THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

NO. 2019-0280

STATE OF NEW HAMPSHIRE

v.

KEITH C. FITZGERALD

Rule 7 Discretionary Appeal

BRIEF OF APPELLANT
KEITH C. FITZGERALD

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QUESTIONS PRESENTED

I. Whether the trial court erred and applied an incorrect legal standard when it found that Defendant Keith C. Fitzgerald had not proven that he was prejudiced by defense counsel's constitutionally deficient performance when he failed to competently advise Fitzgerald about the State's plea offer.

II. Whether the trial court erred when it found that Fitzgerald was not prejudiced by counsel's constitutionally deficient performance in failing to object to the State's inclusion of, and the trial court's jury instruction on, a sentencing enhancement that had not been presented to the grand jury for indictment.

STATEMENT OF THE CASE AND FACTS

Defendant Keith C. Fitzgerald appeals the Belknap Superior Court's (Smukler, J.) denial of his Motion for New Trial or to Vacate Convictions and Reinstate Plea Offer ("Motion"). The Motion followed this Court's Order denying Fitzgerald's direct appeal of his convictions on five counts of theft by unauthorized taking following a jury trial. *State v. Fitzgerald*, Case No. 2017-0328, Order dated July 6, 2018.

The Motion urged the superior court that Fitzgerald was denied the reasonably competent assistance of counsel guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution at critical stages of a criminal proceeding. Fitzgerald argued that defense counsel's performance was constitutionally deficient and he was prejudiced thereby because counsel failed: (1) to challenge the indictments or the court's instruction on the indictments for failing to contain a sentencing enhancement that subjected Fitzgerald to an extended term of imprisonment that had not been presented to the grand jury; and (2) to competently advise Fitzgerald regarding the State's plea offer and his choice to testify at trial.

Counsel's Advice Regarding the State's Plea Offer

During the hearing on the Motion, Fitzgerald called his former counsel, Attorney Robert Hunt, as a witness. Counsel admitted that prior to trying Fitzgerald's case, he had tried only one previous felony, a sexual assault case. Hearing Transcript ("Tr.") 26. Counsel testified that he does not believe he told Fitzgerald that he was subject to a maximum penalty of 150 years imprisonment. Tr. 37, 47-48. Counsel did not explain the extended term statute, the language of which was not stated in the indictments, to Fitzgerald. Tr. 37, 47-48. Counsel testified:

> I actually don't recall specifically talking to Keith about the distinction between the Class A felonies and the extended term. I don't recall having those conversations with him. And having reviewed the file, I don't see any documents where I spelled it out for him explicitly. ...
>
> I don't believe I got into the language of the extended term statute. I honestly have to say that I don't believe that I did or at least I don't recall doing that.

Tr. 37, 48.

Counsel admitted the following regarding his evaluation of Fitzgerald's defense: (1) he became friendly with Fitzgerald, Tr. 23, and came to believe his version of events and in his defense, Tr. 5; (2) he failed to anticipate the damaging admissions Fitzgerald would be forced to make on cross-examination, Tr. 20, and did not review some, or maybe any, of the exhibits the State would use to destroy Fitzgerald's credibility, Tr. 19-20; (3) he would have strongly recommended to Fitzgerald that he refrain from testifying if he had anticipated the damaging admissions, Tr. 20-21; (4) the defense was undermined by Fitzgerald's inability to credibly testify, Tr. 21; and (5) if he had anticipated that Fitzgerald's testimony would go that poorly, he would have more strongly recommended that Fitzgerald accept the State's plea offer, Tr.

22. Counsel also testified that when Fitzgerald elected to testify, he relied on counsel's advice. Tr. 44.

Counsel admitted that he "researched" sentences imposed in potentially similar cases primarily by examining newspaper accounts of cases published on the internet. Tr. 35-36. Counsel was unaware of the sentence imposed in the only case the court and the State found comparable to Fitzgerald's case. Tr. 24, 35. Based on counsel's advice, Fitzgerald rejected a plea offer of two consecutive one-year sentences in the Belknap County House of Correction, followed by two consecutive one-year sentences of home confinement, with restitution and a consecutive suspended state prison sentence. App.101-02. After trial, Fitzgerald was sentenced to an extended term of imprisonment of not less than 9½ years and not more than 25 years at the state prison, with restitution and a consecutive suspended state prison sentence. App.107-17.

Fitzgerald's post-hearing pleadings focused on whether he received reasonably competent assistance of counsel at the critical plea-bargaining stage of the proceedings. Fitzgerald argued that counsel's consistent encouragement about going to trial and the strength of his defense instead of explaining his sentencing exposure and competently evaluating the State's plea offer was constitutionally deficient representation because, among other reasons:

- counsel failed to appreciate Fitzgerald's severe sentencing exposure to enhanced penalty felonies because his research about potential sentences primarily consisted of newspaper accounts of cases reported on the internet;
- counsel's lack of competent research caused him to be unaware of the only comparable case and therefore counsel failed to advise Fitzgerald that the same judge imposed against another defendant almost the same sentence imposed against Fitzgerald;

- counsel advised Fitzgerald that, even if convicted at trial, he was likely to receive a sentence less than one-third of the sentence imposed; and
- counsel's failure to review exhibits the State would use to eviscerate Fitzgerald's credibility and to recognize that Fitzgerald could not credibly testify in his own defense rendered counsel incapable of competently evaluating the merits of the State's plea offer and providing such evaluation to Fitzgerald.

App.31-78.

When it considered Fitzgerald's claim of ineffective assistance of counsel at the plea-bargaining stage of the proceedings, the trial court correctly stated that this Court has not addressed the standard for the prejudice prong of the analysis. Addendum of Appellant's Brief ("Add.") 10. The court correctly identified the test articulated by the United States Supreme Court: but for counsel's ineffective advice there is a reasonable probability that (1) the defendant would have accepted the plea offer, (2) the prosecutor would not have withdrawn the plea offer, (3) the court would have accepted the plea terms, and (4) the sentence would have been less severe under the plea terms than under the judgment actually imposed. *Id.* (citing *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).

However, the superior court interpreted *Lafler* as requiring Fitzgerald to present specific evidence to prove that the court would have accepted the plea terms. Add. 11-12. It found that Fitzgerald failed to satisfy the prejudice prong of the ineffective assistance analysis because he "offered no evidence of similar plea agreements in similar cases or any evidence to suggest that the court would have accepted the plea agreement." Add. 12. Fitzgerald challenged the standard imposed by the court. App.79.

In addition to challenging the court's interpretation of the law, Fitzgerald's motion for reconsideration argued that the court possessed

evidence, two Orders, to satisfy a reasonable probability that the court would have accepted the plea terms. The Orders followed a Settlement Conference conducted by the court (Fauver, J.) six months before trial. The purpose of a Settlement Conference is to "assist negotiations between the parties to criminal cases when the parties have been unable to reach a negotiated disposition ... [and] provide a forum in which to further negotiations and/or bring together concerned parties to reach resolution." App.15 (New Hampshire Superior Court Felony Settlement Conference Policies & Procedures, p. 1).

When a plea agreement was not reached at the Settlement Conference, the parties agreed to continue it "to allow the Defendant time to consider the State's current [plea] offer." The court entered the parties' agreement as an Order. App.87. The parties also submitted a motion to continue the trial. The motion states that the parties engaged in productive settlement discussions, the parties agree that Fitzgerald should be afforded time to consider the State's plea offer, and the parties jointly request the court schedule the matter for a plea and sentencing. App.89. The phrase "to continue the Settlement Conference" was struck and replaced with the phrase "for plea and sentencing." *Id.*

Fitzgerald argued that the combination of the parties agreeing that he would have time to consider the State's plea offer and the scheduling of the matter for plea and sentencing rather than another Settlement Conference prove that there was a reasonable probability that the State left the plea offer open and the court would have accepted the plea terms. He urged the court that even if it applied the heightened burden of proof on the issue of a reasonable probability as it interpreted *Lafler*, the two Orders satisfied the burden. App.81.

Counsel Did Not Object to the Sentence Enhancement

Fitzgerald was indicted on five counts of theft by unauthorized taking in violation of RSA 637:3. The indictments allege that Fitzgerald obtained or exercised unauthorized control of his father's assets with a purpose to deprive him thereof. The following appears near the bottom of each indictment:

RSA: 637:3 (Class A Felony); 651:6

Penalty: NHSP 7½ --15 years and up to $4,000 fine.

After Fitzgerald pled not guilty plea and waived arraignment, the State informed his counsel of its initial plea offer and provided notice of its intention to offer evidence at trial pursuant to N.H. Rule of Evidence 404(b). App.103. The letter identifies another purpose: "to notify [Fitzgerald] of the possible application of RSA 651:6 to each of the five indictments in this case based on RSA 651:6, I(*l*)." *Id.* When Attorney Hunt appeared as successor counsel, the prosecutor sent the letter to Attorney Hunt via email.

Counsel neither moved to dismiss the indictments for failure to include the sentencing enhancement nor objected to jury instructions that included the sentencing enhancement as an element of the offenses for the jury's deliberation despite the fact that the sentencing enhancement was not presented to the grand jury and stated in the indictments. Tr. 25-26. Counsel did not move to dismiss the indictments or object to the jury instruction on the extended term because he did not recognize the legal challenge of failing to present the sentencing enhancement to the grand jury. *Id.* Counsel's performance was constitutionally deficient because allowing the jury to consider a sentencing enhancement that had not been presented to a grand jury violated Fitzgerald's right to a grand jury indictment pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions.

The Motion was denied by Order dated April 2, 2019. Add. 1-13. Fitzgerald's Motion for Reconsideration was denied by Order dated April 24, 2019. Add. 14.

SUMMARY OF ARGUMENT

Fitzgerald was denied the reasonably competent assistance of counsel guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution at the

critical plea-bargaining stage of the criminal proceedings. Inexperienced counsel's egregious errors rendered him unable to competently advise Fitzgerald about the State's plea offer.

Counsel did not explain the extended term statute, the language of which was not stated in the indictments, to Fitzgerald. Counsel did not review with Fitzgerald the enhanced penalty felonies with which he was charged and ensure he understood the charges and the maximum penalties. Counsel testified that he does not believe he told Fitzgerald that he was subject to a maximum penalty of 150 years imprisonment.

Counsel became friendly with Fitzgerald and eschewed objectively evaluating the evidence in favor of believing in Fitzgerald, his version of events, and in his defense. Counsel, who recognized that Fitzgerald's defense was dependent on Fitzgerald's testimony, believed that Fitzgerald could credibly testify because he failed to appreciate and review with Fitzgerald devastating evidence that would eviscerate his credibility. The evidence included records showing that Fitzgerald spent large sums of his father's money on debts he, not his father, owed to others, and that he had previously lied to and committed fraud before the bankruptcy and family courts.

Counsel repeatedly encouraged Fitzgerald about going to trial instead of explaining to him his severe sentencing exposure from enhanced penalty felonies. Counsel could not competently advise Fitzgerald about the likely sentence he could receive because his research about potential sentences primarily consisted of newspaper accounts of cases reported on the internet. Counsel failed to become aware of the only comparable case, which the State and the court relied on at sentencing, and therefore could not advise Fitzgerald that the defendant in that case received almost the same sentence imposed against Fitzgerald from the same judge.

Although the evidence of counsel's constitutionally defective performance was overwhelming, the superior court denied the Motion because

it misinterpreted the proof necessary to demonstrate prejudice. The court correctly recognized the standard for prejudice: but for counsel's ineffective advice there is a reasonable probability that (1) the defendant would have accepted the plea offer, (2) the prosecutor would not have withdrawn the plea offer, (3) the court would have accepted the plea terms, and (4) the sentence would have been less severe under the plea terms than under the judgment imposed. However, the court misinterpreted the law regarding the proof necessary to satisfy the third prong of the analysis and applied a heightened burden of proof.

The court found that Fitzgerald failed to demonstrate that it would have accepted the plea terms because he "offered no evidence of similar plea agreements in similar cases or any evidence to suggest that the court would have accepted the plea agreement." Rather than the heightened burden it imposed, the court should have applied the following test: if a defendant demonstrates that he would have accepted the State's plea offer, in the absence of evidence to prove otherwise, he has demonstrated a reasonable probability that the State would not have withdrawn the plea offer and the trial court would have accepted its terms. Moreover, even if the higher burden of proof was correct, the court erred when it found that two court orders did not prove a reasonable probability that the court would have accepted the plea terms.

Finally, the court erred when it found Fitzgerald was not prejudiced by counsel's failure to move to dismiss the indictments or object to jury instructions that included a sentencing enhancement that was not presented to the grand jury and included in the indictments. Fitzgerald had a right to be convicted only on indictments in which all the elements, including the sentencing enhancement, were presented to the grand jury.

Based on counsel's constitutionally defective advice at the plea-bargaining stage, this Court should vacate Fitzgerald's sentences, reinstate the State's pre-trial plea offer, and remand the case to the superior court with

instructions for the court to resentence Fitzgerald accordingly. Alternatively, this Court should grant Fitzgerald a new trial for counsel's failure to move to dismiss the indictments or object to the jury instruction that subjected Fitzgerald to an extended term of imprisonment because the sentencing enhancement was not presented to the grand jury.

ARGUMENT

I. The trial court erred and applied an incorrect legal standard when it found that Fitzgerald had not proven prejudice from defense counsel's constitutionally deficient performance when he failed to adequately advise Fitzgerald about the merits of the State's plea offer.

A. Standard of Review.

The legal standard for determining prejudice from defense counsel's constitutionally deficient performance at the plea-bargaining stage of a criminal case is a question of constitutional law, which this Court reviews *de novo*. *See State v. Hall*, 154 N.H. 180, 181 (2006).

B. The evidence was overwhelming that counsel's performance was constitutionally deficient.

Counsel's performance denied Fitzgerald the "reasonably competent assistance of counsel" guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *See Hall,* 160 N.H. at 584; *Strickland v. Washington,* 466 U.S. 668, 686 (1984). The test for ineffective assistance of counsel is two-pronged: (1) counsel's performance must be constitutionally deficient; and (2) the deficient performance must prejudice the outcome of the case. *Hall,* 160 N.H. at 584. The first prong requires "that counsel's representation fell below an objective standard of reasonableness[,]" *id.* (citations omitted), such that counsel "failed to function as the counsel the State Constitution guarantees." *State v. Collins*, 166 N.H. 210, 212 (2014).

The prejudice prong requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 213. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *State v. Brown,* 160 N.H. 408, 413 (2010) (quotation omitted)). The prejudice standard "is not stringent - it is, in fact, less demanding than the preponderance standard." *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011) (quotations omitted).

After charges are initiated, a defendant has the right to effective assistance of counsel at all critical stages of the proceedings. *Moran v. Burbine*, 475 U.S. 412, 431 (1986). Counsel's responsibility to competently advise a client extends to the plea-bargaining process, *Lafler v. Cooper*, 566 U.S. 156, 162 (2012), because "[t]he decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case … [and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision." *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996) (quotation omitted). "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies,* 332 U.S. 708, 721 (1948). In short,

> [i]f a plea bargain has been offered, a defendant has a right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Lafler, 566 U.S. at 168.

Counsel must explain the terms of the plea offer and describe the relative merits of the offer compared to the likelihood of success at trial. *Hall,* 160 N.H. at 585. Although not required under all circumstances to

explicitly advise a client whether to accept a plea offer, *id.* (citing *Purdy v. United States,* 208 F.3d 41, 45–46 (2d Cir.2000)), counsel is required to: (1) properly advise his client of the potential sentencing exposure if he is convicted at trial; and (2) provide sufficiently robust advice regarding the advisability of accepting a plea offer under the circumstances presented. *Carrion v. Smith*, 644 F.Supp.2d 452, 467 (SDNY 2009); *see also People v. Curry,* 687 N.E. 2d 877, 882 (Ill. 1997), *abrogated on other grounds by People v. Hale*, 996 N.E.2d 607, 614–15 (Ill. 2013) (recommendation to reject plea offer was predicated on plainly erroneous understanding of sentencing law instead of defensive strategy or judgment); *United States v. Gordon,* 156 F.3d 376, 380 (2d Cir.1998) (defense counsel grossly underestimated defendant's sentencing exposure); *Boria,* 99 F.3d at 494-97 (attorney neglected to discuss advisability of accepting offer); *State v. Kraus,* 397 N.W.2d 671, 672-73 (Iowa 1986) (inaccurate legal advice on elements of criminal charge prompted defendant to reject plea bargain); *Lewandowski v. Makel,* 949 F.2d 884, 888-89 (6th Cir. 1991) (counsel failed to inform defendant of significant aspects of the law).

Here, when the court considered Fitzgerald's claim that his counsel failed to provide him with reasonably competent advice regarding the merits of the State's plea offer, it focused on the prejudice prong of the ineffective assistance of counsel analysis. The court did not "address whether Attorney Hunt's advice was constitutionally deficient." Add. 12. In short - it was.

Counsel lacked experience when he assumed Fitzgerald's defense to five enhanced penalty theft indictments. Counsel had tried only one previous felony jury trial, a sexual assault case. Tr. 26. Counsel became friendly with Fitzgerald. Tr. 23. The combination led to counsel believing Fitzgerald, his scenario of events, and in his defense. Tr. 5. Counsel was sufficiently convinced of Fitzgerald's defense that after commencing the

representation he wrote a letter for Fitzgerald to provide to his creditors that included the following:

> Having reviewed the case and evidence, *I have concluded that Keith did, in fact, have the authority and consent from his father to use all of the funds at issue.* ...
>
> Because Keith has excellent prospects for earning in the future, given the right plea agreement, and because future income will be necessary to meet his obligations, *Keith will enter into a plea agreement only if the terms of such agreement allow him to remain at liberty and to continue work freely to earn such income.*

Tr. 5-7; App.93 (emphasis added).

Counsel shared with Fitzgerald his belief in the strength of his defense and encouraged him to go to trial. The day after providing him with the letter for his creditors, counsel sent Fitzgerald an email and a draft "counter-plea" in response to the State's plea offer that included no period of incarceration. The email states, "[a]s we have discussed in detail, you do not have to plead guilty at all, and you have a right to have a trial." App.91. The day after the Settlement Conference, counsel provided Fitzgerald with a copy of a letter to the prosecutor rejecting the State's plea offer and stating, "Keith has also not ruled out the possibility of trial, and there is substantial evidence that Keith was authorized by his father." App.93.

When the State rejected the counter-plea it advised counsel that its "current offer is essentially as low as the State is willing to go on a negotiated disposition." App.95. Counsel forwarded the email to Fitzgerald and reinforced his encouragement in another email:

> By the way, I am not in any way opposed to you taking this case to trial. You are aware of the risks,[1] but I do believe there is a very good chance that a jury would see that there is a reasonable doubt on

[1] As explained below, counsel had not made Fitzgerald aware of the risks of rejecting the State's plea offer.

> the issue of whether your father authorized you to have the money at issue.

App.94.

After Fitzgerald rejected the State's plea offer based on counsel's advice,[2] counsel exchanged emails with Fitzgerald that included the following: Fitzgerald - "I'm feeling good about our direction:-)." Counsel - "I am feeling good about it too." App.97. Counsel encouraged Fitzgerald to go to trial because counsel "always felt good about his defense." Tr. 9.

Rather than carefully evaluating the evidence and whether Fitzgerald should testify, counsel assumed Fitzgerald would testify. Counsel recognized that Fitzgerald's defense was based on his father authorizing him to use the funds. Tr. 14. Counsel believed that Fitzgerald was "very credible and very clear about his relationship with his father." Tr. 28. As early as the Settlement Conference, counsel told the court and the prosecutor that Fitzgerald would testify that he had provided his father with an accounting of the funds. Tr. 18. At the hearing on the Motion, counsel testified to his belief in Fitzgerald and his recognition of the importance of Fitzgerald's testimony:

> I think it would have been important for him to testify because he – his entire defense, from his perspective, was that he was authorized and he was – in some parts of his defense – was trying to help his father and trying to work with [him]. And he had – he had powers of attorney during different periods of times with his father. And there were facts that I believe Keith could testify to that were persuasive as to his relationship with his father and how good a relationship he had and how special it was between him and his father versus some of the other siblings.

Tr. 13-14.

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[2] The court found that counsel credibly testified that (1) he believed Fitzgerald would not receive a sentence of greater than three years even if convicted at trial, (2) if he realized the sentence might be significantly longer, he would have more strongly encouraged Fitzgerald to accept the State's plea offer, and (3) Fitzgerald relied on his advice. Add. 12 fn 1.

Counsel failed to competently evaluate the true impact of Fitzgerald's testimony. Counsel admitted that he did not discuss with Fitzgerald some, or maybe any, of the exhibits the State would use to eviscerate his credibility. Tr. 19-20. On cross-examination, Fitzgerald was forced to admit:

a. He spent $155,000 of his father's money to pay debts he owed to others. App.119-21.
b. He understood that he did not have the authority to make major gifts or transfers of his father's money. App.123-24.
c. None of his father's funds that he transferred into a charitable foundation he created, which performed no charitable works, was spent to benefit his father. App.125-28.
d. He purchased two airplanes with his father's money and when he later sold them, none of the sales proceeds went to his father. App.128-135.
e. He signed certifications that stated he was Trustee of Trust accounts that did not exist. App.135- 41.
f. He falsely declared income from the foundation that did not perform charitable works in a certification to a bankruptcy court. App.142- 44.
g. He lied to the family court about his income on multiple occasions. App.144- 46.
h. He hid money from the family court and defrauded it as to his assets. App.146.
i. He hid money from the bankruptcy court, thereby committing fraud on the bankruptcy court. App.147.

Fitzgerald's admissions sufficiently assisted the prosecution that the prosecutor commenced his closing argument as follows:

> This Defendant is a liar; is a con man and is a scam artist. He lied to the banks. He lied to the family court. He lied to the bankruptcy court. He lied to his siblings. He lied to his dad. He conned and scammed the bankruptcy and family courts to get what he wanted and now he's trying to lie and con you, too. Don't let him do it. Don't believe his excuses; his reasoning; his lies.

App.149.

Counsel admitted the following facts regarding his advice to Fitzgerald about testifying in his own defense and about the State's plea offer:

- He failed to anticipate the damage cross-examination would do to Fitzgerald's defense. Tr. 20.
- He would have strongly recommended to Fitzgerald that he not testify if he had anticipated the damage from the admissions. Tr. 21.
- The defense was undercut by Fitzgerald's inability to testify credibly. Tr. 21.
- When Fitzgerald elected to testify, he relied on counsel's advice. Tr. 44.
- If he had anticipated that Fitzgerald's testimony would go that poorly, he would have more strongly recommended that Fitzgerald accept the State's plea offer. Tr. 22.

It is unclear whether counsel understood the elements of the offenses and the maximum penalty for each indictment because of the extended term of imprisonment pursuant to RSA 651:6, I(*l*). It is plain, however, that counsel did not provide the information to Fitzgerald and ensure he understood it. Counsel testified that he does not believe he told Fitzgerald that he was subject to a maximum penalty of 150 years imprisonment. Worse, counsel did not explain to Fitzgerald the extended term statute, the language of which was not stated in the indictment. Tr. 37, 47-48. Counsel testified:

> I actually don't recall specifically talking to Keith about the distinction between the Class A felonies and the extended term. I don't recall having those conversations with him. And having reviewed the file, I don't see any documents where I spelled it out for him explicitly. ...
>
> I don't believe I got into the language of the extended term statute. I honestly have to say that I don't believe that I did or at least I don't recall doing that.

Tr. 37, 48.

In other words, counsel did not inform Fitzgerald of the charges pending against him or his maximum exposure. Because counsel did not inform Fitzgerald of the language of the sentencing enhancement and it was not stated on the indictment, Fitzgerald did not understand the enhanced penalty felonies with which he was charged. This fact, standing alone, exhibits ineffective assistance of counsel. It also is unmistakable that counsel could not have rendered competent advice regarding the State's plea offer, thereby allowing Fitzgerald to make an informed choice of whether to accept it. *See Kraus,* 397 N.W.2d at 672-73 (inaccurate legal advice on elements of criminal charge prompted defendant to reject plea bargain); *Lewandowski,* 949 F.2d at 888-89 (counsel failed to inform defendant of significant aspects of the law).

When counsel spoke to Fitzgerald about consecutive sentences, it was in the context of the plea offer, Tr. 26,[3] not his potential sentencing exposure. Tr. 48. Even when counsel vaguely told Fitzgerald that he could face a "very long period of time," he qualified the advice by reiterating that he

[3] The State's final plea offer consisted of two consecutive one-year sentences in the Belknap County House of Correction, followed by two consecutive one-year sentences of home confinement, with restitution and a suspended state prison sentence. App.101-02; Tr. 26.

thought Fitzgerald might receive a sentence of only three years even if convicted at trial. Add. 12 fn 1; Tr. 22-23.

Fitzgerald demonstrated that he did not understand the charges against him or the extended term provision when he exchanged emails with counsel only three days after trial and before sentencing. Tr. 49; App.105. Fitzgerald asked counsel: "Can you please give me the info on the last charge they found me guilty of? I can't find it in the other indictments." Counsel responded two days later: "It is not a separate charge. It is a sentence enhancement provision. That is the special felony aspect we discussed. Let's set up a time this week to talk or meet to discuss all of the issues you are raising." App.105. Although counsel's email included the phrase, "the special felony aspect we discussed[,]" counsel testified that he did not recall speaking with Fitzgerald about the extended term statute in advance of trial. Tr. 37, 48.

Counsel never appreciated Fitzgerald's sentencing exposure. Counsel testified that he "researched" sentences imposed in potentially similar cases primarily by examining newspaper accounts of cases published on the internet. Tr. 35-36. Before trial, counsel was unaware of the sentence imposed in the only case the court and the State found comparable – a case in which a defendant was convicted of similar theft charges,[4] involving a similar large sum of money, and in which the same judge had imposed virtually the same sentence he imposed against Fitzgerald. Tr. 24, 35. Counsel admitted that if he had been aware of the comparable case before trial, he would have shared that knowledge with Fitzgerald. Tr. 35.

In addition to failing to ensure Fitzgerald understood the charges and his maximum sentencing exposure, counsel did not provide Fitzgerald with a comprehensive evaluation of the evidence against him or reasonably evaluate the State's plea offer in relation to the strength of the evidence against him.

[4] Although in that case, *State v. Gagne*, 165 N.H. 163 (2013), the defendant was not convicted of an extended term of imprisonment provision.

Because counsel failed to anticipate the cross-examination material and its impact, he believed that Fitzgerald's testimony provided a good defense. Tr. 5. He also did not review the evidence in support of the cross-examination material with Fitzgerald. Tr. 19-20.

Fitzgerald was "entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *See Von Moltke,* 332 U.S. at 721. Here, counsel did not fulfill his obligation to describe the relative merits of the State's offer compared to Fitzgerald's chances for success at trial. *See Hall,* 160 N.H. at 585. Due to these egregious flaws in counsel's performance identified above, counsel was incapable of providing Fitzgerald with competent advice about the merits of the State's plea offer. The evidence is overwhelming that Fitzgerald did not receive reasonably competent assistance of counsel at the critical plea-bargaining stage of the proceedings.

C. The superior court misapprehended the law regarding the proof necessary to demonstrate a reasonable probability that the court would have accepted the terms of the State's plea offer.

1. When a defendant demonstrates a reasonable probability that he would have accepted the State's plea offer, in the absence of evidence to prove otherwise, he has demonstrated a reasonable probability that the court would have accepted the plea terms.

When it considered Fitzgerald's claim that he received ineffective assistance of counsel at the plea-bargaining stage of the proceeding, the trial court correctly stated that this Court has not addressed the standard for the prejudice prong of the analysis. Add. 10. The trial court also correctly identified the test articulated by the United States Supreme Court: but for counsel's ineffective advice there is a reasonable probability that (1) the

defendant would have accepted the plea offer, (2) the prosecutor would not have withdrawn the plea offer, (3) the court would have accepted the plea terms, and (4) the sentence would have been less severe under the plea terms than under the judgment imposed. *Id.* (citing *Lafler*, 566 U.S. at 164).

The court "assume[d] without deciding that Attorney Hunt's testimony would support a finding that the plea offered by the State would have been presented to the court and that the negotiated sentence would have been less severe than the sentence actually imposed by the court." Add. 11-12. However, the court rejected Fitzgerald's claim and found his proof deficient because he "offered no evidence of similar plea agreements in similar cases or any evidence to suggest that the court would have accepted the plea agreement." *Id.* at 12. The trial court misinterpreted *Lafler* and applied an incorrect, heightened burden of proof to Fitzgerald's claim.

In *Lafler*, the Supreme Court found that Lafler demonstrated that "but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea." 566 U.S. at 174. The sole support for the Supreme Court's finding is the Sixth Circuit Court of Appeals opinion in which that court relied only on Lafler's "own self-serving statement" and rejected the prosecution's argument that additional evidence was required:

> Moreover, petitioner was prejudiced by his counsel's deficient performance. He testified that, had he known that a conviction for assault with intent to commit murder was possible, he would have accepted the State's offer. Nevertheless, although this evidence is uncontradicted, the State suggests that the petitioner cannot show prejudice with his own "self-serving statement." There is no legal basis for us to impose a requirement that habeas petitioners provide additional evidence, and we have declined to create this rule in the past. To do so would contradict the Supreme Court's holdings that petitioner need only establish a "reasonable probability" that the result would have been different.

Cooper v. Lafler, 376 Fed.Appx. 563, 571-72 (6th Cir. 2010) (internal citations omitted). Thus, *Lafler* should be read to impose the following

burden of proof to demonstrate prejudice when a defendant has rejected a plea offer because of counsel's deficient advice: if a defendant demonstrates a reasonable probability that he would have accepted the State's plea offer, in the absence of evidence to prove otherwise, he has demonstrated a reasonable probability that the State would not have withdrawn the plea offer and the court would have accepted its terms.

The same day the Supreme Court decided *Lafler*, it also decided *Missouri v. Frye*, 566 U.S. 134 (2012). In *Frye*, the Supreme Court acknowledged that for most defendants the plea-bargaining stage of their case is when effective assistance of counsel is most critical:

> Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. … "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a Trial, is almost always the critical point for a defendant.
>
> To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less ... might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"

Id. at 143-44. The Supreme Court then described the framework within which a court should determine whether there was is a reasonable probability that the trial court would have accepted the plea terms:

> It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

Id. at 149.

Frye reinforces that the relevant inquiry for a defendant to satisfy the non-withdrawal and acceptance of the plea offer prongs of *Lafler* is whether there is evidence to prove that the prosecution would have withdrawn the plea offer or the court would not have accepted the plea terms. Other courts have interpreted *Lafler* and *Frye* as requiring the burden of proof as described above: if a defendant demonstrates that a reasonable probability that he would have accepted the State's plea offer, in the absence of evidence to prove otherwise, he has demonstrated a reasonable probability that the State would not have withdrawn the plea offer and the trial court would have accepted its terms. *See Woods v. State*, 48 N.E.3d 374, 383 (Ind. 2015); *Green v. Attorney General, State of Florida*, 193 F.Supp.3d 1274, 1287-88 (M.D.Fla. 2016); *Ebron v. Commissioner of Correction*, 307 Conn. 342, 360-61 (2012); *Contreras v. United States*, 2017 WL 9618363 *17-18 (S.D. Tex. 2017); *Hudson v. Harrington*, 2014 WL 4244255 *9 (N.D. Ill. 2014); *Rodriguez v. Texas,* 470 S.W.3d 823, 828-29 (Tex.Crim.App. 2015). Moreover, absent evidence of a particular judge's significant deviation from normal practice, a defendant is

not required to prove that a particular trial judge would have accepted the plea terms. *Ebron*, 307 Conn. at 360-61.

Here, the trial court eschewed the inquiry developed in *Frye* and found that Fitzgerald failed to satisfy the burden of proof because he "offered no evidence of similar plea agreements in similar cases or any evidence to suggest that the court would have accepted the plea agreement." Add. 12. Under the proper interpretation of *Lafler* and *Frye*, Fitzgerald satisfied his burden of proof because there was no evidence that the superior court would have rejected the plea terms offered by the State.[5] If counsel had adequately explained the indictments, including the extended term of imprisonment, the sentencing exposure, and the strength of the State's case, Fitzgerald would have accepted the State's plea offer.[6] Even with counsel's constitutionally deficient advice, Fitzgerald considered accepting a sentence that included incarceration while the plea offer was available. App.93.

However, as the evidence objectively demonstrates, Fitzgerald rejected the State's plea offer upon the advice of counsel. Counsel testified that Fitzgerald relied on his opinion in rejecting the plea offer:

- Because of the relationship they developed, Fitzgerald respected counsel, listened to his opinions, and relied on counsel's opinions, including regarding sentencing expectations. Tr. 23-24.

- "I gave him the impression, as his attorney, that I didn't believe it was going to be as severe as it was. So I had to sit here today honestly and say, that I think Keith relied on that." Tr. 35.

- Although Fitzgerald ultimately made the decision not to accept

[5] In the succeeding section of this brief, Fitzgerald will explain that the superior court had before it evidence, two court Orders, that prove a reasonable probability that the court would have accepted the plea terms.

[6] Counsel testified that, if he had perceived the risk that Fitzgerald could have received the lengthy sentence actually imposed, he would have more strongly recommended the State's plea offer to Fitzgerald and that Fitzgerald relied on his advice, including about sentencing expectations. Tr. 22, 23-24, 33-34.

a plea, "Keith relied on me, and I gave him the impression that even if he was unsuccessful – although I thought we could be successful – that the sentence that he received would not be anywhere near as significant as it was." Tr. 33-34.

The trial court erred when it found Fitzgerald was not prejudiced by counsel's constitutionally deficient performance when he relied upon counsel's advice and rejected the State's plea offer. *See Lafler*, 566 U.S. at 168.

2. Even if the burden of proof applied by the superior court was correct, the court overlooked that its prior Orders are sufficient to satisfy the heightened burden of proof.

Assuming arguendo that the trial court did not err when it interpreted *Lafler* as requiring a defendant to produce affirmative proof of a reasonable likelihood that the court would have accepted the terms of the plea offer, the court erred and unsustainably exercised its discretion when it found that Fitzgerald had not produced such proof. The two Orders issued by the court after a Settlement Conference provide a reasonable likelihood that the court would have accepted the terms of the plea offer.

On August 22, 2016, the trial court (Fauver, J.) conducted a Settlement Conference with the parties. When a plea agreement was not reached, the parties entered into an Agreement "[t]o continue the Settlement Conference ... to allow the Defendant time to consider the State's current [plea] offer." App.87. Judge Fauver approved the Agreement and entered it as an Order. Having presided over the Settlement Conference, Judge Fauver had full knowledge of the State's plea offer. His approval of the Agreement states Fitzgerald is allowed time to consider the plea offer, rather than stating that the parties seek to continue negotiating. App.87. The Order establishes a reasonable probability that the court would have accepted the plea terms.

The other Order issued by Judge Fauver following the Settlement Conference provides additional proof of a reasonable probability that the court

would have accepted the plea terms. The parties submitted a Motion for Continuance of Pretrial and Trial. The facts stated in the motion include: "[t]he State and defendant are in agreement that the defendant have some time to consider the State's current offer ... [and] [t]he next dates Judge Fauver is [sic] available for plea and sentencing are ...." The parties jointly requested that "[p]lea and sentencing be scheduled for ...." App.89.

The superior court rejected Fitzgerald's claim regarding the advice he received during the plea-bargaining stage of the proceedings based on a finding that the evidence was insufficient to demonstrate that the court would have accepted the terms of the plea offer. Add. 12. Assuming arguendo that the court applied the correct burden of proof on the issue, the two Orders issued following the Settlement Conference establish a reasonable probability that the State would have left the plea offer open and the court would have accepted the plea terms.

Accordingly, even if the burden of proof on the issue of a reasonable probability that the court would have accepted the plea terms is heightened as the superior court found, Fitzgerald satisfied the burden of proof through the two August 22, 2016 Orders. The trial court erred and unsustainably exercised its discretion when it found that Fitzgerald was not prejudiced by counsel's deficient performance because had not produced proof of a reasonable likelihood that the court would have accepted the plea terms.

D. The remedy for ineffective assistance at the plea-bargaining stage is to vacate the sentences and reinstate the State's final plea offer.

"Sixth Amendment remedies should be 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'" *Lafler*, 566 U.S. at 170 (quoting *United States v. Morrison*, 449 U.S. 361, 364 (1981)). The remedy should cure the harm from the constitutional violation while neither granting the defendant a windfall

nor wasting the resources the State expended in the prosecution. *Id.* Here, the specific harm occasioned Fitzgerald by his counsel's constitutionally deficient performance in failing to adequately advise him about the benefits of the plea offer and the strength of the State's case was not an unlawful conviction. It was the loss of a lesser sentence as a result of the unprofessionally counseled rejection of the State's plea offer.

Under the circumstances, Fitzgerald is not entitled to a new trial. Instead, the just remedy that neither disproportionately rewards Fitzgerald nor disadvantages the State is to afford Fitzgerald the benefit of the State's last plea offer. *See id.* at 171; *Carrion*, 644 F.Supp.2d at 474; *Williams v. State*, 605 A.2d 103, 110-11 (MD 1992); *Lewandowski,* 949 F.2d at 888-89.

This Court should vacate Fitzgerald's sentences and remand the case to the superior court with instructions that Fitzgerald should be allowed to accept the State's final plea offer, and the court should sentence Fitzgerald accordingly.

II. Fitzgerald was prejudiced by counsel's deficient performance in failing to object to the State's inclusion of a sentencing enhancement as an element of the offenses that had not been presented to the grand jury for indictment.

A. Standard of Review

The question of whether counsel's performance was constitutionally deficient when he failed to object to a sentencing enhancement that had not been presented to the grand jury and included in the five indictments is one of constitutional law, which this Court reviews *de novo*. *See Hall*, 154 N.H. at 181.

B. Counsel should have objected to the sentencing enhancement because it was not presented to the grand jury.

Fitzgerald was indicted on five counts of theft by unauthorized taking in violation of RSA 637:3. The charges allege that Fitzgerald obtained or

exercised unauthorized control of his father's assets with a purpose to deprive him thereof. The following appears near the bottom of each indictment:

RSA: 637:3 (Class A Felony); 651:6

Penalty: NHSP 7½ --15 years and up to $4,000 fine.

After Fitzgerald entered a not guilty plea and waived arraignment, the State informed his counsel of its initial plea offer and provided notice of its intention to offer evidence at trial pursuant to N.H. Rule of Evidence 404(b). App.103. The letter identifies another purpose: "to notify [Fitzgerald] of the possible application of RSA 651:6 to each of the five indictments in this case based on RSA 651:6, I(*l*)." After Fitzgerald's original counsel withdrew his appearance and Attorney Hunt counsel appeared, the prosecutor sent an email to counsel to which the letter was attached.

Counsel failed to object to the inclusion of the sentencing enhancement as an element of the offenses for the jury's deliberation despite the fact that the sentencing enhancement was not presented to the grand jury and stated in the indictments. Counsel's performance was constitutionally deficient because allowing the jury to consider an element of an offense that had not been presented to a grand jury violated Fitzgerald's right to a grand jury indictment pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions. Counsel testified that he did not raise the issue because he was unaware of the challenge. Tr. 25-26.

Part I, Article 15 of the State Constitution provides that "[n]o subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him." In *State v. Cheney*, this Court stated in pertinent part:

> To meet this constitutional standard, an indictment must inform a defendant of the offense with which he is charged with sufficient specificity to enable him to prepare for Trial and at the same time protect him from being placed in jeopardy a second time for the

> same offense. *See Marshall,* 162 N.H. at 661, 34 A.3d 540. It is not enough merely to state the crime with which a defendant is being charged; the indictment must include the elements of the offense with sufficient allegations to identify the offense in fact. *Id.*; *see also State v. Shute,* 122 N.H. 498, 504, 446 A.2d 1162 (1982). ... An indictment that fails to allege all the elements of the offense cannot provide sufficient notice. *See In re Alex C.,* 158 N.H. 525, 528, 969 A.2d 399 (2009).

Cheney, 165 N.H. 677, 679 (2013).

The United States Supreme Court has recognized the "well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Alleyne v. United States*, 570 U.S. 99, 109-10 (2013). "[A]ny 'facts that increase the prescribed range of penalties to which a criminal defendant is exposed' are elements of the crime." *Id.* at 111 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). A fact that alters the sentencing range for an offense must be stated in the indictment because the fact "produces a new penalty and constitutes an ingredient of the offense." *See id.* at 112 (citations omitted). Thus, while sentencing enhancements like recidivism that merely are historical facts about the defendant need not be alleged in the indictment, *see, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998), facts that are elements of the charged crime must be alleged in the indictment to satisfy due process and the Sixth Amendment to the Federal Constitution. *See Alleyne*, 570 U.S. at 112.

Here, counsel admitted that he did not move to dismiss the indictments or object to the jury instruction on the extended term because he did not recognize the legal challenge of failing to present the sentencing enhancement to the grand jury. Tr. 25-26. Because counsel failed to raise the issue on Fitzgerald's behalf, appellate counsel could pursue the issue only in the context of the plain error rule. *See* Sup. Ct. R. 16-A. Under its plain error rule, this Court summarily dismissed the claim as follows:

> In *State v. Marshall*, 162 N.H. 657 (2011), we observed that whether the Federal and State Constitutions require that sentence enhancement factors be alleged in an indictment is an open question. *State v. Marshall*, 162 N.H. 657, 664-65 (2011). Moreover, the Federal Grand Jury Clause does not apply to the states. *Id.* at 665. Accordingly, we conclude that, to the extent that the Trial court may have erred in imposing an extended sentence, any error was not plain. *See, e.g., Noucas*, 165 N.H. 146, 161 (2013) (error is plain if governing law was clearly settled to the contrary at time action was taken).

State v. Fitzgerald, Case No. 2017-0328, Order dated July 6, 2018, pp. 5.

Although Fitzgerald could not satisfy the plain error standard because the law is not well-settled, *see State v. Lopez*, 156 N.H. 416, 424 (2007), that is not the applicable standard for an ineffective assistance of counsel claim. A criminal defendant is guaranteed "reasonably competent assistance of counsel" pursuant to Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. *Hall,* 160 N.H. at 584; *Strickland,* 466 U.S. at 686. An attorney's performance is constitutionally deficient if the "representation fell below an objective standard of reasonableness." *Id.* (citations omitted).

The United States Supreme Court decided *Apprendi* eighteen years ago. This Court decided *Marshall* seven years ago. *Alleyne* and *Cheney* were decided five years ago. It has been almost twenty-nine years since this Court held: "Part I, article 15 guarantees that a defendant can only be convicted of a crime charged in a grand jury's indictment." *State v. Elliott*, 133 N.H. 759, 764 (1990). In *State v. Glanville*, this Court cautioned that a judge cannot amend an indictment through jury instructions and stated that:

> [a]n impermissible amendment would be one that effects a change in the offense charged, or adds an offense. Because an element of the offense charged is automatically considered part of the substance of an indictment, instructing the jury on an element not charged by the grand jury substantively changes the offense and therefore is grounds for automatic reversal.

145 N.H. 631, 633 (2000).

Competent counsel would have challenged the State's failure to seek from the grand jury indictments that included all the elements of the offenses with which Fitzgerald was charged and could be sentenced. Counsel did not raise the issue because he was unaware of it, and Fitzgerald was prejudiced by his attorney's constitutionally deficient representation, which included failing to explain the extended term statute, the language of which was not stated in the indictments, to Fitzgerald. Tr. 37, 47-48. Fitzgerald was convicted of crimes not presented to, or indicted by, a grand jury, and thereafter sentenced to enhanced terms of imprisonment despite the sentencing enhancements having not been presented to a grand jury.[7]

The trial court erred when it found that, assuming Fitzgerald received constitutionally deficient assistance from counsel on this issue, he was not entitled to relief because he could not demonstrate prejudice from counsel incompetent performance. Add. 9. Specifically, the superior court found that Fitzgerald "has not presented any evidence to show the court's sentence without the extended sentence of imprisonment would not have been similar to the sentence received or that the sentence would have been different if not for the sentence enhancement." *Id.*

The trial court's instruction substantively changed the indictment by adding an element not charged by the grand jury, the sentence enhancement. The substantive addition of the sentencing enhancement, having not been charged by the grand jury, "is grounds for automatic reversal." *See Glanville*, 145 N.H. at 633. Fitzgerald's convictions should be vacated because his attorney provided ineffective assistance of counsel in violation of Part I, Article 15 of the New Hampshire Constitution and the

[7] The sentencing enhancement increased the maximum penalty for each offense from 7½-15 years to 10–30 years.

Sixth and Fourteenth Amendments to the United States Constitution by his failure to challenge the indictments and the trial court's instruction because the grand jury did not return indictments that alleged all of the elements of the offenses of which Fitzgerald was convicted and sentenced.

CONCLUSION

Defendant Keith Fitzgerald was denied reasonably competent assistance of counsel guaranteed by Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Trial counsel's performance was constitutionally deficient and Fitzgerald was prejudiced thereby when counsel failed to provide reasonably competent assistance of counsel at a critical stage of the proceedings, the plea-bargaining stage. This Court should order the remedy that neither provides Fitzgerald a windfall nor wastes the State's resources. The Court should vacate Fitzgerald's sentences, order the State's pre-trial plea offer reinstated, and remand the case to the superior court for resentencing.

Alternatively, the Court should grant Fitzgerald a new trial because counsel did not provide reasonably competent assistance of counsel when he failed to move to dismiss the indictments or object to the jury instruction that subjected Fitzgerald to an extended term of imprisonment when the sentencing enhancement had not been presented to the grand jury.

Oral Argument

Mr. Fitzgerald requests 15 minutes for oral argument before the full Court. Oral argument may be helpful to the Court in deciding this appeal, which presents a question of first impression, a novel question of law, an issue of broad public interest, and an important state and federal constitutional matter.

Respectfully submitted,
KEITH C. FITZGERALD
By his counsel,

Dated: September 13, 2019

By: /s/ Michael D. Ramsdell

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CERTIFICATE OF SERVICE

On this 13th day of September, 2019, this brief, which complies with Supreme Court Rule 16(11) because it contains 9,499 words, excluding the table of contents, table of citations, and addenda, was forwarded to Assistant Attorney General Jesse O'Neill through the Court's electronic filing system.

/s/ Michael D. Ramsdell
Michael D. Ramsdell

ADDENDUM TO BRIEF

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS. **SUPERIOR COURT**

The State of New Hampshire

v.

Keith Fitzgerald

No. 2015-CR-276

ORDER

The defendant, Keith Fitzgerald, was tried on five counts of theft by unauthorized taking. The jury returned guilty verdicts on all counts. Before the court is the defendant's motion for new trial based on ineffective assistance of counsel. The state objects. The court held an evidentiary hearing on the motion on January 25, 2019. Because the defendant has failed to sustain his burden of showing that the outcome of his case would be different but for his counsel's performance, his motion is DENIED.

On or about December 3, 2015, the defendant was indicted on five counts of theft by unauthorized taking in violation of RSA 637:3. The following appears near the bottom of each indictment "RSA: 637:3 (Class A Felony); 651:6" and "Penalty: NHSP 7 1/2 - - 15 years and up to $4,000 fine." The defendant was represented at trial by Attorney Rob Hunt. The defendant retained Attorney Hunt on March 8, 2016 after the defendant's prior counsel withdrew. The defendant's ineffective assistance claim only deals with Attorney Hunt's representation. Before this trial, Attorney Hunt had tried only one felony jury trial, a sexual assault case.

Leading up to the trial, Attorney Hunt, the defendant, and counsel for the state engaged in numerous plea discussions. The state offered a plea agreement, through the defendant's previous counsel, in January 2016 of five to ten years, stand committed, with restitution in the amount of

$409,980 on one indictment and suspended incarceration on the four remaining indictments. State's Exh 4. The letter containing the plea offer also purported "to notify [the defendant] of the possible application of RSA 651:6 to each of the five indictments in this case based on RSA 651:6, I(l)." Def.'s Mot. for New Trial, Exh. 1. RSA 651:6, I(l) states an individual may be sentenced pursuant to RSA 651:6, III if the individual:

> Has committed or attempted to commit any of the crimes defined in RSA 637 or RSA 638 against a victim who is 65 years of age or older or who has a physical or mental disability and that in perpetrating the crime, the defendant intended to take advantage of the victim's age or mental condition that impaired the victim's ability to manage his or her property or financial resources or to protect his or her rights or interest.

In June 2016, Attorney Hunt drafted a counter-offer that included the following terms: payment of $409,980 in restitution on a schedule of the defendant's choosing; a plea of guilty to all counts reduced to Class A misdemeanors; one year in the house of corrections on each count, all suspended; and community service. Def.'s Exh. B. Before forwarding the counter-offer to the state, Attorney Hunt emailed it to the defendant. In the email, he stated, "As we have discussed in detail, you do not have to plead guilty at all, and you have a right to have a trial." *Id.*

After a settlement conference in August 2016, Attorney Hunt asked the state to reiterate its most recent plea offer presented at the settlement conference. The state provided the plea offer via e-mail: the defendant would plead guilty to each of the five pending charges and subsequently serve two years in the Belknap County house of corrections, followed by two years on administrative home confinement. Additionally, the defendant would have a four to ten-year suspended sentence with a window of ten years after completion of his final year of home confinement. Def.'s Exh. H. Attorney Hunt responded to this offer with the counter-offer he and the defendant discussed in June 2016. *See* Def.'s Exh. B. The state rejected the defendant's counter-

offer, indicating that its offer was "essentially as low as the State is willing to go on a negotiated disposition." Def.'s Exh. D.

Attorney Hunt forwarded the state's e-mail to the defendant and, in the ensuing string of e-mails between the two, wrote that he was not "in any way opposed to [the defendant] taking this case to trial." *Id.* Attorney Hunt indicated that he believed there was a very good chance that a jury would see there is reasonable doubt on the issue of whether the defendant's father authorized him to have the money at issue. *Id.* In October 2016, the defendant told Attorney Hunt in an email that he was feeling good about their "direction" for the trial. Attorney Hunt responded, "I am feeling good about it too." Def.'s Exh. E.

At trial, the jury heard the following evidence. In 2010, the defendant made a number of transactions using his father's assets without the knowledge of his father or the defendant's siblings. During the summer of 2010, the defendant obtained his father's durable power of attorney with his brother as a joint-attorney-in-fact. While holding durable power of attorney, the defendant moved his father's assets from accounts and trusts in his father's name to bank accounts in only the defendant's name and a charitable foundation the defendant founded. The defendant's father died in early fall of 2010. The jury heard testimony from three of the defendant's siblings during the state's case-in-chief and heard evidence of the financial situation and records of the transactions. The defendant also took the stand in his own defense, testifying that the transactions were authorized by his father. On cross-examination, the state elicited many damaging admissions, including: (1) the defendant spent some of his father's money to pay personal debts; (2) the defendant understood that he did not have the authority to make major gifts or transfers of his father's money; (3) none of the father's funds transferred into a charitable foundation the defendant created were spent to benefit the father; (4) the defendant purchased two airplanes with his

father's money and, when he sold said airplanes, he did not give the proceeds of the sales to his father; (5) the defendant signed certifications that stated he was trustee of trust accounts that did not exist; (6) the defendant falsely declared income from the foundation that did not perform charitable works in a certification to a bankruptcy court; (7) the defendant lied to the family court about his income; (8) the defendant hid money from the family court and defrauded it as to his assets; and (9) the defendant hid money from the bankruptcy court. Def.'s Post-Hearing Memo. 7, citing Trial Transcript at 827, 828–29, 831–32, 847–49, 850–57, 857–63, 867–70, 885–86. Despite having many of the documents the state used to elicit these admissions, Attorney Hunt did not go over these documents with the defendant, nor did he discuss with the defendant their potential effect on the jury's evaluation of his testimony.

Because the state had noticed the sentence enhancement of RSA 651:6, the jury was instructed to determine whether the victim, the defendant's father, was 65 years old or older and whether the defendant, in perpetrating a crime under RSA 637:3, intended to take advantage of the victim's age. The jury returned verdicts of guilty on the five counts of theft by unauthorized taking. Additionally, the jury specified that it had determined that the state had proved the sentencing enhancement factors beyond a reasonable doubt.

After his convictions, the defendant sent an e-mail to Attorney Hunt with the subject line "Elder Abuse (over 65 years old charge)?" which stated, in part:

> Hi Rob,
> Can you please give me the info on the last charge they found me guilty of?
> I can't find it in the other indictments.

State's Exh. 6. Attorney Hunt responded, "It is not a separate charge. It is a sentence enhancement provision. That is the special felony aspect we discussed. Let's set up a time this week to talk or meet to discuss all of the issues you are raising." *Id.* The court subsequently sentenced the

defendant to an extended term of imprisonment of not less than nine and a half years and not more than twenty-five years at the New Hampshire State Prison. *See* RSA 651:6(I).

In support of his request for a new trial, the defendant presented the testimony of Attorney Hunt. He testified at length about his relationship with the defendant and the advice he gave. During the course of his representation, Attorney Hunt became friendly with the defendant and believed in the defendant, his scenario of events, and his defense. Attorney Hunt also recognized that the defendant's defense was based on his father authorizing him to use the funds. This defense involved the defendant's testimony. Indeed, as early as the first settlement conference, Attorney Hunt indicated that the defendant would likely testify.

When asked about the defendant's cross-examination and the admissions the defendant made, Attorney Hunt testified that he did not discuss with the defendant some of the exhibits the state would use to attack the defendant's credibility. He also testified that he failed to anticipate the damage that the state's cross-examination would do to the defendant's defense. If he had anticipated the damage, he would have strongly recommended the defendant refrain from testifying. Attorney Hunt believed the defendant relied on his advice in making the decision to testify. Attorney Hunt also indicated that he also might have more strongly recommended that the defendant accept the state's plea offer if he had anticipated the damage that might have resulted from the defendant's testimony.

With respect to Attorney Hunt's advice regarding the plea deal and the defendant's sentencing exposure, Attorney Hunt did not recall if he went over the potential of the extended term of imprisonment with the defendant. Attorney Hunt recalled telling the defendant what the felonies were, going over the language in the statute regarding the minimum and maximum penalties of Class A felonies, and telling the defendant that there was an enhancement in addition to the

minimum and maximum penalties. The defendant's potential sentencing exposure was 150 years instead of 75 years due to the RSA 651:6 sentencing enhancement. Attorney Hunt told the defendant he was potentially facing a very long period of incarceration; however, Attorney Hunt thought it unlikely that the defendant would receive a sentence of more than three years even if convicted at trial. Attorney Hunt testified that he believes he gave the defendant the impression that even if he went to trial, and lost, that the sentence he might receive would not be anywhere near as significant as it was.

In the instant motion, the defendant asserts that his trial counsel was ineffective. In support, the defendant cites Part I, Article 15 of the New Hampshire Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. Under Part I, Article 15 of the New Hampshire Constitution, a criminal defendant is guaranteed "reasonably competent assistance of counsel." *State v. Brown*, 160 N.H. 408, 412 (2010). As the state Constitution offers at least as much protection as the federal Constitution, the court will analyze the defendant's claims under the New Hampshire Constitution, using federal cases for guidance. *Grote v. Powell*, 132 N.H. 96, 100 (1989). When analyzing a claim of ineffective assistance of counsel, the "analysis is the same under both the Federal and State Constitutions." *State v. Anaya*, 134 N.H. 346, 351 (1991); *Grote*, 132 N.H. at 100. Both constitutions "measure the defendant's right to assistance of counsel under an objective standard of reasonable competence." *State v. Wisowaty*, 137 N.H. 298, 301 (1993). To succeed on a claim of ineffective assistance of counsel, "a defendant must first show that his counsel's representation was constitutionally deficient, and, second, that counsel's deficient performance actually prejudiced the outcome of the case." *State v. Kepple*, 155 N.H. 267, 269–70 (2007).

When applying the first prong, courts begin with a strong presumption that counsel's conduct was reasonable, given the "limitless variety of strategic and tactical decisions that counsel must make." *State v. Faragi*, 127 N.H. 1, 5 (1985). "To satisfy the first prong, the defendant must show that counsel made such egregious errors that he or she failed to function as the counsel guaranteed by the State Constitution." *State v. McGurk*, 157 N.H. 765, 769 (2008). Importantly, the court "will not second-guess the tactical decisions of defense counsel." *State v. Dennehy*, 127 N.H. 425, 428 (1985), quoting *State v. Guaraldi*, 124 N.H. 93, 98 (1985).

> Judicial scrutiny of counsel's performance must be highly deferential. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Brown, 160 N.H. at 412–13, quoting *State v. Whittaker*, 158 N.H. 762, 769 (2009); *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984).

To satisfy his burden on the second prong, "the defendant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Brown*, 160 N.H. at 413. A reasonable probability is a probability that is "sufficient to undermine confidence in the outcome." *Id.*, quoting *State v. Sharkey*, 155 N.H. 638, 641 (2007). In making this determination, the court considers "the totality of the evidence presented at trial." *Id.*, quoting *State v. Kepple*, 155 N.H. 267, 270 (2007). In showing there is a reasonable probability that the result of the proceeding would have been different, the defendant must show that the verdict would have been different but for his counsel's deficient performance. *State v. Chase*, 135 N.H. 209, 212 (1991); *see also Kimmelman v. Morrison*, 477

U.S. 365, 375 (1986) ("[T]he defendant must prove ... there is a reasonable probability that the verdict would have been different ... in order to demonstrate actual prejudice").

"A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective." *Brown*, 160 N.H. at 412. The preferable course in a challenge based on ineffective assistance of counsel is to require the defendant to prove as a threshold matter that the alleged error by counsel prejudiced his case. *Wisowaty*, 137 N.H. at 302. If the defendant cannot demonstrate such prejudice, "[the court] need not even decide whether counsel's performance fell below the standard of reasonable competence." *Id.* For this reason, the court will address the issue of prejudice first with respect to each of the defendant's claims and address the performance issue only if the defendant satisfies the threshold inquiry. *Wisowaty*, 137 N.H. at 302 ("Courts, however, have the flexibility to adopt the analytic approach that promotes clarity and ease of review.").

Having established the standard of review, the court turns to the defendant's claims. The defendant advances three grounds of ineffectiveness. First, the defendant argues that Attorney Hunt failed to object to the state's inclusion of sentencing enhancement as an element when it had not been presented to the grand jury for indictment. Second, the defendant argues that Attorney Hunt provided inadequate advice regarding the state's plea offer. Third, the defendant asserts that Attorney Hunt provided inadequate advice regarding whether the defendant should testify in his own defense. The court is not persuaded.

The first argument concerns the sentence enhancement. The defendant asserts that facts that are elements of a charged crime must be alleged in the indictment. Thus, counsel should have raised the issue of whether the RSA 651:6 sentencing enhancement factors should have been presented to the grand jury and included in the indictments as elements. The defendant

asserts he was prejudiced because he was convicted of, and sentenced for, crimes not presented to or indicted by a grand jury. The court is not convinced.

The defendant has failed to show that, even if this failure rendered his counsel's representation constitutionally deficient, this failure prejudiced him. For each indictment, the defendant's potential sentencing exposure was seven and a half to fifteen years. Without the extended term of imprisonment, the defendant's total sentencing exposure was thirty-seven and a half to seventy-five years. The defendant's sentence of nine and a half to twenty-five years falls squarely within his sentencing exposure based solely on the Class A Felony charges without the extended term of imprisonment. The defendant has not presented any evidence to show the court's sentence without the extended term of imprisonment would not have been similar to the sentence received or that the sentence would have been different if not for the sentence enhancement. Therefore, even assuming, *arguendo*, that trial counsel's performance was constitutionally deficient, the defendant has not sustained his burden on the second prong of his ineffective assistance claim—that his trial counsel's conduct prejudiced the outcome of the case.

The defendant next asserts that Attorney Hunt provided inadequate advice regarding the state's plea offer. Specifically, he argues that Attorney Hunt's advice regarding the defendant's likely exposure after a trial and a guilty verdict was constitutionally deficient and that he relied on this advice when he rejected the plea offer. The defendant claims actual prejudice because he received a substantially longer sentence compared to the sentence he would have served had he accepted the plea offer.

"In the plea agreement context, prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *State v. Hall*, 160 N.H.

581, 585 (2010), quoting *Van Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (internal quotations and brackets omitted). "Counsel must not only communicate the terms of the plea offer to his client, but also the relative merits of the offer as compared to the client's chances for success at trial." *Id.*, citing *State v. Bristol*, 159 Vt. 334 (Vt. 1992). "However, reasonable professional conduct does not, under all circumstances, require an attorney to provide an explicit opinion as to whether a client should accept a plea offer." *Id.*, citing *Purdy v. United States*, 208 F.3d 41, 45–46 (2d Cir. 2000).

While the New Hampshire Supreme Court has addressed counsel's failure to inform a defendant of consequences collateral to a guilty plea in the context of ineffective assistance of counsel claims, *see Sharkey*, 155 N.H. at 642, it has not addressed how to analyze the prejudice prong of an ineffective claim where ineffective assistance results in a rejection of a plea offer. The United States Supreme Court, however, addressed this issue in *Lafler v. Cooper*, 566 U.S. 156 (2012). Specifically, the court addressed how to apply the second prong of the *Strickland* test—the prejudice prong—where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. *Lafler*, 566 U.S. at 163. The court explained:

> [A] defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler, 566 U.S. at 164. In reference to ineffective assistance of counsel claims under the state and federal constitutions, the New Hampshire Supreme Court has explained that "the analysis and result is the same under each constitution," and the "State and federal standards are identical." *Grote*, 132 N.H. at 100. Accordingly, *Lafler* is the proper test to analyze the defendant's claim under the state Constitution.

The defendant asserts that he must "only must demonstrate the reasonable probability that he would have accepted the plea except for counsel's errors." Def.'s Resp. to State's Supp. Obj. at 4. In support, he cites the following Lafler language:

> The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

Lafler, 566 U.S. at 170–71. This, however, does not avail the defendant because the above-quoted section of *Lafler* is not directed at whether the prejudice prong has been satisfied; rather, it is directed at what is to be considered an appropriate remedy if a defendant meets that burden, *i.e.* the first and second prongs of the *Strickland* test. *Id.* at 170. Thus, the defendant continues to bear the burden of satisfying the court by a reasonable probability that but for counsel's ineffectiveness: (1) the plea offer would have been presented to the court; (2) the court would have accepted its terms; and (3) the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. *Id.* at 164.

Here, the defendant has not sustained the burden of demonstrating actual prejudice. For the purpose of its analysis, the court will assume without deciding that Attorney Hunt's testimony would support a finding that the plea offered by the state would have been presented to the court and that the negotiated sentence would have been less severe than the sentence actually

imposed by the court.[1] This evidence, however, goes to the first and third prongs of the *Lafler* test—it does not address the second prong, whether the court would have accepted the terms of the plea offer. *Lafler*, 566 U.S. at 164. Here, the defendant offered no such evidence. Instead, he erroneously asserted that he is only required to show that there is a reasonable probability that he would have accepted the plea agreement. The defendant offered no evidence of similar plea agreements in similar cases or any evidence to suggest that the court would have accepted the plea agreement. Accordingly, the defendant has failed to satisfy his burden on the second prong of the ineffectiveness claim. Because the defendant has failed to satisfy the second prong of the *Strickland* test, the court need not address whether Attorney's Hunt advice was constitutionally deficient.

Finally, the defendant asserts that Attorney Hunt provided inadequate advice regarding the risk to the defendant if he testified. The defendant argues that trial counsel overlooked or underestimated the admissions the state would elicit on cross-examination and failed adequately to prepare the defendant to testify. The defendant argues this constitutes constitutionally deficient performance and that it prejudiced the defendant. In view of the other evidence presented by the state, the court disagrees. In its case-in-chief, the state presented evidence that: (1) the power of attorney executed by the defendant's father specifically stated that the defendant was to act jointly "and not separately" with his brother, who was his co-attorney-in-fact; (2) the defendant made multiple transfers of his father's assets without advising his brothers of his actions; (3) the defendant's father sent, or caused to be sent, several e-mails to the defendant that requested an

[1] Attorney Hunt did testify credibly that he did not think the defendant would receive a sentence of more than three years even if he was convicted at trial. He also testified that if he had realized the defendant's sentence might be significantly longer, he would have more strongly encouraged the defendant to accept the plea agreement. Finally, Attorney Hunt testified that he had a good working relationship with the defendant and that the defendant relied on his advice.

accounting of the father's assets; (4) the defendant sent e-mails to his siblings in which he stated that he was investing his father's funds at his father's request; and, (5) the defendant's siblings had no knowledge of the transactions and had requested that he explain his actions. State's Obj. to Def.'s Mot. for New Trial ¶¶ 26-27. The jury heard all of this evidence before the defendant took the stand. Thus, the defendant cannot say, in light of this evidence, that there is a substantial likelihood the verdict would have been different if he had not testified. This is particularly true given that any additional evidence supporting the theory of the defense—that the transactions at issue were authorized by the victim—would have had to have come through the defendant's own testimony. Thus, the defendant has failed to demonstrate actual prejudice. *Chase*, 135 N.H. at 213. For this reason, the court need not consider whether Attorney Hunt's performance was constitutionally deficient.

Based on the foregoing, the court finds and rules that the defendant has failed to sustain his burden of showing that but for the claimed Constitutional deficiencies in counsel's performance, there is a reasonable probability the outcome would have been different. Accordingly, the defendant's motion for new trial based on ineffective assistance of counsel is DENIED.

So ORDERED.

Date: April 2, 2019

Larry M. Smukler

LARRY M. SMUKLER
PRESIDING JUSTICE

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

FILE COPY

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**

Please be advised that on April 24, 2017 Judge Smukler made the following order relative to:

Defendant's Motion to Set Aside Verdict
DENIED for the reasons set forth in the court's oral rulings in response to the defendant's motion at the close of the state's case (see Record) and for the reasons set forth in the state's objection.

April 24, 2017

Abigail Albee
Clerk of Court

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C: Jesse J O'Neill, ESQ; Robert D. Hunt, ESQ