IN THE ARIZONA SUPREME COURT

In the Matter of:	)	
	)	Supreme Court No. R-21-0023
	)	
PETITION TO ADOPT	)	
ARIZ. R. CRIM. P. 36	)	
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Comment of the American Civil Liberties Union Foundation of Arizona and Arizona Attorneys for Criminal Justice in Response to Petition to Adopt Ariz. R. Crim. P. 36

Jared G. Keenan
AZ Bar No. 027068
P.O. Box 17148
Phoenix, AZ 85011
(602) 650-1854
jkeenan@acluaz.org

Pursuant to Rule 28(D), Rules of the Supreme Court, the American Civil Liberties Union Foundation of Arizona (ACLU of Arizona) and Arizona Attorneys for Criminal Justice (AACJ) respectfully submit this Comment in response to the Petition to Adopt Ariz. R. Crim. P. 36 related to expungement procedures under A.R.S. § 36-2862 (Proposition 207).

The ACLU of Arizona and AACJ support a court rule to allow individuals to have their arrest, charge, adjudication, conviction and/or sentence expunged as required by the voters' adoption of Proposition 207 ("Prop 207"). However, we have serious concerns about the proposed version of this rule. This Comment discusses those concerns, provides a response to another comment, and provides suggested revisions to the proposed rule. Adopting this rule with these revisions is necessary as they comport with both the letter and spirit of the law as approved by an overwhelming majority of Arizona voters.

I. The Burden of Proof to Show a Petition is Ineligible for Expungement Lies Solely with the Prosecuting Agency and Thus Courts *Must* Grant a Facially Valid Petition Any Time the Prosecuting Agency Fails to Respond.

As adopted by the voters, A.R.S. § 36-2862(B)(3) requires that "[t]he court *shall* grant the petition unless the prosecuting agency establishes by clear and convincing evidence that the petitioner is not eligible for expungement." (emphasis added). Yet subsection (d)(1) of this proposed rule states that "[t]he court *may* grant the petition without a hearing if the prosecuting agency does not respond within [30

days].” (emphasis added). Failing to require that courts grant a qualifying petition when the prosecuting agency fails to respond ignores the plain language of Prop 207 where the clear intent is to place the burden on the government to prove that a petition should not be granted. A.R.S. § 36-2862(B)(3).[1]

Given the plain language adopted by voters, any time a prosecuting agency fails to respond to a qualifying petition, courts must grant the petition. Such a situation is analogous to our Confession of Error Doctrine, which provides that when the government fails to respond to an argument made by a defendant, the state has conceded the merit of the defendant’s argument. *See State v. Moody*, 208 Ariz. 424, ¶131 (2004) (the failure to argue a particular point raised by the defendant is taken as a concession of the argument).

While Arizona courts have defined “shall” to be permissive in some instances, “the ordinary meaning of ‘shall’ in a statute is to impose a mandatory provision.” *HCZ Const., Inc. v. First Franklin Financial Corp.*, 199 Ariz. 361, 364 ¶ 11 (App. 2001). This is particularly true when the use of “shall” is found in a ballot initiative approved by the voters. When interpreting such a provision, courts begin by examining the plain language of the voter-approved measure, *see Am. Bus Lines,*

[1] Subsection (d)(1) of the proposed rule also conflicts with subsection (d)(3) of the same rule, which correctly restates the statutory requirement that “[t]he court shall grant the petition unless the prosecutor establishes by clear and convincing evidence that the petitioner is not eligible for expungement.” *See* A.R.S. § 36-2862(B)(3).

Inc. v. Ariz. Corp. Comm'n, 129 Ariz. 595, 598 (1981), "giv[ing] the words used 'their natural, obvious and ordinary meaning' unless the context suggests otherwise." *Ariz. Chamber of Commerce & Indus. v. Kiley*, 242 Ariz. 533, 537, ¶ 9 (2017) (quoting *Brewer v. Burns*, 222 Ariz. 234, 239, ¶ 26 (2009)). Here, both the plain language and context support interpreting "shall" in Prop 207 as imposing a mandatory provision.

This does not mean that courts must grant any petition to which a prosecuting agency fails to respond under the limited exceptions expressly delineated in Prop 207. Thus, Prop 207 does not require courts to grant petitions that are facially deficient or that clearly do not qualify for expungement even when a prosecuting agency fails to respond. *See* A.R.S. § 36-2862(A)(1)-(3) (describing the specific offenses and conduct eligible for expungement). Likewise, if the court "concludes there are genuine disputes of fact regarding whether the petition should be granted," the court may hold a hearing before granting the petition. A.R.S. § 36-2862(B)(2)(b).

However, whenever the court receives a qualifying, facially valid petition and does not receive a response from the prosecuting agency within the statutory time period of 30 days, it must grant the petition. The proposed rule should reflect this to comply with the plain language and intent of Prop 207 as adopted by the voters.

II. Signing a Petition for Expungement Under Penalty of Perjury is Not Required by Prop 207 and Could Chill Those Eligible for Expungement from Filing a Petition While Increasing Criminal Prosecutions in Violation of the Purpose of Prop 207.

Subsection (a)(2) of the proposed rule states that "[t]he petitioner must sign the petition under penalty of perjury." Yet nowhere does Prop 207 require that a petition be signed under penalty of perjury. Indeed, Prop 207 does not require a petition to be signed at all. *See* A.R.S. § 36-2862(A) (describing the requirements for a petition for expungement, which do not include a signature). In approving Prop 207, voters did not simply intend to legalize the responsible adult-use of cannabis in the state, they also intended to undo some of the damage that decades of over-criminalization of cannabis has done to individuals and communities. *See* A.R.S. § 36-2862 (allowing expungement for past convictions); A.R.S. § 36-2863 (establishing a Justice Reinvestment Fund to provide funding for programming "in communities disproportionately impacted by high rates of arrest and incarceration" and programming that addresses "the underlying causes of crime, reducing drug-related arrests and reducing the prison population in this state"); A.R.S. § 36-2854(A)(1)(f) (creating a "social equity ownership program" and mandating that twenty-six marijuana establishment licenses be issued "to entities that are qualified pursuant to the social equity ownership program").

Imposing extraneous and unnecessary requirements like the sworn signature requirement, violates the Voter Protection Act ("VPA") because it does not further

the purpose of Prop 207. Rather, voter approval of these broader criminal justice reform measures in Prop 207 strongly suggests they did not intend to create new avenues of criminal prosecution by requiring petitioners for expungement to sign petitions under penalty of perjury. To the contrary, in passing Prop 207 voters explicitly intended to "reduc[e] the prison population in the state." A.R.S. § 36-2863(G)(3). Thus, the proposed rule's threat of prosecution by demanding petitions be signed under penalty of perjury flies in the face of what voters intended when they approved Prop 207.

Moreover, placing the burden squarely on prosecuting agencies to show by clear and convincing evidence that a petition does not qualify for expungement suggests that voters intended to create a presumption in favor of expungement that would encourage more people to file petitions and empower courts to easily grant them. The sworn statement requirement, however, which includes the risk of future prosecution, would create a chilling effect by discouraging some people from filing petitions particularly in communities of color that are "disproportionately impacted by high rates of arrest and incarceration" – communities the voters explicitly sought to protect when approving Prop 207. A.R.S. § 36-2863(G)(2). Thus, this Court should adopt the proposed rule without the requirement that petitions be signed under penalty of perjury.

III. The Proposed Rule Should Only Require Petitioners to Include Information That is Known to Them When Filing a Petition for Expungement.

The proposed rule requires that:

> (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.

Additionally, the proposed rule at subsection (b)(1) allows courts to "dismiss a petition that fails to provide sufficient information to identify the records to be expunged." Under the proposed rule, courts may therefore deny a petition whenever the petitioner does not know the case number or arresting agency.

Requiring this level of information will undoubtedly impose obstacles for otherwise eligible petitioners and would violate Prop 207's intent and purpose, which is to encourage people to petition for expungement. Indeed, studies support the view that unnecessary complexity in an expungement process can dissuade

eligible applicants from applying for expungement.[2] Moreover, this adds a burden on the petitioner that Prop 207 does not include, and therefore violates the VPA.

Prop 207 provides that all records of a qualifying "arrest, charge, adjudication, conviction or sentence," A.R.S. § 36-2862(A), are eligible for expungement, and is retroactive. Therefore, many petitions will involve conduct that is decades old. As such, petitioners may no longer remember the case number or arresting agency, assuming they ever knew them. Rather than discourage the filing of petitions for expungement while allowing courts to out-right deny petitions that are missing this information, the rule must be revised to allow petitioners to indicate that a particular piece of information is unknown.

IV. The Proposed Rule Should Explicitly Allow for Bulk Petitions.

Pursuant to Prop 207, A.R.S. § 36-2817 establishes the medical marijuana fund and requires that $4 million be distributed as grants "to qualified nonprofit entities that will provide outreach to individuals who may be eligible to file petitions

[2] *See* Kenny Lo, "Expunging and Sealing Criminal Records," Center for American Progress (Apr. 15, 2020), *available at*: https://www.americanprogress.org/issues/criminal-justice/reports/2020/04/15/483264/expunging-clearing-criminal-records/ (explaining how the complexity of an expungement process can dissuade eligible individuals from expunging their records); Sasha Hulsey et al., *Systems Barriers to Expungement*, Univ. of Minnesota at 11 (May 2019), *available at*: https://uroc.umn.edu/sites/uroc.umn.edu/files/Systems%20Barriers%20to%20Expungement%20May%202019.pdf (arguing that cumbersome forms and a complicated process can "directly affect the outcome of an expungement petition").

for expungement pursuant to section 36-2862 and will assist with the expungement petition process." Moreover, A.R.S. § 36-2826(I) provides that "[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." It is therefore possible that a qualified nonprofit, prosecuting agency, or the attorney general may be able to file a bulk petition for expungement on behalf of many individuals. Given the potentially high volume of petitioners, allowing for bulk petitions would be efficient, while helping to conserve the resources of the courts, qualified nonprofits, and government agencies. As such, the proposed rule should explicitly allow for bulk petitions by including language like: "Bulk petitions may be filed on behalf of multiple petitioners. Bulk petitions shall list the information known for each person seeking expungement pursuant to A.R.S. § 36-2862."

V. The Proposed Rule Must Include a Requirement That the Court Provide a Copy of the Petition to the Prosecuting Agency.

Pursuant to A.R.S. § 36-2862(B)(1), when a court receives a petition for expungement, "[t]he court shall notify the prosecuting agency of the filing of the petition." Thus, the concerns expressed in the comment of Judge Dan Slayton of the Coconino County Superior Court notwithstanding, the proposed rule's requirement in subsection (b)(2) that "the court must send a copy of the petition and supporting

documentation submitted by the petitioner to the applicable prosecuting agency" clearly complies with the plain language of Prop 207 as approved by the voters and is likely required by that language.

VI. Conclusion

This Court has the authority to adopt rules necessary to implement Prop 207's expungement process. A.R.S. § 36-2862(H). It should exercise this authority by adopting a rule that comports with both the letter and spirit of the law as approved by an overwhelming majority of Arizona voters. The ACLU of Arizona and AACJ have, therefore, provided a revised version of this proposed rule as an appendix to this Comment.

Respectfully submitted, this 19th day of April 2021.

By /s/*Jared G. Keenan*
Jared G. Keenan
American Civil Liberties Union Foundation of Arizona
Arizona Attorneys for Criminal Justice

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, IF KNOWN; and
(4) if charges were filed, the court's case number, IF KNOWN.

(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, IF KNOWN;
(2) if charges were filed, the name of the prosecuting agency, IF KNOWN;
(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, IF KNOWN.
(4) whether there are any outstanding warrants or active payment plans, IF KNOWN; and
(5) whether petitioner was sentenced to probation, IF KNOWN.

(C) BULK PETITIONS MAY BE FILED ON BEHALF OF MULITPLE PETITIONERS. BULK PETITIONS SHALL LIST THE INFORMATION KNOWN FOR EACH PERSON SEEKING EXPUNGEMENT PURSUANT TO A.R.S. § 36-2862.

(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~~ MUST 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,