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FISCAL IMPACT REPORT

SPONSOR Maestas ORIGINAL DATE 2/22/15
LAST UPDATED _____ HB 531
SHORT TITLE Criminal Expungement Act SB _____
ANALYST A. Sánchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to SB 365.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Public Defender Department (PDD)

Attorney General's Office (AGO)

New Mexico Sentencing Commission (NMSC)

SUMMARY

Synopsis of Bill

House Bill 531 proposes to enact the Criminal Record Expungement Act. The bill establishes procedures for expungement of arrest records and public records in certain circumstances. Expungement is not available if the crime was a sex offense, was committed against minors or children, or involved driving while under the influence of intoxicating drugs or alcohol.

An order of expungement shall prohibit all relevant law enforcement agencies and courts from releasing copies of those arrest and public records. The bill directs the Administrative Office of the Courts and the Department of Public Safety to develop rules and procedures to implement the act. The bill has an effective date of January 1, 2016.

SIGNIFICANT ISSUES

The AGO states that the bill provides relief for persons wrongfully arrested, or acquitted, dismissed without a conviction, and other instances of no conviction, to have all records pertaining to the criminal charges expunged from public records. It also provides relief from the

growing problem of identity theft. In Section 5(E), the bill includes exceptions for crimes against minors or children, a sex offense and DWI. However, in Section 5 (B)(2), permits domestic violence offenders, after 10 years and no other charges or proceedings, to successfully petition for expungement.

The AGO further states that HB 531 may prevent law enforcement from maintaining or locating records. Expungement of records may be a safety issue for law enforcement officers who rely upon arrest records and other data maintained by law enforcement to assess dangerousness or violent tendencies, and criminal records which are routinely used in determining the circumstances, such as modus operandi, in investigating new criminal offenses.

NMSC reports that Section 8 of the bill states that nothing in the act shall be construed to prohibit a law enforcement agency from maintaining and using criminal history information for any lawful purpose. This provision may be particularly important for the prosecution of subsequent domestic violence offenses.

Laws regarding expungement of criminal records vary by state. Of the forty states that allow expungement or sealing of arrest records not leading to conviction, twenty-nine states permit a person to deny the arrest. Of the sixteen states that allow expungement or sealing of convictions, thirteen permit an ex-offender to deny the conviction (Geiger 2006, Mukamal & Samuels 2003). State laws vary as to which conviction and arrest records can be expunged. A few states have very strict laws and rarely allow expungement of accurate arrest or conviction records, but most have expungement procedures that depend on the following factors:

- whether you were actually convicted of a crime
- if you were convicted, the severity of the crime
- how long it has been since you were arrested or convicted
- whether you have successfully completed the terms your sentence, probation, or diversion program, and
- whether you have been convicted of other crimes in the past.

No matter where you live, it is unlikely that you will be able expunge a very serious crime, such as a violent felony or a sex offense. (Criminal Defense Lawyer 2015).

Ten states (Iowa, Maine, Michigan, Montana, North Dakota, Nebraska, New Mexico, South Dakota, Vermont, and Wyoming) do not permit people to expunge or seal arrest records (Mukamal & Samuels 2006).

Ben Geiger,. (2006). *The Case for Treating Ex-Offenders as a Suspect Class*, 94 Cal. L. Rev. 1191, 1200

Criminal Defense Lawyer. (2015). Retrieved from:

<http://www.criminaldefenselawyer.com/resources/criminal-defense/expungement/seal-criminal-records.htm>

Mukamal & Samuels,. (2003). *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1509-1510

PDD reports Many other states have similar public-record expungement laws in place. Just this past Wednesday, the United States Court of Appeals for the Second Circuit decided *Martin v. Hearst*, ___ F.3d ___, 2015 WL347052 (Jan. 28, 2015), discussing the Connecticut “erasure” statute and holding news organizations are not required to take down news stories about arrests.

HB 531 clarifies and expands the inherent authority for courts to expunge criminal records that our appellate courts have found are recognized in most states. See *Toth v. Albuquerque Police Dept.*, 1997-NMCA-079, ¶¶ 5-6, 123 N.M. 637. It would allow expungement in certain situations that our appellate courts have declined to approve of in the recent past, presumably because our courts have preferred to avoid “legislating from the bench.” See *State v. C.L.*, 2010-NMCA-050, ¶ 15, 148 N.M. 837 (finding expungement unwarranted where the defendant was charged only as an accessory in the underlying crime, she had entered an *Alford* plea, she was granted a conditional discharge and was released early due to her compliance with the terms of release, she had been denied employment opportunities as a result of her criminal record, she had been industrious and continued her education, and she had no prior criminal record).

The AGO point out that the following expungement statutes (or statutes and rules for sealing records) already exist in New Mexico, including but limited to:

- Arrest records, NMSA 29-3-8.1,
- DNA, NMSA 29-16-10 and 10.1,
- Conditional discharge for first time drug possession, NMSA 30-31-28(D),
- Children’s Code, 32A-3B-21(A)(1) and (2),
- Delinquency Proceedings, NMSA 32A-2-26,
- Delinquency Proceedings, Rule 10-262, automatic sealing of records,
- Identity Theft, NMSA 31-26-16, expungement from police and court records,
- Identity Theft, 30-16-24.1(I), correction of records,
- District Court Rule 5-123, sealing records’ and
- Grand Jury, NMSA 31-6-5, sealed no bills, Also NMSA 31-6-7, secret proceedings

TECHNICAL ISSUES

According to the AGO, a definition or statutory citation to define “sex offense” as contemplated is necessary for practical application. Likewise, use of the term “wrongfully” may be misleading as an acquittal does not necessarily mean that a defendant was “wrongfully” arrested or charged based on the standard of probable cause. IPRA requirements with proposed expungement statute may need to be reconciled.

OTHER SUBSTANTIVE ISSUES

The AGO reports the that the definition of “sex offense” is unclear. Are the only sex offense those enumerated in Article 9 and Article 6A of the criminal code or would apply to other offenses outside of Article 9 such as child exploitation, child solicitation by an electronic communication device, and human trafficking.