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FISCAL IMPACT REPORT

ORIGINAL DATE 2/9/2018

SPONSOR Hall LAST UPDATED _____ HB 254

SHORT TITLE Absconding from Probation or Parole SB _____

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal	\$4.5 million - \$8.9 million	\$4.5 million - \$8.9 million	\$10.2 million - \$20.4 million	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Adult Parole Board (APB)

New Mexico Corrections Department (NMCD)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

HB 254 creates the fourth-degree felony crime of “absconding from probation or parole,” defined by a supervised probationer or parolee changing residence or leaving the jurisdiction to which he or she is restricted without permission and who lacks a valid, legal excuse for not being available for supervision by the probation and parole officer working for the division.

FISCAL IMPLICATIONS

In the last quarter of 2017, NMCD reported the department apprehended 28 percent of the almost 1,700 known absconders in FY17, or 476 people. If all of the absconders were reincarcerated for a full year (not the full 18 months a fourth degree felony carries, assuming credit for time served) at the FY17 average per diem rate of \$102.72 (the weighted average of both public and private prisons per diem rates), the total incarceration cost to the department would be \$17.9 million per year. If only half of the 476 absconders were reincarcerated, the total incarceration cost for a year would be \$8.9 million. Assuming costs are spread over the cost of an entire year, total yearly costs will be lower. NMCD does not address potential costs from re-incarceration.

According to NMCD, “by criminalizing and deterring absconding, the department may be able to substantially lessen the significant ongoing costs associated with searching for absconders, thereby reducing overtime costs and freeing up staff members to more efficiently focus on their core missions of providing prison-related and probation/parole supervision-related services.”

The Parole Board states:

The number of hearings could increase as the Parole Board would have to set conditions for those convicted of absconding. A conviction of a fourth degree felony, if sentenced to prison, results in a one-year parole. Currently, when a parolee absconds from the supervision of the Corrections Department, they have a hearing before the Parole Board to determine if they should be revoked and returned to prison to finish their sentence. They do not do additional time for absconding. However, they will not get credit for time while an absconder. The Board rarely allows parole violators who abscond from parole supervision the opportunity to re-parole.

This bill would not impact the Parole Board until absconders are charged, convicted, and sentenced to prison. Currently the Parole Board does not track the number of parolees that are returned to prison for absconding.

Any increase in inmates has a direct impact on the Parole Board. If there were a significant amount of persons charged and convicted of this crime, the Parole Board could see an increase in the number of hearings conducted.

The AOC explains “there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact to the judiciary would be proportional to the enforcement of this law and commenced hearings. Increased penalties may result in an increase in the number of accused persons who will invoke their right to trial and their right to trial by jury. More hearings, trials, and more jury trials will require additional judge time, courtroom staff time, courtroom availability, and jury fees. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.”

Enhanced sentences over time will increase the population of New Mexico’s prisons and long-term costs to the general fund. According to the New Mexico Corrections Department (NMCD), the cost per day to house an inmate in public state prisons in FY17 was an average of \$123 per day, or about \$44,895 per year. Increased length of stay would increase the cost to house the offender in prison. 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 by an average of two percent, and the FY18 budget is 11 percent higher than FY14, closely mirroring the inmate population growth of 10 percent. The LFC reported in its FY19 budget recommendation that NMCD ended FY17 with a \$1 million budget surplus.

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.

SIGNIFICANT ISSUES

NMCD provided the following analysis:

While the courts, in the case of probationers, and the parole board, in the case of parolees, have the legal authority (pursuant to Sections 31-21-15 and 31-21-14 respectively) to incarcerate absconders and to decide whether all or any part of the time from the date of the violation to the date of arrest shall count as time served under probation or parole, these current laws have not prevented a large number of offenders from routinely absconding from probation and parole supervision.

For example, as of January 29, 2018, the Department has 1,679 known absconders. In some cases, offenders who abscond are merely kept on probation or parole supervision by the courts or board, and are given credit on probation or parole for the time during which they absconded.

Probation is offered as an alternative to incarceration, and is not a legal right. When judges offer probation as a sentence or a plea deal in lieu of incarceration, it is done in hopes that the offender will take advantage of the services provided in order to help them lead a law abiding life. When offenders are not making themselves available to these services by absconding, public safety is jeopardized.

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. In court, currently, proceedings for a probation violation of absconding are currently insufficient. Rather than an offender being held accountable, judges occasionally rule to give an offender an unsatisfactory discharge from supervision. This effectively sends the offender back into the community removed from any possibility of treatment which NMCD can provide or facilitate.

The bill will allow prosecutorial discretion to pursue charges in cases where offenders, who abscond from supervision, may be charged with a 4th degree felony. The bill does not mandate all offenders be charged and adjudicated. Therefore, the bill would allow the state to seek prosecution, in certain cases, such as for offenders who pose a threat to themselves or the safety of the general public, or who display histories of absconding from supervision. The likelihood of people absconding will decrease due to its classification as a felony versus its current classification as only a technical violation, and offenders will be less likely to abscond and more likely to work toward successful treatment. This will result in a reduction in recidivism rates.

By making absconding from probation or parole into a crime separate from the sentence for which the offender was placed on probation or parole, absconding is likely to be deterred to a significant degree. The Department spends thousands of manpower hours each year searching for absconders, who in many cases pose a significant threat to the public because their whereabouts and activities are unknown. As noted above, by criminalizing and deterring absconding, the Department will be able to substantially significantly lessen the significant ongoing costs associated with searching for absconders, thereby reducing overtime costs and freeing up staff members to more efficiently focus on their core missions of providing prison-related and probation/parole supervision-related services.

AOC provides the following detailed analysis:

Currently a parolee or probationer who fails to report a changed residence without permission, or has otherwise made him or herself unavailable would be in violation of conditions of release and subject to the revocation process. 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. HB 254 would make absconding a new offense, thus entitling the accused to all the rights afforded a criminal defendant.

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

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.

HB 181, as introduced in 2016, was a duplicate of HB 254. During the 2016 legislative session’s committee process, a substitute bill was introduced by the House Safety and Civil Affairs Committee. (See FIR @ <https://www.nmlegis.gov/Sessions/16%20Regular/firs/HB0181.PDF>) Notably, the following changes were made in the 2016 substitute:

- The crime was defined as consisting of a supervised probationer or parolee willfully:
 - changing residence from that on record with the division;
 - leaving the jurisdiction to which the probationer or parolee is restricted without permission; *or* [emphasis added]
 - ceasing to comply with reporting requirements.

Any of one these three conditions will lead to prosecution for the new crime. Unlike HB 181sub, HB 254 defines the crime of absconding from probation or parole as requiring both a change in residence or departure from the jurisdiction without permission, and the lack of a valid, legal excuse for not being available for supervision.

The substitute for 2016’s HB 181 removes the language regarding lacking “a valid, legal excuse for not being available for supervision” and instead makes it a crime to cease to comply with reporting requirements.

TECHNICAL ISSUES

AOC explains that in many contexts, the term “absconder” and “fugitive” are inter-changeable; e.g., on the PPD’s Absconders/Fugitive website. (See <http://cd.nm.gov/ppd/docs/wanted.pdf>) In statute, “absconder” is generally used in civil matters and “fugitive” in criminal matters. Although NM Corrections Department 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.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMCD explains that not enacting the bill upholds the status quo: offenders will continue to abscond from probation and parole with often little or no negative consequences.

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