No. 18-9035

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE CLIFFORD E. AVERY

PETITION FOR A WRIT OF HABEAS CORPUS

CLIFFORD E. AVERY
POST OFFICE BOX 14
CONCORD,NH 03301

QUESTION(S) PRESENTED

(1) Where Petitioner can unequivocally show from the record evidence of his case that he is, as a matter of law and fact, actually and factually innocent of the crime of conviction for which he is incarcerated for by the State of New Hampshire. Does the willful failure of the State of New Hampshire to provide him any remedy for such an occurrence violate the United States Constitution?

(2) Where Petitioner can unequivocally show from the record evidence of his case that he is, as a matter of law and fact, actually and factually innocent of the crime of conviction for which he is incarcerated for by the State of New Hampshire. Does the United States Constitution provide him a remedy for such an occurrence?

(3) Does the incarceration of Petitioner, who is, as a matter of law and fact actually and factually innocent of the crime of conviction and who has been willfully deprived of any remedy for such an occurrence by the State of New Hampshire violate the United States Constitution?

(4) Where Petitioner was convicted for a particular crime under a repealed law with no saving provision permitting such prosecution for such particular crime:

(a) Did the trial court have jurisdiction to try the Petititoner for the particular offense?

(b) If the trial court had no jurisdiction to try Petitioner, is the judgment of conviction and sentence imposed void for want of jurisdiction?

(c) If the judgment of conviction is void, are all subsequent state and federal court decisions and/or opinions given in cases where Petitioner sought corrective judicial process for such a conviction, null and void ab initio?

(d) If Petitioner's judgment of conviction and sentence imposed are void, what corrective judicial process is due him from the New Hampshire Supreme Court?

(5) Under the Constitution of the United States does Petitioner have a right to a remedy for the purpose of establishing before the court his complete innocence of the crime for which he has been convicted and sentenced for?

LIST OF PARTIES

The parties in this case are the State of New Hampshire.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a) and §2254(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner was wrongly charged and prosecuted under a repealed law that contained no saving provision permitting his prosecution for the particular offense. His trial counsel and direct appeal counsel were both grossly ineffective for not raising this fundamental constitutional and jurisdictional defect. Subsequently, a State post-conviction judge who was "specially assigned" to hear Petitioner's Motion For A New Trial Based Upon Newly Discovered Evidence and Petition For A Writ Of Habeas Corpus, was told prior to any of the four (4) evidentiary hearings that would be held, that he must not provide Petitioner any relief for this constitutional violation and jurisdictional defect as well as many other substantial constitutional violations that caused him to be convicted of a murder he did not commit. This State judge colluded with the attorney he appointed to represent Petitioner to deprive him of any fair and impartial tribunal proceeding for corrective judicial process for the violation of his federal constitutional rights. The State courts of New Hampshire have deprived Petitioner of any remedy for corrective process for such want of jurisdiction which is clearly contrary to the rule of law.

REASONS FOR GRANTING PETITION

The reasons for granting this Petition for a Writ of Habeas Corpus are because Petitioner is, as a matter of law, actually and factually innocence of the crime of conviction and he is only in prison because the State of New Hampshire has wrongfully and willfully denied him any state corrective judicial process let alone a fair and impartial corrective process for relief from such a fundamentally unjust conviction and incarceration.

The New Hampshire Attorney General completely agrees that the prosecution of Petitioner under the repealed law RSA 585:1 makes his conviction and imprisonment illegal and unconstitutional.

IN THE SUPREME COURT OF THE UNITED STATES

IN RE CLIFFORD E. AVERY

NO._____

PETITION FOR A WRIT OF HABEAS CORPUS

Now comes the Petitioner, Clifford E. Avery, in pro se and respectfully requests this Honorable Court to invoke its power of original jurisdiction and to provide corrective judicial process for a grave injustice Petitioner has suffered and reverse his conviction and release him forthwith from further illegal and unconstitutional restraint on his liberty.

Petitioner has exhausted all State court remedies. He has not sought relief in the federal district court of New Hampshire because his one and only first federal habeas petition was filed in May 1992 and relief denied. In 2005 Petitioner requested permission from the First Circuit Court of Appeal to file a "second or successive" petition for writ of habeas corpus and the First Circuit denied his request.

Petitioner firmly believes that the facts of this unique and extraordinary Petition clearly show that exceptional circumstances warrant the exercise of the Court's discretionary power, and that adequate relief cannot be obtained in any other form from any other court.

PARTIES

1. Petitioner is illegally and unconstitutionally imprisoned and restrained of his liberty and detained under color of authority of the State of New Hampshire in the custody of Helen Hanks, Commissioner of New Hampshire Department of Corrections (NHDOC),Merrimack County, State of New Hampshire.

2. Michelle Edmark, in her official capacity as Warden of New Hampshire State Prison for men (NHSP-M) has immediate physicial custody over Petitioner.

FACTS

3. The sole claim and authority by which the said Helen Hanks,Commissioner of NHDOC, so restrains Petitioner is a mittimus of the superior court of the State of New Hampshire,in the County of Merrimack, a copy of said mittimus as well as the indictment are contained in Exhibit A attached hereto.

4. The mittimus was based upon an indictment, and judgment of conviction for murder in the first degree. The indictment charged Petitioner with one count of murder of Lee Ann Greeley on December 16, 1973 pursuant to NH RSA 585:1 a repealed law with no saving provision.

Petitioner fully incorporates into this Petition: (1) Petition for writ of habeas corpus(hereinafter "Petition"). Petitioner in 2005 sought permission from the First Circuit Court of Appeals to file it as a "second or successive" petition. The First Circuit denied permission. Pages 1-16 of Petition are in Appendix A (App.), pages 28-129 of the Petition are in App.A,Part 1, pages 130-251 of Petition are in App. A,Part 2.

2) A petition for writ of habeas corpus Petitioner filed in the original jurisdiction of New Hampshire Supreme Court in 2007,(2007 Petition in Attachment1). Petitioner believes that Ground 1 of the Petition and Ground 1 of the 2007 Petition are as a matter of law the first ground this Honorable Court must consider first and each ground is dispositive of the instant petition. There are several reasons why Petitioner needs to fully incorporate the Petition and 2007 Petition.

1. Both are crucial and essential for the Court to see what the Petitioner has done for decades in attempting to obtain redress for the many constitutional deprivations that caused him to be wrongly convicted. And to fully understand why he has to date been unsuccessful and wrongly denied redress.

2. The State has made it very difficult and impossible to prepare this instant petition especially with respect to much of the procedural travel of his case. This is due to the theft, destruction and loss of many of Petitioner's legal actions,pleadings,etc,that he has filed pro se in State and federal court the past several decades seeking redress. Such theft,destruction and loss is all attributable to improper actions of the State of New Hampshire and some to Rhode Island prison officials who lost all Petitioner's trial transcripts and other legal actions,pleadings, etc. Much of this documented.

3. Petitioner is now 73 years of age and suffering from several serious medical conditions and these conditions coupled with the theft,destruction and loss of his legal property have made it very difficult to prepare this instant petition. The Petition and 2007 Petition has been beneficial to Petitioner in preparing the instant petition.

BRIEF DESCRIPTION ABOUT THIS CASE

Petitioner's imprisonment is illegal and unconstitutional and in violation of the Constitutions and laws of the United States and New Hampshire. Because inter alia, and first and foremost a bias and corrupt state trial judge permitted Petitioner to be tried under a repealed law with no saving clause permitting such prosecution. This judge also sanctioned his baliffs illegally drugging Petitioner with potent opioids,narcotics and other drugs throughout **all** stages of his trial and these drugs did render Petitioner incompetent to assist his counsel in his own defense and stand trial. When Petitioner attempted to obtain a due process hearing for having been tried while not competent. The trial judge engaged in acts and omissions to cover-up the fact he permitted Petitioner to be tried while not competent and made so by the trial court baliffs **illegally** drugging him.

As a matter of law and fact Petitioner is actually and factually innocent of the **particular** crime of conviction. He is also **completely innocent** because he never killed anyone. But he was prevented from ever showing his innocence because he was deprived of his constitutional rights.

Petitioner asserts the trial court did not have jurisdiction to try him for the **particular** crime it did because the law creating the offense had been repealed with no saving provision and/or lost jurisdiction when the trial judge tried Petitioner under the repealed law,permitted his baliffs to **illegally** drug him and did allow Petitioner to be tried while not competent.

Subsequently, Petitioner filed a post conviction petition seeking redress for inter alia, the above violations of his

rights. The post conviction tribunal is the first place, according to state law and rules of the court he can raise constitutional claims regarding his conviction. A corrupt state judge, **prior** to any hearings being held, was told he must not provide Petitioner any relief. Moreover, this corrupt judge appointed Petitioner an attorney that he then colluded with to deprive the Petitioner of a fair and impartial state court post conviction process of his claims, flagrantly depriving Petitioner of his constitutional right of access to fair and impartial tribunals,Due Process of law and Equal protection of the laws.

Petitioner to date has not been provided his right to any fair and impartial state judicial corrective process for redress of inter alia, the above violations of his constitutional rights. Because he cannot enforce his federal constitutional rights due to a biased trial judge and corrupt state post conviction judge and throughly corrupted state court tribunals. The state courts also continue to be engaged in a judicial cover-up in order to prevent exposure of the biased, corrupt, illegal and unconstitutional methods used by the State and State courts of New Hampshire in obtaining such a conviction.

SOME FACTS, EVENTS, CLAIMS AND CIRCUMSTANCES OF THIS CASE WHICH ARE FULLY SUPPORTED BY THE PETITION AND 2007 PETITION ARE AS FOLLOWS

This case is about the actual and factual innocence of Petitioner who was illegally and unconstitutionally convicted of murder in the first degree and sentenced to a term of 18 years to life. Petitioner is absolutely innocent of the crime of conviction but was prevented from showing his innocence due to being

deprived of his federal and state constitutional rights due to illegal and unconstitutional acts of a biased trial judge Martin F. Loughlin,egregious and unlawful prosecutorial misconduct of state prosecutor Thomas Rath and **gross** ineffective trial counsel Paul C. Semple.

This case is about flagrant judicial bias,judicial corruption of state judges and of the state courts of New Hampshire as a whole. It is about the illegal and corrupt actions of trial judge Loughlin and state post conviction judge Walter Murphy. It is about a state court judicial cover-up of Petitioner's illegal and unconstitutional conviction and the illegal methods used to obtain such a conviction.

This state court cover-up began immediately after Petitioner's trial and conviction. Its initial purpose was to cover-up the fact Petitioner was tried while not competent and rendered incompetent by the trial courts baliffs illegally and unconstitutionally drugging him throughout all stages of his trial. Prior to and throughout all stages of his trial Petitioner was under the influence of the following drugs: 1) Talwin a synthetic opioid,100mg every 4 hours, 2)Demarol, a narcotic,3) Codiene an opioid,4)two capsules of Secondal a potent barbituate,5)Valium a sedative/hypnotic,6)Belladonna provided for stomach ailment which has a strong Valium base.

Trial judge Loughlin,trial counsel Semple and prosecutor Rath all knew the baliffs were administering drugs to Petitioner. But none of them made any inquiry whatsoever of why the baliffs were drugging Petitioner,what these drugs were and most important,what effect these drugs had on Petitioner and his ability to assist his counsel in his own defense and receive a fundamnetally fair trial.

It is important to note at the time of Petitioner's trial and still today, it is illegal for anyone unless medically qualified to administer opioids,narcotics and these other drugs to any person,let alone Petitioner on trial for murder. This fact is another aspect of the judicial cover-up,i.e. covering illegal actions of trial judge and trial court baliffs.

The trial transcripts and other record evidence clearly show the above illegal acts took place. It is instructive to note that immediately after trial all these six (6) drugs were terminated. In fact a note was placed on the wall by the sergeant station at New Hampshire State Prison that read: "Avery is to get no medication not even asprin."

After trial Attorney Semple was contacted by NHSP Dr. Thomas Walker. Dr. Walker told Semple he believed Petitioner had not been competent to have gone to trial due to the 6 drugs. He told Semple he needed to take appropriate action to have Petitioner's conviction reversed. Subsequently, two forensic expert psychiatrists concurred with Dr. Walker that Petitioner had not been competent to stand trial due to these 6 drugs.

Trial counsel Semple had ex parte meetings with judge Loughlin and told Loughlin he needed to withdraw due to "a serious conflict of interest" and being in "a compromising situation" over the incompetency claims and other potential ineffective claims. Semple also, according to Semple, told Loughlin a motion to vacate judgment and sentence needed to be filed for Petitioner and that new counsel needed to be appointed so the motion could be filed as he could not do so. Semple after this first secret meeting with judge

Loughlin apologized to Petitioner for not looking into the matter of these drugs. He told Petitioner judge Loughlin was very angry about the whole incompetency issue and would not let him withdraw from representing Petitioner. Semple said he could no longer represent him and he never did anything thereafter for Petitioner.

Judge Loughlin was actively involved in covering up the fact he had allowed Petitioner to be tried while not competent. Petitioner believes Semple unwittingly or wittingly participated with judge Loughlin in this cover-up. For more facts and details regarding these matters. SEE Petitioner, Section A,pps. 158-170.

Because judge Loughlin had cast Petitioner adrift to fend for himself by depriving Petitioner of his right to counsel, had summarily denied Petitioner's forced pro se December 15, 1975 motion to vacate judgment and sentence, denied in the face of overwhelming evidence of incompetency to have stood trial. Petitioner in April 1976 sent a pro se letter/motion to the New Hampshire Supreme Court. He informed that court he had been tried while not competent, was being denied counsel by Loughlin, that Loughlin had summarily denied his pro se December 15,1975 motion to vacate judgment and sentence. In a letter the New Hampshire Supreme Court vacated judge Loughlin's summary dismissal, instructed Loughlin to appoint counsel and hold a hearing for Petitioner's December 15, 1975 motion to vacate.

Judge Loughlin over a years time scheduled four (4) hearings but in defiance of the supreme court's instructions never held any of the hearings and never provided any reason why except no reason. During that time period judge Loughlin obstructed and thwarted attorney Francis Holland's efforts to obtain a hearing on Petitioner's

December 15,1975 pro se motion to vacate and attorney Holland's May 3, 1976 Motion to Vacate...". It should be noted that judge Loughlin did not appoint attorney Holland. Petitioner had wrote to several attorneys seeking their assistance and Holland agreed to represent him. When Holland filed his motion to vacate he was then reluctantly appointed by judge Loughlin. SEE Petitioner's December 15, 1975 motion to vacate, app,C,pps 1-2 and Holland's May 3, 1976 Motion to Vacate, App,C pps 3-6.

On September 12, 1977 still without counsel, still no hearing for his pro se and attorney Holland's motions to vacate and a second homicide indictment pending. Petitioner called attorney Semple to obtain some legal documents. He told Semple the above. Semple told Petitioner to file a habeas petition in NH Supreme Court against the Merrimack Superior Court and if he received no corrective process to file a habeas petition in the federal district court.

With no counsel Petitioner wrote a habeas petition to NH Supreme Court. In his petition he informed the court that the superior court was refusing to provide him an evidentiary hearing on his motions to vacate; that it had been over a year (at that time), since he had been waiting for a due process hearing, but due to the failure of the superior court to hold a hearing and ineffective assistance by attorney Holland, his rights were being denied. He also informed the supreme court that, "further delays in a hearing will continue to be detrimental to Petitioner on the merits of his motions to vacate judgment." (Emphasis supplied in original heabeas petition.) SEE pro se September 12, 1977 habeas petition, App.C,pps 7-11.

On October 24, 1977-two years and five months without counsel since his conviction on May 20,1975. Petitioner filed in the federal district court a Petition for a Writ of Habeas Corpus and Injunctive Re-

lief , Avery v Perrin No. C.77-369, hereinafter "Removal Petition." Petitioner requested his criminal case be removed from the state courts. He alleged the state courts had and were depriving him of due process, equal protection of the laws by failure to provide him corrective judicial process on his December 15, 1975 and attorney Holland's May 3, 1976 motions to vacate, delay in his direct appeal from his May 20, 1975 conviction and denial of speedy trial on the Gary Russell homicide indictment pending since September 1974.

In November 1977 the federal court appointed attorney William Brennan to represent Petitioner but due to a conflict of interest attorney Brennan said he could not represent Petitioner. So in November 1977 Petitioner appeared without counsel. After telling the court what had happened to him in the state courts Petitioner could see the state prosecutor was uncomfortable hearing what Petitioner was telling the magistrate judge. The prosecutor requested that a break be had. He went and made a telephone call. When he returned he told Petitioner that his boss-the attorney general did not want the proceedings to continue. This assistant attorney general told Petitioner if he would withdraw his "Removal Petition" from the federal court the State would: (1) Have two lawyers appointed to represent him on his criminal matters in the state courts; (2) Make sure he was provided with a due process hearing in state court on his motions to vacate; (3) Insure he was provided with his direct appeal if he was unsuccessful on his motions to vacate judgment and sentence, (4) "The state will take care of the Russell homicide indictment."

The federal magistrate asked attorney Brennan if he would assist the state in locating two attorneys to represent Petitioner if he decided to withdraw his Removal Petition. Brennan suggested Petitioner

withdraw his Removal Petition in view of the state's promises. Brennan filed a motion to withdraw on January 30,1978 and the court granted it the next day on January 31,1978.

Several months later it became evident attorney Brennan had spoken with over twenty five (25) lawyers in the state but none wanted to represent Petitioner. Their main reason(s) it was "too political." From conversations with attorney Brennan Petitioner became aware that his case was talked about quite frequently amongst lawyers in the state and it it had been pretty much generalized that his trial had been a mockery in large part due to judge Loughlin allowing his bailiffs to drug Petitioner rendering him incompetent and that judge Loughlin and the state courts were in distress over the whole situation. A few attorneys said that judge Loughlin wanted to be a federal judge and this was another reason he had wrongly denied Petitioner a hearing on his motions to vacate.

On May 2, 1978, lacking a few weeks it had been three (3) years since Petitioner's conviction. He was still without counsel, still without any hearing on his and attorney Holland's motions to vacate and still no direct appeal and no trial for the second homicide indictment. The state had clearly not kept its four promises.

On May 2, 1978 Petitioner refiled his Removal Petition in the federal district court. On June 6,1978 this apparently prompted judge Loughlin to appoint attorney Willaim Shea to represent Petitioner. Attorney Shea first told Petitioner he would represent him on his motions to vacate and the second homicide indictment. In light of this he told Petitioner to withdraw his Removal Petition from the federal district court. Shea failed to anything about Petitioner's motions to vacate. Later attorney Shea said judge Loughlin had appointed him to only represent him on an appeal to NH Supreme Court on judge Loughlin's denial

of Petitioner's habeas petition challenging the unconstitutional jury instructions which attorney Brennan suggested he challenge. Brennan said they were the worst instructions on presumption of innocence and reasonable doubt he had ever seen. SEE jury instructions, App. C,pps 12-21. It was obvious why judge Loughlin, according to Shea did not appoint him to represent Petitioner on his motions to vacate. Because all of judge Loughlin's wrongdoing would have been exposed. It was apparent to Petitioner that attorney Shea's primary objective was to get him to withdraw his Removal Petition from the federal district court. Unknown to Petitioner at that time is the fact state trial judge Loughlin would become a federal judge in the district court in April 1979. Obviously it would not look good for Petitioner' Removal Petition to be pending in that court and exposing all of judge Loughlin's improper,illegal and unconstitutional acts and omissions when he was Petitioner's state trial judge.

Subsequently, sometime in November 1978 Petitioner was suddenly taken to Hillsborough Superior Court where Shea's partner agreed by phone to represent Petitioner-thus giving him two lawyers. Nothing else was discussed with the clerk that day. The next day Petitioner received a letter from clerk Carl Randall and all it said was the Gary Russell homicide indictment had been dismissed, no judge was present.

On or about July 1978 Shea appeared in NH Supreme Court to argue the appeal of Loughlin's denial of relief for the jury instructions. The State Supreme Court denied relief on the basis trial counsel Semple had not objected to the instructions. The supreme court noted "Plaintiff [Avery]...perfected no appeal to this court." But, no appeal was ever had because judge Loughlin had never appointed counsel! After this attorney Shea and his partner Edward Mertens withdrew from representing Petitioner.

During this whole period of time with this sordid event of the Removal Petition. There was much unethical, illegal political maneuvering and manipulation involved with Petitioner's case. Many attorneys including Semple and Holland have always said his case was "political" and "much politics involved" in his case from the start and all throughout it. For many more facts and details of this shameful event see Petition at pps. 165-174.

In September 1981 Petitioner met with then law student David Bownes. Mr. Bownes wanted the letter the NH Supreme Court had sent Loughlin and/or Merrimack Superior Court vacating Loughlin's January 6,1976 summary dismissal of Petitioner's December 15, 1975 motion to vacate and instructing him to appoint counsel. Mr Bownes said that was the last document he needed and then an attorney at Franklin Pierce Law School (FPLS) would be filing a petition in court for Petitioner for corrective judicial process for his unconstitutional conviction. Petitioner gave the letter to Mr. Bownes and Bownes gave it to attorney James E. Duggan who headed the NH Appellate Defender Program (NHADP) at FPLS. That night after having talked with Mr. Bownes, feeling happy and optimistic that after six years at that time, he had hope that corrective judicial process on his claims would finally occur. So Petitioner wrote his mother to tell her the good news. Three days after sending his mother this letter, on October 1, 1981, the state transferred him into the federal prison system. For the next three years he was frequently kept in transit-moving from one federal prison to another, nine (9) in all. He lost contact with David Bownes and law students Jil Garber and Robert Ballam. Many of Petitioner's legal pleadings and documents were lost. Years later Petitioner would discover the letter disappeared from FPLS after it was given to attorney James Duggan by law student David Bownes. This is exactly what had

happened to Petitioner's county jail medical records after Jil Garber gave them to attorney Duggan! The medical records were key evidence, they indicated all the 6 drugs Petitioner had been prescribed at Boscawen county jail where he had been held pre-trial. In 1984-85 attorney Duggan told attorney Paul Twomey he didn't know what had happened to the medical records and said he had "turned Franklin Pierce upside down but couldn't find them." These records were also key evidence supporting Petitioner's ineffective trial counsel claim against attorney Paul Semple. They were also evidence of trial judge Loughlin's illegal and unconstitutional actions during trial. Completely unknown to Petitioner at that time is the fact that James Duggan, Paul Semple and judge Loughlin were all fellow instructors at FPLS where law students David Bownes, Jil Garber and Robert Ballam were working on Petitioner's case and finding substantial violations of his constitutional rights caused by attorney Semple and judge Loughlin.Petitioner believes attorney Duggan deliberately destroyed his medical records and the letter from NH Supreme Court he gave to David Bownes in September 1981. For more specific facts and details on this matter, the law students work, and Petitioner's sudden transfer to the federal prison system, SEE Petition,pps,174-181,Section C, pps 202-220.

ILLEGAL, CORRUPT ACTS OF STATE JUDGE WALTER MURPHY AND STATE COURT APPOINTED ATTORNEY PAUL TWOMEY

In 1984 the state's "star witness" in the prosecution of Petitioner came forward and recanted his trial testimony. Also at this time the NH Supreme Court appointed attorney James E. Duggan to represent Petitioner in his 10 year delayed direct appeal from his conviction on May 20, 1975. The federal district court had ordered Pe-

tititoner's release in 90 days unless provided sufficient evidence the state provided him a delayed direct appeal. SEE Avery v Perrin, No. 83-235D. Petitioner had many claims he wanted Duggan to raise in his appeal but Duggan said the appropriate thing to do under state law and rules of court was for Petitioner to raise them in a "habeas motion" in the superior court. He told Petitioner to not worry about counsel because the court would appoint him counsel because the claims were all a part of his direct appeal. So in 1984-85 Petitioner filed in Merrimack Superior court a Motion For New Trial Based Upon Newly Discovered Evidence And Petition For A Writ Of Habeas Corpus(hereinafter "1985 Petition") Avery v Cunningham, No. 85-E-25. Judge Walter Murphy was "specially assigned" to hear the 1985 Petition. Judge Murphy appointed attorney Paul Twomey to represent Petitioner. Unknown to Petitioner at that time is the fact Petitioner's trial counsel Paul Semple and attorney James Duggan were Board Directors of Twomey's law firm. Petitioner had numerous ineffective assistance claims against Semple. Also, at that time of the hearings information turned up that warranted ineffective appellate counsel claims being raised against appellate counsel Duggan in the superior court,but Twomey never raised them. Twomey failed miserably to effectively challenge Semple on many issues when the state called Semple to the stand. Twomey also failed to raise many ineffective claims against Semple. To do so would have placed him in the position of attacking the competency of his Board Director. This is also why Petitioner believes Twomey never raised ineffective claims against appellate counsel Duggan.

At this same time in 1984 Petitioner had filed a 42 USC §1983 civil rights lawsuit and habeas petition against the NH Parole Board, Avery v Knowlton, et al No. 85-E-38 and Avery v Knowlton, et al No. 85-E-39. In this extraordinary case the Petitioner had already served the mini-

mum term of his life sentence and had not been provided with his direct appeal as of right from his conviction on May 20,1975. The parole board had denied him parole because he would not admit guilt for the murder he had been wrongly convicted of. Petitioner told the board he was innocent. The board appeared shocked he had not had his appeal. Judge Murphy had also been "specially assigned" to both of the above lawsuits. Judge Murphy also appointed attorney Twomey to represent Petitioner in both the lawsuits.

Unknown to Petitioner until after the 4 evidentiary hearings held in the 1985 Petition. Is the fact judge Murphy had ex parte meetings with attorney Twomey. At these secret meetings judge Murphy told attorney Twomey prior to any of the hearings that he could not provide any relief to Petitioner in the 1985 Petition. When Twomey asked why, judge Murphy said, "I can't and that comes from the top." Judge Murphy told Twomey to "keep moving" on the lawsuit against the parole board because he-Murphy was going to have Petitioner released from prison through the "backdoor" of that lawsuit!! SEE Petition at pps. 185-186.

Judge Murphy's fixing Petitioner's 1985 Petition was illegal and unconstitutional and did deprive him of due process of law, access to the courts and a fair and impartial judicial proceeding for redress of many claims of violations of his federal and state constitutional rights which did prevent him from showing his actual innocence and caused him to be wrongly convicted of a murder he did not commit. Judge Murphy wrongly held Petitioner had "waived" all the many claims he had raised—at appellate counsel Duggan's instructions, for failing to raise them in his 10 year delayed direct appeal!

There was no lawful waiver of these claims. The record of these 4 evidentiary hearings is **completely barren of any colloquy about waiver!**

At these 4 hearings neither judge Murphy nor the state ever raised the spectre of waiver. SEE Judge Murphy's 55 page opinion and order dismissing Petitioner's 1985 Petition at App D, 1-54, see also Petitioner's Motion to Reconsider and judge Murphy's denial of the motion, App D,pps 55-59 and p. 60. For many more specific facts and details about these unconstitutional and corrupt acts. see Petition at pps 184-201.

Prior to the beginning of judge Murphy's corrupt proceedings. The NH Supreme Court denied Petitioner's 10 year delayed direct appeal on the 4 issues attorney Duggan raised. State v Avery, 126 N.H. 208 (1985). That appeal was completely meaningless and only a ritual. Because Petitioner's appellate counsel had many conflicts of interest he deliberately concealed from Petitioner. These conflicts were completely adverse to Petitioner's best interests. Petitioner asserts appellate counsel Duggan intentionally provided him with ineffective assistance due to his many conflicts of interest and Petitioner believes Duggan was a participant in the judicial cover-up. Petitioner also suffered prejudice and irreparable harm from the 10 year delay of his appeal and this is an independent due process violation. SEE Petition at pps 128-129 and pps 130-144 for facts and details about attorney Duggan's conflicts and ineffectiveness.

Petitioner believes the NH Supreme Court has been the head of this judicial cover-up from the very beginning in 1976 when it failed to take corrective action against judge Loughlin and continued into Avery v Cunningham, 131 N.H. 138 affirming Avery v Cunningham, No. 85-E-25.

The NH Supreme Court manufactured an opinion that is false. The ill conceived and shameful opinion is purposely written to cast blame (wrongly), on Petitioner for not raising his incompetency to stand trial claim in "a pro se supplemental brief before this court in his

1984 appeal." It is craftly written to hint, suggest or impute, (wrongly), that Petitioner sat on his claims until circumstances were more advantageous. All of this is simply not true, it is false and could not be further from the truth! The record evidence clearly shows this. The NH Supreme Court's factual and legal findings are a sham and wholly unsupported by the actual events of the case! The opinion was authored by disgraced judge Stephen Thayer. In March 2001 Thayer was accused of criminal ethic violations. Among other things Thayer was accused of not reporting a loan, then back dating his financial disclosure form and lying about the date; and misrepresenting his experience on his application to become a federal judge. In April 2001 he resigned rather then face criminal prosecution for among other things, trying to influence his own divorce case. This disgraceful, manufactured and false opinion was purposely created, it is a self serving corrupt opinion that serves to cover-up state trial judge Louglin's illegal and unconstitutional acts, cover-up judge Murphy's corrupt acts, to preserve the unconstitutional conviction of Petitioner and hide the illegal methods used to obtain such conviction. It is also designed to keep Petitioner's substantial incompetency to stand trial claim not considered on the merits and considered as an independent ineffective trial counsel claim. For more facts and details about this issue see Petition, Section C, pps. 200-220.

This is a case where the NH Attorney General is much aided by the state courts bias, corruption and cover-up and that office is an active participant in the cover-up. This is because that office has an interest in seeing kept covered-up the illegal and unconstitutional conviction and the illegal acts of former prosecutor Thomas Rath in procuring the illegal indictment. Thomas Rath procured the indictment under RSA 585:1 in June 1974 by deliberately breaking the law of New

Hampshire and by lying to the Grand Jurors by telling them they could return an indictment under RSA 585:1 which they did, never knowing the law had been repealed on April 15, 1974. For many other flagrant acts of misconduct by Rath. SEE Petition, Ground 5,pps 45-52,Ground 6,pps 53-69,Ground 7,pps 70-72 and Ground 11, pps 80-83.

FALSE, DECEPTIVE AND MISLEADING PLEADINGS SUBMITTED TO STATE COURT AND FEDERAL COURT BY NEW HAMPSHIRE ATTORNEY GENERAL TO PRESERVE AND KEEP COVERED-UP PETITIONER'S UNCONSTITUTIONAL CONVICTION

Assistant attorney generals of New Hampshire have submitted false deceptive and misleading pleadings to the state courts and federal district court. Petitioner believes this has been done to continue the judicial cover-up by deceiving the courts into denying wrongly any relief for Petitioner from his unconstitutional conviction and the illegal methods used by the State and State courts in obtaining such a conviction. Examples: In April 1992 Petitioner filed a pro se habeas petition in Merrimack Superior Court, Avery v Powell, No. 92-E-189. In the petition he raised inter alia, that he had been tried and convicted under a repealed law and prosecutor Rath's decision to charge him under the repealed law was an arbitrary and capricious decision which denied him due process and equal protection of the laws. After Petitioner filed his petition he decided instead to file his first federal habeas petition. So he filed a motion to withdraw and the state court granted it. However, apparently the state's answer to the habeas petition and court's granting of the motion crossed in the mail.

It is important and instructive for this Honorable Court to note that the New Hampshire Attorney General completely agrees with Petitioner that it would be unconstitutional to indict and prosecute him under the repealed law RSA 585:1 and it would constitute an "arbitrary

and capricious" decision on the part of prosecutor Thomas Rath and deny Petitioner due process and equal protection of the laws.

Assistant Attorney General Janice Rundles in the State's Answer to Petitioner's habeas petition said:

> "First, petitioner erroneously states RSA 630:1 was effective as of November 1, 1973, and therefore in effect at the time he committed his crime, in December of 1973. RSA 630:1 has an effective date of April 15, 1974--the same date on which RSA 585:1 was repealed...Therefore, the only statute in effect at the time petitioner committed his crime was RSA 585:1, and petitioner was properly prosecuted under it, even though it had been repealed by the time he was indicted. State v Sampson, 120 N.H. 251, 254 (1980),("Though a newly-amended criminal statute applies to offenses committed after its enactment, the prior statute remains applicable to all offenses committed prior to the amendments effective date."). Accord. State v Banks, 108 N.H. 350 (1967). It follows that the State's decision to prosecute him under 585:1 could not have been "arbitrary and capricious," as it was simple in accordance with governing law."

SEE Attorney General Rundle's Answer, pps 24-26. App. C, see also RSA 630:1-**effective November 1, 1973**, App. C, p.23. Attorney General Rundle's statement and argument that RSA 630"1 "has an effective date of April 15, 1974" is patently false. This Honorable Court can easily and quickly verify this by simply looking at NH RSA 630:1 which clearly has an effective date of November 1, 1973 which was forty-five (45) days after the State alleged in the indictment Petitioner had allegedly committed the crime. RSA 630:1 was the proper statute that the state could have charged Petitioner under **prior** to its repeal on April 15, 1975. RSA 585:1 was repealed on April 15, 1974. In June 1974 prosecutor Rath procured the indictment under the repealed law that contained no saving provision. So the New Hampshire Attorney General completely agrees (and in the answer supports with case law), that Petitioner's conviction is unconstitutional because he was prosecuted under the repealed law RSA 585:1, but then the Attorney General lies in her answer by stating RSA 630:1 did not become effective

until April 15, 1974.

Another example: When Petitioner filed his one and only first federal habeas petition on May 21, 1992. Assistant Attorney General John A. Curran lied to the court, lied by omission and filed false and misleading pleadings to mislead the court into believing Petitioner had raised in the state supreme court an ineffective appellate counsel claim against attorney James Duggan in Petitioner's 10 year delayed direct appeal. This was patently false.

State prosecutor Curran had a duty under the law to advise the federal court if Petitioner had in fact exhausted all available state remedies. Rule 5 of the Rules governing §2254 cases in federal district courts required the State's answer to a habeas petition: "Shall state whether the petitioner has exhausted his state remedies including any post conviction remedies available to him under the statutes or procedural rules of the state." See also Granberry v Greer, 108 S? Ct. 1671 (1987) at 1675 n.5 at p. 1674. Also, Title 28 U.S.C 2254 (c) provides that a state law judgment cannot be reviewed on federal habeas if the petitioner has a state right "to raise by any available procedure , the question presented." Castille v Peoples, 109 S.Ct. 1056 (1989). (emphasis added). The Petitioner never had raised any ineffective appellate counsel claim against attorney James Duggan and he had available state remedies to do so!

In Petitioner's first federal habeas he was not raising an ineffective claim against Duggan. He was stating inter alia, that his appellate counsel had also as well as trial counsel been ineffective. Curran was referring to the 1986 pro se Amended Notice of Appeal (ANOA) with a 12 page attachment that Petitioner filed in NH Supreme Court in Avery v Cunningham, 131 N.H. 138 affirming Avery v Cunningham,

No. 85-E-25. SEE Petition at pps 206-208. In that pleading Petitioner was pointing out to the NH Supreme Court that attorney Duggan had been ineffective but he was not raising any ineffective appellate counsel claim. SEE ANOA with 12 page document, App.C,pps 27-41. If the NH Supreme Court had not refused to provide Petitioner this crucial document then Curran could not have argued falsely that Petitioner had raised an ineffective appellate counsel claim in state court. Moreover, the district court could not have concluded that an ineffective appellate counsel claim had been raised in state court.

Petitioner believes that the federal district court wrongly and eagerly accepted the false and deceptive pleadings of the state. Because that court wanted to protect the "Senior Judge" of that court who was Martin Loughlin-Petitioner's state trial judge in May 1975. The court wrongly and contrary to federal law and habeas corpus rules held that appellate counsel Duggan was not ineffective counsel for failing to raise Petitioner's incompetency to stand trial claim in his 10 year delayed direct appeal!

The whole process concerning Petitioner's one and only first federal habeas petition was corrupted so that absolutely no fair and impartial consideration of his petition occurred. For more facts and details concerning this egregious miscarriage of justice see Petition, Section D,pps 221-241, see also Petitioner's Motion For Leave to File Amended Notice of Appeal (ANOA), App. C,pps 27-41.

The NH Supreme Court refused to provide this crucial ANOA to Petitioner to provide the federal district court when that court was in the process of determining what claims the Petitioner exhausted in the state courts. When attorney James Dawe went to NH Supreme Court to obtain a copy of it. He and the clerk determined the 12 page document

had been removed from the ANOA and disappeared from the court. Attorney Dawe the contacted Assistant Attorney General William McCallum several times and requested a copy. McCallum never responded and never provided Dawe a copy of the ANOA.

Petitioner asserts the NH Supreme Court refused to provide him a copy of the ANOA and its disappearance is all a part of that court's on going cover-up. The same is said with respect to McCallum's failure and/or refusal to ever respond to attorney Dawe's requests made in writing and by phone.

Subsequently Assistant Attorney General McCallum ended up going to prison for having committed several felonies.

This is not the first time important documents have gone missing in the state courts and the documents that go missing are always to do with judge Loughlin and Petitioner's incompetency to stand trial claim. In October 1981 from a federal prison cell in Terre Haute Indiana, Petitioner hand wrote a motion for an evidentiary hearing for his December 15,1975 and May 3,1976 motions to vacate. (These motions were still pending in the trial court's original jurisdiction). In his motion for a hearing he alleged that the Merrimack Superior Court had and were deliberately denying him a hearing in order to conceal the fact that court had allowed its bailiffs to drug him during his trial and the drugs had made him incompetent. Petitioner also alleged that he was being denied access to the courts,counsel and equal protection of the laws. From Levenworths federal prison in Kansas Petitioner called his mother who had called the court and spoke with clerk John Safford. Mr. Safford said that a hearing had been scheduled of November 8, 1981 but had not taken place. He said he did not know where the file went and why the hearing had not taken place. He also said

it was "most unusual and strange" the way everything had been handled. A woman clerk later said she had found Petitioner's petition for a habeas corpus but did not know what had happened to the motion for a lawyer and motion for an evidentiary hearing! SEE Petition at pps 176-177. At that time state judge Joseph DiClerico had been assigned to these matters. Subsequently, he would also become a federal judge in the federal district court with judge Loughlin.

Prior to filing his one and only first federal habeas petition. Attorney James Dawe told Petitioner matter of factly: "The deck is stacked against you going in. Your going into a lion's den" and you will not get any relief from that court. "Because the junior judge will have to admit that the "senior judge" Martin Loughlin, "when he was your state trial judge violated your constitutional rights," and that, said Dawe, "is not going to happen. Dawe was absolutely right, Petitioner got no relief from that court. Dawe also said he did not believe Petitioner would get any relief from the First Circuit Court of Appeals. Because law student and then attorney David Bownes had been involved in Petitioner's case. And at that time David Bowne's father Hugh H. Bownes was either Chief Justice of the First Circuit or a Justice of that court.

When Petitioner went to the federal district court in May 1992. Judge Loughlin was the "Senior judge" of that court. Other judges in the court were: Paul Barbadoro who was a former prosecutor from the NH Attorney General's Office. He had actively worked on Petitioner's criminal case when a prosecutor. Judge Joseph DiClerico also a former state prosecutor and state judge and was assigned to Petitioner's case regarding the matters referred to above and at page 23 supra. The other judge was "junior judge" Steven McAuliffe, also a former prosecutor .

In 1995 Petitioner filed a petition for writ of habeas corpus in NH Supreme Court. He raised inter alia Issue 1 that he had been prosecuted under a repealed law with no saving provision. Issue 2 was his 1984 direct appeal counsel was ineffective for not having raised the claim in his appeal. After 17 months, on March 13, 1977 in Avery v Merrimack Superior Court, et al, No. 95-828, the court held that Issue 1 was "procedurally barred" for failure to raise the claim in the 1984 10 year delayed direct appeal. Although Issue 2 was a claim that appellate counsel Duggan had been ineffective for not raising the claim and the court could have considered the claim, it did not. The court had only to look at the indictment, mittimus and law RSA 585:1 to determine appellate counsel had been grossly ineffective for not rasing the claim and Petitioner's conviction was unconstitutional. Moreover, Petitioner believes the court should have on its own motion considered ISSUE 1 because it was a fundamental jurisdictional defect which should have (and probably was), obvious to the court. The rule of law forbids a prosecution on due process grounds if the law has been repealed with no saving provision. "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at that time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed." United States v Tynen, 78 U.S. 88 (1870). In Norris v Crocker, 54 U.S. 429 (1851), the court said that, as plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject.

In Stevens v Diamond, 6 N.H. 330 (1833), the NH Supreme Court said that when laws "expire by their own limitation, or are repealed, they

cease to be the law in relation to the past, as well as the future, and can no longer be enforced in any case." In Lakeman v Moore, 32 N.H. 88 (1870). The NH Supreme Court said: "The repeal of a statute creating an offense, without any saving clause as to penalties previously incurred, has always been held to bar future prosecutions for past violations of the statute.)(emphasis added). "A penalty imposed for violation of a statute may be enforced only during the life of the statute, in the absence of a saving clause." United States v Curtis-Wright Corp., 299 U.S. 304 (1936) quoting State v Diamond, 62 N.H. 330.332,333.

The above and foregoing principles are ancient and precedents are abundant in this country as well as other countries. But do to ad hoc treatment of Petitioner and his case being pervaded with politics, these principles were not and are not being applied to the facts of his criminal case.

"Where a court has no jurisdiction of a case, the correct practice is to dismiss the suit. But a different rule prevails in an appellate court where the subordinate court was without jurisdiction and has given, improperly, affirmative relief. In such a case the judgment or decree in the court below must be reversed." United States v Huckabee, 83 U.S. 414 (1872).

In Petitioner's case, because the trial court had no jurisdiction to try him under a repealed law. The NH Supreme Court should have reversed the judgment of conviction based upon ISSUE 1. Or "else the [State] which prevailed there would [and did] have the benefit of such judgment...though rendered by a court which had no authority to hear and determine the matter in controversy." Mansfield v Swan, 111 U.S. 379 (1881)(in turn quoting United States v Huckabee.

Moreover, the lack of subject matter jurisdiction may be raised at

any time, because if a court lacks subject matter jurisdiction as it did in Petitioner's case, then as a matter of law and fact it did not have the power and authority to hear the case involving this particular offence. See Steel Co. v Citizens for Better Env, 523 U.S. 83 (1998)(quoting Ex Parte McCardle, 73 U.S. 318 (1869); Freytag v Commissioner of Internal Revenue, 501 U.S. 868, 896-97 (1990). If a court lacks subject matter jurisdiction that defect can be raised anytime and is not waivable nor subject to any procedural bar. See e.g., State v Willoughly, 181 Ariz, 530, 892 P.2d 1319 (1995);see generaly LaLave, Israel, et al, Criminal Procedure (2d ed.§ 16.4 (d).

"If authorized tribunals...act in cases to which their authority does not extend...their proceeding would be merely and absolutely void. Their want of jurisdiction cannot be supplied. No act or assent of parties in such case can confer jurisdiction...And the exception cannot be waived [and/or procedurally barred]." State v Richmond, 26 N.H. 232 (1853).

The order of the NH Supreme Court circumvented Petitioner's federal as well as state rights by procedural pretense, arbitrarily invented and set-up, to accomplish an ulterior object-that of keeping the jurisdictional defect as well as Petitioner's constitutional violations from being heard on their merits and his innocence kept covered-up.

Following the NH Supreme Courts order of March 13, 1997 to raise all other issues in the superior court. On November 22,1999 Petitioner filed a habeas petition, motion for counsel and motion for change of venue in Hillsborough Superior Court, Avery v Merrimack Superior Court, et al, No. 00-E-0295. On April 20,2000 the clerk informed Petitioner that the court "has no jurisdiction in the matter." Subsequently, in May 2000 the court transferred the petition to the Merrimack superior

Court. In Petitioner's motion for change of venue he alleged he could not receive any fair and impartial hearing from the Merrimack County Superior court. The petition claimed, inter alia, that that court was in fact bias and had in 1985 denied him full, fair and impartial hearings in his 1985 Petition Avery v Cunningham, No. 85-E-25. The petition sought relief from an unconstitutional conviction. The grounds relied upon included, inter alia, those claims which the NH Supreme court dismissed without prejudice to Petitioner seeking relief from the superior court. Petitioner was asserting that trial counsel,appellate counsel, post conviction counsel and post conviction appeal counsel were all ineffective for failing to raise the fact Petitioner had been tried under a repealed law.

Unknown to Petitioner because no decision was ever sent to him, on August 30,2000 the Merrimack Superior Court denied his motion for counsel. He never became aware of this until December 15,2000. The Petitioner informed the superior court that since August 30,2000 denial of his motion for counsel. He had suffered a stroke on December 7, 2000 resulting in loss of feeling and weakness on the left side of his body. That he was left with partial paralysis on the left side of his face and had difficulty concentrating and expressing himself both verbally and in writing. He also informed the court he had been diagnosed with hepatits C, had uncontrollable hypertension and heart problems. That due to these medical conditions, the complexity of his case and the fact he was currently incarcerated in Rhode Isalnd, he believed appointment of counsel was a necessity to receive any fair hearing for his petition and again asked the court to appoint him counsel. The court denied his motion for counsel.

Because at that time all NH superior courts routinely appointed counsel for indigent criminal defendants in habeas petitions regard-

ing their criminal convictions. And because Petitioner was not provided counsel due to what he considered bias and ad hoc treatment by the superior court, he filed an interlocutory appeal in NH Supreme Court. The Supreme Court denied the appeal so he was left without any counsel.

The superior court granted the state's motion to dismiss Petitioner's uncounseled habeas petition on January 31,2002. Petitioner filed a timely motion for reconsideration and it was denied June 5,2002. In dismissing the petition the superior court said, "that petitioner has attempted to and/or has litigated each issue on prior occassions. Because the defendant has raised these issues repeatedly without introduction of new facts material to the issues his petition for habeas corpus can be disposed of in this motion to dismiss."

The superior court's dismissal order is in large part patently incorrect and/or false, and is not supported by the actual events in the record of the case and is the product of an inadequate, unfair, non impartial and in fact bias state court process. None of the ineffective counsel claims had ever been litigated on their merits in any state court prior to the 1999 state habeas petition, Avery v Merrimack Superior Court, et al, No. 00-E-0295. Also raised in the habeas petition was the claim that judge Walter Murphy had arbitrarily found a "waiver" of Petitioner's rights in the 1985 Petition hearings. That there was unethical, illegal, political maneuvering and manipulation involved in the case. That judge Murphy had fixed the case with attorney Paul Twomey. The four (4) ineffective counsel(s) claims and judge Murphy's corrupt acts, inter alia, clearly provided the **"new facts material to the issues."**

On July 3, 2002 Petitioner filed a timely notice of appeal in NH Supreme Court. On September 18, 2002 the court invoked Rule 7 to de-

cline acceptance of the appeal. Petitioner filed a motion for reconsideration and the court denied it November 14, 2002, but Petitioner was never notified of the denial until March 2003. The NH Supreme Court's declination order effectively denied Petitioner any redress whatsoever for the substantial federal constitutional violations including a fundamental jurisdictional defect.

The NH Supreme Court's use of Rule 7 was unconstitutional in its application to Petitioner because it was an obvious subterfuge to avoid consideration of his violations of his federal and state constitutional rights all of which prevented him from showing his actual and factual innocence. Its use also constitutes a suspension of the writ of habeas corpus in violation of Part 2, article 19 of the New Hampshire Constitution as well as article § 1, 9, art VI,Cl.2 of the Federal Constitution.

The court's declination order of September 18, 2002 did deprive Petitioner of due process, equal protection of the laws, and deprived him of fundamental rights under Part 1, articles 1,2,14,15,33 and 35 of the NH Constitution and the First, Fifth, Sixth, Eighth Amendments to the United States Constitution. In that he has been denied: access to the courts, access to full, fair and impartial judicial proceedings, denied an impartial interpretation of the laws and administartion of justice;denied equal access to the state courts and state court appellate system for corrective process for the deprivation of his constitutional and civil rights which all other criminal defendants in the State of New Hampshire are not only guaranteed but actually are afforded said rights.

The NH Supreme Court's declination order effectively and intentionally put Petitioner in a "catch 22" situation-where no court considers his many constitutional violations as well as jurisdictional defects.

In State v Pepin, 159 N.H.310 (2009), the NH Supreme Court held: "The broad language of Avery v Cunningham,131 N.H.138 (1988) has been significantly undermined so that claims of ineffective assistance of counsel claims based upon alleged trial errors are not procedurally barred by the failure to raise those errors on direct appeal." However, the state courts of New Hampshire have not and will not allow Petitioner to raise his ineffective assistance claims in the State courts while allowing all other criminal defendants to do so. The simple fact is that the state courts are involved in a continuing cover-up to keep from exposure the fact Petitioner's conviction and sentence are illegal and unconstitutional and so are the methods used by the State and State courts in obtaining such a conviction.

On May 10, 2017, Petitioner filed a petition for writ of habeas corpus in the Merrimack Superior Court. He raised two grounds. Ground 1: That his sentence of 18 years to life is being wrongly executed by the New Hampshire Department of Corrections. In that the sentence is illegal, null and void ab initio because the law, RSA 585:1 that defines the offense and prescribes its punishment is and was void because the law was repealed with no saving provision and its application to him was and is unconstitutional. And that the foregoing violates his rights to due process and equal protection of the laws secured to him by the Constitutions and laws of New hampshire and the United States.

Ground 2: That Petitioner's rights to due process and equal protection of the laws of the Federal and State Constitutions were being denied to him. In that he has never been provided any fair and impartial hearings on the merits of his claims raised in Ground 1.

Petitioner asserted that such a complete lack of any state post conviction process violates federal constitutional law. And that: due process and equal protection of the laws requires this court to provide Petitioner a full,fair and impartial State post conviction procedure not only for GROUND 1,but for adjudicating the propriety of continuing to incarcerate the Petitioner who can clearly show by the record evidence of his case,that as a matter of law and fact,he is actually innocent of the particular crime of conviction as well as the sentence by having been wrongly prosecuted under a repealed law."

State prosecutor Sean Gill on June 30,2017 filed a motion to dismiss without a hearing. On July 7,2017 the state court quickly granted the state's motion. The state court denying relief based upon the corrupt opinions in Avery v Cunningham,131 N.H. 138,affirming Avery v Cunningham, No. 85-E-25.

In the case of Pope v Lewis, 4 Ala. 487 (1842). The principal question in that case was "whether any judgment can be rendered in an action founded on a penal statute after its repeal." The same principle was decided by the New Hampshire Supreme Court in Lewis v Foster, 1N.H. 61 (1817). In both Pope and Lewis it was held: "No judgment can be rendered in any action...after the repeal of the statute giving the penalty unless some special provision for that purpose be made by statute." It is well settled that after the repeal of a penal law no judgment can be rendered, either of corporal punishment or pecuiary fine. In the language of Judge Marshall, in Yeaton v The United States, 9 U.S. 281, "it has long been settled on general principles, that after the expiration or repeal of a law, no penalty can be enforced nor punishment inflicted, for violations

of the law, committed while it was in force, unless some specific provision for that purpose be made by statute." To the same effect is the Schooner Rachel v The United States, 10 U.S.329;United States v Preston,28 U.S. 57; The Commonwealth v Welch, 32 Ky.330; The People v Livingston, 6 Wend, 526; Lewis v Foster, 1 N.H. 61 (1817).

In Ex parte Yarbrough, 110 U.S. at p.654,28 L.Ed 274, the court said: "If the law which defines the offence and prescribed its punishment is void, the court was without jurisdiction and the prisoner must be discharged."

In the case before this Honorable Court, the law Petitioner was prosecuted under, NH RSA 585:1, which defined the offence and prescribed its punishment was void because it had been repealed on April 15, 1974 with no saving provision. A lawbreaking prosecutor, knew the law was void, but he broke New Hampshire law by lying to the grand jurors in order to procure his indictment. As such, the state trial court was without jurisdiction to try Petitioner and he must be discharged from further illegal and unconstitutional restraint on his liberty.

Petitioner is innocent of the particular crime of conviction as the record evidence clearly shows. He is also completely innocent because he never killed anyone. But due to illegal and unconstitutional actions of the State and State courts of New Hampshire of depriving him of his fundamental constitutional rights, he was prevented from showing his actual innocence.

The incarceration of Petitioner who is innocent and depriving him of any remedy for correction of such a fundamentally unjust incarceration and miscarriage of justice surely violates Due Pro-

cess of law and the Eighth Amendments prohibition against cruel and unusual punishment.

This Honorable Court has described habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action," Harris v Nelson, 394 U.S.286,290-91 (1969), that is designed "to interpose the federal courts between the states and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action," Reed v Ross, 468 U.S. 1,10 (1984).

Central to American jurisprudence is the concept that the violation of any right has a remedy in law. When a state is alleged to have violated a protected right, it is necessary for some remedy to be available. Marbury v Madison, 5 U.S. (1 Cranch) 137,162-63 (1803) ("The very essence of civil liberty consists in the right of every individual to claim protection of the laws whenever he receives an injury.")

As this Petition indicates, Petitioner has been the victim of arbitrary and lawless state action. His many protected rights were flagrantly denied him and he has been denied any remedy for the violations because he has been unable to enforce his federal constitutional rights in the State courts of New Hampshire. He is only incarcerated as the direct result of a blatant violation of Due Process of law by the State of New Hampshire. Although the State of New Hampshire is aware of this violation, it has deprived him of any opportunity to raise his federal constitutional claims in the State courts. The New Hampshire Attorney General is well aware of this flagrant violation of Due Process and agrees with Petitioner that to prosecute him under RSA 585:1 is unconstitutional. SEE pages 19-21 supra.

WHEREFORE, based upon the foregoing and those facts and arguments set forth in Attachments 1 and 2, Petitioner respectfully prays that this Honorable Court will grant him the Great Writ of Habeas Corpus and;

A) Reverse his conviction and order his release forthwith from further illegal and unconstitutional restraint on his liberty.

April 22, 2019

Respectfully submitted,

Clifford E. Avery

Clifford E. Avery, Pro se
Post Office Box 14
Concord, NH 03301

IN THE SUPREME COURT OF THE UNITED STATES

IN RE CLIFFORD E. AVERY

NO. _____

EXHIBIT A

Clffford E. Avery
PO Box 14
Concord,NH 03301

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MARTIN F. LOUGHLIN, P.J.

It is therefore considered by the court that the said

EDGAR CLIFFORD AVERY, JR.

be imprisoned at hard labor in the state prison, for a term of ~~[illegible]~~ LIFE ~~[illegible]~~ and stand committed till sentence be performed, or until he be otherwise discharged by due course of law. In accordance with the mandate of RSA 651:45 c this Court certifies that the murder of Lee Ann Greeley was not psycho-sexual in nature.

A true copy of the record. Examined.

Attest: [signature] Clerk.

The State of New Hampshire

MERRIMACK, SS.

SUPERIOR COURT, April Term 19 75

ORDERED BY THE COURT, that the sheriff of the County of Merrimack, as soon as conveniently may be, remove the said Edgar Clifford Avery, Jr. to the state prison in Concord, in the County of Merrimack; and deliver him to the warden of the state prison, who is required to receive the said convict into said state prison, and him there imprison at hard labor, according to law, for a term of ~~[illegible]~~ LIFE ~~[illegible]~~ or until he be discharged by due course of law. In accordance with the mandate of RSA 651:45 c this Court certifies that the murder of Lee Ann Greeley was not psycho-sexual in nature.

A true copy of conviction, judgment, and order thereon.

Attest: [signature] Clerk.

Dated May 20 19 75.

N.H.S.P. Warden's Office No. 11126

MAY 20 1975

STATE vs. EDGAR CLIFFORD AVERY, JR.

MITTIMUS to STATE PRISON

No. 1953

MERRIMACK, SS.

Pursuant to the within precept, I have removed the within named Edgar Clifford Avery, Jr. to the state prison in Concord in the County of Merrimack, and there delivered him to the warden thereof, and at the same time I gave to the said warden a copy of the conviction, judgment and order of the court thereon against the said convict, attested by the clerk of the court within named, of which the within is a true copy, with this my return endorsed thereon.

19

Attest: [signature] Sheriff.

(1)

The State of New Hampshire

MERRIMACK, SS.

At the SUPERIOR COURT, holden at Concord within and for the county of Merrimack, on the first Wednesday of June,

in the year of our Lord one thousand nine hundred and seventy-four

PRESENT—THE HONORABLE Presiding Justice.

The grand jurors for the State of New Hampshire, upon their oath, present that

EDGAR CLIFFORD AVERY, JR.

of Concord in the County of Merrimack aforesaid,

on the 16th day of December in the year of our Lord one thousand

nine hundred and seventy-three at Bow in the County of Merrimack

aforesaid, with force and arms,

did feloniously, willfully and of his malice aforethought, with premeditation and deliberation, kill and murder one Lee Ann Greeley of Concord,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

The said Edgar Clifford Avery, Jr., on June 6, 1974, , being arraigned, pleads not guilty, and thereof puts himself on the country for trial. And thereupon on May 5 through May 19, 1975, the Attorney General and counsel for the Defendant having been fully heard upon the evidence, the cause is committed to a Jury, sworn according to law, to try the issue, who make return of their verdict thereon on May 19, 1975, upon oath and say that said Edgar Clifford Avery, Jr. is guilty of murder in the first degree.

(2)

The State of New Hampshire

MERRIMACK, SS.

TO THE SHERIFF OF OUR COUNTY OF MERRIMACK OR HIS DEPUTY:

Whereas, *at the Superior Court, holden at Concord, within and for the County of Merrimack, aforesaid, on the* first Wednes *day of* June *in the year of our Lord one thousand nine hundred and* seventy-four

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, have returned an Indictment charging

EDGAR CLIFFORD AVERY, JR.

of Concord, County of Merrimack, and State of New Hampshire, with the offense of Murder, (R.S.A. c. 585:1), a copy of which Indictment is annexed hereto.

We command you, therefore, that without delay, you apprehend the body of the said Edgar Clifford Avery, Jr. (If to be found in your precinct, and bring him forthwith before our Superior Court, now holden at Concord, within and for the County of Merrimack aforesaid, to answer to said indictment; and make return of this Writ with your doings therein.

Witness, WILLIAM F. BATCHELDER *Esquire, the* 5th day of June Anno Domini 19 74.

CLERK.

~~XXXXXXXXXX~~
~~XXXXXX~~

~~Xxxx.~~

(3)

RSA 585:1

STATE OF NEW HAMPSHIRE

MERRIMACK , S S.

At the Superior Court, holden at Concord , within and for the County of Merrimack aforesaid, on the first ~~Tuesday of~~ Wednesday of June in the year of our Lord one thousand nine hundred and seventy-four ,

The GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that

EDGAR CLIFFORD AVERY, JR.

of Concord , in the County of Merrimack aforesaid on the sixteenth day of December in the year of our Lord one thousand nine hundred and seventy-three at Bow in the County of Merrimack aforesaid, with force and arms, did feloniously, willfully and of his malice aforethought, with premeditation and deliberation, kill and murder one Lee Ann Greeley of Concord

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.

Thomas D. Foley
Attorney

Foreman

(4)

IN THE UNITED STATES SUPREME COURT

ATTACHMENT 1

GROUND 1: DEFENDANT TRIED UNDER REPEALED LAW WITH NO SAVING PROVISION,TRIAL COURT WAS WITHOUT JURISDICTION TO TRY HIM AND JUDGMENT OF CONVICTION NULL AND VOID AB INITIO

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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

MERRIMACK COUNTY

CLIFFORD AVERY

-v-

STATE OF NEW HAMPSHIRE

PETITION FOR A WRIT OF HABEAS CORPUS

Now comes the Petitioner, Clifford Avery, in pro se and respectfully requests this Court to invoke its power of original jurisdiction under NH RSA 534, and if necessary, its all process necessary powers and to provide corrective judicial process for a grave injustice, and to order Petitioner to be immediately released from further illegal and unconstitutional restraint on his liberty.

PARTIES:

1. Petitioner is illegally and unconstitutionally imprisoned and restrained of his liberty and detained under color of authority of the State of New Hampshire in the custody of William Wrenn, Commissioner of New Hampshire Department of Corrections, Merrimack County, State of New Hampshire.

2. Petitioner is incarcerated at the Northern New Hampshire Correctional Facility of the New Hampshire State Prison, Berlin, New Hampshire.

3. Larry Blaisdell, in his official capacity as Warden of the Northern New Hampshire Correctional Facility has immediate physicial custody over Petitioner.

FACTS:

4. The sole claim and authority by which the said William Wrenn, Commissioner of New Hampshire Department of Corrections, so restrains Petitioner is a Mittimus of the Superior Court of the State of New Hampshire, in the County of Merrimack, a copy of said Mittimus as well as the indictment are contained in the Appendix (App.) attached hereto and made a part of this Petition. SEE Mittimus, App., page 1 and indictment page 2.

5. The Mittimus was based upon an indictment, and judgment of conviction for murder in the first degree.

6. The Superior Court for Merrimack County, Concord, New Hampshire entered the judgment of conviction under attack herein.

7. Said judgment of conviction was entered on May 19, 1975.

8. Petitioner was sentenced to a minimum term of eighteen years and a maximum term of life.

9. The indictment charged Petitioner with one count of murder of Lee Ann Greeley on December 16, 1973 pursuant to NH RSA 585:1.

10. Petitioner entered a plea of not guilty to the single count in June 1974.

11. In September 1974, Petitioner was charged with one count of murder of Gary Russell on December 16, 1973 pursuant to NH RSA 585:1.

12. Petitioner subsequently entered a plea of not guilty to the single count.

13. Petitioner's trial for the Greeley homicide took place during the period from May 9, 1975 through May 19, 1975 on the single count indictment, pursuant to NH RSA 585:1.

14. Over four years after indicting Petitioner for the Gary Russell murder and refusing for four years to provide Petitioner a trial. The State prosecutor on November 14, 1978 dismissed the indictment. This was because the State knew Petitioner

had not killed Gary Russell, and that prosecution witness Wendell Russell, along with prosecution witness Michael Davis, both who had provided false information to police prior to trial then testified falsely, had in fact killed Gary Russell. But the State wrongly introduced evidence of the Russell homicide at Petitioner's trial for the Greeley murder as "...part of a common plan or scheme and, in fact, the motive for the killing of Lee Ann Greeley..."! (T.III 584.)

15. Petitioner filed a direct appeal from the judgment of conviction. a.) He appealed the judgment of conviction to this Court; b.) the judgment of conviction was affirmed; c.) the decision affirming the judgment of conviction was entered on March 5, 1985.

16. Petitioner on January 18, 1985 filed in the Superior Court a Motion For A New Trial and Petition For A Writ of Habeas Corpus.. The Superior Court denied the pleading on March 4, 1986. Petitioner appealed the decision to this Court and on December 9, 1988 the Court affirmed the Superior Court's decision.

17. Prior to November 1, 1973, the governing homicide statute in force and effect in the State of New Hampshire was NH RSA 585:1.

18. On November 1, 1973, the State of New Hampshire enacted a new criminal code, NH RSA 625:1 and a new homicide statute, NH RSA 630:1. SEE RSA 630:1, App. page 5.

19. With the new criminal code and homicide statute. The Legislature enacted NH RSA 625:2, a saving clause which permitted prosecution for offenses under the prior homicide statute, RSA 585:1 only if said offenses were committed prior to November 1, 1973. SEE RSA 625:2, App., page 6.

20. On November 1, 1973, the homicide statute in force and effect in the State of New Hampshire was NH RSA 630:1. Under RSA 630:1, a person in New Hampshire was apprised that a conviction for "murder" carried a maximum sentence of life imprisonment and "such minimum term as the court may order." And that a conviction for "manslaughter, a Class A felony under RSA 630:2, carried a maximum sentence of 15 years with a minimum term of $7\frac{1}{2}$ years. Both the maximum and minimum set by statute.

21. On April 15, 1974 both NH RSA 585:1 and RSA 630:1 were repealed by Laws 1974 Chapter 34.

22. On May 21, 1974, a warrant and complaint was issued charging Petitioner with the murder of Lee Ann Greeley. The complaint alleged the murder occurred on December 16, 1973 and charged him with murder under NH RSA 585:1.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR A WRIT OF HABEAS CORPUS

GROUND ONE:

THAT PETITIONER HAS BEEN DENIED HIS CONSTITUTIONAL RIGHTS SECURED TO HIM BY PART 1, ARTICLES 1,14,15,33 and 35 OF THE NEW HAMPSHIRE CONSTITUTION, AND DENIED HIS RIGHTS UNDER THE FIFTH, EIGHTH, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. IN THAT HE WAS PROSECUTED AND CONVICTED UNDER AN EXPRESSLY REPEALED LAW WITHOUT ANY SAVING CLAUSE; AND THE TRIAL COURT WAS WITHOUT POWER AND AUTHORITY AND JURISDICTION TO TRY HIM; AND THAT THE ENTIRE PROCEEDINGS AGAINST HIM AND THE JUDGMENT OF CONVICTION ARE NULL AND VOID AB INITIO

Supporting Facts:

1. Petitioner asserts that from the very first instance when the warrant and complaint was issued on May 21, 1974. The case at that point was **void.** This is so because the law the warrant and complaint was founded on had been expressly repealed. In State v Weed, 21 N.H. 262 (1850), this Court said: "If a warrant is issued upon a charge purporting to be based upon a certain law, and that law has been repealed ...the warrant is void. In such a case, the process shows upon its face that it is a nullity." In the Petitioner's case, the law, RSA 585:1 had been repealed on April 15, 1974. Over a month later, on May 21, 1974, the warrant was issued based upon the repealed law. SEE Warrant and Complaint, App., page 9,10.

2. That the indictment under RSA 585:1, on which this prosecution is based does not state sufficient facts or grounds to constitute against Petitioner a valid offense against the laws of New Hampshire, nor any valid offense. That the statute creating the particular offense in the indictment and upon which statute the said indictment is based, had been repealed and was not in force, as to the offense in said indictment charged, at the time when the said indictment was found.

3. The prosecutor's decision to charge Petitioner with an offense under RSA 585:1, an expressly repealed law, and without any saving clause, was not only an arbitrary and capricious act. It was in clear violation of New Hampshire Laws; the rule of law; and Petitioner's constitutional and civil rights guaranteed to him by the New Hampshire Constitution as well as the United States Constitution.

4. The prosecutor alleged that the homicide occurred on December 16, 1973. However, on December 16, 1973 the **only** homicide statute in force and effect in the State of New Hampshire that was applicable to the Petitioner and the conduct alleged to have occurred on December 16, 1973, was NH RSA 630:1. RSA 630:1 became effective on November 1, 1973. SEE RSA 630:1, App., page 5.

5. NH RSA 630:1 became effective on the very same date as did the enactment of New Hampshire's new criminal code, RSA 625:1. With the new criminal code, the New Hampshire Legislature included a saving provision, RSA 625:2 to the effect that prosecution for offenses under RSA 585:1, the prior law, could only be prosecuted prior to November 1, 1973. RSA states in pertinent part:

> "Prosecution for offense committed prior to the effective date of this code shall be governed by the prior law, **which is continued in effect for that purpose,** as if this code were not in force. For purposes of this section, **an offense was committed prior to the effective date if any of the elements of the offense occurred prior thereto."** (Emphasis added.)

SEE RSA 625:2, App., page 6.

6. As alleged by the prosecutor, all of the elements of the particular offense Petitioner was charged with occurred on December 16, 1973—forty-five (45) days **after** the new criminal code and new homicide statute RSA 630:1 had become effective.

Clearly, as a matter of State law; the organic law of the State, and the rule of law, the alleged offense could only be prosecuted under RSA 630:1, which was the only governing law in force and effect on the date of the alleged offense.

7. The common law rule that repeal of a criminal statute bars further prosecution against earlier offenders, being based on the legislature's presumed intent, may of course be changed by an expression of legislative intent that earlier violations may still be prosecuted. Thus many states and the federal government have statutes (like New Hampshire's RSA 625:2), providing in effect that repeal (or either repeal or amendment) of a statute shall not affect prior liability thereunder unless the repealing act expressly so provides. And in the enactment of a new comprehensive criminal code and repeal of prior substantive criminal laws, there is ususally included a saving provision (like NH RSA 625:2), to the effect that crimes committed prior[1/] to the effective date of the new code are subject to prosecution and punishment under the law as it existed at the time.[2/]

8. It is established law that the New Hampshire Legislature has the "power to enact laws defining crimes and to fix the degree, extent and method for punishment." Doe v State, 114 N.H. 714,718, 328 A.2d 784,787 (1974); N.H. Const. pt. II, art.5. The Legislature expressly stated the new criminal code and homicide statute RSA 630:1 shall take effect on November 1, 1973. Thus, it is clear that the Legislature by enacting RSA 625:2, intended to restrict and preclude the trial court from trying Petitioner under RSA 585:1. And here, also, it must be remembered, RSA 585:1 had been expressly repealed on April 15, 1974. Thus, it is "reasonable, logical, and constitutional" to conclude that the prior statute (RSA 585:1)remained applicable to

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1/ Some statutes specify that the offense is prior to the new law if any element occurred before the law was enacted. Haw. Rev. Stat. § 701-1-1; Kan. Stat. Ann. § 21-3102; Me. Rev. Stat. Ann. tit. 17-A, § 1; Neb. Rev. Stat. § 28-103; N.H. Rev. Stat. Ann. § 625:2.

2/ E.g. Haw. Rev. Stat. § 701-101; Mont. Code Ann. § 45-1-103; Neb. Rev. Stat. § 28-103; N.H. Rev. Stat. Ann. § 625:2.

offenses committed prior to November 1, 1973. See State v Sampson, 120 N.H. 251, 254, 413 A2d 590, 591 (1980). Also see State v Banks, 108 N.H. 350, 236 A.2d 110 (1967)("Though a newly-amended criminal statute applies to offenses committed after its enactment, the prior statute remains applicable to all offenses committed prior to the amendments effective date") Id., accord McMichael v Hancock, 110 N.H. 168, 269 A2d 30 (1970).

9. N.H RSA 585:1 as a matter of State laws; the Constitutions of New Hampshire and the United States; and the rule of law, was not applicable to Petitioner nor the particular offense he was alleged to have committed on December 16, 1973. The application of a repealed law to him was unconstitutional and as such the entire proceedings against him are illegal and void ab initio.

10. As this Court said in State v Richmond, 26 N.H. 232 (1853): "Proceedings may be wholly void, without force or effect...Things may be void as to some persons and for some purposes, and, as to them, incapable of being otherwise, which are yet valid as to other persons and effectual for other purposes."

In Petitioner's case the trial proceedings and subsequent judgment of conviction are "wholly void" ab initio and "without force and effect as to [him]...and incapable of being otherwise." This is so because according to the rule of law, the saving clause statute RSA 625:2, and the express repeal of RSA 585:1 on April 15, 1974, forbid a prosecution against him under RSA 585:1. Because all of the elements of the particular offense to justify a conviction for "first" or "second degree" murder are alleged to have occurred forty-five (45) days **after** November 1, 1973. The independent effect of RSA 625:2 and RSA 630:1 was to preclude a conviction for "first" or "second degree" murder after November 1, 1973.

Petitioner's case is an example of a situation where "Things may be void as to some persons...and...incapable of being otherwise, which are yet valid as to other persons, and effectual for other persons." Here, RSA 585:1 was "void" to Petitioner

but "yet valid as to other persons" who may have been properly charged under RSA 585:1 if the elements of the particular offense occurred prior to November 1, 1973. Quoting State v Richamond supra.

11. In addition to being prosecuted under an expressly repealed law. Some states which New Hampshire is one, view jurisdiction as an element of the offense. See e.g. Haw. Rev. Stat. § 701-114; N.H. Rev. Stat. Ann. § 625:11. It is instructive to note that in Petitioner's case an **essential element** of the particular offense under RSA 585:1, is the **date** the offense is alleged to have occurred. This is so because as a **matter of law and of fact,** subsequent to November 1, 1973 there were **no** "degrees" of murder. N.H. RSA 630:1, effective November 1, 1973, defined a homicide as "murder" and "manslaughter." SEE RSA 630:1, App., page 5.

As a **matter of law and fact,** Petitioner's alleged conduct did **not** support a conviction under RSA 585:1. In order to obtain a legal and valid conviction under RSA 585:1. The State must prove beyond a reasonable doubt that the elements of this **particular** offense **was committed prior to November 1, 1973.** SEE NH RSA 625:2 and 625:11, App., page 6 and 7. These two State laws are among State laws that mandate that the **date** of the particular offense being committed is an **essential element** that must be proven beyond a reasonable doubt by the jury. SEE NH RSA 625:10, App. page 8 which states: **"No person may be convicted of an offense unless each element of such offense is proven beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed."** See also In re Winship, 397 U.S. 358, 364, 25 L.Ed 2d 368, 90 S.Ct. 1068 (1970).

12. The prosecutor's violation of several State laws and Petitioner's constitutional and civil rights caused him to be convicted and sentenced for a particular offense, "first degree" murder, which as **a matter of law and of fact was not** a legislatively proscribed offense on the date the State alleged the offense was to have been committed. Under State Laws RSA 625:2 and 625:11, at the time of Petitioner's trial, the date of the offense was an **essential element** of this **particular** offense

of which he was convicted. It is absolutely clear from the record evidence that the State did not and could not have, presented any evidence to satisfy the essential element. To the contrary, the State admits this by the indictment in which the date of the offense and all the elements of this particular offense are stated to have occurred on December 16, 1973, forty-five (45) days after November 1, 1973.

The record before this Court makes clear that Petitioner's alleged conduct was not reached by RSA 585:1 at the time he was prosecuted and convicted. There is no factual basis as a matter of law and of fact for Petitioner's conviction for murder in the "first degree," as the record evidence makes clear. Under United States Supreme Court precedents Petitioner's conviction and continued incarceration violates Due Process. Thompson v Louisville, 362 U.S. 199, 4 L.Ed. 2d 654, 80 S.Ct. 624, (1960); Jackson v Virginia, 443 U.S. 307, 61 L. ed 2d 560, 99 S.Ct. 2781 (1979); In re Winship, 397 U.S. 358, 364, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970). And because the substantial constitutional errors and jurisdictional defects resulted in the imposition of an unauthorized conviction and sentence, it follows the Petitioner is a "victim of a miscarriage of justice," Wainwright v Sykes, 433 U.S. 72, 91, 53 L. Ed. 2d 594, 97 S.Ct. 2497 (1977), entitled to immediate and unconditional release.

13. At common law, it was generally held that the repeal or amendment of a penal statute barred any further prosecution under the statute for violations committed before the repeal, and abated prosecutions which had not reached final judgment. See e.g. Hartung v People, 22 N.Y. 95, 99-103; United States v Reisinger, 128 U.S. 398, 401; see, also, 1 Sutherland, Statutory Construction (3d ed., 19430, § 2046, pp. 529-530, 50 Am Jur. Statutes, § 568, p. 569.

14. Petitioner asserts that as a matter of law, and the rule of law. That his prosecution: warrant, indictment, trial, judgment of conviction, and any and all proceedings subsequent to the judgment of conviction, regarding his conviction, are a complete nullity. Because the express repeal of RSA 585:1 without a saving clause permitting prosecution under RSA 585:1 after November 1, 1973, rendered his conviction invalid, null and void ab initio. The trial court did not have the power,

authority, and jurisdiction of this particular subject matter in this particular case because of being restricted independently by RSA 625:2 and RSA 630:1 effective November 1, 1973, and of course the repeal of RSA 585:1 on April 15, 1974.

15. A void judgment of conviction such as exists in Petitioner's case, is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights...But whenever it is brought up... [Petitioner] may assail its pretentions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." James & Son v Kirkpatrick Hardware Co., 21 Ga. App. 751 (2) (94 SE 1044).

16. In Eaton v Badger, 33 N.H. 228 (1856), this Court citing Elliott & als v Peirsol & als, 26 U.S. 328 and other authorities, said:"If a court act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them, nor any foundation for a title claimed under them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law trespassers. This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court where the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings. Elliott & als v Peirsol & als, 26 U.S. 328. See, also, 30 U.S. 724 at 758; 38 U.S. 498, 511; 3 How 750, 762; Webster v Reid, 11 How 437, at 451, and authorities cited."

17. In State v Richmond, 26 N.H. 232 (1853), this Court said: "Want of jurisdiction of the subject matter renders the proceedings merely and absolutely void. This want of legal authority cannot be supplied. No act or assent of the parties can confer jurisdiction, (See Wright v Cobleigh, 21 N.H. 339) and the exception cannot be waived. The jurisdiciton may be limited in various ways, as to cases under special statutes." In Petitioner's case the trial court's jurisdiction was independently

"limited" by RSA 625:2 to prosecution of offenses under RSA 585:1 that had been committed prior to November 1, 1973. And of course the express repeal of RSA 585:1.

18. The effect of the New Hampshire Legislature's enactment of the new criminal code, RSA 625:1; the saving provision RSA 625:2; and the new homicide statute RSA 630:1; and independent of the express repeal, was to remove "degrees" of murder and the different penalties that were the sanctions for the different degrees. As such, the Petitioner's alleged conduct was no longer defined by the Legislature as "first" or "second degree" murder, and therefore, the prosecution in this case was at an end before the warrant and complaint issued, let alone the trial. The law, RSA 585:1 as applied to Petitioner was unconstitutional and void. "If the law which defines the offence and prescribes its punishment is void, the court was without jurisdiction and the prisoner must be discharged." Ex parte Yarbrough, 110 U.S. 651 4 S.Ct. 152 (1884).

19. No judgment can be rendered in any such prosecution for a penalty after the repeal of the act by which it was imposed. The repeal of a statute puts an end to all suits founded upon it. Rex v Justices of the Peace for the City of London, 3 Burr. 1456; Yeaton v United States, 5 Cranch, 281; Schooner Rachel v The United States, 6 Cranch, 329; The Irresistible, 7 Wheat. 551; The United States v Preston, 3 Peters, 57; Commonwealth v Marshall, 11 Pick 350; Commonwealth v Kimball, 21 Pick, 373; Commonwealth v Leflevick, 5 Rand. 657; Livingston, 6 Wend. 526; Commonwealth v Welch, 2 Dana. 330; Lewis v Foster, 1 N.H. Rep. 61 Stevenson v Doe, 8 Black. 508; Pope v Lewis, 4 Ala. 487; Road in Hatfield Township, 4 Yeates; Maryland v Baltimore and Ohio Railroad Company, 3 How U.S. Rep. 534; 18 Maine Rep. 109; 25 Maine, 452; Millers' Case, 1 Wm. Black. 451.

20. N.H. RSA 625:2, 630:1 and the repeal of RSA 585:1, all individually deprived the trial court of jurisdiction to entertain proceedings under this particular indictment. When a statute is repealed or rendered inoperative, such as was RSA 585:1, no further proceedings can be had to enforce it in pending prosecutions unless com-

petent authority has kept the statute alive for that purpose. Decisions of the United States Supreme Court afford abundant illustration of this principle. In Yeaton v United States, 5 Cranch 281, 283 (1809), where the statute under which a ship had been condemned in admiralty had expired while the case was pending on appeal, the Court held that the cause was to be considered as if no sentence has been pronounced. Chief Justice Marshall said that "it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." Chief Justice Taney observed in Maryland v Baltimore & Ohio R. Co., 3 How. 534, 552: "The repeal of the law imposing the penalty, is itself a remission." In United States v Tynen, 11 Wall. 88, 95, the United States Supreme Court thus stated the principle applicable to criminal proceedings: **"There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the Act repealed."** See, also Norris v Crocker, 13 How. 429, 440; Gulf, C & S. F. Ry. Co. v Dennis, 224 U.S. 503, 506. (Emphasis added)

At the time of Petitioner's conviction and judgment, "the law creating the offence" **was not in existence, having been repealed on April 15, 1974.** There was no saving clause permitting the prosecution of Petitioner under RSA 585:1. Moreover, RSA 585:1 was not, as a matter of law and of fact, applicable to Petitioner nor the conduct alleged to have been committed by him on December 16, 1973. To the contrary. The **only** homicide law in force and effect in the State of New Hampshire applicable to Petitioner and the conduct alleged by the State to have occurred on December 16, 1973, was NH RSA 630:1, effective November 1, 1973.

21. Because Petitioner was tried under an expressly repealed law with no saving clause. The trial court was without power, authority and jurisdiction to try him in the first instance. Hence, the judgment of conviction is null and void ab initio.

"Where the court have not jurisdiction of the subject matter of a cause which they assume to act, all their proceedings are absolutely void. This principle is elementary, and runs through all well considered cases upon the subject. Many of them collected in State v Richmond, 26 N.H. 232." Quoting White v Landoff, 35 N.H. 128 (1853).

This principle was clearly stated by Mr. Justice Bradley writing for the United States Supreme Court in Ex parte Siebold, 100 U.S. 317, 376-377, 25 L.Ed 717 (1879):

> "...The validity of the judgment is assailed on the grounds that the acts...under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment..."

It is firmly established that if a court which renders a judgment does not have jurisdiction to render it, either because the proceedings or the law under which they are taken are unconstitutional, or the law was repealed, or any other reason, the judgment is void, and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus. This was so decided in the cases of Ex parte Lange, 18 Wall. 163, and Ex parte Siebold supra and in several other cases referred to therein.

22. The rule of law that must be applied to this particular case is the doctrine that when a criminal statute is repealed and a right to prosecute for a prior offense is not saved, such right to is extinguished. The repeal of a statute creating an offense without a saving clause has for hundreds of years been held to bar future prosecutions for past violations of the statute.

It scarcely requires an examination of authorities to establish a principle so plain upon reason as that prosecution cannot be taken under color of law, after the law by which prosecution was authorized has been abrogated by the law-making power of the State unless some special provision be made for that purpose by statute. This Court has held such to be the law by its own precedents going back hundreds of

years. To mention a few that support Petitioner's case in several respects: State v Otis, 42 N.H. 71 (1860); Lakeman v Moore, 32 N.H. 410 (1855); Lewis v Foster, 1 61 (1817); Opinion of the Justices, 66 N.H. 629 and cases cited therein those cases. This Court has also cited in its cases many precedents and authorities from all over this country as well as other countries that reach back across centuries, and that support the Petitioner's grounds for relief. Petitioner asks no more from this Court then to apply those precedents and authorities to the facts of his case. Justice and the rule of law require such.

Petitioner asserts to this Court that because its completely undisputed he was prosecuted under RSA 585:1, the habeas determination in his favor can be made purely as a matter of law on the record evidence before the Court in the instant Petition, with no hearing or factfinding necessary.

CONCLUSION:

Based upon the above and foregoing and the accompanying documents in Appendix attached to said Petition, Petitioner respectfully requests this Court for the following relief:

A) Declare as a matter of law that Petitioner's judgment of conviction is null and void ab initio;

B) That the Court relieve Petitioner of the illegal and unconstitutional restraint on his liberty and release him forthwith by isssuing a writ of habeas corpus.

September 20, 2007

Respectfully submitted,

Clifford Avery

Clifford Avery, Pro se
138 East Milan Road
Berlin, New Hampshire 03570

* * * * * * * * * * * * * *
*
STATE OF NEW HAMPSHIRE *
*
COOS COUNTY *
*
* * * * * * * * * * * * * *

The foregoing PETITION FOR A WRIT OF HABEAS CORPUS was SUBSCRIBED and SWORN to before me this 20th day of September 2007.

NOTARY PUBLIC/JUSTICE OF THE PEACE

My Commission expires on 9/6/11

-APPENDIX-

MARTIN F. LOUGHLIN, P.J.

It is therefore considered by the court that the said

EDGAR CLIFFORD AVERY, JR.

be imprisoned at hard labor in the state prison, for a term of xxxxxxxxxx LIFE xxxxxxx

xxxxxxxxxxxxxxxxxxxx

xxxxx and stand committed till sentence be performed, or until he be otherwise yxxxxxx discharged by due course of law. In accordance with the mandate of RSA 651:45 c this Court certifies that the murder of Lee Ann Greeley was not psycho-sexual in nature.

A true copy of the record. Examined.

Attest: [signature] Clerk.

The State of New Hampshire

MERRIMACK, SS.

Superior Court, ...April........ Term 19 75

ORDERED BY THE COURT, that the sheriff of the County of Merrimack, as soon as conveniently may be, remove the said Edgar Clifford Avery, Jr. to the state prison in Concord, in the County of Merrimack; and deliver him to the warden of the state prison, who is required to receive the said convict into said state prison, and him there imprison at hard labor, according to law, for a term of xxxxxxxxx LIFE yxxxxxx xxxxxxxxxxxx yxxxxxx xxxxxxx xxxxxxx or until he be discharged by due course of law. In accordance with the mandate of RSA 651:45 c this Court certifies that the murder of Lee Ann Greeley was not psycho-sexual in nature.

A true copy of conviction, judgment, and order thereon.

Attest: [signature] Clerk.

Dated ....May 20...... 19 75.

N.H.S.P. Warden's Office No. 111LC

MAY 20 1975

STATE vs. EDGAR CLIFFORD AVERY, JR.

MITTIMUS to STATE PRISON

No. 1953

MERRIMACK, SS. [illegible] 19 [illegible]

Pursuant to the within precept, I have removed the within named [illegible] to the state prison in Concord in the County of Merrimack, and there delivered him to the warden thereof, and at the same time I gave to the said warden a copy of the conviction, judgment and order of the court thereon against the said convict, attested by the clerk of the court within named, of which the within is a true copy, with this my return endorsed thereon.

Attest: [signature] Sheriff.

(1)

The State of New Hampshire

MERRIMACK, SS.

At the SUPERIOR COURT, holden at Concord within and for the county of Merrimack, on the first ~~Tuesday~~ Wednesday of June,

in the year of our Lord one thousand nine hundred and seventy-four

PRESENT—THE HONORABLE

Presiding Justice.

The grand jurors for the State of New Hampshire, upon their oath, present that

EDGAR CLIFFORD AVERY, JR.

of Concord in the County of Merrimack aforesaid,

on the 16th day of December in the year of our Lord one thousand nine hundred and seventy-three at Bow in the County of Merrimack aforesaid, with force and arms,

did feloniously, willfully and of his malice aforethought, with premeditation and deliberation, kill and murder one Lee Ann Greeley of Concord,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

The said Edgar Clifford Avery, Jr., on June 6, 1974, , being arraigned, pleads not guilty, and thereof puts himself on the country for trial. And thereupon on ~~[illegible]~~ May 5 through May 19, 1975, the Attorney General and counsel for the Defendant having been fully heard upon the evidence, the cause is committed to a Jury, sworn according to law, to try the issue, who make return of their verdict thereon on May 19, 1975, upon oath and say that said Edgar Clifford Avery, Jr. is guilty of murder in the first degree.

(2)

The State of New Hampshire

MERRIMACK, SS.

TO THE SHERIFF OF OUR COUNTY OF MERRIMACK OR HIS DEPUTY:

Whereas, *at the Superior Court, holden at Concord, within and for the County of Merrimack, aforesaid, on the* first Wednes *day of* June *in the year of our Lord one thousand nine hundred and* seventy-four

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, have returned an Indictment charging

EDGAR CLIFFORD AVERY, JR.

of Concord, County of Merrimack, and State of New Hampshire with the offense of Murder, (R.S.A. c. 585:1), a copy of which Indictment is annexed hereto.

We command you, therefore, that without delay, you apprehend the body of the said Edgar Clifford Avery, Jr. (if to be found in your precinct, and bring him forthwith before our Superior Court, now holden at Concord, within and for the County of Merrimack aforesaid, to answer to said indictment; and make return of this Writ with your doings therein.

Witness, WILLIAM F. BATCHELDER Esquire, the 5th day of June Anno Domini 19 74

CLERK.

~~Sheriff~~

~~Form.~~

(3)

RSA 585:1

STATE OF NEW HAMPSHIRE

MERRIMACK , S S.

At the Superior Court, holden at Concord , within and for the County of Merrimack aforesaid, on the first ~~Tuesday~~ Wednesday of June in the year of our Lord one thousand nine hundred and seventy-four

The GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oath, present that

EDGAR CLIFFORD AVERY, JR.

of Concord , in the County of Merrimack aforesaid on the sixteenth day of December in the year of our Lord one thousand nine hundred and seventy-three at Bow in the County of Merrimack aforesaid, with force and arms, did feloniously, willfully and of his malice aforethought, with premeditation and deliberation, kill and murder one Lee Ann Greeley of Concord

contrary to the form of the Statute, in such case made and provided and against the peace and dignity of the State.

This is a true bill.

Thomas D. Eck
Deputy Attorney General

Foreman

(4)

II. For purposes of paragraph I, "one or more persons" includes, but is not limited to, persons who are immune from criminal liability by virtue of irresponsibility, incapacity or exemption.

III. It is an affirmative defense to prosecution under this statute that the actor renounces his criminal purpose by giving timely notice to a law enforcement official of the conspiracy and of the actor's part in it, or by conduct designed to prevent commission of the crime agreed upon.

IV. The penalty for conspiracy is the same as that authorized for the crime that was the object of the conspiracy, except that in the case of a conspiracy to commit murder, it is a class A felony.

SOURCE: 1971, 518: 1, eff. Nov. 1, 1973.

ANNOTATION

Anno: *Comment note: necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators.* 46 ALR3d 1148.

CHAPTER 630

HOMICIDE

630: 1 Murder.

I. A person is guilty of murder if he

(a) purposely or knowingly causes the death of another; or

(b) causes such death recklessly under circumstances manifesting an extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor causes the death by use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit arson, burglary or any felony against the person.

II. As used in this section and RSA 630: 2 and 3, the meaning of "another" does not include a foetus.

SOURCE: 1971, 518: 1, eff. Nov. 1, 1973.

ANNOTATION

Anno: *What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine.* 50 ALR3d 397.

Anno: *Homicide predicated on improper treatment of disease or injury.* 45 ALR3d 114.

Anno: *Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide.* 40 ALR3d 1341.

630: 2 Manslaughter. A person is guilty of a class A felony when he causes the death of another

I. recklessly; or

II. under the influence of extreme mental or emotional disturbance but which would otherwise constitute murder.

SOURCE: 1971, 518: 1, eff. Nov. 1, 1973.

Pleas and refusal to plead, see RSA 605.
Preliminary examination of accused, see RSA 596-A.
Proceedings in cases of willful trespass, see RSA 539.
Representation of indigent defendants, see RSA 604-A.
Rights of accused, see New Hampshire Constitution, Part 1, Article 15.
Trial of criminal cases, see RSA 606.
Venue in criminal cases, see RSA 602:1.

CHAPTER 625

PRELIMINARY

625:1 Name. This title shall be known as the Criminal Code.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

625:2 Effective Date.

I. This code shall take effect on November 1, 1973.

II. Prosecution for offenses committed prior to the effective date of this code shall be governed by the prior law, which is continued in effect for that purpose as if this code were not in force; provided, however, that in any such prosecution the court may, with the consent of the defendant, impose sentence under the provisions of this code.

III. For purposes of this section, an offense was committed prior to the effective date if any of the elements of the offense occurred prior thereto.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

ANNOTATIONS

1. Sentencing

Defendant convicted of first-degree manslaughter committed prior to effective date of new criminal code was not entitled to be sentenced solely upon his election under the more lenient code provisions, as sentencing under this code is also in the discretion of the court. Nichols v. Helgemoe (1977) 117 NH 57, 369 A2d 614.

If defendant consents, the trial court may, in its discretion, sentence under this code, but the consent of defendant does not require the court to sentence under this code. State v. McMillan (1975) 115 NH 268, 339 A2d 21.

Where state conceded it did not appear trial court considered paragraph II of this section, whereby court may impose sentence under this code with the consent of defendant, the case would be remanded in order that the court could exercise its discretion under paragraph II to sentence under this code if defendant should consent to it. State v. McMillan (1975) 115 NH 268, 339 A2d 21.

2. Cited

Cited in Doe v. State (1974) 114 NH 714, 328 A2d 784; State v. Dean (1975) 115 NH 520, 345 A2d 408; State v. McMillan (1976) 116 NH 126, 352 A2d 702; State v. Musumeci (1976) 116 NH 136, 355 A2d 434.

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625:11 General Definitions. The following definitions apply to this code.

I. "Conduct" means an action or omission, and its accompanying state of mind, or, a series of acts or omissions.

II. "Person", "he", and "actor" include any natural person and, a corporation or an unincorporated association.

III. "Element of an offense" means such conduct, or such attendant circumstances, or such a result of conduct as:

(a) Is included in the definition of the offense; or

(b) Establishes the required kind of culpability; or

(c) Negatives an excuse or justification for such conduct; or

(d) Negatives a defense under the statute of limitations; or

(e) Establishes jurisdiction or venue.

IV. "Material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unrelated to (1) the harm sought to be prevented by the definition of the offense, or (2) any justification or excuse for the prescribed conduct.

V. "Deadly weapon" means any firearm, knife or other substance or thing which, in the manner it is used, intended to be used, or threatened to be used, is known to be capable of producing death or serious bodily injury.

VI. "Serious bodily injury" means any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

ANNOTATIONS

1. Conduct

Several acts may constitute one crime if impelled by one intent. State v. Sampson (1980) 120 NH 251, 413 A2d 590.

2. Elements of offense

In trial for unauthorized taking, where defendant raised statute of limitations issue in a proposed jury instruction, but did not join the issue at trial, and did not point to any evidence in the record to support this theory of defense, the statute of limitations did not become an element of the offense and the court did not err in refusing to give defendant's requested jury instruction that the statute of limitations was an element of the offense. State v. Weeks (1993) 137 NH 687, 635 A2d 439.

(7)

Under the criminal code, a violation of driving while intoxicated is not a crime. State v. Dery (1991) 134 NH 370, 594 A2d 149.

"Violation", as used in this section, does not refer to any and all offenses, but rather only to those which are neither felonies nor misdemeanors. State v. Doe (1976) 116 NH 646, 365 A2d 1044.

2. Parking violations

The authority of a city to prosecute a violator of its parking ordinance is limited to the institution of an action for the commission of an offense under the criminal code. City of Portsmouth v. Karosis (1985) 126 NH 717, 498 A2d 291.

3. Reduction of charges

Reduction of defendant's misdemeanor charge to a violation prior to arraignment in superior court after defendant appealed her district court conviction on the charge was within the prosecutor's discretion, cost-effective, and not contrary to the supposed purpose of the statute of reducing costs of providing indigent defendants with court-appointed counsel. State v. Gagnon (1991) 135 NH 217, 600 A2d 937.

Superior court properly allowed the prosecutor to reduce defendant's misdemeanor charge to a violation, but erred in remanding case to district court for sentencing only; case should have been remanded for trial de novo. State v. Gagnon (1991) 135 NH 217, 600 A2d 937.

Cited

Cited in State v. Dean (1975) 115 NH 520, 345 A2d 408; State v. Payne (1975) 115 NH 595, 347 A2d 157; State v. Miller (1975) 115 NH 662, 348 A2d 345; State v. Martin (1976) 116 NH 47, 351 A2d 52; State v. Komisarek (1976) 116 NH 427, 362 A2d 190; State v. Bennett (1976) 116 NH 433, 362 A2d 184; State v. Cushing (1979) 119 NH 147, 399 A2d 297; Paey v. Rodrigue (1979) 119 NH 186, 400 A2d 51; State v. Brady (1982) 122 NH 110, 441 A2d 1165; State v. Morrill (1983) 123 NH 707, 465 A2d 882; State v. Sweeney (1983) 124 NH 396, 469 A2d 1362; State v. Cook (1984) 125 NH 452, 481 A2d 823; State v. McKenney (1985) 126 NH 184, 489 A2d 644; State v. Dery (1985) 126 NH 747, 496 A2d 357; State v. Perra (1985) 127 NH 533, 503 A2d 814; State v. Deflorio (1986) 128 NH 309, 512 A2d 1133; Kiluk v. Potter (1990) 133 NH 67, 572 A2d 1157; State v. Murray (1992) 135 NH 369, 605 A2d 676; Opinion of the Justices (DWI Jury Trials) (1992) 135 NH 538, 608 A2d 202; Opinion of the Justices (Misdemeanor Trial De Novo) (1992) 135 NH 549, 608 A2d 874; State v. Woods (1994) 139 NH 399, 654 A2d 960.

LIBRARY REFERENCES

New Hampshire Practice

1 N.H.P. Criminal Practice & Procedure § 3.

2 N.H.P. Criminal Practice & Procedure § 1043.

625:10 Burden of Proof. No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

HISTORY

Source. 1971, 518:1, eff. Nov. 1, 1973.

8

THE STATE OF NEW HAMPSHIRE

.....CONCORD.....DISTRICT ~~(MUNICIPAL)~~ COURT

WARRANT

NO. .....

MERRIMACK....., SS

To the Sheriff or his Deputy or any State, City or Town Police Officer in the State:

WHEREAS: Major Herbert W. Bean, Jr., New Hampshire State Police of Claremont in the County of Sullivan has exhibited to me, Warren E. Waters, Special Justice a Justice of the Peace in the County of Merrimack, his complaint, upon oath against Edgar Clifford Avery, Jr. of Hennniker in the county of Merrimack

WE COMMAND YOU to take Edgar Clifford Avery, Jr. (if found to be in your precinct) and bring him before the Concord District ~~(Municipal)~~ Court.

AND WE FURTHER COMMAND YOU to summon Edgar Clifford Avery, Jr.

to appear and testify what he knows relating to the Complaint, when you have the Defendant before the Concord Court for trial.

Dated the 21st day of May, 19 74.

Justice of the Peace
Special Justice, Concord District Court

....., SS ..... 19.....

I have arrested .....

and summoned .....

and now have him (them) before the .....District (Municipal) Court, as commanded.

.....
Name of Officer

.....
Title of Officer

6/14/74

9

THE STATE OF NEW HAMPSHIRE
MERRIMACK, SS

CONCORD DISTRICT [redacted] COURT
No. .....

COMPLAINT

TO THE CONCORD DISTRICT [redacted] COURT
The undersigned complains to said Court that the defendant
(Name) Edgar Clifford Avery, Jr. of
(Address) Henniker, New Hampshire on or about
(Date of Offense) December 16, 1973 at approximately (time) .....m., on/at
(Location) River Road in (Town) Bow, New Hampshire
in said county and state, did commit the offense of
(Offense) Murder in the First Degree
contrary to RSA 585:1 and the laws of New Hampshire, for which the defendant should be held to answer, in that the defendant did feloniously, willfully and of his malice aforethought with premeditation and deliberation, kill and murder one Lee Ann Greeley of Concord

against the peace and dignity of the State.
DATE: May 21, 1974

Hubert W. Bean Jr.
Complainant

OATH: Subscribed and sworn to by the complainant, before me,
Justice of the Peace
Special Justice, Concord District Court;

PLEA: Upon arraignment the defendant pleaded as follows:
( ) Guilty ( ) Not Guilty ( ) Nolo Contendere ( ) Entered no plea

FINDING: After hearing the court found that the defendant was
( ) Guilty ( ) Not Guilty

SENTENCE: The following sentence (or other order) was imposed:
( ) Fine of $.....
( ) Commitment to House of Correction at ..... at hard labor for period of ..... days months.
( ) Commitment suspended upon payment of $..... fine.
( ) Sentence suspended during good behavior. Order of Commitment may issue upon petition to court.
( ) Case continued for sentence. ( ) Complaint placed on file.
( ) Defendant's license (or right) to operate a motor vehicle revoked for period of .....
( ) Recommended suspension of license (or right) to operate motor vehicle for period of .....
( ) Defendant placed on probation for period of ..... months.
( ) Defendant failed to appear. $..... bail forfeited.
( ) .....

[redacted] COURT
Jun 21 9 46 AM '74

DATE: .....

DOB LIC. NO. Justice REG.

AC 010-z

(10)

IN THE SUPREME COURT OF THE UNITED STATES

ATTACHMENT 2

GROUND 1: DEFENDANT DENIED STATE AND FEDERAL RIGHTS.IN THAT HE IS ACTUALLY AND FACTUALLY INNOCENT OF CRIME OF CONVICTION BUT WAS PREVENTED FROM SHOWING HIS INNOCENCE,INTER ALIA,TRIED UNDER A REPEALED LAW WITH NO SAVING PROVISION AND JUDGMENT OF CONVICTION IS NULL AND VOID

TABLE OF CONTENTS

GROUND ONE:

DEFENDANT IS ACTUALLY AND FACTUALLY INNOCENT OF THE CRIME OF CONVICTION AND WAS PREVENTED FROM SHOWING HIS ACTUAL INNOCENCE DUE TO ILLEGALITY OF THE HIGHEST ORDER: THAT THE INDICTMENT, TRIAL, CONVICTION AND SENTENCE IN MERRIMACK COUNTY SUPERIOR COURT FOR THE STATE OF NEW HAMPSHIRE IN MAY 1975, UNDER WHICH DEFENDANT IS HELD, IS ILLEGAL, NULL, AND VOID. THAT THE LAW WHICH DEFINED THE OFFENSE AND PRESCRIBED THE PUNISHMENT WAS UNCONSTITUTIONAL IN ITS APPLICATION TO THE DEFENDANT IN THAT IT WAS VOID, HAD BEEN EXPRESSLY REPEALED, THAT AS A MATTER OF STATE LAW IT DID NOT APPLY TO THE OFFENSE NOR THE DEFENDANT, WAS VIOLATIVE OF THE RULE THAT STATUTES APPLY PROSPECTIVELY, AND DID OPERATE PRECISELY AS AN EX POST FACTO AND RETROSPECTIVE LAW. THAT THE STATE COURT WAS WITHOUT JURISDICTION TO TRY AND SENTENCE DEFENDANT AND HE MUST BE DISCHARGED FROM FURTHER UNCONSTITUTIONAL AND UNLAWFUL IMPRISONMENT

Supporting Facts:

For purposes of this claim: On May 21, 1974 a warrant and complaint was issued charging Defendant with the murder of Lee Ann Greeley. The complaint alleged the murder occurred on December 16, 1973 and charged him with murder under NH RSA 585:1. On May 29, 1974 Defendant was arrested and subsequently charged with the murder of Gary Russell. The complaint also charged that the Russell murder occurred on December 16, 1973 and was a violation of NH RSA 585:1. On April 15, 1974, NH RSA 585:1 was expressly repealed by Laws 1974 Chapter 34. In June 1974 the State prosecutor procured an indictment from the Merrimack County Grand Jury charging Defendant under NH RSA 585:1 with the murder of Lee Ann Greeley. In September 1974 the prosecutor procured an indictment from the Hillsborough County Grand Jury charging Defendant under NH RSA 585:1 with the murder of Gary Russell.

On May 20, 1975 Defendant was convicted of murder in the "first degree" of Lee Ann Greeley. He was sentenced to a term of life with a mandatory minimum term of 18 years. The indictment charging him with the homicide of Gary Russell was dismissed by the State on November 14,1978.[1/]

UNCONSTITUTIONAL AND EX POST FACTO AND RETROSPECTIVE PROSECUTION:

The prosecutor's acts in charging and procuring the indictments under NH RSA 585:1, an expressly repealed law, did violate Defendant's rights to Due Process and Equal Protection of the Laws. Defendant alleges that it was unconstitutional and unlawful for the State to have charged and prosecuted him under the repealed law NH RSA 585:1 rather than the governing law in force and effect, NH RSA 630:1-2 because of the following:

1. On November 1, 1973 the State of New Hampshire enacted a new criminal code, NH RSA 625:1, et seq., and a new murder statute, RSA 630:1,2.

2. Pursuant to NH RSA 625:1, I-III, and RSA 625:11, as a matter of State law, RSA 585:1, et seq., was not applicable to Defendant and was not applicable to the particular offense that was alleged under NH RSA 585:1.

3. It was clearly contrary to the New Hampshire Legislature's intent in enacting the new criminal code, and hence unlawful.

4. On April 15, 1974, NH RSA 585:1, et seq. was expressly repealed by Laws 1974, Chapter 34.

5. Prior to the express repeal on April 15, 1974, with enactment of the new criminal code and murder statute RSA 630:1 on November 1, 1973, RSA 630:1 was a superceding statute, and there was also an implicit repeal of RSA 585:1.

1: Defendant asserts the Gary Russell homicide indictment was dismissed by the State because the State knew Defendant had not killed Gary Russell and that Wendell Russell, along with Mike Davis had in fact killed Gary Russell. But the State wrongly introduced evidence of the Russell homicide at Defendant's trial for the Greeley murder as "... part of a common plan or scheme and, in fact, the motive for the killing of Lee Ann Greeley..." (T.III 584).

6. The application of RSA 585:1 to Defendant operated precisely as a retrospective and ex post facto law, and as such violated the State and Federal constitutional prohibition against retrospective and ex post facto laws. SEE New Hampshire Constitution, Part 1, Article 23, and United States Constitution, Art. 1,§9,Cl.3; Art.1,§10,Cl.1.

7. It was a violation of the general rules of statutory construction that statutes apply prospectively.

8. The prosecutor's decision to charge Defendant under RSA 585:1 in addition to being a clear violation of State laws, RSA 625:1, I-III, and 625:11, was an arbitrary and capricious decision which deprived Defendant of Due Process and Equal Protection of the Laws and a fair trial guranteed by the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution.

The governing murder statute in force and effect in New Hampshire on December 16, 1973, the date of the alleged offense was NH RSA 630:1 which became effective on November 1, 1973. **SEE** RSA 630:1, App.1,p.3. The prosecutor charged Defendant under the prior homicide statute RSA 585:1 which had been repealed, and even though the offense was alleged to have occurred on December 16, 1973—over a month after the effective date of the new criminal code and new murder statute, RSA 630:1. The prior law, RSA 585:1, as said, had been implicitly repealed and superceded by RSA 630:1, and expressly repealed on April 15, 1974. The prior law 585:1 was left in effect by the New Hampshire Legislature only for the purpose of prosecution of offenses committed prior to the effective date of RSA 625:1 and 630:1. The Legislature's intent was clear, mandatory and in keeping with the law and general rule that statutes apply prospectively. NH RSA 625:1, I-III states in pertinent part:

> "This code shall take effect on November 1, 1973. Prosecution for offenses committed prior to the effective date of this code shall be governed by the prior law [585:1] which is continued in effect for that purpose as if this code were not in force ...For purposes of this section, an offense was committed prior to the effective date if any of the elements of the offense occurred prior thereto." (emphasis added).

The rule of law is that a person must be prosecuted under the law in effect at the time the crime was committed. SEE State v Sampson, 120 N.H. 251, 254 (1980)("Though a newly-amended criminal statute applies to offenses committed after its enactment, the prior statute remains applicable to all offenses committed prior to the amendments' effective date"). SEE also Shannon v Foster, 115 N.H. 699, 701, 349 A2d 591, 593 (1975)("The law presumes that statutes are intended to operate prospectively.") The presumption of prospective application of statutes is supported by over 150 years of United States Supreme Court precedent stretching from the early part of the nineteenth century to the middle of this century. SEE Kaiser Aluminum & Chemical Corp v Borjorno, 110 S.Ct. at 1579-81. It follows that the State prosecutor's decision to charge Defendant under RSA 585:1 rather then RSA 630:1 was arbitrary and capricious, and not in accordance with the governing law and the Constitutions and Laws of New Hampshire and the United States.

Application of RSA 585:1 to Defendant rather then the governing law in force and effect at the time of the crime, RSA 630:1-2, did operate precisely like a retrospective and ex post facto law, in violation of Part 1, Article 23 of the New Hampshire Constitution and Art.1 § 9, Cl. 3; Art. 1, § 10, Cl. 1. of the United States Constitution. Part 1, Article 23 of the New Hampshire Constitution proclaims:

> "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses."

The latter portion of this Article, concerning retrospective application of penal laws, is a prohibition against ex post facto laws. Woart v. Winnick, 3 N.H. 473, 474 (1826). The features that identify a prohibited ex post facto law, or a law that is ex post facto as applied, have been stated as follows:

> "Any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time..."

Dobbert v Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed 2d 344 (1977), Collins v Youngblood, 497 U.S. 37, 41-44, 110 S.Ct. 2715,2718-19,111 L.Ed 2d 30 (1990); Petition of Hamel, 629 A2d 802 (NH 1993), State v Reynolds, 642 A2d 1368 (NH 1994).

One of the most popular definitions of retrospective laws is that of Judge Story. In a case involving Article 23 of the New Hampshire Constitution, Justice Story said:

> "upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disibility, in respect to transactions or considerations already past, must be deemed retrospective."

Society for Propagation of Gospel v Wheeler, 22 F. Cas. 736, 767 (No. 13,516)(CCNH 1814)(Story,J).

Defendant enumerates in the following paragraphs the variances between the governing murder statute RSA 630:1-2 in force and effect at the time of the commission of the offense, and the prior homicide law RSA 585:1 of which he was charged, prosecuted, convicted and sentenced, all of which are claimed to be changes to his prejudice and injury and retrospective and ex post facto within the meaning of Part 1, Article 23 of the New Hampshire Constitution and Articles 1,9 and 1,10 of the United States Constitution.

1. Prior to November 1, 1973, under homicide statute RSA 585:1, murder was defined as either "first degree," or "second degree murder," and the lesser included offenses were defined as "first degree," and "second degree manslaughter."

WHEREAS, under RSA 630:1, (effective November 1, 1973), there was no degrees. Murder was more leniently defined as "murder," or "manslaughter." Thus, the crime of "murder" was aggravated and made greater under RSA 585:1 then it was under RSA 630:1-2. While not making murder innocent, RSA 630:1-2 did eliminate "degrees" making innocent the terms "first" and "second degree" and the severity which those terms, inter alia, connote. By charging Defendant under the prior and repealed law, RSA 585:1, the State subjected him to a conviction of "first degree" murder. **WHEREAS**, under the governing law, a conviction could only result in "murder" or "manslaughter."

2. Under RSA 630:1, the governing law on December 16, 1973, a person in New Hampshire was apprised that a conviction for "murder" carried a maximum sentence of life imprisonment and **"such minimum term as the court may order."** SEE NH RSA 651:2,II(d), Laws 370:1, 370:2 amending RSA 651:2, added subpara. (d) and provisions relating to minimum for life imprisonment.

WHEREAS, under the prior law 585:1-6, a conviction for murder in the "first degree" carried a maximum sentence of life imprisonment, but the minimum term was a **mandatory** term of 18 years—which was made mandatory by statute RSA 607:41-a.

3. By charging Defendant under the repealed law 585:1, the State prosecutor subjected him to a **mandatory minimum term of 18 years and an unauthorized sentence by law. WHEREAS**, if he had been charged under the governing law in effect at the time of the offense, and if he were

convicted for "murder," he would have been eligible to receive a minimum sentence that was determined by **"the court."** Thus, Defendant was deprived of all opportunity of receiving a lesser minimum sentence of 18 years.

4. **FURTHER,** by charging Defendant under the repealed law, 585:1, the State subjected him to spend many more years in prison before becoming eligible for release on parole. Under Senate Bill 352 (Laws 1975,506:1), the New Hampshire Legislature had made a determination that 7½ years is as long as any person should remain ineligible for release on parole **"unless convicted of murder or manslaughter in the first degree in violation of RSA 585:1; 585:8-9."** Senate Bill 352 did not exclude persons convicted for "murder" under RSA 630:1. If Defendant had been charged under the governing law, RSA 630:1, and if he was convicted for "murder," whatever minimum sentence that had been imposed by **"the court"** that was in excess of 7½ years, the minimum term would be reduced to 7½ years for determination of eligibility for release on parole.

5. Under the repealed law, RSA 585:1, a conviction for the lesser included offense of "second degree" murder carried a sentence of imprisonment for life, or for such term as the court may order. The term of years is unlimited by statute, RSA 585:4. The term of years could presumably be 20-40 years, 30-60 years, 50-100 years, or even longer.

WHEREAS, under the governing law at the time of the crime. The maximum sentence for a conviction of "Manslaughter" as a Class A felony under RSA 630:2 is **15 years with a minimum term of 7½ years, both the maximum and minimum terms set by statute.**

6. On December 16, 1973, the date of the offense, under RSA 630:1, the law provided an affirmative defense of manslaughter to a charge of murder. Under RSA 630:2 a person was guilty of manslaughter, a class

A felony if he caused the death of another "recklessly" or owing to "extreme mental or emotional disturbance."

WHEREAS, under the repealed law RSA 585:1 there was no such affirmative defense. When the new criminal code became effective November 1, 1973. The lesser included offenses of "first degree" and "second degree" manslaughter were expressly repealed by Laws 1973, 370:7. This left the statute, RSA 585:1 with only murder in the "first degree" and "second degree." By charging Defendant under the repealed law, RSA 585:1, the State deprived him of an available defense which might have been pleaded as an excuse or justification for the crime of murder under RSA 630:1-2.

FURTHER, by charging Defendant under the prior and repealed law, RSA 585:1, the State deprived him of the lesser included offenses of "first degree" and "second degree" manslaughter afforded all other defendants that were properly and in accordance with the law charged under the homicide statute 585:1.

"A law that abolishes an affirmative defense or justification or excuse contravenes Article 1 § 10 because it expands the scope of a criminal prohibition after the act is done." Collins v Youngblood, 497 U.S. 37, (1990). SEE also Part 1, Article 15 of the New Hampshire Constitution.

In Collins v Youngblood, 497 U.S. (1990), the Supreme Court discussed in some detail the current scope of the Ex Post Facto Clause. The Collins Court further reaffirmed the Court's summary of the meaning of the Ex Post Facto Clause in Beazell v Ohio, 269 U.S. 167 (1925):

> "It is well settled, by decisions of this Court so well known that their citations may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

Collins, 497 U.S. at 42 (quoting Beazell, 269 U.S., at 169-70.) Collins confirmed that these three Beazell catagories define the scope of the Ex Post Facto Clause, stating "[T]he Beazell foundation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause."

"The Ex Post Facto Clause of the Constitution has been construed to embrace any law that deprives a person accused of a crime of a 'substantial protection' that the law afforded at the time of the alleged offense. Thus, the Clause prohibits not only retroactive creation of new criminal offenses and more harsh penalties, but also substantial changes in procedure that are designed to protect the defendant from wrongful conviction."

In the case at bar, the State denied Defendant protections which were "relevant to the determination of his guilt or innocence," and imposed a sentence that was "unauthorized by law" and or "was the consequence of improper procedure." Quoting Collins, supra, at 2724, and 2728.

On November 1, 1973 when the new criminal code became effective, the definition of murder, its elements, defenses, and penalties had been fundamentally changed and made more lenient by the New Hampshire Legislature then under the prior homicide law RSA 585:1-11.

Application of NH RSA 585:1 to Defendant by the State was and or operated precisely as an Ex Post Facto and Retrospective law. It did aggravate the crime and made it greater than it was when allegedly committed. It changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed. Changed the definition and elements of the crime and altered the legal rules of evidence from that which was required under the governing law at the

time of the commission of the offense. And it did deprive Defendant of an affirmative defense which was available at the time of the crime.

In Defendant's case the actions of the State as described above and foregoing, violate all the principles that the United States Supreme Court in Collins, supra, reaffirmed from the Court's earlier summary of the meaning of the Ex Post Facto Clause in Beazell v. Ohio, 269 U.S. 167 (1925).

"It has been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provisions be made for that purpose by statute." Yeaton v United States, 5 Cranch 281, 283, 3 L.Ed 101 (1809); SEE also United States v Tynen, 11 Wall. 88, 95, 20 L.Ed 153 (1870)("There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence.")

At the time of Defendant's arrest, indictment, trial, conviction, sentence and direct appeal, NH RSA 585:1 was no longer in existence. The law had been repealed on April 15, 1974. And as previously said, when the new murder statute RSA 630:1 became effective on November 1, 1973 with the new criminal code, the New Hampshire Legislature had made clear, that prosecution for offenses committed prior to November 1, 1973 shall be governed by the prior law [585:1]. SEE RSA 625:2.

Where the State charged, prosecuted and convicted Defendant under a law that was void, and as a matter of State laws did not apply to him nor the offense charged, had been repealed, and was unlawful and unconstitutional in its operation as an ex post facto and retrospective

law, the State trial court lacked lawful jurisdiction to try him in the first instance. As such, his trial, conviction, judgment and sentence are null and void, ab initio. The entire proceeding against him is a nullity ab initio. This principle was clearly stated by Mr. Justice Bradley writing for the United States Supreme Court in Ex parte Siebold, 100 U.S. 317, 376-377, 25 L.Ed 717 (1879):

> "...The validity of the judgment is assailed on the ground that the acts...under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment..."

See also United States v Chambers, 291 U.S. 217, 218, 54 S.Ct. 434-35 (1934):

> "There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislature will is expressed that no further proceedings be had under the act repealed."

Based upon the facts and law set forth in this claim, Defendant's conviction, judgment and sentence are null and void ab initio and his imprisonment is illegal and unconstitutional, and in violation of the Constitutions and Laws of New Hampshire and the United States. His conviction must be vacated, the indictment dismissed with prejudice, and he must be released forthwith from further illegal and unconstitutional restraint.

Additional material from this filing is available in the Clerk's Office.