UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 10-2133

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 PETITIONER-APPELLANT CHAD EVANS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Chad Evans respectfully requests that this Court hear oral argument. His ex post facto claim is sufficiently complex that oral argument should assist the Court in reaching a fair and just result.

JURISDICTIONAL STATEMENT

On March 20, 2008, Chad Evans filed a petition for a writ of habeas corpus in the United States District Court for the District of New Hampshire ("District Court"). He alleged that the retrospective application of an amendment to N.H. Rev. Stat. Ann. § 651:58, I ("RSA 651:58, I"), which allowed the State to seek an increase of the sentence imposed by the trial court, violated the Ex Post Facto Clause of the Federal Constitution. App. 6-19.[1] The District Court had jurisdiction pursuant to 28 U.S.C. § 2241(a). By order dated June 2, 2010, the District Court (DiClerico, J.) denied the petition. Add. 1-13.

On June 16, 2010, Evans filed a Motion for Certificate of Appealability with an accompanying memorandum. App. 51-59. The motion sought the issuance of a certificate on two grounds. App. 54. By order dated July 20, 2010, the District Court granted the Certificate based on the first ground. App. 60-64. Evans filed a Notice of Appeal asserting that ground on July 29, 2010. App. 65-66.

This Court has jurisdiction pursuant to 28 U.S.C. § 2253(c).

[1] "App." designates the Appendix to this brief. "Add." designates the Addendum.

STATEMENT OF THE ISSUE

Whether the retrospective application of an amendment to a statute, which allowed the State to seek an increase of Evans's sentence, violated the Ex Post Facto Clause because it exposed Evans to a significant risk of increased punishment?

STATEMENT OF THE CASE AND FACTS[2]

A. The State Trial Court Proceedings.

On November 9, 2000, twenty-one month old Kassidy Bortner died in Kittery, Maine while in the care of a babysitter. State v. Evans, 150 N.H. 416, 419, 839 A.2d 9, 11 (2003). Kassidy was the daughter of Amanda Bortner, who lived in Rochester, New Hampshire with her boyfriend, Chad Evans. Id. at 417, 839 A.2d at 10. The State alleged that Evans inflicted the fatal injuries in Rochester the day before Kassidy died. Id. at 418, 839 A.2d at 10. Accordingly, the State charged Evans in the Strafford County Superior Court with reckless second-degree murder, as well as five counts of second-degree assault and one count of endangering the welfare of a child involving Kassidy, and one count of simple assault against Amanda. Id. at 417, 839 A.2d at 10.

Evans's jury trial on the charges commenced December 4, 2001. On December 21, 2001, after ten days of trial and three days of deliberations, the jury convicted Evans of all charges. Petition of Evans, 154 N.H. 142, 144, 908 A.2d 796, 798 (2006), cert. denied, __ U.S. __, 127 S. Ct. 1888, 167 L. Ed. 2d 274 (2007). On April 16, 2002, the Trial Court (Nadeau, J.)

[2] Because the factual basis for Evans's convictions is not relevant to his present claim for relief, he combines the Statement of the Case and Facts into a single section.

sentenced Evans to serve 28 years to life in prison on the murder charge, and suspended sentences on the other charges.[3] Id.

The New Hampshire Supreme Court ("State Court") affirmed Evans's convictions. Evans, 150 N.H. at 427, 839 A.2d at 18. Evans raises no issue concerning his appeal of the convictions in this Court.

B. The State's Petition for Sentence Review.

At the time Evans was convicted, a defendant sentenced to state prison could, within 30 days after his sentencing hearing, petition for review of the sentence by the Sentence Review Division of the Superior Court ("the Division"). RSA 651:58, I (Supp. 2001)(providing that "[a]ny person sentenced to a term of more than one year in the state prison" could file a sentence review application). If the defendant filed such a petition, the Division, which sits in three-judge panels, could increase the defendant's sentence, decrease it, or leave it unchanged. N.H. Super. Ct. Sent. Div. R. 14.

An amendment to RSA 651:58, I (Supp. 2002) became effective on January 1, 2002, eleven days after Evans was convicted. Petition of Evans, 154 N.H. at 144, 908 A.2d at 799. Based on the amendment, either the State or the defendant could petition the Division. Thus, for the first time, the State could seek an

[3] Under New Hampshire law, Evans would have to serve 28 years, less any pretrial confinement credit, before he would be eligible for parole. RSA 651-A:6, I.

increase in the sentence imposed by the sentencing judge. RSA 651:58, I (providing that "[a]ny person sentenced to a term of one year or more . . . or the state of New Hampshire" could file a sentence review application)(emphasis added).

The State petitioned the Division to increase Evans's sentence. Petition of the State of New Hampshire (Sentence Review Division), 150 N.H. 296, 297, 837 A.2d 291, 292 (2003)("Petition of the State"). The Division initially dismissed the State's petition on due process grounds, finding that Evans had no notice at the time he was sentenced that the State could appeal his sentence. Id. The State appealed the dismissal order and the State Court vacated the Division's ruling, holding that the Division had no jurisdiction to consider the constitutional claim. Id. at 298, 837 A.2d at 293. The State Court reinstated the State's petition to increase Evans's sentence. Id. at 299, 837 A.2d at 293.

On remand, Evans unsuccessfully sought legal and equitable relief to prevent the Division from considering the State's petition. Petition of Evans, 154 N.H. at 144, 908 A.2d at 799. By order dated April 26, 2005, the Division increased the minimum term of Evans's sentence from 28 years to 43 years.[4] Id.

[4] The Division imposed five to ten years on one count of second degree assault and ten to thirty years on another count of second degree assault. Id. These terms were consecutive to one another and consecutive to the previously-imposed sentence of 28 years to life. Id.

C. Evans's Appeal of The Division's Increase of His Sentence.

On appeal to the State Court, Evans argued that the Division acted unconstitutionally when it increased his sentence. Id. He made four claims, only one of which he pursues in this Court: whether allowing the State to appeal Evans's sentence under RSA 651:58, I, as amended, violated Federal Constitutional guarantees against ex post facto laws.[5] Id. The State Court held that because the amendment to RSA 651:58, I, effected a change in procedure rather than substance, its retrospective application to Evans did not implicate the ex post facto prohibition. Id. at 146-152, 908 A.2d at 800-05.

D. Evans's Habeas Petition.

Evans filed a petition for a writ of certiorari in the United States Supreme Court, which was denied. Evans v. New Hampshire, No. 06-9176, __ U.S. __, 127 S.Ct. 1888, 167 L.Ed.2d 374 (March 26, 2007). He then filed a timely petition for a writ of habeas corpus in the District Court. App. 6-19. The warden moved for summary judgment, and Evans filed a cross-motion for summary judgment. App. 20-50.

On June 2, 2010, the District Court granted the warden's motion and denied Evans's petition. Add. 1-13. Evans timely

[5] In addition to this claim, Evans argued that the application of the statute to his case violated due process, double jeopardy, and principles of statutory construction. Id. at 144-45, 152-53, 908 A.2d at 799-800, 805-06.

sought a certificate of appealability on two grounds. App. 51-59. The District Court issued the certificate with regard to the first ground, which is:

> 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.

App. 60-64.

SUMMARY OF THE ARGUMENT

The District Court erred when it denied Evans's petition for a writ of habeas corpus.

The decision of the State Court was contrary to Supreme Court precedent establishing that retrospective application of a law exposing the defendant to a significant risk of increased punishment violates the Ex Post Facto Clause. RSA 651:58, I, as amended, is such a law. Before the amendment, the State could not petition for review of a defendant's sentence. After the amendment, the State could, for the first time, file such a petition and thereby avail itself of the opportunity to increase the sentence that the trial court imposed. In this manner, the amended statute converted sentence review from a process where only the defendant could place himself at risk for an increased sentence, to one where the State could initiate the review process, and create such a risk, even if the defendant chose not to.

The State and District Courts failed to apply the "significant risk" test, which is the controlling, clearly established law, to Evans's case. Accordingly, these courts erroneously permitted the retrospective application of the amended sentence review statute to Evans. This Court must grant his petition for a writ of habeas corpus.

ARGUMENT

I. THE RETROSPECTIVE APPLICATION OF AN AMENDMENT TO A STATUTE, WHICH ALLOWED THE STATE TO SEEK AN INCREASE OF EVANS'S SENTENCE, VIOLATED THE EX POST FACTO CLAUSE BECAUSE IT EXPOSED EVANS TO A SIGNIFICANT RISK OF INCREASED PUNISHMENT.

The Ex Post Facto Clause prohibits the retrospective application of any law that subjects a defendant to a "significant risk of increased punishment." Garner v. Jones, 529 U.S. 244 (2000). As applied to Evans, RSA 651:58, I, as amended, is such a law. The amended statute, which allowed the State to seek an increase of the sentence imposed by the trial judge, became effective after Evans was convicted. The risk of increased punishment occasioned by the amended statute was not speculative. Both the State and District Court read too narrowly the scope of the Supreme Court's ex post facto jurisprudence, and thus, failed to apprehend that the retrospective application of the amendment to RSA 651:58, I to Evans was contrary to clearly established Supreme Court precedent. Accordingly, Evans respectfully requests that this Court reverse the District Court's order and grant his petition for a writ of habeas corpus.

Article I, Section 10 of the United States Constitution prohibits the passage of any "Bill of Attainder or ex post facto Law." The Supreme Court has long recognized that "[t]he [ex post facto] prohibition . . . necessarily requires some explanation; for, naked and without explanation, it is unintelligible, and means nothing." Calder v. Bull, 3 U.S. 386, 390 (1798). In

Calder, Justice Chase identified four categories of laws that are ex post facto:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. (Emphasis added). "All these, and similar laws, are manifestly oppressive." Id. at 391.

The Court has consistently employed Justice Chase's four-category formulation. See, e.g., Stogner v. California, 539 U.S. 607, 611-12 (2003)(quoting and applying the formulation); Carmell v. Texas, 529 U.S. 513, 521-30 (2000)(quoting the formulation and discussing its application in subsequent cases); Collins v. Youngblood, 497 U.S. 37, 41-42 (1990)(same); Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)(same). It has described the third category of laws as the "heart of the Ex Post Facto Clause. . . ." Johnson v. United States, 529 U.S. 694, 699 (2000). "To prevail on this sort of ex post facto claim, [the petitioner] must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he

acted." Id. (citing California Dept. of Corrections v. Morales, 514 U.S. 499, 506-07 & n.3 (1995)).

In three particular cases, beginning with Lindsey v. Washington, 301 U.S. 397 (1937), the Court has applied the third Calder category. In Lindsey, the punishment for the crime with which the defendant was charged increased from between six months to fifteen years at the time he was charged, to a mandatory fifteen years at the time of sentencing. Id. at 398-99. The Court held that imposition of the mandatory sentence pursuant to the amended statute violated the Ex Post Facto Clause. "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the offender." Id. at 401.

In Weaver v. Graham, 450 U.S. 24 (1981), the defendant challenged the retrospective application of a statute that changed a prisoner's eligibility for gain-time credits. The Weaver Court, in upholding the defendant's challenge, made clear that a new law may violate ex post facto principles even if it did not, as in Lindsey, effect a direct change in the statutory penalty for an offense. Weaver, 450 U.S. at 32 ("[A] statute may be retrospective even if it alters punitive conditions outside the sentence.").

Finally, in Miller v. Florida, 482 U.S. 423 (1987), the Court considered the potential ex post facto consequences of a

change in sentencing guidelines. Employing Justice Chase's formulation and relying on Lindsey and Weaver, the Court deemed ex post facto any law that "changes the legal consequences of acts completed before its effective date" and "clearly disadvantages" the petitioner. Miller, 428 U.S. at 430-31. As in Weaver, the Court held that a new law could be ex post facto if it did not increase the statutory penalty for the offense: "even if the revised guideline did not technically . . . increase . . . the punishment annexed to [the petitioner's] crime, . . ., it foreclosed his ability to challenge the imposition of a sentence longer than his presumptive sentence under the old law." Id. at 432.

In Morales, the Court rejected the existence of "material disadvantage" to the petitioner as a focal point. Morales, 514 U.S. at 506 n.3. In so ruling the Court relied on Collins, in which it had upheld the retrospective application of a new law allowing reformation of improper verdicts. Id. The Morales Court, citing Beazell, recast the inquiry in terms of the degree of the risk of increased punishment occasioned by the application of the new law. Id. at 509. However, the Morales Court did not alter the principle, applied in Weaver and Miller, that a new law may be ex post facto even if it did not effect a direct increase of the penalty attaching to the defendant's crime.

Morales was convicted of murder. Id. at 502. A subsequent amendment to California's parole procedures decreased the frequency with which inmates could seek parole. Id. at 503. As a result, the defendant, having been denied parole, had to wait a longer time before he could seek another parole hearing.[6] Id. The defendant argued that the amendment, as applied retrospectively to him, violated the Ex Post Facto Clause. Id. at 504.

The Court disagreed. "The . . . amendment made only one change: it introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period." Id. at 507. In so ruling, the Morales Court held that not every law operating to the "disadvantage" of an offender is necessarily ex post facto. Id. Rather, as it had "long held . . . the question of what legislative adjustments will be held to be of sufficient moment to transgress the constitutional prohibition must be a matter of degree." Id. at 509 (citing and quoting Beazell, 269 U.S. at

[6] At the time Morales was sentenced, he could have renewed his request for parole annually. Morales, 514 U.S. at 503. After the amendment, Morales had to wait three years after a denial of parole before requesting a new hearing. Id.

171)(emphasis supplied by Morales Court).[7] According to the Morales Court, "'[t]he amendment create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment . . . and such conjectural effects are insufficient under any threshold we may establish under the Ex Post Facto Clause.'" Id. at 509-10 (citing Dobbert v. Florida, 432 U.S. 282, 294 (1977)).

Thus, after Morales, the inquiry focuses on the degree to which the offender faces a risk of increased punishment. If the risk is speculative, retrospective application of the law does not violate the Ex Post Facto Clause. If the risk is "significant," it does. The test, as established by Miller and Weaver, and as later demonstrated in Garner, can result in the invalidation of a new law as applied to an offender even though the law did not increase the punishment the defendant faced under the applicable criminal statute.

In Evans's case, the District Court found that Garner, and thus inferentially, Morales, did not apply.[8] Add. 9. It ruled

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[7] In Beazell, the new law altered the rules for consolidation of co-defendants for trial. Beazell, 269 U.S. at 168-69. Relying on Calder, the Court found that retrospective application of the law did not offend ex post facto principles. "Just what alterations of procedure will be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a single formula or stated in a general proposition. The distinction is one of degree." Id. at 171.

[8] In its opinion, the State Court did not address or cite Garner. Petition of Evans, 154 N.H. at 146-52, 908 A.2d at 800-05.

that the "significant risk of increased punishment" test described in those cases governed uniquely in the parole eligibility context within which they were decided. Add. 8-9. Additionally, the District Court stated that the Garner Court was careful to limit the test to parole eligibility cases. Add. 9. In granting Evans's certificate of appealability, the District Court implied that Evans could only prevail if he persuaded this Court that Garner had displaced or modified Dobbert. App. 63.

The State Court's decision was contrary to Supreme Court precedent interpreting the Ex Post Facto Clause. See Grant v. Warden, 616 F.3d 72, 76 (1st Cir. 2010)("A state court decision is "contrary to" clearly established law if the court "'arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] on a set of materially indistinguishable facts.'")(quoting Williams v. Taylor, 529 U.S. 362, 413 (2000))(brackets supplied by Grant Court). The applicable Supreme Court law, as set forth in Morales and Garner, is the "significant risk of increased punishment" test, which flows from Calder and Beazell, and is not limited to the parole eligibility context.

Under that test, the amendment to RSA 651:58, I, which was not in effect when Evans was convicted, exposed Evans to the significant risk that his sentence would be increased upon the

State's petition for sentence review. Before the amendment, the State, if dissatisfied with a legal sentence imposed by the trial court, had no remedy. After the amendment, the State could seek to increase such a sentence. Because the State and District Court's interpretations of the Ex Post Facto Clause were contrary to Supreme Court precedent, Evans is entitled to habeas corpus relief.

A. Garner Is Not Strictly A Parole Eligibility Case.

In Garner, the defendant was serving life sentences for two murders. Garner, 529 U.S. at 247. At the time he committed his second offense, the Georgia authorities were required to reconsider parole eligibility after a previous denial every three years. Id. A new rule provided that such reconsideration need only occur every eight years. Id. The defendant argued that application of the new rule to his case violated the Ex Post Facto Clause. Id. at 248.

The starting point for the Court's analysis was the text of the Ex Post Facto Clause, "[o]ne function [of which] is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." Id. at 249-50 (citing Collins, 497 U.S. at 42; Beazell, 269 U.S. at 169-70). "Retroactive changes in laws governing parole of prisoners, in some instances, may be violative of this precept." Id. at 250 (citing Lynce v. Mathis, 519 U.S. 433, 445-46 (1997); Weaver, 450

U.S. at 32; Morales, 514 U.S. at 508-09). The Garner Court then reviewed Morales:

> [N]ot every retroactive procedural change creating a risk of affecting an inmate's terms or conditions of confinement is prohibited. . . . The question is a matter of degree. . . . The controlling inquiry . . . was whether retroactive application of the change in California law created a significant risk of increasing the measure of punishment attached to the covered crimes.

Id. (citations and quotations omitted).

After comparing the California regulation at issue in Morales to the Georgia regulation in Garner, the Court ruled that the record did not allow it to determine whether the defendant, in fact, faced a sufficient risk of extended incarceration. Id. at 255. "The standard announced in Morales requires a more rigorous analysis of the level of risk created by the change in law." Id. (citing Morales, 514 U.S. at 506-07 & n.3). Accordingly, the Court remanded the case to allow the defendant an opportunity to demonstrate " by evidence drawn from the rule's practical implementation . . . that its retroactive application will result in a longer period of incarceration than under the earlier rule." Id.

Thus, the Garner Court, while deciding a case involving parole eligibility regulations, applied Supreme Court precedent generated under the third category of Justice Chase's ex post facto formulation. It relied on several cases outside the

immediate context of parole eligibility, including Beazell, Weaver, and Collins. Contrary to the District Court's conclusion, the Garner Court neither expressly limited its decision to parole eligibility cases, nor suggested that the "significant risk" test, which, in Morales, it had traced back to Beazell, applied only in parole cases.[9] Accordingly, the District Court's ruling that the "significant risk" test did not apply to Evans derived from a misapprehension of Supreme Court precedent.

B. Other Federal Circuits Apply Garner Outside The Parole Eligibility Context.

The fact that other federal circuits have applied Garner outside the immediate context of parole eligibility guidelines supports Evans's argument that the Supreme Court has not limited the "significant risk" test to the parole eligibility context. Recently, a number of circuits have considered whether a change in advisory sentencing guidelines implicates ex post facto concerns. For example, in United States v. Lewis, 606 F.3d 193 (4th Cir. 2010), the defendant, at the time he committed his offense, faced an advisory guideline range of 21 to 27 months.

[9] Since a sentenced inmate has no constitutional right to either parole, or a rehearing within any particular time frame, there is no logical reason to conclude that these inmates are, by virtue of their status, in a unique or superior position for the purposes of an ex post facto analysis.

Id. at 199. By the time of his sentencing the advisory guideline range had increased to 41-51 months. Id.

The Fourth Circuit, applying Garner and the "significant risk" test, ruled that the Ex Post Facto Clause barred the retroactive application of the amended guideline range. Despite their advisory status, the guidelines are nonetheless the "crucial starting point" for federal sentencing decisions. Id. at 201 (internal quotation omitted). "[W]e are . . . persuaded by the D.C. Circuit's description of the Guidelines as an important "anchor" for a sentencing judge." Id. at 202 (citing United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008)). The Lewis Court disagreed with the Seventh Circuit, which rejected the ex post facto argument because the advisory guidelines did not compel the sentencing judge to impose a higher sentence. Id. ("[T]he question is not whether the sentencing courts retain discretion under the Guidelines. . . . Instead, the proper approach is to assess how the sentencing courts exercise their discretion in practice, and whether that exercise of discretion creates a significant risk of prolonged punishment.")(citations and quotations omitted)(discussing United States v. Demaree, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).

Aside from the Fourth Circuit and the D.C. Circuit, the Second, Sixth, and Eighth Circuits, citing the "significant risk"

test, have stated that the retrospective application of advisory sentencing guidelines implicates ex post facto concerns. See, e.g., United States v. Ortiz, Nos. 09-4343 & 4474, ___ F.3d. ___, 2010 WL 3419898 at *6-7 (2nd Cir. September 1, 2010); United States v. Lanham, 617 F.3d 873, 889-90 (6th Cir. 2010); United States v. Carter, 490 F.3d 641, 643 (8th Cir. 2007).

These cases are not Supreme Court precedent and do not strictly control this Court's AEDPA analysis. They are nonetheless noteworthy for two reasons. First, contrary to the District Court's order, Add. 9, the cases demonstrate the applicability of Garner outside the parole eligibility context, and thus corroborate Evans's characterization of Garner. Second, the amendment to RSA 651:58, I, as applied to Evans, is similar to a new advisory guideline range as applied to a defendant facing federal sentencing. In each case, the direct consequence of a new statute is the government's ability to secure a sentence closer to the statutory maximum sentence than the one imposed by the trial court. Each defendant thus faces the similar risk that his sentence will be greater after the advent of the new law. In neither case does the fact that the sentencer retains discretion under the amended law defeat the ex post facto claim. Because Evans, like the advisory guideline claimants, was exposed to a "significant risk of increased punishment" by virtue of a newly-

enacted amendment to a statute, the retrospective application of the amendment violated the Ex Post Facto Clause.

C. Garner States The Controlling Legal Standard.

In denying Evans's habeas petition, the District Court ruled that Garner was not clearly established precedent in Evans's case because Evans did not raise a parole eligibility claim. Add. 8-9. However, in its order granting Evans's certificate of appealability, the District Court stated that "the issue is not whether Garner might apply outside 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." App. 63. The court's order continued, "it may be arguable that jurists of reason could conclude that Garner has displaced Dobbert for the purposes of analyzing the ex post facto effect of the change in RSA 651:58, I." App. 63.

At the time Dobbert committed his crimes, Florida law provided for capital sentencing by the jury. Dobbert, 432 U.S. at 288. A new statute subsequently granted the judge the authority to override the jury's decision. Id. at 291. In Dobbert's case, the jury recommended life, and the judge, applying the new statute, imposed a death sentence. Id. at 287.

Dobbert argued that ex post facto principles barred the application of the new statute to his case. Id. at 292. The

Court found no violation. "The new statute 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 293-94. The Court found speculative the defendant's claim that the new law, as applied, necessarily increased his punishment. Had his jury known that its decision was final, its "recommendation may have been affected by the fact that the members of the jury were not the final arbiter of life or death. They may have chosen leniency when they knew that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final." Id. at 294 n.7. Finally, the new statute afforded a level of appellate review of a death sentence that did not exist under the former statute. Id. at 295-96.

Dobbert, however, is not inconsistent with the clearly established Supreme Court rule that a new law exposing the defendant to a "significant risk of increased punishment" violates the Ex Post Facto Clause. As in Beazell, which the Dobbert Court cited, the Court examined a new law in light of its risk of increased punishment and determined that the risk was not significant enough. A "Dobbert analysis," App. 63, is, like Garner and Morales, a Beazell analysis. Dobbert is an application of "significant risk" rather than a different test. By characterizing Dobbert as having employed an alternative

analysis, the State and District Court failed to recognize Dobbert as an application of established precedent, specifically, the "significant risk" test that the Supreme Court derived from Calder and Beazell. Consequently, the lower courts never applied the "significant risk" test in this case, and thus, erred in denying Evans the relief he requested.[10]

D. Conclusion.

"When determining whether federal law has been clearly established, 'we look to the holdings . . . of the Supreme Court's decisions as of the time of the relevant state-court decision.'" United States v. Gonzalez-Fuentes, 607 F.3d 864, 876 (1st Cir. 2010)(quoting Williams, 529 U.S. at 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389). The Supreme Court has clearly established that a law which exposes the defendant to a "significant risk of increased punishment" cannot be applied retrospectively. As applied to Evans, RSA 651:58, I, as emended, was such a law. This Court must grant his petition for habeas corpus relief.

[10] Evans's case is distinguishable from Dobbert. In Dobbert, the new statute changed the system in a way that could have hurt or helped the defendant. The judge could override either a life or death verdict. Here, the new statute took a system uniquely weighted in the defendant's favor, as only the defendant could have initiated sentence review, and gave the State the chance to unilaterally petition to increase the defendant's sentence. The new statute thus established a novel risk for the defendant, while conferring no correlative advantage.

CONCLUSION

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court:

a. Reverse the District Court's order;

a. Grant his petition for writ of habeas corpus; and

b. Vacate the enhanced sentence imposed by the Division upon the State's appeal of Evans's sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Rothstein, hereby certify that two copies of the foregoing Brief has been delivered to:

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/s/ David M. Rothstein
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DATED: November 12, 2010

ADDENDUM

Order of the District Court (DiClerico, J.) dated June 2, 2010

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

[1]The 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

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

[3]Specifically, 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

[4]In 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.