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ARIZONA SUPREME COURT

In the matter of:

PETITION TO ADOPT RULE 36,)	Supreme Court
RULES OF CRIMINAL)	No. R-21-0023
PROCEDURE)	
)	PETITIONER’S REPLY
_____)	

Petitioner respectfully files this Reply to the Comments received in this matter. Appendix A attached hereto shows modifications to Petitioner’s original proposal in response to the comments received.

A. Response to Comments

1. Judge Slayton’s Comment suggests the rule should require the copy of the petition be provided to the prosecutor’s office by the petitioner rather than the court. Under normal circumstances, Judge Slayton’s comment might be well taken. The expungement statute, however, specifies this to be the responsibility of the court, *see* A.R.S. § 36-2862(B)(1). In addition, proposed Rule 36 is patterned after Rules 29 and 30, governing the process for setting aside a conviction and restoring civil rights; and Rules 29.2(c) and 30.2(d) require the court to send a copy of the application to the prosecuting agency. Petitioner anticipates that petitions will be filed by pro se

litigants and that they may have difficulty complying with any such requirement. Accordingly, Rule 36(b)(2) requires the court to send a copy of the petition to the prosecutor.¹

2. The Comment filed by the Maricopa County Attorney's office makes worthwhile suggestions for revisions to the rule to accommodate petitions filed by a prosecuting agency, as permitted by A.R.S. § 36-2862(I). Petitioner agrees that the rule should include a procedure to process a prosecutor's petition and has proposed revisions in subsections (a)(3) and (b)(3) to accomplish that goal. The revised subsection (b)(3) requires that notice of the petition be mailed by the prosecutor to the person whose records are sought to be expunged as that person should receive notice that the prosecutor is seeking to take action on the person's case. In addition, Petitioner has changed several uses of the term "petitioner" to "subject of the petition" in recognition of the fact that a "petitioner" may be either a prosecuting agency or the subject of the records to be expunged.

The County Attorney's Comment also suggests the rule contain more clarity on how to deal with multi-charge cases where some counts are eligible for expungement and some are not. Accordingly, Rule 36(d)(4) has been revised to

¹ For the purpose of this Reply, when referring to the person who files the Petition to Expunge, the word "petitioner" is set off by quotation marks to distinguish from the Petitioner who filed the Petition to Adopt Rule 36, R. of Cr. Pr.

require the court's order specifically identify the counts that are to be expunged and vacated.

3. The Comment filed by Community Legal Services, et al, suggests the rule identify sample supporting documents that a "petitioner" could attach to the petition. This information will be made available on petition forms and instructions that the Administrative Director will promulgate pursuant to Rule 36(f) and, therefore, is not needed in the rule itself. The Comment also suggests that dismissal for insufficient information should not occur until the court gives the "petitioner" an indication of what additional information is needed and an opportunity to correct the deficiency. Petitioner has revised Rule 36(b)(1) to incorporate this suggestion in a modified form, again pointing to the instructions.

4. The ACLU Comment objects to the use of "may grant" in subsection (d)(1). Petitioner has reworded this subsection to simply state that the court "may decide" the petition without a hearing if the prosecutor fails to respond or if the petition is filed by a prosecuting agency. This subsection was not intended to disturb the burden of proof set forth in the statute, and Petitioner agrees a court must grant a legally sufficient petition if the prosecutor fails to respond, as does Rule 36(d)(3). The Comment recognizes that the petition must be a "qualifying, facially valid petition" (Comment at p. 4). The Rule accounts for the possibility that a petition may lack sufficient information about the records to be expunged for the court to be able to

act, or may seek expungement for an offense that, on its face, is not eligible for expungement under the statute. Under those circumstances, the court must be authorized to dismiss or deny the petition even if the prosecutor fails to respond.

The ACLU Comment also objects to the requirement that the petition be signed under penalty of perjury. In fact, in response to other informal comments, the revised Rule 36(a)(2) sets forth a modified version of the required declaration that reads, “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,” which should alleviate the concerns expressed in this Comment.

Furthermore, Petitioner patterned Rule 36 after the rules and forms adopted for seeking restoration of civil rights and for setting aside a conviction, which require a signature under penalty of perjury, *see* Criminal Rule 41, Forms 31(a) and 32(a), and was not intended to “create new avenues of criminal prosecution.” A.R.S. § 36-2862(H) authorizes the supreme court to adopt rules to implement the expungement statute and does not prohibit verified pleadings. Accordingly, Petitioner does not agree that requiring a declaration under penalty of perjury is a violation of the Voter Protection Act. Prior law did not distinguish between possession of two and a half ounces of marijuana and possession of two pounds of marijuana, A.R.S. § 13-3405. Many possession cases have been resolved with no official record of the amount of marijuana involved. Under Prop 207, eligibility for expungement stops at possession

of two and a half ounces. Therefore, the rule relies heavily on “petitioners” honesty regarding their eligibility. The alternative would entail possibly setting evidentiary hearings on virtually every petition.

The ACLU Comment also requests that only information known to the “petitioner” be required by the rule. In fact, Rule 36(A)(1)(a)(1)-(5) contains a significantly shorter list of required data elements than that proposed by the AOC’s Prop 207 Task Force. The list of required information represents the bare minimum needed to assist the court in identifying the case at issue and to ensure the court’s order, when transmitted to the Department of Public Safety, arresting and prosecuting agencies, will have what they need to locate and seal their own records as required by the statute. Prop 207 places no burden on the courts to research eligible cases on behalf of “petitioners,” yet the ACLU’s version of the rule would do just that.

Petitioner has already considered how the rule should address the possibility that some non-profit and prosecuting agencies may file bulk petitions on behalf of multiple eligible individuals. Petitioner suggests if bulk petitions are to be permitted, they be the subject of either a supreme court or local administrative order after further discussion rather than embedded in Rule.

The Chair of the Prop 207 Task Force informally discussed with the Coconino County Attorney and the ACLU senior staff attorney who filed the ACLU

Comment as to how to resolve the issue of bulk petitions and providing the prosecutor with time to research a case in order to respond to the petition. The initiative does not provide for an extension of time to respond. Further, the Chair discussed the bulk petitions with representatives of the Maricopa County Superior Court and Maricopa County Clerk of Court. Both, at this point, oppose the filing of bulk petitions due to unanswered questions as to case filing, case tracking and staff and work requirements in processing bulk petitions. Petitioner suggests that the concept of bulk petitions not be included in the proposed rule and await further discussion with all courts and clerks and other interested stakeholders.

B. Other Revisions

In addition to minor stylistic changes to the proposal, other amendments derived from informal suggestions received include:

1. Rule 36(a)(1)(A)(2) adds a required data field identifying any name that the subject of the petition may have used at the time the subject was arrested or charged.
2. Rule 36(d)(3) has been amended to clearly account for those cases where a petition seeks expungement of records relating to an offense not covered by the expungement statute, for example, selling marijuana. In such a case, Petitioner believes the rule should specifically authorize a judge to deny

the petition for this reason, regardless of whether or how the State responds to the petition.

Wherefore, Petitioner requests the Court adopt the proposed rule in Appendix

A.

Respectfully submitted this 27th day of April, 2021.

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APPENDIX A

RULES OF CRIMINAL PROCEDURE

(showing changes to the original rule proposal)

[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 under A.R.S. § 36-2862.

(1) Contents of a Petition.

(A) A petition must state the following:

- (1) the ~~petitioner's~~ name, address, date of birth, and the email address, if ~~the petitioner has an email address~~ known for the subject of the petition;
- (2) any name, if different from above used by the person who is the subject of the petition at the time of arrest or charge;
- ~~(2)~~(3) the offense for which ~~the petitioner is seeking expungement~~ is being requested;
- ~~(3)~~(4) the name of the arresting agency; and
- ~~(4)~~(5) 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, if known:

- (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~~ the subject of the petition was sentenced to probation.

(2) Petitioner’s Signature; Attachments. If the petition is filed by the person who is the subject of the petition, the petitioner must sign the petition under penalty of perjury 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) Petitions Filed by a Prosecuting Agency. If a prosecuting agency files for expungement of a person’s records, the petition must include the information required by (a)(1)(A), other than the email address, unless known, for the subject of the petition, and any information specified in (a)(1)(B) that the prosecutor knows at the time of filing.

(3)(4) Place of Filing; Filing Fee. If the ~~petitioner~~-subject of the petition 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~~-subject of the petition was arrested but never charged, the petition must be filed in the superior court ~~of~~ in 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~~ Dismissal of the Petition. The court may dismiss a petition that fails to provide sufficient information to identify the records to be expunged. Before dismissing the petition for this reason, the court should refer the petitioner to the instructions for the petition form that will be published under (f) and inform the petitioner that the petition will be dismissed if the required information is not filed within 45 days.

(2) ~~Copy to Prosecuting Agency~~ Transmitting Petition Filed by the Subject of the Petition. If the petition is not dismissed under (b)(1), ~~and the petition is filed by the person who is the subject of the petition,~~ 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~~must also notify the prosecuting agency that the court may grant the petition if the ~~s~~State does not file a response within the time allowed by (b)(~~3~~4).

(3) Processing a Petition Filed by a Prosecuting Agency. If a prosecuting agency files a petition, the prosecuting agency must notify the person who is the subject of the petition. The person is not required to make an appearance or file a response.

(~~3~~)(4) ~~State's~~ Response. No later than 30 days after the petition ~~was~~is filed, ~~the prosecuting agency~~ an opposing party 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. The party~~

filing the response must send a copy of the response to the petitioner.

~~(4)~~**(5) 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~~decide the petition without a hearing if ~~the prosecuting agency does not respond~~no response is filed within the time allowed by ~~paragraph (b)(34)~~, or if the petition was filed by a prosecuting agency.

(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~~must grant the petition unless the prosecutor establishes by clear and convincing evidence that the offense is not eligible for expungement or if the court finds that the offense identified in the

petitioner is not eligible for expungement.

(4) Action on Granting the Petition. If the court grants the petition, the court must, as to any applicable count, vacate the conviction and sentence, 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~~ restore the civil rights of the subject of the petition, 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 of 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, and~~ the Department of Public Safety. If the order is issued by a superior court, the ~~clerk~~ court must also transmit the order to the justice court identified ~~by the petitioner in the petition~~ in the petition 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 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.