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FISCAL IMPACT REPORT

ORIGINAL DATE 2/26/09

SPONSOR Maestas LAST UPDATED _____ HB 866

SHORT TITLE Criminal Records Expungement Act SB _____

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Indeterminate See Below	Indeterminate See Below		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 649
Conflicts with HB702 and SB78

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

SUMMARY

Synopsis of Bill

House Bill 866 enacts the Criminal Record Expungement Act (Act), codifying the practice for courts to expunge an individual's criminal record in specified circumstances.

For the purposes of this bill expunge means to remove a notation of an arrest placed on an accused's state record or FBI record and to destroy or otherwise remove from public access the court records that contain any reference to or record of the proceeding.

The bill sets out procedures for expungement of records when there has been an identity theft or a wrongful arrest, indictment or charge. The person must petition the district court. After a hearing where the person shows that he is a victim of identity theft or was wrongfully arrested, indicted or charged, the court shall issue an order within 30 days with accompanying justification requiring all arrest records and public records be expunged. The court shall deliver a copy of the order to all relevant law enforcement agencies. The order shall prohibit the release of the records except upon an order of the court

The bill provides for expungement of records upon release without a conviction. The person who was released without conviction for a violation of a municipal ordinance, misdemeanor or felony, must petition the district court. The court shall order expungement of public records and files within 30 days of a petition for expungement if it finds that no other charge or proceeding is pending against the accused, including :

- an acquittal or finding of not guilty;
- a no bill or a dismissal;
- a referral to a pre-prosecution diversion program; or
- the proceedings were otherwise discharged.

The court shall deliver a copy of the order to all relevant law enforcement agencies and courts. The order shall prohibit the release of the records except upon an order of the court.

The bill provides for expungement of records upon conviction. The accused who was convicted of a felony, misdemeanor or violation of municipal ordinance, but has no other conviction after completion of the sentence and payment of fines and fees for the original conviction must petition the court. The court shall order expungement of public records and files within 30 days of a petition for expungement if it finds that no other charge or proceeding is pending against the accused:

1. for a petty misdemeanor conviction, one year has passed;
2. for a nonviolent misdemeanor conviction, two years have passed;
3. for a violent misdemeanor conviction, three years have passed;
4. for a nonviolent felony, five years have passed;
5. for a violent felony conviction not resulting in death, not involving use of a deadly weapon or requiring sex offender registration, ten years have passed; or
6. for driving while under the influence of intoxicating liquor or drugs or a domestic violence conviction, ten years have passed.

the Act including procedures for notifying the accused of the accused's rights under the Act.

The bill further provides that upon entry of an expungement order, the proceedings shall be treated as if they never occurred and officials and the accused may reply to an inquiry that no record exists with respect to the accused.

The effective date of the Act is January 1, 2010.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary will be proportional to the enforcement of this law and the number of petitions filed. 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.

DPS states there will be significant fiscal impact on the judiciary to monitor external agencies' compliance with an expungement order. Also, the court's case management system will require much reprogramming to retain information required for such monitoring and record keeping; or, a new information system will have to be developed to track such monitoring.

As a practical matter, only the DPS has any leverage with local law enforcement agencies since it provides law enforcement agencies with criminal history services including rap sheets, domestic violence order of protection information and missing person information. In contrast, the courts provide no services to law enforcement.

SIGNIFICANT ISSUES

The AGO provided the following:

The ramifications upon New Mexico's entire criminal sentencing scheme based on prior offenses for enhancement purposes posed by the bill are significant regarding the conviction provisions. The other provision regarding Identity Theft and arrest without conviction matters are much less drastic in their implications. The bill provides a desperately needed mechanism for persons who are falsely accused to clear their names and the public record.

The practical ability to expunge information in the electronic age of the Internet is highly problematic. Once information is placed into the public information domain, it is difficult to as it were "put the genie back into the bottle". Providing innocent persons and even those who were properly convicted, but have since led law abiding lives, seems to be a wise public policy choice.

The bill if enacted will have an enormous impact on several areas of existing Law. It will essentially make superfluous the antiquated outmoded and ineffective Arrest Records Information Act It will affect the Felony Habitual Offender Act Section 31-18-17 N.M.S.A. It will potentially alter radically the provisions of the Sex Offender Registration and Notification Act Section 29-11A-1 et.seq. N.M.S.A.

If prior convictions can be erased, the use for subsequent enhancement will be compromised or eliminated. The DWI sentencing scheme and other criminal laws such as Repeat Armed Robbery, Repeat Drug Trafficking and the Three Strikes Law will have to be revised.

DPS further provided:

Arrest record information is maintained for public safety and criminal justice purposes. The bill does not take this into account. Arrest record information is a history of behavior of a person and lends itself to providing investigative leads; substantive statistics regarding crime patterns; crime trend analysis; and, criminal intelligence. For example, under this bill, a sex offender will be able to expunge their sex offense which in turn could enable the offender to also be taken off the Sex Offender Registry. This will deny the public a tool that provides information that a predator may be living or working in their community.

Criminal cases are dismissed for a myriad of reasons. Dismissals based on technicalities do not necessarily or realistically obviate the conduct of the accused.

The courts are not the official custodian of criminal history records in New Mexico. The records kept by a court may include arrest and disposition information, but the courts do not verify offender identification information or any of the other functions of law enforcement that are required to create and maintain a criminal history record repository. The official criminal history repository in New Mexico is maintained by DPS and only DPS can request expungement of records from federal criminal history repositories maintained by the FBI and the National Crime Identification Center (NCIC).

DPS is statutorily mandated to collect and share criminal arrest record information. This bill will reverse that role in that primary mission; DPS will become the clearing house for sanitizing criminal histories.

This bill may be contrary to federal law. The Violence Against Women Act of 1994 (VAWA) and the 1997 Omnibus Consolidated Appropriations Act contain federal firearms laws related to domestic violence.

VAWA makes it a crime for a person who is the subject of a domestic abuse restraining order to transport, receive, or possess firearms or ammunition which have come across state or federal borders.

The Omnibus Consolidated Appropriations Act of 1997 made several amendments to the Federal Gun Control Act of 1968. The amendments prohibit the possession of firearms and ammunition by persons convicted of state or federal misdemeanor crimes of domestic violence and the distribution of firearms and ammunition to such persons. Unlike the provisions in VAWA, law enforcement officers and other governmental officials are not exempt from the amendments.

As of the effective date, September 30, 1996, any person convicted of a domestic violence misdemeanor may no longer possess a firearm or ammunition.

Allowing for expungement could result in a once convicted domestic violence offender to again legally possess a firearm.

ADMINISTRATIVE IMPLICATIONS

DPS states that expungement activity is time and labor intensive. At least two FTE's will be required to deal with expungement issues on a fulltime basis. This does not include increasing the legal support that will also be required to implement the act. Coupled with the likely spike in expungement inquiries, there will also be a significant impact resulting from the notification requirement of the Act.

RELATIONSHIP/CONFLICT

SB 649 almost duplicates HB 866. The bills differ in the section providing for expungement of records upon conviction.

This bill will directly conflict with HB702 and SB78, Additional Violent Felonies for Sentencing, seeking to amend the three strikes law for life imprisonment based upon multiple prior violent felony convictions

TECHNICAL ISSUES

Since the act requires that the FBI remove a notation of an arrest placed on person's record and to destroy or otherwise remove all records of the proceeding, DPS should be made the responsible entity since only they can submit the proper forms and required documentation under current federal rules. It should also be noted that the FBI and the NCIC interprets expungement not to mean that information is physically destroyed but that the information is not available through routinely available access methods.

Federal courts will not accept communications requesting expungement of criminal records from any court and will only accept such communications from the agency in each state that maintains the official criminal history repository.

AGO believes this bill may be in conflict with the Arrest Information Records Act Section 29-10-1 et.seq.

DW/mt