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FISCAL IMPACT REPORT

SPONSOR Maestas/ Romero, A. /O'Neill **ORIGINAL DATE** 2/08/19 **LAST UPDATED** 3/14/19 **HB** 370/aHJC/aHF1#1/ aHF1#2/aSJC/aSF1#1

SHORT TITLE Criminal Record Expungement Act **SB** _____

ANALYST Edwards

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	At least \$70.0	At least \$140.0	At least \$210.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bill 325 and House Bill 382.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Department of Public Safety (DPS)

SUMMARY

Synopsis of SFI #1

Senate Floor Amendment #1 to House Bill 370 amends Section 5 (E), which outlines what the courts must consider when determining whether justice is served by an order to expunge, by striking the Department of Public Safety or the law enforcement agency who arrested the petitioner as being eligible to submit reasons to deny expungement.

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment modifies Section 3(D) to require the courts to *provide notice to and a hearing for all interested parties and in compliance with all applicable law* before correcting the records of someone who was wrongfully identified of a crime.

Synopsis of HF1#1 and #2 Amendments

House Floor amendment #1 strikes the phrase “or wrongful arrest, indictment, or charge” from Section 3 (expungement of records upon identity theft). Section 3 now allows the expungement of records of anyone who is wrongfully identified in an arrest record or public record as a result

of identity theft.

House Floor Amendment #1 also adds language to Section 7 clarifying the effect of an order to expunge, specifically in connection with an application or query regarding qualification for employment or association with any financial institution regulated by the financial industry regulatory authority or the securities and exchange commission.

House Floor amendment #2 adds language to Section 5(C)(3) (expungement of records upon conviction) which adds a new requirement for the expungement of records upon conviction: the petitioner has fulfilled any victim restitution ordered by the court in connection with the petitioner's conviction.”

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 370 strikes the terms “arrest” and “arrested” from Section 3 of the bill which now would allow the expungement of records upon identity theft or wrongful indictment or charge.

The HJC amendment also strikes from Section 5 (Expungement of Records Upon Conviction) (E)(5), which gives the courts guidance on what may be considered when there is a request to expunge a record, the phrase “for retention of” and inserts in lieu thereof “to deny expungement.” Instead of considering why records may need to be retained, the court should now consider reasons to deny expungement. In Section 5 (G), the amendment specifically excludes embezzlement from the records expungement law pursuant to 30-16-8 NMSA 1978.

The HJC amendment strikes the original repeal section provisions and instead adds the repeal of 29-3-8.1 NMSA 1978, Identification of Criminals (Petition to expunge arrest information) and 31-26-16 NMSA 1978 of the Victims of Crime Act (Expungement from police and court records).

Synopsis of Original Bill

House Bill 370 creates the Criminal Record Expungement Act. The act allows persons to petition for criminal record expungement to the appropriate district attorney, the Department of Public Safety, and the law enforcement agency that arrested the person if:

1. they are a victim of identity theft or are wrongfully arrested, indicted or charged for a crime;
2. they are released without conviction for a violation of a municipal ordinance, misdemeanor, or felony;
3. they are convicted of a violation of a municipal ordinance, misdemeanor, or felony, following the completion of the sentence and the payment of any fines and fees owed to the state for the conviction.

The court is required to conduct a hearing on the petition and to issue an order, where appropriate, within 30 days of the hearing that requires that all related arrest records and public records be expunged, provided the required showings and findings are made as required by the bill.

The bill requires the court to deliver a copy of the order to all relevant law enforcement agencies and courts. The order is required to prohibit the law enforcement agencies and courts from releasing copies of the related arrest records and public records to any person, except upon an order of the court.

The bill requires AOC and DPS to develop rules and procedures to implement the act, including procedures to notify the accused of the person's rights under the act.

Under the bill, upon entry of an order to expunge, the proceedings are required to be treated as if they never occurred, and officials and the person who received the order to expunge may reply to an inquiry for records that no record exists with respect to the person. The bill repeals Section 29-3-8.1 NMSA 1978 governing petition to expunge arrest information of a misdemeanor or petty misdemeanor offense when the arrest was not for a crime of moral turpitude.

The effective date of the Act is January 1, 2020.

FISCAL IMPLICATIONS

Senate Floor Amendment #1

There is no anticipated additional fiscal impact as a result of the amendments.

SJC amendments

The SJC amendment which requires the courts to provide notice to and a hearing for all interested parties and in compliance with all applicable law before correcting the records of someone who was wrongfully identified of a crime may have a fiscal impact on the courts if more hearings are to be held in addition to current procedure.

House Floor amendments

There is no anticipated additional fiscal impact as a result of the amendments.

Original Analysis

The AOC explains there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the Judicial Branch would be proportional to the enforcement of this law and the filing of petitions for orders of expungement and required hearings. House Bill 370 does not contain an appropriation. Court resources will be needed to conduct additional hearings and provide paperwork as required. Generally, 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 HJC amendment does not change the estimated fiscal impact to DPS. Additionally, DPS may face increased costs from the bill to remove fingerprint information from DPS databases.

DPS provided the following estimate to the original bill:

This bill has the potential to add a significant workload to DPS, impacting the department both financially and administratively. DPS maintains records in excess of 600 thousand that would be subject to requests for expungement under this bill. If every individual chose to have their record expunged, the cost would be in excess of \$20 million dollars. This estimate

is based upon DPS Records Bureau experience. In FY17-FY18, DPS received 181 expungement requests under 29-3-8.1 NMSA 1978 and court orders. An average expungement of arrest records takes three staff a total of 1.5 hours per record at a cost of \$33 per record.

For every 1,000 cases that come in, it will cost approximately \$33 thousand in personal services costs. Hiring three full-time staff to handle the additional expungement requests would cost \$140 thousand and provide the capacity to handle approximately 4,000 records expungement request per year. Clearly, if the volume of requests is higher than 4,000 per year, a backlog would result, or additional funding would be required.

In addition to the costs mentioned above, the Department of Public Safety is required to undertake, with the Administrative Office of the Courts, a rulemaking procedure and it is expected that this process and the enforcement of the intended rules will have an additional significant fiscal impact.

This analysis assumes, since the bill becomes effective January 1, 2020, halfway through the FY20 fiscal year, that DPS would only incur half of the estimated \$140 thousand in recurring costs.

SIGNIFICANT ISSUES

The AOC provided the following analysis of the bill's requirements:

- (1) Historically, expungements are not favored in law. Recently, an inquiry gaining favor in some jurisdictions is how to balance the need for transparency in government actions versus the interest in rehabilitation and the effects of an arrest or conviction on an individual's pursuit of work, housing, or other activities.

Many jurisdictions adhere to the edict that only duly enacted legislation should guide the courts in matters of expungement. A minority of jurisdictions have held that the courts have "inherent authority" to expunge criminal records. In New Mexico, courts have refrained from accepting the argument that the courts have "inherent authority" to consider whether a criminal record could or should be expunged. Of note, this issue was before the New Mexico Supreme Court in *Stump v ABQ Police Dep't*, S-1-SC-35912 (N.M. Mar. 23, 2017), where the court reviewed de novo whether the district court has the inherent authority to expunge criminal records. In affirming the district court's conclusion that the facts did not justify "the extraordinary power of expungement", the supreme court, citing *Toth v. ABQ Police Dep't, City of ABQ*, 1997-NMCA-079, paragraph 8, 123 N.M. 637, 944 P.2d 285, noted that courts which recognize the inherent authority to expunge arrest records have done so sparingly and only under extraordinary circumstances.

- (2) House Bill 370, Section 3 conflicts with Section 31-26-16 NMSA 1978, permitting a petition for expungement to a "court of competent jurisdiction". Under Section 31-26-16, a magistrate or municipal court may be a court of competent jurisdiction. House Bill 370 permits a petition for expungement to be filed in the district court, exclusively.
- (3) Petitions for convictions of misdemeanors and municipal ordinances take place in courts that are not "record" courts. Verification of documents may be problematic.

- (4) House Bill 260, introduced during the 2018 legislative session, required the court, in Sections 4(C) and 5(C), to provide a copy of the order of expungement to all relevant law enforcement agencies and courts and order them not to disseminate the expunged record, appearing to put the onus on the Court to determine who are the "relevant law enforcement agencies and courts". In an adversarial system, the court depends on the litigants to determine who is relevant. Usually, the "relevant" parties are named as litigants and have an opportunity to respond. House Bill 370, Sections 4(D) and 5(D), require the court to “cause a copy of the order to be delivered to all relevant law enforcement agencies and courts”, and to prohibit these entities from disseminating the expunged records, except upon order of the court. In House Bill 370, the onus still appears to be on the court to determine who are the “relevant law enforcement agencies and courts”.

Under House Bill 370, it is unclear who the actual parties are going to be. Unless the petition seeking expungement brings a non-party under the jurisdiction of the court, there may be issues concerning the enforceability of an order to expunge. (No problem ordering Metro Court to expunge a record, for example, if the entity has had an opportunity to litigate whether the facts warrant expungement.)

DPS explains:

Among the most significant issues presented by passage of the proposed legislation is that the act provides for the expungement of arrests without a conviction, contrary to current law, and the ability to expunge convictions, not based on a wrongful arrest or identity theft. These are found at section four, expungement of records after release without conviction, and at section five, expungement of records after conviction. It should be noted this conflict is essentially that current law allows for the expungement of arrest record information if there is no final disposition. The proposed legislation would provide for expungement where there is no conviction. This appears to be a conflict regarding the intention of the current act versus the proposed legislation.

Additionally, the act as written may preclude federal law enforcement entities including those agencies under the Department of Justice and the Federal Department of Homeland Security, from accessing records that they currently have access to. Since the State controls what information would be entered into NCIC, Federal entities would no longer have this information without coming directly to the State of New Mexico. This appears contrary to the stated purpose of Section Eight of the proposed legislation. Further, this presents an officer safety issue for all law enforcement officers nationwide, who will be deprived of this information and thus at risk.

The bill provides language that the court shall issue an order requiring that all arrest records and public records be expunged if it finds that no other charge or proceeding is pending and the proceedings against the person were discharged. This could have the unintended consequence of being interpreted as requiring expungement for anyone who receives a deferred sentence for their charges. NMSA 1978, § 31-20-9, provides that “[w]henver the period of deferment expires, the defendant is relieved of any obligations imposed on him by the order of the court and has satisfied his criminal liability for the crime, the court shall enter a dismissal of the criminal charges.”

The bill adds a new provision for expungement of records for victims of identity theft,

however, NMSA 1978, § 31-26-16, *Expungement from police court records*, provides for expungement for a person whose name or other identifying information was used, without consent or authorization by another person who was charged, arrested or convicted of a crime while using that person's name or identification. Clarification may be needed as to whether the new language in the bill is intended to be read separately or together with NMSA 1978, § 31-26-16.

The bill provides that with a showing that the person was wrongfully arrested, indicted or charged, the court is required to issue an order requiring expungement. The term "wrongfully" as used here is ambiguous and should be distinguished from a dismissal or acquittal in a criminal proceeding. There are various reasons why charges may be dismissed in a criminal proceeding or why an acquittal is returned by a jury.

This bill may lead to a significant increase in cases filed with court by individuals petitioning the courts for expungement and will also lead to an increase in hearings to establish that the requirements for expungement have been satisfied. It is expected that certain agencies, such as the arresting agency and the Department of Public Safety, will be served with petitions and attend hearings throughout the state to elicit testimony from witnesses and provide a position on whether the requirements in the statute have been met.

The bill provides that the court issue an order to prohibit all relevant law enforcement agencies and courts from releasing copies of the records to any person, except upon order of the court. However, it is ambiguous whether the intent of the bill is for those expunged records to have the notations removed or redacted, or to have the records left un-redacted and removed from access to the public.

ADMINISTRATIVE IMPLICATIONS

DPS states:

Expungement of records could be administratively challenging. The increasing need for educating the public on individuals' criminal history is evident in the continuous passing of fingerprint based Criminal History Screening statutes and federal laws. Public Safety has a duty to educate the public of possible harm and not withhold information that could possibly protect a vulnerable community member.

By expunging the arrests that were committed using identity theft will only allow the true criminal to be having a clean record under this law. The law does not allow for only the erroneous alias name to be expunged, it calls for the whole arrest record to be expunged. Which means, someone could use the wrong name at the time of arrest and identity theft victim could simply petition to expunge the arrest record and true criminal would have arrest information along with alias names expunged. This would and could only re-victimize the victim and perpetuate the undocumented criminal behavior.

TECHNICAL ISSUES

DPS explains the "technical issues noted [in the Significant Issues section] relate to the inclusion of arrests where a final disposition exists but is not a conviction. It is believed these are technical issues because this will change the entire structure of the state's criminal records repository

function. By expunging these records where a final disposition exists but is not coupled with a conviction, the public will now be unable to garner information related to an individual's arrest. It should be noted that this information is currently public and that by expunging this information it appears to work as a counterpoint to the State's Inspection of Public Records Act, which provides that these records are public, presumably to allow the public to ascertain and access the credibility and function of government."

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