IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

THE STATE OF ARIZONA, Appellant, v. DANIEL LOUIS SANTILLANES, Appellee.	CASE No. 1 CA-CR-21-0389 (Maricopa County Superior Court Cause No. CR2011-108577-001)

BRIEF OF *AMICI CURIAE* PIMA COUNTY PUBLIC DEFENDER'S OFFICE and ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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The Pima County Public Defender's Office (PCPD) is the second largest indigent defense agency in the state. Its eighty attorneys represent thousands of clients every year in Superior Court and in Juvenile Court. PCPD's appellate unit represents clients in criminal cases before the Arizona Court of Appeals, the Arizona Supreme Court, and, on occasion, the Supreme Court of the United States. PCPD, through undersigned counsel, represents the appellants in three cases seeking review of the Pima County Superior Court's decisions denying their requests for expungement of marijuana-related offenses pursuant to A.R.S. § 36-2862.[1] The questions presented in this Court's order for supplemental briefing directly relate to the issues presented in these three pending appeals.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order 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,

[1] *State v. Anthony Lawrence Miller*, 2 CA-CR 2021-0107; *State v. Alan Ivan Ibarra*, 2 CA-CR 2021-0087; *State v. Daniel Ricardo Santacruz*, 2 CA-CR 2021-0088.

promoting excellence in 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. AACJ regularly appears as *amicus curiae* before Arizona courts on issues related to marijuana reform initiatives.[2]

ARGUMENTS

Prop 207 is a remedial statute. Section 7(7) of Prop 207 provides that any new rules or legislation must "facilitate[e] the expungement and sealing of records of arrests, charges, convictions, adjudications, and sentences that were predicated on conduct made lawful by this act, by automatic means, and otherwise preventing or mitigating prejudice to individuals whose arrests, charges, convictions, adjudications or sentences are expunged." 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). This principle also applies to implementing rules, such as Ariz. R. Crim. P. 36. *Fullen v. Industrial Comm'n*, 122 Ariz. 425, 429 (1979). Because Proposition 207 is also a voter-enacted initiative, the Voter Protection Act, Ariz. Const. art. IV, pt. 1, § 1(6)(C) (VPA),

[2] *E.g.*, *Reed-Kaliher v. Hoggatt*, 235 Ariz. 361 (App. 2014), 237 Ariz. 119 (2015); *State ex rel. Polk v. Hancock*, 236 Ariz. 301 (App. 2014), 237 Ariz. 125 (2015); *State v. Sisco*, 239 Ariz. 532 (2016); *State v. Maestas*, 242 Ariz. 194 (App. 2017), 244 Ariz. 9 (2018); *State v. Jones*, 245 Ariz. 46 (App. 2018), 246 Ariz 452 (2019); *State v. Green*, 245 Ariz. 529 (App. 2018), 248 Ariz. 133 (2020).

mandates that it be interpreted liberally to "give effect to the intent of the electorate." *State v. Jones*, 246 Ariz. 452, ¶ 5 (2019) (internal quotations omitted).

I. A.R.S. § 36-2862(B)(3) and Ariz. R. Crim. P. 36(d) mandate that courts grant facially valid petitions for expungement of drug paraphernalia charges and convictions related to marijuana.

Because A.R.S. § 36-2862(A)(3) expunges the offense of possession of drug paraphernalia, § 36-2862 is related to § 13-3415, and these two statutes must be read *in pari materia*. *See State v. Burbey*, 243 Ariz. 145, ¶ 13 (2017). Under the statutory construction doctrine *in pari materia*, courts consider "the context and related statutes on the same subject," *Nicaise v. Sundaram*, 245 Ariz. 566, ¶ 11 (2019), "as though they constituted one law" to avoid rendering any word, clause or sentence superfluous. *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970).

Possession of drug paraphernalia is a single offense under § 13-3415(A) based on the act of possession, "regardless of the number or kind or intended use of the paraphernalia possessed." *State v. Soza*, 249 Ariz. 13, ¶ 7 (App. 2020). In *Soza*, this Court found § 13-3415(A) ambiguous because it is amenable to an act-based, object-based, or intent-based unit of prosecution. *Id.* ¶¶ 10-11. But "permitting each object of paraphernalia to support a separate charge under § 13-3415(A) would create a misalignment between the policy objective of the statute and its consequences in practice." *Id.* ¶ 17 (citing *State v. Jurden*, 239 Ariz. 526, ¶ 23 (2016).

Likewise, § 13-3415(A) is not based "on the defendant's intent to commit a particular drug crime" because the statute "does not refer to a specific type of drug crime." *Soza,* 249 Ariz. 13, ¶ 19. Instead, "a defendant could be found guilty of possessing drug paraphernalia without evidence linking the paraphernalia to a specific drug offense." *Id.* at ¶ 19. The fact that all drug paraphernalia charges are classified as a class 6 felony, regardless of the drug involved, and the statute's place in the statutory scheme also demonstrate that possession of drug paraphernalia under § 13-3415 means that it is "reasonably read as a complement to other drug laws," regardless of which drug was involved. *Id.* at ¶ 22. Under *Soza*, therefore, the intent to commit a marijuana versus cocaine offense is irrelevant to the charge or conviction for possession of drug paraphernalia.

Courts have a duty to construe statutes, "if possible, in a way that not only gives effect to the [voters'] intent, but also in a way that maintains its constitutionality." *State v. Thompson*, 204 Ariz. 471, ¶ 27 (2003). A statute is unconstitutionally vague if its terms are not "clear enough to give persons of ordinary intelligence notice of what conduct is prohibited" and are not explicit enough to "prevent arbitrary and discriminatory enforcement." *State v. Cotton*, 197 Ariz. 584, ¶ 19 (App. 2000). Section 36-2862, which permits expungement of the offense of possessing "paraphernalia relating to the cultivation, manufacture, processing or

consumption of marijuana," is ambiguous because an offense of "possession of paraphernalia related to … marijuana" does not exist in Arizona. Even if such an offense existed, § 36-2862 does not provide that a paraphernalia conviction relating to marijuana is ineligible for expungement if it *also* possibly relates to another drug. Thus, § 36-2862 can be interpreted to mean that a paraphernalia offense is eligible for expungement so long as marijuana was involved, even if other drugs were also involved, or it could mean that a paraphernalia offense is ineligible unless marijuana was the sole drug involved in the entire case.

Where, as here, a criminal statute is "susceptible to more than one interpretation, the rule of lenity dictates that any doubt should be resolved in favor of the defendant." *State v. Tarango*, 185 Ariz. 208, 210 (1996). The rule of lenity is based in due process. U.S. Const. amends. V, XIV; Ariz. Const. art. 2, § 4. "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

§§ 36-2862 & 13-3415 can be harmonized to resolve ambiguity and preserve both statutes' constitutionality. § 36-2862(A)(3) does not limit expungement of paraphernalia offenses to situations involving only marijuana, so long as the charge

is "relating to … marijuana." Given the intended remedial nature of expungement, granting expungement of a unitary paraphernalia offense that related to marijuana and possibly another drug is not so irrational, unnatural, or inconvenient that voters could not have intended such a result. *See, e.g., State v. Green,* 248 Ariz. 133 (2020) (quoting *State v. Estrada,* 201 Ariz. 247, ¶ 17 (2001) (holding that Prop 200 did not expressly "limit drug treatment to users who had never engaged in selling drugs," such that the fact "that an offender may have multiple prior convictions for possession of drugs for sale and still be eligible for mandatory probation and drug treatment for a first personal possession or use offense is not 'so irrational, unnatural, or inconvenient' that voters could not have intended that result.")).

Since a petitioner is eligible for expungement as long as the paraphernalia conviction is "relating to … marijuana," allowing expungement for this unitary offense is consistent with Prop 207's remedial purpose.

II. The court's factual determination is limited to the statute and evidence produced by the State; anything else would violate the separation of powers.

Prop 207 permits a court to hold a hearing on a contested petition for expungement "on the request of either the petitioner or the prosecuting agency" or if the court concludes there are genuine disputes of fact regarding whether the petition should be granted," but the court "shall grant the petition unless the

prosecuting agency establishes by clear and convincing evidence that the petitioner is not eligible for expungement." § 36-2862(B)(2)(a)-(b) & (B)(3). The clear purpose of the statute is to provide a mechanism for prosecutors to accomplish their ethical duties as ministers of justice.

The Arizona Constitution entrusts to prosecutors the decision whether to prosecute, plead facts, or enhancements. *State v. Prentiss*, 163 Ariz. 81, 85 (1989). "Generally, the courts have no power to interfere with the discretion of the prosecutor unless he is acting illegally or in excess of his powers." *State v. Murphy*, 113 Ariz. 416, 418 (1976). In addition, separation-of-powers principles embodied in the Arizona Constitution entrust discretion to prosecutors, such as whether to file an allegation of a prior conviction, *State v. Birdsall*, 116 Ariz. 112, 114 (1977), *overruled on other grounds by State v. Burge*, 167 Ariz. 25 (1990), or to decline or discontinue a prosecution, *Smith v. Superior Court*, 101 Ariz. 559, 560 (1967).

"The executive department has the power to enforce the law," and a prosecuting agency is "properly vested with both the power to charge an individual accused of criminal conduct and the discretion to proceed to trial once a criminal action has been filed." *Id.* Similarly, when a prosecutor determines that a conviction must be vacated and files a motion to vacate judgment, the trial court must order the remedy before it can occur—but a court "cannot prevent the prosecution from

dismissing charges against a criminal defendant." *State v. Superior Ct. In & For Cty. of Navajo*, 180 Ariz. 384, 385 (App. 1994). This proscription embodies the constitutional separation-of-powers understanding that it is the role of the executive branch to ensure that the "laws be faithfully executed." Ariz. Const. art. 5, § 4. In addition, article 3 of the Arizona Constitution provides that "the powers of the government of the State of Arizona shall be divided into three separate departments...such departments shall be separate and distinct and no one of such departments shall exercise the powers properly belonging to the others."

If courts cannot interfere with prosecutors' decisions to dismiss prosecutions, then it stands to reason that courts similarly cannot interfere with prosecutors' decisions not to seek evidentiary hearings in opposition to expungement petitions. In *Gomez*, our Supreme Court noted that "[i]ndictments can be dismissed for various reasons, including a prosecutor's determination that the person charged did not in fact commit the crime or—as this case illustrates—that there is no reasonable likelihood of conviction," 212 Ariz. 55, ¶ 21 (2006). "[D]isqualifying a defendant from probation under Proposition 200 based merely on a ten-year-old previously dismissed indictment, without any further proof by the State of the underlying facts or any opportunity for the defendant to contest the factual basis for the indictment, would raise serious due process issues." *Id.* ¶ 28. *Gomez* demonstrates why Prop 207

places the burden of proof on the State—not the court—to contest a petition by producing clear and convincing evidence of ineligibility. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *S. Point Energy Ctr. LLC v. Arizona Dep't of Revenue*, 251 Ariz. 263, ¶26 (App. 2021) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)); *see also United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

While Prop 207 requires a court to "issue a signed order or minute entry granting or denying the petition in which it makes findings of fact and conclusions of law," the court only makes findings "about all relevant factors." *Hubert v. Carmony*, 251 Ariz. 531, ¶ 12 (App. 2021). The court is neither permitted nor required to conduct *ex parte* research into the underlying police reports to find a reason to deny a petition for expungement. To do so would shift the burden of proof. Rule 36(d) provides the correct framework for the court's required findings of fact and conclusions of law. If a petition sets forth sufficient information for a court to identify the records to be expunged under Rule 36(a)(1) and (b)(1), then the court makes a finding whether the prosecution has proven factual ineligibility by clear and convincing evidence under Rule 36(d)(3). If, as here, the prosecution has not met its burden, then the court makes a finding whether the offense "on its face" is of the

type that cannot be expunged under § 36-2862(A)(1)-(3). Rule 36(d)(3). If the offense is legally expungable, then the court orders the relief provided by § 36-3862. Rule 36(d)(4). No other factual findings or conclusions of law are permitted by Prop 207 or Rule 36, in the absence of facts disputed by the parties.

CONCLUSION

Proposition 207 is a remedial statute that was intended to provide relief to defendants who have been previously convicted of marijuana-related offenses. To give effect to the voters' intent, courts must grant a petition for expungement of facially valid offenses unless the State proves through clear and convincing evidence at an evidentiary hearing that a conviction is ineligible. To give meaningful effect to the voters' intent, this necessarily includes inchoate and paraphernalia offenses.

DATED: (electronically filed) May 23, 2022.

By /s/
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