State of New Hampshire
Supreme Court

NO. 2019-0099

2019 TERM

JULY SESSION

State of New Hampshire

v.

Kyle Perkins

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

BRIEF OF DEFENDANT/APPELLANT, KYLE PERKINS

July 19, 2019

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Preserved: Motion to Set Aside Verdict (Apr. 3, 2018), *Appx*. at 17.

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Preserved: Motion to Set Aside Verdict (Apr. 3, 2018), *Appx*. at 17.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

I. Indictment, Trial, Verdict

Kyle Perkins ran "Easy Apple Computer and Repairs," a computer repair and pawn shop in Concord, New Hampshire. PHOTO OF BUSINESS, Exh. 3, *Appx*. at 58; *Day_1* at 100. In September 2015, the police raided Perkins's shop, *Day_1* at 70-88, and took dozens of items, AGREEMENT ON PROPERTY RETURN (Oct. 17, 2017), including 26 iPads, each bearing a label: "City of Manchester School District." *See, e.g.,* PHOTO OF iPADS, Exh. 11, *Appx*. at 59. In February 2016, Perkins was indicted for receiving stolen property. RSA 637:7 ("A person commits theft if he receives, retains, or disposes of the property of another knowing that it has been stolen, or believing that it has probably been stolen, with a purpose to deprive the owner thereof."). It was charged as a class-A felony, rather than a class-B felony or misdemeanor, because the indictment alleged the iPads had a value which "exceeded $1500.00." INDICTMENT (Feb. 19, 2016), *Appx*. at 3; RSA 637:11, I(a) ("Theft constitutes a class-A felony if … [t]he value of the property or services exceeds $1,500.").

Perkins hired Attorney Keith Mathews, and at the January 2017 trial, the State called four witnesses.

Cynthia Courounis was an assistant principal at Parkside Middle School in Manchester. She testified that in August 2015, while doing summer administration at the school, she noticed that some iPads, which students use for assignments, were missing from their proper storage place. *Day_1* at 24-26. She said that at the end of the prior school year, they were in "excellent condition," *Day_1* at 26, but had no information about them after that. *Day_1* at 28.

Robin Tafe was the Media Specialist at Parkside Middle School. Part of her job was to inventory and administer the school's technology equipment.

Day_1 at 30-36. When she learned the iPads were missing, using software on her school computer, she remotely determined the iPads were "dead" and could not be located. *Day_1* at 36-37, 55. She testified that the school paid $479 each for them new, but did not specify when they were purchased. *Day_1* at 40, 49. She said they were in "good condition," *Day_1* at 40, when she had last seen them in June, but did not know their condition in August or thereafter. *Day_1* at 57-58.

Joseph Chaput was a detective with the Concord Police Department, assigned to the Computer Crimes Unit. *Day_1* at 65. He testified that a police search of Perkins's business had produced 26 partially disassembled iPads. *Day_1* at 95. He said that iPad parts have a market value, *Day_1* at 92, and that his Ebay search, for instance, revealed that an iPad screen is worth $15-20. He also testified that there was nothing at Perkins's shop to indicate whether the iPads the police seized were there for repair or for sale, *Day_1* at 94, 137, and that he had no information regarding the condition they were in when they were received into Perkins's store. *Day_1* at 94.

Brian Womersley was also a detective with the Concord Police Department. He testified that he believed, based on seized paperwork, that Perkins was in the business of, among other things, selling iPad parts. *Day_1* at 134-35. Womersley admitted that his only information about the value of the iPads came from the school, *Day_1* at 110, 112-13, 128, 133-34, and that he did not know the value of iPad parts. *Day_1* at 135.

After the State rested, *Day_1* at 137, 141, Mathews made an oral motion for directed verdict, which, quoted in full, was:

> The evidence has not proven beyond a reasonable doubt that Mr. Perkins intended to retain the evidence – the iPads at all. There's been no testimony that's been elicited regarding that issue. And so I would say that no reasonable jury could come to a guilty verdict after the evidence that we just heard.

Day_1 at 138. Mathews's motion for directed verdict did not mention the State's failure to prove value.

The next day Mathews called Perkins to testify. Perkins explained that after his education in computer engineering, he established two shops and has several employees, and that he repaired computers for reputable named businesses and institutions in New Hampshire. Repairs constituted about three-quarters of his business. *Day_2* at 150-55, 160-61.

Attorney Mathews then questioned Perkins about value:

> Q: Let's talk about the iPads themselves. What types of iPads are these?
>
> A: I – are iPad 2's.
>
> Q: And how many generations back are those an iPad 2?
>
> A: Well, I mean, they're the second one that came out. I mean, the first one came out back in 2009, I think, the first one. So these are 2011 models.
>
> Q: How many more iPads have there been since then?
>
> A: There's – I think there's nine right now. There's – I can name them off if you want; iPad 1, iPad 2, iPad 3, iPad 4, iPad 5 – which is also called iPad Air, iPad 6 – which is iPad Air 2, and then they do the minis, which is mini 1, mini 2, mini 3, mini 4, and then they have the iPad Air. And then they have the newest one that just came out which is the iPad Pro, and

then there's another one after that. So there's tons. There's – there's like 15 after this one, I think, now.

Q: So in the industry, would these be considered basically obsolete?

A: Yeah. I mean, not many people have them, you know, or repair them unless they're like 128-gigabyte ones because then they're worth a little bit more money because of the gigabytes. But I mean, you – honestly, not many people – nobody repairs them unless they're like someone that doesn't know much about electronics or something like that, and they don't know they can just buy the same thing for the same price.

Q: And what are these iPads worth used?

A: Used? Like now, probably like $30, maybe. I sell them in my store for like 40, 50 bucks.

Q: Okay. What were they worth used in 2015?

A: Probably like 50 to maybe 75 bucks, maybe more, if – depending on gigabytes. But these are – these – they don't need – they didn't need 128 gigabytes on these for some reason. So they're not the big ones.

Q: And that $75 figure, that's for you as a store owner?

A: Yeah, of course. Yeah. I mean, that's what I was selling them for so – yeah. And I'm pretty fair with my prices. I usually – the way I do my pricing is if something online that goes for say 100 bucks, I would sell it for like 80 to avoid – in my store so people have a good deal, and I would have to – I would avoid paying like the seller fees on that website.

Q: What are these particular iPads worth in their current state?

A: Altogether, all of them?

Q: Individually is fine.

A: I mean, these are worth probably nothing. And these are worth nothing because they all have the pounds on them, and I – there's nothing to do with them. I mean, like they said before, they said I could try to use them for parts, but it's not – it's stupid because a glass on that – or these pads, you can buy brand-new for like $6 from my wholesale account. So I mean, it's just not – it's – and it doubles the time that I have to do stuff because then instead of having to just take off the screen off the broken iPad I have to do, then I have to take off another screen off another one, and then, you know, it just – I – I don't have time for that.

Day_2 at 163-65.

There is nothing further about value in the trial record.

In his closing, Mathews argued generally that Perkins had no larcenous intent. Regarding value, Mathews proferred:

> The State didn't present any witnesses that could describe to you what the value of the iPads were. They didn't indicate to you anything but what these iPads were worth new when they were purchased by the school district, what these items were worth at the – and upon the removal from the school, unfortunately by the thieves. You have no idea about it according to the State.
>
> Mr. Perkins got up there, and he testified that these items are worth 60 to $70 each, and I would ask that you take that into consideration in your deliberations.

Day_2 at 206.

In its closing, the State argued:

> The next element that the State has to prove is the value, that it exceeded $1500. Now, I touched on

> that a little bit. Mr. Perkins wants you to believe that they're valueless.
>
> You heard from the school they're not valueless. The school inventory list indicates that the school paid $479. So if you do the math, $479 times 26 is well over $12,000.
>
> When Detective Womersley was asked about the value, he said he relied on what the school said because they're in the best position to know what their loss would be. These iPads were used by Parkside for students, interactive classroom activities. They weren't valueless. Ms. Tafe told you they were $400 each.

Day_2 at 212-13.

After arguments, the court gave general jury instructions, including:

> I am now going to discuss the definition of the crime with which the Defendant is charged: receiving stolen property. In order to obtain a conviction, the State must prove the following four elements.
>
> One, the Defendant received or retained property belonging to another person. Two, the Defendant knew the property had been stolen or believed that it had probably been stolen. Three, the Defendant acted with a purpose to deprive the owner of the property, and four, the value of the property was more than $1500.

Day_2 at 225-26; JURY INSTRUCTIONS (Jan. 18, 2017) at 8, *Appx*. at 5, 12. The court defined for the jury the words "received" and "purposely," but gave no definition of "value." *Id.* at 9, *Appx*. at 13. Mathews did not ask for one.

The jury returned a verdict of guilty, *Day_3* at 232. A week later, Mathews filed a motion to set aside the verdict, on the grounds that the State did not prove Perkins had an intent to deprive ownership, and that the State did not prove value over $1,500. MOTION TO SET ASIDE GUILTY VERDICT

(Jan. 27, 2017). The State objected, and the motion was denied. STATE'S OBJECTION TO SET ASIDE VERDICT (Feb. 6, 2017) (with margin order, Apr. 27, 2017).

II. Re-Sentencing, Appeal and Withdrawal, Ineffective Assistance of Counsel

Perkins was thereafter sentenced. *Sent.Trn.* (Apr. 27, 2019). With new counsel, he filed a New Hampshire Supreme Court notice of appeal. NOTICE OF APPEAL (Apr. 27, 2017). Noting inconsistencies in sentencing, the new counsel filed an appearance in the superior court, and a motion for re-sentencing, and also withdrew the appeal. APPEARANCE (May 3, 2017); MOTION FOR RESENTENCING ON GROUNDS THAT COURT BASED SENTENCING ON INCORRECT UNDERSTANDING OF DEFENDANT'S PRIOR CRIMINAL HISTORY (Nov. 21, 2017).

Based on corrected information, in March 2018 the court re-sentenced Perkins to a slightly lesser penalty. HOUSE OF CORRECTIONS SENTENCE (Apr. 27, 2017) (omitted from appendix); HOUSE OF CORRECTIONS SENTENCE (Mar. 19, 2018), *Appx*. at 15 (12 months stand committed with all but 3 months suspended). Perkins long ago paid $379 restitution. MOTION FOR COURT ORDER: RESTITUTION (June 1, 2018).

Having reviewed the trial transcripts, Perkins's attorney filed a motion to set aside the verdict based on trial counsel's ineffective assistance, to which the State objected. MOTION TO SET ASIDE VERDICT AND DISMISS BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL (Apr. 3, 2018), *Appx*. at 17; STATE'S OBJECTION TO DEFENDANT'S MOTION TO SET ASIDE VERDICT (Aug. 24, 2018), *Appx*. at 36. The motion alleged: 1) Mathews failed to move for directed verdict based on value upon the State resting, 2) the only evidence of value was elicited by Mathews, and 3) Mathews failed to request an accurate jury instruction regarding value – all three of which constituted ineffective assistance, in violation of Perkins's right to competent representation.

The Merrimack County Superior Court (*Richard B. McNamara,* J.) found that there was sufficient evidence in the State's case alone for the jury to determine value, and upheld the verdict. ORDER (Dec. 4, 2018), *Addendum* at 27. This appeal followed.

SUMMARY OF ARGUMENT

Kyle Perkins first summarizes the law governing ineffective assistance of counsel, and valuation of stolen property.

Perkins first argues that his trial lawyer was ineffective by failing to move for a directed verdict at the end of the State's case, based on the State's failure to offer evidence on the element of value.

Second, Perkins argues that his trial lawyer was negligent in eliciting the only trial evidence of value from Perkins's own testimony, and then compounding the error during his closing argument by emphasizing to the jury the highest price.

The third way Perkins's lawyer was deficient was by neglecting to request a jury instruction defining "value," thereby leaving the jury without any instruction on the lawful parameters of assigning value to tangible personal property.

Finally, Perkins notes that the remedy for ineffective assistance of counsel is to restore the defendant to the position he would have been in had he been properly represented. Because Perkins would have been found not guilty had he had effective counsel, this court should dismiss the indictment.

ARGUMENT

I. Ineffective Assistance of Counsel

Criminal defendants have a right to reasonably competent counsel pursuant to the Federal and New Hampshire constitutions. *Strickland v. Washington*, 466 U.S. 668 (1984); *State v. Henderson*, 141 N.H. 615 (1997). Ineffective assistance is deficient attorney performance combined with prejudice. *State v. Seymour*, 140 N.H. 736 (1996). That is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Cable*, 168 N.H. 673, 681 (2016) (quotations and citations omitted).

Deference is made to strategic decisions of counsel, *State v. Candelo*, 170 N.H. 220, 225 (2017); *State v. Brown*, 160 N.H. 408, 412-13 (2010), but only upon proof that the attorney recognized an issue, investigated it, and made a strategic decision regarding it. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). Where there is no strategic explanation for counsel's lapse, and it results in admission of evidence necessary to convict, counsel has been ineffective. *State v. Thompson*, 161 N.H. 507, 529 (2011) (ineffective assistance when attorney inexplicably failed to make hearsay objection to the only evidence inculpating defendant).

Even if there is more than one source of evidence on the same topic, counsel has been ineffective if the representation results in the jury hearing evidence from an additional source when the additional source has unique expertise. *State v. Marden*, slip op. 2018-0096, _ N.H. _, 2019 WL 2479335 (June 14, 2019).

The remedy for ineffective assistance of counsel is to put the defendant in the same position he would have been in had he been properly represented. *Lafler v. Cooper*, 566 U.S. 156 (2012).

II. Value of Stolen Items at the Time of Theft is an Essential Element of the Crime of Receiving Stolen Property

To be convicted of a class-A felony of receiving stolen property, the State must prove beyond a reasonable doubt that the value of the property received is greater than $1,500. RSA 637:11, II(a). "'Value' means the highest amount determined by any reasonable standard of property or services." RSA 637:2, V.

Failure to prove value is fatal to the State's case. *State v. Gray*, 127 N.H. 348 (1985) (conviction reversed). If the State proves a value of less than $1,500 (and a lesser-included instruction were given), it may be able to prove a class-B felony or a misdemeanor. RSA 637:11, I(a); RSA 637:11, III; *State v. French*, 146 N.H. 97, 100 (2001).

Value, in receiving stolen property prosecutions, must be measured "as of the time and place the item was stolen." *State v. Belanger*, 114 N.H. 616, 618 (1974). The condition of the stolen item at the time of receiving, if the time is different from the time of theft, is relevant to value. *State v. Hammell*, 128 N.H. 787 (1986) (repairs to car between time of theft and receiving). The value of stolen goods is defined as "the market value, or the price which the property will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price for it." *State v. Moody*, 113 N.H. 191, 192 (1973). There is no allowance for special value to a particular owner. *Id.* When there is conflicting evidence of value, a jury may chose the higher reasonable price. *State v. Leith*, _ N.H. _, 205 A.3d 171 (2019).

All known New Hampshire cases concerning the value of stolen goods involved property that had relatively stable values. *See, e.g., Leith* (department store items with price tags); *State v. Wong*, 138 N.H. 56 (1993) (outboard boat motor); *State v. Hammell*, 128 N.H. 787 (1986) (6-year-old Oldsmobile); *Gray*, 127 N.H. at 348 (snowmobile); *State v. Belanger*, 114 N.H. 616 (1974) (spools of

copper banding, office equipment); *Moody*, 113 N.H. at 191 (generator).

The iPads Perkins was alleged to have received, unlike the items in earlier cases, did not have a stable or established value. Because they are consumer technology products with short intended lifespans, iPads quickly become obsolete, and therefore rapidly depreciate in value from their purchase price. *See State v. Spikes*, 961 A.2d 426, 433 (Conn. App. 2008) (distinguishing electronics "subject to prompt depreciation" from jewelry which "may appreciate in value"); *Williams v. United States*, 805 A.2d 919, 928 (D.C. 2002) (noting electronic equipment subject to "prompt depreciation or obsolescence"). When the police found the iPads in Perkins's shop, some were obviously non-functioning, lacking screens or other components. They were also locked so that they could not be sold as working devices.

Perkins was alleged to have received the stolen iPads on or about September 15, 2015. The State offered testimony regarding the price the school paid for the items some years before the theft, and the condition of the items several months before the theft. But the State offered no evidence regarding their value at the time of the theft, sometime in the summer of 2015, nor any evidence of their value at the time Perkins allegedly received them in September.

When seized from Perkins, the iPads were valuable only for parts – much less than the purchase price.

III. Counsel Was Ineffective by Not Moving for a Directed Verdict Based on the State's Failure to Present Evidence of Value

"It is virtually the universal practice of defense counsel to move for a directed verdict at the close of the State's case." 2A Richard B. McNamara, *New Hampshire Practice: Criminal Practice and Procedure* § 43.47 at 57 (6th ed. 2017). The purpose of such a motion is basic to criminal defense: to assert that the defendant is not guilty. *State v. Burke*, 122 N.H. 565, 571 (1982). The consequence of not moving for a directed verdict is significant – the sufficiency issue is waived. *State v. Scott*, 167 N.H. 634 (2015).

Failure to move for a directed verdict when the State has not presented sufficient evidence to convict constitutes ineffective assistance of counsel. *See, e.g., State v. Thompson*, 161 N.H. 507, 532 (2011) ("counsel's deficient performance likely allowed the State's case to withstand a motion to dismiss"); *State v. McGurk*, 157 N.H. 765, 769-70 (2008) (failure to file a non-meritorious motion is not ineffective assistance); *State v. Kepple*, 155 N.H. 267, 273 (2007) ("In order for the defendant to demonstrate actual prejudice …, he must show that a motion for dismissal, a directed verdict, or a JNOV based upon the State's failure to establish [an] element … would properly have been granted."). In *Leith*, _ N.H. _, 205 A.3d at 175, "[a]t the close of evidence, the defendant moved to dismiss the felony indictment, arguing that 'viewing all evidence in a light most favorable to the State, no rational trier of fact could conclude beyond a reasonable doubt that [the defendant] took merchandise in excess of $ 1,000.'" Mathews should have made that argument for Perkins.

The State presented no evidence of the value of the iPads at the time of the alleged theft, but Mathews did not alert the court to the omission in the State's case. Had counsel moved for directed verdict, it would have been granted.

There was no conceivable reason to refrain from pressing the motion; a

motion for directed verdict is made to the bench in the absence of the jury. The motion therefore cannot be said to confuse the jury or weaken a defense conducted on some other basis.

The remedy for counsel's deficient performance is to put Perkins back in the position he would have been in but for counsel's deficient performance. This court should thus dismiss the indictment.

IV. Counsel Was Ineffective by Eliciting Testimony on the Value of the iPads

Even if the State had survived a motion for directed verdict at the close of its case, there still would have been no evidence of the fair market value of the iPads at the time of theft or alleged receipt by Perkins. If the defense had then promptly rested, a defense motion for directed verdict at the close of evidence would have been granted.

By testifying, the defendant takes a chance he will fill gaps in the State's case. *State v. Tabaldi*, 165 N.H. 306, 314 (2013). But here, it was defense counsel who deliberately elicited testimony regarding value. *Day_2* at 164.

Perkins's answers to his *own* counsel's questions were the *only* evidence of current value in the entire trial. The State's evidence was the purchase price years before; without the defendant's testimony, there would have been no evidence as to fair market value of the iPads at the time of the theft. Dooming the defendant were his answers to his own counsel's questions.

In his closing argument, Mathews compounded his deficiency. He argued: "Mr. Perkins got up there, and he testified that these items are worth 60 to $70 each, and I would ask that you take that into consideration in your deliberations." *Day_2* at 206. Given that the jury is enabled to chose the highest reasonable price, *Leith* at 181-82, and that the State provided no estimate of value at the time of theft, Perkins's testimony was therefore the highest price in evidence. Had counsel even emphasized the lowest figure to which Perkins testified – $50 per – that would multiply to $1,300, less than the $1,500 threshold. Rather, Mathews did the State's work by citing an erroneous $60 minimum, which multiplies to $1,560, just above the felony threshold.

Mathews elicited the only evidence on a necessary element, thus filling a fatal hole in the State's case. Without that constitutionally deficient action, Perkins could not have been found guilty. Mathews also argued the fact to the jury – as though Perkins had two prosecutors.

There is no conceivable advantageous strategy to justify a defendant's own lawyer eliciting evidence necessary for conviction.

The remedy for ineffective assistance is to put the defendant in the position he would have been in had there been no deficient performance. Without counsel's deficient performance, Perkins could not have been found guilty. Thus, the remedy for counsel's ineffective assistance is for this court to dismiss the indictment.

V. Counsel Was Ineffective by Not Requesting a Complete and Accurate Jury Instruction Regarding Value of Stolen Items

The purpose of jury instructions is to "adequately and accurately explain each element of the offense" and to "fairly cover the issues of law in the case." *State v. O'Leary*, 153 N.H. 710, 712 (2006).

Although not necessarily in the exact language a party suggests, when a party requests an instruction, the court must so instruct when the proposed instruction is relevant to "some evidence" adduced at trial. *State v. Furgal*, 164 N.H. 430, 436 (2012). The court has a duty to explain to the jury technical terms and the "law applicable to the case." *State v. McDonald*, 163 N.H. 115, 126 (2011).

Failure of the defense to request an instruction constitutes waiver of the issue. *State v. Blackstock*, 147 N.H. 791, 798 (2002) (untimely request was waiver); *State v. Letourneau*, 133 N.H. 565, 567 (1990) (same); *State v. Lister*, 122 N.H. 603, 607 (1982) ("a defendant waives his right to a specific jury instruction unless the request is timely made").

A request for an instruction is generally made well in advance of the charge, to give the court "ample time to consider" it. *State v. Williams*, 137 N.H. 343, 346 (1993) (overruled on other grounds by *State v. Quintero*, 162 N.H. 526 (2011)). Because the request is made away from the jury, there is no valid argument that defense counsel strategically omitted the request to avoid emphasizing an unwelcome issue, as competent counsel might deliberately do regarding a during-trial evidentiary objection. *See, e.g.*, *State v. Bean*, 120 N.H. 946, 949 (1980) ("court could reasonably conclude that the defendant would prefer not to have the prior conviction emphasized by an instruction relating to it").

In this case, the court's instructions were confined to the bare elements of the crime. *Day_2* at 226. While they were accurate insofar as they went, the

instructions omitted the essential limits within which the jury may value property.

The instruction does not specify that "value" is measured "as of the time and place the item was stolen." *Belanger*, 114 N.H. at 618. It does not notify the jury that the condition of the stolen items at the time of receiving, when that time is different from the time of theft (as it was here), is relevant to value. *Hammell*, 128 N.H. at 787. The instruction does not explain that "value" of stolen goods means "the market value, or the price which the property will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price for it." *Moody*, 113 N.H. at 192. It does not include that value is not to be measured by any special importance the owner, or the Manchester students, might place on it. *Id.* The instruction makes no mention of the fact that consumer electronic goods are subject to rapidly declining value. The instruction does not point out that value would be affected by an electronic lock, which prevents sale other than for parts.

In *Leith* the court instructed the jury:

> Value means the market value or the price which the property will bring in a fair market at the time of the alleged theft, after reasonable efforts have been made to find the purchaser who will give the highest price for it. Value means the highest amount determined by any reasonable standard of property.

Leith, _ N.H. _, 205 A.3d at 175. While in *Leith* the items were department store merchandise with easily established prices, the *Leith* instruction is notable because it emphasizes that value must be fair market value, that valuation must be at the time of the theft, and that price must be based on an arms-length appraisal.

Here, the instruction did not "adequately and accurately explain" the value element of the offense, nor "fairly cover the issues of law in the case."

O'Leary, 153 N.H. at 712. Based on the instruction, members of the jury could understand they were supposed to determine value based on the original purchase price, replacement value, or even the existential educational value of iPads to students.

Because of the court's duty to instruct, it can be presumed that, had counsel requested an instruction reflecting *Belanger*, *Hammell*, *Moody,* and *Leith*, the court would have fairly instructed the jury on the nuance and timing of valuation, and perhaps on the peculiarities of valuing consumer electronics. It appears, however, that defense counsel was not aware of New Hampshire law regarding measuring value, or even that value was an issue in the case.

By not requesting an instruction, the issue was waived, and it was therefore ineffective assistance for counsel to neglect it. Had an accurate and complete instruction been given, there is a reasonable probability that the $1,500 threshold would not have been met, and Perkins would have been acquitted. Consequently, the remedy now is for this court to set aside the verdict.

CONCLUSION

The remedy for ineffective assistance of counsel is to put the defendant back in the position he would have been in but for counsel's deficient performance. *Lafler v. Cooper*, 566 U.S. 156 (2012). Had Perkins's attorney not been ineffective, it would have resulted in a verdict of not guilty. Therefore, this court should dismiss the indictment.

REQUEST FOR ORAL ARGUMENT

The issue raised in this appeal is of concern to criminal defendants, citizens of New Hampshire, and criminal defense attorneys. There is currently no clear guidance regarding whether a motion for directed verdict is an essential part of every criminal trial. Accordingly, this court should entertain oral argument, and should also place this case on its full-court docket.

Respectfully submitted,

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Dated: July 19, 2019

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 4,854 words, exclusive of those portions which are exempted.

I further certify that on July 19, 2019, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: July 19, 2019

Joshua L. Gordon, Esq.

ADDENDUM