

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

State of New Hampshire

v.

Chad Evans

No. 2005-0353

and

Petition of Chad Evans

No. 2005-0354

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
STRAFFORD COUNTY SUPERIOR COURT AND
PETITION FOR WRIT OF CERTIORARI TO THE SENTENCE REVIEW DIVISION
PURSUANT TO RULE 11

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15-minute oral argument)

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ISSUES PRESENTED

- I. Whether as a matter of statutory construction, an amendment to RSA 658:51, I (Supp. 2005), which permits the State to seek sentence review, was properly applied retroactively to the defendant's case.
- II. Whether the Ex Post Facto Clauses of the state and federal constitutions prohibit the State from appealing the defendant's sentence where the amendment to RSA 658:51, I, permitting the State to seek sentence review, went into effect after the defendant was convicted but before he was sentenced.
- III. Whether the Double Jeopardy Clauses of the state and federal constitutions prohibit the State from seeking a review of the defendant's sentence.
- IV. Whether the defendant's due process rights were satisfied where RSA 658:51, I, provided the defendant constructive notice of the State's right to seek sentence review.

STATEMENT OF THE CASE AND FACTS

The State concurs with the statement of the case and facts contained in the defendant's brief.

SUMMARY OF THE ARGUMENT

I. The defendant was convicted of second degree murder, second degree assault, and endangering the welfare of a child in December 2001. RSA 651:58, I (Supp. 2005) was amended, effective on January 1, 2002, to permit the State to seek sentence review. The defendant was not sentenced until April 2002. Following the defendant's sentencing, the State sought sentence review and the Sentence Review Division increased the defendant's stand committed prison sentence by 15 years. The defendant now argues for the first time in this appeal that, as a matter of statutory construction, RSA 651:58, I, should not be applied retroactively to permit the State to seek sentence review for crimes occurring prior to January 1, 2002. Even if the defendant had preserved this argument for appeal, RSA 651:58, I, was properly applied to the defendant's case because the amendment to the statute related to matters of procedure and not substance. The rules of statutory interpretation permit the retroactive application of procedural statutory changes.

II. In the case at bar, the statutory amendment permitting the State to seek sentence review took effect after defendant committed the crimes and was convicted but before he was sentenced. Application of the statute to the defendant did not constitute a violation of the state or federal Ex Post Facto Clauses. The amendment to RSA 651:58, I, did not create a new crime, change the elements or defense of the crimes for which the defendant was charged, or increase the range of punishments that applied to the crimes for which the defendant was convicted. As such, the statutory change was merely procedural and not substantive. Procedural changes do not implicate ex post facto concerns.

III. Permitting the State to seek sentence review did not violate the state or federal Double Jeopardy Clauses. Both the United States Supreme Court and this Court have held that a defendant may be resentenced if the original sentencing court made an error in its sentence. In fact, this Court has recognized that a defendant has no interest in finality of his sentence at the original sentencing hearing, even where the State failed to provide sufficient evidence to support an enhanced sentence. A defendant is twice placed in jeopardy only where he is prosecuted twice or receives two sentences for the same criminal conduct. Permitting the State to appeal the sentence imposed by the trial court does not result in the imposition of a second sentence. Rather, such a procedure only delays the finality of the defendant's sentencing. Such a delay in the finality of the defendant's sentence does not run afoul of the New Hampshire Constitution's protection against double jeopardy.

IV. The defendant was not required to receive specific notice of the State's right to seek sentence review. RSA 651:58, I, puts a defendant on constructive notice that the State may seek sentence review. RSA 651:59, I (1996) and the rules of the Sentence Review Division notify a defendant that when an application for sentence review is made, the Review Division may increase or otherwise modify the defendant's original sentence. Due process does not require that a defendant receive individualized notice of the State's right to seek sentence review. Statutory notice is sufficient because a defendant is presumed to know the law. Accordingly, the defendant's due process rights were not violated when the State appealed and the Sentence Review Division increased the defendant's sentences.

ARGUMENT

I. THE STATE HAD A RIGHT TO APPLY FOR SENTENCE REVIEW PURSUANT TO RSA 651:58, I, BECAUSE THE AMENDMENT TO THE STATUTE PERMITTING THE STATE TO APPEAL A SENTENCE WENT INTO EFFECT BEFORE THE DEFENDANT WAS SENTENCED.

Effective January 1, 2002, the New Hampshire Legislature amended RSA 651:58, I, to permit the State the right to seek sentence review. The defendant in the case at bar was convicted on December 21, 2001, of second degree murder and several counts of assault on his girlfriend's toddler, Cassidy Bortner. (ANOA at A10). The defendant was sentenced on April 16, 2002, to a stand-committed term of 28 years to life in prison on the murder conviction. Id. He also received consecutive suspended sentences on the assault convictions. Id. The State appealed the defendant's sentences to the Sentence Review Division. Id. at A1. The Review Division increased the defendant's stand-committed sentence by imposing consecutive five-to-ten-year and ten-to-twenty-year stand committed sentences on two of the assault convictions. Id. The defendant now argues that as a matter of statutory construction, RSA 651:58, I, should not have been applied retroactively to his case.

As a threshold matter, the defendant did not preserve the statutory construction argument. In order to preserve an issue for appeal, the defendant must make a specific and contemporaneous objection at the lower court level. State v. Ainsworth, 151 N.H. 691, 693-94 (2005). It is not enough to object on one ground at the lower court and then make different legal arguments on appeal. Broughton v. Proulx, 880 A.2d 388, 392 (N.H. 2005).

Moreover, this Court will not address issues to which the defendant made only “passing reference” in the lower court. State v. Littlefield, 152 N.H. 331, 334 (2005).

The defendant did not present a claim of statutory construction to the superior court. Both the defendant’s Motion To Dismiss State’s Petition For Sentence Review (ANOA at A3 to 32) and his Motion For Declaratory And Injunctive Relief (ANOA at A45 to A50) were framed only in terms of constitutional claims. Namely, in those two pleadings, the defendant raised claims that his ex post facto, double jeopardy, and due process rights were violated by application of RSA 651:58, I, to his case. The defendant never raised a claim that the legislature did not intend, as a matter of statutory construction, for RSA 651:58, I, to be applied retroactively. Accordingly, the defendant has failed to preserve this issue of appeal.¹

Even if the issue of statutory construction had been preserved, the State was permitted to seek sentence review because the amendment to the statute took effect before the defendant’s sentencing. The defendant does not argue, and there is no evidence, that the legislature specifically addressed the issue of whether the amendment to RSA 651:58, I, was intended to apply to crimes committed before January 1, 2002. In such a situation, the retroactive application of a statute depends on whether the statutory change is substantive or procedural. See State v. Hamel, 138 N.H. 392, 394 (1994). Here, the amendment to RSA 651:58, I, is procedural. Accordingly, the State was properly permitted to seek sentence review in this case.

¹ In fact, in the defendant’s petition for writ of certiorari to this Court, the defendant did not even present the issue of statutory construction. (Petition at 2). The defendant, however, did raise the issue in his Notice of Appeal (NOA at 4-5).

In Hamel, this Court addressed whether a statutory change that extended the statute of limitations in child sexual assault cases could be applied retroactively to crimes committed before the statute was amended. In that case, the Court noted:

When the legislature is silent as to whether a statute should apply prospectively or retrospectively, our interpretation turns on whether the statute affects the parties' substantive or procedural rights. The general rule is that where a law affects substantive rights and liabilities, it is presumed to apply only to future causes of action. This presumption, however, reverses when the statute is determined to affect only the procedural or remedial rights of a party. Unlike statutes affecting substantive rights, those affecting procedural or remedial rights are usually deemed to apply retroactively to those pending cases which on the effective date of the statute have not yet gone beyond the procedural stage to which the statute pertains. *

Id. at 394 (quotations and citations omitted).

The Court concluded that the statutory amendment extending the statute of limitations was a procedural change that could be applied retroactively. The Court reasoned that the statutory amendment did not create any greater burden on the defendant beyond extending the prosecutorial window. Id. at 395. Specifically, the Court noted that the amended statute of limitations "did not change the ultimate facts needed to prove guilt, nor did it punish a previously innocent act." Id. The Court also observed that the new statute of limitations did not alter the elements of the crime. Id. at 395-96. Finally, the Court concluded that the extended statute of limitations did not eliminate any defenses otherwise available to the defendant. Id. at 396.

Applying these same principles to the amended RSA 651:58, I, it is clear that the provision allowing the State to seek sentence review is merely procedural. Rather than

changing the substantive punishment that could be imposed for the charged offenses, the amendment to RSA 651:58, I, created only a procedural change in the statute by delaying the time that the defendant's sentence becomes final. Under the amendment, finality occurs only after the time for filing an appeal of the sentence has lapsed or the Sentence Review Division has considered the propriety of the sentence imposed by the trial court. Moreover, as in Hamel, the statutory change in the case at bar does not punish previously innocent conduct, does not alter the elements of the offense, and does not eliminate any defense previously available to the defendant.

The Sentence Review Division "is an administrative tribunal consisting of three members who are either superior court justices, senior justices, or retired superior court justices." Petition of Turgeon, 140 N.H. 52, 54 (1995) (citing RSA 651:57 (Supp. 1994)). The Review Division was created "to address a perceived inconsistency in sentencing within the State." Id. "The legislature intended the division 'to make sure that the same crime fits the same sentence.'" Id. (quoting N.H. S. Jour. 535 (1975)). Initially, only a defendant had a right to seek sentence review. 1975 N.H. Laws 267:1. RSA 651:58, I, was amended in 2001 to provide the State with the right to seek sentence review as well. 2001 N.H. Laws 45:1 (effective Jan. 1, 2002). As with the original legislation granting defendants the right to seek sentence review, the amendment to RSA 651:58 was also designed to ensure greater uniformity in sentences by allowing the State to seek sentence review. See Senate Judiciary Comm., Hearing on SB 27 (Jan. 31, 2001) (testimony of Rockingham County Attorney James

Reams); N.H. S. Jour. 61-62 (2001); House Criminal Justice and Public Safety Comm., Hearing on SB 27 (Apr. 24, 2001).

To this end, the Sentence Review Division is not permitted to consider any material or facts not considered by the trial court at the time of sentencing. See SUPER. CT. SENTENCE REV. DIV. R. 15 (“The Sentence Review Division will only consider matters which are part of the record of sentencing . . .”) (emphasis in original); SUPER. CT. SENTENCE REV. DIV. R. 16 (“The Sentence Review Division will not consider any matter or development subsequent to the imposition of the sentence.”). Moreover, the factors that the Sentence Review Division may consider in evaluating the propriety of the sentence are the same as those applied by the trial court at the time of sentencing. Compare SUPER. CT. SENTENCE REV. DIV. R. 20 (listing factors that Review Division may consider in re-evaluating the sentence) with 2 RICHARD B. MCNAMARA, CRIMINAL PRACTICE AND PROCEDURE § 1032 (1997) (discussing standards for sentencing in New Hampshire and recognizing that the criteria delineated in the Sentence Review Division Rules provides the “best guidance” “in assessing the propriety of sentences”). Consequently, the amended sentence review process imposes no “greater burden on a criminal defendant” than prior to the statutory change. Hamel, 138 N.H. at 395.²

² To the extent that defendant relies on Stogner v. California, 539 U.S. 607 (2003) (holding that a statute which revives criminal charges after the statute of limitations has expired violates the Ex Post Facto Clause) (Def. Br. at 12), this Court has held that Stogner does not implicate cases where the statute of limitation has not yet expired before the statute was amended. State v. Martin, 151 N.H. 107 (2004). Similarly, Stogner is irrelevant to this case because the defendant’s right to avoid sentence review had not vested before the statute was amended. In other words, the State could not even seek sentence review until after the defendant’s sentencing, which occurred after RSA 651:58, I, was amended.

The defendant relies heavily on State v. Johnson, 134 N.H. 570 (1991), in support of his argument that RSA 651:58, I, should not be applied retroactively. (Def. Br. at 10-12). Johnson is readily distinguishable. Johnson involved the question of whether changes to New Hampshire's death penalty statute could be applied to a homicide that occurred before the statute was amended. This Court concluded that the statutory changes were substantive and, therefore, could only apply prospectively. Specifically, the Court noted that because the legislature added "two new statutory grounds upon which the State may seek the death penalty, there is a possibility that the defendants may now face capital punishment because of circumstances which could not have served as the statutory basis for such a penalty under former RSA 630:5. Such a possibility increases the likelihood of imposition of the death penalty and can hardly be considered procedural or remedial in its impact on the defendants." 134 N.H. at 573.

Unlike the statutory changes at issue in Johnson, the amendment to the sentence review statute did not change the factors that the court could consider in imposing sentence. Rather, as noted above, the Sentence Review Division is limited to consideration of the same facts and factors utilized by the original sentencing court in determining the appropriate sentence. Consequently, the change to RSA 651:58, I, is merely procedural.

Finally, the defendant's reliance on Landgraf v. USI Film Products, 511 U.S. 244 (1994), and Wallace v. Reno, 194 F.3d 279 (1st Cir. 1999), is misplaced. Those cases looked to the defendant's "reasonable reliance" and "settled expectations," among other factors, in determining whether a statute should be applied retroactively. The tests applied in these

federal cases are not consistent with the approach taken by this Court's recent cases, in which this Court has looked to the substantive/procedural dichotomy to determine whether the statute should be applied retroactively. Indeed, in Workplace Sys. Inc. v. Cigna Prop. & Cas. Ins. Inc., 143 N.H. 322 (1999), this Court noted that the "great weight of . . . authority" in this state has permitted "the retroactive application of procedural or remedial statutes that may have altered the outcome of the controversy or subjected parties to criminal or civil actions which otherwise would have been barred." Id. at 325 (citing, inter alia, Hamel, 138 N.H. at 394-96). In other words, a "statute which enlarges or reduces the court's jurisdiction to entertain an action" will be considered procedural. Id. Thus, Landgraf and Wallace provide no support to the defendant's position because they are not consistent with this Court's settled rules of statutory interpretation on the issue of retroactivity.³

³ Moreover, even under the tests applied in Landgraf and Wallace, the defendant here has no "settled expectation" or "reasonable reliance" on the sentencing procedure. As discussed in further detail below, the defendant has no vested interest in the finality of his sentence until the conclusion of the sentencing process. Here the sentencing process did not begin until after RSA 651:58, I, was amended to allow the State to seek sentence review.

II. THE STATE'S APPLICATION FOR SENTENCE REVIEW AND THE DEFENDANT'S INCREASED SENTENCES DID NOT VIOLATE THE *EX POST FACTO* CLAUSE.

In this appeal, the defendant challenges the State's petition for sentence review and his increased sentences on the ground that permitting the State to appeal his sentences violated the Ex Post Facto Clauses of the state and federal constitutions. See U.S. Const. art. I, § 10; N.H. Const. pt. I, art. 23. The amendment to RSA 651:58, I, which grants the State the right to seek sentence review, does not create a new crime, change the elements of the crimes or available defenses, or increase the range of punishments available for the crimes for which the defendant was convicted. As a result, application of the amended version of RSA 651:58 to the defendant does not run afoul of the Ex Post Facto Clauses of the state or federal constitutions.

This Court has long applied the following test for determining whether application of a statute to a criminal defendant violates the Ex Post Facto Clause of the state constitution:

A statute or its application is considered an ex post facto law if it makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action; or aggravates a crime, and makes it greater, than it was when committed; or changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed.

State v. Comeau, 142 N.H. 84, 87-88 (1997) (quotation omitted); see also Wort v. Winnick, 3 N.H. 473, 474 (1826). “[T]he appropriate focus in ex post facto analysis is not on whether a law imposes disadvantages or additional burdens, but rather on whether it ‘increases the punishment for or alters the elements of an offense, or changes the ultimate facts required to prove guilt.’” Comeau, 124 N.H. at 88 (quoting Petition of Hamel, 137 N.H. 488, 494

(1993)) (emphasis in original). As in the area of retrospective application of statutory changes, discussed in Part I above, the issue of whether a law violates the Ex Post Facto Clause turns on whether the new statute is substantive or procedural. This Court has distinguished between a substantive change which augments the crime or increases the range of sentences that could be imposed for the charged crime, from a procedural change to a criminal statute. The Ex Post Facto Clause is not implicated if the statutory change is procedural. See Hamel, 137 N.H. at 494.

This substance/procedure dichotomy in ex post facto analysis is an attempt to reconcile the necessity for continuous legislative refinement of the criminal adjudication and corrections process with the constitutional requirement that substantial rights of a criminal defendant remain static from the time of the alleged criminal act.

Id. (citation and quotation omitted).

In Petition of Hamel, the defendant, who was convicted of aggravated felonious sexual assault, was automatically denied bail pending appeal pursuant to RSA 597:1-a, I (2001). 137 N.H. at 489. That statute, which was amended after the defendant committed his crimes, eliminated the possibility that a defendant could be released on bail pending appeal for certain crimes, including aggravated felonious sexual assault. Id. The defendant challenged application of the statute to him on the grounds that it was an ex post facto law. Id. at 493. This Court applied the substance/procedure test to determine whether application of the statute to the defendant was permissible. Id. at 494. The Court concluded that “even though the change in the law may have disadvantaged the petitioner, the application of it to him was not ex post facto because it ‘neither made criminal a theretofore innocent act, nor

aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict.” Id. (quoting Dobbert v. Florida, 432 U.S. 282, 293 (1977)).

Courts in other jurisdictions have applied this analysis to uphold the application of a variety of different statutes that affect procedural issues.⁴ “For instance, a statute granting the government an expanded right to appeal in criminal cases can be applied to proceedings against defendants whose crimes were committed before the statute was passed.” Amin v. State, 939 P.2d 413, 416 (Alaska Ct. App. 1997) (citing Mallett v. State of North Carolina, 181 U.S. 589, 597 (1901); Nilson Van & Storage Co. v. Marsh, 755 F.2d 362, 365-66 (4th Cir. 1985)). Similarly, courts have permitted the retroactive application of statutes that effect sentencing procedures to the disadvantage of the defendant. See, e.g., Wilson v. Lensing, 943 F.2d 9, 11 (5th Cir. 1991) (retroactive application of statute allowing resentencing after appeal did not violate Ex Post Facto Clause); Amin, 939 P.2d at 417 (statute eliminating defendant’s automatic right to seek sentence review could be applied retroactively); State v. Jackman, 963 P.2d 170, 171 (Or. Ct. App. 1998) (statute allowing appellate court to correct errors in sentencing did not violate Ex Post Facto Clause); Commonwealth v. Young, 637 A.2d 1313, 1317-18 (Pa. 1993) (statute that allowed for resentencing after reversal of death sentence was not ex post facto law, even though previous law required imposition of life sentence after reversal of capital sentence).

⁴ An analysis of case law in other jurisdictions is particularly appropriate in this context because the New Hampshire Constitution offers no more protection than the federal constitution. State v. Costello, 138 N.H. 587, 589 (1994) (“The protection afforded against ex post facto penal laws under both article I, section 10 of the Federal Constitution and part I, article 23 of the New Hampshire Constitution is the same.”).

The analysis discussed above, in connection with the retroactive application of the statute, applies with equal force to the ex post facto issue. The amendment to RSA 651:58, I, at issue here clearly does not criminalize previously innocent conduct. See Comeau, 142 N.H. at 88. Nor does the amendment alter the elements of the offense, id., or eliminate any defense that previously existed. See Hamel, 137 N.H. at 494. Finally, and most importantly for this case, the statutory amendment does not change the punishment by “inflict[ing] greater punishment, than the law annexed to the crime when committed.” Comeau, 142 N.H. at 88 (quotation omitted). In other words, the sentences “annexed to the crime when committed” remain unchanged and the amendment to RSA 651:58 do not alter the burden of proof or permit the Sentence Review Division to consider any additional factors beyond those that existed at the time of the original sentencing. See Comeau, 142 N.H. at 87-88. Rather, it merely delayed the date on which the defendant’s sentence became final, an effect found not to create an ex post facto violation. See Hamel, 137 N.H. at 494. In addition, the sentence review process is not more burdensome to a defendant than the original sentencing process. As discussed in Part I above, the scope of the Sentence Review Division’s review is to limited to the sentencing record of the lower court. As such, the statutory change does not constitute an ex post facto law.

Moreover, contrary to the defendant’s argument, the purpose of the amended RSA 651:58, I, is not primarily punitive. (Def. Br. at 18). Rather, as discussed in Part I above, the purpose of the amended statute is purely remedial. The sentence review process, whether requested by the defendant or the State, is intended to create greater uniformity among

sentences. See SUPER. CT. SENTENCE REV. DIV. R. 22. To this end, the Sentence Review Division is empowered to lower the sentence, increase the sentence, change the sentence in some other way, or leave the sentence unchanged. SUPER. CT. SENTENCE REV. DIV. R. 14. Indeed, there is no guarantee that the Sentence Review Division will impose a longer sentence even when the State appeals the sentence.

The defendant cites this Court's decision in State v. Reynolds, 138 N.H. 519 (1994), to support his ex post facto claim. In that case, the Court held that a statutory change that reduced the frequency by which a defendant could petition to suspend his sentence from every two years to every four years violated the Ex Post Facto Clause of the State Constitution. 138 N.H. at 523. As a threshold matter, there is a substantial question about whether Reynolds is still good law.

The year after this Court decided Reynolds, the United States Supreme Court held that a very similar provision that reduced the frequency of parole hearings did not violate the federal Ex Post Facto Clause. See California Dept. of Corrections v. Morales, 514 U.S. 499, 507 (1995). In Morales, the United States Supreme Court narrowed the interpretation of the very same cases that this Court relied on in reaching its holding in Reynolds. Compare Reynolds, 138 N.H. at 522-23 (relying on, inter alia, Lindsey v. Washington, 301 U.S. 397 (1937), and Weaver v. Graham, 450 U.S. 24 (1981), to support holding that statute that reduced the frequency at which defendant could petition for suspension of his sentence violated Ex Post Facto Clause) with Morales, 514 U.S. at 507 (distinguishing Lindsey and Weaver in order to reach its holding that statute reducing the frequency at which defendant

could petition for a parole hearing did not violate the Ex Post Facto Clause).⁵ In holding that the statutory change reducing the frequency of parole hearings did the violate the Ex Post Facto Clause, the United States Supreme Court reasoned: “Rather than changing the sentencing range applicable to covered crimes, the 1981 amendment simply ‘altered the method to be followed’ in fixing a parole release date under identical substantive standards.” Morales, 514 U.S. at 507-08. As the Court observed, the Ex Post Facto Clause does not “require that the sentence be carried out under the identical legal regime that previously prevailed.” Id. at 510 n.6.

Both the analysis and the holding in Reynolds are undermined by the United States Supreme Court’s decision in Morales. The Reynolds Court began its analysis by noting that the protection afforded by both the state and federal constitutional provisions prohibiting ex post facto laws “is the same,” 138 N.H. at 521, and since Reynolds this Court has never suggested otherwise. Thus, the United States Supreme Court’s decision in Morales should be controlling.

However, even if this Court were to continue to apply Reynolds as good law, that case is easily distinguishable. In Reynolds, the legislative change reduced the opportunities for an inmate to petition for suspension of his sentence. As a consequence, “denial of a chance to petition results in a denial of the inmate’s release and a longer period of incarceration.” 138 N.H. at 522. In contrast to Reynolds, the statutory amendment at issue here is merely a

⁵ As this Court recognized in Reynolds, the fact that a law involves a reduction in the ability to petition for parole instead of suspension of his sentence does not change the Ex Post Facto Clause analysis. 138 N.H. at 523.

procedural change that affects the timing of the sentencing process by delaying the finality of the defendant's sentencing until after the State has had an opportunity to seek sentence review. In this regard, the change to the law is more akin to the elimination of bail pending appeal that was at issue in Hamel. In that case this Court held that even though application of the amendment to the defendant may have resulted in some disadvantages, it did not implicate ex post facto concerns "because it 'neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict.'" 137 N.H. at 495 (quoting Dobbert, 432 U.S. at 293). Similarly, because the amendment to RSA 651:58 did not "chang[e] the sentencing range applicable for the covered crimes," it was only procedural and did not violate the Ex Post Facto Clause. Morales, 514 U.S. at 507-08; see also Collins v. Youngblood, 497 U.S. 37, 46 (1990) (A new law that did not "increase the punishment for which [the defendant was] eligible as a result of that conviction [was] a procedural change.").

III. INCREASING THE DEFENDANT'S SENTENCE AFTER THE STATE APPLIED FOR SENTENCE REVIEW DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The defendant argues that permitting the State to seek sentence review violated the Double Jeopardy Clause of the State Constitution. (Def. Br. at 22-23). See N.H. Const. pt. I, art. 16. The defendant's argument is without merit because the defendant's sentence was not final until after the sentence review process. Accordingly, the State had not put the defendant in jeopardy more than once. Rather, the defendant was subject to continuing jeopardy until the sentencing process was complete.

As this Court has held:

The double jeopardy prohibition protects a defendant from multiple punishments for the same offense. In analyzing claims of multiple punishments, [the Court has] only recognized a double jeopardy violation in cases in which the defendant has been at least twice convicted and at least twice sentenced for separate charges that amounted to the same offense.

State v. Haines, 142 N.H. 692, 696-97 (1998) (quotation omitted). The Court has "refused to extend double jeopardy protections to situations involving only one charged offense and one enhanced sentence." Id. (quotation omitted).

Likewise, in United States v. DiFrancesco, 449 U.S. 117 (1980), the United States Supreme Court held that a statute which permits the government to appeal a sentence imposed by the trial court does not implicate double jeopardy concerns. In DiFrancesco, the Court held that "[t]he Double Jeopardy Clause is not a complete barrier to an appeal by the prosecution in a criminal case. . . . [T]he Government's taking a review of respondent's sentence does not in itself offend double jeopardy principles just because its success might

deprive respondent of the benefit of a more lenient sentence.” Id. at 132. The Court further noted that “[h]istorically, the pronouncement of sentence has never carried the finality that attaches to an acquittal.” Id. at 133. After an analysis of case law, the Court observed that “it may be said with certainty that history demonstrates that the common law never ascribed such finality to a sentence as would prevent a legislative body from authorizing its appeal by the prosecution.” Id. at 134.

Under the statute at issue in DiFrancesco, “the appeal is to be taken promptly and is essentially on the record of the sentencing court. The defendant, of course, is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.” Id. Under these circumstances, the Court concluded that “the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase.” Id. at 137.

The DiFrancesco Court held that permitting the government to appeal a sentence would not constitute multiple punishments in violation of the Double Jeopardy Clause. Id. at 138. The Court reasoned: “Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where . . . Congress has specifically provided that the sentence is subject to appeal.” Id. at 139. The Court concluded that the prohibition on multiple punishments only means that “a defendant may not receive a greater sentence than the legislature has authorized.” Id. In reaching this conclusion, the Court noted that permitting the prosecution to appeal a sentence

beneficial effect on the criminal justice process: “Appellate review creates a check upon this unlimited power [of the judge to be determine the sentence], and should lead to a greater degree of consistency in sentencing.” Id. at 143.

This Court has also held that the state constitutional protection against double jeopardy does not bar a defendant’s resentencing after appeal. In State v. McClellan, 149 N.H. 237 (2003), the Court was presented with the issue of whether the New Hampshire Constitution’s Double Jeopardy Clause bars the State from seeking an extended term of imprisonment at a resentencing hearing when, at the first sentencing hearing, the State failed to prove beyond a reasonable doubt the existence of the prior convictions that supported the extended sentence. Id. at 240. The Court held that the state constitution did not prevent the State from establishing that the defendant was entitled to an enhanced sentence even though it did not provide sufficient proof at the first sentencing hearing. Id. at 243. The Court concluded that in this context the state constitution’s protection against double jeopardy did not provide broader protection than its federal counterpart. Id. Thus, McClellan stands for the proposition that a defendant has no constitutional right to finality in a sentencing hearing where the sentencing court erred in its decision to impose the original sentence. McClellan is completely consistent with the reasoning and holding of DiFrancesco, which permits the prosecution to appeal the lower court’s imposition of a sentence. Thus, this Court should apply DiFrancesco and McClellan to the facts of this case and uphold the constitutionality of RSA 651:58.

IV. THE DEFENDANT WAS NOT ENTITLED TO SPECIFIC NOTICE THAT HIS SENTENCE MAY BE INCREASED IF THE STATE SOUGHT SENTENCE REVIEW WHERE THE STATUTE CLEARLY ESTABLISHED THE STATE'S RIGHT TO SEEK REVIEW.

In dismissing the State's application for sentence review initially, the Review Division concluded that it could not consider the State's application for sentence review without violating the defendant's due process rights because the defendant was not specifically informed at the time of sentencing of the State's right to seek sentence review. Petition of the State of New Hampshire (Sentence Review Division), 150 N.H. 296, 297 (2003). The Review Division relied heavily on State v. Burgess, 141 N.H. 51 (1996), in reaching that decision. The defendant has now adopted the initial position of the Sentence Review Division. The Review Division and the defendant, however, have misapprehended this Court's precedents. The State is not required to provide the defendant with individualized notice that his sentence may be increased by the Sentence Review Division where the statutory provisions adequately put a defendant on notice of the State's right to seek sentence review. Accordingly, the defendant's due process rights were not violated by the lack of specific notice.

In Burgess, this Court was faced with the following question: "Where the trial court imposed a specific sentence and deferred its execution, and the sentence did not provide for probation, did the court have the authority thereafter to add a term of probation at a later hearing on a deferred sentence." 141 N.H. at 51. This Court held that the sentencing court could not modify a defendant's sentence at a later time, unless the defendant was provided

“explicit notice at the time of the original sentencing” that the court retained discretion to modify his sentence at a later time. Id. at 53.

Burgess is readily distinguishable. Unlike the instant case where a statute provided specific notice that the defendant’s sentence could be increased at a later date, Burgess involved a situation where the defendant had no statutory notice that his sentence was subject to modification. In fact, the Burgess Court specifically rejected the State’s argument that a statute allowing for modification of suspended sentences provided the defendant with constructive notice of a potential future modification, reasoning that the statute was inapplicable. 140 N.H. at 53-54 (citing RSA 651:21 (1986)). The Court noted, however, that if the statute had applied to the defendant’s sentence, “then the State’s position might have merit.” Id. at 53. In other words, the Burgess Court recognized that statutory notice might be sufficient to inform the defendant that his sentence may be subject to later modification.

In recognizing the sufficiency of statutory notice, the Burgess Court cited to State v. White, 131 N.H. 555, 558 (1989). See Burgess, 140 N.H. at 53. In White, the defendant was sentenced to 12 months in the house of correction, followed by 2 years of probation. 131 N.H. at 556. After he was released from the house of corrections, the defendant violated the terms of his probation. Id. at 557. Following the probation violation hearing, the court imposed a 2 ½ to 5 year state prison sentence. Id. The defendant appealed the sentence, arguing that the state prison sentence violated his constitutional rights to due process and double jeopardy because he was not notified at the time of the original sentence that the court could later augment his sentence. Id.

This Court rejected the defendant's claim. Id. The Court observed that, if a defendant violated his probation, statutory law allowed a sentencing court to impose the balance of the maximum sentence that could have originally been imposed. Id. (citing RSA 651:2, VII). Because RSA 651:2 allowed the court to impose the maximum sentence at the time of a probation violation, the defendant "is presumed . . . to have known that if his probation terms were found by the court, after notice and hearing, to have been violated, he faced the possibility of further incarceration, not to exceed the limit prescribed by the legislature for (in his case) a class B felony." Id. at 558. In other words, the Court held that statutory notice of a possible future augmentation of sentence, following a probation violation, satisfied due process concerns. Id.

This Court reached a similar result in Stewart v. Cunningham, 131 N.H. 68 (1988). In that case, the defendant argued that the trial court violated his state and federal due process rights by imposing an extended sentence because the State had not provided him specific notice that he could be subject to an enhanced sentence. Id. at 70. The Court noted that at the time the defendant was originally sentenced, RSA 651:6, II, the statute authorizing a court to impose an extended sentence, did not require the defendant to receive individualized pretrial notice that he could be subject to the extended sentence. Stewart, 131 N.H. at 70. After the defendant was sentenced, RSA 651:6, II and the superior court rules were both amended to require the State to give a defendant specific pretrial notice that it intended to seek an enhanced sentence. Stewart, 131 N.H. at 70. The Court held that the absence of specific notice to the defendant that he would be subject to an extended term of incarceration

did not violate the defendant's due process rights. Id. at 71. The Court reasoned that the enhanced sentencing statute itself "meets the constitutional notice requirement by clearly delineating that the enhanced sentencing provision is applicable to all crimes." Id. at 70 (citing State v. Morehouse, 120 N.H. 738, 743 (1980)).

This Court's rulings in White and Stewart thus stand for the proposition that where a defendant has clear statutory notice that he could be subject to the continuing jurisdiction of the court or receive an augmented sentence, the State is not required to provide the defendant with specific notice that his sentence may be increased at a later time. In contrast, in Burgess and the other cases relied on by the defendant and the Review Division, there was no statute authorizing the court to modify or augment the defendant's sentence after his original sentencing hearing. In other words, only where the defendant does not have statutory notice of the court's power to augment his sentence does due process require the defendant to receive particularized notice that the court retains jurisdiction to modify his sentence at a later time.

In the case at bar, there was adequate statutory notice that the State could seek sentence review and the Review Division could increase the defendant's sentence. Effective January 1, 2002, RSA 651:58, I, was amended to read: "[T]he state of New Hampshire[] may file with the clerk of the superior court for the county in which the judgment was rendered an application for review of the sentence by the review division. The application may be filed within 30 days after the date the sentence was imposed, but not thereafter except for good cause shown." RSA 651:58, I. RSA 651:59, I, informed the defendant that "[t]he review

division has jurisdiction: . . . to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences” The Sentence Review Division Rules further state that “[t]he Division can act in any of the following ways: (a) It may increase the penalty imposed by the judge; (b) It may decrease the penalty imposed by the judge; (c) It may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review; or, (d) It may decide that the sentence under review should stand as is.” SUPER. CT. SENTENCE REV. DIV. R. 14. The defendant is presumed to be aware of both the statutes and court rules; ignorance is no excuse. See State v. Stratton, 132 N.H. 451, 457 (1989); People v. Acosta, 768 N.E.2d 746, 751 (Ill. App. Ct. 2001). The statutes and court rules, thus, provided the defendant adequate constructive notice that his sentences could be reviewed and modified following the original sentencing hearing.

RSA 651:58, II (Supp. 2002) and the rules of the Sentence Review Division, SUPER. CT. SENTENCE REV. DIV. R. 2, require the clerk of the superior court to provide specific notice to the defendant of his right to seek sentence review. The fact that neither the statutes nor the court rules require the defendant to receive particular notice of the State’s right to seek sentence review does not violate the defendant’s due process rights. The legislature may well have concluded that a defendant should be provided with particular notice of his right to seek sentence review, and the consequences thereof, so that he can make an informed judgment about whether to exercise that right in a timely manner. RSA 651:58, I, on the other hand, provides sufficient notice that the State also has a right to seek sentence review

that may result in an increased sentence for the defendant. See White, 131 N.H. at 557-58; Stewart, 131 N.H. at 70; Morehouse, 120 N.H. at 743. Due process does not require the State to give the defendants individualized notice at the time of the original sentencing that their sentences may be increased if the State exercises its right to seek sentence review.

Accordingly, the Review Division's decision to augment to the defendant's sentences should be affirmed.

CONCLUSION

For the foregoing reasons, the State of New Hampshire respectfully requests that this Honorable Court affirm the decisions of the Strafford County Superior Court and the Sentence Review Division.

The State requests fifteen minutes for oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

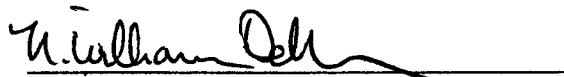
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I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to David M. Rothstein, Deputy Chief Appellate Defender, counsel of record for Chad Evans.



N. William Delker