

Implementation of Marijuana Expungement: Lessons from Maricopa County

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INTRODUCTION

On November 3, 2020, Arizona voters approved Proposition 207 (hereinafter “Prop 207”) by a margin of 60% to 40%.¹ Called the “Smart and Safe Arizona Act,”² Prop 207 effectively made possession of a small amount of marijuana legal in Arizona. The new law defined marijuana as “all parts of the plant of the genus *cannabis*, whether growing or not, as well as the seeds from the plant, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds or resin.”³ That definition was broader than the definition of marijuana in Arizona’s criminal code.⁴ Possessing, consuming, and purchasing up to one ounce of marijuana became legal in Arizona effective November 30, 2020.⁵ It also became legal to possess, transport, or cultivate up to six marijuana plants and to transfer up to one ounce of marijuana

* PROSECUTOR’S CTR. FOR EXCELLENCE, <https://pceinc.org/team/jason-kalish/> [<https://perma.cc/2XPU-HFFA>] (last visited Oct. 13, 2024).

¹ *Ballot Measure*, KATIE HOBBS ARIZ. SEC’Y OF STATE, <https://results.arizona.vote/#/ballotmeasure/18/0> [<https://perma.cc/RR8D-87D6>] (last visited Oct. 3, 2024).

² *Proposition 207*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/prop207> [<https://perma.cc/3M3V-U8W8>] (last visited Oct. 3, 2024).

³ ARIZ. REV. STAT. § 36-2850(19)(A) (LexisNexis 2021).

⁴ The criminal code breaks up marijuana into two parts—the marijuana and cannabis. ARIZ. REV. STAT. § 13-3401(4) (LexisNexis 2024) defines “cannabis” as:

(A) The resin extracted from any part of a plant of the genus *cannabis*, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. Cannabis does not include oil or cake made from the seeds of such plant, any fiber, compound, manufacture, salt, derivative, mixture or preparation of the mature stalks of such plant except the resin extracted from the stalks or any fiber, oil or cake or the sterilized seed of such plant which is incapable of germination.

(B) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.

ARIZ. REV. STAT. § 13-3401(20) (LexisNexis 2024) categorized “cannabis” as a narcotic drug. ARIZ. REV. STAT. § 13-3401(20)(w) (LexisNexis 2024). Possession of Marijuana is a Class 6 felony under Arizona law. ARIZ. REV. STAT. § 13-3405 (LexisNexis 2021). Possession of a Narcotic Drug is a Class 4 felony. ARIZ. REV. STAT. § 13-3408 (LexisNexis 2024). Prop 207 included “cannabis” in the definition of marijuana in ARIZ. REV. STAT. § 36-2850(19)(b) (LexisNexis 2021).

⁵ ARIZ. REV. STAT. § 36-2852(A)(1) (LexisNexis 2020).

as long as it was not advertised or sold.⁶ Prop 207 turned possession of more than the allowed amount of marijuana, but not more than two and a half ounces, into a petty offense.^{7, 8}

Prop 207 also contained a provision that allowed for the expungement of any arrest, charge, adjudication, conviction or sentence for possessing, consuming or transporting two and a half ounces or less of marijuana, six or fewer marijuana plants, or paraphernalia related to marijuana.⁹ The person whose record was expunged could “state that the individual has never been arrested for, charged with, adjudicated or convicted of, or sentenced for the crime that is the subject of the expungement.”¹⁰ Moreover, the expunged charge could “not be used in a subsequent prosecution by a prosecuting agency or court for any purpose.”¹¹ After a charge is expunged, the Department of Public Safety, the agency responsible for keeping criminal history records in Arizona,¹² has to “seal and separate the expunged record from its records and inform all appropriate state and federal law enforcement agencies of the expungement.”¹³ The new law also required the court to seal all records relating to the expunged charge¹⁴ and ordered the police and prosecuting agency to not make the records available as a public record.¹⁵ Expungement, therefore, would effectively erase an arrest, charge, conviction, or sentence from both the public record and a person’s criminal history.

Prior to the enactment of Prop 207, Arizona law had no provision that allowed an individual to expunge an arrest or conviction.¹⁶ As a result, there was no template

⁶ ARIZ. REV. STAT. § 36-2852(A)(2)–(A)(3) (LexisNexis 2020).

⁷ ARIZ. REV. STAT. § 36-2853(A)(1) (LexisNexis 2020).

⁸ *See generally* ARIZ. REV. STAT. § 13-802 (LexisNexis 2024) (a petty offense in Arizona is one where there is no incarceration allowed—there is no statute in Arizona that allows for incarceration for a petty offense. The maximum fine for a petty offense is \$300).

⁹ ARIZ. REV. STAT. § 36-2862(A) (LexisNexis 2020).

¹⁰ ARIZ. REV. STAT. § 36-2862(E) (LexisNexis 2020).

¹¹ ARIZ. REV. STAT. § 36-2862(D) (LexisNexis 2020).

¹² ARIZ. REV. STAT. § 41-1750(A) (LexisNexis 2024).

¹³ ARIZ. REV. STAT. § 36-2862(C)(2) (LexisNexis 2020).

¹⁴ ARIZ. REV. STAT. § 36-2862(C)(1)(e) (LexisNexis 2020).

¹⁵ ARIZ. REV. STAT. § 36-2862(C)(3) (LexisNexis 2020).

¹⁶ ARIZ. REV. STAT. § 13-905 (LexisNexis 2023) permits a person to apply to have a judgment of guilt set aside. However, a conviction that is set aside can still be used as a prior felony conviction to enhance the sentence on a future crime. Moreover, the statute does not require the Department of Public Safety to remove the information from the person’s criminal history. § 13-905. On January 1, 2023, ARIZ. REV. STAT. § 13-911 (LexisNexis 2023) went into effect. That statute allowed someone to

for implementation of the procedures related to expunging an arrest, charge, or conviction. More than just allowing a person to expunge their own record, the new expungement statute stated that the “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.”¹⁷ Otherwise, though, the drafters of Prop 207 left it to the Arizona Supreme Court to “adopt rules necessary to implement this section.”¹⁸

The purpose of this article is to examine the practical difficulties in implementing Prop 207 in Arizona. To understand the hurdles faced, we must first examine the statutes that originally criminalized possession of marijuana. We will then discuss the expungement statute itself. Next, we will examine the process put in place in Arizona for filing expungement requests, paying particular attention to expungements filed by prosecutors and the policy implications of such a practice. We will use the efforts of the Maricopa County Attorney’s Office, representing the fourth-largest county in the United States, as an example of prosecutor-led expungements. We will then discuss legal issues that have been raised by expungement. We will then examine issues raised by criminal justice partners. Finally, we will offer lessons learned in Arizona to make suggestions to other states looking to implement marijuana expungement.

II. ARIZONA CRIMINAL LAW

In Arizona, felonies are classified from Class 1, the most serious, to Class 6, the least serious.¹⁹ The only Class 1 felony is first degree murder, which is punishable by death or life imprisonment.²⁰ People convicted of a felony in Arizona face a term in prison determined by the level of felony committed.²¹ Typically a first-time offender will be eligible to have the sentence suspended and will be placed

file a petition to seal all case records related to a conviction for which a sentence was complete, a dismissed criminal charge, or an arrest for which no charges had been filed. Still, sealed records may still be used in subsequent prosecutions. The Department of Public Safety must note the files as sealed, and while the records may not generally be released, there are a number of exceptions. *See* ARIZ. REV. STAT. § 13-911(P) (LexisNexis 2023).

¹⁷ ARIZ. REV. STAT. § 36-2862(I) (LexisNexis 2020).

¹⁸ ARIZ. REV. STAT. § 36-2862 (H) (LexisNexis 2020).

¹⁹ ARIZ. REV. STAT. § 13-601(A) (LexisNexis 2024).

²⁰ ARIZ. REV. STAT. § 13-1105(D) (LexisNexis 2009).

²¹ ARIZ. REV. STAT. § 13-702 (LexisNexis 2024). If an offender has historical prior felony convictions, then the sentencing range is increased pursuant to ARIZ. REV. STAT. § 13-703(A) (LexisNexis 2024).

on probation.²² Additionally, in 1995, Arizona voters enacted ARIZ. REV. STAT. § 13-901.01, which made probation mandatory for those offenders convicted of possessing any drug other than methamphetamine for the first or second time.²³

Prior to the change in law brought by Prop 207, possession of less than two pounds of marijuana for personal use was a Class 6 felony.²⁴ A Class 6 felony is punishable by a prison sentence of four months to two years.²⁵ A Class 6 felony is unique under Arizona law in that any Class 6 felony may be designated a misdemeanor.²⁶ When filing charges, a prosecutor may designate any Class 6 felony as a misdemeanor simply by doing so in the charging document.²⁷ After trial, a judge may also designate any Class 6 felony as a misdemeanor, or leave the offense “undesigned”—effectively deferring the determination of whether the offense is a misdemeanor or felony until the person completes probation.²⁸ This section is not available if the offender has two prior felony convictions, or if the offense involved a weapon.²⁹ As will be discussed later, as a result of the ability to designate Class 6 felonies as misdemeanors, the vast majority of expungable marijuana cases are misdemeanors.

Under the criminal law in Arizona, marijuana is defined as all parts of the plant of genus *cannabis*.³⁰ If the resin has been extracted from the plant, the drug becomes

²² ARIZ. REV. STAT. § 13-901(A) (LexisNexis 2024). If a person has prior felony convictions, prison becomes mandatory pursuant to ARIZ. REV. STAT. § 13-703(H) (LexisNexis 2024). Prison may also be mandatory if the person commits an offense using a weapon or inflicts serious physical injury. ARIZ. REV. STAT. § 13-704(A) (LexisNexis 2012). There are other offenses and circumstances that may make prison mandatory for a particular offense, but none are relevant to the subject matter of this article.

²³ ARIZ. REV. STAT. § 13-901.01 (LexisNexis 2024) is more complex than described above, and an entire article could be written about how that law was enacted and has been implemented. That is beyond the purview of this article, however, and for our purposes, it is only important to know that, in general, an offender could not be sentenced to prison for Possession of Marijuana unless they had multiple prior convictions. § 13-901.01.

²⁴ ARIZ. REV. STAT. § 13-3405(B)(1) (LexisNexis 2021). Possession of over 2.5 ounces but less than two pounds of marijuana remains a Class 6 felony.

²⁵ ARIZ. REV. STAT. § 13-702(D) (LexisNexis 2024). As mentioned previously, that range may be increased by the offender having historical prior felony convictions. ARIZ. REV. STAT. § 13-703 (LexisNexis2024).

²⁶ ARIZ. REV. STAT. § 13-604 (LexisNexis 2022).

²⁷ ARIZ. REV. STAT. § 13-604(D) (LexisNexis 2022).

²⁸ ARIZ. REV. STAT. § 13-604(A) (LexisNexis 2022).

²⁹ *Id.*

³⁰ ARIZ. REV. STAT. § 36-2850(19)(A) (LexisNexis 2021).

cannabis and is defined as a narcotic drug.³¹ ARIZ. REV. STAT. § 13-3405(A) states that a person shall not knowingly:

1. Possess or use marijuana.
2. Possess marijuana for sale.
3. Produce marijuana.
4. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana.

The classification of a violation of ARIZ. REV. STAT. § 13-3405(A) depends on the amount of marijuana involved. For example, possessing or using less than two pounds of marijuana is a Class 6 felony.³² Possessing less than two pounds of marijuana intended for sale is a Class 4 felony.³³ In order to be found guilty of a more serious felony, the State would have to prove that the amount of marijuana involved was greater than two pounds.

About 98% of criminal cases in Arizona are resolved by plea bargain.³⁴ When accepting a criminal defendant's guilty plea, a court must find a factual basis for the plea.³⁵ This means that the court must have facts that support each element of the offense the person is pleading guilty to committing. However, the amount of marijuana possessed is not an element of the offense unless that amount is above two pounds. Therefore, if a person is pleading guilty to possessing less than two pounds of marijuana, there is no requirement that the record show the exact amount. As a result, if a person is arrested, charged, or convicted of possessing less than two pounds of marijuana, there is no requirement that the record contain any information about the amount of marijuana actually possessed.³⁶

Possession of drug paraphernalia is also a Class 6 felony.³⁷ The definition of drug paraphernalia under Arizona's criminal code is extremely broad. Anything

³¹ ARIZ. REV. STAT. § 13-3401(20) (LexisNexis 2024).

³² ARIZ. REV. STAT. § 13-3405(B)(1) (LexisNexis 2021).

³³ ARIZ. REV. STAT. § 13-3405(B)(4) (LexisNexis 2021).

³⁴ ARIZ. JUD. COUNCIL, TASK FORCE ON PLEA AGREEMENTS, SENTENCING, AND DISPOSITIONS REPORT AND RECOMMENDATIONS 3 (2023).

³⁵ ARIZ. R. CRIM. P. 17.3(b).

³⁶ Likewise, the subsection that criminalizes production of marijuana determines the severity of the offense by the weight of marijuana and makes no reference to the number of plants involved. ARIZ. REV. STAT. § 13-3405 (LexisNexis 2024). The expungement statute, however, allows expungement based on the number of plants. ARIZ. REV. STAT. § 36-2862(A)(2) (LexisNexis 2020).

³⁷ ARIZ. REV. STAT. § 13-3415(C) (LexisNexis 2022).

used to store, contain, or ingest any illegal drug is considered drug paraphernalia.³⁸ Possession of drug paraphernalia is a singular offense.³⁹ This means that a person can only be charged with one count of drug paraphernalia for each incident, regardless of whether they possessed one item or many. Therefore, a person arrested with multiple drugs and multiple ways to ingest them could only be charged with one count of drug paraphernalia.

III. THE EXPUNGEMENT STATUTE

Prop 207 contained a statute that allowed a person to expunge an arrest, charge, conviction, or sentence for an offense that was made legal by Prop 207.⁴⁰ The statute specifically allows expungement for:

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.⁴¹

There is no reference to ARIZ. REV. STAT. § 13-3405, the statute that criminalizes the possession of marijuana, in the expungement statute. Moreover, the amounts in the expungement statute do not correspond to the amounts in ARIZ. REV. STAT. § 13-3405. Had Prop 207 legalized possession of two pounds of marijuana, and the expungement statute allowed expungement of offenses involving less than two pounds, implementation of the expungement scheme would have been much easier. As written, though, no offense under Arizona law is automatically, on its face, eligible for expungement. It is legally possible to have violated ARIZ. REV. STAT. § 13-3405(A)(1) by possessing less than two pounds of marijuana, while at the same time being ineligible for expungement because the actual amount exceeded 2.5 ounces. Likewise, a charge of possession of drug paraphernalia is only expungeable if the drug involved was marijuana. As a result, the question of whether

³⁸ ARIZ. REV. STAT. § 13-3415 (A) (LexisNexis 2022).

³⁹ *State v. Soza*, 464 P.3d 696, 698 (Ariz. Ct. App. 2020).

⁴⁰ ARIZ. REV. STAT. § 36-2862(A) (LexisNexis 2020).

⁴¹ *Id.*

an offense is eligible for expungement is almost always a factual question.⁴² In most cases, the factual question can be answered by the parties without court intervention. The court may hold a hearing if it determines that there are genuine disputes of fact regarding whether the petition should be granted or at the request of either party.⁴³ When the facts are disputed, it is the State's burden to prove that an offense is not eligible for expungement by clear and convincing evidence.⁴⁴

The expungement statute also provides that a prosecutorial agency may file for expungement "on behalf of any individual who was prosecuted by that prosecuting agency."⁴⁵ While most prosecuting offices are limited to filing petitions on behalf of individuals they prosecuted, the Office of the Attorney General may file a petition for expungement on behalf of anyone.⁴⁶ The statute, however, left it to the Arizona Supreme Court to adopt rules to implement expungement.⁴⁷ The rules it implemented, though, made filing expungement by prosecutorial agencies more difficult than necessary.

The Arizona Supreme Court adopted expungement rules to be effective January 1, 2022.⁴⁸ Rule 36 of the Arizona Rules of Criminal Procedure requires a petition filed by a prosecuting agency to include information such as the person's name, address, and date of birth.⁴⁹ Moreover, the petition must be served on the person who is the subject of the petition.⁵⁰ While this requirement seems reasonable at first glance, it has the practical effect of stifling the efforts of prosecuting agencies. Interestingly, both the defense bar and prosecutorial agencies objected to that clause.

⁴² People have filed petitions to expunge offenses that are legally not eligible for expungement. The vast majority of petitions, however, have been for violations of offenses like ARIZ. REV. STAT. § 13-3405(A)(1) (LexisNexis 2021) that may be legally available for expungement depending on the amount of marijuana involved. Therefore, almost all expungement questions are factual questions. Sometimes, though, expungement is a legal question of whether a particular offense qualifies.

⁴³ ARIZ. REV. STAT. § 36-2862(B)(2) (LexisNexis 2020).

⁴⁴ ARIZ. REV. STAT. § 36-2862(B)(3) (LexisNexis 2020).

⁴⁵ ARIZ. REV. STAT. § 36-2862(I) (LexisNexis 2020).

⁴⁶ *Id.*; ADI Staff Reporter, *Maricopa County's Attorney's Office Has Filed to Expunge over 10,000 Eligible Marijuana Convictions*, ARIZ. INDEP. NEWS NETWORK (Mar. 7, 2022), <https://arizonadailyindependent.com/2022/03/07/maricopa-countys-attorneys-office-has-filed-to-expunge-over-10000-eligible-marijuana-convictions/> [<https://perma.cc/CH6T-DXPA>] (providing example of a county that took advantage of the statute and filed over 10,000 expungement petitions within nine months).

⁴⁷ ARIZ. REV. STAT. § 36-2862(H) (LexisNexis 2020).

⁴⁸ ARIZ. R. CRIM. P. 36.

⁴⁹ ARIZ. R. CRIM. P. 36(a)(1)(A).

⁵⁰ ARIZ. R. CRIM. P. 36(b)(3).

In asking to remove the notice requirement, the Maricopa County Attorney's Office argued:

The limitation of notice to the defense in this circumstance because in some instances a prosecution agency may seek to expunge large numbers of convictions and potentially some old convictions. Because these petitions will only benefit Defendants, undoubtedly without objection from the Defendant, this unusual departure from the service and notice requirements will further the will of the voters in passing Prop 207 by eliminating an unnecessary procedural barrier. Furthermore, Defendants and their counsel will receive notice from the court when the petition is granted.⁵¹

Likewise, the American Civil Liberties Union argued that the rule should explicitly allow for bulk petitions, arguing that “[g]iven 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.”⁵²

The Arizona Supreme Court disagreed with the comments, and the final rule does not allow for bulk petitions.⁵³ Instead of a prosecuting agency filing one petition with a list of 1,000 cases that should be expunged, that agency would now have to file 1,000 individual petitions and mail a copy of each petition to the subject of the petition. Filing a bulk petition would require one person to compile a spreadsheet of eligible convictions and format it into a motion. The Supreme Court's rule requires that, instead, someone must generate a motion and proposed order in each individual case, file a copy, and then print and mail another copy. Even if that process takes as little as five minutes, filing 1,000 petitions would take one person over ten full working days doing that job exclusively. One source estimated that there are 192,000 offenses eligible for expungement,⁵⁴ while another listed the possible number at

⁵¹ Maricopa County Attorney's Comment in Support at 2–3, *In re Petition to Adopt Ariz. R. Crim. P. 36*, No. R-21-0023 (Ariz. Apr. 14, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1223> [<https://perma.cc/ZG8X-VEFQ>].

⁵² American Civil Liberties Union Foundation of Arizona & Arizona Attorneys for Criminal Justice, *Comment Letter for Proposed Rule 36 of Arizona's Rules of Criminal Procedure* (Ariz. Apr. 19, 2021), <https://www.azcourts.gov/Rules-Forum/aft/1223> [<https://perma.cc/ZG8X-VEFQ>].

⁵³ One could argue that bulk petitions are still allowed, but because the bulk petition would have to contain personal identifying information of each defendant and would have to be sent to each person included in the petition, a bulk petition would be unwieldy, incredibly expensive to mail to thousands of people, and would defeat the purpose of expungement by sending notice of expungement to people other than those getting their convictions expunged.

⁵⁴ David Abbott, *Arizona Expunging Only a Small Fraction of Minor Pot Convictions*, PHX. NEW TIMES (Dec. 16, 2021), <https://www.phoenixnewtimes.com/marijuana/arizona-is-slow-to-clear-pot-convictions-12624963> [<https://perma.cc/R3F2-N29V>]. There is no indication as to how the author or their source arrived at the number. As we will discuss later in the article, it is difficult to research the number of eligible cases, as records are destroyed, and there is no statewide database of convictions. Any listed number can only be an estimate.

hundreds of thousands.⁵⁵ Instead of taking a short amount of time to file a bulk petition, it would take one person 2.85 years to prepare, file, and mail a petition in 100,000 cases. The increased time for workers in already-short-staffed prosecution offices can be an important part of the decision of whether an agency would proactively file petitions to expunge.⁵⁶

IV. FILING FOR EXPUNGEMENT

As stated above, the Arizona Supreme Court enacted Rule 36 to implement the process for filing a petition to expunge. Rule 36 permitted the Administrative Office of the Courts to create a form petition. It also prohibited the clerk from charging a fee for the filing of a petition. The Arizona Judicial Branch has a webpage devoted to marijuana expungement, including downloadable forms.⁵⁷ Additionally, eight of Arizona's fifteen counties have direct links to the expungement form on their Superior Court websites.⁵⁸ Prop 207 also designated money "for the purpose of

⁵⁵ Ryan Randazzo, *Hundreds of Thousands of Arizonans Could Get Marijuana Crimes Erased. Here's How to Do It.*, AZCENTRAL (Dec. 16, 2021), <https://www.azcentral.com/story/money/business/consumers/2021/06/04/how-expunge-marijuana-convictions-arizona-starting-july-12/7526589002/> [https://perma.cc/9G2Y-Y463]. There is no indication as to how the author or their source arrived at the number. As we will discuss later in the article, it is difficult to research the number of eligible cases as records are destroyed and there is no statewide database of convictions. Any listed number can only be an estimate.

⁵⁶ The cost of postage might also be a consideration to an agency with budget constraints. The current price of first-class postage is \$0.73. It would cost \$140,160 to file 192,000 petitions to expunge just to notify the subjects of the petitions. Additionally, while there are no records of how many of the petitions filed by the prosecutors mailed to the subject of the petition have been returned, anecdotally, the number is extremely high. The notice is mailed to the last address known to the criminal justice system. If a person had a sole conviction for possessing marijuana ten years ago, the notice is sent to a ten-year-old address. A study of criminal summonses issued in New York City between 2003 and 2019 found that 37% of summons issued resulted in a warrant, primarily for failure to appear. SHANNON TOMASCAK ET AL., DATA COLLABORATIVE FOR JUST., TRENDS IN ISSUANCE OF CRIMINAL SUMMONSES IN NEW YORK CITY, 2003–20198 (2020), https://datacollaborativeforjustice.org/wp-content/uploads/2020/12/2020_12_08_The_Summons_Report_Indesign_FINAL.pdf [https://perma.cc/3UY6-KJWP]. Presumably, in many of those cases, the summons went to the wrong address. While a summons typically is issued shortly after a criminal offense, an expungement can take place long after the case is over. Therefore, a significant number of people do not get notice that a petition was filed or granted. Were there ever a change in rule or decision requiring that the prosecutor had to research the present address of the subjects of expungement, there is a very strong likelihood that proactive filing of petitions to expunge would stop, as the effort required to do the research would require too many additional staff members.

⁵⁷ *Arizona Proposition 207: Marijuana Legalization Initiative*, AZ CTS., <https://www.azcourts.gov/prop207> [https://perma.cc/33JW-P4F6] (last visited Mar. 16, 2025).

⁵⁸ Listed alphabetically, these counties have links to the forms: *Seal/Expunge Cochise County Marijuana Conviction*, COCHISE CNTY. ARIZ., <https://www.cochise.az.gov/792/SealExpunge-Cochise->

distributing grants to qualified nonprofit organizations that provide justice reinvestment programs in this state.”⁵⁹ Justice reinvestment includes assisting “with the restoration of civil rights and expungement of criminal records.”⁶⁰ The Arizona Marijuana Expungement Coalition is made up of nonprofit organizations that provide free assistance in preparing and filing expungement petitions.⁶¹ According to their website, as of December 31, 2023, there was at least one free marijuana expungement clinic planned for each month through June 2024.⁶²

With expungement being free to file, instructions available on most court websites, and multiple groups receiving grants to assist people, one would naturally assume that people with marijuana convictions would be filing petitions to expunge in great numbers. That has not been the case. About five months after the expungement statute went into effect, it was estimated that the Maricopa County Attorney’s Office had filed over 8,000 petitions to expunge, while only about 900 people had filed their own petitions to expunge.⁶³ In the same time frame, only forty-

County-Marijuana-Con [<https://perma.cc/H6JX-G7YC>] (last visited Mar. 16, 2025); *Setting Aside, Sealing, or Expunging Criminal Convictions*, COCONINO CNTY. ARIZ., <https://coconino.gov/869/Criminal-Records> [<https://perma.cc/EB36-27B5>]; *Criminal Forms*, GILA CNTY. ARIZ., [https://www.gilacountyaz.gov/government/courts/clerk_of_the_court/criminal_forms_revised\(6-15-17\).php](https://www.gilacountyaz.gov/government/courts/clerk_of_the_court/criminal_forms_revised(6-15-17).php) [<https://perma.cc/Z7W5-UH72>] (last visited Mar. 16, 2025); GRAHAM CNTY. ARIZ., <https://www.graham.az.gov/DocumentCenter/View/5892/H15-Expungement-Of-Records-PDF?bidId=> [<https://perma.cc/R4NF-XPCJ>] (last visited Mar. 16, 2025); JUD. BRANCH OF ARIZ. MARICOPA CNTY., <https://superiorcourt.maricopa.gov/llrc/crex1> [<https://perma.cc/4B5S-YM2E>] (last visited Mar. 16, 2025); MOHAVE CNTY. SUPER. CT., <https://www.mohavecourts.com/forms-and-form-kits> [<https://perma.cc/M4MS-YSXG>] (last visited Mar. 16, 2025); *Marijuana Expungement Forms*, YAVAPAI CNTY., <https://www.yavapaiaz.gov/Resident-Services/Law-and-Justice/County-Attorney/Programs/Marijuana-Expungement-Forms> [<https://perma.cc/FZ3B-9C63>] (last visited Mar. 16, 2025); *Self-Service Center: Criminal*, YUMA CNTY. ARIZ., <https://www.yumacountyaz.gov/government/courts/self-service-center/other-forms> [<https://perma.cc/2LWY-GUVB>] (last visited Mar. 16, 2025). Apache County, Greenlee County, La Paz County, Navajo County, Pima County, Pinal County, and Santa Cruz County all have no webpages dedicated to expungement and no direct links to the expungement form.

⁵⁹ ARIZ. REV. STAT. § 36-2863(C)(2) (LexisNexis 2020).

⁶⁰ ARIZ. REV. STAT. § 36-2863(G)(4) (LexisNexis 2020).

⁶¹ *About*, RECLAIM YOUR FUTURE, ARIZ. MARIJUANA EXPUNGEMENT COAL., <https://azexpunge.org/about/> [<https://perma.cc/FEB7-B75P>] (last visited Mar. 16, 2025). The coalition is made up of the Arizona Justice Project, the DNA People’s Legal Services, Southern Arizona Legal Aid, Inc., U of A, James E. Rogers College of Law, Civil Rights Restoration Clinic, ASU, Sandra Day O’Connor College of Law, Post-Conviction Clinic and Community Legal Services. *Id.*

⁶² *Calendar*, RECLAIM YOUR FUTURE, ARIZ. MARIJUANA EXPUNGEMENT COAL., <https://azexpunge.org/legal-clinics/list/> [<https://perma.cc/9J9G-28MB>] (look at past events to see this information) (last visited Mar. 16, 2025).

⁶³ Abbott, *supra* note 54.

eight petitions had been filed in Superior Court in Pima County, the second largest county in Arizona by population.⁶⁴

A. *Practical Issues with Prosecutor Filing Petitions*

Prosecution offices, then, are filing the bulk of expungement requests.⁶⁵ There are several limitations on their ability to do so, though. As discussed above, the inability to file bulk petitions severely limits the efficiency of filing for expungement. Some trial courts, such as those in Pima County, required an affirmative statement that the offense qualified for expungement.⁶⁶ The assistant prosecutor in Pima County responsible for expungements, Jack Chin, stated, “[I]f we have to do them on an individual case by case basis with an individual motion filed and an individual response and an individual analysis by the court, it’s going to be like emptying out the Pacific Ocean with a teaspoon.”⁶⁷

An even larger problem with prosecutor-led expungement is simply identifying cases that qualify. As stated previously, Arizona law allows most marijuana cases to be filed as either a low-level felony or a misdemeanor.⁶⁸ The decision of whether to treat marijuana cases as felonies or misdemeanors was an individual policy decision to be made by the elected prosecutor in each of Arizona’s fifteen counties. While Arizona was the only state that allowed for felony prosecution of a small amount of

⁶⁴ *Id.*

⁶⁵ As of June 1, 2024, the Maricopa County Attorney’s Office had filed over 25,900 petitions to expunge and had responded to about 3,074 petitions filed by people wishing to expunge their record—meaning the prosecutor had filed about 89% of those petitions filed in Maricopa County Superior Court.

⁶⁶ *State v. Ibarra*, 522 P.3d 1111, 1111 (Ariz. Ct. App. 2022). Ibarra submitted a petition to expunge a conviction for possessing “cannabis oil.” *Id.* at 1114. He did not submit any evidence that the amount of cannabis oil was less than the limit of 12.5 grams. *Id.* The State did not respond to the petition, but still the trial court denied the petition due to “the absence of any evidence that [Ibarra] possessed 12.5 g or less cannabis oil.” *Id.* The Court of Appeals overturned the decision, ruling that the A.R.S. § 36-2862 placed the burden on the State to prove that the offense did not qualify for expungement. *Id.* at 1111. While this decision applies to petitions filed by a defendant, it remains undecided whether the court can require an affirmative statement by a prosecution office when filing for a petition to expunge. The Pima County Superior Court, the court that initially denied Ibarra’s expungement request, requires a statement from the prosecuting attorney that they reviewed the case and determined that it qualifies for expungement. Andrew Oxford, *After Prop. 207, Some Find Expungement Process in Pima County Slower ‘Than Anyone Would Like’*, AZPM (Nov. 23, 2021, 8:27AM), <https://news.azpm.org/s/91005-after-prop-207-some-find-expungement-process-in-pima-county-slower-than-anyone-would-like/> [<https://perma.cc/F84H-5XGU>].

⁶⁷ Oxford, *supra* note 66.

⁶⁸ ARIZ. REV. STAT. § 13-604 (LexisNexis 2022).

marijuana, most prosecutors filed the cases as misdemeanors.⁶⁹ Maricopa County was a notable exception.⁷⁰

A felony prosecution in Arizona can only start with a prosecutorial agency returning an indictment or filing a complaint.⁷¹ A misdemeanor prosecution, on the other hand, may be commenced by a police officer simply issuing a citation.⁷² An elected county attorney in Arizona is responsible for prosecuting felonies in superior court.⁷³ In counties with a population of over two million people, misdemeanors are handled by municipal courts and prosecuted by municipal misdemeanor prosecutors.⁷⁴ The county attorney can also prosecute misdemeanors in a justice court,⁷⁵ most often doing so in unincorporated areas, or those without a municipal prosecutor. As a result, the decision to treat possession of marijuana as a misdemeanor could take several forms. The county attorney's office in a particular county could review all marijuana cases and file those cases as misdemeanors in justice court. Alternatively, that county attorney's office could review all marijuana cases but refer those it deems to be misdemeanors to a municipal prosecution office to prosecute. The county attorney could also have a policy communicated to police and municipal prosecutors directing low-level marijuana cases to be directly filed as misdemeanors into either a municipal court or a justice court. Without one specific route that a marijuana case could take to get filed, tracking charges and convictions in such a county becomes extremely difficult.

Almost all prosecution offices in Arizona use a digital case management system.⁷⁶ Digital case management systems retain information, especially when used

⁶⁹ Bob Christie, *Majority of Arizona Counties to Drop Marijuana-Related Charges*, FOX10 PHX. (Nov. 28, 2020, 9:41 AM), [https://www.fox10phoenix.com/news/majority-of-arizona-counties-to-drop-marijuana-related-charges_\[https://perma.cc/2CMN-S2EZ\]](https://www.fox10phoenix.com/news/majority-of-arizona-counties-to-drop-marijuana-related-charges_[https://perma.cc/2CMN-S2EZ]).

⁷⁰ Bill Montgomery, who was the elected Maricopa County Attorney from 2010 until 2019 when he left office for an appointment to the Arizona Supreme Court, was described by the New York Times as being “well known for his opposition to any relaxation of marijuana laws.” Shaila Dewan, *Caught With Pot? Get-Out-of-Jail Program Comes with \$950 Catch*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/us/marijuana-diversion-program-maricopa-arizona.html> [https://perma.cc/97AC-C3JP].

⁷¹ ARIZ. R. CRIM. P. 2.2.

⁷² ARIZ. R. CRIM. P. 2.1(a)(1).

⁷³ ARIZ. REV. STAT. § 11-532 (LexisNexis 2023).

⁷⁴ ARIZ. REV. STAT. § 22-301 (LexisNexis 2021).

⁷⁵ *Id.* In counties with more than two million people, justice courts can hear misdemeanor cases as long as they are not filed in a municipal court.

⁷⁶ According to a LinkedIn post, over 90% of prosecution in Arizona is managed using the digital case management system PROSECUTORbyKarpel. *Karpel Solutions*, LINKEDIN, <https://www.linkedin.com/posts/karpel-solutions-over-90-of-prosecution-in-arizona-now-managed->

to generate a complaint. There are two main limitations to case management systems. First, while current information is accurate, historical information depends on the quality of the information imported into the system. For example, the Maricopa County Attorney's Office implemented PROSECUTORbyKarpel ("PbK") in 2014.⁷⁷ While older information exists in the system,⁷⁸ it is data only; no police reports, charging documents, or other written information are available for most cases that were resolved before 2014, unless the physical file has been subsequently manually uploaded.⁷⁹ For offices that did not have a previous version of a digital case management system, their current iteration may not even have that historical data. If the case was filed by the issuance of a citation, no information may have been entered into a prosecutorial digital case management system⁸⁰ because the prosecutor did not have to make a charging decision or file a complaint.

Adding to the problem of whether information exists is the issue of record retention. Arizona law requires public agencies to maintain records "in accordance with established standards."⁸¹ The Arizona State Library has published those established standards.⁸² In general, felony records are kept for seven years.⁸³ Misdemeanor records, though, are only kept for one year.⁸⁴ As a result, when expungement became effective in 2021, prosecution offices may not have had files on felony cases resolved prior to 2014 or misdemeanors resolved prior to 2020. Physical storage costs are high, and many offices destroy physical files when the

activity-7034611046539567104-cLON/?trk=public_profile_like_view [https://perma.cc/2CXK-UKC5].

⁷⁷ *County Attorney's Office Streamlines Prosecution Process with New Case Management System*, MARICOPA CNTY. ATT'Y'S OFF. (June 27, 2014), <https://www.maricopacountyattorney.org/CivicAlerts.aspx?AID=271> [https://perma.cc/3GQQ-NQRD].

⁷⁸ Maricopa County had an in-house case management system that was integrated into PbK in 2014. *Id.*

⁷⁹ If a file has previously been destroyed, nothing exists of that file. Agencies do not save any part of the file when it is destroyed. Data in a previous case management system (such as charges and results of the case) may still exist, but no documents exist.

⁸⁰ If an individual files for an expungement on their case, this is not a problem. It is the State's burden of proof to show that an offense is not eligible for expungement. If the prosecutorial agency cannot recreate the file, then the petition will be granted. The lack of information only becomes an issue when the prosecutorial agency wants to file a petition on the behalf of another party.

⁸¹ ARIZ. REV. STAT. § 41-151.14(A) (LexisNexis 2021).

⁸² *See General Retention Schedule Created For: All Public Bodies (General Schedules)*, ARIZ. STATE LIBR., https://azlibrary.gov/sites/default/files/all_general_schedules_searchable.pdf [https://perma.cc/JS7B-R8YA] (last modified Oct. 3, 2023).

⁸³ *Id.*

⁸⁴ *Id.*

retention schedule allows it.⁸⁵ Even if an office stores its files digitally and does not destroy the digital file along the retention schedule, the only complete digital files that exist are those that were created after the date the prosecution office instituted the latest version of digital case management software.

Earlier in this paper, we examined the potential cost of filing expungement. It takes paid staff time to review files, prepare documents, file documents, and send copies to opposing parties. There are postage costs that become expensive when dealing with the scale of petitions potentially filed. While the financial costs are an important factor in expungement, the policy considerations may be even more important.

B. Policy Considerations for Prosecutorial Agencies Filing Petitions to Expunge

If the elected county attorney in a given county wanted to proactively expunge every qualifying conviction, but exclude the convictions that do not factually qualify, the process would be difficult to implement. Consider the main section of ARIZ. REV. STAT. § 36-2862, which makes possessing two and one-half ounces of marijuana an expungable offense. The underlying criminal statute that the individual would have violated is ARIZ. REV. STAT. § 13-3405(A)(1). As discussed earlier, there is no weight requirement for a charge or conviction of that subsection. Therefore, a database search of all convictions under ARIZ. REV. STAT. § 13-3405(A)(1) (if such a database exists) does not give a prosecutor a list of expungable offenses. Some of those cases may still involve over 2.5 ounces of marijuana.

Rather, the prosecuting attorney must decide whether she will affirmatively check the underlying facts of a case to determine whether it is eligible for expungement.⁸⁶ If the elected prosecutor requires their office to review the facts of the case, that will entail more effort on the part of their staff. At a minimum, if there is a file available to review, it will require someone to read the police report or other case documents to determine the weight of the marijuana involved. Even if the exact amount of marijuana is not in the file, there may be other indications of the weight. Two and a half ounces of marijuana looks like this:

⁸⁵ Again, destruction means just that. If a file is destroyed, no part of it is retained.

⁸⁶ In some counties, that decision was made by the courts. In Pima County, the superior court required an affirmative statement that the case was eligible for expungement. *See* Oxford, *supra* note 66; *State v. Ibarra*, 522 P.3d 1111, 1116 (Ariz. Ct. App. 2022).



If the police report says that a small baggie was found in a suspect's shoe, then obviously the amount was under two and a half ounces. Again, a policy decision has to be made as to whether to file a petition to expunge based on the description of the marijuana, even if the exact amount is not known.

If the file is not immediately available, or has been destroyed, a different policy decision needs to be made. While the State would not be able to object to a petition for expungement filed by a criminal defendant, as no evidence exists to prove to the court that the offense is ineligible, should the State affirmatively file to expunge? The attorney filing the petition would not be able to affirmatively attest that they had reviewed the file and determined the case was eligible.⁸⁷ Moreover, the prosecutorial agency may not want to risk filing for expungement on offenses that do not qualify.

However, the policy considerations here do not require an "all or nothing" solution. The prosecutor could decide to file for expungement on all misdemeanor convictions, but not on felony cases. They could also decline to file only on certain cases, such as felonies, unless there was affirmative evidence that the weight of the marijuana involved was under two and a half ounces. Prosecutor offices could also decide to expunge cases where charges were dismissed, or where the individual successfully completed diversion, regardless of the weight of marijuana involved.

⁸⁷ This is not a statutory requirement, but as seen in Pima County, it is something that courts have required. It has yet to be determined whether the court can require such an affirmation from a prosecuting agency. See *Oxford*, *supra* note 66; *Ibarra*, 522 P.3d at 1116.

V. THE MARICOPA COUNTY ATTORNEY'S OFFICE'S EXPUNGEMENT EFFORTS

On June 21, 2021, then Maricopa County Attorney Allister Adel said, "I believe that the will of the voters should be implemented as efficiently as possible. My office has been working for months to identify a system to assist individuals seeking to have their criminal records expunged per statute. On July 12, it is expected that my office will proactively file over 6,900 stipulated motions to expunge convictions."⁸⁸ The Maricopa County expungement effort began by the office creating a spreadsheet of every case resolved in the previous five years where the only charge the defendant was found guilty of committing was possession of marijuana and where the defendant did not have any subsequent cases filed by the Maricopa County Attorney's Office after the marijuana conviction.⁸⁹ Those criteria were chosen with the intent of expunging convictions for the people who would benefit most from expungement.⁹⁰ Using those search parameters, the digital case management system identified 7,515 cases.

Thirty-seven deputy prosecutors then volunteered to review the 7,515 cases to determine whether they qualified for expungement. Those volunteers were asked to do three things. First, they were to confirm that the only charges in the case were Possession of Marijuana under ARIZ. REV. STAT. § 13-3401(A)(1) and Possession of Drug Paraphernalia.⁹¹ If the charges were indeed correct, then the attorney would confirm that the individual had not been sentenced in another case after the marijuana conviction occurred, and that the individual had no other pending cases.⁹²

⁸⁸ *Maricopa County Attorney Announces Effort to Assist with Expungement of Prior Marijuana Convictions*, MARICOPA CNTY. ATT'Y'S OFF. (June 22, 2021), <https://www.maricopacountyattorney.org/civicalerts.aspx?aid=812> [<https://perma.cc/7ETM-3P25>].

⁸⁹ The author of this paper was in charge of the Maricopa County expungement effort at the Maricopa County Attorney's Office and the description of the effort in this section was done from memory and review of internal emails.

⁹⁰ People with convictions in the last five years were more likely to still be paying fines, which would be vacated by expungement. Additionally, individuals with no future charges filed against them would be more likely to benefit from expungement, as potential collateral consequences of conviction would still attach to their other cases, whereas expungement for people without other convictions might erase all collateral consequences.

⁹¹ The purpose of this requirement was twofold. First, with any data management system, the data is only as valid as what has been inputted. This step required the assistant prosecutors to simply verify that the data was correct. Second, by allowing the Maricopa County Attorney's Office to focus solely on those cases where the only charges were Possession of Marijuana and Paraphernalia, it allowed the office to prioritize those cases where all charges would be expunged. There are significant legal questions and policy considerations when dealing with cases that involve another charge as well as an expungable charge.

⁹² It should be noted that the only place checked for subsequent convictions or pending cases was the Maricopa County Attorney's Office's case management system. Attorneys were not asked to

Finally, the attorney would then review the file to determine whether the amount of marijuana was under the 2.5-ounce threshold in the expungement statute. The date range of this project was specifically chosen so that all the files would be digital files, meaning that a digital copy of the police report would be in the digital case managements system to review, so attorneys would not need to go to any other source to get the weight of the marijuana in the case. Instructions were to only exclude cases based on weight if there was affirmative proof in the case that the weight was over 2.5 ounces. If the police report listed the weight as “one dosage unit,” for example, then the case would be expunged. Most police reports for possession of marijuana are relatively short, requiring little time to review.⁹³

Of the 7,515 cases the Maricopa County Attorney’s Office reviewed, they filed a petition to expunge in 91% of them. Only 2% (162 cases) were excluded because the weight of the marijuana could be determined to have been over 2.5 ounces.⁹⁴ As a result, starting July 12, 2021, the Maricopa County Attorney’s Office began to file over 6,800 petitions to expunge. A copy of each petition was mailed to the criminal defendant at the last address listed in the digital case management system.⁹⁵ To avoid overwhelming criminal justice partners, the office agreed to file only 500 a week.⁹⁶ After the filing of the first batch of expungements was completed in January 2022, the Maricopa County Attorney’s Office identified another 7,000 cases for which to file for expungement. This time, the office would file petitions to expunge for individuals who had successfully completed a diversion program for possession of

look at convictions or pending cases in other jurisdictions. Again, this allowed the Maricopa County Attorney’s Office to prioritize for whom they would file expungement. It was the position of the office that a person who had a subsequent felony conviction would receive less of a benefit from expungement than a person who did not. Of course, even if the Maricopa County Attorney’s Office did not file an expungement on behalf of an individual, they could still file their own petition. The criteria used were an attempt to prioritize petitions filed by the State to have the greatest initial impact.

⁹³ If the marijuana was found as part of another investigation, though, it may require the attorney to review hundreds of pages to locate the amount of marijuana involved.

⁹⁴ Another fifty-three cases (0.7%) were not expunged at that time because the files were not digitized, and there was no indication in the digital case management software as to the weight of the marijuana.

⁹⁵ No attempt was made to determine any updated address. There is no way to track how successful the mailing was in giving actual notice to the affected person. The only way to track notice in the digital case management system is manually, which is not practical given the sheer numbers of cases involved.

⁹⁶ *County Attorney’s Office Expands Efforts to Assist Community with Marijuana Expungement*, ALL ABOUT ARIZ. NEWS (Mar. 8, 2022), <https://www.allaboutarizonanews.com/county-attorneys-office-expands-efforts-to-assist-community-with-marijuana-expungement/> [<https://perma.cc/Z33F-CCVW>].

marijuana.⁹⁷ In June 2022, the prosecutor-led expungement program was expanded to include misdemeanor convictions. Another report was run, and 49,000 cases⁹⁸ were identified in which the person had been convicted solely of a misdemeanor for possessing marijuana. The Maricopa County Attorney's Office would file petitions in those cases where a person was convicted of a misdemeanor for possessing marijuana, regardless of the date of conviction and without checking the amount of marijuana possessed. As of January 1, 2024, the Maricopa County Attorney's Office has filed 22,875 petitions to expunge.⁹⁹

At the same time, the Maricopa County Attorney's Office created a webpage,¹⁰⁰ so individuals could request that the office file a petition on their behalf. The page lists the conditions under which the petition will be filed:

Recognizing that there are thousands of applicable cases and that our resources are limited, the Maricopa County Attorney's Office will prioritize which cases we will file a stipulated motion on. In order for the Maricopa County Attorney's Office to file a motion on your behalf the following conditions must exist:

1. The amount of the drugs involved in the case must be below the amounts stated above (2.5 ounces of marijuana, or 12.5 grams of marijuana concentrate, or 6 marijuana plants).
2. Defendant/Juvenile must not have any pending felony cases (or charges submitted to our office to be reviewed for filing felony charges).
3. Defendant/Juvenile must not have been convicted of any felony (other than an offense covered by Prop 207) subsequent to the conviction they wish to have expunged.¹⁰¹

⁹⁷ As these cases did not result in convictions, a policy decision was made not to evaluate the amount of drugs involved or whether the individuals had open cases or subsequent convictions. The sole criterion was whether the charges involved Possession of Marijuana and Drug Paraphernalia and whether the person successfully completed diversion. If both conditions were met, a petition to expunge will be filed.

⁹⁸ Some of these cases had already been expunged, so the 49,000 number is not precise as to the new number of cases expunged. It is estimated that at least 45,000 new petitions to expunge would be filed.

⁹⁹ If the Maricopa County Attorney's Office had filed 500 petitions to expunge each week after the expungement statute went into effect on July 12, 2021, it could have filed over 64,000 petitions to date. However, the number filed has come nowhere close to that. This is most likely due to staffing issues. As mentioned previously, preparing and filing petitions is labor intensive and time consuming. In 2023, the office filed 5,343 petitions to expunge, or about 100 petitions a week. At that rate, it will take about seven more years to expunge all misdemeanor marijuana convictions in Maricopa County.

¹⁰⁰ *Proposition 207 Marijuana Conviction/Adjudication Expungement Request*, MARICOPA CNTY. ATT'Y'S OFF., <https://www.maricopacountyattorney.org/446/Prop-207> [<https://perma.cc/K956-CH7L>] (last visited Oct. 11, 2024).

¹⁰¹ *Id.*

As the expungement process should be free,¹⁰² the Maricopa County Attorney’s website is a way for people to avoid paying a private defense attorney to file a petition on their behalf. It also makes the process simple for those people who would otherwise struggle to fill out and file the proper forms. As of December 31, 2023, over 2,300 requests have been received. The Maricopa County Attorney’s Office filed petitions to expunge in about 82% of the requested cases.¹⁰³

VI. LEGAL ISSUES WITH EXPUNGEMENT

A. *What is the Definition of “Possess”?*

There have been, of course, legal challenges to the expungement process. The most contentious issue to date has been whether or not sales-related offenses are eligible for expungement. The statute criminalizing possession of marijuana states that a person shall not knowingly:

1. Possess or use marijuana.
2. Possess marijuana for sale.
3. Produce marijuana.
4. Transport for sale, import into this state or offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana.¹⁰⁴

The expungement statute, however, does not use the same language, instead allowing for expungement for “[p]ossessing, consuming or transporting two and one-half ounces or less of marijuana.”¹⁰⁵ In the context of the criminalization statute, “possessing” marijuana refers to simple possession for personal use. The question arose as to whether or not “possessing” in the expungement statute had the same limited meaning, or whether it also included “possession for sale.”

That issue was answered in *State v. Sorensen*.¹⁰⁶ *Sorensen* has an interesting procedural history in that Mr. Sorensen submitted a request to the Maricopa County Attorney’s Office website for the office to file a petition on his behalf. Mr. Sorensen

¹⁰² “The clerk may not charge a fee for filing a petition [to expunge].” ARIZ. R. CRIM. P. 36(a)(4).

¹⁰³ In addition to the reasons listed on the website for which a request would be rejected, people routinely submit requests on cases where expungement is not available. Examples of cases where expungement is unavailable are cases where the drug involved was not marijuana and where the person pled guilty to possessing drug paraphernalia (which is expungable where the underlying drug involved is marijuana), but where the underlying drug is not marijuana.

¹⁰⁴ ARIZ. REV. STAT. ANN. § 13-3405(A) (LexisNexis 2021).

¹⁰⁵ ARIZ. REV. STAT. ANN. § 36-2862(A)(1) (LexisNexis 2020).

¹⁰⁶ *See State v. Sorensen*, 531 P.3d 378 (Ariz. Ct. App. 2023).

had pled guilty to solicitation to possess marijuana for sale.¹⁰⁷ The underlying facts were that he possessed about two-thirds of an ounce of marijuana that he intended to sell.¹⁰⁸ The office interpreted the expungement statute to include “possession for sale” offenses and agreed to file a petition on his behalf. The State’s petition and a subsequent motion to reconsider were denied, and Sorensen filed an appeal.¹⁰⁹ The Court of Appeals¹¹⁰ reasoned that nothing in the broad definition of the word possession “encompasses a person's intent or purpose in possessing an item.”¹¹¹ It also noted that while other sections of the statute limited expungement to items possessed for personal use,¹¹² ARIZ. REV. STAT. § 36-2862(A)(1) does not.¹¹³ The court ultimately held that “§ 36-2862(A)(1) authorizes expungement of sale-related marijuana offenses when they otherwise satisfy the statute's eligibility requirements. As a result, the court erred by denying the State's expungement petition.”¹¹⁴

While deciding that ARIZ. REV. STAT. § 36-2862(A)(1) permitted expungement of offenses under ARIZ. REV. STAT. § 13-3405(A)(2), the *Sorensen* decision created another legal question regarding expungement. Instead of simply saying that the word “possession” in ARIZ. REV. STAT. § 36-2862(A)(1) included the offense of “possession for sale,” the *Sorensen* court said that ARIZ. REV. STAT. § 36-2862(A)(1) “authorizes expungement of sale-related marijuana offenses.” Almost immediately individuals started filing for expungement of convictions for actually

¹⁰⁷ *Id.* at 380.

¹⁰⁸ *Id.* at 380.

¹⁰⁹ *Id.* at 379. Another legal issue about the expungement statute is whether the State has jurisdiction to file an appeal of a denial of a petition. The Court of Appeals first held that the State did not have the right to appeal the granting of expungement. *State v. Santillanes*, 522 P.3d 691, ¶ 36 (Ariz. Ct. App. 2022). Ironically, the State appealed the Court of Appeals decision, and the Arizona Supreme Court ultimately ruled that the State could appeal the granting of an expungement. *State v. Santillanes*, 541 P.3d 1150, 1159 (Ariz. 2024). While *Sorensen* took place before the ruling in *Santillanes*, instead of filing an appeal, the Maricopa County Attorney’s Office referred Mr. Sorensen to the Arizona Justice Project, one of the organizations that received a grant to assist people with expungements. The Arizona Justice Project hired an appellate attorney to file the appeal.

¹¹⁰ Even though the Maricopa County Attorney’s Office and Sorensen agreed with the statute’s interpretation, there was an amicus curiae brief from the Arizona Prosecuting Attorney’s Advisory Council arguing that “possession” encompassed “possession for sale,” and the trial court obviously agreed with that interpretation when denying the original petition to expunge. *Sorensen*, 531 P.3d at 380.

¹¹¹ *Sorensen*, 531 P.3d at 381.

¹¹² § 36-2862(A)(2) makes “Possessing, transporting, cultivating or processing not more than six marijuana plants at the individual's primary residence *for personal use*” expungable (emphasis added). ARIZ. REV. STAT. ANN. § 36-2862(A)(2) (LexisNexis 2020).

¹¹³ *Sorensen*, 531 P.3d at 381.

¹¹⁴ *Id.* at 382.

selling marijuana. ARIZ. REV. STAT. § 13-3405(A)(4) makes it illegal to “sell, transfer or offer to sell or transfer marijuana.”¹¹⁵ This is a distinct act from those listed in ARIZ. REV. STAT. § 36-2862(A)(1)—possessing, consuming or transporting marijuana. Moreover, Prop 207 did not legalize the sale of marijuana.¹¹⁶ On October 31, 2024, the Court of Appeals ruled that ARIZ. REV. STAT. § 36-2862 does not allow for expungement of the sale of marijuana and that “*Sorensen* did not expand the scope of expungement-eligible offenses beyond those listed in the statute.”¹¹⁷

B. *Sealing of Files*

A practical issue that turned into a legal question is how to treat cases where not all charges have been expunged. Consider an example of someone arrested for committing a burglary and being caught with a small amount of marijuana. Hypothetically, assume that the person was charged with Burglary and Possession of Marijuana, pled guilty to Burglary and had the Possession of Marijuana charge dismissed as part of the plea agreement. The Possession of Marijuana charge is expungable,¹¹⁸ and if the individual filed a petition to expunge, the State would most likely not object to the expungement. The Arizona Supreme Court issued an administrative order that requires, in cases such as these, for the clerk to

Seal all records contained within the case file relating to the expunged arrest, charge, adjudication, conviction, and sentence, including the petition to expunge and related responses, motions, and orders as to the applicable counts if the charges being expunged constitute less than the entirety of the complaint, information, or indictment. Upon receipt of a public records request, the court must withhold case records related solely to the expunged charges, redact references to the expunged portions of the case file, and allow public access to the records containing information concerning the charges that were not expunged in the case file.¹¹⁹

Legally, then, the court clerk does not need to seal the entire case file. Practically, though, most documents in the file will have some reference to the marijuana charge, including all charging documents, the plea agreement and

¹¹⁵ It also makes it illegal to “transport for sale,” but the expungement statute explicitly includes “transport” as an expungable offense. ARIZ. REV. STAT. ANN. § 36-2862(A)(1) (LexisNexis 2020).

¹¹⁶ A.R.S. § 36-2852(A)(3) (2020) decriminalizes the transfer of one ounce or less of marijuana as long as “the transfer is without remuneration and is not advertised or promoted to the public.” ARIZ. REV. STAT. ANN. § 36-2852(A)(3) (LexisNexis 2020).

¹¹⁷ *State v. Bouhdida*, 560 P.3d 368, 371 (Ariz. Ct. App. 2024).

¹¹⁸ The Possession of Marijuana charge would be expungable whether it was never charged, dismissed as part of a plea, or if the person had pled guilty to the charge. The fact that it was dismissed as part of the plea in this hypothetical is purposeful to show the absurdity of what comes next.

¹¹⁹ Arizona Supreme Court Administrative Order No. 2021-82. ARIZ. ADMIN. ORDER. No. 2021-82 (Sup. Ct. 2021).

sentencing order. Furthermore, any motions that reference the marijuana would have to be sealed. While one could read the documents in the file to determine whether they need to be sealed, the sheer volume of expunged cases makes that completely unviable. So, as a practical matter, almost every case involving a small amount of marijuana, or drug paraphernalia related to marijuana, is sealed if the defendant files a successful petition to expunge.

Defense attorneys have filed petitions to expunge for that very purpose. In one case,¹²⁰ the trial judge refused to seal the entire case, despite a request by the defense attorney.¹²¹ This created a situation where the clerk would have to redact records in the file that mentioned the expunged count. The individual appealed the trial court ruling, arguing that ARIZ. REV. STAT. § 36-2862 requires sealing, not redaction.¹²² On June 25, 2024, the Court of Appeals ruled that the expungement statute “does not authorize the court to order sealing of records related to unexpunged offenses.”¹²³

As the appellate decision is new, there is no indication of how it will affect cases practically. In Maricopa County, at least, almost all expunged cases have been sealed, regardless of whether the expungement order has explicitly ordered the sealing. The new decision means this practice is contrary to the law. As it stands, the court can either proactively redact each of those files of any information related to the expunged count, or it could come up with another process where the files are not immediately publicly available, and the redaction takes place when a member of the public requests the file. Either process could prove to be onerous, although the proactive redaction would most likely prove to be so burdensome as to be unworkable.

C. Conflict Between the Charged Offense and the Pled Offense

Another legal issue is how to resolve a conflict between a charged offense and a conviction. As discussed previously, Arizona’s marijuana criminalization statute has different penalties based on the weight of the marijuana involved. For example, simple possession of marijuana for personal use is a Class 4 felony if the amount is over four pounds; a Class 5 felony if the amount is at least two pounds but less than

¹²⁰ See *State v. Burke*, 553 P.3d 186 (Ariz. Ct. App. 2024).

¹²¹ The defendant in that case had been convicted of two marijuana related counts that were not eligible for expungement due to the weight involved, as well as Money Laundering in the First Degree. She was also charged with Possession of Drug Paraphernalia, which the State agreed she was entitled to have expunged. *Id.* at 188–89.

¹²² *Id.* at 189.

¹²³ *Id.* at 192.

four pounds; and a Class 6 felony if the amount is less than two pounds.¹²⁴ A person can be charged with possessing over four pounds of marijuana but plead guilty to possessing less than two pounds. As there is no requirement of proving weight when one pleads guilty to possessing less than two pounds, the record may be silent as to the weight involved in the conviction—despite it being evident in the arrest and charged offense. Which facts control whether the offense is expungable?

It would be problematic to say that the arrest and charged offenses are not expunged because the weight involved over four pounds, but then to expunge the conviction.¹²⁵ One could argue that the conviction is the most important part of the case, and it should control.¹²⁶ The expungement statute, however, hints that the underlying conduct should control whether a charge can be expunged:

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. (emphasis added)¹²⁷

This issue was before the courts in *State v. Santillanes*.¹²⁸ Santillanes was charged with possessing over four pounds of marijuana, but pled to a crime that did not require evidence of how much marijuana was involved.¹²⁹ Santillanes filed a petition to expunge, the State objected and the Court granted the expungement without a hearing.¹³⁰ The State appealed, and the Court of Appeals remanded the case to the trial court to hold an evidentiary hearing.¹³¹

¹²⁴ ARIZ. REV. STAT. ANN. § 13-3405(1)-(3) (LexisNexis 2024).

¹²⁵ This would lead to a bizarre result where the person's court file is expunged and sealed, but the arrest still shows up on their criminal history, and the police report is available as a public record.

¹²⁶ This argument leads to a different problem—how do you determine the amount of drugs involved in the “conviction” if weight is not an element of an offense? The most probable solution to this issue is that because it is the State's burden to prove the charge is not expungable, when that burden cannot be met the charge is expunged.

¹²⁷ ARIZ. REV. STAT. ANN. § 36-2862(A) (LexisNexis 2020).

¹²⁸ See *State v. Santillanes*, 522 P.3d 691, 691 (Ariz. Ct. App. 2022).

¹²⁹ *Id.* at 694. The factual basis for the plea given by Santillanes's attorney was that “[o]n or about February 17, 2011, Santillanes did provide the means or opportunity to another to sell or transport marijuana.” *Id.*

¹³⁰ *Id.* at 697.

¹³¹ *Id.* at 698. No evidentiary hearing was held. The parties reached a stipulation prior to the hearing, and the petition to expunge became moot.

D. What Happens When an Expunged Offense Had Been Used to Enhance Another Sentence?

In 2017, Bennett Williams pled guilty to two counts of sex trafficking, both Class 2 felonies.¹³² He had, at the time, seven prior felony convictions.¹³³ The most recent of his prior felony convictions, and the only one committed in Arizona, was a 2004 conviction for possessing marijuana.¹³⁴ Upon the passing of Prop 207, Williams was able to have the 2004 conviction expunged.¹³⁵ He then filed a motion claiming his plea in the sex trafficking case was thus invalid, and as a result, that he was entitled to be resentenced as a non-repetitive offender.¹³⁶ The trial court denied his motion, and he petitioned for review to the Court of Appeals.¹³⁷

The State conceded that the trial court should not have denied his initial motion. The issue on appeal was what the proper remedy would be. Williams claimed that since the prior conviction was expunged, it should be struck from the plea agreement, and he should be resentenced.¹³⁸ The State argued that the proper remedy was a resentencing where the State could choose to withdraw from the plea.¹³⁹ The Court of Appeals chose neither option. It compared the plea agreement to a contract and held that “the terms of the plea agreement were altered materially, frustrating its purpose.”¹⁴⁰ The Court vacated the plea agreement and reinstated the original charges.¹⁴¹ In August 2024, the Arizona Supreme Court ruled that the parties were bound by the original terms of the plea agreement.¹⁴² The Supreme Court remanded the case for a new sentencing with instructions that if the trial court imposed a sentence different than that stipulated in the plea agreement, either party could withdraw from the agreement.¹⁴³

¹³² State v. Williams, 524 P.3d 1172, 1174 (Ariz. Ct. App. 2023).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1176.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1174.

¹³⁹ *Id.* at 1176.

¹⁴⁰ *Id.* (quoting State v. Szpyrka, 224 P.3d 206, 209 (Ariz. Ct. App. 2010)).

¹⁴¹ *Id.* at 1177.

¹⁴² State v. Williams, 553 P.3d 161, 168 (Ariz. 2024).

¹⁴³ *Id.*

VII. CRIMINAL JUSTICE PARTNER ISSUES

Just as criminal convictions have collateral consequences, so does expungement. As of February 15, 2024, the Maricopa County Superior Court has processed 26,822 petitions to expunge. This author contacted the court staff asking them to explain how expungement has affected their workload. Their only response was to send a diagram of the expungement process and the number of expungements processed.¹⁴⁴ Obviously the filing of 26,822 petitions created additional work, and Prop 207 did not contain any funding for the courts to deal with the increase in volume. Not all the petitions processed by the court have been handled smoothly.¹⁴⁵

Once a case is expunged, the Department of Public Safety (“DPS”) must process the expungement and remove any expunged charges from a person’s criminal record.¹⁴⁶ This is a labor-intensive process.¹⁴⁷ Once DPS receives an expungement from the court, they must search for the person in their system, and then search the person’s record for the particular record to be expunged.¹⁴⁸ They must then confirm the charges to be expunged and search the record again to make sure there are not subsequent arrests on the record related to the same charge, such as if the person failed to appear at a court hearing and was later rearrested.¹⁴⁹ It takes about 5–10 minutes to review a case involving a single expunged count.¹⁵⁰ As of January 1, 2024, DPS had received 25,420 expungement records.¹⁵¹ They had reviewed and completed 18,495 of those expungements, estimating that it represented 1,129 hours of work.¹⁵² There were no funds allocated in Prop 207 for DPS to do the extra work the new statutes created. DPS believes that, at a minimum,

¹⁴⁴ E-mail from Nicole Garcia, Crim. Dep’t Adm’r, Jud. Branch. of Ariz. Maricopa Cnty. (Feb, 15, 2024) (on file with author).

¹⁴⁵ Anecdotally, in the week that this section was written, the court sent several months-old petitions that had been mishandled back to the Maricopa County Attorney’s Office. This author has also been contacted repeatedly by petitioners asking for a ruling from the court because either the assigned judicial officer had not ruled, or because they had not been sent a copy of the ruling.

¹⁴⁶ ARIZ. REV. STAT. ANN. § 36-2862(C)(2) (LexisNexis 2020).

¹⁴⁷ E-mail from Amber Sliwinski, Admin. Serv. Manager, Ariz. Dep’t of Pub. Safety (Jan. 2, 2024) (on file with author).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

they need one additional administrative assistant, at a cost of at least \$63,000, to assist in processing expungements.¹⁵³

There are other difficulties that DPS has to deal with. Many courts use different computer systems with different labeling systems and have charges listed in different ways. It may be difficult even to just find a case from a court.¹⁵⁴ A court may list a case number as CR2019-00105, but it may be on the criminal history as CR1900105.¹⁵⁵ Some expungement orders do not list a case number, date of arrest, or offender's date of birth.¹⁵⁶ There is also no way to automate the process. Even if the expungement statute had said that "every violation of ARIZ. REV. STAT. § 13-3401(A)(1) is hereby expunged," DPS would have no way of identifying those cases without an order from the court containing a case number and offender-identifying information.¹⁵⁷

VIII. SUGGESTIONS

States looking to create an expungement statute should take the following suggestions into consideration.

A. *An Expungement Statute Should Track the Criminalization Statute*

Most of the issues that have arisen from Arizona's expungement statute have been because the expungement statute does not correlate to the criminalization statute. Had the expungement statute simply said that one could expunge "an arrest, charge or conviction for a violation of ARIZ. REV. STAT. § 13-3405(A)(1)," the law would have been much easier to apply.¹⁵⁸ Arguably, the prosecutor's office would not have to respond to requests for expungement, and it would be much simpler to create an automatic expungement process. By creating a statute where expungement

¹⁵³ *Id.*; § 36-2862(C)(2) states that "[u]nless 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." ARIZ. REV. STAT. ANN. § 36-2862(C)(2) (LexisNexis 2020). However, DPS has no contact with the petitioner, and it has no idea if they are indigent.

¹⁵⁴ Sliwinski, *supra* note 147.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Of course, the decision on how to draft the statute may have been a tactical one politically. Prop 207 was a voter-passed initiative. Two-and one-half ounces is a relatively small amount and there is a question of whether voters would have found legalization of possession of up to two pounds (and expungement of the same) as palatable.

depends on the underlying facts of the case, the writers of Arizona's statute made the process needlessly complicated.

Of course, drafting the expungement statute this way would not have solved every issue. Charges of marijuana possession are often accompanied by charges of possession of drug paraphernalia. In Arizona, possession of non-narcotic drug paraphernalia is one offense, regardless of the number of items of paraphernalia possessed.¹⁵⁹ That means that if a person possessed a marijuana pipe (expungable) and a pipe to ingest methamphetamine (not expungable) at the same time, they would be charged with one count of possession of drug paraphernalia. As a result, there would always be a factual question about whether this charge is expungable. That issue would be avoided, however, by drafting the statute to say that one could expunge "an arrest, charge or conviction for a violation of ARIZ. REV. STAT. § 13-3405(A)(1) and any accompanying drug paraphernalia charges." Another subsection could allow for expungement of any acts decriminalized by the legalization statute, even if not explicitly covered by the expungement statute. In other words, it makes sense to make it easier to expunge the vast majority of cases, and a catch-all provision could be used to capture those odd cases that are not covered. At the very least, an expungement statute should be based on easily accessible information. That information may vary from state to state.

B. The Statute Should Address Cases Where Possession of Marijuana is Not the Lead Charge

The classic example of marijuana expungement is the person who is arrested solely for possessing marijuana and drug paraphernalia. Expungement of the arrest, charge, and conviction on that case serves the purpose of Prop 207. There are compelling reasons to expunge any marijuana conviction. For example, there may be outstanding fines on any such conviction.¹⁶⁰ In addition there can be collateral consequences of a conviction, such as becoming ineligible to receive public benefits.¹⁶¹ When the marijuana arrest accompanies another felony offense, however, the utility of expungement may lessen, especially when the person was ultimately convicted of the other felony offense but not the marijuana charge. As seen in Section VII, there is a cost associated with expunging cases. Moreover, as a practical matter, any expungement results in the entire court file needing to be redacted, which comes with an added labor cost

While there still may be good policy reasons to permit expungement of marijuana arrests when there are other felonies involved, that does not necessarily

¹⁵⁹ State v. Soza, 464 P.3d 696, 697 (Ariz. Ct. App. 2020).

¹⁶⁰ In Arizona, any conviction for Possession of Marijuana carries a mandatory \$750 fine. ARIZ. REV. STAT. ANN. § 13-3405(D) (LexisNexis 2021).

¹⁶¹ ARIZ. REV. STAT. ANN. § 13-3418(A) (LexisNexis 2024).

mean that all other rules of expungement should apply. Specifically, the Arizona expungement statute would have benefited from a clause that read, “The police agency, prosecution office and court do not have to redact any records related to an expunged offense if the individual was convicted of any non-expunged felony arising from the same incident.” Such a clause would stop people from filing for expungement where the expungement would have no effect. This would allow the criminal justice system to focus on expungements that would positively benefit those involved. Additionally, it would further the goal of public access to information.

C. The Expungement Statute Should What Conduct Forms the Basis for the Expungement

In Arizona, a person who is arrested for possessing marijuana but who is never charged or convicted should obviously be able to expunge the arrest. Similarly, a person who is charged with possessing marijuana but not convicted should be able to have their charge expunged. A person who is arrested, charged, and convicted of possessing marijuana should also be able to expunge that conviction. In each of those scenarios, the arrest, charge, and conviction are of offenses that qualify for expungement. On the other hand, it becomes murkier when the arrest and charge are for offenses that do not qualify for expungement, but the case is resolved with a conviction for an expungable offense.

In Arizona, this situation manifests when a person is charged with possessing more than two pounds of marijuana but pleads guilty to possessing less than two pounds. The situation may manifest itself in other ways depending on the criminalization statutes and plea-bargaining practices in the state. The suggestion in subsection A of this section would resolve many of the issues. If the expungement depends solely on the statute violated, then determining whether an offense is eligible is easy. But if expungement depends on conduct, then the statute needs to define what conduct forms the basis of the decision. The statute should clearly state whether it is the underlying facts of the case that determine whether a case is eligible for expungement, or whether the court is bound to the four corners of the conviction.

CONCLUSION

William Ring is the former Chair of the Arizona Prosecuting Attorneys’ Advisory Council. Ring has said that “the Legislature and [Governor] Ducey should have legalized marijuana because they could adjust the law if there were unanticipated effects. But because Prop 207 was a ballot measure, it falls under part of the state constitution that bars lawmakers from making changes to voter approved

laws.”¹⁶² Legalization and expungement is going to be enacted in most states eventually. Prosecutors would be well served to be involved in the drafting of expungement statutes to avoid unintended consequences. Moreover, the statutes should be drafted in a way to give full effect to expungement of those who qualify, while limiting the incentive to file for expungement by or on behalf of those the statutes are not intended to help.

¹⁶² Christie, *supra* note 69. The Arizona Constitution does limit the ability of the legislature to amend or clarify a voter passed initiative in Article 4, Part 1, § 1(14), which states that the legislature may not supersede any initiative measure “unless the superseding measure furthers the purposes of the initiative or referendum measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to supersede such initiative or referendum measure.” ARIZ. CONST. art. IV, pt. 1, §1(14).