

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0009

State of New Hampshire

v.

Ernesto Rivera

Appeal Pursuant to Rule 7 from Judgment
of the Hillsborough (South) Superior Court

BRIEF FOR THE DEFENDANT

Christopher M. Johnson
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301
NH Bar # 15149
603-224-1236
cjohnson@nhpd.org
(15 minutes oral argument)

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	3
Question Presented	5
Statement of the Case and Facts.....	6
Summary of the Argument	14
Argument	
I. THE 2020 SENTENCING COURT ERRED IN INCREASING TWO OF RIVERA'S SENTENCES ON THE SFK DOCKET CONVICTIONS	15
Conclusion.....	26
Addendum	AD 27

TABLE OF AUTHORITIES

Page

Cases

Stapleford v. Perrin,
122 N.H. 1083 (1981) 16

State v. Abram,
156 N.H. 646 (2008) 17, 18, 19, 20

State v. Benner,
172 N.H. 194 (2019) 16

State v. Fletcher,
158 N.H. 207 (2009) 17

State v. Folds,
172 N.H. 513 (2019) *passim*

State v. Marden,
172 N.H. 258 (2019) 23

State v. Martin,
164 N.H. 687 (2013) 16

State v. Ortiz,
162 N.H. 585 (2011) 17, 22

State v. Pandelena,
161 N.H. 326 (2010) 16

State v. Rau,
129 N.H. 126 (1987) 16

State v. Stearns,
130 N.H. 475 (1988) 16

<u>State v. Stern,</u> 150 N.H. 705 (2004)	17
<u>State v. Van Winkle,</u> 160 N.H. 337 (2010)	20
<u>State v. Wilbur,</u> 171 N.H. 445 (2018)	24
<u>United States v. Townsend,</u> 178 F.3d 558 (D.C. Cir. 1999)	19
<u>Williams v. Taylor,</u> 529 U.S. 362 (2000)	24

Constitutional Authorities

New Hampshire Constitution, Part I, Article 15	16, 23
United States Constitution, Fifth Amendment	16
United States Constitution, Sixth Amendment	23
United States Constitution, Fourteenth Amendment	16

QUESTION PRESENTED

Whether the court erred by denying Rivera's request to vacate the sentences pronounced in 2020 in the SFK case.

Issue preserved by defense motion, the State's objection, the hearing on the motion, and the court's ruling. AD 29-45; A3-A157; V 3-16.*

* Citations to the record are as follows:

"AD" refers to the attached addendum, containing the order from which Rivera appeals;

"A" refers to the separate appendix to this brief, containing relevant pleadings;

"H1" refers to the transcript of a hearing held on October 9, 2015;

"H2" refers to the transcript of a hearing held on November 19, 2015;

"S" refers to the consecutively-paginated transcript of the sentencing hearing held over two days on January 2 and 9, 2020;

"V" refers to the transcript of the hearing on the motion to vacate sentence, held on October 19, 2020.

STATEMENT OF THE CASE AND FACTS

Ernesto Rivera was arrested in July 2013 and subsequently charged with various offenses. A15-A30. In late 2015, he stood trial twice in the Hillsborough (South) Superior Court.

First, in September and October 2015, Rivera stood trial on multiple charges associated with four different Superior Court docket numbers.¹ These included three pairs of charges relating to gun possession, with each pair containing an indictment accusing Rivera of being an armed career criminal (ACC) and an indictment accusing Rivera of the lesser-included offense of being a felon in possession of a gun (FIP). A15-A18; AD 30. Each pair referred to a separate alleged act of possession. In addition, in that trial, the State prosecuted Rivera for possession of cocaine with intent to distribute and for four counts of solicitation of witness tampering. A19-A23. The court dismissed one of the ACC-FIP pairs prior to jury deliberations. The jury convicted Rivera on all remaining counts.² Because each FIP count functioned as a lesser-included offense of the associated ACC count, the court did not at that time pronounce sentence on the FIP counts.

¹ These included 2013-CR-613, -636, -722, and 2014-CR-183.

² Rivera's appeal of the convictions entered upon the guilty verdicts in that trial is pending in this Court, under docket 2016-0007. This brief refers to that prosecution as the "ACC case."

After that first trial but before the second, there was some brief discussion of matters relating to sentencing.³ First, at a hearing on October 9, defense counsel stated that Rivera preferred to be sentenced at the same time on any convictions. AD 30-31; H1 10-11. “Although Judge Garfunkel was initially reluctant to agree to a single sentencing hearing because he faced mandatory retirement in February 2016 due to his age and feared that the trials would not be completed by that time, the parties all seemingly agreed by the end of the October 9, 2015, hearing that the defendant’s trials would be concluded in time for a single sentencing hearing.” AD 30-31. Later, at a hearing held on November 19, 2015, shortly before the second trial, the court clerk announced that the sentencing hearing would be held on December 17, 2015. H2 20-21.

On December 14-15, 2015, Rivera stood trial on charges arising out of an incident occurring on the night of July 21-22, 2013, at the San Francisco Kitchen (SFK), a restaurant in Nashua. These included possession of cocaine with intent to distribute, criminal threatening, and five counts of simple assault. A24-A30. The jury acquitted Rivera of possession of cocaine with intent to distribute but convicted on the lesser-

³ At that time, the parties contemplated that Rivera would face charges in at least two more trials. Ultimately, though, the State opted to try him only once more, on the charges prosecuted at the December 2015 trial. AD 30 n.3.

included offense of simple possession of cocaine. The jury returned guilty verdicts on all other counts.⁴

On December 17, 2015, the court (Garfunkel, J.) pronounced sentence on the convictions arising out of both trials. A31-A54. On the verdicts entered in the ACC case, the court sentenced Rivera to a cumulative stand-committed term of thirty-three and one-half years to sixty-seven years in prison.⁵ On the verdicts entered in the SFK case, the court pronounced one stand-committed twelve-month sentence for assault, to run concurrently with the witness-tampering sentences from the ACC case. AD 32-33. All other sentences in the SFK case were suspended, including a consecutive suspended term of seven and one-half to fifteen years in prison for possession of cocaine.⁶

Rivera's direct appeals were stayed pending his pursuit of post-conviction remedies. A75-A88. When this Court issued its opinion in State v. Folds, 172 N.H. 513 (2019), it became clear that Rivera's ACC convictions were invalid. Citing Folds,

⁴ Rivera's appeal of the convictions entered upon the guilty verdicts in that trial is pending in this Court, under docket 2016-0006. All charges prosecuted at that trial were filed in docket 2013-CR-612. For ease of reference and because those charges arose out of events at the San Francisco Kitchen, this brief refers to that prosecution as the "SFK case."

⁵ Rivera received consecutive, stand-committed terms of ten to twenty years for the two ACC convictions. Rivera received a third (also consecutive) term of ten to twenty years for possession of drugs with intent to deliver. He received terms of three and a half to seven years on each of the witness tampering convictions, to run concurrent with each other, but consecutive to his ACC and drug sentences.

⁶ On the remaining four counts of simple assault and on the criminal threatening conviction, Rivera received concurrent suspended terms of twelve months.

Rivera filed a motion to vacate the ACC convictions. A89-A93. Folds, though, did not invalidate any of the convictions or sentences in the SFK case. Accordingly, Rivera's Folds motion was not filed under that docket number and did not seek to vacate any of those convictions or sentences. A89. In due course, the Superior Court (Temple, J.) vacated the ACC convictions and sentences. That disposition of the ACC convictions revived the lesser-included FIP convictions, as to which the court had, in 2015, pronounced no sentence.

In January 2020, the court convened a new sentencing hearing, held over two days. Notwithstanding that Folds affected only the ACC convictions and sentences, various statements made by the court and counsel at the sentencing hearing reveal that all parties contemplated a *de novo* resentencing by Judge Temple on all convictions, including those entered in the SFK case.

At the conclusion of the January 2020 sentencing hearing, the court pronounced the following consecutive, stand-committed sentences: (1) for possession of cocaine with intent to distribute, seven and one-half to twenty years; (2) for simple possession of cocaine, three and one-half to seven years;⁷ (3) for the four witness-tampering convictions, terms

⁷ The court also pronounced a twelve-month, stand-committed term for criminal threatening. Because it was ordered to run concurrently with this cocaine-possession sentence, it does not lengthen the total time of Rivera's imprisonment. The criminal threatening conviction, like the drug possession

of three and a half to seven years, concurrent with each other; and (4) for the two FIP convictions, terms of three and a half to seven years, concurrent with each other. A55-A74. Thus, Rivera now has a cumulative stand-committed term of eighteen to forty-one years. Included within that cumulative stand-committed term is a possession-of-cocaine prison sentence in the SFK case that, in 2015, Judge Garfunkel had pronounced as fully suspended. A61-A62.

In addition, the court pronounced suspended twelve-month terms for the five simple assault convictions. A65-A74. Those sentences remain suspended for two years following Rivera's release from his final stand-committed sentence. If imposed, those sentences shall run consecutive to each other.⁸

In July 2020, represented by new counsel, Rivera filed in Superior Court under the SFK docket a motion to vacate the sentences in the SFK case pronounced in January 2020. A3-A97. The motion argued first that the January 2020 sentencing court lacked the authority to change any of the sentences in the SFK case because Folds only invalidated the ACC convictions in the ACC case. A7-A11. In addition, to the

conviction, arose out of the SFK case, and both sentences had been suspended at the 2015 sentencing hearing.

⁸ However, the court also ordered that those sentences, like the criminal threatening sentence described in the preceding footnote, would run concurrently with Rivera's second stand-committed sentence. Thus, if these sentences are ever imposed, Rivera will already have served at least three and a half years of whatever term is imposed.

extent that the authority to re-sentence was deemed to have arisen by the consent of Rivera's former counsel, the motion raised a claim of ineffective assistance of counsel. A11-A14.

The State objected, filing its objection not only under the SFK docket, but also under the docket numbers associated with the ACC case. A98-A108. The State argued first that Judge Temple had authority to re-sentence on all charges because all charges were, in 2015, part of a single "sentencing scheme." A101-A103. The State argued further that 2020 sentencing counsel was not ineffective. A103-A105. Finally, and in the alternative, the State argued that if the 2020 sentencing court erred, the remedy was to remand for re-sentencing just on the two FIP convictions, in place of the vacated ACC convictions. A105-A106.

The defense filed a response. A109-A157. Addressing the State's "single sentencing scheme" argument, Rivera contended that the SFK docket was never consolidated with the other dockets. A110-A113. Second, Rivera objected to the State's alternative prayer asking that Judge Garfunkel's 2015 sentences be re-instated, except for the ACC sentences. A113-A114. Because the charges under all docket numbers other than the SFK docket were tried together, Judge Temple had the authority to re-sentence on all convictions and sentences arising out of the ACC trial. Rivera accordingly contended that it would not be appropriate to remand for re-sentencing

on the FIP charges. Rather, all that the court could and should do was to vacate the new SFK sentences and reinstate the SFK sentences pronounced by Judge Garfunkel in 2015. Third, Rivera responded to points made with respect to his claim of ineffective assistance. A114-A117.

After a hearing in October 2020, V 3-16, the court (Temple, J.) denied the defense motion by an order issued in December 2020. AD 29-45. After reviewing the procedural history of the case, the order first addressed the question of the court's legal authority to pronounce new sentences in the SFK case. AD 39-43.

On that question, the court reasoned first that Rivera's counsel's request for re-sentencing on the SFK convictions, when granted by the court, created a need for re-sentencing. "Once the defendant's sentences were vacated, the Court regained the authority or 'jurisdiction' to issue new sentences for those convictions." AD 41. Moreover, the court cited the fact that, in 2015, Judge Garfunkel "repeatedly referenced" the ACC convictions when he pronounced sentence on the convictions in the SFK case. AD 41-42. Finally, the court described Rivera's argument as "entirely disingenuous," given that the parties had, at the January 2020 sentencing hearing, agreed to re-sentence on all remaining convictions. AD 42.

The court next denied Rivera's ineffective assistance of counsel claim. AD 43-45. The court reasoned that Rivera

suffered no prejudice from counsel's failure to object to re-sentencing on the SFK convictions, because the court would have overruled any such objection. AD 44. Citing its analysis of its authority to resentence on the SFK convictions, the court concluded that when it "vacated the ACC convictions pursuant to Folds, it was proper – if not necessary – for the Court to resentence the defendant on the convictions stemming from" the SFK trial. AD 44. "As such, the Court would have overruled such an objection even if" counsel had made it. Id. The court did not reach the deficient-performance prong of the ineffective assistance analysis. AD 44-45.

Rivera thereafter filed a discretionary notice of appeal, which this Court accepted for review.

SUMMARY OF THE ARGUMENT

The court erred in re-sentencing Rivera on convictions entered in the SFK docket, to the extent that it increased those sentences. In 2020, the court was required only to pronounce new sentences on the FIP convictions that replaced the ACC convictions, and on any other convictions which, in 2015, resulted in sentences that referred to the ACC sentences. The court was permitted, but not required, to reduce any sentence previously pronounced, because due process only prohibits increasing a previously pronounced sentence.

Because the 2020 court pronounced lawful sentences on the FIP convictions, those sentences cannot now be changed. Because the sentences that the 2020 court reduced from their 2015 levels were likewise lawful, they also cannot now be changed. However, the non-FIP 2020 sentences that the court increased over their 2015 levels are invalid, and thus must be restored to their 2015 levels, unless the court on remand chooses further to reduce them.

Rivera proved the prejudice prong of the ineffective-assistance analysis. The Superior Court erred in ruling to the contrary. If this Court reaches the claim of ineffective assistance, it thus must remand for further proceedings relating to the deficient-performance prong.

I. THE 2020 SENTENCING COURT ERRED IN INCREASING RIVERA’S SENTENCES ON TWO OF THE SFK DOCKET CONVICTIONS.

The 2020 sentencing court erred in re-sentencing on convictions entered in the SFK docket. Because New Hampshire courts do not follow the “sentencing package” doctrine, the court, in 2020, was required only to pronounce new sentences on the FIP convictions that replaced the ACC convictions, and on any other convictions which, in 2015, resulted in sentences stated as being concurrent or consecutive to the ACC sentences. The court was permitted, but not required, to reduce any sentence previously pronounced, because due process only prohibits increasing a previously pronounced sentence.

Because the 2020 court lawfully pronounced sentence on the FIP convictions, those sentences are valid and cannot now be changed. Because the sentences that the 2020 court reduced from their 2015 levels were, likewise, lawfully pronounced, they also are valid and cannot now be changed. However, the non-FIP 2020 sentences⁹ that the court increased over their 2015 levels are invalid, and thus must be restored to their 2015 levels (unless the court on remand chooses further to reduce them).

⁹ These include the sentences pronounced as stand-committed in 2020 that were pronounced as suspended in 2015. The concurrent, stand-committed sentences for possession of cocaine and for criminal threatening fall within this category.

In making the argument leading to the conclusion summarized above, Rivera relies on his rights to due process of law, as protected by the Fifth and Fourteenth Amendments to the United States Constitution, and Part I, Article 15 of the New Hampshire Constitution.

The analysis begins with two fundamental principles. First, “trial judges are vested with broad discretionary powers with regard to sentencing.” State v. Stearns, 130 N.H. 475, 493 (1988) (quoting State v. Rau, 129 N.H. 126, 129 (1987)). Although statutes constrain the authority of sentencing courts in various ways, State v. Pandelena, 161 N.H. 326, 329 (2010), “the trial court is ... provided with many tools to administer fairly the sentencing aspects of the criminal justice system.” Stapleford v. Perrin, 122 N.H. 1083, 1087 (1981). For example, “a sentencing court has broad discretion to assign different sentences, suspend [a] sentence, or grant probation in order to achieve the goals of punishment, deterrence, protection of society and rehabilitation.” State v. Martin, 164 N.H. 687, 689 (2013) (quotation omitted); see also State v. Benner, 172 N.H. 194, 198 (2019) (to same effect).

Second, a court’s sentencing powers are constrained by due process principles. “Due process requires a sentencing court to clearly communicate to the defendant the exact nature of the sentence as well as the extent to which the court retains the discretion to modify or impose it at a later

date.” State v. Fletcher, 158 N.H. 207, 209-210 (2009) (quoting State v. Stern, 150 N.H. 705, 713 (2004)). After a court has pronounced a sentence, “Due process ... imposes an outer limit on the trial court’s ability to correct a sentence....” State v. Ortiz, 162 N.H. 585, 596 (2011). Thus, “where the original sentence is clear as to the intent and is legal, the sentencing court does not have authority to increase the sentence....” Id. at 598 (quoting Fletcher, 158 N.H. at 211).

The sentencing issue here arose because the invalidation of Rivera’s ACC convictions required the entry of judgment and the pronouncement of sentence on the FIP verdicts. Because the 2020 sentencing court not only pronounced sentence on the FIP verdicts, but also re-sentenced Rivera on other convictions untainted by the ACC error, this case accordingly raises first a question about a court’s authority, in a resentencing context, to change valid sentences previously pronounced. In State v. Abram, 156 N.H. 646 (2008), this Court confronted such a situation.

In that case, at trial, the defendant was convicted of twenty-six counts. Id. at 648. The sentencing court grouped the convictions into five sets, with the sentences within each set concurrent with each other, but consecutive to the sentences in the other sets. As a result, Abram received a

cumulative term of fifty to one hundred years, in the form of five consecutive sentences of ten to twenty years. Id.

On appeal, this Court reversed nine of the convictions, including all of the convictions in two of the groups. Id. at 648-49. On remand, at the State's request, the court restructured the sentences so as again to impose five consecutive terms of ten to twenty years. To do so, the court broke apart the groups containing the convictions underlying the surviving sentences, so that sentences previously concurrent to each other became consecutive. Id. at 649. On appeal, Abram argued that, in doing so, the re-sentencing court violated principles of due process.

In analyzing the question, this Court rejected the argument that, because the cumulative sentence remained the same, the re-sentencing court had not increased Abram's sentence. Id. at 653. Rather, because sentences on surviving convictions had been increased, this Court regarded the re-sentencing court as having imposed greater sentences. Id.

Here, the 2015 sentencing court sentenced Rivera to consecutive, stand-committed terms of ten to twenty years for the two ACC convictions. Removing them from the original cumulative sentence of thirty-three and one-half years to sixty-seven years would leave a cumulative term of thirteen and one-half to twenty-seven years. Because the 2020 sentencing court pronounced a longer cumulative term –

eighteen to forty-one years – it follows that Rivera likewise received a longer term on the surviving convictions after the 2020 sentencing than he had received for them in 2015.¹⁰

In Abram, unlike in this case, the same judge presided over the re-sentencing as had presided over the original sentencing. Abram thus could advance a vindictiveness claim that is less available to Rivera. In an effort to defeat Abram’s vindictiveness claim, the State argued for the adoption of the “sentencing package” doctrine. Id. at 653-54. This Court’s discussion and rejection of that doctrine sheds relevant light on Rivera’s claim.

When applying that doctrine, courts presume that “when a defendant is found guilty on a multicount indictment, there is a strong likelihood that the [sentencing] court will craft a disposition in which the sentences on the various counts form part of an overall plan.” Id. at 654 (quoting United States v. Townsend, 178 F.3d 558, 567 (D.C. Cir. 1999)). The implication is that “when one or more counts of a ‘bundled’ sentence are vacated, the [sentencing] court may ‘rebundle’ the package by resentencing the defendant on

¹⁰ This holds true even when one substitutes the 2020 FIP sentences for the 2015 ACC sentences. Substituting the two concurrent three and a half to seven year FIP terms for the original ACC sentences in the original sentencing scheme would yield a cumulative stand-committed sentence of seventeen to thirty-four years. That is less than the eighteen to forty-one year cumulative sentence pronounced in 2020, thereby demonstrating that the 2020 sentencing court imposed a longer sentence on the non-ACC/FIP sentences than had the 2015 sentencing court.

the affirmed charges in order to effectuate its original sentencing intent.” Abram, 156 N.H. at 654 (citation and quotation marks omitted).

Citing other state courts, this Court rejected the “sentencing package” doctrine. Id. at 654-56. The Court first reasoned that the doctrine fit poorly with New Hampshire law as compared to federal sentencing law, which is governed by “the determinate sentencing goals” of the federal guidelines system. Id. at 654-55. In addition, this Court concluded that “public policy considerations militate against adopting the sentencing package doctrine in this State.” Id. at 655. Specifically, the Court noted the concern that “the doctrine could permit vindictively-motivated sentences under the guise of procedural necessity.” Id.

Having described those fundamental principles, this brief next develops the argument supporting the conclusion that the 2020 sentencing court erred in resentencing Rivera on convictions other than the FIP convictions. The scope of the trial court’s sentencing authority raises a question of law which this Court reviews *de novo*. State v. Van Winkle, 160 N.H. 337, 340 (2010).

Because New Hampshire does not subscribe to the sentencing package doctrine, all that the 2020 court need have done was vacate the ACC convictions and sentences, pronounce FIP sentences, and correct any sentence

irregularity caused because some other sentence referred to an ACC sentence, such as by being pronounced as running consecutive to it. The only 2015 non-ACC sentence infected by a reference to an ACC sentence was the sentence for possession of drugs with intent to deliver, stated as running consecutive to the second of the two ACC sentences. A35. Because no due process violation occurs when a sentence is reduced, the court could reduce any other sentence. It could not, though, increase any sentence previously imposed.

Thus, the 2020 court acted properly and within its discretion when it sentenced Rivera on the two FIP convictions to concurrent stand-committed terms of three and a half to seven years. The court likewise acted properly and within its discretion when it eliminated the provision making the sentence for possession with intent to deliver run consecutive to a no-longer existing ACC sentence. Also, because the court has the power to reduce a sentence previously imposed, the court acted properly and within its discretion when it reduced the sentence for possession with intent to deliver from ten to twenty years to seven and a half to twenty years.

The 2020 court, however, acted improperly when it increased the sentence for any conviction beyond what had been pronounced for that conviction in 2015. As noted above, “where the original sentence is clear as to the intent and is

legal, the sentencing court does not have authority to increase the sentence....” Ortiz, 162 N.H. at 598. Here, the 2015 sentences for possession of cocaine and criminal threatening were clear and lawful. Neither Folds nor any other intervening development rendered those sentences invalid or unlawful. The 2020 court therefore erred in increasing them above their 2015 level.

Finally, because all the other sentences pronounced in 2020 were lawful, this Court must reject the State’s alternative prayer that the case be remanded for resentencing as if the 2020 sentencing order had never issued. The 2020 court issued a sentencing order and Rivera is entitled to rely on the lawful sentences pronounced then. Only the sentences for simple possession of cocaine and criminal threatening were unlawful, because increased above their 2015 level. This Court must accordingly remand for re-sentencing on those two convictions, with the instruction that they cannot be increased above their 2015 levels.

The analysis set forth above entitles Rivera to the relief requested on appeal. That being the case, this Court need not reach his alternative claim alleging ineffective assistance of counsel. However, if the Court does reach the issue, the analysis set forth above also suffices to defeat the Superior Court’s basis for rejecting the ineffective assistance of counsel claim.

“The State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel. N.H. Const. pt. I, art. 15; U.S. Const. amend. VI.” State v. Marden, 172 N.H. 258, 262 (2019). “To demonstrate a violation of this right, the defendant must show that his counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id.

“To prevail upon a claim of ineffective assistance of counsel, the defendant must demonstrate, first, that counsel’s representation was constitutionally deficient and, second, that counsel’s deficient performance actually prejudiced the outcome of the case.” Id. “To satisfy the first prong of the test, the performance prong, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. “To meet this prong of the test, the defendant must show that counsel made such egregious errors that he failed to function as the counsel the State Constitution guarantees.” Id.

“To satisfy the second prong, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceedings would have been different had competent legal representation been provided.” Id. at 263. “A reasonable probability is a probability sufficient to undermine confidence in the

outcome.” Id. The “reasonable probability” standard is lower than the “preponderance of the evidence” standard. Williams v. Taylor, 529 U.S. 362, 405-06 (2000).

“Both the performance and prejudice prongs of the ineffectiveness inquiry are mixed questions of law and fact.” State v. Wilbur, 171 N.H. 445, 448 (2018) (quotation omitted). “Therefore, [the Court] will not disturb the trial court’s factual findings unless they are not supported by the evidence or are erroneous as a matter of law, and [the Court] review[s] the ultimate determination of whether each prong is met de novo.” Id. (quotation omitted).

The court rejected the ineffectiveness claim on the ground that, had counsel objected to the court’s authority to alter any non-ACC and non-FIP sentences, the court would have overruled that objection. AD 44-45. Thus, the court reasoned, Rivera could not show prejudice from counsel’s failure to object. For all the reasons stated above and incorporated herein by reference, the court erred in concluding that it had the authority to increase sentences in the SFK case. If this Court reaches the ineffectiveness issue, thus, Rivera can show prejudice from counsel’s failure to object. A proper objection, followed by the correct ruling, would have prevented the court from increasing sentences in the SFK case.

Relying on its analysis of the prejudice prong, the Superior Court did not reach the question of deficient performance. AD 44-45. If this Court reaches the ineffectiveness claim and determines, on the basis of the argument above, that Rivera can show prejudice, it should remand the case for further proceedings and findings with respect to the deficient-performance prong.

CONCLUSION

WHEREFORE, Ernesto Rivera respectfully requests that this Court vacate the sentences for simple possession and criminal threatening, and remand for re-sentencing on those convictions.

Undersigned counsel requests fifteen minutes of oral argument before a full panel.

The appealed decision is in writing and is appended to the brief.

This brief complies with the applicable word limitation and contains approximately 4430 words.

Respectfully submitted,

By /s/ Christopher M. Johnson
Christopher M. Johnson, #15149
Chief Appellate Defender
Appellate Defender Program
10 Ferry Street, Suite 202
Concord, NH 03301

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to the Criminal Bureau of the New Hampshire Attorney General's office through the electronic filing system's electronic service.

/s/ Christopher M. Johnson
Christopher M. Johnson

DATED: November 10, 2021

A D D E N D U M

ADDENDUM – TABLE OF CONTENTS

	<u>Page</u>
Order-December 22, 2020	AD 29

THE STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
SOUTHERN DISTRICT**

**SUPERIOR COURT
No. 2013-CR-00612**

State of New Hampshire

v.

Ernesto Rivera

ORDER ON DEFENDANT'S MOTION TO VACATE SENTENCES

The defendant, Ernesto Rivera, stood trial twice in the fall of 2015. At his first trial, he was found guilty of, among other crimes, two counts of being an armed career criminal ("ACC"). Following additional guilty verdicts at his second trial, the Court (Garfunkel, J.) sentenced the defendant on all of his convictions at a single hearing on December 17, 2015. However, the parties now agree that the ACC convictions from his first trial were improper. As a result, the defendant moved to vacate his convictions. The Court granted the motion and held a new sentencing hearing on January 2 and 9, 2020. At that hearing, the Court resentenced the defendant on all of his convictions from both trials, except the improper ACC convictions. The defendant now moves to vacate the newly-imposed sentences for the convictions arising out of his second trial. He argues that the Court was without subject-matter jurisdiction and legal authority to issue those sentences. He also contends that he received ineffective assistance of counsel. The State objects. The Court held a hearing on this motion on October 19, 2020. For the reasons that follow, the defendant's motion is DENIED.

Procedural Background

The defendant was charged by indictment with three counts of being an ACC, see RSA 159:3-a, and three lesser included counts of being a felon in possession

("FIP") of a deadly weapon. Prior to trial, the defendant moved to dismiss the ACC indictments. The defendant argued that two of the predicate convictions alleged in the ACC indictments arose from a single criminal episode, and therefore the indictments should be dismissed. The Court (Garfunkel, J.) denied the defendant's motion to dismiss in a written order. The Court reasoned that the armed career criminal statute only required "proof of findings of guilt in three or more felonies regardless of whether they arose from one or several criminal episodes." (Citation omitted).

The defendant thereafter stood trial beginning on September 29, 2015 on the following charges: the three ACC indictments and the three lesser-included FIP indictments; possession of a narcotic drug with the intent to sell or dispense (subsequent offense); and four indictments related to solicitation of witness tampering.¹ The Court (Garfunkel, J.) dismissed one of the ACC indictments and the associated lesser-included FIP indictment at trial. The jury, however, found the defendant guilty of the remaining charges on October 2, 2015.² Per agreement of the parties, the defendant's sentencing was delayed until the completion of his remaining trials.³

Indeed, at a hearing on October 9, 2015, the defendant's counsel stated that "Mr. Rivera has advised me that he would rather do sentencing as one." (10/9/15 h'rg at 9:19.) Although Judge Garfunkel was initially reluctant to agree to a single sentencing hearing because he faced mandatory retirement in February 2016 due to

¹ The State also obtained six conspiracy indictments, which were also filed under the same docket number (226-2014-CR-183) as the witness tampering indictments. The State, however, entered nolle prosequis on those indictments prior to trial.

² The jury did not directly consider the FIP indictments as they were lesser included offenses of the ACC indictments. The defendant, however, was still found guilty of those indictments as a matter of law.

³ At the time, the defendant had three additional trials scheduled. Ultimately, the State chose to enter nolle prosequis on the charges from two of those trials. As a result, only one additional trial was held.

his age and feared that the trials would not be completed by that time, the parties all seemingly agreed by the end of the October 9, 2015 hearing that the defendant's trials would be concluded in time for a single sentencing hearing. (See id. at 9:31 (defendant's attorney noting that "[w]e should be able to accomplish sentencing" by mid-December).) In fact, the State indicated that it may not go forward with the final trial if it meant that Judge Garfunkel would be unable to hold the sentencing hearing.

At the pre-trial conference for the defendant's second trial, the Court and the parties again discussed sentencing. The parties agreed that, should the defendant be convicted of any charges at his second trial, the sentencing would take place on the same day as the sentencing from the first trial. (See 11/19/15 h'rg at 10:17–19.) The defendant's second trial then began on December 14, 2015. He was charged with the following, all under Docket Number 226-2013-CR-612: one count of possession of a narcotic drug with intent to distribute; five counts of simple assault, domestic violence related; and one count of criminal threatening.⁴ On December 15, 2015, a jury convicted the defendant of all of the charges except the possession with intent to distribute charge. As to that charge, the jury convicted the defendant of the lesser-included offense of possession of a narcotic drug.

As stated above, the Court (Garfunkel, J.) held a single sentencing hearing on all of the defendant's convictions on December 17, 2015. To recap, the convictions for which the defendant was sentenced on that date were:

Convictions from First Trial

1. ACC (Charge ID 838674c) (Docket 226-2013-CR-636)

⁴ There were five additional informations charging the defendant with simple assault filed under this docket number. However, the State entered nolle prosequis on these informations on December 17, 2015.

2. ACC (Charge ID 854312c) (Docket 226-2013-CR-722)
3. Possession of a Narcotic Drug with the Intent to Sell or Dispense (subsequent offense) (Charge ID 829942c) (Docket No. 226-2013-CR-613)
4. Criminal Solicitation to Witness Tampering (Charge ID 913798c) (Docket No. 226-2014-CR-183)
5. Criminal Solicitation to Witness Tampering (Charge ID 913799c) (Docket No. 226-2014-CR-183)
6. Criminal Solicitation to Criminal Liability to Witness Tampering (Charge ID 913800c) (Docket No. 226-2014-CR-183)
7. Criminal Solicitation to Criminal Liability to Witness Tampering (Charge ID 913801c) (Docket No. 226-2014-CR-183)

Convictions from Second Trial

1. Possession of a Narcotic Drug (Charge ID 815944c)
2. Criminal Threatening (Charge ID 868757c)
3. Simple Assault – Domestic Violence Related (Charge ID 868758c)
4. Simple Assault – Domestic Violence Related (Charge ID 868759c)
5. Simple Assault – Domestic Violence Related (Charge ID 868760c)
6. Simple Assault – Domestic Violence Related (Charge ID 868761c)
7. Simple Assault – Domestic Violence Related (Charge ID 868762c)

The Court sentenced the defendant to a combined minimum sentence of 33.5 years on all of the convictions.⁵ This included the following minimum sentences: 10 years on each ACC conviction, running consecutively (per statute); 10 years on the possession of a narcotic drug with the intent to sell, running consecutively to the ACC sentences; 3.5 years on each of the witness tampering convictions, running concurrently with each other, but consecutive to the previous sentences; 12 month stand committed sentence on one of the simple assault convictions (Charge ID 868762c), running concurrent with

⁵ The defendant was not sentenced on either of the FIP indictments as they were lesser-included offenses of the ACC indictments. Indeed, the Court informed the defendant at sentencing:

[Y]ou would not be sentenced on that [FIP] charge[s] because [they're] a lesser included. But in the event that the supreme court reverses the armed career criminal convictions on your argument that it had to be three separate instances, not -- you would -- you would still then be faced with a conviction on the felon in possession. And you'd be brought back to be sentenced -- if the sentence was vacated on the armed career criminal and the State didn't retry you, you'd still be subject to being sentenced on the felon in possession charge.

(12/17/15 Sentencing Tr. at 37–38.)

the witness tampering sentences, but consecutive to the ACC sentences and the possession with intent sentence. The defendant received suspended sentences for the remainder of his convictions.

Following sentencing, the defendant appealed his convictions to the New Hampshire Supreme Court. While his appeal was pending, the defendant filed a petition for a writ of habeas corpus, in which he alleged that his trial counsel was ineffective ("IAC claim"). As a result of that pleading, the New Hampshire Supreme Court stayed his direct appeal to allow the superior court to consider his IAC claim. While the IAC claim was still pending before the superior court, the New Hampshire Supreme Court released a decision addressing the exact same issue raised in the defendant's pre-trial motion to dismiss the ACC indictments. See State v. Folds, 172 N.H. 513 (2019). In Folds, the supreme court held that the armed career criminal statute "applies only to persons whose qualifying convictions arise from three or more criminal episodes." Id. at 527. As a result of that ruling, it became clear that the defendant's ACC convictions should be vacated and that he should instead be sentenced on the lesser-included FIP convictions

To that end, the defendant's IAC counsel, Attorney Olson, filed a pleading on August 12, 2019, entitled "Motion to Vacate Convictions & Order New Sentencing Hearing." (See Court Index #166 in Docket No. 226-2013-CR-612.)⁶ In that pleading, the defendant contended that his ACC convictions should be vacated in light of Folds. In addition, the defendant argued that the Court "must hold a new sentencing hearing

⁶ On its face, the motion lists following docket numbers: 226-2013-CR-613; 226-2013-CR-636; 226-2013-722; and 226-2014-CR-183. These are the docket numbers for the cases involved in the defendant's first trial. Notably, the docket number from his second trial, 226-2013-CR-612, is not identified on the motion. For reasons that are not entirely clear, the clerk's office put this motion in the 226-2013-CR-612 case file.

on the remaining charges” because the Court should not have considered the ACC convictions when setting those sentences. (Id. at 5.) The defendant did not explicitly identify to which of the “remaining charges” he was referring. However, in his prayer for relief, the defendant asked the Court to “summarily vacate the [ACC] convictions . . . and order a new sentencing hearing, including docket nos. 226-2013-CR-613 and 226-2014-CR-183.” (Id.) All of these docket numbers reference convictions from the defendant’s first trial. In other words, the defendant did not explicitly ask the Court to vacate his sentences for the convictions from his second trial, which were under docket number 226-2013-CR-612.

The Court conducted a new sentencing hearing on January 2, 2020. At the start of the hearing, the Court clarified the scope of the resentencing. That is, the Court wanted to be clear on which convictions the Court was resentencing the defendant.

The following exchange occurred at a sidebar at the beginning of the hearing:

THE COURT: Okay. Let me just make sure. So we'll go through all this. So it's the two armed career criminals that are out under State v. Folds, right?

[Prosecutor]: Right.

THE COURT: Am I correct on that?

[Defense Counsel]: Right.

[Prosecutor]: But he was convicted also of felon in possession. We're asking that he be sentenced on those –

THE COURT: I see.

[Prosecutor]: -- in lieu of it.

THE COURT: Okay.

[Defense Counsel]: Right. And given the nature of everything, both parties agree that he should be resented on everything.

THE COURT: Okay. That was my question --

[Defense Counsel]: Right.

THE COURT: -- for purposes of what happened up here.

[Defense Counsel]: That's what we're requesting and that's my understanding is what the State was requesting.

(1/2/20 Sentencing Tr. at 3–4 (emphases added).) As the foregoing makes clear, the defendant plainly stated that he agreed to be resented on every conviction, including those from his second trial. Thus, when the public portion of the sentencing hearing began, the Court stated:

This is a resentencing in the case of State v. Ernesto Rivera. The docket numbers are 226-2013-CR-613, 226-2013-CR-612, 2014-CR-183, 2013-CR-722, and 2013-CR-636. I have proposed sentences from the State. I have proposed sentences from the Defendant. This sentencing and resentencing, really, is ordered as a result of the Folds case that came down on August 8, 2019, regarding the career criminal convictions in this case is what that Folds case relates to. . . . So I will vacate those two convictions and the sentences on them under the holding of State v. Folds as indicated initially in my order on the motion for a new trial. So as it relates to this sentencing, we've gone over what's happening here, the various docket numbers, and the proposals made by the respective parties

(Id. at 8–9 (emphasis added).) Indeed, during the sentencing arguments that followed, the defendant's counsel proposed new sentences on the convictions arising from the second trial. For instance, at one point he stated: "And then, in docket number 13-CR-612, which is charge ID 868758C, conviction for simple assault domestic violence, misdemeanor, 12 months stand committed with 108 days of pre-trial confinement credit." (Id. at 15–16.) Likewise, at another point in the hearing, defense counsel stated:

Moving on to 13-CR-612, charge ID number 815944C, which was the possession of controlled drug, second offense, that he was convicted of at trial in the second trial. It was originally charged with possession with intent. The jury found him not guilty of that and he was convicted of the lesser included possession. I'm asking the Court to impose a sentence of three and a half to seven years in prison, all maximum and all minimum suspended, suspended for five years.

(*Id.* at 16–17 (emphasis added).) Thus, it was abundantly clear that the defendant was seeking to be resentenced on all of the convictions from both trials.

At the end of the first day of the sentencing hearing, the defendant asked that all of his sentences be vacated pending the imposition of the new sentence. Although not entirely clear, it appears that the defendant requested this relief so that he would be moved to Valley Street Jail from the New Hampshire State Prison until the new sentences were imposed. The Court denied the request to vacate all of his sentences at that point. Rather, the Court stated:

So I think, at this point, those sentences remain. I'll make it very clear that the sentences for armed career criminal are out. But in the interim, the other sentences remain. They may well be vacated or changed in some way; they may not. It just depends on what I decide here. So I would rather not ship him back and forth at this point for a period of a few days.

(*Id.* at 58 (emphasis added).) The defendant did not contest this procedural ruling. Finally, at the very end of the hearing, the defendant's counsel made the following request:

The only other request I have, Your Honor, is if you decide to issue sentences in some of the cases in which they aren't similar or exact as to what was previously issued, I would just ask the Court to issue complete new mittimus on all of them. Because it's just clearer when it gets to the Supreme Court, they're going to be, like, what the heck is going on here when I file a notice of appeal. It's just going to be easier.

(*Id.*) The Court responded, "My plan would probably be to do all new sentences . . . just to make it clear that it's a full resentencing." (*Id.* at 59 (emphasis added).) The

defendant's attorney responded, "Right." (Id.) The Court concluded the hearing that day without issuing new sentences. Because the Court was not the trial judge, the Court stated that it would need time to review the trial transcripts, the PSI report, and other "appropriate documents" before deciding on appropriate sentences. (Id. at 56.)

On January 9, 2020, the Court held the second day of the sentencing hearing.

The Court began the sentencing hearing by noting:

I just wanted to go over the various cases we have on for today before I impose the sentences. We have 226-2019-CR-612, 226-2000-CR-613, 226-2014-CR-183, 226-2013-CR-636, and 226-2013-CR-722.

I have vacated the armed career criminal convictions. Those are at 226-2013-CR-636 at 838674C. That was vacated on January 7th pursuant to my order on court index number 166. That's vacated under the Supreme Court holding of the State of New Hampshire v. Jonathan Folds.

And then the other career criminal charge is also vacated. That's 226-2013-CR-722. The charge ID number on that is 854312C. So those convictions and the associated sentences of 10 to 20 years consecutive are vacated.

That brings us to sentencing today. As we discussed at the last sentencing hearing and before, and as the motion that I have granted indicates, this is a resentencing. It is a de novo resentencing.

I know there were several arguments and references made to Judge Garfunkel's sentences. I have not reviewed those sentences. I did not feel that it was appropriate for me to review them. I felt that I am sentencing de novo. I am sentencing from my perspective based on my review of all of these files . . .

I've reviewed the PSI, considered the arguments of counsel in this case. And as I said before, reviewed all of the files to refresh my memory of the various convictions in this case.

(1/9/20 Sentencing Tr. at 64–65 (emphases added).)

The Court subsequently resentenced the defendant on the FIP convictions in place of the improper ACC convictions. In addition, in accordance with the expectations

of the parties and the Court's prior ruling, the Court also resentenced the defendant on each of the other convictions from both of the two trials. The defendant's new minimum sentences were as follows:

1. For possession of a narcotic drug with the intent to sell or dispense (subsequent offense) (Charge ID 829942c) (Docket No. 226-2013-CR-613), the defendant was sentenced to 7.5 years, stand committed.
2. For possession of a narcotic drug (Charge ID 815944c) (Docket No. 226-2013-CR-612), the defendant was sentenced to 3.5 years, stand committed, running consecutively to the previous sentence.
3. For criminal threatening (Charge ID 868757c) (Docket No. 226-2013-CR-612), the defendant was sentenced to 12 months, stand committed, running consecutively to the first sentence, but concurrent with the second sentence.
4. For the five simple assault convictions (Charge IDs 868758–62c) (Docket No. 226-2013-CR-612), the defendant was sentenced to 12 months for each conviction, consecutive to one another, all of which was suspended. These sentences ran concurrent with the second sentence, but consecutive to the third sentence.
5. For the four witness tampering convictions (Charge IDs 913798–101c) (Docket No. 226-2014-CR-183), the defendant was sentenced to 3.5 years for each conviction, running concurrently with each other, but consecutive to the first sentence and the second sentence.
6. For the two FIP convictions (Charge IDs 854313c; 854288c) (Docket Nos. 226-2013-CR-722; 226-2013-CR-636), the defendant was sentenced to 3.5 years for each conviction, running concurrently with each other, but consecutive to the previous sentences.

Thus, in total, the defendant's new total minimum sentence was 18 years, which was a significant reduction from the 33.5 year minimum sentence originally imposed.

After these new sentences were imposed, the defendant returned his attention to his direct appeal before the supreme court. As noted earlier, the defendant's appeal had been stayed pending the outcome of his IAC claim and the resentencing pursuant to Folds. When the defendant's appellate defender, Attorney Naro, began reviewing

the superior court proceedings, he came to the conclusion “that Mr. Rivera was unlawfully resentenced in January 2020” and that the defendant’s counsel during resentencing, Attorney Olson, “was ineffective.” (Def.’s Mot. Appoint Counsel ¶ 1.) The defendant, through his appellate counsel, then filed a motion to vacate his new sentences for the convictions stemming from his second trial. (See Court Index #190.) In so moving, the defendant argues that “the [C]ourt did not have authority to vacate the sentences in this matter more than four years after they were pronounced,” and therefore “the [C]ourt’s January, 2020 sentencing order must be vacated and the December, 2015 sentencing orders [for the convictions from the second trial] reinstated.” (Id. ¶ 17.) The defendant alternatively argues that Attorney Olson was constitutionally ineffective for permitting the defendant to be resentenced on the convictions stemming from the second trial. The Court will address each issue in turn.

Analysis

I. Subject Matter Jurisdiction

The defendant first argues that the Court was without subject matter jurisdiction to resentence him on the convictions stemming from his second trial. “Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought: the extent to which a court can rule on the conduct of persons or the status of things.” In re D.O., 173 N.H. 48, 51 (2020). “In other words, it is a tribunal’s authority to adjudicate the type of controversy involved in the action.” Id. “A court lacks power to hear or determine a case concerning subject matter over which it has no jurisdiction.” Id.

As a threshold matter, it is well-established that the superior court has “exclusive jurisdiction over felony complaints and misdemeanors and violation level charges that

are directly related to those felonies.” RSA 592-B:1. Moreover, the defendants’ trials occurred in superior court. Thus, the issue here is not really one of subject matter jurisdiction, but whether the Court had the authority to issue new sentences.

“Trial judges are vested with broad discretionary powers with regard to sentencing. They may provide for terms of imprisonment, probation, conditional or unconditional discharge, or a fine.” State v. Fletcher, 158 N.H. 207, 209 (2009). “It is fundamental that, at the conclusion of the sentencing proceeding, a defendant and the society which brought him to court must know in plain and certain terms what punishment has been exacted by the court.” Id. (cleaned up). “It is basic to our judicial system that there must be an end to litigation and that a matter judicially acted upon and properly decided must remain final.” Id. at 210. “In regard to criminal proceedings this requires that the sentencing process must at some point come to an end.” Id. Thus, the Court has authority to amend a properly issued sentence only where “there is a clerical error, or the sentence is illegal and void.” Id. (citations omitted).

Under the unique facts of this case, the Court does not find that the Fletcher analysis applies. The Court did not amend the defendant’s original sentences for the convictions arising out of his second trial. Rather, the defendant himself moved to vacate those sentences, a motion which the Court granted.⁷ See generally State v. Thomson, 110 N.H. 190, 191 (1970) (holding that trial court, in the exercise of its

⁷ As discussed earlier, the defendant’s motion did not explicitly include the docket number related to his second trial, instead vaguely referring to the “remaining charges.” Although that motion was not entirely clear if it sought to vacate all of his sentences or only those from his first trial, the defendant’s subsequent conduct at the sentencing hearing made it clear that he was seeking to have all of his sentences vacated. Indeed, the defendant asked to be resentenced on “everything,” provided the Court with proposed sentence sheets for the charges from the second trial, and made sentencing arguments related to the convictions from that trial. Given this conduct, the Court implicitly granted a request to vacate all of the convictions when it resentenced the defendant on January 9, 2020. See Patey v. Peaslee, 101 N.H. 26, 27 (1957) (order vacating judgment was implied based on record and procedural history).

discretion, could consider defendant's "petition for review of sentence . . . if circumstances warrant"). Once the defendant's sentences were vacated, the Court regained the authority or "jurisdiction" to issue new sentences for those convictions. See State v. Goode, 710 S.E.2d 301, 303 (N.C. Ct. App. 2011) ("As for his argument that the trial court had no authority to 'modify' the original judgments, which defendant contends mandated concurrent sentences, we observe that there was no modification of the judgments; the judgments were vacated by the federal court order. Thus, the matter before the court at the resentencing hearing was the entry of new judgments[.]").

The Court further notes that had it not vacated the defendant's ACC convictions, they would have undoubtedly been vacated by the New Hampshire Supreme Court pursuant to Folds on appeal. Had the New Hampshire Supreme Court done so, it likely would have vacated all of the defendant's other sentences for two reasons. First, it is clear from the December 17, 2015 sentencing transcript that the Court (Garfunkel, J.) repeatedly referenced the defendant's ACC convictions at the time he sentenced the defendant for the convictions stemming from his second trial. See State v. Yates, 152 N.H. 245, 259 (2005) ("Because evidence of [a reversed] conviction may have affected the sentences the court imposed for the defendant's convictions for [other crimes], we vacate those sentences and remand for resentencing."); State v. Rezk, 150 N.H. 483, 493-94 (2004) (same); see generally State v. Cobb, 143 N.H. 638, 660 (1999) (noting that it is "an abuse of discretion to consider offenses for which the defendant has been acquitted" at time of sentencing). Second, it is noteworthy that the ACC convictions carried ten year mandatory minimum sentences each, a fact which Judge Garfunkel referenced throughout this case. In State v. Gordon, 148 N.H. 710 (2002), the supreme

court vacated the defendant's sentence on appeal after considering an issue somewhat similar to the one raised in Folds—whether the defendant had sufficient predicate convictions to make him eligible for a mandatory life without parole sentence. After deciding that the defendant should not have received the mandatory life sentence, the court also vacated the defendant's other sentences “[b]ecause the life sentence may have been a factor in the court's choice of sentences on the other offenses.” Id at 723. In accordance with Gordon, the supreme court likely would have vacated the defendant's other sentences as the mandatory minimum sentences imposed for the ACC convictions could have factored into Judge Garfunkel's sentences for the other convictions.⁸ And, even if the supreme court had not explicitly vacated those sentences, it would have been implied in the mandate. See State v. Abram, 156 N.H. 646, 651 (2008) (where court reversed some convictions but affirmed others, trial court had discretion to resentence defendant on affirmed charges on remand).

Finally, the Court finds the defendant's argument to be entirely disingenuous. At the resentencing hearing, everybody—the Court, the State, and the defendant—was on the exact same page regarding the nature of the proceeding. That is, all agreed that the defendant would be resentedenced on “everything,” and the sentencing hearing then proceeded under that assumption without objection. (1/2/20 Sentencing Tr. at 4.) “Having acquiesced in the procedure employed, the [defendant] cannot now object to the form of the proceeding.” Kukesh v. Mutrie, 168 N.H. 76, 81 (2015).

⁸ Although Judge Garfunkel stated that “Just because those sentences carry mandatory minimums of great length does not mean that you are then excused from the other criminal behavior because those are two 10 to 20 year sentences,” he also noted that “I have to look at your conduct in total and your lifestyle in total and determine what's an appropriate sentence.” (12/17/15 Sentencing Tr. at 28 (emphasis added).) He also stated that he had “restructured” the overall sentence even in light of those mandatory minimums. (Id. at 29.) Thus, it is not clear that the mandatory minimums had no effect on the sentences.

For all of these reasons, the Court concludes that it had both subject matter jurisdiction and the authority to issue the defendant new sentences for the convictions stemming from his second trial. The defendant's motion to vacate his sentences based on those legal arguments is therefore DENIED.⁹

II. Ineffective Assistance of Counsel

"Both the State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel," and the test for determining whether ineffective assistance of counsel was rendered is the same under both constitutions. State v. Candello, 170 N.H. 220, 225, 228 (2017). "To prevail upon his claim, the defendant must demonstrate, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case." Id. at 225. "A failure to establish either prong requires a finding that counsel's performance was not constitutionally defective." Id. "[C]ourts have the flexibility to adopt the analytic approach that promotes clarity and ease of review," and therefore the Court need not consider the two prongs in any particular order. Id. at 228.

"To satisfy the first prong of the test, the performance prong, the defendant must show that [his] trial counsel's representation fell below an objective standard of reasonableness." Id. at 225. "To meet this prong of the test, the defendant must show that trial counsel made such egregious errors that he failed to function as the counsel the State Constitution guarantees." Id. The Court will "afford a high degree of deference to the strategic decisions of trial counsel, bearing in mind the limitless variety

⁹ To the extent the defendant attempts to make a due process claim, the Court finds that it is not sufficiently developed. The defendant's due process right is mentioned in one sentence in his motion and contains just a single citation. See State v. Labranche, 156 N.H. 740, 745 (2008) (explaining that a "passing reference to due process, without more, is not a substitute for valid constitutional argument"). As such, the Court "decline[s] to address this argument." Id.

of strategic and tactical decisions that counsel must make.” Id. “Accordingly, a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. “To meet the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id.


Here, the defendant argues that “Attorney Olson was ineffective when he assented to the State’s request¹⁰ to resentence” him on the convictions from the second trial. (Def.’s Mot. ¶ 19.) In effect, the defendant asserts that Attorney Olson should not have agreed to have the defendant resented on “everything.” (1/2/20 Sentencing Tr. at 4.) The problem with this argument is that it presumes that the Court would not have resented the defendant on “everything” even if Attorney Olson had objected. As discussed in the previous section, when the Court vacated the ACC convictions pursuant to Folds, it was proper—if not necessary—for the Court to resentence the defendant on the convictions stemming from his second trial. See Abram, 156 N.H. at 651; Yates, 152 N.H. at 259; Rezk, 150 N.H. at 493–94; Gordon, 148 N.H. at 723; Cobb, 143 N.H. at 660. As such, the Court would have overruled such an objection even if Attorney Olson had made it. Thus, the defendant has failed to show that “the result of the proceeding would have been different” had Attorney Olson acted as the defendant now contends that he should have. Candello, 170 N.H. at 225. Because the

¹⁰ The Court notes that it is not entirely clear that the State was the party that made the initial request.

defendant has failed to satisfy that prong of the analysis, the Court need not consider the first prong. See State v. Fennell, 133 N.H. 402, 407 (1990) ("If the defendant is unable to demonstrate the requisite prejudice, [the Court] need not even decide whether counsel's performance fell below the standard of reasonable competence."). In light of the foregoing, the defendant's motion to vacate his new sentences based on alleged ineffective assistance of counsel is DENIED.

So ordered.

Date: December 22, 2020



Hon. Charles S. Temple,
Presiding Justice