



# **NEW JERSEY OFFICE OF THE PUBLIC DEFENDER**

*New Jersey Megan's Law: Current Issues*

Presenter: Deputy Public Defender Fletcher C. Duddy

# Issue # 1: Removal From Megan's Law for Juvenile Offenders

## Two Paths to Removal for Juveniles

1. *In re J.G.*, 169 N.J. 304 (2001) — juveniles who offended before their 14<sup>th</sup> Birthday
2. N.J.S.A. 2C:7-2(f) — juveniles who offended after their 14<sup>th</sup> Birthday

# ***J.G.* Removal**

“[W]e hold, consistent with the purpose underlying N.J.S.A. 2A:4A-47a, that with respect to juveniles adjudicated delinquent for sexual offenses committed when they were under age fourteen Megan's Law registration and community notification orders shall terminate at age eighteen if the Law Division, after a hearing held on motion of the adjudicated delinquent, determines on the basis of clear and convincing evidence that the delinquent is not likely to pose a threat to the safety of others.” *J.G.*, 169 N.J. at 337.

## **Two-pronged Test**

1. Under age fourteen when offense occurred and now 18 years old
  - Age of juvenile when offense occurred, not when adjudication occurred
  
2. Prove by clear and convincing evidence that not a threat to the safety of others
  - No published opinion on the meaning of the phrase “threat to the safety of others.” But see *In re M.G.*, No. A-000142-17 (App. Div. July 24, 2018) (slip op. at 3-4) (holding that the phrase “threat to the safety of others” is not limited to the likelihood of committing a new sexual offense, but encompasses any anti-social conduct), *certif. denied*, No. 081744 (November 2, 2018).

# Subsection “(f)” Removal

“Except as provided in subsection g. of this section, a person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.” N.J.S.A. 2C:7-(f).

## Two-pronged Test

### 1. No offense within 15 years following conviction or release

- An “offense” is not limited to a sex offense, but is any crime, disorderly persons offense or petty disorderly persons offense. *In re A.D.*, 441 N.J. Super. 403, 405 (App. Div. 2015), *aff’d o.b.* 227 N.J. 626 (2017).
- A subsequent “offense” does not restart the 15-year clock but rather permanently bars a registrant from removal. *In re H.D.*, 241 N.J. 412, 423 (2020).

### 2. Prove by a preponderance of the evidence that not a threat to the safety of others

# *In re State ex rel. C.K., 233 N.J. 44 (2018).*

## Issue

Whether subsection “(g)’s” offense-based bars to removal are unconstitutional as applied to juvenile registrants seeking removal from Megan’s Law under subsection “(f)”?

### **N.J.S.A. 2C:7-2(f) & (g)**

**f.** Except as provided in subsection g. of this section, a person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following conviction or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.

**g.** A person required to register under this section who has been convicted of, adjudicated delinquent, or acquitted by reason of insanity for more than one sex offense as defined in subsection b. of this section or who has been convicted of, adjudicated delinquent, or acquitted by reason of insanity for aggravated sexual assault pursuant to subsection a. of N.J.S.2C:14-2 or sexual assault pursuant to paragraph (1) of subsection c. of N.J.S.2C:14-2 is not eligible under subsection f. of this section to make application to the Superior Court of this State to terminate the registration obligation.

# *In re State ex rel. C.K., 233 N.J. 44 (2018).*

## **Holding**

“We conclude that subsection (g)'s lifetime registration and notification requirements as applied to juveniles violate the substantive due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution.”

## **Rationale**

Juveniles’ “emotional, mental, and judgmental capacities are still developing and . . . their immaturity makes them more susceptible to act impulsively and rashly without consideration of the long-term consequences of their conduct. Juveniles adjudicated delinquent of committing sex offenses . . . who have been offense-free for many years and assessed not likely to reoffend, pose little risk to the public. Indeed, categorical lifetime notification and registration requirements may impede a juvenile's rehabilitative efforts and stunt his ability to become a healthy and integrated adult member of society.”

Thus, “[p]ermanently barring juveniles who have committed certain sex offenses from petitioning for relief from the Megan's Law requirements bears no rational relationship to a legitimate governmental objective.”

# Aftermath of *C.K.*, *A.D.*, and *H.D.* regarding Statutory Removal for Juvenile Offenders

## Hypothetical

14-year-old boy adjudicated delinquent of aggravated sexual assault for offense committed against a sibling when he was 14 years old. Placed on Megan's Law. A year later, shoplifts an article of clothing from a department store. 20 years later, when he is 35 years old, applies to be removed from Megan's Law.

## *C.K.*

Under *C.K.*, his adjudication for aggravated sexual assault does not make him ineligible for removal. Aggravated sexual assault, which is an offense-based bar, cannot be applied to a juvenile applicant.

## *A.D. & H.D.*

But under *A.D.* and *H.D.*, he is nonetheless ineligible for removal because of the subsequent shoplifting offense. *A.D.* holds that the term "offense" in the 15-year period refers to any offense, not only sexual offenses. And *H.D.* holds that the operable 15-year period starts upon conviction or release from incarceration for the sexual offense; it does not restart upon the conviction of a subsequent non-sexual offense, like shoplifting.

# Does N.J.S.A. 2C:7-2(f) Apply to Juvenile Offenders at All?

## N.J.S.A. 2C:7-(f)

“Except as provided in subsection g. of this section, a person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following *conviction* or release from a *correctional facility* for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others.”

## “Adjudication” Missing from the Statute

A “conviction” is a legal term in NJ’s penal code that is distinct from an “adjudication.” Likewise, a “correctional facility” houses adults only; juveniles are housed in “juvenile facilities.”



# Issue # 2: Removal From Megan's Law & CSL/PSL for Adult Offenders

## Megan's Law – N.J.S.A. 2C:7-2(f) & (g)

- Similar to juvenile removal under the statute as described above.
- Only significant difference from juvenile statutory removal is that subsection (g)'s offense-based bars apply to adult offenders who committed their predicate sexual offenses after the legislative enactment of subsection (g) on January 8, 2002. *In re J.D-F.*, 248 N.J. 11 (2021).

# CSL/PSL – N.J.S.A. 2C:43-6.4(c)

The judge may grant a petition for release from a special sentence of parole supervision for life only upon proof by clear and convincing evidence that the person has not committed a crime for 15 years since the last conviction or release from incarceration, whichever is later, and that the person is not likely to pose a threat to the safety of others if released from parole supervision.

## Two-pronged Test

1. No crime from 15 years since last conviction or release
  - A “crime” does not include disorderly and petty disorderly persons offenses. N.J.S.A. 2C:1-4
  - Unlike Megan’s Law, the 15-year clock restarts upon the conviction of a subsequent crime because the statute uses the term “last” to denote the starting point for the 15-year period.
2. Prove by clear and convincing evidence that not a threat to the safety of others

# Issue # 3: Assessing Risk for Child Pornography (“CP”) Offenders in New Jersey

## Issues

- The RRAS was developed in 1995, before CP was available on the internet, and before internet sex offenses led to Megan’s Law registration. As a result, CP offenders were not considered in the design of the RRAS. When factors 3, 4, and 5 are scored for CP offenders, they over-exaggerate risk.
- Research shows that CP-only offenders have a low-risk of sexual recidivism after they are convicted. Yet, on the RRAS, they are routinely classified as tier two, moderate-risk, offenders.
- The RRAS is constitutionally invalid as applied to CP offenders because it is no longer “a useful and rational scale” that is based on “the scientific literature on valid and reliable predictors of recidivism.” *In re C.A.*, 146 N.J. 71, 107 (1996); see also *Doe v. Poritz*, 142 N.J. 1, 33 (1995).

**REGISTRANT RISK ASSESSMENT SCALE**

Criteria	Low Risk	0	Moderate Risk	1	High Risk	3	Comments	Total
<b>Seriousness of Offense x3</b>								
1. Degree of Force	no physical force; no threats	X	threats; minor physical force		violent; use of weapon; significant victim harm			0
2. Degree of Contact	no contact; fondling over clothing	X	fondling under clothing		penetration			0
3. Age of Victim	18 or over		13 - 17		under 13	X		15
<b>Subtotal:</b>								15
<b>Offense History x3</b>								
4. Victim Selection	household/family member		acquaintance		stranger	X		9
5. Number of Offenses/Victims	first known offense/victim		two known offenses/victims		three or more offenses/victims	X		9
6. Duration of Offensive Behavior	less than 1 year	X	1 to 2 years		over 2 years			0
7. Length of Time Since Last Offense	5 or more years		more than 1 but less than 5 years		1 year or less	X	Released 04/01/2022	9
8. History of Anti-Social Acts	no history	X	limited history		extensive history			0
<b>Subtotal:</b>								27
<b>Characteristics of Offender x2</b>								
9. Response to Treatment	good progress	X	limited progress		prior unsuccessful treatment or no progress in current treatment			0
10. Substance Abuse	no history of abuse	X	in remission		not in remission			0
<b>Subtotal:</b>								0
<b>Community Support x3</b>								
11. Therapeutic Support	current/ continued involvement in therapy	X	intermittent		no involvement			0
12. Residential Support	supportive/ supervised setting; appropriate location	X	stable and appropriate location but no external support system		problematic location and/or unstable; isolated			0
13. Employment/Educational Stability	stable and appropriate	X	intermittent but appropriate		inappropriate or none			0
<b>Subtotal:</b>								0
<b>Total:</b>								42

Scoring: Highest possible total score = 111  
 Low Range: 0 - 36  
 Moderate Range: 37 - 73  
 High Range: 74 - 111

## Hypothetical

Registrant J.D. was convicted of downloading and sharing child pornography over a peer-to-peer file sharing program and placed on Megan's Law. On his computer, he had over 10,000 images of CP, ages ranging from 6 to 17 years old. On factor 3, he scored high-risk because some images contained children under 13 years old. On factor 4, the victims are considered "strangers," thus scored high-risk. On factor 5, he is scored high-risk because each child is considered a separate victim.

This is J.D.'s only criminal offense. He is married, has stable employment, responds well to treatment, and has no history of substance abuse. At J.D.'s first tier hearing, his RRAS score is 42, the lowest it can go. He will be a tier two Registrant and have his information posted on the internet registry.

# Scoring Changes for CP Offenders Thus Far

- *In re P.B.*, 427 N.J. Super 176 (App. Div. 2012) (holding that factor 2 cannot be scored with penetration when the “registrant merely possessed depictions of penetrative sexual activity with children, without any concomitant indication that he played a role in the penetrative activity either as a participant or producer.”)
- While the RRAS is silent on cases involving CP, the JRAS, created in 2005, specifically addresses CP-only offenders. It scores factors 3, 4 and 5 as low-risk in CP cases.
  - *Factor 3 (age of victim): “Child pornography possession or distribution offenses do not count with regard to victim characteristics.” (JRAS, pg. 1).*
  - *Factor 4 (victim selection): “Victims portrayed in child pornography are not scored as victims for purposes of the JRAS. They do not count as non-familiar, stranger, nor male victims.” (JRAS, pg. 4).*
  - *Factor 5 (number of offenses/victims): “[p]ossession of child pornography may count as one offense, but each individual image does not count as a new victim.” (JRAS, pg. 4).*

# **In Re B.D. (Ocean Co. 2022)**

## **Relief Sought**

Request the Court refer this matter to the NJ Office of the Attorney General for the development of a new scale that is reliable for CP offenders, as was done with juveniles, leading to the JRAS. But, until a new risk instrument is developed for CP-only offenders, score factors 3, 4, and 5 as low risk in CP cases.

## **Outcome**

The Court found there was “significant evidence” submitted questioning the validity of the RRAS and “legitimate questions have been raised by competent psychological professionals and experts.” The Court referred the issue to the AG’s office. We currently await their reply.

B.D. was made a tier one, low-risk, registrant under the Heartland exception.



# Issue # 4: Internet & Social Media Bans under Parole Supervision for Life

- *J.I. v. NJ State Parole Bd.*, 228 N.J. 204 (2017) (striking down a total internet ban and holding that “[i]nternet conditions should be tailored to the individual CSL offender, taking into account such factors as the underlying offense and any prior criminal history, whether the internet was used as a tool to perpetrate the offense, the rehabilitative needs of the offender, and the imperative of public safety,” and that parolees are entitled to due process protections of notice and an opportunity to object to an internet restriction imposed by the parole board).
- *K.G. v. NJ State Parole Bd.*, 458 N.J. Super 1 (App. Div. 2019) (extending the decision in *J.I.* to social media bans).
- *State v. R.K.*, 463 N.J. Super 386 (App. Div. 2020) (holding that PSL’s total ban on social media use was unconstitutionally facially and as applied to the parolee, R.K.)

## Issue # 5: Polygraph Examinations

*J.B. v. NJ State Parole Bd.*, 229 N.J. 21 (2017) (holding that the parole board may administer polygraph examinations to CSL/PSL parolees, but it may not rely on the technical results of the examination for a parole-related decision or as the evidential basis to charge the parolee with a violation).