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ARIZONA SUPREME COURT

In the matter of:

PETITION TO ADOPT RULE 36,)	Supreme Court
RULES OF CRIMINAL)	No. 2021- _____
PROCEDURE)	(Expedited Consideration and
)	Emergency Adoption
)	Requested)
_____)	

Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner respectfully petitions the Court to adopt a new rule of criminal procedure, as shown in Appendix A, to implement ARS § 36-2862, which was enacted as part of the recreational marijuana ballot initiative, Proposition 207, the “Smart and Safe Arizona Act.” Petitioner seeks expedited consideration of this petition and emergency adoption of the rule due to the July 12, 2021 effective date of ARS § 36-2862.

GROUND FOR APPROVAL OF THE PETITION

The Smart and Safe Arizona Act creates a new statute permitting expungement of criminal history related to specified marijuana offenses. Court procedures for this expungement are not currently established in the Arizona Rules of Court. Petitioner appointed a task force to identify the impacts of the Smart and Safe Arizona Act and to make recommendations regarding implementing the same.

The task force was chaired by Jerry Landau, the then Government Affairs Director of the Administrative Office of the Courts (AOC) and was comprised of judges, AOC attorneys, and court specialists. The Chair in turn appointed several workgroups devoted to the various relevant subject matters. One such workgroup examined the statutes and the Arizona Rules of Court to identify the changes necessary for courts to process expungement petitions under ARS § 36-2862. A copy of the new statute is attached as Appendix B.

Beginning July 12, 2021, the statute permits eligible individuals to petition a court to have their marijuana-related offense records “expunged.” If successful, the petitioner is entitled to an order vacating the conviction, sealing all court records relating to the offense (ARS § 36-2862(C)(1)), directing law enforcement agencies to clearly identify the pertinent records they maintain as having been expunged and to withhold them from public access (ARS § 36-2862(C)(3)), and restoring civil rights, including the right to possess a firearm, as to the specific case. The statute also imposes on the Department of Public Safety an obligation to seal and separate the expunged records from its other records and to notify “all appropriate state and federal law enforcement agencies of the expungement” (ARS § 36-2862(C)(2)).

The proposed rule incorporates the requirements of the new statute and borrows from current Rules 29 and 30 that govern applications for setting aside a conviction and restoring civil rights.

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

- the specific information that must be included in the petition,
- where to file the petition – for those petitions seeking expungement of only arrest records because no charges were ever filed, the superior court is likely the only court with jurisdiction to consider the petitions,
- No filing fee should be charged due to the essentially criminal nature of these proceedings,
- The court should have discretion to:
 - Deny any petition for insufficient information, and
 - Stay any aspect of sentencing pending resolution of the petition – depending on the individual case, a judge may feel it appropriate to, *inter alia*, suspend collection of outstanding monetary obligations,

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

REQUEST FOR EXPEDITED CONSIDERATION AND EMERGENCY ADOPTION

Pursuant to Supreme Court Rule 28(h)(1)&(2), petitioner believes that expedited consideration and emergency adoption of the proposed rule are warranted

in this matter because of the July 12, 2021 effective date of the statute this rule is intended to implement.

Wherefore, petitioner requests the Court adopt the proposed rule in Appendix A.

Respectfully submitted this 1st day of March, 2021.

By: /S/
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**APPENDIX A
RULES OF CRIMINAL PROCEDURE**

[new] Rule 36. Expunging Marijuana Records and Restoring Civil Rights

(a) Generally. This rule governs petitions to expunge records, vacate convictions, and restore civil rights that are filed pursuant to A.R.S. § 36-2862.

(1) Contents of a Petition.

(A) A petition must state:

- (1) the petitioner's name, address, date of birth, and email address, if the petitioner has an email address;
- (2) the offense for which the petitioner is seeking expungement;
- (3) the name of the arresting agency; and
- (4) if charges were filed, the court's case number.

(B) To assist the court in locating the records to be expunged, the petition should also state:

- (1) the date of the petitioner's arrest;
- (2) if charges were filed, the name of the prosecuting agency;
- (3) 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.
- (4) whether there are any outstanding warrants or active payment plans; and
- (5) whether petitioner was sentenced to probation.

(2) Petitioner's Signature; Attachments. The petitioner must sign the petition under penalty of perjury. The petitioner may attach supporting documents and affidavits to the petition.

(3) Place of Filing; Filing Fee. If the petitioner was charged with the offense listed in the petition, the petition must be filed in the court where the complaint or citation was concluded. If the case commenced in a justice court and was transferred to a superior court, the petition must be filed in the superior court. If the petitioner was arrested but never charged, the petition must be filed in the superior court of the county where the arrest occurred. The clerk, or in the case of a limited jurisdiction court, the court may not charge a fee for filing a petition.

(b) Processing of Petition.

(1) Sufficiency of the Petition. The court may dismiss a petition that fails to provide sufficient information to identify the records to be expunged.

(2) Copy to Prosecuting Agency. If the petition is not dismissed under (b)(1), 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. The court shall also notify

the prosecuting agency the court may grant the petition if the state does not file a response within the time allowed by (b)(3).

- (3) **State's Response.** No later than 30 days after the petition was filed, the prosecuting agency may file a response stating its objections to the petition, if any. The prosecutor must send a copy of its response to the petitioner's attorney, if any, or to the petitioner.
- (4) **Reply.** The petitioner may file a reply no later than 15 days after the State's response is filed.

(c) Hearing.

- (1) **Basis for a Hearing.** The court may set a hearing on the petition on either party's request or if the court concludes there are genuine issues of fact regarding whether the petition should be granted.
- (2) **Time for Hearing.** The hearing must be held no later than 120 days after the petition is filed, unless the court finds good cause for an extension.

(d) Disposition.

- (1) **Failure to Respond.** The court may grant the petition without a hearing if the prosecuting agency does not respond within the time allowed by paragraph (b)(3).
- (2) **Stay of Sentence.** The court has discretion to stay any aspect of the sentence imposed pending disposition of the petition.
- (3) **Burden of Proof.** The court shall grant the petition unless the prosecutor establishes by clear and convincing evidence that the petitioner is not eligible for expungement.
- (4) **Action on granting the petition.** If the court grants the petition, the court must vacate the conviction, if any, order that any record of the petitioners' arrest, charge, conviction and sentence be expunged, and order the petitioner's civil rights be restored including the right to possess a firearm unless otherwise prohibited.
- (5) **Order.** The court must enter a signed order stating the court's findings of fact and conclusions of law.

(e) Notice by Clerk or Court. In addition to notifying the parties of the court's order, if the court grants the petition, the clerk, or in the case of a limited jurisdiction court, the court must transmit the order to the arresting law enforcement agency and the prosecuting agency identified in the petition as well as the Department of Public Safety. If the order is issued by a superior court, the clerk must also transmit the order to the justice court identified by the petitioner and to the probation department, if a term of probation was imposed.

(f) Forms. The administrative director of the Administrative Office of the Courts is authorized to

create and modify forms 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,

Appendix B

Prop 207 Expungement Statute

36-2862 Expungement; petition; appeal; dismissal of complaints; rules

A. Beginning July 12, 2021, an individual who was arrested for, charged with, adjudicated or convicted by trial or plea of, or sentenced for, any of the following offenses based on or arising out of conduct occurring before the effective date of this section may petition the court to have the record of that arrest, charge, adjudication, conviction or sentence expunged:

1. Possessing, consuming or transporting two and one-half ounces or less of marijuana, of which not more than twelve and one-half grams was in the form of marijuana concentrate.
2. Possessing, transporting, cultivating or processing not more than six marijuana plants at the individual's primary residence for personal use.
3. Possessing, using or transporting paraphernalia relating to the cultivation, manufacture, processing or consumption of marijuana.

B. If the court receives a petition for expungement pursuant to this section:

1. The court shall notify the prosecuting agency of the filing of the petition and allow the prosecuting agency to respond to the petition within thirty days.
2. The court may hold a hearing:
 - (a) on the request of either the petitioner or the prosecuting agency.
 - (b) If the court concludes there are genuine disputes of fact regarding whether the petition should be granted.
3. The court shall grant the petition unless the prosecuting agency establishes by clear and convincing evidence that the petitioner is not eligible for expungement.
4. The court shall issue a signed order or minute entry granting or denying the petition in which it makes findings of fact and conclusions of law.

C. If the court grants a petition for expungement:

1. The signed order or minute entry required pursuant to subsection B, paragraph 4 of this section shall do all of the following:
 - (a) If the petitioner was adjudicated or convicted of an offense set forth in subsection A of this section, vacate the judgment of adjudication or conviction.
 - (b) State that it expunges any record of the petitioner's arrest, charge, conviction, adjudication and sentence.

- (c) If the petitioner was convicted or adjudicated of an offense set forth in subsection A of this section, state that the petitioner's civil rights, including the right to possess firearms, are restored, unless the petitioner is otherwise not eligible for the restoration of civil rights on grounds other than a conviction for an offense set forth in subsection A of this section.
 - (d) Require the clerk of the court to notify the department of public safety, the prosecuting agency and the arresting law enforcement agency, if applicable, of the expungement order.
 - (e) Require the clerk of the court to seal all records relating to the expunged arrest, charge, adjudication, conviction or sentence and allow the records to be accessed only by the individual whose record was expunged or the individual's attorney.
 - 2. The department of public safety shall seal and separate the expunged record from its records and inform all appropriate state and federal law enforcement agencies of the expungement. Unless the petitioner is indigent, the department of public safety may charge the successful petitioner a reasonable fee determined by the director of the department of public safety to research and correct the petitioner's criminal history record.
 - 3. The arresting and prosecuting agencies shall clearly identify in each agency's files and electronic records that the petitioner's arrest, charge, conviction, adjudication and sentence are expunged and shall not make any records of the expunged arrest, charge, conviction, adjudication or sentence available as a public record to any person except to the individual whose record was expunged or that individual's attorney.
- D.** An arrest, charge, adjudication, conviction or sentence that is expunged pursuant to this section may not be used in a subsequent prosecution by a prosecuting agency or court for any purpose.
- E.** An individual whose record of arrest, charge, adjudication, conviction or sentence is expunged pursuant to this section may state that the individual has never been arrested for, charge with, adjudicated or convicted of, or sentenced for the crime that is the subject of the expungement.
- F.** If the court denies a petition for expungement, the petitioner may file a direct appeal pursuant to section 13-4033, subsection A, paragraph 3.
- G.** On motion, the court shall dismiss with prejudice any pending complaint, information or indictment based on any offense set forth in subsection A of this section, to include charges or allegations based on or arising out of conduct occurring before the effective date of this chapter. The individual charged may thereafter petition the court to expunge records of the arrest and charge or allegation as provided in this section. A motion brought pursuant to this subsection may be filed with the court before July 12, 2021.
- H.** The supreme court may adopt rules necessary to implement this section, and may also sponsor public service announcements or other notifications intended to provide notice to individuals who may be eligible to file petitions for expungement pursuant to this section.

- I. A prosecuting agency may file a petition for expungement pursuant to this section on behalf of any individual who was prosecuted by that prosecuting agency, and the attorney general may file a petition for expungement pursuant to this section on behalf of any individual.