

# Probation and Parole Reform 2024:

*The Good, the Bad, the  
Statutorily Ambiguous*

APRIL 17, 2024

ELISA DOWNEY-ZAYAS, ALISON LIPSKY

## Probation Reform Bill

1. Miscellaneous Provisions
2. Amendments to 9763
3. Amendments to 9771
4. Probation Review Conferences
5. State Parole Amendments

## 1. Miscellaneous Provisions

### Section 5.

THIS ACT SHALL APPLY to individuals sentenced or RESENTENCED on or after the effective date of June 11, 2024 (180 days after being signed into law)

### Section 6.

Nothing prevents a motion being filed for early termination or modification of the terms and conditions of probation

**TECHNICAL VIOLATION DEFINED:** A violation of the specific terms and conditions of a defendant's probation

## 2. Amendments to 9763

### 9763(b): Conditions of Probation

#### WHAT's NEW:

- ▶ Conditions shall be assessed and ordered based on individualized circumstances. Following an individualized assessment of the defendant, . . . the court shall attach only those conditions that the court deems necessary and the least restrictive means available to promote the defendant's rehabilitation and protection of the public, including any of the following:
- ▶ The language "**the court** shall attach only those conditions that **the court deems** necessary" seems to making it clear that the Pa Supreme Court got it right in Koger/Foster – it is the Court, NOT the probation office/officer.
- ▶ This might impact Elliott.

## 2. Amendments to 9763

### 9763(b): Conditions of Probation

#### What does this mean?

Think about how we currently structure sentences...

- ▶ SO with SO conditions. DV unit with DV conditions
- ▶ D to comply with general supervision rules of APPD
- Nothing about these sentences is individualized – must pick out the conditions that we want defendants to be subject to and specifically order them
- Any conditions set by the court **MUST** have a sufficient nexus to the underlying offense. See *Houtz* and *Carr*.

## 2. Amendments to 9763

### 9763(b): Conditions of Probation

#### OTHER AMENDMENTS

- ▶ **9763(b)(1)**: amended to include language re: "consideration of childcare responsibilities" as a condition of probation... but CANNOT overrule / contradict with family court order
- ▶ **9763(b)(2)**: amended to include language that court can order D to be devoted to a SPECIFIC occupation, employment, study or vocational training initiative
  - Why does the court get to choose? If you're working and compliant, is that enough? See dicta in *Commonwealth v. Riley*, 253 Pa. Super. 260 (1978).
- ▶ **9763(b)(11)**: added provision that defendant must provide notice of a change of address within 15 days but also says "unless defendant shows extenuating circumstances to explain any delay in notice"

### 3. Amendments to 9771

#### 9771: Modification or Revocation of Order of Probation

##### 9771(a): General Rule --NEW LANGUAGE ADDED--

- ▶ The court has inherent power to at any time terminate continued supervision, lessen the conditions upon which an order of probation has been imposed or increase the conditions under which an order of probation has been imposed upon a finding **by clear and convincing evidence** that a person presents an identifiable threat to public safety.

### 3. Amendments to 9771

#### 9771: Modification or Revocation of Order of Probation

##### 9771(b): Revocation --NEW LANGUAGE ADDED--

- ▶ The court may increase conditions . . . or revoke an order of probation upon proof of the violation of specified conditions of the probation. **Subject to the limitations of subsections (b.1) and (c),** upon revocation the sentencing alternatives available to the court shall be the same as were available at the time of initial sentencing,

### 3. Amendments to 9771

#### 9771(b.1): Nonpayment of Fines or Costs

- ▶ The court may not extend the period of probation, . . . and may not revoke an order of probation solely due to nonpayment of fines or costs unless the court finds, with respect to the payment of fines, the defendant is financially able to pay the fines and has willfully refused to do so
- ▶ This codifies existing caselaw

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

(1) The court may impose a sentence of total confinement **upon revocation only if:**

- (i) the defendant has been convicted of another crime;
- (ii) the court finds by **clear and convincing evidence** that the defendant committed a technical violation that involves an identifiable threat to public safety **AND** the defendant **cannot be safely diverted** from total confinement through less restrictive means;

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

**(iii)** the court finds by a preponderance of the evidence that the defendant committed a technical violation and any of the following apply:

- ▶ (A) sexual in nature.
- ▶ (B) assaultive behavior
- ▶ (C) firearm or dangerous weapon.
- ▶ (D) PWID
- ▶ (E) absconded **and** cannot be safely diverted through less restrictive means.
- ▶ (F) intentional and unexcused failure to adhere to recommended programming or conditions on three or more separate occasions **and** the defendant cannot be safely diverted through less restrictive means.

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

Some thoughts...

- ▶ Even if we DO override the presumption against confinement for techs, remember that nothing in this act overrides the requirements at a hearing
- ▶ Daisy Kates / Morrissey v. Brewer still apply
- ▶ An arrest/ hearsay is not enough – See *Comm. v. Allshouse* and *Comm. v. Riley*

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

Some thoughts on (c)(iii)(e)...

- ▶ Subsection (e) on absconding – if a client has absconded but in the interim has gotten themselves together (job, housing, completed treatment), is that sufficient evidence to support “less restrictive means”?
- ▶ If not, need to consider what would

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

Some thoughts on (c)(iii)(f)...

- ▶ For purposes of this clause, **multiple technical violations stemming from the same episode of events shall not constitute separate technical violation**
- ▶ So there is relapse – that’s the violation, essentially. Testing positive at probation? This is ONE technical, despite multiple + tests if part of the same time period
- ▶ If client fails at a treatment program, despite multiple instances of misconduct, that is ONE technical

### 3. Amendments to 9771

#### 9771(c): Limitation on Sentence of Total Confinement

(2) If a court imposes a sentence of total confinement following a revocation, the basis of which is for one or more technical violations under paragraph (1)(ii) or (iii), **the court shall consider the employment status of the defendant**

So if you're employed, that's another explicit rationale AGAINST confinement?  
Not sure, though, why this would be after receiving a sentence of total confinement... perhaps use this to argue for reentry eligibility and/or a lesser sentence if it's a 3<sup>rd</sup> or subsequent violation.

### 3. Amendments to 9771

#### 9771(c)(2): --NEW SECTION IMPOSING SPECIFIC LIMITS--

- ▶ (i): For a **first** technical violation, a maximum period of **14 days**.
- ▶ (ii) For a **second** technical violation, a maximum period of **30 days**.
- ▶ (iii) For a third or subsequent technical violation, the court may impose any sentencing alternatives available at the time of initial sentencing.
- ▶ If reentry / treatment plan needed: (iv) **additional total confinement, not to exceed 30 days**, where necessary to allow a defendant to either be evaluated for or to participate in drug or MH tx or a problem solving court



### 3. Amendments to 9771

#### 9771(c)(2): --NEW SECTION IMPOSING SPECIFIC LIMITS-

What does this mean practically??

**if you get a jail sentence, no matter how egregious the technical is (e.g., new gun case they DK you on), judge is stuck to the limits in this section!** GREAT!

But.... does this create a new sentencing scheme?

- ▶ Are we setting up a setback / sanction model? Something else?
- ▶ This was modeled off of state parole setbacks – which makes sense if you're on parole! Backtime, parole after 14 days. BUT this is trickier if you're on probation

### 3. Amendments to 9771

#### 9771(c)(2): --NEW SECTION IMPOSING SPECIFIC LIMITS-

But.... does this create a new sentencing scheme?

- ▶ Is it just probation continued with detainer lifted? NO, this says FOLLOWING A REVOCATION, which means it would be a resentencing.
- ▶ So for a first violation, would it be 7-14 days followed by probation? Or 7-14 days with concurrent probation? Something else? Be aware of time credit at Gag I hearings and other hearings – it will be a logistical nightmare.
- ▶ How this is supposed to be done, when you're on probation and getting resentenced isn't super clear.
- ▶ Because if you get 5 years probation, and your max sentence upon violation could be 14 days, there would be a perverse incentive to violate...

### 3. Amendments to 9771

#### 9771(c)(2): --NEW SECTION IMPOSING SPECIFIC LIMITS-

**BIG QUESTION:** How do we define "first, second, third, etc." tech???

- ▶ No clue – it's not defined
- ▶ Is it on that specific case and charge? The defendant's whole history with the judge?
- ▶ What if you have consecutive probations, when you start on the subsequent period of supervision, do you get a clean slate?
- ▶ Not clear at all, but I think the proper reading is that it applies only to the current docket
- ▶ The reason is that the "technical violation" is inherently connected to the revocation of the conditions of THIS probation.
- ▶ Whether someone technically violated other probations with different conditions should not bear on whether these conditions are violated. But not clear.

### 3. Amendments to 9771

#### 9771(c)(2): --NEW SECTION IMPOSING SPECIFIC LIMITS-

**BIG ETHICS QUESTION:** Is there ever a time we want to concede a tech?

- ▶ Should we sometimes be conceding a technical violation on a potential direct?
- ▶ If you are in technical violation and approaching the time limit, is there a purpose to the hearing / is there a path of least resistance that might actually be beneficial to our clients?
- ▶ Are we setting them up for failure by not waiving the issue if we know more time is needed to provide them additional supports?

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

(a) **General rule.**--Except as otherwise provided in this section, the court shall hold a probation review conference no later than 60 days from the date the defendant is eligible. If a defendant's probation review conference has not commenced within the time frames specified in this subsection, the defendant's attorney, or the defendant if unrepresented, may file a motion demanding a probation review conference within five business days.

- ▶ But what's the remedy for not having one? Termination? Unclear... amendment has no real teeth
- ▶ This presents a potential logistical nightmare

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (b) ELIGIBILITY FOR INITIAL REVIEW CONFERENCE

- ▶ Misdemeanor charge: 2 years of probation OR 50% of the probation sentence, whichever is SOONER
- ▶ Felony charge: 4 years of probation OR 50% of the probation sentence, whichever is SOONER

\*\*NOT eligible for review conference less than 12 months so that is the floor

- ▶ Probation tails that follow a state sentence: IF defendant served AT LEAST 12 months on state parole WITHOUT violation, then defendant eligible 12 months prior to the date that would otherwise be eligible

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (c) Accelerated Review Conference

Assuming at least 12 months on probation, defendant SHALL be eligible 6 MONTHS earlier than otherwise eligible if satisfies any of the following on probation:

- ▶ HSD/GED; Associates, Bachelor's, Master's from Accredited school; vocational or occupational license; vocational, technical or career program
- ▶ ANY OTHER CONDITION approved by the court at the time of sentencing that ***substantially assists the defendant in leading a law-abiding life or furthers rehabilitative needs***

\*Max reduction for M's is 6 months but for felonies, they ALLOW STACKING – so if you satisfy 2 of these conditions, you may be accelerated by a total of 12 months

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

**(d) Probation Status Report:** NO LATER than 30 days prior to date defendant is entitled to a probation review conference, APPD **SHALL COMPLETE** a probation status report

- ▶ Status report **SHALL be submitted** to: Defendant, Defense Counsel, Court, DAO, Victim registered with VAO
- ▶ Probation Status report **SHALL contain:**
  1. Date defendant eligible for review conference
  2. Summary detailing whether: there are any prohibitions to termination (detailed in sub-section (g)); there are any technical violations with past 6 months; there are any direct violations; the defendant has completed required treatment or programming; restitution has been paid
  3. A description of defendant's progress on probation
- ▶ **A recommendation that:**
  - ▶ Probation be terminated at or before the date of the probation review conference
  - ▶ Probation be continued
  - ▶ Probation be continued with different, reduce or **increased terms and conditions (!!!!!)**

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (e) Objections to Probation Status Report

- ▶ DAO, Defendant have 30 days from date of status report to object or otherwise respond to status report. A victim has 30 days to provide input or respond.
- ▶ If a party objects, the court **SHALL hold** a probation review conference and notice SHALL be given to defendant, DAO, victim
- ▶ If NO objection to the recommendation contained in the report: probation review conference deemed WAIVED and **COURT SHALL ENTER AN ORDER memorializing the recommendation** contained in the probation status report and notify the defendant, DAO, victim
- ▶ The court may enter the order EVEN IF the sentence was the result of a negotiated plea

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (f) Termination of Probation

(1) Immediately following probation review conference, the **COURT SHALL TERMINATE PROBATION UNLESS the court finds**

- ▶ By clear and convincing evidence D's conduct created an **identifiable threat to public safety** (including if there's a PFA!!)
- ▶ By a preponderance of evidence D has not completed tx or required conditions **and** termination would prevent D from engaging in programming OR create a substantial likelihood D would discontinue program
- ▶ By a preponderance of evidence that D has failed to pay total restitution owed

(3) If the court does NOT terminate probation, defendant **SHALL RECEIVE written notice** of the court's order detailing the court's findings. Defendant eligible for a subsequent probation review conference no later than 12 months

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (g) Prohibitions on Early Termination of Probation

NO TERMINATION (but still entitled to PRC) if:

- ▶ Defendant convicted of an M1, M2, or F while incarcerated or serving probation
- ▶ Court finds by clear and convincing evidence a technical violation within 6 months preceding PRC that ***involved an identifiable threat to public safety***
- ▶ Court finds by preponderance of the evidence a technical violations within 6 months preceding PRC that is: sexual in nature, assaultive behavior / threat to cause BI to another, possession of a weapon, PWID, absconding, intentional and unexcused failure to adhere to recommended programming on 3 or more separate occasions
- ▶ If not eligible because of a technical violation under this subsection, probation review conference will be held 6 months after the date that the technical violation occurred

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (h) Failure to Pay Restitution

- ▶ If probation not terminated solely due to outstanding restitution, the court **SHALL ORDER** the defendant to be placed on **ADMINISTRATIVE PROBATION** for balance of probationary period IF (1) atleast 50% of balance paid OR (2) court makes a finding that defendant made good faith efforts to pay

\*\*\*Administrative probation = you have to report 1-4x per year, pay restitution, no supervision fees, and NO other conditions besides to pay

- ▶ Probation/parole departments have to create this, I guess...

## 4. Probation Review Conferences (9774.1)

### § 9774.1. Probation review conference.

#### (i) Applicability

Defendant is **NOT entitled** to a probation review conference OR early termination **IF** defendant was sentenced on: homicide, "crime of violence", SORNA / registration offense, SA where victim is a family member (aka DV cases), stalking

*Crime of violence is the normal list defined in 9714(g) = homicide, aggravated assault of an unborn child, AA § 2702(a)(1) or (2), Pa.C.S. § 2702.1(a)(1) (relating to assault of law enforcement officer), use of weapons of mass § 2716(b), terrorism § 2717(b)(2), F2 strangulation, F1 trafficking of persons § 3011, rape, IDSI, Agg Indecent, Incest, sexual assault, arson endangering persons or aggravated arson, ecoterrorism § 3311(b)(3), kidnapping, burglary § 3502(a)(1), robbery § 3701(a)(1)(i), (ii) or (iii), robbery of a motor vehicle, DDRD § 2506(a) or inchoates for any of the offenses listed above*

## 4. Probation Review Conferences (9774.1)

### LOTS TO UNPACK HERE

- ▶ So if no objection, probation can be terminated / conditions modified, even if the plea was negotiated
- ▶ Allowing terms of probation to be modified via PO recommendation seems to clearly conflict with 9771 (increase conditions . . . only upon a finding by clear and convincing evidence that a person presents an identifiable threat to public safety)
- ▶ As defense counsel of record, we **MUST** be vigilant about letting conditions be modified without a hearing in violation of 9771 and Koger/Foster
- ▶ PDs – you need to make sure you get appointed for any VOPs you handle. And private counsel need to maintain files to ensure that clients' interests are being protected here
- ▶ We must keep the court up to date as to representation status

## 4. Probation Review Conferences (9774.1)

### NOTES ON NOTICE

- ▶ Since it's COMPULSORY that the PRC summaries get sent to last defense counsel of record, defense counsel have a standing ethical obligation to VOP clients
- ▶ PDs – you need to make sure you get appointed for any VOPs you handle. And private counsel need to maintain files to ensure that clients' interests are being protected here
- ▶ Interesting nugget: what happens to our former colleagues who are now judges? No exceptions built into this statute – summaries must be sent to last counsel of record...
- ▶ We must keep the court up to date as to representation status – meaning you need to contact court administration to have yourself removed as counsel

## 4. Probation Review Conferences (9774.1)

### THINGS TO PONDER...

- ▶ There's language that there must be "evidence satisfactory to the court" that the summary was actually sent to the required parties (DA, Defense counsel, victim) – but no indication what that evidence might be / how it's supposed to be shown to the court if there's not an actual hearing...
- ▶ There may be problems with the victim being provided information in the probation review conference summary that should not be shared with them (e.g., treatment history, mental health history, address, place of work, etc.)
- ▶ In section re: bars to termination due to new conviction, unclear whether the criminal conduct has to have occurred while in custody / on probation. It just says "convicted" – so if you had a pre-existing case and you were convicted while on supervision, would you be barred?? Plain language says YES



## 4. Probation Review Conferences (9774.1)

### LOGISTICS

- ▶ Assuming no objection to PO recommendation, how is the court entering this order?!
- ▶ If there's no hearing, no listing, no court clerk, nothing... how is this order automatically being entered?
- ▶ This is a logistical nightmare
- ▶ Each jurisdiction needs to be developing its own protocols for
  1. Determining when defendants are eligible for PRC
  2. Keeping track of the conditions that would make someone eligible for accelerated review
  3. Filing/sending probation review conference summaries to all required parties
  4. Mechanism for lodging / filing an objection
  5. Issuing orders memorializing recommendations of the PRC summary where no objection
  6. Scheduling hearings for contested hearings

## 4. Probation Review Conferences (9774.1)

### Notes on Timing

Section 7: For individuals sentenced BEFORE June 11, 2024, the review shall occur at the LATER of one year after the effective date or when they would otherwise be eligible

- ▶ This essentially is placing a limit on when all cases sentenced prior to June 11, 2024 that are eligible within the next year must be reviewed (June 11, 2025)
- ▶ Court will need to conduct a preliminary assessment of EVERY case on probation as of 6/11/25 at the LATEST to determine eligibility
- ▶ So biggest question here is: **what's the remedy for failing to hold a review conference?**
- ▶ Every jurisdiction needs to have an answer to what the plan will be for the defendants whose cases have NOT been reviewed by June 11, 2025...