SUPREME COURT OF NEW JERSEY
DOCKET NO. A-1516-16 (079813)

IN THE MATTER OF THE EXPUNGEMENT OF THE ARREST/CHARGE RECORDS OF T.B.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** Sat Below: Mitchel E. Ostrer, J.A.D. George S. Leone, J.A.D. Francis J. Vernoia, J.A.D.

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

Alexander Shalom (ID # 021162004)
Tess Borden (ID # 260892018)
Edward Barocas
Jeanne LoCicero
American Civil Liberties Union of New Jersey Foundation
89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
(973)854-1714
ashalom@aclu-nj.org
Counsel for Amicus Curiae

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SUMMARY OF ARGUMENT

This case is about the meaning of a single statutory cross-reference: how to read paragraph (c)(3) of one statute into paragraph (m)(2) of another. In this sense, the question before the Court is anonymous and almost surgically narrow. But in another sense, it has titanic breadth and human impact: because this case is also about the devastating collateral consequences of criminal records and the wisdom of broad-based expungement of those records to promote the public interest, enabling individuals and families to fully contribute to and participate in economic, social, and civic life.

The Legislature designed the drug court expungement statute, *N.J.S.A.* 2C:35-14(m), to be unlike the general expungement statute in its scope and purpose and, as a result, its operation. Whereas the general expungement statute provides an expungement process for certain discrete contacts with the criminal justice system, *N.J.S.A.* 2C:35-14(m) allows successful drug court graduates to expunge their entire criminal records, regardless of how many convictions they contain, how old the convictions are, or whether the convictions relate in any way to drug dependence. This extra-ordinary provision for comprehensive expungement is an incentive and reward for successful completion of the intensive, five-year drug court program, animated by the Legislature's sound appreciation that expungement serves the public interest.

Expungement under *N.J.S.A.* 2C:35-14(m) is available almost automatically or as a matter of right, with only two exceptions. One of those exceptions makes an individual ineligible for expungement if his or her record contains certain barred offenses, which are defined in part by cross-reference to the general expungement statute at *N.J.S.A.* 2C:52-2(c). The meaning of this cross-reference — and specifically whether it imports the public interest showing required for third- and fourth-degree offenses under subsection (c)(3) — is the source of the present dispute.

As explained herein, the drug court expungement statute does not import the public interest requirement for these third- and fourth-degree offenses for three reasons (Point I). First, *N.J.S.A.* 2C:35-14(m) already has a built-in presumption of public interest; its spirit and animating principle recognize that expungement serves that interest.

Second, the plain language of *N.J.S.A.* 2C:35-14(m) demonstrates that the cross-reference to *N.J.S.A.* 2C:52-2(b) and (c) is shorthand for a list of categorically barred offenses only. While *N.J.S.A.* 2C:52-2 bars all offenses under paragraph (b), only first- and second-degree drug sale offenses are barred under paragraph (c). For third- and fourth-degree convictions, subsection (c)(3) allows a judge discretion to decide whether or not to grant expungement, by individually evaluating whether expungement is in the public interest, in light of the character

and conduct of the person seeking expungement. *N.J.S.A.* 2C:52-2(c)(3). Unlike the general expungement statute, the drug court expungement statute is not focused on particular convictions or the particular character or conduct of the person. The entirely different statutory scheme suggests that the cross-reference was not meant to import subsection (c)(3)'s individualized procedural requirements for non-categorically barred offenses.

Furthermore, if the prosecutor in a given case wishes to argue that expungement would disserve the public interest, *N.J.S.A.* 2C:35-14(m)(1) already contains an exception that allows for this argument — and a denial of expungement if the judge is moved by it — where "the need for the availability of the records outweighs the desirability of having the person freed from any disabilities associated with their availability[.]" *N.J.S.A.* 2C:35-14(m)(1).[1] Nothing in the drug court expungement statute suggests the Legislature, having explicitly allowed for a public interest showing here, meant to create a redundancy by borrowing an additional, separate public interest showing through its general cross-reference to *N.J.S.A.* 2C:52-2(c).

Third, and finally, while the plain language is sufficient to dispose of this issue, the legislative history also shows no intent

[1] Significantly, the State concedes that it retains this option, and even that it carries the burden to invoke and prove it.

to impose an individualized public interest requirement for third- and fourth-degree drug sale offenses.

Yet even were this Court to assume *arguendo* that the Legislature intended to import the public interest requirement, the burden falls on the State to show that expungement does not serve the public interest (Point II). The State and Appellate Division's reliance on this Court's opinion in *In re Kollman* is misplaced, because the purpose, effect, and operation of the two expungement statutes are wholly dissimilar. *Kollman*'s requirements that the individual seeking expungement carry the burden, and further that she do so by providing transcripts of plea and sentencing hearings, as well presentence reports, are simply inapposite in the context of the drug court process. Instead, the structure and spirit of *N.J.S.A.* 2C:35-14(m) reveal that the burden must be on the State to show the public interest is not satisfied. Additionally, and separately, the drug court judge should be able to limit the record from which she draws the public interest conclusion to the graduate's conduct and character during the five years of program participation.

In enacting the drug court expungement statute, the Legislature showed sound policy judgment. Expungement of criminal records furthers the public interest, by eliminating the devastating collateral consequences of these records and restoring opportunities for economic, social, and civic participation to

individuals, families, and communities (Point III). Collateral consequences harm the public interest by locking people out of employment, housing, public benefits, and many other rights and benefits, and by subjecting them to private discrimination and stigma in personal and professional settings. Collateral consequences also disproportionately impact people of color, while fueling mass incarceration and stymying economic development, public safety, and community cohesion.

Against this backdrop, the Appellate Division opinion harms the public interest, by significantly limiting opportunities for drug court graduates to be freed of collateral consequences and to enjoy the true second chance that they have spent years in drug court working toward.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") adopts the facts and procedural history contained in petitioner/respondent's Letter Brief in Support of Certification from this Court, adding only the following:

The State opposed the petition for certification, relying on its brief to the Superior Court, Appellate Division and that court's opinion. On November 28, 2017, this Court granted the Petition for Certification and stayed the portions of the judgment of the Appellate Division that vacated the orders of expungement for T.B., J.N.-T., and R.C.. Because this Court did not stay the

effect of the opinion beyond these three individuals, the new procedural requirements imposed by the Appellate Division opinion have continued to apply to all cases involving the relevant third- or fourth-degree drug offenses in drug courts statewide.

Petitioner/respondent elected not to file a supplemental brief. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. THE DRUG COURT EXPUNGEMENT STATUTE DOES NOT IMPORT THE GENERAL EXPUNGEMENT STATUTE'S REQUIREMENT OF AN INDIVIDUALIZED PUBLIC INTEREST EVALUATION FOR THIRD- AND FOURTH-DEGREE DRUG SALE OFFENSES.

Most expungements under *N.J.S.A.* 2C:35-14(m) are essentially guaranteed if the drug court graduate meets the objective criteria of graduation with no convictions during the course of program participation. The Legislature carved out two exceptions: The first is subjective, where the court finds "the need for the availability of the records outweighs the desirability of having the person freed from any disabilities associated with their availability[.]" *N.J.S.A.* 2C:35-14(m)(1). The second is objective, where the person is ineligible because the records to be expunged include "a conviction for any offense barred from expungement" under *N.J.S.A.* 2C:52-2(b) or (c). *Id.* at ¶ (m)(2). The question presented by this case is whether the cross-reference to *N.J.S.A.* 2C:52-2(b) or (c) was the Legislature's shorthand for a list of

offense categories absolutely barred, or whether the cross-reference also imported the individualized public interest showing described in subsection (c)(3) for records containing convictions for offenses not categorically barred.

The presumption of public interest built into the drug court expungement statute, the plain language of that statute, and the Legislature's failure to specify otherwise demonstrate that the cross-reference was for the purpose of identifying the list of categorically barred offenses only, and was not intended to address offense categories under which certain convictions may *potentially* be denied expungement after individualized consideration of the public interest in that case.

A. As the First Statutory Scheme to Offer Expungement of an Entire Criminal Record, *N.J.S.A.* 2C:35-14(m) Has a Built-In Public Interest Presumption, or at Least Animating Principle.

The drug court expungement statute is remarkable — and commendable — because it offers broad-based, comprehensive expungement of eligible criminal records without regard to the specifics of the particular conviction, arrest, detention, or other proceeding (beyond the absolute bars on offense types) or the individual petitioner (beyond the requirements of graduation and non-conviction during program participation). The statute does not limit expungement to only certain graduates whose character and conduct post-conviction is exemplary. It does not limit

expungement to only first offenses or so-called "minor brushes with the law." It does not even limit expungement to convictions related to drugs or drug court involvement. This statutory scheme is therefore unlike most expungement laws, including New Jersey's general expungement statute, which allow individuals to petition as to their particular, exemplary facts. Instead, *N.J.S.A.* 2C:35-14(m) operates under the presumption that expungement of all drug court graduates' records — without, for the most part, regard to particular facts or individual character — is in the general public interest.

The drug court expungement statute explicitly states that graduates need not affirmatively petition for expungement. *N.J.S.A.* 2C:35-14(m)(1) (explaining that the requirements of *N.J.S.A.* 2C:52-7 through 14 do not apply). Administrative Directive #02-16 instructs that, to be considered for an expungement upon graduation, the individual or counsel should simply "bring this matter to the attention of the Drug Court prior to graduation." Glenn A. Grant, J.A.D., *Administrative Directive #02–16: Protocol for "Drug Court Expungements" and Expungements of Arrests Not Resulting in Conviction* (May 23, 2016), https://www.judiciary.state.nj.us/notices/2016/n160526a.pdf. Finally, paragraph (m)(1) expressly requires the court to grant expungements unless certain exceptions apply. Taken together, these provisions reveal a presumption in favor of expungement in

general. They suggest that the animating principle undergirding the statute is that expungement of drug court graduates' records serves the public interest – whether by encouraging entry into and successful completion of the program, aiding reentry into society, reducing recidivism, and/or restoring to the community individuals who are ready to work, live, and participate in economic, social, and civic life unburdened by the weight of criminal records.

B. The Plain Language of *N.J.S.A.* 2C:35-14(m)(2) Describes Absolute Bars According to Offense Category; Because Third- and Fourth-Degree Drug Sale Offenses Are Not Categorically Barred Under *N.J.S.A.* 2C:52-2(c), Any Individualized Public Interest Showing Is Unnecessary Under Paragraph (m)(2).

Statutory interpretation must begin with the statute's plain language, ascribing terms their ordinary meaning. *State v. S.B.*, 230 *N.J.* 62, 68 (2017). By its plain language, the drug court expungement statute describes absolute, categorical bars to expungement according to certain types of offenses. *N.J.S.A.* 2C:35-14(m)(2) does not call for examinations of individual convictions on a case-by-case basis. It says nothing about importing the public interest standard from *N.J.S.A.* 2C:52-2(c)(3), or otherwise requiring additional findings as to specific entries of the criminal record before issuing expungement. There is simply nothing in the plain language of paragraph (m)(2) that suggests the Legislature meant to incorporate anything more than a list of categorically barred offenses.

1. The plain language of N.J.S.A. 2C:35-14(m)(2) describes bars by category of offense, not particular conviction.

When construing a statute, "legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless." *State v. Regis*, 208 *N.J.* 439, 449 (2011) (internal quotations omitted). The drug court expungement statute renders an individual ineligible for expungement if her record contains "a conviction for any offense barred from expungement" under the general expungement statute. *N.J.S.A.* 2C:35-14(m)(2).

Giving meaning to each of the words in this clause reveals the grammar to be dispositive: "barred" modifies the term "offense," not "conviction." If the Legislature meant to define bars based on evaluations of individual convictions, it would have omitted the words "for any offense" and simply stated "for any conviction barred from expungement" under the general expungement statute. It did not do so. Instead, the plain language indicates the definitive, grammatical subject of the bar is the categorical offense, not the particular conviction therefor. Accordingly, under paragraph (m), drug court judges must exclude from expungement any graduate whose record contains convictions for categorical offenses absolutely barred under sections 2(b) and 2(c) of the general expungement statute.

2. *The plain language of N.J.S.A. 2C:52-2 bars all offenses under paragraph (b) but only first- and second-degree offenses under paragraph (c).*

The offenses enumerated in *N.J.S.A.* 2C:52-2(b) are all categorically barred from expungement and include the most serious crimes defined in the Code of Criminal Justice, such as criminal homicide, kidnapping, and human trafficking.

Section 2(c) addresses drug sale, distribution, or possession with intent to sell.[2] Because the introductory language is broadly drafted but then whittled down by exceptions, it is instructive to identify explicitly the three categories of offenses created by the plain language and operation of that paragraph. The first category is defined by the introductory clause, where exceptions (c)(1) through (3) do not apply: first- or second-degree drug sale offenses. The second category is defined by exceptions (c)(1) and (c)(2): drug sale offenses involving 25 grams or less of marijuana or 5 grams or less of hashish, corresponding approximately to fourth-degree amounts.[3] Finally, the third category is defined by exception (c)(3): third- and fourth-degree drug sale offenses not

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[2] For ease of reference, "sale, distribution, or possession with intent to sell" are referred to as "sale offenses" in this brief when discussed in the context of *N.J.S.A.* 2C:52-2.

[3] The weights provided are not congruous with the definitions of drug offenses in Chapter 35. *Compare N.J.S.A.* 2C:52-2(c)(2) to (3), *with N.J.S.A.* 2C:35-5(b)(12). *See also Matter of Expungement of Arrest/Charge Records of T.B.*, 451 *N.J. Super.* 391, 396 n.2 (App. Div. 2017).

involving 25 grams or less of marijuana or 5 grams or less of hashish.

Whereas all the offenses described by paragraph (b) are categorically barred from expungement, only category one as just defined (first- and second-degree offenses) is absolutely barred under paragraph (c). Convictions under category two (small amounts of marijuana and hashish) are not categorically barred. Significantly, neither are convictions under category three (third- and fourth-degree offenses): instead, particular convictions in this category may be eligible for expungement "where the court finds that expungement is consistent with the public interest," after considering *inter alia* the particular individual's character and conduct through specific documentation outlined by this Court (examined in Point II). *N.J.S.A.* 2C:52-2(c)(3); *In re Kollman*, 210 *N.J.* 557 (2012).

Thus, because the plain language and operation of *N.J.S.A.* 2C:52-2(c)(3) does not bar from expungement the latter two categories of drug sale offenses, those offense categories are not barred offenses under *N.J.S.A.* 2C:35-14(m)(2). As such, the required showing of public interest that attaches to third- and fourth-degree offenses under *N.J.S.A.* 2C:52-2(c)(3) is simply inapplicable to *N.J.S.A.* 2C:35-14(m)(2).

The Appellate Division acknowledged that "Chapter 52 does not absolutely bar expungement of the identified third- and fourth-

degree CDS offenses[.]" *Matter of Expungement of Arrest/Charge Records of T.B.*, 451 *N.J. Super.* 391, 401 (App. Div. 2017) (hereinafter "*Matter of T.B.*"). Yet the court mistakenly concluded that "unless and until" expungement of a particular such conviction is shown to be in the public interest, "the 'conviction [is] for an[] offense barred from expungement pursuant to subsection b. or c. of *N.J.S.[A.]* 2C:52-2.' *N.J.S.A.* 2C:35-14(m)(2)." *Id.* (annotations in original). In so concluding, the Appellate Division conflated the concepts of offenses barred from expungement consideration (absolute bars) and convictions for which expungement could potentially be denied after considering the individual case (fact-specific determinations). The plain language of paragraph (m) clearly cross-references paragraphs (b) and (c) for absolute bars only. As discussed *infra*, if the Legislature wished to incorporate the fact-specific determination (and all the evidentiary and procedural burdens that accompany it) that is laid out in (c)(3), it could have done so explicitly. But to read in a requirement for an additional judicial hearing, or other examination on the issue of public interest, is to "rewrite a plainly-written enactment of the Legislature [ ]or presume that the Legislature intended something other than that expressed by way of the plain language." *O'Connell v. State,* 171 *N.J.* 484, 488 (2002).

3. *The plain language of N.J.S.A. 2C:35-14(m)(1) already allows for an individualized public interest argument, rendering unnecessary any additional showing borrowed from N.J.S.A. 2C:52-2(c).*

Finally, the drug court expungement statute contains its own distinct standard and procedure for evaluating an individual's eligibility for expungement. If the State wishes to argue that expungement of specific third- and fourth-degree drug sale convictions — or any other part of the graduate's criminal record in whole or in part — is not in the public interest, paragraph (m)(1) affords that opportunity.

While the cross-reference at issue relates to the second exception to presumed expungement, the first exception is explicitly a balancing of the interests, which can account for the public interest. It provides that the drug court may deny the expungement if "it finds that the need for the availability of the records outweighs the desirability of having the person freed from any disabilities associated with their availability." *N.J.S.A.* 2C:35-14(m)(1). It also contemplates that "any other factors related to public safety" may be considered as part of that balancing. *Id.* at ¶ (m)(2).

To the extent any additional public interest consideration was intended by the Legislature, it was therefore clearly added to the statutory text. Reading a tertiary, particularized public interest requirement into the cross-reference would be redundant

and at cross-purposes with the Legislative intent, as manifested by the plain language of paragraph (m).

C. The Legislature Would Not Have Imposed an Additional, Fact-Specific Public Interest Requirement Without So Stating.

Given the plain language of the statute, no further analysis is required. But even if this Court turns to legislative intent for guidance, it should not "'write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment.'" *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005)(quoting *Craster v. Bd. of Comm'rs of Newark,* 9 *N.J.* 225, 230 (1952)). The Appellate Division has performed this very write-in. The Legislature's provision of broad-based expungement of entire criminal records already accounts for the public interest. It therefore did not need to add, and in fact pointedly omitted, an additional public interest qualification with respect to individuals' particular facts. Nothing in the plain language of the drug court statute or its legislative history suggests this omission was unintentional. Indeed, the entire operation of the drug court expungement statute focuses on the person, not on the particular facts of any specific conviction, and is thus inconsistent with the general expungement statute's scheme for assessing specific convictions for non-categorically barred offenses under subsection (c)(3).

The Appellate Division recognized that "[t]he legislative history does not expressly address the issue[.]" *Matter of T.B.*, 451 *N.J. Super.* at 402. Nevertheless, the court based its opinion in part on the legislative history of the statute, finding that the "Legislature evinced no intent to weaken the barriers to expungement set forth in *N.J.S.A.* 2C:52-2(b) and -2(c)."[4] *Id.* Yet the legislative history cited by the court militates in neither direction. Like the State's exercise, this review of the history simply shows that the Legislature intended to add the cross-reference to paragraphs (b) and (c) of the general expungement statute that appears in the plain language of *N.J.S.A.* 2C:35-14(m).

Moreover, the enactment itself *does* shows an "intent to weaken the barriers to expungement" for drug court graduates. A failure explicitly to clarify that, as applied to drug court graduates, the Legislature meant to weaken the barriers to expungement set forth in Chapter 52-2(c)(3) at the same time that it was explicitly

[4] This Court has examined the legislative history of *N.J.S.A.* 2C:52-2(c)(3) and revealed that subsection (c)(3) was in fact explicitly added to *expand* opportunities for expungement, not to signal a longer list of disqualifying offenses or heightened showings required for eligibility. *In re Kollman*, 210 *N.J.* at 570–72. Thus the Legislature's intent in drafting subsection (c)(3), with its public interest requirement, was not to create an additional barrier to expungement, but rather in fact to help petitioners overcome the existing barriers. This original intent behind subsection (c)(3) is all the more reason to interpret the cross-reference as not importing additional barriers.

weakening the barriers to expungement for those graduates set forth in Chapter 52 *at large* is not remarkable. Reading legislative intent into that silence is wholly misguided. *See Berg v. Christie*, 225 *N.J.* 245, 273 (2016) (recognizing the limitations of reliance on legislative history); *Lamie v. U.S. Tr.*, 540 *U.S.* 526, 541 (2004) (discussing "the difficulty of relying on legislative history here and the advantage of our determination to rest our holding on the statutory text.")

Before the Appellate Division, the State similarly claimed, but pointed to no evidence, that the legislative history shows an intent to import the public interest showing: "[W]hen drafting the drug court expungement law, the Legislature sought to specifically include the public interest determination as a required, additional, determination, even after petitioner has graduated from drug court." Sb. 12.[5] Yet the State's only proof for this statement is that the cross-reference to *N.J.S.A.* 2C:52-2(c) was intentional. That point is, of course, undisputed and indisputable, as it appears on the face of the drug court expungement statute. But that does not provide any evidence as to

[5] The following abbreviations will be used:
"Sb" refers to the State's brief at the Appellate Division.
"Pb" refers to petitioner/respondent's brief in support of certification from this Court.
"Pa" refers to the appendix to petitioner/respondent's brief in support of certification from this Court.
"Stay Br." refers to petitioner/respondent's brief in support of its motion for a stay from this Court.

whether the cross-reference was intended solely for the list of categorically barred offenses or was also meant to import the individualized public interest showing for non-categorically barred third- and fourth-degree offenses. The State's pretense that the issue is the cross-reference to the broader paragraph is simply a tautological strawman.[6]

A final canon of statutory construction counsels against finding any importation of subsection (c)(3)'s public interest requirement. Although the drug court expungement statute is not technically a penal statute, it is located within Title 2C, the New Jersey Code of Criminal Justice. When faced with ambiguity in a criminal law, courts must construe the provision in favor of the defendant. *State v. Reiner*, 180 *N.J.* 307, 311 (2004). Further, Title 2C, section 1, directs that "when the language [of a provision] is susceptible of differing construction it shall be interpreted to further the general purposes stated in this section and the special purposes of the particular provision involved." *N.J.S.A.* 2C:1–2(c); *see also State v. Lewis*, 185 *N.J.* 363, 369 (2005). The special purpose of *N.J.S.A.* 2C:35-14(m) is clearly to offer broad-based expungements of entire criminal records, unlike

[6] For example, the State writes, "To ignore the language in *N.J.S.A.* 2C:35-14m(2) that specifically incorporates subsection c. of *N.J.S.A.* 2C:52-2 is to render this provision superfluous, contrary to cannons of statutory construction." Sb. 13 (citing *DiProspero*, 183 *N.J.* at 494-95.) Yet no one is disputing that the cross-reference to section 2 is intentional and non-superfluous.

the general expungement statute or any other provision of New Jersey law. The Appellate Division's treatment of the cross-reference renders more records ineligible for expungement, frustrating the statute's purpose and deeply harming criminal defendants and their families and communities.[7]

In sum, whether expungement of a particular third- or fourth-degree drug sale offense is in the public interest is immaterial. What matters is that expungement of the whole record is in the public interest, and by granting it almost automatically, the Legislature clearly acknowledged that the fact- and conviction-specific analysis of subsection (c)(3) was unnecessary.

II. IF ANY INDIVIDUALIZED PUBLIC INTEREST SHOWING IS REQUIRED, THE BURDEN FALLS ON THE STATE.

Assuming *arguendo* that the Legislature did intend to import the fact-specific public interest examination from *N.J.S.A.* 2C:52-

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[7] The canon against absurd results may also be instructive, *inter alia* as an alternative way of framing the frustration of purpose analysis. In his brief in support of certification, petitioner/respondent argues:

> The Appellate Division's holding leads to the absurd result that a Drug Court expungement is potentially more burdensome to obtain than an expungement under *N.J.S.A.* 2C:52-2 because there is no limit on the number of past convictions that require the production of the plea and sentencing transcripts, as well as the pre-sentence report.

Pb. 8. *See also State v. Morrison*, 227 *N.J.* 295, 308 (2016) (cautioning "[w]e will not adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme.")

2(c)(3) for third- and fourth-degree drug sale offenses, the burden should fall on the State to show that expungement is not in the public interest. As argued in Point I, the ineligibility bars defined by the cross-reference are absolute and objective. But even if they were instead individualized and subjective, their placement alongside the other subjective exception to expungement, combined with the presumption in favor of broad-based expungement contained in *N.J.S.A.* 2C:35-14(m) more generally, would require that the state carry the burden. This Court's decision in *In re Kollman*, 210 *N.J.* 557, does not change the present analysis, either with respect to the burden placement or the evidence required to make the showing, because the two expungement statutes are so dissimilar. Instead, as petitioner/respondent argues in his brief in support of certification, if any public interest showing is required, the drug court should be permitted to base its finding on the graduate's record of conduct during program participation.

A. *Kollman* Is Inapposite, Because the Purpose and Effect of The Two Expungement Statutes Are Dissimilar.

The State and Appellate Division mistakenly rely on *Kollman* for two propositions: first, that it is the burden of the person seeking expungement of a record containing third- or fourth-degree drug sale offenses to show expungement is in the public interest under paragraph (c)(3); and second, that the person must provide "'all transcripts of plea and sentencing hearings, as well as a

copy of the presentence report'" for those third- and fourth-degree offenses. *Matter of T.B.*, 451 *N.J. Super.* at 406 (quoting *Kollman*, 210 *N.J.* at 577). Because *Kollman*'s analysis is specific to the general expungement statute, such reliance is misplaced.[8]

Like most general expungement statutes, Chapter 52 contemplates one-time offenses or otherwise limited experiences with the criminal justice system. It "shall be construed with the primary objective of providing relief to the reformed offender" but not "persistent violators of the law."[9] *N.J.S.A.* 2C:52-32. Unlike *N.J.S.A.* 2C:35-14(m), the general expungement statute was

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[8] The State is of course correct that "the Legislature knows how to incorporate into a new statute a standard articulated in a prior opinion of this Court." *DiProspero*, 183 *N.J.* at 494–95; Sb. 13. But such incorporation is clearly not intended when the Legislature creates an entirely dissimilar scheme with the new statute.

[9] Previously, "reformed offender" read as "one-time offender," leading this Court to note that the "the legislative purpose of the expungement statute [was] to assist the 'one-time offender' who has led an otherwise lawful existence." *In re J.S.,* 223 *N.J.* 54, 64 (2015). Effective April 2016, the statutory language was amended with this substitution. *N.J.S.A.* 2C:52-2(a) (as amended by L. 2015, c. 261). Under Chapter 52, expungement is off-limits to individuals convicted of more than one indictable offense. *N.J.S.A.* 2C-52:2(a). Effective October 1, 2018, this cap will remain in place but an exception will be provided where the convictions were entered in a single judgment or were "interdependent or closely related in circumstances and were committed as part of a sequence of events that took place within a comparatively short period of time." *N.J.S.A.* 2C:52-2(a) (as amended by S.B. 3307, § 1 (2017)). None of these changes affect the underlying nature of the general expungement statute: to provide relief from discrete and limited contacts with the criminal justice system. However, they do show the Legislature's recognition that expanding opportunities for expungement is sound policy, as embodied by the much broader drug court expungement statute itself.

designed to eliminate "the collateral consequences imposed upon otherwise law-abiding citizens who have had *a minor brush with the criminal justice system.*" *In re T.P.D.*, 314 *N.J. Super.* 643, 648 (Law Div. 1997), *aff'd o.b.,* 314 *N.J. Super* 535, 715 (App. Div. 1998) (emphasis added); *see also Kollman*, 210 *N.J.* at 568 (outlining "certain basic principles about the expungement statute").

By contrast, as examined in Point I, the drug court expungement statute lowers the threshold to expungement so far that there is a presumption in favor of it, and expungement covers not just one-time or discrete offenses but entire criminal records. Accordingly, the drug court judge does not employ a conviction-specific analysis as Chapter 52, and *Kollman*'s interpretation thereof, envision. While *Kollman*'s requirements are highly reasonable under the framework of a single-conviction expungement under Chapter 52, they are inapposite given the purpose, operation, and breadth of the drug court expungement statute.

The State's claim of illogic misses the mark. The State argues that if the court needed Mr. Kollman's extensive documents to consider expungement of a single conviction, certainly it would need these documents to consider expungement of an entire record, "where there is virtually no limit on the number of convictions that can be expunged." Sb. 15. Again, this argument overlooks the crucial distinction between the purposes of the two expungement

statutes. The whole point of the drug court expungement scheme is to offer broad-based expungement, without regard to the particular facts of the individual convictions so long as they are not for barred offenses. Requiring the court to examine and re-interrogate each of these convictions according to the *Kollman* scheme is itself "contrary to logical thought." *Id.*

B. Read in Its Entirety, *N.J.S.A.* 2C:35-14(m) Defines the State's Burden.

As examined *supra*, paragraph (m) creates a presumption of expungement upon successful graduation from drug court, provided the graduate has not been convicted during the course of program participation and is not otherwise ineligible through one of the two exceptions. *N.J.S.A.* 2C:35-14(m)(1) ("The court shall grant the relief requested unless. . ."). The correlative of a presumption in favor of one party – in this case, for graduates in their pursuit of expungement – is that the burden falls on the other party to rebut it. *See Shim v. Rutgers*, 191 *N.J.* 374, 386 (2007); *N.J.R.E.* 301. Accordingly, it is the State's burden in general to show that the graduate is not entitled to expungement.

Additionally, the plain language of paragraph (m) states that it is "the obligation of the prosecutor to notify the court of any disqualifying convictions or any other factors related to public safety that should be considered by the court when deciding to grant an expungement under paragraph (1)[.]" *N.J.S.A.* 2C:35-

14(m)(2). The State concedes that this "obligation" means the State "*bears the burden* to show the need for the availability of the records outweighs the desire for expungement[.]" ABr. 11 (emphasis added). Yet remarkably, it reads the very same sentence to mean that the graduate bears the burden to show public interest with respect to "disqualifying convictions." *Id.*

Putting these pieces together: Subsection 1 of paragraph (m) creates a presumption in favor of the drug court graduate and ultimate expungement — in other words, against the State — and subsection 2 obligates the State to claim that an exception is appropriate, which the State concedes with respect to one exception only. When every other burden in paragraph (m) is construed against the State, the assertion that the public interest showing for one of those exceptions is suddenly the graduate's requires willful blindness to the clear structure and spirit of that paragraph.

The only logical rejoinder would be that the burden begins with the State but then shifts to the graduate once the State has made a preliminary showing that the public interest mandates ineligibility under subsection (c)(3). Neither the State nor the Appellate Division articulated this.[10] Instead, the Appellate Division simply concluded:

[10] Moreover, even were the State to claim the burden-shifting argument before this Court, it would require an underlying assumption that, under the drug court expungement statute, expungement of third- and fourth-degree drug sale offenses is

> The State must initially show that the applicants were convicted of a potentially disqualifying crime covered by *N.J.S.A.* 2C:52–2(c)(3). *See N.J.S.A.* 2C:35–14(m)(2) (stating "[i]t shall be the obligation of the prosecutor to notify the court of any disqualifying convictions"); cf. *Kollman*, *supra*, 210 *N.J.* at 570 (stating that the prosecutor bears burden of demonstrating a cause for denial after the petitioner establishes objective elements of *N.J.S.A.* 2C:52–2(a)). Then, consistent with *Kollman*, *supra*, the Drug Court graduates bear the burden to show they satisfy the public interest test. 210 *N.J.* at 572–73.

Matter of T.B., 451 *N.J. Super.* at 405. The Appellate Division did not explain why it distinguished the drug court expungement statute from *Kollman* in the first sentence but then required consistency with it in the second, nor offer any other basis for its conclusion that the graduate bears the burden simply because the petitioner did in *Kollman*, under an entirely different statutory scheme.

C. Burden of Proof is Distinct from Sufficiency of the Record; The Latter May Be Permissibly Limited to Drug Court Participation, If the Judge So Chooses.

The Appellate Division also erred in importing *Kollman*'s requirement that defendants must provide plea and sentencing transcripts, as well as the pre-sentence report, to aid the court's consideration of the public interest in cases involving third- and fourth-degree convictions. Petitioner/respondent argued that the

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presumptively *not* in the public interest. For all the reasons examined in Point I, while that may be the presumption of the general expungement statute, it is not so in the drug court expungement statute at issue here. The drug court expungement statute is a new statutory scheme that is animated by the principle that expungements of entire criminal records serve the public interest.

Legislature did not mean to import a public interest requirement and that, even if it did, the drug court's consideration of the evidence of public interest can be limited to the graduate's record of participation in the program. *See* Pb. 17-20. *Amicus* ACLU-NJ entirely agrees, for the reasons petitioner/respondent outlines, including principally because the drug court graduate is no stranger to the judge. Quite unlike the scheme under the general expungement statute that *Kollman* addressed, here the judge has spent five years overseeing intensive supervision of the graduate's conduct and character.

However, it should be noted that this point regards the sufficiency of the record on which the drug court can decide the public interest impact, which is distinct from the question of which party bears the burden of proving it. *Amicus* maintains that the Appellate Division erred in its reliance on *Kollman* for both of these points. If any showing is required, the burden remains on the State to raise the issue of public interest and prove that it is not served by expungement. Additionally and separately, as petitioner/respondent argues, the drug court judge can conclude that successful participation in and completion of the program — with or without an examination of the conduct and character of the person during those five years — is sufficient evidence for a finding of public interest.

III. AS A MATTER OF SOUND POLICY, EXPUNGEMENT OF CRIMINAL RECORDS IS PRESUMPTIVELY IN THE PUBLIC INTEREST.

As this Court recognized in the first sentence of its *Kollman* decision, "Millions of adults nationwide have criminal records that affect their reentry into society years after their sentence is complete." 210 *N.J.* at 562. Expungement presumptively serves the public interest, by removing the barriers to reentry of these criminal records. The enactment of *N.J.S.A.* 2C:35-14(m) reflects well-founded public policy, as it expands the opportunities for expungement, providing even greater relief than the Court was considering under the general expungement statute in *Kollman*. By making such expungement significantly more burdensome, the Appellate Division's opinion does the public interest a disservice.

A. Collateral Consequences Harm the Public Interest.

1. Criminal records lock people out of opportunity and inhibit the exercise of their freedoms.

In a powerful examination, and takedown, of the collateral consequences of conviction, U.S. District Court Judge Frederic Block described:

> Today, the collateral consequences of a felony conviction form a new civil death. Convicted felons now suffer restrictions in broad ranging aspects of life that touch upon economic, political, and social rights. In some ways, "modern civil death is harsher and more severe" than traditional civil death because there are now more public benefits to lose, and more professions in which a license or permit or ability to obtain a government contract is a necessity.

United States v. Nesbeth, 188 *F. Supp.* 3d 179, 182 (E.D.N.Y. 2016), *appeal withdrawn* (Sept. 9, 2016) (quoting Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1802 (2012)).[11]

According to the National Inventory of Collateral Consequences of Conviction, a project of the U.S. Department of Justice's Bureau of Justice Assistance, there are nearly 50,000 federal and state laws or regulations imposing collateral consequences upon people as a result of criminal records. National Inventory of Collateral Consequences of Conviction, https://niccc.csgjusticecenter.org/ (interactive database). Federal law alone imposes close to 1,200 collateral consequences. Of those, there are nearly 300 for drug offenses specifically. *See id.* (narrow database search to federal law and then to controlled-substances offenses); *see also* Collateral Consequences Resource Center, *Compilation of Federal Collateral Consequences*, http://federal.ccresourcecenter.org/consequence-search (interactive database). For people convicted in New Jersey,

[11] Finding these collateral consequences to "serve no useful function other than to further punish criminal defendants," Judge Block sentenced the defendant to one year of probation, concluding that the collateral consequences she would face were punishment enough. Ms. Nesbeth had been arrested with more than 600 grams of cocaine and convicted by a jury of importation of cocaine and possession of cocaine with intent to distribute. *Nesbeth*, 188 *F. Supp.* 3d at 180, 189.

another 1,088 state statutes or regulations impose potential collateral consequences, including 199 for drug offenses specifically. *See* National Inventory of Collateral Consequences of Conviction (narrow database search to New Jersey).

As a result of these literally thousands of collateral consequences, individuals and sometimes entire families are blocked from accessing public benefits, exercising their freedoms, and meaningfully contributing to economic, social, and civic life. People living with criminal records experience restrictions in obtaining and maintaining housing, employment, certain public benefits, educational loans, driver's licenses, child custody and other parental rights, volunteering opportunities, immigration status, and many other rights or benefits. Collateral consequences also prevent New Jerseyans from serving on state and federal juries, meaning those with direct experience in the criminal justice system are least able to participate in its operation.[12] *See N.J.S.A.* 2B:20-1(e); 28 U.S.C. § 1865(b)(5). And although New

[12] This is not the case everywhere. A number of states, including Alaska, Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Minnesota, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Washington and Wisconsin, as well as the District of Columbia, do not exclude people with criminal convictions from jury service for life. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. U. L. Rev. 65, 150-57 (2003). Indeed, between 1995 and 1997, New Jersey permitted people with criminal convictions to serve on juries after they had completed their sentences. *Id.* (citing *N.J.S.A.* 2B:20-1(e)).

Jersey has made some strides to protect against discrimination on the basis of criminal records,[13] collateral consequences still subject people to forms of private discrimination and stigma in professional and personal settings. *See, e.g.,* Editorial Board, *Labels Like 'Felon' Are an Unfair Life Sentence*, N.Y. Times (May 7, 2016), https://www.nytimes.com/2016/05/08/opinion/sunday/labels-like-felon-are-an-unfair-life-sentence.html (examining stigma attaching to labels such as "felon," "ex-convict," and "ex-offender"). As Michelle Alexander writes, a record of conviction is a "badge of inferiority [that] remains with you for the rest of your life, relegating you to a permanent second-class status." When that status derives from a criminal record, "discrimination is perfectly legal." Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 142 (2012).

2. Criminal records disproportionately impact people of color.

Collateral consequences of criminal records disproportionately impact individuals and communities of color. Although Black people make up only 15 percent of the New Jersey population, in 2015 New Jersey State Police reported that nearly

[13] *See, e.g.,* the Opportunity to Compete Law, *N.J.S.A.* 34:6B-14. However, like many "ban-the-box" laws, this does not prevent employers from asking about or discriminating on the basis of criminal record in final hiring decisions, after the initial application process has concluded.

39 percent of state-level arrests were of Black people.[14] New Jersey State Police, *Uniform Crime Report, State of New Jersey 2015* 43, 50 (2015), http://www.njsp.org/ucr/2015/pdf/2015b_uniform_crime_report.pdf. New Jersey's racial disparities in incarceration are even worse. New Jersey leads the country in its Black-white racial disparity, incarcerating Black New Jerseyans at a rate 12.2 times higher than white New Jerseyans, more than twice the national average. Data from 2014 show 94 white people and a staggering 1,140 Black people incarcerated for every 100,000 in the population. New Jersey's Latino-white disparity is also higher than the national average, at 2.2 Latino people incarcerated for every one white person, accounting for population size. Sentencing Project, *Detailed State Data: New Jersey,* https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S.%20Total&state2Option=New%20Jersey.

While there is no readily available information on rates of conviction by race, these arrest and incarceration data points can be treated as proxies for who ends up saddled with criminal records in general in New Jersey.[15] They clearly demonstrate that

[14] The State Police's arrest data by race did not include Latino or Hispanic as a category in this aggregation, instead classifying only by white, Black, American Indian or Alaskan Native, and Asian or Pacific Islander. *Uniform Crime Report, State of New Jersey 2015,* Section 3, 50.

[15] Although most discussion of collateral consequences focuses on the result of a record of conviction, even records of arrest can be damaging. The drug court expungement statute importantly

communities of color are disproportionately harmed by collateral consequences, and accordingly that they stand to gain the most from broad-based expungement opportunities.

3. Criminal records fuel mass incarceration and harm society more broadly.

The collateral consequences of criminal records perpetuate the cycles of poverty and mass incarceration and "chip away at critical ingredients of the support systems of poor people in this country." Jeremy Travis, "Invisible Punishment: An Instrument of Social Exclusion," in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 18 (Marc Mauer & Meda Chesney-Lind, eds., 2002), https://www.urban.org/sites/default/files/publication/59901/1000557-Invisible-Punishment-An-Instrument-of-Social-Exclusion.PDF. Because collateral consequences create barriers to reentry and reduce opportunities for employment, housing, and other necessities of daily and family life, they also increase the risk of recidivism. *See, e.g.,* Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 Just. Q. 382, 389 (2011); Cornell William Brooks, *Written Testimony to U.S. Equal Employment Opportunity Commission* (July 26, 2011), https://www1.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm?.

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includes "expungement of all records and information relating to all prior arrests, detentions, convictions, and proceedings for any offense enumerated in Title 2C." *N.J.S.A.* 2C:35-14(m)(1).

For example, studies show that employment contributes to decreases in recidivism and promotes public safety. Marina Duane et al., Urban Institute, *Criminal Background Checks: Impact on Employment and Recidivism* 12 (2017), https://www.urban.org/sites/default/files/publication/88621/2001174_criminal_background_checks_impact_on_employment_and_recidivism_1.pdf. Yet the burden of a criminal record means people have more difficulty accessing employment opportunities, while the experience of repeated rejection by potential employers may lead to "cynicism and withdrawal from formal labor market activity." National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 239 (Jeremy Travis et al. eds., 2014).

A recent study estimates that in 2014, there were between 14 and 15.8 million people of working-age who had felony convictions, or about 7.2 to 8.1 percent of the working-age population. Cherrie Bucknor & Alan Barber, Center for Economic and Policy Research, *The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, 10 (2016). Between 39.5 and 44.6 percent of Black men had felony convictions. *Id.* at 11. A felony conviction significantly lowers future employment opportunities and results in large reductions in personal and household earnings. *Id.* at 13 (presenting statistical estimates of decline in employment by gender, education level, and

race, assuming a 12 percentage-point employment penalty). This individual loss of employment opportunity impacts communities and the country as a whole. The Center for Economic Policy Research estimates that in 2014, barriers to employment faced by people formerly incarcerated and people with felony convictions resulted in a loss of 1.7 to 1.9 million workers across the United States and a loss of between $78 and $87 billion in GDP. *Id.* at 3.

While criminal records have the effect of feeding the cycle of mass incarceration, the myriad collateral consequences of those records are not formally considered criminal punishment, defined instead as "civil" rather than criminal and "disabilities" rather than punishments.[16] Travis, "Invisible Punishment," 16-17. Yet as experienced, these consequences amount to "a form of punishment that is often more difficult to bear than prison time: a lifetime of shame, contempt, scorn, and exclusion." Alexander, *The New Jim Crow*, 142. Expungement provides an opportunity to rise above that status and to regain the liberty of a life without debilitating collateral consequences. The Legislature's decision to offer expungements of entire criminal records for successful drug court graduates was wise public policy and serves the public interest.

[16] Various scholars have argued prosecutors and judges should take collateral consequences into account in their charging and sentencing decisions. *See, e.g.*, Eisha Jain, *Prosecuting Collateral Consequences*, 104 Georgetown L. J. 1197, 1202, 1242 (2016).

This Court should allow that policy wisdom to be fully implemented by reversing the Appellate Division opinion in this case.

B. The Opinion of the Appellate Division Harms the Public Interest.

While this Court stayed those portions of the Appellate Division opinion that vacated the orders of expungement for T.B., J.N.-T., and R.C., the rest of the opinion has remained in force. As a result, since early August 2017, drug courts throughout New Jersey have been required to implement heightened procedures in line with *Kollman*'s documentation requirements, which the Office of the Public Defender, handling the majority of drug court cases, predicted would cause a significant resource strain. *See* Pb. 14 n.4; Stay Br. 3.

As of May 2017, there were 6,175 people in drug court, with 738 in the final phase of the program and ready to seek expungements upon graduation. Since the drug court expungement statute took effect in 2016, 188 graduates have successfully had their criminal records expunged. Pa. 26a. In addition to the resource intensity of the public interest showings, if the Appellate Division opinion is allowed to stand, it runs the risk of discouraging program entry and completion, by removing the incentive and reward of expungement of entire records. It also keeps potentially hundreds — or even, over the years, thousands — of people saddled with the devastating collateral consequences of

criminal records, which harm not only them individually but also the family members and communities who rely on them. With this case, this Court has an opportunity to effectuate the Legislature's purpose of putting an end to that harm.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Appellate Division. The plain language of the drug court expungement statute, the legislative intent, and the public interest require it.

Respectfully submitted,

ALEXANDER SHALOM (ID # 021162004)
TESS BORDEN (ID # 260892018)
EDWARD BAROCAS
JEANNE LOCICERO
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION
Counsel for *Amicus Curiae*

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