

STATE OF MAINE  
CUMBERLAND, SS.

UNIFIED CRIMINAL DOCKET  
LOCATION: PORTLAND  
DOCKET NO. CUMCD-CR-21-1589

STATE OF MAINE

v.

THEODORE LANE,  
Defendant

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**SENTENCING MEMORANDUM**  
(FILED VIA SHAREFILE)

“Defendants who present a risk of flight or violence need the attention and resources of the jails, but many others could be better addressed with the focused attention of less costly resources.” Former Chief Justice Leigh Saufley.

**BACKGROUND**

Theodore Lane was born on July 20, 1998 in New London, Connecticut. He was adopted by his mother, Martha and late father, Russell when he was two years old. He and his sister moved with his new family to Norridgewock, Maine where he grew up.

When Ted’s father was sick, they moved to the southern portion of the State so they could be closer for his medical appointments. This was difficult for Ted as he was just 11 years old and dealing with a new community, school and sick father. Later that year, his father died of cancer and shortly thereafter, Ted was diagnosed with diabetes.

Two years later, Ted and his family moved to North Haven, Maine. At that time, Ted was relatively lonely and began to associate with people that did not offer a good influence in this

life. Ted fondly recalls a saying his mother always telling him “what you put into yourself, whether it is music or television you watch, it sticks in the back of your head” and he now realizes that includes people.

In 2019, his mother contracted Lyme disease which impacted her mental health. It made the continued relationship with her difficult and Ted sought refuge in non-productive ways. While he has always worked, it has been in industries that do not offer health plans. Most of those various jobs have been as a fisherman and painter. This has created a perpetual money issue. While far from an excuse, this was a factor for the criminal action in 2020.

While Ted is still a diabetic and still struggles with health and money, he has finally stopped blaming extraneous factors for his own actions. He realizes that he is accountable and no longer allows for excuses to hold him back. He continues to work whenever possible and is hopeful of becoming a licensed barber within the next year. He has avoided all trouble since December of 2020 and sees a bright and happy future. He is actively involved with his community as noted by the letters submitted with this memorandum including helping those less fortunate and youth.

### **MR. LANE’S PROPOSED SANCTION**

364 days incarceration, all suspended, with one year administrative release<sup>(1)</sup> or alternatively, one year of probation, with the condition of 40 hours of community service to be

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<sup>1</sup> Mr. Lane is not seeking administrative release as opposed to probation but it has recently been observed that Courts are seeking to reduce supervision costs in non-violent offense cases.

completed within the administrative release or probationary period.

### **PROCEDURAL POSTURE**

Mr. Lane will be pleading guilty to Theft by Unauthorized Taking and Misuse of Identification with sentencing set for January 23, 2023.

### **ARGUMENT**

In determining the sentence to be imposed, the Court shall consider the impact of the sentencing decision on the defendant and the strong public interest in imposing the proper sentence. *State v. Samson*, 388 A.2d 60, 67 (Me. 1978). Factors to be considered are:

- gravity of the offense;
- relation of the offense to the victim;
- the defendant's degree of culpability;
- defendant's background, prior criminal history, and history of undesirable behavior;
- the defendant's personal characteristics, including personality, character, social traits, age, education, and employment record;
- the likelihood of rehabilitation of the defendant; and
- the public interest in retribution, deterrence, and incapacitation.

*Id.* at 67, 68; see also *State v. Constantine*, 588 A.2d 294, 296 (Me. 1991).

In this matter, all of the relevant factors point to the lack of necessity of a sentence for

Mr. Lane that includes actual jail. The offense, as a crime, was serious, but not to the extent that imprisonment would be required due to its gravity. It is not a crime of violence. He will have paid restitution in full by the time of sentencing. He is actively employed. The only arguments the state can advance as to the necessity of prison is based on deterrence or as punishment. As to the former, Mr. Lane faces the prospect of severe sanctions for any future criminal conduct, which serves as a far greater deterrence than any current jail sentence could administer. Finally, the consequences of an Assault conviction are vast as it can impact the following:

As to punishment or a retributive factor, Mr. Lane is proposing a sentence that includes a week of work without pay to benefit the community. The Government can produce no evidence that punishment is better served in jail rather than a community service-based sanction. These exact situations gave rise to the Community Service Sentencing Project (CSSP) in New York. That program was created where criminal offenders faced less than a six-month jail sentence. Caputo, Gail: *Why Not Community Service?*, Crim. Policy. Rev., 1999: 10:503, 506, <http://cjp.sagepub.com/content/10/4/503>

Offenders facing jail terms of 20 to 45 days received 8-12 day community service orders. *Id.* at 507. CSSP conducted a case study of the recidivism rate for those that participated in the program. *Id.* (generally). Unsurprisingly, the finding was that those who participated in community service were less likely to re-offend. *Id.* at 513. Additionally, it is inarguable that the number of work hours that are ‘donated’ to the community created a greater benefit to that very community than incarceration. *Id.* at 514. For example, in the program in the month of January 1998, 3,216 labor hours were performed in various community sites. The monetary value of these services was estimated to be over \$16,000, which does not include the savings for the community in the cost of incarceration. *Id.* There is

no relationship between sentence length and general or specific deterrence, regardless of the type of crime. see Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999) (concluding that “correlations between sentence severity and crime rates . . . were not sufficient to achieve statistical significance,” and that “the studies reviewed do not provide a basis for inferring that increasing the severity of sentences generally is capable of enhancing deterrent effects”); Michael Tonry, *Purposes and Functions of Sentencing*, 34 *Crime and Justice: A Review of Research* 28-29 (2006) (“[I]ncreases in severity of punishments do not yield significant (if any) marginal deterrent effects...”). Incarceration in this matter might actually encourage future criminal activity. See Mark W. Lipsey and Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 *Ann. Rev. L. Soc. Sci.* 297, 302 (2007) (“[R]esearch does not show that the aversive experience of receiving correctional sanctions greatly inhibits subsequent criminal behavior. Moreover, a significant portion of the evidence points in the opposite direction – such sanctions may increase the likelihood of recidivism. The theory of specific deterrence inherent in the politically popular and intuitively appealing view that harsher treatment of offenders dissuades them from further criminal behavior is thus not consistent with the preponderance of available evidence.”). A thirteen-year old Missouri study, still relevant today, shows “that recidivism rates actually are lower when offenders are sentenced to probation, regardless of whether the offenders have prior felony convictions or prior prison incarcerations.” Missouri Sentencing Advisory Commission, *Probation Works for Nonviolent Offenders*, 1 *Smart Sentencing* 1 (June 2009), <http://www.courts.mo.gov/file.jsp?id=45429>.

*17-A M.R.S.A. §1151* provides that the purposes of sentences are:

**1.** To prevent crime through the deterrent effect of sentences, the rehabilitation of convicted persons, and the restraint of convicted persons when required in the interest of public safety;

[ 1975, c. 499, §1 (NEW) .]

**2.** To encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served.

[ 1975, c. 499, §1 (NEW) .]

**3.** To minimize correctional experiences which serve to promote further criminality;

[ 1975, c. 499, §1 (NEW) .]

**4.** To give fair warning of the nature of the sentences that may be imposed on the conviction of a crime; [ 1975, c. 499, §1 (NEW) .]

**5.** To eliminate inequalities in sentences that are unrelated to legitimate criminological goals;

[ 1975, c. 499, §1 (NEW) .]

**6.** To encourage differentiation among offenders with a view to a just individualization of sentences; [ 1975, c. 499, §1 (NEW) .]

**7.** To promote the development of correctional programs which elicit the cooperation of convicted persons; and [ 1975, c. 499, §1 (NEW) .]

**8.** To permit sentences that do not diminish the gravity of offenses, with reference to the factors, among others, of:

A. The age of the victim; and [1995, c. 149, §1 (NEW) .]

B. The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property. [2005, c. 551, §1 (AMD) .]

Many studies have attempted to ascertain the best method for a comparison of sentences for misdemeanors, something that is contemplated by our legislature and codified in 17-A M.R.S.A. §1151. Studies have shown that in communities, the rate of incarceration for misdemeanors has an extreme variation, with some as low as 2%. Wheeler, Gerald, *A Survival Time Analysis of Criminal Sanctions for Misdemeanor Offenders*, Evaluation Review, Vol. 12 No. 5, October 1988, 510-527.

Studies are conclusive, however, that across the country, the *overwhelming* majority of misdemeanor offenders do not receive jail sentences or probation. *Id.* An extensive study of Harris County in Texas, not known as an area with a liberal approach to criminality, found that 52% of misdemeanor first offenders received fines only. *Id.* at 516. In fact, only 61% of people charged with misdemeanors and with significant criminal history received jail sentences on the misdemeanor. *Id.* A cursory review of our own system finds that the overwhelming majority of docketed cases for misdemeanors absent any form of significant criminal history only results in a financial sanction.

The legislature is concerned enough about the callous use of incarceration that it has

sought to minimize correctional experiences which only serve to promote further criminality. *Id.* It would be intellectually dishonest for any person associated with the criminal justice system to deny that incarceration often will have a negative effect upon the person that far outweighs any societal gain. This would be especially pertinent in a case where a jail sentence could lead to loss of employment. As discussed *infra*, Mr. Lane is currently actively employed.

There is nothing on the record that the public needs to be protected from Mr. Lane. See *State v. Gray*, 893 A.2d 611 (Me.2006). Even when examining the offense itself, nothing presented would allow the conclusion that it warranted consideration as a serious offense. *State v. Dwyer*, 985 A.2d 469 (Me.2009).(2)

Finally, the sentencing Court is faced with the criminal conduct from over two years ago. During that period of time, Theodore has been actively employed, without any violations.

Mr. Lane is currently employed. Numerous courts have considered current and past employment as a factor for consideration in sentencing. In *U.S. v. Ruff*, the circuit court affirmed the district court's consideration of the defendant's "history of strong employment" in granting a reduction from 30-37 months' imprisonment to one day of imprisonment followed by three years' supervised release (to be partially served in a community confinement facility), in part so that the defendant could continue to work. 535 F.3d 999, 1001 (9<sup>th</sup> Cir. 2008). The Third Circuit affirmed a below-guideline sentence of probation, community service, restitution, and fine on a conviction for tax evasion, which was based in part on the defendant's employment record. *U.S. v. Tomko*, 562 F.3d 558, 571 (3<sup>rd</sup> Cir. 2009) (*en banc*) ("{t}his variance took into account his negligible criminal history, his employment record, his community ties, and his extensive charitable works as reasons for not incarcerating the defendant"); *U.S. v. Fuson*, (6<sup>th</sup> Cir. Feb. 8,



2007) (unpub) 2007 WL 414265(guideline range of 24-30 months, court’s sentence of probation and 6 months home confinement reasonable in part because client’s “working and supporting his family ... entitled to some weight”); *U.S. v. Jones*, 158 F.3d 492 (10<sup>th</sup> Cir. 1998) (where defendant pled guilty to possession of a firearm by a prohibited person, the district court did not abuse its discretion in departing downward by three levels when, as one of eleven factors, it considered the defendant’s “long impressive work history ...where good jobs are scarce”); *U.S. v. Alba*, 933 F.2d 1117 (2<sup>nd</sup> Cir. 1991) (long-standing employment at two jobs); *U.S. v. Jagmohan*, 909 F.2d 61 (2<sup>nd</sup> Cir. 1990) (exceptional employment history and nature of the crime); *U.S. v. Big Crow*, 898 F.2d 1326, 1331-32 (8th Cir. 1990) (excellent employment record).

Finally, and perhaps the most important consideration is the age of the offense and the post-offense conduct. The actions are from 2020. “In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, *without limitation*, any information concerning the background, character and *conduct of the defendant*, unless otherwise prohibited by law. See 18 U.S.C. §3661.” *USSG §1B1.4* (2010)(emphasis added). In *Pepper v. United States*, the Supreme Court stated that “*fundamentally, evidence of Pepper’s conduct since his release from custody in June 2005 provides the most up-to-date picture of Pepper’s history and characteristics.*” 562 U.S. 476 (2011)(emphasis added).

Ted’s conduct while on bail has been exemplary. See *U.S. v. Munoz-Nava*, 524 F.3d 1137 (10<sup>th</sup> Cir. 2008)(defendant’s “behavior while on a year-and-a-half pretrial release, which the district court found to be exemplary” shows defendant unlikely to reoffend); *U.S. v. Baker*, 502

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<sup>2</sup> While the offense itself is a felony, it is based on the prior convictions.

F.3d 465 (6<sup>th</sup> Cir. 2007)(where defendant pled guilty to possession of unregistered firearm arising from altercation with wife during which gun accidentally discharged and guideline range was 27-33 months, below-guideline sentence of probation with one year house arrest proper in part because he behaved “exceedingly well” while under supervision of pretrial services).

In *U.S. v. Clay*, the Court sentenced the Defendant to one-third of the low end of the guidelines. 483 F.3d 739 (11<sup>th</sup> Cir. 2007). The Court held that considerations of post offense rehabilitation are appropriate when a district court evaluates the history and characteristics of the defendant and the need to protect the public from further crimes specifically stating that “a departure for post offense rehabilitation reflects that, unlike some other defendants, Clay had fundamentally changed since his offense, poses a lesser risk to the community, and does not require incarceration for too long.” *Id.* at 743. These factors all exist in this matter. See *U.S. v. Johnson* 588 F.Supp.2d 997 (S.D. Iowa 2008)(“The Court views Defendant’s behavior during the three-year period between the seizure of his computer and his indictment as a good indication of what society can expect from him after he completes his sentence [and is a factor court considers in imposing sentence]”); *U.S. v. D.M.* , 942 F.Supp.2d 327 (E.D.N.Y. 2013) (Weinstein, J.)(guidelines 78-90 months, sentence of probation warranted in part because “[e]vidence of a defendant’s efforts at rehabilitation is persuasive. It is indicative of the likelihood that a defendant will not reoffend and will not cause harm to the public”); Brenda L. Tofte, *Booker at Seven: Looking Behind Sentencing Decisions: What Is Motivating Judges?*, 65 Ark. L. Rev. 529, 572-73 (2012) (“[W]hen it comes to sentencing, judges look at what offenders have done to rehabilitate themselves when deciding what kinds of sentences to assign. Accordingly, in the data set . . . sentencing judges were swayed by offenders’ rehabilitation

efforts almost as much as they were swayed by offenders' family obligations and family support.”)

Finally, if a fully suspended sentence was in conjunction with the maximum period of probation and pretrial release, the supervision would be over three years. In *U.S. v Polito*, the district court's sentence of probation with one year house arrest was reasonable in part because the years of probation would give the community a record of Polito's conduct to measure post offense rehabilitation. 5<sup>th</sup> Cir. Jan. 31, 2007(2007 WL 313463 (unpub.))

Accordingly, Mr. Lane asks this Court to impose a fully suspended sentence with 40 hours of community service and supervision.

DATED: January 19, 2023

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#### CERTIFICATE OF SERVICE

I hereby certify that I have today forwarded a copy of Defendant's Sentencing Memorandum to Sara Shannon, Esq. via email.

Dated: January 19, 2023

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