IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellant, v. DANIEL LOUIS SANTILLANES, Appellee.	Arizona Court of Appeals No. 1 CA-CR 21-0389 Maricopa County Superior Court No. CR2011-108577-001

BRIEF OF AMICUS CURIAE ARIZONA JUSTICE PROJECT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Other Authorities

INTEREST OF AMICUS CURIAE

The Arizona Justice Project ("AJP") is a non-profit organization that provides *pro bono* legal representation to Arizona indigent defendants in post-conviction matters. All of the AJP's clients who have been freed or exonerated in post-conviction proceedings have suffered the collateral consequences of having a past conviction and criminal record and face tremendous hurdles in trying to rebuild their lives.

In 2020, Arizona voters passed Proposition 207 ("Prop 207"), also known as the "Smart and Safe Arizona Act" codified under A.R.S. §§ 36-2801 et seq. and A.R.S. §§ 36-3850 et seq. allowing for adult recreational use of marijuana and, among other things but most relevant here, expungement of past marijuana-related charges and/or conviction records. The AJP and six other legal aid and community organizations joined together, collectively referred to as the Arizona Marijuana Expungement Coalition ("Coalition"), to provide public outreach on expungement and what it is, education regarding the benefits of expungement, and provide *pro bono* legal guidance and, where necessary, *pro bono* direct representation for individuals in seeking expungement.[1]

[1] This work is funded through a grant from the Arizona Department of Health Services pursuant to A.R.S. § 36-2817(D)(5).

ARGUMENT

I. This Court does not have jurisdiction over the State's appeal of a grant of expungement.

a. Prop. 207 does not vest this Court with jurisdiction.

AJP agrees with appellee Santillanes that in expungement proceedings governed by A.R.S. § 36-2862, only a petitioner *denied* expungement has a right to appeal. The statute explicitly excludes any right for the State to appeal when an expungement is *granted*.[2] Where a statute is passed by voter initiative, this Court's "primary objective 'is to give effect to the intent of the electorate'." *State v. Jones,* 246 Ariz. 452, 454 (2019) (quoting *State v Gomez,* 212 Ariz 55, 57 (2006)).

Additionally, the Arizona Supreme Court has held that in interpreting statutes, "[c]ourts also consider 'the policy behind the statute and the evil it was designed to remedy.'" *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 345 (2014) (quoting *State v. Korzep*, 165 Ariz. 490, 493 (1990)); *see also* A.R.S. § 13-104 (requiring criminal statutes to "be construed according to the fair meaning of their terms to promote justice and effect the objects of the law"). Expungement of a past record or conviction was not intended to re-litigate cases that had long been final and where defendants had already been prosecuted, paid their fines, and served their sentences. The policy and societal purpose behind expungement laws in Arizona and other

[2] In its supplemental brief, the State correctly points out the petitioner may be an individual *or* a prosecuting agency under A.R.S. § 36-2862(I). This does not confer the State a right to appeal when an expungement petition has been *granted*. *See* A.R.S. § 36-2862 (F)

states is aimed at reversing the harms and collateral consequences caused by marijuana laws, especially on certain minority communities that are more highly policed and impacted. In the Publicity Pamphlet for the 2020 General Election, an argument in favor of Prop. 207 noted "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." *Arizona 2020 General Election Publicity Pamphlet* 80 (2020). When Arizona voters passed Prop. 207, they did so with the clear intent to retroactively address systemic issues historically exacerbated by marijuana laws.

The Arizona Department of Public Safety ("DPS") estimated that as of 2020, more than 192,000 Arizona cases are projected to be eligible for expungement under the new law.[3] The vast majority of the impacted individuals in these 192,000 cases will be representing themselves in a *pro se* capacity seeking expungement. Prop. 207 provides no right to court appointed counsel, and public defense offices are not able to assist past clients, with no pending case or appointment, with expungement. Most *pro se* litigants cannot afford to hire a lawyer. And, with the exception of the Maricopa County Attorney's Office that has proactively filed nearly 10,000

[3] Fiscal Analysis, Ballot Proposition 207. B. Newcomb, Economist at Arizona Joint Legislative Budget Committee, pg 5; available at https://www.azleg.gov/jlbc/20novI-23-2020fn730.pdf (last accessed May 18, 2022).

expungement petitions, other prosecuting agencies (county attorney, city attorney or Attorney General) have taken little to no action to expunge records for impacted individuals.

The Coalition's goal is to provide legal guidance on the expungement process so that impacted individuals can file petitions *pro se*. The Coalition is much too small and lacks the resources to take on each case, considering the thousands of eligible cases. However, Coalition partners provide direct legal representation where needed. Many of the requests for direct representation received by the Coalition are made *after* an expungement petition has been filed and the lower court has asked for supplemental briefing or ordered a hearing. In these instances, most *pro se* litigants, unfamiliar with the law, untrained in legal practice, and fearful of a court proceeding, reach out for help.

To read a right for the State to appeal the *grant* of an expungement into the statute where no such right exists would vastly multiply litigation in expungement cases – which, again, are overwhelmingly litigated *pro se* by impacted individuals themselves – and would defeat the clear intent of Arizona's voters. Here, the expungement statute is clear: it provides a legal process for an individual to seek expungement of a prior record, allows the State to respond, produce evidence, request a hearing, and ultimately, allows the court that entered the conviction to grant or deny expungement of the prior record. The exclusion of the State's right to appeal

an order *granting* expungement reflects the intent of the electorate. To allow otherwise would subject individuals who have been granted expungement to further litigation, which most are unequipped to handle. It would also provide an opportunity for to the State to re-felonize individuals who might otherwise have wiped their records clean – contrary to the will of the voters who passed Prop. 207.

b. A.R.S. § 13-4032(1), (4), and (7) do not vest this Court with jurisdiction.

An expungement is essentially a remedial measure, which is only available *after* the State has been able to arrest, charge, convict, and sentence an individual for a prior offense. Thus, individuals seeking expungement have *already been* charged, convicted, sentenced, spent time incarcerated or on probation, and paid potentially thousands of dollars in fines and fees. As such, the remedial nature of the expungement law poses a very different scenario than what is encapsulated in A.R.S. §13-4032.

An expungement is fundamentally different from an indictment, information, or complaint. A.R.S. § 13-4032(1). This Court has previously recognized as much when it held that "the only appeal intended to be permitted by the statute was from a dismissal of the prosecution (then called the granting of a motion to quash) based on some legal insufficiency in the charging process." *State v. Lopez*, 26 Ariz. App. 559, 560 (1976) *opinion adopted sub nom. State v. Fayle*, 114 Ariz. 219 (1976). Likewise, an expungement differs from an acquittal, A.R.S. § 13-4032(7), because

"the controlling question is solely whether the record contains 'substantial evidence to warrant a conviction.'" *State v. West*, 226 Ariz. 559, 562 ¶ 14 (2011). Nor are any "substantial rights of the state" at play in an expungement. A.R.S. § 13-4032(4).

The State mis-applies section (G) of A.R.S. § 36-2862 to the present case as the matter at hand does not involve a *pending* complaint, information, or indictment. Section (G) was intended to allow the courts to dismiss *pending* cases as the legalization of recreational use of marijuana went into effect (state licensed sales of recreational cannabis began January 22, 2021, but expungement petitions could not be filed until July 12, 2021). Even if a pending complaint, information or indictment was dismissed pursuant to Section (G), to obtain a full expungement of the arrest or other record associated, the person would have to file under A.R.S. § 36-2862(A).

II. The plain language of the statute provides guidance on what should happen when a conviction is expunged.

For the most part, expungement is new to Arizona for both the legal system and the public. The AJP and Coalition partners have been intentional on educating the public on "expungement", as the term alone has a legal meaning that many people do not fully understand. As evident in the expungement statute, a grant of "expungement" includes a variety of benefits as outlined A.R.S. § 36-2862(C)(1)(a)-(e). [4] Of note, the use of the terms "expunge" and "seal" may be relevant to the

[4] Expungement provides for the sealing of the relevant records plus additional rights. Those additional rights include (1) vacation of the judgement of

Court's inquiry on issue 4. As the Arizona Supreme Court said in *Jones*, "The most reliable indicator of that intent is the language of the statute, and if it is clear and unambiguous, we apply its plain meaning and the inquiry ends." 246 Ariz. at 454. Courts refer to established and widely used dictionaries to determine the plain meaning of terms within a statute. *State v. Lychwick*, 222 Ariz. 604, 606 ¶ 9 (App. 2009).

The statute states that once a court grants expungement under § 36-2862(A), that the court shall order a variety of things to happen with the underlying criminal record. Of relevance here, A.R.S. § 36-2862(C)(1)(b) states that the order expunges *any record* of the Petitioner's arrest, charge, adjudication, conviction, and sentence. The use "any" indicates that the law enforcement and court records relating to matter that has been expunged shall be included. The statute does not include an exception for charges that may have been dismissed pursuant to a plea. As a practical matter, and as Mr. Santillanes notes, the effect of (C)(1)(b) is that the law enforcement and court records are sealed and separated, meaning that they are not publicly accessible. These records are not destroyed by the state agencies, but rather sealed and

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adjudication or conviction, § 36-2862(C)(1)(a); (2) restoration of civil rights that were lost as a result of that specific conviction, § 36-2862 (C)(1)(c); (3) barring the State from using the expunged offense for any subsequent purposes, such as sentence enhancements, § 36-2862 (D); and (4) the ability for the petitioner to state that s/he has never been arrested for, charged with, adjudicated or convicted of, or sentenced for the subject crime, § 36-2862 (E).

separated. Thus, a criminal history related to the expunged matter should not appear in background checks or other criminal history reports.

CONCLUSION

Amicus curiae urges this Court to dismiss this appeal for lack of jurisdiction or, in the alternative, uphold the superior court's grant of expungement.

Respectfully submitted,

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