

**MANDATORY SENTENCES FOR SEX OFFENDERS:
THE WILL OF THE PEOPLE? NOT!**

**A Short History of the Adoption
of the New Hampshire Sexual Predator Act (HB 1692)**

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A Short History of the Adoption of the New Hampshire Sexual Predator Act (HB 1692)

In 2007 New Hampshire's criminal defense lawyers will begin defending clients charged with sex offenses against a new statute which purports to require a presumptive, minimum mandatory, extended term sentence of twenty five years to life for Aggravated Felonious Sexual Assault against a child under 13 years of age. The sentence can be imposed when a prosecutor provides timely notice of its application. See, R.S.A. 651:6, IV (a). This new statute became effective on January 1, 2007. Even before the effective date of the bill we have heard that the minimum mandatory twenty five year sentence is the "will of the people." At a New Hampshire Bar Association CLE Program, Senior Assistant Attorney General Will Delker and Deputy County Attorney Roger Chadwick both expressed this position. It has been reported that former Assistant Belknap County Attorney Wayne Coull and Judge Smuckler have both also used the term.

In fact, the legislative history of HB 1692 (2006) demonstrates that the notion of a minimum mandatory sentence at the election of the prosecutor was firmly rejected by the New Hampshire Legislature.

HB 1692 as originally introduced in the house of Representatives contained the following provision which amended R.S.A. 651:6:

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, a person shall be sentenced to an extended term

of imprisonment as follows:

- (a) A minimum to be fixed by the court of not less than 25 years and a maximum of life imprisonment; and
- (b) The sentence shall also include, in addition to any other penalties provided by law, a special sentence of lifetime supervision by the department of corrections. The defendant shall comply with the conditions of lifetime supervision which are imposed by the court or the department of corrections. Violation of any of the conditions of lifetime supervision shall be deemed contempt of court. The special sentence of lifetime supervision shall begin upon the offender's release from incarceration, parole, or probation. A defendant who is sentenced to lifetime supervision pursuant to this paragraph shall not be eligible for release from the lifetime supervision pursuant to RSA 632-A:10-a, V(b).

The bill was referred to the House Criminal Justice and Public Safety Committee for study. On January 17, 2006 lengthy public hearings were held on the bill¹ followed by at least twelve sub-committee work sessions. The Committee passed a report recommending passage of the bill with certain amendments. The Committee vote was 17 in favor of the amendment and 2 against. Specifically the Committee recommended removal of the mandatory sentencing language so that the bill read:

IV. If authorized by subparagraphs I(l), (m), or (n) and if notice of the possible application of this section is given to the defendant prior to the commencement of trial, a person **may** be sentenced to an extended term of imprisonment as follows:

- (a) A minimum to be fixed by the court of not more than 25 years and a maximum of life imprisonment; and
- (b) The sentence shall also include, in addition to any other penalties provided by law, a special sentence of lifetime supervision by the department of corrections. The defendant shall comply with the conditions of lifetime supervision which are imposed by the court or the department of corrections. Violation of any of the conditions of lifetime supervision shall be deemed contempt of court. The special sentence of lifetime

¹The Committee which normally meets in Room 204 of the Legislative Office Building held its public hearings in Representative's Hall at the State House due to the number of public witnesses addressing the bill.

supervision shall begin upon the offender's release from incarceration, parole or probation. A defendant who is sentence to lifetime supervision pursuant to this paragraph is not eligible for release from the lifetime supervision pursuant to RSA 632-A:10-a, V(b).

See, House Calendar (2006) 22, p. 1282 - 1283. The majority amendment (Amendment 1422h) recommended by the Committee, by using the word "may," permitted extended term sentencing treatment, but left discretion to impose the sentence to the court. A minority amendment (Amendment 1425h) was also offered. The minority amendment restored the original mandatory sentencing language to the bill.

On the floor of the House of Representatives both the minority amendment (1425h) and a proposed floor amendment (1487h)² failed by votes of 264-76 and 254 - 86 respectively. The bill, as amended by Committee to eliminate mandatory sentencing passed by a resounding vote of 307 in favor and 17 against. See, House Journal (2006) 29 pp. 1680-1682.

Judicial discretion did not fare as well in the New Hampshire Senate. HB 1692 was introduced in the Senate, as amended by the House, and referred to the Senate Judiciary Committee on March 22, 2006. Within two weeks the Senate Judiciary Committee rejected the House version and recommended that the full Senate pass with bill with an amendment which restored the original mandatory sentencing provision. See, Senate Calendar (2006) 14A, p. 7 and Senate Journal (2006) 11, pp. 336-337. The full Senate adopted the recommended amendment (Senate Amendment 1700) and passed the bill with the amendment.

²Floor Amendment 1487h appears to be nothing more than a second attempt to return to the language of the bill as originally introduced.

The House refused to accede to the Senate's amendment of the bill and it was eventually scheduled for consideration by a Committee of Conference. As a result of negotiations between the senators and representatives the conference committee reported out the following compromise language:

- IV. If authorized by subparagraphs l(l), (m), or (n) and if notice of the possible application of this section is given to the defendant prior to the commencement of trial:
- (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. Before the court can determine whether the presumption has been overcome, the court shall consider, but is not limited to, the following factors:
- (1) Age of victim at time of offense.
 - (2) Age of the defendant at the time of the offense.
 - (3) Relationship between defendant and victim.
 - (4) Injuries to victim.
 - (5) Use of force, fear, threats, or coercion to the victim or another.
 - (6) Length of time defendant offended against victim.
 - (7) Number of times defendant offended against victim.
 - (8) Number of other victims.
 - (9) Acceptance of responsibility by defendant.
 - (10) Defendant's criminal history.
 - (11) Use of a weapon.
 - (12) Medical or psychological condition of the victim at the time of the assault.
- (b) The sentence shall also include, in addition to any other penalties provided by law, a special sentence of lifetime supervision by the department of corrections. The defendant shall comply with the conditions of lifetime supervision which are imposed by the court or the department of corrections. Violation of any of the conditions of lifetime supervision shall be deemed contempt of court. The special sentence of lifetime supervision shall begin upon the offender's release from incarceration, parole, or probation. A defendant who is sentenced to lifetime supervision pursuant to this paragraph shall not be eligible for release from the lifetime supervision pursuant to RSA 632-A:10-a, V(b).
- (c) Any decision by the superior court under paragraph (a) may be reviewed by the sentence review division of the superior court at the

request of the defendant or at the request of the state pursuant to RSA 651:58.

The compromise language was adopted and passed by both the House and the Senate and signed by the Governor on June 27, 2006.

If the “will of the people” is expressed through the actions of the popularly elected legislature it is clear that the people still desire the courts to have the ultimate decision in the sentencing of sex offenders. Indeed, the process which led to the adoption of HB 1692 in 2006 is actually a legislative rejection of mandatory sentencing. If faced with arguments that the “people” want mandatory sentences the practitioner should be prepared to address this legislative history and argue that the “people” want judges to exercise discretion in sentencing and consider each defendant as an individual. After all, the “people” rejected the mandatory sentencing scheme proposed in the original bill and passed a bill which left discretion to the judge.