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FISCAL IMPACT REPORT

SPONSOR <u>SJC</u>	LAST UPDATED <u>3/12/2023</u>	ORIGINAL DATE <u>2/10/2023</u>
SHORT TITLE <u>Probation & Parole Violation Changes</u>	BILL NUMBER <u>84/SHPACS/SJCS/aSF1#1/aHCPAC</u>	<u>CS/CS/Senate Bill</u>
	ANALYST <u>Rabin</u>	

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Costs to NMCD	No fiscal impact	(\$20,126.7)	(\$20,126.7)	(\$40,253.4)	Recurring	General Fund
Costs to Counties	No fiscal impact	\$108.6	\$108.6	\$217.2	Recurring	County General Funds

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 29

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 Attorney General (NMAG)
- Sentencing Commission (NMSC)
- Adult Parole Board (APB)
- Corrections Department (NMCD)
- Department of Public Safety (DPS)

SUMMARY

Synopsis of HCPAC Amendment

The House Consumer and Public Affairs Committee amendment to the Senate Judiciary Committee substitute for the Senate Health and Public Affairs Committee substitute for Senate Bill 84, as amended by the Senate, resolves a technical error in Senate Floor Amendment #1 and appears to effectively implement the changes intended by that amendment (described below).

The HCPAC amendment further clarifies that, if charged with a technical violation, a person must be given a notice to appear, unless they present a flight risk or danger to the community, and then the director of probation and parole may authorize an arrest warrant. The amendment also restores the Parole Board’s ability to set consistent procedures by “rule or regulation” in Subsection C.

Synopsis of Senate Floor Amendment #1

Senate Floor Amendment #1 to the Senate Judiciary Committee substitute for the Senate Health and Public Affairs Committee substitute for Senate Bill 84 amends the bill’s definition of technical parole violation. Previously, the bill defined a technical violation as “a violation of a condition of probation or parole that does not either create a threat to the probationer or released prisoner or others or does not constitute a new criminal charge.”

The intent of the amendment appears to be to change the definition to “a violation of a condition of probation or parole that does not (1) create a threat to the probationer or parolee, (2) create a threat to others, (3) violate a condition that the probationer or parolee refrain from having contact with a victim or witness, or (4) constitute a new crime.” A technical issue in the amendment has the effect of changing the fourth item in a manner that does not make logical or grammatical sense, and appears to be in error (this error is resolved by the HCPAC amendment described above).

Synopsis of SJC Substitute for SHPAC Substitute for Senate Bill 84

The Senate Judiciary Committee Substitute for the Senate Health and Public Affairs Committee Substitute for Senate Bill 84 revises the system governing violations of probation or parole (collectively, “supervision”) conditions. Under current law, all violations are considered equally, and penalties are determined at the discretion of the courts, the Parole Board, and probation and parole officers. SB84 defines a technical violation as “a violation of a condition of probation or parole that does not either create a threat to the probationer or released prisoner or others or does not constitute a new criminal charge,” while a standard violation of supervision conditions is defined as “any violation not constituting a technical violation.”

SB84 provides for graduated sanctions for offenders accused of technical probation or parole violations based on the number of prior technical violations:

- For a first or second violation of probation or parole conditions, an offender may face a maximum of three or five days of non-detention sanctions, respectively, which include “community service, restrictive curfew, behavioral health treatment, or other non-detention sanction.”
- For a third violation of *probation* conditions, the offender may face a maximum of three days incarceration; for a third violation of *parole* conditions, the offender may face a maximum of seven days incarceration.
- For a fourth or subsequent violation of *probation* conditions, the court may continue the original probation, order a new probation, or revoke probation and require the probationer serve the balance of the sentence or any lesser sentence. For a fourth or subsequent violation of *parole* conditions, the director may refer the violation to the Parole Board, which may impose a sanction of up to 30 days incarceration (counted as time served under the sentence) or for a longer period if the board finds that additional detention is necessary for the parolee’s rehabilitation or public safety. For fourth or subsequent violations of *either probation or parole* conditions, the bill requires the sanction be “commensurate with the seriousness of the violation and not a punishment for the offense of conviction.”

For standard violations of *probation* conditions, the court may continue the original probation, order a new probation, or revoke probation and either order a new probation or require the probationer serve the balance of the sentence or any lesser sentence, provided that the sanction is “commensurate with the seriousness of the violation and not a punishment for the offense of conviction.” For a standard violations of *parole* conditions, the Parole Board may continue or revoke the parole and impose non-detention sanctions, a maximum of 90-days incarceration, or “any other order as it sees fit” so long as the sanction is “commensurate with the seriousness of the violation and not a punishment for the offense of conviction.”

SB84 further limits the authority of the director of the Corrections Department’s (NMCD) Probation and Parole Division to issue arrest warrants for technical violations, requiring the director instead issue a “notice to appear” unless they find the parolee or probationer presents a flight risk or danger to the community. The bill also limits warrantless arrests and continued custody pending a hearing to only parolees accused of a standard violation who present a flight risk or danger to the community or probationers accused of a standard violation.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Over a third of prison admissions in FY22 occurred as a result of offenders having their parole revoked, often as a result of technical parole violations or drug use. Analysis of a random sample of parolee files from 2016 by LFC’s program evaluation team found 90 percent of parole violations were related to substance abuse or absconding. Although specific data on the number of prison admissions due to *technical* parole violations was not available at the time of this writing, prior year data suggests they comprise around 70 percent of admissions for parole violations.

In FY22, 841 offenders were admitted to prison as a result of parole revocation; this analysis estimates 70 percent of those admissions were due to technical parole violations, a total of 589 individuals. NMCD reports the average cost to incarcerate a single inmate in FY22 was \$54.9 thousand; however, due to the high fixed costs of the state’s prison facilities and administrative overhead, LFC estimates a marginal cost (the cost per each additional inmate) of \$26.6 thousand per year across all facilities. Comparatively, the cost of supervision was just \$4,755. The Sentencing Commission (NMSC) reports that offenders admitted to NMCD off parole spent an average of 415 days in prison in FY21 (data from FY22 were not available at the time of this writing). From these data, it can be estimated that technical parole revocations in FY22 led to increased incarceration costs of \$17.8 million, while reducing supervision costs by \$3.2 million, ultimately costing the state \$14.6 million. Assuming similar patterns of reincarceration in other years, the costs of inmates incarcerated for longer than one additional year would be incurred in the second year, resulting in annual costs of \$14.6 million due to technical parole revocations.

While this bill would not entirely eliminate parole revocations for technical violations, it will likely significantly decrease these revocations and, as a result, decrease costs to NMCD to incarcerate these offenders. Although some individuals may be incarcerated for a period up to 30 days without their parole being revoked, this is substantially less than the 415 days served on average after parole revocation under current law. This analysis assumes individuals serving a

30-day sanction for a parole violation may be incarcerated in prison facilities. If 75 percent of cases that currently result in parole revocation instead resulted in just 30 days of incarceration, NMCD would realize savings of \$20.1 per year.

It is assumed that seven-day incarceration sanctions for parolees would most likely be served in county jails. LFC estimates a marginal cost (the cost per each additional inmate) of \$19.2 thousand per county jail inmate per year, based on incarceration costs at the Metropolitan Detention Center. If half of the individuals who currently have their parole revoked instead face seven-day incarceration sanctions in county jails, this would result in annual costs of \$108.6 thousand to counties.

Similar data for probation violations were not available at the time of this writing, but it is likely this bill would also decrease costs incurred by NMCD and county jails to incarcerate inmates whose probation was revoked due to technical probation violations. Additionally, the Administrative Office of the Courts (AOC) notes the bill could result in more hearings, resulting in increased costs to courts.

SIGNIFICANT ISSUES

The Parole Board reports that, under current law, a parolee is only remanded back into NMCD custody if their parole is revoked, and any period of incarceration less than a formal revocation (such as a sanction) is served in a county jail. However, other legal analysis disagrees with this assessment, and it does not appear to be the intent of the bill that longer-term sanctions be served in jails. It may be desirable to clarify this intent explicitly in the bill.

The Parole Board raises the following concerns:

The requirement that parolees be sanctioned on a graduated system, with community service, curfew restrictions, treatment or short stays of incarceration would make it difficult for the NMAPB to timely hold hearings in order to issue the sanctions; and given the transport needs between county jails and the NMCD, the parolee might end up serving time on their violation in advance of the parole board's decision and then still be subject to community service or other restrictions upon their release.

The Parole Board notes the provisions of SB84 conflict with its statutory authority to grant, deny, or revoke parole, established in Section 31-21-25(B) NMSA 1978. Additionally, the board notes Section 31-21-10(E) NMSA 1978 requires parolees found to have violated the conditions of their release by the board are required to remain in NMCD custody.

NMCD raised the following concerns in its analysis for a previous version of the bill but did not submit updated analysis clarifying if the changes made by the Senate floor amendment to the definition of technical parole violation resolved these concerns:

Language in the current bill regarding standard violations of probation or parole and technical violations of probation or parole creates issues for the department. The department currently distinguishes between standard conditions of supervision of probation and parole and special conditions of supervision of probation and parole, a person who violates a standard condition of their

probation or parole is guilty of a technical violation and may be appropriate to serve a sanction unless they are a sex offender or violent offender. A person who violates a special condition of probation or parole, is a sex offender, or violent offender may not be eligible for the sanction program. This bill does not make a distinction between standard or special conditions of supervision.

AOC writes:

The restrictions on the first two technical violations, namely no restrictive curfew, behavioral health treatment, or other non-detention sanction prevents any required screening, assessment or supportive accountability that may be essential to acute stabilization, rehabilitative intervention, or other case management related to health and wellness.

The proscription to limit responses to violations of probation or parole to what is commensurate with the seriousness of the violation and not a punishment for the offense of conviction is consistent with evidence-based practices and could contribute to desistance from crime. This same rationale, applied more broadly, would correct the potential deficiencies noted above by allowing the officer to initiate behavioral health or supervision responses that are commensurate to the demonstrated needs of the individual. For example, drug tests positive for illicit drugs or indicating misuse of licit substances should be addressed commensurately to the seriousness of the situation, such as requiring evaluation for substance use disorder (SUD).

The office of the New Mexico Attorney General (NMAG) raises the following concerns:

Prudentially, treatment and rehabilitation of convicted criminals requires active participation in their own rehabilitation and participation in programs. The substitute bill is silent as the treatment of absconders, and would appear to treat absconding from offender-specific treatment as a technical violation. Especially for sex offenses or serious violent crimes, those who are convicted of these crimes and cease to become active participants in their own rehabilitation would appear to pose a different set of risks that are currently addressed by standard conditions of release. Not distinguishing between the underlying risks posed by the offense of conviction -- while severely limiting options for protecting public safety by the responsible supervising authority -- are likely to increase risks to public caused by contumacy towards rehabilitation.

The Administrative Office of the District Attorneys (AODA) writes:

Senate Bill 84 would take away the discretion of the Courts to impose probation violates as they deem fit for their communities. A similar program is in place in the 2nd Judicial District courts but decide by each individual judge whether or not a defendant should be place in the program. The judges make the determination based on the defendant criminal history and a prior history on probation. Senate Bill 84 would treat all defendant as the same on probation. Not taking in consideration if the defendants are convicted of a sex offense or a property crime. The Courts should have the discretion to shape each term of probation conditions

to each defendant. The prosecutors and defense counsel currently have input at sentencing whether or not a defendant should be placed in program of graduated sanctions. Senate Bill 84 would take away the input from prosecutors whether the defendant is a good candidate for the program. Not every crime and defendant are the same as SB 84 would treat them as all equals. The Courts should have discretion to treat each defendant on probation on their own merits and unique situation.

The District Attorney's office should be notified of any technical violations. The District Attorney's office should have the ability to file a motion if they believe that the violation is not a technical violation but a standard violation.

The Department of Public Safety writes "In many respects...[SB84] places into statute what was referred to as the STEPS program for probation violations that has existed in the Second Judicial District. While DPS remains unclear about what is the problem with leaving these determinations to individual judges, these changes overall are all favorable to public safety."

RELATIONSHIP

SB84 relates to Senate Bill 29, which addresses medical and geriatric parole.

TECHNICAL ISSUES

As noted under Significant Issues, above, it may be useful to clarify if the bill intends incarceration sanctions to be served in county jails, NMCD facilities, or some combination of the two.

NMSC raises the following concerns regarding the definition of "technical parole violation":

The Senate Floor Amendment effectively adds an additional meaning to the definition of "technical violation of probation" or "technical violation of parole," and changes one of the present meanings, as follows:

- 1) The new meaning is that the violation does not violate a condition that the probationer or parolee refrain from having contact with a victim or witness.
- 2) The modified meaning is that instead of the violation not constituting a new *criminal charge*, that it does not constitute a *new crime*.

While these changes do not change the overall analysis of this bill from NMSC, the two changes as drafted have problems:

- 1) The new meaning that the probationer or parolee refrain from having contact with a victim or witness does not make it clear the presumed intent, that the victim or witness is connected with the probationer's or parolee's underlying crime.

- 2) It is unclear, with the change in language from "criminal charge" to "new crime," how Probation and Parole will judge a violation. A "new crime" seems to imply that the person would have a new conviction, rather than a new charge, which would be a significant change.

NMAG raises concerns regarding the definition of “technical parole violation” in SB84, writing:

... the definition of “technical” under SB84 ... would likely not include the positive urinalysis that drives many “technical” violations in courtrooms across the State. See e.g. LR2-307 (defining technical violations to include “urine tests positive for drugs. . . except where exempted by the judge”). This is because, depending on the drug, it may already be categorically considered a “threat to the probationer or release prisoner” to continue consuming those controlled substances defined as having a “high potential for abuse.” See NMSA 30-31-5.

AOC notes the existing definitions of “adult” and “probation” result in SB84 applying only to individuals under supervision by NMCD’s Probation and Parole Division and excludes metropolitan and municipal court probation services and county misdemeanor compliance programs.

NMAG notes, “The Supreme Court has promulgated Rule 5-805(C) NMRA to permit District Courts to develop programs for technical violations of probation. This proposal will supplant all of those individually tailored plans.”

AODA writes, “The district attorneys’ offices file motions to revoke or review probation when a probationer commits a violation(s). It is not clear from the bill whether the district attorneys’ offices have a duty to prosecute a defendant for technical violations, and it could be argued that the NMCD’s PPD prosecutes technical violations in court.”

OTHER SUBSTANTIVE ISSUES

AOC provides the following analysis:

Initial or remedial responses to behavior are best predicated upon validated and objective screening and assessment instruments, not solely upon a technical violation or codified reaction. Re-evaluation and re-assessment should be included before, or in conjunction with, any consideration of re-incarceration. Further the type technical violation should be evaluated for specialized referrals as a means to avoid incarceration. For example, drug testing violations that demonstrate a lack of ability to remain free of illicit substances and missing appointments for treatment services, etc. may indicate a justice-involved individual needs the services of a treatment court to get the help they need. This would often be a more appropriate referral than incarceration.

Treatment courts have been employing the risk-needs-responsivity framework for many years and there have been many lessons learned in the decades of responding to violations. The best interventions are those that are responsive to the risk and needs of the individual on probation. Supervision intensity and services should be predicated upon objective screening instruments as noted above.

The idea of graduated sanctions is a justice system best practice and has been implemented with significant success in the various treatment court types within the drug court model. Several essential elements should be considered when implementing sanctions to positively impact the behavior of justice-involved

individuals, such as the potential habituation and ceiling effects of the response (including incarceration), and the proximal and distal nature of the expectations placed upon the probationer.

However, AOC also notes the following potential issue:

A potentially significant issue in SB84 involves the possibility that the restrictions placed upon the court to respond to technical violations would be construed to apply to treatment court programs, aka, drug courts. If so, the result would be a severe impact to the evidence-based practices guiding treatment court responses to behavior.

Treatment court responses to behavior are predicated upon many factors and variables such as the individualized treatment plan in place, proximal and distal goals, previous incentives, therapeutic adjustments and sanctions provided, length of time in the program, and other circumstances in the participant's life. These responses are part of a coordinated care approach developed by a multidisciplinary team of professionals and ultimately decided on by a judge during a specialized treatment court docket. If SB84 is construed to apply to treatment courts, it would undermine the ability for the program to employ the best practices strategies that have made these types of programs successful for decades.

PDD writes:

Because probation and parole are designed to enable individuals to reintegrate into society, the distinction between technical and non-technical violations is an important one. Many jurisdictions in New Mexico have adopted local rules creating graduated responses to technical violations in recognition of the distinction between struggling to comply with conditions and flagrant disregard for supervision. *See, e.g.* LR2-307; LR7-301; LR5-301. To ensure uniformity throughout the state and to prevent undue incarceration for technical violations (the stated purpose of the bill), it makes sense to codify statewide something akin to the existing local technical violation programs.

The procedures proposed by SB 84 ensure that the probation and parole officers retain the discretion not to *seek* custodial sanctions for a technical violation at all if they feel there are more productive alternatives, such as treatment, counseling, or other supportive services. If the probation/parole officer deems sanctions necessary and appropriate, the bill specifies maximum sanctions for the first violations, moving toward progressively increasing custodial sanctions before moving toward full revocation. The board and district court also retain discretion for full revocation for non-technical violations and upon a fourth technical violation, but are not required to impose full revocation or any particular sanction even then.

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