

STATE OF MAINE
KNOX, SS.

UNIFIED CRIMINAL DOCKET
LOCATION: ROCKLAND
Docket No. KNOCD-CR-21-185

STATE OF MAINE,)
Plaintiff)

v.)

MALCOLM STEWART,)
Defendant)

MALCOLM STEWART’S
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

WHO IS MALCOLM STEWART?

Over the last four years, Malcolm Stewart, has been the subject of an aggressive prosecution with vast and unprecedented resources being devoted to his case.¹ During this time, much has been said about him and his business that is simply demonstrably

¹At various times, three experienced and immensely talented Assistant Attorney Generals prosecuted this matter with numerous agents at their beck and call while Mr. Stewart had one Court-appointed attorney.

not true, by the Government and the media. Even in its Sentencing Memorandum, the Government continues to portray Mr. Stewart as a scheming mastermind who orchestrated a multiyear plot to swindle people out of their money with no intention of performing any work. Yet, they concede that Mr. Stewart was increasing staff and laborers through the winter of 2019. See Government Sentencing Memorandum pg. 3 (hereafter ‘Gov’t Memo’). He also continued using accountants through the early winter of 2019. *Id.* They acknowledge satisfied and repeat customers. *Id.* at 4. They refer to the loan that Mr. Stewart received from April Wolf and Gary Thomas in the amount of \$60,000 and that it was spent in 11 days but fail to mention that bank records show all of the money was spent on materials and payroll. See Eric Purvis Report. The Government, despite having all bank and transaction records of Castle Builders, Inc. and Mr. Stewart, can produce no evidence of any measurable amount of monies that were spent on any personal items or diverted to individual personal accounts of the Stewarts. Discovery, *generally*; see also report of Eric Purvis. Smartly and rightly, the Government does not even allege this. The Government, despite having all bank and transaction records of Castle Builders, Agway, and Mr. Stewart, can produce no evidence that his businesses became ‘cash based.’² *Id.* In fact, the Government points out that the monies were often moved between the two business accounts. See Gov’t Memo at 15. The Government cannot point to missing documents

²This shows that neither entity was trying to hide monies.

or records. Discovery, *generally*. And outside of the final transaction between Mr. Stewart and Mr. Palmer, the Government cannot point to any deposit that wasn't accounted for in the various bank records. See Purvis Report.

The Monthly Comparison charts clearly show a dissipation of assets, not by large quantities of money withdrawn, but rather by verifiable expenditures absent cash infusion from new clients or investors. See Monthly Comparison. Mr. Stewart was unable to meet personal expenses such as his mortgage during the period his business was failing.³ See Mortgage Statements, *discovery*. Mr. Stewart stopped taking a personal paycheck once the business started struggling in the fall of 2018. Discovery, year 2019 personal tax returns. The check stubs of Castle Builders, Inc. from June, July, and August, and even September of 2019 show payments were still being made to various suppliers. See Castle Builder Checks, Purvis Report. Despite the business failings, Castle Builders, Inc. continued to make some payroll. Discovery, *generally*. Even during the last month of business, Castle still employed between 25-28 workers. August 2019 payroll. Upon the closing of Castle Builders, Inc., Mr. Stewart left behind nearly everything he owned including his personal house, personal property, and business property. See Bankruptcy Schedule. And nothing in the Schedule suggests any large assets acquired from 2016-2019. *Id.* The Government even acknowledges that Mr. Stewart was trying to bring in cash and expertise to assist the business. *Id.* at 18. And while the

³ Mr. Stewart failed to pay his mortgage for nearly one year prior to abandoning his property.

Government suggests this was somehow done to ‘cover his crimes,’ common sense shows the exact opposite i.e. that a business partner or cash infusion made sense and they would be the immediate recipient of business and a large amount of account receivables since by the Government’s own admission, the overwhelming majority of transactions for Castle Builders were downpayments only. And finally, the Government concedes that when everything else failed and Mr. Stewart had no alternatives, he closed his business, leaving the state “with nothing but his clothes and a few personal items.” What an amazing schemer he must have been to reap no gains, and leave the State with the clothes on his back and leaving his minimal assets behind. So with all of this, let’s finally learn who is Malcolm Stewart.

On June 25, 1964, Malcolm was born in Newcastle New Brunswick Canada hospital to his parents Herschel and May Stewart. They lived in a little community outside of town known as Troutbrook. It was a beautiful area for hunting and fishing and he grew up loving the outdoors. He fondly recalls salmon fishing with his family at the age of six.

It was at that age when he remembers his first major health issue. He was on the top of the clothesline stand wrestling and was pushed backwards and fell, hitting his head on a rock. It was covered in ice and ended up in a coma for a couple weeks. They did everything they could in Newcastle to help him, but they decided they were going to send him to St. John Hospital, which was a lot bigger. Initially, the prognosis was dim; he was

not expected to live and if he did, it was believed he would have permanent brain damage. But he beat the odds and was released from the hospital after two weeks, although he does have memory issues present to this day.

Growing up, Malcolm's dad was a blacksmith at Heath Steel Mines in New Brunswick. Malcolm recalls his magic with a piece of steel, but that he was missing for much of his childhood. Malcolm did go to his work often on weekends, and he learned how to do blacksmithing and tempering. Sometimes he would sit and ride in the huge dump trucks and recalls driving them in his lap a few times. When his father had time, he would take him fishing after work in the summertime. Although he didn't have siblings when he was growing up (they were significantly older than he) he had many cousins and friends. Saturdays and Sundays were for baseball, riding bikes and fishing in the pond although the fishing would turn into slime ball fights.

He remembers in those days his family did not approve of watching TV so he was outside almost all the time, except for Saturday nights when he would watch cartoons. He loved this because it was time with his mother. His fond memories of his mother revolve around Saturday nights. She would give him 50 cents to buy candy, and he would come home excited to watch the shows. And then they would watch cartoons.

His parents had him at an older age so as he grew, his work around the house increased and became essential. Each year, they needed 15 cords of firewood, so he

learned to cut it with a splitter and then stack it. At first he helped, then it became solely his responsibility.

When he was 16, started working for Brookdale Nurseries which also owned a company, International Harvester Sales and Service. His job was to work in restoring fields thus he spent a lot of summers picking rocks and driving an international dump truck restoring fields. This involved using a bush hog and mowing everything, then bringing in bigger tractors to prepare the ground. They would remove the rocks so they could seed and roll. The company also owned a sawmill. In that area of New Brunswick, there were a lot of large cedars so much of the time was spent working on the sawmill driving the equipment, removing slabs stacking lumber and then moving it and putting it in different areas to dry. It was a well-paying job for his age but it also meant he was working all of the time. He credits that (and his father) for his work ethic. But he also notes with sadness that his father's work ethic also meant ignoring health issues, something that has followed Malcolm as well. He has suffered from significant health problems for years.

He also put his house chore skill to use by splitting firewood with the big tractor and splitter. This is how they heated the greenhouses, as this was the 70s and oil wasn't a great option. They also would take the dirt from the pots that weren't being used, run it through a screen, clean it all up and mix it with parasite and some other products. From

there, he would put it in a big hoppers hook, attach a steam line to it, and then begin to make clean fresh earth for potting plants.

In the late 70s as he was getting older, he started work on building homes. He assisted in building several beautiful cedar cottages. He also worked as a carpenter's helper. During this time, when he was able, he would work weekends doing construction with his uncle. When he graduated high school (which he finished in the top 20% of his class), he started a project for a dentist friend, painting a three-story home.

After graduating high school, he entered Bible school where he attended from 1982 to 1985. In 1984, he met his wife Liz, who was from Washington, Maine and was just starting school. They dated for three years and followed her father's wish for them to refrain from getting married until she finished her three years of school. She graduated in April of 1987 and they were married just a month later in May 23, 1987. While waiting for Liz to graduate, Malcolm put his multi-skills in many trades to use and worked several different jobs, all involving building. Then he went to work for this mission in New York, the Children's Bible Fellowship in Carmel, New York as a printer. He ran a printing press and Liz worked in the school. They did this for a year then then decided to move to her home state of Maine.

That summer Liz's father gave them three acres of land and they did the work clearing and cleaning and getting it ready for their first little house, a double wide. Malcolm worked doing siding and windows and started working in Boothbay and

Islesboro at Woodmaster of Maine. He started in sales, becoming a sales manager then the General Manager. He has very fond memories of the owner.

Although he was happy, the pay wasn't great and there was no more room for advancement, so he went to work for a finance company. When that owner decided he wanted to get into construction, they put together Casco Bay Home Improvement. He did this for several years until a gentleman by the name of Andy Thompson decided he was interested in the company, so Malcolm sold the company but never received the promised payout. Feeling a bit bitter about the construction industry, he went back into selling in a very hot industry, credit card systems that would go to different stores and restaurants in the area.

During this time Malcolm and Liz found a small home on the lake that was for sale just across the street from their current address. It was originally just an unfinished shell, with some minor damage. He applied for a construction loan, and they built it themselves. It was a waterfront, approximately 75 feet from the water. They were so proud because they did the work themselves. It was this house that produced the wonderful memories of becoming parents to Cody, Kelsey, and Trenton.

Malcolm recalls how much fun it was raising them. They did everything together. While he would work hard all week, he remembered the importance of his childhood and spending the weekends together. Similar to when he was a child, they would go hunting and fishing whenever the work schedule allowed.

Malcolm is so proud of their strength and success. They were very different but all very driven and they remain his pride and joy till this day. They have all stood by him to this day. His joy in his children was magnified when his grandchildren started coming. Cody and his wife Ashley were the first and they had a boy, Broderick (Brody). Malcolm recalls the excitement of meeting Brody that very first day when he was in Cody's arms then they told him his full name was Brody Malcolm Ian Stewart. They had another boy, Finnegan (Finn). Kelsey was the next giving birth to Emma, who is now a little four-year-old girl with a very strong will, a later gave birth to another girl. Although he doesn't see them in person, he FaceTimes and talks to them all the time. They are his everything. To Malcolm family is everything. To his family, Malcolm is everything. Even today, with the significant health issues, Malcolm continues to be involved in his church, for his friends and neighbors, and tries to do what is right. See various letters of support.

MALCOLM AND CASTLE BUILDERS

Even though he had some reservations, Malcolm had an opportunity in 2015 to start his own business. Had it been years prior, it would never have happened, but he thought about the joy of working with his father and uncle and now had an opportunity to do that with his son. With that, Malcolm opened Castle Builders in Union, Maine in 2016. At first, the business model was residential renovations and construction, including

roofing, siding, decks, additions, and interior upgrading. The business absolutely took off, as Malcolm notes, was a blessing and a later curse. In his own words:

“For years, the State has said I have no remorse or willingness to accept responsibility. They have no idea. I would pay everything back if I could. I would be homeless and sell my home if it made people whole. If I could have one year back, it wouldn’t be when we closed (in 2019). It would be the first year I was open. During that first year, I didn’t pay attention to our success and didn’t think about the need to ensure that work could be performed. I simply always thought I could manage it with work ethic. We didn’t take vacations. We didn’t buy fancy things. We worked. Nonstop. I tried to be everything, and it ended in disaster. We didn’t need the general manager in 2019. We needed it in 2016 so that I could focus on the actual work and not the management which wasn’t my strength. It was also idiotic to think we could run both Agway and Castle. I made more mistakes than I can count. Then I continued to try and bring cash in. I absolutely was robbing Peter to pay Paul. I have never denied this.”

As the Government notes, the early days of Castle Builders were marked by success. There were many successful projects and happy customers, including repeat ones. There were also staff to perform the work. At the start, Castle was highly successful and generated repeat business.

As with many other construction businesses, there were errors made in accounting and related to the work force. Work crews saw consistent turnover, which was not

uncommon in this industry. 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 summaries. Malcolm hoped to secure cash infusion by bringing in a financial partner(s) but was unable to close any deal. The Government is so quick to point to the statements by Cody Stewart, Malcolm's son, when making their arguments regarding the business but they ignore that Cody never states that Malcolm Stewart intended to defraud any individual. On the contrary, "Cody Stewart noted that Malcom's braking point occurred when he could not make payroll. He also noted that Malcolm thought he had an investor, but it fell through." Cody Stewart statement. He further stated that "when workers had troubles with paychecks, they left suddenly" which helped create situations when work could not be performed. *Id.* Cody Stewart's "biggest concern was using money for jobs taken previously," a known activity of contracting businesses. As Malcolm also notes:

"It is true. Towards the end I was overstating the business solvency.⁴ I wanted desperately to keep the business afloat. I wanted things to work. It is insane to think I wanted to fail. I always thought we could end up doing the work. I was always hoping for some magic. And I completely understand how doing so allowed people to pay a lot of money for work we couldn't perform. I have never been insensitive to that. When I

⁴[T]he law recognizes the fact that men will naturally overstate the value and qualities of the articles they have to sell. *Kimball v. Bangs*, 144 Mass. 321, 11 N.E. 113, 114 (1887). Puffery, exaggerating or overselling one's ability to convince those to hire him are not to be automatically equated with liability. *United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 349 Wis.2d 587, 836 N.W.2d 807, 815-16 (2013).

filed for bankruptcy, I left behind every business asset. All of them. I left our house. I left everything but my truck and clothes. I wanted everything I left to pay debts. I have never done anything to prevent that from happening.”

The Government is quick to point out that Castle Builders left many debts to various suppliers. This is completely true. What does it also show? Malcolm was trying to complete projects. After all, if there was an intent to deprive and profit, why buy materials? Why continue to employ workers?

MALCOLM’S CURRENT HEALTH

Malcolm has a past medical history of hypertension, hyperlipidemia and anemia. He developed End Stage Renal Disease (ESRD) from hypertension. In January 2021, Mr. Stewart was admitted to Greenville Memorial Hospital in Greenville, South Carolina and Dr. Blake Shusterman started his dialysis treatments with a Permcath. A Permcath is a flexible tube that is temporarily inserted into a blood vessel in the neck or upper chest to provide long-term access to the bloodstream for a patient on dialysis. After this hospitalization, Mr. Stewart was discharged with the Permcath and began his outpatient dialysis treatment at DaVita Saluda River Dialysis in Piedmont, South Carolina on a Monday, Wednesday, and Friday schedule.

On March 11, 2021, Mr. Stewart had an arteriovenous fistula (AVF) inserted into his right arm. An AVF represents a surgical connection between an artery and a

vein that is created to provide access for dialysis. Mr. Stewart now received dialysis when needles were inserted into this right AVF.

Malcolm currently continues to receive dialysis three times per week. Missing one treatment can be life-threatening. He also suffers from hypertension, anemia, hyperkalemia, metabolic bone disorder, and generalized pain. While he is a great candidate for a kidney transplant, the current legal situation has made that an impossibility.

ARGUMENT

The Law Court held that sentencing justices should compare basic sentences, not final sentences and there is no database of basic sentences imposed in theft cases. *State v, Stanislaw*, 21 A.3d 91, 94-95 (Me. 2011). Yet the Government has tried to make comparable sentences, leaving out important distinctions in those cases. For example, Terri Moulton, without known health issues, went to trial and was found guilty of forging checks, directly profiting from her actions in upwards of \$700,000. Scott Kennedy diverted State funds for his own use.

<https://www.bangordailynews.com/2022/11/17/bangor/state-worker-stolen-jobless-benefits-xoasq1i29i/>. Tony Glidden had no known health issues and according to the Government, had continued to offer excuses that were outright falsehoods, while

continuing to take deposits following his arrest. His excuses included: "[n]ot limiting to a few of the following: the weather, man power, theft of equipment, death of an employee, theft by his employees, a lending company stole his money, he had no money to buy materials until he paid off the debts so he could get a loan, another customer had not paid him, he had COVID, his worker stole his truck, he's behind on projects, he fell off a roof and broke his wrist." He also was not paying employees nor buying material. Sherrie Genness was stealing money from the Youth Center account for her personal gain. Dale Thistle, who received, according to the Government, "a pretty significant sentence," stole money from his client for personal gain. Eric Murphy used funds that were intended for consumer mortgage loans for his personal use. <https://www.mainebiz.biz/article/broker-gets-prison-for-mortgage-scam>. Anita Volpe, who was sentenced by this Court and was referred to as Maine's Bernie Madoff, used her 1 million in stolen money to purchase property, pay off credit card debt and replace funds she had taken from the other clients. Robert Lindell used the three million dollars he stole to pay for personal expenses, including buying, renovating, and living in a California wine country home with the stolen funds. <https://www.newscentermaine.com/article/news/former-lawmaker/97-94c6311b-04b2-449a-bfec-753a1e90871f> . Tammy Barker gambled away the 400k in funds she stole. <https://www.maine.gov/ag/news/article.shtml?id=308728>

This Court has complete discretion in imposing sentence based on all relevant factors that exist in this matter including Mr. Stewart's age, lack of criminal history, lack of personal gain from the purported activities, and most important, health.

It is also inarguable that a sentence in this case would solely be for retributive purposes as the empirical evidence is unanimous that there is no relationship between sentence length and general or specific deterrence, regardless of the type of crime and in fact, the evidence suggests given his age, there is virtually no chance of recidivism. http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf (“Recidivism rates decline relatively consistently as age increases,” from 35.5% under age 21 to 9.5% over 50).amily ties”); see also 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...”). This is only enhanced based upon the crimes in this matter. See David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*,

(1995) (finding no difference in deterrence for white collar offenders between probation and imprisonment); Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 *Criminology* 357 (2010) (study of over a thousand offenders whose sentences varied substantially in prison time and probation found that such variations “have no detectable effect on rates of re-arrest,” and that “[t]hose assigned by chance to receive prison time and their counterparts who received no prison time were re-arrested at similar rates over a four-year time frame”).

Additionally, Mr. Stewart’s significant health problems show that any incarceration is effectively a death sentence. See *infra*. Courts are required to examine whether the overall sentence ensure(s) that “needed ... medical care” is provided “in the most effective manner.” 18 *U.S.C.* §3553(a)(2)(D). The Sentencing Commission recognizes that “[p]hysical condition . . . may be relevant in determining whether a departure is warranted,” and has always recognized that “in the case of a seriously inform defendant, home detention may be as efficient as, and less costly than, imprisonment.” *USSG §5H1.4, p.s. (2010)*.

For sentencing, the Court must “consider all ... factors and make an individualized assessment based on the facts presented,” *Kimbrough v United States*, 552 U.S. 85, 90 (2007) and explain how the facts relate to the purposes of sentencing. *Id.* at 53-60; *Pepper v. United States*, 131 S. Ct. 1229, 1242- 43 (2011). The Court’s

“overarching” duty is to “impose a sentence sufficient, but not greater than necessary’ to accomplish the goals of sentencing.” *Id.*

In imposing a sentence in Maine for a felony that potentially includes a term of imprisonment, and in setting the length of that term as well as unsuspended portion, the court shall employ the following three-step analysis:

1. The court shall first determine a basic term of imprisonment by considering the particular nature and seriousness of the offense as committed by the offender.

2. The court shall next determine the maximum period of imprisonment by considering all other relevant sentencing factors, both aggravating and mitigating, including but not limited to, the character of the offender, and the offender’s criminal history, the effect of the offense on the victim, and the protection of the public interest.

3. The court shall finally determine what portion, if any, of the maximum period of imprisonment should be suspended, and the appropriate period of probation.⁵ *17-A*

M.R.S.A. Section 1252-C.

⁵The general purposes of sentencing 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; (2) to encourage restitution in all cases in which the victim can be compensated and other purposes of sentencing can be appropriately served; (3) to minimize correctional experiences which serve to promote further criminality; (4) to give fair warning of the nature of the sentences that may be imposed on conviction of a crime; (5) to eliminate inequalities in sentences that are unrelated to legitimate criminological goals; (6) to encourage differentiation among offenders with a view to a just individualization of sentences; (7) to promote the development of correctional programs which elicit the cooperation of convicted persons; and (8) to permit sentences that do not diminish the gravity of offenses. *17-A M.R.S.A. §1151.*

I. Seriousness of the Offense

At the first stage of the analysis, the basic sentence should reflect that this is a lower quadrant offense based on Malcolm's actions in the criminal activities as compared to all the other possible methods of the criminal conduct. *State v. Schofield*, 904 A.2d 409 (Me. 2006). Malcolm's direct criminal actions resulted in no physical injuries or threats to any person. See *State v. Downs*, 916 A.2d 210 (Me. 2007)(higher sentence not justified where defendant "did not use threat of force" and chose to commit criminal activity when individuals and families could not be confronted). His criminal activity also had factors that suggest this was hardly the result of an individual who simply chose to ignore the law or acted in a way for personal gain.

II. Aggravating and Mitigating Factors

At the second stage of the analysis, there are no aggravating factors. There are plenty of mitigating factors, however. The mitigating factors include Malcolm's state of mind which lacked formulization of intent to commit brazen criminal activity. See *State v. DeWalt*, 684 A.2d 1291 (Me. 1996)), his remorse (repentance and remorse are proper factors for mitigation of sentence, see *State v. Discher*, 597 A.2d 1336 (Me.1991)). He is remorseful about his actions, a fact indicative by his willingness to

take responsibility for his actions and enter an Alford plea, thus acknowledging that a jury/judge could properly convict him under law. Further, he has waived any appellate rights, which not only prevented this matter from perpetual delay, but also would have most likely delayed any sanction imposed by the Court. A noted and decorated appellate law scholar believes that legitimate appellate issues exist in this matter. See Report of Rory McNamara, Esq.

III. Suspended Time

At the final stage of the analysis, the court should suspend Malcolm's sentence. If one looks at factors used in consideration for sentencing, they weigh in favor of a suspended sentence. By installing a suspended sentence in this matter, the Court can create both a deterrent effect and allow for continued rehabilitation. 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 fifteen-year-old Missouri study, still relevant today, shows “that recidivism rates actually are lower when offenders are sentenced to a form of supervision, 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>.

A. Rehabilitation as basis for suspended sentence

The possibility of rehabilitation effecting prevention of further criminal activity by an offender is properly considered in determining the suspension portion of sentence and supervisory period for rehabilitation. *State v. Smith*, 600 A.2d 1103 (Me. 1991). The remainder of his sentence being suspended with methods of rehabilitation still offers the necessary punitive disposition. Malcolm remains a convicted felon. He has every incentive to continue to engage stay out of the prison setting.

B. Incarceration not a deterrence

It can also be pointed out that there is no evidence that incarceration in this matter offers any form of deterrence. *Discussed generally, section III.* The empirical evidence is unanimous that 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...”). Even the Sentencing Commission has found that “[t]here is no correlation between recidivism and guidelines’ offense level... . While surprising at first glance, this finding should be expected. A specified sentencing range is not intended or designed to predict recidivism.” U.S. Sent’g Comm’n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 15 (2004) [“U.S. Sent’g Comm’n, *Measuring Recidivism*”]. See also Part IV.A.3, *infra*. And according to “the best available evidence, ... prisons do not reduce recidivism more than noncustodial

sanctions.” Francis T. Cullen *et al.*, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 *Prison J.* 48S, 50S-51S (2011).

a. Cost of incarceration versus probation

According to a recent Bureau of Justice statistic, the overall occupancy rate of the nation’s jails remains largely unchanged from the premier extensive survey that was conducted in 1986, finding that the overall occupancy was 90% of the rated capacity. <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=261>;

<https://www.bjs.gov/index.cfm?ty=tp&tid=131>

This number does not appear to differ from the local facilities being the Maine State Prison, Windham Correctional Facility, and the Knox County Jail. This is an important factor to consider when examining the public interest in the sentence that Malcolm receives. Each incarcerated individual presents a cost to the community compared to the much cheaper cost of supervision.

<http://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system>.

This is further discussed, *infra*. Additional inmates on an already taxed system will only lead to further complications in cost, manpower, and could lead to danger to individuals,

especially non-violent individuals such as Malcolm. This doesn't even consider the additional costs on incarceration due to the health issues in this matter.

b. Incarceration is not necessary for non-violent offenders

Maine's previous Chief Justice, Leigh Saufley, agreed that incarceration is less necessary in cases like this. During a State of the Judiciary address, she stated that "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." <http://bangordailynews.com/2015/02/24/politics/maine-chief-justice-wants-fewer-people-jailed-before-trial/>.

The facts of this matter clearly show there is no danger to the community or risk of violence. The Government can simply point to no reason for incarceration outside of vengeance.

c. Post-Offense Conduct

Another important consideration is the age of the offense and the post-offense conduct. The actions are from 2018 and 2019. "In determining the sentence to impose ... the court may consider, *without limitation*, any information concerning the background,

character and *conduct of the defendant*, unless otherwise prohibited by law. See *Pepper v. United States*, 562 U.S. 476 (2011). In *Pepper*, the Supreme Court stated that “*fundamentally, evidence of Pepper’s conduct since his release from custody ... provides the most up-to-date picture of Pepper’s history and characteristics*” (emphasis added).

Malcolm’s conduct while on bail has been exemplary. See *U.S. v. Munoz-Nava*, 524 F.3d 1137 (10th 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 F.3d 465 (6th 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 (11th 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 period of supervision, the supervision would be over seven years.

d. Malcolm’s health issues are too extreme for incarceration

It would be impossible to argue that Mr. Stewart will receive effective medical care in any prison facility. The most extensive audit by the Office of the Inspector General found systemic deficiencies in the Bureau of Prisons’ delivery of health services.

It found that at a number of institutions, the Bureau of Prisons “did not provide required medical services to inmates,” including inadequate treatment for chronic conditions, failure to properly monitor side effects of medication, allowing unqualified providers to render medical services, and failure to meet performance target levels on treatment of serious conditions, including diabetes. See U.S. Dep’t of Justice, Office of the Inspector General Audit Division, *The Federal Bureau of Prison’s Efforts to Manage Inmate Health Care* ii-xix, 32-34 (2008), available at www.justice.gov/oig/reports/BOP/a0808/final.pdf. In light of the Inspector General’s audit, one cannot argue that any facility will provide “the most effective” treatment for Mr. Stewart’s vast health issues. See *United States v. Martin*, 19 363 F.3d 25, 49-50 (1st Cir. 2004) (upholding departure when BOP had policy of not administering the only medication successful in treating defendant’s Crohn’s disease); *United States v. Gee*, 226 F.3d 885, 902 (7th Cir. 2000) (finding also about the aftercare, sanitation, and the other afflictions. *Id.* It is also because Mr. Stewart cannot engage in self-care. See *United States v. Thompson*, 984 F.3d 431, 433 (5th Cir. 2021))(recognizing a “[m]edical [c]ondition” might be sufficiently serious to warrant release under § 3582(c)(1)(A) where the defendant has a terminal illness or a condition “that substantially diminishes the ability of the defendant to provide self-care”) quoting U.S.S.G. § 1B1.13 cmt n.1(A)); see also *United States v. Helmstetter*, No. CR 92-469, 2023 U.S. Dist. LEXIS 60593, 2023 WL 2810707, at *3 (E.D. La. Apr. 6, 2023) (To be sufficiently serious to warrant release

under § 3582(c)(1)(A), a medical condition must: (1) be a terminal illness, or (2) a condition that substantially diminishes the defendant's ability to provide self-care within the correctional facility environment and from which he is not expected to recover.) (emphasis added) citing U.S.S.G. § 1B1.13 cmt. n.1(A)).

There are many more examples where Courts considered health when imposing sentence particularly in cases of older Defendants whose convictions were white collar crime. See *United States v. Burks*, the sentencing court imposed a sentence of one month incarceration and five years' probation despite a Guidelines range of 57-71 months where, *inter alia*, the defendant suffered from degenerative diabetes. 2010 WL 1221752 at *2;(E.D.N.Y. Mar. 29, 2010) see also *United States v. McFarlin*, 535 F.3d 808, 810-11 (8th Cir. 2008) (affirming variance for 56-year no abuse of discretion where district court concluded BOP's letter stating its ability to handle medical conditions of all kinds was merely a form letter and that imprisonment posed a substantial risk to the defendant's life).

The Bureau of Prisons (hereafter 'BOP') represents that they have the ability to care for Mr. Stewart.⁶ BOP made the same representations during COVID where thousands of inmates died as a result of the same assurances.

<https://www.themarshallproject.org/2024/04/18/covid-prison-deaths-data>. Perhaps they

⁶It is understood why BOP takes this position as it would be fundamentally problematic if BOP ever acknowledged that a person with a health issue could not be incarcerated. It is noteworthy that Knox County Jail, being intellectually honest, has stated they cannot care for Mr. Stewart. See letter to the Court from counsel for Knox County Jail.

made the same assurances about Victor Valdez.

<https://solitarywatch.org/2010/08/03/another-suspicious-death-in-maine-state-prisons-lockdown-unit/>. It is undisputed that there have been significant concerns raised by inmates in the Maine prisons for years. <https://www.mainepublic.org/health/2021-03-08/its-horrible-report-alleges-improper-care-by-private-health-provider-in-maine-state-prison>

Dr. Griffiths and Shusterman’s reports outline the significant concerns with incarceration. See Reports of Dr. Griffiths; Report of Dr. Shusterman. As they explain, it is not just an issue with needing dialysis three times per week. *Id.* It is an older defendant with numerous health problems, including coronary disease and who has undergone many medical procedures. *United States v. Alatsas*, 2008 WL 238559 (E.D.N.Y. Jan. 16, 2008) (imposing a term of probation, despite Guidelines range of 24-30 months where, *inter alia*, “[d]efendant has multiple complex medical problems, which will be better cared for outside of prison.”). In *United States v. Barbato*, 2002 WL 31556376 (S.D.N.Y. Nov. 15, 2002), a pre-Booker decision, the defendant pled guilty to using extortionate means to collect extensions of credit. The sentencing court granted a downward departure from a then-mandatory Guideline range of 24-30 months imprisonment based on the defendant’s history of heart problems and imposed a sentence of home detention with two years of supervised release. *Id.* Notably, the *Barbato* Court imposed home confinement even though the prosecution contended that the Bureau of Prisons would be

able to provide adequate treatment for the defendant's health conditions. *Id.* The Court noted that “[i]t is often relevant, though not always controlling, whether the BOP can provide adequate care.” *Id.* at *4. Case 1:17-cr-00201-ABJ Document 527 Filed 02/25/19
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e. COVID-19 is an additional risk for Malcolm

The severity of a prison sentence has two dimensions: its length, and the harshness of the conditions, and the harsher the conditions the shorter the sentence should be. *U.S. v. Spano*, 476 F.3d 476, 479 (7th Cir. 2007)(there is enough merit to the argument to allow a sentencing judge to take it into account).

The pandemic changed incarceration as society has known it. The United States was woefully unsuccessful in both containing or minimizing the outbreak of COVID-19, especially in its prisons. *United States v. Federico*, 4:12-cr-00862-YGR-2N.D. California August 14, 2020. Infections spread to many Bureau of Prison facilities and courts have found such facilities and the individuals imprisoned therein to be highly at risk of COVID-19. *Id.* Data shows by that the number of inmates and BOP staff members who tested positive for COVID-19 nearly doubled during the pre-vaccine days from November 6, 2020 to 40,533 on January 7, 2021. *U.S. v. Santos*, 2:16-cr-00174-JDL, ECF #183, pg. 3-4. Some studies show those infected in prisons were actually triple.

<https://www.cidrap.umn.edu/news-perspective/2022/03/covid-19-us-prisoners-staff-triple-community-rate>. Although the numbers significantly diminished after the introduction of the various vaccines, the variants continue to present an unknown factor. https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/. The percentages of person's impacted by COVID-19 in the prisons far exceeds those out of BOP custody (approximately 19.7% of the population of BOP while it has infected roughly 4.3% of the general population of the United States). *Id.*

Individuals who are incarcerated are at great risk of contracting the virus-quite simply, the conditions of confinement make social distancing next to impossible. *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191, 17-18 (S.D.N.Y. March 26, 2020). The Bureau of Prisons acknowledged that the risks of the rapid transmission of contagion in the tight quarters of prisons and jails present significant challenges in keeping both staff and inmates safe and healthy. *See Fed. Bureau of Prisons, Program Statement 6190.04: Infectious Disease Management (2014)*.

In response to this, BOP instituted measures designed to reduce the risks of transmissions, but these measures created isolation, and minimal socialization. Long before the current pandemic, Courts noted that these measures significantly increased the harsh prison conditions. *See U.S. v. Noriega*, 40 F.Supp.2d 1378 (S.D.Fla. 1999)(sentence reduction appropriate because of harsh nature of incarceration – “There is little question that [confinement] is a more difficult type of confinement than in

general population. For some, the consequences of such deprivation can be serious.”); *McClary v. Kelly*, 4 F.Supp.2d. 195, 207 (W.D.N.Y. 1998) (“A conclusion however, that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this court as rocket science. Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances.”)(internal citations omitted). The culmination of lengthy lockdowns, isolation, unsanitary conditions, resulted in a BOP “Kafkaesque” quarantine policy. *U.S. v. Separta*, (S.D.N.Y. April 19, 2020.) Those include draconian lockdown measures, confining pretrial detainees and convicted inmates in small cells for up to 23 hours per day, and at times up to 72 hours straight, triple-bunking some inmates in two-person cells; sharply curtailing contact with family and friends; cancelling educational and rehabilitative programs; eliminating or reducing needed medical care; and providing misinformation that frightens, destabilizes, and demoralizes. *See Stirling v. Salazar*, No. 20-cv-00712-SB (D. Or. June 30, 2020), ECF No.16; *U.S. v. Tyler Louis Henderson*, No. 3:18- cr-00457, Transcript of Sentencing at 20:6–18 (“the risk that in [a custodial] setting it's difficult to escape COVID-19. It's difficult to do anything to keep it away, the things that the rest of us can do like social distancing and hand sanitation etc.” *Id.* at 20:19–25. {T}he virus, “quite frequently it's a lot like solitary confinement in prison now, or

at least a lot different than it used to be. There are no or reduced programs, and other things make it a far more difficult sentence to serve,” agreeing that these factors should be taking into account “in reducing the sentence here.”) *Id.* at 21:1–7; *see, e.g.*, Walter Pavlo, *Bureau of Prisons Using Solitary Confinement As A Means To Curb Covid-19 Contagion*, FORBES, July 16, 2020, at

<https://www.forbes.com/sites/walterpavlo/2020/07/16/bureau-of-prisons-using-solitary-confinement-as-a-means-to-curb-covid-19-contagion/#7e2b8fae193a>

(discussing how the “deplorable and [un]sustainable” conditions in the BOP are “causing irreparable harm to ... inmates and their families.”)

If incarcerated, Malcolm would be subject to such isolation for a simple reason;

COVID-19 is fatal in a staggering 25-33% of patients on dialysis.

<https://pmc.ncbi.nlm.nih.gov/articles/PMC10679386/>;

<https://pmc.ncbi.nlm.nih.gov/articles/PMC8842412/>. Thus, his incarceration for a non-violent offense where he presents no danger to society would be exceedingly cruel and extraordinarily dangerous.

CONCLUSION

There is nothing on the record that the public needs to be protected from Malcolm. 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 dangerous offense. *State v. Dwyer*, 985 A.2d 469 (Me.2009). And while the verbosity of this Memorandum offers many arguments, perhaps the best summary comes directly from Judge Kane of the Colorado District Court. In *United States v. Rausch*, 570 F. Supp. 2d 1295 (D. Col. 2008), he was faced with many of the same issues before this Court, on a case far more serious in terms of the criminal act committed. In that case, he eloquently explained his non-incarceration sentence on matter with a presumptive ten-year period of prison:

“There is no dispute that Rausch is in dire need of a kidney transplant. The Government urges that the Bureau of Prisons can provide for such surgery. It submits an affidavit from Newton E. Kendig, M.D., of the United States Public Health Service, assigned to the Federal Bureau of Prisons as the Assistant Director, Health Services Division and Medical Director of the Bureau of Prisons. Dr. Kendig states that organ transplant and related care for inmates in the custody of the Bureau of Prisons is available and that the Bureau will pay for such services and related care for inmates, if the Bureau finds that a transplant is appropriate. He further states that dialysis is available to inmates either in Bureau facilities or through private providers. He advises that four Bureau facilities have the ability to administer dialysis treatment to inmates at those facilities.

Organ transplantation, however, is not available within such facilities and occurs in outside institutions such as the University of Massachusetts Memorial Medical Center. Dr. Kendig further states that "The BOP does not maintain or administer any organ transplant lists, and cannot place medically eligible inmates on the UNOS (United Network for Organ Sharing) list. Transplant centers, such as UMass Memorial Medical Center, have the authority to place candidates on the UNOS national transplant list and depend on UNOS to match available organs to compatible candidates."

If sentenced, the Bureau of Prisons, and not the Court, determines to which facility a prisoner will be assigned, and available space is one of the controlling criteria. Pursuant to my request for additional information, the U.S. Marshals Service advised the Probation Office that should the Court issue an order directing the Marshals Service to provide non-custodial travel based on Rausch's health issues, the Marshals Service would purchase an airline ticket for him to wherever he may be designated. This response was made, however, before he had part of his colon removed and a colostomy bag installed. There apparently is no provision for transportation with medical personnel accompaniment. This may be medically required due to emergencies and the extensive list of medications, including prescribed narcotics, that Rausch must take on a scheduled basis.

A number of problems presented by the Government's response are addressed by Rausch's counsel in her Combined Reply Brief To The Government's Sentencing Statement and The Government's Response Opposing Defendant's Motion For Below-Guideline Sentence.

Dr. Kendig's Declaration is just as interesting for what is not said as it is for what is said. What is not said is that the Bureau of Prisons has only one relationship with a transplant center — the University of Massachusetts Medical Center. Only the transplant center has the authority to place an inmate housed at [Federal Medical Center in Devens Massachusetts] on the UNOS transplant list. Mr. Rausch is already on the UNOS transplant list, but once imprisoned, he is passed over until the Medical Director approves and agrees to pay for the procedure. But first, Mr. Rausch must be approved for transplant "by clinical and professional staff" at a BOP institution. If approved by the BOP staff, he will be referred to the UMass Medical Center. The

UMass Medical Center then must have access to Mr. Rausch through FMC Devens to determine whether he remains a good candidate. Only upon UMass approval, is the case submitted to the BOP Medical Director, who then, must also approve the referral and agree to pay for the procedure. (emphasis in original)

Rausch now has health insurance. It would not cover any medical expenses he would incur if imprisoned. Dr. Kendig's Declaration also points out that placement at FMC Devens is made if space is available and "there are no correctional or other issues precluding designation at FMC Devens." No evidence has been presented that Rausch could be housed in another Bureau of Prisons medical facility that would give him access to the transplant center in Massachusetts. The other looming issues include Rausch's being a former Bureau of Prisons employee, his mental deficits and his susceptibility to abuse, manipulation and perhaps assault by other prisoners. Following a complete evaluation by the University of Colorado Health Sciences Transplant Team, Rausch is already on the UNOS list. Given the foregoing, it is not predictable that he would remain on the list if placed in the custody of the Bureau of Prisons or that he would be assigned to or remain at FMC Devens.

Finally, assuming that Rausch were sent to FMC Devens, remained there and received a transplant, he would be returned to the Bureau of Prison's custody. Stabilization post-transplant would be controlled by the Bureau and not by the UMass experts on the transplant team. If the Bureau decided to transfer Rausch to another facility, access to care by the doctors on the transplant team would be denied both by geographical necessity and bureaucratic fiat.

The Need For the Sentence Imposed

A. To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

Punishment is unpleasant and inflicted on an offender because he has committed an offense. It is not merely the inevitable consequence of a person's voluntary action, but rather the union of the individual's conduct with the recognition by society that its rules have been violated. Punishment is imposed by an agent authorized by the system, the rules of which have been

violated. It is imperative that the agent act within the scope of the authority designated to him to reflect the societal mandate rather than personal preference or caprice.

The retributivist approach, advocated by the prosecution in this case stresses guilt and dessert, looking back to the crime to justify punishment and denying or ignoring that the consequences of punishment have any relevance to its justification. On the other side of the coin, the utilitarian approach taken by defense counsel insists that punishment is justified only if it has beneficent consequences that outweigh the intrinsic evil of inflicting suffering on another human being.

Lord Justice Denning, the great English jurist, has called punishment "the emphatic denunciation by the community of a crime." In his view, and I see great value in it, punishment reinforces the community's respect for its legal and moral standards. The restraint on this principle, however, is that punishment is only justifiable when it is deserved. Rausch has admitted guilt and the proof is evident and overwhelming. Even so, the utilitarian assertion is that every human being should be treated with at least a minimum of respect as a source of rights and expectations and not merely as an instrument for promotion of the social order.

While the practice of punishment has been extant throughout the history of human culture, so, too, has been its cautionary curtailment. As Judge Weinstein observed in *United States v. Gigante*, 989 F. Supp. 436, 442 (E.D.N.Y. 1998):

[T]he principle of modifying a sentence to take account of a defendant's frailty has strong and ancient roots. See, e.g., The Code of Maimonides, Book XIV, The Book of Judges (Abraham M. Hershman, trans., Yale Univ. Press 1949 (emphasis omitted) ("How many stripes are inflicted . . . as it is said: to be beaten . . . according to the measure of his wickedness . . . (Deut.25:2). But the number is reduced in the case of a frail man . . .").

In The Letters of Abelard and Heloise, 159 (Michael Clanchy ed., Betty Radice, trans., Penguin Classics 2004), one finds the following: "[F]or there is a well-known saying, 'The law was not made for the sick.'" (Letter from

Abelard to Heloise discussing caring for the sick and giving them all that they require). Further, in Dostoyevsky's *The House of the Dead and Poor Folk*, 180 Constance Garnett, trans., (Barns and Noble Classics 2004), we read: "It is useless to punish a sick man." *Id.* (explaining the absurd practice of imprisoning sick men and making them wear shackles).

Even when the U.S. Sentencing Guidelines were considered mandatory, downward departure was authorized under USSG Section 5H1.4 for "extraordinary physical impairment":

- *United States v. Willis*, 322 F. Supp. 2d 76 (D. Mass. 2004) (downward departure to 2 years probation warranted for defendant convicted of tax evasion because defendant was 69 years old and suffering from a combination of conditions including phlebitis, early stage chronic lymphocytic leukemia, colon polyps, hypercholesterolemia, and heart murmur. The opinion includes an excellent discussion of the principles behind the departure).
- *United States v. Jimenez*, 212 F. Supp. 2d 214, 216 (S.D.N.Y. 2002) (defendant convicted of illegally reentering U.S. after deportation received downward departure for extraordinary physical impairment because after the offense she suffered a brain aneurism that resulted in severe memory loss, loss of strength in her right arm, headaches, blurred vision and hallucinations).
- *United States v. Blarek*, 7 F. Supp. 2d 192 (E.D.N.Y. 1998) (defendant convicted of conspiracy to commit racketeering and money laundering granted downward departure to three years of supervised release because of HIV-positive status).
- *United States v. Rioux*, 97 F.3d. 648 (2d Cir. 1996) (upholding downward departure based on physical condition and good works for a defendant convicted of violation of the travel act and scheme to commit extortion; defendant had received a kidney transplant 20 years prior, and the new kidney was diseased requiring regular blood tests and medicines, and the defendant also received a double hip replacement requiring monitoring).

- *United States v. Long*, 977 F.2d 1264 (8th Cir. 1992) (upholding probation for defendant convicted of money laundering whose extraordinary physical impairment left him vulnerable to victimization in prison).

- *United States v. Baron*, 914 F. Supp. 660 (D. Mass 1995) (age and physical ailment of 76-year-old defendant, convicted of bank fraud, warranted downward departure to home detention and probation where defendant had cardiac condition and pituitary removed due to cancer, and was suspected of having prostate cancer).

Title 18 Section 3553(a) provides evaluative criteria to restore balance between the order of society emphasized by the retributivist approach and the utilitarian view that every human being must be treated with respect for his or her individual circumstances. The stated criteria may clash, and not all apply in each case. The criteria also point to individuated considerations: No one size fits all. The object of this balancing process is to achieve not a perfect or a mechanical sentence, but a condign one — one that is decent, appropriate and deserved under all attendant circumstances.

In considering the foregoing, I have decided to sentence Rausch to one day’s incarceration... .” *Id.*

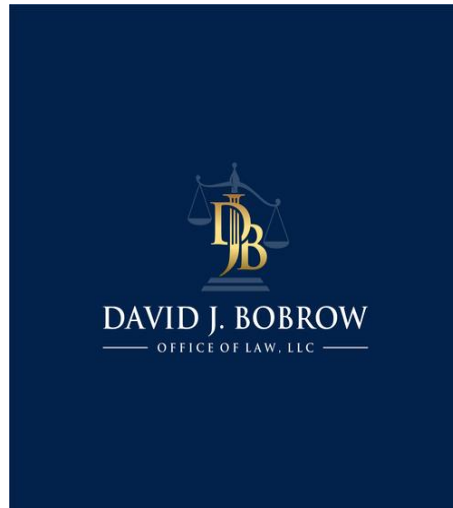
Malcolm Stewart urges the Court to follow the reasoning of Judge Kane and impose a fully suspended sentence rather than impose the vengeance ridden sentence requested by the Government. The stakes are simply too high and the need to protect society simply does.not.exist(emphasis added).

Dated this 27th day of October 2024 at Portland, Maine.

Respectfully submitted,

/s/ David J. Bobrow
Attorney for Malcolm Stewart

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CERTIFICATION

I hereby certify that I have today forwarded a copy of Defendant's Sentencing Memorandum to the Assistant Attorney Generals.

Dated: October 27, 2024

/s/ David J. Bobrow
David J. Bobrow, Esq.

