

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Stephen Ball and Paul Ball

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** August 12, 2019

**SUBJECT:** Proposed initiative measure 2019-2020 #123, concerning expungement of eligible criminal records

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

## Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To provide a process for criminal records expungement based on the eligibility criteria in the proposed initiative; and

2. To create new cash funds to distribute the revenue from expungement to various organizations or causes.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
  - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
  - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
  - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the Legislative Council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
3. In proposed section 24-72-802 (3), which defines "conviction" or "convicted," what does the last sentence mean?
4. In proposed section 24-72-803, the district court is required to order expungement of a person's criminal records and administrative records relating to the person's arrest if a decision is made to not file charges and in the case of executive clemency.
  - a. "Administrative records" is not defined. What is meant by "administrative records" that is not covered by criminal records? Would the proponents consider defining it?
  - b. How is the court going to know when a decision has been made not to file criminal charges?

- c. How is the court going to know that a person received executive clemency?
- 5. In proposed section 24-72-804 (2) and (3), there is a reference to "category of a conviction." What does that phrase mean? Would the proponents consider defining the phrase?
- 6. Proposed section 24-72-804 (4) states municipal infractions have no effect on expungement periods. Does this include municipal charges or just convictions?
- 7. In proposed section 24-72-805 (4), the expungement fee is required to be substituted for a life skills sentence in the case of indigency, but in proposed section 24-72-807 (1) the court has the discretion to impose a life skills course in the case of indigency. Is the intent that it be mandatory or discretionary?
- 8. Proposed first section 24-72-807 states basic identification information will be kept on file by the arresting agency. Is any other custodian authorized to keep basic identification information?
- 9. Proposed second section 24-72-807 (1) describes how to calculate the length of a life skills program sentence. Could you give an example of how the calculation works, for example if the expungement fee is \$1,000?
- 10. Proposed second section 24-72-807 (4) states that if the person does not choose to spend any hours after the initial forty hours on therapy classes or occupational education, the person may spend the rest of the hours in community maintenance. There does not appear to be another option than community maintenance. If that is true, then it should be a "shall" and not a "may" here. If that is not true, then the proposed initiative should state what other options are available.
- 11. In proposed sections 24-72-808 through 24-72-824, the proposed initiative states particular convictions incur an expungement period and fee. The conviction cannot incur the period and fee. Would the proponents consider rephrasing those provisions?
- 12. Proposed section 24-72-829 requires the state to send notice to all private custodians that their records may not be accurate and the consequences of providing expunged records. Which state entity is responsible for this duty, and how will it determine who all the private custodians are?

13. Proposed section 24-72-829 imposes a duty on private custodians to not provide criminal records about a person if the records have been expunged. How will the private custodian determine if the records have been expunged?
14. Proposed section 24-72-830 (2) requires the interest in the expungement fee cash fund and the interest pursuant to proposed section 24-72-805 (3) to be used for furnishing school supplies to schools throughout the state through the state's existing school funding method.
  - a. What does the term "school supplies" mean? Would the proponents consider defining it?
  - b. There is no current existing school funding method for school supplies. What do the proponents mean by "through the state's existing method for funding public schools"?
15. Who is responsible for implementing and operating the following programs mentioned in the proposed initiative:
  - a. The life skills program;
  - b. The Colorado occupational education scholarship program;
  - c. The geriatric health professional scholarship program;
  - d. The after-school literacy program;
  - e. The veterans peer support fund;
  - f. The first responder safety equipment fund;
  - g. The fallen first responders fund; and
  - h. The low income and reentry citizen renewable energy assistance fund.
16. How would the proposed new part 8 of article 72 of title 24 work with the existing criminal record sealing statutes in part 7 of article 72 of title 24, Colorado Revised Statutes?

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below:

1. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado

constitution or the Colorado Revised Statutes. Additionally, statutory section headnotes should appear in **bold** and regular type.

2. For purposes of this proposed statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." The initiative should use the statutory terms "shall" or "must" instead of "will."
3. Although the text of the proposed initiative should be in SMALL CAPITAL LETTERS, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
  - c. The first letter of proper names.
4. In the proposed initiatives definitions section, proposed section 24-72-802, some of the definitions are cross references to existing statutory references. The proper way to cross-reference a definition is to state: "'Defined term' has the same meaning as set forth in section X-X-XXX."
5. If "community maintenance" in proposed section 24-72-802 (2) is intended to be a definition, then it should use the term "means" instead of "is described in this part 8 of article 72 of title 24 as," or it should be moved to a substantive section if it is not a definition.
6. There are two proposed sections numbered 24-72-807.
7. In proposed sections 24-72-808 through 24-72-824, there are a few places that state "and expungement" that should be "an expungement."
8. In proposed sections 24-72-808 through 24-72-824, there is a format used in which the expungement period and fee are described and the crimes that they apply to are then listed as paragraphs. The same format is used for crimes in which expungement is not allowed. Standard drafting practice would state that:

"The following class 3 misdemeanors are subject to an expungement period of X and an expungement fee of Y:

  - a. Crime;"

9. Throughout the proposed initiative, parentheticals with numbers are used when referring to periods of time and money amounts. Standard drafting practice does not use numbers in statute in this way.
10. Throughout the proposed initiative, the phrase "of this section X-X-XXX" is used; the "of this section" does not need to include the statutory numbers. However, when the phrase is "of this subsection (x)(a)," then the subsection numbers and letters are used.
11. In proposed section 24-72-828, there is a missing "to" in the last sentence; it should read "to the person who legally . . ."
12. The following citations need to be corrected:
  - a. In proposed section 24-72-812 (3)(c), "42-4-704" should be "42-4-705."
  - b. In proposed section 24-72-822 (3)(i), "18-12-108 (2)(A)" should be "18-12-108 (2)(a)."
  - c. In proposed section 24-72-823 (2)(a), "18-3-205 (1)(a), (b)" should be "18-3-205 (1)(a) and (1)(b)."
  - d. In proposed section 24-72-823 (3)(b), "18-3-206 (a) and (b)" should be "18-3-206 (1)(a) and (1)(b)."
  - e. In proposed section 24-72-823 (3)(c), "18-3-303 (2)(a), (2)(b), and (2)(c)" should be "18-3-303 (2)."
  - f. In proposed section 24-72-823 (3)(bb), "19-12-107" should be "18-12-107."
  - g. In proposed section 24-72-823 (3)(hh), "36-6-117" should be "33-6-117."
  - h. In proposed section 24-72-830 (3), "paragraph (a) of this subsection (2)" should be "this subsection (3)(a)," and "paragraph (a) of this subsection (3)" should be "this subsection (3)."
  - i. In proposed section 24-72-830 (3)(c), "24-72-830" should be "24-72-831."
13. The format for section 24-72-830 (3) should be phrased so that the paragraphs that follow it follow the introductory portion.