THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2019 TERM

NO. 2019-0280

STATE OF NEW HAMPSHIRE

v.

KEITH C. FITZGERALD

Rule 7 Discretionary Appeal

REPLY BRIEF OF APPELLANT KEITH C. FITZGERALD

Counsel for Keith C. Fitzgerald:

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant Keith C. Fitzgerald incorporates herein the Statement of Facts and Statement of the Case presented in his opening brief.[1] FBr.5-10.

REPLY ARGUMENT

I. An attorney whose "research" about the sentence a defendant is likely to receive if convicted of a serious offense is limited to internet searches for newspaper articles about criminal cases renders ineffective assistance of counsel.

Criminal defense counsel's two most important tasks when representing a defendant against felony charges are ensuring that the client understands the adverse admissible evidence, and therefore the likelihood of conviction, and the likely sentence imposed following a conviction. The United States Supreme Court essentially acknowledged as much in *Missouri v. Frye*, 566 U.S. 134 (2012) when it wrote:

> 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. ... 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. ...
>
> [C]riminal 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.

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[1] Fitzgerald's opening brief is cited as "FBr." The State's brief is cited as "SBr." The separate appendix to Fitzgerald's opening brief is cited as "App." The supplemental appendix is cited as "SApp."

The State commences its argument in defense of counsel's performance by stating that "[h]e and the defendant researched similar cases, and they each shared their research with one another." SBr.20. Later, the State refers to this "research" as leading to counsel's "careful and deliberate prediction of what sentence the court would issue if the defendant was convicted." SBr.32. Nothing could be further from the truth.

Prior to Fitzgerald's case, counsel had never tried a similar case. App.68. His only prior felony trial was a sexual assault case. App.68. Consequently, he had no personal knowledge regarding a likely sentence upon conviction. There were many ways in which he could have educated himself about sentences in other cases. Counsel could have: (1) used computer research tools like Westlaw or Lexis; (2) inquired of the New Hampshire Public Defender Program or experienced private attorneys; or (3) queried the New Hampshire Association of Criminal Defense Attorneys and posed the question through its robust listserve.

If counsel was concerned about displaying his inexperience to the criminal defense bar, he could have queried the Attorney General's Office and County Attorney's Offices about felony theft case dispositions. Counsel could have obtained sentencing information through RSA 91-A requests to the prosecutors' offices or filed a discovery motion with the court.

Fitzgerald's counsel did not avail himself of any of the options that would have afforded him a basis of knowledge to assess Fitzgerald's likely sentencing exposure. Instead, counsel's "research" was limited to examining newspaper accounts of cases published on the internet. App.72-73. He also requested that his non-lawyer client do the same. App.66. In sum, there is no evidence that counsel employed any of the training and experience he may

have acquired in becoming an attorney in assessing Fitzgerald's likely sentencing exposure.

An informed, or to use the State's terminology, "careful and deliberate," strategic error may not constitute ineffective assistance of counsel. *See Lafler v. Cooper,* 566 U.S. 156, 174 (2012). However, counsel did not make a strategic error in assessing his client's sentencing exposure and his failure to reasonably educate himself about similar sentences resulted in his ignorance of the sentence imposed in the only case the court found comparable – a case in which a defendant was convicted of similar theft charges, involving a similar large sum of money, and in which the same judge had imposed virtually the same sentence he imposed against Fitzgerald. App.66, 72. Counsel admitted that if he had been aware of the comparable case before trial, he would have shared that knowledge with Fitzgerald. App.72.

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 v. Gillies,* 332 U.S. 708, 721 (1948). Counsel's lack of knowledge about a likely sentence after trial meant he could not fulfill his obligation to describe the relative merits of the State's offer. Moreover, counsel failed to ensure Fitzgerald understood the charges and his maximum sentencing exposure, and to provide Fitzgerald with a comprehensive evaluation of the evidence against him. Fitzgerald's Br.15-22.

For the reasons stated above and in Fitzgerald's Brief, counsel's egregious flaws 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, s*ee State v. Hall,* 160 N.H. 581, 584 (2010); *Strickland v. Washington,* 466 U.S. 668, 686 (1984), at the critical plea-bargaining stage of the proceedings, *see Lafler*, 566 U.S. at 168.

II. Fitzgerald satisfied his evidentiary burden of a reasonable probability that the outcome of the case would have been different but for counsel's constitutionally deficient performance.

Fitzgerald satisfied the prejudice prong of the ineffective assistance of counsel analysis in the context of the plea-bargaining stage of the proceedings: but for counsel's ineffective advice there is a reasonable probability that (1) he 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. *See Lafler*, 566 U.S. at 164. The State concedes that Fitzgerald satisfied the fourth criteria. SBr.24. The State's arguments on the other three criteria misconstrue the law and the facts.

The State repeatedly argues that Fitzgerald did not "prove" the three disputed criteria would have occurred. SBr.24-30. That is not Fitzgerald's burden. It is a heightened burden of proof that likely is unattainable because of the difficulty in proving what would have happened. Fitzgerald only must demonstrate there is a "reasonable probability" that he would have accepted the plea offer, the plea offer would have remained open, and the court would have accepted the plea terms. *See Lafler*, 566 U.S. at 164. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Collins*, 166 N.H. 210, 213 (2014) (citation omitted)). It is a lesser standard than a preponderance of evidence. *Williams v. Beard*, 637 F.3d 195, 227 (3d Cir. 2011).

The State's argument that Fitzgerald must produce "affirmative proof," including his own testimony also misconstrues the correct legal analysis. In *Lafler*, the sole support for the Supreme Court's finding 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," 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. 566 U.S. at 174 (citing *Cooper v. Lafler*, 376 Fed.Appx. 563, 571-72 (6th Cir. 2010)). The Supreme Court agreed that a higher evidentiary burden would contradict the reasonable probability standard. *Id.*

Thus, *Lafler* imposes the following burden of proof to demonstrate prejudice: 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. In *Frye*, the Supreme Court reinforced such a standard:

> 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. Other courts have applied that burden of proof based on *Lafler* and *Frye*. *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).

The United States Supreme Court has cautioned courts not to accept a defendant's post-hoc statement as sufficient proof of a reasonable probability that he would have rejected a plea offer. *Lee v. U.S.*, 137 S. Ct. 1958, 1967

(2017). Instead, contemporaneous, objective evidence is required to establish reasonable probability. *Id.* Similarly, this case demonstrates why contemporaneous, objective evidence, not the defendant's testimony, is required to establish a reasonable probability that a defendant would have accepted a plea offer. *See Rodriguez v. Texas,* 424 S.W.3d 155, 159-60 (Tex.Crim.App. 2014), *reversed on other grounds in Rodriguez v. Texas,* 470 S.W.3d 823 (Tex.Crim.App. 2015). Fitzgerald's testimony would not have aided the court because the judge previously had determined that Fitzgerald was unworthy of belief. *See* SApp.17 ("What you have said, testified to and presented, if I would put it the most charitably are gross rationalizations and I don't know if you believe there [are] rationalizations or internally you see them for what they are, but either way, it's just as bad ....."). In fact, the court did not mention that Fitzgerald did not testify in its order denying his motion.

Fitzgerald presented objective evidence. There was no evidence that the court would have rejected the plea terms. Counsel testified that, if he had perceived the risk of the lengthy sentence actually imposed, he would have more strongly recommended the plea offer to Fitzgerald and that Fitzgerald relied on his advice, including about sentencing expectations. App.64, 65-66, 70-71. Even with counsel's constitutionally deficient advice, Fitzgerald considered accepting a sentence that included incarceration while the plea offer was available. App.93.

Counsel also 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. App.65-66.

- "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." App.72.

- Although Fitzgerald ultimately made the decision not to accept 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." App.70-71.

The objective evidence demonstrates a reasonable probability that Fitzgerald would have accepted the plea offer but for counsel's deficient advice.

The State's argument is that it would not have kept the offer open after what it refers to as the second settlement conference date, SBr.27, is meritless. The evidence establishes a reasonable probability that Fitzgerald would have accepted the open plea offer and the court would have accepted the plea terms at the time of what the State refers to as the second settlement conference. FBr.27-28. The only settlement conference held by the court ended with a Motion for Continuance of Trial and Pretrial that states: "[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 available for plea and sentencing are ... [the parties request that] [p]lea and sentencing be scheduled for ...." App.89. Thus, the parties specifically requested a plea and sentencing date when the judge who had presided over the settlement conference and was familiar with the plea terms, not the sentencing judge, was available. App.89.

The Court should reject the State's argument that the trial judge's post-trial sentence indicates that he was unlikely to accept the pre-trial plea terms. As explained above, the parties requested a plea and sentencing before the judge who was familiar with the plea terms. Additionally, Fitzgerald is not required to prove a particular judge would have accepted the plea terms. *See Ebron*, 307 Conn. at 360-61. Finally, the sentence imposed was influenced by the trial judge's opinion that Fitzgerald had not

testified truthfully during the trial. SApp.17 ("What you have said, testified to and presented, if I would put it the most charitably are gross rationalizations and I don't know if you believe there [are] rationalizations or internally you see them for what they are, but either way, it's just as bad ....").

Fitzgerald met the applicable burden of proof: a reasonable probability that he would have accepted the State's plea offer, the State would not have withdrawn the plea offer, and the court would have accepted its terms.

III. The State's remaining arguments are not ripe for appeal, and if considered, should be rejected.

The State offers two remaining arguments: (1) the superior court may consider Fitzgerald's trial testimony in deciding whether to accept the State's final plea offer; and (2) Fitzgerald is not entitled to relief because he cannot plead guilty to the indictments without committing perjury. Neither issue is ripe for decision because neither issue was presented to the superior court.

If this Court considers the arguments, the trial judge should not be allowed to consider Fitzgerald's trial testimony in deciding whether to accept the plea terms. Because the charges to which Fitzgerald would have pled guilty are the same as the charges he was convicted of at trial, the sole advantage he would have received through the plea was a lesser sentence. Consequently, the court should determine whether he "should receive the same term of imprisonment the [State] offered in the plea, the sentence he received at trial, or something in between." *See Lafler,* 566 U.S. at 171.

The reference to *Lafler* urged by the State does not include the trial court's consideration of post-ineffective assistance of counsel conduct in determining the appropriate sentence. Instead, *Lafler* affords the trial court the discretion, but does not impose an obligation, to consider "information about the crime" discovered after defense counsel's ineffective assistance

of counsel. The difference is significant. Information about the crime is not impacted by the violation of the defendant's constitutional rights. In contrast, post-ineffective assistance of counsel conduct, particularly trial testimony, is a direct product of the ineffective assistance of counsel at the plea-bargaining stage of the proceedings. Its consideration is antithetical to the Supreme Court's concern about "restor[ing] the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer ...." *Id.*

The State's final argument, that Fitzgerald should be denied relief because he could not plead guilty to the indictments without committing perjury is belied by the State's own brief. The State urges this Court that because Fitzgerald testified at trial that he believed he was authorized to use his father's money, he could not subsequently admit under oath that he was not authorized to use his father's money. SBr.33-34. At the same time, the State also defends defense counsel's performance as reasonable, in part because:

> Counsel also reasonably believed that mitigating facts would reduce the defendant's sentence. IAC 22-23. Trial counsel believed that if the jury ultimately found the defendant's actions to be criminal, the defendant could show that he believed that his father authorized him to conduct the financial transactions on which the indictments rested, and that the trial court would view this as a mitigating factor at sentencing. IAC 34-35.

State's Br.20.

The State's argument that it was reasonable for defense counsel to believe what it now claims Fitzgerald could not believe belies its argument that Fitzgerald must perjury himself to now acknowledge that he was not so authorized. Fitzgerald hardly would be the first defendant who believed he had done nothing wrong until the State's case was laid before him and then was confronted with the realities of cross-examination. In fact, as

explained in Fitzgerald's Brief, counsel's constitutionally deficient performance included failing to explain the evidence to Fitzgerald and competently providing an analysis of the State's evidence while considering the plea offer. FBr.21-22.

CONCLUSION

For the foregoing reasons and those stated in Defendant Keith Fitzgerald's opening brief, 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. Counsel's performance was constitutionally deficient and Fitzgerald was prejudiced thereby because counsel failed to provide reasonably competent assistance of counsel at a critical plea-bargaining stage of the proceedings. This 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.

Respectfully submitted,

KEITH C. FITZGERALD

By: /s/ Michael D. Ramsdell

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CERTIFICATE OF SERVICE

On January 28, 2020, this reply brief, which complies with Supreme Court Rule 16(11) because it contains 2,994 words, excluding the table of contents, table of citations, and addenda, was forwarded to Assistant Attorney General Gregory M. Albert through the Court's electronic filing system.

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY SUPERIOR COURT

STATE OF NEW HAMPSHIRE, Plaintiff, vs. KEITH C. FITZGERALD, Defendant.	Supreme Court Case No. 2017-0328 Superior Court Case No. 211-2015-CR-00276 Laconia, New Hampshire May 11, 2017 9:24 a.m.

SENTENCING
BEFORE THE HONORABLE LARRY M. SMUKLER
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

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I've been widowed for 15 to 17 years and he has been an amazing help to me, never asking for anything back and he is a most wonderful man.

THE COURT: Thank you.

MS. MEAD: Thank you.

MR. HUNT: That's all, Your Honor. Unless anyone else wishes to speak.

THE COURT: Anything further?

MR. O'NEILL: I just note, I'm sure it's clear to the court, the defendant has had four and a half years to repay the money on the probate court order, hasn't paid a dime, doesn't make any efforts to pay anything until one week before he's scheduled to be sentenced and that's at the request of the estate. He doesn't get to play the restitution card now.

THE COURT: Okay. There's nothing further, I'm going to take a brief recess and I'll come back in.

MR. HUNT: Thank you.

THE BAILIFF: All rise.

(Recess at 10:17 a.m., recommencing at 10:42 a.m.)

THE BAILIFF: All rise. The Honorable Court.

THE COURT: Okay. Mr. Fitzgerald, I have made a decision. Mr. Fitzgerald if you could remain standing.

I have sat through the trial, I have heard the presentations today, I'm not going to leave people in suspense for too long. These are state prison crimes and I'm going to

say that up front. It's not a happy day. It's not a happy day for you, not a happy day for your family, it's not a happy day for your friends. But it is a day where justice has to be done for your father and the other victims, so I'm going to tell you directly, they are state prison sentences.

These are state prison crimes. Taking over $400,000 from an elderly person, taking advantage as you did and then I have to also look at aggravating factors, the aggressive responses, the lies, the fact that -- the cover-up, if you will, is all aggravating.

What you have said, testified to and presented, if I would put it the most charitably are gross rationalizations and I don't know if you believe there's rationalizations or internally you see them for what they are, but either way, it's just as bad and I think this has to be a state prison sentence.

In thinking about how much of a state prison sentence, I'm only aware of one comparable. I haven't done my own independent research and I'm aware -- I've only been presented with today and, obviously, I was already aware of it since I was the presiding judge, that was the State v. Gagne case. That was basically the sentence that the state has asked for is structured a little bit different.

I observe -- in the Gagne case I did suspend, I think, six months of the minimum, I'm going to do that on this one too. And so I'm going to give him what the state is asking