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FISCAL IMPACT REPORT

SPONSOR: Moore DATE TYPED: 02/23/01 HB 662
 SHORT TITLE: Criminal Damage to Property SB _____
 ANALYST: Rael

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
		\$ 148.8	\$ 148.4	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Public Defender Department (PDD)
 Department of Public Safety (DPS)
 Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

Amends the current law to add the elements of “entering upon”, and “firing a weapon upon” to the criminal damage offense. Amends penalties for damage under a \$1000 to 60 hours of community service in addition to petty misdemeanor penalties, and increases to 100 hours community service, a fine of \$2,000 and misdemeanor penalties for a second offense committed within 24 months of the first conviction.

The additions also include a provision which may require restitution to the owner of the property and “punitive” damages against the offender. A conviction under this section shall be conclusive presumption in favor of the owner in any civil action for damages

The new portion of the criminal damage section provides for seizure and forfeiture of property “used to commit the offense of criminal damage”. It is provided that the action is in rem and a “civil” action to be brought in district court. Proceeds from the sale of any property seized shall be credited toward restitution, and if any surplus, payable to the crime victims reparation fund..

Significant Issues

The main substantive issue is whether the procedure described by the bill is a separate proceeding or a "single bifurcated proceeding" as required by the recent New Mexico Supreme Court case of *State v. Nunez*. In that case, the New Mexico Supreme Court found that separate forfeiture and criminal proceedings created a double jeopardy problem in violation of the New Mexico Constitution. The bill provides that the Rules of Civil Procedure (as opposed to the Rule of Criminal Procedure) will apply. In their opinion, the New Mexico Supreme Court cited a 1996 forfeiture act which was vetoed by the Governor. The 1996 bill contained an amendment which stated in relevant part that "any forfeiture proceeding shall be brought in the same proceeding as the criminal matter; however, the two issues shall be bifurcated and presented to the same jury." Inserting this language may avoid the Double Jeopardy problem.

PERFORMANCE IMPLICATIONS

DPS reports that by having officers participate in the seizure of property, it would take away from patrol time, citations, and activity. Output measures would be affected because of decreased activity by patrol officers.

FISCAL IMPLICATIONS

DPS estimates that 3 FTE's would be required, at an approximate cost of \$148.4 (salary & benefits for an Administrator II, a Legal Assistant, and an Attorney Master, at mid-range). Minimum range salary & benefits for these 3 FTE's would be \$87.5.

It will cost the judicial system \$400 (dollars) for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws or amendments to existing laws have the potential to increase caseloads and/or judge-time spent on cases in the courts, thus requiring additional resources to handle the increase.

ADMINISTRATIVE IMPLICATIONS

1. Because the proposed legislation allows for payment of punitive damages to the owner of the property, as well as creating a conclusive presumption in a civil action for damages that the offender damaged the owner of the property, including the owner's peaceful enjoyment or constructive use of the property as a result of a conviction, it is anticipated that individuals will more regularly contest criminal charges of this nature.
2. The constitutional problem presented by the bill could increase the number of cases which must be addressed by the Criminal Appeals Division of the Attorney General's Office.
3. Some entity will be required to find, implement and enforce the community service provision. Presently, probation services provides such monitoring, although, the amendment does not require any probation be implemented. In smaller communities, community service is not always available.

CONFLICT/DUPLICATION/COMPANIONSHIP/RELATIONSHIP

Conflicts with SB 314 and HB 18 which provide for uniform forfeiture proceedings.

TECHNICAL ISSUES

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1. DPS recommends adding a 30-day time limit for instituting forfeiture proceeding.
2. This bill conflicts with §30-3-8 (petty misdemeanor vs. fourth degree felony) in situations involving shooting into dwellings and from or into motor vehicles where the damage is less than \$1,000.
3. The AODA recommends that the provision concerning punitive damages should be inserted in the section concerning civil remedies. The agency also recommends including a provision which would also allow the victim to recover their attorney fees in any civil action brought.

OTHER SUBSTANTIVE ISSUES

1. The proposed legislation does not specifically provide that the proceeds of the sale should be first used to satisfy the costs associated with the auction.
2. Because the bill carries no appropriation and there is no mechanism to reimburse law enforcement for the costs associated with the forfeiture proceedings, there is no incentive for law enforcement to undertake the costly and time consuming procedures attendant with forfeiture. Consequently, DPS reports that it is doubtful that law enforcement will pursue the forfeiture options provided by the proposed legislation.
3. The Attorney General believes that the only effective way to create a constitutionally sound forfeiture law is to amend N.M. Const. art. II, §4 to say that the double jeopardy provisions do not apply to civil forfeiture actions.
4. Amending the statute to include an express reference to firing a weapon could present a conflict with §30-3-8 which prohibits shooting at a dwelling or occupied building and shooting at or from a motor vehicle. Section 30-3-8 makes such a shooting (which does not result in great bodily harm) a fourth degree felony. Under §30-15-1 the shooting is a petty misdemeanor unless the damage exceeds \$1000.
5. Subsections C and D of the proposed amendment appear to pertain, in part, to civil claims by private parties who suffer harm to their property. Subsection C provides that a defendant convicted under the section may be required to “pay punitive damages to the owner of the property.” These damages could not be rewarded in a criminal action as they are civil in nature and benefit a private party. According to the Attorney General’s Office, any attempt by the state to obtain punitive damages on behalf of a private party would present serious constitutional problems.

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