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FISCAL IMPACT REPORT

SPONSOR Swisstack DATE TYPED 2/18/05 HB 227/aHJC

SHORT TITLE Criminal Street Gang Activity SB _____

ANALYST Hanika-Ortiz

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			\$0.1	Recurring	

Relates to HB 226 Street Gang Activity Penalty

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
		\$0.1	recurring	

SOURCES OF INFORMATION

LFC Files

Responses Received From

Corrections Department (CD)
 Attorney General's Office (AGO)
 Administrative Office of the Courts (AOC)
 Public Defender Department (PDD)

SUMMARY

Synopsis of HJC Amendment

The House Joint Committee Amendment further defines a "finding of fact" as an event proven beyond a reasonable doubt to a jury or judge. The basic sentence structure is altered from the original bill as follows:

- (1) an additional one year for a fourth degree felony,
- (2) an additional two years for a third degree felony,

- (3) an additional three years for a third degree felony resulting in death,
- (4) an additional four years for a second degree felony,
- (5) an additional six years for a second degree felony resulting in death.

The HJC Amendment allows burglary and the unlawful taking of a motor vehicle to be added to the list of felonies subject to the proposed sentence enhancements. In the original bill, enhancements will run consecutive with the basic sentence. The Amendments adds language clarifying that if more than one enhancement is imposed, the enhancements provided will run concurrently.

Synopsis of Original Bill

HB 227 creates a new section in the sentencing act that defines “criminal street gangs” and “pattern of criminal gang activity” with Subsection A detailing increases in basic sentencing for those found to have committed the crimes below in support of such gang activity.

Subsection B lists the crimes that would be subject to enhancement:

- Homicide
- Voluntary manslaughter
- Aggravated assault
- Assault with intent to commit a violent felony
- Aggravated battery
- Shooting at a building, at or from a motor vehicle
- Aggravated stalking
- Kidnapping
- Sexual exploitation of children by prostitution
- Dangerous use of explosives
- Possession of explosives
- Criminal sexual penetration
- Criminal sexual contact of a minor
- Robbery
- Aggravated burglary
- Extortion
- Aggravated fleeing a law enforcement officer
- Harboring or aiding a felon
- Aggravated assault upon a peace officer
- Assault with intent to commit a violent felony upon a peace officer
- Aggravated battery upon a police officer
- Bribery or intimidation of a witness
- Trafficking in a controlled substance
- Money laundering

Subsection C of the HB 227 makes it mandatory that the enhancements run consecutive to the basic sentence and are not to be suspended or deferred. They are as follows:

- An additional two years for a 4th degree felony
- An additional four years for a 3rd degree felony
- An additional six years for a 2nd degree felony
- An additional eight years for a 1st degree felony

Subsections D and E of HB 227 define “criminal street gang” and “pattern of criminal gang activity”.

Significant Issues

The PD has the following comments:

- The high cost of litigation under the new section.
- May require mini-trials on the issue of whether a street gang exists and whether it has engaged in a pattern of criminal gang activity.
- Considerable “guilt by association” ramifications that may be used against people with marginal involvement. “...for the benefit of...” and “in association with” a criminal street gang may be unconstitutionally vague and overbroad.
- May be multiple enhancement problems with the proposed new section, as some crimes listed are self-enhancing (trafficking, armed robbery).

The AOC has the following comments:

- The definition of “criminal street gang” is dependent upon a “pattern of criminal gang activity”. The definition of that “pattern” is in turn dependent on the term “criminal street gang,” which may link the two definitions in a potentially problematic self-referential loop. For example, to legally (by this bill) define someone as a member of a criminal street gang, that person would have to engage in a pattern of criminal gang activity. But that person cannot be guilty of engaging in such gang activity unless he or she is first defined as a gang member. Offenders seeking to avoid this bill’s increased sentences may be able to exploit the weaknesses of these two definitions, making the additional penalties difficult to impose.
- The definition of “criminal gang activity” is also problematic, as it requires linking a series of offenses over time, so that a pattern is established of offenses that “occurred within three years of each other and were committed on separate occasions or by two or more persons.” The offenses may be easily identified, but establishing a pattern linking them will be more difficult.

The AGO states HB 227 may be open to challenges pursuant to the Sixth Amendment, given the recent United States Supreme Court decisions regarding mandatory sentencing, see Blakely v. Washington, 542 U.S. (2005) and United States v. Booker 543 U.S. 2005.

PERFORMANCE IMPLICATIONS

The AOC report district court’s performance measure clearance rates may be impacted if increased penalties lead to an increased demand for jury trials and fewer plea bargains, thereby increasing the amount of judge and clerk time needed to dispose of cases.

The PD suggest HB 227 will substantially affect the workload of the PD felony trial attorneys because of the need to defend against both the underlying crime and the existence and involvement of a criminal street gang in the crime and necessity to prove a pattern of criminal gang activity.

FISCAL IMPLICATIONS

CD reports there could be moderate to substantial fiscal impact on the CD because of greater numbers serving longer sentences. However, they further state a positive fiscal impact could occur if gang activity, gang-related crimes, and criminal activity in general, reduces the number of convicted felons imprisoned or placed on probation.

The AOC report HB 227 has the potential to increase court caseloads, thus requiring additional resources to handle the increase. They propose a minimal administrative cost impact for state-wide update, distribution and documentation of statutory changes.

The PD claims these cases will require one mini-trial on the existence of the particular gang; and another on whether there is a pattern of criminal gang activity which requires proof that two or more persons committed two or more of the listed offenses within 3 years. Attorney fees, expert testimony and additional administrative costs are difficult to approximate.

ADMINISTRATIVE IMPLICATIONS

The CD is concerned HB 227 could have a substantial impact on the prison population because of the increased prison sentences. However, they further state this bill could deter gang-related crime, which would result in a decreased prison population, decreased probation and parole caseloads.

TECHNICAL ISSUES

The AGO notes listing the “predicate” felonies in subsection B along with a statute citation might make that list exclusive. Pursuant to State v. Bennet, 134 N.M. 705, (Ct App. 2003) the Court of Appeals held that when statutory references are included in enumerated lists, it precludes the interpretation that other conceivable crimes may qualify. See also State v. McDonald, 136 N.M. 417 (Sup. Ct. 2004). Some examples of typical gang crimes that were not included are: armed robbery, unlawful taking of a motor vehicle, aggravated battery on a peace officer, all crimes committed by an inmate, burglary, additional drug crimes, and unauthorized graffiti. In the text of HB 227, the AGO suggest either making the list of enumerated crimes exhaustive or changing the language so that it does not specifically list statute citations.

The PD notes that the language in subsection A of the bill, “for the benefit of, at the direction of or in association with”, is subject to a constitutional challenge for vagueness and over breadth. For example, two friends are in a bar and one happens to belong to a criminal street gang, but the other has no gang association. A fight breaks out and the non-gang member comes to his friend’s aid by joining in the fight. The gang member stabs another patron (“the victim”) while the friend is holding the victim. Under this bill, the friend may be found guilty of both his own battery and the stabbing (as an accessory) and receive the enhanced penalty even though he had no intent to further criminal street gang activity.

There is a typo in the list of offenses (B.7), as it should be “aggravated stalking” not “aggravating stalking.”

OTHER SUBSTANTIVE ISSUES

The AGO further notes that in light of Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 122 S.Ct. 2428 (2002), the Supreme Court held that “other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury,” Apprendi, 530 U.S. at 490, and “if a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, the fact, no matter how the State labels it, must be found by a jury beyond a reasonable doubt.” Ring, 122 S. Ct. at 2439. Therefore, given the wording of this bill it appears that a jury would have to make an additional finding that the crime was “committed for the benefit of, at the direction of or in association with a criminal street gang” and “with specific intent to promote, further or assist in criminal conduct by gang members” as outlined in subsection A of the bill.

The PD suggest HB 227 dilutes the basic principle that a person is liable for his own conduct and makes him criminally liable for the status of others as members of a criminal street gang.

ALTERNATIVES

Penalties imposed pursuant to the existing criminal sentencing act.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The CD emphasizes the lack of any real deterrence or penalty for persons engaging in gang-related crimes.

AHO/yr