ARIZONA SUPREME COURT

THE STATE OF ARIZONA, Appellant, v. DANIEL LOUIS SANTILLANES, Appellee	No. CR-23-0042-PR Court of Appeals No. 1 CA-CR 21-0389 Maricopa County Superior Court Cause No. 2011-108577-001

BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE AND NORML IN SUPPORT OF APPELLEE

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INTRODUCTION

In his law review article, "Insider Expungement," Law Professor Brian M. Murray notes that expungements that are controlled by the courts and attorneys re-stigmatize the individuals and communities that are intended to be helped:

> expungement seems akin to a matter of criminal adjudication given the purposes behind criminal recordkeeping, as well as ongoing stigmatic and punitive effect of public criminal records long after any proportionate measure of desert has been achieved by the formal sentence and its effects. This means that the public has no say in stopping extra, unjustified harm from being inflicted on those with criminal records or, on the other hand, demanding more from petitioners who claim rehabilitation. This is particularly egregious in the case of those who have only arrest records and even more so for those with low-level convictions who unfortunately suffer from the arbitrary choice of insiders to default to a posture of eternal criminal recordkeeping.

Brian M. Murray, Insider Expungement, 2023 ULR 337, 383 (2023). Arizona's expungement program currently struggles to identify and help those who are eligible, and is on par with other states that also use an opt-in method of expunging marijuana convictions. States that adopted expungement early found that opt-in programs were cumbersome and slow to reach the intended communities in need. Michigan recently switched from an opt-in program like Arizona's to an automatic expungement program because the State had only expunged about 6.5% of eligible convictions

after 5 years of an opt-in program that was derailed by reluctance of prosecuting agencies and courts to let go of the old criminal records.[1]

Here, the State is asking this Court to find that it has a "substantial right" under Proposition 207 to directly appeal (with the goal of reversing) court orders granting expungement of marijuana-related convictions. The State's argument ignores the remedial nature of expungement. Granting the State the right to appeal every expungement conflicts with the intent and purpose of Proposition 207, and would have a devastating chilling effect on expungement in Arizona, contrary to the remedial purpose of the voters in enacting Proposition 207.

INTEREST OF AMICI CURIAE

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in

[1] Angie Jackson, "Gov. Whitmer signs bills expanding criminal record expungement in Michigan," Detroit Free Press (Oct. 12, 2020), available at: https://www.freep.com/story/news/local/michigan/2020/10/12/michigan-expungement-bills-law-governor-whitmer/3532215001/ (last visited June 7, 2023).

the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer. Challenging court interpretations of medical marijuana reform laws is squarely within AACJ's core mission. For these reasons, AACJ has an interest in the outcome of this litigation.

Arizona NORML is the local chapter of the National Organization for the Reform of Marijuana Laws. Arizona NORML's mission as a non-profit is to move public opinion sufficiently to legalize the responsible adult use of marijuana by adults and to serve as an advocate for consumers. As part of their advocacy, Arizona NORML sponsors expungement and record-sealing clinics across the state and has facilitated the filing of over 2000 expungement petitions. Arizona NORML has a strong interest in ensuring that Proposition 207 is interpreted in accordance with the voters' intent and advancing a path where every Arizonan criminalized by the war on cannabis gets a true second chance.

AACJ's member attorneys and TCPD's attorneys have an interest in the outcome of this litigation, which will address the way for-cause challenges are raised and defended in criminal trials going forward.

ARGUMENT

I. Proposition 207's Expungement Statute is Remedial and Must Be Interpreted Liberally to Give Effect to Its Remedial Purpose.

Proposition 207 is a remedial statute. Arizona's voters exercised their constitutional right to reform marijuana regulation and created a remedial cause of action for those who have been subject to criminal prosecution to seek redress in the form of court-ordered sealing of past records and cessation of ongoing sentences related to conduct that is no longer illegal. Courts "generally construe such remedial statutes broadly 'to effect the legislature's purpose in enacting them.'" *Delgado v. Manor Care of Tucson AZ, LLC*, 242 Ariz. 309, ¶15 (2017).

Because Proposition 207 is a voter-enacted initiative, the Voter Protection Act mandates that it be interpreted liberally to "'"give effect to the intent of the electorate.'"" *State v. Jones*, 246 Ariz. 452, ¶ 5 (2019) (*quoting Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, ¶ 6 (2015), *quoting in turn State v. Gomez*, 212 Ariz. 55, ¶ 11 (2006)). Courts may not interpret a voter-passed initiative in a way that interferes with the people's right to initiate laws. *Pedersen v. Bennett*, 230 Ariz. 556, ¶ 7 (2012) (*quoting Kromko v. Superior Court*, 168 Ariz. 51, 58 (1991)) (liberal interpretation of initiatives avoids "destroy[ing] the presumption of validity"). And courts "must identify the reasonable interpretation that is most consistent with the intent of the voters in adopting the measure." *Gomez*, 212 Ariz. 55, ¶ 19. In *Delgado*, our Supreme Court held that courts may not add or alter the requirements for a cause of

action provided by a remedial statute because "it is not … our role to rewrite the statute." 242 Ariz. 309, ¶ 22.

What makes Proposition 207 unique in Arizona is that it is a remedial statute for the benefit of criminal defendants intended to correct the evil of arrests or convictions that have disproportionately impacted minority communities by disenfranchising convicted individuals, disrupting families due to prison sentences, preventing individuals from obtaining jobs or housing, with lasting impacts on their children and parents, as well. While changes in criminal laws often alter how and whether an act is deemed to be criminal moving forward, Proposition 207 is rare because it does not simply create a new civil cause of action for damages; rather, it expressly seeks to redress past criminal arrests and/or convictions that have prevented significant numbers of Arizonans from being productive members of society. While the full number of people with convictions eligible for expungement is unknown, published estimates suggest that there are more than 192,000 convictions eligible for expungement in Arizona in the past 14 years alone, but only a small fraction of that number have been expunged.[2]

[2] *See* David Abbott, "Arizona Expunging Only a Small Fraction of Minor Pot Convictions," Phoenix New Times (Dec. 16, 2021), available at: https://www.phoenixnewtimes.com/marijuana/arizona-is-slow-to-clear-pot-convictions-12624963 (last visited June 7, 2023).

Efforts to expunge records have been slow to move through the courts. There is no clearinghouse or automatic system in place to identify eligible convictions, as exists in other jurisdictions.[3] *Id.* Rather, Arizona has an opt-in system that requires individuals such as Mr. Santillanes to self-identify as possibly eligible for expungement. *See* A.R.S. § 36-2862(A) (placing the burden on a criminal defendant to petition for expungement). The individuals then must file a petition for expungement, the State is given an opportunity to object and present evidence of the defendant's ineligibility at an evidentiary hearing if the State so desires, and if the Court denies the petition, the petitioner has a right to appeal. A.R.S. § 36-2862(F).

In this case, the State seeks to create an additional hurdle that would erode the effectiveness of Proposition 207's remedial goal by giving the State a direct right of appeal the *grant* of a petition where none exists in the statute. If this Court were to adopt the State's position and allow direct appeals by the State in every case in which a trial court grants an expungement petition, this would have a chilling effect on individuals' willingness to seek redress. For example, in *American Family Mutual Ins. Co. v. Grant*, 222 Ariz. 507, ¶ 20 (App. 2009), the Court of Appeal noted that "overbroad discovery requests to potential experts … could have a chilling effect on

[3] See, e.g., New York Penal Code, art. 222 (2021), https://www.nycourts.gov/courthelp/criminal/marihuanaExpunge.shtml (last visited June 7, 2023).

the ability to obtain doctors willing to testify and could cause future trials to consist of many days of questioning on the collateral issue of expert bias."

Similarly here, those who are eligible for expungement are persons who are attempting to return their lives to a pre-conviction status, after years (and sometimes decades) of living on the fringe of society – unable to obtain stable housing or employment because of the scarlet letter of a marijuana conviction. The prospect of obtaining expungement, only to have the records reopened after a lengthy appeal by the State, renders Proposition 207's promise of sealed records illusory and could discourage people from seeking expungement in the first instance. Notably records of an appeal are not sealed, and therefore allowing the State to appeal a petition will result in the person's name becoming permanently searchable in background checks. This also shows why the right to appeal is a unilateral right only granted to a petitioner and not to the State. The petitioner controls whether to pursue an appeal that would cement the petitioner's name in public documents to an arrest or conviction. If this Court were to adopt the State's position, the State would be able to make it impossible for a petitioner to actually seal records of a prior conviction or arrest because the appellate record would be publicly available and searchable, regardless of the results of the appeal. A rule by this Court that would permit the State to appeal every granted expungement would completely defeat the purpose of

expungement and the sealing of records, and thus thwarts rather than promotes the voters' intent in passing Proposition 207.

As Will Humble, former Director of Arizona Department of Health Services who implemented the department's first regulations under the Arizona Medical Marijuana Act, wrote in favor of Proposition 207 that decriminalization was needed because "[f]elony convictions and incarceration have lasting impacts on the mental, physical, and economic health of the individual and their children, lifetime lower earning potential, and reduced educational attainment. Incarceration and felony convictions for marijuana offenses have multigenerational social, economic, and health impacts that have been disproportionately thrust on communities of color because they are more likely to be arrested for and convicted of marijuana offenses." Ariz. 2020 Gen. Elec. Pub. Pamphlet at 80.[4] Similarly, Jared Keenan, former President of Arizona Attorneys for Criminal Justice, wrote that Prop 207 will "provide an option for folks who were previously convicted of low-level marijuana charges to have their criminal records expunged so they have fair access to jobs and housing..." *Id*. at 81. Even former Arizona Gov. Fyfe Symington III, who signed into law H.B. 2176, which amended and expanded the felony exposure for possession of

[4] Arizona 2020 General Election Publicity Pamphlet, available at https://azsos.gov/sites/default/files/2020_General_Election_Publicity_Pamphlet_English.pdf (last visited June 7, 2023).

marijuana and drug paraphernalia. H.B. 2176, 1996 Ariz. Sess. Laws, ch. 217 (2nd Reg. Sess.), wrote in favor of Proposition 207:

> As former Governor of our great state, I am keenly aware of how important it is to defend liberty and to conserve scarce government resources. I also know that to accomplish these goals we must constantly re-evaluate our policies in the face of new evidence. Today the evidence is overwhelmingly clear: criminalizing law-abiding citizens who choose to responsibly consume marijuana is an outdated policy that wastes precious government resources and unnecessarily restricts individual liberty.

Id. at 80. The State's position that it has a right to directly appeal every grant of a petition for expungement is therefore contrary to the express remedial purpose of Proposition 207 to "facilitate[e] the expungement and sealing of records of arrests, charges, convictions, adjudications, and sentences..."

II. The State does not have a "substantial right" to appeal every issue in a criminal case; and it lacks statutory authority to appeal the grant of an expungement under Proposition 207.

In its supplemental brief, the State asserts that it has a "substantial right" to appeal a court's order granting expungement of a marijuana-related conviction based on two things. First, the State asserts a statutory right to appeal based on the fact that Proposition 207 does not expressly prohibit the State from appealing. State's Supp. Brief at 5. The State ignores, however, that Proposition 207 expressly grants petitioners—and only petitioners—the right to appeal from a "denial" of a petition for expungement. A.R.S. § 36-2862(F). The State's position that it somehow also

has an equal and opposite right to appeal as the opponent of an expungement petition violates well-established rules of statutory construction and the intent of the voters.

The State also asserts based on an unpublished Court of Appeals decision that it has a "'substantial right to ensure that defendants face the legal consequences of their convictions.'" *Id.* (quoting *State v. Wanna*, No. 1 CA-CR 21-0438, 2023 WL 2318465, at *2, ¶ 8 (Ariz. App. Mar. 2, 2023) (mem. decision)). This argument is incorrect, and this Court should reject the reasoning of the unpublished memorandum decision relied upon by the State.

The State's right to appeal is granted only by constitution or statute because "appeals by the government in criminal matters historically have not been favored." *State v. Lelevier*, 116 Ariz. 37, 38 (1977). Because the State's right to appeal is statutory, it is also governed by the rules of statutory construction. One such rule states that "[w]hen 'two conflicting statutes cannot operate contemporaneously, the more recent, specific statute governs over an older, more general statute.'" *State v. Jones*, 235 Ariz. 501, ¶ 8 (2014) (internal citation omitted). Here, the State relies on the older, more general statute, A.R.S. § 13-4032(4), as providing a right to appeal "[a]n order made after judgment affecting the substantial rights of the state." And the State relies on the omission of any mention of the State's right to appeal in A.R.S. § 36-2862(F) to mean that the general right to appeal post-conviction orders remains

in effect in reference to denials of expungement petitions, but the State ignores the rule that "[i]n general, when the legislature (or voters) expressly prescribes a list in a statute (or initiative), "we assume the exclusion of items not listed." *State v. Maestas*, 244 Ariz. 9, ¶ 15 (2018) (quoting *State v. Ault*, 157 Ariz. 516, 519 (1988)). A.R.S. § 36-2862(F) expressly provides a unilateral right to appeal: only petitioners seeking expungement may appeal a denial of the petition. Where, as here, the State opposed the petition and was not standing in the shoes of the petitioner and where, as here, the State is appealing the *grant* of a petition rather than the denial, no statutory right to appeal is conferred by Proposition 207.

The State's claim of right also leads to absurd results. First, the general rule under A.R.S. § 13-4032(4) only applies to post-judgment orders. Proposition 207, however, allows petitioners to seek expungement of records of arrests, proceedings, adjudications, or convictions. This means that a person may petition to expunge the records of an arrest that was dismissed pre-indictment or post-indictment but pretrial. It also means that a person who was acquitted may petition to expunge the records of the arrest and trial proceedings. The State cannot possibly be arguing that it has *gained* a right to appeal a case dismissed with prejudice, from an acquittal, or from a case the State itself voluntarily dismissed. *See, e.g.*, *State v. Hansen*, 237 Ariz. 61, ¶8 (App. 2015) (the State has no right to appeal a mistrial). It would be absurd to

presume that a statute that is intended to reduce the number of convictions in Arizona would give the State additional rights to pursue through the expungement process convictions it had failed to obtain in the first instance. "A 'result is absurd if it is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of persons with ordinary intelligence and discretion.'" *State v. Estrada*, 201 Ariz. 247, ¶ 14 (2001) (*quoting Perini Land Dev. Co. v. Pima County*, 170 Ariz. 380, 383 (1992)).

The voters wanted to ensure that prosecutors and courts could not thwart efforts to reverse decades of convictions that have devastated communities across Arizona. This Court presumes that the legislative body chose the words of a statute carefully and will not rewrite the statute by inserting words that do not exist there. "It is not the function of the courts to rewrite statutes. The choice of the appropriate wording rests with the Legislature, and the court may not substitute its judgment for that of the Legislature." *Orca Communications Unlimited, LLC v. Noder*, 236 Ariz. 180, ¶ 11 (2014).

The State claims a right to appeal exists in Proposition 207 based on the lack of express exclusion of such a right, but Proposition 207 expressly excludes the State's right to appeal through its omission and stated purpose. Under Proposition 207, the State does not have an interest in appealing a grant of expungement,

particularly where, as here, the State chose not to present evidence of ineligibility at a hearing on the merits of the petition. The expungement process in Arizona is already a time-consuming process due to its opt-in procedure. Granting the State a right to direct appeal every expungement would have a devastating chilling effect on most efforts to pursue Prop 207's remedial goal.

CONCLUSION

Proposition 207 is a first-of-its-kind statute in Arizona intended to create a remedial right to reverse a prior conviction based on conduct society has determined was not a crime. Prop 207 expressly grants to petitioners a direct right to appeal the denial of an expungement petition, in part to prevent government actors from thwarting Prop 207's remedial goal of reducing the number of marijuana-related drug convictions. To read into this remedial statute a prosecutor's right to appeal every *grant* of expungement would constitute judicial rewriting of the statute, contrary to the intent of the voters, and would have a chilling effect on eligible defendants' participation in the expungement process, which also would defeat the express purpose of creating rules to "facilitate[e] the expungement and sealing of records." Accordingly, this Court should reject the State's position and affirm the expungement order.

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