No. 10-2133

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Chad Evans,
Petitioner-Appellant

v.

Warden, New Hampshire State Prison,
Respondent-Appellee

Appeal From An Order Of The United States District Court
For the District Of New Hampshire

BRIEF FOR RESPONDENT-APPELLEE WARDEN, NEW HAMPSHIRE STATE PRISON

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STATEMENT OF THE ISSUE

Whether the application of N.H. Rev. Stat. Ann. § 651:58, I to the petitioner was contrary to clearly established federal constitutional law in that it violates the *Ex Post Facto* Clause of the United States Constitution.

STATEMENT OF THE CASE AND FACTS

A. Procedural Background

On December 21, 2001, the petitioner was convicted after a jury trial in the Strafford County Superior Court (*Nadeau*, J.) of reckless second-degree murder, endangering the welfare of a child, simple assault, and five counts of second degree assault. *Petition of Evans*, 154 N.H. 142, 144, 908 A.2d 796, 798 (2006).

On April 16, 2002, the trial court sentenced the petitioner to 28 years to life in prison on the murder conviction. *Id*. The court imposed suspended sentences on the remaining charges. *Id*. At the time that the jury returned its verdict, only a defendant could ask for sentencing review from the Sentence Review Division of the Superior Court. N.H. Rev. Stat. Ann. § 651:58, I (Supp. 2001). However, the legislature amended the statute, giving the State the right to seek review of a sentence. The amendment took effect on January 1, 2002, three months before the petitioner was sentenced. *Petition of Evans*, 154 N.H. at 144, 908 A.2d at 799.

On April 19, 2002, the State filed a petition for sentence review with the Superior Court Review Division. *Petition of Evans*, 154 N.H. 142, 908 A.2d 796 (2006). On October 24, 2002, the division rejected the State's

petition on the basis that the petitioner had not been informed of the State's right to seek an enhancement of his sentence and that the petitioner's due process rights were violated as a result. *Petition of the State of New Hampshire*, 150 N.H. 296, 297, 837 A.2d 291, 292 (2003). The State then filed a petition for a writ of certiorari with the state court. *Id*., 150 N.H. at 299, 837 A.2d at 292. On December 5, 2003, the state court vacated the division's order on the grounds that the division was not authorized to determine the constitutionality of a sentence. *Id*., 150 N.H. at 298, 908 A.2d at 293.

On April 26, 2005, the division increased the petitioner's minimum sentence from 28 to 43 years by imposing a consecutive sentence of 5 to 10 years of imprisonment on one of the second-degree assault charges and ten to thirty years on a second charge of second-degree assault. Both sentences were imposed consecutively. *Petition of Evan*s, 154 N.H. at 144, 908 A.2d at 799. On May 19, 2005, the petitioner filed a petition for a writ of certiorari to review the division's enhanced sentence. On September 6, 2006, the state court affirmed the sentence. *Id*.

On March 20, 2008, the petitioner filed a petition for a writ of habeas corpus in United States District Court for the District of New Hampshire.

On February 19, 2010, the respondent filed a motion for summary judgment. PB App.: 22.[1] On June 2, 2010, the United States District Court for the District of New Hampshire (*DiClerico*, J.) granted the respondent's motion for summary judgment. PB Add.: 1-13.

On June 16, 2010, the petitioner asked the district court for a certificate of appealability. PB App.: 51-59. The petitioner asked the district court to certify two questions:

> 1. Whether the application of [N.H. Rev. Stat. Ann.] § 651:58, I to [the petitioner] 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 [New Hampshire Sentencing Review Division's] decision to increase [the petitioner'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 [N.H. Rev. Stat. Ann.] § 651:58, I, as applied to [the petitioner], affected his substantive rights.

PB App.: 54. On July 20, 2010, the district court granted the petitioner's

[1] "PB App.:_" refers to the appendix to the petitioner's brief and page number. "PB:_" refers to the petitioner's brief and page number. "PB Add.:_" refers to the addendum to the petitioner's brief and page number.

request with respect to the first question, but denied with respect to the second question. PB App.: 64.

B. Factual Background

The offense conduct is summarized in *State v. Evans*, 150 N.H. 416, 839 A.2d 9 (2003). The victim in the case was a child named K. *Evans*, 150 N.H. at 417, 839 A.2d at 11. K.'s mother, Amanda, dated the petitioner and then she and K. moved in with him. *Id*., 150 N.H. at 417, 839 A.2d at 11. At first, the petitioner bruised K. "only occasionally," by grabbing her face "forcibly." *Id.*, 150 N.H. at 417, 839 A.2d at 10. As time progressed, the petitioner picked the child up under her arms and "roughly" placed her in a corner, grabbed her by the back of the neck and threw her into a door, and pressed his fingers into her throat hard enough to make her gag. *Id*., 150 N.H. at 417-18, 839 A.2d at 11.

The petitioner and Amanda lied about the causes of K.'s bruises. *Id*., 150 N.H. at 418, 839 A.2d at 11. Amanda would not put K. in day care because she feared that the injuries would be discovered and K. would be taken away from her. *Id.* Instead, she asked her sister and her sister's boyfriend to baby-sit for K. *Id*.

K. visited the sister and her boyfriend on the day before she was killed. *Id.* The petitioner picked K. up at 5:00 p.m. and, after picking her up, he made two calls to the boyfriend. *Id.* During one of the calls, the petitioner told the boyfriend that K. had been hit by a ball, that her eyes had rolled back into her head, and that she was "out cold." *Id.* The boyfriend told the petitioner to take K. to the hospital, but the petitioner told her that K. was fine. *Id.*

The following day, Amanda brought K. back to the home of the sister and the sister's boyfriend. *Id.* K.'s face was badly bruised. *Id.* The petitioner called that morning to see how K. was doing and told the boyfriend that the State had called his house about the child. *Id.*, 150 N.H. at 419, 839 A.2d at 11-12. He told the boyfriend that Amanda and "the little bitch" would have to move out of his house. *Id.,* 150 N.H. at 419, 839 A.2d at 12 (internal quotation marks omitted).

At 12:30 p.m., the boyfriend went to check on K. *Id.* She was unresponsive and the boyfriend called 911. *Id.* K. was taken to the hospital where she was pronounced dead. *Id.* An autopsy revealed that K. died from multiple blunt-force injuries that caused bleeding and swelling in her brain

and optic nerve. *Id.* She also suffered internal bleeding in her abdomen, which was also caused by at least two blows from a fist or a foot. *Id.*

In addition to these mortal injuries, K. had suffered numerous bruises and multiple fractures. *Id.* When interviewed by the police, the petitioner said that K. was "'clumsy' and constantly walked into things like his coffee table." *Id.* In a telephone conversation that night, Amanda told the petitioner that he had killed K. *Id.*

SUMMARY OF THE ARGUMENT

The district court properly granted the warden's motion for summary judgment in this case because the petitioner had not demonstrated that the state court's decision was contrary to clearly established federal precedent. The fact that the State of New Hampshire gave the State the same right to sentencing review as defendants had previously enjoyed did not constitute an *ex post facto* law because the change did not offend the precepts adopted by the United States Supreme Court in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) for analyzing *ex post facto* claims.

Although the petitioner urges this Court to read *Garner v. Jones*, 529 U.S. 244 (2000) expansively, the district court properly read *Garner* to address only parole cases. Even if *Garner* is read more expansively, however, the provisions of the Anti-Terrorism and Effective Death Penalty Act preclude federal habeas corpus relief in this case because there is no clearly established Supreme Court precedent based on a case posing indistinguishable facts.

ARGUMENT

THE APPLICATION OF N.H. REV. STAT. ANN. § 651:58, I TO THE PETITIONER WAS NOT CONTRARY TO CLEARLY ESTABLISHED FEDERAL CONSTITUTIONAL LAW AS SET FORTH IN *GARNER V. JONES*, 529 U.S. 244 (2000), BECAUSE *GARNER* WAS LIMITED TO RETROACTIVE CHANGES IN RULES GOVERNING PAROLE.

The petitioner argues that both the state court and the district court erred in applying the *ex post facto* analysis. He contends: (1) that *Garner* is not limited to situations involving parole eligibility; (2) that other courts have applied *Garne*r outside the context of parole eligibility; (3) that *Garner* states the controlling legal standard; and (4) that the state and district courts committed error when they did not apply the "significant risk of increased punishment rule." PB: 16-23.

A. Applicable Statutes and Precedent

1. Standard of Review and AEDPA Background

This Court's review of the district court's ruling is *de novo*. *Mello v. DiPaulo*, 295 F.3d 137, 145 (1st Cir. 2002). As a general rule, "[t]he Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') prevents a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that

adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *Knight v. Spencer*, 447 F.3d 6, 11 (1st Cir. 2006) (internal citation and quotation marks omitted), or "'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,'" *Teti v. Bender*, 507 F.3d 50, 56 (1st Cir. 2007) (quoting 28 U.S.C. § 2254(d)(2) (2006)).

A state court decision is only "contrary to" established Supreme Court authority if it results from applying a rule that contradicts governing law or is inconsistent with a Supreme Court decision in a case with essentially indistinguishable facts. *See Aspen v. Bissonnette*, 480 F.3d 571, 574 (1st Cir. 2007).

2. *Ex Post Facto* Precedent

In general, there are four categories of *ex post facto* laws. First, the Clause prohibits "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). Second, any law that "aggravates a crime, or makes it greater than it was, when committed."

Id. Third, any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Id*. Finally, the *Ex Post Facto* Clause is violated when a law "alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time" that the crime was committed "in order to convict the offender." *Id.* The same four categories apply in the state court. *State v. Comeau*, 142 N.H. 84, 87-88, 697 A.2d 497, 499 (1997) (citation omitted).

If a law is "procedural," it does not implicate the *Ex Post Facto* Clause. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990). The term "procedural" refers to "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id*.

In *Collins*, the Supreme Court held that a statute that permitted a court to correct an improper verdict was not an *ex post facto* violation. The court pointed out that the change did not "punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Id.*, at 51; *see also Comeau*, 142 N.H. at 88, 697 A.2d at 500 ("[U]nfavorable changes in remedies or in statutes of limitations are not ex

post facto unless the changes alter the elements of the offense, enhance the degree of punishment, or strip the defendant of an existing defense." (Citation omitted.)).

To offend the *Ex Post Facto* Clause, a law must be "more onerous than the prior law." *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). In determining if the law is more onerous, the court must compare the original law with its successor "in its totality." *Hamm v. Latessa*, 72 F.3d 947, 957 (1st Cir. 1995). There is "no mechanical formula" for determining which changes in the law have a "sufficiently profound impact on substantive crimes or punishments to cross the constitutional line and which do not." *Id*. Courts must consider, on a case-by-case basis, if the change in the law "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id*. (internal quotation marks and citation omitted). "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was committed." *Weaver v. Graham*, 450 U.S. 24, 30 (1981).

3. The *Garner* Decision

The *Garner* decision involved the review of the frequency of parole hearings scheduled before the Georgia Board of Pardons and Parole. The challenged law enabled a parole board to hold periodic reconsiderations for parole once every eight years, rather than once every three years. *Garner v. Jones*, 529 U.S.. 244, 247 (2000). The parole board was given discretion to permit expedited consideration of parole in the event that the prisoner could demonstrate a change in circumstance. *Id*. at 256

The district court granted summary judgment and the United States Court of Appeals for the Eleventh Circuit reversed, determining that the retroactive application of the law violated the *Ex Post Facto* Clause. The Supreme Court reversed, noting that "[r]etroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept." *Garner*, 529 U.S. at 250. The *Garner* court limited the *ex post facto* discussion to parole, noting that it was addressing "[w]hether retroactive application of a particular change in parole law respects the prohibition on *ex post facto* legislation," which, it noted, was "often a question of particular difficulty when the discretion vested in a parole board is taken into account." *Id.*

In examining the change in Georgia's laws, the Court asked whether the new procedures created "a significant risk of prolonging the [prisoner's] incarceration." *Id*. at 251. The Court noted that "the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of disadvantage but on whether any such change increases the penalty by which a crime is punishable." *Garner*, 529 U.S. at 255 (internal quotation marks and ellipses omitted).

4. District Court's Ruling

The district court considered, and rejected, the claim raised here. First, the court determined that the state court's ruling was not contrary to clearly established federal law. The district court first stated that the state court had not decided the retroactivity issue, but rather addressed the *ex post facto* claim. PB Add: 5.

The district court then examined the state court's to determine if the state court's ruling was contrary to clearly established federal law. PB Add: 7. At the outset, the district court noted that the petitioner had conceded that there was no Supreme Court precedent based on materially indistinguishable facts. *Id.*

The district court then turned to the argument that the Supreme Court in *Garner v. Jones*, 529 U.S. 244 (2000), *Lynce v. Matthews*, 519 U.S. 433 (1997), and *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499 (1995) had adopted an analysis that required a different result from that reached by the state court. PB Add.: 7-8. The district court rejected the suggestion that *Garner* and *Morales* had addressed the issue raised by the petitioner, noting that both cases addressed changes in parole rules and that the Supreme Court had specifically limited its ruling to that arena. PB Add.: 8.

The district court then addressed the argument that the holding in *Lynce* compelled a different result. *Id*. The district court observed that the petitioner in *Lynce* had been released, but that a new statute "retroactively cancelled his credits." *Id*. The court noted that, "[n]ot 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*.

The district court observed that the petitioner had cited cases involving the *ex post facto* potential for parole changes and that the Supreme Court "was careful to explain the parole rule context of its analysis." PB

Add.: 9. The court concluded that the petitioner had not established that the state court's decision was contrary to clearly established federal law." *Id*.

B. The District Court Reached The Right Result And Applied The Appropriate Standard In Reviewing The State Court's Opinion.

As noted above, the petitioner contends that *Garner* is not limited to situations involving parole eligibility and that other courts have applied *Garne*r outside the context of parole eligibility. He argues that *Garner* states the controlling legal standard and that the state and district courts committed error when they did not apply the "significant risk of increased punishment rule." PB: 16-23.

First, the petitioner contends that *Garner* is not limited to situations involving parole eligibility. This argument conflicts with the language in *Garner*. As noted above, the Supreme Court specifically addressed changes in laws governing parole of prisoners and the *ex post facto* prohibitions. *Garner*, 529 U.S. at 247. The *Garner* holding is simply not as expansive as the petitioner suggests, nor has the Supreme Court seen fit to extend the ruling to other, non-parole cases. The district court, therefore, committed no error in reviewing the state court's opinion.

Second, the petitioner points to several decisions of the Circuit Courts of Appeals in support of this contention. PB: 15. Each of the cases cited by the petitioner addresses sentencing issues in federal courts when applying the United States Sentencing Guidelines. As a result, each case is distinguishable from this case on two bases: (1) it is a sentencing guideline case; and (2) there was Supreme Court precedent, in *Miller v. Florida*, 482 U.S. 423 (1987), addressing the same issue.

For example, in *United States v. Lanham*, 617 F.3d 873, 889-90 (6th Cir. 2010), the United States Court of Appeals for the Sixth Circuit held that applying a higher base offense level, adopted after the defendant had committed the offense, would violate the *ex post facto* clause. The court noted that, in *Miller*, the Supreme Court held that the *Ex Post Facto* Clause barred retroactive application of a state's revised sentencing guidelines.

Similarly, in *United States v. Turner*, 548 F.3d 1094, 1098 (D.C. Cir. 2008), the United States Court of Appeals for the District of Columbia Circuit, looked to the *Miller* case as "analogous" to the guideline issue posed before it. *See also United States v. Demaree*, 459 F.3d 791, 793 (7th Cir. 2006) (after *Miller*, "the courts of appeals, including our own, quickly fell into line."); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007)

(citing *Miller* in rejecting an *ex post facto* claim as waived). As a result, the fact that these courts also cited the *Garner* decision is of no consequence, since *Miller* clearly applied to the *ex post facto* claim, giving the appellate courts direct guidance.

Finally, the petitioner suggests that *Garner* requires the courts to focus on whether the change in statute creates "a significant risk" of increasing a defendant's period of incarceration. *Garner*, 529 U.S. at 251. He directs this Court to three Supreme Court precedents: *Lindsey v. Washington*, 301 U.S. 397 (1937), *Weaver v. Graham*, 450 U.S. 24 (1981), and *Miller v. Florida*, 482 U.S. 423 (1987). He contends that the *Morales* decision, combined with the Supreme Court's rulings in *Miller*, *Weaver*, and *Garner,* "can result in the invalidation of a new law as applied to an offender even though the law did not increase the punishment [a] defendant faced under the applicable criminal statute." PB: 14. This argument is unpersuasive.

Bearing in mind the AEDPA standard, the petitioner must show that the state court and the district court in reviewing the state court's ruling, failed to apply clearly established federal law. *Aspen*, 480 F.3d at 574. The

precedent must be based on indistinguishable facts. *Id*. All of the decisions cited by the petitioner are distinguishable from the case presented here.

The *Lindsey* decision found *ex post facto* problems with a statute that required the sentencing court to impose the maximum sentence rather than a sentence of up to the maximum term of imprisonment. *Lindsey*, 301 U.S. at 400. The *Lindsey* court rejected the "application of any new punitive measure to a crime already consummated to the detriment or material disadvantage to the wrongdoer." *Id.* at 401. The "detriment" in *Lindsey* occurred when the statute in effect at the time of the offense offered a minimum and a maximum, but the statute in effect at the time sentence was imposed made the maximum penalty mandatory. *Id*.

In *Weaver*, the Supreme Court rejected a law that changed the availability of good time credits to the detriment of the defendant who had been incarcerated at the time that the statute changed. *Weaver*, 450 U.S. at 26-27. The *Weaver* court noted that, to fall within the ex post facto prohibition, a law must be retrospective and it must "disadvantage the offender affected by it." *Id*. at 29.

And in *Miller*, the Supreme Court addressed an *ex post facto* violation in state sentencing guidelines that were revised after the defendant

committed an offense and made the guidelines more onerous. *Miller*, 482 U.S. at 435. The *Miller* court reiterated the holding in *Hopt v. Utah*, 110 U.S. 574 (1884), that "no ex post facto violation occurs if the change in the law is merely procedural and does 'not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt.'" *Miller*, 482 U.S. at 433 (quoting *Hopt*, 110 U.S. at 590). As a result, each of these cases is distinguishable from that presented here and this Court has no reason to grant habeas corpus relief.

Should this Court conclude that the "significant risk" test should have been applied here, however, the petitioner still has not met his burden. *Lindsey*, *Weaver,* and *Miller* would have met the *Garner* factor that there was a "significant risk"[2] that the prisoner's sentence would be lengthened.

But this is not the case here. In this case, the amended statute simply gave the State the right to seek review of a sentence. The statute did not increase the maximum sentence, nor did it assure that, if the State requested a lengthier sentence, the request would be fulfilled. Indeed, the fact that

[2] It is not even clear that the "significant risk" test suggested by the petitioner adds anything to the existing law. As the United States Court of Appeals for the Seventh Circuit noted, "The test of an ex post facto law has been variously stated by the Supreme Court as whether it places the defendant at a disadvantage or substantial disadvantage compared to the law as it stood when he committed the crime, changed the definition of the crime or increased the maximum penalty for it, or created a significant risk of enhanced punishment." *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006).

both parties had the right to seek sentencing review, strongly suggests that, under the appropriate circumstances, the Sentence Review Division might agree to reduce a sentence.

Moreover, although the petitioner's minimum sentence was increased, the maximum sentence was not. The only change in the petitioner's sentence was the date at which he could seek parole. N.H. Rev. Stat. Ann. § 651-A:6 (Supp. 2010). As in the case with *Garner*, the decision to grant parole is discretionary. *Garner*, 529 U.S. at 253. Although discretion does not "displace the protections of the *Ex Post Facto* Clause," the fact that the petitioner's parole date has changed did not deprive him of actual or constructive notice of the penalty before he committed the crime. *Id.*

In sum, the change in the law did not either change the punishment or inflict a greater punishment than the law adopted at the time that the petitioner committed his offense. *Calder*, 3 U.S. (3 Dall.) at 390. Even if the "significant risk" test had been applied in examining this statute, the petitioner cannot demonstrate that the statute failed this prohibition against *ex post facto* enactments.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

Respectfully submitted,

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December 13, 2010

CERTIFICATION PURSUANT TO RULE 7(a)(7)(C)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 37(a)(7)(B) because this brief contains 4056 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

December 13, 2010

s/Elizabeth C. Woodcock
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to: David M. Rothstein, Deputy Chief Appellate Defender, New Hampshire Appellate Defender Program, 2 White Street, Concord, NH 03301.

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