GREATER BOSTON LEGAL SERVICES
... and justice for all

# GREATER BOSTON LEGAL SERVICES
# CORI & RE-ENTRY PROJECT
# LAW PACKET

September 16, 2024

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## DEFINITION OF CORI

**G.L. c. 6 § 167**

**"Criminal offender record information"**, records and data in any communicable form compiled by a Massachusetts criminal justice agency which concern an identifiable individual and relate to the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, previous hearings conducted pursuant to section 58A of chapter 276 where the defendant was detained prior to trial or released with conditions under subsection (2) of section 58A of chapter 276. sentencing, incarceration, rehabilitation, or release. **Such information shall be restricted to information recorded in criminal proceedings that are not dismissed before arraignment.** Criminal offender record information shall not include evaluative information, statistical and analytical reports and files in which individuals are not directly or indirectly identifiable, or intelligence information. **Criminal offender record information** shall be limited to information concerning persons who have attained the age of 18 and **shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 18**; provided, however, that if a person under the age of 18 was adjudicated as an adult in superior court or adjudicated as an adult after transfer of a case from a juvenile session to another trial court department, information relating to such criminal offense shall be criminal offender record information. Criminal offender record information shall not include information concerning any offenses which are not punishable by incarceration.

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Chapter 268, Section 18. Jailer or officer suffering prisoner to escape.
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Chapter 268A, Section 9. Violation of secs. 2-8. additional remedies; civil action for damages. Chapter 268A, Section 11. County employees; receiving or requesting compensation from, or acting as agent or attorney for other than county agency. Chapter

268A, Section 12. Former county employees; acting as attorney or receiving compensation from other than county; partners of employees or former employees or legislators. Chapter 268A, Section 13. Financial interest of county employee, relatives or associates; disclosure. Chapter 268A, Section 14. County employees; financial interest in contracts of county agency. Chapter 268A, Section 15A. Members of county commission or board; restrictions on appointments to certain positions.
Chapter 268A, Section 16. Repealed, 1978, 210, Sec. 19.
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# RECORD SEALING STATUTES

### ADULT CRIMINAL OFFENSE ADMINISTRATIVE SEALING

## G.L. c. 276 § 100A. Requests to seal files; conditions; application of section; effect of sealing of records (Mail in process)

Any person having a record of criminal court appearances and dispositions in the commonwealth on file with the office of the commissioner of probation may, on a form furnished by the commissioner and signed under the penalties of perjury, request that the commissioner seal the file. The commissioner shall comply with the request provided that: (1) the person's court appearance and court disposition records, including any period of incarceration or custody for any misdemeanor record to be sealed occurred not less than 3 years before the request; (2) the person's court appearance and court disposition records, including any period of incarceration or custody for any felony record to be sealed occurred not less than **7 years** before the request; (3) the person had not been found guilty of any criminal offense within the commonwealth in the case of a misdemeanor, **3 years** before the request, and in the case of a felony, 7 years before request, except motor vehicle offenses in which the penalty does not exceed a fine of $50; (4) the form includes a statement by the petitioner that he has not been

convicted of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except

such motor vehicle offenses, as aforesaid, and has not been imprisoned in any state or county in the case of a misdemeanor, within the preceding **3 years**, and in the case of a felony, within the preceding **7 years**; and (5) the person's record does not include convictions of offenses other than those to which this section applies. This section shall apply to court appearances and dispositions of all offenses; provided, **however, that this section shall not apply in case of convictions** for violations of sections 121 to 131H, inclusive, of **chapter 140 or for violations of chapter 268 or chapter 268A**, **except for convictions for resisting arrest.**

In carrying out the provisions of this section, notwithstanding any laws to the contrary:

**Any recorded offense which was a felony when committed and has since become a misdemeanor shall be treated as a misdemeanor.**

**Any recorded offense which is no longer a crime shall be eligible for sealing forthwith, except in cases where the elements of the offense continue to be a crime under a different designation.**

In determining the period for eligibility, any subsequently recorded offenses for which the dispositions are "not guilty", "dismissed for want of prosecution", "dismissed at request of complainant", "nol prossed", or "no bill" shall not be held to interrupt the running of the required period for eligibility.

**If it cannot be ascertained that a recorded offense was a felony when committed said offense shall be treated as a misdemeanor.**

Any violation of section 7 of chapter 209A or section 9 of chapter 258E shall be treated as a felony.

**Sex offenses, as defined in section 178C of chapter 6,** shall not be eligible for sealing for 15 years following their disposition, including termination of supervision, probation or any period of incarceration, or for so long as the offender is under a duty to register in the commonwealth or in any other state where the offender resides or would be under such a duty if residing in the commonwealth, whichever is longer; provided, **however, that any sex offender who has at any time been classified as a level 2 or level 3 sex offender, pursuant to section 178K of chapter 6, shall not be eligible for sealing of sex offenses.**

When records of criminal appearances and criminal dispositions are sealed by the commissioner in his files, he shall notify forthwith the clerk and the probation officer

of the courts in which the convictions or dispositions have occurred, or other entries have been made, of such sealing, and said clerks and probation officers likewise shall seal records of the same proceedings in their files.
Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public service in the service of the commonwealth or of any political subdivision thereof; **nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards or commissions, except in imposing sentence in subsequent criminal proceedings, and except that in any proceedings under sections 1 to 391, inclusive, of chapter 119, sections 2 to 5, inclusive, of chapter 201, chapters 208, 209, 209A, 209B, 209C, or sections 1 to 11A, inclusive, of chapter 210, a party having reasonable cause to believe that information in a sealed criminal record of another party may be relevant to (1) an issue of custody or visitation of a child, (2) abuse, as defined in section 1 of chapter 209A or (3) the safety of any person may upon motion seek to introduce the sealed record into evidence.** The judge shall first review such records in camera and determine those records that are potentially relevant and admissible. The judge shall then conduct a closed hearing on the admissibility of those records determined to be potentially admissible; provided, however, that such records shall not be discussed in open court and, if admitted, shall be impounded and made available only to the parties, their attorneys and court personnel who have a demonstrated need to receive them.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior arrests or convictions of the applicant shall include the following statement: "**An applicant for employment or for housing or an occupational or professional license with a sealed record** on file with the commissioner of probation **may answer 'no record'** with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant **for employment or for housing or an occupational or professional license** with a sealed record on file with the commissioner of probation **may answer 'no record'** to an inquiry herein relative to prior arrests or criminal court appearances. **In addition, any applicant for employment or for housing or an occupational or professional license may answer 'no record' with respect to any inquiry relative to prior arrests, court appearances and adjudications in all cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution."** The attorney general may enforce the provisions of this paragraph by a suit in equity commenced in the superior court.

The commissioner, in response to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, shall in the case of a sealed record or in the case of court appearances and adjudications in a case of delinquency or the case of a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution, report that no record exists.

Added by St.1971, c. 686, § 1. Amended by St.1973, c. 533, §§ 2, 3; St.1973, c. 1102, § 4; St.1974, c. 525; St.1975, c. 278; St.2010, c. 256, §§ 128 to 130, eff. May 4, 2012; **St.2018, c. 69,** §§ **186 to 192, eff. Oct. 13, 2018.**

# JUVENILE RECORD SEALING (Administrative)

## G.L. c. 276 § 100B. Requests to seal delinquency files or records; conditions; sealing by commissioner; notice for compliance; effect of sealing; limited disclosure

Any person having a record of entries of a delinquency court appearance in the commonwealth on file in the office of the commissioner of probation may, on a form furnished by the commissioner, signed under the penalties of perjury, request that the commissioner seal such file. The commissioner shall comply with such request provided (1) that **any court appearance or disposition including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior** to said request; (**2) that said person has not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request**, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and (3**) said form includes a statement by the petitioner that he has not been adjudicated delinquent or found guilty of any criminal offense in any other state**, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses as aforesaid, **and has not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years.**

When records of delinquency appearances and delinquency dispositions are sealed by the commissioner in his files, the commissioner shall notify forthwith the clerk and the probation officer of the courts in which the adjudications or dispositions have occurred, or other entries have been made, and the department of youth services of such sealing, and said clerks, probation officers, and department of youth services likewise shall seal records of the same proceedings in their files.

Such sealed records of a person shall not operate to disqualify a person in any future examination, appointment or application for public service under the government of the commonwealth or of any political subdivision thereof; **nor shall such sealed records be admissible in evidence or used in any way in any court proceedings or hearings before any boards of commissioners, except in imposing sentence for subsequent offenses in delinquency or criminal proceedings.**

only as "sealed delinquency record over three years old" and to other authorized persons who may inquire as "no record". The information contained in said sealed delinquency record shall be made available to a judge or probation officer who affirms that such person, whose record has been sealed, has been adjudicated a delinquent or has pleaded guilty or has been found guilty of and is awaiting sentence for a crime committed subsequent to sealing of such record. Said information shall be used only for the purpose of consideration in imposing sentence.

Added by St.1972, c. 404.

## ADULT CRIMINAL RECORD SEALING BY A COURT

## SEALING DISMISSED, NOLLE PROSEQUI, NOT GUILTY CASES IN COURT WITHOUT WAITING (COURT PROCESS)

**G.L. c. 276 § 100C. Sealing of records or files in certain criminal cases; effect upon employment reports; enforcement**

**In any criminal case** wherein the defendant has been found **not guilty by the court or jury**, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, **the commissioner of probation shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files**. The provisions of this paragraph shall not apply if the defendant makes a written request to the commissioner not to seal the records of the proceedings.

In any criminal case wherein a **nolle prosequi has been entered**, or **a dismissal has been entered by the court**, **and it appears to the court that substantial justice would best be served**, **the court shall direct the clerk to seal the records of the proceedings in his files.** The clerk shall forthwith notify the commissioner of probation and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files.

Such sealed records shall not operate to disqualify a person in any examination, appointment or application for public employment in the service of the commonwealth or of any political subdivision thereof.

An application used to screen applicants for employment, housing or an occupational or professional license which seeks information concerning prior

arrests or convictions of the applicant shall include in addition to the statement required under section one hundred A the following statement: "**An applicant for employment**, **housing or an occupational or professional license with a sealed record** on file with the commissioner of probation **may answer 'no record' with respect to an inquiry herein relative to prior arrests or criminal court appearances."** The attorney general may enforce the provisions of this section by a suit in equity commenced in the superior court.

The commissioner or the clerk of courts in any district or superior court or the Boston municipal court, in response to inquiries by authorized persons other than any law enforcement agency or any court, shall in the case of a sealed record report that no record exists. After a finding or verdict of guilty on a subsequent offense such sealed record shall be made available to the probation officer and the same, with the exception of a not guilty, a no bill, or a no probable cause, shall be made available to the court.

Added by St.1973, c. 322, § 1. Amended by St.1983, c. 312; St.1984, c. 123; St.2010, c. 256, §§ 131, 132, eff. May 4, 2012; St.2018, c. 69, §§ 193, 194, eff. Oct. 13, 2018.

## BOSTON MUNICIPAL COURT DIVISION
## SEALING UNDER STANDING ORDER 1-09: SUMMMARY

There are 8 divisions of the Boston Municipal Court (BMC)—Brighton, East Boston, Charlestown, Dorchester, Roxbury, West Roxbury, South Boston, and BCM Central (Edward Brooke courthouse),

If there are at least three charges in total that you are trying to seal in different divisions of the BMC, you can file the petition for a hearing before a judge at the BMC courthouse that covers the location where you now live instead of filing a petitions in each court.

For example, if I live in Roxbury and have two charges to seal in Roxbury, one in Dorchester and two in Brighton, I can file all the petitions in the Roxbury Division instead of going to all three courthouses. If I no longer live in Boston, I can file the petition in the last court where I have an eligible BMC charge to seal.

HOWEVER, you need to provide copies of docket sheets from the additional courts since the courthouse file will not be in front of the judge. See GBLS booklet on this topic if you need more information— Booklet 5: One Stop CORI Sealing in Boston Municipal Court available at:

https://www.gbls.org/self-help/cori

# EXPUNGEMENT

There are three types of expungement.

The first type is "time-based" after a waiting period and limited to certain juvenile offenses or adult offenses that occurred before age 21 if the person has a very short juvenile and/or criminal record. G.L. c. 276, §§ 100F-100H.

The second type is "reason based" and applies to both juvenile and adult offenses, but the offenses must be the result of false identification of the petitioner or the unauthorized use or theft of the petitioner's identity, decriminalization of the offense, or errors by law enforcement, civilian or expert witnesses, court employees, or "fraud perpetrated upon the court." G.L. c. 276, §100K.

The third type is limited to decriminalized cannabis offenses. If the reason for expungement is because a cannabis possession offense was decriminalized, any distribution offense that arose out of the same offense, may also be expunged under section 100K 1/4. See G.L. c. 276, §100K ¼,

## EXPUNGEMENT UNDER SECTION C. 276 §§ 100F to 100H (Only applies to juvenile court charges or under age 21 adult charges)

### G.L. c. 276 § 100F

**§ 100F. Petition for expungement of record as adjudicated delinquent or youthful offender**

Effective: December 31, 2020

**(a) A petitioner who has not more than 2 records as an adjudicated delinquent or adjudicated youthful offender may, on a form furnished by the commissioner and signed under the penalties of perjury, petition that the commissioner expunge the record or records; provided, however, that multiple offenses arising out of the same incident shall be considered a single offense for the purposes of this section.** Upon receipt of a petition for an expungement, the commissioner shall certify whether the petitioner is eligible for an expungement under sections 100I and 100J. If the petitioner is not eligible for an expungement under sections 1001 and 100J the commissioner shall, within 60 days of the request, deny the request in writing. If the petitioner is eligible for an expungement under sections 1001 and 100J the commissioner shall, within 60 days of the petition, notify in writing the district attorney of the petition and that the petitioner is eligible for an expungement under sections 1001 and 100J. Within 60 days of receipt of notification from the commissioner of the filing of the petition and that petitioner is

eligible for an expungement pursuant to sections 1001 and 100J, the district attorney shall notify the commissioner in writing of their objections, if any, to the petition.

Upon receipt of a response from the district attorney, if any, or within 65 days of the commissioner's notification to the district attorney pursuant to subsection (a), whichever occurs first, the commissioner shall forthwith forward the petition, along with the objections of the district attorney, if any, to the court wherein the petitioner was adjudicated delinquent or adjudicated a youthful offender.

If the district attorney files an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court shall, within 21 days of receipt of the petition pursuant to subsection (b), conduct a hearing on the petition. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

If the district attorney does not file an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court may approve the petition without a hearing. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the criminal record was created, to the commissioner and to the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6.

Credits. Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018. Amended by St.2020, c. 253, § 95, eff. Dec. 31, 2020.

## G.L. c. 276 § 100G

## § 100G. Petition for expungement of record of conviction

Effective: December 31, 2020

**A petitioner who has not more than 2 records of conviction may, on a form furnished by the commissioner and signed under the penalties of perjury, petition that the commissioner expunge the record or records; provided, however, that multiple offenses arising out of the same incident shall be considered a single offense for the purposes of this section.** Upon receipt of a petition, the commissioner shall certify whether the petitioner is eligible for an expungement under sections 1001 and100J. If the petitioner is not eligible for an expungement under sections 1001 and 100J the commissioner shall, within 60 days of the request, deny the request in writing. If the petitioner is eligible for an expungement under sections 1001 and 100J the

commissioner shall, within 60 days of the petition, notify in writing the district attorney of the petition and that the petitioner is eligible for an expungement under sections

1001 and 100J. Within 60 days of receipt of notification from the commissioner of the filing of the petition and that petitioner is eligible for an expungement pursuant to sections 1001 and 100J, the district attorney shall notify the commissioner in writing of their objections, if any, to the petition for the expungement.

Upon receipt of a response from the district attorney, if any, or within 65 days of the commissioner's notification to the district attorney pursuant to subsection (a), whichever occurs first, the commissioner shall forthwith forward the petition, along with the objections of the district attorney, if any, to the court wherein the petitioner was convicted.

If the district attorney files an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court shall, within 21 days of receipt of the petition pursuant to subsection (b), conduct a hearing on the petition. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

If the district attorney does not file an objection with the commissioner within 60 days of receipt of notification as provided in subsection (a) the court may approve the petition without a hearing. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the criminal record was created, to the commissioner and to the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6.

Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018. Amended by St.2020, c. 253, § 96, eff. Dec. 31, 2020.

**G.L. c. 276 § 100H**

**§ 100H. Petition for expungement of record without adjudication as delinquent or youthful offender or conviction**

Effective: December 31, 2020

**(a) A petitioner who has not more than 2 records that do not include an adjudication as a delinquent, an adjudication as a youthful offender or a conviction may, on a form furnished by the commissioner and signed under the penalties of perjury, petition that**

**the commissioner expunge the record or records; provided, however, that multiple offenses arising out of the same incident shall be considered a single offense for the purposes of this section.** Upon receipt of a petition, the commissioner shall certify whether the petitioner is eligible for an expungement under sections 1001 and 100J. If the petitioner is not eligible for an expungement under sections 1001 and 100J the commissioner shall, within 30 days of the request, deny the request in writing. If the petitioner is eligible for an expungement under sections 1001 and 100J the commissioner shall, within 30 days of the request, notify in writing the district attorney. Within 30 days of receipt of notification from the commissioner that the petitioner is eligible for an expungement pursuant to sections 1001 and 100J, the district attorney shall notify the commissioner in writing of their objections, if any, to the request for the expungement.

If the district attorney files an objection to the petition with the commissioner within 30 days of receipt of notification as provided in subsection (a) the court shall, within 21 days of receipt of the petition pursuant to subsection (b), conduct a hearing on the petition. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

If the district attorney does not file an objection with the commissioner within 30 days of receipt of notification as provided in subsection (a) the court may approve the petition without a hearing. The court shall have the discretion to grant or deny the petition based on what is in the best interests of justice and shall enter written findings as to the basis of its order. The court shall deny any petition that does not meet the requirements of sections 1001 and 100J.

The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the criminal record was created, to the commissioner and to the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6.

Credits Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018. Amended by St.2020, c. 253, § 97, eff. Dec. 31, 2020.

# G.L. c. 276 § 100I. Certification of eligibility for expungement

Effective: October 13, 2018

(a) The commissioner shall certify that a record that is the subject of the petition filed pursuant to section 100F, section 100G or section 100H is eligible for expungement provided that:

(1) the offense resulting in the record that is the subject of the petition is not a criminal offense included in section 100J;

(2) the offense that is the subject of the petition to expunge the record occurred before the petitioner's twenty-first birthday;

(3) the offense that is the subject of the petition to expunge the record, including any period of incarceration, custody or probation, occurred not less than 7 years before the date on which the petition was filed if the offense that is the subject of the petition is a felony, and not less than 3 years before the date on which the petition was filed if the offense that is subject of the petition is a misdemeanor;

(4) other than motor vehicle offenses in which the penalty does not exceed a fine of $50 and the offense that is the subject of the petition to expunge, the petitioner does not have any other criminal court appearances, juvenile court appearances or dispositions on file with the commissioner;

(5) other than motor vehicle offenses in which the penalty does not exceed a fine of $50, the petitioner does not have any criminal court appearances, juvenile court appearances or dispositions on file in any other state, United States possession or in a court of federal jurisdiction; and

(6) the petition includes a certification by the petitioner that, to the petitioner's knowledge, the petitioner is not currently the subject of an active criminal investigation by any criminal justice agency.

Any violation of section 7 of chapter 209A or section 9 of chapter 258E shall be treated as a felony for purposes of this section.

**Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018.**

# JUVENILE & UNDER AGE 21 EXCLUSIONS FROM SEALING APPLICABLE TO §§ 100F, 100G, 100H (See Section 100K as an alternative if you are not eligible)

**G.L. c. 276 § 100J. Offenses excluded from eligibility of record for expungement Effective: October 13, 2018**

(a) No criminal record resulting from a disposition of the following offenses shall be eligible for expungement pursuant to section 100F, section 100G or section 100H:

(1) any offense resulting in death or serious bodily injury;

(2) any offense committed with the intent to cause death or serious bodily injury; (3)any offense committed while armed with a dangerous weapon;

(4) any offense against an elderly person;

(5) any offense against a disabled person;

(6) any sex offense as defined in section 178C of chapter 6;

(7) any sex offense involving a child as defined in section 178C of chapter 6;

(8) any sexually violent offense as defined in section 178C of chapter 6;

(9) any offense in violation of section 24 of chapter 90;

(10) any sexual offense as defined in section 1 of chapter 123A;

(11) any offense in violation of sections 121 to 131Q of chapter 140;

(12) any offense in violation of an order issued pursuant to section 18 or 34B of chapter 208;

(13) any offense in violation of an order issued pursuant to section 32 of chapter 209;

(14) any offense in violation of an order issued pursuant to chapter 209A;

(15) any offense in violation of an order issued pursuant to section 15 of chapter 209C;

(16) any offense in violation of an order issued pursuant to chapter 258E;

(17) any offense in violation of section 13M of chapter 265;

(18) any felony offense in violation of chapter 265;

(19) any offense in violation of paragraph (a), (b), (c) or (d) of section 10 of chapter 269; or

(20) any offense in violation of section 10E of chapter 269.

Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018.

# SECTION 100J NON-EXPUNGEABLE OFFENSES THAT APPLY TO SECTION 100F THROUGH 100H EXPUNGEMENT (This does NOT apply to Section 100K Expungement)

**Section 100J of chapter 276 excludes any of the following offenses from expungement under sections 100F through 100H (under age 21 expungement provisions):**

(1) any offense resulting in death or serious bodily injury;

(2) any offense committed with the intent to cause death or serious bodily injury;

(3) any offense committed while armed with a dangerous weapon;

(4) any offense against an elderly person;

(5) any offense against disabled person;

(6) any sex offense as defined in Section 178C of chapter 6:
"Sex offense", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B 1/2 of said chapter 265; a repeat offense under section 13B 3/4 of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter 272; inducing a minor into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under section 16 of said chapter 272, but excluding a first or single adjudication as a

delinquent juvenile before August 1, 1992; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

(7) any sex offense involving a child as defined in section 178C of chapter 6:

"Sex offense involving a child", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B $^1/_2$ of said chapter 265; a repeat offense under section 13B $^3/_4$ of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under the age of 16 under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude upon a person under 18 years of age under subsection (b) of section 50 of said chapter 265; inducing a minor into prostitution under section 4A of chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

(8) any sexually violent offense as defined in section 178C of chapter 6:

"Sexually violent offense", indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B $^1/_2$ of said chapter 265; a repeat offense

under section 13B $^{3}/_{4}$ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

(9) any offense in violation of section 24 of chapter 90:

§24 Driving while under influence of intoxicating liquor, reckless and unauthorized driving; failure to stop after collision.

(10) any sexual offense as defined in section 1 of chapter 123A:

G.L c. 265 § 26 kidnapping with intent to commit a violation of section 13B, 13B1/2, 13B3/4, 13F, 13H, 22, 22A, 22B, 22C, 23, 23A, 23B, 24 or 24B of chapter 265
G.L. C. 272 § 53 accosting or annoying persons of the opposite sex and lewd, wanton and lascivious speech or behavior
G.L. 274 § 6 any attempt to commit any of the above listed crimes or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority; and any other offense, the facts of which, under the totality of the circumstances, manifest a sexual motivation or pattern of conduct or series of acts of sexually-motivated offenses.

**(11) any offense in violation of sections 121 to 131Q of ch. 140.**

**G.L. c. 140 "Sale of Firearms"**
§ 121 Firearm sales; definitions; antique firearms; application of law; exceptions
§ 121A Identification of firearms; certificate by ballistics expert as prima facie evidence
§ 122 Licenses; contents; fingerprints; procedure on refusal of license; fees; improper issuance.
§ 122A Record of licenses; notice to dept of criminal justice information services; sales record books
§ 122B Sale of ammunition; license; fees; rules and regulations; refusal, suspension or revocation of license; judicial review; penalties

§ 122C Illegal sale or possession of self-defense spray; penalty for violation
§122D Persons prohibited from purchase or possession of self-defense spray; penalty for violation
§ 123 Conditions of licenses
§ 124 Terms of licenses
§ 125 Forfeiture or suspension of licenses; notice
§ 126 Placards, signs or advertisements; prima facie evidence
§ 127 Transfer of licenses
§ 128 Penalty for violation of statute on selling, renting or leasing weapons; evidence on sale of machine gun § 128B Unauthorized purchase of firearms; report to commissioner; penalties
§ 129 Fictitious name or address and other false information; penalties § 129B Firearm identification cards; conditions and restrictions § 129C Application of Sec. 129B; ownership or possession of firearms or ammunition; transfers; report to commissioner; exemptions; exhibiting license to carry, etc. on demand § 129D Surrender of firearms and ammunition to licensing authority upon denial of application for, or revocation of, identification card or license; right to transfer; sale by colonel of state police; rules and regulations
§ 130 Sale or furnishing weapons or ammunition to aliens or minors; penalty
§ 131 Licenses to carry firearms; conditions and restrictions
§ 131A Permits to purchase, rent or lease firearms, or to purchase ammunition; fee; penalties
§ 131B Penalty for loan of money secured by weapons
§ 131C Carrying of firearms in a vehicle
§ 131E Purchase by residents; licenses; firearm identification cards; purchase for use of another; penalties; revocation of licenses or cards; reissuance
§ 131F Nonresidents or aliens; temporary license to carry firearms or ammunition
§ 131F1/2 Theatrical productions; carrying firearms and blank ammunition
§ 131G Carrying of firearms by non-residents; conditions
§ 131H Ownership or possession of firearms by aliens; penalties; seizure and disposition
§ 131I Falsifying firearm license or identification card
§ 131J Sale or possession of electrical weapons
§ 131K Firearms or large capacity weapons without safety devices
§ 131L Weapons stored or kept by owner; inoperable by any person other than owner or lawfully authorized user
§ 131M Assault weapon or large capacity feeding device not lawfully possessed on September 13, 1994; sale, transfer or possession
§ 131N Covert weapons; sale,
transfer or possession;
§ 131P Basic firearms safety certificate; instructors

**(12)** any offense in violation of an order issued pursuant to section 18 or 34B of chapter 208 divorce related orders, such as abuse related protective order violations:
§18 Pendency of action for divorce; protection of personal liberty of spouse; restraint orders authorized §34B Violation of order to vacate marital home

**(13)** any offense in violation of an order issued pursuant to section 32 of chapter 209 or G.L. c. 209C Domestic Relations orders such as abuse related protective order violations:

§ 32 Violation of order prohibiting restraint of personal liberty of spouse or a support, custody or maintenance order

**(14) any offense in violation of an order issued pursuant to chapter 209A Abuse Prevention order:**

§ 3B. Order for suspension and surrender of firearms license; surrender of firearms
§ 5A. Protection order issued by another jurisdiction; enforcement
§ 7. Abuse prevention orders
§ 11. Possession, care and control of domesticated animal owned by persons involved in certain protective orders

(15) any offense in violation of an order issued pursuant to section 15 of chapter 209C Domestic Relations:

§ 15 Violation of an order to vacate, restraining or no-contact order to protect a party or child

(16) any offense in violation of an order issued pursuant to chapter 258E Harassment Prevention Orders:

Enforcement of protection order issued by another jurisdiction
Law officer emergency response to prevent further abuse or harassment
execution of outstanding warrants;; order for payment of damages

(**17) any offense in violation of section 13M of chapter 265:**

(a) Whoever commits an assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 $^1/_2$ years or by a fine of not more than $5,000, or both such fine and imprisonment.
(b) Whoever is convicted of a second or subsequent offense of assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 $^1/_2$ years or by imprisonment in the state prison for not more than 5 years.
(c) For the purposes of this section, "family or household member" shall mean persons who (**i) are or were married to one another**, (ii) **have a child in common** regardless of whether they have ever married or lived together or (iii) **are or have been in a substantive dating or engagement relationship;** provided, that the trier of fact shall determine whether a relationship is substantive by considering the following factors: the length of time of the relationship; the type of relationship; the frequency of interaction between the parties; whether the relationship was terminated by either person; and the length of time elapsed since the termination of the relationship.

**(18) <u>any FELONY offense in violation of chapter 265;</u>**

**GBLS commentary: Ch. 265 offenses include the following:**

§ 1. Murder

Duel; Wound Without and Death within State
Accessory in Duel
Duel; Conviction or Acquittal in
Foreign State
§ 9. Prize Fighting; Engaging Prize Fight; Aiding or Promoting Prize Fight; Appointment Within and Fight Without State; Penalty
Boxing, Kickboxing, Mixed Martial Arts or Other Unarmed Combative Sporting Matches or Sparring Exhibitions
Manslaughter; Business Organization as Defendant
§ 13 1/2. Punishment for Manslaughter While Operating a Motor Vehicle
**§ 13a. Assault or Assault and Battery** (misdemeanor)
§ 13c. Assault and Battery to Collect Loan
§ 13d. Assault and Battery upon Public Employees; Attempt to Disarm Police Officer;
Assault and Battery upon a Police Officer
§ 13d 1/2. Firefighters, Injuries Resulting from Criminal Offenses;
§ 13g. Commission of a Felony for Hire
§ 13i. Assault or Assault and Battery on Emergency Medical Technician, Ambulance Operator, Ambulance Attendant
or Health Care Provider
§ 13j. Assault and Battery upon a Child
§ 13k. Assault and Battery upon an Elderly or Disabled Person;
§ 13l. Wanton or Reckless Behavior Creating a Risk of Serious Bodily Injury or Sexual Abuse to a Child; Duty to Act
§ 13n. Transmission of Conviction Information for Misdemeanor Offense Having as Element the Use or Attempted
Use of Physical Force or the Threatened Use of Deadly Weapon Where Victim or Intended Victim Was Family or
Household Member to Department of Criminal Justice Information Services
Mayhem
Assault; Intent to Murder or Maim
**§ 15a. Assault and Battery with Dangerous Weapon; Victim Sixty or Older**
**§ 15b. Assault with Dangerous Weapon; Victim Sixty or Older**
§ 15c. Assault by Means of Hypodermic Syringe or Needle
§ 15d. Strangulation or Suffocation;
§ 15e. Assault and Battery by Discharge of Firearm, Large Capacity Weapon, Rifle, Shotgun, Sawed-off Shotgun or
Machine Gun;
§ 15f. Attempt to Commit Assault and Battery by Discharge of Firearm, Large Capacity Weapon, Rifle, Shotgun,
Sawed-off Shotgun or Machine Gun
Attempt to Murder
Armed Robbery
Assault with Intent to Rob or Murder; Weapons; Punishment; Victim Sixty Years or Older
§ 18a. Dangerous Weapon; Assault in Dwelling
House;
**§ 18b.Use of Firearms While Committing a felony**
§ 18c. Entry of Dwelling Place; Persons Present Within; Weapons
Robbery by Unarmed Person;
Simple Assault; Intent to Rob or Steal
Stealing by Confining or Putting in Fear

§ 21a. Assault, Confinement, Etc. Of Person for Purpose of Stealing Motor Vehicle
§ 25. Attempted Extortion;
§ 26a. Kidnapping of Minor or Incompetent by Relative
§ 26b. Drugging Persons for Kidnapping
§ 28. Poison; Use with Intent to Injure
§ 29:Assault: Intent to Commit Felony
§ 30: Gross Negligence; Persons Having Care of Common Carrier;
§ 32. Glass; Throwing in Public Streets Beaches;
§ 34 Tattooing Body of Person by Other than Qualified Physician
§ 35 Throwing or Dropping Objects onto Public Way;
§ 36 Throwing or Dropping Objects at Sporting Events;
§ 37 Violations of Constitutional Rights § 39. Assault or
Battery for Purpose of Intimidation
§ 41 Causing Serious Bodily Injury to Participants in Physical Exercise Training Programs;
§ 42 Use of Radios Without Earphones on Public Conveyances
§ 43 Stalking
§ 43a. Criminal Harassment
§ 44 Coercion of Child Under Eighteen into Criminal Conspiracy;
§ 46. Taking from Deceased Victim's Estate
§ 48. Ice Cream Truck Vending by Sex Offender
§ 51. Trafficking of Persons for Forced Service; Victims Under 18 Years; Trafficking by Business Entities
§ 53. Organ Trafficking; Victims Under 18 Years;
§ 55. Forfeiture of Funds Used to Facilitate Violation of SEC. 50 or 51;
§ 58. Possession of Deceptive Weapon Device During Commission of Violent Crime

***End of GBLS comment.***

## Other exclusions:

### (19) any offense in violation of paragraph (a), (b), (c) or (d) of section 10 of chapter 269

**Crimes Against Public Peace:**

§ 10 (a) possession of firearm in vehicle without permission
§ 10 (b) carrying of non-traditional knife or weapon (i.e. blackjack, nunchaku, metallic knuckles, shuriken, etc.)
§ 10 (c) unlawful possession of machine gun or sawed off shotgun

### (20) any offense in violation of section 10E of chapter 269.

§ 10E Firearms sales, distributions or transfers

# SECTION 100K EXPUNGEMENT

## "REASON BASED" EXPUNGEMENT FOR BOTH JUVENILE AND ADULT CASES

**G.L. c. 276 § 100K. Expungement of record resulting from false identification, an offense no longer a crime at time of expungement, error or fraud**

(a) Notwithstanding the requirements of section 1001 and section 100J, a court may order the expungement of a record created as a result of criminal court appearance, juvenile court appearance or dispositions if the court determines based on clear and convincing evidence that the record was created as a result of:

1. **false identification of the petitioner or the unauthorized use or theft of the petitioner's identity;**

2. **an offense at the time of the creation of the record which at the time of expungement is no longer a crime, except in cases where the elements of the original criminal offense continue to be a crime under a different designation;**

3. **demonstrable errors by law enforcement;**

4. **demonstrable errors by civilian or expert witnesses;**

5. **demonstrable errors by court employees; or**

6. **demonstrable fraud perpetrated upon the court.**

(b )The court shall have the discretion to order an expungement pursuant to this section based on what is in the best interests of justice. **Prior to entering an order of expungement pursuant to this section, the court shall hold a hearing if requested by the petitioner or the district attorney.** Upon an order of expungement, **the court shall enter written findings of fact.**

(c)The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the record was created, to the commissioner and to the commissioner of criminal justice information services appointed pursuant to section 167A of chapter 6.

Added by St.2018, c. 69, § 195, eff. Oct. 13, 2018.

# EXPUNGEMENT LEGISLATIVE ALERT
## G.L. c . 276 §100K1/4

**Greater Boston Legal Services CORI & Re-entry Project**
**9-12-2022**

### Roadblocks to expunging cannabis offenses removed by new legislation

The Governor signed the cannabis social equity bill (S3096) on August 11, 2022, which removes judicial discretion to deny petitions to expunge criminal records of decriminalized marijuana charges and expands what charges may be expunged. The Legislature passed a criminal legal reform package in 2018 that included the first criminal record expungement law for Massachusetts, but some judges simply declined to expunge marijuana records. It is obviously unfair, however, to have an offense on your record that is no longer a crime and to suffer the countless adverse collateral consequences of such a record. This enacted legislation delivers expungement relief we had hoped for several years ago.

### Summary of the New Law

**1. Discretion and deadlines.** The discretion of a judge to deny expungement of decriminalized marijuana offenses is removed. The juvenile or adult offenses must be expunged in 30 days from the date of filing of the petition if the offenses were decriminalized. See section 100K 1/4 of chapter 276.

**2. Expansion of relief**. New relief goes beyond a decriminalized possession offense to also include "possession with intent to distribute" or other distribution offenses if the charge(s) arose out of the same incident involving possession. Many people were overcharged with intent to distribute when possession of marijuana was still illegal. As a result, many people did not bother to expunge decriminalized possession offenses because they were unable to also expunge distribution offenses that arose out of the same incident when cannabis possession was illegal.

**3. Mitigating harm**. The provisions in this legislation help to mitigate some of the harm and racially disparate effect of "tough on crime" and "war on drugs" policies on communities of color. Data shows people who are Black were more likely to be arrested for marijuana offenses. The law takes effect 90 days from the signing of the bill which is November 9, 2022. A copy of the new law is below.

## G.L. c. 276, § 100K 1/4 (effective Nov. 9, 2022)

SECTION 23. Chapter 276 of the General Laws is hereby amended by inserting after section 100K the following section:- Section 100K 1/4

(a) Notwithstanding the requirements of section 100I and section 100J, a court shall, within 30 days of a petition being filed, order the expungement of a record created as a result of a criminal court appearance, juvenile court appearance or disposition for: (1) the possession or cultivation of an amount of marijuana decriminalized by chapter 387 of the acts of 2008; (2) the possession or cultivation of an amount of marijuana decriminalized by chapter 384 of the acts of 2016; (3) the possession or cultivation of an amount of marijuana decriminalized by chapter 55 of the acts of 2017; (4) possession of marijuana with intent to distribute based on an amount of marijuana decriminalized by chapter 387 of the acts of 2008, chapter 334 of the acts of 2016 or chapter 55 of the acts of 2017; or (5) distribution of marijuana based on an amount of marijuana decriminalized by chapter 387 of the acts of 2008, chapter 334 of the acts of 2016 or chapter 55 of the acts of 2017.

(b) Prior to entering an order on a petition for expungement pursuant to subsection (a), the court shall hold a hearing if requested by the petitioner or the district attorney. Upon granting or denying a petition for expungement pursuant to subsection (a), the court shall enter written findings of fact.

(c) Upon an order for expungement pursuant to this section or section 100F, section 100G or section 100H, the court clerk's office shall provide the petitioner with a certified copy of the order, the docket sheets and the criminal complaint related to the expunged charge. The court shall send a copy of the expungement order to the clerk of the court where the record was created, to the commissioner of probation and to the commissioner of criminal justice information services.

# CASE LAW

**469 Mass. 296**
**Supreme Judicial Court of Massachusetts,**
**Suffolk.**

**COMMONWEALTH**
**v.**

**Peter PON.[1]**
**SJC–11542.**

Submitted April 7, 2014.

Decided Aug. 15, 2014.

**Synopsis**
**Background:** Defendant petitioned to seal his criminal record after he admitted to facts sufficient for finding of guilty of operating a motor vehicle while under the influence of alcohol (OUI) and leaving the scene of property damage following a motor vehicle accident, after the Boston Municipal Court Department ordered a continuance without a finding for one year with rehabilitation program, and after his case was dismissed one year later on recommendation of probation department. The Boston Municipal Court Department, Dorchester Division, Suffolk County, Robert E. Baylor, J., denied petition.

**Holdings:** After granting defendant's application for direct appellate review, the Supreme Judicial Court, Cordy, J., held that:

sealing of records of closed criminal proceedings that resulted in a dismissal or entry of a nolle prosequi may occur where good cause justifies overriding of general principle of publicity, abrogating *Commonwealth v. Doe*, 420 Mass. 142, 648 N.E.2d 1255, and

a judge may determine on pleadings whether a prima facie showing has been made to seal, and if such a showing is made, the petition should proceed to a hearing on merits.
Remanded.

**Attorneys and Law Firms**
****186** Pauline Quirion, Boston (Susan Malouin with her) for the defendant.

Donna Jalbert Patalano, Assistant District Attorney, for the Commonwealth.

Rahsaan D. Hall, for Lawyers' Committee for Civil Rights and Economic Justice & another, amici curiae, submitted a brief.

Rebecca A. Jacobstein, for Committee for Public Counsel Services & another, amici curiae, submitted a brief.
Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.[2]

**Opinion**

CORDY, J.

***297** Under G.L. c. 276, § 100C, second par., inserted by St. 1973, c. 322, § 1, a former criminal defendant whose case resulted in the entry of a nolle prosequi or a dismissal may obtain discretionary sealing of his or her criminal record where a judge determines that "substantial justice would best be served" by sealing. This provision, which is part of the over-all criminal offender record information (CORI) statutory scheme, is intended to enable such individuals to overcome the inherent collateral consequences of a criminal record and achieve meaningful employment opportunities. See *Globe Newspaper Co. v. District Attorney for the Middle Dist.,* 439 Mass. 374, 384, 788 N.E.2d 513 (2003). In 2010, the Legislature enacted extensive reforms to the CORI scheme, extending access to official CORI records to more employers, housing providers, and other organizations, for limited use, and simultaneously broadening the scope of the sealing provisions to enable more individuals to shield their records from public view. See generally St. 2010, c. 256. Given the demonstrable legislative concern in these reforms about the negative impact of criminal records on the ability of former criminal defendants to reintegrate into society and obtain gainful employment, particularly in an age of rapid informational access through the Internet and other new technologies, it is apparent that the stringent standard for discretionary sealing we articulated nearly twenty years ago, in *Commonwealth v. Doe,* 420 Mass. 142, 149–152, 648 N.E.2d 1255 (1995), no longer achieves the proper balance of interests. We granted the defendant's application for direct appellate review following the denial of his request for discretionary sealing of his criminal record under G.L. c. 276, § 100C, and now set forth a new standard for determining when substantial justice would best be served by the sealing of certain criminal records under G.L. c. 276, § 100C, second par.[3]

*Background.* The defendant was charged in October, 2007, with operating a motor vehicle while under the influence of alcohol (OUI) and leaving the scene of property damage following ***298** a motor vehicle accident. He admitted to facts sufficient for a finding of guilty. In September, 2008, a judge of the Boston Municipal Court Department ordered a continuance without a finding for one year with a rehabilitation program, pursuant to G.L. c. 90, § 24D, involving probation and a recommended forty-five day suspension of his ****187** driver's license. On October 22, 2009, a judge dismissed the case on the recommendation of the probation department.

Three years later, in November, 2012, the defendant filed a petition to seal his criminal record, pursuant to G.L. c. 276, § 100C, due to its impact on his employment opportunities.[4] At a hearing on the petition, the Commonwealth objected to the sealing of the case because, it contended, the employment consequences articulated by the defendant were attributable to earlier, more serious charges and not to the OUI charge at issue. See note 34, *infra.* The judge denied the petition and further denied the defendant's motion for reconsideration. We granted the defendant's application for direct appellate review.

After oral argument before this court, the Commissioner of Probation sealed the defendant's criminal record pursuant to the administrative process set forth in G.L. c. 276, § 100A.[5] Accordingly, ***299** the question of whether the judge abused his discretion by denying the defendant's petition to seal his criminal record is moot because the defendant has attained his desired relief through another process.[6] See ****188** *Ott v. Boston Edison Co.,* 413 Mass. 680, 680, 602 N.E.2d 566 (1992); *Blake v. Massachusetts Parole Bd.,* 369 Mass. 701, 703, 341 N.E.2d 902 (1976).

Nonetheless, we exercise our discretion to revisit the standard for discretionary sealing under G.L. c. 276, § 100C. We may answer a question that is no longer important to the parties "where the issue [is] one of public importance, where it was fully argued on both sides, where the question [is] certain, or at least very likely, to arise again in similar factual circumstances, and especially where appellate review could not be obtained before the recurring question would again be moot." *Lockhart v. Attorney Gen.,* 390 Mass. 780, 783, 459 N.E.2d 813 (1984). The sealing of criminal records is of public importance, and the parties have addressed the merits of the current standard and the need for clearer guidance. Moreover, this issue undoubtedly will arise again for offenders who seek to seal their criminal records prior to the eventual sealing provided for in G.L. c. 276, § 100A, and will again be rendered moot by the passage of time inherent in the due course of litigation and appellate review. See *Commonwealth v. Humberto H.,* 466 Mass. 562, 574, 998 N.E.2d 1003 (2013), quoting *Lockhart, supra.* Further, the issue has "general application to the work of the trial court" and merits discussion by this court "in order to ***300** promote the proper administration of justice." *Doe,* 420 Mass. at 143, 648 N.E.2d 1255.[7,8]

*Discussion.* This case concerns the balance between the public's right of access to criminal court records and the State's compelling interest in providing privacy protections for former criminal defendants to enable them to participate fully in society. In particular, we must consider that balance in relation to the substantive and procedural standards that govern review of a petition for discretionary sealing under G.L. c. 276, § 100C, second par. The defendant asserts that our existing substantive standard does not adequately recognize the compelling interests in support of sealing, and asks that we adopt a more flexible standard that advances the legislative intent behind the 2010 CORI reforms.[9] The Commonwealth contends that our existing jurisprudence properly captures the balance of interests at stake and merits only minor clarification. It further asks this court to affirm the two-step hearing ****189** procedure articulated in *Doe,* 420 Mass. at 149–150, 648 N.E.2d 1255, in order to ensure that adequate constitutional safeguards are afforded to the public. We conclude that a new substantive standard is necessary to achieve the legislative purpose of discretionary sealing and modify the procedure currently in place for reviewing petitions for sealing.

1. *Substantive standard for sealing under G.L. c. 276, § 100C.* a. *Statutory framework and legislative history.* Under ***301** G.L. c. 276, § 100C, second par., an individual may petition the court for sealing of a criminal case ending in a dismissal or entry of a nolle prosequi, as early as the time of the disposition or at any point thereafter.[10] *Id.* If "it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files." *Id.*

This provision was introduced in the 1970s shortly after the passage of the initial CORI Act (act), which authorized the creation of a comprehensive criminal justice information system that would afford limited access to court-based criminal records. See G.L. c. 6, §§ 167–178B; St. 1972, c. 805.

See also St. 1973, c. 322, § 1, inserting G.L. c. 276, § 100C. The act and its subsequent amendments attempted "to balance the public interest in having access to certain types of criminal justice information against the interest of personal privacy," Brant, Barron, Jaffe, Graceffa, & Wallis, Public Records, FIPA and CORI: How Massachusetts Balances Privacy and the Right to Know, 15 Suffolk U.L.Rev. 23, 59–60 (1981) (Brant), "recognizing that ready access to a defendant's prior criminal record might frustrate a defendant's access to employment, housing, and social contacts necessary to ... rehabilitation." *Globe Newspaper Co.,* 439 Mass. at 384, 788 N.E.2d 513.

Section 100C, and related sealing provisions in G.L. c. 276, §§ 100A and 100B, facilitated this balance by requiring or permitting the sealing of records of certain convictions, juvenile records, and nonconvictions, whose availability did not serve criminal justice purposes. See G.L. c. 276, § 100A, inserted by St. 1971, c. 686; G.L. c. 276, § 100B, inserted by St. 1972, c. 404; G.L. c. 276, § 100C, inserted by St. 1973, c. 322.[11] See also *Rzeznik v. Chief of Police of Southampton,* 374 Mass. 475, 479, 373 N.E.2d 1128 (1978); Brant, *supra* at 65 & n. 292. Once an individual's record is sealed, he or she may answer "no record" to any question regarding criminal history, and courts and the probation department must report that "no record" exists to anyone who inquires. See What Is Sealing of a Record?, Massachusetts Criminal ***302** Offender Record Information Law § 5.2 (Mass. Cont. Legal Educ. 1st ed. 2012). Sealing therefore removes some of the social and economic barriers created by a criminal record. See *Globe Newspaper Co.,* 439 Mass. at 384, 788 N.E.2d 513.

The substantive standard for discretionary sealing under § 100C, second par., where "substantial justice would best be served," is not defined in the statute, nor does the phrase lend itself to a clear ****190** definition. See *Wheatley v. Massachusetts Insurers Insolvency Fund,* 456 Mass. 594, 601, 925 N.E.2d 9 (2010), *S.C.,* 465 Mass. 297, 988 N.E.2d 845 (2013). Where the words of the statute are ambiguous, we strive "to make it an effectual piece of legislation in harmony with common sense and sound reason" and consistent with legislative intent. *Wolfe v. Gormally,* 440 Mass. 699, 704, 802 N.E.2d 64 (2004), quoting *Massachusetts Comm'n Against Discrimination v. Liberty Mut. Ins. Co.,* 371 Mass. 186, 190, 356 N.E.2d 236 (1976).

Nearly twenty years ago, this court adopted an interpretation of "substantial justice" based on the determination of the United States Court of Appeals for the First Circuit that G.L. c. 276, § 100C, implicates concerns under the First Amendment to the United States Constitution and therefore requires a heightened burden of proof on the part of the defendant in order to overcome a constitutional presumption of public access. See *Doe,* 420 Mass. at 147–150, 648 N.E.2d 1255, discussing *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497 (1st Cir.1989). In *Pokaski, supra* at 502–507, 510, the First Circuit concluded that because the right of public access guaranteed by the First Amendment was implicated by G.L. c. 276, § 100C, sealing under § 100C must survive a "traditional compelling interest/least restrictive means test." *Id.* at 505. To justify sealing, a defendant must make a specific showing "that sealing [is] necessary to effectuate a compelling governmental interest." *Id.* at 511. Given this heightened standard, the *Pokaski* court stated that sealing under § 100C could occur only in exceptional circumstances. See *id.* at 506 n. 17, 507 n. 18.

In *Doe,* 420 Mass. at 151, 648 N.E.2d 1255, this court adopted the reasoning of *Pokaski* and required that, in order to obtain discretionary sealing under § 100C, the defendant must show "that the value of sealing ... clearly outweighs the constitutionally-based value of the record remaining open to society." As part of this burden of proof, the defendant must establish that "he or she risks suffering

specific harm if the record is not sealed." *Id.* at 152, 648 N.E.2d 1255. See *Pokaski,* 868 F.2d at 507 n. 18. In conducting this balancing, the judge may consider "all relevant information," including "the reason for the ***303** nolle prosequi or dismissal," *Doe, supra* at 151, 648 N.E.2d 1255, and whether "it is substantially probable that future opportunities are likely to be affected adversely by the existence of an arrest record," *id.* at 152, 648 N.E.2d 1255. The court also observed that the pool of defendants able to meet this burden would be small. *Id.* at 149 n. 7, 648 N.E.2d 1255, citing *Pokaski, supra* at 507–508.

b. *Recent CORI reform.* Since our *Doe* decision in 1995, there have been significant changes in the availability of CORI records. These changes indicate a strong legislative policy of providing the public, and particularly employers and housing providers, with access to certain criminal records in order to make sound decisions while also enabling the sealing of criminal records where so doing would not present public safety concerns.

The 2010 CORI reforms consisted of three major components relevant to the analysis here. See Massing, CORI Reform—Providing Ex–Offenders with Increased Opportunities Without Compromising Employers' Needs, 55 Boston B.J. 21, 22, 24 (2011). First, the Legislature extended access to official CORI records to a broader group, creating several tiers of access. See G.L. c. 6, § 172; St. 2010, c. 256, § 21; 803 Code Mass. Regs. § 2.05 (2012). Any employer, housing provider, professional licensing authority, or volunteer organization can generally access the ****191** following CORI information for authorized purposes: pending criminal charges, including cases that have been continued without a finding, until they are dismissed; any convictions that are not yet eligible for automatic sealing under G.L. c. 276, § 100A; and any murder, manslaughter, and certain sex offense convictions, unless they have been sealed affirmatively under G.L. c. 276, § 100A, regardless of their eligibility for such sealing.[12] See G.L. c. 6, § 172 (*a* ) (3), (*b* ); 803 Code Mass. Regs. § 2.05(4)(a). Other employers, volunteer organizations, and local government agencies that work with vulnerable populations such as children, the elderly, or individuals with disabilities may access ***304** "all available criminal offender record information," which includes nonconvictions but implicitly excludes any sealed records. See G.L. c. 6, §§ 172 (*a* ) (8), (10)-(16), (18), (23), 172C, 172E, 172G, 172H, 172I; G.L. c. 71, § 38R; 803 Code Mass. Regs. § 2.05(1), (3)(b). Members of the public may request conviction information on specific individuals within certain time limitations. See G.L. c. 6, § 172 (*a* ) (4); St. 2010, c. 256, § 21; 803 Code Mass. Regs. § 2.05(5). Finally, criminal justice agencies,[13] firearms licensing authorities, and some government agencies that work with children are authorized to obtain all criminal offender record information, including sealed records. See G.L. c. 6, §§ 172 (*a* ) (1) (criminal justice agencies and firearms licensing authorities), 172 (*a* ) (9), (13) (children's agencies), 172B, 172F.

This expansion of access to official CORI records reflects a recognition of two important policy needs: that employers, housing providers, and licensing authorities have "legitimate business reason[s]" for wanting to know prospective employees' or recipients' criminal histories, and that making official CORI records available more broadly would help steer employers and others away from reliance on potentially inaccurate sources of criminal history information made possible by technological advances since the initial passage of the CORI act (and since our decision in *Doe* ). See Massing, *supra* at 21–22. Where criminal records are increasingly available on the Internet and through third-party background service providers, criminal history information that is available only briefly to the public through official means can remain available indefinitely, despite subsequent

sealing or impoundment. See Jacobs & Crepet, The Expanding Scope, Use, and Availability of Criminal Records, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 186–187, 203–208 (2008) (Jacobs & Crepet); Massing, *supra* at 22, 24. By providing an official avenue for criminal history information and offering incentives for use of official CORI,[14] the Legislature sought to balance ****192** a recognized need for broader ***305** access to criminal history information with a desire to minimize reliance on inaccurate or unauthorized criminal history information sources. See Governor Patrick Signs Strong Anti–Crime Package to Protect Public Safety, Expand Job Opportunities, State House News Service, Aug. 6, 2010 (legislation "ensures law enforcement agencies, employers and housing providers have access to accurate and complete records in appropriate circumstances"); State House News Service, July 30, 2010 (statement of Sen. Cynthia S. Creem on Senate Doc. No. 2583) ("There is no accountability or reliability. This bill would allow for a web-based program to give potential employers access to information that is accurate and consistent"); State House News Service, Nov. 18, 2009 (statement of Sen. Creem on Senate Doc. No. 2210) ("The bill encourages users to conduct their background checks through this system and not any other"). See also Cheney, Record Access Debate Juxtaposes Needs of Ex–Prisoners, Employers, State House News Service, July 27, 2009.

Second, the Legislature implemented procedural protections for defendants seeking employment by limiting when employers may ask about criminal history and requiring employers to share criminal history information with applicants.[15] ,[16] See G.L. c. 6, § 171A; St. 2010, c. 256, § 19. These protections were intended to minimize the discriminatory use of CORI information by employers and, again, promote accuracy of information where criminal history is considered. See Massing, *supra* at 23 (so-called "ban-the-box" provision "forces employers to consider ex-offenders' job qualifications on the merits, rather than automatically reject applicants who honestly answer the [criminal history] question in the affirmative").

Third, the Legislature made changes to the sealing provisions by enabling earlier automatic sealing under G.L. c. 276, § 100A, and expanding discretionary sealing to a broader class of nonconvictions. ***306** The shortened waiting periods for automatic sealing[17] reflect the consensus of recidivism research that "past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility." Massing, *supra* at 23. See State House News Service, Nov. 18, 2009 (statement of Sen. Creem on Senate Doc. No. 2210) ("Research tells us that ex-offenders who don't commit crimes in these timeframes are just as likely to reoffend as anyone else"). Further, where continuances without a finding previously had been excluded as a category of dismissed ****193** cases eligible for sealing under § 100C, their addition through the 2010 reform suggests that the Legislature specifically intended to make earlier sealing more widely available. See G.L. c. 276, § 100C, as amended by St. 2010, c. 256, § 131. These reforms, coupled with the procedural protections aimed at minimizing discrimination in the hiring process, strongly indicate that the Legislature was concerned with the collateral consequences of criminal records and sought to make sealing broadly available to individuals whose criminal histories or records no longer presented concerns of recidivism. See State House News Service, July 31, 2010 (statement of Rep. Christine Canavan on Senate Doc. No. 2583) ("This is a bill that's all about [a] second chance at what all of us want, a good job, a good wage, and the ability to raise a family"). Cf. *In re Kollman,* 210 N.J. 557, 568, 46 A.3d 1247 (2012). In light of these expanded opportunities for sealing, the Legislature also granted criminal justice agencies immediate and automatic access to sealed and nonsealed CORI information, further indicating that the Legislature anticipated that more criminal records might be sealed following the reforms.[18] See G.L. c. 6, § 172 (*a* ) (1); G.L. c. 276, § 100D;

St. 2010, c. 256, §§ 21, 133.[19]

***307** Together, these reforms reflect what has been articulated widely in criminal justice research: that gainful employment is crucial to preventing recidivism, and that criminal records have a deleterious effect on access to employment. See Massing, *supra* at 24. See generally Pager, The Mark of a Criminal Record, 108 Amer. J. of Soc. 937 (2003). Sealing is a central means by which to alleviate the potential adverse consequences in employment, volunteering, or other activities that can result from the existence of such records. See G.L. c. 276, § 100A, fifth par.; G.L. c. 276, § 100C, fourth par.

Overall, the legislative history unmistakably suggests that the Legislature's intent in enacting the 2010 reforms was to recalibrate the balance between protecting public safety and facilitating the reintegration of criminal defendants by removing barriers to housing and employment.[20] See ****194** House Speaker Robert A. DeLeo, House Passes Criminal Offender Record Information ***308** Reform, State House News Service, May 26, 2010; State House News Service, Nov. 18, 2009 (statement of Sen. Creem on Senate Doc. No. 2210) ("This bill strikes a great balance ... between providing information that the public has a right to know and protecting people's privacy").

Given these clearly expressed legislative concerns regarding the deleterious effects of criminal records on employment opportunities for former criminal defendants, and the explicit expansion of opportunities for sealing to minimize the adverse impact of criminal records, it is apparent that the test articulated in *Doe,* 420 Mass. at 151, 648 N.E.2d 1255, serves to frustrate rather than further the Legislature's purpose by imposing too high a burden of proof on the defendant and articulating unhelpful factors for the defendant to determine how to meet his or her burden. Consequently, it is proper for us to revisit the meaning of "substantial justice" to ensure that we are interpreting the statute so as to give effect to present legislative intent. See *Wolfe,* 440 Mass. at 704, 802 N.E.2d 64.

c. *New standard.* Given the extent to which *Doe* frustrates the legislative intent behind the recent reforms to the sealing provisions, it is necessary to begin our analysis at the same point at which the *Pokaski* court did: asking whether the First Amendment is indeed implicated by G.L. c. 276, § 100C, second par.

"[A]lthough we give respectful consideration to such lower Federal court decisions as seem persuasive," *Commonwealth v. Hill,* 377 Mass. 59, 61, 385 N.E.2d 253 (1979), quoting *Commonwealth v. Masskow,* 362 Mass. 662, 667, 290 N.E.2d 154 (1972), "we are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law." *Commonwealth v. Montanez,* 388 Mass. 603, 604, 447 N.E.2d 660 (1983). Because the United States Supreme Court has yet to address whether the records of criminal cases that have been dismissed or subject to nolle prosequi are entitled to a First Amendment presumption of access, we are not bound by any particular conclusion.[21]

****195 *309** We turn now to the two-step analysis set forth by the Supreme Court to determine whether a First Amendment presumption of access applies. See *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 8–9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press–Enterprise II* ).

First, we "consider[ ] whether the place and process have historically been open to the press and

general public." *Press–Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735. At the core of the First Amendment right of access is the criminal trial proceeding, whose openness has been an "indispensable attribute of an Anglo–American trial" since time immemorial, *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 569, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality opinion), and whose value is ensuring the accountability of the judiciary to the public. See *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 604–606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Court records also historically have been accessible to citizens of the Commonwealth, for the same reason. *Republican Co. v. Appeals Court,* 442 Mass. 218, 222, 812 N.E.2d 887 (2004). See *Boston Herald, Inc. v. Sharpe,* 432 Mass. 593, 604, 737 N.E.2d 859 (2000); *Ottaway Newspapers, Inc. v. Appeals Court,* 372 Mass. 539, 546, 362 N.E.2d 1189 (1977). See also *Roe v. Attorney Gen.,* 434 Mass. 418, 435, 750 N.E.2d 897 (2001), citing *Globe Newspaper Co. v. Fenton,* 819 F.Supp. 89, 91, 100–101 (D.Mass.1993). But see *Cowley v. Pulsifer,* 137 Mass. 392, 395–396 (1884) (certain papers filed in court not open to public inspection). However, we have long recognized that some classes of court records should not be available for public review, such as records relating to cases brought in juvenile court, see *Commonwealth v. Gavin G.,* 437 Mass. 470, 473–475, 772 N.E.2d 1067 (2002), citing G.L. c. 119, §§ 60, 60A, and 65; G.L. c. 276, §§ 100 and 100B; and *Police Comm'r of Boston v. Municipal Court of the Dorchester Dist.,* 374 Mass. 640, 652, 667, 374 N.E.2d 272 (1978), and that court records properly can be impounded and made unavailable for public inspection upon a showing of good cause, see *Republican Co., supra* at 223, 812 N.E.2d 887, and cases cited. Further, by statute, the records of certain completed criminal cases may not be presumptively open for public view in the same way as the court room or the filings in an ongoing criminal prosecution. See St. 1972, c. 805 (introducing CORI statutory scheme limiting public access to criminal records); St. 1971, c. 686 (introducing statutory sealing of certain criminal records).

***310** Importantly, the elements of the criminal judicial process that we have historically recognized as open to the press and the general public are not affected by the sealing of criminal records that occurs by way of G.L. c. 276, § 100C:

> "The public's ability to attend a criminal trial is not hindered. The media's right to report on the court proceedings is not diminished. The statute does not restrict the media's right to publish truthful information relating to the criminal proceedings that have been sealed.... [Indeed,] the public had a right of access to any court record before, during, and for a period of time after the criminal trial [until the request for sealing was granted]."

*State ex rel. Cincinnati Enquirer v. Winkler,* 101 Ohio St.3d 382, 385, 805 N.E.2d 1094 (2004). Accordingly, we conclude that the records of closed cases resulting in certain nonconvictions have not been open historically in the same sense as other, constitutionally cognizable elements of criminal proceedings.

Second, we consider "whether public access plays a significant positive role in the functioning of the particular process in ****196** question." *Press–Enterprise II,* 478 U.S. at 8, 106 S.Ct. 2735, citing *Globe Newspaper Co.,* 457 U.S. at 606, 102 S.Ct. 2613. Here, we again answer in the negative. There is no indication that the availability of records of criminal cases that have been closed after nonconviction "enhances ... the basic fairness of the criminal trial and the appearance of fairness," as the openness

of criminal trials does. *Press–Enterprise II, supra* at 9, 106 S.Ct. 2735, quoting *Press–Enterprise Co. v. Superior Court,* 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press–Enterprise I* ). The First Amendment presumption of openness stems in large part from the goal of "making the operations of government institutions subject to effective public scrutiny," see *Fenton,* 819 F.Supp. at 94–95, and the sealing of a small subset of criminal records after the cases have closed does not truly impede the functioning of this process. See *Winkler,* 101 Ohio St.3d at 385, 805 N.E.2d 1094. Sealed records are available to a number of entities and licensing commissions that, in the Legislature's determination, may have a particular need to know about such information. See G.L. c. 6, §§ 172–178B. Further, sealing does not compromise law enforcement or criminal justice efforts because such records remain available to criminal justice agencies and may be used as relevant in subsequent criminal proceedings. See G.L. c. 6, § 172; G.L. c. 276, § 100D. See also G.L. c. 276, §§ 100A, 100B. Therefore, sealed records remain ***311** available in ways that are needed to preserve the integrity of the processes at issue.

As the *Press–Enterprise II* Court noted, "history and experience shape the functioning of governmental processes." *Press–Enterprise II,* 478 U.S. at 9, 106 S.Ct. 2735. Where "experience and logic" do not call for a First Amendment right of public access, the right does not attach. See *id.* It bears repeating that the class of records we are considering here is a narrow one: the records of closed criminal proceedings that resulted in a dismissal or an entry of nolle prosequi. We conclude that the records of closed criminal cases resulting in these particular dispositions are not subject to a First Amendment presumption of access, and therefore that the sealing of a record under G.L. c. 276, § 100C, need not survive strict scrutiny. This conclusion, although at odds with that of the First Circuit and the implicit rationale of some of its sister circuits,[22] is consistent with that of at least one other State supreme court, see *State v. D.H.W.,* 686 So.2d 1331, 1336 (Fla.1996), and with our own jurisprudence on impoundment, see, e.g., *Republican Co.,* 442 Mass. at 222–223, 812 N.E.2d 887 (certain court documents not subject to First Amendment presumption may be impounded on lesser showing than required where constitutional right implicated).

Although these records are not subject to a First Amendment presumption, we conclude that they are subject to a common-law presumption of public access. See ****197** *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) ("courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents"); *New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business in Suffolk County,* 462 Mass. 76, 82–83, 966 N.E.2d 797 (2012), and cases cited. See also Massachusetts Body of Liberties, art. 48 (1641) ("Every inhabitant of the Country shall have free liberty to ***312** search and review any rolls, records or registers of any Court or office"). Although this common-law presumption is of paramount importance, like its constitutional counterpart, it is not absolute. See *Nixon, supra* at 597–598, 98 S.Ct. 1306; *Sharpe,* 432 Mass. at 604, 737 N.E.2d 859. Rather, it may be restricted on a showing of "good cause." *New England Internet Café, LLC, supra* at 83, 966 N.E.2d 797, citing *Republican Co.,* 442 Mass. at 223, 812 N.E.2d 887.

Our conclusion that only a common-law presumption of public access applies enables us to depart from the exacting constitutional standard requiring narrowly tailored means toward achieving a compelling government interest. Consequently, we no longer will require that a defendant seeking sealing under G.L. c. 276, § 100C, second par., prove "that the value of sealing ... clearly outweighs the constitutionally-based value of the record remaining open to society." *Doe,* 420 Mass. at 151, 648

N.E.2d 1255. Instead, we interpret the legislative directive that "substantial justice [will] best be served" by sealing to mean that the defendant must establish that good cause exists for sealing. See G.L. c. 276, § 100C. This is consistent with our case law regarding the appropriate substantive standard where a common-law presumption applies. See, e.g., *New England Internet Café, LLC,* 462 Mass. at 78, 83, 966 N.E.2d 797; *Republican Co.,* 442 Mass. at 223, 812 N.E.2d 887 ("The public's right of access to judicial records ... may be restricted, but only on a showing of 'good cause' "), citing *Sharpe,* 432 Mass. at 604, 737 N.E.2d 859; *Newspapers of New England, Inc. v. Clerk–Magistrate of the Ware Div. of the Dist. Court Dep't,* 403 Mass. 628, 631–632, 637–638, 531 N.E.2d 1261 (1988), cert. denied, 490 U.S. 1066, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989), and cases cited.[23] Although a good cause analysis requires consideration of similar factors as an ****198** analysis where the First Amendment is ***313** implicated, see *Republican Co., supra* at 223 n. 8, 812 N.E.2d 887; *Sharpe,* 432 Mass. at 605 n. 24, 737 N.E.2d 859, the weight of the scales is more balanced, and the burden on the defendant somewhat lessened. See *New England Internet Café, LLC, supra* at 83, 966 N.E.2d 797. Nonetheless, the basic framework remains the same: sealing may occur only where good cause justifies the overriding of the general principle of publicity.[24] Cf. *Republican Co., supra* at 223, 812 N.E.2d 887.

***314** In assessing whether the defendant has established good cause for sealing his or her record, judges must balance the interests at stake. Cf. *Republican Co.,* 442 Mass. at 223, 812 N.E.2d 887; *Sharpe,* 432 Mass. at 604–605, 737 N.E.2d 859, and cases cited. If, after balancing those interests, the judge determines that the defendant has done so, the substantial justice standard will be satisfied. This test achieves the necessary balance between the common-law presumption of access and the privacy interests at stake.[25]

****199** Other jurisdictions with discretionary sealing statutes or judicial standards for sealing have adopted such balancing tests. See, e.g., Fla. Stat. Ann. § 943.045(19) (West Supp.2014); Ohio Rev.Code Ann. § 2953.52(B)(2)(d) (West 2006 & Supp.2014) (in determining whether sealing is appropriate, judge must consider statutory factors and "[w]eigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records"); *Johnson v. State,* 50 P.3d 404, 406 (Alaska Ct.App.2002), quoting *Anchorage v. Anchorage Daily News,* 794 P.2d 584, 590 (Alaska 1990) ("In cases where there is no express exception to the state's disclosure laws, we balance 'the public interest in disclosure on the one hand, and the privacy and reputation interests of the affected individuals together with the government's interest in confidentiality, on the other,' " and in cases involving criminal records, court "balance[s] the public's right to know about an individual's past crimes against the convicted individual's right to privacy"); *D.H.W.,* 686 So.2d at 1336 ("policy of public access to old records must be weighed against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated ***315** guilty"); *In re Kollman,* 210 N.J. at 577, 46 A.3d 1247 ("judges will balance ... [articulated] factors as they decide whether expungement [akin to sealing] serves the public interest in a particular case" and will "weigh the risks and benefits to the public of allowing or barring expungement"); *Winkler,* 101 Ohio St.3d at 384–385, 805 N.E.2d 1094 (discussing Ohio balancing test).

We turn now to what this balancing test will entail. Judges should begin by recognizing the public interests at stake. The public has a general right to know so that it may hold the government accountable for the proper administration of justice. See *Nixon,* 435 U.S. at 598, 98 S.Ct. 1306;

*Pokaski,* 868 F.2d at 502; *George W. Prescott Publ. Co. v. Register of Probate for Norfolk County,* 395 Mass. 274, 279, 479 N.E.2d 658 (1985). As this court acknowledged in *Doe,* 420 Mass. at 151, 648 N.E.2d 1255, "[e]ven [where] a case has not been prosecuted, information within a criminal record may remain useful" to the public.

Next, judges evaluating a petition for sealing must recognize the interests of the defendant and of the Commonwealth in keeping the information private. These interests include the compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants. See DeLeo, House Passes Criminal Offender Record Information Reform, State House News Service, *supra;* Massing, *supra* at 23–24. Where there is persuasive evidence that employers and housing authorities consider criminal history in making decisions, there is now a fully articulated governmental interest in shielding criminal history information from these decision makers where so doing would not cause adverse consequences to the community at large.[26] See ****200** *Globe Newspaper Co.,* 439 Mass. at 384, 788 N.E.2d 513; *Doe,* 420 Mass. at 146, 151, 648 N.E.2d 1255. Given the evidence of the long-term collateral consequences of criminal records, judges may take judicial notice that the existence of a criminal record, ***316** regardless of what it contains, can present barriers to housing and employment opportunities. See *Pokaski,* 868 F.2d at 505–506; *Fenton,* 819 F.Supp. at 97. See also Rasmusen, Stigma and Self–Fulfilling Expectations of Criminality, 39 J.L. & Econ. 519, 519 (1996) ("A convicted criminal suffers not only from public penalties but from stigma, the reluctance of others to interact with him economically and socially"). These concerns are heightened by the immediate and effectively permanent availability of criminal history information on the Internet. See Jacobs & Crepet, *supra.*

With these interests in mind, we turn next to the factors relevant to conducting this balancing, noting at the outset that judges may consider any relevant information in weighing the interests at stake. See *New England Internet Café, LLC,* 462 Mass. at 92, 966 N.E.2d 797 (" 'good cause' analysis is sufficiently flexible" to allow consideration of any factors relevant to specific facts of case); *Globe Newspaper Co., petitioner,* 461 Mass. 113, 122, 958 N.E.2d 822 (2011) (under good cause standard, judge must "consider and balance the relevant factors that apply to a particular case"). At a minimum, judges should evaluate the particular disadvantages identified by the defendant arising from the availability of the criminal record; evidence of rehabilitation suggesting that the defendant could overcome these disadvantages if the record were sealed; any other evidence that sealing would alleviate the identified disadvantages; relevant circumstances of the defendant at the time of the offense that suggest a likelihood of recidivism or of success; the passage of time since the offense and since the dismissal or nolle prosequi; and the nature of and reasons for the particular disposition. We consider each of these factors in greater detail.[27]

First, of central importance are the disadvantages the defendant claims to face due to the availability of his or her criminal record. Although the defendant need not establish a risk of specific harm, contrast *Doe,* 420 Mass. at 152, 648 N.E.2d 1255, he or she must allege with sufficient particularity and credibility some disadvantage stemming from CORI availability that exists at the time of the petition or is likely to exist in the foreseeable future.[28] ****201** This can include, but is ***317** not limited to, a risk of unemployment, underemployment, or homelessness attributable to CORI availability; a demonstrated desire to pursue an occupation in which employers have access to nonconviction records; an impeded ability to participate in community or volunteer activities due to CORI

availability; or the potential for reduced opportunities for economic or professional advancement due to CORI availability. It may also involve a demonstration that under- or unemployment, despite efforts to achieve gainful employment, has led the defendant to rely on public assistance to support him-or herself, and his or her family.[29] As noted above, judges may take judicial notice of the well-known consequences for employment and housing prospects from the existence of a criminal record.

Second, evidence of rehabilitation should be considered in conjunction with the judge's assessment of whether sealing would assist the defendant in overcoming the identified disadvantages. Employment attempts, community or civic engagement, successful completion of a probationary period or a sobriety or mental health treatment, lack of further contact with the criminal justice system, or other accomplishments may weigh in favor of sealing by demonstrating that the defendant bears a low risk of recidivism and a likelihood of success in future employment. See *In re Kollman,* 210 N.J. at 576–577, 46 A.3d 1247. This evidence of rehabilitation can begin from the date of the alleged offense, and need not be limited to the date of the disposition, given the significant passage of time that can occur between these events.[30]

Third, judges should consider other evidence on whether sealing would alleviate the identified disadvantages. In this respect, it may be useful to consider the nature of the underlying crime, the ***318** stigma or stereotypes attached to it, and whether the defendant would be benefited by the sealing of the record without posing an additional safety threat to the community.[31] Similarly, where the crime or the case was newsworthy, the judge should consider whether the defendant maintains any sense of privacy, such that sealing could still have a positive impact.[32]

Fourth, consideration of the defendant's circumstances at the time of the offense may prove instructive in assessing his or her likelihood of recidivism or success. For example, significant criminal justice research suggests that younger individuals ****202** have a great capacity for rehabilitation and should not face the harshest consequences for their youthful indiscretions. See *Diatchenko v. District Attorney for the Suffolk Dist.,* 466 Mass. 655, 669–671, 1 N.E.3d 270 (2013). On the other hand, a history of prior criminal activity leading up to the offense weighs against sealing, as it suggests a greater likelihood of reoffense.

Fifth, the passage of time since the date of the offense and the date of the dismissal or nolle prosequi is an important factor that can weigh in favor of either interest. If sealing is sought immediately following the disposition, there may be concerns that the public has not had sufficient opportunity for access, and that the defendant may be likely to reoffend. With the passage of at least some time, however, the potential damage resulting from public availability is done, and the record may exist in the databases of third-party background check services, immune in practice (but not in law) from sealing. See *Doe,* 420 Mass. at 152, 648 N.E.2d 1255; Calvert & Bruno, When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age? 19 CommLaw Conspectus 123, 123–124 (2010). But see G.L. c. 93, § 54 (requiring background check services to update records). In addition, as the passage of time since the offense lengthens, the risk of recidivism lessens, and the case for enabling full-fledged participation in the workforce ***319** becomes even stronger and the burden on the public weaker.[33] See *Police Comm'r of Boston,* 374 Mass. at 658, 374 N.E.2d 272 (after time, maintenance of records "cannot be said to serve any valid law enforcement purpose").

Sixth, the nature of and reasons for the disposition, meaning whether the case was dismissed with prejudice, without prejudice, as part of an agreed-upon disposition, or as the result of a nolle prosequi, should be considered. Cf. N.J. Stat. Ann. § 2C:52–2(a)(2) (West Supp.2014); Ohio Rev.Code Ann. § 2953.52(B)(2) (West 2006 & Supp.2014). Defendants who were subject to wrongful accusations present the strongest case for sealing. See *Commonwealth v. Roberts,* 39 Mass.App.Ct. 355, 358, 656 N.E.2d 1260 (1995) ( "It is peculiarly unjust to saddle an individual with a record in a case that should never have been begun"). Dismissals after admission of guilt and periods of probationary conditions may require more evidence of demonstrated rehabilitation.

d. *Application of new standard.* For the purpose of providing guidance to the lower courts on how to apply the balancing test we announce today, we consider how the defendant in this case would fare under the test, recognizing that his record has already been sealed under G.L. c. 276, § 100A.

First, the defendant alleged specific difficulties in obtaining employment, including noting that he had applied to over 300 positions and obtained a small number of interviews, identifying specific employers who had rejected his applications and specific challenges he faced in obtaining employment or educational opportunities in his chosen field of social work. He also alleged that because of his OUI charge, he was unable to resume his prior work as a commercial truck driver, and instead has had to pursue new career opportunities. The Commonwealth contends that the defendant's prior criminal history, portions of which at the time of his petition for sealing had not yet been sealed and which reflected long-past firearm and drug convictions, ****203** was the basis for his employment challenges.[34] The defendant's prior, serious criminal history weighs against sealing here, but it is notable that ***320** these convictions occurred over twenty years ago. We therefore do not find it dispositive that the defendant cannot demonstrate that the specific charges he seeks to seal are the ones that have prevented his employment, and consider his allegations sufficient to demonstrate meaningful employment disadvantages stemming from the availability of his record.

Second, the defendant submitted significant evidence of rehabilitation, demonstrating his sobriety, his successful efforts to obtain at least occasional employment, his efforts toward self-improvement through enrollment in financial workshops, and his extensive volunteer work, which was corroborated by three letters of recommendation from individuals who work at the volunteer organizations. The evidence on this factor weighs heavily toward sealing where the defendant seems clearly capable of contributing fully to society, and sealing would remove the barrier that prevents him from doing so.[35] This evidence, along with the fact that five years had passed between the date of the dismissal and the date of the defendant's petition, suggest minimal if any risk of recidivism.

The Commonwealth urges us to place great weight on the defendant's admission to sufficient facts for a finding of guilty on the OUI charge and the accompanying charge of leaving the scene of property damage, and the subsequent dismissal of these charges only after a continuance without a finding.[36] However, we are not persuaded that this factor outweighs the significant evidence of rehabilitation and disadvantages that may be remedied from sealing. Accordingly, a judge properly could conclude that the defendant carried his burden of demonstrating that good cause exists to justify sealing. The evidence presented by the defendant ***321** illustrates that the governmental interest of removing stigma to enable a rehabilitated individual to obtain gainful employment in his or her area of training or chosen profession would be well served here, and that there is little need to keep the defendant's record available for public inspection where so much time has passed.

2. *Procedure for discretionary sealing under G.L. c. 276, § 100C.* We turn finally to the question of the procedure courts should employ with regard to petitions for sealing under G.L. c. 276, § 100C. In ****204** *Doe,* 420 Mass. at 149–150, 648 N.E.2d 1255, we adopted a two-stage hearing process suggested in *Pokaski,* 868 F.2d at 507–508, for the resolution of petitions for sealing under G.L. c. 276, § 100C.

The Commonwealth asks this court to affirm the two-stage hearing process because it enables judicial efficiency by providing for summary dismissal of sealing requests without a prima facie case and reserves only the potentially meritorious petitions for full hearings conducted with notice to the public. In contrast, the defendant asserts that a one-stage hearing process is a more effective case management tool that promotes judicial economy and access to justice and does not depart from any procedural requirement imposed by *Doe* and *Pokaski.* We agree with the defendant that an initial hearing may no longer be necessary, and accordingly modify the procedure articulated in *Doe.*

Under the procedural framework set forth in *Doe,* after a defendant files a petition for sealing under G.L. c. 276, § 100C, the defendant must appear for an informal hearing at which he or she must make a prima facie case for sealing.[37] *Doe,* 420 Mass. at 149, 648 N.E.2d 1255. If a prima facie showing is not made, the petition is dismissed summarily. *Id.* If, however, the defendant makes an adequate showing, a second, more extensive hearing is held, with notice provided to the district attorney's office, the probation department, and the public. *Id.* at 150, 648 N.E.2d 1255.

According to the parties, some courts have departed from this two-hearing process in the interest of judicial economy, opting instead to conduct a single, final hearing. See Survey of Greater Boston Area Court Procedures for Criminal Record Sealing, Mass. Legal Services (Oct. 22, 2013). Given that we announce today a lower standard for sealing and no longer require defendants ***322** to overcome the weight of a constitutional presumption, we conclude that an initial hearing may not be necessary. We are satisfied that eliminating the requirement of an initial hearing will go far in improving judicial efficiency and minimizing the burden on pro se litigants without compromising public access to such determinations or depriving defendants of an adequate opportunity to be heard.[38]

Where a defendant files a petition and accompanying documents setting forth facts that demonstrate good cause for overriding the presumption of public access to court records, a judge may determine on the pleadings whether a prima facie showing has been made.[39] If such a showing is made, the petition should proceed to a hearing on the merits. Notice of the hearing must be provided to the public and other interested parties, as detailed in *Doe,* 420 Mass. at 150, 648 N.E.2d 1255.[40] See *United States v. Kravetz,* 706 F.3d 47, 59 (1st Cir.2013) ("It is axiomatic that protection of the right of access suggests that the public be informed of attempted incursions on that right. Providing the public with notice ensures that the concerns of ****205** those affected by a closure decision are fully considered"); *Globe Newspaper Co.,* 457 U.S. at 609 n. 25, 102 S.Ct. 2613, quoting *Gannett v. DePasquale,* 443 U.S. 368, 401, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Powell, J., concurring) (public and press must have opportunity to be heard on "question of their exclusion" where case-by-case assessment employed). After hearing the arguments and balancing the interests at stake, if the judge is satisfied that good cause merits sealing, the judge must make "specific findings on the record setting forth the interests considered by the judge and the reasons for the order directing that such sealing occur." *Doe,* 420 Mass. at 152–153, 648 N.E.2d 1255. This requirement reflects the gravity of the

decision and ensures that the common-law presumption of public access is afforded careful consideration.

*Conclusion.* The case is remanded for dismissal of the action as moot.

*So ordered.*

**All Citations**

469 Mass. 296, 14 N.E.3d 182, 42 Media L. Rep. 2259

**Footnotes**

1 A pseudonym.

2 Chief Justice Ireland participated in the deliberation on this case prior to his retirement.

3 We acknowledge the briefs of amici curiae the Lawyers' Committee for Civil Rights and Economic Justice, and the Union of Minority Neighborhoods; and the Committee for Public Counsel Services, and the Boston Workers Alliance.

4 In support of his petition, the defendant submitted an affidavit discussing his difficulties obtaining employment and his contributions to his community through extensive volunteer work, a memorandum of law, a proposed order, and letters of support and certificates of achievement. In particular, he emphasized his sobriety and clean criminal record since the incident. Because he lost his commercial driver's license due to the incident, he has been unable to resume his career as a driver. Despite applying for hundreds of jobs since 2007, he asserts that employers have declined to hire him due to his criminal offender record information (CORI).

5 General Laws c. 276, § 100A, provides for mandatory sealing of "a record of criminal court appearances and dispositions" on petition to the Commissioner of Probation after a designated period of time if certain criteria are met. A request for sealing under § 100A must be granted if "the person's court appearance and court disposition records, including any period of incarceration or custody for any ... record to be sealed occurred not less than five years before the request," in the case of a misdemeanor; not less than ten years before the request, in the case of a felony; or not less than fifteen years before the request, in the case of certain sex crimes. *Id.* The person must not have "been found guilty of any criminal offense" in Massachusetts, in any other State, or in a Federal court, within the preceding five years. *Id.* In addition, the person's record must "not include convictions of offenses" that are not eligible for sealing. *Id.* Convictions that are ineligible for sealing under § 100A include certain firearms offenses, see G.L. c. 140, §§ 121–131H; crimes against public justice, see G.L. c. 268; and crimes based on the conduct of public officials and employees, see G.L. c. 268A. See G.L. c. 276, § 100A. In addition, persons who have been classified as a level two or level three sex offender may not have such offenses sealed. G.L. c. 276, § 100A.

See G.L. c. 6, § 178K.

Most offenses that are eligible for sealing under G.L. c. 276, § 100A, after the requisite period of time has passed, will not appear in the CORI reports provided to most employers and housing providers, even if the individual has not yet filed a petition to seal them. See 803 Code Mass. Regs. § 2.05(4)(a) (2012). However, if the individual has been convicted of a subsequent offense, offenses that have not been sealed by an affirmative request of the individual will be visible to such employers. *Id.* In addition, convictions of murder, manslaughter, and certain sex offenses are visible to employers, even if they are eligible for sealing under § 100A, unless the individual has affirmatively requested sealing. See *id.*

The defendant apparently met the criteria for § 100A sealing with regard to his OUI and accompanying property damage charges from 2007. Although the Commonwealth contends on appeal that G.L. c. 276, § 100A, is unconstitutional, we decline to address this issue, as it is not properly before us.

6 As far as we can discern from the record before us, all of the defendant's past charges on his CORI record have now been sealed.

7 Although we typically decline to decide constitutional questions unnecessarily, see *Blake v. Massachusetts Parole Bd.,* 369 Mass. 701, 707, 341 N.E.2d 902 (1976), this case involves a question of interpretation of a Massachusetts statute, G.L. c. 276, § 100C, as it relates to a right under the First Amendment to the United States Constitution, and therefore does not signal a departure from our practice of judicial restraint in the realm of constitutional matters.

8 Ensuring that the proper test is in place for review of a petition for discretionary sealing under G.L. c. 276, § 100C, is of particular importance where sealing is the only remedy for limiting access to certain classes of criminal records. "[W]here a sealing statute is applicable to a particular individual's circumstances, judges generally have no equitable authority to expunge court or probation records, because the Legislature has provided sealing as the exclusive remedy to protect the confidentiality of the records." *Commonwealth v. Moe,* 463 Mass. 370, 373, 974 N.E.2d 619 (2012), cert. denied, —— U.S. ——, 133 S.Ct. 1606, 185 L.Ed.2d 582 (2013), and cases cited (discussing G.L. c. 276, § 100C, second par.). See *Commonwealth v. Boe,* 456 Mass. 337, 342–344, 924 N.E.2d 239 (2010).

9 Specifically, the defendant contends that the standard set forth in *Commonwealth v. Doe,* 420 Mass. 142, 149–152, 648 N.E.2d 1255 (1995), is unworkable, because it provides minimal guidance to judges and renders it nearly impossible for defendants to succeed on sealing petitions.

10 The second paragraph of G.L. c. 276, § 100C, provides in full: "In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files."

11 Other statutory provisions also provide for the sealing of certain charges or convictions of unlawful possession of a controlled substance or marijuana. See G.L. c. 94C, §§ 34, 44; St. 1973, c. 1102.

12 CORI reports available online to employers who do not work with vulnerable populations do not

include any convictions eligible for sealing under G.L. c. 276, § 100A, or nonconvictions that would be eligible for discretionary sealing under G.L. c. 276, § 100C. See 803 Code Mass. Regs. § 2.05(4) (2012); Massing, CORI Reform—Providing Ex–Offenders with Increased Opportunities Without Compromising Employers' Needs, 55 Boston B.J. 21, 23 (2011). If, however, an individual is convicted of a new crime, convictions eligible for sealing under § 100A will be visible unless the individual has officially requested sealing. G.L. c. 6, § 172 (*a* ) (3); 803 Code Mass. Regs. § 2.05(4). See Massing, *supra.*

13 "Criminal justice agencies" are defined as "agencies at all levels of government which perform as their principal function, activities relating to (a) crime prevention ...; (b) the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders; or (c) the collection, storage, dissemination or usage of criminal offender record information." G.L. c. 6, § 167.

14 The reforms offer protection from negligent hiring claims based on failure to check other sources of criminal history, and from claims stemming from adverse employment decisions based on erroneous CORI. See St. 2010, c. 256, § 21. In contrast, if an employer relies on information from a private company, it does not receive protection from negligent hiring claims.

15 The reforms also improved the processes for correcting inaccurate information on a CORI record and filing a complaint for violations of the CORI statute, and created a self-auditing mechanism for individuals to receive reports on access to their records. See G.L. c. 6, §§ 168, 175; St. 2010, c. 256, §§ 12, 21, 35.

16 Employers may not ask about criminal history until after the initial written job application, unless such information is required by law for the particular job (the so-called "ban the box" provision). See G.L. c. 151B, § 4 (9 1/2); St. 2010, c. 256, § 101; Massing, *supra* at 23.

17 The reforms shortened the waiting periods for eligibility for automatic sealing under G.L. c. 276, § 100A, from 15 years to 10 years for eligible felonies, and from 10 years to 5 years for eligible misdemeanors, and count time served on probation or parole toward the waiting period. See St. 2010, c. 256, § 128.

18 Prior to the 2010 reforms, criminal justice agencies could see that a sealed record existed, but they needed to petition a court in order to view its contents. See Quirion & Russo, Sealing Criminal Records 8 (Mass. Cont. Legal Educ. 2009).

19 Another justification for changes to the sealing provisions was the concern among legislators that allowing criminal records to be available without limit would impose further punishment than the underlying crimes merited. See State House News Service, July 31, 2010 (statement of Rep. Eugene O'Flaherty on Senate Doc. No. 2583) ("The idea is to keep the time frame briefer and stop the further punishment of what you've already paid for"); State House News Service, July 30, 2010 (statement of Sen. Harriette L. Chandler on Senate Doc. No. 2583) ("These people have served their time but the stigma of jail time remains, and this bill will help them become full-fledged members of society again"); Office of Governor Deval Patrick, Patrick Administration Announces CORI Reforms, State House News Service, Jan. 11, 2008 (statement by Gov. Patrick) ("CORI was never intended to turn every offense into a life sentence").

20 Legislators emphasized the positive impact that the gainful employment of former criminal defendants can have on both preventing recidivism and benefiting the community at large. See State

House News Service, Nov. 18, 2009 (statement of Sen. Sonia R. Chang–Diaz on Senate Doc. No. 2210) ("No work makes a lot of people return to crime, drugs, prison"); State House News Service, May 26, 2010 (statement of Rep. O'Flaherty on House Doc. No. 4703) ("This proposal is grounded in facts, is smart on crime, and is protective of the population.... It is hard for individuals to assimilate back into neighborhoods when they are unable to get work"). This was also the governor's message in his advocacy on the issue. See Governor Patrick Signs Strong Anti–Crime Package to Protect Public Safety, Expand Job Opportunities, State House News Service, Aug. 6, 2010 ("The best way to break the cycle of recidivism is to make it possible for people to get a job.... This legislation ... helps people get back to work so they can support their families"); Massachusetts Exec. Order 495 (Jan. 11, 2008) ("[T]he Commonwealth has compelling interests in ... empowering individuals to obtain gainful employment and housing"). In furtherance of this message, CORI reform was at times framed as an economic bill, stimulating employment and full economic participation by reducing barriers. See Governor Patrick Signs Strong Anti–Crime Package to Protect Public Safety, *supra;* State House News Service, July 30, 2010 (statement of Sen. Cynthia S. Creem on Senate Doc. No. 2583); CORI Reform Supporters Push for Record Overhaul, State Capitol Briefs, State House News Service, June 3, 2009.

[21] It is worth observing that neither the First Circuit nor the District of Massachusetts has revisited the question of access to the records of closed criminal cases for more than twenty years. See *Globe Newspaper Co. v. Fenton,* 819 F.Supp. 89, 100–101 (D.Mass.1993) (denial of "public access to court-maintained alphabetical indices of defendants in closed criminal cases without an individual judicial determination ... that a particular defendant's name must be sealed or impounded to serve a compelling state interest" violates First Amendment). It is indisputable that our society has changed drastically since either we or the Federal courts have given great thought to the consequences of sealing. Clearly, the issue is ripe for revisiting, and we are not concerned that in so doing we are disturbing well-settled jurisprudence that remains readily applicable.

[22] According to a recent opinion by the United States District Court for the District of Maryland, every Federal circuit court except the United States Courts of Appeal for the Federal Circuit and the Tenth Circuit has applied the *Press–Enterprise II* test and concluded that the First Amendment right of public access applies to "documents entered into evidence at a criminal trial or filed in connection with at least some types of substantive pretrial criminal proceedings." *Center for Constitutional Rights v. Lind,* 954 F.Supp.2d 389, 402 (D.Md.2013). Of the cases cited for this proposition, however, only the First Circuit opinion, *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497 (1st Cir.1989), explicitly pertains to the sealing of court records in closed criminal cases. See *Lind, supra* at 402 n. 11.

[23] This test is analogous to the test employed for impoundment of certain court records, which raises similar concerns of privacy and public access. See *Boston Herald, Inc. v. Sharpe,* 432 Mass. 593, 604 n. 22, 737 N.E.2d 859 (2000), quoting Rule 7 of the Uniform Rules on Impoundment Procedure (West 2000). Where we have recognized a common-law presumption of access in a particular court record, we have employed a "good cause" standard to determine when impoundment is permissible. See *Republican Co. v. Appeals Court,* 442 Mass. 218, 223, 812 N.E.2d 887 (2004). See also *New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business in Suffolk County,* 462 Mass. 76, 83–84, 966 N.E.2d 797 (2012) (impoundment requires showing of "good cause"); *Newspapers of New England, Inc. v. Clerk–Magistrate of the Ware Div. of the Dist. Court Dep't,* 403 Mass. 628, 632, 531 N.E.2d 1261 (1988), cert. denied, 490 U.S. 1066, 109 S.Ct. 2064, 104

L.Ed.2d 629 (1989), quoting *H.S. Gere & Sons, Inc. v. Frey,* 400 Mass. 326, 329, 509 N.E.2d 271 (1987) (search warrant affidavits, entitled to common-law presumption, may be impounded "when justice so requires"; this requires judge to "balance the parties' privacy concerns against the general principle of publicity" to determine if " 'good cause' to order the impoundment exists"). The broader scope of sealing presents somewhat different consequences and has an impact on different interests than impoundment does, and judges must be cognizant of these heightened consequences in conducting a good cause analysis. See *Pixley v. Commonwealth,* 453 Mass. 827, 836 n. 12, 906 N.E.2d 320 (2009) (discussing difference between sealing and impoundment).

[24] It is worth discussing briefly the first paragraph of G.L. c. 276, § 100C, although it is not at issue here. That paragraph provides for mandatory sealing following the completion of a criminal case that ends in a finding of not guilty, a finding of no probable cause, or a failure to indict by a grand jury. See *id.* In *Pokaski,* 868 F.2d at 509–511, the United States Court of Appeals for the First Circuit held that this automatic, mandatory sealing of cases violated the First Amendment presumption of public access to court records with regard to cases ending in "not guilty" or "no probable cause" findings, but not with regard to cases ending in "no bill" from a grand jury. The *Pokaski* court indicated, however, that discretionary sealing of such cases would be constitutional where the judge has made "specific, on the record findings that sealing [is] necessary to effectuate a compelling governmental interest"—in other words, where the standard set forth in that opinion for G.L. c. 276, § 100C, second par., is satisfied. See *id.* at 511.

Following *Pokaski* and our adoption of the *Pokaski* reasoning in *Doe,* 420 Mass. at 149, 648 N.E.2d 1255, the District Court Department of the Trial Court determined that, with the exception of "no bill" cases, which were not disturbed by these decisions, it would seal criminal records under either paragraph of G.L. c. 276, § 100C, pursuant to the standard set forth in *Doe.* See The Administrative Office of the District Court, Guide to Public Access, Sealing & Expungement of District Court Records, at 13, 13 n. 42, 17, 42–44 (rev. Sept. 2013) (Guide to Public Access). Accordingly, rather than automatically sealing cases resulting in a finding of "not guilty" or "no probable cause," the District Court requires a defendant to file a petition for sealing and demonstrate that "the value of sealing ... clearly outweighs the constitutionally-based value of the record remaining open to society." *Doe, supra* at 151, 648 N.E.2d 1255. See Guide to Public Access, *supra.* Sealing may occur only after a judge makes specific findings on the record that this standard has been met. See *Doe, supra* at 152–153, 648 N.E.2d 1255; Guide to Public Access, *supra.* If the petition is granted, the District Court judge signs a form which the defendant may then provide to the probation department for sealing of his or her record there. See Guide to Public Access, *supra.*

We suspect that other trial courts in the Commonwealth also may be taking this approach of employing one process and substantive standard for sealing decisions, regardless of whether the case resulted in a finding of not guilty, a finding of no probable cause, a dismissal, or an entry of nolle prosequi. See Guide to Public Access, *supra.* Because sealing under G.L. c. 276, § 100C, first par., is not directly at issue in this case, we decline to extend our holding and the analysis we employ to that portion of the statute. However, until the Legislature revisits the language of G.L. c. 276, § 100C, first par., or until the issue of its interpretation comes before us, we observe that the solution adopted by the District Court is a reasonable one, as long as it is modified consistent with our holding in this case: that sealing may occur where good cause justifies the overriding of the general principle of publicity.

[25] It is only logical that the standard for the closure of a court record from public view after the completion of the criminal proceeding be a lesser one than that for closure of the criminal proceeding itself. Yet the standard articulated in *Doe* and *Pokaski* is essentially the same standard as articulated for closure of ongoing judicial proceedings in criminal cases. See, e.g., *Commonwealth v. Cohen (No. 1),* 456 Mass. 94, 107, 921 N.E.2d 906 (2010), and cases cited.

[26] The corollary that the sealing of nonconvictions does not have deleterious effects on the safety of the community is evidenced by the fact that, according to one national survey, the vast majority of States either permit the sealing of nonconviction information or do not make such information available to the public at all. See Mukamal & Samuels, Statutory Limitations on Civil Rights of People with Criminal Records, 30 Fordham Urb. L.J. 1501, 1509–1510 (2003) (forty States permit expungement/sealing of some or all nonconviction criminal records, whereas only sixteen permit sealing of some conviction records). See also *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 754 n. 2, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

[27] Although we have numbered the factors here for ease of comprehension, this list is not exhaustive, and the factors should be tailored appropriately to the particular circumstances of each case.

[28] As the facts of this case demonstrate, it may be difficult to attribute causation to nonconvictions where a defendant has convictions or other criminal matters on his or her CORI. It is unrealistic, however, to require a defendant to prove causation in any circumstance, and instead, we entrust the assessment of a plausible relationship between CORI availability and the alleged adversity, and the extent to which the alleged adversity may be relieved by the sealing of the particular nonconviction at issue, to the sound discretion of the judge.

[29] This consideration is particularly important where we have recognized a compelling State interest in ensuring that parents are able to support their children. See *L.W.K. v. E.R.C.,* 432 Mass. 438, 446, 735 N.E.2d 359 (2000); *Gray v. Commissioner of Revenue,* 422 Mass. 666, 675, 665 N.E.2d 17 (1996), quoting *Duranceau v. Wallace,* 743 F.2d 709, 711 (9th Cir.1984).

[30] This factor may place the defendant in somewhat of a "Catch–22" situation, in that sealing is intended to enable rehabilitation and reintegration where a criminal record impedes such progress. Nonetheless, the defendant should be able to show some meaningful effort toward rehabilitation, even in the face of the barriers that the availability of his or her criminal record may impose.

[31] It is no longer necessary, however, to consider the value to law enforcement of keeping the record open to the public. See *Police Comm'r of Boston v. Municipal Court of the Dorchester Dist.,* 374 Mass. 640, 656, 374 N.E.2d 272 (1978). Under the revised CORI framework, law enforcement have automatic access to sealed and unsealed records. See G.L. c. 276, § 100D. See also G.L. c. 6, §§ 167, 172 (*a* ) (1). Cf. *State v. Noel,* 101 Wash.App. 623, 628, 5 P.3d 747 (2000).

[32] Where the defendant is a public figure, a different analysis may be necessary. Cf. *Sharpe,* 432 Mass. at 611–612, 737 N.E.2d 859. As those facts are not before us, we decline to discuss this analysis further.

[33] Once the defendant has reached the five- or ten-year marks from the date of the disposition, he or she likely will be eligible for automatic sealing under G.L. c. 276, § 100A.

[34] The defendant pleaded guilty in 1995 to seven crimes arising out of two sets of indictments. These charges were for unlawful possession of a firearm, distribution of cocaine in a school zone, and criminal conspiracy. At the time of his petition for sealing of his OUI and property damage charges, the defendant indicated that portions of his CORI record had been sealed "administratively," presumably under G.L. c. 276, § 100A, but that his record still contained several dismissed charges from District Court, for which he would be petitioning for sealing separately. Although it appears that the defendant's record has since been sealed in full, it is unclear from the record before us whether the drug and firearms convictions from 1995 were sealed at the time of the instant petition, and it is further unclear what the defendant's criminal history is over-all. In conducting the balancing test we introduce here, it is important that the judge have a complete record of the defendant's criminal history.

[35] We are not persuaded by the Commonwealth's assertion that sealing would have no effect on his employment prospects because private background check services are available. Were we to accept this argument, sealing would never be justified. The operations of third-party providers who disregard sealing orders do not dictate our analysis.

[36] This disposition was previously excluded from the sealing provision of G.L. c. 276, § 100C. See St. 2010, c. 256, § 131.

[37] No notice is provided to the public or any other interested party of this initial hearing. See *Doe,* 420 Mass. at 149–150, 648 N.E.2d 1255.

[38] Before a petition is scheduled for a hearing on the merits, a judge must determine that the petitioner has made a prima facie case. This may be made either on the papers or through a preliminary hearing.

[39] In some cases, where a prima facie case is not made on the papers, a preliminary hearing may be desirable. We leave this determination to the discretion of the motion judge.

[40] If a prima facie showing is not made, the sealing petition may be summarily dismissed on the pleadings. See *Doe,* 420 Mass. at 149, 648 N.E.2d 1255.

**90 Mass.App.Ct. 793**
**Appeals Court of Massachusetts,**
**Middlesex.**

**COMMONWEALTH**
**v.**
**Juan DOE.**[1]
**No. 15–P–348.**
|
**Argued Oct. 4, 2016.**
|
**Decided Dec. 28, 2016**.**Synopsis**

**Background:** Petitioner requested sealing of record on criminal charge for murder of his infant son, allegedly by shaken baby syndrome, after prosecution was terminated by nolle prosequi following discovery that his wife had family history of genetic condition that was relevant to determination of cause of infant's death. The Superior Court Department, Middlesex County, Kathe M. Tuttman, J., denied petition without prejudice, and petitioner appealed.

**Holdings:** The Appeals Court, Cohen, J., held that:

petitioner was not required to prove disadvantage in obtaining employment, as basis for petition, by showing that he had attempted and failed to obtain job, and

fact that defense counsel in other unrelated shaken baby syndrome cause had sought discovery of substantial amount of potentially exculpatory information in petitioner's case did not justify denial of petition.

**Vacated; remanded.**
**Procedural Posture(s):** On Appeal.

**Attorneys and Law Firms**

****656** J.W. Carney, Jr., Boston, for the defendant.

Jamie Michael Charles, Assistant District Attorney, for the Commonwealth.

Present: CYPHER, COHEN, & GREEN, JJ.

**Opinion**

COHEN, J.

***793** Juan Doe appeals from an order of a judge of the Superior Court denying his petition to seal his criminal record in a case terminated by a nolle prosequi. We infer from the order that, in balancing the interests of the public and the defendant, as required by *Commonwealth v. Pon,* 469 Mass. 296, 14 N.E.3d 182 (2014), the judge may have relied upon a factor that is inconsistent with *Pon's* revised standard for discretionary sealing, and may have ***794** placed too much importance on another factor that was of limited concern in the circumstances. For those reasons, and for the additional reason that there has been a material change in circumstances since the petition was denied,[2] we vacate the order and remand for reconsideration.

*Background.* In June, 2010, Doe was indicted for murder in the first degree in connection with the death of his six month old son. The Commonwealth's theory was that the child had died as a result of abusive head trauma commonly known as shaken baby syndrome;[3] however, while the case was pending, it was learned that Doe's wife and her family had a previously unknown history of collagen vascular disease, a genetic condition that was relevant to determining the child's cause of death. ****657** This information was supplied to the prosecution and the medical examiner, who, in August, 2014, revised his ruling on the manner of death from "homicide" to "could not be determined." Shortly thereafter, on September 18, 2014, the Commonwealth filed a nolle prosequi, stating that it could not "meet its burden of proving cause of death beyond a reasonable doubt when the revised ruling is considered in light of all the circumstances of this case."

On October 7, 2014, Doe filed a petition, pursuant to G.L. c. 276, § 100C, as amended through St. 2010, c. 256, §§ 131, 132, requesting discretionary sealing of the case record because it impaired his ability to obtain employment. The Commonwealth opposed the petition, and after a nonevidentiary hearing, the matter was considered by the judge on affidavits and other written submissions. At the hearing, the Commonwealth emphasized that its argument was "not that [the record] should never be sealed, but that this is not the right time." On January 20, 2015, the judge issued a marginal order stating: "After non-evidentiary hearing. *Denied,* for substantially the reasons set forth in the Commonwealth's Opposition and the supporting affidavit of [the assistant ***795** district attorney (ADA) ].[4] See *Commonwealth v. Pon,* 469 Mass. 296, 14 N.E.3d 182 (2014). This order is *without prejudice* to the defendant to renew upon a showing of changed circumstances." We reserve additional facts for later discussion in connection with the issues raised.

*Discussion.* We consider whether the judge abused her discretion or committed error of law, using as our touchstone the Supreme Judicial Court decision in *Pon, supra.* In *Pon,* the court concluded that "the records of closed criminal cases resulting in ... dispositions [of dismissal or entry of a nolle prosequi] are not subject to a First Amendment presumption of access, and therefore that the sealing of a record under G.L. c. 276, § 100C, need not survive strict scrutiny." *Id.* at 311, 14 N.E.3d 182. The court therefore replaced the stringent standard set forth in *Commonwealth v. Doe,* 420 Mass. 142, 149–152, 648 N.E.2d 1255 (1995), with a new standard more in keeping with the legislative policy reflected in the 2010 revision of the criminal offender record information (CORI) statutory scheme.[5] That policy is to "provid [e] the public, and particularly employers and housing providers, with access to certain criminal records in order to make sound decisions while also enabling the sealing of criminal records where so doing would not present public safety concerns." *Pon,* 469 Mass. at 303, 14 N.E.3d 182.

"Under G.L. c. 276, § 100C, second par., an individual may petition for sealing of a criminal case

ending in a dismissal or entry of a nolle prosequi, as early as the time of the disposition or at any point thereafter." *Pon, supra* at 300–301, 14 N.E.3d 182. Such relief is warranted if "it appears to the court that substantial justice would best be served." *Id.* at 301, 14 N.E.3d 182, quoting from G.L. c. 276, § 100C. As reinterpreted in *Pon,* the "substantial justice" standard no longer requires a defendant to make a "specific showing 'that sealing [is] necessary to effectuate a compelling governmental ****658** interest,' " *id.* at 302, 14 N.E.3d 182, quoting from *Globe Newspaper Co. v. Pokaski,* 868 F.2d 497, 511 (1st Cir.1989); the standard is met if "good cause justifies the overriding of the general principle of publicity," *Pon, supra* at 313, 14 N.E.3d 182. In assessing whether a defendant has established good cause, the judge must balance the public interests at stake ***796** against the interests favoring privacy. *Id.* at 315, 14 N.E.3d 182. If, after balancing those interests, the judge determines that the defendant has overcome the common-law presumption of public access, the substantial justice standard will be satisfied. *Id.* at 314, 14 N.E.3d 182.

"Judges should begin by recognizing the public interests at stake. The public has a general right to know so that it may hold the government accountable for the proper administration of justice.... [E]ven [where] a case has not been prosecuted, information within a criminal record may remain useful to the public." *Id.* at 315, 14 N.E.3d 182 (quotation omitted). "Next, judges ... must recognize the interests of the defendant and of the Commonwealth [6] in keeping the information private. These interests include the compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants." *Ibid.*

While "judges may consider any relevant information in weighing the interests at stake, ... [a]t a minimum, judges should evaluate the particular disadvantages identified by the defendant arising from the availability of the criminal record; evidence of rehabilitation suggesting that the defendant could overcome these disadvantages if the record were sealed; any other evidence that sealing would alleviate the identified disadvantages; relevant circumstances of the defendant at the time of the offense that suggest a likelihood of recidivism or of success; the passage of time since the offense and since the dismissal or nolle prosequi; and the nature of and reasons for the particular disposition." *Id.* at 316, 14 N.E.3d 182.

In the present case, because the judge's decision was for the reasons argued by the Commonwealth, but without prejudice to renewal, we may infer that the balancing process was influenced by one or both of two arguments rooted in circumstances that could change over time: first, that Doe had not applied for work since the nolle prosequi and, hence, could not demonstrate that his record had disadvantaged him in obtaining employment; and second, that it was too early to terminate the public's access to Doe's court records, because defense counsel in another shaken baby syndrome case pending in the same county was expected to use evidence in Doe's case to impeach the credibility of an expert ***797** witness common to both cases. We address each of these reasons in turn.

1. *Disadvantage in obtaining employment.* As explained in *Pon,* 469 Mass. at 316, 14 N.E.3d 182, a defendant seeking to seal his record "need not establish a risk of specific harm, [so long as] he ... allege[s] with sufficient particularity and credibility some disadvantage stemming from CORI availability that exists at the time of the petition or is likely to exist in the foreseeable future." "This can include, but is not limited to, a *risk* of unemployment [or] underemployment" (emphasis added). *Id.* at 316–317, 14 N.E.3d 182. Far from requiring proof of unsuccessful ****659** job efforts, *Pon*

instructs that "judges may take judicial notice of the well-known consequences for employment ... from the existence of a criminal record." *Id.* at 317, 14 N.E.3d 182. Indeed, if a defendant first had to show that he had applied for work and was rejected because of his criminal record, the benefits of sealing could well be lost.

In Doe's petition and accompanying affidavits, he indicated that he had spent the time since his child's death volunteering at his church and seeing to his wife's medical needs; he further alleged with particularity why he did not seek work before he filed his petition. A well-educated professional, Doe had a promising career at a university before his son's death; but, once his employer became aware of the charges against him, he was placed on leave and eventually terminated. After the nolle prosequi, he refrained from searching for a job because he thought it highly likely that any comparable position would require a CORI check, which would reveal that he had been charged with murder and that his case was terminated by means of a nolle prosequi.

Doe asserted that "nolle prosequi" is an obscure term that most likely would not be understood by an employer, and that the severity of the underlying murder charge would thwart his chances for consideration. He asserted further that, once obtained, his CORI record forever would remain in the files of any employment agency or recruiter he might approach. Doe expressed his belief that, in this respect, a CORI check presents a far more potent disadvantage to him than a general Internet search, which would reveal in plain terms that the Commonwealth dismissed the case because it could not prove that any crime had been committed.

Doe's explanation was more than sufficient to be considered on its merits and, if credited, strongly weighed in favor of prompt sealing. To the extent that the judge's decision adopted the ***798** Commonwealth's argument that Doe could not demonstrate disadvantage in obtaining employment unless and until he actually tried and failed to secure a job, it was inconsistent with the revised standard for sealing set forth in *Pon,* and constituted an error of law.

2. *Pending shaken baby syndrome case.* Nothing in *Pon* suggests that the mere existence of a pending similar case is a justification for denying a petition to seal. To the contrary, the considerations identified in *Pon* are particularized to the defendant seeking to seal his record. That said, we acknowledge that the argument advanced by the Commonwealth, and apparently adopted by the judge, was more subtle; the Commonwealth contended that defense counsel in another shaken baby case, which was very much in the public eye, intended to use the facts in Doe's case to impeach a Commonwealth witness and, therefore, it was too soon to deny the public (and, especially, the media) access to records from Doe's case.

The factual basis for this argument is set out in the ADA's affidavit relied upon by the judge in her order. When Doe filed his petition, a very high profile shaken baby syndrome case was pending in the same county and scheduled for trial in April, 2015. Defense counsel in that case had moved for discovery of a substantial amount of information about Doe's case, contending that it was potentially exculpatory. A hearing was held on the motion, at which Doe's counsel appeared and assented to the release of Doe's records so long as a protective order was imposed. The judge agreed with this course of action, entered a protective order, and directed the Commonwealth to provide records from Doe's case to the attorneys ****660** representing the other defendant. Among other things, the protective order required the Commonwealth and the other defendant to use pseudonyms when referring to Doe, his

child, or any other biographical or personal information about the case.[7]

In both the Doe case and the other case, Dr. Alice Newton of Children's Hospital was an expert for the Commonwealth,[8] and, in both cases, it was her opinion that the child in question had ***799** died as a result of shaken baby syndrome. In light of the revised ruling of the medical examiner, and the filing of the nolle prosequi in the Doe case, defense counsel in the other case was expected to use the Doe case to impeach Dr. Newton and suggest that she was prone to "rush to judgment." This strategy had not escaped the attention of the press. Media representatives were present at the hearing on the other defendant's discovery motion, and articles were published about how the other defendant might take advantage of the developments in the Doe case.

Whether, as the Commonwealth argued, the continued public interest in the Doe case that was being generated by the other case militated in favor of maintaining public access to Doe's file is a close question. On the one hand, the Commonwealth's decision to file a nolle prosequi in Doe's case while proceeding to trial on the other case plainly implicated the public's "general right to know so that it may hold the government accountable for the proper administration of justice." *Pon,* 469 Mass. at 315, 14 N.E.3d 182. On the other hand, Doe's case was receiving continued public attention only in juxtaposition to the other case, and it had been arranged that, in the context of the upcoming trial, the public would have the opportunity to hear the evidence and arguments as to whether the facts in the two cases were analogous or distinguishable, without revealing Doe's identity.

In these circumstances, we conclude that the judge may have placed too much weight on the pendency of the other case in denying Doe's petition. Regardless, however, later developments have made the issue largely academic. In the intervening period between the judge's order and the briefing of this case, the Commonwealth filed a nolle prosequi in the other case, as well.[9] The unusually high degree of public interest in that case, which brought attention to the Doe case, no longer stands in the way of sealing Doe's record.[10]

****661 *800** *Conclusion.* We vacate the order of January 20, 2015, denying Doe's petition to seal his criminal record, and remand for further proceedings consistent with this opinion.

*So ordered.*

**All Citations**

90 Mass.App.Ct. 793, 68 N.E.3d 654

**Footnotes**

1 We allowed the defendant's motion to amend the case caption with a pseudonym.

2 Considerable time has elapsed since the petition was denied on January 20, 2015. Doe's appeal entered in this court on March 13, 2015, but was stayed until October 30, 2015, while a transcript of the motion hearing was prepared. Briefing was not completed until April 14, 2016. After denial of the defendant's application for direct appellate review, the case was argued to a panel of this

court on October 4, 2016.

[3] As noted in two recent opinions of the Supreme Judicial Court, shaken baby syndrome has been the subject of heated debate in the medical community. See *Commonwealth v. Millien,* 474 Mass. 417, 418, 50 N.E.3d 808 (2016); *Commonwealth v. Epps,* 474 Mass. 743, 744, 53 N.E.3d 1247 (2016).

[4] An ADA for the Middlesex District appeared for the Commonwealth in the trial court. At the close of the hearing on Doe's petition, the judge asked her to prepare an affidavit summarizing factual representations that she had made at the hearing about the relationship of Doe's case to another shaken baby case then pending in the same court.

[5] The pertinent statutory revisions are detailed in *Pon,* 469 Mass. at 303–308, 14 N.E.3d 182.

[6] In context, the reference to the "Commonwealth" in this sentence refers broadly to State government and the populace, and not simply to the prosecution.

[7] The protective order also restricted access to the documents to the members of the other defendant's defense team and required advance judicial approval for the Commonwealth or the other defendant to make reference to or comment upon the content of any of the documents in court or in a court pleading.

[8] Dr. Newton has "written extensively on shaken baby syndrome." *Commonwealth v. Millien,* 474 Mass. at 423, 50 N.E.3d 808.

[9] Both Doe and the Commonwealth have called our attention to this fact, and we have been invited to take judicial notice of the status of the other case, which was resolved in September, 2015.

[10] Because of representations made by the Commonwealth at oral argument, we find it necessary to caution that, particularly in light of the passage of time, it would be contrary to the objectives of *Pon* if Doe's petition were held hostage because public interest in his case might be rekindled by other shaken baby cases involving Dr. Newton or otherwise. Furthermore, if there is ever a need to refer to the circumstances of the Doe case in the prosecution or defense of any pending or future case of this nature, a protective order like the one previously negotiated can and should be used.

**491 Mass. 824, 208 N.E.3d 13**
Supreme Judicial Court of Massachusetts,
Plymouth.

**COMMONWEALTH**
**v.**
**J.F.**

**SJC-13334**
|
Argued February 8, 2023
|
Decided May 5, 2023

**Synopsis**
**Background:** At jury trial, defendant was acquitted of rape while armed, assault with intent to rape, and carrying a firearm without license, and jury deadlocked on counts for kidnapping with sexual assault, armed and masked robbery, and another count of rape while armed, resulting in declaration of mistrial. When alleged victim was unable to testify at retrial on deadlocked counts, Commonwealth filed nolle prosequi. Nearly four years later, defendant petitioned to seal his criminal record for all counts. The Superior Court Department, Plymouth County, Brian A. Davis, J., denied the petition in writing. Direct appellate review was granted.

**Holdings:** The Supreme Judicial Court, Cypher, J., held that:

as a matter of first impression, a closed criminal case that ends in a finding of not guilty, a no bill from a grand jury, or a finding of no probable cause by the court is not a record subject to a First Amendment presumption of public access to criminal records;

**common-law presumption of public access was abrogated, by statute, for records in criminal case that ends in finding of not guilty, no bill from grand jury, or finding of no probable cause by court;** and

in denying petition, as to counts for which nolle prosequi was entered, trial judge abused his discretion by failing to explicitly state for the record that he had considered relevant factors that were discussed at hearing.

Remanded.

**Procedural Posture(s):** Expungement Proceeding.

****17** Sealing. Criminal Records. Constitutional Law, Access to criminal records. Practice, Criminal, Nolle prosequi, Record.

Indictments found and returned in the Superior Court Department on February 28, 2014.

A petition to seal the record, filed on August 27, 2021, was heard by Brian A. Davis, J.

The Supreme Judicial Court granted an application for direct appellate review.

**Attorneys and Law Firms**

The following submitted briefs for amici curiae:

Patrick Levin, Committee for Public Counsel Services, for the defendant.

Arne Hantson, Assistant District Attorney, for the Commonwealth.

Alyssa Golden, Ann Maurer, Elizabeth Connor, & Leigh Woodruff, for Community Legal Aid.

Mason A. Kortz, Tamara S. Wolfson, Boston, & Paul M. Kominers, for Upturn, Inc.

Pauline Quirion, Boston, for Greater Boston Legal Services & another.

Chinh H. Pham, Boston, for Boston Bar Association.
Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

**Opinion**

CYPHER, J.

***825** On March 10, 2014, the defendant, J.F., was arraigned on two counts of rape while armed with a firearm, G. L. c. 265, § 22; one count of armed and masked robbery, G. L. c. 265, § 17; one count of armed kidnapping with sexual assault, G. L. c. 265, § 26; one count of assault with intent to rape, G. L. c. 265, § 24; and one count of carrying a firearm without a license, G. L. c. 269, § 10 (a). In December 2015, after a jury trial, he was acquitted on one count of rape while armed, assault with intent to rape, and carrying a firearm without a license.[1] The jury deadlocked on the remaining three

counts, resulting in the declaration of a mistrial. Subsequently, in March 2018, after determining that the alleged victim was unable to testify at a retrial of those counts due to a relapse in her substance use disorder, the Commonwealth filed a nolle prosequi. Consequently, the defendant suffered no convictions resulting from the charges.

On August 27, 2021, the defendant filed a petition pursuant to G. L. c. 276, § 100C (§ 100C), opposed by the Commonwealth, ****18** to seal his criminal record as to both the counts on which he was acquitted and the counts for which a nolle prosequi was filed. After a hearing, a judge denied the defendant's petition in writing. The defendant appealed. On appeal, the defendant argues that the plain language of § 100C requires the sealing of records in cases ending in findings of not guilty, no probable cause, or a no bill by a grand jury, unless the defendant objects to such sealing. He asserts that this court's holding in Commonwealth v. Pon, 469 Mass. 296, 14 N.E.3d 182 (2014), resolves any concern surrounding a right of public access under the First Amendment to the United States Constitution. He further argues that the judge abused his discretion in denying the petition with respect to the counts that were nol prossed because he misapplied the "good cause" standard, committing errors of fact and judgment in weighing the factors relevant to his decision.

For the reasons articulated infra, we hold that, consistent with Pon, a closed case that ends in an acquittal, a no bill from a grand jury, or a finding of no probable cause by the court is not a record ***826** subject to a First Amendment presumption of access. We further hold that the Legislature clearly abrogated the common-law presumption of access with respect to these records by its plain language in § 100C, first par. Regarding the counts in which the Commonwealth entered a nolle prosequi, we conclude that the judge abused his discretion when weighing the relevant interests and factors. Therefore, we remand the case for further proceedings consistent with this opinion.[2]

Background. On February 28, 2014, a grand jury returned six indictments against the defendant, charging him with two counts of aggravated rape, one count of armed and masked robbery, one count of armed kidnapping with sexual assault, one count of assault with intent to rape, and one count of unlawful possession of a firearm. These charges stemmed from allegations that the defendant, who knew the alleged victim, entered her car while masked, told her that he had a gun, and drove her to multiple automated teller machines attempting to have her withdraw cash from her bank account. After the assailant was unable to procure cash due to a lack of funds in the victim's account, he drove her to a parking lot, raped her, and fled.

On December 9, 2015, a jury was empanelled, and trial began. On December 16, the trial judge allowed the defendant's motion for required findings of not guilty on the charges of assault with intent to rape and unlawful possession of a firearm.[3] On that same day, the jury acquitted the defendant on the first count of aggravated rape. The jury were deadlocked as to the remaining three charges.

The case was continued for the scheduling of a new trial, and the defendant's bail was reduced. In addition to multiple continuances by agreement, the Commonwealth advanced and continued pretrial conferences and the trial date on several occasions. On April 4, 2017, a judge found the alleged victim unavailable for purposes of trial. The Commonwealth moved to ****19** present the previous testimony of the unavailable witness, the alleged victim, in the second trial. That motion was denied. On July 10, the ***827** defendant filed a motion for production of the alleged victim's psychiatric treatment records, which was allowed. The case was continued to November 27 for trial. The parties later jointly requested that the trial date be rescheduled. On March 21, 2018, the Commonwealth filed a nolle prosequi as to the remaining three counts: the remaining rape count, robbery, and kidnapping with sexual assault.

On August 27, 2021, the defendant filed a petition to seal his record in connection with the case.[4] The docket indicates that the case was continued to October 18 for a "[first] stage motion to seal," where the defendant's presence was waived. On October 18, the matter was taken under advisement, and the Commonwealth filed its opposition on October 20. On January 6, 2022, the judge scheduled a hearing for "[s]tage [two] motion to seal," but the hearing was continued due to the absence of an interpreter for the defendant.

After another continuance for COVID-19 reasons, the hearing was held on February 9, 2022. At the hearing, the parties and the judge discussed Pon at length. The judge indicated his belief that Pon requires "a higher standard" for cases ending in not guilty verdicts: "the defendant must demonstrate that the value of sealing clearly outweighs the constitutionally-based value of the record remaining open to society."[5]

For the counts in which a nolle prosequi entered, the judge stated that the "defendant must establish that good cause exists for sealing, but it's a lessened burden on the defendant, and the [judge] must balance the interest at stake." Defense counsel asserted that in Pon, 469 Mass. at 311, 14 N.E.3d 182, this court rejected the argument that the records of closed criminal proceedings resulting in an entry of nolle prosequi or dismissal are subject to a First Amendment presumption of public access. The judge responded that the relevant holding only applied to the nolle prosequi counts at issue.[6] Defense counsel went on to argue that the plain language ***828** of § 100C requires sealing for the counts on which the defendant was acquitted.

Discussing the factors in favor of sealing, the defendant pointed out that it had been about four years since the remaining counts had been nol prossed, and approximately six years since the defendant's release, with the defendant accumulating no new charges since then. He was aged forty-four at the time of the hearing, and he had no criminal record aside from the relevant charges and a dismissed

charge of operating a motor vehicle with a suspended license. The defendant, although he has a job as a truck driver, has been unable to get better paying jobs as a result of his record in this case.[7] He explained the stigma ****20** that he suffers as a result of these charges. The defendant acknowledged that the nature and reason of the disposition, particularly the nol prossed counts, may not weigh in his favor.[8] The judge asked counsel about the publicity surrounding the case. The defendant reported one article had appeared in a local newspaper in 2014 about the case. The Commonwealth noted that a news article about the case appeared as a top result when searching the defendant's name on the Internet.

The Commonwealth then summarized the facts of the case. After testifying in the case, the alleged victim, who suffered from substance use issues, relapsed as a result of the trauma from her testimony. The Commonwealth continued the case several times to "try[ ] to get her in a better position to be able to testify, and ultimately, she wasn't." When another judge denied the Commonwealth's motion to use her previous trial testimony at the second trial, the Commonwealth had "no choice" but to file a nolle prosequi as to the remaining charges. The Commonwealth ***829** read a letter from the family of the alleged victim, who opposed the sealing of the defendant's record, which detailed the severe psychological distress and pain that she has suffered and continues to suffer as a result of the violent crimes committed against her.

On February 14, 2022, in a written decision, the judge denied the defendant's motion to seal his record in its entirety. The defendant appealed, and we allowed his application for direct appellate review.

Discussion. 1. Presumption of public access to criminal records for cases ending in findings of not guilty, a no bill by the grand jury, or a finding of no probable cause by the court. The defendant argues that by its terms, § 100C, first par., calls for automatic sealing with no court involvement unless the defendant requests otherwise as part of a fully integrated scheme enacted by the Legislature. He asserts that the 2010 reforms to the criminal offender record information (CORI) system reaffirmed the Legislature's commitment to the preexisting record sealing scheme, and that Pon removed any constitutional impediment to the Legislature's directive to automatically seal closed cases ending in acquittal, as public access would not do much to ensure the integrity of criminal proceedings where there never was probable cause to bring the charges or where a jury acquitted a defendant. The defendant argues that the Legislature, in enacting § 100C, first par., unequivocally abrogated the common-law presumption of public access to judicial records.

The Commonwealth argues that the judge did not err in requiring the defendant to demonstrate that the value of sealing the records of his acquittals at trial clearly outweighs the constitutionally based value of the record remaining open to society where the Pon decision did not extend to § 100C, first par., and where Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-511 (1st Cir. 1989), found a

First Amendment presumption of access in criminal cases ending with findings of not guilty. The Commonwealth asserts that, in ****21** fact, the judge did apply the Pon analysis to the defendant's petition to seal the not guilty charges. Finally, the Commonwealth argues that because the entire criminal case did not result in a finding of not guilty (the defendant was only acquitted on three of the six indictments against him), the statutory language of § 100C, first par., does not apply to the defendant's acquittals.

Section 100C states, in relevant part:

> ***830** "In any criminal case wherein the defendant has been found not guilty by the court or jury, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, the commissioner of probation [(commissioner)] shall seal said court appearance and disposition recorded in his files and the clerk and the probation officers of the courts in which the proceedings occurred or were initiated shall likewise seal the records of the proceedings in their files. The provisions of this paragraph shall not apply if the defendant makes a written request to the commissioner not to seal the records of the proceedings.
>
> > "In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files. The clerk shall forthwith notify the commissioner ... and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceedings in their files."

G. L. c. 276, § 100C, first and second pars.

In Pokaski, 868 F.2d at 499, the decision relied on by the Commonwealth, the United States Court of Appeals for the First Circuit addressed whether there is a constitutional right of access to the records of cases sealed pursuant to § 100C.[9] In discussing § 100C, first par., the First Circuit noted that where the defendant was found not guilty, a grand jury failed to indict, or the court made a finding of no probable cause, § 100C "provides for no court involvement; the sealing occurs automatically upon the completion of a criminal case ending in one of the above enumerated dispositions." Id. at 500. See ***831** Attorney Gen. v. District Attorney for the Plymouth Dist., 484 Mass. 260, 270, 141 N.E.3d 429 (2020) (commissioner "shall" seal court record where defendant found not guilty, no bill returned by grand jury, or finding of no probable cause made by court); Commonwealth v. Gavin G., 437 Mass. 470, 479, 772 N.E.2d 1067 (2002) ("Under § 100C, an adult who is acquitted after trial, or as to whom the grand jury return a no bill or a court finds no probable cause, is entitled to immediate sealing"); Police Comm'r of Boston v. Municipal Court of the Dorchester Dist., 374 Mass. 640, 649, 374 N.E.2d 272 (1978) (§ 100C, as enacted by St. 1973, c. 322, "provides that probation records and

court records must be sealed in criminal ****22** cases on the request of a defendant who has been found not guilty, as to whom no bill has been returned by the grand jury, or where there has been a finding of no probable cause by the court"); Commonwealth v. S.M.F., 40 Mass. App. Ct. 42, 44, 660 N.E.2d 701 (1996) (§ 100C, first par., "mandates" sealing). The second paragraph, for cases ending with a nolle prosequi or a dismissal, to the contrary, does not provide for "automatic" sealing. Pokaski, supra.

The First Circuit "has established a First Amendment right of access to records submitted in connection with criminal proceedings." Pokaski, 868 F.2d at 502. Underlying the determination that there exists a constitutionally secured right of access is the premise that the public should have a full understanding of the criminal proceeding to serve as a check on the judicial system. Id. After determining that the blanket prohibition on the disclosure of records mentioned by § 100C, first par., implicates the First Amendment, the First Circuit held that the automatic sealing of records of cases ending in a finding of not guilty or no probable cause could not withstand strict scrutiny and violated the First Amendment.[10] Id. at 505-509. Further, the First Circuit noted that cases ending in a finding of nolle prosequi or dismissal should be sealed "only where it is necessary to achieve a compelling interest." Id. at 510.

Subsequently, in Commonwealth v. Doe, 420 Mass. 142, 648 N.E.2d 1255 (1995), overruled by Pon, 469 Mass. at 297, 14 N.E.3d 182, § 100C, second par., was at issue.[11] The court recognized the First Circuit's conclusion in Pokaski that there is a First Amendment right of access to records submitted in connection with criminal proceedings, ***832** which rendered § 100C, first par., unconstitutional. Doe, supra at 147, 648 N.E.2d 1255. Under the second paragraph, adopting the constitutional analysis set forth in Pokaski, the court held that the "substantial justice" requirement in that paragraph would not be met "unless it is demonstrated, first at [a] preliminary hearing and, if the matter proceeds that far, at [a] final hearing, that the value of sealing to the defendant clearly outweighs the constitutionally-based value of the record remaining open to society." Id. at 151, 648 N.E.2d 1255. In making this determination, it would be appropriate for a judge to consider the reason for the nolle prosequi or dismissal and the specific harm the defendant risks suffering if the record were to remain open to the public. Id. at 151-152, 648 N.E.2d 1255.

In Pon, the most recent case discussing § 100C, the court revisited the "stringent standard for discretionary sealing" set out in Doe and articulated a new standard for sealing under § 100C, second par., which the court deemed necessary to achieve the legislative intent. Pon, 469 Mass. at 297, 300, 14 N.E.3d 182. As a basis for doing so, the court discussed the legislative history of § 100C and its counterparts, G. L. c. 276, §§ 100A and 100B. Id. at 301, 14 N.E.3d 182.

Section 100C was "introduced in the 1970s shortly after the passage of the initial CORI Act ... which authorized the creation of a comprehensive criminal justice information system that would afford

****23** limited access to court-based criminal records." Pon, 469 Mass. at 301, 14 N.E.3d 182. See St. 1973, c. 322, § 1, inserting G. L. c. 276, § 100C. In 1983, the Legislature amended the first paragraph to require that the commissioner seal the relevant records, rather than sealing only on the request of the defendant. See St. 1983, c. 312. In 1984, the Legislature disposed of the requirement that the commissioner notify the clerk and probation officers of the proceedings before sealing the records associated with them. St. 1984, c. 123.

"In 2010, the Legislature enacted extensive reforms to the CORI scheme, extending access to official CORI records to more employers, housing providers, and other organizations, for limited use, and simultaneously broadening the scope of the sealing provisions to enable more individuals to shield their records from public view." Pon, 469 Mass. at 297, 14 N.E.3d 182. As a part of these changes, the Legislature deleted the phrase "except in cases in which an order of probation has been terminated" from the second paragraph, permitting the court to seal cases in which a defendant had ***833** received a continuance without a finding.[12] St. 2010, c. 256, § 131.

In enacting these statutes, the Legislature intended to balance several interests, including the public's interest in accessing certain types of records relating to criminal proceedings and a defendant's interest in sealing the record of his or her criminal history, "recognizing that ready access to a defendant's prior criminal record might frustrate a defendant's access to employment, housing, and social contacts necessary to ... rehabilitation" (citation omitted). Pon, 469 Mass. at 301, 14 N.E.3d 182. In light of the changes made by the Legislature, the court concluded that the test in Doe "serves to frustrate rather than further the Legislature's purpose by imposing too high a burden of proof on the defendant." Id. at 308, 14 N.E.3d 182.

The court analyzed whether there is a First Amendment presumption of access to the records of criminal cases that have been dismissed or subject to nolle prosequi, and determined that there was not. Pon, 469 Mass. at 308-309, 311, 14 N.E.3d 182. Despite its overruling of Doe and its rejection of the First Amendment analysis in Pokaski with respect to the records mentioned in § 100C, second par., the court concluded in Pon that the records are subject to a common-law presumption of public access which may be restricted on a showing of "good cause" meriting sealing. Id. at 311-312, 14 N.E.3d 182. In determining whether this standard is met, judges should balance a variety of interests, considering several factors discussed infra. Id. at 314-319, 14 N.E.3d 182. A judge no longer needs to go through a two-hearing process, but instead may conduct a single hearing on the merits once the judge decides that a prima facie showing has been made on the pleadings. Id. at 321-322, 14 N.E.3d 182. "After hearing the arguments and balancing the interests at stake, if the judge is satisfied that good cause merits sealing, the judge must make 'specific findings on the record setting forth the interests considered by the judge and the reasons for the order directing that such sealing occur.' " Id. at 322, 14 N.E.3d 182, quoting Doe, 420 Mass. at 152-153, 648 N.E.2d 1255.

****24** Although Pon confined its holding to § 100C, second par., this ***834** court's reasoning supporting the conclusion that there is no First Amendment presumption of access to records of a criminal case ending in a nolle prosequi or a dismissal applies with equal force to records of a criminal case wherein the defendant has been found not guilty, where a no bill has been returned by a grand jury, or where a finding of no probable cause has been made. As the United States Supreme Court has not yet addressed the First Amendment presumption of access as it applies to these records, we are not bound by the First Circuit's conclusion in Pokaski. Pon, 469 Mass. at 308, 14 N.E.3d 182, quoting Commonwealth v. Montanez, 388 Mass. 603, 604, 447 N.E.2d 660 (1983) ("we are not bound by decisions of Federal courts except the decisions of the United States Supreme Court on questions of Federal law").

Applying the two-step test set out in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (Press-Enterprise II), and examining the analysis conducted in Pon, it is clear that the court's reasoning in Pon supports the conclusion that there is no First Amendment presumption of access. The first step requires us to "consider[ ] whether the place and process have historically been open to the press and general public." Pon, 469 Mass. at 309, 14 N.E.3d 182, quoting Press-Enterprise II, supra at 8, 106 S.Ct. 2735.. "[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.... It is uncontested, however, that the right to inspect and copy judicial records is not absolute" (footnote omitted). Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).

Although court records historically have been accessible to citizens of the Commonwealth, the court long has recognized that some classes of court records should not be available for public review, may be impounded on a showing of good cause, and may not be presumptively open for public view by operation of statute. Pon, 469 Mass. at 309, 14 N.E.3d 182. See New England Internet Café, LLC v. Clerk of the Superior Court for Criminal Business in Suffolk County, 462 Mass. 76, 90, 966 N.E.2d 797 (2012) (judge may seal documents on showing of good cause); Republican Co. v. Appeals Court, 442 Mass. 218, 222-223, 812 N.E.2d 887 (2004) ("Massachusetts has long recognized a common-law right of access to judicial records," but right of access may be restricted on showing of "good cause"); Roe v. Attorney Gen., 434 Mass. 418, 435, 750 N.E.2d 897 (2001) (records of conviction are public records constitutionally required to be public); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 546, 362 N.E.2d 1189 (1977) (acknowledging "general principle of publicity" while recognizing ***835** statutory limits on access to court proceedings and official records).

The sealing of criminal records pursuant to § 100C would not affect the public's ability to attend a criminal trial, or the media's right to report on court proceedings or publish truthful information

relating to sealed proceedings. Pon, 469 Mass. at 310, 14 N.E.3d 182. "[Indeed,] the public had a right of access to any court record before, during, and for a period of time after the criminal trial [until the request for sealing was granted]." Id., quoting State ex rel. Cincinnati Enquirer v. Winkler, 101 Ohio St. 3d 382, 385, 805 N.E.2d 1094 (2004). The court in Pon concluded that the records of closed cases resulting in a dismissal or nolle prosequi have not been open historically to the ****25** press and the public as have other "constitutionally cognizable elements of criminal proceedings." Pon, supra. For the same reasons, the records of closed cases that resulted in an acquittal after trial, a finding of no probable cause, or a no bill from the grand jury also have not been open historically to the press and public.

The second step requires the court to "consider 'whether public access plays a significant positive role in the functioning of the particular process in question.' " Pon, 469 Mass. at 310, 14 N.E.3d 182, quoting Press-Enterprise II, 478 U.S. at 8, 106 S.Ct. 2735. The court concluded in Pon that "the availability of records of criminal cases that have been closed after nonconviction" does little to enhance the fairness and appearance of fairness of a criminal trial. Pon, supra. Recognizing that criminal justice agencies and several licensing commissions and other entities with a particular need for the information will retain access to sealed records, the court held that the integrity of the processes at issue are preserved sufficiently. Id. at 310-311, 14 N.E.3d 182. See G. L. c. 6, §§ 172-178B (discussing CORI access to various entities and related sections); G. L. c. 276, §§ 100A, 100B, 100D (sealing statutes).

Even more than criminal cases ending in a nolle prosequi or a dismissal, criminal charges ending in a finding of not guilty, no probable cause, or a no bill after grand jury proceedings are "premised on a presumption of innocence." Commonwealth v. Vickey, 381 Mass. 762, 767, 412 N.E.2d 877 (1980). See Police Comm'r of Boston, 374 Mass. at 657, 374 N.E.2d 272 ("The fact of an arrest without probable cause followed by total exoneration would seem to negate any possible value to law enforcement of an arrest record because the sum total of such an adjudication is that there was no evidence in any way connecting the defendant with participation in criminal ***836** activity"). Particularly where a jury found the defendant not guilty on particular charges against him and were deadlocked on the remaining charges, sealing the criminal records relating to those charges does not "truly impede" the public from ensuring that "the operations of government institutions [are] subject to effective public scrutiny," as the public and the media were free to attend the trial and hear the evidence against the defendant[13] (citation omitted). Pon, 469 Mass. at 310, 14 N.E.3d 182. See Nixon, 435 U.S. at 610, 98 S.Ct. 1306 ("The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed"). See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-573, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media").

Therefore, the First Amendment presumption of access does not apply to nonconvictions mentioned in § 100C, first par.[14]

****26** Although these records are not entitled to a First Amendment presumption of public access, they "are subject to a common-law presumption of public access." Pon, 469 Mass. at 311, 14 N.E.3d 182. "In interpreting a statute, we presume that when the Legislature enacts a law it is aware of the statutory and common law that governed the matter in which it legislates." Globe Newspaper Co., petitioner, 461 Mass. 113, 117, 958 N.E.2d 822 (2011). We review the interpretation of a statute de novo. Commonwealth v. K.W., 490 Mass. 619, 624, 193 N.E.3d 1069 (2022). "Where the words [of a statute] are 'plain and unambiguous' in their meaning, we view them as 'conclusive as to legislative intent.' " Id., quoting Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 271, 94 N.E.3d 370 (2018). "Where the words of the statute are ambiguous, we strive 'to make it an effectual piece of legislation ***837** in harmony with common sense and sound reason' and consistent with legislative intent." Pon, supra at 302, 14 N.E.3d 182, quoting Wolfe v. Gormally, 440 Mass. 699, 704, 802 N.E.2d 64 (2004).

" 'Unless there is a violation of a constitutional guaranty, the Legislature may modify or abrogate common law practices' regarding public access to judicial records." Globe Newspaper Co., petitioner, 461 Mass. at 118, 958 N.E.2d 822, quoting New Bedford Standard-Times Publ. Co. v. Clerk of the Third Dist. Court of Bristol, 377 Mass. 404, 410, 387 N.E.2d 110 (1979). "[W]e do not interpret a statute to modify or abrogate an area traditionally guided by the common law, such as public access to judicial records, unless the intent to do so is clear." Globe Newspaper Co., petitioner, supra. See Chelsea Hous. Auth. v. McLaughlin, 482 Mass. 579, 590, 125 N.E.3d 711 (2019), quoting Riley v. Davison Constr. Co., 381 Mass. 432, 438, 409 N.E.2d 1279 (1980) ("statute is not to be interpreted as effecting a material change in or a repeal of the common law unless the intent to do so is clearly expressed"). Where the common-law doctrine " 'is so repugnant to and inconsistent with' the statute that 'both cannot stand,' " the statute preempts the common-law doctrine by "necessary implication." Chelsea Hous. Auth., supra at 591, 125 N.E.3d 711, quoting George v. National Water Main Cleaning Co., 477 Mass. 371, 378, 77 N.E.3d 858 (2017).

The plain language of § 100C, first par., evidences the Legislature's clear intent to abrogate the common-law presumption of access to the nonconvictions explicitly referenced where it commands that "the commissioner ... shall seal said court appearance and disposition recorded in his files" and the clerk and probation officers "shall likewise seal the records of the proceedings in their files," unless "the defendant makes a written request to the commissioner not to seal the records of the proceedings" (emphases added). G. L. c. 276, § 100C. See Johnson v. District Attorney for the N. Dist., 342 Mass. 212, 215, 172 N.E.2d 703 (1961) ("The word 'shall' in a statute is commonly a word of imperative obligation and is inconsistent with the idea of discretion").

Although the court need not do so where the language of the statute is unambiguous, going beyond the language, the intent of the Legislature supports such an interpretation. The 2010 reforms to the CORI scheme "strongly indicate that the Legislature was concerned with the collateral consequences ****27** of criminal records and sought to make sealing broadly available to individuals whose criminal histories or records no longer presented concerns of recidivism." Pon, 469 Mass. at 306, 14 N.E.3d 182. "Overall, the legislative history unmistakably suggests that the Legislature's intent in ***838** enacting the 2010 reforms was to recalibrate the balance between protecting public safety and facilitating the reintegration of criminal defendants by removing barriers to housing and employment." Id. at 307, 14 N.E.3d 182. Even after Pon's invitation to the Legislature to "revisit[ ] the language of" § 100C, first par., in its 2018 reforms to the statute, the Legislature left the language alone. Id. at 313, 14 N.E.3d 182 n.24. See St. 2018, c. 69. We see this as a "clear" intent to abrogate the common-law right to public access to the nonconvictions at issue. Globe Newspaper Co., petitioner, 461 Mass. at 118, 958 N.E.2d 822.

We disagree with the Commonwealth's assertion that § 100C, first par., does not apply because the jury did not acquit the defendant on all six indictments. At the outset, the language of the statute commands sealing of "said court appearance and disposition" in "any criminal case wherein the defendant has been found not guilty[,] ... a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court." G. L. c. 276, § 100C. This general language would seem to include favorable charges in cases where the defendant was acquitted on some charges, but not all. If the Legislature intended to limit sealing to cases where a defendant is acquitted on all charges, it presumably would have said so.[15] See Commonwealth v. Rossetti, 489 Mass. 589, 593, 186 N.E.3d 729 (2022), quoting Commonwealth v. Williamson, 462 Mass. 676, 679, 971 N.E.2d 250 (2012) (we "presume, as we must, that the Legislature intended what the words of the statute say"). Contrast Colo. Rev. Stat. § 24-72-705(1)(a)(II) (commanding sealing where "defendant is acquitted of all counts in the case"); R.I. Gen. Laws § 12-1-12.1(b) (court shall seal records of criminal case where person acquitted of all counts in case); Utah Code Ann. § 77-40a-201(1)(a) (automatic expungement of records in "case that resulted in an acquittal on all charges"); State v. Diamante, 83 A.3d 546, 550-551 (R.I. 2014) (must be acquitted of "all counts"). Further, even if the statutory language were ambiguous, the legislative history, discussed supra, suggests that the intent of the Legislature was to effectuate sealing in a wider ***839** array of cases. Interpreting the statute to require sealing of the records related to any charge where the defendant was found not guilty, a no bill was returned by the grand jury, or a finding of no probable cause was made would facilitate that intent.[16]

****28** 2. Standard of review. We review a judge's decision on a petition to seal a defendant's criminal record for an abuse of discretion. Pon, 469 Mass. at 299, 14 N.E.3d 182. "Under the abuse of discretion standard, the issue is whether the judge's decision resulted from 'a clear error of judgment in weighing the factors relevant to the decision ... such that the decision falls outside the range of

reasonable alternatives' (quotation and citation omitted)." Commonwealth v. Kolenovic, 471 Mass. 664, 672, 32 N.E.3d 302 (2015), S.C., 478 Mass. 189, 84 N.E.3d 781 (2017), quoting L.L. v. Commonwealth, 470 Mass. 169, 185 n.27, 20 N.E.3d 930 (2014). Where the judge's decision "is based in part on whether the judge made an error of law in interpreting the relevant statutes[,] we review the interpretation of [the] statute de novo." K.W., 490 Mass. at 624, 193 N.E.3d 1069.

3. Denial of defendant's petition. a. Charges of which the defendant was found not guilty. As discussed supra, for closed criminal cases falling under the first paragraph of § 100C, sealing is mandatory. With respect to the charges of which the defendant was found not guilty, the judge erred in failing to seal the records of these counts.

In his memorandum of decision on the defendant's petition to seal, the judge stated: "Where the petitioner 'has been found not guilty by the court or jury, ...' the petitioner must 'prove that the value of sealing ... clearly outweighs the constitutionally-based value of the record remaining open to society.' Pon, 469 Mass. at 312 [14 N.E.3d 182]."[17] He expressed that this court, in Pon, held "that, while the holding of Pokaski may apply to petitions to seal filed pursuant to the first paragraph of [§] 100C ... it does not apply to petitions to seal filed pursuant to the second paragraph of [§] 100C." Although he was correct to direct "[t]he intellectually inquisitive reader who wishes to fully understand the basis for the distinction" to Pon, supra at 313 n.24, 14 N.E.3d 182, the judge misinterpreted the court's directive.

***840** In Pon, 469 Mass. at 313 n.24, 14 N.E.3d 182, the first paragraph of § 100C was "not at issue." The court "decline[d] to extend [its] holding and the analysis [it] employ[ed] to [the first paragraph] of the statute." Id. It discussed the practice of the District Court Department of the Trial Court to seal records of acquittals or where judges made a finding of no probable cause under the standard set out in Pokaski and reinforced by Doe. Id. The court stated:

> "[U]ntil the Legislature revisits the language of [§ 100C], first par., or until the issue of its interpretation comes before us, we observe that the solution adopted by the District Court is a reasonable one, as long as it is modified consistent with our holding in this case: that sealing may occur where good cause justifies the overriding of the general principle of publicity" (emphases added).

Id. Therefore, before our clarification in the present case, the judge should have applied the good cause standard to both the counts that resulted in verdicts of not guilty and the entry of a nolle prosequi. Now, however, it is clear that where a defendant stands acquitted on a charge (or a no bill is returned by the grand jury or a finding of no probable cause has been made by the court), the records pertaining to those charges should be sealed, unless the defendant "makes a written request to the commissioner" not to seal the records of the proceedings. G. L. c. 276, § 100C.

****29** The defendant requests that, if this court "concludes that the judge did not abuse his discretion in denying the petition as to the dismissed counts," we should remand the entire petition, including the not guilty counts, to allow him to decide how he would like to proceed.[18] Because we remand the case for the judge to illustrate his reasoning underlying his findings on the nolle prosequi counts, infra, we remand the petition on the not guilty counts as well so that the defendant may clarify his intentions. If he decides that he would like the records pertaining to his acquittals to remain open to the public, he should make this clear in the Superior Court, and he must make a written request to the commissioner not to seal such records. G. L. c. 276, § 100C.

***841** b. Charges resulting in nolle prosequis. As to the counts that resulted in nolle prosequis, the defendant argues that the judge purported to apply the correct standard, but misapplied it by making clear errors of fact and judgment in weighing the relevant factors. More specifically, he argues that the judge failed to recognize that he was acquitted not only of carrying a firearm, but also of so much of the rape and robbery counts as alleged that he possessed a firearm; that the judge erred in his factual findings regarding the time elapsed since the trial and the nolle prosequis, which weighed heavily in his analysis; that the relevant time period to assess the defendant's "likelihood of recidivism or success" is the time elapsed since the defendant's release into the community, not the time since the charges were nol prossed; and that the judge failed to consider several highly pertinent factors, such as the extreme stigma attached to the charges, the defendant's age, and his lack of criminal history. Last, the defendant asserts that any discussion of "rehabilitation" is improper where he never has been convicted of a crime, and the judge gave insufficient weight to the interests of the defendant and the Commonwealth in keeping the records private.

The Commonwealth argues that the judge properly considered all the factors set out in Pon. For the reasons discussed infra, we remand the matter to the Superior Court for the judge to clarify his reasoning.

The second paragraph of § 100C states, in part: "In any criminal case wherein a nolle prosequi has been entered, ... and it appears to the court that substantial justice would best be served, the court shall direct the clerk to seal the records of the proceedings in his files." G. L. c. 276, § 100C. In demonstrating that "substantial justice [will] best be served," a "defendant must establish that good cause exists for sealing"; in other words, the reason for sealing "justifies the overriding of the general principle of publicity." Pon, 469 Mass. at 312-313, 14 N.E.3d 182. "Although a good cause analysis requires consideration of similar factors as an analysis where the First Amendment is implicated, ... the weight of the scales is more balanced, and the burden on the defendant is somewhat lessened." Id.

When assessing whether a defendant has met the "good cause" standard for sealing, a judge must balance the numerous interests at stake. Pon, 469 Mass. at 314, 14 N.E.3d 182. "If, after balancing those interests, the judge determines that the defendant has done so, the substantial justice standard will be satisfied." Id. In conducting ***842** this balancing test, a judge ****30** "should begin by recognizing the public interests at stake." Id. at 315, 14 N.E.3d 182.

Concomitant with the common-law presumption of access, the public has an interest in knowing about criminal charges so that it may hold the government accountable for the administration of justice. Pon, 469 Mass. at 315, 14 N.E.3d 182. On the other end of the spectrum, judges must acknowledge the interests of the Commonwealth and the defendant in keeping the information private. Id. "These interests include the compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants." Id. In balancing these interests, a judge may take judicial notice of the fact that the existence of a criminal record may "present barriers to housing and employment opportunities." Id. at 316, 14 N.E.3d 182.

Although judges may consider any factors relevant to their weighing of the interests at stake, the court in Pon set out particularly relevant factors for a judge to consider, which the judge noted in his decision here, stating that he "considered" all the factors. The first factor to be considered focuses on "the disadvantages the defendant claims to face due to the availability of his ... criminal record." Pon, 469 Mass. at 316, 14 N.E.3d 182. This may include any effect on the defendant's employment, housing, ability to participate in community or volunteer activities, ability to advance economically or professionally, and reliance on public assistance. Id. at 317, 14 N.E.3d 182.

The defendant, in his petition, identified the disadvantages that he suffers from as a result of his criminal record, including preclusion of further employment opportunities and better paying jobs.[19] In his decision, the judge recognized, in a sentence, that the defendant "undoubtedly" faces disadvantages as a result of the availability of his criminal record. Although it would have been better if the judge expanded on this with specific details from the defendant's case, it is implicit that the judge acknowledged the profound effect such serious charges on his record must have. On remand, we urge the judge to elaborate on these disadvantages in order to afford them the proper weight and assure the parties that the judge has considered the issue adequately.

The second factor to consider, as set out in Pon, is "evidence of ***843** rehabilitation." Pon, 469 Mass. at 317, 14 N.E.3d 182.

> "Employment attempts, community or civic engagement, successful completion of a probationary period or sobriety or mental health treatment, lack of further contact with the criminal justice

system, or other accomplishments may weigh in favor of sealing by demonstrating that the defendant bears a low risk of recidivism and a likelihood of success in future employment."

Id. The defendant's argument that where he never has been convicted of a crime or admitted to sufficient facts for a finding of guilty, he should not be required to show "evidence of rehabilitation," is persuasive. Cf. Commonwealth v. Healy, 452 Mass. 510, 515, 895 N.E.2d 752 (2008) (in sentencing, "[j]udges may not punish the defendant for offenses of which he or she does not stand convicted in the particular ****31** case"); In re Kollman, 210 N.J. 557, 576, 46 A.3d 1247 (2012) ("Facts related to an arrest that did not result in conviction, or to a dismissed charge, may ... offer insight into an applicant's character and conduct.... To assess the public interest ... courts [may] consider conduct before the time of conviction ... [only so far as they are] established or undisputed facts, not unproven allegations"). Contrast Pon, 469 Mass. at 298, 14 N.E.3d 182 (defendant admitted to sufficient facts for guilty finding). The judge should have recognized this in his discussion of the factors.

Even if we were to assume that evidence of rehabilitation is applicable to the defendant, he demonstrated that he has taken a number of steps suggesting "rehabilitation," as it is defined in Pon. He had not faced any new criminal charges following the case at issue and, as of the date of the hearing, had remained free of charges for over five years since his release on bail in 2016.[20] Further, he had maintained employment since his release.

Aside from mentioning that the defendant "presented some 'evidence of rehabilitation,' " the judge discussed none of these factors. This was an abuse of discretion, requiring remand for the judge to expand on his consideration of all the relevant factors. On remand, we urge the judge to describe in detail his weighing of these positive factors in addition to those that he found weighed against sealing in order to illustrate the "balancing" test that Pon requires judges to conduct.

***844** The third factor for the judge to consider is "other evidence on whether sealing [the records] would alleviate the identified disadvantages." Pon, 469 Mass. at 317, 14 N.E.3d 182. Some examples of such evidence may include the nature of the crimes with which the defendant was charged; the stigma associated with the charges; whether the defendant would pose an additional safety threat to the community were his or her record to be sealed; and whether the defendant maintains any sense of privacy, i.e., whether his or her charges were newsworthy to the extent that sealing would not provide a benefit. Id. at 317-318, 14 N.E.3d 182.

The judge indicated, in his written decision, that insufficient time had passed to determine whether the sealing of the defendant's record would pose an additional safety threat to the community. Nonetheless, the judge did not mention the stigma associated with the particularly abhorrent crimes with which the defendant was charged, nor did he discuss the publicity that the defendant's case

received in the news. Although counsel mentioned these factors at the hearing, we cannot determine from the record whether the judge considered them or, if he did, what weight he gave them. It is necessary that the judge explicitly state for the record the factors he considered. To not do so, where they were relevant to the case and discussed at the hearing, was an abuse of discretion. See, e.g., Commonwealth v. Nash, 486 Mass. 394, 414, 159 N.E.3d 91 (2020) (single justice abused her discretion in assessment of security factors when determining whether to grant motion for stay of sentence pending appeal, where her assessment was "underinclusive"); Commonwealth v. Grassie, 476 Mass. 202, 214-215, 65 N.E.3d 1199 (2017), S.C., 482 Mass. 1017, 121 N.E.3d 1290 (2019) ("there must be some mechanism by which an appellate court can meaningfully assess whether a judge acted appropriately in granting or denying [Mass. R. Crim. P. 25 (b) (2), as amended, 420 Mass. 1502 (1995)], relief. ****32** For instance, if a judge grants a motion to reduce a verdict, the expectation is that the judge will explain his or her reasoning in a written ruling or an oral explanation on the record"); L.L., 470 Mass. at 185 n.27, 20 N.E.3d 930 ("judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision such that the decision falls outside the range of reasonable alternatives" [citation omitted]).

Fourth, the judge should consider "the defendant's circumstances at the time of the offense." Pon, 469 Mass. at 318, 14 N.E.3d 182. This includes the defendant's age, insofar as it speaks to his capacity ***845** for rehabilitation, and his prior criminal history leading up to the offense. Id. As the defendant points out, the judge made no mention of the defendant's lack of a criminal record. Aside from a dismissal in 2012 on court costs of a charge of operating a motor vehicle with a suspended license, the defendant had no criminal record prior to the charges at issue. Where the defendant was aged forty-four at the time of his petition, his inexperience in the criminal justice system has some weight, deserving of mention in the judge's decision. See Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 621, 925 N.E.2d 533 (2010) (several scientific and statistical studies "conclude that age is an important factor in determining the risk of recidivism and that such risk diminishes significantly as an offender ages").

In discussing the fifth factor, "the passage of time since the date of the offense and the date of the dismissal or nolle prosequi," we note several factual errors. Pon, 469 Mass. at 318, 14 N.E.3d 182. The judge wrote that it had been "three years since the dismissal" of the counts in which a nolle prosequi was entered, and he indicated that the trial took place in December 2017, "less than five years ago." In fact, at the time of the issuance of the judge's decision in February 2022, it had been nearly four years since the nolle prosequi issued, and the trial was conducted in December 2015, over six years prior. We do not mean to suggest that it was improper for the judge to conclude that not enough time had passed from the date of the offense, trial, or nolle prosequi to merit sealing, and arguably the difference in the calculation of time is insignificant. But where the judge made factual

errors crucial to a factor that was a primary influence in his decision, we cannot determine whether his conclusion would be the same were he to have referenced the correct time periods.[21] On remand, the judge should address this.

As to the defendant's assertion that the "relevant timeframe [to consider] was the six years during which [he] had lived in the ***846** community without incident following his release from pretrial detention," Pon instructs that both "the passage of time since the date of the offense and the date of the dismissal or nolle prosequi" are important factors (emphases added). Pon, 469 Mass. at 318, 14 N.E.3d 182. ****33** Admitting that the passage of time since the defendant was in the community after he was charged with the offenses is relevant to "the risk of recidivism," the judge would not have abused his discretion if he had considered the correct period of time since his remaining charges were nol prossed: almost four years at the issuance of his decision and over five years to date. See id. ("If sealing is sought immediately following the disposition, there may be concerns that the public has not had sufficient opportunity for access, and that the defendant may be likely to reoffend").

Finally, the judge heavily relied on the sixth factor, "the nature of and reasons for the disposition," in coming to his conclusion to deny the defendant's petition to seal. Pon, 469 Mass. at 319, 14 N.E.3d 182. The judge stated:

> "The [c]ourt ... strongly believes that the 'nature and reasons for the disposition' of the [n]olle [p]rosequi [c]ounts against [the defendant] constitutes information that the public has a 'general right to know.' Although [the defendant] is correct that the jury ... 'did not find the allegations (of the [n]olle [p]rosequi [c]ounts) to be proven beyond a reasonable doubt' ... neither did the jury exonerate him of those charges. Indeed, someone interested in [the defendant's] past -- including a prospective employer thinking of hiring [him] for a position that would bring him into frequent contact with members of the public -- might very well want to know that, less than five years ago, a ... jury deadlocked over the question of whether [the defendant] had kidnapped, robbed, and raped a woman at gunpoint."

Aside from the factual error where the defendant was acquitted of the aggravating portion of the commission of his crimes at gunpoint, this factor undeniably is important. The particular reason for the nolle prosequis, that the victim relapsed and was unable to testify, does not speak to the defendant's innocence on the charges. See id. ("Defendants who were subject to wrongful accusations present the strongest case for sealing"). Despite his consideration of this relevant factor, where the judge failed to discuss all the factors mentioned supra in favor of the defendant ***847** and the Commonwealth's interests in keeping the records private, we cannot be sure that he appropriately balanced the interests relevant to a reasoned determination whether "substantial justice would best be served" by sealing.

Conclusion. We take no position on whether the defendant's record should be sealed on the counts in which the Commonwealth entered a nolle prosequi. We remand for the purpose of allowing the judge to adequately address and illustrate all the relevant factors in his balancing of the various interests. On remand, the defendant should clarify his position with respect to automatic sealing of the charges of which he was acquitted. If he determines that he would prefer them to remain open to the public, he must make a written request to the commissioner not to seal those records.

So ordered.

**All Citations**

491 Mass. 824, 208 N.E.3d 13

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**Footnotes**

1 The trial judge granted the defendant's motion for a required finding of not guilty as to the assault with intent to rape and carrying a firearm charges, and on so much of the rape, robbery, and kidnapping counts alleging the involvement of a firearm. The jury found the defendant not guilty on the first rape count.

2 We recognize the amicus briefs submitted by Greater Boston Legal Services and the Union of Minority Neighborhoods; Upturn, Inc.; and Community Legal Aid; and the amicus letter submitted by the Boston Bar Association.

3 The docket indicates that on April 4, 2017, the parties agreed that the trial judge reduced the aggravated portion of the remaining rape count and ordered the firearm provision removed from the robbery count in accordance with his decision on the required findings of not guilty.

4 According to the defendant's affidavit in support of his petition to seal his criminal record, the only other incident on his record is a charge of operating a motor vehicle with a suspended license, which was dismissed on the payment of court costs in 2012.

5 The judge indicated that this standard appeared in Pon, 469 Mass. at 313 n.24, 14 N.E.3d 182, discussed infra.

6 The judge also noted that this court "defer[ed]" to Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-511 (1st Cir. 1989) (Pokaski), and that this court "sa[id it is] going to be bound by [Pokaski]."

7 The defendant applied for, but was denied employment at, among other places, a factory, an international airport as a maintenance staff member, and a driver for various rideshare companies. The defendant stated that the factory job demanded his passport, and his criminal record had to be

clean. From a rideshare company, after he filled out an application, he received a notice that "there's something that's being presented that does not allow [him] to work."

8 The judge stated, with respect to the deadlocked jury on the charges of

> "rape with a firearm, robbery, armed and masked, and kidnapping with sexual assault, armed ..., wouldn't the public want to [k]now, if those charges were ... nol[ ] pros[s]ed after a jury deadlocked on the charges.
> "This is not a conviction; I understand it is not a conviction, but it also is -- and there's some indication that somebody thought there was some validity to the charges, because the jury deadlocked."

9 Before the First Circuit addressed § 100C, this court discussed the statute in Commonwealth v. Vickey, 381 Mass. 762, 767, 412 N.E.2d 877 (1980) (declining to extend availability of sealing beyond named dispositions to pardon as no "strong demonstration of a legislative purpose not to limit the availability of sealing to the named dispositions" where they "are premised on a presumption of innocence"). The court focused on the named dispositions in § 100C -- not guilty, nolle prosequi, no bill, no probable cause, dismissal -- and their connection to a presumption of innocence in reasoning that there is a real need for the remedy of sealing. Id. at 769, 412 N.E.2d 877. In other words, the court's perspective was that a criminal defendant should not suffer adverse consequences where no finding of guilt was entered.

10 The First Circuit held that there is no First Amendment right of access to grand jury records where a grand jury refuses to indict. Pokaski, 868 F.2d at 509.

11 Nonetheless, the court indicated that sealing under § 100C, first par., "was to occur automatically on the completion of a criminal case ending in one of the enumerated dispositions." Doe, 420 Mass. at 146-147, 648 N.E.2d 1255.

12 Prior to the 2010 reforms, the second paragraph of § 100C began, "[i]n any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, except in cases in which an order of probation has been terminated." G. L. c. 276, § 100C, as amended through St. 1984, c. 123.
In 2018, the Legislature made changes to the fourth paragraph of the statute, which is not at issue in this opinion. See St. 2018, c. 69, §§ 193, 194.

13 Indeed, in the present case, the charges against the defendant were published by at least one local news service.

14 Our conclusion is bolstered by the fact that numerous States have statutes commanding the automatic sealing of certain nonconvictions. See Colo. Rev. Stat. § 24-72-705(1)(a), (a.5); Conn. Gen. Stat. § 54-142a(a), (b); Fla. Stat. § 943.0595(2)(a), (3)(a); Ga. Code Ann. § 35-3-37(h); Ky.

Rev. Stat. Ann. § 431.076(1)(a); Mo. Rev. Stat. § 610.105(1); Neb. Rev. Stat. § 29-3523(3); N.H. Rev. Stat. Ann. § 651:5(II-a)(a); N.J. Rev. Stat. § 2C:52-6(a)(1); N.Y. Crim. Proc. Law § 160.50(1) (McKinney); 18 Pa. Cons. Stat. §§ 9121, 9122.2; R.I. Gen. Laws § 12-1-12.1; Utah Code Ann. § 77-40a-201(1)(a). See also State v. Apt, 319 Conn. 494, 510, 126 A.3d 511 (2015); Doe v. State, 347 Ga. App. 246, 247, 819 S.E.2d 58 (2018), quoting Ga. Code Ann. § 35-3-37(a)(6); State v. Coble, 299 Neb. 434, 440, 908 N.W.2d 646 (2018); State v. Williams, 173 N.H. 540, 545, 243 A.3d 900 (2020); People v. Anonymous, 34 N.Y.3d 631, 637, 123 N.Y.S.3d 41, 145 N.E.3d 924 (2020); State v. Diamante, 83 A.3d 546, 550-551 (R.I. 2014).

15 Were we to adopt the Commonwealth's interpretation of the statute, where a defendant is found not guilty on one charge, but guilty on five other charges within the same case, the language of the statute requiring sealing in "any criminal case wherein the defendant has been found not guilty" would seem to result in sealing of the records relating to all the charges, including the convictions. This would be nonsensical. See Commonwealth v. Peterson, 476 Mass. 163, 167, 65 N.E.3d 1166 (2017), quoting Commonwealth v. Parent, 465 Mass. 395, 409-410, 989 N.E.2d 426 (2013) ("we do not adhere blindly to a literal reading of a statute if doing so would yield an 'absurd' or 'illogical' result").

16 We understand the judge's point that "sealing all court and probation records concerning the [n]ot [g]uilty [c]ounts in isolation would be an extremely difficult task." Nonetheless, this was the Legislature's clear intent in enacting the statute. Were there to be a case where some counts are sealed and some are not, we presume that redaction of information within the records would achieve the intended outcome.

17 The judge also indicated this confusion at the motion hearing.

18 He admits that the judge's question "whether it would benefit [the defendant] to seal all court records pertaining to the [n]ot [g]uilty [c]ounts, while leaving the records pertaining to just the [n]olle [p]rosequi [c]ounts open to the public" has some force.

19 At the hearing, the defendant expanded on particular employment opportunities of which he was deprived, alleging that these opportunities were withheld because of his record in this case.

20 Where we have not been alerted otherwise by the Commonwealth, it appears that the defendant now has gone over seven years without being charged with any new offenses.

21 The judge indicated that the passage of time since dismissal of the nolle prosequi counts was insufficient for him to assess accurately the defendant's likelihood of recidivism and the additional safety threat sealing would pose. He also indicated that a prospective employer might want to know that "less than five years ago," a "jury deadlocked over the question of whether [the defendant] had kidnapped, robbed, and raped a woman at gunpoint." Further contributing to the error, the judge appeared to be incorrect about the "at gunpoint" comment: the parties agreed that the trial judge

reduced the aggravated portion of the remaining rape count and ordered the firearm provision removed from the robbery count.

# JUVENILE RECORD SEALING

**493 Mass. 470, 226 N.E.3d 845**
**Supreme Judicial Court of Massachusetts,**
**Suffolk.**

**In the MATTER OF an IMPOUNDED CASE**.
SJC-13465
Argued December 4, 2023.
Decided February 14, 2024.

**Synopsis**
**Background:** Petitioner appealed Commissioner of Probation's denial of his request that his youthful offender records be sealed pursuant to the juvenile delinquency sealing statute rather than the adult criminal record sealing statute. The Supreme Judicial Court, Lowy, J., reserved and reported the case to the full court without decision.

**The Supreme Judicial Court, Lowy, J., held that juvenile delinquency sealing statute, rather than adult criminal record sealing statute, is the proper statute for the sealing of records of youthful offenders in noncapital cases.**

So ordered.

**Procedural Posture(s):** Appellate Review; Juvenile Delinquency Proceeding. ****846**
Sealing. Youthful Offender Act.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on January 24, 2023.

The case was reported by Lowy, J.

**Attorneys and Law Firms**

Pauline Quirion, Boston, for the petitioner.

Nina L. Pomponio, Special Assistant Attorney General (Tonie J. Ryan also present) for Commissioner of Probation.

Paul M. Kominers, Kristen R. Gagalis, Tamara S. Wolfson, Leon Smith, Virginia Benzan, David M. Siegel, Boston & Susan Malouin, for Citizens for Juvenile Justice & others, amici curiae, submitted a brief.

Afton M. Templin, North Attleboro, Committee for Public Counsel Services, for youth advocacy division of the Committee for Public Counsel Services, amicus curiae, submitted a brief.
Present: Budd, C.J., Gaziano, Lowy, Kafker, Wendlandt, & Georges, JJ.[1]

**Opinion**

LOWY, J.

***470** This case requires us to determine which of the two relevant sources for record sealing -- G. L. c. 276, § 100A (§ 100A), the adult criminal record sealing statute, or G. L. c. 276, § 100B (§ 100B), the juvenile delinquency sealing statute -- governs the sealing of records from youthful offender proceedings. This appeal arises from the Commissioner of Probation's (commissioner's) denial of the petitioner's request that his ***471** youthful offender records be sealed pursuant to § 100B, with the commissioner instead applying the adult criminal record sealing statute, § 100A. We conclude that § 100B, the juvenile delinquency sealing statute, is the proper statute for the sealing of records of youthful offenders.[2,3]

****847** Background. In 2012, the petitioner was indicted on four counts of witness intimidation and three counts of felony extortion. The Juvenile Court ordered pretrial probation with respect to the extortion charges, which were later dismissed. With respect to two of the witness intimidation charges, the Juvenile Court adjudicated the petitioner a youthful offender and ordered his commitment to the Department of Youth Services. As to the other two witness intimidation charges, the Juvenile Court adjudicated the petitioner a youthful offender and ordered a seven-year probation sentence. The petitioner sought the sealing of his youthful offender records pursuant to § 100B in late 2021, having satisfied the listed requirements under that statute.[4] The commissioner denied the petitioner's request in early 2022, stating that the petitioner's youthful offender adjudications fell under § 100A, the requirements of which the petitioner had not met.[5] The petitioner appealed from the denial of his request by way of a petition in the ***472** county court seeking extraordinary relief pursuant to G. L. c. 211, § 3. The single justice reserved and reported the case to the full court without decision.

Discussion. Where a case is reserved and reported by the single justice, we do not need to decide if the case meets the standard for relief under G. L. c. 211, § 3, and instead may proceed to the merits. See Commonwealth v. Whitfield, 492 Mass. 61, 67 n.9, 208 N.E.3d 1278 (2023) ("Where the single justice has exercised [his or] her discretion to reserve and report the matter, we proceed to adjudicate the merits"). The question presented by the petitioner's appeal is whether youthful offender

dispositions may be sealed in a manner more like adult criminal records under § 100A or delinquency records under § 100B. Because this is a question of statutory interpretation, the standard of review is de novo. See Pembroke Hosp. v. D.L., 482 Mass. 346, 351, 122 N.E.3d 1058 (2019). "Legislative intent controls our interpretation of statutes." Commonwealth v. Montarvo, 486 Mass. 535, 536, 159 N.E.3d 682 (2020). Legislative intent can be gleaned by looking "to the words of the statute, construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished" (quotation and citation omitted). Commonwealth v. Garvey, 477 Mass. 59, 61, 76 N.E.3d 987 (2017). If the statutory ****848** language is clear, we conclude our analysis. See Montarvo, supra; Garvey, supra. If the statutory language is ambiguous, however, we then look to sources external to the statute to determine legislative intent. See Matter of E.C., 479 Mass. 113, 118, 92 N.E.3d 724 (2018).

1. Plain text. When interpreting a statute, we look first to the "plain and ordinary meaning" of the statutory language (citation omitted). Velazquez v. Commonwealth, 491 Mass. 279, 281, 201 N.E.3d 1250 (2023). See Care & Protection of Rashida, 488 Mass. 217, 225, 172 N.E.3d 390 (2021), S.C., 489 Mass. 128, 180 N.E.3d 428 (2022). If specific terms remain undefined under the statute, we may look to dictionary definitions to understand a term's ordinary meaning. See Commonwealth v. Rossetti, 489 Mass. 589, 593, 186 N.E.3d 729 (2022); Harmon v. Commissioner of Correction, 487 Mass. 470, 479, 168 N.E.3d 320 (2021) ("For terms that are not 'technical,' we construe statutory words and phrases in their 'common and approved usage' " [citation omitted]).

***473** The relevant plain text of § 100A applies the statute to "person[s] having a record of criminal court appearances and dispositions." The relevant plain text of § 100B applies the statute to "person[s] having a record of entries of a delinquency court appearance." Neither statute references youthful offender adjudications -- understandably, given that the category of youthful offender was created in 1996, long after §§ 100A and 100B were passed.

Where adult criminal records may be sealed under § 100A and delinquency records may be sealed under § 100B, we are unconvinced that the Legislature intended that a category of offenders under age eighteen be deprived of the opportunity to have their records sealed under at least certain circumstances. See Commonwealth v. Rainey, 491 Mass. 632, 642, 205 N.E.3d 1090 (2023) ("our respect for the Legislature's considered judgment dictates that we interpret the statute to be sensible, rejecting unreasonable interpretations unless the clear meaning of the language requires such an interpretation" [citation omitted]).

We assume that the Legislature is aware of existing statutes and thus interpret statutes in harmony with prior enactments to promote a consistent body of law. See Globe Newspaper Co., petitioner, 461 Mass. 113, 117, 958 N.E.2d 822 (2011) ("In interpreting a statute, we presume that when the

Legislature enacts a law it is aware of the statutory and common law that governed the matter in which it legislates"); Commonwealth v. Callahan, 440 Mass. 436, 440-441, 799 N.E.2d 113 (2003). See also Montarvo, 486 Mass. at 541, 159 N.E.3d 682 ("The Legislature is presumed to be aware of the prior state of the law as explicated by the decisions of this court" [citation omitted]). Accordingly, we agree with the parties that either § 100A or § 100B permits sealing of youthful offender records.

The petitioner contends that the "criminal court" language of § 100A cannot apply to him because youthful offender proceedings, which occur in the Juvenile Court, are not criminal in nature. Department of Youth Servs. v. A Juvenile, 384 Mass. 784, 786, 429 N.E.2d 709 (1981) ("An adjudication concerning a juvenile is not, of course, a conviction of [a] crime"). The petitioner likewise contends that the phrase "delinquency court" in § 100B is inclusive of youthful offender proceedings because "delinquency" is often understood to encompass a wide range of adjudications of individuals under eighteen years of age. "[D]elinquency" and "delinquency court" are undefined under the statute. Black's Law Dictionary (11th ed. 2019) defines juvenile delinquency broadly ***474** as "a juvenile's ****849** violation of the law," or more specifically as behavior "by a minor ... that would be criminally punishable if the actor were an adult, but instead is usu[ally] punished by special laws applying only to minors." Id. at 1038.

As the commissioner notes, however, the Legislature maintains distinct categories of delinquent child and youthful offender proceedings. See G. L. c. 119, § 58 (describing separate procedures for when juveniles are adjudicated "delinquent child[ren]" versus "youthful offender[s]"). Accordingly, while the dictionary definition of delinquency is expansive, it does not square with the Legislature's distinction between delinquent children and youthful offenders. In sum, the texts of § 100A and § 100B, neither of which contains any reference to the category of youthful offender or otherwise addresses youthful offender proceedings, are ambiguous on the matter of the sealing of the petitioner's record.

2. Sources external to the statutes. Where statutory language is ambiguous, we turn to extrinsic sources to determine the Legislature's probable intent as it pertains to the sealing of youthful offender records. See Harmon, 487 Mass. at 479, 168 N.E.3d 320. Because neither the adult criminal record sealing statute nor the juvenile delinquency sealing statute mentions youthful offenders, and because we have concluded that the Legislature intended for there to be a path for the sealing of youthful offender adjudications, we are tasked with determining whether, in the context of sealing records, the Legislature intended for youthful offenders to be treated more like other juveniles or more like adults based on extrinsic sources.

The commissioner urges that we look to G. L. c. 119, § 60A (§ 60A), which governs the "[i]nspection of records in youthful offender and delinquency cases," to glean the Legislature's intent with regard

to the sealing of youthful offender adjudications. Under § 60A, the commissioner notes, youthful offender proceedings are open to the public "in the same manner and to the same extent as adult criminal court." The commissioner argues that this statute suggests a broader statutory scheme under which youthful offenders are to be treated the same as adult criminal offenders.

In contrast, the petitioner contends that § 60A reveals the Legislature's intent that youthful offenders be treated more like other juveniles than adults. The statute states:

> "The records of a youthful offender proceeding conducted pursuant to an indictment shall be open to public inspection ***475** in the same manner and to the same extent as adult criminal court records. All other records of the court in cases of delinquency arising under [§§ 52 to 59], inclusive, shall be withheld from public inspection except with the consent of a justice of such court ..." (emphasis added).

G. L. c. 119, § 60A. The petitioner argues that the word "other" indicates that the Legislature intended youthful offender proceedings to be a subcategory of delinquency cases.

Moreover, the petitioner directs the court to G. L. c. 119, § 53 (§ 53), which governs the interpretation of § 60A. Section 53 instructs that § 60A "shall be liberally construed so that ... children brought before the court ... shall be treated, not as criminals, but as children in need of aid, encouragement and guidance." Section 53 further indicates that "[p]roceedings against children under [§ 60A] shall not be deemed criminal proceedings." We agree with the petitioner that § 60A's likening of youthful offender records to delinquency records by use of the word "other" and, more significantly, § 53's overarching ****850** mandate that youthful offenders be treated as children in need of aid are more indicative of the Legislature's intent as to the sealing of youthful offender records than § 60A's "public inspection" directive that youthful offender proceedings be open to the public.

More broadly, the commissioner argues that the Legislature provides for separate processes for delinquent children and youthful offenders to hold youthful offenders more accountable for more severe offenses, indicating its intent to treat youthful offenders more like adults than delinquent children. The Commonwealth initiates all delinquency proceedings by way of complaints in the Juvenile Court, whereas the Commonwealth may proceed by indictment in the Superior Court when a juvenile qualifies as a youthful offender. G. L. c. 119, §§ 52, 54. An indictment is required for a juvenile to be adjudicated a youthful offender, which is not the case for delinquent children. See G. L. c. 119, § 54; Commonwealth v. Hampton, 64 Mass. App. Ct. 27, 34, 831 N.E.2d 341 (2005). Should a juvenile be adjudicated a youthful offender as opposed to a delinquent child, a judge may sentence him or her as if he or she had been an adult. See G. L. c. 119, § 58. But see Commonwealth v. Connor C., 432 Mass. 635, 641, 738 N.E.2d 731 (2000) ("At the same time, the provisions of the

1996 amendments did not eviscerate the longstanding principle that the treatment of children who offend our laws are not criminal proceedings").

***476** The petitioner argues that the Legislature provides for a separate Juvenile Court system to maintain a distinction between minors and adults facing charges, indicating its intent to treat youthful offenders more like delinquent children than adults. While youthful offender adjudications, compared to delinquency adjudications, allow for harsher sentencing for more serious offenses such as firearms offenses or those involving the infliction or threat of serious bodily harm, the distinction between these two kinds of adjudications "affects only sentencing." Commonwealth v. Dale D., 431 Mass. 757, 761, 730 N.E.2d 278 (2000). See G. L. c. 119, § 54. Although youthful offender proceedings are begun by indictment, "the Juvenile Court retains jurisdiction over a juvenile in noncapital cases whether the juvenile is indicted as a youthful offender or proceeded against by complaint." Dale D., supra, citing G. L. c. 263, § 4, and G. L. c. 119, § 58. We find this latter fact persuasive.

As we have consistently recognized, the Juvenile Court is a "forum[ ] in which, to the extent possible, the best interests of the child serve to guide disposition" (citation omitted). Commonwealth v. Magnus M., 461 Mass. 459, 466, 961 N.E.2d 581 (2012). "[A]n adjudication of a juvenile as a youthful offender subjects him [or her] to more severe penalties, including State prison sentences, see G. L. c. 119, § 58, but it does not transform his illegal act from an act of delinquency into a crime, and does not change the statutory obligation to treat him 'as far as practicable' as a child 'in need of aid, encouragement and guidance' rather than as a criminal." Commonwealth v. Anderson, 461 Mass. 616, 630, 963 N.E.2d 704, cert. denied, 568 U.S. 946, 133 S.Ct. 433, 184 L.Ed.2d 265 (2012), citing G. L. c. 119, § 53.

Furthermore, a scheme that forces juveniles who meet the standard for record sealing under § 100B to wait considerably longer before they may pursue record sealing under § 100A, or otherwise accept that their record can never be sealed under § 100A, fails to aid, encourage, and guide children and instead may interfere with their capacity to thrive. See ****851** Globe Newspaper Co. v. District Attorney for the Middle Dist., 439 Mass. 374, 384, 788 N.E.2d 513 (2003) ("ready access to a defendant's prior criminal record might frustrate a defendant's access to employment, housing, and social contacts necessary to [his or her] rehabilitation"). The petitioner's records involving witness intimidation charges, for example, could not be sealed pursuant to § 100A, even if he requested sealing after waiting the longer seven-year period. That certain children could never have their records sealed does not ***477** accord with the Legislature's intent that the best interests of the child be prioritized in Juvenile Court dispositions. Thus, we agree with the petitioner that the Legislature's maintenance of a separate Juvenile Court system reflects its intention to treat juveniles tried in that system differently from adults.

After review of the text of §§ 100A and 100B and an analysis of legislative intent as to youthful offender adjudications as revealed in §§ 53 and 60A and more broadly, we conclude that the Legislature intended that, in the context of record sealing, youthful offender adjudications be treated more like delinquency adjudications than adult criminal adjudications.

Conclusion. In sum, we conclude that, in the absence of further legislative guidance, § 100B's process is most consistent with the directive of the Legislature to aid, encourage, and guide juveniles, including youthful offenders. Accordingly, we hold that it was error for the commissioner to refuse to seal the petitioner's Juvenile Court records pursuant to § 100B, given that the petitioner has satisfied all listed requirements and the statute mandates sealing in such instances. The case is remanded to the county court for the entry of a judgment in favor of the petitioner.[6]

So ordered.

**All Citations**

493 Mass. 470, 226 N.E.3d 845

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**Footnotes**

1 Justice Lowy participated in the deliberation on this case and authored this opinion prior to his retirement.

2 This opinion exclusively concerns youthful offender records in noncapital cases. Nothing in this opinion addresses the issue of record sealing as it relates to capital cases.

3 We acknowledge the amicus briefs submitted by Citizens for Juvenile Justice, the Massachusetts Law Reform Institute, the New England Law CORI Initiative, Northeast Legal Aid, and the University of Massachusetts Law School Human Rights at Home Clinic; and the youth advocacy division of the Committee for Public Counsel Services.

4 In part, § 100B provides that "[a]ny person having a record of entries of a delinquency court appearance in the commonwealth ... may ... request that" his or her record be sealed. Pursuant to § 100B, the commissioner must seal the record of such an applicant provided the applicant satisfies certain listed requirements. The relevant listed requirement of § 100B is that an applicant's court appearances and court dispositions, including any period of supervision or probation, must have been closed at least three years prior to the request. The petitioner satisfies this requirement.

5 In part, § 100A provides that "[a]ny person having a record of criminal court appearances and dispositions in the commonwealth ... may ... request that" his or her record be sealed. Pursuant to §

100A, the commissioner must seal the record of such an applicant provided the applicant satisfies certain listed requirements. The relevant listed requirement of § 100A is that an applicant's court appearances and court dispositions, including any period of custody, for any felony record must have been closed at least seven years prior to the request. Also relevant is that § 100A does not apply in cases of convictions for witness intimidation charges; records of such convictions generally cannot be sealed. See G. L. c. 268, § 13B. The petitioner has not satisfied the seven-year waiting period requirement, and his records involve adjudications for witness intimidation charges, which cannot be sealed under § 100A.

[6] Because we allow the petitioner's request for relief pursuant to G. L. c. 211, § 3, we need not address his request for mandamus relief pursuant to G. L. c. 249, § 5. Likewise, because we decide for the petitioner on statutory interpretation grounds, we need not address the petitioner's arguments whether the commissioner's interpretation of the sealing laws violated the equal protection principles of the Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights or is otherwise repugnant to the laws of the Commonwealth.

# EXPUNGEMENT

**193 N.E.3d 1069**
**Supreme Judicial Court of Massachusetts,**
**Suffolk.**

**COMMONWEALTH**
**v.**

**K.W.,**

**SJC-13153**
|
**Argued January 7, 2022**
|
**Decided September 8, 2022**

## Synopsis

**Background:** Defendant petitioned to expunge records related to two separate incidents in which he was arrested for possession of marijuana, and for which he was convicted on marijuana-related charges. The Boston Municipal Court Department, Dorchester Division, Jonathan R. Tynes, J., denied the petition and defendant's motion for reconsideration. Defendant appealed.

**Holdings:** As a matter of first impression, the Supreme Judicial Court, Georges, J., held that:

[1] judges considering whether reason-based expungement of a criminal record is in "the best interests of justice" must balance the petitioner's strong presumption in favor of expungement against any significant countervailing concern;

[2] judges must enter written findings upon denial of a reason-based expungement; and

[3] record suggested no countervailing factors that may have weighed against allowing defendant to expunge his marijuana-related records, and thus expungement was warranted.
**Vacated and remanded**.

**Procedural Posture(s):** Appellate Review; Expungement Proceeding; Motion for Reconsideration.

***1072** Expungement. Criminal Records. Marijuana. Statute, Construction. Words, "Best interests of justice."

COMPLAINTS received and sworn to in the Dorchester Division of the Boston Municipal Court Department on June 30, 2003, and May 22, 2006.

A petition for expungement, filed on June 26, 2019, was heard by Jonathan R. Tynes, J., and a motion for reconsideration was considered by him.

The Supreme Judicial Court granted an application for

direct appellate review. **Attorneys and Law Firms**

Pauline Quirion, Boston, for the petitioner.

Andrew S. Doherty, Assistant District Attorney, for the Commonwealth.

Foundation, Inc., & others, amici curiae, submitted a brief.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker,

Wendlandt, & Georges, JJ. **Opinion**

**GEORGES, J.**

***1073 K.W**. filed a petition pursuant to G. L. c. 276, § 100K, in the Boston Municipal Court, seeking to have expunged two sets of criminal records stemming from separate arrests that had both occurred more than fifteen years earlier. Each set of records involved charges or convictions of possession of an amount of marijuana that since has been decriminalized. See, e.g., G. L. c. 94C, § 32L. A Boston Municipal Court judge denied both petitions on the ground that it was not "in the best interests of justice" to expunge the records. See G. L. c. 276, § 100K (b). The judge subsequently denied **K.W**.'s motion for reconsideration. Because we conclude that the judge abused his discretion in concluding that, here, expungement was not "in the best interests of justice," the order denying **K.W**.'s petition for expungement must be reversed. More generally, we conclude that petitions for expungement that satisfyG. L. c. 276, § 100K (a), are entitled to a strong presumption in favor of expungement, and petitions for expungement in such cases may be denied only if a significant countervailing concern is raised in opposition to the petition.[1]

1. Background. a. Facts. **K.W**. seeks to have expunged records related to two incidents, in 2003 and 2006, in which he was arrested for possession of marijuana. In each instance, the facts are undisputed.

In 2003, **K.W**. was a rear-seat passenger in a vehicle that was stopped for asserted traffic violations. During the stop, an officer pat frisked **K.W**. and found what the officer later described as "a small plastic bag of green vegetable-like substance believed to be marijuana." **K.W**. subsequently was charged with possession of a class D controlled substance, G. L. c. 94C, § 34. He filed a motion to suppress the evidence seized during the stop, and when no police officer appeared at the hearing on that motion, the case was dismissed.

In 2006, K.W. was stopped by a police officer for driving at approximately forty miles per hour in a residential area. During the stop, K.W. presented the officer with another person's driver's license, and was found with what the officer later described as "two plastic bags containing an undetermined amount of a vegetable matter believed to be a Class D substance, to wit, marijuana." K.W. later provided his actual name to the officer, and from this, police learned that he had been driving with a suspended driver's license.

K.W. was arraigned on six charges. To three of these charges -- one count of possession of a class D substance, G. L. c. 94C, § 34; refusal to identify himself, G. L. c. 90, § 25; and operating a motor vehicle with a suspended license, G. L. c. 90, § 23 -- K.W. pleaded guilty. The other three charges -–concealing identification, G. L. c. 90, § 23; use of a motor vehicle without authority, G. L. c. 90, § 24 (2) (a); and the other count of possession of a class D substance, G. L. c. 94C, § 34 -- were dismissed at the Commonwealth's request. K.W. was sentenced to one year of probation, and later petitioned successfully for the sealing of all records pertaining to both the 2003 and 2006 incidents.[2]

***1074** b. The expungement statute. In 2018, Massachusetts enacted an omnibus package of criminal justice reforms entitled "An Act relative to criminal justice reform" (2018 criminal justice reform act or act). See St. 2018, c. 69. Among other changes, the act created two distinct pathways by which to seek expungement of two different types of criminal records. See Matter of Expungement, 489 Mass. 67, 69, 179 N.E.3d 1081 (2022). One pathway, typically referred to as "time-based" expungement, is available to those who committed certain low-level offenses before the age of twenty-one. See id. The pathway at issue here, generally known as "reason-based" expungement, id. at 71, 179 N.E.3d 1081, is set forth in G. L. c. 276, § 100K. That statute provides:

"(a) Notwithstanding the requirements of [G. L. c. 276, §§] 100I and 100J, a court may order the expungement of a record created as a result of criminal court appearance, juvenile court appearance or dispositions if the court determines based on clear and convincing evidence that the record was created as a result of:

"(1) false identification of the petitioner or the unauthorized use or theft of the petitioner's identity;

"(2) an offense at the time of the creation of the record which at the time of expungement is no longer a crime, except in cases where the elements of the original criminal offense continue to be a crime under a different designation;

"(3) demonstrable errors by law enforcement;

"(4) demonstrable errors by civilian or expert witnesses;

"(5) demonstrable errors by court employees; or

"(6) demonstrable fraud perpetrated upon the court.

"(b) The court shall have the discretion to order an expungement pursuant to this section based on what is in the best interests of justice. Prior to entering an order of expungement pursuant to this section, the court shall hold a hearing if requested by the petitioner or the district attorney. Upon an order of expungement, the court shall enter written findings of fact.

"(c) The court shall forward an order for expungement pursuant to this section forthwith to the clerk of the court where the record was created, to the commissioner [of probation] and to the commissioner of criminal justice information services appointed pursuant to [G. L. c. 6, § 167A]." (Emphasis added.)

c. Procedural history. In 2019, **K.W**. filed a petition in the Boston Municipal Court seeking expungement of the marijuana-related records created in 2003 and 2006. Attached to the petition was an affidavit in which **K.W**. averred that the amount of marijuana at issue in both incidents was under one ounce. In the petition, **K.W**. described the "cloud of prosecution" that would continue to linger over him if those marijuana-related records were not expunged. The affidavit explained the steps **K.W**. was taking to secure new employment, and his involvement with his religious community. The affidavit also indicated that **K.W**. was then living with a ***1075** friend and providing child care for his friend's children, and that he hoped to secure a home of his own to better facilitate spending time with his own children. Representatives from an organization with which **K.W**. had completed a job training program
and the community with which **K.W**. worshiped both submitted letters commending **K.W**. for his efforts at self-improvement, attesting to his character, and supporting his attempt to expunge the marijuana-related criminal records.

A hearing on the petition took place in August of 2019. Present were **K.W**.'s attorney and an assistant district attorney. The assistant district attorney told the judge that the Commonwealth did not object to the petition for expungement. At the conclusion of the hearing, the following exchange took place:

THE PROSECUTOR: "There would be no objection from the Commonwealth

[to the petition], Your Honor." THE JUDGE: "All right. And do you know the

effects of expungement?"

THE PROSECUTOR: "So I believe it limits anybody's access to the record where if it were to be viewed, the [criminal offense record information] would come up empty, including to police, [State] agencies, employers, anybody who would have access to a previously sealed record."

THE JUDGE: "What do you say about the effects of expungement?"

**K.W**.'S COUNSEL: "Well, Your Honor, these would

destroy the police records." THE JUDGE: "Destroy all

records?"

**K.W**.'S COUNSEL: "Yes, and as well as the Court records and so the only record that would still exist, Your Honor, would be left to the [Federal Bureau of Investigation (FBI)], and with this new expungement act, there is actually a system being set up so that the expungement notices go to the FBI so that they can decide whether or not to also take it off of the FBI record."

THE JUDGE: "Okay. All right. All right. Thank you. I'll take it under advisement."

In October of 2019, the judge denied the petition for expungement on the grounds that **K.W**. had not filed his petition correctly with the Commissioner of Probation (commissioner), and that "the Court does not find that it is in the interest of justice to destroy all records relating to the charges." In December of 2019, **K.W**. filed a motion for reconsideration. A few days later, the commissioner's deputy legal counsel submitted to the court a letter asserting that **K.W**.'s initial petition had been filed properly; because it sought a reason-based expungement, there was no need to submit it to the commissioner. In April of 2020, the same judge denied the motion for reconsideration. The judge's order stated, in full, "As previously noted the Court does not find that it is in the interest of justice to destroy all records relating to the charges." **K.W**. appealed, and we granted his application for direct appellate review.

**[1] [2] [3] [4] [5]** [6]2. Discussion. a. Standards of review. In reviewing a decision on a motion to expunge, we consider whether the judge abused his or her discretion. See Commonwealth v. Pon, 469 Mass. 296, 299, 14 N.E.3d 182 (2014). That determination is based in part on whether the judge made an error of law in interpreting the relevant statutes; we review the interpretation of a statute de novo. See People for the Ethical Treatment of Animals, Inc. v. Department of Agric. Resources, 477 Mass. 280, 285, 76 N.E.3d 227 (2017). "Where the words [of a statute] are 'plain and unambiguous' in their meaning, we view them as 'conclusive as to legislative intent' " (citation omitted). ***1076** Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 271, 94 N.E.3d 370 (2018). But where "the meaning of a statute is not plain from its language, familiar principles of statutory construction guide our interpretation. We look to the intent of the Legislature 'ascertained from all its words ... considered in connection with the cause of [the statute's] enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated' " (citation omitted). Id.

[7]b. The "best interests of justice" standard. The judge concluded that granting **K.W**.'s petition for expungement would not be "in the best interests of justice." See G. L. c. 276, § 100K (b). This phrase is both undefined in the statute and open to a nearly endless number of plausible interpretations; the plain statutory text therefore is ambiguous. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 818, 857 N.E.2d 1052 (2006) ("When a statute is 'capable of being understood by reasonably well-informed persons in two or more different senses,' it is ambiguous" [citation omitted]). Much can be gleaned, however, from examining both the structure of the statute as a whole and the other provisions of G. L. c. 276, § 100K. See Casseus v. Eastern Bus Co., Inc., 478 Mass. 786, 795, 89 N.E.3d 1184 (2018) ("When the meaning of any particular section or clause of a statute is questioned, it is proper, no doubt, to look into the other parts of the statute ..." [citation omitted]). A judge ordering expungement under G. L. c. 276, § 100K (a), must employ a two-part analysis. "First, the judge must make findings based on clear and convincing evidence that the relevant criminal record was created because of one or more of the reasons listed in G. L. c. 276, § 100K (a)." Matter of Expungement, 489 Mass. at 68, 179 N.E.3d 1081. Only after making such findings may a judge consider "whether expungement would be 'in the best interests of justice.' " Id., quoting G. L. c. 276, § 100K (b).

Because a petition only receives consideration under G. L. c. 276, § 100K (b), if it first satisfies G. L. c. 276, § 100K (a),[3] we may look to the development of the factors enumerated in G. L. c. 276, § 100K (a), to inform our interpretation of the phrase "the best interests of justice" in G. L. c. 276, § 100K (b). See, e.g., Worcester v. College Hill Props., LLC, 465 Mass. 134, 139, 987 N.E.2d 1236 (2013) ("if reasonably possible, all parts [of a statute] shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose"). The factors enumerated in G. L. c. 276, § 100K (a), set a very high bar: the record at issue must pertain to a now-decriminalized offense or have been the product of "fraud" or "demonstrable error." See, e.g., Commonwealth v. A.G., 97 Mass. App. Ct. 1126, 2020 WL 3481431 (2020) (affirming denial of petition for reason-based expungement because arrest that created record, according to motion judge, was ***1077** "judgment call" by police, which is not "the kind of demonstrable error contemplated by the statute").

These factors, furthermore, appear to be a direct response to decisions issued by this court in the years leading up to the enactment of the 2018 criminal justice reform act. Two cases, Commonwealth v. Boe, 456 Mass. 337, 924 N.E.2d 239 (2010), and Commonwealth v. Moe, 463 Mass. 370, 974 N.E.2d 619 (2012), cert. denied, 568 U.S. 1231, 133 S.Ct. 1606, 185 L.Ed.2d 582 (2013), are particularly salient in this regard. In both, we concluded that even though the petitioners' records had been created as a result of profound errors or fraud, those records could not be expunged because the Legislature had decided that sealing was the sole remedy available for records generated as a result of such situations.

In Boe, 456 Mass. at 338-340, 924 N.E.2d 239, for instance, the petitioner sought the expungement of a record that had been created because of a litany of errors by a number of government officials. The fiasco began when a man driving Boe's vehicle got into a two-car accident. When the other driver requested the license and registration of the male driver, "he told her that the car was not his, he threatened to return to the scene with a gun, and then he drove away without providing" any information. Id. at 338, 924 N.E.2d 239. "The police traced the registration plate information through the registry of motor vehicles and learned that" the vehicle was registered to Boe. Id.

Notwithstanding that the offending driver had been identified as a man, while Boe was a woman, police applied for a criminal complaint charging Boe with leaving the scene of an accident after causing personal injury, see G. L. c. 90, § 24 (2) (a 1/2) (1), and a hearing was scheduled "to determine whether probable cause existed to support the charge." Boe, 456 Mass. at 338, 924 N.E.2d 239. Boe "arrived on time for the hearing," but she mistakenly was directed by a court employee to an arraignment session. Id. After waiting for "a long period of time," she inquired about the status of her hearing and was informed, by a different employee, that she was in the wrong place. Id. at 338-339, 924 N.E.2d 239. In the interim, Boe learned, her absence from the hearing had resulted in the issuance of a criminal complaint against her, and she was told to expect a summons with information about her next court date. Id. at 339, 924 N.E.2d 239. Eventually, these errors were revealed, and Boe and the Commonwealth filed a joint motion to dismiss the complaint and to expunge Boe's record, asserting that, as this court summarized it, "expungement was appropriate because the complaint should not have issued in the first instance." Id. The motion judge agreed, dismissed the complaint, and ordered the record expunged. The commissioner, however, filed a motion for reconsideration of the order of expungement on the ground that the judge lacked the statutory authority to order expungement of a record of this type, and that sealing thus was Boe's only available remedy. Id.

The Appeals Court upheld the order, Commonwealth v. Boe, 73 Mass. App. Ct. 647, 900 N.E.2d 884 (2009), but this court reversed. In holding that Boe's record could not be expunged, we acknowledged that the record was created by compounding errors in which Boe played no part, from the "error by the police in misidentifying Boe as the operator of the vehicle" to "the court's error in misdirecting Boe" when she arrived for her show cause hearing. Boe, 456 Mass. at 347, 924 N.E.2d 239. Nonetheless, we concluded that "where the Legislature has clearly prescribed [sealing as] the remedy for limiting access to probation ***1078** records when a criminal case has been dismissed, it is not the province of this court to decide that a different remedy would be more appropriate." Id.

Two years later, in Moe, we applied the holding of Boe to a similarly unfortunate set of circumstances. Moe was the victim of blatant extortion. See Moe, 463 Mass. at 370-371, 974 N.E.2d 619. A man named Ramon Benzan told police that Moe had "pulled a gun" on him in an attempt to avoid paying Benzan a debt he owed. Id. at 371, 974 N.E.2d 619. The incident was entirely fabricated, but police nonetheless arrested Moe at his home and charged him with assault by means of a dangerous weapon, in violation of G. L. c. 265, § 15B (b). Id. While Moe prepared his defense, Benzan told Moe's attorney that he would go on "national television" and describe the assault if Moe did not pay him $5,000. Id.

Eventually, Benzan's story fell apart; after a detective expressed doubts about the allegations, "the prosecutor filed a nolle prosequi," which attested that "based on the evidence it would not be in the interest of justice to further prosecute this case." Id. at 372, 974 N.E.2d 619. As in Boe, Moe filed a motion to expunge the record, and the commissioner opposed the motion. Id. A Boston Municipal Court judge denied the motion for expungement on the ground that the judge "had no legal authority to expunge the criminal records," and that the only available remedy was sealing. Id. After concluding that "this case presents a set of facts very similar to those in Boe, and that case governs," we affirmed the denial. Id. at 375, 974 N.E.2d 619.

"By the enactment of G. L. c. 276, § 100K (a)," however, "the Legislature provided courts precisely the expungement authority that they lacked when Boe and Moe were decided." Matter of Expungement, 489 Mass. at 78, 179 N.E.3d 1081. Indeed, many of the factors enumerated in G. L. c. 276, § 100K (a), describe the precise errors that led to the creation of the records in those cases; such factors include "false identification of the petitioner," G. L. c. 276, § 100K (a) (1); "demonstrable errors by law enforcement," G. L. c. 276, § 100K (a) (3); and "demonstrable errors by court employees," G. L. c. 276, § 100K (a) (5). Other factors concern closelyrelated errors. See, e.g., G. L. c. 276, § 100K (a) (4) ("demonstrable errors by civilian or expert witnesses"), and G. L. c. 276, § 100K (a) (6) ("demonstrable fraud perpetrated upon the court"). In light of this legislative directive, it would be a mistake to interpret "the best interests of justice" provision as allowing judges wide latitude to deny otherwise-eligible reason-based petitions for expungement. See, e.g., Rosnov v. Molloy, 460 Mass. 474, 482, 952 N.E.2d 901 (2011) (noting that "this court has interpreted 'swift legislative action in the wake' of a contrary judicial ruling to evince legislative intent to clarify its position on the issue" [citation omitted]).

[8]The reason-based expungement provisions, moreover, differ in crucial and illuminating ways from the time-based expungement provisions, which the Legislature also enacted as part of the 2018 criminal justice reform act. See G. L. c. 276, § 100I. Broadly speaking, time-based expungement is available to petitioners who were under the age of twenty-one at the time the record was created, whose offenses or alleged offenses were "lower level," and for whom at least three and as many as seven years have passed since the successful completion of any sentence imposed as a result of the offense. See Matter of Expungement, 489 Mass. at 69, 179 N.E.3d 1081, citing G. L. c. 276, § 100I (a) (1)-(3). Petitioners also are excluded from time-based expungement if their record pertains to any of the twenty categories of ***1079** offenses enumerated in G. L. c. 276, § 100J. SeeG. L. c. 276, § 100I (a) (1).

**[9]** [10]Reason-based expungement, by contrast, requires none of these hurdles; reason-based petitioners may have been any age at the time of the creation of the record, and the records they seek to expunge may be from any time and may pertain to any kind of criminal offense, no matter how serious. The relative lack of constraint on those seeking reason-based expungement evinces that the Legislature conceived of expungement as likely appropriate in those rare cases in which the record exists because of "fraud," "false identification," or "demonstrable error," or pertains to behavior that no longer constitutes a criminal act. Reason-based expungement, therefore, is a pathway for which few will meet the threshold qualifications, but those petitioners who do must be entitled to a strong presumption that their records should be expunged.

We previously have observed that "there are situations where the maintenance of criminal records of a particular individual cannot be said to serve any valid law enforcement purpose because the events whose happening they reflect are of little or no relevance to the individual's likelihood of participation

in future criminal activities or necessary to the achievement of other ancillary goals of the criminal justice system." Police Comm'r of Boston v. Municipal Court of the Dorchester Dist., 374 Mass. 640, 658, 374 N.E.2d 272 (1978). Indeed, the record of a decriminalized offense is the paradigmatic example of such a record; even if a petitioner were again to engage in the same conduct as that which created the record, the petitioner would not have committed a criminal act. And this principle applies with equal force to records whose origins in "demonstrable error," "false identification," or "fraud," see G. L. c. 276, § 100K (a), suggest that the records should not have been created in the first instance.

The context for the development of the other reason-based factors, moreover, as typified by the Legislature's response to Boe and Moe, shares a common purpose with the development of G. L. c. 276, § 100K (a) (2). The fact that the Legislature chose to include expungement of decriminalized records in the reason-based factors indicates that it viewed all six types of records as equally worthy of expungement and intended that they be subject to the same level of judicial discretion. Fundamentally, both types of factors represent an effort to make expungement more available where the Legislature has determined that the continued existence of those types of records would be unjust. For instance, the cochair of the committee that led the Legislature's criminal justice reform efforts noted, before the final vote on the legislation, that adoption of the act would mean that "the hope for a fairer and more equitable criminal justice system is being realized," highlighting in particular that the legislation would "allow adult expungement including an offense that is no longer a crime" as part of the Legislature's efforts to "let people reenter society." Report on Senate Bill No. 2371 -- An Act relative to criminal justice reform, at 9 (statement of Rep. Claire Cronin, Apr. 2, 2018).

**[11]** [12]Nonetheless, we recognize that the factors enumerated in G. L. c. 276, § 100K (a), are not self-executing. The Legislature could have made the kinds of records described therein automatically eligible for expungement, as it has done for the sealing of records of decriminalized offenses, see G. L. c. 276, § 100A, yet it did not. The choice to reserve some judicial discretion for reason-based expungement, however, should not be understood as a grant of broad authority. Rather, ***1080** G. L. c. 276, § 100K (b), provides a mechanism by which judges considering whether to eliminate a criminal record permanently can account for the kind of rare countervailing factors that the Legislature could not anticipate with precision, but that would warrant retaining a record that either should never have been created or no longer represents criminal behavior. To conclude otherwise would risk resetting the expungement landscape to something similar to that of the era of Boe, 456 Mass. at 348, 924 N.E.2d 239, and Moe, 463 Mass. at 375, 974 N.E.2d 619, a landscape the Legislature clearly has rejected.

**[13] [14]**K.W. argues that this case presents a situation similar to that in Pon, 469 Mass. at 312, 14 N.E.3d 182. We disagree. The context there differs meaningfully from the inquiry here. In Pon, we established a new standard for judges to apply in determining whether "substantial justice would best be served" by the sealing of a criminal record pursuant to G. L. c. 276, § 100C, and interpreted that phrase "to mean that the defendant must establish that good cause exists for sealing." Pon, supra.[4] In so doing, we noted that the relevant amendments to the sealing statute derived from the Legislature's attempt to balance the public's right of access to information contained in criminal records with the Commonwealth's interest in helping those who have served their criminal sentences to be reintegrated as productive members of society, and the defendant's interest in receiving a fresh start. Id. at 315, 14 N.E.3d 182. As we explained,

"judges evaluating a petition for sealing must recognize the interests of the defendant and of the Commonwealth in keeping the information private. These interests include the compelling governmental interests in reducing recidivism, facilitating reintegration, and ensuring self-sufficiency by promoting employment and housing opportunities for former criminal defendants.... Where there is persuasive evidence that employers and housing authorities consider criminal history in making decisions, there is now a fully articulated governmental interest in shielding criminal history information from these decision makers where so doing would not cause adverse consequences to the community at large."

Id. The good cause standard announced in Pon, id. at 312, 14 N.E.3d 182, as well as our detailed explanation of the factors that judges should consider in applying that standard, see id. at 316-319, 14 N.E.3d 182, explicitly reflected that particular legislative "balancing." See id. at 315, 14 N.E.3d 182.

[15]This case, however, deals with markedly different types of criminal records. By creating the list of factors in G. L. c. 276, 100K (a), involving fraud, falsity, "demonstrable" errors, and conduct that is no longer criminal, the Legislature itself has identified factors that establish good cause for expungement. Records created as a result of one of these factors have virtually no bearing on whether the petitioner might commit a criminal act in the future, and their value to society therefore is vanishingly small. See Police Comm'r of Boston, 374 Mass. at 658, 374 N.E.2d 272. By contrast, the sealing statute at issue in Pon pertained to any record of a case resulting "in the entry of a nolle prosequi or a dismissal," including records involving offenses to which the petitioner, like Pon himself, had admitted to having committed. See id. at 297-298, 14 N.E.3d 182. ***1081** The significant differences between such records and the records described in the reason-based factors therefore demand different considerations, and countenance different degrees of judicial discretion, when judges weigh the merits of a petition filed under G. L. c. 276, § 100K.[5]

This strong presumption in favor of expungement for petitioners who meet the reason-based requirements of G. L. c. 276, § 100K (a), is supported by the legislative history of the 2018 criminal justice reform act. Statements made by legislators around the time the act was adopted indicate that the Legislature conceived of its changes to the expungement scheme as transformational. One legislator described the act as evidence of a "shift in philosophy," reflecting an understanding that "sometimes something someone has done will plague them for the rest of their life," and that this "doesn't help us [ ]or them." Report on Senate Bill No. 2371 -- An Act relative to criminal justice reform, at 3 (statement of Rep. Sheila C. Harrington, Apr. 4, 2018). Another legislator, describing the act as "momentous" and as providing "hope for a fairer and more equitable criminal justice system," noted that the act "allow[s] adult expungement[,] including [of] an offense that is no longer a crime." Id. at 9 (statement of Rep. Claire Cronin, Apr. 2, 2018). On the floor of the House later that year, a different legislator observed that adoption of the act meant "that we can finally start living up to our end of the bargain and give every ex-offender a real ability to become a rehabilitated and productive member of society." State House News Service (House Sess.), Dec. 4, 2018 (statement of Rep. Juana Matias). Adhering to the legislative intent to allow this rehabilitation, therefore, requires affording petitioners whose records fall within the enumerated list of reasons in G. L. c. 276, § 100K (a), a strong presumption in favor of expungement.

**[16]** [17]Given these considerations, we conclude that judges considering whether reason-based expungement is in "the best interests of justice," see G. L. c. 276, § 100K (b), must balance the petitioner's strong presumption in favor of expungement against any significant countervailing concern. Unlike petitioners seeking to seal their records, whose criminal records may still be of some value to society, petitioners who clear the high bar of G. L. c. 276, § 100K (a), need not articulate the particular disadvantages they might confront as a result of their records remaining accessible to those who have access to sealed records.

**[18] [19] [20]**If no substantial countervailing concern is raised, judges must grant the petition for expungement; if a concern is raised, judges who chose to deny motions for expungement in response to those concerns must make written findings as to the basis of their decisions. There "must be some mechanism by which an appellate court can meaningfully assess whether a judge acted appropriately in granting or denying ... relief," because such a mechanism "allows the appellate court to test the judge's reasoning for abuse of discretion." Commonwealth v. Grassie, 476 Mass. 202, 214–215, 65 N.E.3d 1199 (2017), S.C., 482 Mass. 1017, 121 N.E.3d 1290 (2019). Nothing in the language of G. L. c. 276, § 100K (b) -- which provides simply that "[u]pon an order of expungement, the court shall enter written findings of fact" -- prevents judges from also entering written findings on a denial, as we now conclude they must.

***1082 [21] [22]** [23]Although we decline to speculate as to what might constitute a substantial countervailing factor, we note that the existence of any other criminal record belonging to a

petitioner, regardless of whether that record is sealed, may not factor into judges' analyses regarding whether reason-based expungement is "in the best interests of justice" under G. L. c. 276, § 100K (b). General Laws c. 276, § 100E, defines a "record" as "public records and court records ... which concern a person and relate to the nature or disposition of an offense, including, without limitation, an arrest, a criminal court appearance, a [J]uvenile [C]ourt appearance, a pre-trial proceeding, [or] other judicial proceedings" (emphasis added). Thus, under this scheme, expungement is decided on an offense-by-offense basis, and not incident-by-incident. Put another way, a judge may not deny expungement on the ground that, in the judge's view, expunging the requested record would make no practical difference to the defendant, given the existence of other criminal records for that defendant.

**[24]** [25]Judges, therefore, may not deny an otherwise-eligible reason-based petition on the theory that a petitioner's other records make negligible the benefits of expunging the reason-based record or records in question. What is required for the denial of a petition for reason-based expungement on the grounds of "the best interests of justice" is a countervailing consideration regarding the expungement of that particular record that is sufficient to weigh against the petitioner's strong interests in having that record expunged.

**[26]**c. Application to **K.W**.'s petition. Turning to **K.W**.'s petition, the record suggests no countervailing factors that might weigh against allowing **K.W**.'s efforts to expunge his marijuana-related records. The Commonwealth has offered none; to the contrary, it consistently has supported **K.W**.'s petition for expungement.[6] Nor did the motion judge identify any such factor. These records, one of which pertains to a conviction of a now-decriminalized amount of marijuana, and the other of which pertains to a charge that was dismissed without any conviction or pretrial diversion program, are canonic candidates for expungement.

We note, however, that the motion judge ultimately denied **K.W**.'s petition on the grounds that, in the judge's words, it was not in the "interest of justice to destroy all records relating to the charges" (emphasis added). We have scant insight into the motion judge's thinking beyond these findings. Nonetheless, we recognize that the motion judge's denial could be read to imply that he interpreted the statute to mean that expungement of **K.W**.'s marijuana-related records required the destruction of both the 2003 and 2006 records (including the 2006 records pertaining to traffic offenses that are ineligible for expungement) in their entirety. We therefore take this opportunity to clarify this aspect of the expungement scheme.

As discussed supra, under this statutory scheme expungement is done record-by-record, not event-by-event. Moreover, the expungement scheme explicitly permits expungement via redaction. General Laws c. 276, § 100E, which contains definitions for key terms used in G. L. c. 276, §§ 100E through 100U, defines "expungement" as "the permanent erasure or destruction of a ***1083** record so that the record is no longer accessible to, or maintained by, the court, any criminal justice agencies or any other state agency, municipal agency or county agency." That definition also states that "[i]f the record contains information on a person other than the petitioner, it may be maintained with all identifying information of the petitioner permanently obliterated or erased." Id.

Judges considering expungement of a record containing information on multiple individuals, therefore, need not be concerned about the effect of allowing expungement on information pertaining to anyone besides the petitioner. Furthermore, the allowance of a petition for expungement also need not mean that law enforcement officers are unable to access other information in the record, beyond the petitioner's identifying information, that officers may need for an ongoing or future investigation. The expungement of records featuring multiple defendants differs, of course, from the expungement of records that may continue to have investigative value. Nonetheless, G. L. c. 276, § 100E, makes clear that the Legislature anticipated that effectuating the expungement scheme sometimes would require redacting parts of some records rather than

destroying those records entirely. Thus, expungement by redaction, done for the purposes of preserving the future investigative value of other parts of a record, is permissible under the statute.

If, therefore, the Commonwealth were concerned that the destruction of a record would hinder an ongoing law enforcement investigation, it could ask that the judge, in granting a petition for reason-based expungement, do so on the condition that all identifying information related to the petitioner be fully and permanently redacted, while the rest of the record would be left unchanged and would remain accessible to law enforcement. This approach might be necessary, for example, in situations in which a petitioner's record was created by an act of fraud, and law enforcement officials wanted to preserve the record for purposes of investigating or prosecuting the person who perpetrated the fraud on the petitioner. Thus, the expungement of one record has no effect on other records a petitioner may have, and judges may, in appropriate situations, expunge record by permanently redacting a petitioner's identifying information, so as to preserve the investigative value of another part of a record.

3. Conclusion. The order denying **K.W**.'s petition for expungement is vacated and set aside, and the matter is remanded to the Boston Municipal Court, where an order shall enter allowing the petition for expungement and for further proceedings consistent with this opinion.

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**Footnotes**

[1] We acknowledge the amicus brief submitted by the American Civil Liberties Union of Massachusetts Foundation, Inc., the Charles Hamilton Houston Institute for Race and Justice, and the Massachusetts Association of Criminal Defense Lawyers in support of the petitioner.

2 When a record is sealed, it becomes inaccessible to all except "[c]riminal justice agencies" performing "their criminal justice duties," see G. L. c. 6, § 172 (a) (1); firearms licensing authorities, see id.; and numerous entities whose work involves, among others, mental health care and the care and protection of children or the elderly, see, e.g., G. L. c. 6, § 172. Those whose criminal records are sealed may answer "no record" to inquiries about their criminal records on applications for housing or employment. See G. L. c. 276, § 100A.

3 As the judge found, K.W.'s petition falls squarely within the set of enumerated factors in G. L. c. 276, § 100K (a) (2), as his marijuana-related charges and conviction were for possession of marijuana in an amount that since has been decriminalized. In his affidavit, K.W. averred that the amount of marijuana at issue in both the 2003 and 2006 incidents was less than one ounce. Nothing in the record suggests otherwise, and the Commonwealth does not dispute this averment. In 2008, the Legislature decriminalized the possession of up to one ounce of marijuana, see G. L. c. 94C, § 32L, inserted by St. 2008, c. 387, § 2; in 2017, the Legislature modified the statute to decriminalize possession of up to two ounces of marijuana, see St. 2017, c. 55, §§ 15-18. See also G. L. c. 94G, § 13 (e), added by St. 2016, c. 334, § 5. K.W.'s petition therefore clearly satisfies G. L. c. 276, § 100K (a).