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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/02/09

SPONSOR O'Neill LAST UPDATED \_\_\_\_\_ HB 741

SHORT TITLE Street Gang Activities & Penalties SB \_\_\_\_\_

ANALYST Weber

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate but moderate to substantial	Indeterminate but moderate to substantial	Indeterminate but moderate to substantial	Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Similar to HBs 426 and 427

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Administrative Office of the Courts (AOC)
- Attorney General (AGO)
- Department of Finance and Administration (DFA)
- New Mexico Sentencing Commission (NMSC)
- Public Defender Department (PDD)
- New Mexico Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

House Bill 741 enacts new sections of the Criminal Code related to gang activity, as follows:

**Section 1:** provides a misdemeanor penalty for the new crime of furthering or assisting in the commission of a felony by a criminal street gang, and a fourth degree felony penalty for a second or subsequent conviction. Also, it provides definitions for “criminal street gang” and “pattern of street gang activity.”

**Section 2:** provides remedies and presumptions when a public nuisance sought to be abated under Section 30-8-8 NMSA 1978 is a center of criminal street gang activity, as defined in the bill. HB 741 creates a presumption that a center of criminal street gang activity is a public nuisance per se. The bill also creates a presumption that a place is a center of street gang activity

under certain conditions and provides circumstances under which the presumption shall not arise. HB 741 provides that if a court concludes that a center of criminal street gang activity exists at the location alleged, the court may: (1) hold a member of the criminal street gang who created, maintained or contributed to the nuisance personally liable for payment of damages; (2) direct the removal of all personal property used for the benefit of the criminal street gang from the center of criminal street gang activity and direct the sale of that property in the same manner as personal property is sold when seized under a writ of execution; (3) order the closing of the center of criminal street gang activity for a period of one year and prohibit any person entering it except under conditions specified in the order; and (4) award money damages on behalf of the community or neighborhood injured by that nuisance to the credit of the local government community rehabilitation fund.

**Section 3:** creates the “Local Government Community Rehabilitation Fund,” (“Fund”) to reimburse the governing body of a municipality or county in which a public nuisance has been abated as a center of criminal street gang activity for expenses by the county or municipality for the training of law enforcement officers and planning, construction, maintenance and rehabilitation of communities or neighborhoods that have been injured by criminal street gang activity. The fund consists of money credited to the fund pursuant to Section 2 of the Act, from money damages awarded on behalf of the community or neighborhood injured by the nuisance to the credit of the Fund.

**Section 4:** provides for the enhancement of basic sentences by 1 to 10 years for certain enumerated crimes when those crimes have been committed for the benefit of, at the direction of or in association with a criminal street gang. The increases are: for a fourth degree felony, an additional year; for a third degree felony, an additional 2 years; for a second degree felony, an additional 4 years; for a first degree felony, an additional 8 years; for an enumerated violent felony or sexual offense, an additional 10 years; for an enumerated felony committed within 1,000 feet of an elementary, middle, junior high, high or vocational school, 5 years. The following are the 28 enumerated crimes for which penalties will be enhanced: murder; voluntary manslaughter; aggravated assault; assault with intent to commit a violent felony; aggravated battery; shooting at a dwelling or occupied building or shooting 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 in the first, second or third degree; criminal sexual contact with a minor; felony criminal damage to property; felony graffiti; robbery; burglary; 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 peace officer; bribery or intimidation of a witness or retaliation against a witness; trafficking in a controlled substance; unlawful taking of a motor vehicle; and money laundering. Also, contained within this crime is the attempt to commit any of the 28 enumerated crimes. The enhanced portion of the sentence is to be served consecutively with the basic sentence and cannot be suspended or deferred. The bill provides that if more than one enhancement is imposed the enhancements shall run concurrently.

The effective date of the Act is July 1, 2009.

## **FISCAL IMPLICATIONS**

There will be expense at DFA to administer the new fund. The amount will be dependent on the number of cases and the ultimate complexity of determining the payout for each applicant.

However, money in the fund is appropriated to DFA for this purpose but there is no cap or guideline regarding the use of funds for this purpose.

The AOC notes that any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

The NMCD anticipates the bill to have a moderate to substantial negative fiscal impact on the Department if a large number of persons are convicted of these gang-related crimes and then serve prison sentences (including enhanced sentences) and/or probation/parole terms. There is no appropriation in the bill to cover these increased incarceration and probation/parole costs.

However, NMCD continues, the bill could also have a positive fiscal impact on the Department if the bill deters gang activity, gang-related crimes, and criminal activity in general, and thereby reduces the number of convicted felons sent to the Department for imprisonment or placed on probation or parole for gang-related crimes or crime in general.

The PDD estimates the enactment of this bill is likely to lead to a substantial upswing in the number of trials, thus requiring a concomitant increase in prosecution, defense, court and probation/parole resources. Convictions would, of course, require additional Corrections Department resources. Creation of a new crime – especially with felony sentencing provisions – would require additional trial resources for the courts, probation and parole, district attorneys, and Public Defender Department, and would require additional resources for the appellate courts, attorney general, and Public Defender appellate division.

Creation of harsh new sentencing enhancements would cause many more criminal defendants to proceed to trial instead of accepting a plea offer. This would result in an increased caseload and additional court time for the courts and prosecution and Public Defender attorneys, as well as an additional appellate caseload for the Public Defender Department, the Attorney General, and the appellate courts – not to mention the obvious requirement of additional resources for the Corrections Department.

The PDD continues that the nuisance-abatement proceedings in the proposed legislation provide for funds for law enforcement to enforce the abatement proceedings. No funds are provided for defense of such actions. The New Mexico Supreme Court has made clear that civil forfeitures based on criminal activities are punitive in nature, implicate double jeopardy protections, and require assignment of defense counsel. *See State v. Nuñez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264. If it were held that defense counsel constitutionally must also be provided for such actions, the Public Defender Department would need funding in order to defend them under this state constitutional mandate.

### **SIGNIFICANT ISSUES**

The NMSC offers that mandatory criminal penalties remove judicial discretion from the criminal justice process. Upon conviction, all defendants are treated the same, without regard for varying circumstances.

The PDD adds that as mentioned above, the New Mexico Supreme Court has made clear that civil forfeitures based on criminal activities are punitive in nature, implicate state double jeopardy protections, and require assignment of defense counsel. *See State v. Nuñez*, 2000-NMSC-013, 129 N.M. 63, 2 P.3d 264. If this legislation were enacted, there would be a certain challenge claiming that defense counsel would have to be provided in nuisance-abatement proceedings under a similar constitutional mandate.

The proposed legislation raises questions of whether constitutional rights to freedom of association are implicated and whether the already-existing crime of conspiracy does not already provide prosecutors with an adequate “stack-on” charge for the instances contemplated by the legislation. Thorough examination of these questions would require further detailed analysis. Appellate challenges to law would be likely if the legislation were enacted.

MW/mc