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FISCAL IMPACT REPORT

SPONSOR: Tinnin DATE TYPED: 03/03/03 HB 703

SHORT TITLE: Gang Enforcement and Prevention Act SB _____

ANALYST: Fox-Young

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			\$0.1 Significant	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB299, HB491, HB700, SJM47

SOURCES OF INFORMATION

Responses Received From

- Public Defender Department (PDD)
- Administrative Office of the Courts (AOC)
- Attorney General (AG)
- Department of Health (DOH)
- Corrections Department (CD)

No Response

- Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

House Bill 703 enacts the “Gang Enforcement and Prevention Act.”

The bill includes a general statement of legislative intent, stating that the purpose of the Act is not to interfere with constitutionally protected rights of freedom of speech and freedom of association, but rather to deter and punish criminal activity engaged in by criminal gangs.

“Criminal gang” means an organization, association or group of three or more persons that has a common identifying sign or symbol whose members engage in a pattern of criminal gang activity.

“Pattern of criminal gang activity” means convictions for the commission of two or more specified criminal offenses (the bill lists 28 felony offenses), provided that at least one of the convictions occurs within three years of a prior conviction, and that the convictions are obtained against two or more members of the same criminal gang.

The bill creates the crime of “inducement of minors to participate in a pattern of criminal gang activity.” The penalty is a **third degree felony**.

The bill provides for increases in basic sentences when one of the 28 specified felonies is committed with the intent to aid and abet a criminal gang with a pattern of criminal gang activity. Increases are as follows:

- **Two years** for the commission of a specified felony, which shall be the first two years served and shall not be suspended, deferred or taken under advisement.
- **Two additional years** if the offender is a serious youthful offender or a youthful offender.
- **Four years** for the second or subsequent commission of a specified felony, which shall be the first four years served and shall not be suspended, deferred or taken under advisement.
- **Four additional years** if the offender is a serious youthful offender or a youthful offender.

The bill provides that if a prima facie case is established before a jury, showing that a felony was committed with the intent to aid and abet a criminal gang with a pattern of criminal gang activity, the court shall submit the issue to the jury by special interrogatory. If the case is tried by the court and a prima facie case is established, showing the felony was committed with the same intent to aid and abet, the court shall decide the issue and make a separate finding of fact thereon.

The bill provides that if at any time, either after sentence or conviction, it appears that the offender convicted of a specified felony committed the felony while engaging in a pattern of criminal gang activity, it is the duty of the district attorney to file an information charging the offender pursuant to the provisions of the Gang Enforcement and Prevention Act.

Significant Issues

The Attorney General (AG) notes that the provisions of the bill will likely invite constitutional challenges. AG notes the court may deem them void for vagueness, for burdening the first amendment right of association and on equal protection grounds.

The definitions of “criminal gang” and “pattern of criminal gang activity” are so general as to be applicable to numerous cases that lie outside the general conceptions of gang activity. The bill does not contemplate the numerous instances in which members of identifiable groups may be charged with inducement of minors or participation in a criminal gang, the outcome of which will not be “to deter and punish criminal activity engaged in by criminal gangs,” but only to increase the leverage prosecutors have in pursuing criminal charges pursuant to other sections of

the criminal code.

AG indicates that it is unclear whether section 4 is a form of solicitation statute (NMSA 1978, § 30-28-3) or a gang-recruitment statute, noting that if the statute is interpreted to apply to soliciting a person to commit a specific crime, it overlaps § 30-28-3 and may reduce penalties under some circumstances. If, however, the statute is interpreted broadly to criminalize gang recruitment without tying either the recruiter or the recruit to the commission of a specific crime, it could be considered an unconstitutional abridgment of the right of free association. AG references State v. O.C., 748 So.2d 945 (Fla. 1999) and Dawson v. Delaware, 503 U.S. 159 (1992).

AG notes that Section 5 is a "gang-enhancer" sentencing provision and that such gang-enhancers have been challenged on constitutional grounds in several states. AG references People v. Gardeley, 927 P.2d 713 (Cal. 1997) in which the California Supreme Court found no constitutional shortcoming in California's gang-enhancer, Penal Code 186.22. AG notes that California's statute is broader than this bill, in that it includes attempted and uncharged crimes as well as crimes for which a conviction has been obtained. AG also references State v. Ochoa, 943 P.2d 814 (Ariz. 1997) and State v. Frazier, 649 N.W.2d 828 (Minn. 2002). (other decisions upholding gang-enhancer statutes)

AG further notes that because section 5 requires a jury determination and applies to association with the specific intent to commit criminal activity rather than association alone, it avoids problems that have led courts to invalidate gang-enhancers in some other states. AG references State v. O.C., 748 So.2d 945 (Fla. 1999) and State v. Lopes, 980 P.2d 191 (Utah 1999).

The Public Defender Department (PDD) notes unless there is a gang "charter," specifically stating that criminal activity is the purpose of the association, it is unclear how courts will make determinations as to whether a gang leaders are responsible for criminal activity. PDD notes that as the bill is drafted, a minor could commit a criminal act that is not sanctioned by adult gang members, but that would subject the entire association to felony sanctions.

AOC notes that is not clear what evidence courts will use to make a determination that an individual is a member of a particular gang and whether an individual committed a crime with the intent to aid and abet a criminal gang.

DOH notes that the bill provides additional punitive measures for gang-related criminal activity, but it does not address the need for long-range behavioral change. Preventing adolescent gang involvement and subsequent criminal activity is a complex issue that providing for criminal penalties alone will not solve. DOH references a study of residents at youth detention centers overseen by Children, Youth and Families Department (CYFD) on December 1, 1995, revealing that 66% had dropped out or been kicked out of school, 60% had a substance abuse issue, 50% had a mental health issue, 33% were special education designated, and 30% had a history of physical and/or sexual abuse.

FISCAL IMPLICATIONS

PDD notes that the bill, as a result of its far-reaching Constitutional implications, will likely occasion a significant increase in the appellate caseload, driving up costs for courts, district attorneys, PDD and AG. PDD estimates an annual recurring cost of \$200.0 to the department, comprised of increased funding for two additional staff attorneys and an increase in contract attorney

costs.

The bill provides that it is the duty of the district attorney to file an information charging the offender pursuant to the provisions of the Act if at any time, either after sentence or conviction, it appears that the offender convicted of a specified felony committed the felony while engaging in a pattern of criminal gang activity. Given the number of felony convictions that will likely fall into this category, this procedural change will likely prompt dramatic increases in costs across the judicial system.

AOC notes that courts will require additional resources to carry out the provisions of the bill regarding the submission of special interrogatories to juries where prima facie cases are established.

The Corrections Department (CD) estimates that approximately two-thirds of the individuals convicted of the new offense will be sentenced to prison, and that the remaining offenders will be sentenced to probation. Given that the offense is defined somewhat narrowly, the department estimates an increase of between five and 30 convictions each year.

CD notes that based on fiscal year 02 actual expenditures, the annual contract/private prison cost of incarceration is \$23,552 for males, and the annual per client cost to house a female inmate at a privately operated facility is \$25,117. Because state-owned prisons are essentially at capacity, any net increase in inmate population will be housed at a contract/private facility. The annual per client cost for a standard supervision program in Probation and Parole is \$1,533, and the annual per client cost in Intensive Supervision programs is \$2,964. The annual per client cost in department-operated Community Corrections programs is \$5,618, and the annual per client cost in privately-operated Community Corrections programs is \$10,953.

TECHNICAL ISSUES

AG notes that in section 5, paragraph A, it is not clear that the technical phrase "aid and abet" bears its technical meaning. AG recommends excluding the principal criminal, who is by definition not an aide and abettor, and altering the language of section 5, paragraphs A, B and C, to read: "...is committed with the intent to promote, further, or assist in any criminal conduct by a criminal gang, ..." AG notes that this language mirrors that of California's Penal Code sec. 186.22(b)(1).

Section 4 makes it a third-degree felony to induce a minor to "participate in a pattern of criminal gang activity." AG notes that if sections 3(B) and 4 are read together, the latter requires the state to prove that the defendant used threats, intimidation or persuasion to induce a minor "to participate in a convictions for the commission of two or more of the following criminal offenses..." This doesn't make sense. AG indicates that this language, coupled with the lack of a definition of "persuasion" make section 4 vulnerable to a void-for-vagueness challenge.

For purposes of clarity, AG recommends amending the language of section 3, paragraph B, defining a pattern of criminal gang activity, to read, "'pattern of criminal gang activity' means that members of the organization, association or group of three or more persons alleged to be a criminal gang have been convicted of committing two or more of the following criminal offenses; provided..."

AG suggests including a severability clause so that the sentence enhancement provision (section 5) could survive a successful constitutional attack on the recruitment provision (section 4).

CD indicates that it is unclear whether the youthful offender enhancement (section 5, paragraph A) may not be suspended or deferred.

JCF/njw