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FISCAL IMPACT REPORT

ORIGINAL DATE 02/26/09
 SPONSOR SJC LAST UPDATED 03/20/09 HB _____
 SHORT TITLE Criminal Records Expungement Act SB 649/SJCS/aSFI#1/aHJC
 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)

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 HJC Amendment

The House Judiciary Committee amendment to the Senate Judiciary Committee substitute for Senate Bill 649, as amended allows a person released without conviction for a violation of a municipal ordinance, misdemeanor or felony to petition the district court for an order to expunge arrest records and public records. A person is eligible to petition for expungement one year after dismissal.

The amendment clarifies that a person convicted after no more than one incident involving a misdemeanor or violation of a municipal ordinance and who has had no other convictions after completion of the sentence for the conviction may petition the district court within the time periods provided in this section for an order to expunge arrest records and public records.

The amendment also changes the expungement requirements for a person convicted after no more than one incident involving a misdemeanor and who has had no other charge or proceeding has occurred for a period of five years instead of two years.

The amendment removes language allowing a person convicted of misdemeanor aggravated battery to expunge the record after a period of four years if no other charge or proceeding has occurred.

The amendment states the time for calculating eligibility for expungement begins the day a person's sentence, including probation is completed

The amendment further clarifies that the court shall cause a copy of the order to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of such records to the general public except upon order of the court.

In addition, the amendment adds language clarifying that nothing in the Criminal Record Expungement Act shall be construed to prohibit a law enforcement agency from maintaining and using criminal history information for any lawful purpose.

Synopsis of SFI#1Amendment

The Senate Floor Amendment 1 to SJC/CS/SB 649 changes language to read that if a person is released without a conviction that one of the possible ways that they can have all arrest and public records is if they have completed a pre-prosecution diversion program.

The other part of the amendment is a change in wording with no difference in meaning. "Expungement means the removal" is amended to "expunge means to remove".

Synopsis of Original Bill

The Senate Judiciary Committee substitute for Senate Bill 649 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 expungement means the removal from access to the general public of a notation of an arrest, complaint, indictment, information, plea of guilty, conviction, acquittal, dismissal or discharge record, including a record posted on a publicly accessible court, corrections or law enforcement internet web site.

For the purposes of this bill public records means documentation relating to a person's arrest, indictment, proceeding, finding or plea of guilty, conviction, acquittal, dismissal or discharge, including information posted on a court or law enforcement web site.

Public records do not include:

- (1) arrest record information that reveals confidential sources, methods, information or individuals accused but not charged with a crime and that is maintained by the state or any of its political subdivisions pertaining to any person charged with the commission of any crime or is confidential and unlawful to disseminate or reveal, except as provided in the Arrest Record Information Act or other law;

(2) the file of a district attorney or Attorney General maintained as a confidential record for law enforcement purposes and not open for inspection by members of the public;

(3) a record maintained by the Children, Youth And Families Department, the Human Services Department or the Public Education Department when that record is confidential under state or federal law and is required to be maintained by state or federal law for audit or other purposes; or

(4) a record received pursuant to a background check as authorized by law.

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 for an order to expunge arrest records or public records. 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 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 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. After a hearing on the petition 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. A person convicted of no more than one misdemeanor or violation of a municipal ordinance and who has had no other convictions after completion of the sentence and the payment of any fines and fees owed to the state for the conviction may petition the district court within the time periods provided in this bill for an order to expunge arrest records and public records.

After a hearing on the petition, the court shall issue an order within 30 days of the hearing requiring that arrest records and public records be expunged if it finds that no other charge or proceeding is pending against the accused and that justice will be served by an order to expunge and:

1. no other charge or proceeding has occurred for a period of two years if the conviction was for a misdemeanor;
2. no other charge or proceeding has occurred for a period of four years if the conviction was for misdemeanor aggravated battery; or
3. no other charge or proceeding has occurred for a period of ten years if the conviction was for an offense involving domestic violence or abuse.

The provisions of this bill do not apply to a crime committed against minors or children, a sex offense or an offense involving driving while under the influence of intoxicating liquor or drugs.

The Administrative Office of the Courts and the Department of Public Safety shall develop rules and procedures to implement the Criminal Record Expungement Act including procedures for notifying the accused of the accused's rights under that act.

Upon entry of order to expunge, the proceedings shall be treated as if they never occurred, and officials and the person who received the order to expunge may reply to an inquiry that no record exists with respect to the person.

The effective date of the provisions of this 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 provided the following:

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.

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.

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.

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

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.