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**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

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| STATE OF ARIZONA,<br><br>Appellant/Plaintiff,<br><br>vs.<br><br>DANIEL LOUIS SANTILLANES,<br><br>Appellee/Defendant. | No. 1 CA-CR 21-0389<br><br>Maricopa County Superior Court<br>No. CR2011-108577-001 |

# APPELLANT'S RESPONSE BRIEF TO BRIEF OF AMICUS CURIAE ARIZONA JUSTICE PROJECT

## MEMORANDUM OF POINTS AND AUTHORITIES

## ARGUMENT

### I. *Pro se* indigent defendants are entitled to appointed counsel if the State appeals an erroneous expungement, which affects the substantial rights of the State.

Arizona Justice Project (hereinafter "AJP") argues that this Court should not read a right of the State to appeal the grant of an expungement because most petitions are litigated by *pro se* individuals, and the Coalition does not have the resources to provide legal representation for all cases. (AJP Amicus Brief, at 4.)

This argument ignores the fact that Ariz. R. Crim. P. 31.2(e)(2)(A) requires the superior court clerk to notify a defendant and defense counsel "if any," when the State appeals. Rule 32.1(e)(3) further requires the superior court clerk to distribute a notice advising an unrepresented defendant of his right to counsel under Rule 6. Rule 6.1 gives a defendant a right to counsel "in any criminal proceeding," including the right to the appointment of counsel for indigent defendants. Thus, in the event that the State appeals an erroneous expungement granted to a *pro se* defendant, the defendant would be notified that he is entitled to the appointment of counsel for that appeal, if he so chooses.

AJP's argument that the State has no right to appeal pursuant to A.R.S. §13-4032(4) is similarly unavailing. The substantial rights of the State are affected by an erroneous expungement because it subsequently affects the ability of the State to use

the conviction for sentencing enhancement purposes. Consequently, a post-judgement expungement raises a different issue than one that could have arisen from the underlying judgement. *See State v. Jimenez*, 188 Ariz. 342, 348 (App. 1996).

This is particularly true if a trial court erroneously interprets A.R.S. § 36-2862(C)(1)(b) to order the expungement of all counts of an indictment because one count was expungement eligible, as questioned by this Court in question 4 of its order for supplemental briefing. For example, if a person incarcerated for Robbery, Sale of Marijuana over 4 pounds, and Possession of Drug Paraphernalia successfully obtains expungement of all those offenses because the paraphernalia charge was eligible under A.R.S. § 36-2862(A)(3), that person would then be immediately released from the Department of Corrections without any recourse for the State and the State would not be able to use the Robbery offense as a prior felony conviction. Consequently, this Court must find that the State has the right to appeal an erroneous granting of an expungement pursuant to § 13-4032(4).

## II. A.R.S. § 36-2862(C) sets forth the administrative steps for expunging eligible records.

The State agrees that the purpose of A.R.S. § 36-2862(C) is to set forth the administrative responsibilities of the court and other public agencies to enact the expungement of an eligible offense. A.R.S. §36-2862 (C)(1)(b) does not, however, permit the expungement of ineligible counts simply because they appear in the same

charging document. It must not be read to permit a back door expungement of otherwise ineligible offenses.

The purpose of the "any record" language in subsection (C)(1)(b) relates to the records of the eligible charge that appear in other agency files. Looking at subsection (C) as a whole, it is clear that the subsection sets forth the process by which a granted petition is administratively enacted through the various public agencies in which records of the eligible offense appear.

Subsection (C)(1) requires the trial court to take certain actions that will clear the court's own records of the expunged offense, including the notification of other public agencies in which the arrest, charge, and/or conviction appear. Subsection (C)(2) then requires the Department of Public Safety to enforce the trial court's order from subsection (C)(1) by separating the expunged record and notifying other law enforcement agencies. Subsection (C)(3) also requires the arresting and prosecuting agencies to take action to enforce the trial court's order. Subsection (C)(1)(b), therefore, simply requires the court's expungement order to include language that will direct the agencies mentioned in subsections (C)(2) and (C)(3) to take the actions necessary to enforce the expungement order. It does not permit expungement of otherwise ineligible offenses that appear in the same arrest, charging, or conviction record.

## CONCLUSION

Both parties may directly appeal an adverse expungement order regardless of whether the petitioner had counsel in the superior court. A.R.S. § 36-2862(C) merely sets forth the administrative process for enacting a court's expungement ruling and should not be misconstrued to allow the back door expungement of otherwise ineligible offense.

Submitted June 17, 2022.

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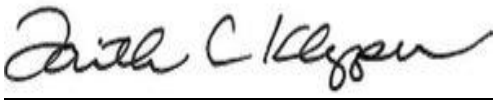
BY: 

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