F I S C A L I M P A C T R E P O R T

SPONSOR HSCAC **ORIGINAL DATE** 2/11/16 **LAST UPDATED** 2/12/16 **HB** 181/HSCACS

SHORT TITLE Absconding From Probation or Parole **SB**

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ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate Increase	Indeterminate Increase	Indeterminate Increase	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Administrative Office of the District Attorneys (AODA)
Public Defender Department (PDD)
New Mexico Sentencing Commission (NMSC)
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of HSCAC Substitute

House Safety and Civil Affairs Committee substitute for House Bill 181 proposes to enact a new section of the Criminal Code making absconding from probation or parole a fourth degree felony. The substitute bill removes "valid, legal from leaving a residence or jurisdiction without permission effectively addressing the concerns expressed by the AGO and AODA in their responses of the original bill.

FISCAL IMPLICATIONS

Although it is difficult to estimate with certainty the fiscal impact on the criminal justice system, new crimes will have an associated cost depending on enforcement.

Enhanced sentences over time will increase the population of New Mexico's prisons and long-term costs to the general fund. According to the NMCD, the cost per day to house an inmate in state prison (public and private combined) is an average of $124 per day, or about $45,250 per year. Increased length of stay would increase the cost to house the offender in prison. The average cost to incarcerate one inmate over the last three years has increased 6.5 percent. Based on this trend, the cost to incarcerate one offender could increase to $51,167 in fiscal year 2017. In addition, sentencing enhancements could contribute to overall population growth as increased sentence lengths decrease releases relative to the rate of admissions pushing the overall prison population higher. NMCD's general fund budget, not including supplemental appropriations, has grown $5 million, or 7 percent, since FY11 as a result of growing prison population.

Societal benefits, particularly to potential victims, would also accrue through enhanced sentences if they reduce or delay re-offenses. LFC cost-benefit analysis of criminal justice interventions shows that avoiding victimization results in tangible benefits over a lifetime for all types of crime and higher amounts for serious violent offenses. These include tangible victim costs, such as health care expenses, property damage and losses in future earnings and intangible victim costs such as jury awards for pain, suffering and lost quality of life.

According to NMCD, HB 181 may deter absconding, reduce overtime costs and free up staff to focus on agency core mission. It does not, however, provide an estimate of reduced overtime.

SIGNIFICANT ISSUES

According to the NMCD "*2016 Legislative Session Frequently Asked Questions*" HB 181 is legislation it endorses and is in response to a probation absconder accused of the death of a police officer in 2015. NMCD, in this document, states that a criminal penalty would likely deter some offenders from absconding and over time lower the number of absconders, of which there are currently 1,700.

On January 22, 2016, the NMCD was supervising 17,272 probationers and parolees. About 10 percent of those under supervision are considered absconders. NMCD reports that offenders who abscond are merely kept on probation or parole supervision, and are given credit on probation or parole for the time during which they absconded. This bill would charge those offenders who abscond with a fourth degree felony.

NMCD also states that offenders on probation or parole who choose to abscond normally do so because they are violating another condition of supervision, typically using drugs or alcohol, and they are afraid to face their probation and parole officer (PPO). Currently, using drugs or alcohol is deemed merely a probation violation, as is absconding. They are considered to be equal violations in the eyes of offenders. If absconding was a crime, the consequences of doing it would be seen as having a greater impact on an offender's life, and make offenders more likely to report. The positive impact of reporting while on probation or parole is that the offender can receive services. The Probation and Parole Division (PPD) has contracts in place to provide referrals for professional assistance to deal with the primary problem often leading to absconding – substance abuse. NMCD is a link to community resources such as treatment services.

According to NMSC, dispositions for absconders vary, offenders who abscond may be placed back on supervision or if it is determined that the terms of supervision were violated they may be placed in jail or returned to prison.

AODA opines in its response that HB 181 appears contradictory to a number of existing statutes and rules promulgated by the Supreme Court that deal with probation. Judges now have the discretion to defer or suspend—in whole or in part, the punishment for any crime which is not a capital or first degree felony. See, Sect. 31-20-3, NMSA 1978. If the crime involved a possible sentence of imprisonment and the sentence was deferred or suspended, the court must place the defendant on probation for all or some portion of the period of sentence deferred or suspended if they are in need of supervision, guidance or direction that is feasible for the corrections department to furnish. See, Sect. 31-20-5, NMSA 1978). Cf., Sect. 31-19-5, NMSA 1978 (Same for misdemeanors.) and Sect.35-15-14, NMSA 1978 (Municipal ordinances probation authorized).

The District Attorney is given complete discretion whether to file a motion to revoke probation after receiving a report of a probation violation. See, Rule 5-805(F), SCRA 1986. The Probation and Parole Act (Sects. 31-21-1 to 31-21-19, NMSA 1978) specifically states that the Act should be "liberally construed" to provide for treatment in the community for constructive rehabilitation of persons convicted of crimes. See, Sect. 31-21-4, NMSA 1978. The Act also states that even those persons in an intensive supervision program, i.e. "house arrest" and/or electronic surveillance programs, should receive "meaningful rehabilitative activities" so the risk or recidivist crime and payment of restitution to their victim(s) can be facilitated. See, Sect. 31-21-13.1(A), NMSA 1978. If a probation violation is established the judge may continue the original probation, revoke the probation and either enter a new probation or require the offender to serve the balance of the sentence originally imposed or any lesser sentence. See, Sect. 31-21-15(B), NMSA 1978. It is possible that judges could set probationary conditions that might contravene the language of HB 181 and not set conditions regarding changing residences or leaving the jurisdiction.

Changing residences and leaving the jurisdiction are ordinarily referred to as "technical violations" since they do not involve new criminal charges. See, Rule 5-805(C), SCRA 1986. Technical violations are usually dealt with on an expedited basis, receive a pre-determined sanction and probation violators are then continued on probation. Making that conduct a fourth degree felony is contrary to long-established practices, although adults, and even juveniles, can have both their original probation revoked and also be prosecuted for new criminal charges that were the basis for the motion to revoke probation. See, *Matter of Lucio T.*, 119 N.M. 76 (Ct. App. 1994). Although HB 181 focuses on being "available for supervision," there are many other potential technical violations, such as going to prohibited places, associating with prohibited persons, etc. that could also be likely to impair a convicted defendant's rehabilitation that are not included in the bill.

AGO states the proposed legislation presents a possible issue concerning double jeopardy by a defendant who is punished during a probation and parole violation hearing for absconding and also charged with the crime separate and apart from the violation. In this regard, a person charged with violating the terms of probation/parole would, as a separate matter, be charged with a new crime, namely absconding from the obligation of reporting to probation/parole authorities. A review of this potential issue found that that claim would be unsupported by law. As a threshold, a probation/parole revocation hearing is an administrative determination of whether or

not an offender violated the terms and conditions of his parole, and therefore the constitutional protection of double jeopardy do not attach." Matter of Lucio F.T. 1994-NMCA-144. State v. Neal mirrors the holding in Lucio. In Neal, the defendant argued that it violated double jeopardy to use his shoplifting offense to also revoke probation and parole. The court held it did not. State v. Neal, 2007-NMCA-086.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to House Bill 296, Senate Bill 257 and Senate Bill 275 – Convictions in Certain Courts as Adults.

TECHNICAL ISSUES

The AODA states that New Mexico has a lengthy record of appeals based on the double jeopardy clauses of Amendment V of the United States Constitution and Article II, Sect. 15 of the N.M. Constitution where persons were prosecuted for multiple crimes based on conduct arising from one event. See, *Blockburger v. United States,* 284 U.S. 299 (1932) and *Swafford v. State,* 122 N.M. 3 (1991).

AOC states that generally, the rights of parolees and probationers are distinct. Under the Probation and Parole Act:

- A parolee who is a fugitive receives no credit for time spent out of custody
- A parole violator is to be treated as an escaped prisoner, subject to appropriate sanctions.
- A probationer's term will toll for the time defendant was a fugitive and thereby extending its jurisdiction over defendant. *State v. Sosa*, 2014-NMCA-091.
- A court may impose additional otherwise permissible sanctions for the acts that form the basis for revocation or modification of probation and, in appropriate circumstances, the state had authority to seek enhancement of a defendant's sentence under the habitual-offender statute. *State v. Freed,* 1996-NMCA-044.

HB 181 would make absconding a new offense, thus entitling the accused to all the rights afforded a criminal defendant. While offenders in probation revocation procedures are afforded some due process rights, they do not rise to the level afforded those who are accused of a criminal offense.

According to AOC, in many contexts the term "absconder" and "fugitive" are inter-changeable. For example, the PPD's Absconders/Fugitive website. In statute, absconder is generally used in civil matters and fugitive in criminal matters. Although NMCD policies use absconder with the identical language in HB 181, New Mexico case law often refers to offenders who fail to report as fugitives. Without further definition the use of absconder might cause confusion.

OTHER SUBSTANTIVE ISSUES

The AGO identified criminal penalties for absconders legislation in its *Violent Crime Review Team Final Report.* The team specifically included in the final report, the possibility of a felony penalty, and perhaps graduated penalties for absconding from probation and parole after a felony conviction. The need for a felony charge for absconding was identified as a tool to help the effectiveness of probation and parole when ordered by a district court. While there existed some disagreement as to how to implement such a change, the final report expressed a genuine

recommendation that allowing probationers to be subjected to additional penalties for failing to report to probation authorities would protect the community and serve as a deterrent to violate terms of probation. This bill would preclude defendants serving a period of probation/parole from being subjected to penalties solely based on the terms of their original probation, allowing a new charge to be based on violating those terms.

The AOC in its response cites the NM Court of Appeals in, *State v. Begay*, 2016 WL 166624 Jan. 13, 2016, ruled "statutory language used by the Legislature (in §31-21-15(C)) limited the tolling provision to cases in which the defendant's underlying conviction occurred in the district court." Thus there was no probation tolling provision that could be used in probation proceedings originating in magistrate courts. The Court of Appeals conducted their analysis with regard to the entire tolling provision of Section 31-21-15 and the Probation and Parole Act as a whole. This finding was based on the Court's plain reading of the statutory language in §31-21-5(A), (F), which defines "probation" and "adult" as limited to persons convicted in the district court, "any person convicted of a crime in district court."

Therefore, under the Court of Appeals opinion, not only are the magistrate courts not required to conduct the fugitive analysis of Section 31-21-15(C), but they are not authorized to toll the running of probation until the probationer is found, because there is no other provision of law which allows magistrates to do so. "[W]hen a defendant is convicted of a crime in magistrate court, placed on probation in lieu of serving a prison sentence, violates the terms of his probation, and cannot be located to answer for this violation until the period of his suspended sentence has expired, tolling does not apply, and the defendant is relieved of his obligations without any apparent consequence." Begay at paragraph 1.

ABS/jo/jle/jo