IN THE UNITED STATES SUPREME COURT
October Term 2006

CHAD EVANS,
Petitioner

vs.

STATE OF NEW HAMPSHIRE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

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Petitioner, Chad Evans, respectfully petitions this Court for a writ of certiorari to review the judgment of the New Hampshire Supreme Court that the retrospective application of a statute granting the prosecution the right to appeal his sentence, where that statute was not in effect at the time he committed the charged offenses, did not violate the federal constitutional prohibition against ex post facto laws.

OPINIONS AND ORDERS BELOW

The New Hampshire Supreme Court's opinion is Petition of Chad Evans, Nos. 2005-353 & 354 (N.H. September 6, 2006) (hereinafter, "Petition of Evans")(Appendix A). Related opinions of the New Hampshire Supreme Court are Petition of the State of New Hampshire (Sentence Review Division), 150 N.H. 296, 837 A.2d 291 (2003) (hereinafter, "Petition of State")(Appendix B), and State v. Evans, 150 N.H. 416, 839 A.2d 8 (2003)(Appendix C).

BASIS FOR JURISDICTION

This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a). See Sup. Ct. R. 10(b) & (c).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 10 of the United States Constitution provides, in pertinent part, that "[n]o State shall . . . pass any ex post facto Law. . . ."

New Hampshire Revised Statute Annotated § 651:58, I, which became effective on January 1, 2002, provides, in pertinent part, 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).

STATEMENT OF THE CASE

The Underlying Charges.

Twenty-one month old Kassidy Bortner died on November 9, 2000, while in the sole care and custody of Jefferey Marshall at his home in Kittery, Maine. T-II 27, 63, 138[1]. At trial, the defense's forensic pathologist testified that Marshall that day inflicted the injuries that caused Kassidy's death, and the State's expert could not rule out either this possibility, or the possibility that Marshall had inflicted injuries the previous day, when he was also babysitting Kassidy.

[1]"T-I" through "T-X" designate the ten volumes of trial transcript.

T-VII 178-79, 220-23, 227-29; T-IX 36, 58-60. Immediately after emergency personnel arrived at his house, in the wake of Kassidy's death, Marshall spontaneously stated to a detective:

> I understand what this looks like. This is not me. You need to be talking to Chad. Chad's the one who did this. You guys really need to talk to Chad. This isn't me.

T-II 49.

Chad Evans lived in Rochester, New Hampshire with his girlfriend, Amanda Bortner. T-II 66, 69. Kassidy was Amanda's daughter. The State contended that Evans inflicted the injuries that killed Kassidy, and over a period of time preceding her death, inflicted physical abuse that resulted in bruises and fractured bones. A Strafford County grand jury indicted Evans with one count of second degree murder, contrary to N.H. Rev. Stat. Ann. § 630:1-b, and five counts of second degree assault, contrary to N.H. Rev. Stat. Ann. § 631:2. Evans, 150 N.H. at 417, 839 A.2d at 10.

Evans maintained his innocence of all charges. His jury trial began December 4, 2001, and after about 10 days of trial and three days of deliberation, ended with guilty verdicts on December 21, 2001. The New Hampshire Supreme Court affirmed the convictions on direct appeal. Id.

The Sentencing Hearing and the State's Appeal of the Sentence.

On April 16, 2002, the trial judge (Nadeau, J.) sentenced Evans to serve twenty-eight years to life on the murder charge, and suspended terms of imprisonment on the assault charges. Petition of Evans, slip op. at 2. Three days later, the State, pursuant to N.H. Rev. Stat. Ann. § 651:58, I, sought review of his sentence. Id. This statute, which became effective on January 1, 2002, allowed the State to appeal a trial judge's sentence to a board of three judges, who could,

based on the State's request, increase the sentence imposed by the trial judge up to the maximum term permitted by the governing statute. Before the enactment of this statute, a defendant, but not the State, could initiate an appeal of a trial judge's sentence. Thus, before January 1, 2002, unless the defendant appealed, a sentence could not be increased. applied for review

The First Appeal Concerning N.H. Rev. Stat. Ann. § 651:58, I.

Evans moved to dismiss the State's petition, relying primarily on the fact that he had no notice of the statute, nor of the State's ability to invoke it to increase his sentence. Petition of State, 150 N.H. at 297, 837 A.2d at 293. The Sentence Review Division granted his motion and dismissed the State's petition. Id. The State, by petition for a writ of certiorari, see N.H. Sup. Ct. R. 11, appealed the Division's decision. Id. The New Hampshire Supreme Court ruled that the Division had no jurisdiction to decide the constitutionality of the application of N.H. Rev. Stat. Ann. § 651:58, I to Evans, and reinstated the State's sentence review petition. See id. at 299, 837 A.2d at 295. The state court did not rule on the merits of the constitutional challenges Evans raised.

On remand, Evans sought a ruling from the Strafford County Superior Court on, inter alia, the ex post facto implications of the new sentence review statute, given that it was not in effect at the time he committed the charged offenses. That court ruled that his challenge was not ripe until, and unless, the Sentence Review Division actually increased his sentence, at which time he could appeal to the New Hampshire Supreme Court. Petition of Evans, slip op. at 2. The Division held the review hearing on September 17, 2004, and on April 26, 2005, issued an order increasing Evans's sentence by fifteen years. Id.

The Second Appeal Regarding N.H. Rev. Stat. Ann. § 651:58, I.

Evans appealed to the New Hampshire Supreme Court, challenging the application of the statute on, inter alia, ex post facto grounds, and relying specifically on the federal constitution. Id. In an opinion issued on September 6, 2006, the New Hampshire Supreme Court ruled that the application of the sentence review statute to Evans did not offend the ex post facto clause of the federal constitution. Petition of Evans, slip op. at 4-9.

REASONS FOR GRANTING THE WRIT

Under Supreme Court Rules 10(b) & (c), this Court will exercise its certiorari jurisdiction where a state court of last resort has decided an important federal question in a way trhat conflicts with a United States court of appeals, or an important question of federal law that either should be settled by this Court, or conflicts with its established, relevant decisions.

The New Hampshire Supreme Court's resolution of the ex post facto consequences attendant to the retrospective application of the sentence review statute is appropriate for this court's certiorari review in two respects. First, the state court fundamentally misapprehended this Court's settled ex post facto law when it favorably analogized the impact of the statutory change at issue in this case to that at issue when 18 U.S.C. §3742(e), which governs the appropriate standard of review for appealing sentences, was amended. Second, the state court failed to apply the proper analysis, set forth in this Court's ex post facto cases, the result of which would have been to declare the statute unconstitutional as applied to Evans.

For these reasons, this Court should grant the writ, and ultimately, reverse the New Hampshire Supreme Court's decision upholding the application of the sentence review statute to Evans.

The State Court's Flawed Analogy to 18 U.S.C. §3742(e).

The linchpin of the state court's decision was its favorable analogy between the effect of the new sentence review statute, and a change Congress had made to 18 U.S.C. §3742(e) in 2003. Petition of Evans, slip op. at 7-8. It was by virtue of this analogy that the state court characterized the amendment to the sentence review statute as being procedural in its effect, and thereby avoided conducting any further ex post facto analysis. The state court erred when it compared the change to the statute at issue in this case to the amendment of 18 U.S.C. §3742(e). The amendment to the sentence review statute was substantive, thus, the court should have moved on to determine whether the amendment created a "significant risk of increased punishment" to Evans.

awkward wording

18 U.S.C. § 3742(e) governs the standard to be applied when an appeals court reviews a district court's decision to depart from the sentencing guidelines. Before 2003, the reviewing court afforded "substantial deference" to the sentencing judge. Id. at 6. After 2003, as the result of an amendment, the standard of review was de novo. Id. In the face of ex post facto challenges to the application of the new standard, where the defendant committed the underlying offense before 2003, federal circuit courts found no ex post facto violation, because the amendment effected no substantive change. Id. at 7(citing cases); see, e.g., United States v. Mallon, 345 F.3d 943, 946 (7th Cir. 2002)("Procedural innovations that don't tinker with substance as a side effect

are compatible with the ex post facto clause.")(citations omitted). According to the state court in this case, because a change in the applicable standard of appellate review under 18 U.S.C. § 3742(e) effected no substantive change, then by analogy, neither did the change to N.H. Rev. Stat. Ann. § 651:58, I. Id. at 7-8.

Evans agrees that if the State, before January 1, 2002, already had the right to appeal a sentence, and the amended statute merely changed the applicable standard of appellate review, the line of federal cases relied on by the state court would govern. However, that is not what happened in this case. Here, at the time Evans was charged (and convicted), the State had no right to appeal a trial judge's sentence. After the amendment, it could appeal a trial judge's sentence and ask an appellate tribunal to increase the defendant's sentence. Thus, the new statute did not merely change the tribunal hearing the appeal, see Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994), the standard of review governing the appeal, see Mallon, 345 F.3d at 946, or an ancillary rule regulating existing procedures, see, e.g., United States v. Ristowski, 312 F.3d 206 (6th Cir. 2002)(change to Fed. R. Crim. P. 33 not substantive). Instead, it afforded the State the opportunity to increase Evans's punishment after its imposition.

Under these circumstances, the state court erred in labeling the amendment, like the change to 18 U.S.C. § 3742(e), merely procedural in its effect. See Landgraf, 511 U.S. at 269 (characterizing 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. . . ."). In this regard, the state court's decision conflicts with relevant, established decisions of this Court, as well as with decisions of

circuit courts of appeal. This Court should grant Evans's petition and reverse the state court's decision.

The Proper Application of the Governing Ex Post Facto Principles.

The key consequence of the state court's analogy between the sentence review statute and 18 U.S.C. § 3742(e) was that the state court, having deemed the statutory change "procedural," did not examine this Court's ex post facto cases and consider the impact of the retrospective application of the sentence review statute. Under the appropriate analysis, the change to N.H. Rev. Stat. Ann. § 651:58, I cannot be applied to Evans.

The federal ex post facto clause limits 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, 101 S.Ct. 960, 67 L.Ed.2d 17 (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, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995); see also, id. at 508-09 (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 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 to allow inmates like Morales, i.e., a multiple murderer, to receive a parole eligibility

hearing only once 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. This Court found no such violation because the change, as applied to a multiple murderer Morales, did not create a significant risk of increased punishment, i.e., Morales's chances at parole were so slim, the change did not make any practical difference. 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, 97 S.Ct. 2290, 53 L.Ed.2d 344 (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, 120 S.Ct. 1362, 146 L.Ed.2d 236 (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, 117 S.Ct. 891, 137 L.Ed.2d 63 (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).

Federal circuit courts have construed Morales to mean that if the new law has a punitive effect as applied to the inmate, its retrospective application violates the ex post facto clause. See, e.g., Richardson v. Pennsylvania Board of Parole, 423 F.3d 282, 290 (3rd Cir. 2005)(holding retroactive application of parole regulations may be ex post facto if practical effect of change creates significant risk of increased punishment); Glascoe v. Bezy, 412 F.3d 543, 548 (7th Cir. 2005)("[the petitioner] must show that as applied to his own sentence the new law created a significant risk of increasing his punishment.").

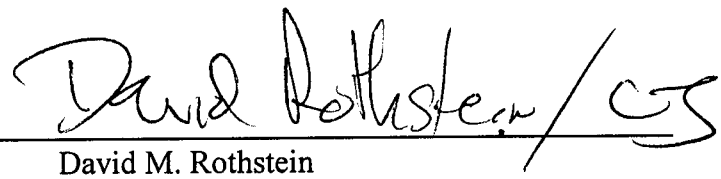
In this case, the Morales test compels reversal of the state court's decision. The amendment to the sentence review statute is, as applied to Evans, a new law, the application of which actually lengthened his sentence by fifteen years. This increased sentence could not have been sought, or imposed, under the law as it existed when Evans was charged, tried, or even convicted. The state court's resolution of Evans's ex post facto challenge conflicts with established federal jurisprudence. This Court should grant his petition and reverse the state court's decision.

No need to do risk of increase analysis

CONCLUSION

For all of the foregoing reasons, Chad Evans respectfully requests that this Honorable Court grant his petition for writ of certiorari, and reverse the state court's decision.

Respectfully submitted,

By 

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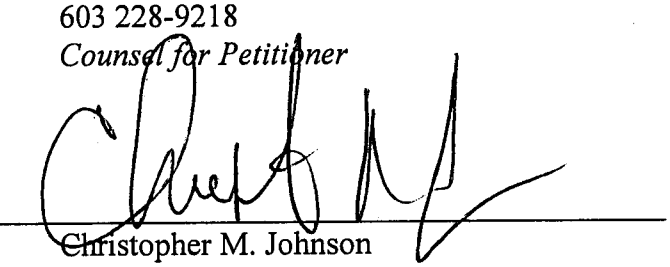
By 

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