

State of New Hampshire
Supreme Court

NO. 2017-0328

2017 TERM

NOVEMBER SESSION

State of New Hampshire

v.

Keith C. Fitzgerald

RULE 7 APPEAL OF FINAL DECISION OF THE
BELKNAP COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT/APPELLANT, KEITH FITZGERALD

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QUESTIONS PRESENTED

- I. Was Keith Fitzgerald unlawfully sentenced to an extended term pursuant to RSA 651:6, when the indictments failed to allege the extended term elements?
Unpreserved; defendant is seeking plain error review.
- II. Was conviction on indictment 57 unlawful, because if any unauthorized control over the property of another occurred, it occurred at a time before the acts alleged in the indictment?
Preserved: Trial Transcript, *Day 5* at 725.
- III. Were the convictions and sentences on indictments 58, 59, 18, and 60, unlawful because they are multiplicitous, charging four times what was, at most, a single crime?
Preserved: Sentencing Hearing Transcript at 21, 23.
- IV. Did the court err by allowing into evidence hearsay statements allegedly made by the alleged victim?
Preserved: MOTION IN *LIMINE* TO ADMIT EVIDENCE OF OUT-OF-COURT RECITATIONS (Feb. 17, 2017), *Appx.* at 230; PARTIAL OBJECTION TO STATE'S MOTION IN *LIMINE* TO ADMIT OUT-OF-COURT RECITATIONS (Feb. 27, 2017), *Appx.* at 244; *Limine Hrg.* (Mar. 20, 2017) at 48-50.
- V. Was the evidence insufficient for conviction, where there is no direct evidence suggesting Keith Fitzgerald conducted the transactions forming the State's allegations?
Preserved: Defendant's Motion to Dismiss, *Day 5* at 725-736; DEFENDANT'S MOTION TO SET ASIDE VERDICT (Apr. 10, 2017), *Appx.* at 248.

STATEMENT OF FACTS

I. Clifford's Five Children

Keith Fitzgerald,¹ the defendant, is one of five adult siblings. His father, Clifford Jr. (known as Clifford), died at age 79, on September 15, 2010. From his first marriage, Clifford had four children – Hope, Clifford, III (known as Cliff), Heather, and Keith. Later, Clifford got remarried, to Ingrid, and had a fifth child, Alexandra (known as Allie), Keith's half-sister. *Day 1* at 5-7; *Day 4* at 334.²

Clifford was a Dartmouth graduate with a Harvard MBA. He had been a prominent New York investment banker, a financial expert advising federal and state governments, and an expert witness in high-profile financial litigation. Cliff described him as “a smart guy and articulate,” “very rational in his approach,” who “could grasp very complex concepts and ideas.” In the Air Force, Clifford was an interceptor pilot, and retired as captain. His children appreciated his demanding work ethic and high standards. Clifford's retirement hobbies included sailing, flying, skiing, fishing, and hunting, and he owned boats and airplanes. By 2010, he and Ingrid had lived in Florida for a decade. *Day 1* at 11-12; *Day 2* at 25-27, 41-42, 56.

In 2010, Hope was living in western Massachusetts. While she had studied theater in college and enjoyed a career in acting, she had developed an interest in healthcare, and pursued a post-graduate degree in therapy. *Day 1* at 5, *Day 4* at 337-40, 390-92. In 2010 Cliff lived in California with his wife and college-aged children, and worked in business operations for enterprise software. *Day 1* at 3-7. Heather, the only sibling who did not testify, was living in Colorado. *Day 1* at 7; *Day 4* at 343.

¹Because there are several people in this case with the surname Fitzgerald, first names are used throughout. No disrespect is intended.

²Pagination of the trial transcripts is not sequential. To avoid confusion, transcripts are cited as “*Day #* at #.”

In 2010 Allie worked at a New York City textile company performing environmental project management and sales training. She lived with her husband James (“Jamie”) Dodwell, who had a career in finance, and was raising their newborn infant. *Day 1* at 5-7; *Day 4* at 446-50.

II. Keith and Siblings

In 2010 Keith was 45 years old. He had studied aeronautical engineering in college and, like his father, had served in the Air Force. *Day 1* at 4; *Day 6* at 789-90. Honorably discharged in 1991, he pursued a career as a private equity consultant, working on projects around the country, *Day 2* at 196; *Day 6* at 796, and by 2010 had acquired the accoutrements of his success.

In 2010 Keith lived in a luxury house on 147 acres in Center Harbor, New Hampshire, and owned another large parcel in Meredith. His home had grand views, a guesthouse, a pool and pool house, horses and dressage rink, and a heliport; he drove a nice car and wore nice clothes. *Day 2* at 196-97; *Day 3* at 312-14; *Day 4* at 459-60; *Day 6* at 790-92. Starting around 2007, but hastened by the recession in 2008, Keith’s business model unraveled, his income went to near zero, and in 2011 his big house was foreclosed. *Day 3* at 313-18; *Day 6* at 792-93.

At the same time his business was failing, so was his marriage. His wife wanted a horse, but ended up with eight of them and their associated equine equipment, *Day 6* at 814, and the couple made other impractical expenditures. *Day 6* at 817. His family understood Keith “got hammered” in the divorce court. *Day 2* at 61; *Day 3* at 317-18; *Day 4* at 338; *Day 6* at 793-94; FINANCIAL AFFIDAVITS (Mar. 24, 2010 & Apr. 26, 2010), Exhs. 54B & 54C (omitted from appx.). Keith filed for bankruptcy, both personally and for the entity through which he ran his business, but both cases were dismissed with no creditors discharged because he had no income for debt-repayment. *Day 3* at 284-89, 319, 323-26; MOTION TO DISMISS (personal bankruptcy) (Jan. 26, 2010), Exh. 53F (omitted from appx.); ORDER (dismissing personal bankruptcy) (Aug. 12, 2010), Exh. 53J (omitted from appx.); MOTION TO DISMISS (entity bankruptcy) (Dec. 22, 2009), Exh. 52H (omitted from

appx.); ORDER (dismissing entity bankruptcy) (Mar. 9, 2010), Exh. 52L (omitted from appx.); *see also* STATE'S MOTION IN *LIMINE* TO ADMIT EVIDENCE OF DEFENDANT'S MOTIVE AND INTENT (Feb. 17, 2017) at ¶ 3, *Appx.* at 213.

By the time of trial, Keith was living in a small cabin with his dog, working at a green energy startup. *Day 6* at 790-91, 794.

Keith had lots of shared interests with his father, and they did many things together, often involving their mutual flying hobby. *Day 2* at 56. They flew to Georgia and Florida for hunting and fishing, Vermont to see a former roommate, Nantucket for dinner, the Chesapeake Bay for a clambake, Princeton for a day trip, Stamford, Barcelona, and trips to and from where each lived just to visit. *Day 6* at 796-99. Keith went to Florida to talk with his father about his disintegrating marriage. *Day 6* at 800. The record includes pictures of them flying, fishing, and motorcycling. PHOTOGRAPHS (undated), Exh. A, *Appx.* at 259; *Day 6* at 822-25. The other siblings saw Clifford much less often, *Day 4* at 448 (Allie had telephone relationship); *Day 1* at 41; *Day 2* at 59 (Cliff visited once between 2005 and 2010), and acknowledge Keith was very close to their father and visited him frequently. *Day 2* at 53, 59 (Cliff); *Day 4* at 460-61 (Allie).

Before 2010, it appears there were generally amicable familial relationships. The siblings, for example, had borrowed and repaid money from each other and their parents. *Day 4* at 338-39, 392 (record of borrowing between Hope and Keith); *Day 2* at 76-78 (Clifford helped Cliff with mortgage; direct gifts of \$100,000); *Day 4* at 491-92 (Clifford helped Allie with security deposit). Keith and Hope both testified that before 2010 they felt close, enjoying a big sister, little brother relationship, especially after their mother died in 2000. *Day 4* at 336-37; *Day 6* at 801. Allie testified she had regular contact with her siblings. *Day 4* at 458. Keith testified that although he had felt annoyed with Heather in the mid-1990s, in the years since, "there was no difficult energy with her." *Day 6* at 801. He enjoyed "pleasant interactions" with Cliff. *Day 6* at 800-01.

Keith was humiliated by his downturn and impending loss of lifestyle, especially given his perception that his siblings were all prospering, so he felt he could not tell them. *Day 6* at 813-14. They probably knew anyway. *Day 2* at 61 (Clifford aware); *Day 2* at 60 (Cliff aware); *Day 4* at 338 (Hope aware).

III. Clifford Got Sick in Early 2010, and Died in September 2010

In 2000 Clifford had been diagnosed with colon cancer and related conditions. He was in remission, but the cancer recurred in early 2010, *Day 1* at 7-8; *Day 4* at 336, 449-50, requiring repeated hospital admissions. *Day 1* at 12-14; *Day 4* at 340, 375, 450. Because she knew the process would be arduous, and Clifford's doctors were at Sloan-Kettering in New York City, Ingrid rented an apartment a few blocks away, and hired Joan, a home health aid, to care for Clifford physically. *Day 1* at 8, 13; *Day 4* at 340, 374-75, 450; *Day 6* at 744-48, 779, 785.

All Clifford's children began seeing their father much more often. Cliff visited five times in 2010. *Day 1* at 9, 62, 85. Living nearby in New York, Allie visited once or twice a week. *Day 4* at 450-59. Hope visited weekly, staying for as many as 10 days at a time, *Day 4* at 342, and having a background in health, she became the family's "point person" on Clifford's medical issues, keeping everyone informed by phone and email. *Day 1* at 37-38; *Day 2* at 32; *Day 4* at 337-42. Keith maintained his frequent visits, traveling to New York several times per week, and taking Clifford to restaurants, for walks, and on airplane rides. *Day 6* at 759.

During the summer of 2010, Clifford was overall in good spirits, and usually, but not always, clearheaded. *Day 1* at 10-11, 31; *Day 2* at 31-32; *Day 4* at 345, 453, 489; *Day 6* at 769-72. Hope called Clifford's physical health a "roller coaster," and Allie said he was generally "getting frailer." *Day 4* at 344, 460. The family did not expect Clifford to live long. *Day 4* at 340.

Clifford nonetheless had a list of things he wanted to do before he died, including flying a bush plane across Canada, which Hope and Cliff considered unrealistic. *Day 2* at 56-57; *Day 4* at

375-76. Keith was more optimistic, and helped Clifford buy the plane. *Day 2* at 74; *Day 4* at 389. Clifford refused to discuss his purchase with Hope. *Day 4* at 389, 417-20.

In early September 2010, Keith piloted Clifford to Keith's home in Center Harbor. *Day 1* at 51; *Day 4* at 366-67, 459. Allie understood "Keith was trying to give dad some quality of life at the end of his life and had taken him up to New Hampshire and invited Jamie, myself, and my daughter to visit with dad up there." *Day 4* at 459. Hope was also Keith's guest, *Day 4* at 368; *Day 6* at 766, and Joan (accompanied by her boyfriend) went along as Clifford's attendant. *Day 6* at 748, 751. Keith was attentive to Clifford, organizing an off-road ride, a skeet shoot, and other activities he knew his father would enjoy. During the New Hampshire visit, Allie had a conversation with Clifford about Keith, which later became a hearsay matter at trial. *Day 4* at 460-62. With Keith's help, Allie and Clifford also resolved some friction between them which had arisen that summer.

Clifford's health weakened during the trip, and he was admitted to the hospital in Laconia, New Hampshire. He then returned to New York, where on September 15 he died in the hospital at age 79, surrounded by friends and family. *Day 1* at 54; *Day 4* at 334, 374-75, 410, 470; *Day 6* at 747, 766.

IV. Dramatic Summer, 2010

In addition to Clifford's declining health and subsequent death, Summer 2010 was dramatic for the Fitzgerald family in three respects.

First, on April 19, Ingrid, Allie's mother and Clifford's second wife, died. *Day 1* at 14-15; *Day 4* at 342, 446.

Given Clifford's condition, and the fact that Ingrid had been in charge of the checkbook, there was immediate need to provide for Clifford's day-to-day banking, bookkeeping and bill-paying. *Day 1* at 14, 31; *Day 4* at 342. Accordingly, Keith downloaded a New York power-of-attorney form from the internet, which Clifford executed four days after Ingrid's death. *Day 6* at 830-31. Clifford

appointed Keith his durable power of attorney, with Jamie as “successor agent.” Cliff was appointed as a “monitor” with access to records. The document gave powers over a variety of matters, but expressly did not authorize “major gifts and other transfers.” NEW YORK STATUTORY SHORT FORM POWER OF ATTORNEY (Apr. 23, 2010), Exh. 22, *Appx.* at 7.

On the same day, Keith, Clifford, and Jamie went to a Wachovia bank branch in New York City, and together executed several durable powers of attorney. The documents provided that, for all Wachovia accounts then controlled by Clifford, Keith and Jamie were granted “power to open, deposit in, operate, withdraw from and close deposit accounts of all types.” WACHOVIA BANK DURABLE POWER OF ATTORNEY (Apr. 23, 2010), Exhs. 36D & 37D, *Appx.* at 270 & 280; WACHOVIA CUSTOMER AGREEMENT (Apr. 23, 2010), Exhs. 32E & 33C, *Appx.* at 289 & 291.

With Cliff understanding his role was strategist and Keith’s was implementor, together they began simplifying Clifford’s banking and consolidating his money. *Day 1* at 31-40; *Day 2* at 13-14, 68-72, 86-87; EMAIL FROM CLIFF TO KEITH (Aug. 25, 2010), Exh. 14, *Appx.* at 38.

Second, Ingrid left a secret will.

She and Clifford had years before executed parallel wills, which treated all five children similarly. Unbeknownst to Clifford, however, Ingrid had executed a subsequent will which made her daughter Allie beneficiary of all her property. *Day 2* at 43, 78-79. If Allie knew of the will, she kept Ingrid’s secret. *Day 6* at 802-03. Moreover, around 2007, Clifford’s and Ingrid’s Florida house had been put into Ingrid’s name alone to limit liability because Clifford had been convicted of drunk driving. *Day 6* at 802-03. Consequently, Allie would inherit the Florida house, as well as personal property which included things of value. *Day 1* at 7; *Day 2* at 39, 43-44, 51, 79-80; *Day 4* at 465; *Day 6* at 811. The total value of Allie’s inheritance was not resolved in this matter, but may have been substantial, *Day 1* at 14; *Day 2* at 38-39, 62; *Day 4* at 484; *Day 6* at 814, and in any event was probably greater than a one-fifth share of Clifford’s and Ingrid’s joint estate.

Clifford had been committed to treating his five children equally, but the secret will hampered his plans. *Day 2* at 45; 79-80. More immediately, if Allie owned the Florida house, Clifford worried he might have nowhere to live, *Day 2* at 45-47, and that he would lose control of his money and his things. *Day 6* at 804. Clifford first tried to talk Allie into disclaiming the inheritance, or at least the house or a percentage of it. *Day 4* at 455; *Day 6* at 812. When that fizzled he hired a lawyer, who sent Allie a demand letter on May 11. *Day 2* at 44; *Day 4* at 464. Allie and her lawyers believed that meant “there would be legal challenge.” *Day 4* at 464-65.

Third, on May 25, Clifford executed a new will, terminated the existing power of attorney that had given Jamie some authority over Clifford’s money, and issued a new power of attorney.

The May 25 will named his “five children, whom I love dearly and have always endeavored to treat equally.” LAST WILL AND TESTAMENT OF CLIFFORD FITZGERALD, JR. (May 25, 2010) at ¶ 1, Exh. 24, *Appx.* at 27. It provided they would share his estate equally, *Id.* at ¶ 2, except “[t]o the extent my daughter Alexandra has received benefits from the Estate of my late wife Ingrid, the total amount of those benefits shall reduce the share she receives under this Will.” *Id.* at ¶ 5B. Allie regarded the will as: “I was disowned fundamentally.” *Day 4* at 456.

On the same day, Clifford executed a new durable power of attorney, on a Florida power-of-attorney form. It revoked the New York power of attorney, and did not include Jamie in any capacity. Instead, Clifford appointed Keith and Cliff as joint attorneys-in-fact, authorized them to “act together” in enumerated ways on his behalf, but prohibited them from “distribut[ing] assets so as to discharge a legal obligation of my attorney-in-fact.” FLORIDA DURABLE POWER OF ATTORNEY (May 25, 2010) at 4, Exh. 23, *Appx.* at 12.

V. Siblings Take Sides

Allie testified that after Ingrid died, her relationship with her father changed. While she said their love was not diminished, things were “uncomfortable” in that “[w]e were forced to spend a lot

more time talking about legal ease [sic] and memorandums of understanding than talking about fond memories as one should at the end of one's life." *Day 4* at 455, 489. Cliff thought the matter created a dispute among the whole family. *Day 2* at 79-80.

The matter created other disputes as well. Allie was to inherit jewelry from Ingrid that some family members believed was not hers; grandparents' wills were studied, an accounting was performed, and there was litigation. *Day 4* at 462, 495; *Day 6* at 804-06, 811; EMAIL AMONG LAWYERS (June 28, 2010), Exh. M (omitted from appx.). Although not highlighted for the jury, Ingrid's death was a suicide, and Allie placed some blame on her siblings for events leading up to it. *Day 4* at 478, 484, 489; *Day 6* at 802; *see also, Settlement Conf.* (Aug. 22, 2016) at 17.

In these disputes, Cliff appears to have taken Clifford's side, *Day 2* at 46, and Keith appears to have taken Allie's. *Day 4* at 464. Although the record says nothing about Hope and Heather in this context, Allie noted that Keith "made some comments about his brothers and sisters that weren't necessarily friendly." *Day 4* at 463.

Ultimately, both the house and personal property issues were negotiated, with Keith acting as a mediator, two weeks before the end of Clifford's life, during the September family visit to Keith's house in New Hampshire. *Day 2* at 45-51; *Day 4* at 461-66, 486-87, 496; *Day 6* at 812. Even though Clifford's and Allie's dispute was worked out, Allie was left believing she was regarded as the "bad guy" by her siblings, and feeling alienated because she had lost her mother but nobody was "in my sphere." *Day 4* at 490. Keith thought the episode created lasting anxieties among other sibling relationships as well. *Day 6* at 801-05, 812-13.

VI. Siblings Discover Transactions

In the midst of these other disputes, and Keith's humiliation about his declining finances, Hope discovered a series of transactions during the summer, about which more is detailed below.

When Clifford was living in New York to be near Sloan-Kettering, Allie lived nearby, and

was doing Clifford's day-to-day bookkeeping. *Day 4* at 454. During the weekend of August 21, however, Hope was in New York, and at Keith's request, she picked up the mail at Clifford's apartment. *Day 4* at 346. She saw a bank statement, but thought little of it. *Day 4* at 347.

A few days later she opened it, and noticed curious transactions, but because healthcare was her bailiwick, again did not pay much attention. *Day 4* at 348. Nonetheless, Hope saw transactions she did not recognize, totaling about \$723,000, and worried all was not well. *Day 4* at 405-06, 409, 411, 432. She called Keith, and in a series of emails, he explained he had appropriately invested Clifford's money. Hope questioned Keith's math, and urged him to share details with Clifford and the siblings. *Day 4* at 349-51; EMAILS BETWEEN KEITH AND HOPE (Aug. 23 & 24, 2010), Exhs. 63A-F, *Appx.* at 32-37.

Because she felt Keith's explanation was not sufficiently specific, she also talked to Cliff, who said he was surprised by the transactions, and then pressed Keith for details. *Day 1* at 44-45, 50, 23, 54; *Day 2* at 72-73; *Day 4* at 351, 362-65, 377-78, 429-31, 473-74. Keith's replies echoed the escalated emotion from the summer, with references to Clifford's will and Allie's inheritance. *Day 1* at 48-50; *Day 4* at 430; EMAILS BETWEEN KEITH AND CLIFF (Aug. 24, 2010), Exh. 14, *Appx.* at 38; EMAILS BETWEEN KEITH AND HOPE (Sept. 4, 2010), Exh. 64, *Appx.* at 39; EMAILS BETWEEN KEITH AND CLIFF (Sept. 12, 2010), Exh. 21, *Appx.* at 45.

The following weekend was the family trip to Keith's house in New Hampshire, and Hope brought along the bank statement she had picked up in New York. *Day 4* at 368. When Hope and Cliff began calling banks, they learned that accounts Cliff thought contained Clifford's money were empty, that there were other Wachovia bank accounts of which he had not been aware, and that Clifford's money had been moved from Wachovia to USAA, another bank. *Day 1* at 55-56; *Day 2* at 12-16, 21-22; *Day 4* at 370-71, 405, 410-11.

Hope and Cliff later talked with Clifford, who assisted in contacting New York banks. *Day*

1 at 51-56; *Day 2* at 6, 23; *Day 4* at 369. This resulted in several statements, made by Clifford on September 1 and 8, spoken to Cliff and Allie, suggesting that Clifford was not aware of some transactions involving Clifford's funds. *Day 1* at 52-54; *Day 4* at 466-67. It also resulted in several emails, purportedly dictated by Clifford to Hope and Cliff on September 9 and 12, and sent to Keith. EMAILS BETWEEN CLIFFORD/HOPE AND KEITH (Sept. 9, 2010), Exhs. 65A-E, *Appx.* at 40-44; *Day 4* at 378-79; EMAILS BETWEEN CLIFFORD/CLIFF AND KEITH (Sept. 12, 2010), Exh. 21, *Appx.* at 45; *Day 1* at 56-57; *Day 2* at 9-10, 31. After Clifford died, Cliff brought his concerns to the New Hampshire Attorney General. *Day 2* at 28, 75, 84.

VII. Transactions

A. Charts of Transactions

During the summer of 2010, between May 12 and August 12, a series of bank transactions were made. They are well-presented on an array of six charts created by the State, CHARTS OF TRANSACTIONS (Mar. 24, 2017), Exhs. 69, 70, 71, 72, 73, 74, which became exhibits during trial, *Day 5* at 585, 605, 610, 616, 627, 644, and which were displayed to the jury during the testimony of the State's documents investigator, and at other times. *Day 4* at 506.

Keith does not contest that the transactions happened; he concedes they occurred at the time, at the place, and in the manner the State alleges, and that the State's charts are accurate in all detail. *Day 6* at 838-39 (accurate generally), 826-30 (accurate as to particular transactions).

The six exhibits have been included in the addendum to this brief, pages 38-43 *infra*, annotated and colorized to highlight certain transactions. Because the defendant contends some transactions are mischarged, multiplicitously charged, or unproven, the six charts are described *infra*, and the reader is urged to consult the charts in conjunction with this narrative description.

B. Central Bucket

All the charts depict a large central circle, repeatedly called a "bucket" by the State due to its

belief that funds were revolved among the accounts within it. *Day 5* at 571-80; STATE'S CLOSING, *Day 6* at 928, 929, 931, 933, 942, 944, 945. The bucket has been encircled purple on the colorized charts.

The bucket is comprised of three accounts. Two were at Wachovia, shown as the top and bottom segments of the bucket, shaded green on the colorized charts. The third was at USAA, shown in the middle segment of the bucket, shaded blue on the colorized charts. The critical difference between the two green Wachovia accounts and the blue USAA account was ownership.

Both Wachovia accounts were owned by a *purported entity*, the "Clifford L. Fitzgerald Jr. Trust." *Day 5* at 542-44; WACHOVIA x9216 STATEMENT (May 28, 2010), Exh. 32A, *Appx.* at 147; *Day 5* at 544-46; WACHOVIA x8941 STATEMENT (May 28, 2010), Exh. 33A, *Appx.* at 123.

The USAA account, however, was jointly owned by two *live persons*, Clifford and Keith. *Day 5* at 547-49; USAA x5685-8 STATEMENT (July 15, 2010), Exh. 34A, *Appx.* at 201; USAA x5685-8 APPLICATION FORM (June 23, 2010), Exh. 34B, *Appx.* at 194.

Five of the charts, exhibits 71, 72, 74, 73, and 70, *infra* at 38-42, show *outflows* from the bucket. The remaining chart, exhibit 69, *infra* at 43, shows *inflows* to the bucket. At the top left-hand corner of each outflow chart, the inflow chart is summarized.

C. Outflows From Bucket

The State focused its attention on the outflow charts, because it considered the charged conduct as occurring as outflows from the bucket. To emphasize the charged transactions, each outflow chart has been colorized with an orange arrow, indicating the transaction or transactions constituting that indictment, and have also been labeled with the State's indictment number charging that conduct.³

³The State has assigned unique character strings to identify the indictments, which are handwritten at the top of each indictment. INDICTMENTS (Dec. 3, 2015), *Addendum* at 44-48. For convenience of reference here, these numbers have been truncated, so that each indictment identification is a two-digit number.

1. Indictment 58, Exhibit 71

Indictment 58, exhibit 71, is the simplest charged conduct.⁴ *Addendum* at 38. It shows three transactions totaling \$24,980: on June 29 for \$5,000, July 6 for \$5,000, and August 10 for \$14,980, indicated by orange arrows. All three withdrawals were from the blue USAA account x5685-8, shown in the middle segment of the bucket, which, as noted, was owned jointly by Clifford and Keith.

In all three transactions, the money was deposited into a different USAA account, numbered x7329-6, shaded yellow on the colorized chart, which was owned solely by Keith. *Day 4* at 528-29; USAA x7329-6 STATEMENT (Jan. 26, 2010), Exh. 41A, *Appx.* at 60; USAA x7329-6 APPLICATION FORM (Oct. 27, 2009), Exh. 41B, *Appx.* at 58. The chart does not show how the money was spent.

Because the money was withdrawn from a jointly-owned account (Clifford and Keith), and deposited into a solely-owned account (Keith only), the State alleged the transactions were thefts. *See State v. Gagne*, 165 N.H. 363 (2013).

2. Indictment 59, Exhibit 72

Indictment 59, exhibit 72, is essentially the same.⁵ *Addendum* at 39. It shows one transaction, on August 3, for \$30,000, indicated by an orange arrow on the colorized chart. The money came out of and went into the same accounts as indictment 58. It was withdrawn from the blue USAA account

⁴Indictment 58: “Between approximately June 29, 2010 and August 10, 2010, pursuant to one scheme or course of conduct, Keith C. Fitzgerald transferred money from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. An amount in excess of \$1,500.00, transferred via this scheme or course of conduct, was the property of Clifford L. Fitzgerald Jr, but Keith C. Fitzgerald performed this scheme or course of conduct without the authorization of Clifford L. Fitzgerald Jr. and with the purpose to deprive Clifford L. Fitzgerald Jr. of the money.”

⁵Indictment 59: “On or about August 3, 2010, Keith C. Fitzgerald transferred \$30,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. Of the \$30,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr., but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with the purpose to deprive Clifford L. Fitzgerald Jr. of the money.”

x5685-8, in the middle segment of the bucket, owned jointly by Clifford and Keith, and deposited into Keith's solely-owned USAA account x7329-6, shaded yellow on the colorized chart.

The chart also shows how the money was spent, indicated within dotted gray lines. Ambrose Bros., an excavation company, had completed work on the dressage rink at Keith's house years before, but had not been fully paid; Keith paid \$30,000 to Ambrose on August 4 from his solely-owned USAA account. *Day 2* at 118-26; INVOICE FROM AMBROSE BROS. (Oct. 14, 2007), Exh. 62, *Appx.* at 47; CHECKS (July 27, 2010), Exhs. 6C & 7C, *Appx.* at 210 & 211.

How the money was spent is understandably important to the State's proof, MOTION IN LIMINE TO ADMIT EVIDENCE OF DEFENDANT'S MOTIVE AND INTENT (Feb. 2, 2017), *Appx.* at 213, but it was not charged conduct. Rather, the charged conduct was the (orange) \$30,000 withdrawal from the (blue) jointly-owned USAA account into the (yellow) solely-owned USAA account, as indicated on the colorized exhibit 72.

3. Indictment 18, Exhibit 74

Indictment 18, exhibit 74, is, again, essentially the same.⁶ *Addendum* at 40. It shows one transaction, on July 28, for \$125,000, indicated by an orange arrow on the colorized chart. The money came out of and went into the same accounts as indictments 58 and 59. The money was withdrawn from the blue USAA account x5685-8, shown in the middle segment of the bucket, owned jointly by Clifford and Keith, and was deposited into Keith's solely-owned yellow USAA account x7329-6.

As with indictment 59, the chart also shows how the money was spent. Although it looks complicated, and the State spent much of its trial time proving the various transactions shown, only

⁶Indictment 18: "On or about July 28, 2010, Keith C. Fitzgerald transferred \$125,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr. to a second account that was titled solely to Keith C. Fitzgerald and to which Clifford L. Fitzgerald Jr. was not a signatory and had no right of access. Of the \$125,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr., but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with a purpose to deprive Clifford L. Fitzgerald Jr. of the money."

the \$125,000 July 28 transaction was charged conduct. The rest, enclosed by dotted gray lines, reflects Keith's ongoing relationship with Richard Adams,⁷ who had loaned money to Keith, and who also was the informal bookkeeper for a charitable entity, Airlift Support Foundation, with which Keith was also involved. *Day 5* at 699. Keith made some payments to the Foundation, and others to Adams. *Day 5* at 699-711; *Day 6* at 947-48 (State's closing argument).

As above, how the money was spent is understandably important to the State. But all the transactions enclosed by gray dotted lines were not charged conduct. The charged conduct was the single (orange) \$125,000 withdrawal from the (blue) jointly-owned USAA account into the (yellow) solely-owned USAA account, as indicated on the colorized exhibit 74.

4. Indictment 60, Exhibit 73

Indictment 60, exhibit 73, is similar.⁸ *Addendum* at 41. It shows one transaction, on August 12, for \$200,000, indicated by an orange arrow on the colorized chart. Money came out of same account as indictments 58, 59, and 18 – withdrawn from the blue USAA account x5685-8 in the middle segment of the bucket, owned jointly by Clifford and Keith. Unlike indictments 58, 59, and 18, however, the money was deposited into a lawyer's escrow account, outlined in yellow on the colorized chart, held by Dahar, Keith's divorce and bankruptcy attorney.

The chart also shows how the money was spent, indicated within gray dotted lines. A business associate, Tim Brown, had a lawsuit against Keith over the purchase of excavation equipment, the settlement of which required payment of \$200,000. SETTLEMENT AGREEMENT

⁷Richard Adams was ill at the time of trial, and testified by video deposition. *Day 5* at 691, *et seq.*

⁸Indictment 60: "On or about August 12, 2010, Keith C. Fitzgerald transferred \$200,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr., to Keith C. Fitzgerald's client trust account at the Dahar Law Firm. Of the \$200,000.00 transferred, an amount in excess of \$1,500.00 was the property of Clifford L. Fitzgerald Jr, but Keith C. Fitzgerald made this transfer without the authorization of Clifford L. Fitzgerald Jr. and with a purpose to deprive Clifford L. Fitzgerald Jr. of the money. Clifford L. Fitzgerald Jr. had no right of access to Keith C. Fitzgerald's client trust account at the Dahar Law Firm."

(Aug. 31, 2010), Exh. 8C (omitted from appx.). The disbursement was handled by Attorney Dahar, *Day 2* at 139, 142; DISBURSEMENTS FROM ESCROW (Apr. 13, 2012), Exh. 8B, *Appx.* at 212, but the money originated in a withdrawal from the USAA joint account. *Day 6* at 815-17.

What Keith did with the money after it was withdrawn from the jointly-owned USAA account, however, was not the charged conduct. The charged conduct was the (orange) \$200,000 withdrawal from the (blue) jointly-owned USAA account into the yellow outlined Dahar escrow, over which Clifford had no control.

5. Indictment 57, Exhibit 70

Indictment 57, exhibit 70, is different from the other four.⁹ *Addendum* at 42.

The chart shows three transactions totaling \$30,000: on May 12 for \$10,000, on May 28 for \$17,000, and on June 22 for \$3,000, indicated by orange arrows.

The withdrawals were not made from the joint USAA account as with the other indictments. Rather, all three were from the green Wachovia accounts x9216 and x8941, shown in the top and bottom segments of the bucket, *Day 5* at 589, 594-98, 599-601, which were solely owned by a purported entity, the “Clifford L. Fitzgerald Jr. Trust.”

In addition, rather than the money going into an account solely controlled by Keith, it was deposited into an account at Meredith Village Savings Bank, owed by the Airlift Support Foundation and controlled by Keith and Richard Adams. *Day 2* at 92-96; MEREDITH BANK SIGNATURE FORM (Feb. 10, 2010), Exh. 35D, *Appx.* at 113; MEREDITH BANK STATEMENT (May 28, 2010), Exh. 2D,

⁹Indictment 57: “Between approximately May 12, 2010, and June 22, 2010, pursuant to one scheme or course of conduct, Keith C. Fitzgerald executed checks drawn on one or more accounts of Wachovia Bank, which he deposited or caused to be deposited in an account at Meredith Village Savings Bank titled to Airlift Support Foundation. An amount in excess of \$1,000.00, transferred via this scheme or course of conduct, was the property of Clifford L. Fitzgerald Jr; however, Clifford L. Fitzgerald Jr. was not a signatory to, and had no right of access to, the Meredith Village Savings Bank account where the monies were deposited. Keith C. Fitzgerald performed this scheme or course of conduct without the authorization of Clifford L. Fitzgerald Jr. and with the purpose to deprive Clifford L. Fitzgerald Jr. of the money.”

Appx. at 118; MEREDITH BANK STATEMENT (June 30, 2010), Exh. 2F, *Appx.* at 196.

D. Inflows to Bucket

The inflows into the central bucket are depicted on the State's chart, exhibit 69. *Addendum* at 43. As above, the bucket has been encircled purple on the colorized chart. The two Wachovia accounts, shown as the top and bottom segments of the bucket, are shaded green on the colorized chart. The third account, at USAA, is shown in the middle segment of the bucket, shaded blue.

As noted, both Wachovia bucket accounts were owned by a *purported entity*, the "Clifford L. Fitzgerald Jr. Trust," while the USAA bucket account was jointly owned by two *live persons*, Clifford and Keith.

The bucket was filled, as shown on the inflow chart, by three streams of money, graphically arranged as rows on the state's exhibit 69, demarcated by alternate shading on the colorized chart. The three rows have also been labeled in red on the colorized chart as Row A, Row B, and Row C.

1. Row A

Row A shows that on May 5 and 6, money was openly transferred, under the then-effective first power of attorney. First, about \$115,000 was transferred from Clifford's Fidelity account into a Wachovia account owned by Clifford and Ingrid, with Jamie and Keith as attorneys-in-fact. Then, about \$110,000 was transferred into another Wachovia account, x7176, owned by Clifford, with Jamie and Keith as attorneys-in-fact. WACHOVIA x7176 Statement (June 3, 2010), Exh. 27C; *Day 5* at 560. Cliff was apprised of these transfers, the purpose of which was to consolidate Clifford's money and simplify his banking. *Day 1* at 39-40; *Day 2* at 13-14, 68-72.

On May 10, \$105,000 was moved from Wachovia x7176, into Wachovia x9216, shown with a light orange arrow on the colorized chart. The difference between these two Wachovia accounts is ownership. The originating account, Wachovia x7176, was owned by Clifford, with power-of-attorney control by Jamie and Keith. WACHOVIA BANK, DURABLE POWER OF ATTORNEY (April

23, 2010), Exh. 37D, *Appx.* at 280. As noted in the discussion of the bucket, the destination account, however, Wachovia x9216, was owned by the “Clifford L. Fitzgerald Jr. Trust.” WACHOVIA x9216 STATEMENT (May 28, 2010), Exh. 32A, *Appx.* at 147; *Day 4* at 544-46.

The “Clifford L. Fitzgerald Jr. Trust” never existed. No record document attests to its existence. There is an off-hand mention of a trust in Clifford’s 2010 will, LAST WILL AND TESTAMENT OF CLIFFORD FITZGERALD, JR. (May 25, 2010) at ¶ 8E, Exh. 24, *Appx.* at 17, but that will did not exist until May 25, 2010, and to the extent it created a testamentary trust, that would not have come into existence until after Clifford died in September. The siblings were not aware of any trust. *Day 1* at 26. When the Wachovia account in the name of the trust was opened, emails between Keith and the Wachovia banker show that the bank was unable to confirm the existence of the trust. EMAIL FROM KEITH TO LEONARDO PALANA (June 4, 2010), Exh. 50, *Appx.* at 30; EMAILS BETWEEN KEITH AND LEONARDO PALANA (June 16, 2010), Exh. 51, *Appx.* at 31 (Wachovia warning account would be closed unless trust document timely provided). In his testimony, Keith agreed the trust never existed. *Day 6* at 857-59.

Nonetheless, after opening the Wachovia x9216 account on May 5 with his own \$100 (in Row B), CHECK FROM KEITH TO THE CLIFFORD L. FITZGERALD TRUST (May 5, 2010), Exh. 25D, *Appx.* at 114, a few days later Keith added the \$105,000 to Wachovia x9216. CHECK FROM KEITH TO THE CLIFFORD L. FITZGERALD TRUST (May 5, 2010), Exh. 28B, *Appx.* at 117 (handwritten on reverse: “for deposit only ...9216”); WACHOVIA STATEMENT (May 28, 2010), Exh. 28C, *Appx.* at 121.

It thus appears that on May 10, Keith withdrew \$105,000 from an account owned by Clifford, and deposited it into an account controlled solely by Keith in the name of a trust that did not exist. Although not indicated on the State’s chart, the next day Keith moved the \$105,000 within the bucket – from top-segment Wachovia x9215, to bottom-segment Wachovia x8941. *Day 5* at 572; WACHOVIA x8941 STATEMENT (May 28, 2010), Exh. 33A, *Appx.* at 123.

2. Row B

Row B on the colorized exhibit 69 is not relevant to this appeal, as it shows transfers of Keith's own money into the bucket accounts.

3. Row C

The transactions in Row C repeat the pattern of Row A.

On May 21, Keith withdrew \$722,526 from Clifford's Fidelity account and deposited it at Wells Fargo Bank, account x3867, the transaction indicated by a light orange arrow on the colorized chart, exhibit 69. FIDELITY INVESTMENT REPORT (May 31, 2010), Exh. 29A, *Appx.* at 168; WELLS FARGO ACCOUNT SNAPSHOT (May 31, 2010), Exh. 38A, *Appx.* at 172.

Wells Fargo records listed the account owner as the Clifford L. Fitzgerald, Jr. Trust, with Keith the named trustee. WELLS FARGO SUPPLEMENTAL ACCOUNT OWNER DOCUMENTATION & TRUSTEE CERTIFICATION OF INVESTMENT POWERS (May 10, 2010), Exh. 38B, *Appx.* at 172.

Although Cliff testified this transfer was part of the financial consolidation of which he was aware, *Day 2* at 68-72, 86-87, it nonetheless appears that when Keith moved the money, it was into an account over which Keith had sole control, as trustee of the non-existent trust.

On June 7 Keith moved the money again, withdrawing a similar amount, \$722,909, from Wells Fargo x3867, indicated by a light orange arrow on the colorized chart, exhibit 69. Keith deposited it into Wachovia x8941, the bottom segment of the bucket, over which only Keith had control. *Day 5* at 544-46; *Day 6* at 881; WACHOVIA x8941 STATEMENT (May 28, 2010), Exh. 33A, *Appx.* at 123. Thus, even if the money was still considered owned by Clifford after May 21, it appears to have become in Keith's sole control after June 7.

STATEMENT OF THE CASE

Keith Fitzgerald was indicted on five counts of theft by unauthorized taking, contrary to RSA 637:3, for banking transfers in 2010 involving money that belonged to his (now deceased) father.

Before trial, the Belknap County Superior Court (*Larry M. Smukler, J.*) held a hearing and ruled on motions in *limine*.

Trial occurred over seven days in March 2017, during which the State presented 11 witnesses: three were Keith's siblings, three presented evidence of his financial situation and the record of transactions, and five were individuals with whom Keith had conducted business. After the State rested, the defendant requested the indictments be dismissed. On the last day of trial, Keith and one other defense witness testified. Keith denied taking Clifford's money, and also asserted – in his opening, his testimony, and his closing – that Clifford had authorized the transactions in which Keith was involved.

After a morning of deliberation on the seventh day of trial, a Belknap County jury found Keith guilty of all five counts, including a special verdict regarding extended term elements pursuant to RSA 651:6. The defendant filed a motion to set aside the verdicts.

On May 11, 2017, Keith was sentenced to 10 to 30 years, stand committed, with six months of the minimum and 5 years of the maximum suspended on condition of good behavior. Three of the sentences are to be served concurrently; the other two, concurrent with each other, are suspended on conditions, and consecutive to the first three. Keith was incarcerated immediately following sentencing.

Also on May 11, the court set bail pending appeal, in the amount of \$410,000, with conditions. Mr. Fitzgerald tendered that amount on October 6, 2017, and is currently at liberty.

SUMMARY OF ARGUMENT

Keith Fitzgerald was tried and sentenced on five counts of theft. He asserts five issues on appeal.

First, the grand jury indictments did not allege a special victim. The trial court instructed the petit jury, however, with extra elements – that Keith had an intent to harm an elderly or impaired person. The verdict included these extra elements, which had the effect of doubling his sentence. Trial courts cannot substantively amend indictments through expansive instructions. By instructing the jury with elements not in the indictments, the trial court constructively amended them beyond what the grand jury charged. The verdicts should thus be reversed.

Second, one of the indictments alleges theft for a transaction whereby Keith allegedly transferred funds from one bank account to another. The record reveals, however, that if there was an appropriation of money, it was at a time before the transaction alleged in the indictment. At the time of the transaction constituting the charged conduct, the money already belonged to Keith. Accordingly, the verdict on that indictment must be reversed.

Third, several of the indictments allege transactions that are essentially the same – going from and to the same bank accounts, and concerning the same alleged victim. Because the only differences were how the money was spent, the indictments are impermissibly multiplicitous.

Fourth, the court allowed into evidence, through a witness, a question allegedly posed by the victim to Keith, which directly contradicted Keith's defense, and should have been excluded as hearsay. Because the error is not harmless, this court should reverse the convictions.

Fifth, all the State's evidence was circumstantial, but there was nothing to tie Keith to the charged conduct. Because the jury did not exclude the rational explanation that Clifford had authorized Keith to handle his money, the verdicts should be reversed.

ARGUMENT

I. Court Impermissibly Added Sentencing Enhancement Elements to Indictments

The grand jury indictments did not allege a special victim, yet the jury was instructed that Keith was charged with intent to harm an elderly or impaired person, doubling his sentence. The trial court thus constructively amended the indictments, requiring the verdicts be reversed.

A. Court Cannot Constructively Amend Indictments to Add Enhanced Sentencing Elements

Both the Federal and New Hampshire Constitutions demand that certain crimes be charged by a grand jury and alleged in an indictment. U.S. CONST., Amd. 5; N.H. CONST., Pt. I, Art. 15; *see also* RSA 601:1 (“No person shall be tried for any offense, the punishment of which may be ... imprisonment for more than one year, unless upon an indictment found against such person by the grand jury....”).

An indictment must “set forth all the elements necessary to constitute the offence intended to be punished.” *Hamling v. United States*, 418 U.S. 87, 117 (1974); *State v. Cote*, 126 N.H. 514, 519 (1985). “[A]fter an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself.” *Stirone v. United States*, 361 U.S. 212, 215-16 (1960), citing *Ex parte Bain*, 121 U.S. 1 (1887). Thus, “a trial judge cannot freely amend indictments brought on the oath of a grand jury.” *State v. Glanville*, 145 N.H. 631, 633 (2000); *State v. Prevost*, 141 N.H. 559, 560 (1997).

“A constructive amendment of an indictment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment.” *United States v. Baldwin*, 774 F.3d 711, 724 (11th Cir. 2014); *see also State v. Erickson*, 129 N.H. 515, 519 (1987) (“an element of the offense is automatically considered part of the substance of an indictment”). A jury instruction can work a constructive amendment. *State v. Elliott*, 133 N.H. 759, 764 (1990).

A constructive amendment that omits nonessential items is permissible, *United States v. Miller*, 471 U.S. 130, 144 (1985), but a constructive amendment cannot add crimes or elements. *Id.*; *Stirone*, 361 U.S. at 217; *State v. Johnson*, 130 N.H. 578, 585 (1988) (“An impermissible amendment ... would be one that effects a change in the offense charged, or adds an offense.”) (quotations and citations omitted).

This court has “assume[d], without deciding” that a sentencing enhancement element must “be alleged in an indictment.” *State v. Marshall*, 162 N.H. 657, 666 (2011); *see also, Apprendi v. New Jersey*, 530 U.S. 466 (2000); *c.f. State v. Fichera*, 160 N.H. 660, 661 (2010) (no constructive amendment where indictment sufficiently alleged enhancement element).

An indictment may be amended in form, but not in substance. RSA 601:8. *See, e.g., State v. Oakes*, 161 N.H. 270, 279 (2010) (erroneous date); *State v. French*, 146 N.H. 97, 99 (2001) (erroneous dollar amount of theft); *State v. Demmons*, 137 N.H. 716 (1993) (misidentification of part of body that was raped); *State v. Hutchinson*, 137 N.H. 591, 594 (1993) (“An instruction that omits surplusage from the charge is an amendment of form, not substance.”); *State v. Donovan*, 128 N.H. 702, 705 (1986) (place where defendant possessed drugs); *State v. Bell*, 125 N.H. 425 (1984) (misidentification of purchaser of drugs); *State v. Spade*, 118 N.H. 186 (1978) (erroneous date); *but see State v. Poole*, 150 N.H. 299, 300 (2003) (error to amend indictment date where defense relied on date).

This court has set forth the general rule regarding when a jury instruction constitutes a constructive amendment, identifying three “tiers,” *Poole*, 150 N.H. at 302, of constructive amendments:

[1] An impermissible amendment ... would be one that effects a change in the offense charged, or adds an offense. Because an element of the offense charged is automatically considered part of the substance of an indictment, a jury instruction that changes an element of an offense charged by a grand jury is automatically in error, and a conviction based upon such an instruction should be reversed. [2] A trial judge may, however, amend a grand jury’s indictment if the amendment is purely one of form, for such amendments do not jeopardize the right to be tried only on charges that have been passed on by a grand jury. [3] In between

these two extremes is the amendment that does not alter the crime charged in an indictment, but changes an allegation in the indictment that has the effect of specifying and circumscribing the scope of the crime alleged; for instance, an allegation of how the crime was committed. Such an allegation is part of the indictment's substance, but it is not as protected from trial court amendment as an element of the offense charged.

State v. Elliott, 133 N.H. 759, 764-65 (1990) (quotations and citations omitted, numbering added).

“The test for determining whether changes of this third type are permissible is whether the change prejudices the defendant either in his ability to understand properly the charges against him or in his ability to prepare his defense.” *State v. Quintero*, 162 N.H. 526, 541-42 (2011) (quotations and citations omitted).

B. Convictions Stemming From Constructively Amended Indictments Must Be Reversed

The 2007 legislature added to New Hampshire's sentencing statute an extended term for crimes of theft, if the theft is committed:

against a victim who is 65 years of age or older or who has a physical or mental disability and that in perpetrating the crime, the defendant intended to take advantage of the victim's age or a physical or mental condition that impaired the victim's ability to manage his or her property or financial resources or to protect his or her rights or interests.

RSA 651:6, I(1). The enhancement doubles the otherwise standard 7½ to 15 years for felonies, RSA 651:2, II(a) & (d), instead allowing prison time of 10 to 30 years. RSA 651:6, III(a).

All five indictments in this case allege that, on various dates, Keith transferred Clifford's money from accounts to which Clifford had access, to accounts controlled by Keith, with a purpose to deprive Clifford of the money. However, beyond the numerals “651:6” in their lower-left margins, none of the indictments allege the enhancement elements. Before the indictments were read to the jury, the court gave the State an opportunity to amend them, but it declined. *Limine Hrg.* (Mar. 20, 2017) at 53.

The jury was nonetheless instructed with the additional elements¹⁰, *Day 6* at 965-66, and its special verdict found them applicable to each count. *Day 7* at 979-80. No objection to the instruction or the verdict was made on these grounds. *Day 6* at 968. Later, the sentencing court imposed 10 to 30 years prison, specifically referencing “the nature of the victim.” *Sent.Hrg.* at 38.

The sentencing enhancement was in error because the enhancement elements were not alleged in the indictments by the grand jury. By instructing the petit jury with regard to the enhancement elements, the court impermissibly constructively amended the indictments.

Because the court effectively added an offense to each indictment – the crime of taking advantage of the elderly or disabled – it was “automatically in error,” *Elliott*, 133 N.H. at 764, and the convictions must be reversed.

Even if this case is not in the automatic reversal tier, the conviction must be reversed because Keith was prejudiced. One cannot know from the indictments that Keith was being charged for a special victim. Even if the cryptic numerals “651:6” in the bottom margin disclose that much, it is impossible to know whether the State was alleging a victim “who is 65 years of age or older” or one who had “a physical or mental disability.” Keith was prejudiced in his “ability to understand properly the charges against [him] or in [his] ability to prepare [his] defense,” *Erickson*, 129 N.H. at 519, and by a doubling of his prison term. The constructive amendment was not the trivial sort such as minor adjustment of places or dates.

This court gives *de novo* review to the sufficiency of indictments. *State v. Marshall*, 162 N.H. at 661. Because this issue was not preserved below, it is reviewed for plain error. SUP.CT.R. 16-A.

¹⁰“If, and only if, you find that the State has satisfied its burden on any of the indictments, you will go on to consider whether the State has also proved the following two elements beyond a reasonable doubt. First, that Clifford L. Fitzgerald, Jr. was 65 years of age or older or had a physical or mental disability, and second, in perpetrating the crime, the defendant intended to take advantage of Clifford L. Fitzgerald, Jr.’s age or a physical or mental condition that impaired Clifford L. Fitzgerald, Jr.’s ability to manage his property or financial resources or to protect his rights or interests.” *Day 6* at 965-66.

In *State v. Kelly*, 160 N.H. 190 (2010), this court held that the indictment was impermissibly constructively amended; the court instructed the jury broadly with respect to when in the course of events the jury might find criminal conduct, even though the indictment narrowly specified that fact. Under the first three prongs of plain error review, this court held there was plain error which affected the defendant's substantial rights because it prejudiced the outcome. "Fourth, because the trial court amended the complaint to include an act neither charged in the complaint, nor itself a criminal act, to allow the defendant's conviction to stand would seriously affect the fairness and integrity of judicial proceedings." *Kelly*, 160 N.H. at 198.

Keith's case is the same as *Kelly*. The error is plain, and substantially affected the outcome, doubling his sentence. The integrity of the proceedings were seriously affected: he was forced to defend against unknown allegations, created long after the grand jury spoke.

Accordingly, this court should reverse all five convictions.

II. There Was No Theft in Indictment 57 Because the Money had Already Been Appropriated

In New Hampshire, a person is guilty of theft by unauthorized taking "if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." RSA 637:3, I. The unauthorized control must be "over the property of another." "Property of another" is defined as "property in which any person other than the actor has an interest which the actor is not privileged to infringe," RSA 637:2, IV, and can include a joint bank account. *State v. Gagne*, 165 N.H. 363, 371 (2013). To "obtain" property of another, the defendant must "bring about a transfer of possession" of the property. RSA 637:2, II.

Indictment 57 alleged that Keith deprived Clifford of his money on May 28 and June 22 by withdrawing it from the Wachovia x9216 account, and on May 12 by withdrawing it from the Wachovia x8941 account.

However, the Wachovia x9216 and the Wachovia x8941 accounts were both owned by the

non-existent “Clifford L. Fitzgerald Jr. Trust,” of whose bank accounts Keith was in sole control. By the time the money was in those two Wachovia accounts, it was already his. The actual times at which deprivations occurred – when Clifford lost “control” – are suggested on the colorized inflow chart, *Addendum* at 43, with a light orange indicator marked “Clifford Deprived of Control.”

Regarding the Wachovia x9216 account, possession of the money was transferred on May 10, when \$105,000 flowed from Wachovia x7176 into Wachovia x9216, not later in May or June when it flowed out of Wachovia x9216. This is because when the money was in Wachovia x7176, it was Clifford’s, with Keith and Jamie as attorneys-in-fact. But when the money was transferred to Wachovia x9216, it became under Keith’s sole control, as the trustee of the non-existent trust.

Regarding the Wachovia x8941 account, possession of the money was transferred on *either* (1) May 21, when \$722,526 flowed from Clifford’s Fidelity account into Wells Fargo x3867, controlled by Keith as trustee of the non-existent trust, *or* (2) June 7, when \$722,909 flowed from that Wells Fargo account into Wachovia x8941, also controlled by Keith as trustee of the non-existent trust. Both possibilities are suggested on the colorized inflow chart, *Addendum* at 43, with light orange indicators marked “Clifford Deprived of Control.” If what had been Clifford’s money was in the Wachovia x8941 account before those dates, such that it could have been removed on May 12 as the State alleged, by virtue of it having been in the Wachovia x8941 account, it was nonetheless already in Keith’s control.

Indictment 57 charges Keith with transferring money from two Wachovia accounts, which he solely controlled, to an Airlift Support Foundation account at Meredith Village Savings Bank, of which he was also in control. None of the indictment 57 transactions resulted in the deprivation of Clifford’s control, because indictment 57 charges Keith with theft of money that was – by whatever means – already appropriated. *See State v. Chaisson*, 123 N.H. 17, 24 (1983) (“defendant cannot be charged with theft and receiving the same stolen property from himself”).

Either the State mis-charged, or the jury mis-convicted. In either case, Keith cannot be held liable for theft of property over which the owner had already lost control, and this court should reverse the conviction on indictment 57.

III. Multiplicitous Indictments, Convictions, and Sentences Violate Protections Against Double Jeopardy

Of the five indictments, four recite withdrawals from the same joint account, USAA x5685-8, of which Keith and Clifford were joint owners, to a sole account, USAA x7329-6, to which Clifford did not have access. The transactions are tabulated here.

Because the indictments, and subsequent convictions and sentences, were multiplicitous, they should have been combined into a single indictment,

Date	Origination	Destination	Amount	Indictment
June 29	USAA 5685-8	USAA 7329-6	\$5,000	58
July 6	USAA 5685-8	USAA 7329-6	\$5,000	58
July 28	USAA 5685-8	USAA 7329-6	\$125,000	18
August 3	USAA 5685-8	USAA 7329-6	\$30,000	59
August 10	USAA 5685-8	USAA 7329-6	\$14,980	58
August 12	USAA 5685-8	Dahar	\$200,000	60

conviction, and sentence. Because they were not, the convictions and sentences must be vacated.

The Double Jeopardy Clause of the United States Constitution provides: “No person shall be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST., amd. V. Similarly, the New Hampshire constitution provides: “No subject shall be liable to be tried, after an acquittal, for the same crime or offense....” N.H. CONST. pt. I, art. 16. Although the two clauses offer similar protections, *State v. Ford*, 144 N.H. 57, 65 (1999), they have been framed slightly differently.

“The double jeopardy clause of the New Hampshire Constitution protects a defendant from multiple punishments for the same offense.... [M]ultiple indictments are permissible only if proof of the elements of the crimes *as charged* will in actuality require a difference in evidence.” *State v. Hull*, 149 N.H. 706, 716 (2003) (quotations omitted, emphasis in original).

As shown in the table above, in Keith’s case, the evidence required for the four indictments (58, 59, 18, and 60, *Addendum* at 38-41) was identical: for each, the State set out to prove Keith withdrew funds from the joint USAA x5685-8 account, without the permission of Clifford, and transferred the money to an account to which Clifford had no access. The destination of the money was not relevant to the theft itself; a theft occurs when a victim is “deprive[d].” RSA 637:3, I. Thus, all four indictments are functionally identical. But even if indictment 60 is different – the money went to Dahar rather than Keith’s sole USAA 7329-6 account – the other three (58, 59, and 18) are strictly identical.

State v. Williams, 133 N.H. 631 (1990), does not control this case. There, the defendant was convicted of six thefts for eight withdrawals from the same account. In *Williams*, however, the thefts were from a trust account for tenants’ security deposits, and the funds in the account came from multiple victims. Here, Clifford was the only possible victim. Moreover, *Williams* was a consolidation under RSA 637:2, V, with no double jeopardy claim.

The federal constitution provides several varieties of protection against “multiple punishments for the same offense.” *State v. Wilson*, 169 N.H. 755, 772-73 (2017). “[U]nit of prosecution cases” are those “in which the problem is not that the same course of conduct is proscribed by more than one statute but that a defendant’s continuing course of conduct is fragmented into more than one violation of a single statutory provision.” *Id.* (quotations omitted). The proper unit of prosecution is determined by the “legislature’s articulated intent.”

The statutory language in this case is: “A person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof.” RSA 637:3, I. The “property” here is the funds in the USAA joint account. All of the withdrawals in the four multiplicitous indictments came from this same account, and the funds in that account are a single unit of “property.” Also, because the withdrawals were alleged deprivations from a single

victim, together they should be considered a single theft.

Accordingly, the withdrawals should together be considered a single theft. *See United States v. Lilly*, 983 F.2d 300 (1st Cir. 1992) (29 counts of bank fraud multiplicitous because all counts related to defrauding single bank in connection with single loan); *United States v. Podell*, 869 F.2d 328 (7th Cir. 1989) (multiple acts of tampering with same vehicle is single crime); *United States v. Berry*, 977 F.2d 915 (5th Cir. 1992) (multiple convictions for felon in possession of firearm and felon in possession of ammunition were multiplicitous); *United States v. Kushner*, 256 F.Supp.2d 109, 113 (D. Mass. 2003) (each deposit or withdrawal not constitute separate structuring offense; look to source of funds to determine unit of prosecution).

To the extent the statute is ambiguous, lenity dictates that only one theft conviction and sentence may stand. “The rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously. The rule generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant.” *State v. MacLeod*, 141 N.H. 427, 434 (1996); *see also State v. Lukas*, 164 N.H. 693 (2013).

The fact that the sentences on indictments 58, 59, and 18 are concurrent does not vitiate a multiplicity claim:

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant’s eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Ball v. United States, 470 U.S. 856, 864-65 (1985) (emphasis in original). In addition, remand for resentencing is the appropriate remedy because the “judge may have sentenced the defendant more

heavily on those counts thinking erroneously that he was guilty of additional crimes.” *United States v. Davenport*, 929 F.2d 1169, 1172 (7th Cir. 1991).

Keith timely objected to the multiplicitous indictments at sentencing. *Sent.Hrg.* at 21, 23 (“Although he’s charged with five separate felonies, they’re all the same and they’re all involving not multiple victims, but one victim.”). When multiplicity is not apparent on the face of the indictments, there is no waiver by failing to object before trial. *Wilson*, 169 N.H. at 782. In Keith’s case, indictments 58, 59, and 18 did not specify the origination or destination of the funds. The indictments would have had to specify that they each related to transfers from the same USAA joint account in order to facially realize their multiplicitous nature.

Because double jeopardy presents a question of constitutional law, this court reviews *de novo*. *Wilson*, 169 N.H. at 772.

The proper remedy is to vacate all the multiplicitous sentences, and remand to the trial court for sentencing on one count of theft. *Lilly*, 983 F.2d at 305-06; *United States v. Saks*, 964 F.2d 1514, 1526 (5th Cir. 1992) (“We accordingly remand the case and direct the government to elect the ... count that it wishes to leave in effect. The court must then vacate the convictions on the remaining ... counts and resentence the defendants.”).

IV. Hearsay Should Have Been Excluded

Before trial the State requested admission of an alleged conversation between Clifford and Keith, overheard by Allie, when they were at Keith’s house in New Hampshire in September; the defendant objected. MOTION IN LIMINE TO ADMIT EVIDENCE (Feb. 17, 2017), *Appx.* at 230; OBJECTION TO MOTION IN LIMINE (Feb. 27, 2017), *Appx.* at 244; *Limine Hrg.* (Mar. 20, 2017) at 48-50. Just before she testified, the court heard argument on whether Allie’s recitation of the conversation would be excludable hearsay. N.H. R. EVID. 801(a) & (c)(2). Based on a “recent interview” with her, the State proffered that Allie’s testimony would be that Clifford asked Keith:

“And you’re going to tell me where the money is, right?” *Day 4* at 436. The defendant argued that the State’s purpose for the testimony was “to prove that Clifford ... was, in fact, unaware of where the money was,” and in that context Clifford’s query was “equivalent to the assertion that he did not know where the money was.” *Day 4* at 440-41.

The court ruled the question was not hearsay, and thus admissible. It said that although “the underlying purpose of it is that [Clifford] did not know the answer to the question,” the statement was nonetheless “not an assertion made for the purpose of asserting that he didn’t know the answer to the question, it was made for the purpose of getting the information that the question was asking for.” *Day 4* at 442-43.

Allie’s testimony was generally what the State anticipated:

Q: Was anything else discussed during that conversation... ?

A: Yes. ... The conversation pivoted rather quickly at the end to my father asking Keith where all his money was.

Q: To the best of your recollection, what words did your father use to ask Keith where his money was?

A: You’ll tell me where the money is. ...

Q: Did the defendant respond?

A: Yes.

Q: What did he say?

A: To the best of my recollection, his wording was similar to “any time you want to know where it is, dad, I’ll tell you.”

Day 4 at 466-67. Though Allie’s testimony appears in the grammatical form of a statement, she was testifying about a question Clifford had asked. Allie also testified that when Clifford spoke, he was uncharacteristically “[t]imid and scared.” *Day 4* at 467.

While once debated, it is settled in New Hampshire that an out-of-court question can be hearsay. *State v. Bennett*, 144 N.H. 13, 18 (1999); *see also State v. Gibney*, 133 N.H. 890, 898 (1991) (whether requests and commands can be hearsay). In *Bennett*, the defendant contended he did not strangle the victim, and offered as proof a question he had asked the police: “what did he die from.” *Bennett*, 144 N.H. at 18. This court held:

In the context of this case, the defendant's inquiry as to the cause of [victim's] death is equivalent to an assertion that he did not know what caused it. The defendant sought to introduce his query to prove that he was, in fact, unaware of the manner of [victim's] death. Therefore, the query was actually being offered for its truth and was properly excluded.

Bennett, 144 N.H. at 18.

Accordingly, in evaluating whether a question is hearsay, this court looks to the context of the case, and the purpose for which the statement is offered at trial. *See, e.g., Powell v. State*, 714 N.E.2d 624, 626 (Ind. 1999) (state offers no alternative purpose for admission other than the truth of the matter asserted); *People v. Morgan*, 125 Cal. App. 4th 935, 943 (Cal. Ct. App. 2005) (statement only relevant for the implied assertion).

Keith's key defense was that the takings were authorized. He testified Clifford offered to help with his financial situation, condoned some transactions as a way for Keith to get his inheritance early, and facilitated the \$200,000 payment to Dahar. Keith believed this was a product of his close relationship with his father, to which his siblings were not privy, and why Clifford did not revoke the powers of attorney even after Hope and Cliff apprised him of their concerns. *Day 6* at 807-09, 814-18.

The State offered Allie's testimony to negate that defense – to show Clifford did not know where the money was, and therefore could not have authorized the transactions. In its closing, the State argued that Clifford's question to Allie "is not the question of someone who has given permission; this is the question of someone who has no idea what's happened to his money; this is the question of someone whose [sic] been victimized." *Day 6* at 937.

The trial court, however, allowed Allie's recitation of Clifford's question because it regarded Clifford's intent in posing the question as merely asking for information. *Day 4* at 443. But an assertion implicitly made in a question is no less an assertion. *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) ("where the declarant intends the question to communicate an implied assertion

and the proponent offers it for this intended message, the question falls within the definition of hearsay”); *United States v. Summers*, 414 F.3d 1287, 1300 (10th Cir. 2005) (question hearsay because “intent to make an assertion was apparent”); *State v. Cosby*, 262 P.3d 285, 290 (Kan. 2011) (“The interrogatory form of [defendant’s] out-of-court statement does not protect it from hearsay challenge.”).

Clifford’s question implicitly asserted, and intentionally so, that he did not know where his money was. If Clifford were just asking for information, he would have no reason to be uncharacteristically scared; the State argued his timidity arose from his suspicions of Keith.

This court reverses hearsay determinations when they are “clearly erroneous.” *Bennett*, 144 N.H. at 17. Because the trial court in Keith’s case considered only intent, but not context and purpose, it reached an erroneous result. Moreover, the court erred in finding the statement was merely about Clifford seeking ministerial banking information, rather than, as Allie testified and the State argued, that Clifford was making an assertion regarding authority.

The error was not harmless. The Constitution “commands ... that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 61 (2004); *State v. Maga*, 166 N.H. 279, 283 (2014). The statement related by Allie was the baldest instance of Clifford’s supposed lack of authorization – the core issue in Keith’s defense – yet not subject to cross-examination.

Because the trial court allowed into evidence inadmissible hearsay that was not harmless, this court should reverse Keith’s convictions. *See State v. Francoeur*, 146 N.H. 83 (2001).

V. Insufficient Evidence for Conviction

The State did not offer any direct evidence that Keith was the person who conducted the charged transactions; its entire case was circumstantial. There was no evidence that Keith appeared at a teller window, wrote a check, initiated a wire transfer, passed a wad of cash, or in any other way

directed the transactions that form the charged conduct. Anyone could have.

Moreover, the record suggests that Clifford understood Keith's financial predicament, allowed Keith's use of his money, and never withdrew Keith's powers of attorney or removed Keith from the joint accounts. Authorization is a rational explanation for the transactions, and the jury erred in finding guilt given that explanation. *State v. Saunders*, 164 N.H. 342, 351 (2012) (“[W]here solely circumstantial evidence is at issue, the critical question is whether, even assuming all credibility resolutions in favor of the State, the inferential chain of circumstances is of sufficient strength that guilt is the sole rational conclusion.”).

Accordingly, this court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse Keith Fitzgerald's convictions, or remand for re-sentencing.

REQUEST FOR ORAL ARGUMENT

Keith Fitzgerald requests that his attorney, Joshua L. Gordon, be allowed oral argument because resolution of the issues presented herein will have a significant effect on his convictions and sentences, and because this court has not before ruled on the nature of allegations necessary for indictments pursuant to the relatively recent RSA 651:6.

Respectfully submitted,

Keith Fitzgerald
By his Attorney,
Law Office of Joshua L. Gordon

Dated: November 16, 2017

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief.

I further certify that on November 16, 2017, copies of the foregoing will be forwarded to Jesse O'Neill, Esq., Office of the Attorney General.

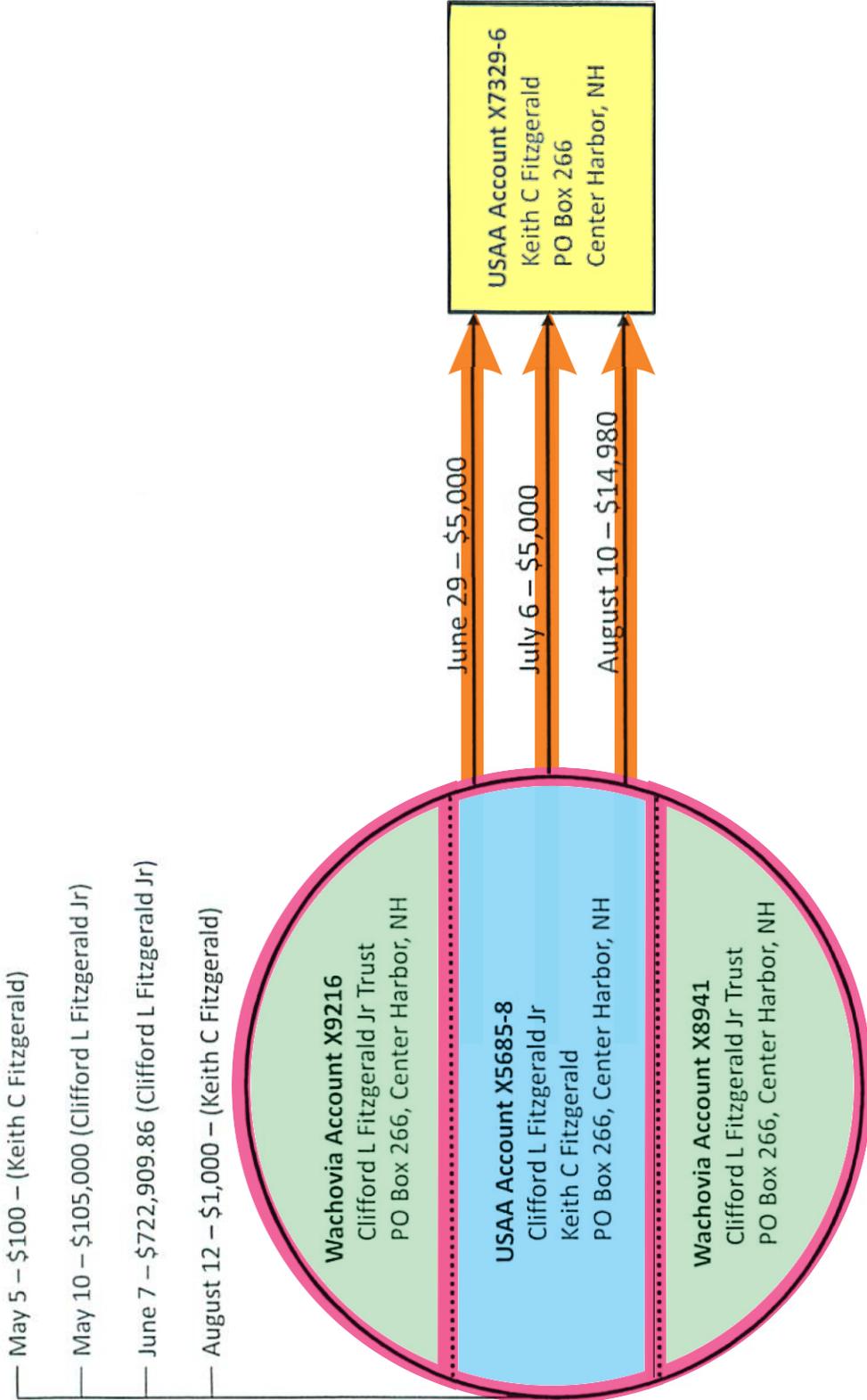
Dated: November 16, 2017

Joshua L. Gordon, Esq.

ADDENDUM

1.	State's Chart, Indictment 58, Colorized Exhibit 71.	<u>38</u>
2.	State's Chart, Indictment 59, Colorized Exhibit 72.	<u>39</u>
3.	State's Chart, Indictment 18, Colorized Exhibit 74.	<u>40</u>
4.	State's Chart, Indictment 60, Colorized Exhibit 73.	<u>41</u>
5.	State's Chart, Indictment 57, Colorized Exhibit 70.	<u>42</u>
6.	State's Chart, Inflows, Colorized Exhibit 69.	<u>43</u>
7.	Indictment 58.	<u>44</u>
8.	Indictment 59.	<u>45</u>
9.	Indictment 18.	<u>46</u>
10.	Indictment 60.	<u>47</u>
11.	Indictment 57.	<u>48</u>
12.	Trial Transcript (containing hearsay), Day 4, pages 466-67.	<u>49</u>
13.	State Prison Sentence & Mittimus.	<u>51</u>

Indictment 58

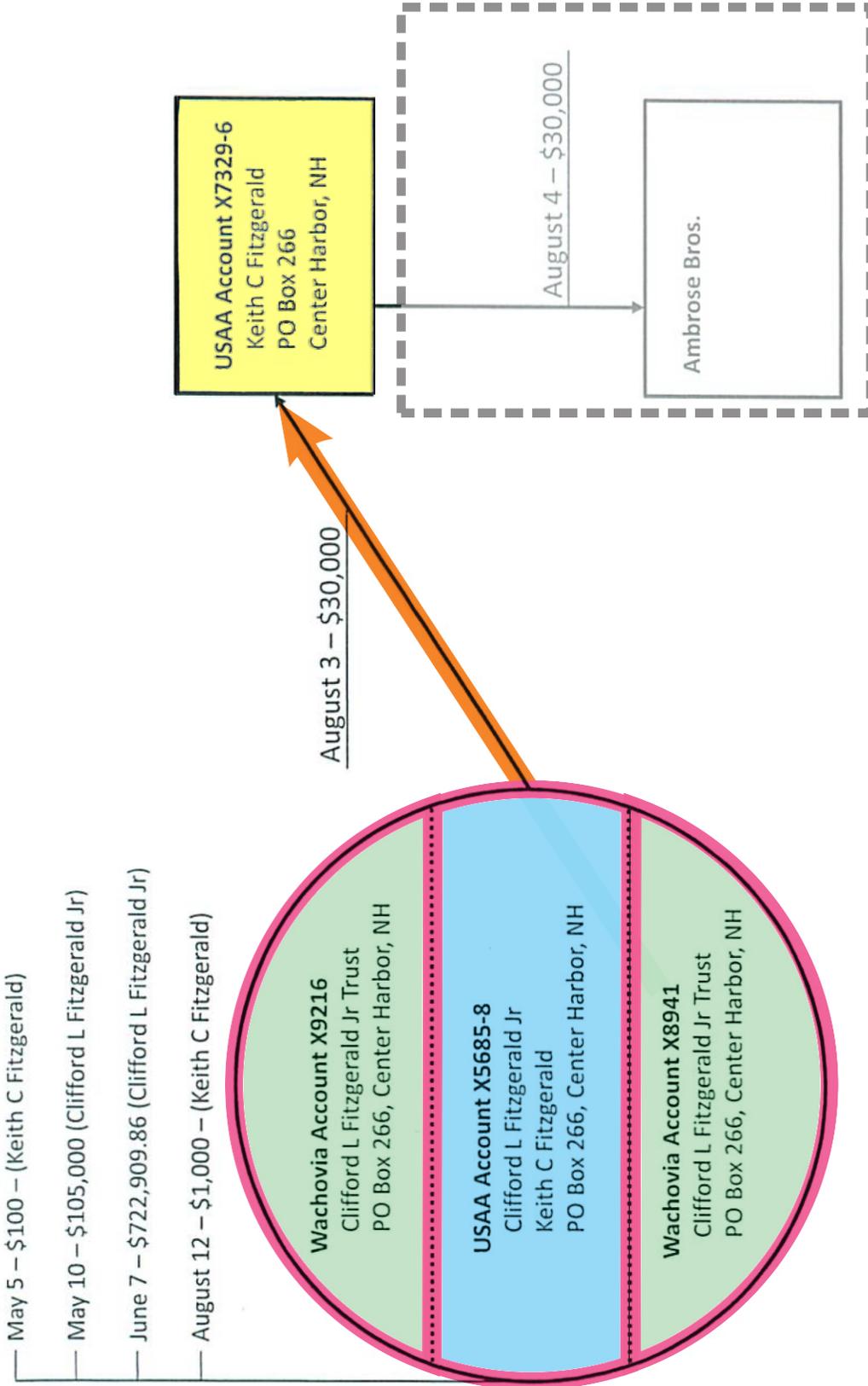


(All dates 2010)

Exhibit 71



Indictment 59

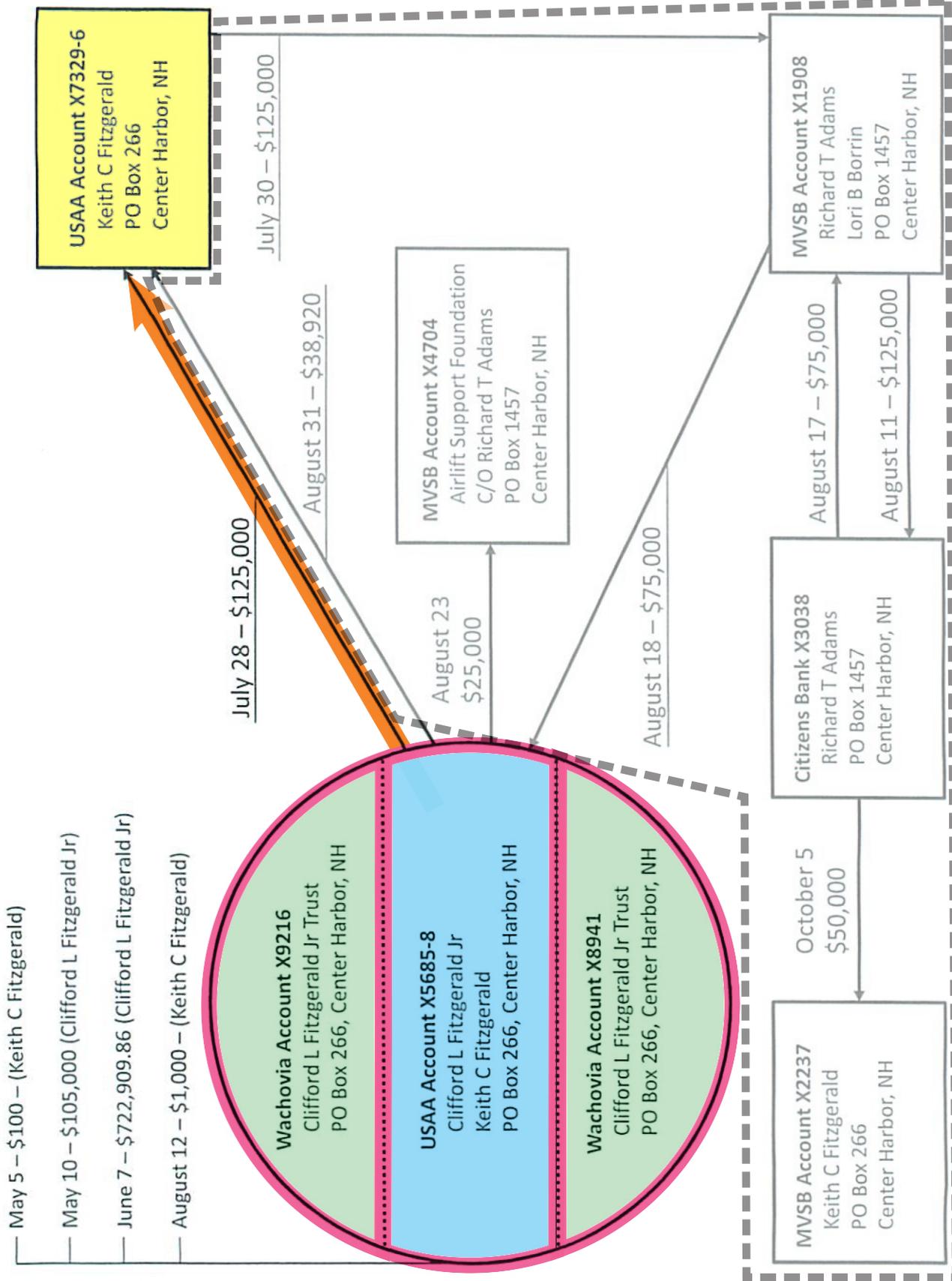


(All dates 2010)

Exhibit 72



Indictment 18

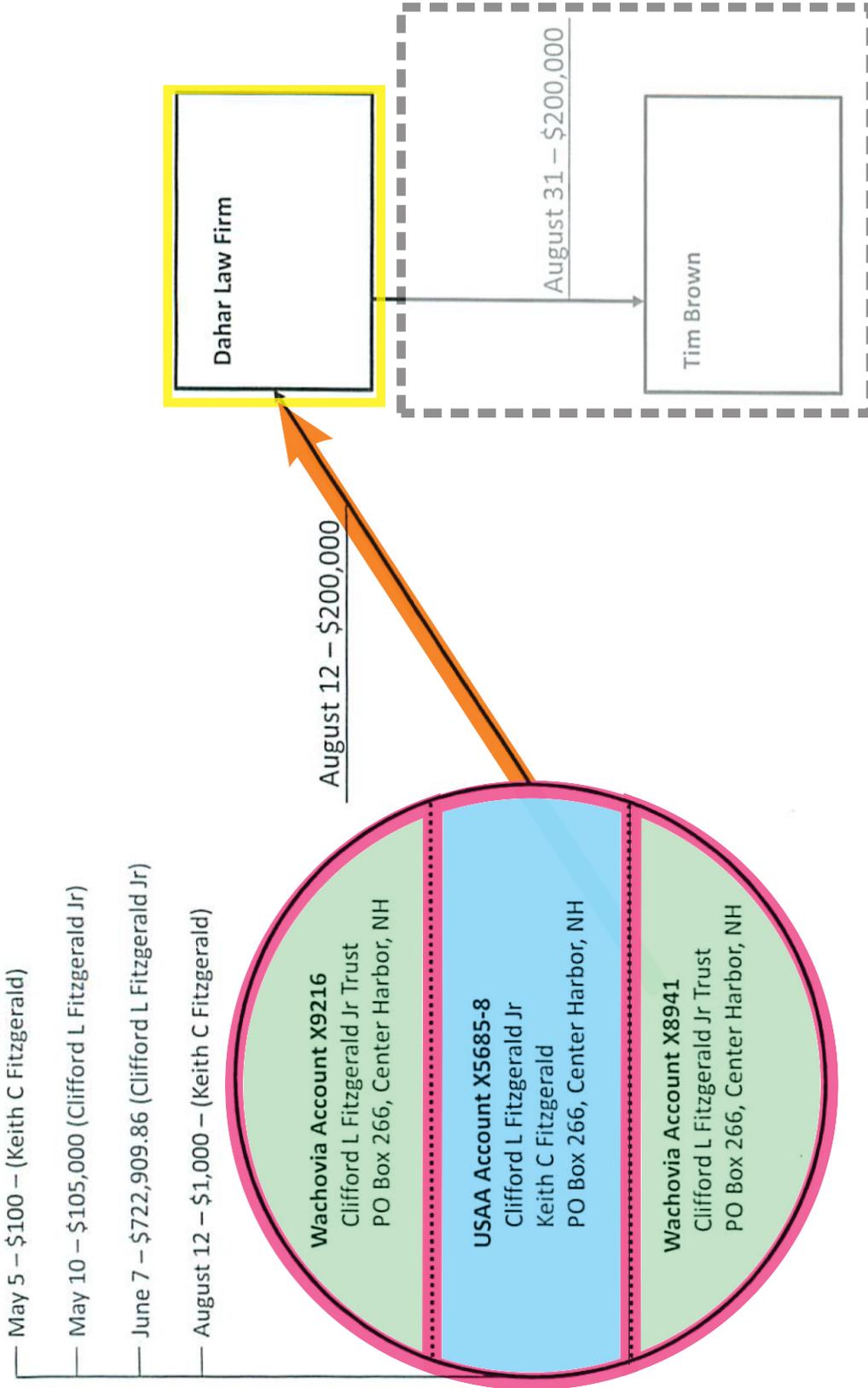


(All dates 2010)

Exhibit 74



Indictment 60

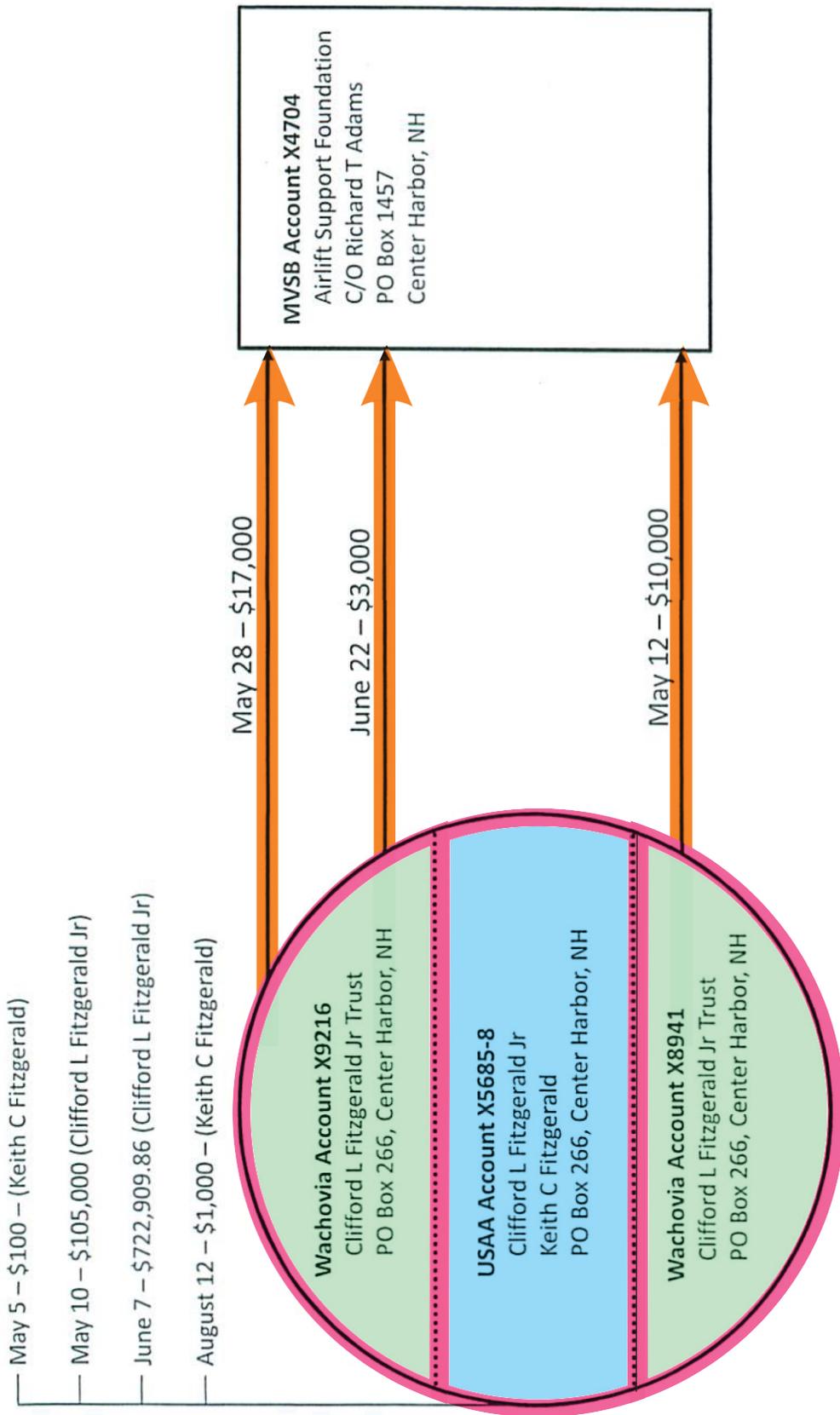


(All dates 2010)

Exhibit 73



Indictment 57

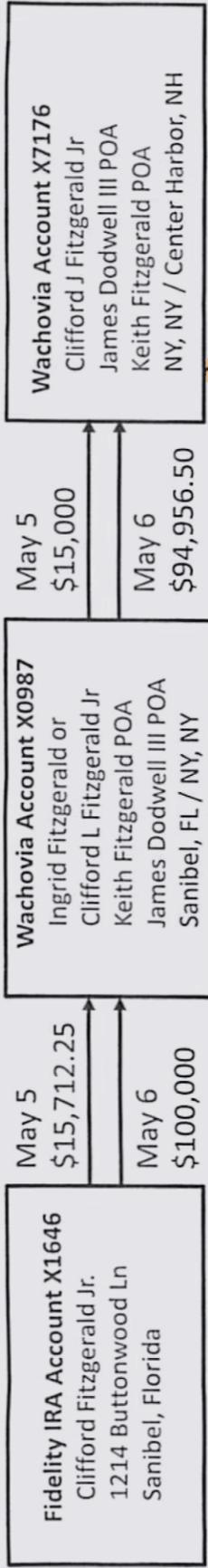


(All dates 2010)

Exhibit 70

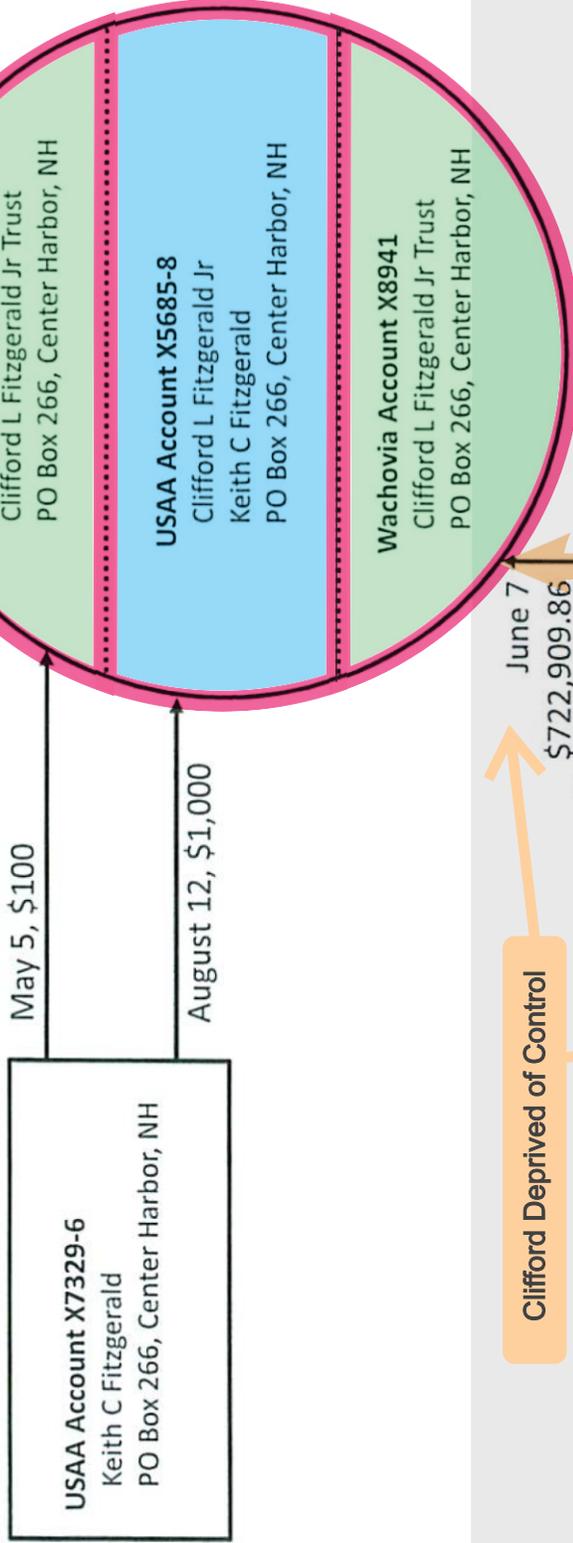


Inflow Chart

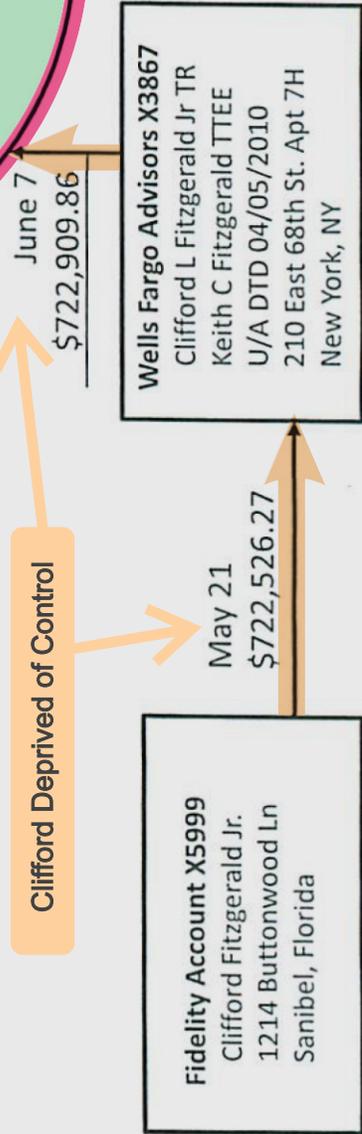


Row A

Clifford Deprived of Control



Row B



Row C

(All dates 2010)

Exhibit 69



THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

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

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

KEITH C. FITZGERALD

DOB: 1/20/1965

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

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

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

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

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



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

This is a true bill.



Foreperson

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

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

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

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

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

KEITH C. FITZGERALD

DOB: 1/20/1965

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

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

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

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

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



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

This is a true bill.

Foreperson

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

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

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

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

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

KEITH C. FITZGERALD

DOB: 1/20/1965

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

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

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

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

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



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

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

This is a true bill.



Foreperson

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

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

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

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

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

KEITH C. FITZGERALD

DOB: 1/20/1965

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

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

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

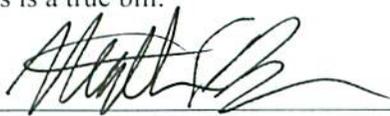
On or about August 12, 2010, Keith C. Fitzgerald transferred \$200,000.00 from an account that was titled jointly to himself and to Clifford L. Fitzgerald Jr., to Keith C. Fitzgerald's client trust account at the Dahar Law Firm. Of the \$200,000.00 transferred, an amount in excess of \$1,500.00 was the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

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



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

This is a true bill.



Foreperson

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

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

THE STATE OF NEW HAMPSHIRE

BELKNAP, SS

INDICTMENT

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

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

KEITH C. FITZGERALD
DOB: 1/20/1965

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

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

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

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

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



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

This is a true bill



Foreperson

3/29/2017
Jury Verdicts Guilty
Harry M. Smuckler PJ
Janet K. Alford
Deputy Clerk

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

1 role in that conversation, correct?

2 A Uh-huh.

3 Q Did that conversation turn to the house issue?

4 A It did. My remembrance of it is that dad acknowledged
5 that the jewelry was Ingrid's, my mother's, and now mine. And
6 that he still hoped that I would sign the house over to his
7 estate.

8 Q Did he use that term specifically, to his estate?

9 A No.

10 Q Why did you just use that term?

11 A I guess because he's been dead for so long now, it's
12 kind of how I think about it.

13 Q Was anything else discussed during that conversation
14 beyond the house and jewelry issues?

15 A Yes. My father was on a roll. The conversation
16 pivoted rather quickly at the end to my father asking Keith
17 where all his money was.

18 Q To the best of your recollection, what words did your
19 father use to ask Keith where his money was?

20 A You'll tell me where the money is.

21 Q That was to the best of your recollection what your
22 father said to the defendant?

23 A Yes.

24 Q Did the defendant respond?

25 A Yes.

1 Q What did he say?

2 A To the best of my recollection, his wording was similar
3 to "any time you want to know where it is, dad, I'll tell you."

4 Q Did the defendant tell him right then where it was?

5 A My father balked.

6 Q What do you mean?

7 A I don't think he knew what to say. And at that point I
8 chimed in and asked him if he was asking right now explicitly.

9 Q Asked how if he was asking --

10 A Asked my father if he was asking Keith right now
11 explicitly where the money was.

12 Q How did your father sound when he asked the defendant
13 about his money?

14 A Timid and scared a little bit.

15 Q Why do you characterize it that way?

16 A Because it's not my father's character at all.

17 Q Can you describe what you mean?

18 A My father was a man that -- he was lovely and charming,
19 but he was also someone you didn't say no to. Firm in his
20 beliefs and in his desires. And to see him act like that was
21 out of character.

22 Q So during that conversation did the defendant provide
23 your father with an explanation?

24 A No. My father said he wasn't going to ask right then
25 in a very out of character way.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Belknap Superior Court
64 Court St.
Laconia NH 03246

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

RETURN FROM SUPERIOR COURT – STATE PRISON SENTENCE

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

Charging document: Indictment

Offense:	Charge ID:	RSA:	Date of Offense:
Theft by Unauthd Taking	1120218C	637:3	July 28, 2010
Theft by Unauthd Taking	1162257C	637:3	May 12, 2010
Theft by Unauthd Taking	1162258C	637:3	June 29, 2010
Theft by Unauthd Taking	1162259C	637:3	August 03, 2010
Theft by Unauthd Taking	1162260C	637:3	August 12, 2010

Disposition: Guilty/Chargeable By: Jury

A finding of GUILTY/CHARGEABLE is entered.

Conviction: Felony
Sentence: see attached

May 11, 2017
Date

Hon. Larry M. Smukler
Presiding Justice

Abigail Albee
Clerk of Court

MITTIMUS

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

Attest: *Janette K. Wilkins*
Deputy Clerk of Court

SHERIFF'S RETURN

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

Date

Sheriff

J-ONE: State Police DMV

C: Dept. of Corrections Offender Records Sheriff Office of Cost Containment
 Prosecutor Jesse J O'Neill, ESQ Defendant Defense Attorney Robert D. Hunt, ESQ
 Sentence Review Board Sex Offender Registry Other _____ _____ Dist Div. _____

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

Court Name: Belknap Superior Court
 Case Name: State v. Keith C Fitzgerald
 Case Number: 211-2015-CR-00276 Charge ID Number: 1120218C
 (if known)

STATE PRISON SENTENCE

Plea/Verdict: Guilty	Clerk:
Crime: RSA 637:3 (Theft by Unauthorized Taking)	Date of Crime: 7/28/2010
Monitor:	Judge: Smukler

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.
- 1. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
- 2. This sentence is to be served as follows: Stand committed Commencing _____
- 3. Six Months of the minimum sentence and 5 years of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on _____
(Charge ID Number)
- 4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
- 5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
- 6. The sentence is consecutive to _____
(Charge ID Number(s))
 concurrent with _____
(Charge ID Number(s))
- 7. Pretrial confinement credit: _____ days.
- 8. The Court recommends to the Department of Corrections:
 - Drug and alcohol treatment and counseling
 - Sexual offender program
 - Sentence to be served at House of Corrections
 - _____

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

STATE PRISON SENTENCE

PROBATION

- 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: Forthwith Upon Release _____
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

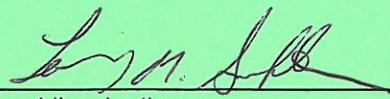
OTHER CONDITIONS

- 12. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, and Alexandra Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant and the State have waived sentence review in writing or on the record.
 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other: *In addition to other conditions suspensions are conditioned on defendant's good faith effort to comply with restitution requirement while on parole, without the approval of probation/parole officer.*
Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services.

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

5/11/2017

Date



Presiding Justice

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

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

STATE PRISON SENTENCE

Plea/Verdict: Guilty	Clerk:
Crime: RSA 637:3 (Theft by Unauthorized Taking)	Date of Crime: 5/12/2010–6/22/2010
Monitor:	Judge: Smukler

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.
1. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2. This sentence is to be served as follows: Stand committed Commencing _____
3. All of the minimum sentence and all of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 15 years from today or release on 1120218C, 1162258C, 1162259C
(Charge ID Number)
4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
6. The sentence is consecutive to 1120218C, 1162258C, 1162259C
(Charge ID Number(s))
 concurrent with _____
(Charge ID Number(s))
7. Pretrial confinement credit: _____ days.
8. The Court recommends to the Department of Corrections:
- Drug and alcohol treatment and counseling
 - Sexual offender program
 - Sentence to be served at House of Corrections
 - _____

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

STATE PRISON SENTENCE

PROBATION

- 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: Forthwith Upon Release _____
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

- 12. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, and Alexandra Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant and the State have waived sentence review in writing or on the record.
 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other:

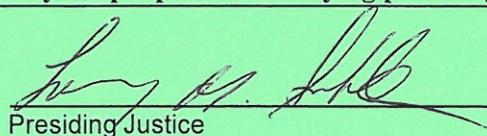
without the approval of the Probation/Parole Officer.

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services.

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

5/11/2017

Date


Presiding Justice

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

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

STATE PRISON SENTENCE

Plea/Verdict: Guilty	Clerk:
Crime: RSA 637:3 (Theft by Unauthorized Taking)	Date of Crime: 6/29/2010-8/10/2010
Monitor:	Judge: Smukler

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.
1. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2. This sentence is to be served as follows: Stand committed Commencing _____
3. Six Months of the minimum sentence and 5 years of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on _____
(Charge ID Number)
4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
6. The sentence is consecutive to _____
(Charge ID Number(s))
 concurrent with 1120218C, 1162259C
(Charge ID Number(s))
7. Pretrial confinement credit: _____ days.
8. The Court recommends to the Department of Corrections:
- Drug and alcohol treatment and counseling
 - Sexual offender program
 - Sentence to be served at House of Corrections
 - _____

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

STATE PRISON SENTENCE

PROBATION

- 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: Forthwith Upon Release _____
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

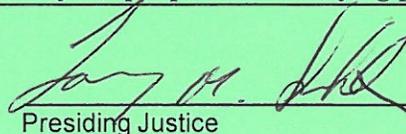
- 12. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, and Alexandra Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant and the State have waived sentence review in writing or on the record.
 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other: *Suspensions* In addition to other conditions, suspensions are ~~with~~ conditioned on defendant's good faith effort to comply with ~~restoring~~ ^{restoring} requirement while on parole. *without the approval of Probation/Parole officer*

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services.

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

5/11/2017

Date


Presiding Justice

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

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

STATE PRISON SENTENCE

Plea/Verdict: Guilty	Clerk:
Crime: RSA 637:3 (Theft by Unauthorized Taking)	Date of Crime: 8/3/2010
Monitor:	Judge: Smukler

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.
1. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2. This sentence is to be served as follows: Stand committed Commencing _____
3. Six Months of the minimum sentence and 5 years of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 30 years from today or release on _____
(Charge ID Number)
4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
6. The sentence is consecutive to _____
(Charge ID Number(s))
 concurrent with 1120218C, 1162258C
(Charge ID Number(s))
7. Pretrial confinement credit: _____ days.
8. The Court recommends to the Department of Corrections:
 Drug and alcohol treatment and counseling
 Sexual offender program
 Sentence to be served at House of Corrections

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

STATE PRISON SENTENCE

PROBATION

- 9. The defendant is placed on probation for a period of _____ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: Forthwith Upon Release _____
 The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.
- 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.
- 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

- 12. Other conditions of this sentence are:
 - A. The defendant is fined \$ _____ plus statutory penalty assessment of \$ _____
 The fine, penalty assessment and any fees shall be paid: Now By _____ OR
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
 \$ _____ of the fine and \$ _____ of the penalty assessment is suspended for _____ year(s).
A \$25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.
 - B. The defendant is ordered to make restitution of \$ 409,980.00 to Estate of Clifford L. Fitzgerald Jr.
 Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
 At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
 Restitution is not ordered because: _____
 - C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.
 - D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.
 - E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
 New Hampshire State Prison House of Corrections
 - F. The defendant shall perform _____ hours of community service and provide proof to
 the State or probation within _____ days/within _____ months of today's date.
 - G. The defendant is ordered to have no contact with Clifford Fitzgerald III, Hope Fitzgerald, Heather Fitzgerald, and Alexandra Dodwell either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.
 - H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.
 - I. The defendant and the State have waived sentence review in writing or on the record.
 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other: *In addition to other conditions suspensions are conditioned on defendant's good faith effort to comply with restitution requirement while on parole.*
Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services
Contact with above-named persons permissible via attorney for purposes of satisfying probate judgment.

without the approval of Probation/Parole Officer

5/11/2017
Date

[Signature]
Presiding Justice

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

Court Name: Belknap Superior Court
Case Name: State v. Keith C Fitzgerald
Case Number: 211-2015-CR-00276 Charge ID Number: 1162260C
(if known)

STATE PRISON SENTENCE

Plea/Verdict: Guilty	Clerk:
Crime: RSA 637:3 (Theft by Unauthorized Taking)	Date of Crime: 8/12/2010
Monitor:	Judge: Smukler

A finding of GUILTY/TRUE is entered.

- The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.
1. The defendant is sentenced to the New Hampshire State Prison for not more than 30 years, nor less than 10 years. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.
2. This sentence is to be served as follows: Stand committed Commencing _____
3. All of the minimum sentence and all of the maximum sentence is suspended. Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 15 years from today or release on 1120218C, 1162258C, 1162259C (Charge ID Number)
4. _____ of the sentence is deferred for a period of _____ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of _____ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.
5. _____ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.
6. The sentence is consecutive to 1120218C, 1162258C, 1162259C (Charge ID Number(s))
 concurrent with 1162257C (Charge ID Number(s))
7. Pretrial confinement credit: _____ days.
8. The Court recommends to the Department of Corrections:
 Drug and alcohol treatment and counseling
 Sexual offender program
 Sentence to be served at House of Corrections

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

STATE PRISON SENTENCE

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 - J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.
 - K. Other:

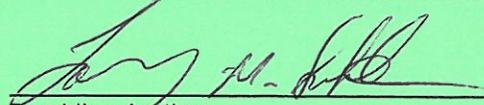
w/that the Probation/Parole Officer

Defendant shall not work, either voluntarily, for pay, or otherwise, in fundraising or financial services,

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

5/11/2017

Date


Presiding Justice