

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0595

State of New Hampshire

v.

Keith C. Fitzgerald

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

BRIEF OF THE APPELLEE
THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

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(Fifteen-minute argument requested)

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ISSUES PRESENTED

1. Did the trial court err when it resentenced the defendant to the same sentence he received post-trial when *State v. Fitzgerald*, 173 N.H. 564 (2020), vested the trial court with the discretion to sentence the defendant to terms consistent with the plea bargain, the sentence he received after trial, or anywhere in between?

2. Did the trial court err, in the absence of any evidence of vindictiveness and with a different sentencing judge than the underlying case, when it provided sufficient reasoning for the defendant's sentence by explaining it had reviewed sentencing memoranda, the parties' arguments, the relevant law, and *State v. Fitzgerald*, 173 N.H. 564 (2020), in resentencing the defendant?

STATEMENT OF THE CASE AND FACTS

This appeal marks the third time this case has come before this Court. *State v. Fitzgerald*, Case. No. 2017-0328 (N.H.), Order dated July 6, 2018 (“Fitzgerald I”); *State v. Fitzgerald*, 173 N.H. 564 (2020) (“Fitzgerald II”).

Fitzgerald I concerned the merits of the defendant’s convictions.

The defendant had been charged with five Class A felony counts of Theft By Unauthorized Taking. DA at 32, 38, 44, 50, 56¹; *see also* RSA 637:3, I (2010). A jury convicted the defendant on all five counts. This Court affirmed those convictions. *Fitzgerald*, Case No. 2017-0328 at 1.

The court (*Smukler*, J.) sentenced the defendant to three concurrent sentences of 10 to 30 years with 6 months of the minimum and 5 years of the maximum suspended for 30 years. SA at 78-84. The court also sentenced the defendant to two concurrent sentences of 10 to 30 years in prison, which were fully suspended for 30 years upon release conditioned upon good behavior and compliance with the terms of his sentences. *Id.*

¹ “SA” refers to the State’s appendix.

“DB” refers to the appellant’s brief.

“DAdd” refers to the defendant’s addendum.

“DA” refers to the defendant’s appendix.

“Tr1” refers to the sentencing hearing that occurred on November 9, 2020.

“Tr2” refers to the sentencing hearing that occurred on November 25, 2020.

Fitzgerald II followed. Following this Court's affirmance on the merits, the defendant moved for a new trial or to vacate his sentences and reinstate the plea offer based on ineffective assistance of counsel. *Fitzgerald*, 173 N.H. at 569. Prior to trial, the State offered a plea agreement to the defendant, "explaining that, in exchange for pleading guilty to each of the five pending charges, the defendant would serve two years in the Belknap County House of Corrections, followed by two years on administrative home confinement. Additionally, the defendant would have a four to ten-year suspended sentence with a window of ten years after completion of his final year of home confinement." *Id.* at 570. The defendant sent a counter-offer to the State which the State rejected. *Id.* Thereafter, a jury convicted the defendant of five counts of Class A felony Theft By Unauthorized Taking. *Fitzgerald*, Case No. 2017-0328 at 1.

This Court found that the defendant's trial counsel was constitutionally deficient in his representation during the plea bargain stage because trial counsel "did not adequately advise the defendant about the applicable sentence enhancement and the merits of the State's plea offer relative to the defendant's likelihood of success at trial." *Fitzgerald*, 173

N.H. at 576. This Court also held that the defendant was prejudiced as a result of trial counsel's performance at the plea bargaining stage. *Id.* at 581.

This Court found that the sole advantage the defendant would have received, absent deficient representation, was a lesser sentence. *Id.* at 582. The proper inquiry for the trial court on resentencing is "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 (quoting *Lafler v. Cooper*, 566 U.S. 156, 171 (2012)). This Court explained the trial court did not have the discretion to vacate the conviction or accept the plea, and it remanded the case for resentencing. *Fitzgerald*, 173 N.H. at 583-84.

This appeal, *Fitzgerald III*, concerns what happened on remand. *Fitzgerald II* remanded the case to the trial court for resentencing. *Id.* at 584. The trial court reviewed sentencing memoranda, heard oral arguments from the State and defense counsel, and it heard victim-impact statements. Tr1 at 4, ln. 11-15; Tr1 at 7. The State advocated for the original sentence of 9 ½ to 25 years and the consecutive suspended sentence to be imposed. Tr1 at 4, ln. 18-19. The State argued that the underlying facts had not changed, evidence had not been excluded at trial, and nothing required the

trial court to ignore anything that happened after the plea bargaining stage. *Id.* The State explained that the defendant's convictions stem from "stealing \$409,000 from his now-deceased father in the waning weeks and months of his father's life." *Id.* The defendant exploited his power of attorney over his father's finances to fund charities that never did any charity work, to pay down debts, and to continue to live his luxurious lifestyle. *Id.* The State told the court that the last couple of weeks of the victim's life were spent being concerned about where his money had gone. *Id.*

The State reminded the trial court of its discretion in sentencing and that the court could sentence the defendant to the State's last offer, to the post-trial sentence, or any length sentence in between. *Id.* The State also reminded the court of the case Judge Smukler relied upon: *State v. Gagne*, 165 N.H. 363 (2013). Tr1 at 6, ln. 13-22. The State argued that Judge Smukler had found similar facts in *Gagne* and therefore properly relied on the identical sentence he gave in *Gagne* in issuing the original sentence here. *Id.*

In addition to his sentencing memorandum, the defendant argued that restitution had been paid more than two years ago, and that the payment was not made in anticipation of this resentencing. Tr1 at 18-24. He

argued that the trial court should return him to the same position he would have been in had there been no violation of his right to counsel, which he argued was the denial of the State's plea offer. *Id.* The defendant argued that the court should sentence the defendant to the terms of the State's plea bargain. *Id.* The defendant argued that the trial court should not consider the defendant's trial testimony, and that his "earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions" should favor the defendant. Tr1 at 19-20.

On November 25, 2020, the trial court resentenced the defendant to the sentence he received post-trial: 9 ½ to 25 years in prison and additional suspended sentences. Tr2 at 4-12. The trial court provided its reasoning for the defendant's sentence: a review of the charges and convictions, the applicable law including *Fitzgerald II*, the pleadings, and the arguments made by respective counsel. Tr2 at 29, ln. 7-12.

The court denied the defendant's subsequent motion to reconsider. DA 45. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court had the authority to “resentence the defendant to either the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.” *Fitzgerald*, 173 N.H. at 583. After listening to arguments, reviewing sentencing memoranda, and reviewing the relevant law, the trial court resentenced the defendant to the identical sentence he had received after trial. The trial court’s resentencing adhered to this Court’s guidance and was within the limits of its sentencing authority. *Fitzgerald II* did not require the trial court to resentence the defendant to the terms of the rejected plea bargain despite the defendant’s argument otherwise.

Fitzgerald II provided the defendant a remedy to correct the constitutionally deficient representation by trial counsel when it remanded the case for resentencing. *Fitzgerald II* recognized the trial court’s broad discretion in sentencing and provided a remedy that neither gave the defendant a windfall nor squandered the resources the State properly invested in criminal prosecution. *Lafler*, 566 U.S. at 171.

Without expressly using the term, the defendant seeks specific performance of the terms of the plea agreement. Neither *Lafler* nor

Fitzgerald II provide such a remedy. In fact, *Lafler* overruled the lower court which had ordered specific performance of the plea agreement. *Id.* at 174. Despite *Lafler*'s clear holding, the defendant now argues that the trial court ignored this Court's order and did not "neutralize the taint of the constitutional violation" by resentencing the defendant to the post-trial sentence. DB at 8-9. *Lafler* clarified that the proper remedy is one that allows trial courts to exercise discretion in "all circumstances of the case," *Lafler*, 566 U.S. at 175. The trial court properly exercised its discretion in this case.

Case law does not require "magic words" in the trial court's reasoning prior to sentencing. Notably, a trial court is not required to provide a detailed record of its reasoning for sentencing criminal defendants absent limited factual scenarios not applicable to the defendant's case. *See State v. Landry*, 131 N.H. 65, 67 (2008) (holding trial courts no longer had to justify increased sentences on appeal absent a finding of prosecutorial or judicial misconduct or vindictiveness). Historically, whenever a judge imposed a *more severe* sentence after a new trial, the court had to make a record of its reasons or else a presumption of vindictiveness arose. *State v. Abram*, 156 N.H. 646, 649 (2008). Moreover,

it is difficult to see how a presumption of vindictiveness could arise when the second sentence was imposed by different judges. *Id.* at 652 (explaining the presumption of vindictiveness is inapplicable when the disparate sentences were imposed by two different judges). *Fitzgerald II* forecloses this presumption from arising because it did not authorize the trial court to impose a more severe sentence, and the trial court followed its dictate.

Accordingly, because the trial court on resentencing properly followed *Fitzgerald II* and appropriately exercised its discretion in resentencing the defendant, the trial court's resentencing decision should be affirmed.

ARGUMENT

1. **THE TRIAL COURT SUSTAINABLY EXERCISED ITS DISCRETION WHEN IT RESENTENCED THE DEFENDANT IN ACCORDANCE WITH THIS COURT’S DECISION IN *FITZGERALD II*.**

The trial court (*O’Neill*, J.) resentenced the defendant within the bounds prescribed by this Court in *Fitzgerald II*. This Court explained its order of remand for resentencing “permits the trial court to exercise discretion in determining whether to resentence the defendant to either the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.” *Id.* at 583 (quoting *Lafler*, 566 U.S. at 171). The trial court did just that.

A. **Standard of Review**

The defendant’s argument in this appeal ultimately boils down to a disagreement about how the trial court exercised its broad discretion in sentencing the defendant upon remand. He does not argue, nor could he, that the trial court could not constitutionally resentence the defendant to the same terms as the original sentence given this Court’s order in *Fitzgerald II*. The proper standard of review, therefore, is “unsustainable exercise of

discretion.” *State v. LeCouffe*, 152 N.H. 148, 153 (2005); *State v. Timmons*, 145 N.H. 149, 151 (2000).

The defendant argues the trial court failed to follow *Fitzgerald II* when it resentenced him to the same sentence he received following trial, and the trial court imposed the sentence without adequate explanation. DB at 5. To the extent those arguments raise constitutional issues, the standard of review on those arguments is *de novo*. *State v. Burgess*, 156 N.H. 746, 752 (2008).

B. Fitzgerald II provided a procedural remedy to allow the trial court to use its discretion in resentencing the defendant within the bounds of the opinion.

Fitzgerald II provided clear guidance to the trial court. The trial court followed that guidance. *Fitzgerald II* noted that its decision “leaves open to the trial court how best to exercise that discretion in all the circumstances of the case before it.” *Id.* at 583 (quoting *Lafler*, 566 US. at 174-75). The United States Supreme Court explained that though “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, [] that baseline can be consulted in finding a remedy that does not require the

prosecution to incur the expense of conducting a new trial.” *Lafler*, 566 U.S. at 172.

Fitzgerald II in no way required the trial court to sentence the defendant to the terms the State offered in the plea. To be sure, the trial court could not sentence below the State’s last offer just as it could not sentence above the sentence the defendant received after his convictions. *Id.* This Court prescribed the range of allowable sentences, and the trial court chose to sentence the defendant to one of its options: the defendant’s post-conviction sentence.

The defendant argues that the trial court misapprehended *Fitzgerald II* and failed to follow its mandate upon remand. DB at 15-16. The defendant mischaracterizes the relief this Court provided. The defendant is correct in that, according to *Fitzgerald II*, he should be returned to his *procedural* position at the time of the ineffective assistance of counsel. He is incorrect, however, that this Court’s mandate is that his ultimate sentence should reflect the State’s last offer prior to the ineffective assistance of counsel. That is not the remedy under *Lafler*, and it was not the remedy in this Court’s holding. Rather, *Fitzgerald II* explained the “remedy permits the court to exercise discretion in determining whether to resentence the

defendant to either the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.” *Fitzgerald*, 173 N.H. at 583-84 (citing *Lafler*, 566 U.S. at 171).

Without expressly saying so, the defendant seeks specific performance of the original plea agreement by the trial court. DB at 13. In *Lafler*, the district court ordered specific performance of the original plea agreement. 566 U.S. at 174. The Supreme Court reversed the district court and instead ordered the State to reoffer the plea agreement. *Id.* Then “[p]resuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.” *Id.* Despite the Supreme Court’s correction, the defendant here asks this Court to order the same relief that the district court in *Lafler* incorrectly provided: specific performance of the plea agreement.

Fitzgerald II’s remedy dictated a resentencing hearing. *Fitzgerald*, 173 N.H. at 583-84. The defendant suggests that the trial court cannot resentence the defendant to the original sentence while still neutralizing the

taint of the constitutional violation. DB at 8-9. The Georgia Court of Appeals rejected that premise in a case similar to the facts in Fitzgerald. In *Maines v. State*, 330 Ga. App. 247 (2014), *overruled on other grounds by Collier v. State*, 307 Ga. 363 (2019), the court encountered virtually the same issue that this Court confronts. In *Maines*, the defendant was sentenced after entering a non-negotiated guilty plea which the trial court later permitted him to withdraw due to ineffective assistance of counsel. *Id.* at 248. On resentencing, the trial court re-imposed the identical sentence. *Id.*

In *Maines*, the defendant appealed his conviction arguing that the resentencing court erred by not requiring the State to reoffer its original plea agreement prior to the resentencing. *Id.* The Georgia Court of Appeals disagreed and found the proper remedy was a resentencing hearing because the negotiated plea bargain was to the same charge as he entered in his non-negotiated plea. *Id.* at 249.

The *Maines* court went on to note explicitly that there was no offer for a plea to a lesser count for which the defendant was convicted after his first guilty plea, nor was there a mandatory sentence confining the judge's sentencing discretion. *Id.* at 248-49. Thus, *Maines* found that the

“circumstances contemplated by *Lafler* which might have necessitated a re-offering of the plea proposal simply are not present in this case.” *Id.* *Maines* further explained that “even if such circumstances were present, *Lafler* still clearly states that such a remedy would be up to the trial court's discretion.” *Id.*

The Georgia Court of Appeals holding in *Maines* follows the Supreme Court's reasoning in *Lafler*, where the Supreme Court held that its decision “leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.” *Id.* at 250 (internal citations omitted). In *Maines*, the Georgia Court of Appeals held that the trial court had properly exercised its discretion in imposing the same sentence on the defendant, and affirmed the trial court's ruling after finding the defendant was unable to show an abuse of that discretion. *Id.* at 250. Here, as in *Maines*, Fitzgerald was convicted of the same charges, both in number and severity, as were contemplated in the plea. *Fitzgerald*, 173 N.H. at 570; *Fitzgerald*, Case No. 2017-0328 at 1.

Absent the holding in *Maines*, the vast majority of cases citing *Lafler* share one or two common fact patterns: either the government offered fewer or reduced charges in its plea bargain, or the resentencing

court's discretion was limited by mandatory minimums such that a resentencing alone would not remedy the constitutional violations. *See, e.g. Ahvakana v. State*, 475 P.3d 1118, 1120-21 (Alaska Ct. App. 2020) (requiring the state to re-offer its earlier plea agreement to the defendant where at re-sentencing the trial court is bound by statute to impose a mandatory sentence that is harsher than what the defendant would have otherwise received under the terms of the state's plea offer); *People v. Delgado*, 442 P.3d 1021, 1024 (Colo. Ct. App. 2019) (finding that the appropriate remedy for ineffective assistance during the plea bargaining stage may be to require the state to re-offer the plea agreement which was imprudently rejected by the defendant if the plea agreement was for less severe charges than what the defendant would be exposed to at trial); *State v. Rose*, 406 P.3d 443, 447 (Mont. 2017) (plea offer for fewer/less severe charges); *Miller v. United States*, 561 Fed. Appx. 485, 486 (6th Cir. 2014) (mandatory minimum sentence limiting trial court's discretion); *United States v. Cobb*, 110 F. Supp. 3d 591, 600 (E.D. Pa. 2015) (mandatory minimum sentence limiting trial court's discretion); *Jacobs v. United States*, 10 F. Supp. 3d 272, 281-82 (D. Conn. 2014) (mandatory minimum sentence limiting trial court's discretion).

The cases cited in support of the defendant's argument, DB at 13-14, are all distinguishable and do not advance his argument. The defendant cites *People v. Hudson*, 95 N.E. 3d 1148 (Ill. App. Ct. 2017), for the proposition that the trial court's discretion is "limited by the requirement that the remedy had to neutralize the taint of the constitutional violation." *Id.* at 1151. *Hudson*, however, dealt with a mandatory life sentence. *Id.* at 1152. The prosecution had previously offered reduced charges which would not have triggered the mandatory sentence. *Id.* at 1150. The federal court's remedy required the prosecution to re-offer a 20-year sentence to a charge that would not trigger mandatory life imprisonment. *Id.* at 1151.

On remand, the state court rejected the plea deal and maintained the defendant's sentence of natural life without parole. *Id.* On appeal, the court explained that the trial's court discretion "did not extend to rejecting a plea to a charge that did not trigger a mandatory life sentence." *Id.* at 1153. The *Hudson* court explained the trial court's discretion was "limited by the requirement that the remedy had to neutralize the taint of the constitutional violation." *Id.* Rejecting the plea meant Hudson had no opportunity for a different result upon resentencing because the trial court would have been constrained by mandatory sentences. *Lafler*, 566 U.S. at 171 (explaining a

resentencing may be insufficient “if a mandatory sentence confines a judge’s sentencing discretion”). Conversely, *Fitzgerald II* gave the trial court discretion to sentence Fitzgerald to the terms of the plea bargain, his post-trial sentence, or a sentence in between. *Fitzgerald*, 173 N.H. at 583-84. Unlike in *Hudson*, Fitzgerald had the opportunity for a lower sentence. *Id.* The trial court exercised its discretion to sentence Fitzgerald within the parameters set by *Fitzgerald II*, and Fitzgerald’s general disagreement with it is not enough to overturn the trial court’s decision.

In the present matter, the State is neither required to re-offer the plea agreement nor does the trial court have the authority to reject such an offer, and there is no mandatory minimum sentence triggered upon resentencing. *Fitzgerald*, 173 N.H. at 583-84; *see also* RSA 637:3, :11. Unlike in *Hudson* where a plea rejection would trigger a mandatory minimum sentence, Fitzgerald faced no such concern.

The defendant also relies on *Green v. Attorney General*, 193 F. Supp. 3d 1274 (M.D. Fl. 2016), seemingly for the proposition that a habeas court can dictate the imposition of a specific sentence on remand. DB at 13. In *Green*, defense counsel failed to communicate the prosecution’s offer prior to its expiration. 193 F. Supp. 3d at 1282. As a result of not pleading

guilty, Green's crime subjected him to habitual offender status under Florida law which carried enhanced penalties and mandatory minimums. *Id.* at 1278; *see also* Fla. Stat. §775.084 (2019).

The court found Green's defense counsel was constitutionally deficient. *Green*, 193 F. Supp. 3d at 1282. Under *Lafler*, re-offering the plea agreement is the proper remedy where the judge's discretion is confined by a mandatory sentence after trial. *Lafler*, 566 U.S. at 171. To remedy the constitutional deficiency in *Green*, the State agreed to re-offer the defendant a sentence of time served in order to avoid a windfall for the defendant that would have resulted from re-issuance of the original plea bargain. *Green*, 193 F. Supp. 3d. at 1288. The defendant's reliance on *Green* overlooks a fundamental principle of *Lafler*: while neutralizing the taint of the constitutional violation, the remedy should neither grant the defendant a windfall or "needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Lafler*, 566 U.S. at 170.

In *United States v. Knight*, 981 F.3d 1095, 1099 (D.C. Cir. 2020), the State's pre-trial offer was to plead to a single count of assault with a dangerous weapon with no further charges being filed related to an armed

robbery and kidnapping, an offer which carried sentencing guidelines of two to six years in prison. Knight declined the plea offer, the government thereafter prosecuted and convicted Knight on 10 charges, and the court sentenced him to more than 22 years in prison. *Id.* Relying on *Lafler*'s guidance, the appeal court required the government to re-issue the pre-trial offer, and it gave the sentencing court the requisite discretion to accept or reject the plea. *Id.* at 1108-09. This is the proper remedy under *Lafler*, because Knight was offered lesser or fewer charges, but it is inapplicable to the present case because Fitzgerald was not offered any lesser or fewer charges than on which he was tried, convicted, and sentenced. *Knight* does not advance the defendant's argument.

Medina v. United States, 797 Fed. Appx. 431 (11th Cir. 2019), similarly does not advance the defendant's argument. In *Medina*, the defendant did not get the benefit of a three-level federal sentencing guideline reduction based on acceptance of responsibility because of his trial attorney's constitutionally defective plea bargain advice. *Id.* at 437. The federal district court determined that Medina would not have demonstrated the required acceptance of responsibility because he previously expressed his desire for a "conditional plea" and because

Medina had maintained his innocence throughout his direct appeal. *Id.* at 436.

The Court of Appeals disagreed with the district court's determination of Medina's eligibility for the guideline reduction. *Id.* at 437. In order to provide the benefit of the acceptance of responsibility to Medina in a resentencing, the Court of Appeals vacated Medina's plea and instructed the lower court to "resentence as if he pled guilty ab initio." *Id.*

The *Medina* decision addresses the Court of Appeals' underlying concern upon remand. In order to qualify for acceptance of responsibility, Medina would have needed to, as applicable here, truthfully admit the conduct comprising the offense(s) of conviction. *U.S. Sentencing Guidelines Manual* § 3E1.1 (2018) (Commentary). Given that Medina maintained his innocence throughout the trial and appeals process, the "timeliness of the defendant's conduct in manifesting the acceptance of responsibility" would also weigh against qualifying for the sentence reduction. *Id.* Finally, the commentary explains that the adjustment is "not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.*

Here, New Hampshire has no sentencing guidelines other than statutory maximums and a few statutory minimums not applicable in the present case. There is no equivalent “acceptance of responsibility” in the state system which limits or otherwise strongly guides the sentencing court’s authority.

Fitzgerald II explained the trial court “may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions.” *Fitzgerald*, 173 N.H. at 582 (quoting *Lafler*, 566 U.S. at 171-72). As *Fitzgerald II* concluded, “but for counsel's deficient performance, there is a reasonable probability that the defendant would have accepted the plea offer.” *Fitzgerald*, 173 N.H. at 578. Prior to issuing its sentence, the trial court explained that it reviewed, *inter alia*, the *Fitzgerald II* opinion prior to issuing sentence. Tr2 at 29, ln. 7-12. Given the trial court’s reliance on *Fitzgerald II* as a factor to determine the defendant’s sentence, Fitzgerald had the benefit of acceptance of responsibility at a resentencing that the defendant in *Medina* did not.

C. The trial court would have had an understanding of the facts of the case either as a result of trial or from an offer of proof as part of a plea colloquy.

The defendant in his present appeal seeks to limit the trial court's ability to consider damaging trial testimony in its resentencing consideration. The trial court would have had to understand the facts of this case in order to make its sentencing determination. If the defendant had been returned to the procedural stage of plea and sentencing, the court would be required to determine through an offer of proof whether there is a factual basis for the plea. Super. Ct. Crim. R. 11(b)(2)(A). The State's offer of proof must necessarily contain the facts it believed supported the charges which naturally would include a summary of evidence including witness testimony. At that time, the victims would also have a right to be heard. RSA 21-M:8-k, II(p).

Lafler puts this defendant in the odd procedural position of trying to unwind the clock. The *Lafler* Court recognized this difficulty. "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, 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." *Lafler*, 566

U.S. at 172. On one hand, this Court’s order requires the trial court to “place the [defendant], as nearly as practicable, 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 (internal citations omitted). However, this Court also noted its decision “does not give the trial court the discretion to vacate the conviction or accept the plea.” *Id.* This Court explained that no plea colloquy was necessary to apply the resentencing remedy. *Id.* at 584.

Therefore, *Fitzgerald II* placed the defendant in a sentencing hearing with a “cap” and a “floor.” In this situation, the trial court would have heard all of the evidence and testimony during trial in order to make its determination of whether to accept the “floor” sentence suggested by the defendant, the “cap” sentence suggested by the State, or any sentence in-between. As with a plea and sentencing hearing, the victims have a right to be heard. RSA 21-M:8-k, II(p).

Fitzgerald II provided guidance to the trial court that “a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions; and second, 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.” *Fitzgerald*, 173 N.H. at 582 (internal quotations omitted).

The defendant seeks to limit the trial court to “information concerning the crime or the petitioner that would have come to light between the acceptance of the plea offer and the imposition of sentence.” DB at 12. The cases he cites, however, are all cases where the defendant had either been offered to plead to fewer or less severe charges, or the court’s discretion was constrained by mandatory minimums. *See H.P.T. v. Commissioner*, 310 Conn. 606, 613 (2013) (offer to plead to fewer charges); *Commonwealth v. Steckley*, 128 A.3d 826, 838 (PA Super Ct 2015) (court’s resentencing discretion limited by a mandatory sentence); *Dodson v. Ballard*, 800 Fed. Appx. 171, 181 (4th Cir. 2019) (offer not to seek mandatory life sentence); *United States v. Penoncello*, 358 F. Supp. 3d 815, 828-829 (D. Minn. 2019) (vacated by *United States v. Penoncello*, slip op. (D. Minn. April 7, 2021)) (offer not to seek additional indictments). In those cases, *Lafler*’s remedy is for the State to re-offer the plea bargain that had been rejected prior to trial. *Lafler*, 566 U.S. at 174.

In the scenarios above where the State re-offered the plea agreement, the trial court could understandably return the defendant to the pre-trial plea

bargain stage, and the defendant's argument would hold weight. There, by unwinding the clock to the constitutionally deficient representation, the trial would have never happened.

However, in the defendant's present scenario, the State is not required to re-offer the plea agreement, and the court has no ability to accept the defendant's plea or vacate the defendant's conviction.

Fitzgerald, 173 N.H. at 583. *Fitzgerald II* placed the defendant at a post-conviction sentencing hearing rather than a pre-trial hearing. The trial court was not limited to considering only the information that came to light prior to the plea offer and imposition of sentence. *Lafler* provided this guidance, instructing "it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made." 566 U.S. at 172-73.

Fitzgerald II's guidance for resentencing contemplates the defendant's current posture upon remand. The trial court would have already heard the evidence in the criminal case and, therefore, the defendant would have already testified in a manner the trial court considered "gross rationalizations" for his behavior. SA at 79, ln. 12. The trial court then

exercised its discretion to resentence the defendant to “to either the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.” *Fitzgerald*, 173 N.H. at 584-85.

D. The defendant’s proper remedy was a motion to reconsider or a request for a hearing with the Sentence Review Division.

The defendant recognizes the superior court’s discretion on sentencing. DB at 9. He does not, and cannot, argue that the trial court was required to resentence the defendant to the terms of the plea bargain because *Fitzgerald II* provided the trial court with a sentencing range upon remand. *Fitzgerald*, 173 N.H. at 583-84. The defendant’s quarrel is that the trial court resentenced him to the post-trial sentence. In effect, the defendant now wants this Court to overrule *Fitzgerald II* and require the trial court to resentence the defendant to the terms of the plea bargain. Put simply, the defendant wants to remove the trial court’s discretion upon resentencing.

If the defendant believed that was the proper remedy, he should have moved for this Court to reconsider its decision on resentencing and require the trial court to impose the terms of the plea bargain. Sup. Ct. R. 22. He

chose not to ask this Court to reconsider its remedy, and he is therefore bound by *Fitzgerald II* which gave the trial court discretion in resentencing.

Following the defendant's resentencing, the court provided the defendant a notice of his right to apply for sentence review. Tr2 at 37, ln. 5-13. Under RSA 651:58, any person sentenced to a term of one year or more in state prison may file for a review of the sentence by the review division. Under New Hampshire Rule of Criminal Procedure 29(k)(1)(iii), the sentence may be increased, decreased, modified or affirmed. The defendant's complaint comes down to his disagreement on what the court's sentence should have been on remand, which is the precise jurisdiction of the Sentence Review Division.

2. THE TRIAL COURT COMMITTED NO ERROR IN PROVIDING ITS REASONING FOR THE DEFENDANT'S SENTENCE.

A trial court has "broad discretion to choose the sources and types of evidence upon which to rely in imposing sentence, though that discretion is not unlimited." *State v. Lambert*, 147 N.H. 295, 295 (2001). The *Lafler* Court recognized this broad discretion and chose to provide guidance in its opinion. *Fitzgerald*, 173 N.H. at 582 (quoting *Lafler*, 566 U.S. at 171). *Lafler* provided guideposts it deemed relevant: "first, a court may take

account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions; and second, 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.* at 582 (internal quotations omitted).

Prior to pronouncing sentence, the trial court explained that it reviewed both the State's and defendant's sentencing memoranda and arguments, the applicable law, and *Fitzgerald II*. Tr2 at 29, ln. 7-12. The defendant has not pointed to any requirement that a sentencing court use "magic words" to describe its reasoning in great detail for its sentence. The trial court's discussion of what it relied upon in order to make its decision is sufficient to provide a basis to the defendant of the reasons for the court's sentence. Regardless, absent a showing of vindictiveness or the court's expression of reliance on evidence it could not consider, the trial court is not required to explain its reasoning.

A. Case law does not require a detailed record of the trial court's reasoning for its sentence absent limited factual scenarios not applicable to the defendant's case.

There are factual scenarios, inapplicable to the present case, where a trial court is required to provide a more detailed explanation of its reasoning for a sentence. In *State v. Willey*, 163 N.H. 532, 540-41 (2012), the sentencing court criticized the defendant's defense strategy and made it an aggravating factor in its sentencing. The *Willey* Court concluded that the *trial court's* comments implied that the trial court may have penalized the defendant for his *attorney's* trial strategy. *Id.* at 542 (emphasis added). In finding the court's remarks to be improper evidence for it to consider, this Court held that because it "cannot conclude on the record before us that the trial court clearly gave no weight to improper factors," it vacated the defendant's sentence and remanded for sentencing. *Id.* at 541. Here, the trial court did not suggest that it relied on any improper evidence nor did it comment on the defendant's trial strategy, and therefore the reasoning from *Willey* does not apply.

In *Abram*, this Court affirmed several of the defendant's convictions while reversing others. 156 N.H. at 649. The defendant argued that when the court resentenced him on remand, the second sentence was effectively

more severe than the first and, thus, was presumptively vindictive. *Id.* at 651 (internal citations omitted). The *Abram* court cited to *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969), which held that “whenever a judge imposes a *more severe sentence* upon a defendant after a new trial, the reasons for his doing so must affirmatively appear” on the record or else a presumption of vindictiveness will arise. *Abram*, 156 N.H. at 652 (emphasis added).

The *Abram* Court cautioned that the presumption does not arise in “every case where a convicted defendant receives a higher sentence on retrial,” but that it “applies in only those situations where there is a realistic likelihood of vindictiveness.” *Abram*, 156 N.H. at 652 (internal quotations omitted). That presumption is inapplicable, however, when the second sentence was imposed following a *de novo* trial in a two-tiered system, such as in New Hampshire, or where the disparate sentences were imposed by two different judges. *Id.*

In the present case, the trial court did *not*, and indeed could not, issue a harsher sentence to the defendant after the resentencing hearing. The trial court (*O’Neill*, PJ.) issued the same sentence on resentencing as the original trial court (*Smukler*, J.) had issued upon the defendant’s

convictions after trial. *Fitzgerald II* permitted this result and did not permit a harsher sentence to be issued. *Fitzgerald*, 173 N.H. at 583-84. Therefore, the *Abram* requirement that the “reasons affirmatively appear” on the record is inapplicable to the present case. Additionally, even if the defendant could imply vindictiveness, the *Abram* court makes it clear that the presumption does not apply when the sentences were imposed by two different judges. *Id.* (internal citations omitted). The trial court on remand (*O’Neill*, PJ.) imposed the sentence at issue. Not only was this defendant sentenced by two separate judges, but also the sentences themselves were in no way disparate.

B. Historical jurisprudence lacks the requirement for the types of detailed explanations the defendant argues are required for Due Process.

New Hampshire’s historical jurisprudence demonstrates a trend away from requiring sentencing courts to issue detailed reasons on the record during sentencing. The evolving case law on sentencing in trials *de novo* is instructive as to what is required of the sentencing court. New Hampshire historically took a similar view to *Abram* in scenarios where a defendant’s sentence substantial increases after a trial *de novo*. In *State v. Wheeler*, 120 N.H. 496, 499 (1980) (abrogated by *State v. Landry*, 131

N.H. 65 (2008)), the Court held that under the New Hampshire Constitution, Part II, Article 73-A, whenever the superior court substantially *increases* a sentence imposed by the lower court, the record must reflect the reasons for the change (emphasis added).

The Court in *State v. Landry*, abrogated the *Wheeler* rule which now no longer requires trial courts to justify increased sentences on appeal absent a finding of prosecutorial or judicial misconduct or vindictiveness. 131 N.H. at 67. In explaining its reasoning, the *Landry* Court said “[i]n a trial *de novo*, [] trial judges may impose increased sentences so long as the increase is not a penalty for pursuing the appeal. There is no more reason for this court to believe that an increased sentence is a penalty for seeking a superior court trial than to believe that the district court sentence was too lenient.” *Id.* (internal citations omitted).

The earlier *Wheeler* rule required an explanation when there was an increase in sentence, and the *Landry* abrogation no longer required such an explanation. In the present case, the trial court sentenced the defendant to the exact terms of his original sentence. If *Wheeler* required an explanation upon an increase in sentence but *Landry* no longer required such an explanation, then it stands to reason that the court is not required to make a

detailed record for issuing the identical sentence to what had been entered earlier in the case's procedural history.

CONCLUSION

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

The State requests a 15-minute oral argument.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE

By its Attorneys,

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October 25, 2021

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CERTIFICATE OF COMPLIANCE

I, Gregory M. Albert, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 6,720 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

October 25, 2021

/s/ Gregory M. Albert
Gregory M. Albert

CERTIFICATE OF SERVICE

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

October 25, 2021

/s/ Gregory M. Albert

Gregory M. Albert

APPENDIX

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TRANSCRIPT OF SENTENCING HEARING – DAY 1..... 44

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.
)

SENTENCING

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

APPEARANCES:

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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.

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MISTY R. PETO, CET-612
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August 10, 2017