THE STATE OF NEW HAMPSHIRE
SUPREME COURT

DECEMBER SESSION
2005 TERM

No. 2005-0353

State of New Hampshire

v.

Chad Evans

No. 2005-0354

Petition of Chad Evans

Appeal Pursuant to Rule 7 from Judgment
of the Strafford County Superior Court
and Rule 11 from Order of the Sentence Review Division

BRIEF FOR CHAD EVANS

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(15 Minutes Oral Argument)

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TEXT OF RELEVANT STATUTES:

New Hampshire RSA 651:58 Application for Review.

I. Any person sentenced to a term of one year or more in the state prison, except in any case in which a different sentence could not have been imposed, or the state of New Hampshire, may file with the clerk of the superior court for the county in which the judgment was rendered an application for review of the sentence by the review division. The application may be filed within 30 days after the date the sentence was imposed, but not thereafter except for good cause shown. The filing of an application for review shall not stay the execution of the sentence.

QUESTION PRESENTED

Whether the State can appeal Evans's sentence under the new sentence review statute, RSA 651:58, I, where the statute was not in effect at the time of the underlying offenses, and the trial court did not inform Evans of the statute at the time of his sentencing.

Issue preserved by Motion to Dismiss State's Petition for Sentence Review, App. at A3-32; State's Objection, App. at A33-35; court's order denying motion, App. at A42-43; Motion for Declaratory and Injunctive Relief, App. at A45-50; State's Objection, App. 51-57; court's order denying motion, App. at A58; and Sentence Review Division's order increasing Evans's sentence, App. 1.

*App. designates the appendix to this brief.

STATEMENT OF THE CASE AND FACTS

In these consolidated appeals, from orders of the Strafford County Superior Court (Mohl, J.) and the Superior Court Sentence Review Division (hereinafter "the Division"), Chad Evans challenges the State's authority to appeal his sentences for second degree murder and second degree assault.

On December 14, 2000, a Strafford County grand jury indicted Evans with second degree murder and multiple counts of second degree assault. App. at A10. The same day, the State filed an information alleging endangering the welfare of a child. App. at A10. In each case the alleged victim was 21-month old Kassidy Bortner, the daughter of Evans's girlfriend Amanda. App. at A10.

A jury convicted Evans on December 21, 2001. App. at A10. On April 16, 2002, the trial court (T. Nadeau, J.) sentenced Evans to serve 28 years to life on the second degree murder charge, and to suspended terms on the felony assault and endangering charges. App. at A3. Three days later, the State filed an application for sentence review pursuant to RSA 651:58, I (effective January 1, 2002). App. at A3. On October 24, 2002, the Division denied the State's petition, citing Evans's due process rights, because he "was not informed at sentencing in plain and uncertain terms that the state could seek an enhancement of his sentence." App. at A10-11.

When the Division denied the State's motion to reconsider, the State filed a petition for writ of certiorari in this Court,

asking it to rule that the Division had no authority to rule on the constitutionality of RSA 651:58, I as it applied to Evans. Petition of the State of New Hampshire (Sentence Review Division), 150 N.H. 296, 297 (2003). The Court agreed with the State and vacated the Division's order dismissing the State's petition. Id. at 299. However, the Court did not rule on the constitutional issue that the Division decided, or any of the other substantive arguments set forth in the parties' briefs. Id.

In an opinion dated December 30, 2003, the Court rejected Evans's direct appeal of his convictions. State v. Evans, 150 N.H. 416 (2003). The Division scheduled a hearing on the State's sentence review petition on September 17, 2004. App. at A4. On September 2, 2004, Evans filed a motion to dismiss the petition in Strafford County Superior Court. App. at A3-32. In that motion, Evans proffered the same challenges to the application of RSA 651:58, I that he made in his brief in opposition to the State's petition for writ of certiorari, and attached a copy of that brief to the motion. App. at A3-32.

The same day, Evans filed a motion asking the Division to stay the September 17 hearing pending the superior court's ruling on his constitutional challenges to the application of RSA 651:58, I. App. at A36-38. The State objected to both motions. App. at A33-35, A39-41. The Division denied the motion to stay, and held the hearing on September 17 as scheduled, but agreed to

hold its decision in abeyance pending the superior court's ruling on Evans's constitutional challenges to the statute. App. at A44. On December 6, 2004, the superior court denied the motion to dismiss, ruling that Evans's request for relief was not ripe unless the Division increased his sentence. App. at A42-43.

Evans then filed in superior court a motion for declaratory and injunctive relief, arguing that he was entitled to a ruling on the constitutional issues he raised before the Division released its decision. App. at A45-49. The State objected, and the superior court denied the motion. App. at A51-58. In its order, dated April 19, 2005, the court ruled that if the Division increased Evans's sentence, he could appeal that ruling to this Court. App. at A58.

By order dated April 26, 2005, the Division imposed a sentence of 5-10 years in prison on one count of second degree assault, consecutive to the 28-life sentence for murder. The Division imposed an additional 10-30 year sentence on another count of second degree assault, consecutive to each of the above sentences. App. at A1. Accordingly, the Division increased Evans's minimum term of imprisonment from 28 to 43 years. Evans now asks this Court to vacate the Division's April 26 order, because RSA 651:58, I, as applied to his case, is unconstitutional.

SUMMARY OF THE ARGUMENT

RSA 651:58, I, the statute that gives the State the ability to appeal sentences to the Division, is unconstitutional as applied to Evans, since Evans committed the offenses, and had his trial, before the statute became effective.

Three arguments support Evans's claim for relief. First, as a matter of statutory construction, the new statute should not apply retrospectively because it affects substantive, rather than merely procedural, rights. Second, retrospective application of the new statute would violate the state and federal prohibitions against ex post facto laws. Finally, because the trial court failed to notify Evans of the existence of the statute at the time of his sentencing, its application would violate his rights under the due process and double jeopardy clauses.

For any of these reasons, this Court must vacate the Division's order increasing Evans's sentence, and reinstate the sentence imposed by the trial court on April 16, 2002.

I. THE STATE CANNOT APPEAL EVANS'S SENTENCES UNDER THE NEW SENTENCE REVIEW STATUTE, RSA 651:58, I, BECAUSE THE STATUTE WAS NOT IN EFFECT AT THE TIME EVANS COMMITTED THE UNDERLYING OFFENSES, AND THE TRIAL COURT DID NOT INFORM EVANS OF THE STATUTE AT THE TIME OF SENTENCING.

The issue presented by this appeal is whether the State may ask the Division to review Evans's sentences for second degree murder and second degree assault, where the acts underlying those sentences occurred before the effective date of RSA 651:58, I, the statute that afforded the State the right to seek sentence review. For several reasons, this Court should rule that RSA 651:58, I does not apply to Evans, and therefore, it must vacate the increased sentences imposed by the Division. First, under settled principles of statutory construction, the new sentence review statute may only be applied prospectively. Second, retrospective application of the sentence review statute violates Evans's constitutional right to be protected against ex post facto laws. N.H. Const. pt. I, art. 23; U.S. Const. Art. 1, §10. Finally, application of the statute to Evans violates his due process right to notice of the possibility that his sentence could be increased at a later date, and his double jeopardy right to be protected against being punished twice for the same offense. N.H. Const. pt. I, art. 15; U.S. Const. Amend. V.

A. Under settled principles of statutory construction, the sentence review statute only applies to offenses committed after its effective date.

RSA 651:58, I provides that "[a]ny person sentenced to a term of one year or more in the state prison, . . ., or the State of New Hampshire, may file with the clerk of the superior court for the county in which the judgment was rendered an application for review of the sentence by the review division." (Emphasis added). The highlighted language was not effective until January 1, 2002, well after Evans committed the offenses underlying his sentences. If the Legislature does not specify that a statute applies retroactively, and if the statute affects substantive rights, it will only apply to acts occurring after the date of its enactment. State v. Hamel, 138 N.H. 392 (1994); State v. Johnson, 134 N.H. 570 (1991); see also, In re Donovan, 152 N.H. 55, 63 (2005)("In the final analysis, however, the question of retrospective application rests on a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice.")(quotation and bracket omitted).

It is not always easy to determine whether a statute affects substantive or procedural rights. "While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task." Landgraf v. USI Film Products, 511 U.S. 244, 268 (1994). The Landgraf Court quotes Justice Story's formulation, which

characterizes as substantive "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . ." 511 U.S. at 269 (quotation and citations omitted). See also, Eldridge v. Eldridge, 136 N.H. 611, 615 (1993)(quoting similar language in Woart v. Winnick, 3 N.H. 473, 479 (1826)). Ultimately, however, the Landgraf Court concludes that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." 511 U.S. at 270. According to the Court, the decision of whether a statute affects substantive rights is to be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations. . . ." Id. at 270.

The First Circuit looked to "reasonable reliance" and "settled expectations" in the context of analyzing whether statutes governing deportation applied retrospectively. Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999). In Wallace, two aliens committed deportable offenses. Id. at 281-82. At the time they committed the offenses, a statute permitted them to seek deportation waivers from the Attorney General. Id. Before they actually sought the waivers, a change in the law severely decreased the possibility of getting a waiver. Id. The aliens alleged the new statute could not apply retroactively, and the

First Circuit agreed. According to the Wallace Court, "the change could certainly have a direct, and in some measure predictable, impact on [the aliens'] interest in avoiding deportation." Id. at 286. "However they are characterized, the waiver rules - once proceedings have begun - become a common focus of expectation and even reliance. The alien's choice of strategy . . . may well be affected by the chances of waiver, so one must be cautions about changing the rules after the game has begun." Id. at 287.

In this case, applying these principles of expectation and reliance, an alleged offender has fixed expectations with regard to the elements of the offenses and their statutorily-prescribed penalties. He also has fixed expectations with regard to other circumstances potentially pertinent to his punishment, should he be convicted, such as how many times the State can seek the sentence it ultimately decides fits his crimes. Here, even as of the end of Evans's trial, the State could seek such a sentence once, at a single proceeding, before the trial judge. However, the new statute, which took effect less than two weeks after Evans was convicted, gave the State two chances at obtaining the sentence it desired, one at the sentencing hearing, and another before the Division. Had the Legislature merely changed the composition of the Division, or altered the amount of time a party had to make a presentation before the Division, such amendments could fairly be characterized as procedural. See

Landgraf, 511 U.S. at 274 (noting statute that changes tribunal that will hear case does not affect substantive rights). However, a statute that gives the State two chances to seek the sentence it wants, when it previously only had one chance, increases the risk that an offender will face harsher punishment than that imposed by the trial judge, and therefore, affects substantive rights. The Court must vacate the Division's order increasing Evans's sentences.

This Court can reach the same result, i.e., that RSA 651:58, I does not apply retroactively, by examining its own cases, which tend to focus more on the "injurious" or "oppressive" effects of the new law. See Eldridge, 136 N.H. at 615 (quoting Wallace v. Stearns, 96 N.H. 367, 369 (1950)). For example, in Johnson, the defendants were charged with capital murder in indictments dated January 23, 1990. 134 N.H. at 571. They contested the retroactive application of a statute that became effective on January 1, 1991, and established statutory aggravators that did not exist at the time the defendants committed the alleged offense. Id. at 572-73. The new statute was silent as to whether the Legislature intended its retrospective application. Id. at 572. The Johnson Court, citing "[t]he general rule that statutes are only to be applied prospectively," id., noted that there is "a presumption against retrospective application when the statute affects a party's substantive rights. . . . Thus, [the issue is] whether [the new statute] affects substantive, or,

rather, procedural rights of the defendants." Id. at 572-73 (citations omitted)(brackets added).

The Johnson Court held that the new statute affected substantive rights. "Because [the current statute] provides two new statutory grounds upon which the State may seek the death penalty, there is a possibility that the defendants may now face capital punishment because of circumstances which could not have served as the statutory basis for such a penalty under [the former statute]." Id. at 573 (brackets added). Accordingly, the Court ruled that, "[f]aced with a statute that contains no expression of the legislature's intent that it be applied retrospectively and that also has an adverse and substantial impact on the rights of the defendants, we agree with the superior court's conclusion that the legislature did not intend [that the statute] apply to incidents occurring prior to its effective date." Id. at 573-74 (quotation omitted).

In Hamel, the Court reached the opposite conclusion. There, the State charged the defendant with committing a felonious sexual assault before September of 1982. 138 N.H. at 393. At that time, the applicable statute of limitations was six years. Id. The Legislature extended the limitations period in 1986, and again in 1990, creating a new limitations period of 22 years after the victim turned 18. Id. After he was indicted, in 1992, the defendant argued that the new statutes of limitations should not apply retroactively to his offense. Id.

The Court, applying the same statutory construction analysis it set forth in Johnson, found that the Legislature intended that the new limitations periods apply retrospectively. Id. at 394 ("The plain language and purpose of the statute lead us to the conclusion that the legislature intended to extend the limitations period . . . to give a young woman the opportunity to reach maturity before having to accuse her assailant.")(citation and quotation omitted). In addition, the Court held that extending the statute of limitations before it expired in regard to Hamel's defense did not affect his substantive rights, and therefore, "we will presume that an extension of the limitations period applies retrospectively." Id. at 394-95. But cf. Stogner v. California, 539 U.S. 607 (2003)(holding court could not apply new statute of limitations retroactively if former statute had expired before new statute was enacted).

In enacting RSA 651:58, I, the Legislature said nothing about whether the statute applied retroactively. However, RSA 651:58, I, like the capital murder statute at issue in Johnson, but unlike the statute of limitations in Hamel, affects substantive rights. Before the Legislature enacted this statute, a sentence imposed by the trial court was final on the date of sentencing, unless the defendant chose to seek sentence review before the Division, Bell v. Superior Court, 117 N.H. 474 (1977), the court made a technical error in the wording of the sentence, State v. Stern, 150 N.H. 705 (2004), or the sentence the court

imposed was plainly unlawful, Petition of State of New Hampshire (State v. Langille), 139 N.H. 705 (1995). Thus, absent these discrete conditions, the defendant knew, at the end of his sentencing hearing, that the State could not ask the sentencing court, or a panel of judges, to change his sentence. State v. Burgess, 141 N.H. 51, 52 (1996)("Due process requires a sentencing court to make clear *at the time of sentencing* "in plain and uncertain terms what punishment it is exacting . . . as well as the extent to which the court retains discretion to impose punishment at a later date and under what conditions the sentence may be modified.'")(quoting Stapleford v. Perrin, 122 N.H. 1083, 1087 (1982))(emphasis by Burgess Court)(brackets omitted).

However, after the enactment of RSA 651:58, I, a defendant has no such assurance. Assuming that the statute is facially constitutional, a defendant, once sentenced, faces the risk that the State may persuade the Division to increase his sentence, even if he chooses not to seek sentence review. As this case demonstrates, that risk is more than hypothetical. Under these circumstances, the statute affects substantive rights because it alters the defendant's expectations, grounded in principles of due process and double jeopardy, with regard to the finality of his sentence, and for the first time under New Hampshire law permits the State to initiate proceedings to seek an increase of a lawfully-imposed sentence. Accordingly, this Court should rule

that RSA 651:58, I applies only prospectively, and vacate the Division's order increasing Evans's sentence.

B. Retrospective application of RSA 651:58, I to Evans's sentence violates the prohibition against ex post facto laws.

In addition to principles of statutory construction, the state and federal ex post facto clauses limit the retrospective application of certain laws. "[T]wo critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Weaver v. Graham, 450 U.S. 24, 29 (1985). Specifically, the "disadvantage" effected by the new law must "alter[ ] the definition of criminal conduct or increase[ ] the penalty by which a crime is punishable." California Department of Corrections v. Morales, 514 U.S. 499, 503 n. 3 (1995). See also State v. Comeau, 142 N.H. 84, 88 (1997)("[T]he appropriate focus in *ex post facto* analysis is *not* on whether a law imposes disadvantages or additional burdens, but rather on whether it "`increase[ ] the punishment for or alter[s] the elements of an offense, or change[s] the ultimate facts required to prove guilt.'")(quoting Petition of Hamel, 137 N.H. 488, 494 (1993))(emphasis supplied by Comeau Court).

If the new law retrospectively eliminates a vested defense, or increases the sentence that was in effect at the time of the

offense, its ex post facto consequences are clear. E.g., Stogner, 539 U.S. 607 (holding new statute of limitations inapplicable where defendant's rights under prior statute had vested); United States v. Frank, 354 F.3d 910 (8th Cir. 2004)(holding cannot apply harsher sentencing guideline than that in effect at time of offense). However, retrospective application of a new law may be ex post facto even if its effects are not so pronounced. See Weaver, 450 U.S. at 32 n. 17 ("The critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases the sentence."). Under the federal constitution, retrospective application of a new law violates the ex post facto clause when it poses more than a "speculative, attenuated risk of affecting a prisoner's actual term of confinement. . . ." Morales, 514 U.S. at 508-09.

Morales committed murders in 1971 and 1980. Id. at 502. At that time, a statute entitled him to annual parole eligibility hearings. Id. at 503. Subsequently, the legislature amended the statute such that an inmate like Morales, i.e., a multiple murderer, may only receive a parole eligibility hearing every three years. Id. Morales argued that retrospective application of the less-favorable parole eligibility statute violated the ex post facto clause. Id. at 504.

In denying Morales's claim, the Court first reviewed three cases in which it held that the application of new laws violated

an inmate's rights under the ex post facto clause. Id. at 505. In Lindsey v. Washington, 301 U.S. 397 (1937), the Court struck down, as ex post facto, a law that required the imposition of a mandatory 15 year sentence, as opposed to the sentence of "not more than 15 years" in effect at the time Lindsay committed his crime. See Morales, 514 U.S. at 505 (discussing Lindsey). Similarly, in Miller v. Florida, 482 U.S. 423 (1987), the Court deemed ex post facto a law, enacted after Miller committed his crime, that increased his "presumptive sentencing range" for the charged offense by 2 - 3 ½ years. See Morales, 514 U.S. at 506 (discussing Miller). Additionally, in Weaver, the Court held invalid the retrospective application of a law that substantially changed the manner of calculation of "gain time" credits for inmates, which resulted in Weaver serving a longer sentence. See Morales, 514 U.S. at 505-06 (discussing Weaver).

The Court distinguished Morales's claim from those in the above cases on two grounds. First, the Court found that the new parole statute was remedial in its purpose. Id. at 507 ("In contrast to the laws at issue in Lindsey, Weaver, and Miller . . ., the evident focus of the California amendment was merely to relieve the Board from the costly and time-consuming responsibility of scheduling parole hearings for prisoners who have no reasonable chance of being released.")(internal quotations and brackets omitted). Second, the Court held that the statute, as applied to Morales, had no legitimate potential

to increase his punishment. Id. at 509 (holding retrospective application of law does not offend the ex post facto clause if it "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes. . . .")(citing Dobbert v. Florida, 432 U.S. 282, 294 (1977)).

In subsequent cases, the Court has continued to apply the "significant risk of increased punishment" test. For example, in Garner v. Jones, 529 U.S. 244 (2000), a new parole regulation established that inmates serving life sentences, who had been denied parole, could not apply for reconsideration for eight years. Id. at 247. The law in effect at the time Jones began serving his sentence allowed him to seek reconsideration every three years. Id. The Court remanded Jones's ex post facto claim for a determination of whether the new regulation "created a significant risk of increasing his punishment." Id. at 255. Additionally, in Lynce v. Mathis, 519 U.S. 433 (1997), the Court deemed ex post facto a statute that eliminated "gain time" credits awarded to inmates convicted of murder and related offenses. The Court held that, unlike in Morales, the punitive effect of the statute on the inmate was neither speculative nor attenuated. Id. at 446 ("Unlike the California amendment at issue in Morales, the 1992 Florida statute did more than simply remove a mechanism that created an *opportunity* for early release of a class of prisoners whose release was unlikely; rather, it

made ineligible for early release a class of prisoners who were previously eligible - including some, like petitioner, who had actually been released.")(Emphasis supplied by Lynce Court).

Based on Morales, RSA 651:58, I is ex post facto as applied to Evans. The statute is punitive in both its purpose and its effect. Its lead purpose, unlike the statute at issue in Morales, is to create an avenue through which the State may seek an increase in the amount of time an inmate spends in prison, in relation to the sentence he received from his trial judge. Unlike in Morales, however, the risk of such an increase is neither speculative nor attenuated. Because RSA 651:58, I poses a "significant risk of increased punishment," and it did not exist at the time Evans was convicted of the charged offenses, the State should not have been permitted to appeal his sentence.

The result is no different under New Hampshire law. While this Court has not specifically analyzed the part I, article 23 prohibition against ex post facto laws in light of Morales, the New Hampshire Constitution may be even more protective than its federal counterpart. State v. Reynolds, 138 N.H. 519 (1994). At the time Reynolds was sentenced for murder, an inmate could appeal for review of her sentence every two years. Id. at 520. Subsequently, the Legislature amended the statute to preclude violent offenders from filing petitions more frequently than every four years. Id. The Reynolds Court held that "application of the new law to Reynolds' petition would violate part I,

article 23 because the new law could operate to keep her in prison longer than the old law." Id. at 521. Notably, the Court reached this conclusion even though there was no guarantee that Reynolds, who had been sentenced for second degree murder in 1986, would have been released any sooner, even under the old law. Id. at 522 ("If a delay in the chance to petition is caused by retrospective application of a penal law, such an application violates part I, article 23.").

Because the Reynolds Court did not inquire into the inmate's actual chance for release, or, whether there was a "significant risk of increased punishment," the opinion affords the inmate more ex post facto protection than did the Supreme Court in Morales. In any event, the Court need not speculate as to whether the new law actually inflicted a measure of punishment upon Evans that was not available at either the inception of his case, or the conclusion of his trial. Thus, under either the state or federal constitution, the ex post facto clause bars retrospective application of RSA 651:58, I to Evans's case. This Court must reinstate his initial sentence.

C. The Division correctly determined that due process required the sentencing court to inform Evans of the State's right to seek an increase in his sentence.

After the State filed its petition for review of Evans's sentence, in April of 2002, the Division dismissed the petition

because it determined that the proceeding would violate Evans's due process rights. The Division's decision was based on Burgess, 141 N.H. at 52, and Stapleford, 122 N.H. at 1087. The Division correctly ruled that the sentence review statute did not lawfully apply to Evans.

In Stapleford, this Court held that:

> At the conclusion of the sentencing proceeding, a defendant . . . must know in plain and certain terms what punishment has been exacted by the court as well as the extent to which the court retained discretion to impose punishment at a later date and under what conditions the sentence may be modified.

122 N.H. at 1087. See also Burgess, 141 N.H. at 50 (holding that "unless the terms of a sentence at the time it is imposed specifically allow augmentation at a later date," the court may not subsequently increase a defendant's penalty); State v. Huot, 136 N.H. 96, 100-01 (1992) (holding that sentencing court "must give the defendant explicit notice at the time of his original sentencing" if court retains discretion to run sentences consecutively for violation of probation). As this Court explained in State v. Timmons, 130 N.H. 831, 836 (1988), this line of case law "stand[s] for the proposition that a sentence must be determinable at the time it is imposed." In accord with this proposition, the Division ruled that it could only increase the sentence consistent with due process if the trial court gave Evans notice of that possibility at the time of his sentencing.

Because Evans had no such notice, the Division's ruling, dismissing the State's sentence review petition was correct.

In the State's appeal of the Division's denial of its petition, it cited State v. White, 131 N.H. 555 (1989), and Stewart v. Cunningham, 131 N.H. 68 (1988), to support its argument that RSA 651:58, I provided Evans with all the notice he was due under part I, article 15. Neither case supports the State's argument.

In White, this Court held that a sentencing court can impose, for a violation of probation, the balance of the defendant's maximum sentence that it could have originally imposed. 131 N.H. at 557-60. There was no due process violation because at the close of his sentencing hearing, White was aware that he was on probation and was aware, therefore, that he would remain under the sentencing jurisdiction of the court during his term of probation. Id. at 558-60. The Court distinguished the Rau line of cases because, at the original sentencing hearing in those cases, the court did not make clear to the defendant the terms and conditions of his sentence and "the extent of the defendant's vulnerability to confinement . . . was left up in the air." Id. at 559.

Unlike the defendant in White, Evans was not given a sentence of probation which put him on notice that the court retained jurisdiction to impose further punishment in the future. Rather, Evans was sentenced to a term of 28 years to life, stand

committed, with a suspended sentence to follow upon release from prison. Nothing in Evans's sentence put him on notice that the court, or a panel of independent superior court judges, had the power to increase his sentence at a later date.

The State's citation to Stewart is similarly unavailing. In that case, the Court held that a defendant has no constitutional right to pretrial notice from the State that his sentence is subject to a statutorily-based enhancement. 131 N.H. at 70-71. Evans, however, is not contending that his rights were violated by the State's failure to notify him in advance of his trial about the State's right to seek sentence review. Rather, Evans's interest in the finality of his sentence attached post-trial, when the sentence was imposed. His claim, therefore, is much stronger than Stewart's.

Likewise, United States v. DiFrancesco, 449 U.S. 117 (1977), does not authorize the application of the new sentence review statute to Evans. In DiFrancesco, the defendant was sentenced to serve 10 years. Id. at 122. Under the authority of a federal statute, the government appealed, arguing that the trial court abused its discretion by not imposing a harsher sentence. Id. at 123. The Supreme Court held that double jeopardy principles did not bar the government from appealing the defendant's sentence. Id. at 132, 139. DiFrancesco was aware of the potential that his sentence could be increased. Id. at 137 ("Respondent was similarly aware that a dangerous special offender sentence is

subject to increase on appeal."). Accordingly, because he had no legitimate expectation that the sentence imposed by the trial court was final, the subsequent appeal neither punished him twice, nor subjected him to something akin to a new trial after an acquittal. Id. at 137-142.

While the Supreme Court rejected the defendant's claim, Evans's case is factually distinguishable. The trial court did not tell Evans, when he was sentenced, that the State had the right to appeal. Under those circumstances, he had every reason to believe his sentence was final unless he initiated sentence review proceedings. As such, the statute, as applied to Evans, violated his state and federal guarantees against multiple punishment for the same offense. See United States v. Fogel, 829 F.2d 77, 88 (D.C. Cir. 1987)("It would seem to follow that a defendant has, barring an awareness to the contrary, an expectation of finality in the severity of his sentence that is protected by the double jeopardy clause."); United States v. Jones, 722 F.2d 632, 637-38 (11th Cir. 1983)("If the legitimate expectations of a defendant in Jones' position are frustrated by resentencing, double jeopardy rights would be implicated.").

Accordingly, for any of the reasons discussed in subsections A.-C. of this brief, this Court must vacate the Division's decision to increase Chad Evans's sentence. The Division's action contravenes principles of statutory construction, and violates the ex post facto, due process, and double jeopardy

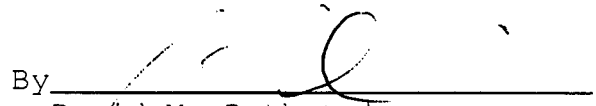
clauses. Evans respectfully requests that the Court reinstate the sentence of 28 years to life imposed by the trial court on April 16, 2002.

CONCLUSION

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court vacate the Division's order increasing his sentence by 15 years.

Oral argument before a full panel of this Court is requested.

Respectfully submitted,

By 

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CERTIFICATE OF SERVICE

I, hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 19th day of December, 2005.

David M. Rothstein

DATED: December 19, 2005