

<b>LFC Requester:</b>	
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**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:**

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*{Analysis must be uploaded as a PDF}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** Jan. 22, 2024  
**Bill No:** SB 39-280

**Sponsor:** Bill O’Neill  
**Short Title:** Limit Incarceration for Tech Violations

**Agency Name and Code**    LOPD-280  
**Number:** \_\_\_\_\_  
**Person Writing**    Kim Chavez Cook  
**Phone:** 505-395-2822    **Email** [Kim.chavezcook@lopdnm.us](mailto:Kim.chavezcook@lopdnm.us)

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

SB 39 addresses some of the issues addressed in SB 84 (2023), SB 141 (2021), and HB 654 (2019), by distinguishing between technical and standard violations of probation and parole supervision.

SB 39 would create a statewide technical violation penalty scheme, addressing variations between judicial districts under current law. It seeks to reduce the incarceration consequences for “technical violations” of parole and probation supervision. The bill cleans up some language in various sections, such as replacing the phrase “released prisoner” with “parolee” and referring to a “sanction” for violations, instead of a “sentence.”

Section 1 of the bill adds a new subsection to NMSA 1978, Section 31-20-5 (“Placing defendant on probation”) allowing a sentencing judge to categorize certain probation conditions that would otherwise be “technical violations” as incurring “standard violation” sanctions for sex offenders and serious violent offenders.

Section 2 updates definitions used in the Probation and Parole Act. Of note, it adds a definition of “absconding” that excludes minor missed appointments. It then differentiates standard and technical violations of probation and parole. It defines a “standard violation” as any violation:

- (1) that violates a condition that the probationer or parolee refrain from having contact with a victim or witness;
- (2) that constitutes absconding;
- (3) that constitutes a new crime not constituting a technical violation; or
- (4) for a sex offender or serious violent offender pursuant to Subsection C of Section 31-20-5 NMSA 1978, any contact with the victim or any violation of a condition designated by the sentencing court as a standard violation;

and defines a “technical violation” to mean “any willful violation of conditions of probation or parole supervision that is not a standard violation, including a positive chemical test for alcohol or controlled substance consumption or missing a scheduled supervision appointment.” The bill then re-alphabetizes the terms defined throughout this section.

Section 3 of the bill addresses the procedure when a person is accused of a parole violation. 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. Subsection D describes the parole board's options for sanctioning standard violations, to include a maximum 90 days of incarceration, **or** "any other order as it sees fit." **In contrast with 2023's SB 84, SB 39 does not provide the additional guidance that "the sanction shall be commensurate with the seriousness of the violation and not a punishment for the offense of conviction."**

Thereafter, in Subsection E, the bill would create graduated sanctions for first, second, third, and fourth (or subsequent) technical violations of parole, as follows:

- For a **first**, a maximum 3 days of non-detention sanctions, including "community service, restrictive curfew, behavioral health treatment or other non-detention sanction"
- For a **second**, a maximum 5 days of non-detention sanctions, employing the same language
- For a **third**, a maximum 7 days of incarceration
- And for a **fourth** or subsequent, "may impose incarceration for a fixed term up to thirty days, which shall be counted as time served under the sentence, **or enter any other order as it sees fit.**"

In contrast to 2023's SB 84, a new Subsection F provides that the parole board may provide sanctions more severe than those outlined in (E), "if the board finds that additional detention is necessary for the parolee's rehabilitation or public safety."

Section 4 of the bill addresses *probation* violations with graduated sanctions for technical violations, maintaining a court's current authority to respond to non-technical violations, providing that the court may provide sanctions more severe than those outlined in B(1-4), "if the court finds that additional detention is necessary for the probationer's rehabilitation or public safety." The bill retains the court's current discretion to fully revoke probation for a fourth or subsequent technical violation. It also 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 court may issue an arrest warrant.

## **FISCAL IMPLICATIONS**

Parole violations are adjudicated and sanctioned by the parole board. LOPD does not represent parolees before the parole board in adjudicating violations of conditions of release, but many people are under "dual" supervision so that parole violations are often handled through the probation process instead. Only a subset of parole violations are handled exclusively through the parole board's revocation process. LOPD is not privy to the number of parole violations processed by the board each year. However, the NM Sentencing Commission reports that in the last year, the average length of stay in NMCD for a parole violation was 377 days. *See* NMSC, Profile of New Mexico Prison Population, at 4 (Dec. 2022), available at <https://nmsc.unm.edu/reports/2022/confined-report-2022.pdf>.

Probation violations are adjudicated and sanctioned by district courts. While local "STEPS" programs handle technical violations with graduated sanctions in some judicial districts now, not every case falls within the technical violations program and many judicial districts do not have such a program in place.

LOPD represents probationers in district court when probation violations are referred to the district attorney for revocation proceedings. The available sanction for a probation violation is the entirety of a probationer's suspended or deferred sentence, which can vary from one year to decades of potential incarceration. With an assurance of reduced sanctions for first, second and third technical violations, the need to fully litigate those violations could potentially be reduced, if a person were willing to plead to the violation and accept the reduced sanction. If that is the case, LOPD probation revocation caseload could be somewhat reduced.

Although exact numbers are difficult to identify, significant number of New Mexico prison inmates are serving a sentence imposed for technical violations of probation or parole. The Sentencing Commission's December 2022 report on the NM prison population reviewed a snapshot of the 5,384 prisoners incarcerated on June 30, 2022. It identifies 908 inmates incarcerated for parole violations, or 16.9%. The data does not distinguish between technical and non-technical violations. *Id.* at 2. Analyst confirmed with staff at the NM Sentencing Commission that NMCD (Corrections) does not track admissions for probation violations, as they are instead tracked as admissions for the underlying felony, so data for probation violation admissions is not available. However, analyst believes the number is at least equal to the number of parole violators.

This information is consistent with a January 2023 LFC report which tracks parole returns but not probation returns. NM LFC Report to the 56th Legislature, First Session, Vol. 1: *Legislating for Results: Policy and Performance Analysis*, 130-33, available at [https://www.nmlegis.gov/Entity/LFC/Documents/Session\\_Publications/Budget\\_Recommendations/2024RecommendVol.pdf](https://www.nmlegis.gov/Entity/LFC/Documents/Session_Publications/Budget_Recommendations/2024RecommendVol.pdf). The LFC report on NMCD performance indicates:

[R]ecidivism due to technical parole violations fell 6 percentage points [between FY21 and FY22]. Reduced recidivism aligns with the reduction in prison admissions due to parole revocations, which fell 13 percent in FY22 compared with FY21, and went from comprising 41 percent of total admissions in FY21 to 35 percent in FY22.

Improved recidivism rates may reflect improved reentry programming, but other factors upstream in the criminal justice system, such as arrests, could also impact recidivism. Despite meeting the target for overall recidivism, the measure's rating remains yellow due to a lack of historical data with which to compare current results (see Data Quality Concerns on page 131).

*Id.* at 130. The report also describes "data quality concerns" which impact past evaluations of parole violation returns to prison, explaining that, during FY21, "NMCD reported its overall three-year recidivism rate had been reported incorrectly **since 2016** due to a database error that erroneously counted all intakes to the parole system as prison admissions for purposes of calculating reincarceration rates." *Id.* at 131. It explains that NMCD has not provided corrected historical data, so all LFC reports on recidivism rates from the past 3 years are in question and it is impossible to tell whether current rates represent an increase or decrease. *Id.*

Similarly, due to an error in NMCD reporting,

several prior years' performance reports had excluded absconders when calculating recidivism rates for technical parole violations, although the measure

is defined to include absconders. The department included absconders in its FY21 reports but had not informed LFC of this change. As a result, it is not possible to compare FY21's 30 percent recidivism rate for technical violations to prior years' performance, and it is not clear if this is an increase or decrease.

*Id.*

Despite the difficulty with hard data, the average cost to incarcerate someone in the state's prison system is about \$40.4 thousand annually. Because SB 39 would place limitations on incarceration for technical violations, a reduced fiscal impact on NMCD is guaranteed.

## **SIGNIFICANT ISSUES**

Under current law, a technical probation violation is subject to full revocation and imposition of the balance of a suspended sentence, even on a first violation. Certainly, some probation/parole officers refrain from seeking revocation on a first minor violation and some judges are lenient on minor violations brought to court. Nevertheless, the statutory scheme provides no guidance discouraging full incarceration sanctions for a first technical violation.

In October 2018, the Legislative Finance Committee released a program evaluation of the Corrections Department in which it encouraged NMCD to improve case management of parolees to ensure connection to services, implement evidence-based programs statewide (including graduated interventions, short jail-time, etc.) to maximize attempts to divert offenders from full revocation.

Although custodial sanctions may serve purposes other than behavior change (e.g., public safety interest in addressing behavior considered to be a threat to themselves or others), current research does not support the system- and individual-level cost of relying on these sanctions as a method to promote success on supervision.

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 39 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.

## PERFORMANCE IMPLICATIONS

## ADMINISTRATIVE IMPLICATIONS

## CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

## TECHNICAL ISSUES

While the graduated sanctions otherwise align for probation and parole technical violations, there appears to be a drafting error causing a discrepancy for *third technical violations*; the parole provision in Section 3 provides for up to seven (7) days' incarceration, while the probation provision in Section 3 allows for up to three (3) days' incarceration.

Analyst is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill and analyst is unaware that it has been drawn pursuant to a special message of the Governor.

## OTHER SUBSTANTIVE ISSUES

As noted above, SB 39, while providing graduated sanctions that are, for the most part, less punitive than is currently possible, still relies on custodial sanctions; i.e., incarceration. Furthermore, because a person can be arrested and held in custody until their violation is adjudicated by the board or district court, a person often spends months in jail or Corrections awaiting that hearing. The bill seeks to dramatically limit the use of **pre**-adjudicatory detention for technical violations.

In 2015, researchers did a rigorous evaluation of the impact of jail versus community-based sanctions, using data from over 800 violations committed by a random sample of probationers and parolees on intensive supervision probation to examine whether jail sanctions are more effective than community sanctions in 1) extending time to the offender's next violation event, 2) reducing the number of future violations, and 3) successfully completing the probation program. See Wodahl, E.J., Boman IV, J.H., Garland, B.E. (2015), *Responding to probation and parole violations: Are jail sanctions more effective than community-based graduated sanctions?* JOURNAL OF CRIMINAL JUSTICE, 43, 242-250.

The study found no evidence to suggest that jail sanctions are any more or less effective than community-based graduated sanctions (such as increased treatment participation, electronic monitoring, and written assignments) in bringing about compliance with release conditions. The imposition of a jail sanction for noncompliance as opposed to a community-based sanction did not affect the number of days until the next violation, the number of subsequent violations, or the overall likelihood of completing supervision. Furthermore, the number of times the person went to jail, the number of days spent in jail, or the timing of the jail sanction did not influence peoples' outcomes.

Additional studies in Multnomah County, Oregon and Olympia, Washington found similar results. Rengifo, A.F. & Scott-Hayward, C.S. (2008). *Assessing the effectiveness of intermediate sanctions in Multnomah County, Oregon* (Clients who were given jail plus programs, while still more likely to recidivate than clients who did not receive any sanctions, had a lower likelihood of failure compared to the jail-only sub-sample); Drake, E. K., & Aos, S. (2012, July), *Confinement for technical violation of community supervision: Is there an effect on*

*felony recidivism?* Washington State Institute for Public Policy (using jail as a sanction for a technical violation of the conditions of supervision does not lower recidivism for the commission of new felonies).

Although custodial sanctions may serve purposes other than behavior change (e.g., public safety interest in addressing behavior considered to be a threat to themselves or others), current research does not support the system- and individual-level cost of relying on these sanctions as a method to promote success on supervision.

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

## **AMENDMENTS**