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**VIA ELECTRONIC FILING**

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

**Re:** A-60-20 State v. Ashley Bailey (085342)

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. For the reasons stated herein, *amicus* joins Defendant in urging this Court to reverse the decision of the Appellate Division.

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## Preliminary Statement

In 2014, when Ashley Bailey sent the text messages at issue to her husband, her communications were protected under the long-standing and legislated marital communications privilege. The newly-enacted crime-fraud exception to this privilege, relied on by the trial court to admit the otherwise confidential messages into evidence, was not adopted as a rule until 2015. In fact, the exception was only adopted after this Court, in *State v. Terry*, considered it and judged the change so significant that it needed to be referred to the Legislature for deliberation, rather than implemented through caselaw. *Amicus* joins Ms. Bailey in arguing that applying the newly-enacted exception retroactively under these circumstances violates the *Ex Post Facto* clauses of the New Jersey and Federal Constitutions.

The New Jersey and United States Constitutions both prohibit *ex post facto* lawmaking. The purpose of those clauses includes the notion that laws must provide fair warning of their effect, and that individuals are permitted to rely on their meaning until they are explicitly changed. It was wholly reasonable for this Defendant—or for any person—to have relied on the protections of a codified privilege when deciding whether to engage in speech that could later be used as incriminating evidence. *Amicus* urges the Court to find a presumption that the *Ex Post Facto* clauses are triggered when a modification of an evidentiary rule is so significant it must be adopted in a manner consistent with the Evidence Act, and

when the proposed modification, without notice, will plausibly impact the speech or behavior of an individual immediately preceding, during, or following a charged offense.

### **Statement of Facts and Procedural History**

*Amicus* accepts the statements of facts and procedural history found in the unpublished Appellate Division opinion in this matter, *State v. Nathan Ingram and Ashley D. Bailey*, Dkts. No. A-2640-17T4, A-3157-17T4, 2021 WL 71292 (App. Div. Jan. 8, 2021).

### **Argument**

#### **I. A retrospective application of the crime fraud exception to the privilege protecting martial communications 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. “Those clauses proscribe ‘any statute which makes more burdensome the punishment for a crime, after its commission.’” *State v. Brown*, 245 N.J. 78, 88 (2021) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169 (1925)) (alteration omitted); *see also id.* (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981), for the proposition “that the *Ex Post Facto* Clause seeks not to guarantee ‘an individual’s right to less punishment, but [to guard against] the lack of fair notice and [to promote] governmental restraint when the legislature increases punishment beyond what was prescribed when the

crime was consummated”). “The *Ex Post Facto* Clause proscribes every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” *State v. Witt*, 223 N.J. 409, 449-50 (2015) (citation omitted); *see also Miller v. Florida*, 482 U.S. 423, 429 (1987) (finding same). That is exactly the scenario presented by this case.<sup>1</sup>

Although newly adopted but retrospectively applied Rules of Evidence that modify the scope of evidence that may be admitted without altering any substantive rights of a defendant do not violate the *Ex Post Facto* clauses, *State v. Muhammad*,

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<sup>1</sup> In *Carmel v. Texas*, the United States Supreme Court outlined four types of laws that fall within the *ex post facto* prohibition:

I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal rules of evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.

[529 U.S. 513, 522 (2000) (emphasis in original) (quoting *Calder v. Bull*, 3 Dall. 386, 390 (1798) (Chase, J.)).]

*See State v. Rose*, 425 N.J. Super. 463, 469 (App. Div. 2012) (quoting same).

It does not appear that there is any dispute that the question before the Court is whether the Rule of Evidence at issue here falls into the fourth *Carmel* category.

145 N.J. 23, 57 (1996) (collecting cases), for the reasons that follow, *Amicus* agrees with Defendant that the retrospective application of the crime-fraud exception *does* materially alter the substantive rights of Defendant Bailey, and therefore violates the *Ex Post Facto* clauses of the State and Federal Constitutions.

**A. The crime-fraud exception is a significant change that implicates the *Ex Post Facto* clauses of the Federal and State Constitutions.**

The *Ex Post Facto* Clauses are aimed at the concern “that legislative enactments ‘give fair warning of their effect and permit individuals to rely on their meaning until explicitly charged.’” *Miller*, 482 U.S. at 430 (collecting cases). *Amicus* urges the Court to find a presumption that the *Ex Post Facto* clauses are triggered when a modification of an evidentiary rule is so significant it must be adopted in a manner consistent with the Evidence Act, and when the proposed modification, without notice, plausibly impacts the speech or behavior of an individual immediately preceding, during, or following a charged offense.

This Court first considered a crime-fraud exception to the marital communications privilege in *State v. Terry* and declined to unilaterally adopt an exception to that rule. 218 N.J. 224, 243 (2014). In considering how to proceed, the Court outlined the profound significance of adopting this type of exception. *Id.* (“Adding a crime-fraud exception to the marital communications privilege would amount to a ‘fundamental change’ with ‘serious and far-reaching’ consequences.” (internal citations omitted)). Invoking the procedures of the Evidence Act, the Court

proposed an amendment encompassing this exception to the marital communications privilege and transmitted it for approval by joint resolution of the Legislature and for the Governor's signature. *Id.* at 243-244, 246. In so doing, the Court adhered to the principle that "evidence rules that dramatically impact the conduct of trials" should be adopted by way of the Evidence Act, which calls for the collaborative effort of all the branches of government. *Terry*, 218 N.J. at 241-242 (quoting *State v. Byrd*, 198 N.J. 319, 345 (2009)); see also *State v. D.R.*, 109 N.J. 348, 352 (1988). The Court's proposed revision was subsequently adopted by the New Jersey Legislature, signed by the Governor, and the amended *N.J.R.E.* 509 (codified at N.J.S.A. 2A:84A-22) was thereafter enacted on November 9, 2015.

The Court chose to refer the question of a crime-fraud exception for presentment to the Executive and Legislative Branches, because significant changes in evidence rules require the procedures of the Evidence Act, 'while evidence rule changes of lesser consequence' can 'be developed through case law.'" *Terry*, 218 N.J. at 241 (quoting *Byrd*, 198 N.J. at 345) (alteration omitted). It logically follows that such a significant enactment alters the substantive rights of defendants, implicating the *Ex Post Facto* Clauses. See *Muhammad*, 145 N.J. at 57.

**B. The *Ex Post Facto* Clauses apply when an evidentiary rule retroactively permits a defendant's statements to be used against them without notice or warning.**

The crime-fraud exception is not an ordinary rule of evidence and involves different principles than the *ex post facto* analyses of evidentiary rules in prior cases heard by New Jersey appellate courts. The prior cases involve the enlargement of evidentiary rules to admit into evidence information that was not connected to the on-going behavior of defendants immediately preceding, during, and after the crimes. *See, e.g., State v. Cope*, 224 N.J. 530, 555-56 (2016) (evaluating impeachment by evidence of conviction); *State v. Fortin*, 198 N.J. 619, 624-25 (2013) (considering amendments to the statutory scheme surrounding the elimination of the death penalty and prohibiting the defendant from presenting mitigating factors); *State v. Muhammad*, 145 N.J. 23, 56 (1996) (relating to the use of a victim-impact statement); *State v. Erazo*, 126 N.J. 112, 134-35 (1991) (assessing a sentence enhancement based on the defendant's prior record). In contrast, this matter concerns an evidentiary rule that retroactively permits a criminal defendant's own statements to be used against her when those statements were protected by a long-standing and legislated privilege at the time that they were made, and she did not know at that moment that they could later be used against her.

In *State v. Rose*, the Appellate Division considered whether the retroactive application of the forfeiture by wrongdoing exception to the hearsay rule, codified



at *N.J.R.E.* 804(b)(9) following the Court’s referral to the Legislature in *Byrd*, 198 N.J. 319, constituted a violation of the State and Federal Constitutions. 425 N.J. Super. 463, 471-73 (App Div. 2012). The Appellate Division found that it did not, and in its analysis focused on two points: (1) that there was “no unfairness or injustice in applying the rule” as the evidentiary rule is “evenhanded in its application because it applies to ‘any party who wrongfully procures the unavailability of a witness,’” and is an “‘ordinary’ rule of evidence,” *id.* at 472 (first quoting *Byrd*, 198 N.J. at 350, then *Muhammad*, 145 N.J. at 56-57); and (2) that exception to the hearsay rule “reflects long-standing legal and equitable principles that were well recognized at the time of the charged offenses,” *id.* at 473.

With respect to the first line of analysis, unlike in *Rose*, the application of the crime-fraud exception is not applied even-handedly. It only implicates additional evidence that could be used against a defendant, without enlarging the defendant’s ability to defend herself. Moreover, as described herein, an evidentiary rule that retroactively permits a criminal defendant’s words to be used against them, without fair notice, *cf. Miller*, 482 U.S. at 430, is not an ordinary rule of evidence.

Importantly, with respect to the second line of analysis, the crime-fraud exception does not reflect a long-standing legal and equitable principle that was recognized at the time of the offense. *Cf. Rose*, 425 N.J. Super. at 473. As described in *Terry*, the form of the marital communications privilege that existed then was

enacted as part of the Evidence Act of 1960, and further codified at N.J.R.E. 509, *Terry*, 218 N.J. at 232-33 (citing L. 1960, c. 52 § 22 (codified at N.J.S.A. 2A:84A-22)), did not contain any crime-fraud exception. N.J.S.A. 2A:84A-22; *N.J.R.E.* 509.

This privilege “stem[med] from the strong public policy of encouraging free and uninhibited communication between spouses, and, consequently of protecting the sanctity and tranquility of marriage.” *Terry*, 218 N.J. at 233 (quoting *State v. Szemple*, 135 N.J. 406, 414 (1994)). As this Court explained, “[t]he privilege has traditionally been viewed as ‘essential to the preservation of the marriage relationship.’” *Id.* (quoting *Wolfle v. United States*, 291 U.S. 7, 14 (1934)). As the Court noted, “[a]ll of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife.” *Id.* at 233-34 (quoting 1 McCormick on Evidence § 86 at 524 (Broun ed., 7th ed. 2013)). Not only was the addition of the crime-fraud exception a new legal principle, but it also disrupted this State’s decades-long safeguarding of protected communications.

Moreover, it was reasonable for this Defendant—or for any person—to have relied on the protections of marital privilege when deciding whether to engage in speech that could later be used as incriminating evidence.<sup>2</sup> Although the text

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<sup>2</sup> Defendant was aware that she was part of a criminal probe at the time she sent the relevant text messages. (10T:77-2 to 79-15.) In fact, part of the State’s argument before the Appellate Division was that “the text [w]as proof that Defendant was disclosing confidential information to her husband, and [] consciousness of guilt.” (State’s App. Div. Br., at 12.) As a police officer, Defendant was presumably

messages at issue came after this Court's decision in *Terry*, the Court's recommendation was not yet operative. While crime-fraud exceptions to other evidentiary privileges were recognized and codified in this state's evidentiary rules, at the time Defendant sent the relevant messages to her husband, *N.J.R.E.* 509 explicitly did not contain that exception.<sup>3</sup> *See Terry*, 218 N.J. at 241 (noting explicit crime-fraud exceptions to *N.J.R.E.* 504(2)(a) (attorney-client privilege), *N.J.R.E.* 506(f) (physician-patient privilege), *N.J.R.E.* 511(2) (cleric-penitent privilege), *N.J.R.E.* 514 (trade-secret privilege), and *N.J.R.E.* 519(b) (mediation privilege)).<sup>4</sup> Not only was there a codified protection of the marital communications privilege in the statute, there was also a reasonable belief that the Legislature had specifically

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familiar with her right to remain silent. It is reasonable to infer that she believed that her communications with her husband were protected from disclosure.

<sup>3</sup> The idea that marital communications are protected was not just codified in statute but exists in the zeitgeist. From the Agatha Christie classic, *Witness for the Prosecution*, made into film in 1957, where the defense attorney objects to the defendant's wife taking the stand against her husband, citing the sanctity of privileged marriage communication, to the *Greed* episode of *Law & Order: Special Victims Unit* where the two suspects confess a sordid plot to their respective spouses to invoke this privilege, the concept that communications between spouses are protected is widely publicized and known.

<sup>4</sup> This differentiates the adoption of the crime-fraud exception in state law from the Federal Rules of Evidence, which abdicates the governance of privilege claims to common law. *Compare Fed. R. Evid.* 501 (“The common law—as interpreted by the United States courts in the light of reason and experience—governs a claim of privilege unless [the United States Constitution, a federal statute, or the rules prescribed by the Supreme Court] provides otherwise[.]”), with *N.J.R.E.* 500-534 (outlining grants of privilege), and N.J.S.A. 2A:84A-38 (Evidence Act).

opted out of adopting a crime-fraud exception to this privilege by not enacting the exception. *Cf. Borough of East Rutherford v. E. Rutherford PBA Local 275*, 213 N.J. 190, 215 (2013) (“When the Legislature creates an exhaustive list, it is assumed to intend to exclude what is not enumerated unless it indicates by its language that the list or section is not meant to be exhaustive or exclusive.” (citations omitted)). Though not squarely within the ambit of the Fifth Amendment and state-law rights against self-incrimination, *see Miranda v. Arizona*, 384 U.S. 436, 439, 444-45 (1966); *State v. Bey*, 112 N.J. 45, 62 (1988), similar principles are at play. To later permit admissions made in a legislatively- and historically-protected context to incriminate a criminal defendant without notice or warning involves federal and state prohibitions against *ex post facto* rulemaking. After all, “[t]he purpose of the *Ex Post Facto* Clause is ‘to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.’” *Fortin*, 198 N.J. at 627 (quoting *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981)); *cf. State v. Natale*, 184 N.J. 458, 490-91 (2005) (finding that the *Ex Post Facto* Clause bars the retroactive enlargement of a criminal statute by the Judiciary where it is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue” (citation omitted)). By definition, the admission of this evidence “alters the legal rules of evidence, and receives . . . different[] testimony[] than the

law required at the time of the commission of the offence, in order to convict the offender.” *Witt*, 223 N.J. at 449-50.

**II. The Court should ask the Rules Committee to propose an instruction that instructs juries on how to interpret communications between a defendant and their abusive spouse when admitting evidence pursuant to the crime-fraud exception to the marital communications privilege.**

Regardless of the Court’s disposition of the *ex post facto* question central to this case, it should address an issue not directly raised by the parties, but important to the fair administration of justice in New Jersey: The defendant in this case testified to incidents of abuse by her partner. (*See, e.g.*, 10T:116-16 to 5; 10T:131-11 to 132:13.) Researchers have found that most people in women’s prisons experienced intimate partner and/or sexual violence before incarceration. Alisa Bierria & Colby Lenz, *Battering Court Syndrome: A Structural Critique of “Failure to Protect”*, in *THE POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES*, 130 (Jane K. Stoeber ed., 2019). In New Jersey, there were 59,645 domestic violence offenses reported by the police in 2019. STATE OF NEW JERSEY, DEPARTMENT OF LAW & PUBLIC SAFETY, DIVISION OF STATE POLICE UNIFORM CRIME REPORTING UNIT, THIRTY-SEVENTH ANNUAL DOMESTIC VIOLENCE OFFENSE REPORT (2019). *Cf. State v. Kelly*, 97 N.J. 178, 191-92 (1983) (relying on state police statistics to describe the rate of intimate partner abuse in New Jersey and listing public misconceptions about abusive relationships). Given that, it is likely that the crime-fraud exception will arise again in the context of intimate partner abuse.

The Court should refer to the Rules Committee a question of whether it should adopt a model jury instruction to accompany evidence admitted pursuant to the crime-fraud exception to the marital communications privilege when there exists evidence that those communications were made in the context of intimate partner abuse. Dispelling jurors' preconceived notions about how an individual acts and reacts in communications during an abusive relationship, and particularly in electronic communications, is relevant to ensuring a fair trial when a defendant in an abusive relationship is accused of conspiring to participate in the crimes of their spouse.

Jurors require context for understanding the power dynamics of intimate partner violence when evaluating evidence created in the context of those relationships. Without context, the "jury's and judge's understanding of submitted evidence in competing trial narratives" can be limited or distorted. BIERRIA & LENZ, *Battering Court Syndrome: A Structural Critique of "Failure to Protect"*, at 130. Advocates for survivors of intimate partner violence have consistently emphasized how abusive text messages are not "always easy to spot" or can be "misconstrued as normal." See, e.g., *Abusive Texts: 6 Red Flags*, HEALING ABUSE WORKING FOR CHANGE (last visited July 16, 2021), <https://hawcdv.org/6-ways-to-recognize-abusive-text-messages>. Jurors would benefit from guidance, crafted by experts, to

help them understand and evaluate communications conveyed in the context of an abusive relationship.

### **Conclusion**

For the foregoing reasons, this Court should reverse the Appellate Division's decision below. Additionally, the Court should ask the Rules Committee to consider the use of a jury instruction, going forward, when evidence suggests that communications were made as part of an abusive relationship.

Respectfully submitted,

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