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April 24, 2020

VIA ELECTRONIC FILING

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-39-19 State v. Hakum Brown and Rodney Brown (083353)

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), please accept this letter brief in lieu of a more formal submission on behalf of *amicus curiae* the American Civil Liberties Union of New Jersey ("ACLU-NJ") in the above-captioned matter.

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Preliminary Statement

When Rodney Brown and Hakum Brown were sentenced in 1995 and 2000, respectively, their convictions subjected them to the registration requirements of Megan's Law. At the time of sentencing, failure to register with the proper authorities would result in a *fourth*-degree charge. Upon release from prison years later, neither of the Respondents registered. They were charged with *third*-degree failure to register pursuant to a 2007 amendment to Megan's Law, which upgraded the charge for failure to register and burdened Respondents with a heavier sentence for their convictions.

Prior to passage of the 2007 amendment, Respondents had already committed the underlying offenses, been convicted, and started their sentences. Imposing the upgraded sentence for failure to register on Respondents for convictions levied years prior to the amendment therefore retrospectively applies a more burdensome punishment in violation of the *ex post facto* clauses of the New Jersey and United States Constitutions. The same logic this Court rightly applied in *State v. Hester* just two years ago to conclude that a 2014 amendment upgrading violations of community supervision for life violated the *ex post facto* clauses when applied to respondents who were sentenced prior to the amendment applies with equal force in the case of Rodney and Hakum Brown. Consequently, the third-degree charges against Respondents should be dismissed.

Statement of Facts and Procedural History

Amicus curiae adopts the facts and procedural history laid out in Respondent Hakum Brown's brief filed on December 4, 2018, before the Appellate Division in *State v. Brown*, 2019 N.J. Super. Unpub. LEXIS 1710, 2019 WL 3437740 (App. Div. July 31, 2019), and subsequently filed with this Court on August 27, 2019.

Argument

I. Applying the 2007 amendment to upgrade Respondents' punishment for failure to register from a fourth-degree to a third-degree offense violates the *ex post facto* clauses of the Federal and State Constitutions.

The New Jersey and United States Constitutions both prohibit the imposition of *ex post facto* laws. U.S. Const. art. I, § 10, cl. 1; N.J. Const. art. IV, § 7, ¶ 3. These clauses have been interpreted consistently by state and federal courts to prohibit laws that apply retrospectively to "events occurring before [their] enactment" or that "change[] the legal consequences" of an act committed prior to the enactment of the law. *Riley v. N.J. State Parole Bd.*, 219 N.J. 270, 285 (2014) (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987)) (internal quotation marks omitted). A law, if applied retrospectively, will violate the *ex post facto* clauses if it "imposes additional punishment to an already completed crime." *Id.* The 2007 amendment to Megan's Law is precisely such a law when applied to Respondents.

Respondents were convicted of sexual assault under N.J.S.A. 2C:14-2. Their convictions subjected them to a number of registration requirements under the

statutory scheme known as Megan's Law. *See* N.J.S.A. 2C:7-1, *et seq*. At the time of Respondents' sentencing, Megan's Law criminalized the failure to register as a fourth-degree crime. N.J.S.A. 2C:7-2(a) (1994). In 2007, several years after both Respondents were sentenced, the Legislature upgraded failure to register to a third-degree crime. *L*. 2007, *c*. 19 ("2007 amendment"). The State insists that because Hakum and Rodney Brown violated N.J.S.A. 2C:7-2(a) after the effective date of the 2007 amendment, they have committed a third-degree crime. However, the State's argument hinges on classifying Respondents' failure to register as a new crime divorced from the underlying convictions. This interpretation is incorrect. State and federal case law, including a recent decision by this Court, demand that the *ex post facto* analysis be moored to Respondents' 1995 and 2000 convictions.

This Court has already grappled with the central issue in this case. In *State v. Hester*, the Court concluded that subsequent upgrades to punishment imposed for violating community supervision for life ("CSL") were unconstitutional as applied to individuals with convictions subjecting them to CSL that predated the upgrading amendment. 233 N.J. 381 (2018). Although the present case considers a different statutory scheme and different post-conviction obligations, the Court's reasoning in *Hester* necessitates finding that imposing the 2007 amendment's punishment on Respondents would violate their constitutional rights under both the Federal and State Constitutions.

A. Mandatory registration under Megan's Law is part-and-parcel of Respondents' sentences for their underlying offenses, therefore qualifying the predicate offenses as the relevant crimes for purposes of *ex post facto* analysis.

To find an *ex post facto* violation, the Court must first identify the already-completed act that subjects defendants to new or enhanced consequences. Central to the present case, then, is the question of what action qualifies as the crime for *ex post facto* purposes. The State argues that Respondents' failure to register, committed after the effective date of the 2007 amendment, qualifies as the crime for *ex post facto* analysis. Appellant's Pet. for Cert. 7-8. However, state and federal law require that the predicate sex offenses serve as the relevant crimes for *ex post facto* analysis. In contrast, the State relies on out-of-state, out-of-circuit, and unpublished case law, as well as cases that respond to a different, narrower question than that presented here, to support their contention that Respondents' failure to register qualifies as a new crime independent of the underlying offense.

1. Respondents' failure to register is not a new crime for *ex post facto* purposes.

Megan's Law subjects individuals convicted of a variety of sex offenses to a statutory scheme of registration and notification requirements. N.J.S.A. 2C:7-1 *et seq.* The registration requirements imposed by Megan's Law are conditions of a defendant's sentence – the requirements apply automatically upon the conviction of an offense listed in N.J.S.A. 2C:7-2(3)(b)(1)-(3). *See* N.J.S.A. 2C:7-2(a)(1) ("A

person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sex offense as defined in subsection b. of this section *shall* register as provided" (emphasis added)). The registration requirements inextricably accompany a sex offense conviction, making them a part of the sentence imposed on an individual convicted of a sex offense. *See, e.g., State v. F.W.*, 443 N.J. Super. 476, 480 (App. Div. 2016) (referring to Megan's Law as "part of [defendant's] sentence" for lewdness and endangering the welfare of a child).

This Court has already established that for violations of conditions accompanying a defendant's sentence, the "completed crime" is the predicate offense. *See Hester*, 233 N.J. at 242-43. In *Hester*, Justice Albin wrote that, "because the additional punishment attaches to a condition of [the] defendants' sentences, the 'completed crime' necessarily relates back to the predicate offense." *Id.* at 392 (rejecting the State's argument that the "completed crime" for *ex post facto* analysis purposes was the CSL violation). This Court interpreted the 2014 amendment at issue in *Hester,* which enhanced consequences for violations of CSL, to relate "not to the commission of a subsequent crime [of violating CSL] but rather to the terms of the sentence imposed for defendants' prior crimes." *Id.* at 397. The Supreme Court of the United States has similarly clarified that "postrevocation sanctions" are "part of the penalty for the initial offense." *Johnson*

v. United States, 529 U.S. 694, 700 (2000); *see also F.W.*, 443 N.J. Super. at 489 (relying on *Johnson* to conclude that the underlying offense which subjected defendant to Megan's Law, rather than the violation of his post-release supervision, qualified as the relevant offense for *ex post facto* analysis). Although "postrevocation sanctions" may be distinguishable from the punishment imposed for failure to register, New Jersey courts have applied *Johnson*'s reasoning to conclude that the initial criminal offense, rather than the subsequent violation of conditions placed on a person as a result of this offense, is the relevant crime for *ex post facto* purposes. *See, e.g., F.W.*, 443 N.J. Super. at 489; *Riley*, 219 N.J. at 291-92.

Hakum and Rodney Brown's registration requirements attach to their sentences for sexual assault – the requirements necessarily followed their convictions for qualifying offenses pursuant to N.J.S.A. 2C:7-2. Following the logic of *Hester*, the punishments imposed on Respondents for registration violations relate to their underlying sex offenses rather than their failure to register.

Appellants nevertheless insist that Respondents' failure to register qualify as new crimes independent of the underlying offenses and the 2007 amendment upgrading the crime cannot be said to apply retrospectively. Appellant's Pet. for Cert. 15. The State relies on *Smith v. Doe* to argue that prosecution for failing to comply with reporting requirements is "a proceeding separate from the individual's

original offense." 538 U.S. 84, 101-02 (2003). *Smith* is inapplicable to the present case for two reasons. First, the Court in *Smith* only analyzed the registration and community notification requirements of the Alaska Sex Offender Registration Act ("ASORA"), looking to the Alaska Legislature's intent when enacting this specific statute. *See id.* at 93. Second, *Smith* examined whether retroactive application of registration requirements themselves violated the *ex post facto* clause of the U.S. Constitution – defendants were convicted and completed their prison sentences before ASORA was enacted, and accordingly were not subject to *any* registration requirements at the time of sentencing. *See id.* at 90-91. In contrast, Hakum and Rodney Brown were already subject to registration requirements at the time of sentencing, albeit requirements that were punishable by a lesser charge. *Smith* did not consider *upgraded* penalties for failure to register. Its influence in the present case is therefore limited.

Other courts have similarly concluded that *Smith v. Doe* does not reach as far as the State suggests. For example, the Southern District of Alabama found that in *Smith*, "[t]he only issue before the court was whether the registration and notification scheme, by itself, violated *ex post facto*." *U.S. v. Kent*, No. 07-00226-CG, 2008 U.S. Dist. LEXIS 10044, 2008 WL 360624, at *4 (S.D. Ala. Feb. 8, 2008). Importantly, "[a]lthough failure to comply with the statute [at issue in *Smith*] could result in criminal prosecution, nothing in the *Smith* case indicates that

the respondents were facing criminal prosecution or jail time for failing to comply with the registration and notification scheme." *Id.* Respondents in the present case, who have already been prosecuted for their failure to register, are easily distinguishable. Likewise, the Western District of Oklahoma rejected the government's reliance on *Smith* to retroactively apply penalties for violations of federal registration requirements because "*Smith* did not address criminal penalties associated with a failure to register as a sex offender" but only considered whether registration itself was punishment. *U.S. v. Sallee*, No. CR-07-152-L, 2007 U.S. Dist. LEXIS 68350, 2007 WL 3283739, at *2 n. 7 (W.D. Okla. Aug. 13, 2007). The District Court of the Virgin Islands also recognized *Smith*'s fact-specific limitations, finding that *Smith*'s analysis was limited to ASORA's registration requirements. *See U.S. v. Gillette*, 553 F.Supp.2d 524, 528 (V.I. 2008).

For the same reasons, the State's reliance on the Third Circuit's decision in *U.S. v. Shenandoah* is flawed. Appellant's Pet for Cert. 17-18. (citing *United States v. Shenandoah*, 595 F.3d 151 (3d Cir. 2010), *cert. denied*, 560 U.S. 974 (2010), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432, 438-446 (2012)). Unlike in this case, the law at issue in *Shenandoah* imposed *new* requirements, rather than upgrading the punishment for violating an existing registration requirement. *See id.* at 154-55 (explaining the Sex Offender Registration and Notification Act).

Aside from the out-of-state and out-of-circuit cases that the State relies on[1] to support its contention that the registration violation is independent of the underlying offense, the State relies on an unpublished case decided by the Appellate Division. *See State v. Hunt*, 2014 N.J. Super. Unpub. LEXIS 1424, 2014 WL 2718737 (App. Div. June 17, 2014).[2] Although this case examines the same questions raised in the present case, it was decided several years before *Hester* such that the panel was without the benefit of this Court's guidance on how to apply the *ex post facto* clauses to violations of post-release requirements. *Hunt* fails to follow the United States Supreme Court's conclusion in *Johnson*, which this Court relied on to adjudicate *Hester*, and disavows the conclusion that punishments for violating post-release requirements relate back to the initial criminal offense. *Hunt*, 2014 WL 2718737 at *2 (rejecting analogy to *Johnson*, 529 U.S. 694). Because the case predates this Court's decision in *Hester* and remains unpublished, it is not persuasive.

[1] *See* Appellant's Pet. for Cert. 16-17 (citing state decisions from Kentucky and Kansas, as well as a decision from the District Court for the District of Columbia).
[2] *Amicus* does not append *Hunt* because the State has already provided the unpublished decision. *R.*1:36-3.

2. This Court's recent decision in *Hester* was correct and binding in the present case.

Just two years ago, this Court adjudicated a nearly identical issue – whether an amendment upgrading violations of community supervision for life, as applied to respondents who were sentenced to CSL prior to the amendment, violated the *ex post facto* clauses of our State and Federal Constitutions. *See State v. Hester*, 233 N.J. 381 (2018). This Court concluded that applying the upgraded charges to respondents ran afoul of the *ex post facto* clauses and dismissed the charges. *See id.* at 398. Undoubtedly, the present case involves a different statute and different obligations upon release. Nevertheless, the same logic that the Court applied in *Hester* applies with equal force in the present case, and obligates the Court to again find a violation of the *ex post facto* clauses.

In *Hester*, defendant-respondents had been convicted of sex offenses that required them to serve special sentences of CSL after release from prison. *Id.* at 385. Like in the present case, the "commission of [respondents'] offenses, the judgments of their convictions, and the commencement of their sentences all preceded passage" of an amendment that increased the penalty for a violation of the previously imposed obligation. *Id*. Nevertheless, the defendants were charged with the amendment's upgraded charge – a "third-degree crime punishable by a presumptive term of imprisonment" and conversion to parole supervision for life from what had been a fourth-degree charge at the time of defendants' sentencing

for their underlying sex offenses. *Id.* This Court concluded that the amendment "retroactively increased the punishment for defendants' earlier sex offenses by enhancing the penalties for violations of the terms of their supervised release." *Id.* at 386.

The same is true here. By the time the Legislature enacted the 2007 amendment, Rodney and Hakum Brown had already been convicted and completed years of the incarcerative portion of their sentences. Still, the State charged them with the heightened third-degree charge.

Appellants attempt to distinguish *Hester* from the present case by noting that there are different statutes at issue, and that the differences between registration requirements and CSL preclude any analogy to this Court's opinion in *Hester*.[3] Appellant's Pet. for Cert. 10-11. The Appellate Division rejected this same argument in *State v. Timmendequas*, finding it to be "unpersuasive" that *Hester* "only dealt with violations of CSL" because other requirements imposed by Megan's Law were not before the Court. 460 N.J. Super. 346, 352 (App. Div.

[3] Although seeking to distinguish the present case from *Hester*, the State nonetheless makes many of the same arguments to support its contention that the 2007 amendment applies to Respondents as they made in *Hester* to argue that the 2014 amendment applied to Respondents there. In both cases, for example, the State argues that Respondents' violations are "new crimes" independent of the underlying convictions. *Compare* Appellant's Pet. for Cert. 7 with *Hester*, 233 N.J. at 390-91. This Court considered this argument in *Hester* as applied to the 2014 amendment elevating sentences for violations of CSL, and nevertheless found a violation of the *ex post facto* clauses. *See Hester*, 233 N.J. at 390-91.

2019). Indeed, this Court did not discuss the statute at issue in the present case when deciding *Hester*. Although there are substantive differences between CSL and registration requirements, this does not foreclose applying the Court's *ex post facto* analysis in the present case. Conceding the fact that the CSL and registration schemes are themselves different, what is important for the *ex post facto* analysis is that the mechanism for enforcement in both is a punitive one.

Lower courts have already relied on this Court's logic in *Hester* to find that application of the 2007 amendment to persons convicted of sex offenses prior to the amendment violates the *ex post facto* clauses. In *State v. Timmendequas*, the Appellate Division concluded that *Hester* necessitated the holding that the 2007 amendment upgrading penalties for failing to register pursuant to Megan's Law could not be applied to the defendant without violating the *ex post facto* clauses. *See* 460 N.J. Super. at 356-57.

The State attacks *Timmendequas*, arguing that to accept the logic of *Timmendequas*, "the Legislature can never prospectively increase the penalties for failure to register." Appellant's Pet. for Cert. 9. However, Appellant overstates the effect of finding an *ex post facto* violation in this case. The Legislature is free to apply new laws and amendments to *future* crimes without violating the *ex post facto* clauses. As established above, when examining charges levied for failure to register, courts must look to the predicate sex offense as the relevant crime for *ex*

post facto analysis. The Legislature can still apply the amendment upgrading a registration violation from a fourth- to a third-degree charge to individuals whose underlying sex offense is committed subsequent to the effective date of the amendment. Consequently, Respondents agree with the State that "the prohibition against *ex post facto* laws does not require such a drastic result." *Id.* Finding a violation of the *ex post facto* clauses in the present case does not prevent the Legislature from increasing penalties for prospective violations.

The State's arguments cannot negate the logic of *Hester*, which is equally applicable to the present case.

B. The 2007 amendment retroactively makes the punishment more burdensome for the same offense in violation of the *ex post facto* clauses.

To find a violation of the *ex post facto* clauses, a law must not only apply retrospectively, but must impose punishment. Under New Jersey law, courts use a two-part test to make that determination. First, "a court must assess whether the Legislature intended to 'impose punishment,'" in which case the law is considered punitive, or if the Legislature instead intended "to enact a regulatory scheme that is civil and nonpunitive." *Riley*, 219 N.J at 285 (quoting *Smith v. Doe*, 538 U.S. at 92). But even a regulatory scheme that was not intended to be punitive can still be "so punitive either in purpose or effect as to negate the State's intention to deem it

civil." *Id*. (quoting *Smith*, 538 U.S. at 92). What matters for *ex post facto* analysis is whether a law "inflict[s] punishment." *Doe v. Poritz*, 142 N.J. 1, 46 (1995).

In the present case, the Court need not revisit the question of whether registration requirements are punitive themselves. Instead, the Court need only look to the consequences that the Legislature chose to impose on violators of registration requirements and the amendment's upgraded punishments to find that the 2007 amendment makes the punishment for Respondents' underlying sex offenses more burdensome.

1. The 2007 amendment's upgraded punishment indicates the Legislature's punitive intent.

The question of whether registration requirements pursuant to Megan's Law are themselves constitutional is not at issue in the present case. The 2007 amendment did not introduce registration requirements, but rather further penalized the failure to register by upgrading the charge for the existing statutory crime. *Amicus* therefore does not presently challenge the constitutionality of registration, but instead challenges the constitutionality of applying an upgraded punishment for failure to register that "materially alter[s] defendants' prior sentences to their disadvantage." *Hester*, 233 N.J. at 398. It is not necessary for the Court to examine whether registration requirements are themselves punitive to find a violation of the *ex post facto* clauses; it is sufficient to find that the Legislature increased the possible punishment for violating the law. The consequences for

violating the statute at issue are not remedial, but punitive. Violating N.J.S.A. 2C:7-2 exposes defendants to three to five years of potential imprisonment. *See* Assemb. Judiciary Comm. Statement to S. 716 & 832 (Oct. 23, 2006). The Assembly Judiciary Committee's report clarifies that the 2007 amendment "upgrades the penalty for failure to register." *Id.* Previously, Megan's Law "provide[d] that failure to register is a crime of the fourth degree, which is punishable by a fine of $10,000, up to 18 months imprisonment, or both." *Id.* The amended law makes "failure to register [] a crime of the third degree, which is punishable by a fine of up to $15,000, three to five years imprisonment, or both." *Id.* Under the amended law, Respondents' potential imprisonment could be more than triple the maximum sentence that they may have faced prior to the amendment. Although the Legislature could have pursued alternative methods to ensure compliance with Megan's Law, "instead it elected to impose potential penal consequences" and enforce the requirements "through decidedly punitive measures." *Timmendequas,* 460 N.J. Super. at 355, 57.

An *ex post facto* violation is not precluded merely because Megan's Law's registration scheme has been found to be remedial and not punitive. *See Poritz,* 142 N.J. at 40-77. In fact, several federal and state courts have found amendments to regulatory, remedial schemes that increase punishments to be unconstitutional when applied retroactively. *See, e.g., Gillette,* 553 F. Supp. 2d at 529; *U.S. v.*

Stinson, 507 F.Supp.2d 560 (S.D.W.Va. 2007); *Doe v. State*, 167 N.H. 382 (N.H. 2015) (finding a violation of the New Hampshire Constitution's *ex post facto* clause when the punitive effect of the registration law was sufficient to overcome the nonpunitive legislative intent); *Starkey v. Okla. Dep't of Corr.*, 2013 O.K. 43 (O.K. 2013) (finding that retroactive application of amendments related to registration violated Oklahoma's *ex post facto* clause). In *U.S. v. Gillette*, the court considered whether an increased prison sentence for failure to register was unconstitutional. *See* 553 F.Supp.2d at 529. The maximum punishment was increased from one year to ten years, which the court found to "clearly increase[] the punishment for the crime," *id.*, meeting the second prong of the *ex post facto* analysis, *id.* at 530.

Here, the Legislature's decision to upgrade the registration violations to a third-degree crime, which subjects individuals to a significantly larger fine and a term of imprisonment three times the length of the maximum term under the earlier law, indicates an intent to impose punishment.[4] It is irrelevant that the registration scheme in general has been found remedial – the Legislature nonetheless chose a

[4] Even if the Legislature did not intend the 2007 amendment to be punitive, the increase in potential punishment is so significant that intent is unnecessary. *See Riley*, 219 N.J at 285 (explaining that "despite the remedial intent of the Legislature" a statute's adverse consequences can be "so punitive either in purpose or effect as to negate the State's intent to deem it only civil and regulatory" (citing *Smith v. Doe*, 538 U.S. at 92) (internal quotation marks omitted)).

punitive means to enforce registration under Megan's Law. The 2007 amendment changed the already punitive part of what has been considered a remedial scheme, and made the punishment *harsher*, thereby making a clearly punitive change.

2. The 2007 amendment exacts a more burdensome punishment on the Respondents.

Having established that the 2007 amendment to N.J.S.A. 2C:7-2(a) was intended to be punitive, it is necessary to determine whether the enhanced consequences increase the burden on Respondents for their underlying offenses. The legislative change must be "more than 'a simple change in nomenclature'" to qualify as punishment and violate the *ex post facto* clauses. *Hester*, 233 N.J. at 395 (quoting *State v. Perez*, 220 N.J. 423, 441 (2015)). The 2007 amendment does exactly this, imposing dramatically higher fines and prison sentences on violators.

As explained above, the amended law subjects Respondents to more than triple the term of imprisonment than what they may have faced prior to the amendment. This Court has previously found that the imposition of additional years in prison "enhances the punitive consequences" and satisfies this prong of the *ex post facto* analysis. *Perez*, 220 N.J. at 441-42 (concluding that an amendment to the CSL statutes "requires [defendant] to spend many additional years in prison due to this so-called clarification" and amounts to punishment despite the State's contention that the Legislature's changes are a "simple change in nomenclature").

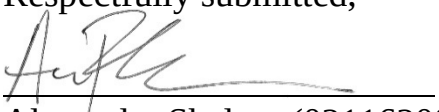
New Jersey courts have previously found that upgrading a crime from the fourth to the third degree made the punishment for the underlying crimes more burdensome. In *State v. F.W.*, like here, the Appellate Division relied on U.S. Supreme Court precedent to conclude that the "defendant's prosecution for a third-degree crime…rather than a fourth-degree crime" made defendant "worse off" in violation of the *ex post facto* clauses. 443 N.J. Super. at 489 (quoting *Johnson*, 529 U.S. at 701 (internal quotation marks omitted)). The same result is required here.

Conclusion

For the foregoing reasons, this Court should conclude that the application of the 2007 amendment on people, like Respondents, who committed underlying offenses prior to the amendment violates the *ex post facto* clauses of the State and Federal Constitutions, and affirm the Appellate Division's decision below.

Dated: April 24, 2020

Respectfully submitted,



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