

**MARYLAND JUDICIAL CONFERENCE
GOVERNMENT RELATIONS AND PUBLIC AFFAIRS**

Hon. Mary Ellen Barbera
Chief Judge

187 Harry S. Truman Parkway
Annapolis, MD 21401

MEMORANDUM

TO: House Judiciary Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: House Bill 238
Criminal Procedure – Automatic Expungement
DATE: January 21, 2021
POSITION: Oppose

The Maryland Judiciary opposes House Bill 238. Find attached the Fiscal Worksheet representing the impact on the Maryland Judiciary with an initial estimated cost in excess of \$15 million.

cc. Hon. Melissa Wells
Judicial Council
Legislative Committee
Kelley O'Connor

Department of Legislative Services
2021 Session
Agency Explanation of Impact

Bill number: HB0238

Cross file:

Bill title: Criminal Procedure - Automatic Expungement

Agency: Judiciary (Administrative Office of the Courts) - (jdy / 292)

Prepared by: Roberta L. Warnken and Jamie L. Walter

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Date: January 14, 2021

To assist our department in preparing a fiscal and policy note for this proposed legislation, please provide detailed responses to the questions below.

If you have additional information that cannot be included in either this Word document or the provided Excel file, please send that information **in a separate email** to fnotes@mlis.state.md.us **with the bill number included in the document and the email subject line.**

1. Will this legislation have a fiscal and/or operational impact on your agency?

YES X NO

If yes, please proceed to question #2 on page 2.

If no, please briefly indicate **why** below and then proceed to question #6 on page 4.

2. General Operational/Fiscal Impact on Your Agency – Please describe the operational and/or fiscal impact of the proposed legislation on your agency.

The proposed legislation creates Criminal Procedure § 10-105.1, which provides that a person who, on or after October 1, 2021, has been charged with the commission of a crime, including a violation of the Transportation Article for which a term of imprisonment may be imposed, who has been charged with a civil offense or infraction, except a juvenile offense, or who is the subject of an invalidated warrant or a fugitive warrant is entitled to automatic expungement of all police records, court records, and other records maintained by the State or a political subdivision of the State relating to the matter if: (1) the person is acquitted; (2) the charge or warrant is dismissed or invalidated; (3) a probation before judgment is entered, unless the person is charged with a violation of TR 21-902 (driving while under the influence or impairment of alcohol and/or drugs) or Title 2, Subtitle 5 (homicide by motor vehicle or vessel while impaired or under the influence), or § 3-211 of the Criminal Law Article (life-threatening injury by motor vehicle or vessel while under the influence of alcohol and related crimes); (4) a nolle prosequi other than a nolle prosequi with the requirement of drug or alcohol treatment is entered; or (5) the court indefinitely postpones trial of the charge by marking the charge "stet" on the docket, without a requirement of drug or alcohol treatment.

Proposed CP § 10-105.1 further specifies that certain dispositions are eligible for **automatic expungement** at certain times as follows: (1) an **acquittal, a dismissal, or a nolle prosequi** other than a nolle prosequi with the requirement of drug or alcohol treatment is eligible for automatic expungement immediately on disposition; (2) a **probation before judgment** is eligible for automatic expungement after satisfactory completion of any sentence and probationary conditions imposed in connection with the probation before judgment disposition; and (3) a **stet** other than a stet with the requirement of drug or alcohol treatment is eligible for automatic expungement 3 years after the entry of the stet.

This legislation requires that within 60 days after the established eligibility date, the court with jurisdiction over the matter must search diligently for and expunge each court record about the charge and send a notice of expungement containing all relevant facts about the expungement and underlying charge to: (i) the Central Repository; (ii) each booking facility or law enforcement unit that the court *believes* may have a police record about the arrest, confinement, or charge; and (iii) the person entitled to the expungement. Within 60 days after receipt of the notice, the Central Repository, a booking facility, any other law enforcement unit is required to search diligently for and expunge police and court record about the arrest, confinement, or charging of the person and send an advisement in writing to the person entitled to expungement of compliance with the order.

Additionally, pursuant to proposed § 10-105.1, a police or court record cannot be expunged by obliteration until three years after the disposition of the charge. However, during this three-year period, the records must be removed to a separate secure area to which persons who do not have legitimate reason for access—using the records for purposes of proceedings relating to the arrest or charge—are denied access.

Failure to expunge a police or court record by a court, law enforcement unit, booking facility, or the Central Repository as required allows the individual to seek redress by means of any

appropriate legal remedy and to recover court costs. A person entitled to an automatic expungement would not pay any fees or costs in connection with the expungement.

Upon entry of a verdict that would result in the eligibility of the individual to have an automatic expungement, the court must inform the defendant that all police records, court records, and other records relating to the matter will be automatically expunged unless the defendant opts out of expungement. A person entitled to automatic expungement may opt out by notifying the court at the time of disposition. Opting out of expungement of a particular charge does not bar expungement of other eligible charges.

This legislation also creates a new expungement process and additional tracks based on disposition. For automatic expungements, there are varied timeframes which include immediate, sentence/conditions satisfaction based, and a three-year track. For all automatic expungements, the records must be removed to a separate secure area and cannot be obliterated until three years after the disposition of the charge. For expungements where a petition must be filed, eligibility is determined, and the obliteration of records happens immediately after the granting of the expungement.

The proposed legislation setting a 60-day timeframe for compliance with the automatic expungement provision, would require additional staff for courts to be able to comply in a timely manner. While determinations for automatic expungement eligibility would initially be reviewed at the disposition of the case, it would still require tracking and subsequent actions based on the disposition type, since no records (police or court) may be obliterated until three years after the disposition of the charge.

The Judiciary is unclear on the use of the term “invalidated warrants” and have assumed that this term includes warrants invalidated, dismissed, quashed, and/or recalled by a judge prior to being served. The term “invalidated” was used extensively in years past but is no longer common practice. The Judiciary also is unable to distinguish between current cases that have the requirement of drug or alcohol treatment for stet dispositions that would make an individual ineligible for automatic expungement.

It is difficult to retrieve accurate information on the number of offenses that would now be eligible for expungement; however, the Judiciary believes this will mean hundreds of thousands of cases would now be eligible for automatic expungement. In the 2020 Legislative Session, the Judiciary prepared a fiscal note for SB0589 involving partial expungements. In that fiscal note, it was estimated that an additional 219 clerks would be needed between the District Court and the circuit courts. In addition to the more expansive nature of this legislation, HB0238 adds an “automatic” element to the expungement process which leads the Judiciary to believe that this legislation may have an impact on all cases. Accordingly, the Judiciary anticipates a need for at least 219 clerks but potentially double that amount.

This new “track” for expungement would require a new business process; postage costs for mailing to law enforcement agencies, defendants, defendant’s attorneys; copying expenses; holding periods for pending expungements, physical redaction, and storage costs for the expunged records for three years. Court records that need to be redacted include all official records maintained by the clerk or other personnel pertaining to any criminal action or

proceeding for expungement, including indices, docket entries, charging documents, pleadings, orders, memoranda, assignment schedules, disposition sheets, transcriptions of proceedings, electronic recordings, orders, judgments, exhibits, and decrees. In cases where there are multiple charges in a case but only one charge needs to be expunged, clerks would need to read through all aspects of the court record to properly redact references to the expungable charge. The appellate court process would be similar to the circuit court process, with a significant number of paper records needing to be researched. Part of the expungement process for paper and electronic files is identifying all the custodians of the records that must expunge their files and then respond to the court with a Certificate of Compliance. Court commissioners can be a custodian of a record when a defendant applies for Public Defender eligibility determination. The entire file needs to be checked.

In the past two fiscal years, the following petitions for expungement have been filed in the District Court and the circuit courts:

	District Court	Circuit Court
Fiscal Year 2019	74,508	10,951
Fiscal Year 2020	55,105	8,642

*FY2020 numbers are impacted by the COVID-19 pandemic and are not an accurate depiction of a typical year of data.

The Maryland Judiciary is currently in the process of implementing a single Judiciary-wide integrated case management system that will be used by all the courts in the Judiciary. Maryland Electronic Courts (MDEC), which has been implemented in 87% of the jurisdictions (the largest courts – Baltimore City, Montgomery and Prince George’s counties have future implementation dates), allows courts to collect, store, and process records electronically. The new system is “paper-on-demand,” that is, paper records can be generated when specifically requested. MDEC has reduced some processing time, as well as the storage expenses associated with the expungement process; however, the bulk of the process still requires the clerks to do manual processing. This bill would only eliminate the filing of an expungement petition and the requirement that the expungement be served on the State’s Attorney to allow for the timely filing of an objection to the petition. The average time to complete expungement of an entire case in the District Court or circuit courts has been determined to be 1.5 hours. The average time to complete the more complex process of expunging a single charge from a case with multiple charges, which requires reading through all documents and docket entries, has been determined to be 3 hours for District Court and 5 hours for circuit court due to the size of case files. Time estimates could increase depending on circumstances such as the complexity of the case and the number of custodians. The time to complete the expungement process is not currently available for the appellate courts.

If the bill is interpreted as requiring partial expungement, there will be a mix of: single charge cases; multi-charge cases in which all dispositions are eligible for expungement; and multi-charge cases where there is a combination of charges that are and are not eligible for expungement based on disposition.

The Judiciary maintains that it is not able to effectively expunge one charge in a unit. There is no functionality currently within CaseSearch to remove records at the charge level without

displaying a space for a missing charge(s). When a person is charged with multiple offenses, the charges are numbered and reported to CJIS in the order presented on the charging document. For instance, if there are three charges, and charge 2 is expunged, the system will still reflect charges 1 and 3. They are not and cannot be renumbered because the case information reported to CJIS must align with the same charge numbers initially reported. A missing numbered charge may raise questions and red flags, thereby, nullifying the purpose of the expungement.

The clerk would need to review the file, page by page to remove any information pertaining to the expunged charge. Charge information is repeated throughout the case many times and the charging document outlines what the alleged events are that occurred. There may not be a clear way to obliterate all information in a charging document related to a specific charge.

Additionally, there is currently no functionality to build programmatic relationships between CaseSearch and the six case management systems that process criminal information to remove any reference to the existence of specific charges that may exist in any of the various components within those systems as required by the proposed legislation. As explained in the current and prior legislative sessions, the Judiciary anticipates that the implementation of CaseSearch Version 2 will provide the needed functionality to enable the removal of case information at a more granular level such as individual charges and will parallel the final rollout of MDEC. **The CaseSearch rebuild is estimated to cost at a minimum \$1.14 million.**

The court will have to create an additional processes and reports to ensure the records are expunged in the required time periods required by this legislation. The Judicial Information Systems department estimates that implementing the programming changes will require 2,613.6 hours at an approximate cost of \$300,636.00 with the following breakdown:

	<u>Hours</u>	<u>Cost</u>	<u>Total</u>
Analysis	591	\$110.00	\$65,010.00
Programming	876	\$125.00	\$109,500.00
Testing	711	\$110.00	\$78,210.00
Project Management	435.6	\$110.00	\$47,916.00
TOTAL	2,613.6		\$300,636.00

Other expenditures include the printing and restocking of forms and brochures, website revisions, postage for mailing and orders to State’s Attorneys, law enforcement agencies, defendants and their attorneys, storage for expunged records, and copying. The cost to revise and restock the expungement forms/brochures will be approximately \$6,000.00.

Accordingly, at least 219 clerks will be needed and will result in a cost of **\$14,542,854** in the first full fiscal year (see attached worksheet). This estimate could be grossly underestimating the actual need for additional clerks in the District Court and the circuit courts.

Due to the new categories of eligible records, related time periods, records handling, and courtroom procedures, extensive changes to procedures will be required in addition to judicial and clerical training and retraining.

HB0238 Cost of Implementation	
Clerks (1 st Full Year)	\$14,542,854
Programming, including Reports	\$300,636
Forms/Brochure	\$6,000
Case Search 2.0	\$1,140,000
TOTAL	\$15,989,490

If passed, this legislation would have a significant fiscal and operational impact on the Judiciary

<p>3.</p>	<p>Impact on Revenues – Please estimate any increase or decrease in revenues (general, special, federal, or other funds) in each of the next five fiscal years. Enter the estimated amounts in the <i>Revenues</i> worksheet in the provided Excel file and describe in the space below.</p> <ul style="list-style-type: none"> • Please be aware of delayed effective dates or other factors that may cause revenue increases/decreases to begin in later years. • Please explain the cause(s) of the revenue increase(s)/decrease(s), any assumptions and/or calculations used, and any variations if the revenue impact(s) are not constant. • If federal funds are affected, please describe how (<i>e.g.</i>, loss of funds for noncompliance, availability of new funds, etc.)
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N/A

<p>4.</p>	<p>Impact on Expenditures – Please estimate the increase or decrease in expenditures in each of the next five fiscal years using the <i>Expenditures</i> worksheet in the provided Excel file and describe in the space below.</p> <ul style="list-style-type: none"> • Please be aware of delayed effective dates or other factors that may cause expenditure increases/decreases to begin in later years. • Please explain the need for the number and type of personnel (both permanent and contractual), including (1) what specific provision(s) of the bill necessitate additional staff; (2) what the duties of each type of employee will be; and (3) why existing personnel cannot absorb the additional work. • Please describe the items included under “Other Operating Expenses” and explain any assumptions or calculations used in your estimates. • Please specify the fund type (general, federal, special, or other) or combination of fund types of the expenditure increases and/or decreases.
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Please see No. 2.

5. Anticipated in Proposed Operating/Capital Budget? – Have funds been included in your agency’s proposed operating or capital budget in anticipation of this legislation? Or has your agency submitted a request for funding in a supplemental budget? If so, please indicate specific amount(s) budgeted and budget code(s).

No.

6. Other Information – Please provide any other information that may be helpful in determining the fiscal effect of this legislation, even if the bill does not directly affect your agency.

The Criminal Justice Information System (CJIS) should be contacted as well as law enforcement agencies, parole and probation, agencies that supervise community service, Maryland Archives, and other custodians of records.

7. Effect on Local Governments – Will local government operations or finances (revenues or expenditures) be affected by this legislation? If yes, please describe how.

Any local law enforcement agency may be a custodian of the record.

8. Effect on Small Businesses – Will existing small businesses be affected (either positively or negatively) by this legislation and/or will the legislation encourage or discourage new small business opportunities? If so, please describe.

State law defines a small business as a corporation, partnership, sole proprietorship, or other business entity, including affiliates that: (1) is independently owned and operated; (2) is not dominant in its field; and (3) employs 50 or fewer full-time employees.

No.