# DO THE SENTENCING PROVISIONS OF THE SEXUAL PREDATOR ACT CREATE MANDATORY SENTENCES?

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*The best laid schemes o' mice an men*
*Gang aft agley . . . .*
Robert Burns, 1785[1]

## I. Introduction

Last year the New Hampshire Legislature passed HB 1692, described as the Sexual Predator Act (SPA). The bill, codified as Laws, 2006 c. 327, amended the extended term sentencing statute, R.S.A. 651:6. Many have opined that the new law creates the presumption of a mandatory sentence of twenty five years to life in those cases where the sexual assault victim is under 13 years of age and the prosecutor files a notice of extended term. In first offense cases the allegedly presumptive minimum mandatory sentence does not apply if the sentencing judge, in writing, sets forth sufficient reasons from a list articulated in the statute or any other reason that the court believes to "overcome" the presumptive minimum sentence. This new provision of New Hampshire law has been referred to as a "presumptive minimum mandatory sentence." In fact the sentence is not mandatory at all. Any sentence imposed under the statute can be suspended by the sentencing court.

HB 1692 amended the extended term sentencing statue by adding a new sub-chapter that reads:

> IV. If authorized by subparagraphs I(m), (n), or (o) and if notice of the possible application of this section is given to the defendant prior to the commencement of trial:

[1]From, *To a Mouse On Turning Up In Her Nest With a Plough*. The Scottish version of the poem is translated as "The best laid plans of mice and men / often go awry."

> (a) There is a presumption that a person shall be sentenced to a minimum to be fixed by the court of not less than 25 years and a maximum of life imprisonment unless the court makes a determination that the goals of deterrence, rehabilitation, and punishment would not be served, based on the specific circumstances of the case, by such a sentence and the court makes specific written findings in support of the lesser sentence. . . .

The sub-chapter goes on to lay out the criteria that the Court must consider in determining whether or not to impose the presumptive sentence. Nothing in the plain language of the new statute prohibits a sentencing judge from suspending the sentence. This new law has been described as requiring the judge to impose a mandatory stand committed sentence. At this point, it appears that most prosecutors believe it does. It is important to know and be able to articulate to the sentencing court why there is no minimum mandatory sentence and, in appropriate cases, to seek suspension of a portion or all of any stand committed sentence regardless of the operation of the presumption.

## II. Statutory Construction: *State v. Burroughs* and its Progeny

The proper interpretation of this statute is based upon standard concepts of statutory construction under New Hampshire law. The New Hampshire Supreme Court has previously addressed this statutory construction issue. In 1973 the Court was presented, via interlocutory transfer, with the issue of whether a new statute appearing to mandate a ten day sentence for second offense driving under the influence prohibited the suspension of the sentence. *See, State v. Burroughs*, 113 NH 21 (1973). The *Burroughs* court canvassed then existing precedent finding that the power to suspend all or a portion of any sentence was assumed as a matter of "practice and precedent" and that the power to suspend a sentence "has been consistently sustained

in this State and in other jurisdictions." *Burroughs* at p. 22 (citations omitted.) The *Burroughs* Court also cited the then existing statutory authority to suspend all or a portion of a sentence (RSA 504:1 *et. seq.* (supp 1972)). Additionally, in *Burroughs*, the Court recognized Part I, Article 18 of the State Constitution and its admonition to proportionality in criminal sentencing statutes. *Burroughs* at p. 24. Finally, in interpreting the meaning of the statute, the Court found that the use of the word "shall" as opposed to "may" in a sentencing statute did not limit the authority of a sentencing court to suspend a sentence:

> The intention of the legislature is to be determined from the language of the statute as a whole and not from the use of a particular word or phrase. *Plymouth School Dist. v. State Bd. of Educ*, 112 N.H. 74, 77, 289 A.2d 73, 75 (1972). The use of the word 'may' in regard to the penalty for a first offense and 'shall' for a second conviction is not controlling. *See, New Castle v. Rand*, 102 N.H. 16, 20, 148 A.2d 658, 661 (1959). The legislative history surrounding the passage of this amendment is at best equivocal. 1 N.H.S.Jour. 554-73 (Jan. 1, 1971-Sept. 28, 1971). It is significant, however, that reference was made to Laws 1967, 281:1, at 565-66, which provided for a two day mandatory sentence for driving after revocation of license. This statute, which provided that such sentence 'may not be suspended,' indicates that the legislators were well aware of the proper language to be used when a mandatory sentence was intended. An examination of the penalties imposed for the punishment of most crimes will reveal that the word 'shall' is used almost exclusively. No contention is made, or could reasonably be made, that all these sentences are intended to be mandatory.

*Burroughs* at p. 25. *Burroughs* spawned a progeny of cases which define when a criminal sentencing statute can be interpreted to contain a non-suspendable mandatory sentence.

In *State v. Dean,* 115 N.H. 520 (1975) the Court addressed the minimum

mandatory sentence contained within the motor vehicle habitual offender statute which existed at that time. The pertinent sentencing language of the statute stated that a person convicted of the offense : "shall . . . be sentenced to imprisonment for not less than a year nor more than five years." It further provided that "(n)o portion of the aforesaid minimum mandatory sentence shall be suspended, and no case brought to enforce this chapter shall be continued for sentencing." *Dean* at p. 522.

Dean argued that the general sentence suspension provisions of RSA 651:20 which were enacted before the habitual offender statute, but became effective on the same day, and contained the language "notwithstanding any other provision of law" trumped the habitual offender mandatory sentence. The Court dealt with the statutory conflict issue summarily and without citation to authority stating: "We find no reason to doubt that the legislative intent was that the specific provision of the most recent enactment R.S.A. 262-B:7 (Supp.1973) should control, taking priority over the general provision of the earlier enactment, now R.S.A. 651:20. We so hold." *Dean* at p. 522.

The *Dean* Court in its 4-1 decision[2] also recognized the inherent authority of the Courts to suspend a sentence but held that the legislature does have the authority to mandate sentences and remove the authority to suspend a sentence from the courts:

> In this State that power has long been held typically judicial. *State v. Burroughs*,113 N.H. 21, 22, 300 A.2d 315, 316 (1973); *State v. Valrand*,

[2]Justice Grimes' dissent is very interesting. He relies on the Burroughs language recognizing the Court's inherent power to suspend a sentence and declares the statute at issue to violate the separation of powers doctrine by prohibiting the courts from exercising their inherent discretion to suspend a sentence.

> 103 N.H. 518, 519-20, 176 A.2d 189, 191 (1961); E. Page, Judicial Beginnings in New Hampshire 1640-1700, at 114 (1959). Common law judicial powers, and the authority of courts traditionally described as 'inherent', are constitutional prerogatives only to the extent that constitutions make them so. *See State ex rel. Sonner v. Shearin*, 272 Md. 502, 325 A.2d 573, 579, 582 (1974), distinguishing *State v. McCoy*, 94 Idaho 236, 486 P.2d 247 (1971); 11 Idaho L.Rev. 29 (1974) criticizing *McCoy*. By our constitution the general court is given 'full power . . . to impose fines, mulcts, imprisonments, and other punishments. . ..' N.H.Const. pt. II, art. 5.
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> The constitution does not prohibit the legislature from constricting the independent exercise of judicial discretion by the requirement of mandatory sentences. N.H.Const. pt. II, arts. 4, 5; *State v. Owen*, 80 N.H. 426, 427, 117 A. 814, 815 (1922) *State v. Drew*, 75 N.H. 402, 74 A. 875 (1909), 75 N.H. 604, 76 A. 191 (1910); *accord, People v. Broadie*, 45 App.Div.2d 649, 360 N.Y.S.2d 906 (1974), *aff'd*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (1975); *Madjorous v. State*, 113 Ohio St. 427, 149N.E. 393 (1925); *State v. Gorman*, 322 N.E.2d 319 (Ohio App.1974). Hence, the exercise of the judicial privilege of suspension can be withdrawn by statutory language expressing a clear legislative intent that a sentence is to be mandatorily imposed. *State v. Greenwood*, 115 N.H. 117, 119-120, 335 A.2d 644, 645-46 (1975). Since such legislative intent is clearly expressed by R.S.A. 262-B:7 (Supp.1973), no authority to suspend the minimum sentence was afforded in the case before us.

*Dean* at p. 523. It should be stressed that the Court relied upon specific language in the habitual offender statute that did not appear in the DWI statute at issue in *Burroughs*.

In *State v. Mullen*, 119 N.H. 703 (1979) the supreme court was met with circumstances extremely similar to *Burroughs*. *Mullen* dealt with the legislature's first attempt to create the seven day minimum mandatory sentence for a subsequent offense of DWI. The court relying on *Burroughs* extensively reviewed the legislative history of the statute and found that language such as that approved in *Dean* at various times was included in the proposed legislation but did not make it into the final statute.

The Court found that the legislature had considered and rejected the language which would clearly designate the sentence ineligible for suspension. The Court stated:

> The text of RSA 262-A:62 I (as amended) contains no provision similar to that held effective for withdrawal of the judiciary's power of suspension in *State v. Dean*, 115 N.H. 522, 345 A.2d 408 (1975). Rather, the legislature specifically withdrew only the express statutory authority to suspend sentences, an authority which we have held is separate from the Common law authority. *See State v. Smith*, 119 N.H. __, __ A.2d __ (decided this day). *See also State v. Burroughs*, 113 N.H. 21, 300 A.2d 315, 316 (1973). The statute, as amended, despite long-established case law and tradition, makes no reference to a withdrawal of the inherent common-law judicial authority to suspend imposition or execution of sentence.

The fact that the new statute had language specifically referencing RSA 651:20 did not save the minimum mandatory sentence from the ability of the court to suspend such sentences.

In *State v. Peabody*, 121 N.H. 1075 (1981) the Court again upheld the mandatory minimum sentence for driving as an habitual offender:

> Arguments similar to those advanced by the defendant have been considered by this court in cases involving the mandatory sentencing of second offenders under statutes dealing with persons driving motor vehicles while under the influence of intoxicating liquor or drugs. *State v. Mullen*, 119 N.H. 703, 705-09, 406 A.2d 698, 699- 02 (1979); *State v. Dean*, 115 N.H. 520, 522-24, 345 A.2d 408, 410-11 (1975). In each instance the arguments have failed. “(T)he exercise of the judicial privilege of suspension can be withdrawn by statutory language expressing a clear legislative intent that a sentence is to be mandatorily imposed.” *State v. Dean*, 115 N.H. at 523, 345 A.2d at 411; *see State v. Mullen,* 119 N.H. at 705-06, 406 A.2d at 699-700; *State v. Greenwood*, 115 N.H. 117, 118, 335 A.2d 644, 645-46 (1975).

Although *Peabody* appears to simply apply the *Burroughs/Dean* line of reasoning it is worthy to note the following passage:

> It should be noted that mandatory sentencing in New Hampshire has been cautiously and sparingly used. Its application has been limited to habitual motor vehicle offenses, R.S.A. 262-B:7 I, second drunk driver offenses, R.S.A. 262-A:62 (Supp.1979), and the felonious use of a firearm, R.S.A. 651:2 II-b (Supp.1979). Mandated sentences that impose too severe a punishment for offenses may run afoul of constitutional prohibitions.

This language begs the question about whether a 25 year mandatory sentence or a sentence of life without parole would "run afoul of constitutional prohibitions."

The *Burroughs* line of cases consistently interpret sentencing provisions for crimes under the motor vehicle code. A prosecutor may reasonably claim that interpretation of a statute under the criminal code is different. *See*, R.S.A. 625:3[3]. However, the Supreme Court has considered at least one mandatory sentence derived from the Criminal Code. In *State v. Henderson*, 153 N.H. ___ (Decided August 23, 2006), 907 A.2d 968, the Court interpreted the mandatory provisions of R.S.A. 651:2, II-g (Supp. 2005) pertaining to sentences for offenses which include the possession of firearms. In determining that the gun sentencing statute did not require imposition of minimum mandatory sentence when a jury made no distinction between being "in possession" of a firearm as opposed "having a firearm under his control" the Court stated:

> The legislature has vested in the trial court the ability to adapt sentencing to best meet the constitutional objectives of punishment, rehabilitation and deterrence. *State v. Timmons,* 145 N.H. 149, 151, 756 A.2d 999 (2000). Under the general sentencing statutes, *see* R.S.A. ch. 651, the trial court has broad discretion to impose different sentences, suspend sentences or grant probation. *Timmons,* 145 N.H. at 151, 756 A.2d 999. Minimum

[3]R.S.A. 625:3 reads: "The rule that penal statutes are to be strictly construed does not apply to this code. All provisions of this code shall be construed according to the fair import of their terms and to promote justice."

> mandatory sentences, however, restrict the sentencing discretion of the trial judge. *See Petition of State of N.H.,* 152 N.H. 185, 191, 872 A.2d 1000 (2005). Recognizing this constraint, we have previously declined to extend the application of a mandatory sentencing statute where the legislature's intent was not "unmistakably clear." *Id.*

In the light of *Henderson*, the "fair import" language of RSA 625: 3 does not appear to require a lesser standard for the legislation of mandatory sentencing under the criminal code.

**III. Application of Statutory Construction Rules to the Sexual Predator Act.**

The best place to start in interpreting the sentencing provisions of the Sexual Predator Act is with the language of the act itself. As recently stated by the Court:

> In matters of statutory interpretation, we are the final arbiter of legislative intent as expressed in the words of a statute considered as a whole. *State v. Clark,* 151 N.H. 56, 57, 849 A.2d 143 (2004). We first examine the words of the statute and ascribe plain and ordinary meanings to them. *Id.* We interpret the statute as written and *will not consider what the legislature could have said or add words to the statute that the legislature did not see fit to include*. *In re Estate of Fischer,* 152 N.H. 669, 673, 886 A.2d 996 (2005).

*State v. Corrado*, 153 N.H. ___ (decided August 3, 2006)(Emphasis added); *see also, State v. Barnard*, 141 NH 230, 231-233 (1996)("Courts can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include. The legislative intent is to be found not in what the legislature might have said, but rather in the meaning of what it did say.") Notably, the SPA does not contain a provision which indicates that a sentencing judge is prohibited from suspending all or any part of the sentence. The "magic words" found in the habitual offender statutes considered in *State v. Dean*, 115 N.H. 520, 522 (1975) and *State v. Peabody,* 121 N.H.

1075, 1077 (1981) do not exist in this law. Those words do continue to exist in other statutes however. The motor vehicle habitual offender statute and the driving while intoxicated statutes continue to contain language specifying that the mandatory sentence shall not be suspended. See R.S.A 262:23, I (habitual offender statute)[4]; R.S.A. 265-A:18, VIII (pertaining to DWI sentences.)[5] Similarly, the firearms sentencing statute continues to contain such language. See, R.S.A. 651:2, II-g.[6]

Even more illuminating of the lack of legislative intent to create a mandatory sentence as part of the SPA is consideration of Laws, 2006 c. 163, which was passed by the same Legislature that created the SPA. Laws, 2006 c. 163, enacted HB 1377 which amended the felonious use of a firearm sentencing statue, R.S.A. 651:2, II-b. In amending the mandatory sentence to apply only to subsequent offenses, the Legislature left the following language in the statute:

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[4] The statute, in pertinent part reads: "No portion of the minimum mandatory sentence shall be suspended, and no case brought to enforce this chapter shall be continued for sentencing; provided, however, that any sentence or part thereof imposed pursuant to this section may be suspended in cases in which the driving of a motor vehicle was necessitated by situations of apparent extreme emergency which required such operation to save life or limb."

[5] The DWI statute states: "No portion of the minimum mandatory sentence of imprisonment and no portion of the mandatory sentence of the period of revocation and no portion of any fine imposed under this section shall be suspended or reduced by the court. No case brought to enforce this section shall be continued for sentencing for longer than 35 days. No person serving the minimum mandatory sentence under this section shall be discharged pursuant to authority granted under RSA 651:18, released pursuant to authority granted under RSA 651:19, or in any manner, except as provided in RSA 623:1, prevented from serving the full amount of such minimum mandatory sentence under any authority granted by RSA title LXII or any other provision of law."

[6] If a person is convicted of a felony, an element of which is the possession, use or attempted use of a deadly weapon, and the deadly weapon is a firearm, such person may be sentenced to a maximum term of 20 years' imprisonment in lieu of any other sentence prescribed for the crime. The person *shall be given a minimum mandatory sentence* of not less than 3 years' imprisonment for a first offense and a *minimum mandatory sentence of not less than 6 years' imprisonment* if such person has been previously convicted of any state or federal offense for which the maximum penalty provided was imprisonment in excess of one year, and an element of which was the possession, use or attempted use of a firearm. *Neither the whole nor any part of the minimum sentence imposed under this paragraph shall be suspended or reduced.* (Emphasis added.)

> A person convicted of a second or subsequent offense for the felonious use of a firearm, as provided in R.S.A. 650-A:1, *shall*, in addition to any punishment provided for the underlying felony, be given a *minimum mandatory sentence* of 3 years imprisonment. *Neither the whole nor any part of the additional sentence of imprisonment hereby provided shall be served concurrently with any other term nor shall the whole or any part of such additional term of imprisonment be suspended. No action brought to enforce sentencing under this section shall be continued for sentencing, nor shall the provisions of R.S.A. 651-A relative to parole apply to any sentence of imprisonment imposed.*

(Emphasis added.) It is clear that the Legislature is historically aware of how to pass mandatory sentencing legislation. Indeed the very Legislature which adopted the SPA addressed mandatory sentencing in another statute during the very same legislative session. In that bill they demonstrate that they know how to use the "magic words."

Review of another section of the SPA also demonstrates that the legislature did not intend to create a mandatory sentence. The SPA created a condition of lifetime supervision. *See*, R.S.A. 651:6, IV (b) (Supp. 2007). However, the statute indicates that the period of supervision "shall begin upon the offender's release from incarceration, parole or *probation*." (Emphasis added.) The statute therefore envisions the possibility of probationary sentences for sex offenders which would fly in the face of any claim that a stand committed sentence is mandatory.

In short, New Hampshire law requires that the intent to establish a mandatory sentence be "unmistakably clear. " The New Hampshire Legislature, in 2006, knew how to legislate mandatory sentencing laws and chose not to do so in enacting the Sexual Predator Act.