

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.

  
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Joseph A. DiClerico, Jr.  
United States District Judge

July 20, 2010

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