UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chad Evans,
Petitioner

v. No. 1:08-cv-105-JD

Warden, New Hampshire State Prison,
Respondent

MOTION FOR CERTIFICATE OF APPEALABILITY

For reasons set forth in his accompanying memorandum, Chad Evans moves for a certificate of appealability pursuant to 28 U.S.C. § 2253(c).

Respectfully submitted,

/s/ David M. Rothstein

By_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been emailed this 16th day of June, 2010, to:

Elizabeth C. Woodcock
Assistant Attorney General
at: Elizabeth.Woodcock@doj.nh.gov

/s/ David M. Rothstein
David M. Rothstein

DATED: June 16, 2010

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MEMORANDUM IN SUPPORT OF
MOTION FOR CERTIFICATE OF APPEALABILITY

By order dated June 2, 2010, this Court (DiClerico, J.) granted the Warden's motion for summary judgment, dismissed Evans's petition for writ of habeas corpus, and directed Evans to file a motion for a certificate of appealability on or before June 16, 2010. This is a memorandum in support of Evans's motion. He respectfully requests that this Court grant him a certificate of appealability.

## Facts

On December 21, 2001, Chad Evans was convicted of second degree murder, five counts of second degree assault, and one count of endangering the welfare of a child. Order[1] at 2. On January 1, 2002, New Hampshire Revised Statutes Annotated ("RSA") § 651:58, I went into effect. The statute permitted the government to appeal a trial judge's sentence to the Sentence Review Division of the Superior Court ("SRD"), which could

[1] "Order" refers to this Court's order of June 2, 2010 granting the Warden's motion for summary judgment.

increase the sentence the trial judge imposed. Previously, only the defendant could initiate a sentencing appeal to the SRD. Thus, if the defendant initiated no such appeal, there was no risk that his sentence would be increased.

On April 16, 2002, the superior court (Nadeau, J.) imposed on Evans a sentence of 28 years to life in prison, with suspended sentences on the other charges. Order at 2. The government appealed the sentence pursuant to RSA § 651:58, I. Order at 2. The SRD gave Evans fifteen years on the second degree assault charges, stand committed, and consecutive to the 28 year sentence on second degree murder. Order at 2. Thus, the SRD, after the government's appeal under RSA § 651:58, I, increased Evans's sentence to 43 years to life in prison.

The New Hampshire Supreme Court ruled that the SRD's action did not violate the ex post facto clause of the Federal Constitution. Order at 3. Evans filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, alleging that the state court's ruling was contrary to and an unreasonable application of federal law. Order at 3. This Court, in an order dated June 2, 2010, granted the Warden's motion for summary judgment.

## Questions Presented

Evans seeks a certificate of appealability with regard to the following questions:

1. Whether the application of RSA § 651:58, I to Evans was contrary to clearly established federal constitutional law as set forth in Garner v. Jones, 529 U.S. 244 (2000), because Garner is not limited to retroactive changes in rules governing parole.

2. Whether the SRD's decision to increase Evans's sentence by 15 years was an unreasonable application of federal law, as set forth in Garner; Dobbert v. Florida, 432 U.S. 282 (1977); and United States v. Mallon, 345 F.3d 943 (7th Cir. 2003), because RSA § 651:58, I, as applied to Evans, affected his substantive rights.

Standard Governing Issuance of Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." See Slack v. McDaniel, 529 U.S. 473, 483-84 (2000)("To obtain a COA under § 2253 (c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that includes showing reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.")(quotation omitted). However, "[w]e do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable

even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Miller-El v. Cockrell, 537 U.S. 322, 338 (2003).

Statement of Reasons for Granting Certificate of Appealability

Based on this standard, this Court should grant Evans's request for a certificate of appealability on both issues.

Regarding the first issue, Evans argued that the governing rule, as set forth by the Supreme Court, is that a new law is ex post facto when it "create[s] a significant risk that the defendant would be subject to increased punishment." Order at 7. After reviewing the cases on which Evans relied for this statement, including Garner, the Court dismissed the argument, concluding that in those cases, "the Supreme Court was careful to explain the parole rule context of its analysis." Order at 9. Since the rule Evans relied on was limited to changes in parole rules, the Court held, "Evans has not shown that the cited cases provide Supreme Court precedent for an ex post facto analysis in the context of his case." Order at 7.

This Court, however, cited no authority for the statement that the "significant risk" rule promulgated by the Supreme Court is limited to the parole context. None of the cases expressly state such a limitation on their holdings. Indeed, these cases derive from ex post facto precedent generated outside the

immediate context of parole rule changes. Garner relies on California Dept. of Corrections v. Morales, 514 U.S. 499 (1995). While Morales is a parole regulation case, it relied on Beazell v. Ohio, 269 U.S. 167 (1925), and Dobbert v. Florida, 432 U.S. 282 (1977) – neither of which concern changes in parole rules – to derive the standard it applied: whether the new law "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." Morales, 514 U.S. at 509.

Nor would it be illogical to apply this rule to Evans. In Garner, the Court entertained the prospect that the rule change worked an ex post facto violation even though an inmate has no right to parole at any time. Evans's claimed entitlement is superior. Before the enactment of RSA § 651:58, I, he had a vested right to the sentence imposed by the trial judge, unless he chose to place that sentence at risk by initiating an appeal to the SRD.

Recently, the Fourth Circuit applied the same "significant risk of increased punishment" test to the retrospective application of advisory sentencing guidelines, i.e., outside the context of parole rule changes. United States v. Lewis, No. 09-4343, slip op. at 4-8 (4th Cir. May 27, 2010). In Lewis, the Fourth Circuit concluded that "the retroactive application of severity-enhancing Guidelines amendments contravenes the Ex Post Facto clause." Id. at 5.

> [T]he retroactive application of an upwardly amended advisory sentencing range poses a significant risk of an increased sentence. And Lewis was not required to "show definitively" that he would have received a higher sentence had the sentencing court utilized the amended 2008 Guidelines edition. . . . It was sufficient that he show that the application of the 2008 edition "created a substantial risk" that his sentence would be more severe.

Id. at 8 (citations and quotations omitted). Similarly, the retrospective application of RSA § 651:58, I, while not mandating an increased sentence, exposed Evans to the "substantial risk" of such an increase.

For all of these reasons, reasonable jurists could disagree with regard to whether the application of RSA § 651:58, I to Evans was contrary to clearly established federal law, i.e., the Supreme Court's rule that a new law is ex post facto if it creates a significant risk of increased punishment. This Court should grant Evans's certificate as to Question 1.

It should also grant the certificate as to Question 2. Here, the Court ruled that the state court did not unreasonably apply the federal rule that "'[p]rocedural innovations that don't tinker with substance as a side effect are compatible with the ex post facto clause.'" Order at 11 (quoting Mallon, 345 F.3d at 946).[2] Whether this case is similar enough to Mallon and Dobbert to sustain the Court's analogy, and characterize the application

[2] The order cites to Page 346 of Mallon. Since Mallon begins on page 943, Evans presumes that the cite should be to Page 946.

of RSA § 651:58, I as a "procedural innovation," is a matter reasonable jurists could debate. On one hand, RSA § 651:58, I could, as the Court found, change only who makes the ultimate sentencing decision, which in Mallon and Dobbert had no ex post facto consequence. Order at 12. Or, the new law could grant the government two chances to get the long sentence it desired, thus effecting a change in procedure that has a substantive impact. Because reasonable jurists could debate whether the state court unreasonably applied federal law, this Court should grant the certificate of appealability.

## Conclusion

Evans has made a substantial showing of the denial of a constitutional right, and has demonstrated that reasonable jurists could debate the correctness of this Court's rulings. He respectfully requests that the Court grant his motion for a certificate of appealability.

Respectfully submitted,

/s/ David M. Rothstein

By_____

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