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

SPONSOR HJC **ORIGINAL DATE** 2/13/16 **LAST UPDATED** **HB** 296/HJCS

SHORT TITLE Conviction in Certain Courts as "Adults" **SB**

ANALYST Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates SB275, SB257, HB181

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Public Defender Department (PDD)
Bernalillo County Metropolitan Court (BCMC)

No Responses Received From
New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill (HJC Substitute)

House Judicary Committee Substitute for House Bill 296 adds the definition of "probationer" to the body of Section 31-21-15 NMSA 1978 (a person convicted of a crime by a district, metropolitan, magistrate or municipal court). The definition is almost identical to the definition of "adult" in Section 31-12-5 NMSA 1978, which remains unchanged.

The HJC substitute has an emergency clause.

FISCAL IMPLICATIONS

PDD states that the substitute for HB 296 appears to respond to concerns about the fiscal impact of the original bill on NMCD by directly amending Section 31-21-15 of the Probation and Parole Act, Sections 31-21- 3 to -19, NMSA 1978. Like the original HB 296, the substitute responds to the Court of Appeals' opinion in *State v. Begay*, 2016-NMCA-___, (Ct. App. 33,588 Jan. 13, 2016). The tolling provisions of Section 31-21-15 of the Act permit a court to prevent the period of probation from expiring during a period of time when a probationer cannot be located to answer for an alleged probation violation. *Begay* held that because of the definitions contained in Section 31-21-5, this tolling provision applies only to individuals convicted in a district court but not in a court of limited jurisdiction.

The two-year average (2013 and 2014) of defendants on magistrate court-ordered probation is 46,796. According to the AOC, it has a memorandum of understanding with the NMCD to supervise up to 50 probationers and it does not anticipate it will require NMCD to supervise more than that. The individuals on probation are required to pay NMCD actual costs of supervised probation not to exceed $1,800 per year. It costs the NMCD $2,766 to provide standard supervision to probationers. Based on the NMCD's standard supervision costs, it currently absorbs up to $48,300 per year to supervise 50 probationers. Should the number of probationers needing NMCD supervision increase, the cost is $2,766 per probationer per year.

Other defendants on magistrate court-ordered supervised probation are supervised by county compliance programs.

The BCMC employs 12 probation officers to supervise the 2,190 individuals placed on supervised probation; those numbers are not included in the table above. Data is not readily available from the numerous municipal courts so the impact from individuals placed on probation by those courts cannot be estimated.

A probationer accused of being a fugitive from justice would be entitled to an appeal de novo in district court and possibly a second appeal to the Court of Appeals, as happened in the *Begay* case. Thus, this substitute would impose some additional burdens on courts, prosecutors, and the public defender. Depending on the increase in the number of cases filed, the cost to the PDD, district attorneys and district courts will also increase. However, it is not possible to quantify the amount with any certainty. Although it is difficult to accurately estimate the cost of increased trials because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly for the district courts, district attorneys and public defenders are as follow:

- PDD: $152.1
- District Attorneys: $195.4
- District Courts: $335.6

SIGNIFICANT ISSUES

PPD notes that because "probationer" is defined in the substitute bill to include someone convicted of a crime in a court of limited jurisdiction, the above language still appears to contemplate that the director would be involved in supervising the release of all probationers and not simply those convicted by a district court. Not only might this require NMCD to provide such supervision, if it failed to do so that might result in litigation in the event an unsupervised

probationer caused harm to a third party. Conversely, however, NMCD is not given the clear mandate to provide such services as it did under the original bill. The definition of "probationer" in the substitute is for the tolling provisions of the statute specifically (rather than across the board as did the original HB 296).

The AOC, BCMC, PDD, and AGO all cite the New Mexico Court of Appeals, in *State v. Begay*, No. 33,588 (Ct. App. filed January 13, 2016), which made it clear that all sections of the Probation and Parole Act, aside from Section 31-21-9(A) NMSA 1978, apply only to people sentenced by a district court. This is because the definition section, which this bill amends, currently says that "'probation' means the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions;" and "'adult' means any person convicted of a crime by a district court."

The major provision of the Probation and Parole Act at issue in the *Begay* case was Section 31-21-15(C) NMSA 1978, which allows a court to toll the running of a defendant's probation while a warrant is outstanding, and the defendant cannot be found to answer for the violation. As a result of the statutory limitation of this provision to only adults convicted by a district court, "when 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*, ¶ 1. This tolling provision is not available to the courts of limited jurisdiction in any of the other statutory authorities which allow those courts to suspend or defer a sentence, set conditions of probation, and provide for the return of a probationer to answer any alleged violations.

"Although it seems that the Legislature's decision in 1984 to require the magistrate court to order probation when deferring or suspending a sentence would have been logically followed by an amendment to the Probation and Parole Act to provide that the term 'probation' under the Act also applies to persons convicted in magistrate court, [the Court] cannot judicially amend the Probation and Parole Act to reach this result." *Begay*, ¶ 6. This bill makes that amendment, not only for the magistrate courts, but all courts with criminal sentencing authority.

ADMINISTRATIVE IMPLICATIONS

This proposed change may reduce the administrative burden on magistrate, metropolitan, and municipal courts in regard to monitoring compliance with conditions of probation, by providing those courts with the ability to toll the running of probation when a probation violation warrant is outstanding.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This HJC substitute relates to Senate Bill 275, Senate Bill 257 and House Bill 181.

TECHNICAL ISSUES

The proposed language defines a probationer as "a person convicted of a crime by a district, metropolitan, magistrate or municipal court" however the existing language in the same statute, which is not amended defines an adult as "any person convicted of a crime by a district court."

BCMC suggests that consideration is being given in legislation to gender-neutral terms so too should consideration be given to court-neutral terms. When the Act was created in 1953, there were only District Courts, the Metropolitan Court. The present-day Magistrate and Municipal Courts did not exist. It is impossible to know the types of Courts that may exist tomorrow, thus it is important that statutory language embrace the functions of the Courts as opposed to the specific names of the Courts so that the Act may continue to be relevant and accurate in the future.

OTHER SUBSTANTIVE ISSUES

BCMC states that while the HJC Substitute for HB 296 has changed considerably from the original Bill, the language that is proposed to be added to § 31-21-15(C) would appear also to remedy the issue that has arisen post-*Begay* and would allow the judges of the District, Metropolitan, Magistrate, and Municipal Courts to toll a defendant's sentence when that defendant violates conditions of probation and has been a fugitive from justice. If the Metropolitan Court cannot toll, the incentive will be for defendants to plea, negotiate a suspended or deferred sentence, and abscond. Then, so long as a defendant can avoid being arrested on any outstanding bench warrants until after the period of the original sentence has expired, the defendant will never have to face the consequences of the crime for which the defendant has been convicted. As the Metropolitan Court is a Court of limited jurisdiction, the maximum sentence on many of the crimes over which the Court has jurisdiction is less than one year. For example, the domestic violence crime of assault against a household member under NMSA 1978, § 30-3-12 carries a maximum sentence of incarceration of six months. Without tolling, then the potential days of incarceration is essentially reduced to zero if a defendant absconds.

PDD notes that the time in which the State may ask the Supreme Court to review the Court of Appeals Opinion in *Begay* does not expire until February 12, 2016. If the Supreme Court decided to reverse the Court of Appeals no further action would be required by the Legislature to "overturn" the result. The Legislature may decide it is better to take a "wait and see" attitude given the number of other pending bills.

Overall, as recognized by the Court of Appeals, the basic issue addressed by the proposed amendment was/is one that for this Legislature to decide – whether the additional cost of providing a tolling mechanism to include persons placed on probation for all minor offenses prosecuted in courts of limited jurisdiction is justified by the perceived benefits. Those costs, while real, are difficult to predict or quantify – as is the frequency with which this becomes a problem. It is noted, however, that to the extent the proposed legislation would affect municipal budgets for towns and cities across the state, the Legislature may wish to ascertain from municipalities whether they agree the cost of change is outweighed by the benefits.

Further it is noted that the House currently is considering whether to make it a felony crime to "abscond" from probation or parole. *See* HB 181. This would create a new criminal offense for absconding from probation or parole while under the supervision of the adult probation and parole division of the corrections department. Because in Substitute HB 296, Section 31-21-15(A)(3) appears to contemplate and/or may be read to place a probationer convicted in a court of limited criminal jurisdiction within the supervision of the director (*see* above), it also creates the possibility that a person placed on probation following conviction for even a petty misdemeanor would face felony prosecution if they could not be located following a reported probation violation (for example, the alleged commission of a second petty misdemeanor).

If the question of such felony exposure is unclear, moreover, the combined effect of these two measures may be to motivate more individuals accused of minor crimes to insist on going to trial rather than agreeing to even a conditional discharge, because taken together the two measures may be perceived as raising the risks of probation far beyond any criminal exposure for the charged underlying crime. The Legislature therefore may wish to consider these two bills in conjunction with one another, and whether these possible outcomes are in the public interest.

Finally, it is noted that municipal courts are not currently required to place a defendant on probation under Section 31-20-5; if the Legislature wishes to expand the Probation and Parole Act to include all municipal courts, it may wish to amend this statute as well.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

When a Magistrate, Metropolitan, or District Court suspends or defers a defendant's sentence of imprisonment, the convicted defendant is placed on probation by the Court per NMSA 1978, § 31-20-5. If the defendant-probationer later violates any condition of release or probation, a warrant may be issued for the arrest of the defendant per NMSA 1978, § 31-21-15. But if the defendant cannot be located to answer for that violation until after the period of the suspended sentence has expired and is therefore a fugitive from justice, per NMSA 1978, § 31-21-15(C) of the Probation and Parole Act, the Court can determine whether all or any portion of the time from the date of violation to the date of arrest shall be counted as time served on probation or if the period is to be tolled.

While the Metropolitan Court is a Court of Limited Jurisdiction and does not have jurisdiction over felonies, it is a Court of record per NMSA 1978, § 34-8A-6(C) for domestic violence and driving while under the influence of intoxicating liquors or drugs. These are serious crimes. In addition, the Victims of Crime Act, NMSA 1978, § 31-26-1 et seq., includes at least five misdemeanors, within its definition of "criminal offense" in Section 31-26-3(B). These are crimes that are considered to be of such a serious nature that a victim is entitled under the Victims of Crime Act to notice and an opportunity to be heard at various stages in the criminal proceeding, including any post-sentencing hearings.

If the Court does not have the power to toll, so that it can revoke conditions of probation and impose the original sentence when a defendant has violated the terms of probation and been a fugitive from justice, then the ability of the Court to ensure that defendants are held accountable for the crimes for which they are convicted will be severely limited. Without this important tool, rather than suspend or defer sentences and place defendants on probation or allow them to participate in the Court's many successful post-adjudication, pre-sentence specialty court programs such as the Court's DWI/Drug Courts (DWI Recovery Court and the Urban Native American Healing to Wellness Court) and the Court's Domestic Violence Repeat Offenders Program, full sentences may be imposed, which means more defendants will be incarcerated. These specialty court programs have been proven to reduce recidivism and to enhance community safety, promote evidence–based practices for offender accountability, and promote offender rehabilitation. However, without the power to toll, the numbers of defendants participating in these important programs may be greatly reduced.

This bill is critical to the operations of the Metropolitan Court and would allow the tolling provision in the Probation and Parole Act to be updated consistent with creation of the Magistrate and Metropolitan Courts. Therefore, the Metropolitan Court agrees that the emergency clause is warranted.

ABS/jle