

# In Child Pornography Matter, Appellate Division Upholds Use of Registrant Risk Assessment Scale in Determining Offenders' Designation as Tier Two Registrants Under Megan's Law

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April 23, 2020 | by Matthew Troiano

The court determined that the RRAS is an appropriate tool to help assess the risk of re-offense for sex offenders who are convicted of one offense for possession or distribution of child pornography.

In In the Matter of Registrant J.G., a published Appellate Division decision from April 13, 2020, the court upheld the use of the Registrant Risk Assessment Scale (RRAS) as applied to the tiering of Megan's Law registrants for defendants convicted of distributing child pornography. The court held that the defendants failed to present evidence demonstrating that the RRAS was improper as applied to them.

Further, the court held that the defendants failed to present evidence that warranted a rejection or modification of the RRAS when applied to one-time child pornography offenders.

The court did not, however, preclude the possibility that a future registrant could establish a record to challenge the RRAS as applied to such offenders.

In the trial court, both defendants pleaded guilty to second-degree endangering the welfare of a child by distributing child pornography. Both sentences resulted in a prison sentences, as well as the imposition of Megan's Law requirements.

## What is Megan's Law?

Megan's Law was designed to protect the community from the dangers of recidivism by sexual offenders. It is one of the [potential consequences](#) an accused offender must face in addition to possible prison time. The law requires certain sex offenders to register with law enforcement agencies. Law enforcement agencies are then responsible for the distribution of information to the public when necessary.

Following the completion of their state prison sentences, each defendant's Megan's Law obligations began. Both defendants were found to pose a moderate risk of re-offense and were designated as Tier Two registrants under Megan's Law.

## What are the Three Levels of Community Notification under Megan's Law?

Megan's Law identifies three levels of community notification depending upon the degree of the risk of re-offense.

- Tier One designations are for those that have a low risk of re-offense. In those cases, law enforcement agencies likely to encounter the registrant are notified.
- Tier Two designations are for those of a moderate risk. There, organizations in the community are also notified.
- Finally, Tier Three designations apply where the risk of re-offense is high, in which case notification is also given to members of the public who are likely to encounter the registrant.

In this case, the defendants were both found to be a moderate risk, a Tier Two classification.

## How are Tiers Determined?

The tiering process, through the use of the Registrant Risk Assessment Scale, is based on guidelines and procedures that have been adopted to assist in the determination of the risk of re-offense. The RRAS identifies thirteen factors and assigns them to four categories:

1. Seriousness of offense
2. Offense history
3. Characteristics of offender
4. Community support

The RRAS gives greater weight to the first two categories. Registrants are assigned scores for each factor and the factors are then adjusted by multipliers.

Defendants argued that the use of RRAS for first time offenders convicted of child pornography was improper as it did not accurately predict the risk of re-offense. They contended that offenders convicted of only one offense of possessing or distributing child pornography should be scored differently from sex offenders with a history of physical contact with their victims. Defendants argued that the RRAS should be modified, replaced, or not used in tiering one-time child pornography offenders. Specifically, the defendants argued that factors three (age of the victim), four (victim selection) and five (number of offenses/victims) should be scored differently or replaced with a different assessment tool in these particular cases.

The Appellate Division affirmed the tiering of each defendant and rejected the arguments regarding the RRAS. The court determined that the RRAS is an appropriate tool to help assess the risk of re-offense for sex offenders who are convicted of one offense for possession or distribution of child pornography.

## Can a Defendant/Offender Challenge His or Her Tier?

The Appellate Division reiterated that our Supreme Court has upheld the registration and community notification components of Megan's Law, as well as the presumptive reliability of the RRAS in classifying registrants. However, despite the deference afforded to the RRAS, [a Megan's Law registrant may challenge his or her tiering](#). A registrant can challenge his or her individual characteristics and any issues with the applicability of the RRAS in the particular case. In doing so, the registrant may call an expert witness to address relevant aspects of the underlying offense or character traits. In the event the RRAS is challenged it should be based on empirical studies or data.

Here, the Appellate Division determined that neither defendant presented credible evidence to show that the RRAS as applied to them was improper. They also both failed to present any studies or data that called into question the continued validity of the RRAS as applied to one-time child pornography offenders.

The court noted that an expert was called in each case, and the expert in both opined that each presented a low risk of re-offending. However, the court upheld the trial court's ruling that the expert relied on the defendants' self-reporting, both of which were incomplete and minimized their past behavior. The trial court rejected the expert's testimony and opinions as unreliable. The Appellate Division found no reason to disturb those findings.

## **The Appellate Division Upheld the Trial Court's Determination of Tier 2**

The Appellate Division also upheld the trial court's determination that both defendants posed moderate risks of sexual reoffending. In support, the court noted the amount of images and videos possessed by the defendants, and the length of time some of the items were possessed. Importantly, as it relates to child pornography cases and the RRAS factors challenged, the trial court indicated that the defendants victimized children under the ages of thirteen, those children were strangers, there were numerous victims, and that the distribution of child pornography continues the revictimization of the children depicted.

The Appellate Division Rejected that Other Assessment Tools Should be Utilized, but Did Not Preclude Possibility for Specific Offenders to Challenge the RRAS

The Appellate Division also rejected the more general challenge to the RRAS as it relates to child pornography, as well as the request to reject or modify the RRAS when applied to one-time child pornography offenders. The court held that neither defendant presented any new, validated empirical studies or data supporting their positions. The court rejected the suggestion that other assessment tools should be utilized.

However, in conclusion, the court did not preclude the possibility that a registrant could develop the record to challenge the RRAS when it is applied to a one-time child pornography offender.