



## NEW JERSEY LAW REVISION COMMISSION

### Draft Tentative Report Concerning Ex Post Facto Nature of the Parole Supervision for Life Statute (N.J.S. 2C:43-6.4)

**December 11, 2023**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **February 20, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Project Summary<sup>1</sup>

In New Jersey, individuals convicted of certain sex offenses are sentenced to parole supervision for life (PSL), pursuant to N.J.S. 2C:43-6.4 in the Violent Predator Incapacitation Act of 1994.<sup>2</sup> A 2014 amendment to the statute instructed that an offender who “violates a condition of a special sentence of community supervision for life [– the supervision type imposed prior to amendments made in 2003 –] or parole supervision for life . . . is guilty of a crime of the third degree.”<sup>3</sup> In addition, the amendment added a requirement that the sentence for violating a condition of community supervision for life (CSL) “shall include, in addition to any sentence authorized by this Code, a special sentence of parole supervision for life.”<sup>4</sup>

In *State v. Hester*, the New Jersey Supreme Court examined “the constitutionality of the retroactive application of the 2014 Amendment to N.J.S.A. 2C:43–6.4” to offenders sentenced to CSL before the amendment took effect.<sup>5</sup> The Court analyzed the amendment pursuant to the Federal and New Jersey State Constitution prohibitions on “ex post facto” laws,<sup>6</sup> which “include[] ‘[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.’”<sup>7</sup>

The *Hester* Court held that the Ex Post Facto Clauses in both Constitutions “bar the retroactive application of the 2014 Amendment to defendants’ CSL violations” because the amended law “retroactively increase[d] or ma[d]e more burdensome the punishment of a crime.”<sup>8</sup> The Court relied, in part, on a previous Supreme Court decision in *State v. Perez*,<sup>9</sup> which held that a 2003 amendment eliminating the possibility of parole for certain offenders constituted an ex post facto law when applied to offenders sentenced to CSL prior to the amendment’s effective date.<sup>10</sup>

Proposed modifications to N.J.S. 2C:43-6.4 are set forth in the Appendix and reflect the Supreme Court’s holdings in *Hester* and *Perez*.

## Statute Considered

**N.J.S. 2C:43-6.4** provides, in relevant part,

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<sup>1</sup> The issue discussed herein was brought to Staff’s attention by Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, New Jersey Office the Public Defender, while he was providing assistance with another NJLRC project.

<sup>2</sup> N.J. STAT. ANN. § 2C:43-6.4 (West 2023).

<sup>3</sup> N.J. STAT. ANN. § 2C:43-6.4(d).

<sup>4</sup> N.J. STAT. ANN. § 2C:43-6.4(a).

<sup>5</sup> *State v. Hester*, 233 N.J. 381, 384 (2018). *See also* L.2013, c. 214, § 4, eff. July 1, 2014.

<sup>6</sup> U.S. CONST. art. I, § 10, cl. 1 (“[n]o State shall . . . pass any . . . ex post facto Law”); N.J. CONST. art. IV, § 7, para. 3 (“[t]he Legislature shall not pass any . . . ex post facto law”).

<sup>7</sup> *Hester*, 233 N.J. at 391 (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798)).

<sup>8</sup> *Id.* at 385.

<sup>9</sup> *State v. Perez*, 220 N.J. 423 (2015).

<sup>10</sup> *Id.* at 442.

a. Notwithstanding any provision of law to the contrary, a judge imposing sentence on a person who has been convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to paragraph (2) of subsection c. of N.J.S.2C:13-1, endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S.2C:24-4, endangering the welfare of a child pursuant to paragraph (3) or sub-subparagraph (i) or (ii) of subparagraph (b) of paragraph (5) of subsection b. of N.J.S. 2C:24-4, luring, violating a condition of a special sentence of community supervision for life pursuant to subsection d. of this section, or an attempt to commit any of these offenses shall include, in addition to any sentence authorized by this Code, a special sentence of parole supervision for life.

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d. A person who violates a condition of a special sentence of community supervision for life or parole supervision for life imposed pursuant to this section without good cause is guilty of a crime of the third degree. Notwithstanding any other law to the contrary, a person sentenced pursuant to this subsection shall be sentenced to a term of imprisonment, unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice. Nothing in this subsection shall preclude subjecting a person who violates any condition of a special sentence of parole supervision for life to the provisions of sections 16 through 19 and 21 of P.L.1979, c. 441 (C.30:4-123.60 through 30:4-123.63 and C.30:4-123.65) pursuant to the provisions of subsection c. of section 3 of P.L.1997, c. 117 (C.30:4-123.51b).

e. A person who, while serving a special sentence of parole supervision for life imposed pursuant to this section, commits a violation of N.J.S.2C:11-3, N.J.S.2C:11-4, N.J.S.2C:11-5, subsection b. of N.J.S.2C:12-1, N.J.S.2C:13-1, section 1 of P.L.1993, c. 291 (C.2C:13-6), N.J.S.2C:14-2, N.J.S.2C:14-3, N.J.S.2C:24-4, section 8 of P.L.2017, c. 141 (C.2C:24-4.1), N.J.S.2C:18-2 when the offense is a crime of the second degree, or subsection a. of N.J.S.2C:39-4 shall be sentenced to an extended term of imprisonment as set forth in N.J.S.2C:43-7, which term shall, notwithstanding the provisions of N.J.S.2C:43-7 or any other law, be served in its entirety prior to the person's resumption of the term of parole supervision for life.<sup>11</sup>

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## **Background**

The *Hester* case involved the appeals filed by four defendants convicted of qualifying sex offenses who “were required to serve a special sentence of community supervision for life after

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<sup>11</sup> N.J. STAT. ANN. § 2C:43-6.4 (emphasis added).

completion of their prison terms.”<sup>12</sup> All four defendants committed the offenses, were convicted, and commenced their sentences prior to the amendment to N.J.S. 2C:43-6.4 in 2014 (2014 Amendment).<sup>13</sup>

Each of the four defendants was charged with violating CSL conditions after the 2014 amendment.<sup>14</sup> As a result of these violations, the defendants were charged with third-degree offenses, as required by N.J.S. 2C:43-6.4(d).<sup>15</sup>

The trial courts “found that the 2014 Amendment to N.J.S.A. 2C:43-6.4 constituted an ex post facto law as applied to defendants who were on community supervision for life at the time of the alleged violations.”<sup>16</sup> The Appellate Division affirmed the determinations of the trial courts, holding that “in contravention of the Federal and State Ex Post Facto Clauses, the 2014 Amendment retroactively increased defendants’ punishment for a CSL violation by elevating the penalty from a fourth-degree to a third-degree crime and by mandating the imposition of PSL.”<sup>17</sup>

The New Jersey Supreme Court granted the State’s petition for certification.<sup>18</sup>

### **Analysis**

The Supreme Court analyzed the constitutionality of the 2014 Amendment, finding that it “effected not a simple procedural change but rather one that offends the very principles animating the Ex Post Facto Clauses of our Federal and State Constitutions.”<sup>19</sup>

The State argued that, because the violations of CSL were committed after the enactment of the 2014 Amendment, the “defendants [were] on notice that . . . they would face conviction for a third-degree offense and conversion of CSL to PSL.”<sup>20</sup> The State characterized the CSL violations as “new crimes subject to new statutory punishments” which “did not relate back or increase the punishment for defendants’ predicate sex offenses.”<sup>21</sup>

Defendants “contend[ed] that the 2014 Amendment substantively altered the terms of their supervised release by exposing them to an enhanced punishment . . . for a CSL violation and conversion of their CSL status to PSL status.”<sup>22</sup> They argued that “any statutory amendment enhancing the punishment for a CSL violation, beyond [what] exist[ed] at the time of the

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<sup>12</sup> *Hester*, 233 N.J. at 385.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 389.

<sup>16</sup> *Id.* at 390.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 398.

<sup>20</sup> *Id.* at 390-91.

<sup>21</sup> *Id.* at 391.

<sup>22</sup> *Id.*

commission of the predicate offense, relates back to the predicate offense and cannot be retroactively applied.”<sup>23</sup>

### ***Legislative History of N.J.S. 2C:43-6.4***

When the defendants in *Hester* were sentenced for their predicate sexual offenses, “a violation of any of the terms of the general conditions of CSL constituted a fourth-degree crime punishable by no more than eighteen months in prison.”<sup>24</sup> Therefore, the Supreme Court examined the legislative history of the statute to “give[] context to the issue before” it.<sup>25</sup>

In 2003, N.J.S. 2C:43-6.4 was amended to “replac[e] community supervision for life with parole supervision for life,” which subjected the offender to “the legal custody of the Commissioner of the Department of Corrections . . . under the supervision of the State Parole Board.”<sup>26</sup> Consequently, unlike a violation of CSL, a violation of the conditions of PSL “could be prosecuted as a fourth-degree offense . . . or treated as a parole violation.”<sup>27</sup>

The Legislature amended N.J.S. 2C:43-6.4 again in 2014, to “provide[] that a defendant on CSL who violates the terms of his supervised release may be prosecuted for committing a third-degree crime.”<sup>28</sup> In addition, the amendment “convert[ed] a defendant’s CSL status to PSL status” following a conviction for violating the conditions of CSL.<sup>29</sup>

The Court then engaged in an ex post facto analysis of the amended law to determine whether it “makes more burdensome the punishment for a crime, after its commission.”<sup>30</sup>

### ***Ex Post Facto Laws Pursuant to the United States and New Jersey Constitutions***<sup>31</sup>

To qualify as an unconstitutional ex post facto law, the law “must apply to events occurring before its enactment” and must also “disadvantage the offender affected by it.”<sup>32</sup> A statute which “retroactively ‘imposes additional punishment to an already completed crime’ disadvantages a

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 387 (adding that, “[i]n the event of a prosecution for a violation, defendants were entitled to all of the procedural protections of the criminal justice process, including the right to a grand jury presentation and trial by jury,” because the statute “did not authorize the Parole Board to revoke defendants’ supervised release and return them to prison”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 387-88; see also L.2003, c. 267, § 1, eff. Jan. 14, 2004.

<sup>27</sup> *Hester*, 233 N.J. at 388 (emphasis added).

<sup>28</sup> *Id.* (“The statutory language makes clear that a defendant convicted of a CSL violation faces a presumption of imprisonment.”).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 391-92.

<sup>31</sup> *Id.* at 392 (noting the New Jersey Supreme Court has “construed New Jersey’s Ex Post Facto Clause in the same manner as its federal counterpart”).

<sup>32</sup> *Id.* at 392 (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987) (internal quotations omitted)).

defendant.”<sup>33</sup> The Court first addressed the parties’ disagreement over whether the “completed crime” was the CSL violation or the predicate sexual offense.<sup>34</sup>

- *Events Occurring Before Enactment*

Observing that “[p]arole and probation are punishments imposed for the commission of a crime,” the Court found that “[c]ommunity supervision for life and its corollary parole supervision for life are merely indefinite forms of parole . . . classified as punishment.”<sup>35</sup>

Therefore, “because the additional punishment [of the 2014 amendment] attaches to a condition of defendants’ sentences, the ‘completed crime’ necessarily relates back to the predicate offense.”<sup>36</sup>

- *Disadvantage to Offender*

The Court then addressed “whether the defendant is ‘worse off’ for ex post facto purposes.”<sup>37</sup> To address this element of the analysis, the *Hester* Court examined its prior decision in *State v. Perez*, finding that “[t]his case is not substantively different from *Perez*.”<sup>38</sup>

Concluding that the “2014 Amendment retroactively increased the punishment for defendants’ earlier committed sex offenses by enhancing the penalties for violations of the terms of their supervised release,” the *Hester* Court held that “[t]he Amendment, therefore, is an ex post facto law that violates our Federal and State Constitutions as applied to defendants.”<sup>39</sup>

***State v. Perez***

In *State v. Perez*, the defendant, who was sentenced to CSL in 1998, pled guilty to two new sex offenses in 2011.<sup>40</sup> The defendant was sentenced to two concurrent “extended terms” of imprisonment pursuant to N.J.S. 2C:43-6.4(e),<sup>41</sup> which requires that:

[a] person who, while serving a special sentence of parole supervision for life imposed pursuant to this section, commits a violation of [the specified statutes] shall be sentenced to an extended term of imprisonment as set forth in N.J.S.2C:43-7, which term shall, notwithstanding the provisions of N.J.S.2C:43-7 or any other

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 393.

<sup>36</sup> *Id.* at 392.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 398 (citing *Perez*, 220 N.J. at 427-28, 442).

<sup>39</sup> *Id.* at 386.

<sup>40</sup> *Perez*, 220 N.J. at 427.

<sup>41</sup> *Id.*

law, be served in its entirety prior to the person's resumption of the term of parole supervision for life.<sup>42</sup>

The *Perez* Court addressed whether the extended term sentences were legal given that the defendant was not serving *parole* supervision, but *community* supervision, when he committed the new offenses.<sup>43</sup> The Court found that “CSL and PSL are distinct special post-sentence supervisory schemes,” and observed that “[t]he extended term authorized for those who commit statutorily designated offenses while serving the special sentencing condition of CSL does not preclude parole.”<sup>44</sup>

The arguments advanced by the parties in *Perez* mirror those made in *Hester*.<sup>45</sup> The *Perez* defendant “maintain[ed] that the special sentencing condition of PSL enhances the penal consequences of his existing CSL status and such an alteration violates the Ex Post Facto Clause[.]”<sup>46</sup> The State argued “that the distinction between CSL and PSL is one of form not substance.”<sup>47</sup>

The *Perez* Court analyzed the 2003 amendment in the context of the Ex Post Facto Clauses of the New Jersey and Federal Constitutions.<sup>48</sup> The Court explained that, whether the 2003 amendment “makes more burdensome the punishment of a crime after its commission[,] . . . turn[ed] on whether the special sentencing condition of CSL is considered penal or remedial.”<sup>49</sup>

Noting that the Supreme Court has previously “recogniz[ed] the punitive nature of CSL,”<sup>50</sup> the *Perez* Court also concluded that “PSL must similarly be considered a punitive rather than a remedial or administrative obligation of a defendant convicted of a qualifying sex offense.”<sup>51</sup> Furthermore, after “a close examination of the pre- and post-2003 versions of N.J.S.A. 2C:43-6.4,”

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<sup>42</sup> N.J. STAT. ANN. § 2C:43-6.4(e) (emphasis added).

<sup>43</sup> *Perez*, 220 N.J. at 427.

<sup>44</sup> *Id.* at 428 and 438 (“pursuant to a pre-amendment version of N.J.S.A. 2C:43-6.4(e), a defendant on CSL status who committed an enumerated offense was subject to a mandatory extended term but was also eligible for parole”).

Prior to the 2003 amendment replacing CSL with PSL, subsection (e) simply authorized an “extended term of imprisonment” when an individual serving a CSL sentence was convicted of a qualifying offense. L.2003, c. 219, § 1, eff. Jan. 14, 2004. In 2003, N.J.S. 2C:43-6.4(e) was amended to add the requirement that the extended term “be served in its entirety prior to the person’s resumption of the term of parole supervision for life.” *Id.*

<sup>45</sup> *See supra* at ----.

<sup>46</sup> *Perez*, 220 N.J. at 438.

<sup>47</sup> *Id.* at 432.

<sup>48</sup> *Id.* at 438-39.

<sup>49</sup> *Id.* at 440.

<sup>50</sup> *Id.* (citing *State v. Schubert*, 212 N.J. 295, 313 (2012)).

<sup>51</sup> *Id.* (“Its numerous restrictions, which monitor every aspect of the daily life of an individual convicted of a qualifying sexual offense and expose that individual to parole revocation and incarceration on the violation of one, some, or all conditions, commence once a defendant completes his probationary or custodial sentence.”).

the Court noted that “several of the alterations or clarifications effect substantive changes to the CSL scheme.”<sup>52</sup>

Therefore, the *Perez* Court held that, “[a]s applied to defendant, the 2003 amendment to N.J.S.A. 2C:43–6.4(e) enhances the punitive consequences of the special sentence of CSL to his detriment and violates the federal and state prohibition of ex post facto legislation.”<sup>53</sup>

### Appellate Division Decisions

In addition to the discussions in *Hester* and *Perez*, the Appellate Division has also addressed the applicability of the 2014 amendment. These decisions provide additional context for the proposed modifications to N.J.S. 2C:43-6.4.

#### ***State v. Caston*<sup>54</sup> and *State v. Lopez*<sup>55</sup>**

Following the decision in *Hester*, the Appellate Division relied on the Supreme Court’s reasoning in *State v. Caston*<sup>56</sup> and *State v. Lopez*.<sup>57</sup> In both of those cases, the courts reduced third-degree convictions for violating CSL to fourth-degree offenses and “remov[ed the] Parole Supervision for Life . . . component of the sentence to conform with the holding of [*Hester*].”<sup>58</sup>

In *Caston*, the defendant was convicted of qualifying sex offenses in 2000 and sentenced to CSL.<sup>59</sup> After the 2014 amendments to N.J.S. 2C:43-6.4, the defendant was charged with two third-degree offenses for violating the conditions of CSL.<sup>60</sup> He pled guilty to both in 2015, was sentenced to three years in prison, and his sentence of CSL was converted to PSL.<sup>61</sup> Following his release, he filed a petition for post-conviction relief based on the *Hester* decision.<sup>62</sup> He was “resentenced [in] 2018, to reflect a conviction for a fourth-degree offense . . . and [the trial court]

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<sup>52</sup> *Id.* at 440-41 (explaining that “the Legislature has manifested that CSL and PSL were and are intended to be penal rather than remedial post-sentence supervisory schemes”).

<sup>53</sup> *Id.* at 442 (“the 2003 and subsequent amendments to N.J.S.A. 2C:43–6, by which the special sentence of PSL is introduced to the sentencing scheme for some sexual offenders and which substitutes PSL for CSL, . . . accomplishes two substantive alterations[; f]irst, it confirms the penal nature of the special conditions of CSL and PSL[; and s]econd, it enhances the penal exposure of a person previously sentenced to CSL for certain offenses committed while sentenced to that status[, which] violates the Ex Post Facto Clauses of the federal and state constitutions”).

<sup>54</sup> 2022 WL 14987271 (App. Div. Oct. 27, 2022).

<sup>55</sup> 2019 WL 361583 (App. Div. Jan. 30, 2019).

<sup>56</sup> *Caston*, 2022 WL 14987271, at \*1.

<sup>57</sup> *Lopez*, 2019 WL 361583, at \*1.

<sup>58</sup> *Id.* See also *Caston*, 2022 WL 14987271, at \* 1 (“The trial court resentenced defendant . . . to reflect a conviction for a fourth-degree offense, instead of a third-degree offense, and removed the imposition of PSL.”).

<sup>59</sup> *Caston*, 2022 WL 47987271, at \*1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*



removed the imposition of PSL.”<sup>63</sup>

Similarly, in *Lopez*, the defendant was charged with three third-degree violations of the conditions of CSL in 2015.<sup>64</sup> Following a bench trial, he was convicted and sentenced in 2016 to concurrent four-year terms of imprisonment on each count and his sentence of CSL was converted to PSL.<sup>65</sup> The trial court “rejected defendant's argument that sentencing him as a third-degree offender rather than a fourth-degree offender, based on the Legislature's 2014 amendment to N.J.S.A. 2C:43-6.4, . . . violated the Ex Post Facto Clauses of the United States and New Jersey Constitutions.”<sup>66</sup> The defendant appealed,<sup>67</sup> and the Appellate Division “remand[ed] for the entry of an amended judgment of conviction reflecting fourth-degree violations of CSL conditions and the removal of the PSL component of the sentence.”<sup>68</sup>

These decisions make clear that the *Hester* holding is applicable not only to the 2014 amendment changing a violation of CSL to a third-degree offense, but also the additional requirement that CSL be converted to PSL upon a conviction for violating the conditions of CSL.<sup>69</sup>

### ***State v. Jacobus***<sup>70</sup>

The defendant in *State v. Jacobus*, was in a situation similar to that of the *Hester* defendants: after being placed on CSL in 2002, the defendant was charged with violating the conditions of CSL and indicted on three third-degree offenses after the 2014 amendment to N.J.S. 2C:43-6.4.<sup>71</sup> The *Jacobus* defendant moved to dismiss the indictment because the 2014 amendment increasing violations from fourth-degree to third-degree crimes was an ex post facto law as applied to him, as held in *Hester*.<sup>72</sup>

The defendant further argued that N.J.S. 2C:43-6.4(d) “provides only for a third degree crime for violating the conditions of CSL, and [since] he cannot be prosecuted for that crime under

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<sup>63</sup> *Id.* (defendant withdrew his PCR but filed another PCR in 2019 – which was denied – “contend[ing] that prior PCR counsel was ineffective for failing to argue defendant's sentence, even though amended by the first PCR judge, was, nevertheless, improper as it still showed the imposition of a three-year term as opposed to an eighteen-month term consistent with a fourth-degree offense” and also for failing to “move to dismiss the two accusations because the *Hester* Court dismissed the indictments in that case and did not simply impose resentencing as a remedy”).

<sup>64</sup> *Lopez*, 2019 WL 361583, at \*1.

<sup>65</sup> *Id.* at \*3.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (“stay[ing] all appeals involving claims of alleged violations of the Ex Post Facto clauses of the United States and New Jersey constitutions in which defendants were sentenced to CSL or PSL pending the New Jersey Supreme Court's resolution of *State v. Hester* . . .”).

<sup>68</sup> *Id.* at \*6.

<sup>69</sup> *Hester*, 233 N.J. at 398 (“ . . . the 2014 Amendment materially altered defendants' prior sentences to their disadvantage—increasing to a third-degree crime a violation of the terms of their supervised release and converting their CSL to PSL,” and therefore “[t]he 2014 Amendment effected not a simple procedural change but rather one that offends the very principles animating the Ex Post Facto Clauses of our Federal and State Constitutions”).

<sup>70</sup> 469 N.J. Super. 136 (App. Div. 2021).

<sup>71</sup> *Id.* at 138-39.

<sup>72</sup> *Id.* at 141.

*Hester*, there is no offense in [New Jersey’s] criminal code for which he can be prosecuted for violating the conditions of CSL.”<sup>73</sup> The State conceded that *Hester* barred the prosecution of the defendant for a third-degree offense, but argued that “the fourth-degree crime extant under N.J.S.A. 2C:43-6.4(d) was unaffected by the 2014 amendments” by virtue of the “savings clause” in N.J.S. 1:1-15.<sup>74</sup>

The *Jacobus* Court analyzed the express language of N.J.S. 1:1-15, which embodies the “well-established principle . . . that a person who commits a crime in violation of a statute prior to its amendment may only be prosecuted for, and convicted of, the offense existing under the statute in effect when the crime was committed.”<sup>75</sup> The Court found the savings clause of N.J.S. 1:1-15 applicable to the defendant because, although he violated the conditions of his CSL after the 2014 amendments, he “‘incurred’ the penalty of his original CSL sentence prior to the 2014 amendments.”<sup>76</sup> The Court concluded that the penalty for violating CSL, “which included defendant’s exposure to prosecution for [a] fourth-degree offense, was neither ‘repealed or altered’ nor ‘discharged, released or affected’ by the [2014] amendments.”<sup>77</sup>

Therefore, the *Jacobus* Court held that “[t]he fourth-degree offense extant under N.J.S.A. 2C:43-6.4(d) . . . continued in all respects as to defendant’s post-amendment violations of CSL,” and the “[d]efendant could be charged with a fourth-degree offense under N.J.S.A. 2C:43-6.4(d).”<sup>78</sup>

The *Jacobus* decision clarifies that, despite the plain language of N.J.S. 2C:43-6.4(d) mandating that a violation of the conditions “of a special sentence of community supervision for life . . . without good cause is guilty of a crime of the third degree,” a violation of CSL should be prosecuted as a fourth-degree offense.<sup>79</sup>

### **New Jersey Administrative Code Provisions**

An examination of the New Jersey Administrative Code (Administrative Code) revealed two provisions separately addressing “community supervision for life” and “parole supervision for life.”<sup>80</sup> The text of these provisions incorporates the 2003 amendment to N.J.S. 2C:43-6.4, which replaced CSL with PSL, and specifically instructs that individuals who committed qualifying crimes before the effective date of the 2003 enactment are sentenced to CLS, while those that

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* See also N.J. STAT. ANN. § 1:1-15 (“ . . . indictments, prosecutions and actions for such offenses, liabilities, penalties or forfeitures already committed or incurred shall be commenced or continued and be proceeded with in all respects as if the act or part of an act had not been repealed or altered . . . ”).

<sup>75</sup> *Jacobus*, 469 N.J. Super. at 145-46 (citing *State v. Low*, 18 N.J. 179, 187-88 (1955)).

<sup>76</sup> *Id.* at 148.

<sup>77</sup> *Id.* (emphasis added).

<sup>78</sup> *Id.*

<sup>79</sup> See N.J. STAT. ANN. § 2C:43-6.4(d).

<sup>80</sup> N.J. ADMIN. CODE §§ 10A:71-6.11 & -6.12 (West 2023).

committed crimes after the effective date are subject to PSL. The Administrative Code provision governing CSL also maintains that a violation of CSL is a fourth-degree offense, consistent with the decision in *Hester*. The structure of the Administrative Code provisions provided guidance for developing the language set forth in the Appendix.

N.J.A.C. 10A:71-6.11, provides that:

[p]ursuant to N.J.S.A. 2C:43-6.4(a), any enumerated offense committed prior to January 14, 2004,<sup>81</sup> a court imposing sentence on a person who has been convicted of [a qualifying offense] shall include, in addition to any sentence authorized by the Code of Criminal Justice, N.J.S.A. 2C:1-1 et seq., a special sentence of community supervision for life.<sup>82</sup>

In addition, the provision governing CSL also states that “[p]ursuant to N.J.S. 2C:43-6.4(d), an offender who violates a condition of a special sentence of community supervision without good cause is guilty of a crime of the fourth degree.”<sup>83</sup> This cross-reference directly conflicts with the text of N.J.S. 2C:43-6.4(d), which provides that violating a condition of CSL without good cause is a third-degree crime.<sup>84</sup>

N.J.A.C. 10A:71-6.12 governs PSL and was adopted in 2005.<sup>85</sup> Subsection (a) of that provision provides that “a special sentence of parole supervision for life” must be imposed “[p]ursuant to N.J.S.A. 2C:43-6.4(a), [for] any enumerated offense committed on or after January 14, 2004.”<sup>86</sup> The administrative provision governing PSL does not specify that a violation of the conditions of PSL is a third-degree crime.<sup>87</sup>

### **Additional Information Regarding Community Supervision for Life**

As noted above, CSL was replaced with PSL when N.J.S. 2C:43-6.4 was amended in 2003.<sup>88</sup> The Supreme Court articulated the differences between CSL and PSL in both *Hester* and *Perez*.<sup>89</sup>

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<sup>81</sup> The 2003 amendment to N.J.S. 2C:43-6.4 replacing community supervision for life with parole supervision for life became effective January 14, 2004. *See* L. 2003, c.267, § 1, eff. Jan. 14, 2004.

<sup>82</sup> N.J. ADMIN. CODE § 10A:71-6.11(a) (emphasis added).

<sup>83</sup> N.J. ADMIN. CODE § 10A:71-6.11(l) (emphasis added).

<sup>84</sup> N.J. STAT. ANN. § 2C:43-6.4(d) (“A person who violates a condition of a special sentence of community supervision for life or parole supervision for life imposed pursuant to this section without good cause is guilty of a crime of the third degree.”) (emphasis added).

<sup>85</sup> N.J. ADMIN. CODE § 10A:71-6.12.

<sup>86</sup> N.J. ADMIN. CODE § 10A:71-6.12(a) (emphasis added) (providing that, for certain endangerment offenses committed “on or after August 14, 2013” the sentence “may include, upon motion of the prosecutor, . . . a special sentence of parole supervision for life”) (emphasis added).

<sup>87</sup> *Id.*

<sup>88</sup> L. 2003, c.267, § 1 (eff. Jan. 14, 2004).

<sup>89</sup> *Hester*, 233 N.J. at 388; *Perez*, 220 N.J. at 441-42.

Individuals sentenced to CSL “are ‘supervised as if on parole,’” and “a violation of CSL is punishable only as a crime; the Parole Board cannot return a defendant to prison through the parole-revocation process.”<sup>90</sup> An individual sentenced to PSL “is ‘in the legal custody of the Commissioner of Corrections [and] shall be supervised by the Division of Parole of the State Parole Board’ for life,” and therefore a PSL violation “may be prosecuted as a fourth-degree offense, . . . but it may also be treated as a parole violation.”<sup>91</sup>

In addition, commission of certain offenses subject those on CSL and PSL “to a mandatory extended term, but [individuals on CSL were] eligible for parole, . . . whereas a defendant on PSL who commits the same offense . . . must serve the entirety of his sentence and then resume his PSL status.”<sup>92</sup> Furthermore, the pre-2003 version of the statute required the State “to notify the court and the defendant of [an] intention to seek [a mandatory extended term], and the defendant ha[d] the opportunity to controvert the grounds cited.”<sup>93</sup> Following the 2003 amendment, this language was eliminated and the statute amended to require that an “extended term shall be ‘served in its entirety prior to the person's resumption of the term of parole supervision for life.’”<sup>94</sup>

According to the 2022 Annual Report of the New Jersey State Parole Board, there are about 2,700 individuals currently serving a sentence of community supervision for life.<sup>95</sup> In addition, the Community Supervision for Life Unit remains one of the nineteen operational Division of Parole units in New Jersey.<sup>96</sup>

Finally, during the course of discussions related to this project, Fletcher Duddy of the New Jersey Office of the Public Defender explained that the current formulation of N.J.S. 2C:43-6.4, which does not specify that a violation of the conditions of CSL is a fourth-degree (rather than a third-degree) offense, has led to confusion at the trial court level regarding the appropriate course of action when an individual has been convicted of a third-degree violation of CSL.<sup>97</sup>

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<sup>90</sup> *Perez*, 220 N.J. at 441 (“The Parole Board's ‘only recourse; is to refer the matter to the county prosecutor, who may or may not seek to present the matter to a grand jury.’”); *see also Hester*, 233 N.J. at 388 (“The Parole Board has no power to ‘return a defendant [on CSL] to prison through the parole-revocation process.’”).

<sup>91</sup> *Perez*, 220 N.J. at 441 (“The State conceded at oral argument that the almost-universal practice since the enactment of the 2003 amendment is to revoke a defendant's parole and return him to prison.”).

<sup>92</sup> *Hester*, 233 N.J. at 388.

<sup>93</sup> *See* L. 1994, c.130, § 2, eff. Oct. 31, 1994 (requiring (1) “[a] person serving a special sentence of community supervision imposed pursuant to this section who commits a violation . . . shall be sentenced to an extended term of imprisonment”; (2) “[t]he court shall not impose a sentence of imprisonment pursuant to this subsection unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed”; and (3) “[t]he defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.”).

<sup>94</sup> *Perez*, 220 N.J. at 442.

<sup>95</sup> New Jersey State Board of Parole, 2022 Annual Report, at 15, Appendix F (Dec. 30, 2022), available at <<https://www.nj.gov/parole/docs/Annual%20Report%202022%20Final.pdf>>.

<sup>96</sup> *Id.* at 6.

<sup>97</sup> *See* E-Mail from Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, New Jersey Public Defender's Office, to Whitney G. Schlimbach, Counsel, NJLRC, at \*1 (Aug. 15, 2023, 4:25 PM EST) (providing Staff with a

## Pending Bills

There are no pending bills that address N.J.S. 2C:43-6.4.

## Conclusion

In accordance with the holding in *Hester*, the proposed modifications to N.J.S. 2C:43-6.4 add language clarifying that a violation of the conditions of CSL is a fourth-degree offense and eliminate the requirement that CSL be converted to PSL upon conviction for a violation of CSL.<sup>98</sup>

Additional proposed modifications reflect the holding in *Perez*, clarifying that the extended term imposed when an individual commits a statutorily designated offense while serving a sentence of CSL, does not preclude the possibility of parole.<sup>99</sup>

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letter brief filed in response to a trial court's "reluctan[ce] to amend a Judgment of Conviction because the code conflicted with the holding in *Hester*") [on file with NJLRC].

<sup>98</sup> *Hester*, 233 N.J. at 398 ("The 2014 Amendment materially altered defendants' prior sentences to their disadvantage—increasing to a third-degree crime a violation of the terms of their supervised release and converting their CSL to PSL, . . . The 2014 Amendment effected not a simple procedural change but rather one that offends the very principles animating the Ex Post Facto Clauses of our Federal and State Constitutions.").

<sup>99</sup> *Perez*, 220 N.J. at 442 ("The elimination of any prospect for parole enhances the penal consequences for a person placed on CSL status before January 14, 2004. Applying the current version of N.J.S.A. 2C:43-6.4(e) to defendant requires him to spend many additional years in prison due to this so-called clarification. ").

## APPENDIX

The proposed modifications to **N.J.S. 2C:43-6.4**, Special sentence of parole supervision for life imposed on persons convicted of certain sexual offenses, (shown with ~~striketrough~~ and underlining), are shown on the following pages.

### **N.J.S. 2C:43-6.4. Special sentence of parole supervision for life imposed on persons convicted of certain sexual offenses.**

a. Notwithstanding any provision of law to the contrary, a judge imposing sentence on a person who has been convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, kidnapping pursuant to paragraph (2) of subsection c. of N.J.S. 2C:13-1, endangering the welfare of a child by engaging in sexual conduct which would impair or debauch the morals of the child pursuant to subsection a. of N.J.S. 2C:24-4, endangering the welfare of a child pursuant to paragraph (3) or sub-subparagraph (i) or (ii) of subparagraph (b) of paragraph (5) of subsection b. of N.J.S. 2C:24-4, luring, ~~violating a condition of a special sentence of community supervision for life pursuant to subsection d. of this section,~~<sup>100</sup> or an attempt to commit any of these offenses shall include, in addition to any sentence authorized by this Code, a special sentence of parole supervision for life. Notwithstanding any provision of law to the contrary, a court imposing sentence on a person who has been convicted of endangering the welfare of a child . . . shall include, upon motion of the prosecutor, a special sentence of parole supervision for life in addition to any sentence authorized by Title 2C of the New Jersey Statutes, unless the court finds on the record that the special sentence is not needed to protect the community or deter the defendant from future criminal activity.

b. The special sentence of parole supervision for life required by this section shall commence immediately upon the defendant's release from incarceration.

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c. A person sentenced to a term of parole supervision for life may petition the Superior Court for release from that parole supervision. The judge may grant a petition for release from a special sentence of parole supervision for life only upon proof by clear and convincing evidence . . .

d. A person who violates a condition of a special sentence of ~~community supervision for life~~ or parole supervision for life imposed pursuant to this section without good cause is guilty of a crime of the third degree. A person who violates a condition of a special sentence of community supervision for life imposed prior to July 14, 2014, pursuant to this section without good cause is guilty of a crime of the fourth degree.<sup>101</sup> Notwithstanding any other law to the contrary, a person

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<sup>100</sup> See e.g. *Lopez*, 2019 WL 361583, at \*1 (trial court “remov[ed the] Parole Supervision for Life . . . component of the sentence to conform with the holding of [*Hester*]”); see also *Caston*, 2022 WL 14987271, at \*1 (“The trial court resentenced defendant . . . and removed the imposition of PSL.”).

<sup>101</sup> See *Hester*, 233 N.J. at 386 (“2014 Amendment retroactively increased the punishment for defendants’ earlier committed sex offenses by enhancing the penalties for violations of the terms of their supervised release,” and “therefore, is an ex post facto law that violates our Federal and State Constitutions as applied to defendants”). See also L.2013, c. 214, § 4, eff. July 1, 2014 (emphasis added).

sentenced pursuant to this subsection shall be sentenced to a term of imprisonment, unless the court is clearly convinced that the interests of justice so far outweigh the need to deter this conduct and the interest in public safety that a sentence to imprisonment would be a manifest injustice. Nothing in this subsection shall preclude subjecting a person who violates any condition of a special sentence of parole supervision for life to the provisions of sections 16 through 19 and 21 of P.L. 1979, c. 441 (C.30:4-123.60 through 30:4-123.63 and C.30:4-123.65) pursuant to the provisions of subsection c. of section 3 of P.L. 1997, c. 117 (C.30:4-123.51b).

e. A person who, while serving a special sentence of parole supervision for life or community supervision for life imposed pursuant to this section, commits a violation of N.J.S. 2C:11-3, N.J.S. 2C:11-4, N.J.S. 2C:11-5, subsection b. of N.J.S. 2C:12-1, N.J.S. 2C:13-1, section 1 of P.L. 1993, c. 291 (C.2C:13-6), N.J.S. 2C:14-2, N.J.S. 2C:14-3, N.J.S. 2C:24-4, section 8 of P.L. 2017, c. 141 (C.2C:24-4.1), N.J.S. 2C:18-2 when the offense is a crime of the second degree, or subsection a. of N.J.S. 2C:39-4;

(1) shall be sentenced to an extended term of imprisonment as set forth in N.J.S. 2C:43-7; and ~~which~~

(2) the term shall, notwithstanding the provisions of N.J.S. 2C:43-7 or any other law, be served in its entirety prior to the person's resumption of the term of parole supervision for life. Subsection (e)(2) shall not apply to a person serving a special sentence of community supervision for life imposed prior to January 14, 2004, pursuant to this section.<sup>102</sup>

f. The special sentence of parole supervision for life required by this section may include any of the following Internet access conditions:

(1) Prohibit the person from accessing or using a computer . . . ;

(2) Require the person to submit to periodic unannounced examinations of the person's computer . . . ;

(3) Require the person to submit to the installation on the person's computer or device with Internet capability, at the person's expense, one or more hardware or software systems to monitor the Internet use;

(4) Require the person to submit to any other appropriate restrictions concerning the person's use or access of a computer or any other device with Internet capability; and

(5) Require the person to disclose all passwords . . . .

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<sup>102</sup> See *Perez*, 220 N.J. at 442 (“The elimination of any prospect for parole enhances the penal consequences for a person placed on CSL status before January 14, 2004. . . . As applied to defendant, the 2003 amendment to N.J.S.A. 2C:43–6.4(e) enhances the punitive consequences of the special sentence of CSL to his detriment and violates the federal and state prohibition of ex post facto legislation.”); see also N.J. ADMIN. CODE § 10A:71-6.11(a) (“[p]ursuant to N.J.S.A. 2C:43–6.4(a), any enumerated offense committed prior to January 14, 2004, a court imposing sentence . . . shall include, in addition to any sentence authorized by the Code of Criminal Justice, N.J.S.A. 2C:1–1 et seq., a special sentence of community supervision for life”) (emphasis added).

g. The special sentence of parole supervision for life required by this section may include reasonable conditions prohibiting or restricting the person's operation of an unmanned aircraft system in order to reduce the likelihood of a recurrence of criminal or delinquent behavior.

### **Credits**

L.1994, c. 130, § 2, eff. Oct. 31, 1994. Amended by L.2003, c. 267, § 1, eff. Jan. 14, 2004; L.2007, c. 219, § 3, eff. Feb. 25, 2008; L.2013, c. 136, § 2, eff. Aug. 14, 2013; L.2013, c. 214, § 4, eff. July 1, 2014; L.2017, c. 141, § 5, eff. Feb. 1, 2018; L.2017, c. 315, § 3, eff. May 1, 2018; L.2017, c. 333, § 1, eff. Jan. 16, 2018.

### **COMMENT**

#### ***Subsection (a)***

The proposed modifications to subsection (a) eliminate the language authorizing a special sentence of community supervision for life to be converted to parole supervision for life upon conviction of violating a condition of CSL.<sup>103</sup> This modification reflects the holding in *Hester*, as well as subsequent holdings in *Caston* and *Lopez*, which relied on the reasoning in *Hester*.<sup>104</sup> The Supreme Court held in *Hester* that the 2014 Amendment, which raised a CSL violation from a fourth to a third-degree crime and required CSL to be converted to PSL, “effected not a simple procedural change but rather one that offends the very principles animating the Ex Post Facto Clauses of our Federal and State Constitutions.”<sup>105</sup>

#### ***Subsection (d)***

In subsection (d), the modifications also reflect the holding in *Hester*.<sup>106</sup> The modifications eliminate the original reference to CSL and add language clarifying that a CSL violation is a fourth-degree, rather than a third-degree, crime.<sup>107</sup> In addition, the modified language specifies that the change is limited to those individuals sentenced to CSL prior to the effective date of the amendment: July 14, 2014.<sup>108</sup>

#### ***Subsection (e)***

Subsection (e) sets forth the consequences of committing certain crimes while serving a special sentence of PSL.<sup>109</sup> The modifications add a reference to community supervision for life and divide subsection (e) into two further

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<sup>103</sup> See N.J. STAT. ANN. § 2C:43-6.4(a) (eliminating “violating a condition of a special sentence of community supervision for life pursuant to subsection d. of this section” from the list of offenses that trigger the imposition of PSL).

<sup>104</sup> See *supra* at ----.

<sup>105</sup> *Hester*, 233 N.J. at 398.

<sup>106</sup> See *Hester*, 233 N.J. at 386 (“2014 Amendment retroactively increased the punishment for defendants’ earlier committed sex offenses by enhancing the penalties for violations of the terms of their supervised release”).

<sup>107</sup> *Id.* at 398 (“affirm[ing] the judgment of the Appellate Division dismissing defendants’ indictments, which charged them with the third-degree crime of violating the general conditions of their supervised release”).

<sup>108</sup> L.2013, c. 214, § 4, eff. July 1, 2014; see *Hester*, 233 N.J. at 391, n.4 (specifying that “Defendants’ challenge to the constitutionality of the 2014 Amendment, as applied, is limited to those defendants on CSL for offenses that predated the enactment of the Amendment”).

<sup>109</sup> See N.J. STAT. ANN. § 2C:43-6.4(e) (listing qualifying offenses as follows: “a violation of N.J.S. 2C:11-3, N.J.S. 2C:11-4, N.J.S. 2C:11-5, subsection b. of N.J.S. 2C:12-1, N.J.S. 2C:13-1, section 1 of P.L.1993, c. 291 (C.2C:13-6), N.J.S. 2C:14-2, N.J.S. 2C:14-3, N.J.S. 2C:24-4, section 8 of P.L.2017, c. 141 (C.2C:24-4.1), N.J.S. 2C:18-2 when the offense is a crime of the second degree, or subsection a. of N.J.S. 2C:39-4 . . .”).



subsections that separately address the consequences of committing an enumerated crime while serving a sentence of CSL or PSL. Subsection (e)(1) requires an extended term of imprisonment and subsection (e)(2) mandates that the extended term be served in its entirety before resuming PSL.

The proposed modifications incorporate the *Perez* holding into subsection (e)(2) by adding language clarifying that the prohibition on parole is not applicable to an individual serving a sentence of CSL that was imposed prior to the effective date of the 2003 amendments.<sup>110</sup> Prior to 2003, N.J.S. 2C:43-6.4(e) required the court to impose an “extended term of imprisonment” on an individual convicted of certain crimes while serving CSL.<sup>111</sup>

***Subsections (a), (b), (f) and (g)***

There are no proposed modifications with respect to subsections (a), (b), (f) and (g).

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The underlined statutes were added to N.J.S. 2C:43-6.4(e) in 2003 and 2017, respectively. *See* L.2003, c. 267, § 1, eff. Jan. 14, 2004 *and* L.2017, c. 141, § 5, eff. Feb. 1, 2018. N.J.S. 2C:11-5 defines the crime of “reckless vehicular homicide,” N.J. STAT. ANN. § 2C:11-5 (West 2023), and N.J.S. 2C:24-4.1 created a separate criminal offense for the “leader of a child pornography network.” N.J. STAT. ANN. § 2C:24-4.1 (West 2023).

<sup>110</sup> *Perez*, 220 N.J. at 442.

<sup>111</sup> L. 1994, c.130, § 2, eff. Oct. 31, 1994 (“e. (1) A person serving a special sentence of community supervision imposed pursuant to this section . . . shall be sentenced to an extended term of imprisonment[;] (2) The court shall not impose a sentence of imprisonment pursuant to this subsection unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to the defendant of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.”) (emphasis added).