

LFC Requester:	Scott Sanchez
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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 1/18/2024
Bill No: SB39

Sponsor: Bill O’Neill, Antonio Maestas & Gail Chasey
Short Title: Limit Incarceration for Technical Violations

Agency Name and Code Number: 770-NMCD
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
0	0	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
0	0	0	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(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

Synopsis: Amends the Probation and Parole Act by limiting incarceration for “technical violations” of probation and parole. Establishes standards for two new levels of violation: Standard Violation and a Technical Violation of parole or probation and imposes limitations on sanctions that may be imposed for each, particularly for a technical violation.

STANDARD VIOLATION (for a Sex Offense or a Serious Violent Offense).

The court is given discretionary authority to designate specific and particular conditions that justify a “standard violation” for a defendant serving a period of probation under a suspended, deferred or condition discharge from a plea or conviction that includes either: (a) a sex offense, or (b) a serious violent offense. The court may order that violating these conditions constitutes a “standard violation” if it finds by clear and convincing evidence that the “additional conditions” are necessary to ensure public safety or the safety of a particular individual.

DEFINITIONS

The act proposes four new definitions, three of which are key to understanding the new sentencing criteria being proposed by the bill:

"absconding" means that a person under supervision willfully makes the person's whereabouts unknown or willfully fails to report as ordered with a purpose to evade compliance with the person's supervision obligations by making the person's self unavailable for supervision, which may be inferred from surrounding circumstances, and when a person's failure to appear without notice for three or more consecutive supervision appointments of which the person had actual notice, shall provide a rebuttable presumption of that purpose;

"standard violation of probation" or "standard violation of parole" means 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 Sec. 31-20-5, any contact with the victim or any violation of a condition designated by the sentencing court as a standard violation.

"technical violation of probation" or "technical violation of parole" means 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.

CRITERIA FOR RETURN OF PAROLE VIOLATOR.

FOR A STANDARD VIOLATION, the board or director may issue a warrant for the arrest of a parole violator which authorizes the warden to return the parolee to the actual custody of the institution from which released, or any other suitable detention facility designated by the board or the director. If the parolee is out of state, the warrant shall authorize the warden to return the parolee to the state.

FOR A TECHNICAL VIOLATION, the director shall issue a notice to appear served personally upon the parolee unless the director authorizes an arrest warrant based on a flight risk or danger to the community.

The director may arrest the parolee without a warrant or deputize an officer with power of arrest by setting forth in writing that the parolee has, in the judgment of the director, committed a Standard Violation of parole and the parolee presents a flight risk or danger to the community. When the arrest occurs without a warrant, the parolee "shall not be returned to the institution" unless authorized by the board or director. However, the bill then takes a seemingly contradictory turn by stating that, pending hearing on a charge of a Standard Violation of parole, the parolee presenting a flight risk or danger to the community "shall remain incarcerated in the institution." (See, p.8 of bill, Subsec. B.)

Upon arrest and detention or service of a notice to appear, the board is required to promptly hold a parole revocation hearing on the "parole violation charge."

If a Standard Violation of Parole is established, the board is given the discretionary authority to continue to revoke the parole, or to impose detention for a fixed term up to 90 days, which shall be counted as time served under the sentence, or enter another order as it sees fit.

PAROLE TECHNICAL VIOLATION HEARING SANCTIONS

If a Technical Violation of Parole is established before the board at a "technical violation hearing," the board shall not impose a sanction for more than 3 days of community service for a first violation, 5 days of community service for a second violation, and 7 days of community service for a third violation, and restrictive curfew, behavioral health treatment or other non-detention sanction for first, second or third violations. For a fourth or subsequent technical violation, the board is given discretion to impose incarceration for a fixed term up to 30 days, which shall be counted as time served under the sentence or enter any other order as it sees fit. The board may impose incarceration beyond this if it finds that additional detention is necessary for the parolee's rehabilitation or public safety.

CRITERIA FOR RETURN OF PROBATION VIOLATOR

FOR A STANDARD VIOLATION, the court may issue a warrant for the arrest of a probationer which authorizes return to the custody of the court or to any suitable detention facility designated by the court. The court may issue a notice to appear to answer a charge of

any violation and shall issue the notice for a Technical Violation of probation unless the court issues an arrest warrant based on a flight risk or danger to the community. The notice shall be personally served on the probationer.

The director may arrest a probationer without a warrant or deputize an officer with power of arrest to do so by setting forth in writing that the probationer has, in the judgment of the director, committed a Standard Violation of probation. As under existing law, the written statement is sufficient warrant for the arresting officer to have the probationer placed in a county jail or other place of detention. Upon arrest and detention, the director shall immediately notify the court and submit a written report showing the manner in which the probationer has violated the conditions of release.

Following service of a notice to appear or arrest, the court shall hold a hearing, which may be informal, on the violation charged probation to serve the balance of the sentence imposed, or any lesser sentence, EXCEPT that the court:

If a standard violation of probation is established, the court may continue the original probation or revoke the probation, order a new probation with new conditions, or require the probationer to serve the balance of the sentence, provided that court:

FOR A TECHNICAL VIOLATION, the court shall not impose a sanction of more than 3 days of community service for a first violation, 5 days of community service for a second violation, along with restrictive curfew, behavioral health treatment or other non-detention sanction for either the first or second violations. For a third violation, the court shall not impose a sanction of more than 3 days of incarceration. And for a fourth or subsequent violation, the court may continue the original probation or revoke it and either order a new probation with any condition provided for in Sec. 31-20-5 or 31-20- 6 or require the probationer to serve the balance of the sentence imposed or any lesser sentence.

The court may impose incarceration beyond the terms outlined if it finds that additional detention is necessary for the probationer's rehabilitation or public safety.

If the sentence was deferred, the court may impose any sentence that might originally have been imposed but credit shall be given for time served on probation (and the sentence is subject to sentencing limits imposed for Technical Violations in Subsec. B of Sec. 31-21-15).

FISCAL IMPLICATIONS

The requirement that certain parole sanctions ordered by the board be served in county jails could have a significant fiscal impact as parolees found to have violated conditions of their release by the board remain in NMCD custody pursuant to Section 31-21-10(E), NMSA 1978. As statutory NMCD inmates, even if an inmate or parole violator is prohibited from being in NMCD custody, NMCD remains responsible for the daily costs of incarceration, health care, and other costs. Without addressing cost sharing between the department and county jails, specific cost estimations cannot be made, but could constitute substantial amounts as there could be an increase cost to NMCD to house these individuals in county detention centers. The current budget for retaking an inmate is calculated in the jurisdiction from where the offender's violation occurred.

SIGNIFICANT ISSUES

The proposed legislation presents numerous substantial concerns outlined below;

Section 2A- Absconding: The definition in the bill stipulates that an offender must miss three or more consecutive appointments to be declared as an absconder. However, this means that it could take approximately three months (for a minimum/medium supervision level offender as these offenders report 1 time a month) before they are officially declared an absconder. This prolonged period without supervision poses a potential risk to the community, especially when the offender is absent without a warrant. Additionally, proving that an offender received notice of appointments after missing the first one becomes challenging when their address is no longer valid or their phone numbers are non-functional. It is recommended to eliminate the term “willfully” from the absconder definition. The process of proving an offender’s willingness to abscond raises complexities and needs to be reevaluated.

Section 2J – Standard Violation of Probation or Standard Violation of Parole: Needs to be amended to include possession of a firearm or explosive device as a standard violation. An offender in possession of a firearm poses a significant risk to public safety.

Section 2K- Technical Violation: Needs to be amended to include that a technical violation is a "a violation that does **not** constitute a threat to the community, threat to the probationer/parolee or others". The proposed legislation would permit the arrest of a parolee for standard or technical violations if they pose a flight risk or threat to the community, eliminating arrests solely for being a threat to self. Presently, probationers and parolees can be taken into custody after positive drug screenings for their safety while awaiting entry into detox or inpatient treatment programs.

Likewise, substance use is categorized as a technical violation leaving the possibility that substance use would not rise to the level of a full violation, in turn a parolee would not be subject to a full revocation and would be eligible to receive a satisfactory discharge from supervision while continuing to use illegal substances during the term of supervision.

Section 3B line14 - Needs to be amended to read "committed a standard violation of parole **OR** the parolee presents a flight risk or danger to the community." This would allow us to arrest if the parolee has numerous technical violations and they pose a threat to the community or themselves because of their repeated violations.

Section 3E- Conducting hearings for each technical violation is impractical and could further burden an already stretched parole board. If we are considering the implementation of a matrix to handle technical violations, this can be achieved without necessitating a hearing for each case.

This section also lacks clarification on when a technical violator can be arrested. While it is important for us to work with offenders who have technical violations, which is present practice, there is a point where repeated technical violations pose a risk to the individual, community and others. Language also needs to be added to mandate an appearance before the parole board when the offender becomes a risk to themselves, the community, and others when there are repeated technical violations.

Section 3E 1 and 2 – The verbiage used is confusing “Shall not impose a sanction of more than three days of community service, restrictive curfew, behavioral health treatment or other non-detention sanction for a first technical violation of parole”. Does this mean that we can only

place them on restrictive curfew for a three-day period? The same issue applies to all the other listed sanctions, three days of behavioral health treatment or it cannot be imposed?

The proposed bill also lacks a specified timeframe for completing community service sanctions and fails to emphasize the importance of timely completion for sanctions like behavioral health treatment. Consequently, for subsequent violations where sanctions accumulate, the parolee would not be held accountable for fulfilling these sanctions.

Finally, the requirement that certain parole sanctions ordered by the board be served in county jails could have a significant impact as NMCD is not responsible for the availability or quality of programming options at county jails. Active participation in programs is required for meritorious deductions authorized for returned parole violators in Section 33-2-34(A)(3)-(4) and without the ability to earn good time, violators remaining in county jails pursuant to this bill might have a cognizable complaint relating to good time calculations in accordance with the law.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

Section 3 of the bill authorizes the board and the director to issue warrants, but it does not indicate who is responsible for serving the warrant. This distinction is necessary to determine who is responsible.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

N/A

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS

N/A