THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0246

State of New Hampshire

v.

Jeremy Surrell

Appeal Pursuant to Rule 7 from Judgment
of the Cheshire County Superior Court

BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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QUESTION PRESENTED

Whether the court erred by denying, on the basis only of the nature of the offense, Surrell's motion to suspend the balance of his minimum sentence.

Issue preserved by defense motion to suspend sentence, the State's objection, the motion to reconsider, and the court's rulings. Supp. 1-2; A10-A73.*

* Citations to the record are as follows:
"A" refers to the Appendix to this brief, filed under separate cover;
"Supp." refers to the documentary supplement attached to this brief.

TEXT OF RELEVANT AUTHORITY

RSA 651:20 (1971)

> Notwithstanding any other provision of law, the sentence to imprisonment of any person may be suspended, at the time of sentence or at any time while any part thereof remains unserved.

RSA 651:20 (1979)

> Notwithstanding any other provision of law, the sentence to imprisonment of any person may be suspended, at the time of sentence or no later than 180 days after imposition of the sentence, unless otherwise ordered by the court at the time of sentencing.

RSA 651:20 (1981)

> Notwithstanding any other provision of law, the sentence to imprisonment of any person may be suspended, at the time of sentence unless otherwise ordered by the court, or at any time while any part of the sentence remains unserved, but a petition to suspend sentence may not be brought less than 2 years after commencement of said sentence nor more frequently than every 2 years thereafter. . . .

RSA 651:20, I (1992)

> Notwithstanding any other provision of law, except as provided in subparagraphs (a) and (b), the sentence to imprisonment of any person may be suspended, at the time of sentence unless otherwise ordered by the court, or at any time while any part of the sentence remains unserved, but a petition to suspend sentence may not be brought less than 2 years after commencement of said sentence nor more frequently that every 2 years thereafter.
>
> (a) Any person sentenced for any of the following violent crimes against a person listed in RSA 651:4-a shall not bring such petition to suspend sentence earlier than 4 years after commencement of said sentence nor more frequently than every 4 years thereafter.

(b) A petition to suspend the sentence of any state prison inmate may be brought at any time upon the recommendation of the commissioner, department of corrections, or designee.

RSA 651:20, I (1994)

Notwithstanding any other provision of law, except as provided in subparagraphs (a), (b), and (c), the sentence to imprisonment of any person may be suspended by the sentencing court at the time of imposition of the sentence or at any time thereafter in response to a petition to suspend sentence which is timely brought in accordance with the limitations set forth below in subparagraphs (a), (b), and (c).

(a) Any person sentenced to state prison shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence, whichever is greater, and not more frequently than every three years thereafter.

(b) A petition to suspend the sentence of any state prisoner may be brought at any time if, prior to the petition being filed, the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence.

(c) A petition to suspend the sentence of any state prisoner may be brought at any time by the attorney general in recognition of substantial assistance by the inmate in the investigation or prosecution of a serious felony offense.

(d) Petitions filed which do not meet the criteria in (a), (b), or (c) above shall be dismissed without a hearing.

RSA 651:20, I (2009)

Notwithstanding any other provision of law, except as provided in subparagraphs (a), (b), and (c), the sentence to imprisonment of any person may be suspended by the sentencing court at the time of imposition of the sentence or at any time thereafter in response to a petition to suspend sentence which is timely brought in accordance with the limitations set forth below in subparagraphs (a), (b), and (c).

(a) Any person sentenced to state prison for a minimum term of 6 years or more shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence, whichever is greater, and not more frequently than every 3 years thereafter. Any person sentenced to state prison for a minimum term of less than 6 years shall not bring a petition to suspend sentence until such person has served at least 2/3 of the minimum sentence, or the petition has been authorized by the sentencing court. For purposes of this sub-paragraph:

(1) For concurrent terms of imprisonment, the minimum term shall be satisfied by serving the longest minimum term imposed, and the maximum term shall be satisfied by serving the longest maximum term.

(2) For consecutive terms of imprisonment, the minimum terms of each sentence shall be added to arrive at an aggregate minimum term, and the maximum terms of each sentence shall be aggregated to arrive at an aggregate maximum term.

(b) A petition to suspend the sentence of any state prisoner may be brought at any time if, prior to the petition being filed, the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence.

(c) A petition to suspend the sentence of any state prisoner may be brought at any time by the attorney general in recognition of substantial assistance by the inmate in the investigation or prosecution of a serious felony offense.

(d) Petitions filed which do not meet the criteria in (a), (b), or (c) above shall be dismissed without a hearing.

STATEMENT OF THE CASE AND FACTS

In 2011, the State indicted Jeremy Surrell on four counts of aggravated felonious sexual assault (AFSA), alleging four single-act instances of fellatio involving a child under the age of thirteen. A1-A4. Surrell pled guilty to two counts, and the court (Kissinger, J.) sentenced him to a stand-committed term of seven and a half to fifteen years, and to a suspended term of ten to twenty years. A5-A8. The State entered a *nolle prosequi* on the other two indictments. A3-A4.

Surrell thereafter earned good time credits for successfully completing certain programs during his incarceration. A9. Calculating that he would have served two-thirds of his minimum in February 2017, Surrell filed, in January 2017, a motion asking the court to suspend the balance of his minimum. Supp. 1. To that motion, he attached documentation of his successful completion of a number of educational and rehabilitative programs. A10-A58.

The State objected. A59-A62. While acknowledging and commending Surrell for his rehabilitative efforts, the objection cited the nature of the crime. A60. The State thus argued that "[p]unishment alone requires that the defendant serve the maximum minimum portion of his sentence." Id. In that vein, the State argued that Surrell

> received leniency for his confession and his pleas of guilty, saving the victim the traumatic experience of a trial. He has already received that benefit. A guilty verdict after trial would have been much closer to a 20 year sentence. The 7.5 – 15 is the absolute minimum that can be the punishment for such a betrayal of trust and abuse of innocence.

A61.

With respect to any deficiency in Surrell's rehabilitation, the State noted only that the motion made no reference to completion of the sex offender treatment program. A60-A61. Finally, the State questioned the timeliness of the motion, calculating that Surrell would reach the two-thirds point of his minimum in November 2017. A61.

Surrell filed a response. A63-A66. He acknowledged the leniency implied in the sentence he received as compared with the sentence he would have received had he been convicted after a contested trial. A63. That leniency, however, reflected not a kind of advance payment on anticipated successful rehabilitation while incarcerated, but rather, as the State's objection had noted, a benefit conferred for the contrition he had shown by confessing and pleading guilty, and for sparing the victim the trauma of testifying at trial. Id. He further countered the State's description of his sentence as "the absolute minimum" by noting that the State had initially offered a five to ten year sentence. Id.

With respect to the sex offender treatment program, Surrell noted that the Department of Corrections had recommended out-patient treatment, and he provided a letter from an out-patient treatment provider admitting him to the provider's treatment program. A63, A66. With respect to the timeliness of his petition, Surrell countered that the State's calculation had erroneously excluded the effect on his minimum of the good time credits he had earned. A64.

Upon receiving the motion to suspend and associated pleadings, the court (Ruoff, J.) entered an order asking the Warden to prepare a synopsis of Surrell's incarceration. A67. The Warden complied. A68-A69. The synopsis confirmed Surrell's successful completion of various rehabilitative programs, and documented that the Department recommended Surrell for community sex offender treatment. A69. It listed only two minor disciplinary infractions – one for failing to stand for count in 2015 and one in 2016 for being out of place, "on a pod that [Surrell] does not live on, talking to another inmate." Id.

By a notation order entered on March 6, 2017, the court denied Surrell's motion to suspend his sentence. Supp. 1. The order explained: "[t]he offense conduct against the defendant's own son does not warrant a lesser sentence." Id.

Surrell filed a motion to reconsider, arguing that the court erred in relying solely on the nature of the offense conduct. A70-A73. He contended that a grant of the relief contemplated by RSA 651:20 does not depend on the seriousness of the offense. A71. The trial court's discretion to set an appropriate minimum sentence, combined with the legislature's mandate in RSA 651:20 that prisoners may not petition for the suspension of their sentences until they have served two-thirds of the minimum, together ensure that the perpetrators of more serious offenses will serve more time before obtaining any suspension of their sentences than will the perpetrators of less serious offenses. Surrell argued that, once a prisoner has served two-thirds of that minimum, the question of whether to suspend the balance of the sentence

depends entirely on the quality of the prisoner's post-sentencing rehabilitative efforts. Because the court relied only on the seriousness of the offense, the court had erred in treating as irrelevant Surrell's successful efforts at rehabilitation. A71.

The State filed no response to the motion to reconsider. On April 3, 2017, the court denied the request. Supp. 1. In explaining the order, the court wrote:

> The Court carefully considered all of the mitigating evidence submitted by the defendant prior to denying his RSA 651:20 request.
>
> The Court was impressed with the defendant's efforts while serving his sentence. However, the Court cannot ignore the punitive aspect of the original sentence, which is why the Court looked to the offense conduct when making its decision.
>
> Therefore, the Court neither misapplied the law nor misapprehended any facts when denying the defendant's request.

Supp. 1.

Surrell thereafter filed a discretionary Notice of Appeal. This Court accepted the case for review, and assigned the appeal to the 3JX docket for oral argument.

SUMMARY OF THE ARGUMENT

RSA 651:20 says nothing about the factors bearing on the decision to suspend the balance of a previously-imposed sentence. This Court thus must look to the statute's structure, purpose and evolution. That review discloses a transformation over time in the understanding of the relevant factors, as the legislature has poured new wine into the old bottle of RSA 651:20.

In the first phase, from the initial enactment of RSA 651:20 in 1971 up to the passage of the 1981 revision, sentence suspension proceedings had little or nothing to do with an inquiry into the prisoner's rehabilitation. Rather, the mechanism of post-sentencing suspension existed to allow courts to correct what in retrospect became clear was an erroneous initial sentencing decision.

During the second phase, from 1981 up to the passage of the 1994 revision, the logic of the statutory language indicated that a court, when confronted with a petition to suspend, could consider both the prisoner's rehabilitative efforts and the seriousness of the offense. Thus, if a prisoner petitioned so early that suspension would conflict with the State's legitimate interest in punishment, a court could, on that ground alone, deny the petition.

During the third phase, from 1994 through the present, the logic of the statute's language and structure elevates the quality of the prisoner's rehabilitative efforts to the position of exclusive focus. Thus, the court erred in denying the motion based on the nature of the offense. Surrell contends, in the alternative, that courts can no longer consider only the offense conduct in denying a petition to suspend.

I. THE COURT ERRED IN DENYING SURRELL'S MOTION TO SUSPEND SENTENCE SOLELY ON THE BASIS OF THE NATURE OF THE OFFENSE.

RSA 651:20, I authorizes trial courts to suspend sentences. Sub-paragraphs (b) and (c) empower the commissioner of the Department of Corrections and the Attorney General, respectively, to petition for the suspension of sentences. Surrell's case arises under sub-paragraph I(a), which provides:

> Any person sentenced to state prison for a minimum term of 6 years or more shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence, whichever is greater, and not more frequently than every 3 years thereafter. . . .

RSA 651:20, I(a).

When called upon to interpret a statute, this Court looks first to the language of the statute, construing it if possible in accord with its plain and ordinary meaning. State v. Horner, 153 N.H. 306, 309 (2006). Further, the Court interprets "statutes in the context of the overall statutory scheme and not in isolation." State v. Moran, 158 N.H. 318, 321 (2009). To that end, the Court aims to "effectuate the statute's overall purpose and to avoid an absurd or unjust result." State v. Paige, __ N.H. __ (decided August 15, 2017) (slip op. at 3).

RSA 651:20 does not list the factors a court may consider in deciding whether to suspend the balance of a previously-imposed sentence. Insofar as that silence renders the statute ambiguous, this Court must look to legislative history. ATV Watch v. N.H. Dep't of Transp., 161 N.H. 746, 752 (2011). Insofar

as the legislature's silence leaves the statute open to more than one reasonable interpretation, this Court will look to the underlying policy considerations that motivated the legislature in enacting and amending the statute. State v. Hull, 149 N.H. 706, 709 (2003). Under either view of the implications of the statute's silence, this Court must examine the history of RSA 651:20.

Finally, "the rule of lenity comes into play . . . when a statute is ambiguous and resort to legislative history does not resolve the ambiguity." Paige, __ N.H. at __ (slip op. at 5). This Court has explained:

> [T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously. This rule of statutory construction generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant. It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should. By applying the rule of lenity, we reject the impulse to speculate regarding a dubious legislative intent, and avoid playing the part of a mind reader.

State v. Dansereau, 157 N.H. 596, 602 (2008) (quotations and citations omitted). When construing statutes, this Court employs a *de novo* standard of review. Paige, __ N.H. at __ (slip op. at 3).

In the face of the statute's silence as to the relevant factors, Surrell contends first that the structure and logic of RSA 651:20 supports his position. Alternatively, to the extent that the statute's silence on the point renders it ambiguous, Surrell relies on the considerations of legislative history described below. Finally, to the extent that any ambiguity remains after consideration of the text and history of RSA 651:20, the rule of lenity requires this Court to

adopt Surrell's position, because the contrary interpretation would have the effect of disentitling him to relief under RSA 651:20, and thus would increase the punishment imposed upon him.

Contextual evidence supports an interpretation of the statute that emphasizes factors relating to the quality of a prisoner's efforts at rehabilitation. Paragraphs I(b) and (c), for example, authorize the commissioner of the Department of Corrections, RSA 651:20, I(b), or the Attorney General's office, RSA 651:20, I(c), to petition for the suspension of a prisoner's sentence. The statutorily-stated or –implied reasons for the commissioner and the Attorney General to exercise that authority involve a prisoner's post-sentencing conduct.

With respect to the authority of the Attorney General, the statute authorizes motions to suspend "in recognition of substantial assistance by the inmate in the investigation or prosecution of a serious felony offense." RSA 651:20, I(c). With respect to the authority of the commissioner of the Department of Corrections, the statute authorizes motions to suspend when the commissioner has found the prisoner to be a "suitable candidate for suspension of sentence." RSA 651:20, I(b). In those grounds and in the designation of those officials as authorized to file such motions, RSA 651:20 manifests an intention to focus on a prisoner's post-sentencing conduct. The statute does not suggest that the legislature believed that those authorities possess a special ability to discern that the sentence initially pronounced did not fit the crime.

Moreover, as shown below, the history of RSA 651:20 from its first enactment in 1971 to the present reveals an evolution in the mechanism and purpose of the opportunity for a court, after sentencing, to suspend a previously-imposed sentence. See Petition of State of New Hampshire (State v. Fischer), 152 N.H. 205, 211-13 (2005) (describing the various versions of RSA 651:20 up to that time). That evolution has now reached the point that, in deciding whether to suspend a previously-imposed sentence, the court should consider only the quality of the prisoner's efforts at rehabilitation. Accordingly, Surrell first contends that the Superior Court erred in taking account of the facts of the offense in denying his motion to suspend. Second, and in the alternative, Surrell contends that, even if a court can take account of the facts of the offense, it cannot deny a petition to suspend on the basis only of a judgment about the facts of the offense.

"From the earliest times in this State as a matter of practice and precedent it has been assumed that courts had the power to suspend either the imposition or the execution of a criminal sentence." State v. Burroughs, 113 N.H. 21, 22 (1973) (citing Page, Judicial Beginnings in New Hampshire: 1640-1700 114 (1959)). Quoting a 1916 decision of the United States Supreme Court, the Burroughs Court grounded the power to suspend sentences in the "modern notion[]" that "abandon[s] the theory that the imposition of the sentence is solely to punish. . . ." Burroughs, 113 N.H. at 22-23 (quoting Ex Parte United States, 242 U.S. 27, 38 (1916)). Rather,

> the best thought considers three elements properly to enter into the treatment of every criminal case after

> conviction. Punishment in some measure is still the object of sentence, but, affecting its extent and character, we consider the effect of the situation upon the individual, as tending to reform him from or to confirm him in a criminal career, and also the relation his case bears to the community in the effect of the disposition of it upon others of criminal tendencies.

Id.

The common law tradition also supplied doctrines governing the authority of a court, after the pronouncement of sentence, later to modify its terms. In State v. Dunn, 111 N.H. 320 (1971), this Court articulated several such doctrines. "It is generally held that under common law a trial court has no power to revise its judgment and sentence in a criminal case after the expiration of the term at which the sentence was imposed or after the execution of the sentence has commenced." Id. at 320. In light of the declining significance of "terms of court," the Dunn Court held that a trial court can revise its judgment until the later of either the conclusion of the term of court, or the commencement of the execution of the sentence. Id. at 320-21. The common law, though, insisted on some outer limit on the opportunity to revise a sentence, because of the need for finality. Id. at 321.

Against this backdrop, the legislature in 1971 enacted a new criminal code that included RSA 651:20. N.H. Laws 1971, ch. 518:1 (enacting RSA 651:20 (Supp. 1972)). As originally enacted, RSA 651:20 provided that

> [n]otwithstanding any other provision of law, the sentence to imprisonment of any person may be suspended, at the time of sentence or at any time while any part thereof remains unserved.

RSA 651:20 (Supp. 1972), quoted in Burroughs, 113 N.H. at 24.

Two features of the original statute warrant comment. First, consistent with all versions of RSA 651:20 since 1971, the statute was silent as to the factors or considerations that might justify a court in choosing, in a particular case, to suspend a part or the whole of a sentence. Second, the statute modified the common law in that it imposed no time constraints on when a trial judge might choose to suspend the sentence, as long as a part of the sentence remained unserved. See State v. Lemire, 116 N.H. 395, 396-97 (1976) (recognizing authority of trial court to suspend any portion of original sentence while it remains unserved). In the view of the Burroughs Court, "[t]hese enactments demonstrate a continuing intent by the legislature to provide the sentencing judge with options to adapt his sentence to a particular individual in the manner best suited to accomplish the constitutional objectives of punishment, rehabilitation, and deterrence." Id. at 24. Elaborating on that principle of flexibility, the Lemire Court observed that

> [i]t is as significant as it is obvious that both in our legislature and in our courts the current of our criminal law philosophy has set in toward the shore of more flexibility in sentencing. This serves to promote that basic purpose of the Criminal Code to achieve justice by protecting the public and helping the criminal to return to society as a law-abiding and useful citizen. The trend has definitely been to create more, rather than fewer, avenues toward reaching this result.

Lemire, 116 N.H. at 397.

Beginning in 1979, the legislature began to amend RSA 651:20 with a view to restricting a court's window of opportunity for suspending sentences. See State v. Theodosopoulos, 123 N.H. 287 (1983) (noting the 1979 and 1981

amendments to RSA 651:20). The 1979 restriction was simple. Laws 1979, ch. 407:3. It repealed the phrase "or at any time while any part thereof remains" and substituted "or no later than 180 days after imposition of the sentence, unless otherwise ordered by the court at the time of sentencing." RSA 651:20 (Supp. 1979).

In effect, unless the court at the time of sentencing reserved a longer opportunity, the 1979 provision allowed courts only six months after sentencing within which to decide whether to suspend an initially-imposed sentence. Given the relative brevity of that period of time for accomplishing a prisoner's slow work of completing programs and achieving true rehabilitative self-transformation, the amendment indicates that a prisoner's post-sentencing rehabilitative success could not form the basis for a decision to suspend a sentence.

Indeed, a 1979 judiciary committee report on the bill notes disapprovingly that "[t]here have been requests for suspension of sentence even after ten or twenty years of incarceration." A74. Another report further confirms that sentence suspension under RSA 651:20 at that time focused backward on the facts of the offense, in the observation that, after ten or fifteen years, the "sentencing judge may have long forgotten the sentencing and facts of the case . . . ." A76; see also A78 (letter from Attorney General, noting as problematic the fact that under then-current law, "a prisoner may request a suspension of his sentence many years after his sentence was originally imposed"). Thus, its brevity indicates that the legislature envisioned the six-

month period as a time within which a judge might reconsider the wisdom of a stand-committed sentence, in light of the traditional concerns of punishment, deterrence, and rehabilitation.

In re-establishing an outer limit on a court's opportunity to modify an initially-pronounced sentence, the 1979 version echoed the common law doctrines articulated in Dunn. As noted above, those doctrines acknowledged a space for courts to reconsider sentences, but enforced a relatively short temporal limitation on that space, in the interest of finality. The Dunn Court's explanation of the common law doctrines included the following observation, relevant to the present issue:

> Another factor which militates against extending the common-law power of the trial court to modify a sentence to cover the present case is that the modification is not sought because of factors which existed at the time of sentencing, such as misapprehensions by the trial court as to the history, character, or physical or mental condition of the defendant. Rather defendant's motion for modification is based on events which have taken place some period of time after sentencing and while he was serving his sentence. These are matters within the realm of the executive rather than that of the judicial power. . . .

Dunn, 111 N.H. at 322; see also A78 (Attorney General's letter, referring to parole board as appropriate entity for assessing and rewarding successful rehabilitation).

Thus, if made under the common law or under RSA 651:20 as it existed before 1981, the court's order would be proper. Up to 1981, the entire weight of tradition and statutory language indicated that the law allowed courts to suspend previously-imposed sentences only on the ground of error in the initial

sentencing judgment. The law did not, at that time, contemplate judges suspending previously-imposed sentences in response to events – such as successful efforts at rehabilitation – that happened after the initial sentencing hearing. This began to change in 1981.

In 1981, the legislature substantially revised the relevant part of RSA 651:20. Laws 1981, ch. 516:1. As revised, the statute provided:

> [n]otwithstanding any other provision of law, the sentence to imprisonment of any person may be suspended, at the time of sentence unless otherwise ordered by the court, or at any time while any part of the sentence remains unserved, but a petition to suspend sentence may not be brought less than 2 years after commencement of said sentence nor more frequently than every 2 years thereafter. . . .

RSA 651:20 (Supp. 1981).

The revision made two important changes. First, it eliminated the six-month outer limit, restoring to trial courts the power to suspend a sentence at any time while any part of the sentence of the sentence remained unserved. Second, the statute introduced for the first time a limitation on a prisoner's right to petition for the suspension of a sentence. Specifically, the statute barred prisoners from petitioning to suspend a sentence until a minimum of two years had passed since the pronouncement of the sentence. In that way, the statute introduced a distinction between types of suspension proceedings: first, a proceeding initiated by the court, available at any time during the service of the sentence; and second, a proceeding initiated by a petition filed by a party asking the court to suspend the sentence, first available two years into the service of the sentence. See State v. Callaghan, 125 N.H. 449, 450-51

(1984) (noting distinction between court's power to suspend sentence on own motion at any time, and petitioner's right to petition for suspension).

In Callaghan, citing documents in the 1981 statute's legislative history, this Court explained the establishment of the initial and subsequent two-year waiting periods. "[T]he primary object of the 1981 amendment creating the two-year rule was to preserve or expand the court's power to suspend sentences while lightening its workload by means of a rule that would reduce the number of frivolous petitions for suspension." Id. at 451. Implicit in the idea that petitions brought too soon will be frivolous is the understanding that, during the first two years of a sentence, not enough will have changed with respect to the prisoner's rehabilitation to justify considering a request to suspend. In this way, the 1981 revision marked a movement away from the Dunn idea that a post-sentencing-hearing inquiry into whether to suspend the balance of a sentence does not involve an assessment of the success of the prisoner's efforts at rehabilitation, but only the possibility of error in the sentencing court's initial sentence. After 1981, the worthiness of a petition to suspend would depend, at least in part, on the prisoner's post-sentencing rehabilitation.

The legislative history of the 1981 statute confirms the appearance of post-sentencing rehabilitation as a central factor in the sentence suspension proceedings contemplated by RSA 651:20. In support of ending the 180-day outer limit on petitions, the Warden observed that "it is desirable to include provisions for further review of a sentence with an eye toward sentence reduction for those inmates who are sentenced to longer terms and who

provide evidence that substantial rehabilitative change has in fact transpired . . . .) (emphasis added). A84. In opposition to the bill, then-superior-court judge David Souter identified two reasons to suspend a sentence: first, "to give some kind of a kick to a rehabilitative purpose;" and second, "it is an unjust sentence in the first place." A82. He argued that the second purpose could be served within the 180-day period. As to the rehabilitative purpose, Judge Souter argued that "[i]f that is what the judge wants to accomplish, he can provide for this at the time of sentencing." Id. Judge Souter's view thus constituted a rejection of the Warden's idea that RSA 651:20 should serve as a mechanism for encouraging and rewarding post-sentencing rehabilitation. The defeat of Judge Souter's view, as manifested by the enactment of the 1981 revision, thus marks the initial sign of a legislative intent to adapt RSA 651:20 to serve the purpose of encouraging and rewarding post-sentencing efforts at rehabilitation.

The next major amendment to the relevant part of the statute came in 1992. Laws 1992, ch. 254:13. As pertinent to the issue in Surrell's case, the 1992 statute provided:

> [n]otwithstanding any other provision of law, except as provided in subparagraphs (a) and (b), the sentence to imprisonment of any person may be suspended, at the time of sentence unless otherwise ordered by the court, or at any time while any part of the sentence remains unserved, but a petition to suspend sentence may not be brought less than 2 years after commencement of said sentence nor more frequently that every 2 years thereafter.
>
> (a) Any person sentenced for any of the following violent crimes against a person listed in RSA 651:4-a

> shall not bring such petition to suspend sentence earlier than 4 years after commencement of said sentence nor more frequently than every 4 years thereafter.
>
> (b) A petition to suspend the sentence of any state prison inmate may be brought at any time upon the recommendation of the commissioner, department of corrections, or designee.

Laws 1992, ch. 254:13.

The 1992 statute retained the distinction between two types of suspension proceedings: one initiated by the court at any time, and the other initiated by a petitioner, subject to a waiting period. The 1992 version introduced two innovations into the scheme. First, with respect to the petitioner-initiated category, it established a separate sub-category of violent offenders, and lengthened to four years the waiting period applicable to them. Second, it permitted the Department of Corrections to file a sentence suspension request at any time.

Both innovations strengthen the inference that, increasingly, the law had shifted in its understanding of sentence suspension, from serving only as a means of correcting an erroneous initial sentencing decision to providing a mechanism for rewarding successful rehabilitation. The first innovation did so by treating violent offenders as a distinct sub-class whose rehabilitation presumably would take longer than that of non-violent offenders. The second innovation emphasized the rehabilitative orientation of sentence suspension by, for the first time, granting power to seek suspension to the Department of Corrections, the institution responsible on a daily basis for supporting and

assessing state prisoners' efforts at rehabilitation. Moreover, the department's authority to seek sentence suspension functioned as an exception to the two- and four-year waiting periods, in that paragraph (b) empowered the department to seek the suspension of the sentence of any prisoner – violent or non-violent – at any time.

In 1993, this Court decided State v. Roy, 138 N.H. 97 (1993), a case that warrants mention here. In 1976, a court sentenced Roy to a term of fifty years to life for murder, and thus by 1993 he had more than satisfied the 1992 statute's four-year violent-offender waiting period. After reviewing Roy's "four-page letter explaining why he believed he should be granted relief," the superior court denied the suspension request, "[n]oting the magnitude of the defendant's offense. . . ." Id. at 98. This Court did not directly address the propriety of that rationale, as its memorandum opinion on appeal focused on Roy's claim that the court erred in denying an evidentiary hearing.

Nevertheless, the Roy case suggests that, notwithstanding the growing significance of sentence suspension as a mechanism for rewarding rehabilitation, it remained possible, in 1993, to deny a motion to suspend on the ground alone that the interest in punishing serious crimes could not be reconciled with suspension in certain instances, no matter how successful the prisoner's rehabilitative efforts. Indeed, in requiring a violent offender to wait only four years before petitioning to suspend a sentence, the legislature could not have intended entirely to disallow, in sentence suspension proceedings, judicial consideration of the seriousness of the offense, for to do so would treat

alike offenders who occupy significantly different positions. The case of a violent offender sentenced to a term of five to ten years might be appropriate, after four years, for suspension of the remaining year of the minimum, in recognition of successful rehabilitation. On the other hand, the case of a violent offender sentenced to a term of fifty years to life almost certainly would not be appropriate for suspension, after four years, of the remaining forty-six years of the minimum, no matter how impressive the prisoner's rehabilitative efforts, because too small a part of the interest in punishment had yet been served.

Thus, though Roy waited about seventeen years after his 1976 sentencing before filing his 1993 petition, he had by then still only served approximately a third of his fifty-year minimum. In such circumstances, it cannot be denied that the legislature would intend to allow a judge to consider not just the quality of Roy's efforts at rehabilitation, but also the need for him to be punished appropriately for his crime.

In 1994, the legislature again amended RSA 651:20, introducing the most significant changes since 1981. In relevant part, the 1994 statute provided:

> [n]otwithstanding any other provision of law, except as provided in subparagraphs (a), (b), and (c), the sentence to imprisonment of any person may be suspended by the sentencing court at the time of imposition of the sentence or at any time thereafter in response to a petition to suspend sentence which is timely brought in accordance with the limitations set forth below in subparagraphs (a), (b), and (c).
>
> (a) Any person sentenced to state prison shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum

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> (b) A petition to suspend the sentence of any state prisoner may be brought at any time if, prior to the petition being filed, the commissioner of the department of corrections has found that the prisoner is a suitable candidate for suspension of sentence.
>
> (c) A petition to suspend the sentence of any state prisoner may be brought at any time by the attorney general in recognition of substantial assistance by the inmate in the investigation or prosecution of a serious felony offense.
>
> (d) Petitions filed which do not meet the criteria in (a), (b), or (c) above shall be dismissed without a hearing.

Laws 1994, ch. 129:1. The statute made four changes relevant to the issue in Surrell's case.

First, the statute abolished the separate category of court-initiated sentence suspensions that under the prior scheme could occur at any time while a part of the sentence remained unserved. The 1994 system preserved the authority of a sentencing court to suspend a sentence at the time of its pronouncement at a sentencing hearing. However, thereafter, a court could suspend a sentence only "in response to a petition . . . which is timely brought in accordance with the limitations set forth" in subparagraphs (a) through (c). See Petition of State, 152 N.H. at 213 (holding that court lacks authority to waive statutory waiting periods). This change ended the conception of sentence suspension as a way for a court, on its own motion, to correct a wrong initial sentencing decision.

Second, the 1994 statute changed the prior practice of defining the eligibility to petition by counting forward from the beginning of the service of the sentence by two or four years. Instead, the post-1994 system would count backward from the end of a sentence's minimum term, in requiring a prisoner, before petitioning, to serve at least two thirds of the minimum (and more than two thirds, in the case of prisoners with minimum sentences so short that the two-thirds mark would arrive earlier than four years into the sentence). This constituted a momentous change, with respect to the present issue, because it eliminated the possibility of a Roy-type petition, filed by a prisoner who had served so small a proportion of the minimum term as to render the suspension of the balance of the minimum inconsistent with the obvious demands of due punishment. By eliminating that Roy possibility, the 1994 statute eliminated the need for a judge, in considering whether to suspend a sentence, to assess whether a sufficient measure of punishment had yet been exacted.

In effect, one can understand the 1994 statute as attributing two-thirds of any minimum sentence to the interest in punishment, and the remaining one-third to the interest in rehabilitation. Accordingly, after reaching the two-thirds point in a sentence and upon demonstrating to the satisfaction of a judge that the work of rehabilitation and self-transformation has already been accomplished, a prisoner can gain the suspension of the balance of the minimum sentence. On that understanding, the question of whether the nature of the offense was such as to require further punishment beyond the two-thirds point of the minimum should not be asked. If the legislature deems a particular

crime so heinous as to require the completion of the entire minimum term in order to satisfy the demands of punishment, it can exempt those who commit such crimes from RSA 651:20. In a number of instances, the legislature has done so. See, e.g., RSA 159:3-a, III (armed career criminal offenders ineligible for RSA 651:20); see also State v. Farrow, 140 N.H. 473, 476 (1995) (holding that prisoners sentenced to life without parole for first degree murder are statutorily ineligible for sentence suspension under RSA 651:20).

Support for this interpretation appears in the legislative history of the 1994 revision. The motivation of the revision was to "reduce trauma to crime victims while still offering hope to truly reformed prisoners." N.H.H.R. Jour. 461 (1994). The revision reduced trauma to crime victims by ensuring that offenders would have to wait, before petitioning for suspension, until after serving at least two thirds of the minimum term. See Farrow, 140 N.H. at 476 (noting same motivation underlying 1992 revision's establishment of longer waiting period for violent offenders). The revision offered hope to truly reformed prisoners by creating an expectation that, after serving two thirds of their sentences, a persuasive demonstration of their reformation would result in the suspension of the remaining balance of their minimum, and thus empower the parole board at that time to grant parole, should it choose to do so.

Further inferential support appears in more recent decisions that refer to the propriety of granting relief under RSA 651:20 exclusively in terms of demonstrated rehabilitation. For example, in State v. Lecouffe, 152 N.H. 148, 153 (2005), the Court held that a sentencing court can impose conditions on

the grant of a suspension of a sentence under RSA 651:20. In Lecouffe, the conditions in question involved the completion of a certain rehabilitative program. Lecouffe, 152 N.H. at 149-50; see also Petition of State, 152 N.H. at 213 (similarly noting that court can grant petition to suspend sentence, "conditioned upon the occurrence of future events, such as the defendant demonstrating good behavior and completing treatment and/or education programs").

The most recent significant amendment to the relevant section of RSA 651:20 came in 2008. N.H. Laws 2008, ch. 114:1. The 2008 amendment made no change to the introductory paragraph in RSA 651:20, I, or to sub-paragraphs (b), (c), or (d). It amended sub-paragraph (a) to read as follows:

> (a) Any person sentenced to state prison for a minimum term of 6 years or more shall not bring a petition to suspend sentence until such person has served at least 4 years or 2/3 of his minimum sentence, whichever is greater, and not more frequently than every 3 years thereafter. Any person sentenced to state prison for a minimum term of less than 6 years shall not bring a petition to suspend sentence until such person has served at least 2/3 of the minimum sentence, or the petition has been authorized by the sentencing court. For purposes of this sub-paragraph:
>
> (1) For concurrent terms of imprisonment, the minimum term shall be satisfied by serving the longest minimum term imposed, and the maximum term shall be satisfied by serving the longest maximum term.
>
> (2) For consecutive terms of imprisonment, the minimum terms of each sentence shall be added to arrive at an aggregate minimum term, and the maximum terms of each sentence shall be aggregated to arrive at an aggregate maximum term.

RSA 651:20, I(a) (Supp. 2009).

In this revision of I(a), the legislature resolved a controversy about how to calculate eligibility to petition for relief under RSA 651:20 for prisoners serving consecutive stand-committed sentences. See State v. Duquette, 153 N.H. 315 (2006) (addressing issue); Horner, 153 N.H. at 310-11 (2006) (same). The only other notable change concerned the situation of prisoners serving relatively short prison sentences.

Under the statute's prior version, prisoners serving sentences involving minimums between four and six years received a proportionately smaller benefit from the opportunity codified in RSA 651:20, since they would have to serve a minimum of four years before petitioning, even if four years amounted to more than two thirds of their minimum sentence. Prisoners serving a minimum sentence of four years or less received no benefit from RSA 651:20, since they would reach parole eligibility anyway before serving (or at the time of completion of serving) the prior version's mandated four years.

The 2008 amendment eliminated that disparity by generalizing the two-thirds-of-the-minimum principle so that it applied to all state prisoners, regardless of whether they had also served at least four years. See N.H.S Jour. 843 (2008) (citing elimination of that "inequity" as motivation for revision). Indeed, in a certain respect the 2008 amendment uniquely advantaged prisoners serving relatively short sentences, by enacting the clause allowing sentencing courts to waive the two-thirds-of-the-minimum waiting period for prisoners serving minimum terms shorter than six years.

For example, under the prior version, a prisoner with a five-year minimum would have to wait the then-statutorily-mandated four-year period, even though four years is more than two-thirds of a five-year minimum. Under the 2008 version, such a prisoner need wait only two-thirds of five years (about three years and four months) before petitioning under RSA 651:20, I(a), and the sentencing court has the power to shorten the waiting period further. Under the 2008 version, as under the prior version, courts pronouncing minimum sentences of six years or more do not have that power to authorize petitions before the service of two-thirds of the minimum.

The 2008 amendment further supports an understanding of the statute that attributes two-thirds of any minimum term to the interest in punishment, and the remaining one-third to the interest in rehabilitation. See N.H.S Jour. 843 (2008) (referring to opportunity codified in RSA 651:20 as creating "incentive" to try to achieve parole). It stands to reason that the shorter the sentence, the less the need of punishment and the less self-transformation is required for the prisoner to achieve rehabilitation. But even short prison sentences bespeak a need for some punishment and some rehabilitation.

By generalizing the two-thirds principle to all prison sentences, the 2008 revision eliminated the peculiarity that had deprived prisoners serving relatively short sentences of the opportunity to benefit by RSA 651:20 in the same proportion as more serious offenders. No longer would prisoners serving a five-year minimum have to serve a full eighty percent of that minimum (four years) before satisfying the minimum demands of punishment under RSA

651:20. Indeed, the 2008 revision recognizes that, for relatively minor offenses resulting in relatively short prison sentences, a judge may legitimately decide that the interest in punishment is sufficiently small as to justify permitting such prisoners to satisfy it and gain release, upon demonstration of rehabilitation, even before completing two-thirds of a minimum term.

For the reasons stated above, the evolution of RSA 651:20 shows that the legislature now understands the outcome of a prisoner's petition for suspension after serving two-thirds of a minimum term to depend entirely on whether the prisoner has demonstrated successful rehabilitation. That being the case, a court errs when it denies a petition on the basis, even in part, of the nature of the offense conduct. This does not mean that a court considering suspension under RSA 651:20 can or should be ignorant of the offense conduct. Indeed, the offense conduct can help clarify and define what aspects of the prisoner's character and personality require rehabilitative transformation. But a court cannot decide, as the court here did, to deny the petition of a rehabilitated prisoner who has served two-thirds of the minimum term just because the offense conduct requires further punishment.

If this Court rejects that conclusion, Surrell contends, in the alternative, that the considerations described above at least lead to the conclusion that a court cannot deny relief under RSA 651:20 on the basis alone of the offense conduct. In other words, even if a court can weigh the need for further punishment for the offense conduct as a factor in the RSA 651:20 analysis, it must also weigh in the balance the nature and extent of the prisoner's

rehabilitative success. This alternative argument contends that, even if the 1994 revision did not have the effect of focusing the sentence-suspension analysis exclusively on rehabilitation, the revisions to RSA 651:20, viewed in their totality, at a minimum require a sentencing court to consider a prisoner's rehabilitation and weigh rehabilitative success against the need for further punishment.

In Surrell's case, the court did not do so. It acknowledged having information about Surrell's rehabilitation and identified no deficiency in his efforts. The court, though, made no finding about the quality of Surrell's rehabilitation. Instead, it said only that it had "carefully considered" the information presented and was "impressed" by it. Supp. 2. Ultimately, though, the court based its decision on "the punitive aspect of the original sentence." Id. In so reasoning, the court rejected the relevance of Surrell's rehabilitation as a factor by basing the denial entirely on the nature of the offense conduct, without also having made any finding of a need, or a lack thereof, for further rehabilitation.

Under Surrell's alternative position, if a court finds a need for further punishment, it must then make a finding as to whether a need also exists for further rehabilitation. If it finds no further rehabilitation necessary, the court must then weigh the need for further punishment against the lack of a need for further rehabilitation. The court's failure to do so in Surrell's case was error.

CONCLUSION

WHEREFORE, Mr. Surrell respectfully requests that this Court reverse the superior court's denial of his RSA 651:20 petition.

Though the Court has provisionally assigned the case to the 3JX docket, undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

Respectfully submitted,

By_____
Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

Criminal Bureau
New Hampshire Attorney General's Office
33 Capitol Street
Concord, NH 03301

_____
Christopher M. Johnson

DATED: October 18, 2017

SUPPLEMENT TO DEFENDANT'S BRIEF

SUPPLEMENT – TABLE OF CONTENTS

The State of New Hampshire
Judicial Branch

Court Name: Cheshire Superior Court

Case Name: State v. Jeremy Sewell

Case Number: 11-CR-45 213-2011-CR-00045

RECEIVED
CHESHIRE SUPERIOR COURT
2017 JAN 20 A 10:08

Motion to Suspend Sentence under RSA 651:20

The defendant, Jeremy Sewell, states the following facts and requests the following relief:

1. That upon a plea of (GUILTY) (NOT GUILTY), a judgment of conviction was rendered against the defendant by this court for violation(s) of [illegible].
2. That on May 24, 2012 this court sentenced the defendant to the care and custody of the warden of the New Hampshire State Prison to serve a term of imprisonment of 7 1/2 years - 15 years. The defendant's minimum parole date with this/these sentence(s) is September 9, 2019.
3. That since incarceration for this/these offense(s), the defendant has been an exemplary prisoner and further incarceration would serve no rehabilitative or other useful purpose.
4. That other mitigating circumstances are present which suggest that a suspension of the sentence, or a portion thereof, would be just and appropriate. [illegible]

WHEREFORE the defendant prays that:

1. The sentence(s) be suspended as provided by RSA 651:20.
2. A hearing be held on this motion in order that the defendant may present the necessary documentary and/or oral evidence to support this motion.
3. That the decision as to whether a hearing will be granted be reserved until the court receives the warden's synopsis so that a recommendation can be considered by the court in making its decision.
4. And for such further relief as this court deems right and just.

1-20-2017
Date

Jeremy Sewell
Signature

I certify that on this date I provided a copy of this document to the prosecutor's office by United States mail.

1-20-2017
Date

Jeremy Sewell
Signature

State of N.H., County of Merrimack

This instrument was acknowledge before me on [illegible] by Jeremy Sewell

My Commission Expires: JOHN E. PERKINS, Notary Public, State of New Hampshire, My Commission Expires September 16, 2020
Affix Seal, if any

John E. Perkins
Signature of Notary

Motion Denied. The offense conduct upon to the defendants own son do not warrant a lesser sentence.

David W. Ruoff, Presiding 3/6/17

updated 9.24.2015

Supp. 1

CLERK'S NOTICE DATED 3/16/17 BY: K Clowater/Dep

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

Docket #: 213-2011-CR-0045

State v. Jeremy Sorrell

ORDER ON Motion for Reconsideration

The Court carefully considered all of the mitigating evidence submitted by the defendant prior to denying his RSA 651:20 request.

The Court was impressed with the defendant's efforts while serving his sentence. However, the Court cannot ignore the punitive aspect of the original sentence, which is why the Court looked to the offense conduct when making its decision.

Therefore, the Court neither misapplied the law nor misapprehended any facts when denying the defendant's request.

The defendant's Motion to Reconsider is Denied.

4-3-17
Date

CLERK'S NOTICE DATED
4/6/17
CC: K. Clouatre / Def.

David W. Ruoff, Presiding Justice