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SJC-13705

Commonwealth of Massachusetts
Supreme Judicial Court

COMMONWEALTH

v.

MARK GRAVITO

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES, MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND BOSTON BAR ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE DEFENDANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

REGULATIONS

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, amici make the following disclosures: The Committee for Public Counsel Services (CPCS) is a statutorily created agency established by G.L. c. 211D, §1. The Massachusetts Association of Criminal Defense Lawyers (MACDL) is a 501(c)(6) organization. The Boston Bar Association (BBA) is a bar association that currently has 15,000 members. *Amici* do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in any *amici*.

PREPARATION OF AMICUS BRIEF

Pursuant to Appellate Rule 17(c)(5), *amici* and their counsel declare that:

(a) no party or party's counsel authored this brief in whole or in part;

(b) no party or party's counsel contributed money to fund preparing or submitting the brief;

(c) no person or entity other than the *amici curiae* contributed money that was intended to fund preparing or submitting a brief; and

(d) counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

STATEMENTS OF INTEREST OF AMICI

The Committee for Public Counsel Services (CPCS) is a statutorily created statewide agency established by G.L. c. 211D, §§1 et seq., whose responsibility is "to plan, oversee, and coordinate the delivery" of legal services to certain indigent litigants, including defendants in criminal appeals. G.L. c. 211D, §1, 2, 4, 6. This brief addresses an issue critical to CPCS's ability to provide effective assistance of appellate counsel to its clients: the extent to which appellants and their counsel may access the record of the criminal proceedings against them. This Court's decision in this case will affect the interests of CPCS's present and future clients. See *Patton v. United States*, 281 U.S. 276, 304 (1930) ("Whatever rule is adopted affects not only the defendant, but all others similarly situated.").

The **Massachusetts Association of Criminal Defense Lawyers** (MACDL) is an incorporated association of more than 1,000 experienced lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL seeks to improve the criminal legal system by supporting policies to ensure fairness in criminal matters and devotes much of its energy to attempting to correct problems in the criminal legal system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice, such as those presented here.

The **Boston Bar Association** (BBA), with 15,000 members, traces its origins to meetings convened by John Adams, who provided pro bono representation to the British soldiers prosecuted for the Boston Massacre and went on to become the nation's second president. Its mission is to advance the highest standards of

excellence for the legal profession, facilitate access to justice, foster a diverse and inclusive professional community, and serve the community at large. The BBA's interest in the case arises from its longstanding commitment to ensuring meaningful access to justice. A fair and reliable appellate process depends on counsel's ability to engage in informed advocacy, which in turn requires access to the complete record of proceedings that are the subject of the appeal. Where effective assistance of counsel is at the heart of meaningful access to justice and counsel can only be effective when they have access to all relevant information, limiting access erodes the integrity of appellate review, the protections afforded by the rule of law, and the public's trust in the justice system.

Introduction

Following trial, Mark Gravito was convicted of one felony and acquitted of five other charges. The acquittals were automatically sealed, pursuant to G.L. c. 276, §100C. Mr. Gravito has a right to appeal from his sole conviction, which cannot yet legally be sealed. However, because many of the key documents related to his conviction also relate to the acquitted charges, the trial court has treated those documents as sealed. And it has assumed, erroneously, that Mr. Gravito cannot fully access his own sealed record. For Mr. Gravito, this is the worst of all worlds: the fact of his conviction remains available to the public, but he cannot sufficiently access the record to vindicate his right to appeal, despite having been present throughout the proceedings that give rise to the record.

This is nonsensical. No statutory language defines sealing to bar even the subjects of sealed records from accessing them, and in other contexts and jurisdictions sealing is *not* understood that way. Neither the judge below nor the Commonwealth suggest any reason that the Legislature might have intended to bar the subjects of sealed records from accessing them. In fact, the Commonwealth appears to concede that there likely was no such intent, C.B. 36—sensibly, given that the only purpose of the sealing statutes is to protect the privacy rights and employment and housing prospects of those with criminal records. At best, the statutory interpretation proposed by the Commonwealth and trial court creates pointless inefficiencies in bringing criminal appeals even as CPCS struggles to provide appellate representation to everyone who needs it; at worst, it could substantively impair the rights to appeal and to effective assistance of counsel on appeal. And it also would do real harm to non-citizens required to present evidence regarding their criminal histories in immigration proceedings and prisoners

seeking parole who must explain their past conduct, among others. This Court should reject it.

BACKGROUND

General Laws c. 276, §§100A-100C set forth the circumstances under which records of criminal or delinquency court appearances may be "sealed." In general, and with some exceptions, criminal convictions and delinquency adjudications shall be sealed upon request after statutorily-prescribed time periods (§§100A and 100B); acquittals and cases unsupported by probable cause are subject to automatic sealing (§100C, para. 1); and cases in which a nolle prosequi or dismissal are entered shall be sealed if "it appears to the court that substantial justice would best be served" by sealing (§100C, para. 2).

Since a 1983 amendment, see St. 1983, c. 312, §100C has required automatic sealing of acquittals and cases in which no probable cause was found, but that provision was not generally honored until this Court's decision in *Commonwealth v. J.F.*, 491 Mass. 824 (2023). Following the decision in *J.F.*, in which this Court held that the first paragraph of §100C means what it says and mandates sealing of any charges ending in acquittal or a finding of no probable cause, the Executive Office of the Trial Court issued Transmittal 24-4 on the implementation of the decision. Transmittal 24-4 requires the trial court clerk to inform defendants in relevant cases that their cases will be sealed within ten days unless they make a written request that they not be sealed. R. 55-56. Although the notice sent to Mr. Gravito informed him—without legal justification—that he would not be able to access

the record of his sealed charges, it did not explain that neither he nor his counsel would be able to access the record of his conviction, which is not sealed.[1] R. 61-62.

While the trial courts have uniformly assumed that sealing prohibits access even by the subjects of sealed records, different clerks' offices have granted appellate counsel different levels of access to the records of mixed verdict cases. In the experience of CPCS staff attorneys and bar advocates, some trial courts have denied attorneys access to the entire file in mixed verdict cases, while others attempt, with difficulty, to seal only those portions of the record related to an acquitted charge.[2] In Mr. Gravito's case, at least ten documents that related to both the sealed and unsealed charges were initially withheld from appellate counsel. R. 31. The trial court eventually attempted to strike a compromise by permitting counsel to review the court's file in the clerk's office and take notes, R. 54, but not to photocopy documents necessary for the required addendum and record appendix. And many courts will not provide recordings of mixed verdict cases to the Office of Transcription Services, or first require motions to unseal those cases, making it difficult for attorneys to access the trial transcripts necessary for appeal. Mixed verdict cases constitute a sizable number of criminal appeals: in a recent six-

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[1] In *J.F.*, this Court described as "nonsensical" an interpretation of §100C that would result in sealing *all* of the charges in a mixed verdict case, including the convictions. 491 Mass. at 838 n. 15.

[2] The Court recognized, but perhaps underestimated, this challenge in *J.F.* 491 Mass. at 839 n. 16 (acknowledging "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'" but "presum[ing] that redaction of information within the records would achieve the intended outcome").

month period, 53 cases with mixed verdicts were referred to CPCS for assignment of appellate counsel.

The confusion generated by these circumstances comes at a time when CPCS is struggling to provide appellate counsel in a timely manner due to a growing shortage of defenders taking assigned criminal appeals. If appellate defenders must spend time litigating motions for access to records and transcripts or taking copious notes when barred from photocopying necessary documents, they cannot represent as many clients as they otherwise would.

Problems unrelated to appeals are also arising. CPCS is aware of a case in which counsel moved to unseal for the limited purpose of obtaining a transcript following acquittal because the same complaining witness is involved in another case with the defendant; the judge unsealed the case for all purposes and then denied a motion to reseal.

Other judges have taken the position that, once sealed, a case *cannot* be unsealed, even on the defendant's motion. Combined with the erroneous assumption that sealing prohibits even the subjects of sealed records from obtaining them, this view has potentially devastating consequences far beyond appeals in mixed-verdict cases. Non-citizens in immigration proceedings routinely bear the burden of presenting evidence of what happened in any criminal proceedings against them. A defendant who succeeds in sealing a conviction may later struggle to challenge it, even if evidence of egregious governmental misconduct emerges, as in the drug lab scandals. Prisoners seeking parole also must prepare to address their convictions; if they cannot review the records because they have been sealed, they may struggle to adequately respond to the Parole Board's concerns. An

interpretation of the sealing statutes that bars the subjects of sealed records from accessing them has wide-ranging negative effects.

Argument

General Laws c. 276, §§100A-100C do not bar the subject of a sealed record, or their legal representative, from accessing the record.

A. The sealing statutes are silent as to whether the subjects of sealed records can access those records.

The sealing statutes are reasonably clear about *when* the court record of a criminal case is to be sealed. See *supra* at 11. But they are less explicit on exactly what it means to seal a case. There is no "definitions" provision applicable to these sections of Chapter 276. The statutes do explain the intended effect of sealing. Sections 100A, 100B, and 100C state that a sealed record "shall not operate to disqualify a person" in any application for a public service job; that the commissioner of probation and court clerks shall respond to inquiries made by non-law enforcement that "no record" exists; and that any screening application for employment, housing, or occupational licensure seeking information about past arrests or convictions must state that a person with a sealed record may respond "no record." Section 100D provides "criminal justice agencies," including prosecutors' offices, with access to sealed criminal record information. But the statutes are silent as to whether the subjects of sealed records may themselves access those records.

B. In other contexts and jurisdictions, sealing is not understood to bar the subject of a record from accessing it once sealed.

"[I]n the absence of statutory definitions, [the Court] may 'derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts . . . ." *Commonwealth v. Garafalo*, 495

Mass. 746, 749 (2025), quoting *Curtatone v. Barstool Sports, Inc.*, 487 Mass. 655, 658 (2021). Within the Commonwealth, the treatment of grand jury transcripts and documents, which must be "filed and maintained *under seal*," G.L. c. 268, §13D(e) (emphasis added), sheds some light on whether a "sealed" record should be inaccessible to its subject: defendants are entitled to sealed grand jury minutes as a matter of automatic discovery. Mass. R. Crim. P. 14(b)(1)(B). In other words, the subject of the sealed grand jury record is granted access to it.

The view that "sealing" is most naturally understood to permit the subjects of sealed records to access them is supported by the many statutory provisions in other jurisdictions granting the subjects of sealed records access. See, e.g., Ariz. Rev. Stat. Ann. §13-911(J)(1) (sealed records available to "[t]he person whose records are sealed and any attorney who has filed a notice of appearance on behalf of the person whose records are sealed"); Ark. Code Ann. §16-90-1416(a)(1) ("The custodian of a sealed record shall not disclose the existence of the sealed record except when requested by . . . [inter alia] [t]he person whose record was sealed or the person's attorney when authorized in writing by the person"); D.C. Code Ann. §16-807(d)(1)(A) (sealed records available to "[t]he person who was cited, arrested, charged, or convicted, or their counsel"); N.H. Rev. Stat. Ann. §651:5(X)(c) ("The court records relating to an annulled arrest, conviction, or sentence shall be sealed and available only to the person whose record was annulled, his or her attorney [and specified others]"); N.Y. Crim. Proc. Law §160.50(1)(d) (records sealed after

"termination of criminal action in favor of the accused" are "made available to the person accused or to such person's designated agent").[3]

Citing *Pixley v. Commonwealth*, 453 Mass. 827, 836 n. 12 (2009), the Commonwealth contends that sealing strictly means that "the document is unavailable except to law enforcement and the courts," while "impoundment" permits counsel to see it. C.B. 38. But crucially, in *Pixley*, the defendant was *not* the subject of the sealed record he sought—a transcript of a *Martin*[4] hearing at which a proposed defense witness had asserted his Fifth Amendment right against self-incrimination. The defendant had no right to be present at that *in camera* hearing, and no right to argue the content of that hearing on appeal. 453 Mass. at 833, 835. In contrast, a defendant who seeks the record of his own criminal proceedings both had a right to be present at those proceedings and enjoys a right to challenge them on appeal. Moreover, the Commonwealth's suggestion that, in adopting 100C, the Legislature "understood the[] levels of protection" enunciated in *Pixley* ignores the fact that *Pixley* was decided more than thirty-five years after the Legislature

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[3] Many more jurisdictions provide access to sealed (sometimes called "erased," "set aside," "expunged," "non-disclosed," or "shielded") criminal records to the subjects of those records or their counsel. See Colo. Rev. Stat. Ann. §24-72-703(VII); Conn. Gen. Stat. Ann. §54-142a(g)(1); Fla. Stat. §943.059(6)(a)(1-2); Ga. Code Ann. §35-3-37(v)(1); Iowa Code Ann. §901C.2(b)(2); Kan. Stat. Ann. §§21-6614(l)(1), 22-2410(h), 38-2312(k)(1); La. Code Crim. Proc. Ann. art. 973(A)(3); Me. Rev. Stat. Ann. tit. 15, §2265(1); Md. Code Ann., Crim. Proc. §10-302(b)(4); Mich. Comp. Laws Ann. §780.623 Sec. 3(3); Mo. Ann. Stat. §610.140(8); Minn. Stat. Ann. §609A.03 Subd.7a(b)(8); Neb. Rev. Stat. §29-3523(1)(c); Nev. Rev. Stat. Ann. §179.295(1); Ohio Rev. Code Ann. §2953.34(A)(3); Tex. Gov't Code Ann. §411.076(a)(3); W. Va. Code Ann. §61-11-25(f).

[4] *Commonwealth v. Martin,* 423 Mass. 496 (1996).

enacted §§100A-100C, and thus sheds no light on what "sealing" meant in those statutes—particularly given this Court's acknowledgment that "impoundment" and "sealing" are "often used interchangeably." *Id.* at 837 n. 12.[5]

The Commonwealth also argues that proposed but unadopted legislation that would explicitly make sealed records accessible to their subjects evinces a past legislative intent not to do so. C.B. 38. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Regis Coll. v. Weston*, 462 Mass. 280, 288 n. 10 (2012), quoting *United States v. Craft,* 535 U.S. 274, 287 (2002) (further citation, quotation marks omitted). A legislative failure "might merely reflect . . . an assumption that the proposal was not needed." See *United States v. Estate of Romani,* 523 U.S. 517, 533–34 (1998). Even "[s]ubsequent legislation which declares the intent of an earlier law is not . . . conclusive in determining what the previous [legislature] meant." *Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958). "If the *enacted* intent of a later Congress cannot change the meaning of an earlier statute, then it should go without saying that the later *unenacted intent* cannot possibly do so." *Estate of Romani*, 523 U.S. at 536 (Scalia, J., concurring in part and in the judgment) (emphasis original).

Finally, "fundamental canons of statutory interpretation" require this Court to "read statutes concerning the same subject matter as a harmonious whole whenever possible." *Commonwealth v. Morgan*, 476 Mass. 768, 770 (2017).

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[5] The Commonwealth's claim that *Pixley* makes sealed documents "unavailable except to *law enforcement* and the courts," C.B. 38 (emphasis added), is without basis. *Pixley* explicitly made the document at issue available only to the court, not to police and particularly not to the prosecutor (who also is not a party to a *Martin* hearing). *Id.* at 834-835.

This Court has observed that the sealing and criminal offender record information (CORI) statutes are designed to work in tandem by permitting some access to CORI records where appropriate while simultaneously "providing privacy protections for former criminal defendants to enable them to participate fully in society." *Commonwealth v. Pon*, 469 Mass. 296, 297, 300 (2014) (identifying G.L. c. 276, §100C as "part of the over-all [CORI] scheme"). And G.L. c. 6, §175 explicitly provides "a subject . . . the right to inspect, and if practicable, obtain a copy of *all* criminal offender record information from the [Department of Criminal Justice Information Services] that refers to the subject." (emphasis added). The relevant definition of "criminal offender record information" contained in c. 6, §167 does not exclude sealed record information, though a separate definition of "all available criminal offender record information" in the same statute does explicitly exclude sealed material. (The phrase "all available criminal offender record information" is used elsewhere in Chapter 6, but not in §175.) In other words, the Legislature appears to have made a considered decision that sealed CORI records should remain available to the subjects of those records. Interpreting §§100A-100C to permit access to the subject of sealed court records appropriately harmonizes those statutes with c. 6, §§167 and 175.[6]

[6] 803 Code Mass. Regs. 2.06(1), promulgated by DCJIS, purports to deny sealed record information to individuals seeking their own criminal offender record information. That regulation is contrary to the unambiguous language and the underlying purpose of c. 6, §§167 and 175, and this Court owes it no deference. See *Harmon v. Comm'r of Correction*, 487 Mass 470, 476 (2021).

Sections 100A-100C may not explicitly grant access to the subjects of sealed records, but neither do they explicitly prohibit it. The common understanding in other contexts and jurisdictions that subjects of sealed records should be able to obtain those records rebuts the Commonwealth's suggestion that, in the absence of a statutory definition, sealing must mean "unavailable except to law enforcement and the courts." This Court should not indulge that presumption, particularly where it is entirely at odds with the purpose of the sealing statutes.

C. The sealing statutes should be interpreted to give effect to their purpose: advancing the interests of those whose records are sealed.

1. The only purpose of the sealing statutes is the protection of defendants; as the Commonwealth acknowledges, no one has an interest in keeping a criminal record from its subject, who is already familiar with its content.

"[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words 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, to the end that the purpose of its framers may be effectuated." *Harmon*, 487 Mass. at 478. As discussed *supra* at 14, §§100A-100C are ambiguous as to the meaning of "sealing," but that word is often used to refer to situations in which the subject of the sealed record may access it.

The purpose of the sealing statutes is decidedly *not* ambiguous. As this Court has recognized, §100C was enacted "in the 1970s shortly after the passage of the initial CORI Act," which afforded "limited [public] access to court-based criminal records." *Pon*, 469 Mass. at 301. "[R]ecognizing that ready access to a defendant's prior criminal record might frustrate a defendant's access to employment,

housing, and social contacts," the Legislature enacted §§100A, 100B, and 100C in order to "remove[] some of the social and economic barriers created by a criminal record." *Id.*, quoting *Globe Newspaper Co. v. District Attorney for the Middle Dist.,* 439 Mass. 374, 384 (2003).

Legislative history on the sealing statutes, though sparse, confirms this Court's understanding of its obvious purpose.[7] Addressing the Legislature in June 1971, Governor Francis Sargent described the "most beneficial purpose" of the bill that became §100A as to rid youthful offenders of "the distinct disadvantage—particularly in the area of employment—which their earlier criminal records would otherwise entail." Add.32.[8] And when the Legislature was in the process of amending §100C in 1983 to make automatic the sealing of charges ending in acquittals or findings of no probable cause, Governor Michael Dukakis recognized the goal of that amendment as "afford[ing] privacy rights in regard to the record of the proceedings." Add.35. He went on to suggest a change that the Legislature adopted—to permit a defendant to request that the record *not* be sealed—but only because "it may be deemed beneficial by some to have the record read not guilty, as opposed to sealed, upon inquiry by legitimate law enforcement officials."

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[7] A 1973 letter from the Attorney General's Office to the governor's legislative secretary expressing support for the bill leading to the enactment of §100C described its provisions as "self-explanatory." Add.36.

[8] Governor Sargent unsuccessfully advocated that the Legislature amend the bill to apply only to those whose "less serious" felony and misdemeanor convictions occurred before the age of 25. Add.33.

Add.35. There was no suggestion that without such a change, the subject of the record could not access it.

In other words, the sole purpose of §100C was to *protect* the subjects of sealed records, by making the records of their involvement in the criminal system inaccessible to the public.

2. Making criminal records inaccessible to their subjects causes potentially irreparable harm in many different contexts.

Making sealed records inaccessible even to their subjects hinders rather than advances the legislative purpose of the sealing statutes, by harming the subjects of sealed records, in several contexts. For defendants like Mr. Gravito who receive mixed verdicts, the difficulty in disentangling the theoretically unsealed record of their convictions from the sealed record of their acquittals impairs their statutory right to appeal and their constitutional right to the effective assistance of appellate counsel. Problems will also arise for non-citizens in immigration proceedings, for defendants in collateral postconviction proceedings, and for those appearing before the Sex Offender Registry Board or the Parole Board, if they are unable to access their own sealed records.

i. Defendants need access to their sealed records to vindicate their right to appeal and to have the effective assistance of appellate counsel.

Mr. Gravito and other defendants convicted of crimes following a trial have a statutory right to appeal those convictions. See *Commonwealth v. Bruneau*, 472 Mass 510, 513 (2015) (statutory right to appeal granted by G.L. c. 278, §§28 and 33E). And those defendants also have "a clear constitutional right to the assistance of

counsel in that appeal." *Commonwealth v. Frank*, 425 Mass. 182, 184 (1997), citing *Douglas v. California*, 372 U.S. 353 (1963). "[T]he right to the assistance of counsel on appeals requires the *effective* assistance of counsel." *Frank*, 425 Mass. at 184, citing *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (emphasis added).

Appellate counsel cannot effectively represent clients without examining all pleadings, orders, and transcripts from the trial court. Such review is necessary to identify the issues to be raised on appeal and to effectively brief them. Without review of pretrial motions and orders, motions in limine, and trial transcripts, counsel cannot identify trial or pretrial errors or accurately describe those errors—or even the procedural history and facts of the case—to the appellate court, let alone do so with the required citations. See Mass. R.A.P. 16(a)(6), 16(a)(7), 16(a)(9). Nor can counsel determine whether those issues were preserved, see Mass. R.A.P. 16(a)(9), or provide the documents necessary for the requisite record appendix, including the docket entries from the trial court, all complaints or indictments, and copies of any relevant exhibits, see Mass. RA.P. 18(a)(1), (2). That failure could result in the forfeiture of an issue. See *Shawmut Community Bank, N.A. v. Zagami*, 411 Mass. 807, 810–812 (1992) (appellate courts may decline to consider any issue if relevant portions of the record are not provided).

Again, in mixed verdict cases, the primary problem is not that the convictions defendants seek to appeal are actually sealed—they are not. It is that it is close to impossible to disentangle the sealed acquittals in the file from the unsealed convictions. There is only one docket sheet for all of the charges, for example. Motions in limine and other pretrial motions are often relevant to all of the charges, as in Mr. Gravito's case.

And even if the records of acquittals and convictions *could* be disentangled, appellate counsel will often need to point to acquittals, and the circumstances surrounding them, in the course of briefing an issue. Our appellate courts have frequently reasoned that split verdicts indicate some willingness by the jury to disbelieve the Commonwealth's case, at least in part, and thus have concluded that established legal errors were not harmless. See, e.g., *Commonwealth v. Abubardar*, 482 Mass. 1008, 1011 (2019) (failure to properly instruct on self-defense created substantial risk of miscarriage of justice, given acquittals on most serious charges); *Commonwealth v. Arana*, 453 Mass. 214, 228 (2009) (court "unable to conclude that no prejudice occurred" from improper bolstering testimony where acquittals showed that jury disbelieved portion of complainant's testimony); *Commonwealth v. Brissett*, 55 Mass. App. Ct. 862, 866 (2002) (improper cross-examination held prejudicial in part because acquittals indicated Commonwealth's case not "sufficiently robust" to overcome the error). Conversely, courts also sometimes look to acquittals in determining that there was *not* prejudice from a legal error at trial. See, e.g., *Commonwealth v. Sherman*, 481 Mass. 464, 478 (2019) ("where the jury acquitted the defendant of one of the three rape charges, we conclude that it is unlikely that the [challenged] drug evidence was given significant weight in the jury's evaluation of the defendant's testimony or culpability"). It simply is not possible to do the job of the appellate defender—and thus to vindicate the rights to appeal and to the effective assistance of counsel—without access to the full record of the trial.

It would be especially unfair to deny full access to sealed records to appellate defenders because appellate prosecutors enjoy full access to those records pursuant to G.L. c. 276, §100D, which permits "criminal justice agencies"

"immediate access . . . for the performance of their criminal justice duties . . . [to] any sealed information concerning criminal offenses."[9] The Commonwealth posits that the trial court's solution in this case, permitting appellate counsel to view the sealed records (perhaps only once) but not to photocopy them, is not a problem because "both the Appeals Court and the Commonwealth continue to have access to the sealed records." C.B. 42.[10] But due process principles and general fairness concerns cannot countenance a system where the government and the court have full access to the record, but the defendant does not. See, e.g., *Commonwealth v. Mayotte*, 475 Mass. 254, 261 (2016) ("one-sided evidentiary rules are inherently unfair").

The Commonwealth also purports to solve the problem of the mixed-verdict appeal by suggesting that that the "opt-out" provision of §100C can be invoked at any time, effectively permitting a defendant to unseal his case to pursue his appeal. C.B. 31-37. *Amici* agree that a defendant should be permitted to move to unseal a previously-sealed case, beyond the ten-day time frame adopted by Transmittal 24-4. But according to the Commonwealth, once a defendant has asked to opt out, he cannot seek to have his acquittals resealed. On the Commonwealth's view, the defendant must choose between his right to have his acquittals sealed and his rights to appeal his conviction and to the effective assistance of counsel

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[9] District Attorney's Offices fit the statutory definition of criminal justice agencies, as they "perform as their principal function, activities relating to . . . the apprehension, prosecution, adjudication, incarceration, or rehabilitation of criminal offenders." See G.L. c. 6, §167.

[10] Courts are also considered "criminal justice agencies" within the definition of c. 6, §167. See *Hawkins v. Commissioner of Correction*, 406 Mass. 898, 900 n. 2 (1990).

and due process in that appeal. That choice should not be forced on defendants. Cf. *Commonwealth v. Taylor*, 469 Mass. 516, 518 (2014) ("untenable" to force defendants to choose between right to speedy trial and right to receive mandatory discovery). Criminal defendants have a strong interest in sealing their acquittals, *supra* at 19-21. And they also have a strong interest in appealing convictions after trial. A successful appeal may help a defendant avoid a sentence of incarceration or probation and many other negative consequences, including: the reputational and dignitary harms of a criminal conviction, see *Commonwealth v. Walczak*, 463 Mass. 808, 828 n. 21 (2012); possible deportation for non-citizens, see *Commonwealth v. Marinho*, 464 Mass. 115, 124 (2013); required registration as a sex offender, G.L. c. 6, §178D; or potential indefinite civil commitment as a sexually dangerous person, G.L. c. 123A. And an appellate win can mitigate the problems that motivated the enactment of the sealing statutes: difficulties in securing employment and housing. See *Pon*, 469 Mass. 296, 301. Exercising both the right to appeal a conviction and the right to seal an acquittal is thus often in the clear interest of a defendant who has gotten a mixed verdict after trial. There is no reason to make them choose between those rights.[11]

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[11] Moreover, defendants like Mr. Gravito were not even aware that they were making such a choice. The notice that the Executive Office of the Trial Court sent him did not explain that sealing an acquittal would also render the ostensibly non-sealed charge(s) that are the basis for the conviction(s) on appeal inaccessible to defendants and their counsel; in fact, it explicitly stated that non-acquittals would remain "visible to the public." R. 61-62. Nor did it advise that without access to the court record of conviction, an appeal would be virtually impossible. Defendants who received the notice and did not request that their records remain unsealed thus did not make a knowing and intelligent waiver of their right to appeal and concomitant right to the effective assistance of counsel in that appeal. Cf.

ii. Noncitizens in immigration court, defendants with collateral postconviction challenges, and those appearing before the Sex Offender Registry Board or Parole Board all need access to their sealed records to ensure that their proceedings are fair.

Barring subjects of sealed records from obtaining those records has profound negative consequences for noncitizen defendants. Noncitizens have the burden of providing documentation of involvement with our criminal legal system in virtually every possible immigration court scenario, including applications for naturalization,[12] legal permanent residency,[13] cancellation of removal,[14] and a range of visas.[15] Making those records inaccessible could prevent non-citizens

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Commonwealth v. Barros, 494 Mass. 100, 100-101 (2024) (waiver of right to counsel must be knowing and intelligent).

[12] See 8 C.F.R. §316.10 (naturalization applicant must demonstrate good moral character); USCIS Policy Manual, vol. 12, pt. F(3)(B) (2025) (requiring applicants to provide court dispositions in various situations).

[13] See U.S. Dep't of Homeland Security, USCIS Instructions for Application to Register Permanent Residence or Adjust Status (Form I-485) at 13-14 (requiring applicants to provide records of any proceedings following arrest), available at https://www.uscis.gov/sites/default/files/document/forms/i-485instr.pdf.

[14]See U.S. Dep't of Justice, Executive Office for Immigration Review, Application for Cancellation of Removal for Certain Permanent Residents (requiring applicants to provide documentation of criminal history), available at https://www.justice.gov/eoir/page/file/904286/dl.

[15] See 8 U.S.C. §1361 (requiring visa applicants to prove admissibility and eligibility for immigration benefits).

who might otherwise be successful in these applications from carrying their burden of proof, resulting in arrest, detention, deportation and the separation of families.

Reading the sealing statutes to prohibit access by the subjects of sealed records would also impair the rights of defendants who might have potential claims for new trial, or to vacate a guilty plea, under Mass. R. Crim. P. 30. It often becomes clear only years after conviction—and thus after the sealing of a mixed verdict case under §100C, or potentially after the sealing of a conviction under §100A—that justice may not have been done.[16] Prohibiting defendants from accessing their own sealed records makes it significantly more difficult for CPCS to screen cases for possible assignment of Rule 30 counsel, and for pro se defendants to investigate their own claims.

An individual appearing before the Sex Offender Registry Board also needs access to court records to effectively litigate their classification level or their requirement to register before SORB. In addition to the qualifying sex offense conviction, SORB may introduce hearsay into evidence, such as newspaper clippings and police reports, if relevant to a wide variety of risk factors, such as violence, substance abuse, or hostility towards women. See 803 Code Mass. Regs. 1.33. SORB may also consider factual allegations of which the registrant was acquitted,

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[16] This was true, for example, of the drug lab scandals that plagued our system in the 2010s. See *Commonwealth v. Bridgeman*, 476 Mass. 298, 301-303 (2017) (describing misconduct by state lab chemist Annie Dookhan, beginning in 2003 and not uncovered until 2012); *Comm. for Pub. Counsel Servs. v. Attorney Gen.*, 480 Mass. 700, 702-705 (2018) (misconduct by state lab chemist Sonja Farak began in 2005 but was not fully exposed until 2016 hearing).

if proven by a preponderance of the evidence. *Doe #339940 v. Sex Offender Registry Bd.,* 488 Mass. 15, 28 n.11 (2021). An individual or their attorney must be able to access court records to effectively contest the allegations against them at their hearings.

And the same is true for defendants appearing in front of the Parole Board. As law enforcement agencies, the Parole Board and any opposing prosecutors will have access to all case information regarding mixed verdict cases, but the parole candidate and their counsel will not. Parole Board members may have questions for the parole candidate about the circumstances underlying the sealed record. But if the parole candidate is not adequately prepared to answer such questions, the Parole Board's fact finding could be impaired, and the parole candidate's chances unfairly diminished.

3. The plain language of the sealing statutes does not bar the subjects of sealed records from access, but if it did, that result would be absurd.

As discussed *supra* at 14, §§100A-100C do not define sealing and certainly do not explicitly prohibit the subjects of sealed records from accessing them. And there is no reason to believe that the Legislature intended the myriad negative effects of that interpretation. Excluding the subjects of sealed records from accessing them would serve no rational purpose. Indeed, despite assuming that the statute prohibits people from obtaining their own sealed records, the Commonwealth acknowledges that the affirmative right to access one's own criminal offender record information provided under c. 6, §175, "does suggest that there is no legislative intent to separate defendants from their own records." C.B. 36. A person who has exercised their right to be present throughout the criminal proceedings against

them is obviously well aware of what the record of those proceedings reveals. And the only purpose of the sealing statutes—protecting the subjects of the sealed record and aiding in their social reintegration—would be impeded by making it impossible for them to obtain the records when needed. In short, it would be absurd to read the statute to bar the subject of a sealed record from viewing or obtaining a copy of that record. See *Commonwealth v. Morgan*, 476 Mass. at 778-779 (this Court reads statutes "in a commonsense way to effectuate legislative intent and avoid absurd results").

This Court's "primary goal in interpreting a statute is to effectuate the intent of the Legislature." *Garafalo*, 495 Mass. at 749 (further citation, quotation marks omitted). In light of that goal, and because nothing in the statutory language prohibits an interpretation consistent with the legislative intent to advance the interests of those whose criminal records have been sealed, this Court should hold that "sealing" in §§100A-100C does not mean that the subjects of sealed records themselves are prohibited from accessing those records.

Conclusion

Our sealing statutes were enacted to protect the privacy rights and future employment and housing prospects of criminal defendants like Mr. Gravito. No one—not the Commonwealth, not the courts, and certainly not Mr. Gravito—has an interest in protecting the record of the proceedings in his own criminal case from *his* review. There is no reason to think that the Legislature intended to prohibit the subjects of sealed criminal records from accessing them, and nothing in the language of the sealing statutes requires such an interpretation. This Court should hold that the subjects of sealed records may access those records.

Respectfully submitted,

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August 14, 2025

ADDENDUM

TABLE OF CONTENTS

HOUSE . . . . . No. 5719

The Commonwealth of Massachusetts

EXECUTIVE DEPARTMENT,
STATE HOUSE, BOSTON, June 2, 1971

To the Honorable Senate and House of Representatives:

In accordance with the provisions of Article LVI of the Amendments to the Constitution, I am returning, herewith, House Bill No. 5362 entitled "AN ACT RELATIVE TO FILES IN THE OFFICE OF THE COMMISSIONER OF PROBATION."

As presently drafted, the bill would require the Commissioner, upon request of a person whose last sentence for a criminal offense occurred or ended more than ten years previously, to seal the record of that person's court appearances or convictions. Under the terms of the bill, the record thus sealed may never again be seen by any authorized persons or agencies, including civil service, other public employing or appointing authorities, police or the courts, unless the person is subsequently convicted of another criminal offense. In the latter case, the court may examine the prior criminal record prior to imposing sentence. The bill may or may not supersede, without specifically citing them, various statutes barring certain areas of public employment to convicted felons; e.g., G.L., C. 22, Section 6A and C. 41, Section 96A, which bar their employment as police officers; G.L., C. 125, Section 9, which prohibits them from holding positions in the Department of Correction involving personal contact with prisoners; and others. The bill requires, subject to criminal penalties, that if an application for employment inquires into prior arrests or convictions, it contain a statement authorizing the person with a sealed record to answer "no record".

The most beneficial purpose this legislation can serve is to enable youthful offenders, who later settle down to a responsible life, to be rid of the distinct disadvantage – particularly in the area of employment – which their earlier criminal records would otherwise entail. This objective I approve.

The bill, however, as presently drafted, encompasses much more. It makes no distinction as to age. It makes no distinction as to the seriousness of the offense. It makes no distinction as to the type of employment being sought.

The Governor, for example, in the appointment of our highest state officials, responsible for the expenditure of hundreds of millions of taxpayer dollars, and in the appointment of judges, would be denied knowledge of a record of prior criminal offenses which might cast doubt on a candidate's basic honesty. Police forces, willing to employ as police officers persons who as youths engaged in peace demonstrations or minor drug involvements, would also be prevented by this bill from taking into consideration a record of offenses indicating connections with organized crime. The Department of Youth Services, and other agencies or institutions involving direct contact with children, would be barred access to records indicating character deficiencies which could impair the moral welfare of the children in their custody.

What is lacking in the approach of this bill and others you have sent me in previous years is a selective consideration of the relationships between various types of past criminal involvements and suitability for various types of employment. It is essential that such a study be undertaken before we legislate too extensively in this area. Such a study should, of course, build on the work of the Criminal Law Revision Commission whose report I anticipate later this year.

In the meantime, recognizing your desire to pass legislation in this area, I would recommend that you narrow the scope of the legislation so as to achieve with more particularity the fundamental objective on which we all agree, while at the same time reducing the possible danger areas. In particular, I recommend that the bill be amended so as to apply at this time only to criminal convictions for offenses committed prior to age 25; that the bill be restricted in general to misdemeanors; but that certain specified misdemeanors of a more serious character be excluded, and that certain specified felonies of a less serious character be included; that in making appointments to government service an applicant's entire record be available to an authorized person representing the appointing authority; and that the criminal penalty attaching to failure to include in an application for employment the statement required by the bill be replaced with civil enforceability in an action brought by the Attorney General.

I therefore recommend that the engrossed bill be amended as follows: –

By striking out, in line seven of paragraph one of Section 100A of Chapter 276 of the General Laws, inserted by this act, the word: – and, and by inserting at the end of said paragraph the following: – and (4) said persons's record does not include convictions of offenses other than those to which this section applies, nor convictions of offenses committed after the age of twenty-five. This section shall apply to convictions of all offenses punishable only by a fine or by imprisonment in a jail or house of correction, provided, however, that this section shall not apply in the case of convictions for violations of chapter two hundred sixty-eight, chapter two hundred sixty-eight A, sections one hundred twenty-one to one hundred thirty-one H, inclusive, of chapter one hundred forty, or section eight or twenty-four of chapter two hundred seventy-two; and to convictions of sections two hundred five and two hundred thirteen A of chapter ninety-four.

By striking out the last sentence of the fourth paragraph of said Section 100A, and inserting in place thereof the following sentence: – The attorney general may enforce the provisions of this paragraph by a suit in equity brought in the superior court.

By striking out the fifth paragraph of said Section 100A, and by inserting in place thereof the following paragraph: – 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 report that no record exists.

Respectfully submitted,

FRANCIS W. SARGENT,
Governor of the Commonwealth.

HOUSE . . . . . No. 6384

The Commonwealth of Massachusetts

THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE DEPARTMENT
STATE HOUSE • BOSTON 02133

MICHAEL S. DUKAKIS
GOVERNOR

May 25, 1983

TO THE HONORABLE SENATE AND
HOUSE OF REPRESENTATIVES

I am returning House bill no.3712, entitled "An Act Further Regulating the Sealing of Certain Criminal Records", for amendment.

I agree in principle with the notion that an individual found not guilty or who has had a case dismissed due to a finding of no probable cause or the grand jury's inability to indict should be afforded privacy rights in regard to the record of the proceedings; however, since it may be deemed beneficial by some to have the record read not guilty,as opposed to sealed, upon inquiry by legitimate law enforcement officials, I propose the following amendment:

Insert after paragraph two the following paragraph:

"The foregoing provisions shall not apply if the defendant, as referred to in the preceding paragraph, makes a written request to the commissioner of probation that he does not desire the records of the proceedings to be sealed."

Sincerely,

MICHAEL S. DUKAKIS
GOVERNOR

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29

6145

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE • BOSTON 02133

ROBERT H. QUINN
ATTORNEY GENERAL

May 17, 1973

Mr. Edward S. Morrow
Legislative Secretary to the
Governor
Executive Department
State House
Boston, Massachusetts 02133

Dear Mr. Morrow:

I am returning herewith photostat of H 6145, entitled "AN ACT RELATIVE TO THE SEALING OF FILES IN CERTAIN CRIMINAL CASES."

The provisions of the bill are self-explanatory, and we have no objection to its approval.

Yours very truly,

Walter H. Mayo III

WALTER H. MAYO III
Assistant Attorney General
Chief, Administrative Division

WHM:AMJ
Enclosure

Certificate of Compliance

I hereby certify that this brief complies with Rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas font and contains 5,742 non-excluded words, as counted by the word-processing system used to prepare it.

/s/ Rebecca Kiley
Rebecca Kiley

Certificate of Service

I hereby certify that I have today made service of this amicus brief by directing copies through the electronic filing service provider to Assistant District Attorney Rachel Eisenhaure of the Bristol County District Attorney's Office and to Attorney Josh Daniels, counsel for Mr. Gravito.

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August 14, 2025