

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
2020 TERM
NO. 2020-0595

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 by failing to follow this Court’s opinion in *State v. Fitzgerald*, 173 N.H. 564 (2020) and remedying the taint of the ineffective assistance of counsel found by this Court in *Fitzgerald* when it sentenced Fitzgerald to the same sentence he received following the ineffective assistance of counsel.

- II. Whether the trial court erred when it misapprehended this Court’s opinion in *Fitzgerald* and violated Fitzgerald’s Part I, Article 15 and Fifth and Fourteenth Amendment right to due process by imposing a sentence upon resentencing other than the terms of the State’s pre-ineffective assistance of counsel plea offer without explanation.

STATEMENT OF THE CASE AND FACTS

Defendant Keith C. Fitzgerald appeals the Belknap County Superior Court’s (O’Neill, PJ.) reimposition of the same 9½ to 25 years state prison sentence¹ upon resentencing following this Court’s remand in *State v.*

¹ Specifically, the terms of Fitzgerald’s five sentences are as follows: Charge ID Number 1120218C, 10-30 years, stand committed at the New Hampshire State Prison (“State Prison”), with six months of the minimum and five years of the maximum sentences suspended on conditions; Charge ID Number 1162259C, an identical, concurrent sentence; Charge ID Number 1162258C – an identical concurrent, sentence; Charge ID Number 1162257C - 10-30 years, stand committed at the State Prison, suspended on conditions for 15 years following release on the first three sentences, and consecutive to the first three sentences; and Charge ID Number 1162260C – an identical, concurrent sentence to that imposed on Charge ID Number 1162257C. The superior court also reimposed Fitzgerald’s obligation to pay restitution in the amount of \$409,980, although the restitution was paid in July 2018, a no-contact provision, and a prohibition on Fitzgerald working in financial services or fundraising without approval of his probation/parole officer following his release from State Prison. Notice of Appeal (“NOA”), pp. 15-44; Addendum to brief (“Add.”), pp. 26-55.

Fitzgerald, 173 N.H. 564 (2020)² to which Fitzgerald was sentenced after he received ineffective assistance of counsel in rejecting a plea offer of 2 years in the Belknap County House of Corrections to be followed by 2 years of home confinement. In *Fitzgerald*, after finding that 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 at the plea-bargaining stage of the original criminal proceeding, this Court remanded the case to the trial court for resentencing because that is the remedy “tailored to the injury suffered from the constitutional violation ... [and that] neutralize[s] the taint of [the] constitutional violation, while at the same time [does] not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution.” *Id.* at 581-83 (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2016)).

Prior to the resentencing hearing, Fitzgerald filed a sentencing memorandum in which he urged the trial court that this Court had explained that the paramount goal of the resentencing remedy is to “place [Fitzgerald], as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel.” *Id.* at 583 (quoting *H.P.T. v. Commissioner of Correction*, 79 A.3d 54, 59 (Conn. 2013). App. 9.³ Fitzgerald argued that the trial court should impose a sentence that most nearly approximates the plea offer that would have been

² The procedural history of the case preceding *State v. Fitzgerald*, 173 N.H. 564 (2020) is set forth in detail in *Fitzgerald*, *id.* at 569-573, and therefore will be restated herein only as necessary.

³ Fitzgerald reiterated the most important points in the sentencing memorandum during the resentencing hearing. Transcript of November 9, 2020 hearing (“TrI, pp. 17-24).

accepted but for the ineffective assistance of counsel.⁴ TrI, pp. 19-20, 22-24. Fitzgerald also argued that the only information the resentencing court could consider is his “earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions ...[.]” *see Fitzgerald*, 173 N.H. at 582. TrI, p. 19-20. Fitzgerald urged the superior court that it should not consider “any information concerning the crime that was discovered after the plea offer was made[.]” *see id.* (citing *Lafler*, 566 U.S. at 171-72), but to the extent the court considered such evidence the only properly considered information was favorable to him. App. 5-6.

After hearing sentencing arguments on November 9, 2020, the trial court took the matter under advisement without comment. TrI, p. 24. On November 25, 2020, the trial court reconvened the parties and made only the following conclusory statement: “After review of the charges and convictions involving the Defendant, the applicable law, including New Hampshire Supreme Court determination of 9/22/2020, and the pleadings and arguments made by respective counsel, I’ve determined the following sentences. Clerk may proceed.” Transcript of November 25, 2020 hearing (“TrII”), p. 29. Thereafter, the court clerk read the sentence.

When Fitzgerald asked for clarification of the sentence to ensure it was the same sentence that was imposed following the ineffective assistance of counsel, the court remarked only that: “The sentences speak for themselves, Counsel. You will get copies of same. Anything else?”. TrII, p. 38. When Fitzgerald reiterated that the sentence, which had been read during an audio-challenged WebEx proceeding, was not easily understood, the trial court remarked: “I believe the minimum release date for the Defendant is 2/4/2028, if that responds to your question. But again,

⁴ The trial court could not impose the exact terms of the plea offer because Fitzgerald already has served more time in the State Prison than the plea offer required him to serve in the Belknap County House of Corrections.

don't hold me to that. I haven't done the precise computations. And again, the sentences speak for themselves. Anything further?". TRII, p. 39.⁵

When Fitzgerald objected to the sentence as inconsistent with this Court's decision in *Fitzgerald*, TRII, pp. 38-39, the trial court stated only: "Okay. The objection so noted, Counsel. Anything further?". TRII, p. 39.

Fitzgerald moved for reconsideration of the sentence. App. 22. He argued that when the trial court imposed the same sentence upon resentencing that he had received after his trial counsel's constitutionally defective representation, it overlooked or misapprehended the guidance provided by this Court in *Fitzgerald* when it vacated the original sentence and remanded the case for resentencing. App. 23-27. Fitzgerald also argued that he was denied due process when the trial court resentenced him to the same sentence without stating any basis for the reimposition of the original sentence. App. 27-30. The trial court summarily denied the motion for reconsideration. Add. 56.

This appeal followed.

SUMMARY OF ARGUMENT

When the superior court, upon resentencing following remand from this Court, reimposed the same sentence Fitzgerald received following the ineffective assistance of counsel that this Court found in *State v. Fitzgerald*, 173 N.H. 564 (2020), the trial court failed to follow this Court's opinion in *Fitzgerald*. The superior court's rote reimposition of the same sentence that followed the ineffective assistance of counsel ignored the two paramount objectives of the remand for resentencing:

1. to "neutralize the taint of [the] constitutional violation, while at the same time not grant a windfall to the defendant

⁵ The transcript erroneously attributes Fitzgerald's question and succeeding objection to the State's counsel.

or needlessly squander the considerable resources the State properly invested in the criminal prosecution[.]” *id.* at 581-82 (quoting *Lafler*, 566 U.S. at 170); and

2. to place the [defendant], as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel. *Id.* at 583 (citations omitted).

Although the superior court possesses reasonable discretion on resentencing, that discretion is limited by the paramount objectives of the remedy. Here, the trial court failed to acknowledge the overriding purposes of the resentencing and neither cured the taint of the constitutional violation nor placed Fitzgerald in the same position he would have occupied absent the ineffective assistance of counsel.

The trial court’s failure to follow *Fitzgerald* and to recognize that the resentencing was a remedy for a constitutional violation was exacerbated by the fact that the original sentence was reimposed without a stated substantive reason. The reimposition of a 9½ to 25-year sentence at the State Prison instead of 2 years in a house of corrections followed by 2 years home confinement without a stated reason under the circumstances of the remedial nature of the resentencing violated Fitzgerald’s right to due process pursuant to Part I, Article 15 of the State Constitution and the Fifth and Fourteenth Amendments to the Federal Constitution.

The trial court’s failures have come at a substantial cost to Fitzgerald. By the time this Court considers the merits of Fitzgerald’s appeal, he likely will have spent more time incarcerated at the State Prison, a level of incarceration to which he would not have been subjected under the plea offer that was the subject of the ineffective assistance of counsel, than the two years at the Belknap County House of Corrections and the two years home confinement demanded by the plea offer.

ARGUMENT

- I. The trial court erred by failing to follow this Court’s opinion in *State v. Fitzgerald*, 173 N.H. 564 (2020), and to remedy the taint of the ineffective assistance of counsel found by this Court in *Fitzgerald* when it sentenced Fitzgerald to the same sentence he received following the ineffective assistance of counsel.**

A. Standard of Review.

The legal standard for determining whether the trial court properly remedied a State and Federal Constitutional violation is a question of constitutional law, which this Court reviews *de novo*. See *State v. Hall*, 154 N.H. 180, 181 (2006).

- B. While the trial court retains reasonable discretion when resentencing a defendant whose right to counsel was denied at the plea-bargaining stage of a case, such discretion is limited by the paramount goal of the resentencing remedy – the court must neutralize the taint of the constitutional violation by placing the defendant, as nearly as possible, in the same position he would have occupied if his right to counsel had not been violated.**

In *State v. Fitzgerald*, 173 N.H. 564 (2020), this Court addressed for the first time “how to analyze the prejudice prong of an ineffective assistance of counsel claim where ineffective assistance results in the defendant’s rejection of a plea offer[.]” *id.* at 576, and adopted the test that the United States Supreme Court announced in *Lafler v. Cooper*, 566 U.S. 156 (2016):

a defendant must show that, but for the ineffective advice of counsel, there is a reasonable probability that: (1) 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); (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.

Fitzgerald, 173 N.H. at 577 (quoting *Lafler*, 566 U.S. at 163-64).

After finding that Fitzgerald satisfied the test, and therefore was denied his right to effective assistance of counsel in considering whether to accept the State's plea offer, *see id.* at 576, this Court vacated Fitzgerald's sentence and remanded for resentencing, but not a new trial, because resentencing would "neutralize the taint of [the] constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* at 581-82 (quoting *Lafler*, 566 U.S. at 170). The trial court was advised that "in deciding the appropriate remedy, the court's inquiry should focus on whether the defendant should receive the term of imprisonment the State offered in the plea, the sentence he received at trial, or something in between." *Id.* at 583 (citing *Lafler*, 566 U.S. at 171). The difference is substantial. As this Court recognized: (1) the plea offer was "two years in the Belknap County House of Corrections followed by two years on administrative home confinement[,]" with a consecutive, suspended sentence, *id.* at 570; and (2) the post-trial sentence was "nine and one-half years and not more than 25 years in the New Hampshire State Prison[,]" *id.* at 571.

Although this Court declined to define the "boundaries of proper discretion[,]" *id.* at 582 (quoting *Lafler*, 566 U.S. at 171), and "le[ft] open to the trial court how best to exercise [its] discretion in all the circumstances of the case before it[,]" *id.* at 583 (quoting *Lafler*, 566 U.S. at 174-75), the Court provided guidance to the trial court. Most importantly, this Court stated the hallmark of the remedy: "[t]he proper remedy upon a finding of ineffective assistance of counsel is to remand to the trial court, **which is vested with the discretion to place the**

[defendant], as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel.” *Id.* (quoting *H.P.T.*, 79 A.3d at 59 (quotation omitted) (emphasis added); cf. *Lafler*, 566 U.S. at 172)).

This Court also commented on two potential considerations for the trial court. The Court advised the trial court that it ““may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions” *Id.* at 582. At the same time, this Court implicitly expressed skepticism about the trial court’s consideration of post-plea offer information when it stated “it is not necessary here to decide as a constitutional rule that the court is required to disregard ‘any information concerning the crime that was discovered after the plea offer was made.’” *Id.* (citing *Lafler*, 566 U.S. at 171-72).

The cases cited in *Fitzgerald* support the guidance that information properly considered at a resentencing hearing should be limited. In *H.P.T.*, the Connecticut Supreme Court reaffirmed that if a criminal defendant receives ineffective assistance of counsel at the plea bargaining stage and ““a habeas court finds prejudice, then, in most cases, that court should order the trial court to determine the proper remedy in light of any information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence, such as a [presentence investigation report] or a victim impact statement.”” *H.P.T.*, 79 A.3d at 59 (quoting *Ebron v. Commissioner of Correction*, 307 Conn. 342, 358 (2012)). Other jurisdictions agree. *See Commonwealth v. Steckley*, 128 A.3d 826, 836-38 (PA Super Ct 2015); *United States v. Penoncello*, 358 F.Supp.3d 815, 828-29 (D.Minn. 2019); *Dodson v. Ballard*, 800 Fed.Appx. 171, 181 (4th Cir. 2019). In other words, the resentencing court should consider only that information that ordinarily

would have been discovered between the acceptance of the plea offer and sentencing.

Most importantly, the remedy must be fashioned to remedy the taint of the constitutional violation and place the defendant in the same position he would have occupied absent the violation. Other appellate and federal courts also have remanded cases to state trial courts with instructions that the defendant who had suffered ineffective assistance of counsel at the plea-bargaining stage of the proceedings should be afforded the opportunity to accept the pre-ineffective assistance plea offer. In *People v. Hudson*, 95 N.E.3d 1148 (Ill. App. Ct. 2017), the Illinois appellate court found that its trial court abused its discretion when it rejected a former plea offer of 20 years upon resentencing and reimposed a sentence of life imprisonment because “[u]nder the authority of *Lafler* and *Curry*, the state trial court had discretion to reject details of the plea, but that discretion was limited by the requirement that the remedy had to neutralize the taint of the constitutional violation.” *Id.* at 1151. In *Green v. Attorney General*, 193 F.Supp.3d 1274 (M.D. FL 2016), the federal court found that a defendant who, at the time his habeas corpus petition was granted had served five years more than he would have served pursuant to a plea offer that was rejected because of ineffective assistance of counsel, must be resentenced to time served. *Id.* at 1288-89.

In *United States v. Knight*, 981 F.3d 1095 (D.C. Cir. 2020), after finding that the defendant had received ineffective assistance of counsel in rejecting a government plea offer, the D.C. Circuit found that the appropriate remedy was to remand the case to the district court with instructions that the government should re-offer the rejected plea offer. *Id.* at 1109. In *Medina v. United States*, 797 Fed.Appx. 431 (11th Cir. 2019), the Eleventh Circuit held that the appropriate remedy for ineffective assistance of counsel at the plea-bargaining stage was to remand the case to the federal district court with instructions to resentence Medina as if he had pled guilty ab initio upon his entry of an unconditional guilty plea. *Id.* at 437-38. Sentencing Medina ab

initio entitled him to a lesser sentence under the federal sentencing guidelines because of his “acceptance of responsibility.” *Id.* at 436.

Here, the trial court gave no indication of the substantive information upon which it relied in reimposing the original sentence. TrII, p. 29. Yet, the only factor this Court plainly articulated that the trial court could consider in determining the new sentence favored Fitzgerald. This Court found that it is reasonably probable that Fitzgerald was willing to accept responsibility for his conduct absent his counsel’s constitutionally deficient performance. *Fitzgerald*, 173 N.H. at 577. (“The record demonstrates that the defendant was seriously considering the State’s plea offer at all times prior to trial.”). Even the consideration that this Court referenced in the context that it might not be constitutionally permissible, “information concerning the crime that was discovered after the plea offer was made[,]” *id.* at 582, favors imposition of a sentence that most closely reflects the plea offer because there was no substantive “information about the crime” that was discovered after the State’s plea offer that would reflect unfavorably on Fitzgerald.

Instead of information about the crime, the State urged the trial court to rely on Fitzgerald’s trial testimony – which would not have occurred absent counsel’s ineffective assistance of counsel – to seek to have the trial court impose the same sentence Fitzgerald received after trial. However, because the trial testimony would not have occurred but for defense counsel’s ineffective assistance of counsel and “was not information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence, such as a [presentence investigation report,]” it was not “properly available” to the resentencing court. *See H.P.T.*, 79 A.3d at 59; *Ebron*, 307 Conn. at 358; *Steckley*, 128 A.3d at 836-38; *Penoncello*, 358 F.Supp.3d at 828-29; *Dodson*, 800 Fed.Appx. at 181.

Similarly, the victim's statements submitted to the trial court at the original sentencing hearing and reiterated at the resentencing hearing also are not sufficiently reliable for the resentencing court to consider. The State has not, and cannot, dispute that the victims did not object to the State's plea offer. Hence, their statements at a sentencing hearing that would not have been influenced by the ineffective assistance of counsel, and instead, would have obviated a trial would have been wholly different than their post-trial statements, which included commentary on evidence and testimony presented at trial. To "'neutralize the taint of [the] constitutional violation,'" *id.* at 581-82 (quoting *Lafler*, 566 U.S. at 170), the trial court could not properly consider the unreliable statements.

When this Court found that Fitzgerald was denied his right to effective assistance of counsel in considering whether to accept the State's plea offer, *see id.* at 581, it stated that "[t]he proper remedy upon a finding of ineffective assistance of counsel is to remand to the trial court, 'which is vested with the discretion to place the [defendant], as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel.'" *Id.* at 583 (quoting *H.P.T.*, 79 A.3d at 59 (quotation omitted); cf. *Lafler*, 566 U.S. at 172). Those words, "in the position he would have been in if there had been no violation of his right to counsel" are not limited to a mere procedural remedy. Returning Fitzgerald to the resentencing court only to have the trial court impose the same sentence imposed after trial, particularly without explanation, does not "'neutralize the taint of [the] constitutional violation'" *Id.* at 581 (quoting *Lafler*, 566 U.S. at 170). Rather, it exacerbates it.

The trial court failed in the paramount objective of resentencing, to remedy the Part I, Article 15 and Sixth and Fourteenth Amendment violation of Fitzgerald's right to competent counsel. It did not place Fitzgerald, as nearly as possible, in the position he would have been absent

his counsel's constitutionally defective advice. Accordingly, the trial court abused its discretion and committed an error of law by failing to follow *Fitzgerald*, and resentencing Fitzgerald to a sentence much more severe than the terms of the State's plea offer.

II. The trial court erred when it misapprehended this Court's opinion in *Fitzgerald*, and violated Fitzgerald's Part I, Article 15 and Fifth and Fourteenth Amendment right to due process when it imposed a sentence other than the terms of the State's plea offer without explanation.

A. Standard of Review

The question of whether the trial court misapprehended this Court's decision on an issue of constitutional law is one of constitutional law, which this Court reviews *de novo*. See *Hall*, 154 N.H. at 181.

B. Although its discretion upon resentencing was limited by this Court's remedy articulated in *Fitzgerald*, the trial court failed to state any basis for reimposing the same sentence Fitzgerald received after the ineffective assistance of counsel.

In *Fitzgerald*, this Court found that Fitzgerald was denied his right to effective assistance of counsel in considering whether to accept the State's plea offer, *see id.* at 581, and remanded the case to the superior court "for resentencing consistent with [its] opinion." *Id.* at 584. This Court held that Fitzgerald should be resentenced, but not afforded a new trial, because that remedy would "neutralize the taint of [the] constitutional violation, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Id.* at 581 (quoting *Lafler*, 566 U.S. at 170). This Court clarified that "in deciding the appropriate remedy, the court's inquiry should focus on whether the defendant should receive the term of imprisonment the State offered in the plea, the sentence he received at trial, or something in between." *Id.* (citing *Lafler*, 566 U.S. at 171). However,

this Court declined to define the “boundaries of proper discretion[,]” *id.* at 582 (quoting *Lafler*, 566 U.S. at 171), and “le[ft] open to the trial court how best to exercise [its] discretion in all the circumstances of the case before it.” *Id.* at 583 (quoting *Lafler*, 566 U.S. at 174-75).

On November 9, 2020, the State and Fitzgerald offered sentencing arguments to the trial court. The court did not sentence Fitzgerald on that date and stated only that it was taking the matter under advisement. On November 25, 2020, the court resentenced Fitzgerald to the same sentence imposed following the ineffective assistance of counsel. The trial court stated no basis for the reimposition of the same period of incarceration even when Fitzgerald’s counsel asked for confirmation that the sentence was effectively the same as had been imposed previously and when counsel objected to the sentence. The trial court’s unexplained reimposition of the post-ineffective assistance of counsel sentence violated Fitzgerald’s Part I, Article 15 and Fifth and Fourteenth Amendment right to due process.

Trial courts are afforded broad, but not unlimited, discretion when imposing a sentence. *State v. Benner*, 172 N.H. 194, 198 (2019); *State v. Willey*, 163 N.H. 532, 541 (2012). Additionally, “it is necessary that ‘[p]roceedings in the trial court on remand ... [are] in accordance with both the mandate of the appellate court and the result contemplated in the appellate opinion.’” *State v. Abram*, 156 N.H. 646, 650-51 (2008) (citation omitted). Here, when the trial court imposed a sentence greater than that offered in the State’s pre-ineffective assistance of counsel plea offer without stating its reasons or basis therefor, it misapprehended the opinion in *Fitzgerald* and failed to act in accordance with this Court’s mandate or achieve the paramount result contemplated in its opinion, curing the taint of the constitutionally deficient representation.

“Although a sentencing judge has broad discretion to choose the sources and types of evidence upon which to rely in imposing sentence, that

discretion is not unlimited.” *Willey*, 163 N.H. at 541 (quoting *State v. Lambert*, 147 N.H. 295, 295-96 (2001)). Moreover, “[i]f improper evidence is admitted at sentencing, the sentence imposed must be reconsidered unless the trial court clearly gave that evidence no weight.” *Id.* (quoting *State v. Burgess*, 156 N.H. 746, 751-52 (2008)). In other words, a sentence must be vacated when there is doubt about whether the trial court considered improper factors in imposing a sentence because the court “must err on the side of protecting the defendant’s constitutional rights.” *Id.* at 547.

In *Fitzgerald*, although this Court declined to set the boundaries of the trial court’s discretion, it provided guidance on the scope of evidentiary considerations for the resentencing trial court. The resentencing court “may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions” *Id.* at 582. This Court implicitly expressed skepticism about the resentencing court’s consideration of information other than the ordinary post-plea agreement information when it stated “it is not necessary here to decide as a constitutional rule that the court is required to disregard ‘any information concerning the crime that was discovered after the plea offer was made.’” *Id.* (citing *Lafler*, 566 U.S. at 171-72).

When it opined that deciding a constitutional rule requiring the resentencing court to disregard post-plea offer acquired information was unnecessary, this Court likely believed that the resentencing court would follow the cases cited in *Fitzgerald* and similar decisions from other jurisdictions. The cases support such a constitutional rule. In *H.P.T.*, the Connecticut Supreme Court reaffirmed the standard it had articulated previously following *Lafler*. The *H.P.T.* court held that after a criminal defendant receives ineffective assistance of counsel at the plea bargaining stage and “when a habeas court finds prejudice, then, in most cases, that

court should order the trial court to determine the proper remedy in light of any information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of the sentence, such as a [presentence investigation report] or a victim impact statement.”” *H.P.T.*, 79 A.3d at 59 (quoting *Ebron*, 307 Conn. at 358). In sum, the resentencing court should consider only that information that ordinarily would have been discovered between the acceptance of the plea offer and sentencing. *Id.* at

Like this Court in *Fitzgerald*, the Connecticut Supreme Court recognized the paramount goal of a just remedy:

These recent decisions demonstrate that, regardless of whether a petitioner's successful claim of ineffective assistance of counsel during plea negotiations arises by way of a subsequent plea agreement or conviction after trial, **the proper remedy remains the same in most cases, namely, remanding the case to the trial court, which is vested with the discretion to place the habeas petitioner, as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel.**

H.P.T., 79 A.3d at 59 (quotations and citations omitted) (emphasis added). Other jurisdictions agree. *See Steckley*, 128 A.3d at 836-38; *Penoncello*, 358 F.Supp.3d at 828-29 (D.Minn. 2019); *Dodson*, 800 Fed.Appx. at 181.

Here, two facts are clear: (1) the trial court must have considered information other than that which ordinarily would have been available between the plea offer and sentencing when it reimposed the same sentence as was imposed after Fitzgerald was denied his right to effective assistance of counsel regarding acceptance of the State’s plea offer; and (2) the Court denied Fitzgerald the opportunity to discover and challenge the Court’s consideration of such information. The Court’s consideration of information beyond the scope allowed by *Fitzgerald* and *Lafler* failed to remedy the Part I, Article 15 and Sixth and Fourteenth Amendment

violation of Fitzgerald's right to competent counsel. Its consideration of, and failure to disclose, the information also violated Fitzgerald's Part I, Article 15 and Fifth and Fourteenth Amendment right to due process.

Despite the cautions in *Fitzgerald* and *Lafler* about the resentencing court limiting its considerations at resentencing, the trial court failed to state its sentencing considerations either on its own initiative or in response to Fitzgerald's question about, and objection to, the sentence. The circumstances here are at least as compelling as other instances in which a defendant's New Hampshire Part I, Article 15 and United States Fifth and Fourteenth Amendment right to due process of law requires the sentencing court to state on the record the reasons for the sentence imposed. *See Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982) (imposition of suspended sentence); *Abram*, 156 N.H. at 652 (more severe sentence imposed by same sentencing judge following retrial). Consequently, the trial court's failure to explain the information it considered and the basis for reimposing the same sentence instead of "placing [Fitzgerald], as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel[,]" *Fitzgerald*, 173 N.H. at 583, violated Fitzgerald's state and federal constitutional right to due process.

The resentencing circumstances here are analogous to those present in *Abram*. In *Abram*, the defendant originally was convicted of twenty-six separate charges. 156 N.H. at 648. On appeal, this Court reversed the convictions on nine charges and affirmed the remaining seventeen convictions. *Id.* at 649. The case was remanded for resentencing, whereupon the trial court essentially reimposed the same, if not a slightly harsher. sentence. *Id.* This Court subsequently found that the sentence violated due process. *Id.* at 653-55.

This Court explained the trial court's failure upon resentencing: "Distilled to its essence, [the trial court's] justification ... is not a

justification based on objective information concerning identifiable conduct on the part of the defendant occurring *after* the time of the original sentencing procedure.” *Id.* at 653 (italics in original) (quotations and citations omitted). Thus, to remedy the harm of a presumptively vindictive sentence, this Court limited the information upon which the trial court could rely when resentencing a defendant to a harsher sentence after a successful appeal to conduct that occurred **after** the time of the imposition of the original sentence. *Id.* Moreover, the Court reaffirmed that the basis for the new sentence must be articulated on the record. *Id.* at 652-53 (citing *State v. Goding*, 128 N.H. 267, 271 (1986)).

Similarly, the information properly available for the trial court’s consideration after a defendant’s successful appeal following ineffective assistance of counsel at the plea-bargaining stage of the proceedings must be limited in accordance with the remedy for the violation. The remedy is “placing the defendant, as nearly as possible, in the position that he would have been in if there had been no violation of his right to counsel.” *Fitzgerald*, 173 N.H. at 583. The only way the trial court could have placed *Fitzgerald*, as nearly as possible, in the position he would have been absent his counsel’s constitutionally defective advice was by limiting the information it considered at resentencing to information that ordinarily would have been discovered between the acceptance of the plea offer and sentencing. *See id.*; *Lafler*, 566 U.S. at 171-72; *H.P.T.*, 53 A.3d at 983; *Steckley*, 128 A.3d at 836-38; *Penoncello*, 358 F.Supp.3d at 828-29; *Dodson*, 800 Fed.Appx. at 181.

In certain instances, due process requires that the Court state the information it considered and its basis for imposing the sentence. *See Willey*, 163 N.H. at 546-47; *Stapleford*, 122 N.H. at 1088; *Abram*, 156 N.H. at 652. *Fitzgerald* and *Lafler* also should be read to require that the Court state the information relied upon and the basis for sentence on the record.

Otherwise, it should be presumed that the sentence imposed at the resentencing, which was significantly greater than the sentence that would have been imposed without defense counsel's ineffective assistance of counsel, did not cure the Part I, Article 15 and Sixth and Fourteenth Amendment violation of Fitzgerald's right to competent counsel. *See Willey*, 163 N.H. at 546-47 (sentence vacated because this Court could not conclude from the record that the trial court did not consider improper factors).

The information "properly available" to the trial court does not include Fitzgerald's trial testimony. It would not have occurred but for defense counsel's ineffective assistance of counsel. The victim's statements submitted to the trial court at the original sentencing hearing and reiterated at the resentencing hearing also are not sufficiently reliable for the superior court to consider. The State has not, and cannot, dispute that the victims did not object to the State's plea offer. Hence, their statements to the trial court at a sentencing hearing following Fitzgerald's acceptance of the State's plea offer would have been wholly different than their post-trial statements, which included commentary on evidence and testimony presented at trial. To "neutralize the taint of [the] constitutional violation," *Fitzgerald*, 173 N.H. at 581 (quoting *Lafler*, 566 U.S. at 170), the trial court could not have considered the unreliable statements.

The trial court failed to place Fitzgerald in a position that approximated his pre-ineffective assistance of counsel position when it considered evidence not properly before it in resentencing Fitzgerald to the same term of years as he received post-ineffective assistance of counsel. The trial court's reimposition of the same sentence without a stated reason or explanation of the facts it considered in imposing the sentence violated Fitzgerald's right to due process of law pursuant to Part I, Article 15 of the

New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

III. The proper sentence for Fitzgerald.

When the trial court resentenced Fitzgerald on November 25, 2020, he had served 987 days in the State Prison.⁶ Between November 25, 2020 and October 25, 2021, the deadline for the State's responsive brief in this appeal, Fitzgerald will serve another 334 days at the State Prison. Thus, by the time the State files its brief, Fitzgerald will have served approximately 3.6 years at the State Prison ($[987 + 334 = 1,321] / 365 = 3.61$).

The State's pre-ineffective assistance of counsel plea offer to Fitzgerald was "two years in the Belknap County House of Corrections followed by two years on administrative home confinement." *Fitzgerald*, 173 N.H. at 570. Consequently, it is likely that before this Court considers the merits of Fitzgerald's appeal, he will have served more time at the state prison than the plea offer required him to serve at the county house of corrections and on administrative home confinement. Under the circumstances, this Court should vacate Fitzgerald's sentence and remand to the trial court with instructions to impose the following sentence:

1. Charge ID #1120218C: time served at the New Hampshire State Prison;
2. Charge ID #1162259C: time served at the New Hampshire State Prison, concurrent to #1120218C;
3. Charge ID #1162258C: time served at the New Hampshire State Prison; concurrent to #1120218C and #1162259C;
4. Charge ID #1162257C: time served at the New Hampshire State Prison; concurrent to #1120218C, #1162259C, and #1162258C; and
5. Charge ID #1 162260C: 4-10 years to the New Hampshire State

⁶ The trial court erroneously credited Fitzgerald with 1,294 days of pretrial confinement credit.

Prison, all suspended for 10 years commencing upon the termination of the sentence on #1120218C; to be served consecutively to any of the other sentences if imposed; restitution of \$409,980, which the Court notes has been paid.⁷

Since the sentence called for in the plea offer no longer can be imposed, this sentence represents the sentence that most closely approximates the plea offer. It is the sentence that best neutralizes the taint of the ineffective assistance of counsel and most closely restores Fitzgerald to the position he occupied prior to the ineffective assistance of counsel.

CONCLUSION

The trial court failed to remedy the taint of the ineffective assistance of counsel found by this Court in *Fitzgerald* when it failed to restore Keith Fitzgerald to the same position he occupied pre-ineffective assistance of counsel, and instead, sentenced Fitzgerald to the same sentence he received following the ineffective assistance of counsel. The trial court also violated Fitzgerald's right to due process of law pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution when it reimposed the same sentence he received following the ineffective assistance of counsel without identifying a basis for the sentence.

This Court should vacate Fitzgerald's sentence and remand the case to the superior court with instructions to sentence Fitzgerald to three concurrent sentences of time served at the New Hampshire State Prison and a consecutive, suspended sentence of 4-10 years at the New Hampshire State Prison.

⁷ The resentencing hearing transcript incorrectly quotes the State's counsel regarding restitution. The State's counsel represented to the trial court: "Just to confirm, Judge, with Attorney Ramsdell that restitution **was** paid. The State would **agree** that restitution is paid." TrI, p. 24.

Oral Argument

Fitzgerald requests 15 minutes for oral argument before the 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.

CERTIFICATE OF COMPLIANCE

This brief complies with Supreme Court Rule 16(3)(i) because the written sentences appealed from appear at pages 26-55 of the Addendum to this brief, and the written Order denying Fitzgerald's motion for reconsideration of the sentences appears at page 56 of the Addendum. The brief also complies with Supreme Court Rule 16(11) because it contains 6,474 words, excluding the table of contents, table of citations, and Addendum. Counsel relied on the word count of the computer used to produce the brief.

Respectfully submitted,

KEITH C. FITZGERALD

By his counsel,

Dated: September 9, 2021

By: /s/ Michael D. Ramsdell
Michael D. Ramsdell (NH Bar No. 2096)
SHEEHAN PHINNEY BASS &
GREEN, P.A.
1000 Elm Street, 17th Floor
Manchester, NH 03101
(603) 627-8117
mramsdell@sheehan.com

CERTIFICATE OF SERVICE

On this 9th day of September, 2021, this brief was forwarded to Attorney General John M. Formella through the Court's electronic filing system.

/s/ Michael D. Ramsdell
Michael D. Ramsdell

ADDENDUM TABLE OF CONTENTS

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THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
64 Court St.
Laconia NH 03246

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**
Name: **Keith C Fitzgerald, PO Box 266 Center Harbor NH 03226**
DOB: **January 20, 1965**
Charging document: Indictment

Offense: Theft by Unauthd Taking GOC: Charge ID: 1120218C RSA: 637:3 Date of Offense: July 28, 2010

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered. Resentenced after Remand from Supreme Court.

Conviction: Felony

Sentence: see attached

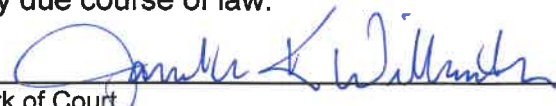
November 25, 2020
Date

Hon. James D. O'Neill, III
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: 
Deputy Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ; Patrick J. Queenan, ESQ; Gregory M. Albert, ESQ Defendant Defense Attorney Michael D. Ramsdell, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Belknap Superior Court

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276 Charge ID Number: 11202186
(if known)

STATE PRISON SENTENCE

Plea/Verdict: <u>GUILTY</u>	
Crime: <u>RSA 637:3 (Thrift by unauthorized taking)</u>	Date of Crime: <u>7/28/10</u>

A finding of GUILTY/TRUE is entered.

CONVICTION AND CONFINEMENT

A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

B. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

Pretrial confinement credit: 1,294 days.

C. This sentence is to be served as follows:

Stand committed Commencing _____

six (6) months of the minimum sentence and 5 years of the maximum sentence is suspended.

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order.

Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on 5/11/17

_____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

D. The sentence is consecutive to case number and charge ID _____
 concurrent with case number and charge ID _____

E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.

G. The Court recommends to the Department of Corrections:

Screen and/or assess for drug and alcohol treatment needs.

Sentence to be served at House of Corrections

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: Forthwith Upon release from _____

The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

A. **Fines and Fees:**

Fine of \$ _____, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By _____

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

B. **Restitution:**

The defendant shall pay restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

C. **Appointed Counsel: NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court order for repayment is suspended until the time of the defendant's release from state prison.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 - New Hampshire State Prison
 - House of Corrections
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hop's Fitzgerald, Heath Fitzgerald, Alexander Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
- G. The defendant and the State have waived sentence review in writing or on the record.
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other:

See Attached Addendum

For Court Use Only

D. DONILL P.J.
11/25/20

Addendum

In addition to other conditions, suspensions are conditioned on defendant's good faith effort to comply with restitution requirements while on parole.

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services without the approval of a Probation/Parole officer.

Contact with above-names persons permissible via attorney for purposes of satisfying probate judgment.

211-2015-CR-276
Charge ID #1120218C

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

At the Superior Court, holden at Laconia, within and for the County of Belknap aforesaid, on the 3rd day of December in the year of our Lord two thousand and fifteen,

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

KEITH C. FITZGERALD

DOB: 1/20/1965

on or about July 28, 2010, in the County of Belknap aforesaid, did commit the crime of


THEFT BY UNAUTHORIZED TAKING OR TRANSFER

(RSA 637:3)

in that Keith C. Fitzgerald obtained or exercised unauthorized control over the property of Clifford L. Fitzgerald Jr., the value of which exceeded \$1,500.00, with a purpose to deprive Clifford L. Fitzgerald Jr. thereof.

On or about July 28, 2010, Keith C. Fitzgerald transferred \$125,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. Of the \$125,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr., but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with a purpose to deprive Clifford L. Fitzgerald Jr. of the money.

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


Jesse O'Neill, NH Bar #20723
Assistant Attorney General

This is a true bill.


Foreperson

Name: Keith C. Fitzgerald
Address: 166 Follett Road, Center Harbor, New Hampshire
DOB: 1/20/1965
RSA: 637:3 (Class A Felony); 651:6
Penalty: NHSP 7½-15 years and up to \$4,000 fine
Sup. Case No.: 211-2015-CR-00276

3/29/2017
Jury Verdict:
Guilty
Larry M. Smucker, RJ
James W. Walker
Deputy Clerk

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
64 Court St.
Laconia NH 03246

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**
Name: **Keith C Fitzgerald, PO Box 266 Center Harbor NH 03226**
DOB: **January 20, 1965**
Charging document: Indictment

Offense: Theft by Unauthd Taking GOC: Charge ID: 1162257C RSA: 637:3 Date of Offense: May 12, 2010

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered. Resentenced after Remand from Supreme Court.

Conviction: Felony

Sentence: see attached

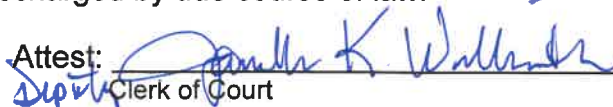
November 25, 2020
Date

Hon. James D. O'Neill, III
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: 
Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ; Patrick J. Queenan, ESQ; Gregory M. Albert, ESQ Defendant Defense
Attorney Michael D. Ramsdell, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**
http://www.courts.state.nh.us

Court Name: Belknap Superior Court
 Case Name: State vs. Keith Fitzgerald
 Case Number: 211-2015-CR-00276 Charge ID Number: 1162257C
 (if known)

STATE PRISON SENTENCE

Plea/Verdict: <u>GUILTY</u>	
Crime: <u>RSA 637:3</u>	Date of Crime: <u>5/12/2010 - 6/22/2010</u>

A finding of GUILTY/TRUE is entered.

CONVICTION AND CONFINEMENT

A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

B. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

Pretrial confinement credit: _____ days.

C. This sentence is to be served as follows:

Stand committed Commencing _____

All of the minimum sentence and All of the maximum sentence is suspended.

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order.

Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 15 years from today or release on 1120218C, 112258C, 1162259C

_____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

D. The sentence is consecutive to ~~case number and~~ charge ID (s) 1120218C, 1162258C, 1162259C
 concurrent with case number and charge ID _____

E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.

G. The Court recommends to the Department of Corrections:

Screen and/or assess for drug and alcohol treatment needs.

Sentence to be served at House of Corrections

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: Forthwith Upon release from _____

The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

A. **Fines and Fees:**

Fine of \$ _____, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By _____

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

B. **Restitution:**

The defendant shall pay restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.

If not already paid

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

C. **Appointed Counsel: NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court order for repayment is suspended until the time of the defendant's release from state prison.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hopi Fitzgerald ^{Heather Fitzgerald} ⁺ ^{Alexandre Dodwell} either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
- G. The defendant and the State have waived sentence review in writing or on the record.
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other:

See Attached Addendum

For Court Use Only

D. O'Neill ~~RE~~ PJ
11/25/20

Addendum

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services without the approval of a Probation/Parole officer.

Contact with above-names persons permissible via attorney for purposes of satisfying probate judgment.

211-2015-CR-276
Charge ID # 1162257C

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

At the Superior Court, holden at Laconia, within and for the County of Belknap aforesaid, on the 3rd day of December in the year of our Lord two thousand and fifteen,

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

KEITH C. FITZGERALD

DOB: 1/20/1965

between approximately May 12, 2010 and June 22, 2010, in the County of Belknap aforesaid, pursuant to one scheme or course of conduct, did commit the crime of


THEFT BY UNAUTHORIZED TAKING OR TRANSFER

(RSA 637:3)

in that Keith C. Fitzgerald obtained or exercised unauthorized control over the property of Clifford L. Fitzgerald Jr., the aggregate value of which exceeded \$1,000.00, with a purpose to deprive Clifford L. Fitzgerald Jr. thereof.

Between approximately May 12, 2010 and June 22, 2010, pursuant to one scheme or course of conduct, Keith C. Fitzgerald executed checks drawn on one or more accounts at Wachovia Bank, which he deposited or caused to be deposited in an account at Meredith Village Savings Bank titled to Airlift Support Foundation. An amount in excess of \$1,000.00, transferred via this scheme or course of conduct, was the property of Clifford L. Fitzgerald Jr; however, Clifford L. Fitzgerald Jr. was not a signatory to, and had no right of access to, the Meredith Village Savings Bank account where the monies were deposited. Keith C. Fitzgerald performed this scheme or course of conduct without the authorization of Clifford L. Fitzgerald Jr. and with the purpose to deprive Clifford L. Fitzgerald Jr. of the money.

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


Jesse O'Neill, NH Bar #20723
Assistant Attorney General

This is a true bill



Foreperson

Name: Keith C. Fitzgerald
Address: 166 Follett Road, Center Harbor, New Hampshire
DOB: 1/20/1965
RSA: 637:3 (Class A Felony); 651:6
Penalty: NHSP 7½-15 years and up to \$4,000 fine
Sup. Case No.: 211-2015-CR-00276

3/29/2017
Jury Verdicts Guilty
Harry M. Smucker, PJ
Janella K. Allinckh
Deputy Clerk

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Belknap Superior Court
64 Court St.
Laconia NH 03246

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**
Name: **Keith C Fitzgerald, PO Box 266 Center Harbor NH 03226**
DOB: **January 20, 1965**
Charging document: Indictment

Offense: Theft by Unauthd Taking	GOC:	Charge ID: 1162258C	RSA: 637:3	Date of Offense: June 29, 2010
--	-------------	-------------------------------	----------------------	--

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered. Resentenced after Remand from Supreme Court.

Conviction: Felony

Sentence: see attached

November 25, 2020
Date

Hon. James D. O'Neill, III
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: 
Deputy Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ; Patrick J. Queenan, ESQ; Gregory M. Albert, ESQ Defendant Defense
Attorney Michael D. Ramsdell, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

http://www.courts.state.nh.us

Court Name: Belknap Superior Court
 Case Name: State vs. Keith Fitzgerald
 Case Number: 211-2015-CR-00276 Charge ID Number: 1162258L
 (if known)

STATE PRISON SENTENCE

Plea/Verdict:	
Crime: <u>RSA 637:3 (Theft by unauthorized taking)</u>	Date of Crime: <u>6/29/10 - 8/10/10</u>

A finding of GUILTY/TRUE is entered.

CONVICTION AND CONFINEMENT

A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

B. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

Pretrial confinement credit: _____ days.

C. This sentence is to be served as follows:

Stand committed Commencing _____

six (6) months of the minimum sentence and five (5) years of the maximum sentence is suspended.

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on 5/11/17
 _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

D. The sentence is consecutive to case number and charge ID _____
 concurrent with ~~case number and~~ charge ID (3) 1120218L + 1162259C

E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.

G. The Court recommends to the Department of Corrections:

Screen and/or assess for drug and alcohol treatment needs.

Sentence to be served at House of Corrections

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

- A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: Forthwith Upon release from _____

The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Office.

- B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

- A. **Fines and Fees:**

Fine of \$ _____, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By _____

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

- B. **Restitution:**

The defendant shall pay restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

- C. **Appointed Counsel: NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court order for repayment is suspended until the time of the defendant's release from state prison.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald ^{Heather Fitzgerald} ^{Alexandra} ^{Dodwell} either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
- G. The defendant and the State have waived sentence review in writing or on the record.
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other:

See Attached Addendum

For Court Use Only

J. DONNILL P.J.
11/25/20

Addendum

In addition to other conditions, suspensions are conditioned on defendant's good faith effort to comply with restitution requirements while on parole.

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services without the approval of a Probation/Parole officer.

Contact with above-names persons permissible via attorney for purposes of satisfying probate judgment.

211-2015-CR-276
Charge ID # 1162258C

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

At the Superior Court, holden at Laconia, within and for the County of Belknap aforesaid, on the 3rd day of December in the year of our Lord two thousand and fifteen,

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

KEITH C. FITZGERALD

DOB: 1/20/1965

between approximately June 29, 2010 and August 10, 2010, in the County of Belknap aforesaid, pursuant to one scheme or course of conduct, did commit the crime of


THEFT BY UNAUTHORIZED TAKING OR TRANSFER

(RSA 637:3)

in that Keith C. Fitzgerald obtained or exercised unauthorized control over the property of Clifford L. Fitzgerald Jr., the aggregate value of which exceeded \$1,500.00, with a purpose to deprive Clifford L. Fitzgerald Jr. thereof.

Between approximately June 29, 2010 and August 10, 2010, pursuant to one scheme or course of conduct, Keith C. Fitzgerald transferred money from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. An amount in excess of \$1,500.00, transferred via this scheme or course of conduct, was the property of Clifford L. Fitzgerald Jr. but Keith C. Fitzgerald performed this scheme or course of conduct without the authorization of Clifford L. Fitzgerald Jr. and with a purpose to deprive Clifford L. Fitzgerald Jr. of the money.

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


Jesse O'Neill, NH Bar #20723
Assistant Attorney General

This is a true bill.


Foreperson

Name: Keith C. Fitzgerald
Address: 166 Follett Road, Center Harbor, New Hampshire
DOB: 1/20/1965
RSA: 637:3 (Class A Felony); 651:6
Penalty: NHSP 7½-15 years and up to \$4,000 fine
Sup. Case No.: 211-2015-CR-00276

3/29/2017
Jury Verdict: Guilty
Larry M. Smucker, PJ
Janet K. DeLalonde
Deputy Clerk

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
64 Court St.
Laconia NH 03246

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RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**
Name: **Keith C Fitzgerald, PO Box 266 Center Harbor NH 03226**
DOB: **January 20, 1965**
Charging document: Indictment

Offense: Theft by Unauthd Taking GOC: Charge ID: 1162259C RSA: 637:3 Date of Offense: August 03, 2010

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered. Resentenced after Remand from Supreme Court.

Conviction: Felony
Sentence: see attached

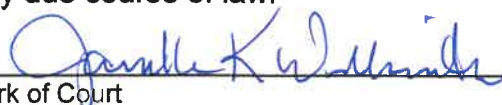
November 25, 2020
Date

Hon. James D. O'Neill, III
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: 
Deputy Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ; Patrick J. Queenan, ESQ; Gregory M. Albert, ESQ Defendant Defense
Attorney Michael D. Ramsdell, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**
http://www.courts.state.nh.us

Court Name: Belknap Superior Court
 Case Name: State vs. Keith Fitzgerald
 Case Number: 211-2015-CR-00276 Charge ID Number: 1162259C
 (if known)

STATE PRISON SENTENCE

Plea/Verdict: <u>GUILTY</u>	
Crime: <u>RSA 637:3 (th.ft by unauthorized & key)</u>	Date of Crime: <u>9/3/10</u>

A finding of GUILTY/TRUE is entered.

CONVICTION AND CONFINEMENT

A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

B. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

Pretrial confinement credit: 1,294 days.

C. This sentence is to be served as follows:

Stand committed Commencing _____

Six (6) months of the minimum sentence and five (5) years of the maximum sentence is suspended.

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on 5/11/17
 _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

D. The sentence is consecutive to case number and charge ID _____
 concurrent with ~~case number and~~ charge ID (2) 1120218C + 1162258C

E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.

G. The Court recommends to the Department of Corrections:

Screen and/or assess for drug and alcohol treatment needs.

Sentence to be served at House of Corrections

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: Forthwith Upon release from _____

The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

A. **Fines and Fees:**

Fine of \$ _____, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By _____

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

B. **Restitution:**

The defendant shall pay restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald, Jr.

If not already paid →

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

C. **Appointed Counsel: NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court order for repayment is suspended until the time of the defendant's release from state prison.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, Alexander Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
- G. The defendant and the State have waived sentence review in writing or on the record.
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other:

See Attached Addendum

For Court Use Only

J. D. O'Neil P.J.
11/25/20

Addendum

In addition to other conditions, suspensions are conditioned on defendant's good faith effort to comply with restitution requirements while on parole.

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services without the approval of a Probation/Parole officer.

Contact with above-names persons permissible via attorney for purposes of satisfying probate judgment.

211-2015-CR-276
Charge ID # 1162259C

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

At the Superior Court, holden at Laconia, within and for the County of Belknap aforesaid, on the 3rd day of December in the year of our Lord two thousand and fifteen,

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

KEITH C. FITZGERALD

DOB: 1/20/1965

on or about August 3, 2010, in the County of Belknap aforesaid, did commit the crime of

THEFT BY UNAUTHORIZED TAKING OR TRANSFER

(RSA 637:3)

in that Keith C. Fitzgerald obtained or exercised unauthorized control over the property of Clifford L. Fitzgerald Jr., the value of which exceeded \$1,500.00, with a purpose to deprive Clifford L. Fitzgerald Jr. thereof.

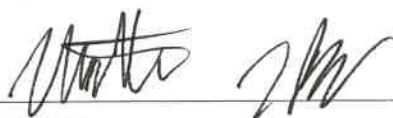
On or about August 3, 2010, Keith C. Fitzgerald transferred \$30,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. Of the \$30,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr., but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with the purpose to deprive Clifford L. Fitzgerald Jr. of the money.

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



Jesse O'Neill, NH Bar #20723
Assistant Attorney General

This is a true bill.



Foreperson

Name: Keith C. Fitzgerald
Address: 166 Follett Road, Center Harbor, New Hampshire
DOB: 1/20/1965
RSA: 637:3 (Class A Felony); 651:6
Penalty: NHSP 7½-15 years and up to \$4,000 fine
Sup. Case No.: 211-2015-CR-00276

3/6/2017
Jury Verdict: Guilty
Larry M. Smucker, PJ
Janet K. Sullivan
Deputy Clerk

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
64 Court St.
Laconia NH 03246

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http://www.courts.state.nh.us

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

Case Name: **State v. Keith C Fitzgerald**
Case Number: **211-2015-CR-00276**
Name: **Keith C Fitzgerald, PO Box 266 Center Harbor NH 03226**
DOB: **January 20, 1965**
Charging document: Indictment

Offense: Theft by Unauthd Taking GOC: Charge ID: 1162260C RSA: 637:3 Date of Offense: August 12, 2010

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered. Resentenced after Remand from Supreme Court.

Conviction: Felony

Sentence: see attached

November 25, 2020
Date

Hon. James D. O'Neill, III
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

In accordance with this sentence, the Sheriff is ordered to deliver the defendant to the **New Hampshire State Prison**. Said institution is required to receive the Defendant and detain him/her until the Term of Confinement has expired or s/he is otherwise discharged by due course of law.

Attest: 
Clerk of Court

SHERIFF'S RETURN

I delivered the defendant to the **New Hampshire State Prison** and gave a copy of this order to the Warden.

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ; Patrick J. Queenan, ESQ; Gregory M. Albert, ESQ Defendant Defense
Attorney Michael D. Ramsdell, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name: Belknap Superior Court

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276 Charge ID Number: 1162260C

STATE PRISON SENTENCE

Table with 2 columns: Plea/Verdict, Crime: RSA 637:3 (Theft by unauthorized taking), Date of Crime: 8/12/10

A finding of GUILTY/TRUE is entered.

CONVICTION AND CONFINEMENT

A. The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b or of an offense recorded as Domestic Violence. See attached Domestic Violence Sentencing Addendum.

B. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years

There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

Pretrial confinement credit: days.

C. This sentence is to be served as follows:

Stand committed Commencing

All of the minimum sentence and All of the maximum sentence is suspended.

Suspensions are conditioned upon good behavior and compliance with all of the terms of this order.

Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 15 years from today or release on 1120218C, 1162258C, 1162259C

of the sentence is deferred for a period of year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

D. The sentence is consecutive to case number and charge ID 1120218C, 1162258C, 1162259C concurrent with case number and charge ID 1162257C

E. See Addendum to State Prison Sentence Sexual Offender Assessment and Treatment.

F. See Addendum to State Prison Sentence Substance Use Disorder Assessment and Treatment.

G. The Court recommends to the Department of Corrections:

Screen and/or assess for drug and alcohol treatment needs.

Sentence to be served at House of Corrections

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

PROBATION

A. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.

Effective: Forthwith Upon release from _____

The defendant is ordered to report immediately, or immediately upon release, to the nearest Probation/Parole Office.

B. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.

FINANCIAL OBLIGATIONS

A. **Fines and Fees:**

Fine of \$ _____, plus a statutory penalty assessment of \$ 0.00 to be paid:

Today

By _____

Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed by DOC for the collection of fines and fees, other than supervision fees.

\$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).

A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

B. **Restitution:**

The defendant shall pay restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald, Jr.

If not already paid

Restitution shall be paid through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.

At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.

Restitution is not ordered because: _____

C. **Appointed Counsel:** **NOTE:** Financial Obligations, Section C is NOT a term and condition of the sentence.

The Court finds that the defendant has the ability to pay:

counsel fees and expenses in the amount of \$ _____

payable through _____ in the amount of \$ _____ per month.

The Court order for repayment is suspended until the time of the defendant's release from state prison.

The Court finds that the defendant has no ability to pay counsel fees and expenses.

Case Name: State vs. Keith Fitzgerald

Case Number: 211-2015-CR-00276

STATE PRISON SENTENCE

OTHER CONDITIONS

- A. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
- B. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
- C. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
- D. The defendant shall perform _____ hours of community service and provide proof to _____ within _____ of today's date.
- E. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, Alexandre Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
- F. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
- G. The defendant and the State have waived sentence review in writing or on the record.
- H. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
- I. Other:

See Attached Addendum

For Court Use Only

D. DONNILL P.J.
11/25/20

Addendum

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services without the approval of a Probation/Parole officer.

Contact with above-names persons permissible via attorney for purposes of satisfying probate judgment.

211-2015-CR-276
Charge ID # 1162260C

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

At the Superior Court, holden at Laconia, within and for the County of Belknap aforesaid, on the 3rd day of December in the year of our Lord two thousand and fifteen,

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

KEITH C. FITZGERALD

DOB: 1/20/1965


on or about August 12, 2010, in the County of Belknap aforesaid, did commit the crime of

THEFT BY UNAUTHORIZED TAKING OR TRANSFER
(RSA 637:3)

in that Keith C. Fitzgerald obtained or exercised unauthorized control over the property of Clifford L. Fitzgerald Jr., the value of which exceeded \$1,500.00, with a purpose to deprive Clifford L. Fitzgerald Jr. thereof.

On or about August 12, 2010, Keith C. Fitzgerald transferred \$200,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr., to Keith C. Fitzgerald's client trust account at the Dahar Law Firm. Of the \$200,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr, but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with a purpose to deprive Clifford L. Fitzgerald Jr. of the money. Clifford L. Fitzgerald Jr. had no right of access to Keith C. Fitzgerald's client trust account at the Dahar Law Firm.

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



Jesse O'Neill, NH Bar #20723
Assistant Attorney General

This is a true bill.



Foreperson

Name: Keith C. Fitzgerald
Address: 166 Follett Road, Center Harbor, New Hampshire
DOB: 1/20/1965
RSA: 637:3 (Class A Felony): 651:6
Penalty: NHSP 7½-15 years and up to \$4,000 fine
Sup. Case No.: 211-2015-CR-00276

3/29/2017
Jury Verdict: Guilty
Larry M. Smukler, P.J.
Janet K. Waltham, Deputy Clerk

STATE OF NEW HAMPSHIRE

BELKNAP COUNTY

SUPERIOR COURT

State of New Hampshire

V

Keith C Fitzgerald

Docket No.: 211-2015-CR-276

ORDER


Order in reference to the "Defendant Keith C Fitzgerald's Motion for Reconsideration of Sentence With Incorporated Memorandum of Law" (filed 12-4-2020). Subsequent to review of said Motion and the Objection to same submitted by the State (filed 12-14-2020), the Court renders the following determination(s).

The Court finds, after a review of the pleadings submitted by the respective parties, that the Defendant has not provided with particular clarity sufficient points of law or fact that the Court either overlooked or misapprehended in the rendering the underlying Sentencing Order(s) (dated 11-25-2020).

Accordingly, the Defendant's pending Motion is DENIED. The provisions of the above-said Sentencing Order(s) shall remain in full force and effect.

SO ORDERED.

12/15/20
Date


James D. O'Neill III
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 12/15/2020