Hearing on Probation Reform
Senate Judiciary Committee
September 20, 2021

Dave Sunday
District Attorney, York County
Pennsylvania District Attorneys Association

Thank you for the opportunity to speak with you today. My name is Dave Sunday, and I am the District Attorney of York County. On behalf of the Pennsylvania District Attorneys Association, I would like to address legislation designed to reform our county probation system.

My colleagues and I appreciate all the work that has gone into this issue. It is important we get it right, and in doing so it is important we understand the dynamics of Pennsylvania's county probation practice. We believe that the work product you are putting together will get it right and will yield meaningful improvements while ensuring public safety and victims' rights.

According to PEW, the average length of a probation sentence in Pennsylvania in 2018 is 24 months. That figure puts Pennsylvania in the middle (24th) when compared to other states. In 2000, the average length was 32 months, meaning the drop by 2018 was 25%. By contrast, probation lengths increased in more than half the states since 2000. In terms of the change in probation population, Pennsylvania's increase during the same time period was on the higher end, 8th, with an increase of 48%. Our rate of adults on probation is 11th in the country.[1]

The data on what percentage of the prison population consists of probation violators is not as robust, but a report by the Council of State Governments (CSG) indicates that just 10% of the state prison admissions in 2017 were for probation violations. The report could not distinguish between admissions for technical violations and violations based on new convictions. This data does not measure returns to our county prisons.[2]

Let me also point out that the reforms we are all working on center on county probation, not state parole. These are entirely different systems. County probation and state parole operate differently, with different rules, statutory authority, supervising agents, and often a different cohort of individuals involved with these systems. In order to achieve good results, therefore, the data we look at has to be focused on our county-based probation system.

These statistics demonstrate that there is work to be done to meaningfully improve the county probation system. Our goal is to help ensure that our probation officers can focus on the correct individuals for the optimal period of time, that individuals who do not need to be on probation are not on probation, that probationers are incentivized to comply with the terms of their probation and achieve important milestones that will reduce the likelihood of recidivism, that those for whom probation works remain on probation, and that we do not create any unintended consequences that would ended up diminishing the likelihood of judges sentencing people to probation in lieu of incarceration in appropriate circumstances.

We support efforts to streamline county probation and to appropriately reduce both the length of supervision as well as the number of individuals ultimately on probation. For those who are

---

[1] https://www.pewtrusts.org/-/media/assets/2021/04/shorten_probation_and_public_safety_report_final-revised_v2.pdf

[2] https://csgjusticecenter.org/publications/confined-costly/?usState=PA#primary

less violent and have not violated the terms of probation, we ought to provide a mechanism to end probation after a reasonable period of time. We believe the language developed in SB 14 as it passed the Senate last session is in the spirit of the goals of creating a more goal-based supervision system, where those who do the right thing, stay out of trouble, and achieve important milestones will be able to see their length on probation reduced and may ultimately be terminated from probation early.

To be sure, there are a number of individuals on probation who need probation and would be far more likely to recidivate without the supervision and programming. While there are lower-level individuals who have committed less serious crimes that may need a short period of supervision, there are some for whom probation is an alternative to incarceration. There are those whose crimes may be lower-level but who have high risk and needs and for whom the supervision and programming is necessary to help reduce the likelihood of reoffending. And there are still others who have been convicted of violent crimes, and for whom probation serves an additional layer of supervision once the term of incarceration and state parole has concluded. Probation reform must account for each of these groups of individuals.

With that in mind, let's take a step back and understand why we have county-based probation. It serves many functions: sometimes it is an alternative to incarceration. It is designed to deter future criminal behavior, help rehabilitate the offender, ensure compliance with treatment to address the offender's criminogenic needs, serve as a form of punishment, and serve as a useful mechanism to increase the likelihood of payment of victim restitution. It also can help provide more appropriate supervision than state parole. Under current law, a judge may terminate county probation at any time.

I, along with a number of my colleagues, have implemented programs where we collaborate with our probation departments and courts to identify probationers who should be terminated from probation early because they have complied with their programming, have not violated the conditions they are required to follow, do not pose a danger to public safety, and do not have continuing treatment or other needs which necessitate continued probation supervision. We have seen great success in York County, as well as in other counties.

The structure about which we are speaking today would formalize and advance these important concepts and also implement them statewide. It recognizes that limitless probation does not work, but that targeted probation does. For most individuals, three to five years of supervision, depending on the gravity of the offense, should be sufficient. Research makes clear that probation that is too long fails to provide any appreciable benefit and may actually have a detrimental effect. And we recognize at the same time that some who are on probation have received a break, an appropriate break, because without robust probation they would be incarcerated. Some who are on probation have high risk and need levels, have substance abuse or mental health issues, and without the intervention and continued supervision, they would recidivate. Some who are on probation violate the terms of their probation – not a mere single technical violation by missing a meeting – but by committing concerning and dangerous acts.

This structure of SB 14 from last session recognizes these distinctions. It identifies a large cohort of probationers who have not been convicted of a crime of violence, sex crime, or certain domestic violence crimes against a family or household member. It further identifies those who have complied with the requirements of probation and provides that after a certain period of time probation termination is presumed, absent certain conditions or exceptions, such as treatment needs or danger to the public. Incentives to complete important milestones would also potentially shorten the length of time on probation as well. Review conferences to determine whether those who fall within these categories would accomplish our goals. And we believe in cases where a probationer is otherwise eligible for a review conference, the probation department recommends early termination, and neither the Commonwealth nor the court objects following victim input, then early termination should occur without the need for a more formalized hearing.

What would be the result of this structure? Far fewer people on probation, a system which encourages and incentivizes good behavior and achieving milestones that may reduce the likelihood of recidivism, the ability for probation officers to focus on those who need the attention, and the appropriate discretion to ensure that those who will still benefit from longer supervision, who have not paid restitution, or who would pose a danger to public safety if probation is terminated will remain on probation.

Some of the early debate focused on whether imposing hard caps represented sound public policy. What we have seen is that picking a number of years and putting a cap on it does not necessarily mean the results some would expect. According to PEW, low maximum probation terms and early discharge mechanisms do not always reflect states' times on supervision rankings. Oklahoma has a cap of two years for felonies and misdemeanors, yet has the 4th highest length of probation supervision average. Florida has no caps, and is 43rd in terms of length of supervision. And states approach the issues in different ways. Almost half the states allow felony probation lengths of 5 or more years. For misdemeanors, some states cap probation at one or two years, while others provide no limits or the limit is the statutory maximum.[3] Of course, in most other states misdemeanors cover a smaller number of crimes, thus exposing a defendant to less prison or supervision time than in Pennsylvania. What is a misdemeanor in Pennsylvania is often a felony in other jurisdictions.

The time we have collectively spent fashioning legislative language and continuing to look at how the language would operate in practice, not just in theory, has been well spent because the result will be public safety, fairness, and efficiency.

[3] https://www.pewtrusts.org/-/media/assets/2021/04/shorten_probation_and_public_safety_report_final-revised_v2.pdf

The legislation also limits the instances and time for which probationers can be returned to incarceration for technical violations. The language permits the return to incarceration for the more serious technical violations, but for limited periods of time. These are considered technical violations when they do not result in new criminal charges. They include those that are sexual in nature, that involved assaultive behavior or possession of a weapon, that involve identifiable threats to public safety, or an unexcused failure to adhere to recommended programming on more than three occasions.

One of the challenges of figuring out how to handle technical violations has to do with terminology. The term technical violation sounds like what we think about when we hear in this building the term "technical amendment." Something relatively minor, not life changing, and not necessarily significant. But in the world of probation violations, that couldn't be further from the truth. Not all technical violations are the same. Some involve sex, drugs, guns, assaults, or domestic violence. By contrast others involve much smaller things like being late to a meeting. Perhaps if we labeled those kinds of violations which are serious but don't lead to a charge for a new crime with another term (such as "intermediate violation") then the phrase "technical" violation would better match the conduct.

Finally, we would ask that the legislation include a legislative fix stemming from a recent Superior Court case, *Commonwealth v. Simmons*. In this decision, the Superior Court overruled 40 years of precedent and held that courts do not have the discretion under current law to anticipatorily revoke probation when the defendant commits a new crime or otherwise violates a condition of supervision after sentencing but before the period of probation has begun.

This was a case about statutory discretion but was stunning in its abandonment of *stare decisis* and the presumption of legislative acquiescence. And as a matter of policy, it is important that judges retain the ability to revoke someone's probation before it has begun following the commission of a new crime. When an individual commits a new crime or violation, that is a fact and circumstance entirely relevant to the determination of risk, dangerousness, public safety, and recidivism. The statutory fix is straightforward, and we would respectfully request that the overall legislation include such language.

Thank you for your consideration, and I would be happy to answer any questions.