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## FISCAL IMPACT REPORT

SPONSOR Maestas ORIGINAL DATE 03/01/17  
LAST UPDATED \_\_\_\_\_ HB 505  
SHORT TITLE Expungement of Criminal Records SB \_\_\_\_\_  
ANALYST Sánchez

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### 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 Corrections Department (NMCD)

### SUMMARY

#### Synopsis of Bill

House Bill 505 proposes creation of the Criminal Records Expungement Act which would allow persons

- Who were arrested, indicted, charged and convicted of certain crimes, to petition the district courts for an order to expunge the criminal record.
- Who was a victim of identity theft or were wrongfully arrested, indicted or charged for any crime may petition the court to expunge the arrest records and public records.
- Released without conviction for violation of municipal ordinance, misdemeanor or felony could petition the court for expungement one year after dismissal of the matter.
- Convicted of no more than one incident involving a misdemeanor or violations of municipal ordinances after completing the sentence and paying all fines and fees could petition the court to expunge the person's arrest records and public records.

Certain crimes are excluded from the expungeable offenses. The Administrative office of the Courts (AOC) and the Department of Public Safety (DPS) are directed to develop rules to implement provisions of the bill.

Upon expungement, law enforcement would be directed to reply that no record exists. Law enforcement could maintain and use the criminal history for any lawful purpose.

The effective date of the provisions, upon enactment, would be January 1, 2018.

### **FISCAL IMPLICATIONS**

AOC states it will require additional funding for additional hearings and to provide required paperwork but does not provide as estimate of the additional funding.

Although it is difficult to accurately estimate the cost of additional hearings because of this or similar legislation, it is important to note that the average salaries, benefits and other costs yearly, in thousands, for the district courts, district attorneys and public defenders are as follow:

- District Attorneys: \$195.4
- District Courts: \$335.6
- PDD: \$202.7

The bill does not have an appropriation.

### **SIGNIFICANT ISSUES**

A 2016 article by the Harvard Law and Policy Review, “*A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*” explains that expungement is the erasure or elimination of criminal record history information by rendering the information inaccessible because it has been destroyed or sealed from view. It notes that recent expungement law efforts at the state level include attempts at drastic reforms and piecemeal tinkering. Most of the available remedies have been based on judicial decision. However, in the past decade, due to heightened interest in criminal law reform—especially the perceived injustice of certain collateral consequences inhibiting reentry, the effects of mass criminalization, and the technology-driven inability of ex-offenders to move on—several states have enacted specific laws providing for expungement or sealing. Between 2009 and 2014, over sixty percent of states attempted to broaden their expungement laws. Such legislation aims to address the reentry difficulties facing ex-offenders with criminal records. Having even a minor criminal history now carries lifelong barriers that can block successful reentry and participation in society. Having a criminal record, whether it consists of a conviction or an arrest, can affect an individual’s ability to find employment and housing, obtain public assistance or enroll in educational programs, and maintain custody or other domestic rights. While many states possess laws restricting discrimination on the basis of a criminal record to relevant convictions, these laws are remarkably under-enforced.

The Harvard Law and Policy Review reports that recent reforms at the state level are sometimes divided into two camps that capture the broad objectives of the particular law: (1) “forgetting” statutes, which aim to expunge or seal various forms of criminal records; and (2) “forgiving” statutes, which are focused less on expungement and more on how to alleviate the effect of a criminal record. For example in Maryland, the law does not affirmatively prevent private reporting agencies from disclosing shielded convictions. In Indiana, the law empowers the courts to expunge most criminal records, including convictions after waiting periods that are tied to the seriousness of the offense. Indiana law categorically defines the refusal of employment or

a license on the basis of an expunged conviction or arrest as unlawful discrimination, prevents employers from asking about expunged convictions, and “makes clear that a person’s civil rights are restored after expungement, including the rights to vote, hold public office, serve as a juror, and own a firearm.” In Minnesota, individuals eligible for expungement include those who have completed diversionary programs, and those who have been convicted of petty, regular, and gross misdemeanors, or low-level, nonviolent felonies. The length of the waiting period before petitioning is, in theory, linked to the grade of the offense.

The Attorney General’s Office notes IPRA requirements with proposed expungement statute may need to be reconciled.

AOC states that expungement of public records in law are not favored. It notes that 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. This issue is before the New Mexico Supreme Court: *Stump v ABQ Police Dep’t, S-1-SC-35912*.

The Public Defender Department (PDD) states that HB505 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).

## **ADMINISTRATIVE IMPLICATIONS**

The New Mexico Corrections Department (NMCD) believes the provisions in this bill would reduce staff workload in responding to records requests.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

### **TECHNICAL ISSUES**

AOC point out Section 3 of the bill conflicts with NMSA 1978, Section 31-26-16. The statute allows for petition to a court of competent jurisdiction. Under the statute a magistrate or municipal court may be a court of competent jurisdiction.

The OAG suggests including a definition for “sex offense” and “wrongfully”.

NMCD recommends amending the bill to allow agencies a “good faith mistake” defense so that they will not be subject to contempt or other civil or criminal penalties for mistakes in releasing or disclosing the records.

## OTHER SUBSTANTIVE ISSUES

The Harvard Law and Policy Review article states it is estimated that between twenty-five and thirty-five percent of the adult population of the United States has a criminal record. The FBI adds over ten thousand names to its database each day. Collectively, law enforcement agencies are approaching two hundred and fifty million arrests, resulting in close to eighty million individuals in the FBI criminal database. Executive branch agencies, courts, administrative offices related to the justice system, and commercial databases all contain this information.

The NMAG notes New Mexico law has the following expungement laws or laws that seal records:

- 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

According to the Harvard Law and Policy Review, jurisdictions generally remain conservative when it comes to which types of information should be eligible for expungement. The Internet is a near-bottomless repository of information, impossible to fully clean. The number of private data companies has grown exponentially and many of those companies do not solely use public sources of information when compiling data. Thus, restricting the availability of public information—through expungement or sealing—will only achieve so much. The reality is that the efficacy of expungement remedies is linked to the reforms that occur in other areas as well. While state-level action has inspired reforms in other states, those reforms are only one piece of a larger puzzle related to collateral consequences, rehabilitation, and other aspects of criminal justice. Jurisdictions have to be mindful of the multi-layered nature of the problem, which includes the accessibility of data, the social stigma that comes with a criminal record, attitudes towards ex-offenders, the regulatory nature of collateral consequences as well as the breadth of such consequences, and the actions of many of the players involved, including prosecutors, defense attorneys, and judges.

ABS/al/jle