

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chad Evans, Petitioner

v.

Warden, New Hampshire State
Prison, Respondent

No. 1:08-cv-105-JD

**RESPONDENT'S MEMORANDUM IN SUPPORT
OF THE MOTION FOR SUMMARY JUDGMENT**

The petitioner seeks federal habeas corpus relief based on the claim that the law that permitted the State to seek sentencing review was an *ex post facto* law and, therefore, unconstitutional. D. 1: 1.¹ On January 20, 2010, this Court directed the respondent to answer or otherwise plead in response to the petition.

D. 15: 6.

¹ "D. :_" refers to this Court's document and page number. "Exh. :_" refers to the exhibit, identifying letter, and page number. The following documents will be filed conventionally with this Court: (1) the petitioner's notice of direct appeal (Exh. A); (2) the petitioner's brief on direct appeal (Exh. B); (3) the State's brief on direct appeal (Exh. C); (4) the petitioner's reply brief (Exh. D); (5) the petitioner's notice of discretionary appeal (Exh. E); (6) the petitioner's brief and petition (Exh. F); (7) the appendix to the petitioner's brief and petition (Exh. G); (8) the State's brief; and (9) and (10) transcripts relating to sentencing.

The respondent has consulted with counsel for the petitioner about the twelve volumes of trial transcripts. Neither the respondent nor the petitioner feels that the trial transcripts are necessary to consideration of the legal issue in this case. As a result, the respondent will not conventionally file them unless this Court feels that access to them is necessary.

In lieu of an answer, and in accordance with Federal Rule of Civil Procedure 56(b), the respondent files a motion for summary judgment and this memorandum of law. The petitioner does not merit habeas corpus relief because: (1) the law is not an ex post facto law; (2) the decision of the New Hampshire Supreme Court (state court) is neither contrary to, nor an unreasonable application of, clearly established federal law; and (3) the state court's decision is not objectively unreasonable.

I. BACKGROUND

A. Procedural Background

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

The trial court sentenced the petitioner to 28 years of imprisonment to life imprisonment on the second degree murder charge. *Id.* The petitioner received suspended sentences on the second-degree assault and endangering charges. *Id.*

Direct Appeal: On May 14, 2002, the petitioner filed a notice of appeal. In that notice, the petitioner raised the following claims: (1) that the trial court's jury instructions, taken as a whole, were improper; (2) that the evidence of guilt was insufficient; and (3) that the trial court improperly ruled that statements made

by the victim's mother were excited utterances and, therefore, admissible as an exception to the hearsay rule. Exh. A: 4. In his brief on direct appeal, filed on April 1, 2003, he pursued two claims: (1) the sufficiency of the evidence; and (2) the propriety of the false exculpatory evidence instruction. Exh. B.

The petitioner also filed a *pro se* brief in which he raised: (1) a claim that the trial court admitted inadmissible hearsay statements and (2) a claim that the trial court admitted inadmissible Rule 404(b) evidence. Exh. C. The State moved to strike the second portion of the *pro se* brief on the ground that the petitioner had not been granted permission to brief the second issue. Exh. D. After oral argument, the state court granted the State's motion to strike. *State v. Evans*, 150 N.H. 416, 427, 839 A.2d 8, 18 (2002). On December 30, 2003, the state court affirmed the conviction. *Id.*

Sentencing Appeal: On April 19, 2002, the State filed a petition for sentence review with the Superior Court Review Division. *Petition of Evans*, 154 N.H. 142, 908 A.2d 796 (2006). On October 24, 2002, the division rejected the State's petition on the basis that the petitioner had not been informed of the State's right to seek an enhancement of his sentence and that the petitioner's due process rights were violated as a result. *Petition of the State of New Hampshire*, 150 N.H. 296, 297, 837 A.2d 291, 292 (2003). The State then filed a petition for a writ of certiorari with the state court. *Id.*, 150 N.H. at 299, 837 A.2d at 292. On December 5, 2003, the state court vacated the division's order on the grounds that

the division was not authorized to determine the constitutionality of a sentence.

Id., 150 N.H. at 298, 908 A.2d at 293.

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

B. Factual Background

The offense conduct is summarized in *State v. Evans*. The victim in the case was a child named K. *Evans*, 150 N.H. at 417, 839 A.2d at 11. According to the indictments, K. was twenty-one months old when the petitioner beat her and caused her death. Exh. A: 7. K.'s mother, Amanda, dated the petitioner and then she and K. moved in with him. *Evans*, 150 N.H. at 417, 839 A.2d at 11. At first, the petitioner bruised K. "only occasionally," by grabbing her face "forcibly." *Id.*, 839 A.2d at 10. As time progressed, the petitioner picked the child up under her arms and "roughly" placed her in a corner, grabbed her by the back of the neck and threw her into a door, and pressed his fingers into her throat hard enough to make her gag. *Id.*, at 417-18, 839 A.2d at 11.

The petitioner and Amanda lied about the causes of K.'s bruises. *Id.* Amanda would not put K. in day care because she feared that the injuries would be discovered and K. would be taken away from her. *Id.* Instead, she asked her sister and her sister's boyfriend to babysit for K. *Id.*

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

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

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

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

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

II. ARGUMENT

A. *Petition of Evans*

The state court considered, and rejected, the claim of an *ex post facto* violation raised in the petition filed with this Court. A review of the state court decision is helpful.

The state court first considered the due process claim under both the state and federal constitutions. *Petition of Evans*, 154 N.H. at 145, 908 A.2d at 799-800. The state court concluded that the federal constitution provided no greater Due Process protection than the Constitution of the State of New Hampshire. *Id.*, at 146, 908 A.2d at 800. Because the petitioner was provided with statutory notice that the State could seek review of the sentence, the state court found no due process violation. *Id.* at 145, 908 A.2d at 800.

The state court next considered the petitioner’s claim that State’s right to seek review of the sentence imposed violated the Double Jeopardy Clauses of the

New Hampshire and United States Constitutions. *Id.* at 146, 908 A.2d at 800. Relying on the United States Supreme Court decision in *United States v. DiFrancesco*, 449 U.S. 117 (1980), the state court concluded that the petitioner had no “‘expectation of finality’ until the sentence review process [had] concluded.” *Petition of Evans*, 154 N.H. at 146, 908 A.2d at 800. The state court observed that the outcome would be the same under either the state or federal constitution.

Finally, the state court reviewed the petitioner’s argument that the claimed retrospective application of N.H. Rev.Stat.Ann. § 651:58, I (2007), and the resulting enhanced sentence, violated the prohibitions against *ex post facto* laws found in both the United States and New Hampshire Constitutions. The state court observed that the appropriate inquiry was whether the law “increases the punishment for or alters the elements of an offense, or changes the ultimate facts required to prove guilt.” *Petition of Evans*, 154 N.H. at 146, 908 A.2d at 800. The state court drew a distinction between changes that are substantive, i.e., changes that augment the crime or increase the sentence, from procedural changes, which do not usually warrant an *ex post facto* analysis. *Id.* at 147, 908 A.2d at 801.

The state court concluded that the protections against *ex post facto* laws did not apply to the petitioner’s case. Employing the reasoning in *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir. 2003), the state court noted that the standard of review of sentences had changed after the defendant in *Mallon* had

been sentenced. The change in the standard of review did not raise an *ex post facto* issue, however, because the change in the standard of review was procedural rather than substantive. *Petition of Evans*, 154 N.H. at 147, 908 A.2d at 821. The United States Court of Appeals for the Seventh Circuit observed that “[p]rocedural innovations that don’t tinker with substance as a side effect are compatible with the *ex post facto* clause.” *Mallon*, 345 F.3d at 947.

By analogy, the state court concluded that, like the statute at issue in *Mallon*, N.H. Rev.Stat. Ann. § 651:58 “merely changed who made the final sentencing decision, but not the legal standards for that decision.” *Petition of Evans*, 154 N.H. at 151, 908 A.2d at 804 (citing *Mallon*, 345 F.3d at 946). It concluded that the purpose of the statute was “remedial rather than punitive” and that its purpose was to “achieve greater uniformity in sentencing.” *Petition of Evans*, 154 N.H. at 151-52, 908 A.2d at 804-05. As a result, the state court concluded that statute was not in conflict with the prohibition against *ex post facto* laws found in both the New Hampshire and United States Constitutions. *Id.* at 152, 908 A.2d at 805. Finally, because the change was procedural rather than substantive, the state court concluded that the legislature intended that it would apply retroactively. *Id.* at 153, 908 A.2d at 806.

B. The Petitioner Has Not Demonstrated That Applying The Amendment To The Sentence Review Statute To Him Violates *Ex Post Facto* Law Or That The State Court's Decision Was Contrary To Or an Unreasonable Application Of Clearly Established Federal Law.

The petitioner contends that the state court's decision was contrary to, or an unreasonable application of, clearly established federal law. D. 1: 1, 6-13. As a result, he concludes that this Court should grant his petition. The claim raised by the petitioner, however, is neither contrary to clearly established federal law, nor is it an unreasonable application of clearly established federal law. As a result, this Court should decline to give federal habeas corpus relief.

1. Standard Under The AEDPA

“The Antiterrorism and Effective Death Penalty Act of 1996 (‘AEDPA’) prevents a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” *Knight v. Spencer*, 447 F.3d 6, 11 (1st Cir. 2006) (internal citation and quotation marks omitted), or “‘resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,’” *Teti v. Bender*, 507 F.3d 50, 56 (1st Cir. 2007) (quoting 28 U.S.C. § 2254(d)(2) (2006)).

A state court decision is “contrary to” established Supreme Court authority if it results from applying a rule that contradicts governing law or is inconsistent with a Supreme Court decision in a case with essentially indistinguishable facts. *See Aspen v. Bissonnette*, 480 F.3d 571, 574 (1st Cir. 2007). A state court ruling is an “unreasonable application” of controlling Supreme Court authority if the state court states the correct legal principle but applies the principle unreasonably to the petitioner’s case. *Id.*

Habeas relief is available only if the state court’s decision was objectively unreasonable, not simply erroneous or mistaken. *See Wiggins v. Smith*, 539 U.S. 510, 520-21 (2003); *Sleeper v. Spencer*, 510 F.3d 32, 38 (1st Cir. 2007); *Furr v. Brady*, 440 F.3d 34, 37 (1st Cir. 2006); *see also Castillo v. Matesanz*, 348 F.3d 1, 9 (1st Cir. 2003) (“If it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application.”).

2. Ex Post Facto Clause

In general, there are four categories of *ex post facto* laws. First, the Clause prohibits “[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.” *Calder v. Bull*, 3 Dall. 386, 390 (1798). Second, any law that “aggravates a crime, or makes it greater than it was, when committed.” *Id.* Third, any law that “changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.” *Id.* Finally, the Ex Post Facto Clause is violated when a law

“alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time” that the crime was committed “in order to convict the offender.” *Id.* The same four categories apply in the state court. *State v. Comeau*, 142 N.H. 84, 87-88, 697 A.2d 497, 499 (1997) (citation omitted).

If a law is “procedural,” it does not implicate the *Ex Post Facto* Clause. *Collins v. Youngblood*, 497 U.S. 37, 45 (1990). The term “procedural” refers to “changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.” *Id.* In *Collins*, the Supreme Court ruled that a statute that permitted a court to correct an improper verdict was not an ex post facto violation. The court pointed out that the change did not “punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.” *Id.* at 51. *See also Comeau*, 142 N.H. at 88, 697 A.2d at 500 (“[U]nfavorable changes in remedies or in statutes of limitations are not ex post facto unless the changes alter the elements of the offense, enhance the degree of punishment, or strip the defendant of an existing offense.” (Citation omitted.)).

3. The Law Allowing The State To Apply For Sentence Review Is Not An *Ex Post Facto* Law.

For a law to offend the *Ex Post Facto* Clause, it must be “more onerous than the prior law.” *Dobbert v. Florida*, 432 U.S. 282, 294 (1977). In

determining if the law is more onerous, the court must compare the original law with its successor “in its totality.” *Hamm v. Latessa*, 72 F.3d 947, 957 (1st Cir. 1995). There is “no mechanical formula” for determining which changes in the law have a “sufficiently profound impact on substantive crimes or punishments to cross the constitutional line and which do not.” *Id.* Courts must consider, on a case-by-case basis, if the change in the law “produces a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.* (internal quotation marks and citation omitted).

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

4. The State Court’s Decision Is Not Contrary To, Nor Is It An Unreasonable Application Of, Clearly Established Federal Law.

The petitioner concedes that there is no United States Supreme Court case that has been decided on “materially indistinguishable facts.” D. 1: 11. However, he contends that a series of Supreme Court decisions have established a “broader ‘mode of analysis’” than that employed by the state court. D. 1: 12. To prove his point, he directs this Court to the decisions in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), *Lynce v. Mathis*, 519 U.S. 433 (1997), and *Garner v. Jones*, 529 U.S. 244 (2000).

A review of each of these cases is instructive. In *Morales*, the petitioner challenged a statute that amended the parole procedures so that parole suitability hearings were held every three years rather than annually. *Id.* at 503. In concluding that the prohibition against *ex post facto* laws was not implicated, the Supreme Court noted that the Clause was directed toward laws that “retroactively alter the definition of crimes or increase the penalty for criminal acts.” *Id.* at 505 (internal quotation marks and citations omitted).

In *Lynce*, the petitioner successfully challenged a statute that canceled provisional release credits. *Lynce*, 519 U.S. at 446. The Supreme Court observed that the petitioner had been released and re-arrested when the law was changed. *Id.* at 436. The “central concerns” of the *Ex Post Facto* Clause were “the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Id.* at 441 (internal quotation marks and citation omitted). Since *Lynce* had been awarded the credits, the attempt to rescind them constituted an *ex post facto* violation. *Id.* at 446.

In *Garner*, the Supreme Court upheld a change that enabled a parole board to hold periodic reconsiderations for parole once every eight years, rather than once every three years. *Garner*, 529 U.S. at 247. The parole board was given discretion to permit expedited consideration of parole in the event that the prisoner could demonstrate a change in circumstance. *Id.* at 256. The change in this

regulation did not necessarily violate the provisions of the *Ex Post Facto* Clause. *Id.* at 252. The Supreme Court rejected “the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.” *Id.* (Internal quotation marks and citation omitted). With respect to matters of “confinement and release,” the *Garner* Court felt that the State should have “due flexibility.” *Id.*

These cases do not clearly establish a prohibition against the procedure in this case. The right to petition for sentence review did not criminalize previously non-criminal behavior, nor did it lengthen the maximum sentence that could be imposed. It simply gave the State the same right previously afforded to defendants. As a result, the petitioner has not demonstrated that the state court reached a conclusion that was at odds with “clearly established Federal law, as determined by the Supreme Court of the United States,” *Knight*, 447 F.3d at 11, and federal habeas corpus relief is not warranted.

5. The State Court’s Decision Was Not Objectively Unreasonable.

Finally, the petitioner has not demonstrated that the state court decision was “objectively unreasonable.” *Wiggins*, 539 U.S. at 520-21. As noted above, if the case is a close case, the state court decision cannot be objectively unreasonable. *Castillo*, 348 F.3d at 9.

The state court concluded that the law giving the State the right to request review of a sentence was procedural, rather than substantive. As a result, the right could not offend the rule against *ex post facto* laws. See *United States v. Martin*, 363 F.3d 25, 46 (1st Cir. 2004) (“While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant’s disadvantage in the particular case.” Internal quotation marks and citation omitted.)).

Because the State’s right to appeal a sentence does not involve any of the four factors adopted in *Calder*, 3 Dall. at 390, and because the United States Supreme Court has not directly addressed the issue raised here, the petitioner cannot bear his burden of demonstrating that the state court’s decision was objectively unreasonable. Since none of the generally recognized factors is present here, the case is arguably not even a close case for purposes of habeas relief. As a result, the state court’s decision should stand because the petitioner has not demonstrated that he is entitled to relief from this Court.

III. CONCLUSION

WHEREFORE, the respondent respectfully requests that the petition for a writ of habeas corpus in this case be denied.

Respectfully Submitted,

Warden, New Hampshire State Prison,
Respondent.

By his attorneys,

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/s/ Elizabeth C. Woodcock

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February 19, 2009

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the petitioner, by e-filing the within motion so that a copy is forwarded to his lawyer. Defense counsel is: David M. Rothstein, Deputy Chief Appellate Defender, Appellate Defender Program, 2 White Street, Concord, NH 03301.

/s/ Elizabeth C. Woodcock

Elizabeth C. Woodcock