails pretrial are incarcerated on probation and parole [detainers](#). Probation supervision [disproportionately](#) impacts communities of color. And as one of just a [handful of states](#) that does not limit terms of probation, **mass supervision in Pennsylvania is driving our mass incarceration problem**. PA's probation system operates like a hamster wheel, where people get re-sentenced on the same offense over and over again by 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](#) (PN 946) not only fails to meaningfully reform our broken probation system, it threatens to make probation worse.

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 does not offer meaningful probation reform.

Pennsylvania's probation system is among the most archaic and punitive in the U.S. Any reform legislation should seek to fix the underlying drivers of mass supervision in PA. Specifically, reform legislation should limit or reduce probation terms and/or limit opportunities to revoke probation and impose incarceration.



Sentences: The sand on the left reflects the number of people sentenced to probation. Pennsylvania is one of just a handful of states that fails to limit the length of probation sentences. 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. **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.**

Time on probation: The center of the hourglass reflects the long period of time people spend on probation. The longer someone spends on probation, the greater the likelihood they'll violate probation, typically for a technical violation (breaking a rule that in itself is not a crime).

Violations & revocations: And the sand on the right reflects the huge number of people back in court who end up incarcerated and/or with extended terms of probation resulting from technical violations.

Like its predecessors, SB 838 fails to reform any of the structural problems that plague Pennsylvania's probation system. SB 838 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. It fails to provide an automatic, or even efficient, way to terminate probation early—doing little to reduce the number of people under supervision.

#1 | Does SB 838 limit the amount of time a person can be sentenced to probation?

- ✗ SB 838 fails to cap probation terms.
- ✗ SB 838 does not prohibit consecutive sentences of probation (sentences served back-to-back).
- ✗ SB 838 does not prohibit split sentences (sentencing someone to a probation term to be served *after* incarceration). In fact, SB 838 *reaffirms* the use of split sentences.

#2 | Does SB 838 reduce the amount of time a person can spend on probation?

- ✗ SB 838 fails to provide an *automatic*, or even efficient, way to terminate probation early. Probation "review conferences" Instead, SB 838 presumes that judges will accept recommendations from probation officers, including for early termination, as long as no one objects and the person meets the eligibility requirements to even be considered for termination.
- ✗ 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.

#3 | Does SB 838 restrict the court's ability to revoke or incarcerate following a technical violation?

- ✗ Although SB 838 eliminates a widely abused provision that allows judges to incarcerate people in order to "vindicate the authority of the court," SB 838 would explicitly **permit revocation and incarceration** for basic and routine technical violations, capturing the vast majority of people on probation in PA.
- ✗ SB 838 would make it **easier to revoke probation** 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.

¹ [42 Pa.C.S. § 9754 \(a\)](#).

Recommendations for harm reduction: SB 838 would change current law in 3 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 keep people too poor to pay restitution on probation indefinitely.²

Under current law:

- Fines or restitution 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 converted to a civil judgment, enforceable by the court's use of its contempt power.⁶

What SB 838 does:

- **Creates 'administrative probation,' which would impose indefinite probation for people who owe restitution:** Under SB 838, administrative probation provides for reduced supervision (contact once a year; updated contact information on change of residence or employment; no supervision fees). 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. But this new category of probation would allow judges to keep people who owe restitution on probation indefinitely until restitution is paid in full.

Why this would make probation worse in PA:

- **Sets up an unnecessary, parallel process for collecting restitution:** Current law under [18 Pa.C.S. § 1106](#) already outlines a process for addressing noncompliance with a restitution order. There is no reason why SB 838 shouldn't rely on this process as the mechanism to ensure restitution is collected, rather than creating an confusing, parallel process that competes with current law.
- **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 express purpose of **keeping people on probation indefinitely because they have not paid or cannot afford to pay restitution.** And denying termination to those who have not paid restitution in full (or denied administrative probation if they haven't paid 50%) is almost certainly [unconstitutional](#).⁸

² [Act 145 of 2018](#) was recently amended to define **corporate entities as 'victims'** for the purposes of restitution. As a result, SB 838 would require some people to remain on indefinite probation due to restitution owed to Walmart or CVS and not a human victim..

³ See [§ 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 [ACLU-PA FAQs Probation–Payment of Fines, Costs, and Restitution](#).

- **Conflicts with recently adopted 8th edition Sentencing Guidelines:** The PA Commission on Sentencing recently adopted revisions to PA’s sentencing guidelines, which provides for “Administrative probation in limited circumstances as necessary to fulfill court-ordered obligations **for a period not to exceed six months.**”⁹ Notably, the guidelines limit administrative probation to six months; SB 838 would allow administrative probation to continue indefinitely.
- **‘Administrative probation’ is STILL PROBATION:** No matter what the bill sponsors say, “administrative probation” is *still probation*. Although the terms of administrative probation may seem like a reasonable reduction in supervision requirements, 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](#)¹⁰ in jail pending a hearing, where they are [unconstitutionally denied pre-hearing release](#).

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

What SB 838 does:

- **Repeals—but replaces—bad practice:** Although SB 838 eliminates a [widely abused provision](#) that allows judges to incarcerate people in order to “vindicate the authority of the court,” SB 838 explicitly creates **new authority to incarcerate** people who have broken a rule of their probation. Rather than limiting violations that warrant revocation or incarceration, these changes codify bad practice, giving judges explicit permission to punish people for reasons that are both *more specific* AND similarly *broad* as the vindication provision.

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 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.
- **Permits incarcerating people for purely rule-based technical violations:** SB 838 would allow people to be incarcerated for the most common and routine technical violations, like missing meetings (absconding) or for failure to adhere to programming, capturing the vast majority of people on probation in PA without providing meaningful protections. This provision would now explicitly grant courts permission to incarcerate people for three or more technical violations. Is there a time limit? Is it more than three technical violations within a year or over a term of probation? Is it more than three violations of the same condition? Or is it more than three violations of any number of different conditions?

⁹ PA Commission on Sentencing, [Proposed 8th Edition Sentencing Guidelines](#).

¹⁰ Melamed, S., & Purcell, D. (2019, December 27). [Everyone is Detained: How probation detainers can keep people locked up indefinitely — even when they haven’t committed a crime](#). The Philadelphia Inquirer.

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) 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.

- **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 would radically undermine criminal law by attempting to make victims parties to a criminal case.

Under current law:

- Criminal law recognizes only two parties in a criminal case—the government or state (prosecution) and the defendant. Victims are considered witnesses, rather than a party to a criminal case.
- Victims do, however, 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](#). And notifying victims if/when probation is terminated is entirely appropriate. But granting victims access to sensitive data violates a defendant’s legal privacy protections, and allowing victims to object to terminations of probation would illegally grant victims standing in a criminal case.

What SB 838 does:

- **Includes “any victim” as party to probation review conferences:** As part of the “probation review conference” process, SB 838 invites “*any victim* registered with either the Pennsylvania Office of Victim Advocate or a county victim witness program” to participate in the process. At an absolute minimum, the bill should restrict ‘any victim’ to “a victim of the offense for which the defendant was sentenced to probation (as defined under 18 P.S. § 11.103) who is registered with either the Pennsylvania Office of Victim Advocate or a county victim witness program.”
- **Excludes a defendant’s attorney from the entire review process:** SB 838 sends status reports, notifications of review conferences, notifications of determinations, and opportunities to object to the defendant, but inexplicably fails to include the defendant’s attorney in any step of the process.¹²
- **Requires that probation offices 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 offices have no access to victim information and therefore no ability to notify them.**

Why this would make probation worse in PA:

- **Attempts to treat victims as parties to a criminal case:** SB 838 would allow victims to object to a recommendation to terminate probation. Under the law, victims can offer impact statements for consideration, such as prior to sentencing or at parole hearings. But SB 838 would grant victims the same standing as the court and district attorneys to object to an early termination of probation. Treating victims as party to a case would radically upend how our entire criminal legal system operates.
- **Permits sharing a defendant’s confidential and protected information with victims:** Furthermore, under SB 838, victims would receive probation status reports. Status reports include protected information, like criminal history records and treatment information. Disseminating such information would be a violation under CHRIA ([Criminal History Record Information Act](#)), and therefore **would be illegal** to share with victims.

¹² **Recommended change:** Add “the defendant’s last counsel of record” as a party that receives probation review status reports and notifications.

Core “reforms” proposed under SB 838 will have little to no effect on most people on probation.

For each of the proposed ‘reforms’ offered under SB 838, it is important to ask two questions: What problem does this provision seek to fix, and who is it trying to help?

- **SB 838 is more restrictive than what other counties are currently doing AND more limited than recommendations recently adopted by the PA Commission on Sentencing:**
 - Recently adopted 8th Edition Sentencing Guidelines recommends *limiting all probation sentences to 24 months* and allows up to 30 months probation when aggravating circumstances exist.¹³
 - 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.
- **‘Probation review conferences’ do not create anything not already available under current law:** Review conferences under SB 838 would create a process that complicates an already complex system and distracts from tackling the core problems of our broken probation system. Under [current law](#), judges may already terminate probation at any time, for any reason, for any offense; and it allows for probation review hearings at any time, including by petition of the probationer. In other words, current law already provides a straightforward off-ramp from probation. By contrast, instead of an off-ramp, SB 838 creates a maze of “probation review conferences” intended only to *consider* terminations of probation. These review conferences are largely inaccessible, nearly impossible to navigate, and shot through with exceptions and conditions. Pennsylvania’s probation problem is NOT a lack of access to termination hearings or reviews—it’s the excessive time people spend under supervision. This is not reform. It is a solution in search of a problem—an unnecessary, convoluted process that will only help the handful of people who survive its gauntlet.
- **Initial reviews are held too late to be effective:** All available data on probation shows that supervision is increasingly ineffective after 1 to 2 years.¹⁴ Initial reviews should be held before the 2-year mark, e.g., at 12 or 18 months. And waiting four years for an initial review is FAR too long.
- **May justify denying petitions for early termination:** Despite language affirming a defendant’s existing right to file for early termination, some judges might use the review conference provision as justification/permission to deny petitions for early termination and instead wait 2-4 years for a review conference.
- **“Incentives” offered under SB 838 fail to reduce probation sentences:** SB 838 attempts to incentivize people on probation. The incentives included under SB 838, such as earning a GED or vocational degrees, are typically used in other states to reduce the length of a probation sentence. However, SB 838 only rewards good behavior and accomplishments by merely reducing the time until a defendant reaches the 2- or 4-year mark for a review conference (assuming they are even eligible).
- **Limits on incarceration following revocation would offer limited protections:** SB 838 limits the time people can spend incarcerated for first and second technical violations. In theory, this is an improvement.

¹³ PA Commission on Sentencing, [Proposed 8th Edition Sentencing Guidelines](#).

¹⁴ See Columbia University Justice Lab, [The Pennsylvania Community Corrections Story](#) (April 2018); Pew Charitable Trusts: [States Can Shorten Probation and Protect Public Safety](#) (December 2020); [Comprehensive Policies Can Improve Probation and Parole](#) (April 2020) and Council of State Governments, [50-State Report on Public Safety](#), among many others.

However, SB 838 fails to recognize everyday practice in courtrooms across the commonwealth. Because these limits only apply to periods of total confinement, it provides no meaningful protection for probationers facing revocation and resentencing to a split sentence (period of confinement followed by probation upon release). Infrequently, if ever, would any court in the commonwealth revoke probation and impose a 30-day period of confinement for a violation of probation without any continued supervision.

- Similarly, because this protection only applies to total confinement upon revocation, SB 838 does not address circumstances where a court finds a probationer in violation, but *does not revoke*, and instead chooses to continue probation following a lengthy period of detention on a detainer. **The marginal protections provided by this provision are rendered completely meaningless by the exceptions.**

Conclusion

The sheer length of probation terms is the primary driver of Pennsylvania's probation problem, and any meaningful reform legislation must **limit** the amount of time people can be sentenced to probation. If caps on probation terms are unattainable or significantly compromised, 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, if any, 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.