THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT
2006

STATE OF NEW HAMPSHIRE

v.

ALEX GUILLERMO

No. 04-S-2353

and

STATE OF NEW HAMPSHIRE

v.

DANIEL OTERO

No. 05-S-0166

ORDER

The defendants, Alex Guillermo (No. 05-S-2353) and Daniel Otero (No. 05-S-0166), each stand indicted of one felony count of operating a motor vehicle after having been declared an habitual offender. See RSA 262:23 (2004). The defendants each filed a notice of intent to plead guilty, but have each also requested that the Court declare its authority as to whether it may order home confinement as a part of the sentence. The State here objects to any sentence involving home confinement because Hillsborough County and the Hillsborough County Department of Corrections

("HOC") have not established a home confinement program under RSA 262:23 and RSA 651:19 (Supp. 2005).[1]

Presently before the Court is the issue whether the statutory scheme that allows violators of RSA 262:23 the possibility of home confinement as an alternative to incarceration only in those counties which have themselves established appropriate home confinement programs violates the equal protection guarantees of the Federal and State Constitutions.[2]

I. Introduction

The current statutory home confinement scheme for habitual offenders is set forth in RSA 262:23 and RSA 651:19. In relevant part, RSA 262:23(I) provides,

> If any person found to be an habitual offender under the provisions of this chapter is convicted of driving a motor vehicle on the ways of this state while an order of the director or the court prohibiting such operation is in effect, he or she shall be guilty of a felony and sentenced…to imprisonment for not less than one year nor more than 5 years. No portion of the minimum mandatory sentence shall be suspended….Any sentence of one year or less imposed pursuant to this paragraph shall be served in a county correctional facility. The sentencing court may order that any such offender may serve his or her sentence under home confinement pursuant to RSA 651:19 based on the rules and regulations of the county correctional facility where the sentence is to be served for the minimum mandatory term or any portion thereof, provided the offender first serves 14 consecutive days of imprisonment prior to eligibility for home confinement....

RSA 651:19, entitled "Release for Purpose of Gainful Employment, Rehabilitation or Home Confinement," provides, "A sentencing court may order any person who has been committed to a correctional institution other than state prison under a criminal

[1] HOC has filed, in both cases, a Motion To Intervene For Limited Purpose Of Addressing Home Confinement Issue. By Order dated October 24, 2005, the Court deferred ruling on the Motion. In view of the Court's ruling herein, the Court denies HOC's Motions.

[2] The Court notes that while the defendants have not yet pleaded guilty, they have stated that they are prepared to do so. As such, the parties have agreed that the constitutional questions are properly before the Court because after the pleas, the sentencing issue regarding home confinement would inevitably arise.

sentence…to serve the sentence under home confinement, provided the correctional facility has a home confinement program."

In support of their positions, the defendants initially argued that (1) the current statutory scheme does not prevent this Court from placing the defendants in home confinement as a form of "strict probation," and (2) in the alternative, an interpretation of the statutory scheme related to RSA 262:23 that requires incarceration in Hillsborough County without eligibility for home confinement would violate the equal protection guarantees of the State and Federal Constitutions.

On August 12, 2005, however, and after the issues here raised were joined, the Supreme Court, in Petition of the State of New Hampshire (State v. Campbell), ___ N.H. ___ (Aug. 12, 2005) (Slip Op. at 5) ("Campbell"), held that "because the HOC... does not have a home confinement program under RSA 651:19, the trial court lacked authority to sentence the defendant [who had pleaded guilty to operating a motor vehicle while certified as an habitual offender and was subject to the mandatory minimum sentence] to anything less than the mandatory minimum sentence under RSA 262:23, which is one year of imprisonment in a county correctional facility." The Court further found that, under "the statutory scheme at issue[,]" it appeared that an electronic bracelet program is "a [necessary] component of home confinement under RSA 262:23 and RSA 651:19." Id.

The Campbell case thus establishes that this Court lacks authority to place the defendants here in "home confinement" under RSA 262:23 and RSA 651:19 as some form of "strict probation." The defendants' first argument is, in consequence, no longer open. In this regard the Court observes that both defendants are slated to plead guilty

to felony counts, and the minimum mandatory sentence provisions of RSA 262:23 are here implicated. The question that remains is whether the statutory sentencing scheme for violators of RSA 262:23 is unconstitutional because defendants (like those here) prosecuted in counties where the correctional facilities do not have electronic bracelet programs (like HOC) are denied the possible alternative to incarceration of home confinement that comparable defendants living in counties with such electronic monitoring programs enjoy.

As to this remaining issue, the defendants further assert that the Legislature's unequal treatment between counties of otherwise similarly situated persons affects an important substantive right, that is, a direct significant liberty interest. Therefore, the defendants maintain that the Court should review the statutory home confinement scheme under New Hampshire's intermediate scrutiny equal protection standard, that is, determine whether the county-based distinction is reasonable, not arbitrary, and rests upon some ground of difference having a fair and substantial relation to the object of the legislation.

In seeking to apply this standard, the defendants point to the policies related to the State's overall treatment of habitual offenders, as declared in RSA 262:18. There:

> [i]t is…declared to be the policy of New Hampshire:
> I. To provide maximum safety for all persons who travel or otherwise use the ways of the state; and
> II. To deny the privilege of driving motor vehicles on such ways to persons who by their conduct and record have demonstrated their indifference for the safety and welfare of others and their disrespect for the laws of the state, the orders of her court and the statutorily required acts of her administrative agencies; and
> III. To discourage repetition of criminal acts by individuals against the peace and dignity of the state and her political subdivisions and to impose an increased and added deprivation of the privilege to drive motor vehicles

> upon habitual offenders who have been convicted repeatedly of violation of traffic laws.

RSA 262:18 (2004). According to the defendants, "this statute indicates that the legislature was concerned about *state-wide* behavior and *state-wide* consequences for misbehavior." (Defs.' Mem. Of Law: Habitual Offender Sentencing at 5) ("Defs.' Mem.") (emphasis in original). The defendants thus maintain that sentencing for habitual offender "defendants is a matter for state, and not local concern, and there is nothing whatsoever in the purpose of the ...[habitual offender] statute that indicates why the state might wish to allow punishments for... [habitual offender] violations to differ on a county-by-county basis." (Defs.' Mem. at 7.) In discussing the pertinent legislative history, moreover, the defendants contend that the "legislative history utterly fails to show how the Legislature connected these goals with its means of allowing counties to punish this crime differently from one another." Id.

Alternatively, the defendants maintain that even if the rational basis equal protection test is applied, no rational basis exists for the disparate treatment of habitual offender defendants in different counties. Finally, the defendants submit that because the statutory scheme is unconstitutional, the Court should, as a remedy, strike the language, "provided the correctional facility has a home confinement program" from RSA 651:19.

The State objects, arguing that, because the defendants would be convicted of a crime, there is no direct significant liberty interest at stake. Thus, the State argues the rational basis equal protection test should be applied. Applying the rational basis test, the State contends that "the classification created, that a defendant can be sentenced to home confinement if the county has the program available, is rationally related to

reducing the county's expenditures of creating and maintaining a new program, which is a legitimate state interest." (State's Supplemental Mem. Of Law: Habitual Offender Sentencing at 5) ("State's Mem.").[3] In the alternative, the State maintains that even if the classification affects an important substantive right and the fair and substantial relation equal protection test is applied,

> [t]he classification in question bears a fair and substantial relationship to the legislative goal of preserving to each county it's [sic] autonomy to create and maintain their [sic] own correctional facility programs as they [sic] see appropriate for their [sic] particular area. Furthermore, the classification bears a fair and substantial relationship to Hillsborough County's concern that the creation and maintenance of a habitual offender program will be a significant burden on the County's finances and allocation of resources of the Hillsborough House of Corrections.

Id. Finally, the State argues that if the statutory scheme is found unconstitutional, "the Court is left with the remedy of striking RSA 651:19 in its entirety" to avoid creating an unfunded mandate in violation of Part I, Article 28-a of the New Hampshire Constitution. Id. at 14.

II. Analysis

"Federal equal protection offers no greater protection than our State equal protection guarantee." In re Sandra H., 150 N.H. 634, 637 (2004) (citations omitted). "[T]he equal protection guarantee of the New Hampshire Constitution does not forbid classifications, but requires [an examination of] the rights affected and the purpose and scope of the classification." Winnisquam Reg'l Sch. Dist. v. Levine, ___ N.H. ___ (Aug. 18, 2005) (Slip. Op. at 3) (citing LeClair v. LeClair, 137 N.H. 213, 222 (1993) and In re

[3] In support of its argument, the State has submitted various tables documenting the population of the various counties in New Hampshire, as well the population of each county's correctional facility. (State's . Mem. at 6-12.)

Sandra H., 150 N.H. at 638). Thus, "[t]he issue is whether a difference in treatment is constitutionally permissible." Winnisquam, ___ N.H. ___ (Slip. Op. at 3).

In harmony with the equal protection analysis used by the federal courts, see Follansbee v. Plymouth Dist. Court, 151 N.H. 365, 367 (2004) (citation omitted), this Court must

> first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected. Classifications based upon suspect classes or affecting a fundamental right are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be necessary to the accomplishment of its legitimate purpose. Classifications involving important substantive rights must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation….Finally, absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.

In re Sandra H., 150 N.H. at 637-38 (quotations and citations omitted).

The defendants contend that the statutory scheme affects a direct and significant liberty interest, and therefore, the Court should apply the fair and substantial relation test. The State argues that because the defendants would be convicted of a crime before the Court imposed a sentence, no such direct and significant liberty interest is at stake. The Court agrees with the State.

In Petition of Hamel, 137 N.H. 488, 491-92 (1993), the New Hampshire Supreme Court addressed whether a classification denying the petitioner post-conviction bail violated equal protection under the State and Federal Constitutions. In that case, the petitioner had argued that his fundamental right to liberty was at stake, and therefore, strict scrutiny should have been applied. 137 N.H. at 491. The Hamel Court disagreed, noting that the petitioner had "cite[d] no authority for characterizing as fundamental his

interest in liberty after conviction" and had "overlook[ed] a decision of [the New Hampshire Supreme Court] in which [it] found no fundamental liberty interest despite the inevitability of incarceration flowing from the classification at issue." Id. (citing State v. DeFlorio, 128 N.H. 309, 314-15 (1986) (where the court applied the rational basis test, rejecting the defendant's apparent assumption that the middle tier test applied)). The Hamel Court explained, "Contrary to the petitioner's contention, the right at issue is not the broad right to liberty; the petitioner lost that right upon conviction of a felony….Whatever right he has to be free from incarceration post-conviction is subject to the discretion of the legislature in the first instance." Id. (citations omitted). Thus, the Hamel Court stated, "While the petitioner may be interested in his liberty after conviction, this is not an interest that the law regards as fundamental." 137 N.H. at 492. The petitioner in that case, however, did not argue that the classification at issue involved an important substantive right under the State Constitution. Id. Therefore, the Hamel Court applied the rational basis test to the issue before it. Id.

In DeFlorio, the New Hampshire Supreme Court applied the rational basis test when assessing an equal protection challenge to a statute that subjected minors over the age of sixteen to adult process and penalties, including incarceration, for motor vehicle misdemeanors. 128 N.H. at 314-15. In so doing, the Court expressly rejected the position that intermediate review would apply.

In State v. Tester, 879 S.W. 2d 823, 828 (Tenn. 1994), (the only case this Court has found that involved a constitutional challenge to a release-type program in a comparable set of circumstances to those present here), the Tennessee Supreme Court, in addressing an equal protection challenge to a work release statute, applied

rational basis review. In using this test, the Tester Court reasoned that "[a]lthough the right to personal liberty is fundamental, that right is not implicated after a person is convicted of a crime and the only issue is the manner of service of the sentence imposed." 879 S.W. 2d at 828 (citations omitted). The Tester Court further explained that "work release…is…a privilege and not a right." Id.

Similarly, the defendants in this case will have been convicted of a crime under the laws of New Hampshire. They will have thus lost that right to liberty that they possessed prior to conviction. RSA 262:23 basically provides, among other things, that a person deemed to be a felony habitual offender, like each defendant here, is subject to a minimum sentence of one year. The statute further states that if the sentence is for just one year, that sentence is to be served in the county correctional facility, with, however, the sentencing court having the discretion to allow such an offender to serve a portion of his/her sentence under home confinement based on the rules of the county correctional facility. This statute does not *entitle* the offender to home confinement. Rather, under RSA 651:19, which is notably located under the section entitled "Discretionary Sentences," the Court has the discretion to permit the offender to serve a portion of the sentence pursuant to a home confinement program. Thus, like work release, home confinement is not a right, but a form of privilege. See RSA 651:19 (addressing "release for purpose of gainful employment" in same section as "home confinement," both listed under "Discretionary Sentences"). Moreover, once the defendants plead guilty, whether they would receive home confinement goes only to the manner in which they will serve, in part, their sentences.

Therefore, and particularly upon consideration of the discussions in Hamel, DeFlorio and Tester, the Court concludes that the defendants do not here raise issues that implicate a direct significant liberty interest - - that any remaining liberty interest they would have after conviction would not rise to the level of an important substantive right. The rational basis test shall thus be applied.

The defendants cite Stapleford v. Perrin, 122 N.H. 1083, 1088 (1982), to support their argument that intermediate equal protection review should here pertain. In Stapleford, the New Hampshire Supreme Court addressed the *due process* that is required to deal with such matters as *revocation* of a suspended sentence and later sentencing in regard to convictions "Continued for Sentence." Id. The Stapleford Court held that "when the court retains the power to impose incarceration at a later time, the defendant has been afforded liberty, albeit conditional, which may not be revoked without due process." 122 N.H. at 1088. The Stapleford Court characterized the defendant's liberty interest in those circumstances to be a "significant" one, "worthy of due process protection." Id.

In State v. LeCouffe, 152 N.H. 148 (2005), the New Hampshire Supreme Court dealt with challenges to a trial court's decision requiring a defendant, who was incarcerated at the time, to complete a substance abuse treatment program equivalent to the discontinued Summit House program before it would grant the defendant's request for a suspension of all or a portion of his sentence. In applying Stapleford, the LeCouffe Court found that the trial court had not, in so doing, acted in violation of the defendant's right to due process. The Court stated in that regard:

> While we have found that when a trial court retains the power to impose incarceration at a later time, the defendant has been afforded liberty, albeit

> conditional, which may not be revoked without due process, it is quite another matter to hold than an *incarcerated* defendant has an equal liberty interest in *gaining* his freedom. There is a crucial distinction between being deprived of a liberty one has and being denied a conditional liberty that one desires.

LeCouffe, 152 N.H. at 152 (quotations and citations omitted) (emphasis in original).

Stapleford was clearly a due process case dealing with a situation where the State conferred some privilege to an offender, and then at some later point, wished to revoke that grant. Here, the defendants have not yet been provided with the privilege of home confinement. They have not yet been *afforded* any arguable liberty interest that may not be revoked without due process. Thus, the significant liberty interest dealt with in Stapleford is not involved here. In any case, as demonstrated by the reasoning in both Stapleford and LeCouffe, the underlying assumption in Stapleford appears to be the notion that an offender, post-conviction, lacks any arguable significant liberty interest until the State affirmatively grants that offender some privilege. Therefore, Stapleford does not call for application here of a higher equal protection test than that of rationality.

"Especially in the area of the enactment of police laws, the legislature enjoys a wide scope of discretion, assailable as violative of equal protection only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective, and therefore is purely arbitrary." Hamel, 137 N.H. at 492 (quotations and citations omitted). "Under the rational basis test, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest….Under the rational basis analysis, the party challenging the legislation has the burden to prove that whatever classification is promulgated is

arbitrary or without some reasonable justification." Hamel, 137 N.H. at 491 (quotations and citation omitted).

The State asserts that the classification created by the statutory scheme here at issue "is rationally related to reducing a county's expenditures of creating and maintaining a new program, which is a legitimate state interest." (State's Mem. at 5.) According to the State, "[p]reserving the resources of the county is a legitimate state interest." Id.

In regard to the pertinent legislative history,[4] (Defs.' Mem. at Ex. A, at 30.) the bill introducing what came to be amendments to RSA 651:19 and RSA 262:23, effective January 1, 2004, was entitled, "Senate Bill 130 relative to county department of corrections." Id. On February 19, 2003, the Senate Committee on Executive Departments and Administration ("the Senate Committee") held a hearing regarding Senate Bill 130. Id. At the hearing, James O'Mara, the Superintendent of HOC, stated he was testifying on behalf of "the ten county correctional superintendents from across the state." Id. at 31. Mr. O'Mara stated that the bill would assist the county correctional superintendents in meeting their responsibilities to the offenders. Id. Specifically, Mr. O'Mara explained that the proposed revisions were "designed to afford county correction superintendents with a more active role in the decision making process as to who and who are not the most appropriate inmates to leave the secure setting of a county correctional facility to go into community based programs such as work release

[4] In 2001, the Legislature had inserted language in RSA 262:23 and RSA 651:19 to provide habitual offenders serving a minimum mandatory sentence the possibility state-wide of serving a portion of their sentences under home confinement. The amendments here at issue became effective in 2004, and altered the pertinent statutes to allow home confinement only if the involved county correctional facility has such a program. Therefore, the Court addresses the legislative history regarding the 2004 revisions to the statutory home confinement scheme.

and home confinement." Id. Mr. O'Mara presented the Senate Committee with "a supporting document" pertaining to the proposed bill that, on one side, listed the old statute with highlighted revisions and, on the other side, provided a "description" of those revisions. Id. at 51-72.)

As advanced by Mr. O'Mara, the proposed bill sought, among other things, to revise RSA 262:23 by removing from the sentencing court the power to order that an offender serve a portion of his or her sentence under home confinement. Id. at 62. The revision not merely deleted previous statutory authority for a sentencing court to order an offender to serve a portion of his or her sentence under home confinement, but referenced home confinement as a "program" option not a "sentence". Id. The accompanying "description" to the proposal provided that the "amendment remove[d] the courts [sic] ability to sentence an offender to a 'program' within the county correctional facility." Id. The description further explained, "Home confinement is not a sentence – it is a corrections custody level. Public safety could be compromised when unsuitable offenders are court-ordered to home confinement." Id. (emphasis in original).

The proposed textual revisions to RSA 651:19 also removed from the sentencing court the power to allow an offender to serve any part of the sentence under home confinement. Id. at 72. Instead, the proposal stated that home confinement may be *recommended* by the sentencing court. Id. Further, if the offender violated the terms and conditions of his custody, the proposal provided that the offender would be returned to the correctional facility, not to the sentencing court, and that the superintendent, not the sentencing court, may then require the offender to spend the balance of his or her sentence in actual confinement. Id. The proposal also specified that home confinement

may be utilized in connection with a sentence to "a correctional institution other then state prison [only]… provided the correctional facility has a home confinement program and the superintendent agrees the person is appropriate for the program". Id. The proposal described these alterations as amendments that "remove[d] the court from county correction's inmate management and require[d] superintendents to determine which offenders are appropriate to participate in a work release program." Id.

Moreover, other portions of the proposal dealt with certain additional statutory provisions concerning the duty and role of a county corrections superintendent as well as prisoner management. In that regard, and, for example, in the "description" for the proposed amendment to RSA 504-A:5, the section regarding "Detention of Violators," it was advanced, among other things, that "[c]ounty corrections superintendents are accountable for the effective and efficient operation of the county department of corrections" and that "[t]he average daily cost for managing a prisoner in a county correctional facility is approximately fifty ($50) dollars." Id. at 64. Further, the description for the proposed amendment to RSA 618:6, entitled "Place of Committal," averred that "[c]ost controls and prisoner management are functions of the county correction superintendents and not the courts." Id. at 65.

At the February 19, 2003 Senate Committee hearing, the county correctional facility representatives apparently fully supported the proposed bill, except for the Strafford County representative. Moreover, Representative William Knowles, "representing Strafford District 69" clearly opposed the portions of the proposed bill that are pertinent here. Id. pp. 35-37. Representative Knowles expressed his concern as to the bill's proposed revision to RSA 651:19, which as presented, conditioned the

availability of home confinement on whether "the correctional facility has a home confinement program and whether the superintendent agrees that the person is appropriate for the program." Id. at 36, 72. Representative Knowles testified, "We have had this home confinement in existence for a great many years. Many of the counties do have a home confinement program. Why the others do not, I will never understand because there's a tremendous savings involved there. To say we'll do it if we have a program just doesn't make sense." Id. at 36-37.

After the February 19, 2003 Senate Committee hearing, and In a "Fiscal Note" for SB 130, revised February 27, 2003, it was stated that, according to the Association of Counties, the bill "[was] likely to reduce the number of bed days some individuals are incarcerated… [,would] reduce some inmate transportation costs for county sheriffs and court time for county attorneys … [, and would] assist in the administrative cost associated with inmate care." Id. at 43.

On May 20, 2003, the House Committee on Criminal Justice and Public Safety ("the CJPS") voted to recommend passage of Senate Bill 130 with amendment. Id. at 44. This occurred after prior amendments had been made both in the Senate and the House. The House Committee on Municipal and County Government had expressly dealt with the bill. The CJPS held another public hearing on May 20, 2003, and made further amendments at that time "to satisfy all [remaining] concerns." Id. The CJPS had monitored the bill through the entire legislative process. Id. In its "Statement of Intent," the CJPS explained, among other things,

> SB130 as amended will allow the sentencing court to order an inmate to a home confinement program if such facility has a home confinement program. It further allows the superintendent discretion if he, the superintendent, deems an inmate is inappropriate for the program [sic] he then notifies the sentencing court and at

> the request of the inmate a hearing may be scheduled. The amendment includes clarifying the terms of what a home confinement program is. Finally, the amendment also allows an inmate, who was on a home confinement program, to now also be eligible for reduced sentencing, or an early release, upon having served his or her time with good behavior. All parties appear to be satisfied with the amended bill.

Id. As stated previously, the pertinent amendments became effective on January 1, 2004.

The above legislative history indicates that the pertinent amendments were enacted as significant components of a package of measures seeking to improve or enhance the ability of county correctional authorities to effectively meet prisoner maintenance needs and concerns. The amendments reflect particular concern or regard for the State's county-based correctional system, and, in that context, allow county authorities dealing with correctional facilities discretion to decide whether or not to have a home confinement program for purposes of RSA 262:23. The legislation expressly characterizes home confinement under RSA 262:23 to be a program – an alternative to incarceration program that may or may not be available in a particular county depending on that county's decision to have such a program in place in dealing with its particular inmate-related administrative and maintenance operations.

While Hillsborough County is this State's most populous county with, also, the most prison inmates, the counties greatly vary in terms of both total and prison populations. (See State's Mem. at 6-12.) In consequence, the implementation, administration, and maintenance of a home confinement program in Hillsborough County may pose different problems, challenges, and concerns in connection with county administrative oversight and/or costs than may be experienced by other counties. Thus, the Legislature reasonably could have determined that allowing county

authorities dealing with correctional facilities discretion to determine whether to expend resources to maintain and administer a home confinement scheme would assist this State's county-based correctional system in effectively and cost efficiently managing inmate treatment and care.

In Opinion of the Justices (Misdemeanor Trial *De Novo*, 135 N.H. 549, 553 (1992), the New Hampshire Supreme Court analyzed whether a classification in a proposed senate bill that would enact a pilot program allowing for trial *de novo* for misdemeanor defendants in some counties, but not allowing for the option in other counties, violated equal protection strictures. The Justices explained that "the bill ensure[d] that each defendant retain[ed] the right to a jury trial" and that "[t]his right [did] not include the option to specify where and when the right [would] be executed." Misdemeanor Trial *De Novo*, 135 N.H. at 553. The Court thereupon applied the rational basis test, and in analyzing the equal protection claim, noted that "[e]ven where no pilot program is used to justify a territorial discrepancy in the administration of justice, courts have often upheld intra-state differences if persons within each territory were treated alike and constitutional protections were not otherwise abridged." Id. at 554 (citations omitted). Thus, "[a] state may establish one system for one portion of its territory and another system for another portion." Id. (quotations and citations omitted).

Similarly, in this case, while the defendants are of course entitled to many important rights, they do not have the right to specify where and when they will serve their sentence. These defendants are being treated exactly as other violators of RSA 262:23 in Hillsborough County. As stated earlier, home confinement is a form of privilege, or an alternative sentence-related program, not a right-- and other than the

defendants' equal protection argument, no other constitutional protections are arguably being abridged by the statutory scheme. Therefore, as stated earlier, population differences coupled with the differences in challenges that each county faces with regard to its prisoners in the context of the State's county-based correctional system, provides rational basis justification for this territorial classification.

To be sure, while the Tennessee Supreme Court in Tester found that no real direct liberty interest existed post-conviction, it also concluded that the work release statute there at issue violated both State and Federal equal protection guarantees. 879 S.W. 2d at 827-30. This statute "allow[ed] persons convicted of second offense driving under the influence of a drug or intoxicant to serve the mandatory 45-day jail sentence in a work release program[,]" but limited the work release option only "to counties with a population of more than 700,000 and counties with a metropolitan government…." Tester, 879 S.W.2d at 825-26. In effect, however, the statute made work release available only in three counties of a total of 95, with one of the three counties being the second smallest in the State and none having been convincingly shown to have greater jail overcrowding problems than other counties. In this context, the Tester Court found that the work release statute there did not pass the rational basis equal protection test in its delineation of specific counties in which such release would be allowed. Id. at 827-30. The Court concluded, " the State has failed to demonstrate any rational basis for the classification or to advance a hypothetical state of facts to support the classification, nor can we conceive of a reasonable basis for the classification at issue." Id. at 829-30.

In the instant case, the State has presented the Court with evidence regarding the general population of the counties as well as the population of the county

correctional facilities, and nothing in that evidence undermines the legislation here challenged. Significantly, the home confinement statutory scheme at bar does not specifically delineate which counties shall implement such a program; rather, it allows for the possibility that all counties or no counties will have one. While the impact appears to be that some persons in certain counties who are convicted under RSA 262:23 will be eligible for home confinement treatment while others in other counties will not, the Court deems that the legislation, in allowing for such distinctions, is not arbitrary, but is rationally related to furthering a legitimate state interest, that of obtaining more effective management and local control in the State's county-based corrections system. Thus, the Court concludes that the statutory home confinement scheme here is constitutional and does not deny equal protection constitutional guarantees.

Even assuming that the home confinement statutory scheme affects a direct significant liberty interest, and thus requires application of the fair and substantial relation equal protection test, the Court concludes that the scheme does not abridge equal protection rights.[5] Under this test of intermediate review, the Court must determine "whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation." Winnisquam, ___ N.H. ___ (Slip. Op. at 3) (citation omitted). However, "[i]n applying this test," the Court is not required to "examine the factual basis relied upon by the legislature as justification for the statute." Id. Thus, "[i]n the absence of a suspect classification or a fundamental right, courts will not second-guess the legislature as to the wisdom of or necessity for legislation. [The] sole inquiry is whether the legislature could reasonably conceive to be

[5] As to intermediate scrutiny, the Court observes that the statutory scheme at bar does pertain to eligibility for a limited form of conditional liberty, that is a "home confinement program" constituting a strictly controlled alternative to full incarceration. See RSA 651:19.

true the facts on which the challenged legislative classifications are based." Id. (quotations and citations omitted).

In their argument, the defendants cite RSA 262:18, as setting forth state-wide policies with respect to habitual offender treatment which they assert are not served by the statutory scheme they here challenge. The Court finds the defendants' argument in this regard without much force because the policies announced in RSA 262:18 do not directly or specifically deal with the punishment options or sentence-related mechanisms involved with RSA 262:23.

In applying intermediate review to this case, the Court may not second-guess the Legislature's wisdom in providing county correctional authorities, in the context of RSA 262:23 and RSA 651:19, discretion to have home confinement programs. Rather, as stated previously, the Court concludes that the Legislature, in enacting the amendments in question, reasonably could have determined that each county faces different challenges and concerns in financing and/or administering critical facility operations, which may impact a particular county's decision to implement, or have, a home confinement program under RSA 262:23 and RSA 651:19.

Again, the pertinent statutes here treat home confinement as a program, that is, a means under which a sentence may be carried out; and, again, the statutory scheme draws its justification from the legislative conclusion that New Hampshire's counties merit some measure of discretion in their handling of prisoners through programs such as home confinement with respect to achieving fair and effective sentencing under RSA 262:23. In this context, that of according due respect to this State's county-based correctional system, the Court deems the classification, or difference in home

confinement eligibility which results from the statutory provisions, to be reasonable, not arbitrary, and to rest upon a ground of difference bearing a fair and substantial relation to the object of the legislation.

III. Conclusion

Accordingly, and for the reasons stated above, the Court concludes that the statutory home confinement scheme does not violate equal protection under either the State or Federal constitution.[6] Therefore, the defendants' requests for home confinement would be DENIED, unless HOC has an appropriate home confinement program in place at the time of sentencing.

SO ORDERED.

Date: 3/1/06

JOHN M. LEWIS
Presiding Justice

[6] The Court expressly notes that it has reached the same result under both the State and the Federal Constitutions. See Estate of Robitaille v. N.H. Dep't of Rev. Admin., 149 N.H. 595, 599 (2003).