

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 REVISED ANSWER TO RESPONDENT'S
PETITION FOR A WRIT OF HABEAS CORPUS**

NOW comes the Warden, Northern New Hampshire Correctional Facility, respondent, by and through counsel, the Attorney General of the State of New Hampshire, and, pursuant to Rule 5 of the Rules Governing § 2254 Cases, provides the following answer to Petitioner Chad Evans's petition for a writ of habeas corpus.

By order dated January 20, 2010, this Court ordered service of the instant petition for a writ of habeas corpus on the Attorney General, and ordered the Attorney General to answer or otherwise plead within thirty days in compliance with Rule 5 of the Rules Governing § 2254 Proceedings. D. 15: 6.¹ The respondent filed a motion for summary judgment and supporting memorandum on February 19, 2010. D. 16, 16-2.

By Order dated March 4, 2010, at the request of the respondent, this Court clarified a docket entry and ordered the respondent to file an answer by March 10, 2010. D. 18, 19. The respondent filed an answer on March 9, 2010. D. 20.

By order dated May 19, 2010, this Court states that the respondent has not complied with Rule 5(c) and (d) of the Rules Governing Section 2254 Cases. These two

¹ "D. :_" refers to this Court's document and page number.

sections Rule five address the following: (1) the production of transcripts; and (2) the production of briefs on appeal and opinions.

Transcripts: On February 19, 2010, the respondent filed a motion for summary judgment and a memorandum of law in the belief that this pleading complied with the direction to “otherwise plead.” D. 16. In that memorandum, the respondent included the following footnote:

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.² As a result, the respondent will not conventionally file them unless this Court feels that access to them is necessary.

D. 16: 1 n.1. On February 22, 2010, the respondent filed the sentencing transcripts by letter indicating that the transcripts provided were dated April 16, 2002, and September 17, 2004.³

² According to the 1976 Advisory Committee Notes, Rule 5 contemplates just such an agreement. “The respondent is required to furnish those portions of the transcripts which he believes relevant. The court may order the furnishing of additional portions of the transcripts upon the request of the petitioner or upon the court’s own motion.”

³ According to internal records kept by the Attorney General, there may have been two post-conviction other hearings that were not transcribed. These are listed pursuant to Local Rule 5(c), however, they do not appear to be relevant to the issue raised in the petition. The first was a hearing on the petitioner’s motion to dismiss, dated November 29, 2004. The second was a hearing relating to the forfeiture of weapons, dated November 9, 2005.

In addition to these two transcripts, which the parties agree are the relevant transcripts, the following transcripts of the trial exist:

12/4/01 (65 pages); 12/5/01 (194 pages); 12/6/01 (277 pages); 12/7/01 (234 pages); 12/10/01 (250 pages); 12/11/01 (207 pages); 12/12/01 (107 pages) 12/13/01 (255 pages); 12/14/01 (55 pages); 12/17/01 (182 pages); 12/18/01 (46 pages); and 12/18/01 (Closing Arguments only: 62 pages).

There is a transcript of a pretrial conference, dated November 26, 2001 (81 pages), which addresses pretrial matters including the decision of the victim's mother to invoke her Fifth Amendment rights. Further, there is a transcript, dated December 4, 2001 (19 pages), of the State's opening statement; the respondent does not have a transcript of the defense's opening statement.

As noted in the respondent's memorandum, the matter before this Court is the legal issue of whether the change in the sentencing review law is a violation of the prohibition against *ex post facto* laws. The parties have agreed that the transcripts that have not been provided to this Court are irrelevant to this discrete issue.

Briefs and Opinions: The respondent provided all briefs via conventional filing on February 22, 2010. In addition, there are three published opinions with respect to this case: *Petition of Evans*, 154 N.H. 142, 908 A.2d 796 (2006); *Petition of the State of New Hampshire*, 150 N.H. 296, 837 A.2d 291 (2003); and *State v. Evans*, 150 N.H. 416, 839 A.2d 9 (2003). These three opinions are cited in the respondent's memorandum of law; two of the opinions are cited in the respondent's initial answer. The respondent understands this Court's order to require the respondent to provide copies of these three opinions. They are attached as exhibits to this pleading.

The respondent reiterates its answers to the petition as follows:

1. In response to paragraph 1, the respondent admits the allegation.
2. In response to paragraph 2, the respondent admits the allegation.
3. In response to paragraph 3, the respondent admits the allegation.
4. In response to paragraph 4, the respondent admits the allegation.
5. In response to paragraph 5, the respondent admits the allegation.
6. In response to paragraph 6 through 8, the respondent finds no factual errors in the recitation of facts. The facts are consistent with those recounted in *State v. Evans*, 150 N.H. 416, 839 A.2d 9 (2003), and *Petition of Evans*, 154 N.H. 142, 908 A.2d 796 (2006).
7. In response to paragraph 9, the opinion of the New Hampshire Supreme Court, cited by the petitioner, affirmed his convictions.
8. In response to paragraph 10, the respondent admits the allegation.
9. In response to paragraph 11 through 13, the respondent admits the allegations.
10. In response to paragraph 14, the respondent has insufficient information to know if the petition for a writ of certiorari was timely filed in the United States Supreme Court, and so the respondent denies that part of the allegation. The respondent admits the allegation that a petition for a writ of certiorari was filed with the United States Supreme Court and denied on March 26, 2007.
11. In response to paragraph 15, the respondent is aware of no other petitions or writs filed in the federal courts by the petitioner with regard to the *ex post facto* claim. In

the absence of any information, with the exception of the representation in the pleading filed by the petitioner, the respondent denies the allegation.

12. Paragraphs 16 through 30 contain legal argument already addressed in the respondent's motion for summary judgment and memorandum of law in support of the motion. The respondent asks this Court to consider that motion and memorandum as the response to the allegations contained in those paragraphs. By way of general answer, the respondent disagrees with the conclusions that the petitioner has drawn from the cases cited. The New Hampshire Supreme Court's opinions are neither contrary to, nor an unreasonable application of, United States Supreme Court precedent. 28 U.S.C. § 2254(d)(1) (2006).

13. The respondent does not dispute this court's assessment that the petitioner has presented his claims in some form to the New Hampshire courts.

14. The respondent believes that an evidentiary hearing is unnecessary because the petition can be appropriately resolved on the current record, assisted by the pleadings of counsel.

15. As noted earlier, with the agreement of the petitioner regarding the transcripts, the respondent has provided this Court with the documents helpful to determining the legal issue in this case.

16. If this Court feels that the transcripts, totaling in excess of 1700 pages, are necessary to resolve the *ex post facto* claim with respect to sentencing, the respondent will file them conventionally with this Court.

Respectfully Submitted,

Warden, New Hampshire State Prison,
Respondent.

By his attorneys,

Michael A. Delaney
Attorney General

/s/ Elizabeth C. Woodcock

Elizabeth C. Woodcock

N.H. Bar # 18837

Assistant Attorney General

Criminal Justice Bureau

33 Capitol Street

Concord, NH 03301-6397

Phone: (603) 271-3671

E-mail: Elizabeth.Woodcock@doj.nh.gov

June 1, 2010

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have served the petitioner through his counsel, by electronic filing. 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

Exhibit A

Westlaw

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 1

H

Supreme Court of New Hampshire.
 Petition of Chad EVANS.
 Nos. 2005-353, 2005-354.

Argued: May 17, 2006.
 Opinion Issued: Sept. 6, 2006.

Background: State filed petition seeking review of defendant's sentences on his convictions for reckless second-degree murder, five counts of second-degree assault, endangering the welfare of a minor, and simple assault with the Superior Court Sentence Review Division. Following review, the Division entered order increasing defendant's minimum term of imprisonment from 28 to 43 years. Defendant filed petition for writ of certiorari challenging the constitutionality of the statute governing review of state prison sentences, and seeking reinstatement of his original sentence.

Holdings: The Supreme Court, Dalianis, J., held that: (1) statute governing review of state prison sentences by the Division did not violate defendant's due process rights under Federal Constitution; (2) defendant's right against double jeopardy was not violated when the Division increased minimum term of his imprisonment; (3) in a matter of first impression, application to defendant of amended statute governing review of state prison sentences by the Division did not violate Ex Post Facto Clause of Federal or State Constitution; and (4) amendment to statute governing review of state prison sentences by the Division applied retroactively to defendant.

Petition denied.

West Headnotes

[1] Criminal Law 110 ↪ 1023(11)

110 Criminal Law
 110XXIV Review
 110XXIV(C) Decisions Reviewable
 110k1021 Decisions Reviewable
 110k1023 Appealable Judgments and Orders

110k1023(11) k. Requisites and Sufficiency of Judgment or Sentence. Most Cited Cases
 Statutory scheme governing sentence review procedures does not provide for direct appeal of a sentence review decision. RSA 651:58.

[2] Criminal Law 110 ↪ 1011

110 Criminal Law
 110XXIV Review
 110XXIV(A) Nature and Form of Remedy
 110k1006 Proper Mode of Review
 110k1011 k. Certiorari. Most Cited Cases

Certiorari is an extraordinary remedy, granted not as a matter of right, but rather at the court's discretion, when the substantial ends of justice require such relief.

[3] Administrative Law and Procedure 15A ↪ 741

15A Administrative Law and Procedure
 15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General
 15Ak741 k. In General. Most Cited Cases
 Certiorari review is limited to whether an administrative agency acted illegally with respect to jurisdiction, authority or observance of the law, whereby it arrived at a conclusion which could not legally or reasonably be made, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously.

[4] Constitutional Law 92 ↪ 4765

92 Constitutional Law

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 2

92XXVII Due Process
 92XXVII(H) Criminal Law
 92XXVII(H)8 Appeal or Other Proceedings for Review
 92k4765 k. In General. Most Cited Cases
 (Formerly 92k271)

Sentencing and Punishment 350H ↪2236

350H Sentencing and Punishment
 350HXII Reconsideration and Modification of Sentence
 350HXII(A) In General
 350Hk2233 Constitutional, Statutory, and Other Regulatory Provisions
 350Hk2236 k. Validity. Most Cited Cases
 Statute governing review of state prison sentences by superior court sentence review division provided defendant with statutory notice of state's right to seek review of his sentence, and the extent to which jurisdiction was retained to either increase or decrease imposed sentence after hearing was conducted by the division, and, thus, statute did not violate due process rights under Federal Constitution of defendant, whose minimum term of imprisonment was increased by Division following review on state's petition from 28 to 43 years. U.S.C.A. Const.Amend. 14; RSA 651:58(1).

[5] Double Jeopardy 135H ↪112.1

135H Double Jeopardy
 135HIV Effect of Proceedings After Attachment of Jeopardy
 135Hk112 Resentencing; Increase of Punishment
 135Hk112.1 k. In General. Most Cited Cases
 Defendant's Fifth Amendment right against double jeopardy was not violated when superior court sentence review division increased minimum term of his imprisonment from 28 to 43 years following review on state's petition filed pursuant to statute governing review of state prison sentences, as de-

fendant had no expectation of finality until sentence review process had concluded. U.S.C.A. Const.Amend. 5; RSA 651:58 (1).

[6] Double Jeopardy 135H ↪2

135H Double Jeopardy
 135HI In General
 135Hk2 k. Constitutional and Statutory Provisions. Most Cited Cases
 The State Constitution provides at least as much protection as the Federal Constitution with respect to prohibition against double jeopardy. U.S.C.A. Const.Amend. 5; Const. Pt. 1, Art. 16.

[7] Constitutional Law 92 ↪2789

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in General
 92k2789 k. Penal Laws in General. Most Cited Cases
 (Formerly 92k197)

Constitutional Law 92 ↪2790

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in General
 92k2790 k. Punishment in General. Most Cited Cases
 (Formerly 92k197)
 Under State Constitution's Ex Post Facto Clause, a law or an application of a law is "ex post facto" 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. Const. Pt. 1, Art. 23.

[8] Constitutional Law 92 ↪2789

92 Constitutional Law

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
(Cite as: 154 N.H. 142, 908 A.2d 796)

Page 3

92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in
 General
 92k2789 k. Penal Laws in General. Most
 Cited Cases
 (Formerly 92k197)

Constitutional Law 92 ↪2790

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in
 General
 92k2790 k. Punishment in General. Most
 Cited Cases
 (Formerly 92k197)

Constitutional Law 92 ↪2812

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(B) Particular Issues and Applica-
 tions
 92k2809 Criminal Proceedings
 92k2812 k. Evidence. Most Cited Cases
 (Formerly 92k197)

Like the federal constitutional inquiry, the ex post
 facto analysis under the State Constitution is not
 upon whether a law imposes disadvantages or addi-
 tional burdens, but rather upon whether it increases
 the punishment for or alters the elements of an of-
 fense, or changes the ultimate facts required to
 prove guilt. U.S.C.A. Const. Art. 1, § 10, cl. 1;
 Const. Pt. I, Art. 23.

[9] Constitutional Law 92 ↪2789

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in
 General
 92k2789 k. Penal Laws in General. Most
 Cited Cases
 (Formerly 92k197)

Constitutional Law 92 ↪2793

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(A) Constitutional Prohibitions in
 General
 92k2793 k. Remedies and Procedure in
 General. Most Cited Cases
 (Formerly 92k197)

A substantive change to a criminal statute, which
 augments the crime or increases the range of sen-
 tences that could be imposed for the charged crime
 is distinguishable from a procedural change to a
 criminal statute, which, under most circumstances,
 does not implicate the Ex Post Facto Clause of the
 State Constitution; the substance/procedure dichot-
 omy in ex post facto analysis is an attempt to re-
 concile the necessity for continuous legislative re-
 finement of the criminal adjudication and correc-
 tions process with the constitutional requirement
 that substantial rights of a criminal defendant re-
 main static from the time of the alleged criminal
 act. Const. Pt. 1, Art. 23.

[10] Constitutional Law 92 ↪2816

92 Constitutional Law
 92XXIII Ex Post Facto Prohibitions
 92XXIII(B) Particular Issues and Applica-
 tions
 92k2814 Sentencing and Imprisonment
 92k2816 k. Length of Sentence. Most
 Cited Cases
 (Formerly 92k203)

Sentencing and Punishment 350H ↪2236

350H Sentencing and Punishment
 350HXII Reconsideration and Modification of
 Sentence
 350HXII(A) In General
 350Hk2233 Constitutional, Statutory, and
 Other Regulatory Provisions
 350Hk2236 k. Validity. Most Cited
 Cases
 Application to defendant of amended statute gov-
 erning review of state prison sentences by superior
 court sentence review division, which resulted in

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
(Cite as: 154 N.H. 142, 908 A.2d 796)

Page 4

division increasing defendant's minimum term of imprisonment from 28 to 43 years, did not violate Ex Post Facto Clause of Federal or State Constitution, as amendment to statute merely changed who made final sentencing decision, not the legal standards for that decision, and, thus, amendment created only a procedural change to statute, such that division's enhancement of sentence did not inflict greater punishment than law annexed to crime when committed, and purpose of statute, which was to achieve greater uniformity in sentencing, which, under some circumstances, could benefit a defendant, was remedial, not punitive. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Pt. 1, Art. 23; RSA 651:58 (1).

[11] Criminal Law 110 🔑 **1030(1)**

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1030 Necessity of Objections in General
 110k1030(1) k. In General. Most Cited Cases

Criminal Law 110 🔑 **1043(2)**

110 Criminal Law
 110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1043 Scope and Effect of Objection
 110k1043(2) k. Necessity of Specific Objection. Most Cited Cases
 General rule is that a contemporaneous and specific objection is required to preserve an issue for appellate review.

[12] Criminal Law 110 🔑 **1042.3(1)**

110 Criminal Law

110XXIV Review
 110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
 110XXIV(E)1 In General
 110k1042.3 Sentencing and Punishment

110k1042.3(1) k. In General. Most Cited Cases

(Formerly 110k1042)
 Even assuming that defendant did not assert to superior court sentence review division his claim that amended statute governing review of state prison sentences by the division did not apply to him because he committed his crimes prior to effective date of amendment, Supreme Court would nevertheless review this issue on appeal, given that, even if defendant had presented issue below, the division might not have considered it, it was arguable whether trial court would have considered issue prior to division's enhancement of defendant's sentence, in light of its refusal to address his constitutional claims for the same reason, and judicial economy supported consideration of issue.

[13] Sentencing and Punishment 350H 🔑 **2241**

350H Sentencing and Punishment
 350HXII Reconsideration and Modification of Sentence
 350HXII(A) In General
 350Hk2233 Constitutional, Statutory, and Other Regulatory Provisions
 350Hk2241 k. Retroactive Operation.

Most Cited Cases
 Amendment to statute governing state prison sentences by superior court sentence review division applied retroactively to defendant, who committed his crimes before amendment's effective date, as amendment created a procedural change in the statute by altering who made the final sentencing decision, but not the legal standards for that decision, and the amendment did not alter definition of underlying offenses, increase sentencing range for which defendant was eligible as result of conviction, or eliminate any available defenses. RSA

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 5

651:58(1).

West Codenotes

Recognized as Unconstitutional 18 U.S.C.A. §§ 3553(b), 3742(e) **798 Kelly A. Ayotte, attorney general (N. William Delker, senior assistant attorney general, on the brief and orally), for the State.

David M. Rothstein, deputy chief appellate defender, of Concord, on the brief and orally, for the petitioner.

DALIANIS, J.

*143 The petitioner, Chad Evans, challenges the constitutionality of RSA 651:58 (Supp.2005), which permits the State to seek sentence review, arguing that it violates the *ex post facto*, due process *144 and double jeopardy protections of the New Hampshire Constitution and United States Constitution, and contravenes legislative intent. We deny the petition.

I. Background

The record supports the following facts. On December 21, 2001, a jury convicted the petitioner of reckless second-degree murder, *see* RSA 630:1-b (1996), five counts of second-degree assault, *see* RSA 631:2 (1996), endangering the welfare of a minor, *see* RSA 639:3, I (1996), and simple assault, *see* RSA 631:2-a (1996). *State v. Evans*, 150 N.H. 416, 417, 839 A.2d 8 (2003). On April 16, 2002, the Superior Court (*Nadeau*, J.) sentenced the petitioner**799 to serve twenty-eight years to life on the second-degree murder charge, and suspended sentences on the felony assault and endangering charges. The State filed a petition for sentence review pursuant to RSA 651:58, I (effective January 1, 2002), as amended.

The division originally dismissed the State's petition, concluding that such consideration would violate the petitioner's due process rights because he was not specifically informed at the time of senten-

cing of the State's right to seek sentence review. Upon a petition for writ of certiorari, we vacated the division's dismissal order because it "exceeded its jurisdiction when it ruled that granting the State's petition would violate the [petitioner's] due process rights." *Petition of the State of New Hampshire*, 150 N.H. 296, 299, 837 A.2d 291 (2003). The Trial Court (*Mohl*, J.) denied the petitioner's subsequent motions to dismiss and for declaratory and injunctive relief, ruling that, among other things, the petitioner's requests for rulings on constitutional claims were not ripe unless the division increased his sentence.

By order dated April 26, 2005, the Superior Court Sentence Review Division (division) imposed a sentence of five to ten years in prison on one count of second-degree assault, consecutive to the sentence of twenty-eight years to life for second-degree murder. It imposed an additional ten-to-thirty-year sentence on another count of second-degree assault, consecutive to each of those sentences. It left the remaining sentences unchanged. Thus, the division increased the petitioner's minimum term of imprisonment from twenty-eight to forty-three years.

The petitioner asks us to vacate the division's April 26, 2005 order and reinstate the original sentence imposed by the trial court because: (1) application of RSA 651:58, I, violated his state and federal constitutional rights to due process; (2) RSA 651:58, I, on its face, violates state and federal constitutional prohibitions against double jeopardy; (3) application of RSA 651:58, I, violated state and federal constitutional prohibitions *145 against *ex post facto* laws; and (4) retrospective application of RSA 651:58, I, ignored rules of statutory construction.

[1][2][3] As a threshold matter, we note that the petitioner filed both a petition for writ of certiorari and a discretionary notice of appeal under Supreme Court Rule 7. *See Sup.Ct. R. 7(1)(B)*. The applicable statutory scheme governing sentence review procedures does not provide for direct appeal of a sentence review decision. *See Petition of Guardar-*

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 6

ramos-Cepeda, 153 N.H. ---, ---, 904 A.2d 609 (2006). Accordingly, we consider only the petition for writ of certiorari. Certiorari is an extraordinary remedy, granted not as a matter of right, but rather at the court's discretion "when the substantial ends of justice require such relief." *Petition of Turgeon*, 140 N.H. 52, 53, 663 A.2d 82 (1995) (quotation omitted). Certiorari review is limited to whether the agency acted illegally with respect to jurisdiction, authority or observance of the law, whereby it arrived at a conclusion which could not legally or reasonably be made, or unsustainably exercised its discretion or acted arbitrarily, unreasonably, or capriciously. *Petition of the State of New Hampshire*, 150 N.H. at 297, 837 A.2d 291; *Petition of State of New Hampshire (State v. Theodosopoulos)*, 153 N.H. 318, 319-20, 893 A.2d 712, 714 (2006).

II. Due Process

We first review whether the application of RSA 651:58, I, violated the petitioner's state and federal constitutional rights to due process because the trial court did not **800 provide individualized notice at the time of his sentencing of the State's right to seek sentence review. RSA 651:58, I, provides, in pertinent part:

Any person sentenced to a term of one year or more in the state prison, ... or the 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....

RSA 651:58, I (Supp.2005) (emphasis added). The division consists of three current or retired superior court justices. RSA 651:57 (1996).

[4] We recently concluded that RSA 651:58, I and II provided a defendant with statutory notice of the State's right to seek a review of his sentence, and the extent to which jurisdiction was retained to

either increase or decrease the imposed sentence after a hearing conducted by the division. See *Guardarramos-Cepeda*, 153 N.H. at ---, 904 A.2d 609. We thus held that RSA 651:58, I, does not violate the Due Process Clause of the New Hampshire Constitution. *Id.* We have previously recognized that the *146 United States Constitution offers the petitioner no greater due process protection than does the New Hampshire Constitution under circumstances similar to those before us. *Stewart v. Cunningham, Warden*, 131 N.H. 68, 70, 550 A.2d 96 (1988) (citing *Oyler v. Boles*, 368 U.S. 448, 452, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)). The petitioner does not argue to the contrary. Accordingly, we reach the same result under the United States Constitution as we do under the New Hampshire Constitution.

III. Double Jeopardy

[5][6] We next consider the petitioner's facial challenge to RSA 651:58, I. Specifically, he contends that the Double Jeopardy Clauses of the New Hampshire and United States Constitutions preclude the State from seeking review of a criminal defendant's sentence pursuant to RSA 651:58, I. We recently held that RSA 651:58, I, does not violate the Double Jeopardy Clause of the New Hampshire Constitution. *Guardarramos-Cepeda*, 153 N.H. at ---, 904 A.2d 609. Relying upon *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), we recognized that the defendant had no "expectation of finality" until the sentence review process has concluded. *Guardarramos-Cepeda*, 153 N.H. at ---, 904 A.2d 609. The New Hampshire Constitution provides at least as much protection as the United States Constitution under these circumstances. *Id.* at ---, 904 A.2d 609; *United States v. DiFrancesco*, 449 U.S. at 136, 138-39, 101 S.Ct. 426. Accordingly, we reach the same result under the United States Constitution as we do under the New Hampshire Constitution.

IV. Ex Post Facto Laws

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 7

We next review whether the claimed retrospective application of RSA 651:58, I, violated the state and federal constitutional prohibitions against *ex post facto* laws. Although the petitioner committed his offenses and was convicted prior to the effective date of amended RSA 651:58, I, the trial court sentenced him after the effective date.

Both Part I, Article 23 of the New Hampshire Constitution and Article I, Section 10 of the United States Constitution forbid *ex post facto* penal laws, *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Petition of Hamel*, 137 N.H. 488, 494, 629 A.2d 802 (1993), and we have stated that both constitutions afford the same level of protection, **801 *State v. Comeau*, 142 N.H. 84, 87, 697 A.2d 497 (1997). The petitioner contends, however, that the New Hampshire Constitution actually provides him greater protection than the United States Constitution, because the United States Supreme Court narrowly construed *ex post facto* prohibitions in *California Department of Corrections v. Morales*, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995), a case not before us in *Comeau*.

[7][8][9] *147 We will first address the petitioner's *ex post facto* claim under the New Hampshire Constitution, *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347 (1983), and cite federal opinions for guidance only. *Id.* at 232-33, 471 A.2d 347. A law or an application of a law is *ex post facto* 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. Reynolds, 138 N.H. 519, 521, 642 A.2d 1368 (1994) (quotation omitted). Like the federal constitutional inquiry, the focus in the State *ex post facto* analysis is not upon whether a law imposes disadvantages or additional burdens, but rather

upon whether it "increases the punishment for or alters the elements of an offense, or changes the ultimate facts required to prove guilt." *Comeau*, 142 N.H. at 88, 697 A.2d 497 (quotation and brackets omitted). We have also distinguished a substantive change to a criminal statute, 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, which, under most circumstances, does not implicate the *Ex Post Facto* Clause. See *Hamel*, 137 N.H. at 494, 629 A.2d 802.

[The] 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).

The petitioner argues that pursuant to *Reynolds*, the New Hampshire Constitution offers him greater *ex post facto* protection than does the United States Constitution under these circumstances. In *Reynolds*, we examined whether the application of a new law to the defendant's petition for a suspended sentence would violate the *Ex Post Facto* Clause of the State Constitution. *Reynolds*, 138 N.H. at 520, 642 A.2d 1368. At the time the defendant was sentenced for second-degree murder, the law permitted her to petition to suspend her sentence every two years thereafter. *Id.* Six years later, the legislature amended the statute to preclude violent offenders from filing petitions for sentence suspension more frequently than every four years. *Id.*

Although we did not analyze whether the change to the sentence suspension statute was substantive or procedural, we examined federal *148 case law and held that the application of the new law to the defendant would violate the *Ex Post Facto* Clause because "the new law could operate to keep her in prison longer than the old law." *Id.* at 521, 642 A.2d 1368. We reached this conclusion even

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 8

though there was no guarantee that the defendant would have been released any sooner under the old law. *See id.* at 522, 642 A.2d 1368.

The United States Supreme Court subsequently examined whether the retrospective application of a statute that could **802 operate to defer parole suitability hearings violated the federal *Ex Post Facto* Clause. *Morales*, 514 U.S. at 509, 115 S.Ct. 1597. The defendant in *Morales* committed murders in 1971 and 1980. *Id.* at 502, 115 S.Ct. 1597. At that time, a statute entitled him to annual parole suitability hearings. *Id.* at 503, 115 S.Ct. 1597. The California legislature later amended the statute to authorize the parole board to defer subsequent suitability hearings for up to three years for convicted multiple murderers, such as *Morales*. *Id.* Upon federal habeas corpus review, he argued that retrospective application of the amended parole eligibility statute violated the *Ex Post Facto* Clause because it increased the “standard of punishment” applicable to his crimes. *Id.* at 504-05, 115 S.Ct. 1597.

The amended parole statute did not change the sentencing range applicable to the covered crimes; it simply altered the method to be followed in fixing a parole release date using substantive standards identical to those of its predecessor. *Id.* at 507-08, 115 S.Ct. 1597. The Court acknowledged, however, that the retroactive application of such a law could violate the *Ex Post Facto* Clause if the law created “a sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.* at 509, 115 S.Ct. 1597. The Court held that the decrease in the frequency of parole suitability proceedings “create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes.” *Id.* It reasoned that, among other things, the amended parole statute was remedial in purpose and the parole board was required to make a special finding before depriving an inmate of an annual hearing. *Id.* at 510-14, 115 S.Ct. 1597.

We have not heretofore been called upon to analyze

the state constitutional prohibition against *ex post facto* laws in light of *Morales*. The State argues that *Morales* undermines both the analysis and the holding in *Reynolds*. Assuming without deciding that *Reynolds* is still good law, it is, in a manner akin to *Morales*, factually distinguishable from the case before us. The statutory changes in those cases occurred long after the sentences were imposed and concerned the availability of parole suitability and sentence suspension hearings. Insofar as federal case law has regularly informed our application of the State *Ex Post Facto* Clause, *see, e.g., Reynolds*, 138 N.H. at 522-23, 642 A.2d 1368, we will examine opinions *149 addressing whether the retrospective application of a federal sentence review statute, which allowed the government to seek *de novo* review of criminal sentences, violated the federal *Ex Post Facto* Clause.

Title 18, section 3742 of the United States Code provides a defendant and the government with the right to appeal a sentence under various circumstances. 18 U.S.C. § 3742(a), (b) (2000). Prior to 2003, a federal court of appeals reviewed a district court's factual findings for clear error and reviewed its decision to depart from the sentencing guidelines for abuse of discretion while affording “substantial deference” to the district court. *Koon v. United States*, 518 U.S. 81, 97-99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996). In 2003, however, Congress amended section 3742(e) to provide that while appellate courts would still review factual findings for clear error, they would review *de novo* the district court's application of the sentencing guidelines. 18 U.S.C. § 3742(e) (Supp.2003). With the exception of the Third and Sixth Circuit Court of Appeals, which have not addressed the issue, every federal circuit court of appeals has held that section 3742(e), as amended, could be applied retrospectively without constitutional disability. *See, e.g., **803 United States v. Riley*, 376 F.3d 1160, 1164-65 n. 3 (D.C.Cir.2004) (listing all circuit court decisions). Several circuits specifically have held that the retrospective application of amended section 3742(e) did not implicate the *Ex Post Facto*

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 9

Clause because the amendment made only a procedural, and not a substantive, change in the law. See *United States v. Stockton*, 349 F.3d 755, 764 n. 4 (4th Cir.2003), cert. denied, 541 U.S. 953, 124 S.Ct. 1695, 158 L.Ed.2d 385 (2004); *United States v. Mallon*, 345 F.3d 943, 946-47 (7th Cir.2003); *United States v. Andrews*, 447 F.3d 806, 809-10 (10th Cir.2006); *Riley*, 376 F.3d at 1165. None of the circuit courts has referenced *Morales*.

We find the reasoning employed by the Seventh Circuit Court of Appeals in *Mallon* particularly instructive on the issue before us. In *Mallon*, the defendant pleaded guilty to the crime of “using the means of interstate and international communication in an effort to entice a female under the age of 18 to engage in sexual activity.” *Mallon*, 345 F.3d at 944. The district court sentenced the defendant to twenty-one months’ imprisonment, which was a significant downward departure from the sentencing range of forty-one to fifty-one months’ imprisonment. *Id.* The government appealed the downward departure. *Id.* at 944-45. At the time that the defendant committed his offense, the appellate court reviewed such an issue for abuse of discretion. *Id.* at 945; see also 18 U.S.C. § 3742(e) (2000) (amended 2003). Subsequent to his conviction, however, Congress adopted the new *de novo* standard of review. *Mallon*, 345 F.3d at 945.

The defendant argued that retrospective application of the new standard of review would violate the *Ex Post Facto* Clause because it “would alter the consequences of his completed criminal conduct.” *Id.* at 946. In *150 rejecting his contention, the Seventh Circuit reasoned that amended section 3742(e) :

d[id] not change the statutory penalties for [the] crime, affect the calculation of the Guidelines range, or alter the circumstances under which departures are permitted. It change[d] *who* within the federal judiciary makes a particular decision, but not the legal standards for that decision. Instead of one district judge, three appellate judges now decide whether a departure is justified. An

increase in the number of judges who must consider an issue reduces the variance of decision-making but should not affect the mean or median outcome.

Id. It further reasoned that the *Ex Post Facto* Clause applied only to penal legislation, which encompasses four traditional categories, and that “[t]he punishment that ‘the law’ annexed to [the defendant’s] crime—which is to say, the statutory maximum—is unchanged.” *Id.* “Procedural innovations that don’t tinker with substance as a side effect are compatible with the ex post facto clause.” *Id.* The Seventh Circuit, thus, held that amended section 3742(e) was procedural only and could be applied retrospectively upon sentence review. *Id.* at 947.

The Supreme Court later struck down the portion of 18 U.S.C.A. § 3553(b) (Supp.2006) making the sentencing guidelines mandatory and, accordingly, excised from section 3742(e) the provision setting forth the *de novo* standard of sentence review. *United States v. Booker*, 543 U.S. 220, 245, 260-62, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). It adopted “unreasonableness” as the new standard of sentence review. *Id.* at 260-61, 125 S.Ct. 738. It said nothing, however, to undermine the circuit courts’ holdings that retrospective application of a *de novo* standard of review to sentencing decisions produced no *ex post facto* violation. See *Andrews*, 447 F.3d at 809-10 **804 (recognizing, in post-*Booker* decision, that defendant suffered no *ex post facto* violation by application of former *de novo* standard of sentence review). Nor did the Supreme Court suggest the circuit courts erred by not relying upon *Morales* in analyzing this issue.

Former section 3742(e) and RSA 651:58, I, are similar in practical effect. The petitioner argues that RSA 651:58, I, as amended, “gave the State two chances at obtaining the sentence it desired, one at the sentencing hearing, and another before the Division.” With the imposition of a *de novo* standard of review, however, former section 3742(e) operated to the same end. Although both statutes afforded the reviewing tribunal broad discretion to modify a

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 10

sentence, they also prohibited it from considering any material or facts not considered by the original sentencing court at the time of sentencing. *See* 18 U.S.C. § 3742(d) (2000); *Super. Ct. Sentence *151 Rev. Div. R.* 15-16. Neither statute altered the definition of underlying offenses, increased the sentencing range for which a defendant was eligible as a result of a conviction, or eliminated any applicable defense. Thus, under either statute, a defendant was subject to the same potential punishment at both his original sentencing hearing *and* before the reviewing tribunal.

[10] In a manner akin to former section 3742(e), RSA 651:58 merely changed who made the final sentencing decision, but not the legal standards for that decision. *See Mallon*, 345 F.3d at 946. Instead of one superior court judge, three current or retired superior court judges are empowered to decide finally the defendant's sentence. *See* RSA 651:57. We, therefore, conclude that the amendment to RSA 651:58, I, created only a procedural change in the statute, and that the division's enhancement of the trial court's sentence did not "inflict[] greater punishment, than the law annexed to the crime when committed." *Reynolds*, 138 N.H. at 521, 642 A.2d 1368 (quotation omitted).

The petitioner also contends that applying RSA 651:58, I, violates the *Ex Post Facto* Clause because the amendment is "punitive in both its purpose and its effect." Specifically, he contends that the primary purpose of RSA 651:58, I, is "to create an avenue through which the State may seek an increase in the amount of time an inmate spends in prison, in relation to the sentence he received from his trial judge." The State counters that the purpose of the amended statute is purely remedial, and that the sentence review process, whether requested by the defendant or the State, is "intended to create greater uniformity among sentences ... [in that] the [division] is empowered to lower the sentence, increase the sentence, change the sentence in some other way, or leave the sentence unchanged."

We agree with the State that the purpose of

amended RSA 651:58, I, is remedial rather than punitive. In 1975, the legislature established the division in order to permit a criminal defendant in superior court to request sentence review. Laws 1975, 267:1. The legislature created the division to address a perceived inconsistency in sentencing within the state. *Turgeon*, 140 N.H. at 54, 663 A.2d 82. The legislature intended the division "to make sure that the same crime fit[] the same sentence" and not otherwise. *Id.* In 2001, the legislature amended RSA 651:58, I, to permit the State also to apply for sentence review. Laws 2001, 45:1. While we recognize that the State might be unlikely to seek a sentence reduction, RSA 651:58, I, is silent concerning the purpose of the amendment and the legislative history reveals the State requested the amendment because there were "times when the [State] believe[d] that the sentence [wa]s **805 too severe, or too light." *N.H.S. Jour.* 61-62 (2001). There is nothing in the text of *152RSA 651:58 or the legislative history that suggests that the purpose of the statute is punitive. To the contrary, the legislative history indicates that the purpose of both RSA 651:58, I, and its 2001 amendment, was to achieve greater uniformity in sentencing, which, under some circumstances, could benefit a defendant. *See Turgeon*, 140 N.H. at 54, 663 A.2d 82. Accordingly, we hold that application of RSA 651:58, I, to the petitioner did not violate the *Ex Post Facto* Clause of the New Hampshire Constitution.

The petitioner acknowledges that the United States Constitution offers him no greater protection than does the New Hampshire Constitution under these circumstances. Thus, we reach the same result under the United States Constitution as we do under the New Hampshire Constitution.

V. Statutory Construction

[11] Finally, we review the petitioner's contention that, as a matter of statutory construction, the legislature did not intend that amended RSA 651:58, I, apply to an offender, such as himself, who committed his crimes before the amendment's effective

908 A.2d 796
 154 N.H. 142, 908 A.2d 796
 (Cite as: 154 N.H. 142, 908 A.2d 796)

Page 11

date. As a preliminary matter, we address the State's argument that the petitioner did not present a claim of statutory construction to the trial court or division after the filing of the State's petition for review, and, thus, did not preserve the issue for appellate review. The general rule is that a contemporaneous and specific objection is required to preserve an issue for appellate review. *State v. Blackmer*, 149 N.H. 47, 48, 816 A.2d 1014 (2003). Preservation did not bar our recent consideration of the constitutionality of RSA 651:58, I, however, because the division lacked jurisdiction to consider the constitutional claims in the first instance, and our review furthered the interest of "judicial economy." *Guardarramos-Cepeda*, 153 N.H. at ---, 904 A.2d 609.

[12] Assuming without deciding that the petitioner did not present his statutory construction claim below, we will, nonetheless, review this issue. Even if the petitioner had presented the issue below, the division may not have considered it. *Cf. Petition of the State of New Hampshire*, 150 N.H. at 298, 837 A.2d 291 ("[B]ecause the due process claim is a constitutional issue wholly apart from whether the sentence is appropriate and consistent, it is well beyond the division's statutory jurisdiction."). Furthermore, it is arguable whether the trial court would have considered the petitioner's argument prior to the division's enhancement of his sentence, in light of its refusal to address his constitutional claims for that same reason. Insofar as this issue turns upon the "substantive-or-procedural" dichotomy, similar to that present in our *ex post facto* analysis, judicial economy also supports its consideration.

[13] *153 Neither party argues that the legislature has expressly addressed the retroactivity of amended RSA 651:58, I. We have held that when the legislature is silent as to whether a statute should apply prospectively or retrospectively, our interpretation turns upon whether the statute affects the defendant's substantive or procedural rights. *State v. Hamel*, 138 N.H. 392, 394, 643 A.2d 953

(1994). In *Hamel*, we concluded that an amendment extending the statute of limitations in child sexual assault cases was a procedural change and could, thus, be applied retrospectively in the absence of an explicit legislative directive. *Id.* at 393, 395-96, 643 A.2d 953. We reasoned that the amendment did not "place[] a greater burden on a criminal defendant than merely extending the prosecutorial**806 window" because it did not change the ultimate facts needed to prove guilt, punish a previously innocent act, alter the elements of the crime, or eliminate any defenses otherwise available. *Id.* at 395-96, 643 A.2d 953. Compare *id.* with *State v. Johnson*, 134 N.H. 570, 573-74, 595 A.2d 498 (1991) (holding that statute that changed aggravating factors that court could consider in imposing sentence affected defendants' substantive rights and could not apply retrospectively).

As addressed above, 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. As in *Hamel*, RSA 651:58, I, did not alter the definition of underlying offenses, increase the sentencing range for which a defendant was eligible as a result of a conviction, or eliminate any available defenses. Accordingly, we presume that the legislature intended RSA 651:58, I, as amended, to apply retrospectively.

Petition denied.

DUGGAN and GALWAY, JJ., concurred.
 N.H., 2006.
 In re Evans
 154 N.H. 142, 908 A.2d 796

END OF DOCUMENT

Exhibit B

Westlaw

837 A.2d 291
 150 N.H. 296, 837 A.2d 291
 (Cite as: 150 N.H. 296, 837 A.2d 291)

Page 1

C

Supreme Court of New Hampshire.
 In re Petition of the STATE of New Hampshire
 (Sentence Review Division).
 No. 2002-753.

Argued: Nov. 6, 2003.
 Opinion Issued: Dec. 5, 2003.

Background: In cases consolidated for appeal, state sought writ of certiorari challenging jurisdiction of sentence review division to hear and decide constitutional claims.

Holding: The Supreme Court, Duggan, J., held that sentence review division exceeded its jurisdiction in ruling that granting state's petition to enhance sentence would violate defendants' due process rights.

Petition granted; sentence review division orders vacated; and remanded.

West Headnotes

|1| Sentencing and Punishment 350H ↪2231

350H Sentencing and Punishment
 350HXII Reconsideration and Modification of Sentence
 350HXII(A) In General
 350Hk2228 Authority to Reconsider or Modify Sentence
 350Hk2231 k. Specially Designated Court, Panel or Board. Most Cited Cases
 Sentence review division exceeded its jurisdiction in ruling that granting state's petition to enhance sentence would violate defendants' due process rights; section of review procedure did not give division broad jurisdiction to consider all appeals, but simply permitted division to consider appeal with or without holding hearing, nothing in division's rules suggested that it had jurisdiction to consider constitutional claims, and since due process claim

was constitutional issue wholly apart from whether sentence was appropriate, it was beyond division's statutory jurisdiction. U.S.C.A. Const.Amend. 14; RSA 651:58, 651:59.

|2| Certiorari 73 ↪1

73 Certiorari
 731 Nature and Grounds
 73k1 k. Nature and Scope of Remedy in General. Most Cited Cases

Certiorari 73 ↪9

73 Certiorari
 731 Nature and Grounds
 73k9 k. Discretion as to Grant of Writ. Most Cited Cases
 Certiorari is an extraordinary remedy and is not granted as a matter of right but rather at the discretion of a court when substantial ends of justice require such relief.

|3| Administrative Law and Procedure 15A ↪741

15A Administrative Law and Procedure
 15AV Judicial Review of Administrative Decisions
 15AV(D) Scope of Review in General
 15Ak741 k. In General. Most Cited Cases
 Certiorari review is limited to whether an agency acted illegally with respect to jurisdiction, authority or observance of the law, whereby it arrived at a conclusion which could not legally or reasonably be made, or abused its discretion or acted arbitrarily, unreasonably, or capriciously.
 **292 *296 Peter W. Heed, attorney general (N. William Delker, senior assistant attorney general, on the brief and orally), for the State.

Landya McCafferty, assistant appellate defender, of Concord, on the brief and orally, for defendant Chad Evans.

837 A.2d 291
 150 N.H. 296, 837 A.2d 291
 (Cite as: 150 N.H. 296, 837 A.2d 291)

Page 2

*297 Law Office of Joshua L. Gordon, of Concord (Joshua L. Gordon on the brief), for defendant Steven Summa.

Philip D. Cross, of Portsmouth, by brief, for defendant Allan Cullen.

DUGGAN, J.

In these cases consolidated for appeal, the petitioner, the State of New Hampshire, seeks a writ of certiorari challenging the jurisdiction of the sentence review division (division) to hear and decide constitutional claims. We grant the petition, vacate the orders of the division and remand.

The three defendants, Chad Evans, Steven Summa and Allan Cullen, were convicted of various felony offenses and sentenced to terms of incarceration in the State prison. When each defendant was sentenced, the sentencing judge did not inform him that under a recently enacted statute, *see* RSA 651:58, 1 (Supp.2002), the State could seek enhancement of his sentence by petitioning the division. In each case, the State subsequently filed a petition for sentence review.

In all three cases, the division issued an order stating that it had “reviewed the transcript of the sentencing hearing and determined that the defendant was not informed at sentencing in plain and certain terms that the state could seek an enhancement of his sentence.” As a result, the division concluded that “any relief afforded to the state would violate the defendant’s due process rights” and dismissed the State’s petitions. The division denied the State’s motion for reconsideration and the State petitioned this court for a writ of certiorari.

[1][2][3] “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 of Turgeon*, 140 N.H. 52, 53, 663 A.2d 82 (1995) (quotation omitted). “Certiorari review ... is limited to whether the agency acted illegally with respect to jurisdic-

tion, authority or observance of the law, whereby it arrived at a conclusion which could not legally or reasonably be made, or abused its discretion or acted arbitrarily, unreasonably, or capriciously.” *In re Ryan G.*, 142 N.H. 643, 645, 707 A.2d 134 (1998) (quotation omitted).

The State argues that under our holding in *Turgeon*, 140 N.H. at 53-54, 663 A.2d 82, the division was not empowered to determine whether granting the petition would violate the defendants’ due process rights. In *Turgeon*, the petitioner argued that because his sentence violated the Double Jeopardy Clause, the division acted illegally when it upheld his sentence. *Id.* at 53, 663 A.2d 82. We held that the petitioner was not entitled to a writ of certiorari because, even assuming that his argument had merit, the division did not have jurisdiction to hear his constitutional claim. *Id.* at 54-55, 663 A.2d 82.

*298 In *Turgeon*, we emphasized the limited jurisdiction of the division. *Id.* at 54, 663 A.2d 82. The division is “an administrative tribunal” comprised of superior court judges. *Id.* Its jurisdiction is defined by RSA 651:59, 1 (1996), which provides:

**293 The review division has jurisdiction: to consider an appeal with or without a hearing; to review the judgment insofar as it relates to the sentence imposed; to review any other sentence imposed when the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence; to amend the judgment by ordering substituted therefor a different appropriate sentence or sentences; or to make any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review.

Thus, we held that under RSA 651:59, 1, the division is “not empowered to determine the constitutionality of a sentence” and, therefore, did not have jurisdiction to decide whether the petitioner’s sentence violated the Double Jeopardy Clause. *Id.*

If, as in *Turgeon*, the division lacks jurisdiction to

837 A.2d 291
 150 N.H. 296, 837 A.2d 291
 (Cite as: 150 N.H. 296, 837 A.2d 291)

Page 3

determine the constitutionality of a sentence generally, it likewise lacks jurisdiction to determine whether the failure to notify a defendant of the State's statutory right to appeal his sentence violates the defendant's constitutional due process protections specifically. Indeed, because the due process claim is a constitutional issue wholly apart from whether the sentence is appropriate and consistent, it is well beyond the division's statutory jurisdiction.

Moreover, the division's own rules recognize the narrow limits of its jurisdiction. The division's rules limit its scope of review to:

- (a) The excessiveness or lightness of the sentence having regard to the nature of the offense, the protection of the public interest and safety, and the character of the offender;
- (b) The manner in which the sentence was imposed, including the sufficiency and accuracy of the information before the sentencing court.

Super. Ct. Sentence Rev. Div. R. 22. Nothing in the division's rules suggests that it has jurisdiction to consider constitutional claims.

The defendants argue that RSA 651:59, I, authorizes the division "to consider an appeal," and therefore the division's authority "is broad and must include not only consideration on the merits but also any threshold matters, such as the legality of an application, that might preclude *299 consideration on the merits." The quoted language of RSA 651:59, I, however, cannot be read in isolation. The full phrase cited by the defendants grants the division authority "to consider an appeal with or without a hearing." RSA 651:59, I. Read in its entirety, this phrase does not give the division broad jurisdiction to consider all appeals, but simply permits the division to consider an appeal with or without holding a hearing.

We conclude that the division exceeded its jurisdiction when it ruled that granting the State's petition

would violate the defendants' due process rights and, therefore, we vacate the division's order. Thus, the due process issue is not properly before us and we decline to address it on the merits. *See Big League Entertainment v. Brox Industries*, 149 N.H. 480, 485-86, 821 A.2d 1054 (2003). In their briefs, the defendants raised additional constitutional challenges to RSA 651:58, I (Supp.2002), which we decline to address as well. *Id.*

Petition granted; sentence review division orders vacated; and remanded.

BROCK, C.J., and DALIANIS, J., concurred.
 N.H., 2003.
 In re State
 150 N.H. 296, 837 A.2d 291

END OF DOCUMENT

Exhibit C

Westlaw

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 1

H

Supreme Court of New Hampshire.
 STATE of New Hampshire
 v.
 Chad EVANS.
 No. 2002-287.

Argued: Nov. 6, 2003.
 Opinion Issued: Dec. 30, 2003.

Background: Defendant was convicted in the Superior Court, Strafford County, Nadeau, J., of reckless second-degree murder, five counts of second-degree assault, endangering the welfare of a minor, and simple assault. Defendant appealed.

Holdings: The Supreme Court, Brock, C.J., held that: (1) trial court's giving of false exculpatory evidence instruction did not constitute an impermissible comment on the evidence; (2) evidence was sufficient to support finding that defendant, rather than alleged perpetrator, committed victim's murder; and (3) statements child victim's mother made to her friend on night of arrest of defendant, who was mother's boyfriend, which included mother's statement "and you knew, and I didn't listen," and mother's description of defendant grabbing victim by the shirt and pushing her into a corner when she cried, were admissible under the excited utterance exception to the hearsay rule.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚡805(1)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k805 Form and Language in General

110k805(1) k. In General. Most Cited

Cases

The scope and wording of jury instructions is generally within the sound discretion of the trial court.

[2] Criminal Law 110 ⚡1172.1(1)

110 Criminal Law
 110XXIV Review
 110XXIV(Q) Harmless and Reversible Error
 110k1172 Instructions
 110k1172.1 In General
 110k1172.1(1) k. Instructions in General. Most Cited Cases

An appellate court will not reverse a conviction based on an alleged impermissible jury charge unless the charge fails to cover fairly the legal issues in the case.

[3] Criminal Law 110 ⚡822(1)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k822 Construction and Effect of Charge as a Whole
 110k822(1) k. In General. Most Cited Cases

An appellate court does not review a challenged jury instructions in isolation; instead, it reviews them in the context of the entire charge and all of the evidence to determine whether the trial court adequately stated the relevant law.

[4] Criminal Law 110 ⚡1134.51

110 Criminal Law
 110XXIV Review
 110XXIV(L) Scope of Review in General
 110XXIV(L)4 Scope of Inquiry
 110k1134.51 k. Instructions. Most Cited Cases
 (Formerly 110k1134(3))

An appellate court interprets jury instructions as a

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 2

reasonable juror would have understood them.

[5] Criminal Law 110 ↪ 778(10)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k778 Presumptions and Burden of Proof
 110k778(10) k. Suppression or Fabrication of Evidence. Most Cited Cases
 Where a jury instruction permits, but does not require, the jury to infer consciousness of guilt from false exculpatory statements, it is not an improper comment on the evidence but rather a correct statement of law.

[6] Criminal Law 110 ↪ 351(10)

110 Criminal Law
 110XVII Evidence
 110XVII(D) Facts in Issue and Relevance
 110k351 Subsequent Condition or Conduct of Accused
 110k351(10) k. Suppression or Destruction of Evidence, or Misrepresentations to Avoid Suspicion or Cast It Upon Another. Most Cited Cases
 Evidence that a defendant intentionally made an exculpatory statement that is later discovered to be false may constitute circumstantial evidence of consciousness of guilt.

[7] Criminal Law 110 ↪ 351(3)

110 Criminal Law
 110XVII Evidence
 110XVII(D) Facts in Issue and Relevance
 110k351 Subsequent Condition or Conduct of Accused
 110k351(3) k. Flight or Refusal to Flee. Most Cited Cases

Criminal Law 110 ↪ 351(10)

110 Criminal Law

110XVII Evidence
 110XVII(D) Facts in Issue and Relevance
 110k351 Subsequent Condition or Conduct of Accused
 110k351(10) k. Suppression or Destruction of Evidence, or Misrepresentations to Avoid Suspicion or Cast It Upon Another. Most Cited Cases
 Exculpatory statements later shown to be false are akin to other evidence that may be relevant to show consciousness of guilt, such as flight and efforts to avoid suspicion.

[8] Criminal Law 110 ↪ 778(10)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k778 Presumptions and Burden of Proof
 110k778(10) k. Suppression or Fabrication of Evidence. Most Cited Cases
 To be proper, a false exculpatory statement instruction must explain that the inference of consciousness of guilt is permissive, not mandatory and must make sure that false exculpatory statements are not evidence of guilt but evidence of consciousness of guilt.

[9] Criminal Law 110 ↪ 778(10)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k778 Presumptions and Burden of Proof
 110k778(10) k. Suppression or Fabrication of Evidence. Most Cited Cases
 There must be an evidentiary basis for a false exculpatory statement instruction.

[10] Criminal Law 110 ↪ 778(10)

110 Criminal Law

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 3

110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k778 Presumptions and Burden of Proof
 110k778(10) k. Suppression or Fabrication of Evidence. Most Cited Cases
 Trial court's giving of false exculpatory evidence instruction, which stated that jury could consider statements made by murder defendant explaining child victim's bruising to show consciousness of guilt if it found defendant intentionally made such statements to demonstrate his innocence, did not constitute an impermissible comment on the evidence; instruction left exclusively to the jury the question as to whether false exculpatory statements, if made, indicate consciousness of guilt, or nothing at all, and trial court, in its general instructions, instructed the jury that if the jury thought that the judge had expressed an opinion about the facts of the case, it must disregard that expression..

[11] Criminal Law 110 ⚡778(10)

110 Criminal Law
 110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k778 Presumptions and Burden of Proof
 110k778(10) k. Suppression or Fabrication of Evidence. Most Cited Cases
 Defendant was not entitled to instruction on false exculpatory statements made by individual who defendant claimed committed charged murder; scant evidence existed that individual lied about child victim's injuries to demonstrate his innocence, and while defense counsel argued vigorously in his opening and closing arguments that individual was a liar and a killer, trial court's instructions included extensive information to help jury evaluate witness credibility.

[12] Criminal Law 110 ⚡769

110 Criminal Law

110XX Trial
 110XX(G) Instructions: Necessity, Requisites, and Sufficiency
 110k769 k. Duty of Judge in General.
 Most Cited Cases
 Whether an instruction is necessary in a particular case is an issue reserved to the trial court's sound discretion.

[13] Criminal Law 110 ⚡552(3)

110 Criminal Law
 110XVII Evidence
 110XVII(V) Weight and Sufficiency
 110k552 Circumstantial Evidence
 110k552(3) k. Degree of Proof. Most Cited Cases
 When the evidence supporting guilt is solely circumstantial, it must exclude all rational conclusions except guilt.

[14] Criminal Law 110 ⚡1144.13(3)

110 Criminal Law
 110XXIV Review
 110XXIV(M) Presumptions
 110k1144 Facts or Proceedings Not Shown by Record
 110k1144.13 Sufficiency of Evidence
 110k1144.13(2) Construction of Evidence
 110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution.
 Most Cited Cases

Criminal Law 110 ⚡1159.6

110 Criminal Law
 110XXIV Review
 110XXIV(P) Verdicts
 110k1159 Conclusiveness of Verdict
 110k1159.6 k. Circumstantial Evidence. Most Cited Cases
 When evidence supporting guilt is solely circumstantial, an appellate court, in conducting a sufficiency of evidence review, considers the evidence

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 4

in the light most favorable to the State and examine each evidentiary item in context, not in isolation.

[15] Homicide 203 ↪ 1184

203 Homicide
 203IX Evidence
 203IX(G) Weight and Sufficiency
 203k1176 Commission of or Participation in Act by Accused; Identity
 203k1184 k. Miscellaneous Particular Circumstances. Most Cited Cases
 Evidence was sufficient to support finding that defendant, rather than alleged perpetrator, committed child victim's murder; evidence indicated that over a three-month period, defendant hurt victim repeatedly by grabbing her face so hard that it bruised, evidence indicated that victim's bruises were so frequent and so obvious that the defendant and victim's mother felt obliged to fabricate stories, and medical evidence was given that indicated most of victim's recent bruises were inflicted when the defendant was taking care of her. RSA 630:1-b.

[16] Criminal Law 110 ↪ 363

110 Criminal Law
 110XVII Evidence
 110XVII(E) Res Gestae
 110k362 Res Gestae; Excited Utterances
 110k363 k. In General. Most Cited Cases
 To admit testimony under the excited utterance exception to the hearsay rule, the trial court must be satisfied that there was a sufficiently startling event or occurrence and the declarant's statements were a spontaneous reaction to the occurrence and not the result of reflective thought. Rules of Evid., Rule 803(2).

[17] Criminal Law 110 ↪ 368(3)

110 Criminal Law
 110XVII Evidence
 110XVII(E) Res Gestae
 110k362 Res Gestae; Excited Utterances

110k368 Acts and Statements of Third Persons

110k368(3) k. Subsequent to Commission of Crime. Most Cited Cases
 Statements child victim's mother made to her friend on night of arrest of defendant, who was mother's boyfriend, which included mother's statement "and you knew, and I didn't listen," and mother's description of defendant grabbing victim by the shirt and pushing her into a corner when she cried, were admissible under the excited utterance exception to the hearsay rule; friend testified during voir dire that on the night that the defendant was arrested, mother arrived at her house "hysterical" and crying, friend lived approximately twenty minutes from the defendant's home, where mother and the defendant had been when he was arrested, and friend testified that mother was very sporadic in her conversation and disheveled. Rules of Evid., Rule 803(2).
 **10*417 Peter W. Heed, attorney general (N. William Delker and Simon R. Brown, senior assistant attorneys general, on the brief, and Mr. Delker orally) for the State.

David M. Rothstein, deputy chief appellate defender, of Concord, by brief and orally, for the defendant.

BROCK, C.J.

The defendant, Chad Evans, was convicted of reckless second-degree murder, *see* RSA 630:1-b (1996), five counts of second-degree assault, *see* RSA 631:2 (1996), endangering the welfare of a minor, *see* RSA 639:3, I (1996), and simple assault, *see* RSA 631:2-a (1996), following the death of twenty-one-month-old Cassidy Bortner, the daughter of his girlfriend, Amanda Bortner. He appeals, arguing that: (1) the Superior Court (*T. Nadeau, J.*) erroneously gave the jury a false exculpatory statement instruction; (2) the evidence on the second-degree murder charge was insufficient because it failed to eliminate the conclusion that Cassidy's babysitter, Jeffrey Marshall, killed her; and (3) the court erroneously admitted various of Amanda's

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 5

statements under the excited utterance exception to the hearsay rule. *See N.H. R. Ev.* 803(2). We affirm.

I. Facts

The jury could have found the following facts. Amanda and the defendant began dating in June 2000. A month later, she and Cassidy moved into the defendant's Rochester home. Shortly thereafter, bruises started appearing on Cassidy. These bruises were caused by the defendant.

At first, the defendant bruised Cassidy only occasionally by forcibly grabbing her face out of frustration because Cassidy became jealous when Amanda was affectionate towards him. As time went on, his frustration with Cassidy grew.

In the month before she died, the defendant grabbed Cassidy's face hard as often as twice a week. He called her names such as "little bitch" and "f---ing retard." **11 As frequently as three times a week, the defendant disciplined Cassidy by picking her up by the armpits and roughly placing her in front of a wall or in a corner. Once, he grabbed her by the back of the neck and tossed her against a closet door, banging her head against the door. Another time, when Cassidy resisted, he picked her up by the *418 armpits and threw her on the bed. When Amanda intervened, he grabbed Cassidy's leg and then walked away, muttering that he wished Cassidy had never been born. On another occasion, to stop her from crying and screaming, the defendant pressed his finger on Cassidy's throat, hard enough to make her gag.

The defendant and Amanda made up false excuses to explain the obvious bruises on Cassidy's face, including that the defendant grabbed Cassidy's face to prevent her from falling off a trampoline. They also said that Cassidy was bruised because she was clumsy or because she accidentally bumped her head. Because of the bruises and her fear that Cassidy would be taken from her, Amanda refused to put Cassidy in day care. Instead, she asked her

sister and her sister's boyfriend, Marshall, to babysit.

On November 8, 2000, the day before Cassidy died, Amanda dropped her off at her sister's and Marshall's home in Kittery, Maine, at around 1:30 or 2:30 p.m. When she dropped Cassidy off, Cassidy was fine, although a bit sleepy. She had a couple of scratches and a faded bruise on her face, but nothing more. Her behavior was normal. She spent the afternoon watching cartoons.

The defendant picked up Cassidy at around 5:00 p.m. Shortly thereafter, he called from his car to tell Marshall that "[t]he little bitch is acting weird again." He said that Cassidy was "kind of bobbin' around" in the car. An hour or so later, he again called Marshall and said that she fell on her face on the ground when he took her out of the car. Later that evening, the defendant called Marshall again and told him that while playing ball with his three-year-old son, Cassidy was hit by his son with a ball. During the conversation, the defendant became frantic, telling Marshall that Cassidy's eyes were in the back of her head, and yelling at her to wake up. He told Marshall that Cassidy was out cold. When Marshall suggested that the defendant take her to the hospital, the defendant said that she had "come out of it" and was fine.

The defendant also called Amanda to tell her about the incident. He told her that he did not want to baby-sit for Cassidy anymore because "[i]t seems like every time that I have her something happens where she hurts herself."

When Amanda came home that night, she and the defendant fought. At one point, the defendant grabbed her throat and pinned her against the couch, telling her to "cut it out you know what gets me going. You know what makes my temper."

The next morning, Amanda brought Cassidy to Marshall's house. Amanda lay Cassidy on a bed, looked at Cassidy's face, and then said to *419 her sister, "Look what he did. It looks like f---ing s---

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 6

doesn't it." Kassidy's face was badly bruised; the bruises around her forehead looked like finger marks.

Kassidy appeared sick and in pain. Marshall and Amanda's sister were concerned about her and put her to bed. When they tried to rouse her, Kassidy whimpered and pulled away from them. Amanda's sister went to work and Marshall stayed at home with Kassidy, letting her sleep. At around 9:30 that morning, the defendant called and asked how Kassidy**12 was doing. The defendant then told Marshall that he had received a call from the State because "someone had seen Kassidy at his house acting weird." The defendant was quite angry, telling Marshall that Amanda and "the little bitch [are] going to have to get out of my house."

At around 12:30 p.m., Marshall went to the bedroom to check on Kassidy and saw that she was unconscious, her eyes were in the back of her head, and she was making a gargling noise. While on the phone with 911, he tried to resuscitate her, but could not. Kassidy was taken by ambulance to a Maine hospital and pronounced dead on arrival.

An autopsy revealed that Kassidy died at approximately 12:30 p.m. from multiple blunt-force injuries that had caused bleeding and swelling in her brain, bleeding in the optic nerve, and internal bleeding in her abdomen. The medical examiner estimated that before she died, Kassidy received eight to ten blows to the head and at least two blows to the abdomen from a blunt force, such as a fist or a foot. Kassidy's fatal head injuries were inflicted sometime within the twenty-four hours preceding her death.

In addition to her fatal injuries, Kassidy had numerous bruises and multiple fractures in various stages of healing. Most of the bruises were between eight and twelve hours old. None of the bruises on Kassidy's face was consistent with being hit by a ball.

On the night of Kassidy's death, the police interviewed Amanda, her sister, Marshall and the de-

fendant. The defendant told the police the trampoline story to explain how he had once bruised Kassidy's face. He also told them that she would sometimes "throw herself in the corner or throw herself into the wall" or run and "slam right into" a corner. He stated that Kassidy was "clumsy" and constantly walked into things like his coffee table. That night, Amanda and the defendant spoke by telephone. Crying, Amanda told the defendant, "[Y]ou killed my baby; I know you did this; you wanted her dead."

II. False Exculpatory Evidence Charge

The defendant assigns two errors to the court's false exculpatory statement instruction. First, he argues that such an instruction constitutes *420 an impermissible comment on the evidence. Second, he argues that even if the instruction is permissible, the court should have broadened it to include false exculpatory statements made by Marshall. We address each argument in turn.

[1][2][3][4] The scope and wording of jury instructions is generally within the sound discretion of the trial court. *State v. Lamprey*, 149 N.H. 364, 366, 821 A.2d 1080 (2003). We will not reverse unless the jury charge fails to cover fairly the legal issues in the case. *See id.* We do not review the challenged instructions in isolation; instead, we review them in the context of the entire charge and all of the evidence to determine whether the trial court adequately stated the relevant law. *State v. Newell*, 141 N.H. 199, 205, 679 A.2d 1142 (1996). We interpret jury instructions as a reasonable juror would have understood them. *Lamprey*, 149 N.H. at 366, 821 A.2d 1080.

A. Comment on Evidence

[5] The challenged instruction was as follows:

Evidence has been introduced regarding statements the defendant offered to explain certain bruising on Kassidy. If you find the defendant in-

839 A.2d 8

150 N.H. 416, 839 A.2d 8

(Cite as: 150 N.H. 416, 839 A.2d 8)

Page 7

tionally made statements tending to demonstrate his innocence, or to influence a witness, and that the statements are **13 later discovered to be false, then you may consider whether the statements show a consciousness of guilt, and determine what significance, if any, to give to such evidence.

This instruction is similar to one which we approved in *State v. Fischer*, 143 N.H. 311, 318-20 [725 A.2d 1] (1999). In *Fischer*, we did not decide whether such an instruction constitutes improper comment on the evidence because this issue was not preserved for our review. *Id.* at 318 [725 A.2d 1]. We now hold that where, as here, the instruction permits, but does not require, the jury to infer consciousness of guilt from false exculpatory statements, it is not an improper comment on the evidence. See *State v. Marti*, 143 N.H. 608, 616-17 [732 A.2d 414] (1999); see also *State v. Cassell*, 129 N.H. 22, 24 [523 A.2d 40] (1986). It is “merely a correct statement of law.” *Marti*, 143 N.H. at 617 [732 A.2d 414].

[6][7] Evidence that a defendant intentionally made an exculpatory statement that is later discovered to be false may constitute circumstantial evidence of consciousness of guilt. See *United States v. Ingram*, 600 F.2d 260, 262 (10th Cir.1979). It is reasonable to infer consciousness of guilt from a defendant's false exculpatory statement because “an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish [his or her] innocence.” 1A K. O'Malley *421 & a., *Federal Jury Practice and Instructions-Criminal* § 14.06, at 286 (5th ed.2000). Exculpatory statements later shown to be false are akin to other evidence that may be relevant to show consciousness of guilt, such as flight and efforts to avoid suspicion. See *State v. Steed*, 140 N.H. 153, 155-56, 665 A.2d 1072 (1995); cf. *State v. Stott*, 149 N.H. 170, 173, 816 A.2d 1018 (2003) (defendant's statements to police were “extremely probative of his consciousness of guilt”).

[8][9] False exculpatory statement instructions

“have long been accepted by the courts.” *United States v. McDougald*, 650 F.2d 532, 533 (4th Cir.1981). To be proper, a false exculpatory statement instruction must explain that the inference of consciousness of guilt is permissive, not mandatory. See *State v. Orta*, 66 Conn.App. 783, 786 A.2d 504, 510 (2001); see also *Com. v. Martinez*, 437 Mass. 84, 769 N.E.2d 273, 280 (2002); cf. *Cassell*, 129 N.H. at 24, 523 A.2d 40. The instruction must also make clear that false exculpatory statements are not evidence of guilt, but are evidence of consciousness of guilt. See *Fischer*, 143 N.H. at 319, 725 A.2d 1. Further, there must be an evidentiary basis for the instruction. See *United States v. Hudson*, 717 F.2d 1211, 1215 (8th Cir.1983). In this case, the defendant concedes that there was sufficient evidence for the State to argue adverse inferences from his false exculpatory explanations for Cassidy's bruises.

[10] When viewed in the context of the entire jury charge, we hold that the instruction in this case was appropriate. In its general instructions, the court instructed the jury that if the jury thought that the judge had expressed an opinion about the facts of the case, it “must disregard that expression.” The judge further informed the jury that it was the judge's job “in this and in all cases ... to remain entirely neutral, and it's up to you, alone, and not up to me to decide the facts in this case.” The court explained that it was the jury's job to “decide the credibility of the witnesses,” which meant that it had “to decide whom to believe.”

In its false exculpatory statement instruction, the court made clear that the jury had to decide whether the defendant “intentionally made statements tending to **14 demonstrate his innocence, or to influence a witness” and whether these statements were later shown to be false. It was further up to the jury to consider whether these statements indicated consciousness of guilt and to determine the significance “if any” to give to them. The instruction left “exclusively to the jury the question as to whether false exculpatory statements, if made, indicate con-

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 8

sciousness of guilt, or nothing at all.” *Ingram*, 600 F.2d at 262. As such, it was proper. *See State v. Parker*, 142 N.H. 319, 324, 702 A.2d 306 (1997) (jury instructions are *422 appropriate when they accurately state law and allow jury to exercise its own judgment in evaluating conflicting evidence).

B. False Exculpatory Statement Instruction Pertaining to Marshall

The defendant contends in the alternative that if the false exculpatory statement instruction was permissible, the trial court should have applied it to Marshall. We disagree.

We rejected a similar argument in *State v. Bruneau*, 131 N.H. 104, 116-18, 552 A.2d 585 (1988). In *Bruneau*, the defendant argued that one of his associates had killed the victim and that another of his associates was lying to cover for him. *Id.* at 106, 116, 552 A.2d 585. In support, defense counsel urged the jury to consider that the two associates had disappeared after speaking with police. *Id.* at 116, 552 A.2d 585. Defense counsel argued that the behavior of the two associates merited an instruction that the jury could conclude from their behavior that the two associates were conscious of their guilt. *Id.* at 116-17, 552 A.2d 585.

We held that the court's refusal to give this instruction was not error. *Id.* at 117-18, 552 A.2d 585; *cf. Com. v. Toney*, 385 Mass. 575, 433 N.E.2d 425, 432 (1982) (judge need not bring to attention of jury defendant's own innocent explanation for alleged flight). The defendant's assertion that someone other than he was guilty was not a theory of defense upon which he was entitled to an instruction, but was a theory of the case. *Bruneau*, 131 N.H. at 117-18, 552 A.2d 585.

[11] We conclude that, like the defendant in *Bruneau*, the defendant in this case was not entitled to an instruction elucidating his theory that Marshall was guilty. *Id.* at 118, 552 A.2d 585. This was not a theory of defense upon which he was entitled

to an instruction. *Id.* at 117-18, 552 A.2d 585; see *State v. Ramos*, 149 N.H. 272, 274, 821 A.2d 979 (2003).

[12] The defendant argues that instructing the jury that it could infer consciousness of guilt from Marshall's allegedly false statements was necessary to prevent unfairness. We assume, without deciding, that it may be appropriate in some instances for the jury to be instructed on the false exculpatory statements of others. *See United States v. Boekelman*, 594 F.2d 1238, 1241 (9th Cir.1979). “Whether an instruction is necessary in a particular case ... is an issue reserved to the trial court's sound discretion.” *Ramos*, 149 N.H. at 274, 821 A.2d 979. We review the denial of a proposed jury instruction in the context of the entire charge and all evidence presented at trial, reversing only if the instructions did not adequately state the relevant law. *State v. Blackstock*, 147 N.H. 791, 798, 802 A.2d 1169 (2002).

The trial court's decision not to expand the false exculpatory statement instruction to include Marshall was a sustainable exercise of discretion. *See Ramos*, 149 N.H. at 274, 821 A.2d 979. In contrast to the evidence *423 concerning the defendant's false exculpatory statements, there was scant evidence that Marshall lied about **15 Cassidy's injuries to demonstrate his innocence. The defendant points to Marshall's denial that he abused Cassidy on either November 8 or November 9. Such general denials, however, do not merit a false exculpatory statement instruction. *See McDougald*, 650 F.2d at 533.

The defendant also refers to a statement Marshall made to his girlfriend, while he was trying to resuscitate Cassidy, that Cassidy was “coming through” and that she was going to the hospital. From this statement, Marshall's girlfriend inferred that Cassidy was “alert, sitting up and watching television,” when, in fact, she was already dead. Marshall's statement, even if false, did not tend to demonstrate his innocence and did not merit a false exculpatory statement instruction.

In his opening and closing remarks, defense coun-

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 9

sel vigorously argued that Marshall was a liar and a killer:

Folks, you are gonna have one of those rare opportunities, you are going to see the killer of Kassidy Bortner, and you're going to see Jeff Marshall.... [I]f you want to hear about lame excuses, you're gonna hear 'em from none other than the star witness for the [S]tate ... Jeffrey Marshall.... He's not the most perfect babysitter. Well, not only is he not the most perfect babysitter, he is a killer.

....

Folks, [Amanda] dropped [Kassidy] off in the morning on November 9th, alive, at Jeff Marshall's house.... At Jeff Marshall's house she was supposed to be cared for by Jeff Marshall.... And she wasn't cared for by Jeff Marshall. She was dealt with at the highest level of neglect, and she was beaten at that house.... I'm going to û-I'm going to tell you, we don't know what exactly happened over at Jeff Marshall's house, but he wasn't straight with you. He wasn't straight with you at all. And you don't have to take that from me.

....

Jeffrey Marshall is a liar. Jeffrey Marshall is protecting himself. Jeffrey Marshall is avoiding reality here, folks.... But, he's a liar for more than one reason, and he's covering up, and he's minimizing, and he's doing everything that a liar would do.... Why? ... Because he's innocent? ... No.... He had a dead baby. He had a dead baby in his house. And he knows why he had a *424 dead baby in his house. He knows why he did it. He inflicted her wounds, okay....

The defendant thus had "ample opportunity to present his theory and the jury was free to consider it." *State v. Shannon*, 125 N.H. 653, 663, 484 A.2d 1164 (1984).

The court's jury instructions included extensive in-

formation to help the jury evaluate witness credibility. For instance, the court outlined various factors for the jury to consider, including:

Whether the witness appeared to be candid; whether the witness appeared worthy of belief; the appearance and demeanor of a witness; whether the witness had an interest in the outcome of the case; whether the witness had any reason for not telling the truth; whether what the witness said seemed reasonable or probable; whether what the witness said seemed unreasonable or inconsistent with other evidence in the case or with prior statements by the witness; and whether the witness had any friendship or animosity toward other people in the case.

Viewing the jury instructions as a whole, we cannot say that the jury was incapable of evaluating the defendant's theory of the case absent a false exculpatory statement instruction that pertained to Marshall. **16 See *Bruneau*, 131 N.H. at 118, 552 A.2d 585.

III. Sufficiency of the Evidence

The defendant argues that the evidence was insufficient because the State failed to eliminate the rational conclusion that Marshall killed Kassidy. We disagree.

[13][14] To prevail on his challenge to the sufficiency of the evidence, the defendant must prove that no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt. See *State v. Hull*, 149 N.H. 706, 712, 827 A.2d 1001 (2003); *State v. Chapman*, 149 N.H. 753, 758, 829 A.2d 1083 (2003). When the evidence is solely circumstantial, it must exclude all rational conclusions except guilt. See *State v. Duguay*, 142 N.H. 221, 225, 698 A.2d 5 (1997). Under this standard, however, we still consider the evidence in the light most favorable to the State and examine each evidentiary item in context, not in isolation. See *id.*

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 10

[15] We conclude that a rational trier of fact, viewing the evidence and reasonable inferences from it in the light most favorable to the State, could have found beyond a reasonable doubt that the defendant, not Marshall, killed Cassidy.

*425 The jury heard evidence that over a three-month period, the defendant hurt Cassidy repeatedly. He grabbed her face so hard that it bruised. He grabbed her by the neck and threw her against a closet door. He tried to stop her from crying by pressing his finger so hard against her throat that she gagged.

The jury heard evidence that the bruises were so frequent and so obvious that the defendant and Amanda felt obliged to fabricate stories, such as the trampoline story, to explain them. The bruises were so bad that Amanda did not want to take her daughter to day care because she was afraid that Cassidy would be taken from her.

The jury heard evidence that Cassidy's repeated injuries and the stories Amanda and the defendant made up to explain them were consistent with battered-child syndrome. As the expert explained:

A battered-child syndrome is used to refer to a child in which there is repeated trauma inflicted upon them over a period of time. Usually, they present to a physician or the emergency room with some kind of an acute injury, often a head injury, and, upon examination, there are multiple other injuries present, sometimes other bruises, sometimes fractures or other injuries, and they are of varying ages, some older than others.

....

[S]ome of the other characteristics are that usually the parent or caregiver, the[re] might be a delay ... in the time in which they bring the child in for care. Secondly, usually the story that is told about how the injury occurs is inconsistent with the severity of the injury. There may be explanations that are just not plausible that are given by

the caregiver for why or how the child has sustained multiple injuries.

....

[O]ften we hear that these parents will say, well, there's a lot of bruises because the child just bruises easily; or if there is fractures, or other injuries, they might say that the child was just very clumsy and fell frequently.

The jury heard evidence from which a rational juror could have found, beyond a reasonable doubt, that the defendant inflicted Cassidy's fatal injuries on the night before she died. The jury heard that on the day before she died, Cassidy acted "[p]retty normal" and had only one fading **17 bruise and a few scratches on her face. The jury heard that that night, something happened that rendered Cassidy unconscious. The defendant said that his son hit Cassidy in the head with a baseball. A later autopsy *426 revealed that none of the bruises on Cassidy's face was consistent with being hit by a ball.

The jury heard that the next day, Cassidy's face was very badly bruised and that Amanda blamed the defendant for the bruises, telling her sister, "Look what he did." The jury heard evidence that in his police interview, the defendant repeated the false stories he and Amanda made up to explain Cassidy's injuries, including the trampoline story. The jury also heard that on the night of Cassidy's death, Amanda accused the defendant of killing her, saying, "[Y]ou killed my baby; I know you did this; you wanted her dead."

The jury also heard medical evidence that most of Cassidy's recent bruises were inflicted when the defendant was taking care of her, approximately eight to twelve hours before she died. Her fatal injuries were inflicted sometime within the twenty-four hours before she died.

The defendant argues that the following evidence could have led a rational juror to conclude that he was not guilty: (1) when Cassidy died, she was in

839 A.2d 8
 150 N.H. 416, 839 A.2d 8
 (Cite as: 150 N.H. 416, 839 A.2d 8)

Page 11

Marshall's care; (2) her pajama bottoms were removed and left on the bed the day that she died, although Marshall did not testify that he removed them and his girlfriend could not explain how they came to be removed; and (3) the medical evidence did not conclusively rule out Marshall as a cause of Cassidy's fatal injuries.

Viewing all of the evidence in the light most favorable to the State, we hold it was sufficient for the jury to exclude all rational conclusions except that the defendant was guilty.

IV. Excited Utterance Exception

We briefly dispose of the argument in the defendant's *pro se* supplemental brief that the court erroneously admitted as excited utterances statements Amanda made to her friend on the night of his arrest. These statements included Amanda's comment to her friend, "And you knew, and I didn't listen." They also included Amanda's description of the defendant grabbing Cassidy by the shirt and pushing her into a corner when she cried.

[16][17] To admit testimony under the excited utterance exception to the hearsay rule, the trial court must be satisfied that there was a sufficiently startling event or occurrence and the declarant's statements were a spontaneous reaction to the occurrence and not the result of reflective thought. *State v. Bonalumi*, 127 N.H. 485, 488, 503 A.2d 786 (1985); *see N.H. R. Ev.* 803(2). The evidence supports the trial court's finding that both of these prerequisites were satisfied.

*427 During *voir dire*, the friend testified that on the night that the defendant was arrested, Amanda arrived at her house "hysterical" and crying. The friend lives approximately twenty minutes from the defendant's home, where Amanda and the defendant had been when he was arrested. The friend testified that Amanda was "very sporadic in her conversation ...; disheveled; her hair was a mess; she was chain smoking; almost incoherent talking to me."

The friend had never seen Amanda like that before. Throughout their conversation, Amanda cried and was "very emotional." The friend stated that it was "very hard to have a conversation with her that evening" because "[s]he was in a highly agitated, emotional state." The friend described it as "bits and pieces" rather than a conversation. Given this testimony, we hold that the trial court's decision to **18 admit Amanda's statements as excited utterances was a sustainable exercise of discretion. *See Bonalumi*, 127 N.H. at 487-89, 503 A.2d 786.

We grant the State's motion to strike the remaining issues the defendant raises in his *pro se* supplemental brief because they were not raised in the notice of appeal and we did not grant him permission to brief them. *See State v. Thomas*, 150 N.H. 327, ---, 840 A.2d 803, 2003 WL 22887919 (2003); *Sup.Ct. R.* 16(3)(b).

Affirmed.

DALIANIS and DUGGAN, JJ., concurred.
 N.H., 2003.
 State v. Evans
 150 N.H. 416, 839 A.2d 8

END OF DOCUMENT