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**ARIZONA SUPREME COURT**

In the matter of: )  
 )  
PETITION TO AMEND RULE 26.11 ) Supreme Court No. 22-\_\_\_\_\_  
AND ADOPT RULE 36.1, RULES ) (expedited consideration  
OF CRIMINAL PROCEDURE ) and emergency adoption  
 ) requested)  
 )  
\_\_\_\_\_ )

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions the Court to amend Criminal Rule 26.11 and adopt new rule Criminal Rule 36.1, as shown in Appendix A, to implement SB 1294, which creates A.R.S. § 13-911 and was enacted as part of the 2021 legislative session as more particularly described below. Petitioner seeks expedited consideration of this petition and emergency adoption of the proposed Rule 26.11 amendment and proposed Rule 36.1 due to the January 1, 2023 effective date of A.R.S. § 13-911.

**I. Grounds for Petition Approval.**

SB 1294 creates A.R.S. § 13-911 which allows a person to request that all case records related to a criminal offense be sealed when certain criteria have been met. Court procedures for this process are not currently established in the Arizona

Rules of Court. Petitioner directed the formation of a workgroup comprised of court administrators, clerks of court, AOC staff and attorneys, court specialists, and other stakeholders. The workgroup examined A.R.S. § 13-911 and the Arizona Rules of Court to identify the changes necessary for courts to process requests to seal criminal records under A.R.S. § 13-911. A copy of the new statute is attached as Appendix B.

Beginning January 1, 2023, the statute permits eligible individuals to petition a court to have all records related to a criminal offense sealed. If successful, the petitioner is entitled to an order sealing all records relating to the offense (A.R.S. § 13-911(I)(2)), directing the clerk of court to notify the Department of Public Safety (DPS) and the prosecutor of the sealing order. The statute also imposes on the DPS an obligation to designate its records as “sealed” and to notify “all appropriate state and federal law enforcement agencies of the sealing” (A.R.S. § 13-911(I)(3)). Arresting and prosecuting agencies must clearly identify in their files and electronic records that the petitioner’s records are sealed (A.R.S. § 13-911(I)(4)). “Case records” under this statute means all records that pertain to a person’s arrest, conviction, and sentence for a particular offense that are eligible for sealing pursuant to A.R.S. § 13-911.

Petitioner proposes creating a new Criminal Rule 36.1 because the procedures for processing petitions under the new statute do not fall squarely within the

procedures for other matters that would otherwise allow an existing rule to be amended. The proposed Rule 36.1 incorporates the requirements of the new statute and borrows from Rule 36 that governs applications for expunging marijuana records.

To implement the new statute, the workgroup identified and resolved a number of legal and policy issues, which are contained in the proposed rule, including:

- Eligibility requirements to file a petition to seal criminal records under A.R.S. § 13-911.
- The specific information that must be included in the petition.
- Where the petition must be filed.
- Timeframe, hearing, and notice requirements.
- No filing fee should be charged due to the essentially criminal nature of these proceedings.
- The court should have discretion to:
  - Dismiss any petition for insufficient information, and
  - Schedule a hearing before granting, denying, or dismissing a petition.

The rule also delegates to the AOC administrative director the task of creating and modifying criminal records sealing-related forms for the public and courts to use. This will permit greater flexibility should amendments to the forms be needed.

A.R.S. § 13-911 also includes a requirement that at the time of sentencing the court inform the defendant that they may be eligible to petition the court for an order that seals all case records pursuant to A.R.S. § 13-911. Accordingly, Petitioner proposes an amendment to Rule 26.11(a)(1) that would add a new subsection (F) for this purpose.

## **II. Request for Expedited Consideration and Emergency Adoption.**

Pursuant to Supreme Court Rule 28(h), Petitioner believes that expedited consideration and emergency adoption of the proposed Rule 36.1 and Rule 26.11 amendment are warranted in this matter because of the January 1, 2023 effective date of the statute that the proposed Rule 36.1 and amended Rule 26.11 are intended to implement.

Therefore, as permitted by Supreme Court Rule 28(h), Petitioner requests expedited consideration of the proposed Rule 36.1 and Rule 26.11 amendment at the court's next Rules Agenda with a comment period to follow, and emergency adoption of the proposed Rule 36.1 and Rule 26.11 amendment with an effective date of January 1, 2023.

Respectfully submitted this 26<sup>th</sup> day of June, 2022.

By /s/ \_\_\_\_\_  
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## APPENDIX A

### Arizona Rules of Criminal Procedure

(deletions shown with ~~strikethrough~~, new language is underlined)

## **RULE 26. JUDGMENT, PRESENTENCE REPORT, PRESENTENCING HEARING, SENTENCE**

### **Rule 26.11. A Court's Duty After Pronouncing a Sentence**

**(a) Disclosures.** After pronouncing judgment and sentence, the court must:

(1) inform the defendant:

(A) through (C) No change

(D) of the right to apply to have the judgment of conviction set aside, except as provided in A.R.S. § 13-905(K); ~~and~~

(E) of the right to the restoration of civil rights; and

(F) that the defendant may be eligible to petition the court for an order that seals all case records of the defendant's arrest, conviction, and sentence that are related to the offense, pursuant to A.R.S. § 13-911.

(2) No Change

**(b) No Change**

## **RULE 36.1. SEALING ARREST, CONVICTION, AND SENTENCING RECORDS**

**(a) Applicability.** This rule governs petitions to seal records that are filed under A.R.S. § 13-911. "Case records" as used in this rule means all records that pertain to the person's arrest, conviction, and sentence for a particular offense and that may be sealed pursuant A.R.S. § 13-911.

**(b) Eligibility.** A person may file a petition to seal all case records related to a criminal offense if the person has not previously had a petition denied in the past three years and the person was:

(1) Convicted of a criminal offense and has completed all the terms and conditions of probation or sentence, including the payment of all monetary obligations and restitution to all victims, and the required timeframes in A.R.S. § 13-911 have passed;

(2) Charged with a criminal offense and the charge was subsequently dismissed or resulted in a not guilty verdict at a trial; or

(3) Arrested for a criminal offense and no charges were filed.

**(c) Petition.**

(1) Contents of a Petition.

(A) A petition filed pursuant to A.R.S. § 13-911 must include:

- (i) the petitioner's name, address, date of birth, and the email address;
- (ii) any name, if different from (i) used by petitioner at the time of the arrest, charge, or conviction;
- (iii) the offense for which sealing is being requested;
- (iv) if charges were filed, the court's case number;
- (v) whether there are any outstanding fines, fees, restitution, or other court ordered financial obligations for the offense; and
- (vi) whether the petitioner has completed the conditions of their probation or sentence.

(B) The petition should also state the following, if known:

- (i) the date of arrest;
- (ii) location of arrest;
- (iii) the name of the arresting agency;
- (iv) if charges were filed, the name of the prosecuting agency;  
and
- (v) if the case was initially filed in a justice court but was transferred to the superior court, the name of the justice court and the justice court case number.

(2) Petitioner's Signature; Attachments. The petitioner must sign the petition with the following declaration "I declare under penalty of perjury that the information I have provided in this petition and any attachments is true and correct to the best of my knowledge." The petitioner may attach supporting documents and affidavits to the petition.

(3) Place of Filing; Filing Fee.

(A) If the petitioner was convicted of an offense listed in the petition, the petition must be filed in the court where the person was convicted.

(B) If an indictment, information, citation, or complaint was filed and all charges were dismissed, the person was found not guilty on all charges, or the person's conviction was vacated, the petition must be filed in the court where the indictment, information, citation, or complaint was filed, except that if the case commenced in a justice court and was transferred to a superior court, the petition must be filed in the superior court.

(C) If the petitioner had an initial appearance but no charges were filed, the petition must be filed in the court where the initial appearance was held.

(D) If the petitioner was arrested, did not have an initial appearance, and no charges were filed, the petition must be filed in the superior court in the county where the arrest occurred.

(E) The clerk may not charge a fee for filing a petition.

(4) *Victim Notification.* The victim has a right to be present and heard at any proceeding in which the defendant has filed a petition to seal case records. If the victim has made a request for post-conviction notice, the prosecutor must provide the victim with notice of the defendant's petition and of the victim's rights under A.R.S. § 13-911.

**(d) Processing of Petition.**

(1) *Dismissal for Failure to Provide Sufficient Information.* Within ten days of filing, the court must make a determination as to whether the petition contains sufficient information to identify the records to be sealed. A petition that does not contain sufficient information to identify the records to be sealed must be dismissed. A dismissal under this section may be made without a hearing. A dismissal for lack of providing sufficient information does not constitute a denial for purposes of (f)(4).

(2) *Providing the Petition to the Prosecutor and Victims.* If the petition is not dismissed, the court must send a copy of the petition and supporting documentation submitted by the petitioner to the applicable prosecuting agency no later than 10 days after filing.

(3) *Response.* Within 30 days of the petition filing date, the prosecutor or victim may file a response stating any objections to the petition. The person filing the response must send a copy of the response to the petitioner's attorney or the petitioner, if unrepresented.

(4) *Reply.* The petitioner may file a reply no later than 15 days after the response is filed.

(5) *Notification to the Department of Public Safety (DPS).* If the petition is not dismissed, within 10 days of filing and on the approved form made available under section (i), the court must notify DPS to request that DPS prepare and submit a report to the court that includes all of the petitioner's state and federal arrests, prosecutions, and convictions, and any other information that DPS believes will assist the court in making its determination.

**(e) Hearing.**

(1) Basis for a Hearing. The petitioner, prosecutor, or victim may request a hearing before the court has ruled on the petition. The court may sua sponte set a hearing before ruling on the petition.

(2) Time for Hearing. A hearing under this section must be held no later than 90 days after the petition is filed, unless the court finds good cause for an extension.

(3) Notice to Victims. The prosecuting agency must provide post-conviction victim notice of the hearing date and time and the right to be heard, if the victim requested post-conviction notification.

**(f) Disposition.**

(1) Timeframe for Ruling on the Petition. At least 30 days must elapse from the date of the filing of the petition before the court can grant or deny a petition, unless the court receives notice that the prosecutor and all victims who have made a request for post-conviction notice do not object to the petition.

(2) Granting or Denying the Petition. The court must grant the petition if it determines that granting the petition is in the best interests of the petitioner and the public's safety, except that if the petitioner is charged with an offense after filing a petition and the offense could result in a conviction that cannot be sealed or that could extend the time to file a petition to seal case records, the court may not grant or deny the petition until the court disposes of that charge. Unless the petitioner, prosecutor, or victim requests a hearing, a petition may be granted or denied without a hearing.

(3) Order Granting Petition. If the court grants the petition, the court must, as to any applicable count, order sealed all case records related to the petitioner's arrest, conviction, and sentence.

(4) Order Denying Petition and Refiling. If the court denies the petition, the petitioner must wait at least three years from the date of denial before refiling the petition.

**(g) Action by Clerk.** If the court grants the petition, the clerk must seal all case records related to the petitioner's arrest, conviction, and sentence, and transmit the order to DPS and to the prosecutor. If the order is issued by a superior court, the clerk must also transmit the order to any limited jurisdiction court identified in the petition and to the probation department, if a term of probation was imposed.

**(h) Appeal.** An appeal from an order denying a petition may be taken only when the basis of the appeal is the defendant's eligibility to petition the court.

**(i) Forms.** The Administrative Director of the Administrative Office of the Courts is authorized to create and modify forms and instructions for use by the public and the courts to implement this rule. The director shall make the forms available on the self-service page of the Arizona Judicial Branch website, azcourts.gov. Any substantial variation from these forms must first be approved by the Administrative Director. A petitioner may file a petition that varies from the approved form so long as it includes the information required by this rule and complies with Rule 1.6.

## APPENDIX B

### 13-911. Sealing of arrest, conviction and sentencing records; requirements; fee; appeal; definition

A. A person may file a petition to seal all case records related to a criminal offense if the person was:

1. Convicted of a criminal offense and has completed all of the terms and conditions of the sentence that was imposed by the court, including the payment of all monetary obligations and restitution to all victims.
2. Charged with a criminal offense and the charge was subsequently dismissed or resulted in a not guilty verdict at a trial.
3. Arrested for a criminal offense and no charges were filed.

B. All case records that are sealed pursuant to this section may be:

1. Alleged as an element of an offense.
2. Used as a historical prior felony conviction.
3. Admissible for impeaching any party or witness in a subsequent trial.
4. Used to enhance the sentence for a subsequent felony.
5. Used to enhance the sentence pursuant to sections 28-1381 and 28-1382.
6. Pleaded and proved in any subsequent prosecution of the person by this state or a political subdivision of this state.
7. Used as a conviction if the conviction would be admissible if the conviction was not sealed.

C. The person shall file a petition to seal all case records in one of the following:

1. The court in which the person was convicted of an offense.
2. The court in which an indictment, information, criminal citation or complaint against the person was filed and the charges were dismissed, the person was found

not guilty or the person's conviction was vacated, except that if the complaint was filed in a justice court and subsequent information was filed, the petition must be filed in the superior court.

3. The court in which the person had an initial appearance if charges were not filed.
4. The superior court in the county where a person was arrested if the person did not have an initial appearance and no charges were filed.

D. The court may not grant or deny a petition to seal a person's case records until thirty calendar days after the court receives the petition unless the court receives notice that both the prosecutor and all victims who have made a request for postconviction notice do not object to the petition. Unless the petitioner, prosecutor or victim requests a hearing, the court may grant or deny a petition to seal case records without a hearing. The court may dismiss a petition that does not meet the requirements prescribed in this section without a hearing. The court shall grant the petition if the court determines that granting the petition is in the best interests of the petitioner and the public's safety. The clerk of the court shall provide a copy of the petition to seal case records to the prosecutor. The prosecutor may respond to the petition and request a hearing. The victim has a right to be present and heard at any proceeding in which the defendant has filed a petition to seal case records. If the victim has made a request for postconviction notice, the prosecutor shall provide the victim with notice of the defendant's petition and of the victim's rights under this section.

E. At the time of sentencing, the court shall inform the person on the record that the person may be eligible to petition the court for an order that seals all case records of the person's arrest, conviction and sentence that are related to the offense pursuant to this section and shall provide this notice in writing. A person who was convicted of an offense and who has not subsequently been convicted of any other offense except a misdemeanor violation included in title 28, excluding a conviction for a violation of section 28-1381, 28-1382 or 28-1383, may petition the court to seal the person's records of arrest, conviction and sentence after the person completes all of the terms and conditions of the person's sentence, including paying all fines, fees and restitution that are ordered by the court, and the following period of time has passed since the person completed the conditions of probation or sentence and was discharged by the court:

1. Ten years for a class 2 or 3 felony.

2. Five years for a class 4, 5 or 6 felony.
3. Three years for a class 1 misdemeanor.
4. Two years for a class 2 or 3 misdemeanor.

F. Notwithstanding subsection E of this section, if the person has a prior historical felony conviction, the person may petition the court to seal the person's records of arrest, conviction and sentence pursuant to subsection E of this section after an additional five years.

G. A person who is convicted of two or more offenses may not petition the court to seal the person's case records until the period of time prescribed in subsection E of this section has passed for each conviction.

H. After a petition to seal case records is filed, the court shall notify the department of public safety and request the department to prepare and submit a report to the court that includes all of the petitioner's state and federal arrests, prosecutions and convictions and any other information that the court requests or that the department believes will assist the court in making its determination. The director may charge the petitioner a fee that is determined by the director for the investigation unless the petitioner is indigent or has been found not guilty or the case was dismissed or not prosecuted and the petition is filed pursuant to subsection C, paragraph 2 or 3 of this section.

I. If the court grants a petition to seal case records:

1. The court shall issue an order sealing all records relating to the petitioner's arrest, conviction and sentence and directing the clerk of the court to notify the department of public safety and the prosecutor of the sealing order.

2. On order of a court, the clerk of the court shall seal all case records relating to the petitioner's arrest, conviction and sentence. A court order to seal case records pursuant to this section is subject only to the disclosure requirements in this section and shall be treated differently than a record that is sealed pursuant to any other statute or court rule. The clerk shall create and manage a system for sealing case records pursuant to this section and for providing sealed case records to an entity or person that is listed in subsection J of this section and that requests the record. On the request of an entity or person listed in subsection J of this section, the clerk shall provide the entity or person with any sealed case records. The clerk may not provide

sealed case records pursuant to this section to any person or entity that is not listed in subsection J of this section.

3. The department of public safety shall designate the case records as sealed within the department's records and inform all appropriate state and federal law enforcement agencies of the sealing. The department may not share or provide sealed case records with any person or entity that is not listed in subsections B and J of this section. The department may charge the successful petitioner a fee determined by the director to research and correct the petitioner's criminal history record unless the petitioner is indigent or has been found not guilty or the case has been dismissed or not prosecuted and the petition is filed pursuant to subsection C, paragraph 2 or 3 of this section.

4. The arresting and prosecuting agencies shall clearly identify in each agency's files and electronic records that the petitioner's arrest or conviction and sentence records are sealed.

5. A person whose records are sealed pursuant to this section may state, in all instances, that the person has never been arrested for, charged with or convicted of the crime that is the subject of the arrest or conviction, including in response to questions on employment, housing, financial aid or loan applications unless any of the following applies:

(a) The person is submitting an application that requires a fingerprint clearance card pursuant to title 41, chapter 12, article 3.1.

(b) The sealed case records involved a violation of chapter 34 of this title.

(c) The sealed case records involved burglary or theft from a residential or nonresidential structure and the person is applying for a job that requires entering into and performing services inside of a residential structure.

(d) The sealed case records involved child abuse or aggravated assault and the person is applying for a job involving supervising, educating or administering care to a minor.

(e) The sealed case records involved vulnerable adult abuse and the person is applying for a job involving supervising or administering care to a vulnerable adult or a person who is at least sixty-five years of age.

(f) The sealed case records involved a violation of section 5-395.01, 5-396, 5-397, 13-1814, 28-1381, 28-1382, 28-1383, 28-8282, 28-8284, 28-8286, 28-8287 or 28-8288 and the person is applying for a job involving the commercial or private operation of a motor vehicle, boat or airplane.

(g) The sealed case records involved theft, theft of means of transportation, forgery, taking the identity of another or fraudulent schemes and artifices and the person is applying for a job involving accounting, overseeing, transporting, handling or managing another person's money or financial assets.

(h) The person is applying for a position with a law enforcement agency, a prosecutor's office, a court, a probation department, a child welfare agency as defined in section 8-501, the department of child safety, the department of juvenile corrections or the state department of corrections.

(i) The person is undergoing a background check for the placement with that person of a child who is in the custody of the department of child safety.

(j) The disclosure is required by a state or federal law.

(k) The disclosure is required to comply with program integrity provisions of medicare, medicaid or any other federal health care program.

6. The person's employer is not liable for hiring or contracting with the person as prescribed in section 12-558.03.

J. If the person's case records are sealed pursuant to this section, the records shall be made available for the purposes listed in subsection B of this section and to the following:

1. The person whose records are sealed and any attorney who has filed a notice of appearance on behalf of the person whose records are sealed.

2. The victim in the case if the victim has exercised victims' rights pursuant to section 13-4414.

3. Any of the following if the purpose relates to the operation of the requesting party's official duties or internal hiring practices, or both:

(a) A law enforcement agency.

(b) A prosecuting agency. On request of a person who is charged with a criminal offense or that person's attorney of record, a prosecuting agency shall provide the sealed case records of any person whom the prosecuting agency intends to call as a witness in that person's prosecution.

(c) A probation department or any agency that is responsible for the preparation of a presentence report.

(d) A court.

(e) The department of child safety or a child welfare agency as defined in section 8-501.

(f) The department of juvenile corrections.

(g) The state department of corrections or any other correctional facility in this state.

(h) The clerk of the court or any department that is responsible for maintaining court records.

K. This section does not require the supreme court or the court of appeals to seal any record.

L. If the court denies a petition to seal case records, a person may not file a new petition until three years after the date of the denial.

M. A conviction for an offense that is committed in another jurisdiction and that if committed in this state would not constitute an offense in this state may not be used against the petitioner or prohibit the petitioner from having a record sealed. For the purposes of this section, the classification of an offense committed in another jurisdiction has the classification that the offense would have if committed in this state.

N. If the petitioner is charged with an offense after filing a petition to seal case records and the offense could result in a conviction that cannot be sealed or that could extend the time to file a petition to seal case records, the court may not grant or deny the petition until the court disposes of that charge.

O. This section does not apply to a person who is:

1. Sentenced as a dangerous offender pursuant to section 13-704.

2. Convicted of a dangerous crime against children as defined in section 13-705.
3. Convicted of a serious offense or violent or aggravated felony as defined in section 13-706.
4. Convicted of any offense that has either of the following as an element of the offense:
  - (a) The discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.
  - (b) The knowing infliction of serious physical injury on another person.
5. Convicted of sex trafficking pursuant to section 13-1307.
6. Convicted of a class 2, 3, 4 or 5 felony offense that is included in chapter 14 or 35.1 of this title.

P. This section does not affect any of the following:

1. The right of the person whose case records are sealed to appeal the conviction or sentence or to rely on it in bar of any subsequent proceeding for the same offense.
2. The right of a law enforcement agency to maintain an arrest and conviction record and to communicate information regarding the sealed record of arrest or conviction to prosecuting agencies, courts, probation departments and other law enforcement agencies for a purpose listed in subsection J of this section or in defense of a civil action that arises out of the facts of the arrest or to the Arizona peace officer standards and training board solely to assist the board in determining the fitness of a person to serve as a peace officer, except that in any of these cases the information may not be disclosed to any person or entity that is not listed in subsection J of this section.
3. The department of public safety or the board of fingerprinting from considering a conviction that is sealed pursuant to this section when evaluating an application for a fingerprint clearance card pursuant to section 41-1758.03 or 41-1758.07.

Q. For the purposes of this section, "case records" means all records that pertain to a person's arrest, conviction and sentence for a particular offense and that may be sealed pursuant to this section.

