

NEW HAMPSHIRE SUPREME COURT
SUPREME COURT

No. 2005-_____

Petition of Chad Evans

PETITION FOR WRIT OF CERTIORARI
TO THE SENTENCE REVIEW DIVISION OF THE SUPERIOR COURT

Chad Evans asks this Court to exercise its original jurisdiction and issue a writ of certiorari to the Sentence Review Division of the Superior Court ("the Division"), reversing the Division's order of April 26, 2005, in which it increased Mr. Evans's sentence from 28 to 43 years. The Division acted based on the State's request to increase Evans's sentence under RSA 651:58, I, which was not in effect either when Evans committed the alleged criminal conduct in this case, when he was indicted based on that conduct, or when he was tried and convicted. Accordingly, application of this statute to increase Evans's sentence violated his rights to due process, to double jeopardy protection, and to be free from the retrospective application of penal statutes. N.H. Const. pt. 1, arts. 15, 16 & 23; U.S. Const. Art. 1, Sec. 10 & Amend. V.

Evans brings this petition under Supreme Court Rule 11.

As grounds, and in accord with Rule 11, Mr. Evans states:

1. He asks this Court to rule that the Division acted unlawfully when, by order dated April 26, 2005, it increased

Evans's sentence by fifteen years. A copy of this order is attached to this petition as Appendix A.

2. Evans specifically asks the Court to consider the following questions:

Whether the legislature intended that RSA 651:58, I apply retroactively?

Whether retroactive application of RSA 651:58, I violated Evans's right against retrospective application of penal statutes, under the state and federal constitutions?

Whether application of RSA 651:58, I to Evans violated his right to due process, because the trial court did not notify him of the provision, and the possibility the State could appeal his sentence, at the time he was sentenced?

Whether RSA 651:58, I violates a criminal defendant's state constitutional rights to due process, and to not be placed twice in jeopardy for the same offense?

3. In support of his claim for relief, Evans relies upon the New Hampshire Constitution, Part One, Articles 15, 16 & 23, the Fifth Amendment to the Federal Constitution, and Article 1, Section 10 of the Federal Constitution. The texts of these provisions are attached to this petition as Appendix B.

STATEMENT OF THE CASE

4. On December 14, 2000, a Strafford County grand jury indicted Chad Evans with one count of second degree murder, and several counts of second degree assault. On December 21, 2001,

after trial, a jury found him guilty of the murder charge, five second degree assault charges, and two misdemeanors.

5. The trial court (Nadeau, J.) sentenced Evans to serve twenty-eight years to life on the second degree murder charge, and consecutive, suspended terms on the felony assault charges, on April 16, 2002. Three days later, the State filed a petition asking the Division to review his sentence. The State filed its petition based on RSA 651:58, I, effective January 1, 2002, which, for the first time, gave the State the power to initiate sentence review.

6. By order dated October 24, 2002, the Division denied the State's petition, finding the sentence review provision inapplicable to Evans because he was not informed, when he was sentenced, that the State could seek to increase the sentence the trial court imposed.

7. The State appealed the Division's ruling. On appeal this Court ruled in favor of the State, holding that the Division lacked legal authority to find that the statute's application violated Evans's due process rights. Petition of State of New Hampshire (Sentence Review Division), ("Petition"), 150 N.H. 296 (2003). The Court did not reach any of the issues Evans raised concerning the legality of the application of RSA 651:58, I to his sentence..

8. When the Division scheduled a hearing, Evans filed two motions: one in Strafford County Superior Court to dismiss the State's petition for sentence review, and one before the Division to stay its proceedings pending the resolution of the motion to dismiss. The motions, and the State's objections, are attached as Appendix C.

9. The Strafford County Superior Court (Mohl, J.) refused to rule, primarily finding the issue unripe because Evans's sentence had not yet been increased. The Division denied the motion to stay proceedings. These orders are attached as Appendix D.

10. The Division held its hearing on September 17, 2004, but held its decision in abeyance pending resolution of Evans's motions in Strafford County. This order is included in Appendix D.

11. Evans also filed a petition for declaratory and injunctive relief in Strafford County, in which he sought a ruling that RSA 651:58, I could not lawfully be applied to him. The lower court (Mohl, J.) denied this motion, and in so doing, stated that Evans should appeal to this Court if the Division increased his sentence. The motion, the State's objection, and the lower court's order are attached as Appendix E.

12. The Division released its decision on the State's sentence review petition on April 26, 2005. In sum, the Division

increased Evans's sentence by fifteen years. A copy of the Division's order is attached as Appendix A.

ARGUMENT AMPLIFYING THE REASONS RELIED UPON FOR SEEKING EXERCISE OF ORIGINAL JURISDICTION

13. "Certiorari is an extraordinary remedy and is not granted as a matter of right but rather at the discretion of the court when the substantial ends of justice require such relief." Petition, 150 N.H. at 297 (quoting Petition of Turgeon, 140 N.H. 52, 53 (1995)). The Court, exercising its certiorari jurisdiction, previously held that the Division acted without authority when it decided that it could not lawfully increase Evans's sentence. Id. at 298-99. Evans has asked this Court, as well as the Strafford County Superior Court, to rule on his arguments that the State cannot ask the Division to increase his sentence. Both courts declined to rule, and as a result, Evans has now suffered the substantial increase of his sentence absent the benefit of any authoritative ruling that the State could lawfully seek such an increase.

14. This Court, as the final arbiter of the meaning, and the constitutionality, of statutes, must determine whether the Division's order of April 26, 2005, increasing Evans's sentence, can stand. Because the Division has no power to make such a ruling, and the Strafford County Superior Court has refused to conclusively rule, Evans can only turn to this Court if he is to

avoid the irreparable harm of serving fifteen years more than the sentencing judge in his case saw fit to impose. In other words, this Court must exercise its certiorari jurisdiction because Evans has nowhere else to turn. Cf. Turgeon, 140 N.H. at 53-54 (holding certiorari not appropriate because defendant had alternative means to challenge legality of sentence).

15. Based on the record in this case, Evans was indicted in December of 2000, and convicted in December of 2001. The sentence review statute, RSA 651:58, I, became effective January 1, 2002, and the court sentenced Evans on April 16, 2002. The statute confers upon the State a right it did not previously have to initiate sentence review proceedings, and seek increases in sentences, where the defendant chose to accept the state prison sentence imposed by the trial court.

16. Evans has raised several legal arguments based on these factual circumstances. He argues that the legislature did not intend the statute to apply retroactively. Two constitutional arguments attack the statute only as applied to Evans, i.e., whether its retrospective application violates the ex post facto prohibition, and whether its application to Evans violates due process because the sentencing judge did not inform Evans, at the time of sentencing, that his sentence may be increased based on a petition for sentence review filed by the State. Finally, Evans makes one argument that the statute, on its face, violates the

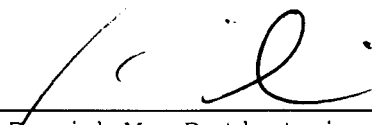
state constitution, specifically, the double jeopardy clause, and the due process clause.

17. These arguments have been set forth in the brief underlying the Petition decision, which is attached at Appendix C to Evans's motion to dismiss, the pleadings he has filed in Strafford County, his argument during a December 6, 2004 motion hearing in Strafford County, and his oral and written arguments before the Division. Evans asserts that the issues are properly preserved in his several oral and written arguments. The Division is powerless to rule on these issues, and the Strafford County has refused to do so. This Court, in Petition, has previously refused to rule on the issues Evans raises. It must do so now.

WHEREFORE, Mr. Evans respectfully requests that this Honorable Court grant this petition, rule that the State cannot lawfully seek to increase his sentence, and vacate the Division's order of April 26, 2005.

Respectfully submitted,

By



David M. Rothstein
Deputy Chief Appellate Defender
Appellate Defender Program
2 White Street
Concord, NH 03301

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing motion have been mailed, postage prepaid, N. William Delker, Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 19th day of May, 2005.



David M. Rothstein

DATED: May 19, 2005