Public Safety Act of 2007

Preamble

Whereas, The number of persons with criminal records in Massachusetts who are unable to get jobs, housing, education, training or credit, or are otherwise unable to enter the mainstream, has grown enormously, to wit: –

The Massachusetts prison population more than tripled between 1980 and 2002,[1] and the vast majority of former inmates are eventually released to our communities.[2] Nationwide, approximately 630,000 former offenders were released from state and federal prisons in 2001, a fourfold increase over the last twenty years.[3] Between 1998 and 2005, the number of Criminal Offender Record Information (CORI) requests has more than tripled, from 400,000 to 1.5 million requests per year.[4] Since 1993, the number of organizations with CORI access has increased fivefold, from 2,000 to 10,000.[5] An increasing number of Massachusetts companies are conducting background checks.[6] Of 196 Boston area companies surveyed in 2006, 65% conduct CORI checks, compared with 56% in 2004.[7] Originally meant for law enforcement officials, CORI reports are difficult for the average employer to read.[8] Over 60% of employers in four urban areas, including Boston, reported that they would "probably not" or "definitely not" hire an applicant with a criminal record.[9] The challenges facing former offenders to find employment and housing are greater than ever.[10]

Whereas, State and federal money devoted to re-entry programs is thwarted by a system where people cannot re-enter the mainstream, to wit: –

In 2004, the Governor's Commission on Corrections Reform (GCCR) made recommendations for reforms in the Department of Corrections (DOC).[11] The GCCR recommended that the DOC should adopt a comprehensive re-entry strategy because reducing the rate of re-offense should be one of the state's highest priorities.[12] In response to the GCCR recommendations, the Executive Office of Public Safety (EOPS) has created nine Regional Reentry Centers that provide services in the areas of employment, vocational training, and housing.[13] The Commonwealth also obtained a U.S. Department of Justice Serious and Violent Offender Reentry Initiative grant of $2 million to create programs that address recidivism of adult and juvenile former offenders.[14] Additionally, the parole board administration requested a $1.6 million increase in budget from 2005 to 2006, with a note that the increased budget was requested to pay for reentry initiatives.[15]

But despite evidence that employment may reduce crime, the use of criminal history records has been increasing.[16] Efforts to ease the transition of individuals with criminal records back into society have been conflicting with the existence of CORI records making the transition more difficult.[17]

Whereas, The sealing provisions set forth in this Act – the quasi-automatic structure and the enhanced fairness for sealing non-conviction cases and the shortened waiting periods for the sealing of conviction cases – are justifiable, because they are inherently fair and because former offenders recidivate very early after release, or not at all, to wit: –

Criminal records are similar to credit reports in that negative information carries less and less weight in the calculation of risk as time passes.[18] Yet unlike the extensive controls governing access to personal information on credit reports,[19] charges on one's CORI continue to be reported for years to come.[20] Former offenders who will recidivate do so shortly after release from custody: Rates of recidivism are high in the first two years after release, but are significantly lower in the third year, and approach zero risk by the fifth year.[21] Differences in the likelihood of offending between former offenders and non-offenders weaken dramatically and quickly over time.[22] After six or seven years, the rates of former offenders' re-offending begin to approximate the rates of those who have never offended.[23] The federal government adopted a seven-year standard for criminal records after 9/11, when the Transportation Security Administration of the Department for Homeland Security began examining criminal records of truck drivers of hazardous materials.[24] The most cautious reading of the evidence supports sealing CORI records seven years after the final disposition of a felony[25] and three years after the final disposition of a misdemeanor.

Now Therefore, The General Court hereby finds and declares that: –

In addition to the state interest in safeguarding the reputations and privacy of the Commonwealth's residents, there is, collectively, a *compelling governmental interest* to seal or otherwise mitigate the harm caused by stale, misleading or otherwise unpredictive criminal records, which governmental interest may, in appropriate instances, be ruled by a judge to overcome what some federal courts have found to be a First Amendment interest in favor of keeping these governmental records available to all persons, including the more than ten thousand organizations which now have access to CORI.

[1] Lisa E. Brooks, Amy L. Solomon, Sinead Keegan, Rhiana Kohl, Lori Lahue, *Prisoner Reentry in Massachusetts* at 7 (Washington, DC: The Urban Institute, March 2005).

[2] Commonwealth of Massachusetts, Governor's Commission on Corrections Reform, *Strengthening Public Safety, Increasing Accountability, and Instituting Fiscal Responsibility in the Department of Correction* at i (June 2004), available at http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf (last visited March 26, 2007).

[3] Paige M. Harrison and Jennifer C. Karberg, *Prison and Jail Prisoners at Midyear 2002* (Washington, DC: U.S. Department of Justice, Bureau of Statistics (2003), in *Prisoner Reentry in Massachusetts* at 3.

[4] Claire Kaplan, *CORI: Balancing Individual Rights and Public Access* at 8 (Boston, MA: Boston Foundation, 2005), available at http://www.tbf.org/uploadedFiles/CORI%20Report.pdf (last visited March 26, 2007).

[5] *Id*. Some employers are granted statutory access and others have access under discretionary access or a broad grant of access given by the Criminal History Systems Board. A listing of the general grants of CORI access is available at: http://www.mass.gov/?pageID=eopssubtopic&L=5&L0=Home&L1=Crime+Prevention+%26+Personal+Safety&L2=Background+Check&L3=Criminal+Offender+Record+Information+(CORI)&L4=General+Grants+of+Access+to+CORI&sid=Eeops (last visited March 26, 2007).

[6] Press Release, The Survey Group, *More Companies Conducting Employee Background Checks* (Feb. 10, 2006), available at http://www.thesurveygroup.com/articleview.php?id=48 (last visited March 26, 2007).

[7] *Id*.

[8] Kaplan, *CORI: Balancing Individual Rights and Public Access* at 10.

[9] Harry J. Holzer, Steven Raphael, Michael A. Stoll, *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks, and Their Determinants* at 8 (Chicago, IL: Northwestern University and University of Chicago Joint Center for Poverty Research, October 2001), available at http://www.jcpr.org/wpfiles/holzer_raphael_stoll.pdf?CFID=7328770&CFTOKEN=39022325 (last visited March 26, 2007).

[10] Note, *Winning the War on Drugs: A "Second Chance" for Non-Violent Drug Offenders*, 113 Harv. L. Rev. 1485, 1493 (2000).

[11] Commonwealth of Massachusetts, Governor's Commission on Corrections Reform, *Strengthening Public Safety, Increasing Accountability, and Instituting Fiscal Responsibility in the Department of Correction* (June 30, 2004), available at http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf (last visited March 26, 2007).

[12] *Id*. at vii.

[13] Department of Corrections Advisory Council, Preliminary Report at 12 (Massachusetts, June 2005), available at http://www.mass.gov/Eeops/docs/doc/DOCAC_prelim_report.pdf (last visited March 26, 2007).

[14] Press Release, U.S. Department of Justice, Office of Justice Programs, Massachusetts to Receive Federal Funds for Offender Reentry Efforts (July 15, 2002), available at http://www.ojp.usdoj.gov/newsroom/2002/Release-MA02183b.html (last visited March 26, 2007).

[15] 2006 Proposed Budget, available at http://www.mass.gov/bb/fy2006h1/06budrec/acct/h89500001.htm (last visited March 26, 2007).

[16] Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?* at 1102, Criminology and Public Policy, Vol. 5, Issue 3 (August 2006), available at www.reentrypolicy.org/reentry/Document_Viewer.aspx?DocumentID=1386 (last visited April 2, 2007).

[17] Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement* at 3, Crime & Delinquency, Vol. 53, No. 1 (2007), available at www.reentry.net/library.cfm?fa=download&resourceID=81140&print (last visited April 2, 2007).

[18] Kurlychek, *Enduring Risk?* at 21.

[19] *See, e.g.*, the Fair Credit Reporting Act, 15 U.S.C., §1681, available at http://www.ftc.gov/os/statutes/fcrajump.htm (last visited April 2, 2007).

[20] *See, e.g.*, Kaplan, "Case Example: Do You Know What Your CORI Says?," *CORI: Balancing Individual Rights and Public Access* at 14.

[21] James Hannon, *Recidivism Rates Support Accelerated Sealing of CORI* at 3, Criminal Justice Policy Coalition, Vol. II, Issue 7 (October 2005), available at http://www.cjpc.org/OctoberNewsletter.htm#article3 (last visited April 2, 2007).

[22] Kurlychek, *Scarlet Letters and Recidivism* at 1101.

[23] *Id*.

[24] Department of Homeland Security, Transportation Security Administration, Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License, available at http://hazmat.dot.gov/regs/rules/final/68fr/68fr-23851.htm (last visited April 2, 2007).

[25] Hannon, *Recidivism Rates Support Accelerated Sealing of CORI* at 3.

[Makes Certif of Com't to Rehab part of CORI report]

SECTION 1. Section 168A of Chapter 6 of the General laws is hereby amended by inserting after the first sentence the following sentence: – Said records shall include, where applicable, regularly updated certifications of commitment to rehabilitation, as defined in section 168D.

[Creates Certif of Com't to Rehab]

SECTION 2. Chapter 6 of the General Laws is hereby amended by inserting after section 168C the following section: –

Section 168D. Probation officers, parole officers, the heads of county jails or houses of correction, or their delegates, and the superintendents of state correctional institutions, or their delegates (hereinafter collectively referred to as "supervisory officials"), shall, where appropriate, on a regular basis but at least every six months, issue a certification of commitment to rehabilitation with respect to each person under supervision, if the person has substantially complied with the behavioral requirements established by the supervisory official, including reasonable participation in treatment or other rehabilitative programs that are available to the person; but lack of reasonable access to such treatment or rehabilitative programming due to circumstances beyond the control of the supervised individual shall not compromise the eligibility of the individual for certification.

At the beginning of each period for which the individual is potentially eligible, the supervisory official shall clearly describe to the person the requirements for certification, including advance warning of an adverse recommendation and its basis, where such recommendation is subject to reversal upon correction of the deficient behavior by the person.

The certification shall be dated and indicate the time period covered. Supervisory officials, upon issuing such a certification, shall inform the criminal history systems board, pursuant to section 168A, so that appropriate data will be made part of a so-called "CORI report."

[CHSB to send out just conviction & open cases; also mandates screener due process]

SECTION 3. Section 172 of said chapter 6 of the General Laws is hereby amended by inserting after the first paragraph the following paragraphs: –

Agencies, other entities or persons granted access under clause (c) of the first sentence of the first paragraph of this section, including local or regional housing authorities, as provided in the third sentence of the third paragraph of section 168, shall receive criminal offender record information limited to cases which are either open or contain convictions, except as otherwise specifically provided by a separate statute relating to a particular agency, entity or class of entities.

Any such agency, housing authority, entity or person receiving a criminal offender record information report and, as a result thereof, is inclined to make an adverse decision as to the individual who is the subject of the report, shall, before making the decision, give the individual a photocopy of the report and afford him an opportunity, in a private discussion, to dispute the accuracy or relevance of the report, after which the agency, housing authority, entity or person shall consider all the information before making a final decision and shall advise the individual of the decision and the reasons for it.

[CHSB manda trng & testing of outside accessors]

SECTION 4. Said section 172 of said chapter 6 of the General Laws is further amended by adding the following sentences at the end of the third paragraph, as appearing in the 2006

Official Edition: – The board shall not certify or re-certify for access under clause (c) any individual or entity unless the individual or "CORI-cleared person" of such entity has received training from, and passed an examination administered by, the board, in how to read and understand a CORI report. The board shall charge a fee of not greater than twenty-five dollars for each person trained and shall keep money from training fees in a separate fund which may be drawn on to pay the costs of such training.

[Min-Manda Drug convicts serving 2/3 of max sentence eligible for programs and parole]

SECTION 5. Section 32H of chapter 94C is hereby amended by striking out, in line 13, the word "parole."

SECTION 6. Said section 32H of chapter 94C is hereby further amended by inserting at the end thereof the following paragraph: – Notwithstanding any general or special law to the contrary, a person convicted of violating any provisions of sections 32, 32A, 32B, 32E, 32F, and 32J who is serving a sentence where two-thirds of the maximum term of imprisonment imposed is less than the mandatory minimum sentence required under that section shall be eligible for parole after serving two-thirds of the maximum term of imprisonment.

[Discrimination to reject person merely for having CORI]

SECTION 7. Subsection 9 of section 4 of chapter 151B of the General Laws is hereby amended by striking the first paragraph and inserting in place thereof the following paragraph:-

For an employer, employment agency, employment training provider, or licensing agency, by himself or itself or through an agent, in connection with an application for employment, employment training or licensing or in connection with the terms, conditions, or

privileges of employment, licensing or job training or the transfer, bonding, promotion, demotion, or discharge of any person or in any other matter relating to the employment of any person:

(a) to request from the person, orally or in writing, any information which consists of or relates to criminal offender record information, which shall be obtained, if at all, from the criminal history systems board, pursuant to section 172, or other applicable sections of chapter 6 of the General Laws, and all applicable regulations and certifications thereunder, or

(b) to exclude, limit or otherwise discriminate against any person (1) by reason of his failure to furnish such information orally or in writing, or (2) because his criminal offender record information consists of (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of the person's application or the employer's request for such criminal offender record information, or (3) on account of the person's merely having a criminal record, *provided however,* that it shall not be a violation of this subsection if the person has a criminal record containing one or more convictions which substantially relate to the circumstances of a particular employment or job training position or licensed activity.

[Shortens waiting periods in General Law for Slg Conviction cases]

SECTION 8. Section 100A of Chapter 276 of the General Laws is hereby amended by striking out the first paragraph through clause (3) and inserting in place thereof the following: –

Any person having a record of criminal court appearances and dispositions in the commonwealth on file with the commissioner of probation may, on a form furnished by the commissioner and signed under the penalties of perjury, request that the commissioner seal such file. The commissioner shall comply with such request provided (1) that said person's court appearance and court disposition records, including termination of court supervision, probation or sentence for any misdemeanor occurred not less than three years prior to said request; (2) that said person's court appearance and court disposition records, including termination of court supervision, probation or sentence for any felony occurred not less than seven years prior to said request; (3) and that said person has not been found guilty of any criminal offense for which he was sentenced to three months or more of incarceration within the three years preceding such request;.

[Clarifies meaning of "order of prob'n" in Gen Law re Slg Non- Conviction Cases]

SECTION 9. Section 100C of said chapter 276 of the General Laws is hereby amended by striking the second paragraph and inserting in place thereof the following paragraph: –

In any criminal case wherein a nolle prosequi has been entered, or a dismissal has been entered by the court, except where (whether or not such dismissal is preceded by a continuance without a finding) such dismissal is preceded by a term of active probation as to which the court ordered the assignment of a probation officer to whom the defendant was required periodically to report, and it appears to the court that substantial justice would be served, the court shall direct the clerk to seal the records of the proceedings in his files. The clerk shall forthwith notify the

commissioner of probation and the probation officer of the courts in which the proceedings occurred or were initiated who shall likewise seal the records of the proceeding in their files.

[New General Laws]

SECTION 10. Said chapter 276 is hereby amended by inserting after section 100C the following new sections: –

[Makes Non-Conviction Slg quasi-automatic & fairer]

Section 100D. Notwithstanding, but in addition to, the provisions of section 100C, on the first business day of each month the clerk of each court having criminal jurisdiction shall have prepared and shall maintain for public access a list of non-conviction criminal cases which will be considered for sealing in one or more sessions of the court on the first business day of the following month.

A “non-conviction criminal case,” as used in this section, is one in which a no bill was returned by the grand jury, or the defendant was found not guilty by the court or jury, or a finding of no probable cause was made by the court, or a *nolle prosequi* was entered, or a dismissal was entered by the court except where (whether or not such dismissal was preceded by a continuance without a finding) such dismissal was preceded by a term of active probation as to which the court ordered the assignment of a probation officer to whom the defendant was required periodically to report.

The list shall be organized in alphabetical order by last name of the individuals whose record or records will be considered and shall contain each individual’s full name, the title of the crime or crimes charged and the date or dates of their final dispositions. The list shall also contain, when applicable, a brief notation that an objection has been filed as to the sealing of a

particular case, if the objector has, at least two weeks before the scheduled hearing date, filed with the clerk's office a written objection, stating a reason or reasons, which writing shall be made available upon request to the person whose record is posted for possible sealing, or to his or her attorney.

Each court is encouraged to issue a press release to local newspapers generally received by or available to persons residing within the jurisdiction of the court. Such release should announce the forthcoming sealing session and describe the means by which the list of individuals whose case records will be considered may be accessed by the public and the range of final disposition dates of the cases to be considered. The release should also explain that anyone who objects to the sealing of a particular case may file with the clerk's office, at least two weeks before the session, a written objection stating the reason or reasons for the objection.

At each court session, in making its decision in each case, the court shall consider (a) the facts and arguments presented by the petitioner in favor of sealing, if any; (b) the facts and arguments presented by an objector, if any, who timely filed an objection with a reason or reasons for the objection relating to the interests of public safety or in favor of the general public interest in access to governmental records, as fostered by the First Amendment of the U.S. Constitution; and (c) the findings and declaration of the General Court and the evidence displayed to bolster those findings, as set forth in the Preamble to this Act.

If the court concludes that sealing the record would be in the interests of substantial justice and that there is a compelling governmental interest (which may include a public safety interest) to seal the record, which interest overcomes the general public safety or public access interests asserted by an objector, the court shall order that the clerk and the probation officers in

the courts in which the proceedings occurred or were initiated to seal the records of the proceedings in their files and send notice thereof to the commissioner of probation, who shall seal the case record in the probation central file.

[Juvenile Purging]

Section 100E. Notwithstanding but in addition to the provisions of section 100B of chapter 276, upon final disposition of a person's juvenile delinquency proceeding, and completion of all court-ordered requirements, the juvenile court shall inform the defendant of his right to petition for sealing or purging or his records as provided for by law; and the clerk of the juvenile court shall provide the juvenile or his attorney with a packet providing information on sealing and purging juvenile records, written in plain language, and include sample petitions for sealing and purging.

The juvenile or his attorney may petition the court for an order directing the purging of all the juvenile's identifying information in law enforcement, court activity and/or probation records, leading, or related, to the person's proceeding in juvenile court. Records shall be considered purged when all the identifying information is removed and destroyed, leaving no trace of the person's identity.

Records which may be so purged include those in which the juvenile was adjudicated delinquent or not delinquent, had his case dismissed , or where a *nolle prosequi* was entered or the case was terminated because of the absence of evidence, or the court took judicial notice that the person's arrest was made without probable cause or for constitutionally protected conduct.

In making its determination the court shall also consider the following factors: (a) any specific public safety need to maintain the record unpurged of the person's identifying

information, (b) any probable and serious adverse consequences for the person if the case is not purged and (c) the person's personal history and behavior since the juvenile proceedings were commenced or disposed of.

If the court orders that the juvenile record be purged, the court shall circulate its order to the police department involved in the juvenile proceeding, the state police, the office of the commissioner of probation, the criminal history systems board and to all other believed or known holders, governmental or otherwise, of information in paper or digital form, relating to the relevant juvenile proceedings. Such records may include, besides court activity and probation records, police booking reports or records, fingerprint records and photographs. In determining what other entities to which the court's order should be sent, the court shall solicit and consider suggestions of the juvenile, his parents or his attorney.

A person prosecuted as a youthful offender, pursuant to section 54 of chapter 119 of the General Laws, may similarly petition the court to purge the records leading, or related, to the youthful offender proceeding where there was an indictment not resulting in a youthful offender trial or a finding of not delinquent or not guilty, and the person was declared not a youthful offender.

The court, following the standards and procedures set out above, may similarly issue an order to purge the relevant personal identity information from law enforcement, court and probation records and similarly circulate its purging order to other agencies and organizations known or believed to have records of the person's identity associated with that youthful offender matter.

All agencies and organizations receiving the court's order shall purge the relevant

personally identifying information in their records within 30 days of receipt of the court order.

A person whose record has been purged may consider the purged case never to have occurred and may so reply upon any inquiry. In any situation where a clerk, probation or other law enforcement officer is asked, as to a particular individual, whether a juvenile or youthful offender record exists , and the officer knows that the record has been purged, the officer shall respond that no such record exists.

[Adult Purging]

Section 100F. Upon a criminal court's final disposition of a case in which a "no bill" was returned by the grand jury, or the defendant was found not guilty by the court or jury or a finding of "no probable cause" was made by the court, the court or probation officer shall advise the defendant that he has the opportunity to obtain, fill out and file with the clerk's office a petition to have the case purged of his identity, which means to have all information identifying the person the case removed from the criminal offender record information system, such that there is no trace of the identifying information removed.

When a petition for purging comes on for hearing before the court, the judge shall hear whatever competent and relevant evidence or argument that may be presented by the petitioner, his attorney, the district attorney or other persons reasonably involved. The judge shall then make his decision after careful consideration of at least the following factors:

(1) whether there has been a mistaken identity;

(2) any specific public safety need to maintain, or to purge, the record;

(3) where the court takes judicial notice that the person was arrested without probable cause or for constitutionally protected conduct;

(4) any actual or probable adverse consequences to the person as a result of maintenance of the record even if sealed under the provisions of sections 100C or 100D;

(5) the person's personal history and behavior before, during and after the criminal proceedings took place.

A person whose record had been purged may consider the purged case never to have occurred and may so reply upon any inquiry. In any situation where a clerk or other court or criminal justice official is asked whether, as to a particular individual, a purged record exists, and the official knows that the case has been purged, the official shall respond that no such record exists.

[Transitional Slg of Conviction cases]

SECTION 11. Notwithstanding the provisions of section 100A of chapter 276 of the General Laws, the clerk and the probation officers of each court with criminal jurisdiction shall seal every unsealed case record, as directed in the next paragraph, in which there is either a conviction or the record is otherwise not sealable as a non-conviction record under the provisions of section 100C of this chapter; and the clerk and probation officers shall report, electronically or otherwise, such sealings to the commissioner of probation, who shall insure that such records are duly sealed in the probation central file.

Each such clerk, probation officer and the commissioner shall seal every such case with a final disposition, including any term of probation, incarceration or parole, so that a record of a misdemeanor is sealed three years after its final disposition, and a record of a felony is sealed seven years after its final disposition, *provided, however,* that in the three years which precede

any such sealing the person was not convicted of any crime for which he was sentenced to three months or more of incarceration .

This section shall be complied with as expeditiously as possible, starting with case records showing the earliest final dispositions occurring on or after January 1, 1970 and continuing through the records with final dispositions seven years before this Act takes effect.

[Transitional Slng of Non-Conviction cases]

SECTION 12. The judges, clerks and probation officers of the affected courts are authorized and encouraged to follow the standards, procedures and techniques mandated and encouraged in section 100D of chapter 276 of the General Laws, as inserted by SECTION 10 of this Act.

[Going-into-Effect Provisions]

SECTION 13. The provisions of this Act shall generally take effect on the first working day of the month that is three months after the month in which the Act was passed; provided, however, that:

(1) Sections 1, 2, 7 and 11 of this Act and sections 100E and 100F of chapter 276, as inserted by section 10 of this Act, shall take effect on the first day of the month that is 6 months after the month in which the Act passed;

(2) Section 100D of chapter 276 , as inserted by section 10 of this Act, shall take effect on the first day of the month that is 15 months after the month in which this Act passed.