SUPREME COURT OF NEW JERSEY
DOCKET NUMBER 39,989

JOHN DOE (a fictitious name), individually and on behalf of all others similarly situated,	:	
		Civil Action
Plaintiff-Appellant-Cross-Responsent,	:	On Direct Cirtification from an Order of the Superior Court, Law Division, Burlington County.
v.	:	
DEBORAH PORITZ, Attorney General of the State of New Jersey,	:	Stat Below:
Defendant-Respondent-Cross-Appellant.	:	Hon. Harold B. Wells, III, J.S.C.

BRIEF ON BEHALF OF THE PUBLIC DEFENDER, AMICUS CURIAE*

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On the Brief

* This brief is reprinted in its original form as submitted to the Supreme Court of New Jersey, with the exception of Point II which has been only partially reprinted for editorial reasons.

STATEMENT OF MATTER INVOLVED

The Public Defender has been granted status as *amicus curiae* in this matter per this Court's order of March 14, 1995. (PDa 1)[1] Other orders issued on that date granted the Attorney General's motion for direct certification (PDa 2), and provided a briefing schedule whereby initial briefs of the parties and the Public Defender are to be filed on even date, respondents' briefs are to be filed by April 18, 1995 and reply briefs are to be filed by April 25, 1995. (PDa 3 to 4) Because the Public Defender's general position on the issues is the same as John Doe's, this initial brief will cover those issues which John Doe lost below and which the Public Defender feels she can provide argument which will be of assistance to the Court (*ex post facto*; double jeopardy; privacy; cruel and unusual punishment). The Public Defender will respond to the due process arguments the Attorney General makes in her initial brief by the April 18 deadline.

The Public Defender will rely on the procedural history and statements of facts submitted by the parties to this action since she has no independent information regarding John Doe's particular case. Any reference below to specific facts of this case has been culled from the parties' briefs which were filed in the lower court. The Public Defender merely sets forth her understanding of the relevant statutes which she herein submits are unconstitutional in their application to John Doe and to others similarly situated.

"Megan's Law" encompasses several new criminal statutes and amendments to existing statutes, which became effective on October 31, 1994, and will be codified primarily at *N.J.S.A.* 2C:7-1 to 2C:7-11.[2] The provisions before this Court are those which require registration of juveniles and adults convicted of certain sex offenses, and which require notification to the community of the presence of these individuals.

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[1] "PDa" refers to the appendix to this brief.

[2] Megan's Law also amends the following statutes: *N.J.S.A.* 2C:43-7 and *N.J.S.A.* 2C:44-3 with respect to the imposition of extended terms of imprisonment; *N.J.S.A.* 2C:11-3 by adding an aggravating factor that the victim was less than 14 years old; *N.J.S.A.* 2C:47-3 and 2C:47-5 concerning the disposition and parole of sex offenders whose conduct was characterized by a pattern of repetitive, compulsive behavior; *N.J.S.A.* 2C:25-29 with respect to domestic violence complaints; *N.J.S.A.* 52:4B-44 regarding assistance to victims in submitting impact statements and notification to victims of a prisoner's release or escape from custody; *N.J.S.A.* 30:4-27.2, 27.10, 27.12, 27.13, 27.15, 27.17 concerning the definition of mental illness and regarding involuntary commitment, especially with respect to inmates about to be released from incarceration. Megan's Law created the following statutes: *N.J.S.A.* 2C:43-6.4 and *N.J.S.A.* 2C:47-8 with respect to community supervision of sex offenders; *N.J.S.A.* 2A:12-14, *N.J.S.A.* 30:4-6.1, and *N.J.S.A.* 30:4-123.55a concerning certain notice to victims of crime; *N.J.S.A.* 30:4-82.4 regarding involuntary commitment of inmates; *N.J.S.A.* 30:4-123.53a and b with respect to the obligations of institutions and agencies to notify prosecutors of the release of sex offenders; *N.J.S.A.* 53:1-20.17 through .28 concerning DNA testing of certain offenders.

A. *Registration*

The new registration statutes, Pub. L. 1994, ch. 133 (to be codified at *N.J.S.A.* 2C:7-1 to 2C:7-5) require that a person convicted, adjudicated delinquent, or found not guilty by reason of insanity, of certain "sex offenses" register with designated law enforcement authorities. The following crimes constitute "sex offenses" under the act, regardless of the date of commission or conviction, if the offender's conduct was characterized by a pattern of repetitive, compulsive behavior: aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping pursuant to *N.J.S.A.* 2C:13-1c(2); or an attempt to commit any of the above crimes. *See N.J.S.A.* 2C:7-2b(1). In the absence of a finding of repetitive, compulsive behavior, the following crimes constitute "sex offenses" under the act, if the conviction, adjudication or acquittal by reason of insanity occurred on or after October 31, 1994, or the offender was serving a sentence of incarceration, probation, parole or community supervision, or had been confined as the result of an insanity acquittal or civil commitment on October 31, 1994: aggravated sexual assault; sexual assault; aggravated criminal sexual contact; kidnapping under *N.J.S.A.* 2C:31-1c(2); endangering the welfare of a child under *N.J.S.A.* 2C:24-4a or 2C:24-4b(4); luring or enticing pursuant to *N.J.S.A.* 2C:13-6; criminal sexual contact if the victim is a minor; kidnapping, criminal restraint, or false imprisonment if the victim is a minor and the offender is not the parent of the victim; or an attempt to commit any of the above crimes. *See N.J.S.A.* 2C:7-2b(2).

The obligation to register never ceases. A defendant may, however, apply to the court to terminate the obligation upon proof that: (1) he or she has not committed an offense within 15 years of conviction or release from incarceration, whichever is later; and (2) he or she "is not likely to pose a threat to the safety of others." *N.J.S.A.* 2C:7-2f.

At the time of registration, the sex offender must provide his or her name, recent photograph, offense for which he or she was convicted, fingerprints, address, place of employment and/or schooling, a vehicle license plate number, and any other information the Attorney General deems necessary, including criminal and corrections records, nonprivileged personnel, treatment and abuse records, and evidentiary genetic markers.[3] This information may be released to the public as provided in the community notification statute, P.L. 1994, ch. 128 (to be codified in pertinent part at *N.J.S.A.* 2C:7-6 to 2C:7-11).

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[3] A separate statute entitled "State Police - Bureau of identification - DNA Databanks" requires every person convicted of aggravated sexual assault and sexual assault under *N.J.S.A.* 2C:14-2 or aggravated criminal sexual contact and criminal sexual contact under *N.J.S.A.* 2C:14-3 or any attempt to commit any of these crimes, on or after January 1, 1995, to provide a DNA sample. Anyone convicted of and incarcerated for any of the above enumerated offenses prior to January 1, 1995, is required to provide a DNA sample before parole or release from incarceration. P.L. 1994, ch. 136, § 4 (to be codified at *N.J.S.A.* 53:1-20.20).

In this case, plaintiff was convicted of sexual assault. In addition, at the time of his conviction, the trial court found that plaintiff's conduct was characterized by a pattern of repetitive, compulsive behavior.[4] Thus, even though plaintiff's conviction occurred nine years ago (he was sentenced in February, 1986), he falls within the purview of Megan's Law, and was required to register by February 28, 1995. *N.J.S.A.* 2C:7-2c(4). In addition, plaintiff must verify his address with designated law enforcement authorities every 90 days, and reregister 10 days before any change of address. *N.J.S.A.* 2C:7-2d, e.

B. *Community Notification*

The community notification statutes, Pub. L. 1994, ch. 128 (to be codified at *N.J.S.A.* 2C:7-6 to 2C:7-11), provide for three different levels of notification to the community by local law enforcement authorities. *N.J.S.A.* 2C:7-8c. The level of community notification is determined by the prosecutor of the county in which the offender intends to reside, and the prosecutor of the convicting county (if different), based upon a factual assessment of the risk of repeat offense, and in accordance with guidelines to be established by the Attorney General. *N.J.S.A.* 2C:7-8d(1). On December 20, 1994, the Attorney General's Office issued Guidelines For Community Notification (hereinafter "Guidelines"). (PDa 5 to 18)

Based on the Guidelines, if the prosecutor determines that the registrant exhibits a "low" risk of reoffense, *see N.J.S.A.* 2C:7-8c(1), the registrant is classified as Tier One. (PDa 9) Notification is made to law enforcement agencies likely to encounter the offender, and the victim.[5] If the prosecutor determines that the registrant exhibits a "moderate" risk of reoffense, *see N.J.S.A.* 2C:7-8c(2), the registrant is classified as Tier Two. (PDa 10) In addition to the notification required under Tier One, the prosecutor will also notify organizations in the community including schools, religious and youth organizations, licensed day care centers, summer camps, Boy Scouts and Girl Scouts, Big Brothers and Big Sisters, local PTAs, women's advocacy groups, rape victim support groups, and battered women's organizations. (PDa 10 to 12) Although the Guidelines ask each of these community organizations to caution their staffs that this information is not intended as at-large community notification, there are no procedures outlined that prohibit any private person from further disclosing the information or sanction them for doing so. (PDa 15) If the prosecutor determines the risk of reoffense is "high," the registrant is classified as Tier Three. *See N.J.S.A.* 2C:7-8c(3). (PDa 12) In that case, the prosecutor will notify the community at large. Methods for

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[4] But for the "repetitive, compulsive" label attached to plaintiff's prior conduct, he would not fall within the purview of the Act in light of his release from parole supervision in January, 1992.

[5] Such notification is in addition to that mandated by the registration statutes, which includes transmittal of registration information to the State Police, the local law enforcement agency for the municipality in which the offender plans to reside, and "other appropriate law enforcement agencies." N.J.S.A. 2C:7-4c. The Attorney General guidelines also require notification to the victim. (PDa 9)

such notification include meetings, speeches in schools or churches, door-to-door visits, and any other method the prosecutor chooses. (PDa 16)

POINT I

THE RETROACTIVE APPLICATION OF MEGAN'S LAW VIOLATES THE CONSTITUTIONAL PROSCRIPTIONS AGAINST *EX POST FACTO LAWS AND DOUBLE JEOPARDY.*

A. Megan's Law Requires Scrutiny Under The Ex Post Facto And Double Jeopardy Clauses Of the Federal And State Constitutions Because It Retroactively Imposes Registration And Notification Requirements.

John Doe committed a sex-related crime nearly a decade before Megan's Law was enacted. However, he and many similarly-situated clients of the Public Defender fall under the burden of Megan's Law because part of the legislation provides that registration and notification are mandated "if the court found that the offender's conduct was characterized by a pattern of repetitive, compulsive behavior, *regardless of the date of the commission of the offense or the date of conviction.*" *N.J.S.A.* 2C:7-2b(1) (emphasis added). The Public Defender submits that the application of Megan's Law to those who committed sex offenses prior to the enactment of the statute violates the federal and state constitutional proscriptions against *ex post facto* laws and double jeopardy.

It is clear that the *Ex Post Facto* and Double Jeopardy Clauses are implicated by Megan's Law. The *Ex Post Facto* Clauses of the United States and New Jersey Constitutions prohibit, among other things, a retrospective law "that changes the punishment, or inflicts a greater punishment than the law annexed to the crime when it was committed." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *accord Lindsley v. State Prison Bd. Managers*, 107 N.J.L. 51, 55 (Sup. Ct. 1930), aff'd, 108 N.J.L. 415 (E. & A. 1931). The Public Defender contends that the registration requirement, when combined with the system of community notification created here, amounts to "punishment," and thus cannot be applied to a person whose offense predates the enactment of the challenged statute.

The application of Megan's Law is clearly retrospective since it "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31, 101 S.Ct. 960, 965 (1981); *accord State v. T.P.M.*, 189 N.J. Super. 360, 367 (App. Div. 1983); *see also Miller v. Florida*, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451 (1987) (retroactive application of revised sentencing guidelines violated *ex post facto* clause). As set forth above, the statute also "alters the situation of the offender to his disadvantage," by making the burden on defendant "more onerous," in terms of punitive consequences of his past offense. *State v. T.P.M.*, 189 N.J. Super at 366-67; *accord Weaver v. Graham*, 450 U.S. at 29-30, 101 S.Ct. at 964-65. In fact, the Public Defender submits that "the legislative aim was to punish [certain] individual[s] for past activity." *DeVeau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 1155 (1960). Even if the

legislative aim was not punitive, however, the registration and notification requirements are so punitive, in purpose and effect, as to negate any non-punitive intention. *United States v. Ward*, 448 U.S. 242, 250, 100 S.Ct. 2636, 2642 (1980).

With respect to the Double Jeopardy Clauses of the United States and New Jersey Constitutions, they "protect[] against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and *multiple punishments for the same offense*." *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 1900 (1989) (emphasis added); *accord North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076 (1969); *State v. Eigenmann*, ___ N.J. Super. ___, ___ (App. Div. 1995), slip op. at 5; *Ayars v. New Jersey Dept. of Corr.*, 251 N.J. Super. 223, 226 (App. Div. 1991). The Public Defender contends that because Mr. Doe has already been criminally punished for the sex offense of which he was convicted, further punishment for that conduct is barred by the Double Jeopardy Clause.

Megan's Law is being applied retrospectively and is disadvantageous to Mr. Doe and others like him, and it therefore engenders *ex post facto* concerns; the law imposes a new burden on Mr. Doe long after he has served his sentence for the crime at issue, and therefore it implicates double jeopardy considerations. As the parties to this action both recognize, the only possible question to be addressed regarding these constitutional concerns is whether the severe penalties of Megan's Law constitute punishment. If they do, then Megan's Law is unconstitutional as applied to John Doe and all others who come within the statute's broad reach by virtue of the repetitive and compulsive nature of the crimes they committed before Megan's Law was enacted.

B. *Megan's Law Imposes Retroactive Punishment In Violation Of The Guarantees Against* Ex Post Facto *Laws And Double Jeopardy.*

1. General Tests Formulated By The United States Supreme Court.

To determine whether Megan's Law punishes those who come within its reach, this Court must first decide what factors are relevant to that determination. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), the United States Supreme Court dealt with acts of Congress which made expatriates of persons who left or remained outside the United States during time of war or national emergency—in other words, the statutes stripped draft dodgers of their citizenship. Although the laws were said to be civil, the Supreme Court noted that "[t]he punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character. . . ." *Id.* at 168, 83 S.Ct. at 567. The factors which make up those traditional tests are:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will

> promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

Id. at 168-69, 83 S.Ct. at 567-68.

In 1989 the Supreme Court, in *United States v. Halper*, found that where a medical service manager had previously been prosecuted for Medicare fraud, a subsequent civil action under the False Claims Act which resulted in a fine of $130,000 due to the manager's Medicare fraud (which had netted the plaintiff just $585) was a second punishment in violation of double jeopardy protections. The *Halper* Court noted that

> the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis.

Id. at 446, 109 S.Ct. at 1900. However, the Court still found that some statutory penalties which were designated civil really provide punishment:

> But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the "humane interests" safeguarded by the Double Jeopardy Clause's proscription of multiple punishments . . . . This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

Id. at 447, 109 S.Ct. at 1901. (footnote omitted)

The *Halper* Court recognized that "[t]he notion of punishment . . . cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *Id.* at 447-48, 109 S.Ct. at 1901. Even when a sanction is contained in a civil statute, as opposed to a criminal one, that "sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.* at 448, 109 S.Ct. at 1901-02. *Halper* cited *Mendoza-Martinez* for the proposition that punishment can be recognized as serving "the twin aims of retribution and deterrence," and held as follows:

> a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term . . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanc-

> tion may not fairly be characterized as remedial, but only as a deterrent or retribution.

Id. at 448-49, 109 S.Ct. at 1902 (emphasis added).[6] The *Halper* Court limited its ruling to "the rare case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." *Id.* at 449, 109 S.Ct. at 1902.

Recently, in *Austin v. United States*, ___ U.S. ___, 113 S.Ct. 2801 (1993), the Supreme Court held that the Eighth Amendment's protection against excessive fines applies to *in rem* civil forfeiture proceedings in a case in which the plaintiff was ordered to forfeit his home and his business after he had been convicted of selling two grams of cocaine. The Court stated that the question was not whether the forfeiture statute "is civil or criminal, but rather whether it is punishment." *Id.* at 2806. Since *Mendoza-Martinez* addressed the civil/criminal query, the *Austin* Court did not employ the *Mendoza-Martinez* test. *Austin*, 109 S.Ct. at 2806 n. 6. Rather, in ruling that the forfeiture violated the Eighth Amendment, the *Austin* Court emphasized *Halper*'s focus on the fact that the statute in question need only partially serve the ends of punishment for it to bring constitutional protections into play:

> We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as *serving in part to punish*. We said in *Halper* that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."

Austin, 109 S.Ct. at 2806 (emphasis added). The *Halper* quote was repeated later in the opinion. *Id.* at 2812.

> We conclude . . . that forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, *at least in part*, as punishment.

Id. at 2810 (emphasis added).

> Under *United States v. Halper*, . . . the question is whether forfeiture serves *in part* to punish, and one need not exclude the possibility that forfeiture serves other purposes to reach that conclusion.

Id. at 2810 n. 12 (emphasis in original).

A year later, the Supreme Court characterized Montana's Dangerous Drug Tax Act as "punishment" for the purpose of double jeopardy analysis in *Department of Revenue of Montana v. Kurth Ranch*, ___ U.S. ___, 114 S.Ct. 1937 (1994). In that case, the Court was confronted with the question "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty

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[6] Justice Scalia has described Halper as focusing "on whether the sanction serves the goals of 'retribution and deterrence.' " *Kurth Ranch*, 114 S.Ct. at 1959 (Scalia, J., dissenting).

for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." *Id.* at 1941. The Bankruptcy Court relied on both *Halper* and *Mendoza-Martinez* in finding that a tax which was eight times the market value of the illegal drugs was punitive.[7] *Id.* at 1943. However, the Supreme Court noted that *Halper*'s analysis about whether a civil penalty constitutes punishment "does not decide the different question whether Montana's tax should be characterized as punishment." *Kurth Ranch*, 114 S.Ct. at 1944. Although the *Kurth Ranch* Court stated the obvious when it said that "*Halper* did not . . . consider whether a tax may similarly be characterized as punitive," *id.* at 1945, that Court went on to cite *Halper* repeatedly as it explained double jeopardy analysis. *Id.* at 1946. Later, the Court noted that "*Halper*'s method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.' " *Id.* at 1948.

The *Kurth Ranch* Court found that while the high tax rate and the deterrent purpose of Montana's tax were not dispositive,

> Other unusual features, however, set the Montana statute apart from most taxes. First, *this so called tax is conditioned on the commission of a crime. That condition is "significant of penal and prohibitory intent rather than the gathering of revenue."* Moreover, the Court has relied on the absence of such a condition to support its conclusion that a particular federal tax was a civil rather than a criminal sanction. In this case, *the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place.* Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.

Id. at 1947 (emphasis added; footnotes omitted). The Court concluded that "[t]his tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment." *Id.* at 1948.

2. Application Of The General Tests By The New Jersey Courts.

Turning to the decisions of this jurisdiction, they are instructive but they do not set forth a clear answer to the question of what test must be followed to determine whether Megan's Law punishes John Doe. Prior to the United States Supreme Court's 1989 decision in *Halper*, our courts considered the *Mendoza-Martinez* factors to determine whether penalties were really punishment in a variety of contexts. *See, e.g., Kimmelman v. Henkels & McCoy*, 108 N.J. 123, 132 (1987) (in deciding whether per diem penalties of civil antitrust statute were "so punitive as to transform them into criminal sanctions," this Court relied on the *Mendoza-Martinez* factors); *In re Garay*, 89 N.J. 104, 113 (1982) (where penalty

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[7] While the Supreme Court's recitation of the Bankruptcy Court's actions specifically mentions Halper but does not mention *Mendoza-Martinez* by name, the Supreme Court quotes the Bankruptcy Court's analysis of the *Mendoza-Martinez* factors. *See Kurth Ranch*, 114 S.Ct. at 1943.

provisions of medicaid fraud statute were imposed after physician had already been convicted of making false medicaid claims, this Court noted that "*Mendoza-Martin* [sic] . . . sets forth some of the factors that are helpful in determining whether a sanction is civil or criminal"); *In re Kaplan*, 178 N.J. Super. 487, 494 (App. Div. 1981) (in case in which suspended health care provider received civil penalties regarding overpayment of medicaid, Appellate Division noted that *Mendoza-Martinez* "enumerates elements to be considered in determining whether an ostensibly civil remedy is actually a criminal penalty"); *City of New Brunswick v. Speights*, 157 N.J. Super. 9, 16 (Law Div. 1978) (police officer sought to have certain evidence declared inadmissible at anticipated disciplinary hearing in which he could be sanctioned by permanent removal from his position, and court relied on the *Mendoza-Martinez* factors in determining whether the penalty to be imposed was penal or regulatory).

After 1989, the Appellate Division relied on the *Mendoza-Martinez* factors in a case in which *ex post facto* concerns were pressed when the Bureau of Public Utilities imposed penalties against solid waste facilities, *see Matter of Recycling & Salvage Corp.*, 246 N.J. Super. 79, 106 (App. Div. 1991), and it looked exclusively to *Halper* for guidance where double jeopardy claims were made with respect to a prison guard's removal by the State Merit System Board after he had been convicted of a third-degree crime, *see Ayars v. New Jersey Dept. of Corr.*, 251 N.J. Super. at 226-28, and with respect to a school psychologist's pension reduction and the attempted recovery of excess pension payments after he had been convicted of a sex-related offense involving a student. *See LePrince v. Teachers' Pension Fund*, 267 N.J. Super. 270 (App. Div. 1993). This Court, in *Merin v. Maglaki*, 126 N.J. 430 (1992), considered a claim of double punishment where the defendant had been convicted of attempted theft by deception, and then the Division of Insurance imposed what it called civil sanctions. Relying on *Halper* and its earlier decision in *Garay* (which had utilized the *Mendoza-Martinez* factors), this Court noted that "the central issue in a double jeopardy challenge of this nature is whether the penalties imposed amount to a 'punishment,' thereby triggering constitutional protection, or are only 'remedial' in nature and outside the scope of the Double Jeopardy Clause." *Maglaki*, 126 N.J. at 442.

A unique approach was taken by the Appellate Division in *State v. Darby*. There, the court considered the *Halper* analysis only after the *Mendoza-Martinez* factors did not lead to a finding that the penalties in question were on their face criminal. In *Darby*, the defendants were indicted for conspiracy and theft, and they moved to dismiss the indictment on double jeopardy grounds because they had already suffered what they called "the punitive effects of the Chancery Division judgment rendered against them for securities fraud for the same conduct alleged against them in the indictment." 246 N.J. Super. at 435. The Appellate Division stated that "the dispositive question is whether the sanctions imposed on defendants in the Chancery proceedings should be considered criminal or civil." *Id.* at 438. It noted that in *Henkels & McCoy* this Court adopted the *Mendoza-Martinez* factors, and, applying those factors to its case, the Appellate Division found that the test yielded "a mixed result, weighted toward a conclusion that the penalties are civil." *Darby*, 246 N.J. Super. at 442. Having found

that the penalties "are not on their face criminal," the Appellate Division then said: "But that does not end the double jeopardy inquiry, for a civil penalty actually assessed must be tested for punitive purpose and effect as applied to the particular facts involved." *Id.* at 443. The court relied on *Halper* in making that assessment, *id.* at 444-46, and ultimately ruled that "[b]ecause the Chancery Division proceedings did not produce sanctions that served the punishment goals of retribution and deterrence, they did not constitute criminal proceedings for double jeopardy purposes." *Id.* at 448.

3. Application Of The General Tests In The Context Of Sex Offender Registration And Notification Statutes.

The United States Supreme Court and New Jersey cases discussed above provide a backdrop to the current debate about how the courts should address the question of whether Megan's Law imposes penalties which constitute punishment. In the case at bar, the plaintiff John Doe has argued that the *Mendoza-Martinez* factors are the appropriate focus for determining whether Megan's Law contains new punishment. (Ptb 33-37)[8] On the other hand, the defendant Attorney General argued in the lower court that the test articulated in *Mendoza-Martinez* should give way to the very recent analysis done by the Seventh Circuit in the case of *Bae v. Shalala*, 44 F.3d 489 (7th Cir. 1995) (Dtb 30-32), which purported to follow the *Halper* test.[9]

In the proceedings below, Judge Wells followed the *Bae* analysis, slip op. at 7-9, and ruled "that the registration and notification provisions [of Megan's Law] do not amount to punishment in the constitutional sense." Slip op. at 9. Interestingly, in a federal challenge to Megan's Law both parties argued "that the *Kennedy v. Mendoza-Martinez* analysis is inappropriate in *ex post facto* review." *Artway v. Attorney General*, ___ F. Supp. ___ (D.N.J. 1995), slip op. at 16-17 n. 8. Instead, they advocated analysis under the more recent decisions of *Halper*, *Austin* and *Kurth Ranch*. *Id.* However, the Honorable Nicholas H. Politan, U.S.D.J., noted:

> While the Court realizes that in review of certain kinds of legislative provisions the appropriate test can vary, and that the Supreme Court has recently, in the cases cited by the parties, partially altered the appropriate form of analysis in certain contexts, none of the three cases relied upon by plaintiff's stand by counsel serves in any way to either dilute or modify the appropriate use of [*Mendoza-Martinez*] criteria in *ex post facto* contexts. . . . Therefore, at least in the context of *ex post facto* review, it is appropriate to engage in [*Mendoza-Martinez*] analysis to determine whether a statute is in fact punitive as opposed to regulatory.

Id. In the double jeopardy context, Judge Politan noted the *Halper/Austin/Kurth Ranch* line of cases before he stated that his determination of the *ex post facto*

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[8] "Ptb" refers to the brief filed in the trial court by the plaintiff John Doe; "Dtb" refers to the brief filed in the trial court by the defendant Attorney General.

[9] The Bae decision will be more fully analyzed *infra*, at p. 38-39.

issue was dispositive in *Artway*, and therefore no decision on the double jeopardy claim was necessary. *Artway*, slip op. at 47-48. In *Diaz v. Whitman*, unpub. op., Civil Action No. 94-6376 (D.N.J., Jan. 3, 1995) (PDa 19 to 30), another federal judge, the Honorable John W. Bissell, U.S.D.J., considered the *Mendoza-Martinez* factors and found that the notification requirement of Megan's Law which applied to the plaintiff was punishment in the *ex post facto* sense. (PDa 27)

Other jurisdictions have also wrestled with the constitutional implications of sex offender registration and, less frequently, notification. As long ago as 1983, the California Supreme Court utilized the *Mendoza-Martinez* factors to determine "that the sex offender registration compelled by section 290 [of the California Penal Code] is a form of punishment." *In re Reed*, 33 Cal. 3d. 914, 663 P.2d 216, 218-20 (1983). The California statute mandated registration of the petitioner sex offender who was convicted of "lewd or dissolute conduct" under a misdemeanor disorderly conduct statute. *Id.* at 216. The Court held that registration under those circumstances was not only a form of punishment, but it was cruel and unusual punishment and therefore unconstitutional. *Id.* at 222.

In the 1990s, judicial consideration of registration and notification acts has increased. In *People v. Adams*, 144 Ill. 2d 381, 581 N.E.2d 637 (1991), the Supreme Court of Illinois considered whether the Habitual Child Sex Offender Registration Act imposed punishment in the Eighth Amendment context. In light of the fact that the statute required registration only, the *Adams* Court concluded that it did not punish:

> The statute proscribes a duty on the part of an individual on the basis of a criminal conviction. The question to be answered is whether this duty is punishment. Traditional notions of punishment add little in the resolution of this issue since the statutory duty is neither imprisonment nor a fine. It imposes no restraints on liberty or property. In short, by traditional definition, the duty to register is not punishment.

Id. at 640. The Illinois Supreme Court rejected the defendant's suggestion that the *Mendoza-Martinez* factors apply, ruling that those factors are to be used only "when conclusive evidence of legislative intent is unavailable," and in that case, "the intent with respect to the Registration Act is clearly nonpenal in nature . . . ." *Id.* at 641. A key to the Court's finding that the law did not amount to cruel and unusual punishment was the fact that "[t]he Registration Act simply makes that information more readily available to the police. Furthermore, the law enforcement community is prohibited from disseminating the information to the public at large on pain of criminal sanctions." *Id.*

In *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992), the Supreme Court of Arizona analyzed traditional *ex post facto* cases as it concluded that there was no "question that, by burdening [defendants] with the registration requirement, the retrospective application of the statute altered the situation to their disadvantage." *Id.* at 1220. Since the Arizona Legislature did not clearly indicate whether that "disadvantage" was meant to be punitive or merely regulatory, the Court turned to the *Mendoza-Martinez* factors for guidance. The Court noted that the

sex offender registration statute "has both punitive and regulatory effects," and that the *Mendoza-Martinez* factors pointed in different directions. *Id.* at 1224. Admitting that its decision was a close one, the Arizona Supreme Court concluded that requiring sex offenders to register is not punishment in large part because the statute does not require community notification:

> potentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential.

Id.

New Hampshire is another state with a sex offender registration act which does not include a community notification provision. In *State v. Costello*, 643 A.2d 531 (N.H. 1994), the Supreme Court of New Hampshire considered whether that State's registration statute was punitive or regulatory as it addressed the *ex post facto* implications of the law. The Court found that

> a statute is generally "considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.". . . A statute that has both a penal and nonpenal effect is nonetheless nonpenal if that is the "evident purpose of the legislature."

Id. at 533, quoting *Trop v. Dulles*, 356 U.S. 86, 96, 78 S.Ct. 590, 596 (1958). The New Hampshire Court "perceive[d] any punitive effect of the registration requirement to be *de minimis*." *Id.*

In *State v. Ward*, 123 Wash. 2d 488, 869 P.2d 1062 (1994), an *ex post facto* challenge to Washington's sex offender registration/notification law was considered. Relying on *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715 (1990), the Washington Supreme Court held "that appellants are not 'disadvantaged' by the statute because it does not *alter the standard of punishment* which existed under prior law." *Ward*, 869 P.2d at 1068 (emphasis in original). The *Ward* Court noted that the first place to look in determining whether a statute provides punishment is at the legislative purpose. *Id.*, citing *DeVeau v. Braisted*, 363 U.S. at 160, 80 S.Ct. at 1155. But even though it found that the State Legislature "unequivocally" announced a nonpunitive intent, the *Ward* Court recognized that it had to look beyond the stated purpose to determine "whether the actual *effect* of the statute is so punitive as to negate the Legislature's regulatory intent." 869 P.2d at 1068 (emphasis in original). The Court noted the applicability of the *Mendoza-Martinez* factors, *id.*, then refuted their applicability, *id.* at 1069, and finally considered four of the seven *Mendoza-Martinez* factors as it concluded that, "While the Legislature's regulatory intent is clear, we also conclude the *Mendoza-Martinez* factors weigh in favor of finding that the statute is regulatory and not punitive." *Id.*[10]

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[10] The Ward Court noted that the Arizona and Illinois Supreme Courts, in *Noble* and *Adams* respectively, did not find that the registration statutes in those states were punitive in large part because those statutes did not contain community notification provisions.

Most recently, the United States District Court for the District of Alaska addressed the constitutionality of Alaska's sex offender registration statute when the plaintiffs moved for preliminary injunctive relief. *Rowe v. Burton*, unpub. op., Docket No. A94-206-Civ (D. Alaska, July 27, 1994) (PDa 31 to 69). In considering an *ex post facto* claim, the district court said:

> The statutory design displays a purpose to regulate present circumstances, not to punish. The Registration Act may, nevertheless, be considered punitive, for its effect is to impose an affirmative burden on those subject to registration as a consequence of past conduct. Characterization of the effect of the law as punitive or regulatory is informed by considering a variety of factors identified in *Mendoza-Martinez*. . . .

Slip op. at 10 (PDa 40) After analyzing all of the *Mendoza-Martinez* factors, the district court concluded "that plaintiffs are likely to succeed on the merits of the claim that the Registration Act violates the prohibition on *ex post facto* legislation, because the law includes a provision providing for public dissemination of information concerning sex offenders whose convictions antedate the Registration Act." *Id.* at 17 (PDa 47)

While none of the cases analyzed above provide a definitive answer to the question of how to gauge whether Megan's Law violates plaintiff's constitutional protections against *ex post facto* law making and/or double jeopardy, they all provide guidance. The Public Defender submits that the caselaw suggests that this Court must be concerned with whether Megan's Law is a criminal or civil act, and then whether its purpose is punitive or regulatory. One can cull from the various decisions that most courts consider the *Mendoza-Martinez* factors when dealing with an *ex post facto* challenge, and they turn to the *Halper/Austin* line of cases for guidance in the double jeopardy setting. The Public Defender suggests that this Court can use any and all of the tests which have been formulated by the United States Supreme Court to assist it in finding answers to the criminal/civil and punitive/regulatory questions which Megan's Law presents. It is respectfully submitted that under any of the tests, Megan's Law violates the *Ex Post Facto* and Double Jeopardy Clauses of the United States and New Jersey Constitutions.

4. Megan's Law Violates The *Ex Post Facto* Clauses.

"[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. at 29, 101 S.Ct. at 964. The *Ex Post Facto* Clause

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Ward, 869 P.2d at 1071-72. But even though there is such a provision in the Washington statute, *Ward* determined that it was not punitive because of the limitations the state legislature put on the dissemination of the information. *Id.* at 1069-70. "The Legislature's pronouncement evidences a clear regulatory intent to limit the exchange of relevant information to the general public to those circumstances which present a threat to public safety." *Id.* at 1070.

is concerned with "anything to do with the definition of crimes, defenses, or punishments." *Collins v. Youngblood*, 497 U.S. at 51, 110 S.Ct. at 2724; *accord Government of Virgin Islands v. D.W.*, 3 F.3d 697, 701 n.11 (3d Cir. 1993). The starting point with respect to an *ex post facto* issue should be the intent of the legislature. *See DeVeau v. Braisted*, 363 U.S. at 160, 80 S.Ct. at 1155; *In re Kaplan*, 178 N.J. Super. at 494; *see also Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. at 568 (in due process context Supreme Court applies its seven factor test when there is no "conclusive evidence of congressional intent as to the penal nature of a statute"). The legislative history of Megan's Law does not indicate whether it was intended to be punitive or regulatory. Although the registration section describes the facial purpose the Legislature hoped to address (aid to law enforcement in preventing recidivism), *N.J.S.A.* 2C:7-1a, the community notification provision contains no description of its purpose or legislative goals. *N.J.S.A.* 2C:7-6 to 2C:7-11.

However, the placement of Megan's Law in the Code of Criminal Justice speaks volumes about the criminal nature of the legislation. The courts of this jurisdiction have paid due deference to the civil label which the Legislature has placed on certain penalties:

> Where the legislature has labelled the penalty civil, that expression of legislative purpose is accorded substantial weight. . . . Such a penalty will be deemed criminal only upon "the clearest proof" that the sanction is punitive either in purpose or effect.

In re Garay, 89 N.J. at 112, quoting *United States v. Ward*, 448 U.S. at 248-49, 100 S.Ct. at 2640-41; *accord Kimmelman v. Henkels & McCoy, Inc.*, 108 N.J. at 132; *State v. Darby*, 246 N.J. Super. at 440. Even more deference should be paid to the placement of a statute in the criminal code. Since Megan's Law is a criminal law, the question addressed in *Mendoza-Martinez*—whether the legislation is civil or criminal[11] — has already been answered. The Public Defender submits that all criminal penalties require scrutiny under the *Ex Post Facto* and Double Jeopardy Clauses of the federal and state constitutions, and Megan's Law is no exception. The retroactive application of Megan's Law's criminal penalties are therefore unconstitutional.[12]

Even if the placement of Megan's Law in the criminal code is not dispositive of the *ex post facto* issue, analysis of the various tests formulated by the United

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[11] In Austin v. United States, 113 S.Ct. at 2806 n.6, the Court said that "[t]he question in [*Mendoza-Martinez*] was whether a nominally civil penalty should be reclassified as criminal and the safeguards that attend a criminal prosecution should be required."

[12] Judge Wells reached a contrary decision below. Quoting Rowe v. Burton, the lower court ruled that:

> Placement of a statutory provision in a particular title may reflect nothing more than a perception that the placement will facilitate indexing. Here, whether the law in question is punitive or not, it is undeniably directly associated with certain criminal convictions, and it is perfectly logical to place most of it in [Title 2C]. It may be added that [Title 2C] contains many provisions which are not punitive in character.

Slip op. at 12. For the reasons expressed in the text, the Public Defender disagrees.

States Supreme Court and the courts of this jurisdiction make clear that Megan's Law punishes those who come within its broad reach, and therefore the constitutional provision is being violated. Turning first to the *Mendoza-Martinez* factors, the Public Defender submits that they qualitatively and quantitatively show that Megan's Law is punitive.[13]

Factor 1 - *Whether the sanction involves an affirmative disability or restraint.* The Public Defender submits that the registration and notification requirements of Megan's Law work as an affirmative disability or restraint. Judge Bissell so found in *Diaz v. Whitman*, noting: "the dissemination of information or notification provisions which are triggered by tier two may subject this plaintiff to the type of public stigma and ostracism that would affect his life." Slip op. at 6 (PDa 24); *accord Rowe v. Burton*, slip op. at 11 (PDa 41) (since the Alaska Registration Act provides for a central registry and wide dissemination of information, "the Registration Act may subject registrants . . . to public stigma and ostracism that would affect both their personal and professional lives. In view of the provision for dissemination of information, the court finds application of the first factor indicates a punitive effect"); *In re Reed*, 663 P.2d at 218 (registration requirement amounted to cruel and unusual punishment because "although the stigma of a short jail sentence should eventually fade, the ignominious badge carried by a convicted sex offender can remain for a lifetime"). In *Artway*, Judge Politan elaborated:

> The public dissemination of a registrant's information may well affect his employability, his business associations if he is self-employed. . ., his associations with his neighbors, and thus his ability to return to a normal private law-abiding life in the community. Even in light of the previous public access to an individual's conviction record, the Court is troubled by any argument that such impediments do not rise to the level of affirmative disabilities or restraints.
>
> It has long been a facet of United States law that criminal records should be available to the public for scrutiny and investigation. Such criminal records normally would include an individual's name, address, the nature of his crime and conviction and the period for which he was imprisoned therefor. However, Megan's Law goes beyond that. The registration and public notification provisions of Megan's Law provide public dissemination — not mere access by vigilant members of the public — of a convicted sex offender's name, likeness, place of residence, place of employment, a description and identification of his motor vehicle, as well as that information already available in the public record. Therefore, Megan's Law goes well beyond all previous provisions for public access to an individual's criminal history. Indeed, unlike previous access provisions, registration and public notification ensure that, rather than lying potentially dormant in a court-

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[13] In assessing the Mendoza-Martinez factors, the Public Defender primarily finds guidance in the *Diaz* and *Artway* decisions, since those opinions specifically dealt with Megan's Law, and the *Rowe* decision, since the District Court of Alaska analyzed the *Mendoza-Martinez* factors in the context of a challenge to a statute similar to New Jersey's in that the Alaska statute contained both registration *and* notification provisions.

> house record room, a sex offender's former mischief — whether habitual or once-off — shall remain with him for life, as long as he remains a resident of New Jersey. This information, under Megan's Law, is available not just to those who take the time and effort to search out courthouse records, telephone books, or other sources of public information, but to each and every member of a registrant's community, whether they are interested or not. In this Court's view . . . such an eclipse of a registrant's future weighs heavily in favor of finding it to be an affirmative disability or restraint.

Slip op. at 57-58.

Factor 2 - *Whether it has historically been regarded as a punishment.* Judge Bissell found that registration and notification have not been historically viewed as punishment. *Diaz*, slip op. at 6 (PDa 24). Other courts have held otherwise. Indeed, both the California and Arizona Supreme Courts agreed that even mere registration, in which the registrant is perpetually identified as a sex offender, "has traditionally been viewed as punitive." *State v. Noble*, 829 P.2d at 1222 (referring to Nathaniel Hawthorne's *The Scarlet Letter* (1850) as an example); *In re Birch*, 10 Cal. 3d 314, 515 P.2d 12, 17 (Calif. 1973) (describing sex offender registration as an "ignominious badge"). Even the United States Supreme Court, in holding that a sentence of permanent government surveillance was cruel and unusual punishment, described the convict as

> forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.

Weems v. United States, 217 U.S. 349, 366, 30 S.Ct. 544, 549 (1910).

In *Artway*, Judge Politan found that at least the notification portion of Megan's Law has historically been regarded as punishment:

> Some of those courts which have found registration acts not to be punitive have recognized that "registration has traditionally been viewed as punitive." *Noble*, 829 P.2d at 1222. *See also Austin, supra*, and *Kurth, supra* (recognizing the importance of "historical" analysis in determining whether legislation is punitive). Likewise, in view of the particular public approbation historically associated with sex offenses and the contemporary almost uniform view that such offenses are loathsome, the Court must find that at least the public dissemination element of Megan's Law would, in its application, be a measure historically perceived as punitive.

Slip op. at 59; *but see Rowe*, slip op. at 12 (PDa 42) (discussing registration only, the court found that it "is not a concept which this court perceives to be imbued by history with a punitive connotation"). Since registration and notification have historically been viewed as punishment, Megan's Law is punitive and

violates the *Ex Post Facto* Clauses when applied retrospectively to sex offenders.

Factor 3 - *Whether it comes into play only on a finding of scienter.* Neither New Jersey District Court judge who has considered Megan's Law has found that it comes into play only on a finding of *scienter. See Diaz*, slip op. at 6-7 (PDa 24 to 25); *Artway*, slip op. at 59-61. However, it should be noted that the crime for which plaintiff was convicted and sentenced, sexual assault, does require a showing of *scienter. See State in the Interest of C.P. & R.D.*, 212 N.J. Super. 222 (Ch. Div. 1986) (sexual assault as defined in *N.J.S.A.* 2C:14-2b and c require that the defendant act knowingly in that he or she must know that he or she is performing a sexual act). The Public Defender submits that the reasoning of the court in *Rowe v. Burton* makes more sense. There, the Alaska District Court stated that "[t]he Registration Act is premised upon the past knowingly wrongful conduct of the registrant, and this factor, therefore, would indicate the law is punitive." Slip op. at 12 (PDa 42); *accord In re Reed*, 663 P.2d at 219.

Factor 4 - *Whether its operation will promote the traditional aims of punishment — retribution and deterrence.* In *Diaz*, Judge Bissell determined "that there may well be both a deterrent effect and the possibility of public retribution despite the admonitions of the guidelines warning the public against conduct directed toward the registrant. These are inherent, natural consequences of the notification procedure which, therefore, support an *ex post facto* determination here." Slip op. at 7 (PDa 25) Judge Politan found that "[w]hile the stigma associated with being perpetually perceived as a sexual deviant or predator might arguably constitute retribution, the Court cannot so find based on the record before it." *Artway*, slip op. at 62. However, Judge Politan did find that "Megan's Law is aimed at and satisfies one of the traditional goals of punishment — deterrence" and therefore he ruled that this factor "must weigh in favor of a finding that [Megan's Law] is punitive." *Id.* Other courts reviewing similar registration statutes are in accord. *See Rowe v. Burton*, slip op. at 13-14 (PDa 43 to 44) (registration act "obviously meant to deter crime;" "existence of the registry and concomitent facility with which members of the public may focus attention on registrants could have a classic deterrent effect on the behavior of potential criminals, for public dissemination of information about a sex offender may elicit a strong reaction which has unpleasant consequences for the offfender"); *State v. Noble*, 829 P.2d at 1223 ("registration requirement serves, at least in part, the traditional deterrent function of punishment, the notion being that a convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials"); *In re Reed*, 663 P.2d at 219 ("legislative intent was to deter recidivism by facilitating apprehension of past offenders"); *but see State v. Ward*, 869 P.2d at 1072-73 (disagreeing with *Noble* and *Reed*). Because the statute so clearly promotes the traditional aims of punishment, it cannot be applied to defendant without violating the Ex Post Facto Clauses.

Factor 5 - *Whether the behavior to which it applies is already a crime.* As Judge Bissell said, "The whole thrust of our *ex post facto* analysis is, do subsequent legislative impositions in essence enhance the penalty previously imposed?

That penalty, of course, is imposed on a preexisting crime such as that which we have here. Therefore, factor five weighs in favor of an *ex post facto* conclusion." *Diaz*, slip op. at 7 (PDa 25) The *Artway* court is in accord: "The behavior to which Megan's Law applies is already a crime. As such, to the extent that this factor must be considered, this Court must consider it indicative of the punitive aspect of Megan's Law." *Artway*, slip op. at 63; *accord Rowe*, slip op. at 15 (PDa 45); *In re Reed*, 663 P.2d at 219; *cf. Kurth Ranch*, 114 S.Ct. at 1947 (in case in which tax was conditioned on the commission of a crime, Supreme Court noted the such a condition indicates a " 'penal and prohibitory intent' ").

Factor 6 - *Whether an alternative purpose to which it may rationally be connected is assignable for it.* The federal judges who have considered Megan's Law are split on this factor. Judge Bissell notes that: "The answer to that is yes, through the expressed bona fide legislative purpose for both registration and notification. No one questions either that purpose or the legislature's good faith in making the efforts that it has." *Diaz*, slip op. at 7 (PDa 25) Judge Bissell goes on to say that "[t]he alternative purpose weighs against an *ex post facto* determination, but it is only one of several factors to be considered. . . ." *Id.* at 8 (PDa 26); *accord Rowe*, slip op. at 15 (PDa 45) (the Alaska registration statute "is rationally related to an entirely proper and non-punitive purpose, the protection of society from crime").

On the other hand, although Judge Politan found that "there is indeed an alternative purpose to which [Megan's Law] may be connected," he also noted that any such alternative purpose "is inextricably linked to deterrence: a traditional element of punishment." *Artway*, slip op. at 64. He therefore analyzed "the possible purposes of Megan's Law to determine whether there is indeed a legitimate purpose, apart from deterrence, assignable to the act," and reached the following conclusion:

> Facilitating the effective operation of a law enforcement authority by maintaining a data base of the criminal records, identities, and present locations of known criminals has long been viewed as a legitimate state and federal objective. That objective has long been accomplished by maintaining records of conviction, by requiring exfelons to register with authorities, and by providing for limited dissemination of information concerning a registrant in appropriate circumstances. However, the Court must find that Megan's Law goes beyond such traditional justifiable law enforcement objectives.
>
> As discussed in the analysis of the third [*Mendoza-Martinez*] factor, the public notification provisions of Megan's Law include the public dissemination of facts about registrants which otherwise could not be obtained, or would be difficult to obtain, in the absence of the notification prescribed. As such, *despite the presence of a legitimate alternative purpose for the Act, its inherent punitive aspect must, at least in the context of public dissemination, weigh in favor of finding Megan's Law punitive.*

Id. at 64-65 (emphasis added; footnote omitted).

The Public Defender contends that especially the notification aspect of Megan's Law contains the "inherent punitive aspect" that *Artway* discussed.

Any nonpunitive purpose in aiding law enforcement is completely served by notification of relevant police and other law enforcement authorities. Here, plaintiff has not been informed of the tier to which he will be assigned. If, however, he was classified as "Tier Two," then notification would be made to all schools in the area of his intended residence, and potentially to a host of other private youth, volunteer, and victim-support organizations. The organizations would receive not only plaintiff's name and a description of his conviction, but also a recent photograph, home address, place of employment or schooling if any, and a vehicle license plate number. There is furthermore no explicit provision or procedure to ensure that private persons who receive such information will not further disclose it to others. In fact, Tier Two notification will most likely have the same effect as the more expansive Tier Three notification. In a very disturbing development, at least one PTA organization is soliciting members with promises of telling them about sex offenders who receive Tier Two classification:

> ATTENTION PARENTS !!!!
> PTA Membership Benefit
>
> Under the newly enacted MEGAN'S LAW, our PTA registered with our local police and prosecutors'[sic] office to be informed when a Tier 2 sex offender is being released into our community.
>
> In accordance with those guidelines, our PTA President can notify the members of the Sharon School PTA so they can be aware of and alert their children to the potential danger.
>
> If you are not a member of our PTA, according to the State guidelines, you cannot be informed of the presence of a Tier 2 pedophile in our area. Please take the time to fill out the bottom portion of this page so we can inform you if there is a Tier 2 predator in our community.

Sharon School PTA Gazette and Membership Application. (PDa 71)

Of course, if plaintiff is classified as Tier Three, the ramifications are even worse. The information gathered at the time of registration will then be freely disseminated to the public.

It is not clear what regulatory purpose the publication of such information serves, and the community notification statute contains no description of its purpose or legislative goals. Speculation that this information will allow the recipients of the information to be vigilant, not vigilantes, is perhaps wishful thinking on both counts. See also the discussion *infra*.

Factor 7 - *Whether it appears excessive in relation to the alternative purpose assigned.* Judge Bissell found that even though there was an alternative, nonpunitive purpose for Megan's Law, "a strong argument can be made in favor of the plaintiff" with regard to the statute's excessiveness in relation to the alternative purpose. *Diaz*, slip op. at 8 (PDa 26). The *Diaz* court was concerned with the level of notification which followed even a Tier Two classification, according to the guidelines created by the Attorney General, *id.*, and it noted that "Mr. Diaz was not convicted of an offense against a child. Furthermore, he has served at least ten years in prison since the perpetration of the offenses of conviction. I

think this generates some doubt as to whether tier two notification with the orientation that the guidelines themselves express is potentially excessive with regard to Mr. Diaz." *Id.* at 9 (PDa 27). Having found no legitimate alternative purpose in Megan's Law, Judge Politan found "that, in relation to the purpose of facilitating effective law enforcement, Megan's Law is an excessive intrusion into the realm of punishment sufficient to lend credence to a finding that its effect, if not its purpose, is punitive." *Artway*, slip op. at 65.

The *Rowe* court found that "the consequences attendant upon the public dissemination of information" is excessive in relation to the Alaska statute's alternative purpose of protecting society. Slip op. at 15-16 (PDa 45 to 46). *Rowe* concluded: "plaintiffs are likely to succeed on the merits of the claim that the Registration Act violates the prohibition on *ex post facto* legislation, because the law includes a provision providing for public dissemination of information concerning sex offenders whose convictions antedate the Registration Act." *Id.* at 17 (PDa 47).

It is the position of the Public Defender that any marginal furtherance of legitimate law enforcement goals provided by notification is clearly outweighed by the stigmatic and punitive effects associated with even partial disclosure to nonlaw enforcement personnel. Therefore, the community notification provisions of Megan's Law are excessive in relation to any conceivable nonpunitive purpose of the law.

In conclusion, the Public Defender submits that whether this Court considers the *Mendoza-Martinez* factors quantitatively or qualitatively it must find as the federal courts have found — that Megan's Law "has sufficient punitive effect to render it violative of the *ex post facto* clause of the Constitution in its retroactive application." *Artway*, slip op. at 66; *accord Diaz*, slip op. at 9 (PDa 27).

As noted previously, Judge Wells concluded that *Bae v. Shalala*, rather than *Mendoza-Martinez*, sets the appropriate standard for determining whether a statute is punitive in the *ex post facto* sense (and also in the double jeopardy sense). However, the Public Defender contends that reliance on *Bae*, by both the lower court and the Attorney General, is misplaced because *Bae* turned United States Supreme Court precedent on its head.

In *Bae*, the Federal Drug Administration barred a drug manufacturer from providing services to certain persons, and the question before the court was "whether the retroactive application of the debarment penalty of the [statute] violates the Constitution's prohibition against *ex post facto* laws." *Id.* at 492. The Seventh Circuit recognized that under *Halper* and *Kurth Ranch* a civil sanction implicates *ex post facto* concerns "if it can fairly be characterized as punishment," 44 F.3d at 492, but it specifically refused to read *Halper* as holding that a civil sanction that serves both remedial and punitive goals must be characterized as punishment. *Id.* at 493.

> A civil sanction that can fairly be said solely to serve remedial goals will not fail under *ex post facto* scrutiny simply because it is consistent with punitive goals as well. A civil sanction will be deemed to be punishment in the constitutional sense only if the sanction "may not fairly be characterized as remedial, but *only* as a deterrent or retribution."

Id., quoting *Halper*, 490 U.S. at 449, 109 S.Ct. at 1902 (emphasis in *Bae*). Finding that the civil debarment penalty is not punishment, the Seventh Circuit declined to consider the *Mendoza-Martinez* factors, noting that its determination "of the nature of a civil sanction under the *Ex Post Facto* Clause closely parallels the Supreme Court's determination in *Austin* of a similar question under the Excessive Fines Clause. We have accordingly limited our analysis to those considerations described in *Halper*." 44 F.3d at 496-97.

Halper's primary concern is the same as the fourth *Mendoza-Martinez* factor — whether the sanction at issue serves the goals of retribution and deterrence. *Bae* gives a decidedly different slant to *Halper* than the United States Supreme Court did in *Austin*. This Court is referred to the several *Austin* passages reproduced above, wherein the Supreme Court clearly emphasized *Halper*'s focus on the fact that the statute in question need only *partially* serve the ends of punishment for it to bring constitutional protections into play. *See Austin*, 109 S.Ct. at 2806, 2810, 2810 n.12, 2812 (reproduced *supra*). When the Seventh Circuit refused to read *Halper* as holding that a civil sanction that serves both remedial and punitive goals must be characterized as punishment, *Bae*, 44 F.3d at 493, it was effectively overruling *Austin*. Of course, the Seventh Circuit has no such authority, and therefore the lower court's reliance on *Bae* served only to confuse the issues.

A correct assessment of *Halper* and *Austin* lends further support to the Public Defender's position that Megan's Law serves to punish those who are affected by it. As has been noted previously, *Halper* made clear that "a civil sanction that cannot fairly be said *solely to serve a remedial purpose*, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." 490 U.S. at 448, 109 S.Ct. at 1902 (emphasis added). The Tenth Circuit has explained that this language from *Halper* "means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin*." *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994). Therefore, "a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose." *United States v. $405,089.23 United States Currency*, 33 F.3d 1210, 1219 (9th Cir. 1994). Consequently, it is easier for a person like John Doe to satisfy the *Halper/Austin* test for punishment than the *Mendoza-Martinez* test because the former requires only a showing that the statute provides punishment at least in part.

Having already shown that Megan's Law satisfies even the more difficult *Mendoza-Martinez* test, the Public Defender will rely on that analysis in support of her position that Megan's Law at least partially imposes punishment and Mr. Doe should therefore prevail on his *ex post facto* claim. The Public Defender merely adds that the public humiliation and shame which Megan's Law imposes on those subject to it are historically essential elements of punishment in general and of retribution and deterrence in particular. In *Artway*, the court was led to the *Mendoza-Martinez* factors by its concern for what it called "The Dangers Posed by Megan's Law." Slip op. at 51. Judge Politan noted that

> Plaintiff and his stand by counsel suggest that Megan's Law potentially imposes upon him a lifelong badge of infamy, rendering him a pariah in his community. Such an allegation cannot be taken lightly. In order to appreciate the effect Megan's Law will or may have on plaintiff, it is beneficial to consider how such badges of shame and their attendant consequences have occurred and been portrayed in a historical context.

Id. Judge Politan went on to discuss "the potential for hysteria inherent in any castigation by a community of one of its members," *id.* at 52, how punishment can be accomplished by humiliation, *id.* at 52-53, and how "[p]laintiff's challenge raises the specter that [Megan's Law] is a sophisticated and veiled attempt to brand registrants in the eyes of a hostile populace." *Id.* at 54. The Public Defender submits that all of the concerns expressed in *Artway* are worthy of this Court's consideration, and they lead to the inescapable conclusion that Megan's Law, at least in part, punishes sex offenders.

In light of the fact that Megan's Law is a criminal statute, and it retroactively punishes previously convicted sex offenders, this Court is urged to find that the law violates the federal and state constitutional provisions against *ex post facto* law making.

5. Megan's Law Violates The Double Jeopardy Clauses.

Of relevance to the matter at bar, the Double Jeopardy Clause is a "constitutional prohibition against successive punishments for the same offense." *Montana Dep't of Revenue v. Kurth Ranch*, 114 S.Ct. at 1941. Clearly, since John Doe (and the many clients of the Public Defender who are similarly situated) has already been criminally punished for his conduct, the Double Jeopardy Clauses of the federal and state constitutions bar any further punishment for that conduct.[14] If the penalties contained in Megan's Law amount to punishment,

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[14] This Court has interpreted the protections of Article I, paragraph 11 of the New Jersey Constitution to be coextensive with the guarantee of the federal constitution. However, in *State v. Churchdale Leasing Inc.*, 115 N.J. 83, 105 (1989), this Court expressed its concern with the United States Supreme Court's holding in *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673 (1983), that "the constitutional protection against double jeopardy does not prohibit multiple punishment of two statutory offenses involving essentially the same conduct tried in a single trial when there is a clear expression of legislative intent to impose punishment for those offenses." It has been suggested that " '[a]t some point [our Supreme Court] may be obliged' to determine whether the New Jersey Constitution provides greater protection for our citizens than application of the Fifth Amendment with respect to multiple punishment." *State v. Darby*, 246 N.J. Super. 432, 449 (App. Div.), certif. denied, 126 N.J. 342 (1991) (Stern, J., concurring), quoting *Churchdale Leasing*, 115 N.J. at 107. But to date, this Court has not been called upon to determine "whether or to what extent New Jersey's constitutional guarantee affords greater protection than does the federal constitution." *See State v. Dillihay*, 127 N.J. 42, 47 (1992). The Public Defender notes that in the case at bar both parties agree that if Megan's Law imposes punishment now, after John Doe and others who are similarly situated have already been sentenced for their sex offenses, then double jeopardy notions

they simply cannot be applied to John Doe and people like him. The courts of this jurisdiction have followed the *Halper* test -- whether the sanction serves the goals of punishment, which are retribution and deterrence — in assessing the double jeopardy implications of civil sanctions. *See Merin v. Maglaki*, 126 N.J. at 442; *State v. Darby*, 246 N.J. Super. at 444-46. So even if Megan's Law is determined to be a "civil" statute despite its placement in the Code of Criminal Justice, the Public Defender submits again that this Court must find that it metes out punishment per the *Halper* test. Consequently, this Court is urged to find that the application of Megan's Law to those who were sentenced before the enactment of that law is a violation of the protection against double jeopardy.

POINT II

BECAUSE ENFORCEMENT OF THE REGISTRATION AND NOTIFICATION REQUIRED BY MEGAN'S LAW WOULD IMPINGE ON THE CONSTITUTIONALLY PROTECTED PRIVACY AND LIBERTY INTERESTS OF JOHN DOE AND ALL OTHERS WHO COME WITHIN THE REACH OF THE LAW, ENFORCEMENT OF MEGAN'S LAW IS UNCONSTITUTIONAL.

Amicus American Civil Liberties Union (hereinafter "ACLU") is to file a brief in this matter wherein it argues that Megan's Law infringes on the fundamental privacy and liberty interests of those individuals who are subject to it. The ACLU contends that the collection and dissemination of the registrants' personal information and the classification decision placing registrants into one of the three tiers of risk of reoffense, thereby effectively branding some registrants with an indelible mark of dangerousness to the community, serve to violate the Due Process Clause of the Fourteenth Amendment. In brief, the ACLU argues that: (1) the systematic collection and dissemination of personal information and the classification of a registrant as having a low, moderate or high risk of recidivism violates constitutionally protected privacy interests under the federal constitution and, even more so, under the state constitution; (2) the disclosures authorized by Megan's Law constitute a deprivation of constitutionally protected liberty interests; and (3) Megan's Law provides insufficient procedural protection because it does not provide for a predeprivation hearing before a neutral decisionmaker.

POINT III

MEGAN'S LAW MANDATES CRUEL AND UNUSUAL PUNISHMENT.

In the instant matter, the plaintiff argued that Megan's Law violates the Eighth Amendment's prohibition against cruel and unusual punishment on the ground that "the behavior for which the plaintiff was originally convicted is now determined to be a mental illness . . . ." (Ptb 43 to 44) Judge Wells ruled that since he found that the "burdens" imposed by Megan's Law are not punishment, "it

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would preclude application of the law to those people. Therefore, it does not appear that resort to the New Jersey Constitution is necessary in this case; if Megan's Law metes out punishment then John Doe must prevail even under federal constitutional analysis.

follows that they cannot be cruel and unusual and do not violate the State or Federal Constitutions." Slip op. at 14. The Public Defender recongnizes that with respect to John Doe and all other persons who committed sex offenses before the enactment of Megan's Law, the Court may not reach the issue of whether that law is cruel and unusual under the state and federal constitutions. Once this Court rules on the punishment question discussed in Point I, *supra*, it will have decided this particular case. If Megan's Law punishes John Doe, then it clearly violates the *Ex Post Facto* and Double Jeopardy Clauses of both constitutions; whether the punishment it metes out is also cruel and unusual would be of no moment. *See Artway*, slip op. at 33 (in light of the application of the *ex post facto* doctrine in that case, court finds that decision on whether Megan's Law inflicts cruel and unusual punishment "would in practical terms be redundant").

However, Megan's Law applies to many sex offenders and future sex offenders who have committed or will commit their crimes after the effective date of the legislation (October 31, 1994). The Public Defender contends that Megan's Law violates the state and federal constitutions as applied to those later sex offenders because the law inflicts cruel and unusual punishment.

With respect to the issue of whether a punishment[15] is cruel and unusual, the United States Supreme Court has held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. at 107, 78 S.Ct. at 598. This Court has recently said:

> The State and Federal Constitutions require a three part inquiry in determining whether a punishment is unconstitutionally cruel and unusual:
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> > First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective? [*State v. Ramseur*, 106 N.J. 123, 169, 524 A.2d 188 (1987).]
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> *See Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed. 2d 982, 989 (1977) (plurality opinion); *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed. 2d 637 (1983). *But see Harmelin v. Michigan*, 501 U.S. 957, 961-995, 111 S.Ct. 2680, 2684-2701, 115 L.Ed. 2d 836, 843-64 (1991) (opinion of Scalia, J.) (arguing that Eighth Amendment does not require proportional punishments).

State v. Maldonado, 137 N.J. 536, 556-57 (1994).[16] "[T]he Eighth Amendment

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[15] That Megan's Law punishes has been extensively analyzed in Point I, *supra*. That analysis will not be repeated here.

[16] In Harmelin v. Michigan, 501 U.S. 957, 111 S.Ct. 2680 (1991) (plurality opinion), Justice Scalia and Chief Justice Rehnquist concluded that the Eighth Amendment prohibition against cruel and unusual punishment does not contain a proportionality guarantee . . ., and Justices Kennedy, O'Connor, and Souter adopted a more limited view of the proportionality analysis than that promulgated in *Solem* . . . . Justices

demands more than that a challenged punishment be acceptable to contemporary society." *Gregg v. Georgia*, 428 U.S. 153, 180, 49 L.Ed.2d 859, 880 (1976). In considering whether a challenged punishment is cruel and unusual in violation of the Eighth Amendment, courts are required to "ask whether it comports with the basic concept of human dignity at the core of the amendment." *Id.* Courts are to question whether the criticized punishment "goes beyond what is necessary to accomplish any legitimate penal aim." *State v. Des Marets*, 92 N.J. 62, 82 (1983).

"There are 28 states with registration laws. New Jersey's law is the toughest. . . ." Kathy Barrett Carter, *Retroactive sex crime law raises thorny issue*, The Star Ledger, January 15, 1995. (PDa 73) According to information provided by the New Jersey Attorney General's Office, New Jersey is one of only six states to require juvenile sex offenders to register; it is one of only seven states to mandate lifetime registration (and two of the other states that provide for lifetime registration terminate that requirement when a juvenile offender reaches his or her 25th birthday); it is one of only three states to allow notification to be provided to the general public; and it is one of only two states to require the taking of a DNA sample from sex offenders as they are released from incarceration. (PDa 73) New Jersey is the only state to have a registration/notification law with all of the requirements noted herein. (PDa 73) Despite the fact that Megan's Law is in its infancy, because notification is so widespread there already have been unfortunate acts of vigilantism against former sex offenders and those thought to be former sex offenders. (PDa 73) In fact, a Phillipsburg man has brought suit against two vigilantes, the township, the police department and the Warren County Prosecutor's Office after he was beaten because he was mistaken for a sex offender after the real sex offender's whereabouts were published in local newspapers under Megan's Law. Maureen Castellano, *Judge: Megan's Law Unfairly Brands Sex Offenders*, 139 N.J.L.J. 923, 931 (March 6, 1995). The Public Defender argues that Megan's Law, especially its notification provisions, goes beyond what is necessary to accomplish any legitimate penal aim and it fails to comport with the basic concept of human dignity.

The Court is reminded that in *In re Reed*, the California Supreme Court invalidated a section of that state's penal code which required registration of persons convicted of the misdemeanor disorderly conduct offense of "lewd or dissolute conduct" because the legislation imposed cruel and unusual punishment as applied to that "relatively minor" offense. 663 P.2d at 220-22. Megan's Law applies to a wide array of offenses, some very serious, like aggravated sexual assault, *N.J.S.A.* 2C:14-2a, but some not so serious, like fourth-degree criminal

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Kennedy, O'Connor, and Souter indicated that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."

United States v. Premises Known As RR No. 1, 14 F.3d 864, 874 n.10 (3d Cir. 1994). Justice Stevens referred to the plurality opinion in *Harmelin* as "a minority view that proportionality should play no part in our [cruel and unusual punishment] analysis." *Graham v. Collins*, ___ U.S. ___, ___, 113 S.Ct. 892, 916 (1993) (Stevens, J., dissenting).

sexual contact pursuant to *N.J.S.A.* 2C:14-3b. With respect to fourth-degree criminal sexual contact, Megan's Law provides that a 17-year old boy who intentionally touches a 13-year old girl's "intimate parts" "through [her] clothing," will face no more than 18 months in prison even if juvenile jurisdiction is waived, but he will also face a lifetime of humiliation and prejudice via registration and notification. *Compare N.J.S.A.* 2C:7-2b(2) *with N.J.S.A.* 2C:14-1d and *N.J.S.A.* 2C:14-3b. The Court is further reminded that a key to the Illinois Supreme Court's decision to uphold that state's registration statute in the face of a cruel-and-unusual-punishment attack was the statute's lack of a community notification provision. *See People v. Adams*, 581 N.E.2d at 641; *see also State v. Noble*, 829 P.2d at 1224 (Arizona's registration act found not to punish in context of *ex post facto* analysis because it did *not* contain a public disclosure element). Of course, public notification is an integral part of Megan's Law.

In Point I, *supra*, the Public Defender has already pointed out many of the ramifications former sex offenders will face due to the registration and notification requirements of Megan's Law. In the analysis of the seventh factor of the *Mendoza-Martinez* test, it was argued that Megan's Law was excessive in relation to any nonpunitive purpose it might contain. *See supra*. It is submitted that for those same reasons Megan's Law goes beyond what is necessary to accomplish any of its legitimate aims. The Public Defender also respectfully refers this Court to the discussion in *Artway* of the potential for hysteria inherent in the notification provisions, slip op. at 52, the humiliation which will accompany notification, *id.* at 52-53 and how Megan's Law may be "a sophisticated and veiled attempt to brand registrants in the eyes of a hostile populace." *Id.* at 54. Those concerns expressed in *Artway* are scary and real, and they must lead this Court to the conclusion that Megan's Law mandates cruel and unusual punishment which would not be tolerated in other contexts and must not be tolerated even though it is sex offenders who are to feel the awful sting of the law.

Should this Court decide to consider in the matter at bar whether Megan's Law provides cruel and unusual punishment as applied to those who cannot mount *ex post facto* and/or double jeopardy challenges, the Public Defender submits that for the reasons discussed herein Megan's Law violates the United States and New Jersey Constitutions. The Public Defender would be glad to submit further briefing to flesh out the cruel-and-unusual-punishment arguments contained herein should this Court deem it necessary.

CONCLUSION

The Public Defender submits that Megan's Law punishes former sex offenders in violation of the constitutional protections against *ex post facto* lawmaking and double jeopardy, and it violates the privacy rights of all individuals who come within its broad reach while it metes out cruel and unusual punishment. However, the Public Defender recognizes that to the extent that Megan's Law is meant to protect children and others from dreaded sex offenses, no one can argue with the law's goal. It is easy to understand the temptation to succumb to feelings of fear and helplessness at the cost of liberty, to perceive an illusion of

an objective approach to legitimate ends where there is in reality only an evasion of the constitutional rights of those we fear.

Any time society is faced with the threat of violence, it is essential not just that we respond to the threat, but that we meet the peril in a manner consistent with our constitutional guarantees. Unfortunately, there are times when we respond not with reasoned policy, but with panic and fear. Such is the case with Megan's Law. It is, in part, an attempt to address a serious problem. However, it does so in a way that substantially violates the principles upon which this state and nation are based. The Public Defender does not intend in any way to minimize the importance of protecting people, especially children, from sex offenses. But no law can survive if it does damage to our very constitutional fabric. We must not lose sight of the fact that our federal and state constitutions exist for the benefit of all of us, even the worst of us. If that were not true, then we would not have the freedom which is our greatest treasure.

It should also be pointed out that in many instances Megan's Law may cause new, serious problems. For instance, the courts have been very sensitive to the need to protect the identity of children victims. However, it is well known by this Court that most child-victim sex offenses are committed by people who know the child, usually a family member. How do we protect the identity of an incest victim if the offender is classified as Tier Two or Three? What harm will the widespread notification do to that child? If an offender lives with his or her family will the family be subject to a lifetime of harassment, intimidation and humiliation? Another potential problem lies in the seemingly remote area of real estate. If you receive notification that a sex offender lives next door, are you obligated to share that information with a prospective buyer of your home? If you do not, can the buyer later sue on the ground that information which has a potentially great effect on the value of the property was kept from him or her? Of course, there is also the obvious problem noted in the Philadelphia Inquirer: "All that community notification will achieve is to invite vigilantism, which never makes a neighborhood safer, and give released offenders a powerful reason to go underground. . . ." *A Rush to Respond: More Debate is Needed on "Megan's Law"*, Phila. Inquirer, Sept. 2, 1994, at A26. For the foregoing reasons, this Court is respectfully urged to reverse the lower court's decision and hold that Megan's Law is unconstitutional in that it violates the federal and state constitutional protections against *ex post facto* lawmaking and double jeopardy, it frustrates the right to privacy and it imposes cruel and unusual punishment.

Respectfully submitted,
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