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March 23, 2020

VIA FIRST CLASS MAIL TO:
Edward J. Dolan
Commissioner of Probation
One Ashburton Place, Room 405
Boston, MA 02108

RE: SXXXXXX CXXXXX
G.L. c. 276, §100A; §100B Petition to Seal Record
PCF number 0000XXXXXX3

Dear Mr. Dolan:

I represent the legal interests of Mr. SXXXXXX CXXXXX. Please consider this supplemental correspondence in support of Mr. CXXXXX's March 23, 2020 Petition to Seal Record pursuant to G.L. c. 276, §100A; §100B. Attachment A.

In 1983, Mr. CXXXXX was convicted of rape in violation of G.L. c. 265, §22(b). Fifteen years later, following passage of the Commonwealth's sex offender registry law, the Sex Offender Registry Board ("SORB") classified him as a level 3 sex offender without a hearing. SORB later reduced Mr. CXXXXX to classification level 1. On December 13, 2019, SORB relieved Mr. CXXXXX of any duty to register as a sex offender.

Mr. CXXXXX's final parole supervision relative to his rape conviction ended on August 18, 2001. His last criminal offense was an OUI. His probation supervision on that case terminated in 1989.

Thus, Mr. CXXXXX meets all criteria for sealing contained in G.L. c. 276, §100A, save for the last clause of paragraph (6), which provides that "any sex offender who has at any time

been classified as a level 2 or level 3 sex offender ... shall not be eligible for sealing of sex offenses." Id.[1]

However, pursuant to the principles articulated in Koe v. Commissioner, 478 Mass. 12 (2017), the statutory prohibition on sealing is "retroactive and unreasonable" as applied to him and "cannot be enforced against [him]." Id. at 13.

I respectfully request that you seal Mr. CXXXXXX's record notwithstanding the final clause of G.L. c. 265, §1001A par.(6), because that clause is unconstitutional as applied to him. Id.

1. CRIMINAL HISTORY:

On December 23, 1983, a Superior Court jury convicted Mr. CXXXXX of raping Jane Doe[2] on September 9, 1982. Mr. CXXXXX was 19 years old at the time of his offense. Ms. Doe was 30 years old.

In consideration of his offense, the Superior Court sentenced Mr. CXXXXX to ten to fifteen years in the State's prison, with two years to serve and the balance suspended for a period of five years of probation. Mr. CXXXXX was released on February 28, 1984. On April 6, 1989 the Superior Court found Mr. CXXXXX in violation of probation and ordered him to serve the balance of his prison sentence. Mr. CXXXXX was paroled on June 18, 1993, then finally discharged from parole supervision on August 18, 2001.

2. CHANGING CRITERIA FOR SEALING:

At the time of Mr. CXXXXX's offense, G.L. c. 276, §100A directed the Commissioner of Probation, upon request, to seal the record of "any felony," for which final supervision had ended fifteen years prior to the petition to seal. See St. 1974, c. 525 (1974). Under the law then-in-effect, Mr. CXXXXX met all requirements of having his record sealed as of August 18, 2016.

The law has changed in two important ways since the date of Mr. CXXXXX's offense.

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[1] For purposes of G.L. 276, §100A, the term "sex offender," defined at G.L. c. 6, §178C includes those convicted of rape in violation of G.L. c. 276, §22(b).

[2] A pseudonym.

The first change occurred on August 5, 1996, the date upon which Governor William Weld signed St. 1996, c. 239, "An Act Relative to Sex Offender Registration and Community Notification" into law. This legislation required Mr. CXXXXX to register as a sex-offender for the first time, though his conviction was, at that time, more than a decade in the past. Nevertheless, Mr. CXXXXX complied with that requirement.

The second change followed passage of St. 2010, c. 256 ("An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release.") St. 2010, c. 256, §§128-130; 145, hereinafter (the "CORI amendment"). Though it reduced the statutory waiting period for most offenses, the CORI amendment added additional obstacles for sealing sex offenses. G.L. c. 276, §100A(6) now reads in pertinent part:

> "Sex offenses ... shall not be eligible for sealing for 15 years ... provided, however, that any sex offender who has at any time been classified as a level 2 or level 3 sex offender ... shall not be eligible for sealing of sex offenses."

SORB initially classified Mr. CXXXXX as a Level 3 Offender in 1998, in the absence of any hearing. Shortly thereafter, the Essex County Superior Court, the Honorable Justice Howard Whitehead (ret.) vacated that finding and remanded Mr. CXXXXX's matter to SORB for a classification hearing. On February 7, 2003, SORB classified Mr. CXXXXX at Level 2. On April 28, 2010 SORB granted Mr. CXXXXX's petition to further reduce his classification to Level 1.

On August 19, 2016 Mr. CXXXXX submitted a petition to terminate his registration obligation. On December 13, 2019, SORB determined that he "pose[d] no cognizable risk to sexually reoffend and [no] degree of dangerousness to the public," and determined that he had no duty to register as a sex offender. Attachment B.

3. AS APPLIED TO MR. CXXXXX, THE RETROACTIVE APPLICATION OF THE 2010 CORI AMENDMENTS VIOLATE HIS STATE CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW

More than fifteen years have elapsed since Mr. CXXXXX's final parole supervision ended. He has had no further offenses. He has no duty to register as a sex offender. Consequently, Mr.

CXXXXX is entitled to have his record sealed -- but for the final clause of par. (6) of G.L. c. 276, §100A. This clause, which the legislature added to the statute via the 2010 CORI amendment, renders Mr. CXXXXX ineligible to seal his record because of SORB's past decision to classify him higher than level 1.

In Koe v. Commissioner, 478 Mass. 12 (2017), the Supreme Judicial Court took the opportunity to consider the potential unfairness to sex offenders whose convictions predated the 2010 amendments to G.L. c. 276, §100A. A unanimous Court determined that the application of the 2010 amendment was "retroactive and unreasonable" as applied, and therefore, violated Massachusetts constitutional due process standards. Id. at 21.

Like Mr. CXXXXX, the petitioner in Koe was convicted before the legislature passed the sex offender registry law. Like Mr. CXXXXX, the petitioner in Koe received a sex offender classification above level 1 before the 2010 CORI amendment became law. Like Mr. CXXXXX, the petitioner in Koe was able to successfully petition SORB to relieve her of any duty to register as a sex offender. Id. at 13-14.

As to the legally operative facts underlying Koe, then, Mr. CXXXXX's case is identical. But that is not to say that there are no differences between Mr. CXXXXX's case and Koe.

The petitioner in Koe was convicted of rape of a child. She was twenty-two years old at the time. Her victim, at only twelve years old, was especially vulnerable. In contrast, Mr. CXXXXX was not convicted of an aggravated form of rape; he was nineteen at the time of his offense and his victim was thirty. Id. at 13.

The time period between Koe's conviction and her motion to seal was much shorter than Mr. CXXXXX's. Koe was convicted in 1995, then petitioned to seal in 2015. Id. at 13-15. In contrast, Mr. CXXXXX was convicted in 1983, thirty-seven years before his petition to seal. Mr. CXXXXX's conviction is sixteen years further in the past than that of the petitioner in Koe.

The absence of aggravating factors and the expanse of time since Mr. CXXXXX's offense combine to make his case more compelling than that in Koe. Over and above the circumstances in Koe, the details of Mr. CXXXXX's life and choices following his offense bring into focus the unjustifiable harm caused by

the continued availability of a criminal record which provides no insight into whether Mr. CXXXXX poses a risk of re-offense.

Following his incarceration, Mr. CXXXXX embraced the realization that his drug and alcohol use led him down the wrong path. He gained his sobriety on October 28, 1989. He has now been clean and sober for over thirty years. He recognizes that sobriety is a life-long journey. Consequently, he remains active in Alcoholics Anonymous and regularly attends meetings in the Merrimac Valley and in North Hampton, New Hampshire.

Mr. CXXXXX is a loving husband to HXXXX (HXXXXXX) CXXXXX, who he married on September 3, 2005. They have two beautiful children - a twelve-year-old girl and a nine-year-old boy. They raise their family in a loving, supportive, intact household.

Following his release from prison, Mr. CXXXXX worked in physically demanding jobs. In January 2013, Mr. CXXXXX suffered an injury while working for Commonwealth Waste Management, which resulted in his latissimus dorsi and bicep muscles being ripped from their bones and his shoulder being torn apart. Other physical injuries flowing from the wear and tear of manual labor took their toll on him. He is no longer able to work the blue-collar jobs upon which he relied to support his family over the years. However, Mr. CXXXXX is even happier now, having shifted into the role of "Mr. Mom" while his wife HXXXX serves the family as breadwinner through her work as a hairstylist.

Nevertheless, Mr. CXXXXX has a strong desire to work and ease his wife's financial burden within the limits of his injuries. Mr. CXXXXX undergoes daily physical therapy, which allows him to manage his pain. He is eligible to work 18 hours per week. He very much would like to work. For instance, Mr. CXXXXX worked for Bay State Gas from 2000 until 2010, which qualifies him to work as a consultant for a natural gas company. Mr. CXXXXX is also interested in seeking a part-time position at his gym, turning his love for healthy habits into a means to support his family. But Mr. CXXXXX is unable to pursue any of these opportunities, because he knows that those opportunities will vanish upon access to his past record.

The loss of job opportunities is only one of the consequences of his CORI remaining unsealed. Other, more personal consequences affect him more deeply.

Despite Mr. CXXXXX's full engagement as a parent, he has been unable to participate in sporting and after-school

activities involving his children. He is unable to volunteer or participate in these activities because a CORI check will reveal his 1983 rape conviction. Mr. CXXXXX worked hard at fostering his children's interest in athletics and team play but finds himself unable to participate in their development in these key areas. Worse, his children do not understand why their father is not there to coach them or support them at school and extra-curricular events. He should be there for his children, but he cannot, because of the instant, irrelevant conviction.

Despite the scarlet letter which this case represents, Mr. CXXXXX has lived his life in the best possible way. Not only is he a beloved father and husband, he is a cherished friend and pillar of his community. Even writing concisely, I could fill dozens of pages describing Mr. CXXXXX's exceptional character, as I did with the 2016 application to SORB to terminate his duty to register. I am happy to share that petition with you or discuss the many details which reveal Mr. CXXXXX to be the model citizen he is.

But I think it is sufficient to say that, as in Koe, any reasons "for wanting to know about [Mr. CXXXXX's] sex offense[] are tempered, if not extinguished, by the administrative and judicial findings that [he] poses no cognizable degree of dangerousness and no risk of reoffense, and has been relieved of the obligation to register as a sex offender." Id. at 20.

An animating force behind the 2010 CORI reform was "to make sealing broadly available to individuals whose criminal histories or records no longer presented concerns of recidivism." Id. at 18. When time attenuates the connection between a person's conviction and risk of recidivism, the denial of that person's right to "participate fully in society" becomes unjustifiable. Commonwealth v. Pon, 469 Mass. 296, 300 (2014).[3]

SORB is the entity charged with identifying the specific factors creating a risk of re-offense in cases such as Mr. CXXXXX's. That entity, after evaluation of all the circumstances, has relieved Mr. CXXXXX of any duty to register following its determination that he "poses no risk of

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[3] The Supreme Judicial Court in Pon recognized research which showed "past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility." Id. at 306 (citation omitted). It also underscored that "Sealing is a central means by which to alleviate the potential adverse consequences in employment, volunteering, or other activities that can result from the existence of such records." Id. at 307 (citation omitted).

reoffense." Mr. CXXXXX otherwise meets the statutory criteria for sealing. At the intersection of these facts, "it is difficult to discern how retroactively prohibiting [him] from sealing [his] sex offenses furthers the regulatory legislative goals of protecting public safety and rehabilitating former offenders." Id. at 20-21.

Consequently, the 2010 CORI amendment is unconstitutional as applied to Mr. CXXXXX.

I respectfully request that you grant Mr. CXXXXX's petition to seal his record.

Respectfully Submitted,

SXXXXXX CXXXXX
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Enclosures: Attachment A: Petition to Seal; Attachment B: December 13, 2019, letter from SORB