

LFC Requester:	
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AGENCY BILL ANALYSIS
2016 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 Jan. 22, 2016
Bill No: HB 181

Sponsor: Paul A. Pacheco
Short Absconding From Probation or
Title: Parole

Agency Code: 264
Person Writing Gary Cade
Phone: 505-507-7752 Email cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	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: HB 181 would create a new crime, punishable as a fourth degree felony, for “...any probationer or parolee who...changes residence or leaves the jurisdiction to which the probationer or parolee is restricted without permission and lacks a valid, legal excuse for not being available for supervision...” by their probation and parole officer.

FISCAL IMPLICATIONS

Unknown, although it seems likely that the increased exposure to being convicted of a felony and having to serve time in prison will result in more litigation which will require more personal and financial resources for the courts, prosecutors, defenders and corrections department.

SIGNIFICANT ISSUES

HB 181 would apply to persons supervised by adult probation and parole division of the corrections department that “changes residence or leaves the jurisdiction” to which they are restricted without, “a valid, legal excuse for not being available for supervision.” It appears contradictory to a number of existing statutes and rules promulgated by the Supreme /Court that deal with probation. Judges now have the discretion to defer or suspend—in whole or in part, the punishment for any crime which is not a capital or first degree felony. See, Sect. 31-20-3, NMSA 1978. If the crime involved a possible sentence of imprisonment and the sentence was deferred or suspended, the court must place the defendant on probation for all or some portion of the period of sentence deferred or suspended if they are in need of supervision, guidance or direction that is feasible for the corrections department to furnish. See, Sect. 31-20-5, NMSA 1978). Cf., Sect. 31-19-5, NMSA 1978 (Same for misdemeanors.) and Sect.35-15-14, NMSA 1978 (Municipal ordinances probation authorized).

The District Attorney is given complete discretion whether to file a motion to revoke probation after receiving a report of a probation violation. See, Rule 5-805(F), SCRA 1986. The Probation and Parole Act (Sects. 31-21-1 to 31-21-19, NMSA 1978) specifically states that the Act should be “liberally construed” to provide for treatment in the community for constructive rehabilitation of persons convicted of crimes. See, Sect. 31-21-4, NMSA 1978. The Act also states that even those persons in an intensive supervision program, i.e. “house arrest” and/or electronic surveillance programs, should receive “meaningful rehabilitative activities” so the risk or recidivist crime and payment of restitution to their victim(s) can be facilitated. See, Sect. 31-21-13.1(A), NMSA 1978. If a probation violation is established the judge may continue the original probation, revoke the probation and either enter a new probation or require the offender to serve the balance of the

sentence originally imposed or any lesser sentence. See, Sect. 31-21-15(B), NMSA 1978. It is possible that judges could set probationary conditions that might contravene the language of HB 181 and not set conditions regarding changing residences or leaving the jurisdiction. That seems especially so since a violation based on those criteria for probation on a minimal offense might result in a felony conviction.

Changing residences and leaving the jurisdiction are ordinarily referred to as “technical violations” since they do not involve new criminal charges. See, Rule 5-805(C), SCRA 1986. Technical violations are usually dealt with on an expedited basis, receive a pre-determined sanction and probation violators are then continued on probation. Making that conduct a fourth degree felony crime is contrary to long-established practices, although adults, and even juveniles, can have both their original probation revoked and also be prosecuted for new criminal charges that were the basis for the motion to revoke probation. See, *Matter of Lucio T.*, 119 N.M. 76 (Ct. App. 1994). Although HB 181 focusses on being “available for supervision,” there are many other potential technical violations, such as going to prohibited places, associating with prohibited persons, etc. that could also be likely to impair a convicted defendant’s rehabilitation that are not included in the bill.

HB 181, as drafted, does not limit its application to just probation imposed for felony offenses. It is conceivable that someone could be charged with a felony for moving to another residence, even within the same community, if they were on probation for misdemeanor offense or even a municipal ordinance. It’s also conceivable that if they received a probated sentence for absconding from supervision and again were unavailable for supervision because they had moved that could constitute yet another felony, and so on, exposing them to increasing sanctions as a habitual offender when their original offense was a simple misdemeanor prosecuted in magistrate or municipal court. An argument about increasing the punishment for a lesser offense is likely.

The bill would apply only to persons who move or leave the jurisdiction and lack a “valid, legal excuse for not being available for supervision” (emphasis added) by their probation and parole officer. However, no guidance is provided on what could constitute a “valid, legal excuse” so that is practically certain to give rise to intense litigation in many cases. A statute is void for vagueness if it fails to give persons of ordinary intelligence a fair opportunity to determine if their conduct is prohibited, or if police, prosecutors, judges or juries can engage in arbitrary and discriminatory enforcement because there are no standards or guidelines so allows subjective and *ad hoc* enforcement. See, *State v. Laguna*, 1999-NMCA—152. The concern over vagueness claims is so great that issue can be raised on appeal, even if it was not raised in the trial court. Id. Given the vagueness of the phrase “valid, legal excuse” in HB 181 it seems likely that there would be a challenge to both any motion to revoke probation filed involving that issue as well a challenge to any new criminal charge, especially since it would be designated as a felony.

New Mexico has a lengthy record of appeals based on the double jeopardy clauses of Amendment V of the United States Constitution and Article II, Sect. 15 of the N.M. Constitution where persons were prosecuted for multiple crimes based on conduct arising from one event. See, *Blockburger v. United States*, 284 U.S. 299 (1932) and *Swafford v. State*, 122 N.M. 3 (1991). It seems likely that litigation in the trial and appellate courts will ensue if the bill becomes law to determine if failing to be available for probation supervision, because of changing residences or leaving the jurisdiction (even temporarily?) without a valid, legal excuse, can form the basis for both a new crime and a motion to revoke probation.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS