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FISCAL IMPACT REPORT

SPONSOR: Lujan DATE TYPED: 2/26/03 HB 847
 SHORT TITLE: Theft of Identity and Unlawful Communication SB _____
 ANALYST: Maloy

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			See Narrative		

SOURCES OF INFORMATION

Responses Received From
 Office of the Attorney General
 Department of Corrections
 Department of Health
 Public Defenders Office

SUMMARY

Synopsis of Bill

House Bill 847 amends three criminal statutes: NMSA 1978, § 30-16-24.1 (theft of identity); § 30-20-12 (use of telephone to terrify, etc.); and §§ 30-20A-1 *et seq.* (antiterrorism act).

The bill amends these acts as follows:

1. Theft of identity is currently a misdemeanor. The bill would make it a second-degree felony offense when committed with the intent to commit or assist an act of terrorism, or facilitate the use of a weapon of mass destruction. Those terms are defined by reference to the antiterrorism act.
2. The use of telephone statute would be revised in three ways. First, it would include "electronic or written communication[s]", updating the statute to reflect technological progress in communications. Second, while the first offense remains a misdemeanor, a second offense is elevated to a fourth-degree felony. Third, committing the offense by threatening an act of terrorism or use of a destructive device or weapon of mass destruction (all these terms are defined) is a

third-degree felony upon first conviction, and a second-degree felony upon subsequent conviction. In addition, the bill specifically states a legislative intent that prosecution under this section would not bar prosecution under other laws.

3. The antiterrorism act would be revised in several ways. Definitions of the following terms are added: "act of terrorism" and "weapon of mass destruction." The statute currently prohibits training another in the use of firearms and destructive devices with the intent that the training will be used to promote civil disorder. The bill includes training with a "knife, box cutter or similar device" when used to further an act of terrorism or threatened use of a weapon of mass destruction. The penalty is increased from fourth to third-degree felony. Commission of an act of terrorism and use of a weapon of mass destruction, neither of which is currently prohibited by the statute, are criminalized as first-degree felonies. The bill specifically states a legislative intent that prosecution under this section would not bar prosecution under other laws.

Significant Issues

The Attorney General's Office notes two potential constitutional issues. While the issues below are noted, the Attorney General's Office also states that neither of the potential issues is a meritorious legal claim.

1. New Mexico courts could conclude that prosecution under both the antiterrorism and other criminal statutes, such as murder, would constitute double jeopardy, effectively making the anti-terrorism act a dead letter. Swafford v. State, 112 N.M. 3 (1991). However, with the inclusion of an express statement of specific legislative intent that one prosecution does not bar the other, the bill's provisions should be adequate to survive a double jeopardy challenge.

2. The Ninth Circuit has held that the first amendment protects one gang member training another in criminal techniques, so long as "imminent" criminal activity isn't planned. McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002), cert. denied, 123 S.Ct. 468 (2002). That opinion is not controlling in New Mexico and is a dubious precedent (see Justice Stevens' statement on denial of certiorari). This bill's requirement that the training be provided with the specific intent of furthering a civil disorder, terrorist act or use of a weapon of mass destruction should be sufficient to remove the conduct from the realm of "mere abstract advocacy."

FISCAL IMPLICATIONS

There are no direct, readily immediate fiscal implications for the state with HB 847. However, secondary costs may arise for such agencies as the Courts, District Attorneys Offices, Public Defenders Offices and Corrections Department if an individual undertakes criminal conduct that would fall under the heightened sanctions outlined in this bill.

Terrorism is a reality in today's world and, thus, appropriate legal preparation (such as this bill) is a responsible and sound course of action.

It is not likely a large number of convictions would arise under the heightened charges and sanctions in this bill. As such, the impact (both fiscally and administratively) are likely very manageable within the bounds of existing resources. However, if the legal preparation outlined in this bill were to become costly to the state in an unexpected turn of events, the costs are something the state simply must absorb as part of being appropriately prepared for the unique chal-

lenges of today's political environment and covert violent attacks by outsiders on the innocent.

OTHER SUBSTANTIVE ISSUES

The Office of the Public Defender has noted these additional substantive issues for consideration:

1. This bill makes a second violation of the "telephone harassment" statute a fourth degree felony. Turning a misdemeanor into a felony (as in the felony DWI statute) means that this crime cannot be enhanced under the habitual offender statute and cannot be used to enhance another crime under the habitual offender statute.

2. The bill also authorizes the state to impose additional penalties by using the same evidence twice. This provision could potentially be a violation of the double jeopardy clause of the state and federal constitutions. "The state is not permitted to use the same evidence more than once to increase a penalty. If the legislative intent of one statute and the legislative intent of the other are different (i.e., one statute protects people and one protects property) there is no double jeopardy problem. If the two statutes protect the same societal interest, there is a double jeopardy problem and this phrase is meaningless."

3. The bill seeks to redefines "destructive device" to exclude devices that are not designed or redesigned for use as a weapon unless the device is readily convertible for use as a weapon. This definition does not put a reasonable citizen on notice of what constitutes a destructive device. The provision is too vague and ambiguous. For example, is a "potato launcher" a destructive device? It meets the definition of destructive device except that it is not designed for use as a weapon. However, although it is not intended for use as a weapon, the fact that a potato can be replaced with a more serious projectile makes it "readily convertible into a weapon." School book clubs sells instructions for making a potato launcher to children in middle school. Is the publisher of the book in violation of the statute if the device is converted into a weapon? Is the teacher who distributes the book guilty? Is a child who makes a potato launchers guilty if someone else converts it to an actual weapon?

The Department of Health also raises the following for consideration:

4. The certificate of birth is widely known as a "breeder document", due to the fact that once a birth certificate is obtained, it opens the doors to obtain other types of "Identifying information". A "certificate of birth" allows a person to obtain a driver's license, identification card, US Passport, etc., which in turn allow a person to apply for and/or access credit cards, bank accounts, social security card, employment, health and human service benefits and other critical resources. If enacted, HB 847 would support Section 24-14-31 NMSA 1978 which identifies penalties for violation of the Vital Statistics Act and would increase penalties for terrorist acts.

SJM/sb:yr