THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0280

State of New Hampshire

v.

Keith C. Fitzgerald

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE BELKNAP COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(15 minutes)

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II. If counsel was constitutionally ineffective, whether the defendant is prejudiced when he cannot present evidence that he would have accepted the plea offer at the time, that the State would have kept the offer open, or that the trial court would have accepted the proposed sentence.

III. Whether trial counsel was ineffective when he did not file a motion to dismiss the indictments or object to jury instructions that alleged the factual elements of the charge of felony charges of theft by unauthorized taking but not sentencing enhancements.

IV. If counsel was constitutionally ineffective, whether the defendant is prejudiced when this Court found that the requirement was an open question and when the trial court could have sentenced him to the identical sentence without the sentence enhancement.

STATEMENT OF THE CASE

The defendant was charged with five counts of Theft By Unauthorized Taking. T1 54-59 [1]; see RSA 637:3, I (2010). Following a seven-day trial, the jury convicted the defendant on all counts. T7 977-980. The court (*Smukler*, J.) sentenced the defendant to three concurrent sentences of 10 to 30 years with 6 months of the minimum and 5 years of the maximum suspended for 30 years. S 35-41. The court also sentenced the defendant to two concurrent sentences of 10 to 30 years in prison, which was fully suspended for 30 years upon release conditioned upon good behavior and compliance with the terms of his sentences. *Id*.

After sentencing, the defendant appealed the merits of the conviction. This Court affirmed his convictions in an unpublished opinion. *State v. Fitzgerald*, Case No. 2017-0328, Order dated July 6, 2018. Following this Court's opinion on the merits, the defendant moved for a new trial or to vacate his sentences and reinstate the plea offer based on ineffective assistance of counsel. DA 31-50. The court denied his motion and his subsequent motion to reconsider. DA 1-14.

This appeal followed.

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[1] "T1" refers to transcript day one of trial that occurred on March 20, 2017.
"T6" refers to transcript day six of trial that occurred on March 28, 2017.
"T7" refers to transcript day seven of trial that occurred on March 29, 2017.
"S" refers to the sentencing hearing that occurred on May 11, 2017.
"IAC" refers to the hearing on the appellant's ineffective assistance of counsel motion that occurred on January 25, 2019.
"DB" refers to the appellant's brief.
"DA" refers to the defendant's appendix.
"D. Add." refers to the defendant's addendum.

STATEMENT OF FACTS

The thefts in this case involved several different bank accounts. The defendant's father, Clifford Fitzgerald, Jr., was a wealthy man who, until April and May 2010, had kept most of his assets with Fidelity. When Clifford Jr. became sick and his second wife, Ingrid, died, Clifford Jr. and his family decided to move some of the assets to Wachovia Bank. The defendant's theft charges arose from transactions that he made, without the knowledge of his father or his siblings, and involved accounts which he had opened using his father's name.

This Court summarized the evidence which was presented to the jury during trial to include, but not be limited to: (1) email exchanges between the defendant and his siblings in which he stated that he was investing his father's funds at his father's request; (2) testimony of the defendant's siblings that they had no knowledge of the transactions and had requested that he explain his actions; and (3) the defendant's trial testimony in which he admitted that he withdrew his father's funds. *Fitzgerald*, 2017-0328, at 4. This Court detailed additional evidence presented to the jury, including "(1) the power of attorney executed by his 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 brother of his actions; and (3) the defendant's father sent, or caused to be sent, several e-mails to the defendant that requested an accounting of the father's assets." *Id*. at 3.

The defendant testified during trial. T6 789. During his testimony, the defendant told the jury that his father, the victim in this case, gave the

defendant an advance on his inheritance. T6 817. The defendant further testified that he had authorization from his father to use the money. T6 821. The defendant explained that, because his father authorized his use of the money, the defendant did not hide the money from his father, but that he was instead hiding the money from his divorce and his bankruptcy. *Id*. The defendant claimed that it was because of his father's authorization to use his funds that the defendant was able to move money around but not to actually have it in the defendant's name. *Id*.

The defendant claimed that his father never told him to stop handling his money. T6 817. The defendant further claimed that his father was not mad about the bank transactions at issue, and that his father never told the defendant that he did not authorize the defendant to receive the bank funds. T6 817-818.

Prior to trial, the parties extended a plea offer to the defendant of 5 to 12 years in prison. DA 103-04. After the parties participated in a settlement conference, the State amended its offer to two consecutive 12-month sentences at the Belknap County House of Corrections with two consecutive 12-month sentences on administrative home confinement to follow those two years of incarceration. DA 101-02. The day after the State sent the amended offer, the defendant rejected the offer, and made a counter-offer of fully suspended Class A misdemeanor convictions. DA 93. The State rejected the defendant's counter-offer. DA 95.

Relevant to this appeal, during the hearing on the defendant's motion for new trial or to vacate convictions and reinstate plea offer ("motion hearing"), the defense only called the defendant's trial counsel, Attorney Robert Hunt ("trial counsel"). IAC 2. The defendant did not testify at this

hearing. *Id*. During the motion hearing, trial counsel described the attorney-client relationship with the defendant. He believed that the defendant had a special relationship with his father and that the defendant's siblings were out to get the defendant. IAC 4. Trial counsel testified that he wrote a letter on the defendant's behalf in which he concluded the defendant did have the authority and consent of his father to use the funds at issue. IAC 6; DA 90.

Trial counsel testified that he believed in his defense. IAC 5-6. Trial counsel made similar statements of belief in his client's innocence to the State in response to a plea offer. IAC 8. Trial counsel testified that he told the defendant that there was a "very good chance that a jury would see that there is reasonable doubt on whether your father authorized you to have the money at issue." IAC 9. Trial counsel's testimony further described the defendant's strategy. He described the defendant's entire defense, from the defendant's perspective, was that he was authorized to use the funds in question. IAC 13-14.

Trial counsel also believed the defendant. He testified that the defendant seemed to be "very clear and credible about his relationship with his father." IAC 28. Given how the defendant handled the money at issue and the bank transactions, in addition to the defendant's explanations, trial counsel believed the defendant's statements about the circumstances of the case. IAC 28-29. Trial counsel also based his belief of the defendant's truthfulness on trial counsel's review of other estate cases in which the defendant had been involved and what he had seen the defendant's siblings say and write as part of those proceedings. IAC 29.

The defendant questioned trial counsel at length about the plea bargaining procedure. Trial counsel explained in his letter, DA 90, that the

defendant would only enter into a plea agreement if the terms allowed the defendant to remain at liberty and continue to work freely and earn income. IAC 6. Later, at some time after the first day of a settlement conference, trial counsel told the State that the defendant had not ruled out some incarceration, and trial counsel believed it made sense to return to the second day of the settlement conference. IAC 8, DA 93.

Trial counsel testified that he considered what sentence the defendant would receive if he were convicted at trial. IAC 22. He expected that the defendant would not receive more than three years in prison. IAC 22. Trial counsel based that belief on the facts of the defendant's case, which he believed would be mitigating in sentencing. IAC 22-23. Trial counsel explained that he expected the facts of the case to show that the defendant had a good relationship with his father and that if he did something, which was ultimately criminal, that he did so believing that his father authorized him to do so. IAC 34-35.

Trial counsel advised the defendant, however, that he could potentially get a severe sentence. IAC 36. His basis for the warning was that the defendant was charged with Class A felonies, and that he was subject to the extended term. IAC 36-37. Trial counsel, however, told the defendant that, in his opinion, his sentence would be substantially less than what it ultimately turned out to be. IAC 23. Trial counsel testified that he was shocked when the defendant received the sentence of 9 ½ to 25 years. IAC 24.

Trial counsel's belief in the expected length of the defendant's sentence was partly due to his research in which he compared "drug cases and violent crimes, trafficking, those kinds of things." IAC 34. He believed

that having been involved in cases like those and having seen sentences in sexual assaults, that the defendant's case was not the type of case with the facts on his side that would warrant the sentence that was ultimately imposed. IAC 34.

Both the defendant and trial counsel researched various verdicts associated with similar cases. IAC 24. They shared examples of sentences with each other for both similar and dissimilar cases. IAC 24. Trial counsel's research of similar cases supported his view that the defendant might be sentenced to three years in prison. IAC 36. He did not remember if all of the cases the defendant found supported a three-year sentence. IAC 36.

Trial counsel was not sure whether he had seen the sentence of *State v. Gagne*, 165 N.H. 363 (2013), a case in which the same trial judge sentenced a defendant to 9½ years in prison, prior to trial. IAC 24. Trial counsel believed that he would have given the defendant further advice about the risks if he had known about *Gagne* prior to trial, but he also explained that the facts in *Gagne* were quite different from the defendant's case. IAC 35.

Trial counsel and the defendant discussed plea negotiations several times, but trial counsel was unable to remember how many times specifically. IAC 30-32. Under cross-examination, trial counsel agreed that he had likely discussed plea negotiations at least three times around the time of court events. IAC 30-33.

Trial counsel testified that he recalled telling the defendant that, after reviewing the applicable statutes, his exposure was not limited to the Class A felonies. IAC 37, 47. Trial counsel recalled a discussion about the

extended term, but he did not have any documents in his file in which he spelled it out for the defendant explicitly. IAC 37. Trial counsel also discussed the possibility of consecutive sentences with the defendant. IAC 48.

Trial counsel memorialized a reference to a prior discussion about extended term in response to the defendant's email post-trial related to the defendant's confusion about what his convictions were. IAC 37-38. In that email response to the defendant, trial counsel referred to the special felony aspect of the case that he and the defendant had previously discussed. IAC 38. Trial counsel further acknowledged that, soon after he filed his appearance, he received a letter from the State advising the defendant of the possible application of the enhanced sentencing statute. IAC 39.

SUMMARY OF THE ARGUMENT

The defendant fails to meet his burden to show ineffective assistance of counsel under the *Strickland* standard. He fails to show constitutionally deficient performance on the part of his trial counsel. He similarly fails to demonstrate a reasonable probability that the result of the proceeding would have been different, and, therefore, cannot establish any prejudice.

Trial counsel provided constitutionally effective advice in the plea bargaining process. Counsel reviewed news articles about related sentences for similar crimes, and compared sentences for violent crimes in order to get a rough estimate of what he expected a post-trial sentence to be. Beyond his research, counsel reasoned that, if the defendant were convicted of these charges, many mitigating factors in the defendant's favor would help in sentencing.

Even if trial counsel was constitutionally defective in his plea bargain advice, the defendant has not met his burden to prove that the result of the proceeding would have been different by proving that he would have accepted the State's last plea offer, that the offer would have remained open, and that the court would have accepted the proposed terms. Therefore, the defendant has not demonstrated that, but for counsel's errors, the result of the proceeding would have been any different.

Even if the defendant can meet his burden on both prongs of the standard, his only remedy would be to require the State to re-offer its last proposed terms. However, even if the defendant is convincing that he would have accepted those terms and even if the court would now accept the terms, the defendant cannot plead guilty to these charges without

committing perjury. Therefore, any remedy that he could receive through this argument is illusory.

Trial counsel was also constitutionally effective when he did not file a motion to dismiss indictments or object to jury instructions that included the elements of the charges but not the sentence enhancement language. The State complied with statutory notice requirements when, upon indictment, the State sent to a letter to then-defense counsel which provided notice of its intent to seek enhanced penalties under the sentencing statute. This letter complied with both the statute and court rules related to enhanced sentences, leaving trial counsel with no viable objection to the instructions.

The trial court's jury instructions neither changed the charge nor added an offense. The felony theft charges were properly-charged Class A felonies and remained so throughout the duration of the trial. The jury found beyond a reasonable doubt that the defendant met the factors for a sentencing enhancement.

This Court has observed that it is an open question under the State Constitution whether any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum, must be alleged in the indictment. *State v. Marshall*, 162 N.H. 657 (2011). A sentence enhancement, unlike a substantive change to the indictment, needs to be presented to the jury to be proven beyond a reasonable doubt, as the sentencing enhancement in this case was. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt). A sentence enhancement simply

provides additional penalties for which the court may, but is not required to, sentence a defendant according to a court's broad powers in sentencing.

In issues involving settled law, the issue of showing a different result as part of an appeal would be an easier burden for the defendant to meet. Here, however, where the law is neither settled nor obvious, the defendant cannot make a showing that there is a reasonable probability the result of the underlying appeal of the merits would have been different.

Finally, the defendant suffered no prejudice as a result of trial counsel not objecting to the jury instructions on the sentencing enhancement or moving to dismiss the indictments. The trial court could have sentenced the defendant to the same sentence, 9½ to 25 years, with or without application of the sentence enhancements.

STANDARD OF REVIEW

Both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact. Therefore, the court will not disturb the trial court's factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and the court reviews the ultimate determination on each prong *de novo*. *State v. Collins*, 166 N.H. 210, 213 (2014). The analysis is the same under both the Federal and State Constitutions. *State v. Anaya*, 134 N.H. 346, 351 (1991).

ARGUMENT

I. TRIAL COUNSEL PROVIDED CONSTITUTIONALLY EFFECTIVE ASSISTANCE IN HIS PLEA BARGAINING ADVICE.

In *Collins*, this Court explained the defendant's burden to demonstrate ineffective assistance of counsel:

> To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. *State v. Brown,* 160 N.H. 408, 412 (2010). A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective. *Id.*
>
> To satisfy the first prong of the test, the performance prong, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.*; *Strickland v. Washington,* 466 U.S. 668, 688 (1984). To meet this prong of the test, the defendant must show that counsel made such egregious errors that she failed to function as the counsel the State Constitution guarantees. *State v. Thompson,* 161 N.H. 507, 529 (2011). The court affords a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety of strategic and tactical decisions that counsel must make. *Id.* The defendant must overcome the presumption that trial counsel reasonably adopted her trial strategy. *Id.* Accordingly, "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." *Id.* (Quotation and brackets omitted); *Strickland,* 466 U.S. at 689.

> To satisfy the second prong, the prejudice 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; *see Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Brown,* 160 N.H. at 413 (quotation omitted). "In making this determination, we consider the totality of the evidence presented at trial." *Id.* (quotation omitted).

Collins, 166 N.H. at 212–13.

A. Trial counsel provided constitutionally reasonable advice to the defendant through research of similar cases and by comparing the present case to sentences received on violent charges.

Trial counsel's actions fall easily within an objective standard of reasonableness. He and the defendant researched similar cases, and they each shared their research with one another. IAC 24. Counsel's research supported his prediction that that the defendant would not receive more than a three-year sentence. IAC 36. Counsel also reviewed sentences for violent crime cases. IAC 34. In trial counsel's mind, this research triangulated his position of a lower sentence for these non-violent thefts. IAC 34. 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 in sentencing. IAC 34-35.

At the same time, counsel properly cautioned the defendant about the risks of post-trial sentencing. He told the defendant that he could get a pretty severe sentence. IAC 36. He told the defendant that his exposure was not just to the Class A felony charges, IAC 37, 47, but also to an extended term. IAC 37. Counsel further discussed the possibility of consecutive sentences. IAC 48.

In hindsight, counsel was incorrect in his prediction that the defendant would not serve more than three years in prison. However, hindsight does not supply the proper lens through which to evaluate the defendant's claim. An attorney can be incorrect in his advice without being constitutionally ineffective. *See Collins,* 166 N.H. at 213 (requiring "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.")

The *Strickland* Court noted that "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689. The question is whether the attorney's actions fell below an objective standard of reasonableness. *Collins*, 166 N.H. at 212.

In whole, counsel made the defendant aware of possible penalties, including consecutive sentences. He researched related cases along with the defendant. He reasoned that a non-violent case would not likely incur the same sentence that a violent felony would. He took into account what he

believed were mitigating circumstances that would keep the sentence low if the defendant were convicted. Counsel's actions were objectively reasonable under the circumstances, and the fact that the court imposed a higher sentence does not call into question his otherwise constitutionally effective assistance.

B. The result of the proceeding would not have changed, and therefore, the defendant cannot show prejudice.

"In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." *Missouri v. Frye*, 566 U.S. 134, 148 (2012). This further showing is of particular importance because a defendant has no right to be offered a plea, *see Weatherford v. Bursey,* 429 U.S. 545, 561 (1977), nor a federal right that the judge accept it, *Santobello v. New York,* 404 U.S. 257, 262 (1971). *Frye*, 566 U.S. at 148-49.

The analysis of ineffective assistance of counsel claims is the "same under both the Federal and State Constitutions." *Anaya*, 134 N.H. at 351. 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). As the trial court noted in its order, this Court has "not addressed how to analyze the prejudice prong of an ineffective

claim where ineffective assistance results in the rejection of a plea offer." D. Add. 10.

In *Frye*, the United States Supreme Court considered a scenario in which defense counsel failed to communicate a plea offer to the defendant, and the defendant later pleaded guilty to a harsher sentence than he would have received as a result of the plea offer. 566 U.S. at 138-39.

In *Lafler v. Cooper*, 566 U.S. 156, 160-61 (2012), defense counsel told the defendant that he could not be convicted of attempted murder if the victim was shot below the waist. This constitutionally defective advice led the defendant to go to trial and receive a sentence far above what the State had offered pre-trial. *Id*.

Lafler describes the standard necessary to meet the second prejudice prong: a defendant must establish that, but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been presented to the court in that 1) the defendant would have accepted the plea; 2) the prosecution would not have withdrawn it in light of intervening circumstances; 3) that the court would have accepted its terms; and 4) 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. 566 U.S. at 164.

Even if this Court finds that the defendant has met the first prong of the *Strickland* test, the defendant has not shown a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The defendant cannot meet his burden to show that he would have accepted the last plea offer, that the State would not

have withdrawn the offer, or that the trial court would have accepted the proposed terms. *See Lafler*, 566 U.S. at 164.

The defendant meets prong four because the 9 ½ to 25 year court-imposed sentence is more than the two-year stand committed with two consecutive years administrative confinement sentence last offered by the State. However, the defendant cannot meet the other three prongs of the *Lafler* test to show prejudice.

C. The defendant cannot prove that he would have accepted the State's last offer.

On August 24, 2016, the State emailed trial counsel the amended offer. DA 101-02. In response two days later, the defendant again countered with a fully suspended misdemeanor proposal, but noted that the defendant has not ruled out a plea including "some incarceration." DA 93. The State rejected this counter-offer on September 7, 2016, noting that the State's most recent offer is "essentially as low as the State is willing to go on a negotiated disposition." DA 95. No further negotiations occurred after that point.

The defendant has not shown that he would have accepted the State's offer even if the offer had remained open. At the absolute most, trial counsel told the State that the defendant had "not ruled out a plea including some incarceration." DA 93. A vague assertion that the defendant has not ruled out a period of incarceration is a far cry from the defendant agreeing, even in principal, to accept the terms of the State's offer.

The defendant presented no affirmative evidence post-trial that he would have accepted the State's last offer. In *Frye*, the defendant testified

at an evidentiary hearing that "he would have entered a guilty plea to the [lesser charge] had he known about the offer." 566 U.S. at 139. Similarly in *Lafler*, the defendant, in a communication with the court, admitted guilt and expressed a willingness to accept the offer. 566 U.S. at 161. No such evidence exists in this present case. The defendant did not present any emails showing his willingness to accept the State's last offer. The defendant cannot point to any evidence that proves he would have accepted the State's last offer pre-trial.

Here, though he had the opportunity to testify at the motion hearing, the defendant did not take that opportunity as the defendants in *Lafler* and *Frye* did. IAC 2. As such, unlike in *Frye* and *Lafler*, the defendant made no record that he would have accepted the State's proposed terms. At the most, the defendant required more time to consider the State's offer, DA 89, which is far from indicating his acceptance.

In cases that follow *Frye* and *Lafler*, courts have looked at defendants' post or pre-trial statements to determine whether they would have accepted the plea bargain if given constitutionally effective advice. In *Ebron v. Commissioner*, 307 Conn. 342, 346-47 (2012), the prosecutor gave the defendant several plea options, including a non-negotiated resolution. Defendant's counsel suggested to the defendant that he accept the non-negotiated offer, and the defendant followed his counsel's advice. *Id.* In *McMillion v. Commissioner*, 151 Conn. App. 861, 877 (2014), the defendant presented evidence that he asked his counsel if the plea offer from the prosecutor was still on the table, and the defense attorney informed the defendant that it had expired. In both instances, the defendants established that they would have accepted a more favorable plea bargain in

the case. In *Ebron*, the defendant received a higher sentence on a non-negotiated basis than he would have had he received constitutionally effective advice. 307 Conn. at 347. In both instances, the defendants made affirmative statements of their willingness to accept the state's offer. In the present case, the defendant made no such statement.

The defendant cannot meet his burden given the evidentiary record. He attempts to daisy-chain a series of inferences together in order to show that the he would have accepted the terms of the State's last plea offer. The defendant argues that if trial counsel had given an adequate explanation of the indictments and exposure, including sentence enhancements, and the strength of the State's case, then counsel would have more strongly advised the defendant to take the State's plea offer, and that the defendant would have accepted it. DB 26. As noted above, however, trial counsel did inform the defendant of the indictments and sentence enhancements. IAC 36-37. He further explained the idea of consecutive sentences. IAC 48. Finally, trial counsel believed the defendant in his explanations about what happened and reasonably believed in his client's chances at trial. IAC 29.

Beyond the attacks on trial counsel's advice, the defendant hangs his hat on the argument that the defendant would have followed trial counsel's advice on taking the plea, had counsel recommended it. When asked during the motion hearing whether the defendant relied on his opinions, trial counsel testified, "I think he did." IAC 23. "I think he did" is at best a long shot at the extent of the reliance the defendant put on counsel's advice, and at worst is pure speculation on the part of trial counsel. If the defendant himself had chosen to testify at the motion hearing that he would have taken trial counsel's advice and taken the State's plea offer, then the

defendant may have been able to meet his burden on this prong. Absent the defendant's testimony, his arguments rest on inferences that cannot sustain the weight he places on them.

D. The record demonstrates the State would not have kept the offer open beyond the second Settlement Conference.

On the second prong, whether the State would have withdrawn the offer, the record contains written evidence that the State would not have kept the offer open beyond the second settlement conference date. In an email from the State to trial counsel on September 7, 2016, the State again rejected the defendant's fully-suspended misdemeanor offer and said that it would keep its most recent offer open through the second day of the settlement conference. DA 95.

E. The defendant cannot show that the trial court would have accepted the terms of the State's last plea offer even if the defendant had accepted it.

The defendant also cannot show that the trial court would have accepted the State's plea offer. New Hampshire judges are not required to accept proposed plea agreements, and have the discretion to reject the proposals. *See N.H. R. Crim. P.* 11(c)(1-2). A plea agreement itself "calls for nothing more than a request or proposal to the trial court to impose a given sentence in response to a plea of guilty; however significant that proposal may be, the trial court is free to reject it." *See Santobello v. New York,* 404 U.S. 257, 262 (1971); *Lynch v. Overholser*, 369 U.S. 705, 719 (1962); *State v. Goodrich,* 116 N.H. 477, 479 (1976).

As the Supreme Court put it in *Mabry v. Johnson,* [467 U.S. 504, 507 (1984)], "it is the plea of guilty, not the plea agreement, that affects a defendant's liberty." *State v. O'Leary*, 128 N.H. 661, 665 (1986) (internal citation omitted). Therefore, whatever might be the nature of an executory plea agreement, it would not give rise to anything more than a hope that the court would accept the prosecutor's recommendation and limit incarceration accordingly. *Id*.

In *McMillion*, 151 Conn. App. at 875, the Connecticut Appellate Court reviewed the defendant's habeas petition and found that his trial counsel had been constitutionally ineffective by failing to properly advise the defendant of the maximum penalty for the charge. In order to determine whether the trial court would have accepted the original plea offer, the court compared the pre-trial plea offer of five years to the defendant's ultimate sentence post-trial of eight years. *Id*. at 875-76. The court inferred that the plea offer was "not unduly lenient" in light of the defendant's conduct and that a trial court would have conditionally accepted the plea agreement. *Id*. at 876.

In *Ebron*, 307 Conn. at 347, the Connecticut Supreme Court reviewed the defendant's habeas petition and found that his trial counsel had been constitutionally ineffective by failing to properly advise the defendant to accept the state's offer. During a pre-trial conference, the judge said that the offer was appropriate and that the court would accept the proposed terms of the plea offer with a small modification. *Id*. at 346. During a subsequent hearing on the habeas petition, the assistant state's attorney testified that the judge "would have imposed the sentence in the plea agreement if the defendant had accepted it." *Id*. at 359. The *Ebron*

Court concluded that "when there is evidence that a particular judge had indicated that he would have conditionally accepted the plea agreement, such evidence is probative of the question of what a reasonable court would have done." *Id*. at 361.

In the defendant's case, the record contains evidence that the trial court would not have accepted the terms of the State's last offer if it had been presented. During sentencing, the State suggested the comparable case of *State v. Gagne* in which Judge Smukler was also the presiding judge. S 6-7. In providing its rationale for the ultimate sentence imposed, the court said it was only aware of one comparable case: *Gagne*. S 36. The court explained it was already aware of this case because it was the presiding judge. *Id*. The court then explained that it was not structuring the defendant's sentence like *Gagne* but that it would "basically end up being the same kind of sentence." S 37.

The court's 9½ year sentence is nearly five times the stand committed portion of the sentence in the State's last plea offer. Given the court's sentence is what it described as a comparable case and that the defendant's ultimate sentence was out of line with the State's last offer, there is little likelihood it would have accepted the terms of the State's last offer as proposed.

The defendant argues that the settlement conference judge's (*Fauver*, J.) conduct establishes that the court would have accepted an agreement based on the State's last offer. The trial court made no representation in favor or disfavor of the terms of the State's last plea offer. The settlement conference judge played only an administrative role in approving two assented-to motions to continue. In one handwritten motion,

the court approved a continuance to allow the defendant "time to consider the State's current offer." DA 87. Contrary to the defendant's appellate argument, DB 27-28, the court's ministerial approval of a continuance to allow the defendant to consider the State's offer provides no probability, reasonable or otherwise, that the court would have accepted the terms of the State's offer.

In the second handwritten motion, the parties requested a plea and sentencing date at Judge Fauver's next availability. DA 89. The motions are silent about the defendant's acceptance of the State's offer much less the court's acceptance of the terms of the plea. The court simply approved and ordered a future plea and sentencing date, the terms of which were aspirational at best. Absent a pre or post-trial record to support the defendant's argument that the court would have accepted the plea, under *Lafler*, the defendant cannot meet his burden.

The court has broad discretion and is not bound to accept the terms of a plea bargain. *O'Leary*, 128 N.H. at 665-6. Certainly, there are times in which a judge indicates either in writing or orally on the record of his likelihood in accepting potential terms of a plea offer. However, here, there is no evidence that the settlement conference judge or the trial court (*Smukler*, J.) indicated any sort of willingness to accept the terms of the State's last plea offer.

F. Under *Lafler*, in considering whether to accept the State's last plea offer, the Court can consider the defendant's testimony that he committed fraud in both bankruptcy and family courts.

Lafler sets forth as a remedy that the trial court 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." 566 U.S. at 171. If the defendant makes the required showing, the court can "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." *Id*.

In taking into account the remedy suggested by *Lafler*, the trial court need not unwind the clock and disregard anything that happened after the plea was rejected. *Id.* The *Lafler* Court explained its allowable level of review: "[f]irst, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made." *Id*.

During the defendant's cross-examination at trial, he admitted to continually lying to the family court. T6 870-77. The defendant also admitted to not disclosing a $25,000 payment in his bankruptcy filings. T6 880. He testified that he moved money to keep it away from the bankruptcy and family courts in order to defraud both the family and bankruptcy courts, and presumably, his former spouse and creditors. T6 885-86.

In addition to these admissions of false swearing and perjury, the defendant made related admissions to the facts of the underlying charges in his case. In his appendix, the defendant cited the major admissions he made during his cross-examination. DA 37. He admitted to spending more than $150,000 of his father's money to pay debts the defendant owed to other people. *Id*. The defendant admitted that he created a charitable foundation that performed no charitable work, and that he deposited some of his father's funds into this account. *Id*. When he sold two airplanes (paid for using his father's money), he admitted that none of the $240,000 in proceeds went to his father. *Id*.

Under *Lafler*, a trial court may consider all of those admissions in deciding whether it would accept a plea if the case were remanded to Superior Court as a result of an ineffective assistance of counsel finding. *See Lafler*, 566 U.S. at 171-72. The admissions during the defendant's sworn trial testimony provide compelling evidence that a court would not accept the terms of the State's last offer.

Lafler's trial counsel gave objectively constitutionally deficient advice that the defendant could not be convicted of attempted murder if the victim were shot below the waist. *Id*. at 161. The fact of deficient performance was conceded by all parties. 566 U.S. at 174. The remedy, ordering the State to reoffer the plea agreement is an extraordinary remedy for extremely bad advice from Lafler's attorney. *Lafler* is not like the present case in which the defendant's trial counsel was incorrect in his careful and deliberate prediction of what sentence the court would issue if the defendant were convicted. *See id*. (agreeing that an "erroneous strategic prediction about the outcome of a trial is not necessarily deficient

performance."). Lafler also testified at a post-trial hearing that he would have accepted the plea offer but for the errors of his constitutionally defective counsel, a fact not present in this case.

G. The defendant cannot plead to the underlying charges without subjecting himself to a new felony charge of perjury.

Finally, if this Court reversed the defendant's conviction on this ground and ordered that the State reinstate its final plea offer, the defendant could only accept this remedy by committing a Class B felony charge of Perjury. Under RSA 641:1, I(b), a person is guilty of perjury, if in an official proceeding, he makes inconsistent material statements under oath, one of which is false and not believed by him to be true. The statute does not require proof of which of the statements is false but only that one or the other was false and not believed by the defendant to be true. *Id*.

During his sworn trial testimony, the defendant testified that his father gave him an advance on his inheritance. T6 817. He testified that he had authorization from his father to use the money. T6 821. He testified that his father authorized his use of the money, that he did not hide the money from his father, and that he was instead hiding his money from the bankruptcy and family courts. *Id*. The defendant further testified that it was because of his father's authorization to use his funds that the defendant was able to move money around but not actually have the money in the defendant's name. *Id*. In summary, the defendant testified to support his theory that his father authorized him to take and use the money at issue in this case, that is, that he was not guilty of the charged offenses.

All five indictments allege that the defendant used this money without his father's authorization. As part of a plea colloquy in Superior Court, all judges require the defendant to be sworn in. 2 Richard B. McNamara, *New Hampshire Practice Series: Criminal Practice and Procedure*, §27.15 at 291-92 (2010). During the colloquy, the trial court interrogates the defendant to ensure that he committed the crimes to which he intends to plead. *Id*. The defendant cannot have testified under oath during trial that he had his father's authorization to use the funds and then also plead guilty under oath that he lacked his father's authorization. To do so would amount to meeting all of the elements of perjury contrary to RSA 641:1. A defendant's constitutional right to testify does not extend to testifying falsely. *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (limiting the scope of the constitutional right to testify).

The New Hampshire Rules of Evidence contemplate a subsequent prosecution for perjury for statements made during plea proceedings. *N.H. R. Ev.* 410(b)(2). Under this rule, a statement made during a proceeding on either a guilty or *nolo contendere* plea may be used if the defendant made the statement under oath, on the record, and with counsel present. *Id*. Any plea in this case would meet the requirements under *N.H. R. Ev.* 410(b)(2) to use the defendant's statements in a subsequent perjury prosecution as pleas are done on the record, under oath, and with counsel present. *See McNamara, supra*, at 291.

The policy reasoning behind this exception does not allow defendants to protect untruthful statements made during formal plea hearings. David P. Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility*, § 5.9.8 (3rd Edition, Aspen

Publishers 2019). As the treatise reasoned, "[o]ur justice system depends on upholding the sanctity of the oath or affirmation to tell the truth, and particularly when represented by counsel in a formal plea hearing, there is little doubt that the defendant is aware of the gravity of the proceeding and the need to be truthful." *Id*. When a record of the plea reveals that the defendant has failed to tell the truth under such circumstances, that defendant should not be able to argue that his lies are protected by the privileges in Rule of Evidence 410. *Id*.

There are occasions in which the court may allow a plea if the defendant claimed he did not commit the act but still wished to plead guilty, a so-called "Alford plea." *See North Carolina v. Alford*, 400 U.S. 25, 37 (1970) (holding that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional prerequisite to the imposition of the criminal penalty"). However, this is inapplicable because the remedy the defendant seeks, reinstatement of the last plea offer, did not include a provision for an *Alford* plea. DA 101-02. Therefore, even if the court were to reverse on the ground of ineffective assistance of counsel, the defendant could not take advantage of the remedy by pleading guilty to the State's last plea offer without committing perjury.

II. THE TRIAL COURT PROPERLY FOUND THAT TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE WITH RESPECT TO THE SENTENCE ENHANCEMENT.

Trial counsel provided constitutionally effective assistance to the defendant in not objecting to jury instructions or moving to dismiss the indictments because the State complied with the relevant statute and court rules concerning the sentence enhancement. Trial counsel had no viable objection to make. RSA 651:6 (III) requires notice *in writing* to the defendant of possible application of an enhancement at least 21 days prior to the commencement of his trial (emphasis added). *N.H. R. Crim. P.* 14(b)(1)(A) mirrors this statutory requirement.

In a letter dated January 15, 2016, 14 months prior to the commencement of jury selection, the State sent written notice to the defendant's then-counsel of the possible application of RSA 651:6(I)(l) to each of the 5 indictments in the case. DA 103. When trial counsel reviewed this letter after entering his appearance, S 39, he had the requisite notice required under the statute. A review of both the relevant statute and court rules would have confirmed to trial counsel that the State had complied with the requirements of each.

In order to satisfy the first prong of the *Strickland* test, the defendant must show that counsel's representation fell below an objective standard of reasonableness. *Collins*, 166 N.H. at 212. Appellate counsel is attempting to move the goalposts by now saying that even though trial counsel received notice of the possibility of a sentence enhancement in compliance with applicable law and court rules, trial counsel should have additionally moved to dismiss all of the indictments or objected to jury instructions for

lack of inclusion of the sentencing enhancement therein. Trial counsel followed the law and court rules as written, and he was constitutionally effective by doing so.

A. The court did not substantively or impermissibly amend the indictment.

The defendant heavily relies on *State v. Glanville*, 145 N.H. 631 (2000) to support his argument that the court impermissibly amended the indictment by instructing the jury on the sentencing enhancement. DB 32-34. However, *Glanville* is distinguishable from the present case. In *Glanville*, the defendant was charged with a Class A felony of Attempted Armed Robbery. *Glanville*, 145 N.H. at 633. This Court found that the indictment was legally insufficient. *Id*. at 634. The *Glanville* trial court, through jury instructions, "supplied what was otherwise a legal insufficiency" to the indictment. *Id*. By contrast, the indictments in the present case include all of the necessary elements for Theft By Unauthorized Taking. *See* RSA 637:3. The State met all of the requirements, including notice, necessary to assert the enhancement. This trial court in no way supplied a missing element.

The defendant's reliance on language from *Alleyne v. United States*, 570 U.S. 99 (2013) is also misplaced. In *Alleyne*, the trial court sentenced the defendant to a higher mandatory minimum based on a presentence report finding that he brandished a firearm, a sentencing enhancement which the jury did not expressly find in its verdict. *Id*. at 103-04. The *Alleyne* Court held that a "fact that increased a sentencing floor forms an essential ingredient of the offense," and that such a fact must be included in

the indictment. *Id*. at 113-14. In the present case, the sentence enhancement does not include a mandatory minimum that would require this Court to follow the language or reasoning from *Alleyne*.

This Court has also circumscribed the language from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), in this type of factual scenario. In *Apprendi*, the Supreme Court invalidated a New Jersey statute that allowed a judge to impose a sentence enhancement solely based upon the judge's finding by a preponderance of the evidence that an element was satisfied. *Id*. at 491-92. The Court held that any fact, other than the fact of a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. *Id*. at 490.

In *State v. Marshall*, this Court explained that the defendant's argument that making a sentence enhancement an essential element of the offense requiring its inclusion in the indictment is an argument based on a misreading of *Apprendi*. 162 N.H. 657, 664 (2011). This interpretation may have been based on this Court's own error in *State v. Ouellette*, 145 N.H. 489, 491 (2000), as this Court conceded in *Marshall*. 162 N.H. at 664. This Court explained that it incorrectly held in *Ouellette* that, according to *Apprendi*, sentencing factors, other than prior criminal convictions, had to be alleged in the indictment. *Marshall*, 162 N.H. at 664. This Court further explained that this was not the holding of *Apprendi*, nor could it have been, because the defendant in *Apprendi* did not challenge his sentence based upon an omission of the sentence enhancement from the indictment. *Id*. at 664-65 (citing *Apprendi*, 530 U.S. at 477 n. 3). Even though *Apprendi* does not apply to the present case, the State did not conflict with the *Apprendi* rule in that the sentence enhancement was presented to the jury, and the

judge instructed the jury that the State was required to prove this factor beyond a reasonable doubt. T6 965-66.

As noted above, both the statute and court rules require notice in writing to the defendant at least 21 days prior to the commencement of jury selection. That language on its face contemplates that notice of a sentencing enhancement would normally post-date an indictment. Indictment and arraignment naturally come at the beginning of the criminal process. If the statute required that the sentence enhancement be included in the indictment, then there would be no reason for the statutory language to give a defendant at least 21 days notice prior to trial as the indictments would have been filed much earlier in the criminal process.

B. Even if the court did amend the indictment in its instructions, its amendment was permissible.

In *State v. Fennelly*, this Court explained the test for determining whether changing an allegation causes an impermissible amendment to an indictment. 123 N.H. 378, 388 (1983). The question comes down to whether the change "prejudices the defendant either in his ability to understand properly the charges against him or in his ability to prepare his defense." *Id*. (internal quotations omitted). Phrased differently, such "an amendment to an indictment might be disallowed, or might constitute ground for a new trial, if the amendment surprises the defendant and this surprise prejudices his defense." *State v. Johnson,* 130 N.H. 578, 586 (1988).

Here, as this Court noted in its appeal on the merits, the indictment included a statutory reference to RSA 651:6 and the defendant received

notice by letter of the State's intent to seek enhanced penalties more than a year before trial. *Fitzgerald*, 2017-0328, at 4. The defendant was on notice of this enhanced sentence so there was no concern of surprise. He had more than a year to prepare for this possibility, and he had the opportunity to combat this evidence through cross-examination of witnesses and with the defendant's own testimony. To this point, the defendant noted in his reply brief in his appeal on the merits, cited in the decision on the merits, that his argument about the constructive amendment of the indictments was based "upon the authority of juries, not about notice." *Id*. at 5. The test for an impermissible amendment, however, is about notice rather than about a jury's authority. *See Johnson,* 130 N.H. at 586.

C. Even if trial counsel's performance was constitutionally defective, the defendant suffered no prejudice from his counsel's actions.

The defendant must prove that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Collins*, 166 N.H. at 213. The *Collins* court further defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." *Id*.

The defendant argument rests on impermissible leaps of logic in its attempt to meet his burden under *Strickland*. His argument would have required trial counsel to either file a motion to dismiss or object to the jury instructions.[2] Once trial counsel had objected, the trial court would have

[2] If trial counsel filed a motion to dismiss which the court granted, the State could simply re-indict the defendant with the enhanced sentencing language.

reviewed the relevant statutes, court rules, and case law. Given that this Court found the issue was an open question, the defendant cannot say that the trial court would have necessarily found that a sentence enhancement needed to be included in the language of the indictment. Conversely, at the time, the trial court could have found that the defendant had the proper notice and that *Apprendi*, *Alleyne*, and *Glanville* did not apply to the factual situation as the State has demonstrated above.

The defendant's logical leap also requires a reasonable probability that this Court would deviate from its reasoning in *Marshall*. That is, this Court would now have to find that the question this Court deemed open, both in the defendant's appeal on the merits and from *Marshall*, was now clear law and that it has changed in the defendant's favor. The defendant cannot sustain his burden here either.

As this Court noted in the defendant's appeal on the merits, "whether the Federal and State Constitutions require that sentence enhancement factors be alleged in an indictment is an open question." *Fitzgerald*, 2017-0328, at 5. This scenario is quite different than cases where it is unquestionable that trial counsel's errors violated clearly established law.

In *State v. Cressey*, 137 N.H. 402, 412 (1993), this Court made clear that "expert testimony may not be offered to prove that a particular child has been sexually abused." A lack of objection when faced with that type of clear law, as this Court viewed in both *Collins* and *Wilbur*, allows for a reasonable probability that the trial court would have ruled in the defendant's favor had the objection been made. *See State v. Wilbur*, 171 N.H. 445, 455 (2018); *Collins*, 166 N.H. at 214. As this Court noted in both

appeals in its findings of ineffective assistance of counsel, case law is clear on this issue. *Wilbur*, 171 N.H. at 455; *Collins*, 166 N.H. at 214. Given a constitutional failure like the ones in *Wilbur* and *Collins*, a court could say with reasonable certainty that a different result would have occurred in the trial court but for trial counsel's unprofessional errors.

Beyond the threshold issue, the defendant did not receive a higher total sentence including the sentence enhancement than he could have received if either the jury found the State did not prove the enhancement or the court had sustained an objection to the instruction's inclusion. Absent the sentence enhancement, the court could not have sentenced the defendant to a 10-30 year sentence on an individual charge, but it could have sentenced the defendant to a cumulative sentence of up to 37½ to 75 years in prison if the court chose to make each sentence consecutive to another.

In *State v. Stearns*, 130 N.H. 475, 493 (1988), this Court held that "[t]rial judges are vested with broad discretionary powers with regard to sentencing." The court's sentence of 9½ to 25 years in prison falls squarely within the allowable range of Class A felony charges, stacked consecutively. In fact, on only the three charges for which the defendant was sentenced to stand-committed time, the court had discretion of up to 22½ to 45 years. Therefore, even if trial counsel provided constitutionally defective representation under the first prong of *Strickland*, the defendant suffered no prejudice on the second prong.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

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December 23, 2019

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CERTIFICATE OF COMPLIANCE

I, Gregory M. Albert, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9,440 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

December 23, 2019 /s/*Gregory M. Albert*
Gregory M. Albert

CERTIFICATE OF SERVICE

I, Gregory M. Albert, hereby certify that a copy of the State's brief shall be served on Michael D. Ramsdell, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

December 23, 2019 /s/*Gregory M. Albert*
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