

Technical Probation & Parole Violations:
Statutory Options to Limit Incarceration

I. DEFINING TECHNICAL VIOLATIONS (SECTION 31-21-5)

Follow 2020 HB 263’s approach of defining them as “not standard” violations, and thus defining standard violations as:

“absconding or violating any criminal municipal or county ordinance, or tribal, state or federal criminal law”

And then in turn defining absconding narrowly to ensure that it does not apply to *willful* missed appointments that are nonetheless less culpable than actual ‘absconding’:

“‘absconding’ means that a person under supervision willfully makes the person’s whereabouts unknown to the person’s probation and parole officer or willfully fails to report as ordered with a purpose to evade their supervision obligations by hiding within or secretly leaving the jurisdiction, and where reasonable efforts by the probation and parole officer to locate the person have been unsuccessful.”

This is critical because missing an appointment is presumptively willful and the only thing that makes it not willful is that they had a “lawful excuse” or were prevented from coming by something out of their control. Choosing to go to work instead is not good enough; that is still a willful violation.

Based on the dictionary definition, absconding does and should require an intent to avoid supervision:

State v. Robbins, 188 P.3d 262 (Or. 2008) (missing an appointment is not absconding; absconding requires Def. to act with intent, which can be shown through circumstantial evidence)

In the end, our review of the text of the rule and this court's case law confirm that **the dictionary definition of “abscond”** accurately reflects the requirements of ORAP 8.05(3). In determining whether a defendant has absconded from supervision, appellate courts must consider whether the defendant’s acts show the intent that inheres in the definition of “abscond”—not simply that the defendant failed to attend one meeting with a probation officer or could not be located for a brief period of time, but that the defendant sought to “evade the legal process

of a court by hiding within or secretly leaving its jurisdiction.” Webster’s at 6. Moreover, as our prior cases reflect, the “legal process” sought to be evaded may include compliance with the terms of one’s sentence, including the defendant’s conduct in “mak [ing] himself available for probation.” Smith, 312 Or. at 564, 822 P.2d 1193.

Additionally, to ensure that *all* probationers have some protection from undue incarceration while ensuring public safety, allow applicability to serious offenders while giving the sentencing judge the ability to identify particular conditions that would otherwise be “technical” under the definitions as carrying standard violation consequences by adding the following provision as a new Subsection of NMSA 1978, 31-20-5 (Placing defendant on probation):

“For a person serving a period of probation under a suspended, deferred or conditional discharge from a plea or conviction that includes any sex offense enumerated in Subsection I of Section 29-11A-3 NMSA 1978 and a serious violent offense as enumerated in Paragraph (4) of Subsection L of Section 33-2-34 NMSA 1978, the court may specify particular conditions that if violated constitute a non-technical violation. In order to set specific conditions that would constitute a non-technical violation pursuant to this subsection, the court shall find by clear and convincing evidence that such conditions are necessary to ensure public safety or the safety of a particular individual.”

II. LIMITING INCARCERATION FOR TECHNICAL VIOLATIONS

When a PO believes a violation has occurred, they report them to either the parole board (parole) or the district attorney (probation) to pursue revocation proceedings; just the filing of that violation report can result in arrest and incarceration until the violation is resolved. If the DA brings a petition to revoke probation, the decision is made by a judge. To prevent incarceration for technical violations, the POs, parole board, and judges need to be expressly limited in their ability to incarcerate.

1. **Codify the “STEPS” approach and require POs to impose graduated sanctions before filing a report.**

To ensure a supervisee’s participation in the STEPs program, it has to be anticipated at the time they are being *sentenced* so that they can voluntarily agree to it with counsel present. Add the following provisions to the sentencing process:

To NMSA 1978, Section 31-18-15:

"The order imposing a period of parole shall indicate the defendant's counseled, voluntary waiver of future formal resolution for technical parole violations pursuant to [new material (STEPS)]."

To Section 31-20-5:

"The order placing the defendant on probation shall indicate the defendant's counseled, voluntary waiver of future formal resolution for technical violations pursuant to [new material (STEPS)]."

Then codify STEPs in new material applicable to probation and parole officers to address **Technical Violations**:

"A. When a technical violation is alleged, before seeking formal resolution in a court pursuant to Section 31-21-15 NMSA 1978, the probation and parole officer shall impose graduated sanctions pursuant to this section. If the probationer declined to enter a waiver of formal resolution under [Section 31-18-15 or 31-20-5], or if the probationer or parolee rescinds that waiver, the probation and parole officer shall promptly report the alleged violation to the court.

B. If additional detention is sought or a probation and parole officer believes that non-detention sanctions have failed, the probation and parole officer shall seek formal resolution of a technical violation in a court pursuant to Section 31-21-15 NMSA 1978 for a probationer or formal resolution by the board for a parolee.

C. A probation and parole officer shall impose graduated non-detention sanctions for a technical violation in the following manner:

(1) for a first violation, three days of community service or in a community corrections program pursuant to the Adult Community Corrections Act; and

(2) for a second violation, five days of community service or a fixed term in a community corrections program pursuant to the Adult Community Corrections Act.

D. After imposing the non-detention sanctions, if a probationer's probation order does not reflect a voluntary, counseled waiver of formal resolution for technical violations pursuant to Subsection A of Section 31-20-5 NMSA 1978,

or if the probationer rescinds such waiver, the probation and parole officer shall seek formal resolution in a court pursuant to Section 31-21-15 NMSA 1978 and formal resolution by the board for a parolee. If a waiver was given and not rescinded, the probation and parole officer shall impose graduated detention sanctions for a technical violation in the following manner:

- (1) for a third violation, up to three days in jail;
- (2) for a fourth violation, up to seven days in jail; and
- (3) for a fifth and subsequent violation, formal resolution in a court pursuant to Section 31-21-15 NMSA 1978 for a probationer, and formal resolution by the board for a parolee.

E. If a probationer or parolee fails to complete any part of the community service imposed pursuant to Subsection D of this section, the probationer or parolee shall be detained in a county jail for the remainder of the community service specified in Subsection D of this section.

F. Once sanctions are imposed pursuant to this section, a probationer or parolee shall not be subject to further technical violation sanctions for the same technical violation unless the probationer or parolee fails to comply with the sanctions imposed pursuant to this section.

G. To impose detention sanctions under this section, the director shall issue a written statement to the jail detaining the probationer or parolee affirming that the adult probation and parole division of the corrections department has complied with Subsections A and B of this section and that this statement shall serve as sufficient warrant for detention of a probationer or parolee. Time served in detention as a sanction shall be counted as time served for the period of probation or parole."

2. Limit the ability of the parole board or judge to impose incarceration.

For technical probation violations referred to the district court, Section 31-21-15 should be updated as follows:

B. Upon the probationer's arrest and detention for a standard violation:

- (1) the director shall immediately notify the court and submit in writing a report describing the manner in which the probationer has violated the conditions of release; and

(2) the court shall hold a probation revocation hearing on the standard violation charged.

C. If the standard violation is established at the probation revocation hearing, the court may continue or revoke the probation or enter any other order as it sees fit.

D. At any time during probation, the court may issue a notice to appear to answer a charge of technical violation. The notice shall be personally served upon the probationer and shall initiate a technical violation hearing.

E. If the technical violation is established before the court at a technical violation hearing, the sanction for the technical violation shall be commensurate with the seriousness of the violation and not a punishment for the offense for which the probationer was placed on probation, and the court shall:

(1) inquire whether the probation and parole officer supervising the probationer followed the graduated sanctions system provided in Sections 9 and 10 of this 2020 act; then

(2) continue the probation term and impose a non- detention sanction, including community service, a behavioral health or mental health treatment program or a fixed term in a community corrections program pursuant to the Adult Community Corrections Act, which term shall be credited toward the sentence originally imposed, and the defendant shall be placed back on probation; or

(3) determine whether detention shall be imposed to enforce the purpose of probation pursuant to Subsection A of Section 31-20-5 NMSA 1978, and if the court determines that detention shall be imposed, the court may impose a term of detention in a county jail that shall not exceed thirty days unless the court articulates findings and concludes that additional detention is necessary for the probationer's rehabilitation or public safety.”