

ADMIN, APPEAL, CLOSED, LMrecused

**U.S. District Court
District of New Hampshire (Concord)
CIVIL DOCKET FOR CASE #: 1:08-cv-00105-JD**

Evans v. NH State Prison, Warden
Assigned to: Judge Joseph A. DiClerico, Jr
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 03/20/2008
Date Terminated: 06/03/2010
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

Petitioner

Chad Evans

represented by **David M. Rothstein**
Franklin Pierce Law Center
2 White St
Concord, NH 03301
603 228-9218
Email: drothstein@piercelaw.edu
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Respondent

NH State Prison, Warden
other
Richard M. Gerry

represented by **Elizabeth C. Woodcock**
NH Attorney General's Office (Criminal)
33 Capitol Street
Concord, NH 03301-6397
603-271-1267
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Notice Only

**NH Attorney General – Notice Only –
HC (Court Use Only)**

Notice Only

**NH Department of Corrections – Notice
Only – HC (Court Use Only)**

Date Filed	#	Page	Docket Text
03/20/2008	<u>1</u>		NEW CASE/PETITION FOR WRIT OF HABEAS CORPUS 2241/2254. (No fee paid, USA or IFP.) filed by Chad Evans.(Rothstein, David) (Entered:

			03/20/2008)
03/20/2008	<u>2</u>		MOTION to Proceed in forma pauperis with Custodial Certificate filed by Chad Evans. Follow up on Objection on 4/7/2008. (Rothstein, David) (Entered: 03/20/2008)
03/20/2008	<u>3</u>		MOTION stay processing of habeas petition and toll limitations period filed by Chad Evans. Follow up on Objection on 4/7/2008. (Rothstein, David) (Entered: 03/20/2008)
03/20/2008			Case assigned to Magistrate Judge James R. Muirhead. The case designation is: 1:08-cv-105-JM. Please show this number with the judge designation on all future pleadings. (jeb) (Entered: 03/20/2008)
03/20/2008	<u>4</u>		NOTICE of Assignment to U.S. Magistrate Judge James R. Muirhead sent to petitioner with service copies for all parties. (jeb) (Entered: 03/20/2008)
03/20/2008			ENDORSED ORDER granting <u>2</u> Motion to Proceed in forma pauperis. Text of Order: "Plaintiffs request to proceed in forma pauperis is hereby granted, but only for the purpose of waiving the filing fee." So Ordered by Magistrate Judge Justo Arenas. (jeb) (Entered: 03/20/2008)
04/08/2008			OBJECTION to Assignment to U.S. Magistrate Judge. Objection form returned to submitting party. Case reassigned to Judge Joseph A. DiClerico, Jr. The new case designation is: 08-cv-105-JD, please show this number with the correct judge designation on all further pleadings. (kad) (Entered: 04/09/2008)
05/06/2008	<u>5</u>		ORDER granting <u>3</u> Motion to Stay Processing of Habeas Petition and Toll Limitations Period. Federal proceedings stayed and petition held in abeyance pending his resolution of state court remedies. Status reports due every 90 days; Evans to notify court within 30 days of NH Supreme Court ruling. So Ordered by Magistrate Judge James R. Muirhead. (dae) (Entered: 05/06/2008)
05/06/2008			Notice of Administrative Closing. This case has been administratively closed pending exhaustion of state court remedies. The parties may move to reopen the case when the reason for the stay no longer applies. Status reports must be filed in accordance with the court order dated 5/6/08. By James R. Starr, Clerk. (dae) (Entered: 05/06/2008)
08/04/2008	<u>6</u>		

			SEALED STATUS REPORT at Level II. (Attachments: # <u>1</u> Evans Affidavit)(dae) (Entered: 08/06/2008)
08/04/2008	<u>7</u>		MOTION to Seal Document – <u>6</u> Sealed Document/Status Report Affidavit at Level II filed by Chad Evans. (dae) (Entered: 08/06/2008)
08/06/2008			ENDORSED ORDER granting <u>7</u> Motion to Seal Document <u>6</u> Sealed Document/Status Report Affidavit at Level II. Text of Order: Granted. So Ordered by Magistrate Judge Justo Arenas. (dae) (Entered: 08/08/2008)
11/04/2008	<u>8</u>		STATUS REPORT by Chad Evans : progress is being made as outlined. Status Report due by 2/4/2009. (dae) (Entered: 11/05/2008)
02/04/2009	<u>9</u>		STATUS REPORT by Chad Evans : petitioner's progress re interviewing witnesses/jurors. Status Report due by 5/4/2009. (dae) (Entered: 02/04/2009)
05/05/2009	<u>10</u>		STATUS REPORT by Chad Evans : update re juror and witness information. Status Report due by 8/5/2009. (dae) (Entered: 05/06/2009)
07/28/2009	<u>11</u>		STATUS REPORT by Chad Evans : update re juror and witness information. Status Report due by 10/28/2009. (jab) (Entered: 07/28/2009)
10/23/2009	<u>12</u>		STATUS REPORT by Chad Evans : investigator still working on witness and juror information. Status Report due by 1/25/2010. (dae) (Entered: 10/26/2009)
12/14/2009	<u>13</u>		ORDER; petitioner's petition remains mixed at this time. Pleadings in this action must be filed and signed by counsel of record. Any pleading not conforming to LR 4.3(e) shall not be docketed or presented to a judicial office and will instead be returned to the filer. (Notice of Compliance Deadline set for 1/13/2010.) Signed by Magistrate Judge James R. Muirhead. (dae) (Entered: 12/14/2009)
01/11/2010	<u>14</u>		RESPONSE re <u>13</u> Order,, Set Deadlines, filed by Chad Evans. (Rothstein, David) (Entered: 01/11/2010)
01/12/2010			ENDORSED ORDER re <u>14</u> Petitioner's Response to Order. Text of Order: Reviewed. The stay is lifted. Reopen and forward for preliminary review. Signed by Magistrate Judge James R. Muirhead. (dae) (Entered: 01/12/2010)

01/20/2010	<u>15</u>		ORDER re: <u>1</u> Petition for Writ of Habeas Corpus, <u>13</u> Order, and <u>14</u> Petitioner's Response to Order. This Order, Petition and Documents 13 and 14 to be served upon Respondent Gerry in accordance with Agreement on Acceptance of Service; answer due within 30 days. Signed by Magistrate Judge James R. Muirhead. (dae) (Entered: 01/20/2010)
01/20/2010			NOTICE: The court has issued a ruling on preliminary review. Pursuant to the Agreement on Service between the Clerk of Court and New Hampshire Attorney General, this Notice constitutes service under the Rules Governing Habeas Corpus Cases Under Section 2254. Answer follow up 2/22/2010. (dae) (Entered: 01/20/2010)
02/19/2010	<u>16</u>		MOTION for Summary Judgment filed by NH State Prison, Warden. Follow up on Objection on 3/24/2010. (Attachments: # <u>1</u> Memorandum of Law)(Woodcock, Elizabeth) (Entered: 02/19/2010)
02/24/2010	<u>17</u>		Exhibits to Memorandum of Law in support of motion for summary judgment (Doc. #16) from New Hampshire State Court Proceedings by NH State Prison, Warden. (Attachments: # <u>1</u> Exhibit Notice of Appeal, # <u>2</u> Exhibit Petitioner's Brief on Appeal, # <u>3</u> Exhibit State's Brief, # <u>4</u> Exhibit Petitioner's Reply Brief, # <u>5</u> Exhibit Notice of Discretionary Appeal, # <u>6</u> Exhibit Brief and Petition, # <u>7</u> Exhibit Appendix, # <u>8</u> Exhibit Motion to Supplement Appendix, # <u>9</u> Exhibit State's Brief and Reply to Petition, # <u>10</u> Exhibit Transcript: 4/16/02, # <u>11</u> Exhibit Transcript: 9/17/04)(Woodcock, Elizabeth) Modified on 2/25/2010 to add: memorandum of law in support(Mulvee, Ann). (Entered: 02/24/2010)
02/25/2010			Deadlines terminated: Answer deadline expired. Answer was due 2/22/2010 – none filed. Placed a call to Libby Woodcock. (amm) (Entered: 02/25/2010)
02/25/2010	<u>18</u>		MOTION to Clarify filed by NH State Prison, Warden. Follow up on Objection on 3/15/2010. (Woodcock, Elizabeth) (Entered: 02/25/2010)
03/03/2010	<u>19</u>		ORDER granting <u>18</u> Motion to Clarify – Warden has not complied with court's order of 1/20/10. Warden to file answer or otherwise plead on or before 3/10/10. So Ordered by Judge Joseph A. DiClerico, Jr. (dae) (Entered: 03/04/2010)
03/09/2010	<u>20</u>		ANSWER to Petition for Writ of Habeas Corpus (Date Served 1/20/2010) (Per Local Rule 7.4

			statement or motion to be filed within sixty days.) by NH State Prison, Warden. Notice of Compliance Deadline set for 5/11/2010. (Woodcock, Elizabeth) (Entered: 03/09/2010)
03/17/2010	<u>21</u>		OBJECTION to <u>16</u> MOTION for Summary Judgment filed by Chad Evans. (Rothstein, David) (Entered: 03/17/2010)
03/17/2010	<u>22</u>		Cross MOTION for Summary Judgment filed by Chad Evans. Follow up on Objection on 4/19/2010. (Rothstein, David) (Entered: 03/17/2010)
03/17/2010	<u>23</u>		Addendum/ to <u>22</u> Cross MOTION for Summary Judgment, <u>21</u> Objection to Motion / <i>Memorandum of Law</i> by Chad Evans. (Rothstein, David) (Entered: 03/17/2010)
05/19/2010	<u>24</u>		ORDER : Warden to refile answer in accordance with this order. (Answer due by 6/1/2010.) Signed by Judge Joseph A. DiClerico, Jr. (dae) (Entered: 05/19/2010)
06/01/2010	<u>25</u>		<i>Revised</i> ANSWER to Petition for Writ of Habeas Corpus (Date Served 6/1/2010) (Per Local Rule 7.4 statement or motion to be filed within sixty days.) by NH State Prison, Warden. Notice of Compliance Deadline set for 8/5/2010. (Attachments: # <u>1</u> Exhibit State Court Opinion of 5/17/06, # <u>2</u> Exhibit State Court Opinion of 12/5/03 (Petition of State of NH), # <u>3</u> Exhibit State Court Opinion of 12/5/03)(Woodcock, Elizabeth) (Entered: 06/01/2010)
06/02/2010	<u>26</u>	25	///ORDER granting <u>16</u> Respondent's Motion for Summary Judgment; denying <u>22</u> Petitioner's Motion for Summary Judgment. Petition for Writ of Habeas Corpus <u>1</u> is denied. Evans may move for a certificate of appealability by 6/16/10; warden to respond within 10 days after date motion is filed. So Ordered by Judge Joseph A. DiClerico, Jr. (dae) (Entered: 06/03/2010)
06/03/2010	<u>27</u>	43	JUDGMENT is hereby entered in accordance with <u>26</u> Order on Motions for Summary Judgment. Signed by Clerk James R. Starr. (Case Closed) (dae) (Entered: 06/03/2010)
06/16/2010	<u>28</u>		MOTION for Certificate of Appealability filed by Chad Evans. Follow up on Objection on 7/6/2010. (Attachments: # <u>1</u> Memorandum of Law)(Rothstein, David) (Entered: 06/16/2010)
07/20/2010	<u>29</u>	38	ORDER granting in part and denying in part <u>28</u> Motion for Certificate of Appealability. Signed by

			Judge Joseph A. DiClerico, Jr. (cmp) (Entered: 07/21/2010)
07/29/2010	<u>30</u>	9	<p>NOTICE OF APPEAL by Chad Evans. (No fee paid, USA or IFP.) [NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the Forms & Notices section of the First Circuit website at www.ca1.uscourts.gov, MUST be completed and submitted to the U.S. Court of Appeals for the First Circuit.]</p> <p>NOTICE TO COUNSEL: Counsel should register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf/. Counsel should also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/efiling.htm</p> <p>(Attachments: # <u>1</u> Exhibit Motion for Certificate of Appealability, # <u>2</u> Exhibit Court's July 20, 2010 Order)(Rothstein, David) (Entered: 07/29/2010)</p>
09/24/2010	<u>31</u>	7	Appeal Cover Sheet as to <u>30</u> Notice of Appeal filed by Chad Evans (dae) (Entered: 09/24/2010)
09/24/2010	<u>32</u>	8	Clerk's Certificate transmitting Record on Appeal to US Court of Appeals, documents numbered 31, 32, 30, 26, 27, 29, (6 – Sealed (via US Mail)) re <u>30</u> Notice of Appeal. A copy of the Notice of Appeal mailed to all parties this date. (dae) (Entered: 09/24/2010)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

APPEAL COVER SHEET

1. D.C.# Civil No. 08-cv-105-JD C.C.A.# _____

2. TITLE OF CASE: Chad Evans v. NH State Prison, Warden

3. NAME OF COUNSEL FOR APPELLANT(S):
See certified copy of docket (ECF retistered users not provided with a copy of docket)

4. NAME OF COUNSEL FOR APPELLEE(S):
See certified copy of docket (ECF registered users not provided with a copy of docket)

5. NAME OF JUDGE: Joseph A. DiClerico, Jr., United States District Judge

6. COURT REPORTER(S) & DATES: N/A

TRANSCRIPTS ORDERED / ON FILE NO

7. HEARING / TRIAL EXHIBITS N/A

8. COURT-APPOINTED COUNSEL NO

9. FEE PAID NO

10. IN FORMA PAUPERIS YES

11. MOTIONS PENDING NO

12. GUIDELINES CASE NO

13. RELATED CASES ON APPEAL NO

C.C.A. # (IF AVAILABLE):

DATE OF LAST N OF A:

14. SPECIAL COMMENTS:

Appeal filed 7/29/10, however mistakenly not forwarded to the First Circuit until now.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Chad Evans

v.

Civil No. 08-cv-105-JD

NH State Prison, Warden

CLERK'S CERTIFICATE TO
CIRCUIT COURT OF APPEALS

I, Deborah A. Eastman-Proulx, Deputy Clerk of the United States District Court for the District of New Hampshire, do hereby certify that the following documents constitute the abbreviated record on appeal to the First Circuit Court of Appeals:

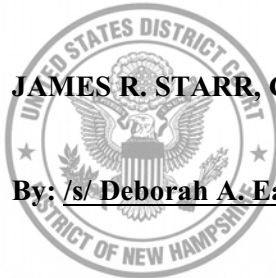
DOCUMENTS NUMBERED: 31, 32, 30, 26, 27, 29

The Clerk's Office hereby certifies that the record and docket sheet available through ECF to be the certified record and the certified copy of the docket entries, and that all non-electronic documents of record will be forwarded with a copy of this Certificate.

The following non-electronic documents will be forwarded to the Circuit Court of Appeals on this date:

SEALED DOCUMENTS NUMBERED: #6 - Sealed Status Report, Level II
(Submitted in orange sealed envelope)

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said Court, at Concord, in said District, on this day, September 24, 2010.



JAMES R. STARR, Clerk

By: /s/ Deborah A. Eastman-Proulx, Deputy Clerk

cc: David Rothstein, Esq.
Elizabeth Woodcock, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chad Evans

Civil No. 08-cv-105-JD

v.

Richard Gerry, Warden,
New Hampshire State Prison

NOTICE OF APPEAL

Petitioner Chad Evans hereby appeals to the United States Court of Appeals for the First Circuit, from this Court's June 3, 2010 order granting Respondent's Motion for Summary Judgment.

Evans's Notice of Appeal is confined to Question One in his Motion for Certificate of Appealability, which is attached to this Notice. Evans also attaches the Court's July 20, 2010 Order on his Motion, in which the Court approved his appeal for Question One.

Respectfully submitted,

/s/ David M. Rothstein

By _____
David M. Rothstein #5991
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
603) 228-9218
Email: drothstein@piercelaw.edu

-2-

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been emailed this 29th day of July, 2010, to:

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

/s/ David M. Rothstein
David M. Rothstein

DATED: July 29, 2010

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 _____
David M. Rothstein #5991
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301
603) 228-9218
Email: drothstein@piercelaw.edu

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

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

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. Order¹ 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

[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 _____
David M. Rothstein #5991
Deputy Chief Appellate Defender
Appellate Defender Program
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Concord, NH 03301
603) 228-9218
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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

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Chad Evans

v.

Civil No. 08-cv-105-JD
Opinion No. 2010 DNH 118

Warden, New Hampshire State Prison

O R D E R

After his petition for habeas corpus relief under 28 U.S.C. § 2254 was denied, Chad Evans filed a motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). Evans asks the court to grant a certificate of appealability on two questions pertaining to whether application of New Hampshire Revised Statutes Annotated ("RSA") § 651:58 in his case was either contrary to or an unreasonable application of clearly established federal law. The Warden did not file a response to Evans's motion.

To be entitled to a certificate of appealability, Evans must make a substantial showing that he was denied a constitutional right. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000). A substantial showing demonstrates "that the resolution was debatable among jurists of reason." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). "The petitioner must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 338.

In support of his petition, Evans argued that for purposes of deciding an ex post facto claim the Supreme Court examines whether application of the new law created a significant risk that the defendant would be subject to increased punishment, as held in Garner v. Jones, 529 U.S. 244 (2000); Lynce v. Mathis, 519 U.S. 433 (1997), and Cal. Dep't of Corrs. v. Morales, 514, U.S. 499 (1995). He asserted that the New Hampshire Supreme Court's decision, denying his appeal, was both contrary to United States Supreme Court precedent and an unreasonable application of that precedent. The court granted summary judgment in the Warden's favor, concluding that Evans had not shown that the cited cases provided the governing standard for his case, so that the New Hampshire Supreme Court's decision, which relied on the analysis provided in Dobbert v. Florida, 432 U.S. 282 (1977), as applied by the Seventh Circuit in United States v. Mallon, 345 F.3d 943, 945 (7th Cir. 2003), was neither contrary to nor an unreasonable application of federal law.

Evans now asks the court to grant a certificate of appealability on two 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.

The court will address each question in turn.

I. Contrary to Garner

Evans contends that the Supreme Court established in Garner that a retroactive application of a law that imposes a significant risk that a defendant would be subject to increased punishment violates the prohibition against ex post facto laws. In denying Evans's petition, this court concluded that the significant risk analysis used in Garner to evaluate the effect of changes in parole rules was not a clearly established governing precedent that controlled the decision in Evans's case. Evans argues that reasonable jurists could disagree with the court's decision and instead could conclude both that Garner provided the governing standard for his case and that the New Hampshire Supreme Court's decision was contrary to that precedent.

Evans cites United States v. Lewis, 606 F.3d 193 (4th Cir. 2010), to show that jurists of reason could disagree about the application of Garner in contexts other than changes to the parole rules. The issue is not whether Garner might apply outside of the parole context but, instead, is whether Garner provides the controlling standard in Evans's case so that a decision based on a Dobbert analysis is contrary to clearly established Supreme Court precedent. The Fourth Circuit in Lewis applied the "significant risk" standard from Garner to assess whether a retroactive application of the Sentencing Guidelines violated the prohibition against ex post facto laws and distinguished the Seventh Circuit's analysis of retroactive application of Sentencing Guideline changes. 606 F.3d at 199. Although Evans does not cite a case involving procedural changes, which was at issue in his case, it may be arguable that jurists of reason could conclude that Garner has displaced Dobbert for purposes of analyzing the ex post facto effect of the change in RSA 651:58, I.

Therefore, the court will grant a certificate of appealability for the first question Evans presents.

II. Unreasonable Application of Federal Law

Evans also contends that reasonable jurists could disagree with this court's conclusion that the New Hampshire Supreme Court's decision, based on a Dobbert analysis as applied by the Seventh Circuit in Mallon, was not an unreasonable application of federal law. Evans argues that unlike the retroactive changes considered in Dobbert and Mallon, the amendment to RSA 651:58, I gave the government a second chance to have a longer sentence imposed on him, and therefore was not a mere procedural change. The court disagrees with Evans's interpretation and concludes that jurists of reason would not debate whether the New Hampshire Supreme Court's decision was wrong.

Therefore, a certificate of appealability will not issue for the second question Evans presents.

Conclusion

For the foregoing reasons, Evans's motion for a certificate of appealability (document no. 28) is granted for the first question he presents and denied as to the second question.

SO ORDERED.



Joseph A. DiClerico, Jr.
United States District Judge

July 20, 2010

cc: David M. Rothstein, Esquire
Elizabeth C. Woodcock, Esquire

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Chad Evans

v.

Civil No. 08-cv-105-JD
Opinion No. 2010 DNH 094

Warden, New Hampshire
State Prison

O R D E R

Chad Evans seeks habeas corpus relief, pursuant to 28 U.S.C. § 2254, from his sentence following his conviction in state court on charges of reckless second-degree murder, second-degree assault, and endangering the welfare of a minor. Evans's minimum sentence was increased following review by the Superior Court Sentence Review Division, requested by the state under the amended version of New Hampshire Revised Statutes Annotated ("RSA") § 651:58, I. For purposes of habeas review, Evans contends that application of the amended version of RSA 651:58, I, in his case violated the constitutional prohibitions against ex post facto laws, and that the New Hampshire Supreme Court's decision affirming the sentence was both contrary to and an unreasonable application of federal law.

Background

Evans was convicted on December 21, 2001. On April 16, 2002, he was sentenced to serve twenty-eight years to life in prison on the second-degree murder charge and received suspended sentences on the assault and endangering charges. Evans appealed his conviction, which was affirmed. State v. Evans, 150 N.H. 416 (2003).

The state filed a petition for sentence review under RSA 651:58, I. The Superior Court Sentence Review Division ("Division") dismissed the petition because Evans was not informed at his sentencing hearing that the state could seek review. The state appealed that decision, and the New Hampshire Supreme Court held that the Division exceeded its jurisdiction in dismissing the state's petition. Petition of New Hampshire, 150 N.H. 296, 299 (2003). On April 26, 2005, in response to the state's petition, the Division added a consecutive sentence of five to ten years for one of the assault convictions and a second consecutive sentence of ten to thirty years on another assault conviction. Because the additional sentences were consecutive to the sentence of twenty-eight years to life on the second degree murder conviction, Evans's minimum sentence increased from twenty-eight years to forty-three years.

Evans appealed the Division's sentencing decision, contending that application of RSA 651:58, I, violated his rights under the state and federal constitutions to due process, to protection against double jeopardy, and to the prohibition against ex post facto laws. The New Hampshire Supreme Court concluded that the amendment to RSA 651:58, I, "created a procedural change in the statute by altering who made the final sentencing decision, but not the legal standards for that decision . . . [and] did not alter the definition of the underlying offenses, increase the sentencing range for which a defendant was eligible as a result of a conviction, or eliminate any available defenses." Petition of Evans, 154 N.H. 142, 153 (2006). As a result, the supreme court held that application of the amended version of RSA 651:58, I, did not violate the prohibitions against ex post facto laws. Id. The Supreme Court denied Evans's petition for a writ of certiorari. Evans v. New Hampshire, 127 S. Ct. 188 (March 26, 2007). Evans filed his petition under § 2254 in this court on March 20, 2008.

Discussion

Evans contends that the application of RSA 651:58, I, in his case, which resulted in an increase in his minimum sentence, was a violation of the prohibitions against ex post facto laws in the

Federal Constitution because RSA 651:58, I, went into effect eleven days after Evans was convicted. He argues that the New Hampshire Supreme Court's decision that application of RSA 651:58, I, in his case was not an ex post facto law was both contrary to and an unreasonable application of federal law. The Warden moves for summary judgment to deny Evans's petition. Evans moves for summary judgment in his favor.

Summary judgment is commonly used in habeas corpus proceedings. See Fed. R. Civ. P. 81(a)(4); Rule 12, Rules Governing § 2255 Cases. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Evans and the Warden agree that Evans's petition does not raise factual issues, that the petition presents only a legal issue, and that no hearing is necessary. Cross motions for summary judgment that are based on the factual background of the claims must be considered separately. When only a legal issue is presented, as in this case, the parties have presented their motions as a "case stated." See Am. Lease Ins. Agency Corp v. Balboa Capital Corp., 579 F.3d 34, 39 n.5 (1st Cir. 2009); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 643 (1st Cir. 2000).

States are prohibited by the Federal Constitution "from enacting laws with certain retroactive effects." Stogner v. California, 539 U.S. 607, 610 (2003). A challenged law violates the prohibition against ex post facto laws if it applies to conduct that was completed before the law was enacted and raises the penalty above what was previously provided. Johnson v. United States, 529 U.S. 694, 699 (2000). A procedural change in a law, which does not change a defendant's substantive rights, does not implicate the ex post facto prohibition, "[e]ven though [the change in the law] may work to the disadvantage of a defendant." Dobbert v. Florida, 432 U.S. 282, 293 (1977).

In this case, the amendment to RSA 651:58, I, added a provision giving the state the right seek sentence review and became effective on January 1, 2003, after Evans was convicted of the charged crimes but before he was sentenced in April of 2003. For purposes of habeas review, the parties assume that the application of RSA 651:58, I, to Evans was retroactive because the law became effective after Evans was convicted. The New Hampshire Supreme Court did not expressly decide the retroactivity issue, stating first that it was reviewing whether "the claimed retrospective application of RSA 651:58, I, violated the state and federal constitutional prohibitions against ex post facto laws" and later that because the amendment affected only

procedural rights, it could be applied retrospectively. Evans, 154 N.H. at 800 & 805-06 (emphasis added).

RSA 651:58, I, applies to the sentencing process, allowing the state, as well as a defendant, to seek review of a sentence. It may be arguable that RSA 651:58, I, was not applied retroactively to the sentencing procedure in Evans's case. Because the deferential standard of review applies here, and the state court did not address retroactivity, this court will not address the question of whether the amendment was applied retroactively. See Gray v. Brady, 592 F.3d 296, 300-01 (1st Cir. 2010).

To succeed on a petition under § 2254 challenging the state court's legal conclusions, a petitioner must show that "the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States.'"¹ Abrante v. St. Amand, 595 F.3d 11, 15 (1st Cir. 2010) (quoting § 2254(d)(1)). "[A] state-court decision is contrary to clearly established

¹The New Hampshire Supreme Court stated that it was deciding the ex post facto issue under the New Hampshire Constitution's prohibitions against ex post facto laws, which were more protective than the Federal Constitution. Evans, 154 N.H. at 148-49. "[W]e infer that the federal claim was considered if the state court rejects a counterpart state claim and then cites to a case holding that the federal constitution provides no greater protection." White v. Coplan, 399 F.3d 18, 23 (1st cir. 2005).

federal law if the state court employs a rule that contradicts an existing Supreme Court precedent or it if reaches a different result on facts materially indistinguishable from those of the controlling Supreme Court precedent." Janosky v. St. Amand, 594 F.3d 39, 47 (1st Cir. 2010). "A state-court decision constitutes an unreasonable application of clearly established federal law if it identifies the correct rule, but applies that rule unreasonably to the facts of the case sub judice." Id.

A. Contrary to Clearly Established Federal Law

Evans concedes that no Supreme Court case presents materially indistinguishable facts. Instead, he argues that the Supreme Court has established an analysis for ex post facto claims that requires a different result from that reached by the New Hampshire Supreme Court. See Williams v. Matesanz, 230 F.3d 421, 425 (1st Cir. 2000) (overruled on other grounds by McCambridge v. Hall, 303 F.3d 24, 37 (1st Cir. 2002)). In particular, Evans argues that when considering an ex post facto claim the Supreme Court examines whether application of the new law created a significant risk that the defendant would be subject to increased punishment. He cites Garner v. Jones, 529 U.S. 244 (2000); Lynce v. Mathis, 519 U.S. 433 (1997), and Cal.

Dep't of Corrs. v. Morales, 514, U.S. 499 (1995), along with several lower court decisions, in support of his theory.

Garner and Morales addressed ex post facto challenges to changes in parole rules. In Garner, the Supreme Court noted the difficulty of evaluating the ex post facto effect of changes in parole rules, limited its analysis to that context, and explained Morales in the same context. 529 U.S. at 250-54. The change in Florida law considered in Lynce is not analogous to the amendment to RSA 651:58, I, which is at issue in this case.

In Lynce, the Supreme Court considered whether a change in Florida law that cancelled early release credits for certain prisoners violated the Ex Post Facto Clause. 519 U.S. at 435. The petitioner had been released, based on early release credits, and then was rearrested and returned to prison after the new law retroactively cancelled his credits. Id. at 435-36. The Court rejected the warden's argument that because the credits were granted only to relieve prison overcrowding, cancellation of the credits did not affect the statutory penalty for the crime. Id. at 446-47. Not surprisingly, the Court concluded that the retroactive application of the Florida law, which cancelled the petitioner's credits after he had been released from prison, increased his punishment and violated the prohibition against ex post facto laws. Id. at 441 & 449.

The Supreme Court recognized that “[r]etroactive changes in laws governing parole of prisoners, in some instances, may be violative of [the prohibition against ex post facto laws].” Garner, 529 U.S. at 250 (citing Lynce, 519 U.S. at 445-46). As such, the cases Evans cites involved the ex post facto potential for parole changes, and the Supreme Court was careful to explain the parole rule context of its analysis. Because of the subject matter, those cases differ substantially from Evans’s ex post facto challenge to the amended version of RSA 651:58, I.

Evans has not shown that the cited cases provide Supreme Court precedent for an ex post facto analysis in the context of his case. Therefore, Evans has not established that the state court’s decision, which relied on a different analysis, is contrary to clearly established federal law as determined by the Supreme Court.

B. Unreasonable Application of Federal Law

Evans also contends that the New Hampshire Supreme Court’s decision is based on an unreasonable application of federal law. He contends that the New Hampshire Supreme Court’s failure to find a violation of the prohibition against ex post facto laws was an unreasonable application of the ex post facto analysis, as required by the Supreme Court in Garner, Lynce, and Morales.

In Evans's case, the New Hampshire Supreme Court followed the analysis used by the Seventh Circuit in assessing the ex post facto implications of an amendment to the PROTECT ACT, 18 U.S.C. § 3742(e)(4), which changed the appeals court's sentence review from "due deference" to the district court's decision to a de novo standard.² United States v. Mallon, 345 F.3d 943, 945 (7th Cir. 2003). In Mallon, the district court imposed a sentence below the Guideline range. The government appealed the sentence, and an issue arose on appeal as to whether deferential review or the new de novo standard would apply. Id. The defendant argued that application of the new de novo standard on appeal would violate the ex post facto prohibition because it would alter the consequences of the crime he had committed before the change in the review standard was enacted.³ Id. at 946.

In addressing the ex post facto challenge, the Seventh Circuit relied on Dobbert v. Florida, 432 U.S. 282 (1977), and Beazell v. Ohio, 269 U.S. 167 (1925). Mallon, 345 F.3d at 946-47. The court noted that the change in the PROTECT ACT did "not

²The New Hampshire Supreme Court relied on federal law as instructive in the area of ex post facto challenges. Evans, 154 N.H. at 149.

³Specifically, the defendant argued that the change in the review standard effectively meant that instead of a sentence imposed by the judge in his case, his sentence would be imposed by a panel of appellate judges.

change the statutory penalties for crime, affect the calculation of the Guidelines range, or alter the circumstances under which departures are permitted." Id. at 346. Instead, the new law merely "change[d] who within the federal judiciary makes a particular decision, but not the legal standards for that decision." Id. The court concluded that "[p]rocedural innovations that don't tinker with substance as a side effect are compatible with the ex post facto clause." Id.

In Dobbert, between the time the defendant murdered two of his children and the date his trial was scheduled to begin, Florida changed its procedures for imposing the death penalty, from a presumption of the death penalty unless a majority of the jury recommended mercy to a separate sentencing procedure decided by the judge, and if a death sentence was imposed, automatic review by the Florida Supreme Court. 432 U.S. at 288. The defendant argued that the change implicated the prohibition against ex post facto laws because it deprived him of "a substantial right to have the jury determine, without review by the trial judge, whether that penalty should be imposed." Id. at 292. The Supreme Court, in explaining its precedent, stated that the prohibition against ex post facto laws does not limit "the legislative control of remedies and modes of procedure which do not affect matters of substance.'" Id. at 293 (quoting Beazell

v. Ohio, 269 U.S. 167, 171 (1925)). The Court then explained that the change in the Florida law "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." Id. at 294. For that reason, the Court concluded that the change was "clearly procedural" and did not offend the prohibition against ex post facto laws. Id. at 293-94.

Consonant with Supreme Court precedent in Dobbert, as applied by the Seventh Circuit's analysis in Mallon, the New Hampshire Supreme Court determined in Evans's case that RSA 651:58, I, as amended, was a procedural rule pertaining to who makes the final sentencing decision and that it did not affect Evans's substantive rights. Evans, 154 N.H. at 151. In other words, the amendment did not change the legal standards for the sentencing decision. Id.

Evans points out that providing a right of sentence review to the state allowed the state a second chance to advocate for a longer sentence, which often would result in an increase and in his case did result in a longer sentence. Before the amendment, no such risk existed. Although the state's petition for review did result in a longer minimum sentence for Evans, he does not dispute that the sentence was still within the range of

punishment that was applicable when he committed the crimes.⁴

Id. Therefore, the New Hampshire Supreme Court's decision was not an unreasonable application of federal law.

Conclusion

For the foregoing reasons, the respondent's motion for summary judgment (document no. 16) is granted. The petitioner's motion for summary judgment (document no. 22) is denied. The petition for a writ of habeas corpus (document no. 1) is denied.

Evans may move for a certificate of appealability under 28 U.S.C. § 2253(c), with a supporting memorandum, **on or before June 16, 2010**. The Warden shall file a response **within ten days after the date the motion is filed**. See Rule 11, Rules Governing § 2254 Cases.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

June 2, 2010

cc: David M. Rothstein, Esquire
Elizabeth C. Woodcock, Esquire

⁴In addition, the new version of RSA 651:58, I, was in effect when Evans received his initial sentence with a minimum of twenty-eight years. Evans is deemed to have had statutory notice then of the change in the law, which gave the state the right to seek review. Evans, 154 N.H. at 145. Therefore the law was not changed after he began serving his sentence, as in Garner, Lynce, and Morales.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Chad Evans

v.

Civil No. 08-cv-105-JD
Opinion No. 2010 DNH 118

Warden, New Hampshire State Prison

O R D E R

After his petition for habeas corpus relief under 28 U.S.C. § 2254 was denied, Chad Evans filed a motion for a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). Evans asks the court to grant a certificate of appealability on two questions pertaining to whether application of New Hampshire Revised Statutes Annotated ("RSA") § 651:58 in his case was either contrary to or an unreasonable application of clearly established federal law. The Warden did not file a response to Evans's motion.

To be entitled to a certificate of appealability, Evans must make a substantial showing that he was denied a constitutional right. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000). A substantial showing demonstrates "that the resolution was debatable among jurists of reason." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). "The petitioner must demonstrate that

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 338.

In support of his petition, Evans argued that for purposes of deciding an ex post facto claim the Supreme Court examines whether application of the new law created a significant risk that the defendant would be subject to increased punishment, as held in Garner v. Jones, 529 U.S. 244 (2000); Lynce v. Mathis, 519 U.S. 433 (1997), and Cal. Dep't of Corrs. v. Morales, 514, U.S. 499 (1995). He asserted that the New Hampshire Supreme Court's decision, denying his appeal, was both contrary to United States Supreme Court precedent and an unreasonable application of that precedent. The court granted summary judgment in the Warden's favor, concluding that Evans had not shown that the cited cases provided the governing standard for his case, so that the New Hampshire Supreme Court's decision, which relied on the analysis provided in Dobbert v. Florida, 432 U.S. 282 (1977), as applied by the Seventh Circuit in United States v. Mallon, 345 F.3d 943, 945 (7th Cir. 2003), was neither contrary to nor an unreasonable application of federal law.

Evans now asks the court to grant a certificate of appealability on two 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.

The court will address each question in turn.

I. Contrary to Garner

Evans contends that the Supreme Court established in Garner that a retroactive application of a law that imposes a significant risk that a defendant would be subject to increased punishment violates the prohibition against ex post facto laws. In denying Evans's petition, this court concluded that the significant risk analysis used in Garner to evaluate the effect of changes in parole rules was not a clearly established governing precedent that controlled the decision in Evans's case. Evans argues that reasonable jurists could disagree with the court's decision and instead could conclude both that Garner provided the governing standard for his case and that the New Hampshire Supreme Court's decision was contrary to that precedent.

Evans cites United States v. Lewis, 606 F.3d 193 (4th Cir. 2010), to show that jurists of reason could disagree about the application of Garner in contexts other than changes to the parole rules. The issue is not whether Garner might apply outside of the parole context but, instead, is whether Garner provides the controlling standard in Evans's case so that a decision based on a Dobbert analysis is contrary to clearly established Supreme Court precedent. The Fourth Circuit in Lewis applied the "significant risk" standard from Garner to assess whether a retroactive application of the Sentencing Guidelines violated the prohibition against ex post facto laws and distinguished the Seventh Circuit's analysis of retroactive application of Sentencing Guideline changes. 606 F.3d at 199. Although Evans does not cite a case involving procedural changes, which was at issue in his case, it may be arguable that jurists of reason could conclude that Garner has displaced Dobbert for purposes of analyzing the ex post facto effect of the change in RSA 651:58, I.

Therefore, the court will grant a certificate of appealability for the first question Evans presents.

II. Unreasonable Application of Federal Law

Evans also contends that reasonable jurists could disagree with this court's conclusion that the New Hampshire Supreme Court's decision, based on a Dobbert analysis as applied by the Seventh Circuit in Mallon, was not an unreasonable application of federal law. Evans argues that unlike the retroactive changes considered in Dobbert and Mallon, the amendment to RSA 651:58, I gave the government a second chance to have a longer sentence imposed on him, and therefore was not a mere procedural change. The court disagrees with Evans's interpretation and concludes that jurists of reason would not debate whether the New Hampshire Supreme Court's decision was wrong.

Therefore, a certificate of appealability will not issue for the second question Evans presents.

Conclusion

For the foregoing reasons, Evans's motion for a certificate of appealability (document no. 28) is granted for the first question he presents and denied as to the second question.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

July 20, 2010

cc: David M. Rothstein, Esquire
Elizabeth C. Woodcock, Esquire

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Chad Evans

v.

Civil No. 08-cv-105-JD

NH State Prison, Warden

J U D G M E N T

In accordance with the Order dated June 2, 2010, by United States District Judge Joseph A. DiClerico, Jr., judgment is hereby entered.

By the Court,

/s/Deborah A. Eastman-Proulx

Deborah A. Eastman-Proulx, Deputy Clerk

June 3, 2010

cc: David Rothstein, Esq.
Elizabeth Woodcock, Esq.