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| STATE OF MAINE<br>KNOX, SS. | | MAINE SUPERIOR COURT<br>LOCATION: ROCKLAND<br>Docket No. KNOCD-CR-21-185 |
| STATE OF MAINE,<br>Plaintiff<br><br>v.<br><br>MALCOLM STEWART,<br>Defendant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | MOTION IN LIMINE TO PRECLUDE CERTAIN WITNESSES FROM APPENDIX A TESTIFYING OR ALTERNATIVELY MOTION TO SEVER<br>(PARTIALLY RENEWED) |

NOW COMES Mr. Stewart by and through counsel, and hereby moves this Court to preclude certain witnesses from testifying and/or sever Count Ones and Two or alternatively, to sever the various complainants in Count Two[1] based on the each complaining witness stating as cause as follows:

[1] Count two involves one of the complaining witnesses in count one and thus, could be consolidated with that matter.

## PROCEDURAL POSTURE

Mr. Stewart was indicted by a Grand Jury on March 25, 2021 of two counts of theft by deception (Class B), 17-A M.R.S. S 354. Mr. Stewart was arraigned by video on May 20, 2021. Mr. Stewart pleaded 'not guilty' and the court set a $50,000 unsecured bond. A Dispositional Conference was scheduled for July 22, 2021 and later continued until September 30, 2021 as Mr. Stewart tried to obtain representation.

On February 8, 2022, undersigned counsel entered an appearance on behalf of Mr. Stewart. A Judicial Settlement Conference was held on April 21, 2022. The matter was not resolved and the Court conducted a conference on June 6, 2022. The time to file pretrial Motions was extended and were timely filed in the fall of 2022. The Court conducted a hearing on those Motions on March 23, 2023. The Court issued its Order on May 19, 2023. On May 25, 2023, the Maine Law Court issued a decision in State v. Chase, 2023 ME 32 clarifying the expectation when arguments related to such matters are made. On or about July 10, 2024, Mr. Stewart filed a Motion to Sever. The Court denied the Motion by Order dated September 18, 2023.[2] On July 10, 2024, the Court conducted a phone conference

[2] In that Order, the Court noted that the Defendant had not made a showing of cognizable prejudice. Based on the Government's representation, discussed *infra*, that showing is present.

following a hearing on the Motions *in Limine*. During that conference[3], the Government made a statement acknowledging work had been performed for some of the persons named in Exhibit A of the indictment. As such, the Motion *in Limine* or alternately, Motion to Server is renewed based on that Government acknowledgment.

## INDICTMENT

The Indictment charges Mr. Stewart with two counts of Theft By Deception under 17-A M.R.S. §354(1)(B)(1). The Indictment includes Appendix A, as referenced in Count I, which names 57 separate persons.

## BACKGROUND

Castle Builders, Inc. opened in 2017 employing office staff and laborers. Malcolm Stewart, the founder, had a background in sales but not as much in construction. He was the salesman for Castle Builders, Inc. and his wife, Elizabeth managed the finances. Castle Builders, Inc. offered residential construction and

[3] Although the conference was not sealed, undersigned counsel chooses not to disclose the specifics of the phone call in an abundance of caution and as a courtesy due to the contents of the communications. Only the relevant matters pertaining to this Motion are disclosed.

renovation services. At the start, Castle was highly successful and generated repeat business.

As with many construction businesses, there were errors made in accounting and related to the work force, to name two areas. Work crews saw consistent turnover. But at no point did Castle ever fail to pay a worker, even though some work checks initially had insufficient funds. As time progressed, Castle saw its income dwindling and its bills expanding as evidenced by the monthly summary. Castle hoped to secure cash infusion by bringing in a financial partner(s), but were unable to close any deal. Finally, without money to pay the employees, Mr. Stewart closed his business on September 8, 2019, leaving behind all of his business and main personal assets. Both he and his wife filed for bankruptcy. Subsequently, Mr. Stewart was employed as a car salesman, sometimes working 60 hours per week. His wife has worked stocking shelves at a store and is currently a public high school custodian. Currently, Mr. Stewart is unable to work for any significant periods due to health problems. He receives dialysis three times per week.

## SUMMARY OF APPLICABLE LAW

A person is guilty of theft by deception if the person obtains or exercises control over property of another as a result of deception and with intent to deprive the other person of the property. 17-A M.R.S.A. § 354; *State v. Bouchard*, 881 A.2d 1130, 2005 ME 106 (Me. 2005). "The Criminal Code instructs that an '[i]ntent to deprive' includes, among other things, an intent '[t]o use or dispose of the property under circumstances that make it unlikely that the owner will recover it.' 17-A M.R.S.A. § 352(3)(C) (1983)." *Bouchard*, 881 A.2d 1130. "A person acts intentionally with respect to a result of the person's conduct when it is the person's conscious object to cause such a result." 17–A M.R.S. § 35(1)(A) (2012); *State v. Woodard*, 2013 ME 36, 68 A.3d 1250 (Me. 2013).

## MEMORANDUM OF LAW

In September of 2022, the Defendant filed a Motion to Dismiss based on the Government's decision to aggregate the various charges involving individual complaining witnesses. See Defendant's Motion to Dismiss. The Court issued an order denying the Defendant's Motion on May 23, 2023. See Order on Motions. Subsequent to that Motion, argument, and Order issued by this Court, the Law

Court issued an opinion in *State v. Chase*, 2023 ME 32. In that matter, the Law Court clarified that the Defendant must specifically seek to separate charges in order to preserve this issue.("In the present case, there is no indication that before or during trial Chase moved to separate into multiple charges any of the five counts for which he argues there was evidence of multiple factual incidents potentially sufficient to establish a conviction. Nor did Chase make any effort to have the jury return a separate determination as to which factual incident supported each count on the verdict form. In effect, what the jury was asked to do was to return a general verdict for each of the charged offenses.")*Id.*

"Courts regularly encounter indictments that may aggregate, in one count of the indictment, several identical crimes committed against one or more victims." *State v. Fortune*, 2011 ME 125, ¶ 26, 34 A.3d 1115. "When a defendant believes that he or she is prejudiced by the consolidation of several identical crimes into a single count of an indictment, the defendant may move for relief from prejudicial joinder . . . ." *Id.* ¶ 27; see also M.R.U. Crim. P. 8(d)[4].

[4] This is not resolved by a specific unanimity instruction, which will be addressed at trial. A specific unanimity instruction explains to jurors that they are required to unanimously agree that a single incident of the alleged crime occurred that supports "a finding of guilt on a given count." *Hodgdon v. State*, 2021 ME 22, ¶ 14 n.5, 249 A.3d 132.

A motion raising a defect in an indictment or information must be raised before trial. M.R.U. 12(b)(2). As a general issue, the Due Process Clause requires that the jurors find each element of an offense beyond reasonable doubt in order for a criminal conviction to pass constitutional muster. See *In re Winship*, 397 U.S 358, 364 (1970)("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.") The Indictment in this case is defective as outlined below.[5]

## I. THE INDICTMENT REQUIRES A CONVICTION AS TO ALL PERSONS IN APPENDIX A OR IT WOULD BE A VIOLATION OF M.R.EVID. 404(b) OR ALTERNATIVELY, BY THE GOVERNMENT'S ADMISSION, PRIOR BAD ACTS WOULD BE USED AGAINST MR. STEWART IN MATTERS THAT CANNOT BE PROVEN AS A MATTER OF LAW

The language in Count I of the indictment would require the factfinder to determine beyond a reasonable doubt that Mr. Stewart committed Theft By Deception against all of the those named in Appendix A. Any contrary finding would allow for a conviction based upon evidence of a crime or wrong to show

[5] For the same reasons argued that the Indictment is defective, Mr. Stewart argues that 17-A M.R.S. §352 is constitutionally unsound under State and Federal law however there is no specific caselaw on this particularized and unique issue. See generally *F.R.Crim.P. 8(a).*

that Mr. Stewart acted in accordance with his character. To expand upon this, if the Government indicted Mr. Stewart based on one name on Appendix A, it might argue that it would be allowed to bring in evidence against Mr. Stewart as to others pursuant to the common scheme exception. This would inarguably implicate M.R.Evid. 403. The current indictment risks giving the jury a false impression as to the amount of criminal activity that has occurred.

The Government has acknowledged that Mr. Stewart, at the very least, partially performed for some of those named in Appendix A. They cannot sustain a conviction based on those complaining witnesses.[6] See *Yerrick v. State*, 979 So. 2d 1228, 1230, 1231 (Fla. 4th DCA 2008)(The defendant had taken a deposit to repair a fence. He did partly perform the contract by taking down the old fence even though he did not follow through with the rest of the repairs. The Court found that because of the part performance no felonious intent was present when

[6] The reasoning for this is understandable. The Government must show that Mr. Stewart had the requisite criminal intent at the time of the taking. *Yerrick* at 1230. A necessary element of theft is that the defendant must have the specific intent to commit the theft *at the time of, or prior to, the commission of the act of taking*." *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992)*(emphasis added)*. Partial performance negates such intent. *Stratacos v. State*, 748 S.E.2d 828(2013 Fulton County D. Rep. 2020)(The defendant's partial performance of the promised services gives rise to the inference, required by the presumption of innocence, that the defendant did not intend to deprive the victim of the property that the victim paid up front).

the deposit was received); *Cates v. State*, 267 Ark. 726, 589 S.W.2d 598 (1979) (only evidence to support conclusion that builder did not intend to pay off liens was subsequent failure to do so); *State v. Pearson*, 39 N.J. Super. 50, 120 A.2d 468 (1956) (at most, State showed breach of contract after partial performance of building contract); *People v. Churchill*, 47 N.Y.2d 151 (N.Y. Ct. App.)(People's evidence "sufficient only to create the impression that defendant was a bumbling novice in the entrepreneurial community"); *Orr v. Commonwealth, 229 Va. 298, 329 S.E.2d 30 (1985)* (evidence insufficient where builder's good faith efforts and behavior showed he acted without criminal intent); *Commonwealth v. Austin*, 258 Pa. Super. 461, 393 A.2d 36 (Pa. Super. 1978); *Peterson v. State*, 645 S.W.2d 807, 811-12 (Tex. Crim. App. 1983); *Phillips v. State*, 640 S.W.2d 293, 294 (Tex. Crim. App. 1982).

Simply put, allowing the Government to present witnesses where money was obtained but a conviction cannot be sustained allows the circumvention of M.R.Evid. 404(b).[7] *United States v. Marquardt*, 786 F.2d 771, 778 (7th Cir. 1986)

[7] This is not a complicated issue but it presents a complication that undersigned counsel has been reticent to present. The Government has devoted unprecedented resources to this case, including a minimum of three assistant attorney generals (usually only one or two are involved in a murder case). The confidential settlement conference memo was provided to the press. The media has on several occasions referenced a source within the Attorney General's office. https://knox.villagesoup.com/news/malcolm-stewart-trial-likely-to-be-held-in-june-or-july/article_96fbca54-c511-11ee-9e50-47b3bd83303d.html

(the indictment gives the impression of more criminal activity on his part than in fact may have been present; *United States v. Smith*, 231 F.3d 800, 815 (11th Cir. 2000) ("indictment may improperly prejudice a jury by suggesting that a defendant has committed several crimes--not one"); *United States v. Clarridge*, 811 F. Supp. 697, 702 (D.D.C. 1992) ("Once such a message is conveyed to the jury, the risk increases that the jury will be diverted from a careful analysis of the conduct at issue. Compromise verdicts or assumptions that, with so many charges pending the defendant must be guilty on at least some of them, pose significant threats to the proper functioning of the jury system.")

If the Government believes they can sustain a conviction in those matters, they should be severed. The reality is the Government absolutely knows they could not pursue a case where partial performance occurred within good faith.[8]

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While undersigned has on several occasions stated that he does not believe that the persons in the Attorney General's office in this case have acted intentionally, the reality is that Mr. Stewart's right to a fair trial are impacted daily by the actions and resources devoted in this matter and it creates a perception that 57 people are dictating justice. https://www.newscentermaine.com/article/news/crime/former-customers-say-theyre-relieved-former-builder-was-indicted/97-1aaebaa2-9070-4831-95f3-8f3428c141bd
This is not the first time that undersigned counsel has been concerned about such actions (see fn. 8). The question becomes: is this Office more concerned about justice or a conviction? https://www.legistorm.com/stormfeed/view_rss/2985061/organization/179538/title/attorney-general-announces-indictment-of-malcolm-stewart.html

[8] See fn. 7. Undersigned counsel was counsel of record in the State v. Fuquan Wilson, who was prosecuted by the Attorney General's office. In that matter, the lead investigator made claims against that office.

## II. IF THE MOTION IN LIMINE IS NOT GRANTED, THE COUNTS SHOULD BE SEVERED

### A. The Indictment impermissibly aggregates Counts I and II

Counts I and II of the Indictment allege the same dates and the same named persons in Appendix A. The State has attempted to separate the two based on different allegations however each involves the same suggested scheme. This is contrary to *State v. Fournier*, 617 A.2d 998, 1000 (Me. 1992)("Amounts of value involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated to charge a single theft of appropriate class or grade. We conclude that the amendment made explicit that which had previously been implicit only. Giving the amended section its plain and ordinary meaning leads to the conclusion that the Legislature intended to provide the State with the authority either to charge each instance of theft in a separate count or to charge the entire course of conduct in a single count. Thus the State, having elected to proceed pursuant to section 352(5)(E),

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https://www.newscentermaine.com/article/news/local/state-prosecutor-denies-misconduct-in-double-fatal-shooting-case/97-441903549

may not divide a single count of theft by receiving into fifteen separate counts of theft by receiving.")(internal citations omitted).

B. The current Indictment raises issues of multiplicitous counts

The Double Jeopardy Clause of the Fifth Amendment proscribes the imposition of multiple punishments for the same crime. *U.S. Const. amend V*. Offenses are multiplicitous when they require proof of identical facts. *Blockburger v. United States*, 284 U.S. 299, 304 (1932) (holding defendant's conviction for selling a drug without original paper and conviction for selling drug without a written order both arising out of same drug sale were not multiplicitous as each offense required proof of a fact the other did not). The prohibition against multiple punishments for the same offense includes multiple convictions. *Rutledge v. United States*, 517 U.S. 292, 302 (1996) (the collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence). Moreover, a court cannot cure multiplicitous convictions by imposing concurrent sentences. *Id*. Imposition of multiple punishments may only be remedied by vacating one of the convictions. *Id*.

C. The Indictment does not protect Mr. Stewart against double jeopardy if the Government is allowed to proceed on Count I and obtain a conviction based on a finding that Mr. Stewart committed Theft By Deception against one or more but not all of the those named in Appendix A.

In accordance with federal due process principles, a defendant must have the ability to protect himself against double jeopardy. See *Schrimsher v. Commonwealth*, 190 S.W.3d 318, 325 (Ky.2006) ("Under the Due Process Clause…the Indictment and instructions together [must] provide adequate specificity that [defendant] may plea acquittal or conviction as a defense against any future indictment for the same conduct and that he may not be punished multiple times…for the same offense."); *Valentine v. Konteh,* 395 F.3d 626, 634 (6th Cir. 2005) ("Due process also requires that criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy.") See *e.g.State v. Ardolino*, 1997 ME 141, ¶ 5, 697 A.2d 73 ("The purpose of a bill of particulars is to enable the defendant…to establish a record upon which to plead double jeopardy if necessary"); *State v. Gauthier*, 2007 ME 156, ¶ 17, 939 A.2d 77 ("The test for determining whether an Indictment is sufficient is whether an accused…could…be

protected against a subsequent prosecution for the same cause.") Because the State has chosen to aggregate the alleged victims into one count, Mr. Stewart is not protected by double jeopardy. This is because, assuming the State can convict Mr. Stewart if the jury finds that he committed Theft by Deception as to one or more, but not all of the named persons in Appendix A of the indictment, there is no ability to prevent a subsequent trial based on the same conduct.

D. All of the *Olmo* Factors Are Present in this Matter

The Law Court has stated in State *v. Olmo*, 2014 ME 138, 106 A.3d 396, 2014 Me. LEXIS 147:

> We have identified three types of prejudice that can result from a joinder of charges: (1) the defendant may become embarrassed or confounded in presenting separate defenses; (2) proof that defendant is guilty of one offense may be used to convict of him of a second offense, even though such proof would be inadmissible in a separate trial for the second offense; and (3) a defendant may wish to testify in his own behalf on one of the offenses but not another, forcing him to choose the unwanted alternative of testifying as to both or testifying as to neither.
> (quoting *United States v. Jordan*, 112 F.3d 14, 16 (1st Cir. 1997)).

All three of the *Olmo* prejudicial factors are a basis for severing the charges in this matter. In presenting separate defenses, Mr. Stewart will find himself arguing contradictory, *confounding* issues. For example, there might be a defense of substantial compliance in the matter of one complainant but not available with

another. Mr. Stewart may also elect to testify in response to one complainant but will be hard pressed and prejudiced to remain silent in response to the alternate accuser's allegations. If this Motion is denied, Mr. Stewart will be caught in the pressurized conundrum in deciding whether or not to testify. This is an unfair and unduly prejudicial choice about whether or not to remain silent at trial because of improper consolidation of offenses. See also paragraph (C)(addressing M.R.Evid. 404(b) factors).

WHEREFORE, Mr. Stewart seeks that the Court grant this Motion *in Limine* and preclude any witnesses testifying where partial performance occurred, or alternatively, sever those matter together with any and all other relief that is fit and just.

Dated this 11th day of July 2024 at Portland, Maine.

Respectfully submitted,

*/s/David J. Bobrow*_____

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CERTIFICATE OF SERVICE

I hereby certify that on this date that a copy of this Motion was provided, via email and mail, to the Office of the Attorney General through the Assistant Attorney Generals in this matter.

Date: 07/11/2024 */s/David J. Bobrow*