

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Community Supervision for Life Violations Punishable as Third-Degree Offense and Conversion to Parole Supervision for Life Unconstitutional as Ex Post Facto Law
Date: October 10, 2023

MEMORANDUM

Project Summary¹

In New Jersey, individuals convicted of certain sex offenses may be sentenced to parole supervision for life (PSL), pursuant to N.J.S. 2C:43-6.4 in the Violent Predator Incapacitation Act of 1994.² 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 . . . without good cause is guilty of a crime of the third degree.”³ 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.”⁴

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

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.”⁸

Statute Considered

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

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

¹ The issue discussed in this Memorandum 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.

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

³ N.J. STAT. ANN. § 2C:43-6.4(d).

⁴ N.J. STAT. ANN. § 2C:43-6.4(a).

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

⁶ 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”).

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

⁸ *Id.* at 385.

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.

* * *

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).⁹

* * *

Background

The *Hester* case involved the appeals of four defendants convicted of qualifying sex offenses who “were required to serve a special sentence of community supervision for life after completion of their prison terms.”¹⁰ All four defendants committed the offenses, were convicted and commenced their sentence prior to the amendment to N.J.S. 2C:43-6.4 in 2014 (2014 Amendment).¹¹

Each of the four defendants, however, was charged with violating CSL conditions after the 2014 amendment.¹² 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).¹³

⁹ N.J. STAT. ANN. § 2C:43-6.4 (emphasis added).

¹⁰ *Hester*, 233 N.J. at 385.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 389 (“(1) Hester for failing to reside at a residence approved by a parole officer, to obtain permission to change his address, and to comply with curfew requirements; (2) Warner for failing to reside at a residence approved by a parole officer and to obtain permission to change his address; (3) McKinney for failing to report to his parole officer; and (4) Roundtree for failing to reside at a residence approved by a parole officer, to obtain permission to change his address, and to report to his parole officer”).

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.”¹⁴ On appeal, the Appellate Division affirmed 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.”¹⁵

The Supreme Court granted the State’s petition for certification.¹⁶

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.”¹⁷

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.”¹⁸ 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.”¹⁹

Defendants “contend[ed] that the 2014 Amendment substantively altered the terms of their supervised release by exposing them to an enhanced punishment — a third-degree rather than a fourth-degree crime — for a CSL violation and conversion of their CSL status to PSL status.”²⁰ They argued that “any statutory amendment enhancing the punishment for a CSL violation, beyond [what] exist[ed] at the time of the commission of the predicate offense, relates back to the predicate offense and cannot be retroactively applied.”²¹

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

¹⁴ *Id.* at 390.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 398.

¹⁸ *Id.* at 390-91.

¹⁹ *Id.* at 391.

²⁰ *Id.*

²¹ *Id.*

punishable by no more than eighteen months in prison.”²² Therefore, the Supreme Court examined the legislative history of the statute to “give[] context to the issue before” it.²³

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.”²⁴ 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.”²⁵

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.”²⁶ In addition, the amendment “convert[ed] a defendant’s CSL status to PSL status” following a conviction for violating the conditions of CSL.²⁷

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.”²⁸

*Ex Post Facto Laws Pursuant to the United States and New Jersey Constitutions*²⁹

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.”³⁰ A statute which “retroactively ‘imposes additional punishment to an already completed crime’ disadvantages a defendant.”³¹ The Court first addressed the State’s and defendants’ disagreement over whether the “completed crime” was the CSL violation or the predicate sexual offense.³²

²² *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”).

²³ *Id.*

²⁴ *Id.* at 387-88; *see also* L.2003, c. 267, § 1, eff. Jan. 14, 2004.

²⁵ *Id.* at 388 (emphasis added). The Court observed that a noteworthy distinction between CSL and PSL is that a defendant on CSL who commits an enumerated offense is subject to a mandatory extended term, but is eligible for parole, . . . whereas a defendant on PSL who commits the same offense is subject to a mandatory extended term, but must serve the entirety of his sentence, and then resume his PSL status.

Id. In *State v. Perez*, the Supreme Court held “that the 2003 Amendment to N.J.S.A. 2C:43–6.4, which substituted PSL for defendants already on CSL, violated the Ex Post Facto Clauses of our Federal and State Constitutions because the conversion enhanced the penal exposure of those convicted of crimes when CSL was the applicable law.” *Hester*, 233 N.J. at 388 (citing *State v. Perez*, 220 N.J. 423, 441-42 (2015)).

²⁶ *Id.* (“The statutory language makes clear that a defendant convicted of a CSL violation faces a presumption of imprisonment.”).

²⁷ *Id.*

²⁸ *Id.* at 391-92.

²⁹ *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”).

³⁰ *Id.* at 392 (quoting *Miller v. Florida*, 482 U.S. 423, 430 (1987)).

³¹ *Id.*

³² *Id.*

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.”³³ 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.”³⁴

The Court then addressed the question “whether the defendant is ‘worse off’ for ex post facto purposes.”³⁵ In *State v. Perez*, the Supreme Court “held that a law that retroactively increases the punishment for a CSL violation constitutes an ex post facto law.”³⁶ In *Perez*, the defendant was convicted and sentenced to CSL in 1998 and then convicted of a violation in 2011.³⁷ In the intervening years, the 2003 amendment to N.J.S. 2C:43-6.4 replaced CSL with PSL, and therefore the defendant was sentenced “to a mandatory extended term without parole eligibility.”³⁸ The Court explained that, had the defendant been sentenced as though it were a CSL, rather than a PSL, violation, he would have been eligible for parole and he would not have been “subject to the Parole Board’s authority to revoke his supervised release.”³⁹

Therefore, because the 2003 amendment “required the defendant to ‘spend many additional years in prison,’” the *Perez* Court determined the amendment “rendered more than a ‘simple change in nomenclature’ or ‘a simple clarification of the Legislature’s intent’” and “violate[d] the federal and state prohibition of ex post facto legislation.”⁴⁰

Finding that “[t]his case is not substantively different from *Perez*,” the *Hester* Court concluded that the 2014 Amendment “materially altered defendants’ prior sentences to their disadvantage.”⁴¹ Therefore, the Court held that “retroactive application of the 2014 Amendment to N.J.S.A. 2C:43–6.4 . . . violates the Ex Post Facto Clause of the United States Constitution . . . [and] defendants’ rights under the New Jersey Constitution’s Ex Post Facto Clause.”⁴²

Pending Bills

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

³³ *Id.* at 393.

³⁴ *Id.* at 392.

³⁵ *Id.* (relying for the proposition that “postrevocation penalties must be attributed to an original conviction” on the Massachusetts case of *Greenfield v. Scafati*, in which the Court held that a law disallowing “good-conduct deductions” after returning to prison on a parole violation, which was changed while the *Greenfield* defendant was in prison but prior to his release and parole revocation, “materially ‘alter[ed] the situation of [Greenfield] to his disadvantage’ and therefore constituted prohibited ex post facto legislation”) (alterations in original) (citing *Greenfield v. Scafati*, 277 F.Supp. 644, 645-46 (D. Mass. 1967), *aff’d*, 390 U.S. 713 (1968)).

³⁶ *Id.* at 394.

³⁷ *Id.*

³⁸ *Id.* at 395.

³⁹ *Id.*

⁴⁰ *Id.* (quoting *Perez*, 220 N.J. at 440-43).

⁴¹ *Id.* at 398.

⁴² *Id.*

Conclusion

Staff requests authorization to conduct further research and outreach to determine whether N.J.S. 2C:43-6.4 would benefit from a modification addressing the Supreme Court's holding in *State v. Hester* that the 2014 Amendment constitutes an unconstitutional ex post facto law as applied to violations of the conditions of CSL.⁴³

⁴³ *Id.* at 385 (“hold[ing] that the Federal and State Ex Post Facto Clauses bar the retroactive application of the 2014 Amendment to defendants' CSL violations”).