

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

**STATE OF NEW HAMPSHIRE**  
**v.**  
**KEITH C. FITZGERALD**

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Rule 7 Discretionary Appeal

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**REPLY BRIEF OF APPELLANT**  
**KEITH C. FITZGERALD**

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## STATEMENT OF THE CASE AND FACTS

Appellant Keith C. Fitzgerald (“Fitzgerald”) incorporates herein the Statement of Case and Facts presented in his opening brief.<sup>1</sup> FBr.5-8.

## REPLY ARGUMENT

**I. In *State v. Fitzgerald*, 173 N.H. 564 (2020), this Court directed the resentencing court to provide Fitzgerald with more than a mere procedural remedy.**

The State argues that this Court’s opinion in *State v. Fitzgerald*, 173 N.H. 564 (2020) provides the trial court with a mere procedural remedy to resentence Fitzgerald. SBR 15. The State urges this Court that the relief provided in *Fitzgerald* was to return Fitzgerald “to his *procedural* position at the time of the ineffective assistance of counsel.” SBR 16. While *Fitzgerald* requires a procedural mechanism to implement the substantive remedy, the State’s too narrow reading of *Fitzgerald* eviscerates the paramount purpose of the procedural mechanism – to “neutralize the taint of [the] constitutional violation.” *See Fitzgerald*, 173 N.H. at 581.

In *Lafler v. Cooper*, 566 U.S. 156 (2012), the United States Supreme Court declined to establish the parameters of a judge’s discretion in resentencing a defendant to cure the ineffective assistance of counsel and recognized that future cases would provide helpful guidance. *Id.* at 171. However, *Lafler* states that “in implementing a remedy ... the trial court must weigh various factors ....” *Id.* *Lafler* also acknowledges that the process commences with consideration of the original plea offer: “The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer,

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<sup>1</sup> Fitzgerald’s opening brief is cited as “FBr.” The State’s brief is cited as “SBr.” The separate appendix to Fitzgerald’s opening brief is cited as “App.” Fitzgerald’s supplemental addendum is cited as “SAdd.”

but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.” *Id.* at 172.

In *Fitzgerald*, this Court quoted *Lafler* and acknowledged the trial court’s obligation to weigh various factors and to consult the plea offer as a baseline when determining a remedy. *Fitzgerald*, 173 N.H. at 582. Here, however, there is no indication that the trial court either consulted the plea offer as a baseline or weighed various factors when it imposed the same sentence Fitzgerald that resulted from a violation of Fitzgerald’s Sixth Amendment and Part I, Article 15 right to competent counsel. The resentencing court neither mentioned the plea offer nor articulated any basis for reimposing the same sentence.

It also does not appear that the resentencing court could have used the plea offer as the basis for fashioning a remedy. When the trial judge sentenced Fitzgerald to 9½ to 25 years, the lengthy sentence was heavily influenced by his belief that: (1) Fitzgerald’s trial testimony and defense were “most charitably ... gross rationalizations,” which were “aggravating factors,” SAdd 50; and (2) Fitzgerald would not make restitution, SAdd 51-52. Neither aggravating factor warranted similar consideration at resentencing. Fitzgerald would not have testified or presented a defense absent the constitutional violation. Additionally, the restitution was paid in full. App 13. Thus, the two paramount factors upon which the trial court relied when it grossly increased Fitzgerald’s sentence from the terms of the plea offer were not present at resentencing.

The State also argues that Fitzgerald seeks specific performance of the original plea agreement. SBr 17. The State is wrong. In his resentencing memorandum, Fitzgerald explained that it no longer was possible to sentence him to the terms of the plea offer. App 12-13 (“Mr. Fitzgerald already has served a harsher sentence than called for in the plea offer.”). Fitzgerald argued for a different sentence, one that “place[s]

[him], 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 (quoting *H.P.T. v. Commissioner*, 79 A.3d 54, 59 (2013) (quotation omitted)); cf. *Lafler*, 566 U.S. at 172. Fitzgerald reiterated this position in his motion for reconsideration. App 29-30. Fitzgerald also advised this Court in his opening brief that the terms of the State’s plea offer no longer were available. FBr 23-24. While Fitzgerald argues that a substantive remedy is necessary to cure the constitutional violation, he never has suggested that specific performance of the State’s plea offer is the proper remedy.

The State’s argument that the plea offer must be used as the baseline for a remedy only when a defendant later receives a mandatory maximum sentence that needs to be vacated or could have pled to fewer or lesser charges is ill-founded. In *United States v. Hamilton*, 2018 U.S. Dist. LEXIS 32736 (E.D. Ky., January 22, 2018), a federal court found that the proper remedy for a defendant whose sole loss because of ineffective assistance at the plea bargaining stage of a federal prosecution was a 1-point reduction in the federal advisory sentencing guidelines calculation “as a matter of practice, could simply be resentencing under a guideline range that reflects application of the third point [for acceptance of responsibility].” *Id.* at \*36 and n.19.<sup>2</sup> A similar remedy was ordered in *Randall v. United States*, 2014 U.S. Dist. LEXIS 122080 (W.D. N.C., August 29, 2014) when ineffective assistance of counsel resulted in a defendant rejecting a plea agreement that included a similar additional one-level reduction and later pled guilty to an agreement that included the same material terms except for the additional one-level reduction. *Id.* at \*4, \*19.

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<sup>2</sup> The remedy in *Hamilton*, 2018 U.S. Dist. LEXIS 32736 was accepted by the federal court in *United States v. Hamilton*, 326 F.Supp.3d 354, 358-59 (E.D. Ky. 2018).

*Pouncy v. Macauley*, 2021 U.S. Dist. LEXIS 119874 (E.D. Mich. June 28, 2021), a federal habeas corpus case following state convictions, is particularly instructive. *Pouncy* did not involve a post-trial mandatory maximum sentence or a plea offer to fewer or lesser charges. Instead, Pouncy's attorney mistakenly believed that the Michigan minimum sentencing guidelines range pursuant to the state's plea offer was 135-225 months, and if convicted at trial, Pouncy's minimum sentencing guidelines range would be 135-337 months. *Id.* at \*77. At the time of Pouncy's sentencing, a Michigan sentencing court could deviate from the minimum sentencing guidelines range if it found "substantial and compelling" reasons for a departure. *Id.* at \*61.

Pouncy's actual minimum sentencing guidelines range when convicted at trial was 225-562 months. *Id.* at \*66. Pouncy was sentenced to 562 months to life, plus a consecutive two-year sentence that also was required in the plea offer. *Id.* at \*65-66. After finding that Pouncy's counsel was constitutionally deficient, the federal court ordered the State of Michigan "to offer Pouncy, within 60 days, the plea deal that it would have offered but for the deficient performance of Pouncy's counsel." *Id.* at \*155-56. The federal court ordered that the plea offer must include two special provisions previously afforded Pouncy: (1) Pouncy could plead no contest, thereby avoiding a sentencing enhancement; and (2) the minimum sentence imposed by the court must fall within the guidelines range estimated by the parties. *Id.* at \*155, \*80. Most importantly, the federal court ordered that, after Pouncy accepted the plea offer, the state must petition the state court to re-open Pouncy's case, vacate the convictions, accept the parties' plea agreement, and sentence Pouncy consistent with the agreement. *Id.* at \*155-56.

However, the federal court did not order specific performance of the plea offer. *Id.* It found that *Lafler* does not require such a remedy, which

would deprive the resentencing court of all discretion. *Id.* at \*91-93. Rather, the federal court recognized that: “[i]f the State makes the offer as directed, Pouncy accepts, and the State petitions the trial court as directed, then at that point the state trial court ‘can [] exercise its discretion in determining whether to vacate the convictions and resentence [Pouncy] pursuant to the plea agreement, to vacate only some of the convictions and resentence [Pouncy] accordingly, or to leave the convictions and sentence from trial undisturbed.’” *Id.* at \*93 (quoting *Lafler*, 566 U.S. at 174-75).

The federal court recognized that the resentencing court would not be writing on a blank slate and its consideration of the proper sentence must begin with the plea offer. *Id.* at 93 n23. The federal court stated that it “shares the concern” previously expressed by the Sixth Circuit Court of Appeals that: “‘the remedy in *Lafler* could become illusory if the state court chooses to merely reinstate’ the ‘current sentence’ of a habeas petitioner who has demonstrated that he received ineffective assistance in connection with the plea bargaining process.” *Pouncy*, 2021 U.S. Dist. LEXIS 119874 at \*93 n23 (citing *Titlow v. Burt*, 680 F.3d 577, 592 (6th Cir. 2012)). The federal court explained that: “The concern is mitigated, at least to some extent, by the requirement in *Lafler* that a state court ‘consult’ the initial plea agreement in crafting a new sentence for the defendant. Given that requirement, the state court’s discretion is not entirely unfettered.” *Id.* (internal quotations and citations omitted).<sup>3</sup>

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<sup>3</sup>The federal court acknowledged the subsequent history of *Titlow* as follows: “The Supreme Court reversed the Sixth Circuit’s decision in *Titlow*, see *Burt v. Titlow*, 571 U.S. 12, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013), but the Supreme Court did not address the Sixth Circuit’s discussion of the remedy issue. Instead, the Supreme Court held that the petitioner’s claim of ineffective assistance failed on the merits, and thus the Supreme Court did not reach the issue of an appropriate remedy. This Court recognizes that the Sixth Circuit’s decision in *Titlow* is no longer a binding



The State attempts to persuade this Court that Fitzgerald seeks specific performance of the plea offer because its argument is dependent on the Court finding that the case fits neatly into the category of cases described in *Fitzgerald* and *Lafler* as “typically when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted after trial, ‘the sole advantage a defendant would have received under the plea is a lesser sentence.’” *Fitzgerald*, 173 N.H. at 581 (quoting *Lafler*, 566 U.S. at 170-71). The State’s argument is flawed.

In *Fitzgerald*, this Court recognized that the two categories of cases expressly identified in *Lafler* likely did not contemplate the universe of cases for which remedies for constitutional violations would be necessary. 173 N.H. at 581 (“In *Lafler*, the Supreme Court stated that the “injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in *at least one of two forms.*”) (emphasis added). This Court correctly found that Fitzgerald should not be afforded a new trial because “the sole advantage [he] would have received under the plea is a lesser sentence.” *Id.* at 582. However, the State’s argument overlooks that Fitzgerald’s “lesser sentence” pursuant to the plea offer was something qualitatively different than the mere reduction in years of incarceration at issue in the case upon which the State relies, *Maines v. State*, 330 Ga.App.247 (2014). The State’s 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. Thus, the

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precedent, but the Court nonetheless believes that *Titlow* identifies important issues that may need to be addressed by a federal court if a state court imposes the same sentence upon a successful habeas petitioner.” *Pouncy*, 2021 U.S. Dist. LEXIS 119874 at \*93 n23.

constitutional violation not only resulted in additional years of incarceration, but also includes the tremendous difference between confinement at a county facility followed by home confinement, and incarceration at the state prison. Therefore, the case falls outside the “typical” first category of cases referenced in *Lafler* and *Fitzgerald*.

Particularly because the sentencing terms stated in the plea offer were no longer available to Fitzgerald, it was critical that the resentencing court begin its consideration of the appropriate sentence with the plea offer as the baseline. *See Fitzgerald*, 173 N.H. at 582; *Lafler*, 566 U.S. at 171-72. Notwithstanding the resentencing court’s rote recitation that “[a]fter 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[,]” Transcript of November 25, 2020 hearing, p. 29, there is no evidence that the court used the plea offer as a baseline before it, without explanation, reimposed the post-constitutional violation sentence.

Similarly, there is no evidence in the record that the resentencing court attempted to “neutralize the taint of [the] constitutional violation . . .,” *see Fitzgerald*, 173 N.H. at 581-82 (quoting *Lafler*, 566 U.S. at 170), or to place Fitzgerald, as nearly as possible, in the position that he would have been absent the constitutional violation. *See id.* at 583. Consequently, the resentencing court failed to follow *Fitzgerald* and *Lafler*, and failed to acknowledge that its resentencing discretion was limited by *Fitzgerald* and *Lafler*.

This Court should vacate Fitzgerald’s sentence. Since the terms of the plea offer no longer can be imposed and 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, this Court should vacate Fitzgerald's sentence and remand to the trial court with instructions to sentence Fitzgerald to four 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.<sup>4</sup> 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.

## **II. The trial court's failure to identify a basis for reimposition of the sentence imposed following the constitutional violation *Fitzgerald* and due process.**

Trial courts are afforded broad, but not unlimited, discretion when imposing a sentence. *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). "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)). "If 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)). A sentence must be vacated when there is doubt about whether the trial court considered improper factors in imposing a sentence because the

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<sup>4</sup> The Conclusion in Fitzgerald's opening brief incorrectly stated three concurrent sentences of time served at the New Hampshire State Prison.

court “must err on the side of protecting the defendant’s constitutional rights.” *Id.* at 547.

Here, the resentencing court’s rote reimposition of the same sentence Fitzgerald received following a constitutional violation failed to follow *Fitzgerald* and *Lafler*, and left considerable doubt about whether it considered improper factors at resentencing. The resentencing court neither mentioned the plea offer nor indicated that it had considered the plea offer as a baseline. *See Fitzgerald*, 173 N.H. at 582; *Lafler*, 566 U.S. at 171-72. The resentencing court did not mention or otherwise indicate that it was attempting to remedy the harm from the constitutional violation or return Fitzgerald to the position he occupied pre-violation. *See Fitzgerald*, 173 N.H. at 581; *Lafler*, 566 U.S. at 170.

In certain instances, due process requires that the Court state the information it considered and its basis for imposing a sentence. *See Willey*, 163 N.H. at 546-47; *Abram*, 156 N.H. at 652. *Fitzgerald* and *Lafler* should be read to require that a resentencing court state on the record the information relied upon and the basis for sentence. Otherwise, it should be presumed that the sentence imposed at resentencing, which was significantly and qualitatively harsher than the plea offer, did not cure the Part I, Article 15 and Sixth and Fourteenth Amendment violation of Fitzgerald’s right to 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).

### **CONCLUSION**

For the foregoing reasons and those stated in Defendant Keith Fitzgerald’s opening brief, the trial court failed to remedy the taint of the ineffective assistance of counsel found by this Court in *Fitzgerald* when it failed to follow *Fitzgerald* and *Lafler*, and resentenced Fitzgerald to the

same sentence he received following the constitutional violation. The trial court also violated Fitzgerald's Part I, Article 15 and Fifth and Fourteenth Amendments right to due process pursuant to when it reimposed the same sentence 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 four concurrent sentences of time served at the New Hampshire State Prison and a consecutive, suspended sentence of 4-10 years at the state prison.

Respectfully submitted,

KEITH C. FITZGERALD

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**CERTIFICATE OF SERVICE**

On November 10, 2021, this reply brief, which complies with Supreme Court Rule 16(11) because it contains 2,999 words, excluding the table of contents, table of citations, and addenda, was forwarded to Assistant Attorney General Gregory M. Albert through the Court's electronic filing system. Counsel relied on the word count of the computer used to produce the brief.

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

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STATE OF NEW HAMPSHIRE

BELKNAP COUNTY SUPERIOR COURT

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

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

APPEARANCES:

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Audio Operator:	Electronically Recorded by Kathy J. Johnson
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Proceedings recorded by electronic sound recording; transcript produced by court-approved transcription service.

1 (Proceedings commence at 9:24 a.m.)

2 THE COURT: Good morning. For the record -- you may  
3 be seated. We're here on docket 2015-CR-276, State v. Keith  
4 Fitzgerald. The record should reflect that on March 28th of  
5 this year, after a trial, the jury returned verdicts of guilty  
6 on five counts of theft by unauthorized taking with enhanced  
7 penalties. We are here for sentencing and I will entertain the  
8 state's argument first, then I'll hear from the defense.

9 MR. O'NEILL: Thank you, Your Honor.

10 As Your Honor is aware there's also one victim  
11 present to deliver a statement to the court, that's Clifford  
12 Fitzgerald III on behalf of himself, his sisters Hope and  
13 Heather. Additionally, Alexander Dodwell has submitted a  
14 statement which he wishes for victim witness advocate  
15 Mulligan-Shea to read. I don't know at what point in the  
16 proceedings the court would like to hear those statements. I  
17 would prefer to do them after the state's argument if that's  
18 agreeable.

19 THE COURT: That's fine. It's your presentation, Mr.  
20 O'Neill, so I'll let you structure it the way you want.

21 MR. O'NEILL: Okay.

22 THE COURT: For the record, I will say that I have  
23 reviewed the sentencing materials that have been submitted by  
24 both the state and the defense and the state's did include the  
25 two victim impact statements that you have indicated and, of



1 course, I'll let them be presented orally in court, but I have  
2 read them.

3 MR. O'NEILL: Thank you.

4 So, not only, Your Honor, did this Defendant steal  
5 \$409,980 from his father, but he intentionally took advantage  
6 of a father who was unable to manage his own financial  
7 resources.

8 For that reason the state is requesting the following  
9 sentence, which is more detailed, more fully detailed in the  
10 sentencing forms in front of the court.

11 On three of the charges, the state is requesting the  
12 sentence of 10 to 30 years, stand committed to the New  
13 Hampshire State Prison, each concurrent with each other. On  
14 the other two charges, the state is requesting a sentence of an  
15 additional 10 to 30 years in state prison, suspended for 15  
16 years from the defendant's release on the first three charges.

17 On all charges the state is asking for full  
18 restitution in the amount of \$409,980 as well as an order  
19 prohibiting the defendant from working in fund raising or  
20 financial services.

21 One of the reasons why the state is requesting this  
22 particular sentence is for its general deterrent effect on  
23 similar crimes in the community. As this court is aware  
24 there's an increasingly aging population both in our state, as  
25 well as in the country and, unfortunately, the elderly

1 population is a vulnerable population and they're frequently  
2 the victims of financial exploitation.

3           Research cited by the National Adult Protective  
4 Services Association shows that 1 in 20 elderly adults are  
5 victims of perceived financial mistreatment, but perhaps more  
6 troubling, 1 in 44 cases, only 1 in 44 cases of elder financial  
7 abuse are actually reported. Sadly 90 percent of the abusers  
8 in these situations are generally family members or trusted  
9 others.

10           On the local level, looking at statistics from the  
11 Bureau of Elderly and Adult Services here in our state of New  
12 Hampshire in fiscal year 2016 alone, that bureau received over  
13 one separate report of elder financial exploitation every  
14 single day for a total of 407 complaints in that fiscal year  
15 alone throughout our state.

16           In recent years with the passage of the elder  
17 financial exploitation law New Hampshire has shown its  
18 commitment to punish those who commit these types of crimes and  
19 to protect its elders from these types of crimes.

20           While the defendants convictions aren't under that  
21 new law because it was in effect at the time, his exploitation  
22 of an elderly victim is in the same spirit and the same type of  
23 act that that law was designed to protect. This population  
24 needs to be protected. People who take advantage of the elders  
25 need to know that there will be grave but just consequences.

1 And with the sentence today the court can send a general  
2 deterrent message that this type of behavior is more than just  
3 a law on the book and that these types perpetrators will be  
4 punished.

5 Another reason why the state is requesting this  
6 sentence is for its specific deterrent effect on the defendant.  
7 What happened in the facts of this case was not just an  
8 isolated incident, it wasn't just a misunderstanding between  
9 the defendant and his father. The defendant has exhibited a  
10 pattern of fraud and lies in his life.

11 During the case, Your Honor heard about the Tim Brown  
12 lawsuit. The alleged claims in that lawsuit included fraud by  
13 the defendant, misrepresentation by the defendant and  
14 conversion by the defendant. The evidence at trial established  
15 that Mr. Brown sought an amount of \$475,000 in that that  
16 lawsuit. And while there was never a judicial determination of  
17 the facts, this defendant agreed to settle that lawsuit for  
18 \$500,000 more than what Mr. Brown was seeking. That speaks  
19 volumes the merits of Mr. Brown's claims.

20 In addition, in front of this court and under oath,  
21 this defendant admitted to having defrauded the New Hampshire  
22 Family Court and the Federal Bankruptcy Court. The defendant  
23 is a con man and a thief and this sentence should deter him  
24 from further behavior of that nature. Specifically the  
25 significant suspended time that the state is requesting will

1 deter the defendant from engaging in further criminal behavior  
2 for a very long period of time following his release from  
3 incarceration.

4           Finally, and perhaps most significantly, the state is  
5 requesting this sentence because it is the most appropriate  
6 punishment for the defendant's crimes. When we were looking  
7 for comparable cases, we kept coming back to the case of State  
8 v. Karen Gagne. And I know that Your Honor is familiar with  
9 that case, but for the benefit of the record, Ms. Gagne was  
10 sentenced to 10 to 30 years stand committed time. Just like  
11 this Defendant, she had no prior record, she was involved in a  
12 similar operation whereby she exploited a close relationship,  
13 gain access to the victim's bank accounts and then drained  
14 those accounts for her own benefit.

15           Now I do know that Ms. Gagne stole about \$100,000  
16 more than this Defendant stole, but this case has more  
17 aggravating factors, because Karen Gagne did not exploit the  
18 relationship that this Defendant exploited.

19           As Your Honor will recall, through the defense's own  
20 case at trial, the defendant introduced significant evidence,  
21 both through testimony as well as photographs of his  
22 relationship with his father. And I'm sure Your Honor  
23 remembers hearing about how the defendant and his father bonded  
24 over their love of flying, how they took plane trips together,  
25 how they went fishing together. In fact, one of dad's bucket

1 list items was to go on a float plane fishing trip with this  
2 Defendant and is brother.

3 It's clear that Clifford, Jr. loved this Defendant  
4 very much, but the defendant chose to exploit that love to  
5 satisfy his own greed, even Karen Gagne didn't exploit that  
6 kind of relationship.

7 In addition, the defendant lied under oath, on the  
8 stand to this court and to those jurors. And it wasn't just  
9 any lie, it wasn't just a lie that involved himself, he dragged  
10 Tim Brown into his lies, he dragged Eleanor Dahar into his  
11 lies, he dragged Peter Crosby into his lies, he dragged Richard  
12 Adams into his lies and he dragged his own father into his  
13 lies.

14 He didn't just exploit and take advantage of his  
15 father's love in committing the thefts, but he dragged his now  
16 deceased and defenseless father into his lies by making his  
17 father a complicit party in those frauds in the family court  
18 and the bankruptcy court and he did that right in front of his  
19 older brother, who's present here today. Who, in what is a  
20 supreme twist of irony, this Defendant, tried to paint as only  
21 being interested in protecting his inheritance.

22 We all hope that when it's our time to pass on, that  
23 we can do so surrounded by loved ones. We hope that our last  
24 days are peaceful and that those days turn into cherished  
25 memories for the people we leave behind. But because of this

1 Defendant's thefts that wasn't the case for Clifford, Jr.

2 As Your Honor certainly remembers from the testimony  
3 at trial, just hours before Clifford, Jr's condition took a  
4 turn for the worse and he fell into a sleep from which he would  
5 never wake up, he talked to his longtime friend, Peter McCauley  
6 about making Peter McCauley power of attorney instead of this  
7 Defendant and about asking Peter McCauley to look into where  
8 the missing money had gone.

9 Instead of passing in peace and instead of his  
10 enjoying his final moments, Clifford, Jr. spent the end of his  
11 life worrying about whether the money he intended to be split  
12 equally among his children -- and from his will those were five  
13 children whom he loved dearly and had always endeavored to  
14 treat equally. He spent the end of his life worrying whether  
15 that money even existed any more.

16 The state sentencing recommendation is appropriate  
17 because this Defendant didn't just steal money, he stole those  
18 precious last moments from his dad and from his siblings. He  
19 stole those cherished memories. Cliff and Hope and Heather and  
20 Allie will never think of their father's passing without being  
21 remembered of this Defendant's crimes and for that reason, the  
22 state implores the court to adopt its recommendation.

23 At this point, Clifford Fitzgerald III has as  
24 statement he would like to read to the Court on behalf of  
25 himself and his sisters, Hope and Heather.

1 THE COURT: Of course.

2 And, for the record, sir before you read your  
3 statement if you could just say your name and spell your last  
4 name?

5 MR. FITZGERALD: Yes. I'm Clifford L. Fitzgerald  
6 III, last name spelled F-I-T-Z-G-E-R-A-L-D.

7 Thank you for the opportunity to express how Keith's  
8 mistakes have impacted our family. First and foremost, our  
9 father, Clifford L. Fitzgerald, Jr. was Keith's primary victim.  
10 In his final two weeks of life, dad was tragically burdened by  
11 the concern that Keith had built to honor the trust bestowed on  
12 him as attorney in fact.

13 As facts in the case have shown, between Labor Day  
14 weekend 2010 and dad's death two weeks later on September 15th,  
15 Keith knew full well the many secretive acts he already  
16 committed to unlawfully take dad's funds.

17 Keith knew that a large majority of dad's money was  
18 already gone and in his control, but in this sensitive moment,  
19 near the end of dad's days, Keith chose not to come clean but  
20 rather to raise a vale of confusion and deceit telling all  
21 kinds of lies and committing crude manipulations to avoid  
22 scrutiny, even as dad was asking him directly for an  
23 accounting.

24 One of dad's greatest priorities was that his  
25 children be treated equally. Keith blatantly disregarded and

1 violated this stated priority. In dad's final days it appears  
2 Keith had everything precisely calculated including dad's  
3 limited capacity to get Keith to tell the truth with the end  
4 near. Keith chose to send dad out of this life under the  
5 weight of these burdens.

6 Keith's misdeeds did not end when dad died. Two  
7 weeks later my sister, Hope, asked Keith via email for an  
8 inventory of dad's estate assets. Keith was a co-executor of  
9 the estate and was the primary agent looking after dad's  
10 finances, so he was the person responsible for reporting the  
11 estate's financial assets.

12 At first Keith did not respond to those requests, but  
13 a few days later replied to a follow-up reminder, Keith  
14 answered with a rant of nine text messages that included the  
15 following statements; sue me and you get nothing, you and your  
16 brother, Cliff, killed dad before he was ready, I have his  
17 letters, depose me, please. Note, I'm leaving out the worst of  
18 these messages.

19 Keith's behavior in this and many other examples can  
20 only be seen as brutish attempt at intimidation with no  
21 foundation in reality.

22 With Keith derelict in his role as co-executor we  
23 were forced to petition the Florida probate court to appoint an  
24 attorney to serve as an independent estate administrator,  
25 concurring wasteful expense. Later, I sent a request to Keith



1 with a copy to his attorney asking him to resign his role as  
2 co-executor so that we could proceed more efficiently and even  
3 this simple request went unanswered. Keith wasn't going to  
4 help in any way either by performing his responsibilities as  
5 co-executor or by resigning, so others could.

6 In attempt to recover what Keith had taken, on behalf  
7 of the estate I initiated civil complaints against Keith in  
8 Florida and New Hampshire, which resulted in a summary judgment  
9 in Belknap County Probate Court in the amount of \$764,683 in  
10 October, 2012. It's worth noting, this amount is greater than  
11 the 400 and roughly \$10,000 in the criminal counts in this  
12 proceeding, because the former \$10,000 did not include the two  
13 airplanes and legal fees Keith caused us to expend.

14 In the four and a half years since the probate court  
15 judgment was awarded, Keith has done absolutely nothing to  
16 repay his debt to the estate.

17 In addition to the financial loss this ordeal has  
18 consumed an immense amount of our time, between having to piece  
19 together the flight of money, track the disposition of  
20 aircraft, engage with attorneys and pursue justice in court,  
21 I've personally expended at least 1,000 hours over the last  
22 seven years. My sisters have spent additional hours helping  
23 with facts, research and support.

24 For me and Karen, the loss of this time has a greater  
25 impact than the financial loss. All this effort, aggravation,

1 the loss of time in the prime of our lives is damage that can  
2 never be put right.

3           And during Keith's malfeasance it has had an  
4 emotional impact as well, the experience has been tiresome,  
5 frustrating and at times, frightening. We've had to endure the  
6 nightmare of Keith's schemes, extortions and lies in 2010. We  
7 then had to endure a new round of these in the criminal trial  
8 where Keith sought to turn truth on its head, by characterizing  
9 himself as the only one of dad's children who had his best  
10 interest in mind.

11           The truth is our family responded --

12           (Pause)

13           MR. FITZGERALD: The truth is our family responded to  
14 dad's terminal illness in the same caring and united way that  
15 we did for our mother's and grandmother's illnesses and deaths  
16 before them. We rallied and did what needed to be done to  
17 support them and to support one another. We honored dad and  
18 supported him in any way we could, including in his decision to  
19 trust Keith with his finances, we knew this was a significant  
20 for Keith to prove himself trustworthy, but in the end Keith  
21 completely abused his trust. That this abuse and burden was  
22 imposed on a dying father is unconscionable in the extreme.

23           Throughout Keith has demonstrated an unrelenting  
24 habitual disregard of the truth, the free willing use of  
25 unjustified aggression as an intimidation tactic and an

1 uncaring willingness to victimize anyone in his path. We are  
2 grieved to see how Keith put Richard Adams at risk and how he  
3 abused the New Hampshire Public Trust in using his support  
4 foundation charity as a private piggybank.

5 We also learned of Tim Brown's lawsuit against Keith  
6 which alleges Keith converted nearly half a million dollars of  
7 Tim's money for Keith's personal use. Note that Keith settled  
8 this lawsuit, which suggests culpability.

9 So this trial might be Keith's first encounter with  
10 criminal court, but by no means is the first time our family  
11 and the public have had to deal with these issues -- with  
12 issues like these from Keith.

13 A long history has shown, Keith is incapable of  
14 learned lessons. He tells lies and believes them and he lacks  
15 a conscious. These three are underscored phrases are from  
16 notes I took during a 1987 meeting with a psychiatrist who had  
17 been evaluating Keith. Dad arranged that meeting and I  
18 attended as did one of my -- our cousins.

19 The following three documents give further sense of  
20 our family's history with Keith. First, here is an excerpt of  
21 a letter written by our grandfather to me in 1983 when Keith  
22 was 18 years old.

23 "We all are part of a truly great problem with Keith.  
24 His whole life if being formed right now and if  
25 thinks this present pattern will get him through the

1 problems ahead, he is tragically wrong. It looks to  
2 me like he thinks he can talk himself out of a paper  
3 bag. The most important thing is that he understand  
4 that he must first, be true to himself, truth is the  
5 most important thing in life. If he follows the path  
6 he is on he is headed for a tangle of trouble he will  
7 never be able to get out of."

8 That was in 1983.

9 In the ten-year period that followed 1983, we faced a  
10 number of further issues with Keith. In 1994, dad wrote a  
11 letter to Keith that including the following,

12 "I hope that you have regrouped, are standing  
13 independently on your own two feet, have a job that  
14 you value, working for persons who appreciate you  
15 most of all for your reliability and trustworthiness.  
16 This is what we all want. It has to be earned and  
17 unaware of the many shortcuts. The most recent  
18 problem that comes to my attention involves your  
19 reported incurring of, roughly, \$13,000 of  
20 unauthorized charges to Muzzy's credit card."

21 And finally this item, listing of debts, dad asking  
22 to inventory as part of a program by which our grandmother  
23 would provide funds to pay down Keith's debts, this is dated  
24 April 1995 when Keith was 30 years old. The list shows a total  
25 of \$46,000 that Keith owed to 14 individuals.

1           What these records will show is that Keith's  
2 problematic behaviors started at a young age, they were well  
3 known across the family and the family, including dad in his  
4 central role, was actively engaged to help Keith overturn his  
5 bad habits. Keith has, obviously, wasted all the love and  
6 attention his family has provided to help him find a virtuous  
7 path in life.

8           In his last year of life, dad gave Keith the ultimate  
9 opportunity to prove himself trustworthy. Keith accepted this  
10 responsibility and behaved outwardly in a compliant manner,  
11 enough to draw us all in. The evidence shows, however, that  
12 almost immediately and in secret Keith started drawing funds  
13 for himself. He somehow justified this to himself even while  
14 knowing he was throwing away the opportunity to show that he  
15 was trustworthy. That Keith might fail, that was always a  
16 possibility in the back of our minds, that the callous  
17 coincidency and extent of his failure was truly shocking.

18           The decision to approach the criminal justice system  
19 was a difficult one, but, ultimately, we were motivated by the  
20 idea, a conviction served to alert others in the future to  
21 avoid damaging engagements with Keith. It's a profound tragedy  
22 and sadness in our family that criminal prosecution has been  
23 necessary.

24           We've always hoped that Keith could reform himself,  
25 but the experiences of 2010 and Keith's overall history do not

1 make us optimistic. We strongly recommend a sentence that will  
2 protect New Hampshire citizens from future victimizations by  
3 our brother.

4           Regarding restitution we ask the court to order Keith  
5 to repay his debts. To the extent possible we ask that any  
6 restitution order have teeth in it to force action and monitor  
7 progress. His history has shown he will say many things, but  
8 only actions count.

9           As a first and relatively small step, last week we  
10 presented Keith with disclaimer forms to relinquish his share  
11 of dad's IRAs, these are IRAs that have been frozen for seven  
12 years. The amount he would be surrendering is, roughly,  
13 \$51,000, less than 10 percent of what he owes.

14           Keith responded with a long list of reasonable  
15 sounding questions, but many are questions he already has  
16 information on or should be able to have answered by his  
17 lawyer.

18           Though Keith had legal representation and was copied  
19 on court filings related to my father's estate, so lots of  
20 words from Keith, but no positive action. Keith seems to be  
21 concerned that he is not being treated fairly, this is  
22 delusional, we are the ones who have been victimized by him.  
23 We've suffered for seven years with Keith's scheming and  
24 dodging. At any moment he could have lifted the toxicity he  
25 create and reached out to us offer an apology and our

1 reparation. That fact that he didn't has led us to this  
2 moment. We now hope to get our lives back but we fully expect  
3 Keith will continue to scheme wherever he is permitted to.

4 Consequently, we respectfully ask the court to  
5 provide the fullest extent of the support it can to help drive  
6 action on restitution. In closing, words cannot fully express  
7 our relief and gratitude to the court, the attorney general and  
8 his team and the members of the jury that we have a just  
9 verdict in this matter. Thank you again for the opportunity to  
10 speak.

11 THE COURT: Thank you, sir.

12 MR. O'NEILL: Your Honor, the copy of the statement  
13 that was just read that we provided for the court to review.  
14 We do have a signed copy signed by Clifford Fitzgerald III to  
15 be added to the court's file.

16 THE COURT: Okay.

17 MR. O'NEILL: May I approach?

18 THE COURT: Yeah.

19 MR. O'NEILL: At this point I'd like the court to  
20 hear a statement submitted by Alexander Dodwell to be read by  
21 Victims Witness Advocate Sunny Mulligan-Shea.

22 MS. MULLIGAN-SHEA: Good morning, Your Honor. My  
23 last name is spelled M-U-L-L-I-G-A-N S-H-E-A.

24 To Keith. During the course of your trial the  
25 effects of facts involving your actions has been well

1 established. From the first transfer to the last lie, it's all  
2 be recorded in the transcripts influent on his testimony of his  
3 character and the warnings to anyone considers trusting you in  
4 the future. I know you won't believe this, but this warning  
5 was what motivated all of this.

6 What has not been established in all of those pages  
7 of testimony is how much you hurt everyone around, especially  
8 your three closest siblings and most of all, dad. You hurt  
9 them deeply and profoundly and it's certainly not the first  
10 time.

11 I was younger and still living at home, so I was  
12 there. I was there since that time dad found out about your  
13 latest con. I saw the hurt, I saw the disappointment. I was  
14 there when so many people were calling the house to ask that we  
15 repay money that you owed, that we had to change our phone  
16 number to an unlisted number. I saw it crush dad.

17 For you to stand up in court and claim that you were  
18 the only child that cared for him or mattered is laughable and  
19 offensive. To say that you are the only child to steal from  
20 him and to break his heart would be sadly accurate.

21 I find myself reflecting on what dad would say if he  
22 could watch all these proceedings, what advice he would give  
23 you on this day. Strangely, it is the same advice that he  
24 always gave you, use this time to reflect on what got you here.  
25 Prove the truth of the fact that there are no easy short cuts,



1 we are all long distance runners.

2           There is still time to live an honest and productive  
3 life. I hope for dad's sake that you find the strength and  
4 character and integrity to live it. Literally, nothing would  
5 have made him prouder. I only wished you understand that.

6 Best of luck, Keith. Alex. Thank you, Your Honor.

7           THE COURT: Thank you.

8           MR. O'NEILL: Nothing further from the state at this  
9 time.

10          THE COURT: Okay. Good morning, Mr. Hunt.

11          MR. HUNT: Good morning, Your Honor.

12                 First, the sentencing form submitted and the  
13 sentences proposed by the state on their face would appear to  
14 be disproportionate right off the bat, given the comparison of  
15 this particular type of crime and the crimes that would  
16 normally result in a sentence of that magnitude.

17                 And the court is to also consider punishment,  
18 deterrence and rehabilitation. Our proposed sentences, the  
19 court has them, accomplishes all of those objections, not just  
20 punishment and deterrence.

21                 Before addressing those specific forms, I just want  
22 the court to have some other information about Mr. Fitzgerald  
23 that may not have been presented by his family members here or  
24 during the trial.

25                 Mr. Fitzgerald is 52 years old, he has no criminal

1 record. He served in the United States Air Force from 1987 to  
2 1991 and was honorably discharged. Mr. Fitzgerald served as a  
3 volunteer firefighter with Greenwich Connecticut Fire  
4 Department from 1981 to 1987. He served as the vice chair of  
5 the Livelihoods Council for the Save the Children Foundation  
6 from 2007 to 2010 as a volunteer. He served as an engine  
7 driver and firefighter with the Center Harbor Fire Department  
8 from 2013 to 2015 and Mr. Fitzgerald is currently a partner in  
9 an ongoing business, Golden Gate Investment Advisory, LLC and  
10 there have been no issues as far as we know with Mr.  
11 Fitzgerald's participation in that business.

12           The proposed sentences that we've submitted to the  
13 court are vastly different than what the state has proposed and  
14 I'll go into those reasons in a moment, but our proposed  
15 sentences are not prison time, they are house of corrections  
16 time and they were maximum house of corrections time on each  
17 one, all to be suspended and all to be suspended for a good  
18 reason, but they are to run consecutively. And the other  
19 conditions in the proposals should be obvious to the court, one  
20 of them is two years' probation, the other is that the  
21 suspended time be five years of good behavior. But we've also,  
22 specifically, listed the restitution, which we believe is the  
23 most important part of the case that Mr. Fitzgerald is facing  
24 right now, because, specifically, with regard to some of the  
25 things that the victims have said today.

1 First of all, this person, as I said, has absolutely  
2 no criminal record, he now has five felony convictions. The  
3 collateral consequences of five felony convictions themselves  
4 constitute punishment for a person in his position. The  
5 collateral consequences of those five felony convictions will  
6 punish him for many years to come whatever the sentence on top  
7 of that my end up being.

8 With our proposed sentences probably most  
9 importantly, Mr. Fitzgerald would be subject to substantial  
10 potential incarceration for an extended period of time for any  
11 trouble that he gets into, for any problems he causes for  
12 anyone else. He would be on probation for two years and  
13 subject to strict requirements.

14 And again, the harm in this case is financial.  
15 Restitution from our perspective is the most important  
16 component of sentencing in this case. The sum of the harm that  
17 has been charged according to the attorney general's office is,  
18 \$409,980 that is attributable to the crimes charged.

19 Presumably and based on what we heard today, the  
20 surviving siblings would be served by requiring Mr. Fitzgerald  
21 to pay that restitution, that's why it's part of our proposal.  
22 Mr. Fitzgerald, effectively, cannot work to pay restitution if  
23 he's incarcerated for 10 to 30 years or 10 to 30 consecutively  
24 as requested by the state, which would, ultimately, end up with  
25 him spending most if not all of the remainder of his life in

1 prison, according to the state.

2           Punishment is important, we recognize that, we  
3 believe that the proposed sentence we've given gives  
4 substantial punishment because he was would be subject to five  
5 years in the house of correction if he did not comply with all  
6 of the requirements of his conditions for probation and good  
7 behavior.

8           Yes, punishment is important but a long term  
9 incarceration would defeat the purpose of getting restitution  
10 paid. If any stand committed time is ordered, work release or  
11 administrative home confinement would be appropriate. We ask  
12 the court to consider that if stand committed time is going to  
13 be issued.

14           However, without work release, without administrative  
15 home confinement, without something, he's -- Mr. Fitzgerald  
16 will be unable to address restitution in any way.

17           This case with a request for 10 to 30 years for each  
18 of the counts flies in the face of other crimes that involve,  
19 for example, trafficking in severe narcotics like heroin and  
20 meth and so forth. Even people who are convicted of  
21 trafficking are sentenced to less time than Mr. Fitzgerald  
22 would be sentenced under the state's proposal.

23           Even people who use weapons to steal, to commit  
24 crimes, to use violence with other means to commit crimes, are  
25 sentenced to less time than what the state is asking for in

1 this case. Again, this is a financial crime in a finite period  
2 of time and the state's request is very disproportionate to the  
3 crimes charged for one period of time in this man's life. If  
4 completely ignores everything else about this person's life and  
5 what he has done that is positive for the community.

6 Although he's charged with five separate felonies,  
7 they're all the same and they're all involving not multiple  
8 victims, but one victim. Of course the court knows that my  
9 client has not admitted guilt in this case. And it's difficult  
10 to say anything with regard to that, but the relationship that  
11 Mr. Fitzgerald believed he had with his father is different, as  
12 the court knows, in his mind, than what his siblings seem to  
13 think.

14 Neither the house of corrections or the prison have  
15 services to my knowledge designed to address the type of crime  
16 charged in this case and the behaviors that are alleged in this  
17 case.

18 We heard Clifford Fitzgerald III state today  
19 something to do with an IRA release request. In fact, Mr.  
20 Fitzgerald was recently asked to cooperate in releasing his  
21 share of his fathers' IRA funds to his other siblings and he is  
22 doing so. That request came from the attorney for the siblings  
23 and the estate two days before Friday of last week with a  
24 demand that it be done immediately within two days. I was in  
25 trial, it was very difficult for me to get Mr.

1 Custer -- Attorney Custer's request and even so, while I was in  
2 trial my client scrambled to try to address Mr. Custer's  
3 request to get that release done as soon as possible, even  
4 without me, through direct contact with Attorney Custer and  
5 Attorney Custer even asked him to contact Clifford and that was  
6 done because he was attempting to make sure that those IRA  
7 disclaimer forms were provided. So that's, as far as I know, a  
8 done deal and agreed upon.

9           Again, our sentence proposals address punishment but  
10 they also address deterrence and rehabilitation and  
11 rehabilitation is something that the state didn't even talk  
12 about. But our sentences also address the actual harm caused  
13 by the crimes charged focusing on restitution and that's  
14 something that the victim who testified today actually focused  
15 on too, making sure -- I believe his words were, putting teeth  
16 in an order that would require Mr. Fitzgerald to pay  
17 restitution.

18           Again, incarceration for a long period of time would  
19 not only prevent it during incarceration, but it would make it  
20 less likely that Mr. Fitzgerald could do anything after that  
21 incarceration to address that issue of restitution.

22           There's no question that my client has also been  
23 through very harsh and grueling times for the past year and a  
24 half since he was indicted on these counts. It may be a  
25 different experience for him than his siblings, but it has been

1 very grueling and something he's never experienced before. And  
2 the proposals that we have will certainly -- highly incentivizes  
3 him not to repeat any such actions in the future and to earn  
4 money to pay restitution. Again, he will be subject to strict  
5 supervision and he'll have five consecutive sentences hanging  
6 over his head.

7           The sentences would serve as a deterrent to Mr.  
8 Fitzgerald for those reasons including also probation. But it  
9 would also send a message to the public regarding such crimes.  
10 The public will learn that such transactions can be charged  
11 separately and can subject a person to separate and severe  
12 consequences both to liberty and finances. They will see that  
13 not only the money will have to be repaid, which is something  
14 that we're proposing, that there are real and severe  
15 consequences that would change their lives for the worse,  
16 including the potential for long term incarceration if those  
17 obligations are not satisfied.

18           The sentence also serves the purpose of  
19 rehabilitation. Mr. Fitzgerald will have to take  
20 responsibility and be held accountable for earning and paying  
21 large sums of money in restitution. He will be subject to  
22 probation supervision which will constantly remind him to think  
23 carefully and ethically about all of his future dealings. The  
24 threat of lengthy incarceration for an extended period of time  
25 will do the same, especially subject to good behavior.

1           Again, the monetary losses are the crux of this crime  
2 and the focus of the sentence should be on insuring that Mr.  
3 Fitzgerald is forced to work to satisfy that obligation.

4           One thing that I want to mention is that the court  
5 has heard today some facts that have been alleged with regard  
6 to uncharged conduct. We'd ask the court to carefully weigh  
7 the statements that have been made today in making a decision  
8 about sentencing and not consider uncharged conduct directly  
9 for the purposes of sentencing.

10           Mr. Fitzgerald was fortunate to have three people  
11 here today who would like to make statements for the court, one  
12 of them is Phil Jepson, the other is Amanda McLane and another  
13 one is Honska Mead.

14           May we proceed with that?

15           THE COURT: Yes.

16           MR. HUNT: Thank you. Mr. Jepson, would you like to  
17 proceed?

18           THE COURT: And as before, if you can simply say your  
19 name and spell your last name first?

20           MR. JEPSON: Yes, Your Honor. Good morning. My last  
21 name is Jepson and the last name is spelled J-E-P-S-O-N.

22           Thank you, Your Honor. I'd just like to start by  
23 saying that I am a resident of the State of New Hampshire, I've  
24 lived here my whole life and I live in the Town of Moulton  
25 Borough, New Hampshire and I've come to know Mr. Fitzgerald for



1 probably, approximately, nine years, Your Honor.

2           Currently I work in the Town of Tilton, New Hampshire  
3 as a commercial account manager, but the previous employment  
4 that I had for 25 years of my life was serving the State of New  
5 Hampshire as a New Hampshire State Trooper.

6           I worked as an extension retrieval field office for a  
7 period of time and had what I would classify as an extensive  
8 background investigating a number of crimes which I've done for  
9 the State of New Hampshire in dealing with various people from  
10 different walks of life.

11           I met Mr. Fitzgerald through a co-worker of mine,  
12 like I said, approximately nine years ago when he lived in  
13 Center Harbor, New Hampshire and we kind of befriended each  
14 other. We had a common interest and that being that Mr.  
15 Fitzgerald owned a large parcel of land in Center Harbor and,  
16 I, being an avid outdoorsman and as a result of that he was  
17 kind enough to allow me to use his property for sportsman  
18 activities.

19           At that time Mr. Fitzgerald was married at the time  
20 and he had a step-son, he was a devoted father to his son and  
21 also to his wife. And I interact with them on a social basis,  
22 going to their home, which they cordially invited me into and  
23 as a result of that I did the same into my home. I'm married  
24 and I also have a son.

25           My interactions with Mr. Fitzgerald were nothing but

1 pleasant. I saw him interact with people, friends of his,  
2 business partners and in no way in any shape or form did I ever  
3 see him display what I would characterize as any disrespect or  
4 any opportunity to take advantage of anybody else. All I saw  
5 him display was kindness and compassion for others.

6 And I give you a specific circumstance, Your Honor.  
7 Mr. Fitzgerald has a very good friend of his named Richard  
8 Adams that he's known for an extensive period of time and Mr.  
9 Adams' wife had passed away, Mr. Fitzgerald was kind enough to  
10 have Mr. Adams live with him for a year until he was  
11 emotionally capable to be out on his own.

12 Approximately six to eight months ago when Mr. Adams  
13 was diagnosed with stage 4 cancer and is currently on his death  
14 bed at his time. Mr. Fitzgerald in my knowledge to date is  
15 living in the State of New York and routinely, makes regular  
16 trips back to the State of New Hampshire to see his friend,  
17 just to demonstrate the loyalty and compassion that he has for  
18 him.

19 And yesterday morning, probably about 9:00 I met with  
20 Mr. Fitzgerald and we went over to see Mr. Adams who is on his  
21 death bed at this time and I would be surprised if he made to  
22 the end of the week. And I saw him interact with Mr. Adams and  
23 I saw concern, I saw compassion, I saw all those other things  
24 that a good human being demonstrates. And I'd be remiss to  
25 stand before you to say that it wasn't disturbing to listen to

1 Mr. Fitzgerald's brother give an articulate detailed accounting  
2 of the past -- a lot of things that I didn't know about.

3 I can honestly say that the interactions that I've  
4 had over the period of time with Mr. Fitzgerald, in my opinion,  
5 for the character that I have, I think that he's a good person.  
6 I think that there has been and it's clear from the process  
7 that's taking place, there has been some discretions in the  
8 past and we've talked about when this process started, the  
9 possibility of him being found guilty of these crimes and the  
10 penalties to go along with them and at no time did he try to  
11 point the burden on anybody else, but made statements regarding  
12 to accepting accountability and responsibility of this actions  
13 if due process went through and he was found guilty of these  
14 crimes. So I think in and of itself speaks towards the  
15 character that he has.

16 Mr. Fitzgerald -- I know we talked about a number of  
17 different instances that have taken place and just one -- just  
18 to give a little bit of credibility in a specific instance, as  
19 part of his arrest waiting for these crimes that were before  
20 the court, one of the obligations, I believe, from the attorney  
21 general's office, was that he was supposed to relinquish any  
22 firearms that he had in his possession, as a result of this,  
23 related to the crimes. Immediately upon when that order was  
24 put in place by the court he immediately called me up and  
25 complied with that order, stating that the order was rectified

1 by the court and that we drove to me house and gave me the  
2 possession of all those firearms, which I deposited into a gun  
3 safe that I have. And I give you that example as just a  
4 demonstration of Mr. Fitzgerald following the law and the  
5 orders that were put in effect by the court.

6 Attorney Hunt had talked a little bit about Mr.  
7 Fitzgerald's volunteerism. I live in the adjacent town and he  
8 had volunteered with the Center Harbor Fire Department and also  
9 with the ambulance service, volunteering his time at  
10 inconvenient times of the night providing service to the  
11 public, expecting nothing in return but just wanting to give  
12 back in some form to the community.

13 During our conversations that we have had over the  
14 period of time that I've known him, Mr. Fitzgerald talked about  
15 his father, Clifford, on a regular basis. He talked about a  
16 relationship that he had with his dad and a number of things  
17 that he enjoyed doing with him. He also talked about his  
18 brother and his sister and he had explained to me that the  
19 relationship that he had with them was very much strained and  
20 that he was deeply saddened by that and that he wished things  
21 thing were different. That he had made other advances in his  
22 life for taking times to correct those problems that he had,  
23 but he had a legitimate concern for his family and also for his  
24 brothers and sisters.

25 I sat on the other side of the law for an extensive

1 period of time, Your Honor, and not to take away in any way,  
2 shape or form the seriousness of his crimes that are before you  
3 that Mr. Fitzgerald has been convicted of at this time. I  
4 honestly feel that any form of incarceration would work against  
5 his ability to more than anything else repay back the  
6 restitution and some of the financial harms that have been  
7 caused to his family.

8 I feel that the process that he's gone through has  
9 mentally and financially, obviously, emotionally taken a toll  
10 upon him. And not taking away from any of his family it will  
11 have that lastly effects on the rest of his life.

12 I would never want to minimalize the severity of the  
13 charges against him, but I honestly feel that the court has a  
14 number of remedies at its disposal that they can use to still  
15 impose a penalty, whether it be suspended time as Attorney Hunt  
16 has explained or some other probation or ramifications that  
17 will still serve as accountability and he be punished for his  
18 actions, but still being able to give back in some way shape or  
19 form and make up for the inconsistencies in his life in hoping  
20 to repay some of the hardship that has been caused as a result  
21 of this, Your Honor.

22 That's all that I would have.

23 THE COURT: Thank you, sir.

24 MR. HUNT: Amanda McLane.

25 MS. ROSWELL: Good morning, Your Honor. Thank you,

1 Court, for giving me the opportunity to speak on Keith  
2 Fitzgerald's behalf. My name is Amanda McLane Roswell and  
3 that's R-O-S-W-E-L-L.

4 I was hired by Sir Michael Bouchard Tenney Mountain  
5 to work as a marketing manager and I interviewed with Keith  
6 Fitzgerald a couple years back and, honestly, at first he  
7 scared me. As an employer he was hard-nosed and he was a great  
8 teacher and I've had the fortunate experience to learn a lot of  
9 Keith Fitzgerald in our time getting to know one another.

10 He would make adjustments to my emails and he would  
11 suggest things like how to use a new subject line when sending  
12 an email and not just forward forward. And I believe that he  
13 has taught me a lot about being a good employee and I enjoyed  
14 having him as a boss.

15 After that period of time he and I both stood away  
16 from the project because it was dissolving and it was not  
17 something that I wanted to stay a part of and that was my own  
18 decision. And I as I moved forward from Tenney Mountain Keith  
19 and I stayed friends and we became really good friends. Keith  
20 is a kind individual, he's fair -- as I said he could be  
21 hard-nosed but always with a good amount of thought behind how  
22 he handles individuals.

23 I have also found Keith to be very compassionate. He  
24 was very outspoken with Sir Michael Bouchard at Tenney Mountain  
25 on my employment with Tenney Mountain and he suggested that

1 they offer me a reimbursement for my relocation, which is very  
2 kind. I have a husband and little girl -- at that time I had a  
3 husband and a little girl and he helped me to be able to move  
4 the area in which I was employed and that is something that we  
5 were very appreciative of.

6           Since then I've had another little girl and I have  
7 appointed Keith Fitzgerald as the Godfather for that little  
8 girl -- excuse me. She is seven months old. Keith stood by my  
9 side during my pregnancy and he was a good friend to me. My  
10 daughter has been diagnosed with numerous health issues since I  
11 was pregnant and he has been a good friend to me with constant  
12 telephone calls, he has always been a worldwide traveler, so he  
13 is not always here. But he has been kind enough to take the  
14 opportunities to come from Manhattan or wherever he is working  
15 or staying for pleasure, to come and to see me and to take the  
16 time to make sure that I'm okay and that my husband is okay.  
17 We consider him part of our family.

18           I know families can be extremely challenging, we all  
19 have them and money in conjunction with family can be very  
20 challenging. I know everyone in this courthouse has dealt with  
21 that at some point. That aside, he is our family and will  
22 continue to be a part of our family through this process.

23           Other than being the Godfather of our child and the  
24 Tenney Mountain project I have spent time with Keith and other  
25 friends of his, who also hold him in high regard as a kind and

1 honest person.

2 And I'll leave you with two things that Keith has  
3 taught me, not only as an employee but as an individual. He  
4 has taught me that it is important to be transparent, because  
5 to be transparent in life offers you great opportunity.

6 And the other thing that he has taught me is that,  
7 clear understandings make for long lasting relationships and  
8 those are things that I hold dear to my own person and he  
9 taught me those things. So that's what I would like to leave  
10 you with as far as my relationship with him and his character.  
11 So thank you for giving me the time.

12 THE COURT: Thank you.

13 MR. HUNT: Honska Mead.

14 MS. MEAD: My name is Honska Mead and I live on Squam  
15 Lake and Keith, I've known Keith for --

16 THE COURT: Can you spell your last name, please,  
17 ma'am?

18 MS. MEAD: Mead M-E-A-D.

19 THE COURT: Thank you. Go ahead.

20 MS. MEAD: Keith has been an amazing friend for 12  
21 years to my children and my grandchildren and I am very sad to  
22 hear all this about his life and I hope that he will get a much  
23 less sentence than I heard and I can go into detail about all  
24 the wonderful things that he's done, because he's been so  
25 helpful to me.



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

4 THE COURT: Thank you.

5 MS. MEAD: Thank you.

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

8 THE COURT: Anything further?

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

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

17 MR. HUNT: Thank you.

18 THE BAILIFF: All rise.

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

20 THE BAILIFF: All rise. The Honorable Court.

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

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

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

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

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

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

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

1 for by some suspensions, I'm suspending six months of the  
2 minimum concurrent sentences, I'm not structuring it like Gagne  
3 but it's basically ending up being the same kind of sentence.

4 So it will be six months of the minimum and five  
5 years of the maximum will be suspended in addition to the usual  
6 conditions of suspension there will be the condition of good  
7 faith efforts to make restitution.

8 I have heard the arguments regarding restitution and  
9 why I should not incarcerate you at all, so you can have the  
10 opportunity to make restitution, but I think the fact that  
11 there has been probate judgment outstanding for a period of  
12 years and the people who are supposed to get payments under  
13 that judgment have not seen a penny for those years, speaks  
14 volumes.

15 I bluntly am skeptical about restitution. I would  
16 like to give you that opportunity, but if I saw or had heard  
17 evidence that there had been payments made, efforts made over  
18 those years and I do observe that as your counsel said, you've  
19 been employed, you've been working as a partner at Golden Gate  
20 Investments, you've been earning income, not one penny. That  
21 speaks volumes.

22 I don't think that -- while I would love to see  
23 restitution and while I would love the victims to have  
24 restitution, I'm not holding my breath. I'm not structuring a  
25 sentence other than to create the incentives based on

1 restitution because if -- I think if I gave the sentence that  
2 your counsel recommended it would be nothing like pulling teeth  
3 to get a penny on the dollar. And that would go on for years  
4 and there would be multiple proceedings where people would say  
5 you weren't paying restitution and you'd be back in court. I'm  
6 not going to waste anybody's time or emotional energy on those  
7 kinds of proceedings. If you're going to make good faith  
8 efforts to make restitution as I require, that's great, the  
9 suspensions will happen and if you're not, the consequences  
10 will follow from that, but I'm not going to go out of my way  
11 because of the restitution requirement.

12 I will observe -- I've heard from your friends. I am  
13 not sentencing you based on other things you may have done in  
14 your past, I'm looking at this crime.

15 I'm not sentencing you or considering -- I mean,  
16 I -- I -- understand that you've given things to the community,  
17 that you've been a good friend, but I'm sentencing you not  
18 because of those or what you've done in the past to other  
19 people, but because of the thefts and dishonesty and the scope  
20 and magnitude and the nature of the victim and your actions in  
21 driving a wedge between your siblings and your father as this  
22 thing has gone on. I just think overall very aggravating  
23 factors and more state prison sentences.

24 So with that I'm going -- there are, as the state has  
25 proposed, three stand committed sentences to run concurrently

1 and two fully suspended state prison sentences to run  
2 consecutively. I'm going to consolidate the reading as the two  
3 classes are basically identical sentences, I'm going to  
4 consolidate the reading of the sentences so as not to put you  
5 and everyone else in the courthouse having to hear them  
6 multiple times. But you should take them as if I am reading  
7 them separately because they are all separate sentences.

8 On charge ID numbers 1162259C, 1162258C and 1120218C  
9 findings of guilty are entered. You are sentenced to the New  
10 Hampshire State Prison for not more than 30 years nor less than  
11 10 years. There's added to the minimum sentence as a  
12 disciplinary period equal to 150 days for each year of the  
13 minimum term of your sentences to be prorated for any part of  
14 the year. These are stand-committed sentences with six months  
15 of the minimums and five years of the maximums suspended.

16 Suspensions are conditioned upon good behavior and  
17 compliance with all of the terms of these orders. Any  
18 suspended sentences may be imposed after a hearing at the  
19 request of the state. The suspended sentences begin today and  
20 end 30 years from today.

21 Other conditions of the sentences are; restitution in  
22 the amount of \$409,980 to the Estate of Clifford L. Fitzgerald,  
23 Jr. through the department of corrections as directed by the  
24 probation/parole officer, a 17 percent administrative fee is  
25 assessed for the collection of restitution. You are to

1 participate meaningfully and complete any counseling treatment  
2 and educational programs as directed by the correctional  
3 authority or probation/parole officer.

4           You are ordered to have no contact with Clifford  
5 Fitzgerald, III, Hope Fitzgerald, Heather Fitzgerald and  
6 Alexandra Dodwell either directly or indirectly including but  
7 not limited to contact in person by mail, phone, email, text,  
8 text message, social networking sites or through third parties.

9           You are ordered to be of good behavior and comply  
10 with all terms of these sentences. In addition to other  
11 conditions, suspensions or conditions on your good faith effort  
12 to comply with the restitution requirement law while on parole.  
13 You are not work either voluntarily for pay or otherwise in  
14 fund raising or financial services without the approval of your  
15 probation/parole officer. The ability to do it with the  
16 approval PPO if something I abated to the state's condition.

17           Contact with the above named persons is permissible  
18 via attorney for purposes of satisfying the probate judgment.

19           On charge ID numbers 1162257C and 1162260C findings  
20 of guilty -- I should have mentioned on the other ones, they  
21 were on concurrent with each other.

22           On the ones that I've just referenced, findings of  
23 guilty are entered. You are sentenced to the New Hampshire  
24 State Prison for not more than 30 years nor less than 10 years.  
25 There is added to the minimum sentence a disciplinary period

1 equal to 150 days for each year of the minimum term of your  
2 sentences to be prorated for any part of the year.

3 All of the minimum and all of the maximum sentences  
4 are suspended. Suspensions are conditioned upon good behavior  
5 in compliance of all of the terms of these orders. Any  
6 suspended sentences may be imposed after a hearing at the  
7 request of the state. The suspended sentences begin today and  
8 end 15 years from your release on the stand-committed sentences  
9 I just imposed, 1120218C, 1162258C, 1162259C. And these  
10 sentences are concurrent with each other and consecutive to  
11 those sentences.

12 Other conditions are the identical restitution  
13 conditions that I've already read so I won't repeat it, the  
14 identical no contact condition, the identical condition of  
15 meaningful participation and completion and counseling  
16 treatment and educational services, good behavior and the  
17 conditions about not working in fund raising or financial  
18 services except without the approval of the PPO and the contact  
19 permitted via attorney for sentence filling the probate  
20 judgment.

21 Do you understand the terms and conditions of your  
22 sentences, sir?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Okay. Because I'm imposing a state  
25 prison sentence on you today, I am notifying you that you do

1 have the right to request sentence review and I'm notifying you  
2 of that right at this time and I'm also notifying you that the  
3 state has an identical right.

4 Both you and the state are hereby notified that you  
5 have the same right to apply for a review of the state sentence  
6 imposed today. The application may be filed within 30 days  
7 after the date of sentence but not there after except for good  
8 cause shown.

9 If either party files such an application the  
10 sentence will be reviewed by a board of three members who will  
11 be either judicial referees and or superior court judges.  
12 Review of the sentences may result in the decrease or increase  
13 of the minimum or maximum terms within the limits fixed by law  
14 or there may be no change in the sentences.

15 A form for making application if either party wishes  
16 to do so has been provided to both parties and the record  
17 should reflect that I am asking the bailiff now to hand to the  
18 defense and the state the forms for making application if they  
19 wish to do so.

20 Are there other matters to come before the court?

21 MR. HUNT: Yes, Your Honor. We ask for bail pending  
22 appeal -- excuse me, bail pending appeal.

23 THE COURT: What's the state's position?

24 MR. O'NEILL: The state would object.

25 THE COURT: Okay. Do you want to make an argument



1 or --

2 MR. HUNT: Yes, Your Honor.

3 THE COURT: Go right ahead. You may be seated, Mr.  
4 Fitzgerald.

5 MR. HUNT: First, we'll state that Mr. Fitzgerald is  
6 stating in good faith that he shall file a timely appeal to the  
7 New Hampshire Supreme Court in this matter. His appellate  
8 attorney Joshua Gordon is here today to verify, if necessary  
9 that he's been hired and shall file a timely appeal and that  
10 the appeal has merit and it is not being taken for the purpose  
11 of delay.

12 The nature of the crimes and the sentence imposed  
13 support bail pending appeal under the circumstances of this  
14 case and under the history of this case. Mr. Fitzgerald was  
15 aware of throughout this proceeding the potential severity of  
16 his sentences, nevertheless, he has appeared at every hearing  
17 and complied with every condition. Mr. Fitzgerald has clearly  
18 demonstrated to answer judgment. He has no criminal record as  
19 the court is well aware. Prior to conviction he was on bail  
20 for over a year in this case and has no bail violations.  
21 Pending sentencing Mr. Fitzgerald has remained on bail to date  
22 and has no bail violations. Mr. Fitzgerald has attended every  
23 hearing and cooperated with every order of this court. Nothing  
24 has changed since the bail order was ordered pending sentence,  
25 other than the sentences issued today and there's no reason to

1 believe that Mr. Fitzgerald will not appear to answer judgment  
2 following the appeal.

3           As before he has reasons to remain in New Hampshire  
4 and he also, I'm reminded, has turned over his passport to the  
5 court. He has reasons to remain in New Hampshire in that he  
6 owns real estate in the State of New Hampshire. As the court  
7 may not be aware he also has a pending civil matter in this  
8 case, which we actually had a hearing for following this  
9 hearing and that is a substantial claim against a defendant,  
10 which he continues to wish to and needs to pursue. Therefore,  
11 we, respectfully, request that Mr. Fitzgerald be released on  
12 bail under the current bail conditions pending appeal.

13           THE COURT: Thank you, Mr. Hunt. What's the state's  
14 position?

15           MR. O'NEILL: The state objects and would argue that  
16 neither of the standards expressed in the statute are  
17 sufficiently met.

18           The state would argue there's not clear and  
19 convincing evidence that the defendant is not likely to fail to  
20 appear to answer the judgment.

21           Yes, the defendant has had a good track record in  
22 this case to this point and the state would argue that that's  
23 because the defendant thought he could con his way out of these  
24 charges. And at this point he's learned he can't convince the  
25 jury and he can't convince the court that he's not guilty of

1 these crimes.

2           The defendant now is facing a significant state  
3 prison sentence, when he walked in today lightly thinking that  
4 he would walk right back out with suspended time. The nature  
5 of the crime and the length of the sentence imposed are two of  
6 the statutory factors that the court is to consider when  
7 deciding whether there's clear and convincing evidence that,  
8 essentially, the defendant will return.

9           I would note that the defendant has not remained in  
10 New Hampshire. There was statements expressed to the court  
11 today that he's actually living in New York and I believe  
12 Manhattan was even mentioned. Furthermore, Ms. McLane  
13 characterized the defendant as a worldwide traveler. This is a  
14 defendant who at this point has absolutely every single  
15 motivation to flee as well as the opportunity to not return  
16 pending the outcome of his appeal.

17           Furthermore, the state would argue that there's not a  
18 preponderance of the evidence that the appeal will not likely  
19 be frivolous.

20           Your Honor heard the evidence, heard the case. There  
21 were very few disputes between the parties that the court had  
22 to rule on. There is not an appellate issue here that is not  
23 frivolous, therefore, because both standards of the bail  
24 stature are not met, because neither one is met, the state  
25 objects to the defendants release on bail.

1 THE COURT: Anything further?

2 Do we have bail forms?

3 I'll fill out a form after I get off the bench. I  
4 think -- I'm prepared to rule on the bail pending appeal issue.  
5 I am not convinced that the \$20,000 cash or corporate surety  
6 and current conditions are sufficient given the significant  
7 state prison sentence imposed that is hanging over the  
8 defendants head should the appeal be unsuccessful.

9 I'm not going to comments on the merits of the  
10 appeal, that's up to the Supreme Court and that I am aware that  
11 there were very few disputed issues, I mean, there was the  
12 sufficiency of the evidence and some other things.

13 But in any event, I'm not going to comment on the  
14 merits of the appeal but I do think that given the -- not only  
15 the return of guilty verdicts and the state prison sentence  
16 that there is a need for a higher bail to warrant the  
17 defendant's appearance.

18 So I am maintaining the current conditions of bail  
19 and increasing the amount of bail from \$20,000 cash or  
20 corporate surety to \$410,000 cash only, which is the amount of  
21 restitution in this case.

22 THE BAILIFF: All rise.

23 (Proceedings concluded at 11:00 a.m.)

24

25

CERTIFICATE

I, Misty R. Peto, a court-approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

TRANSCRIPTIONIST: Sheri Chism, CET-00435

MISTY R. PETO, CET-612  
Proofreader

August 10, 2017