

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA)	
)	Criminal No.: CR10-4028MWB
vs.)	
)	Filed:
)	
KENT ROBERT STEWART)	Violation: 15 U.S.C. § 1
a/k/a KENT STEWART)	

MOTION OF DEFENDANT KENT ROBERT STEWART FOR THE COURT TO DEPART
OR VARY DOWNWARD FROM THE ADVISORY UNITED STATES SENTENCING
GUIDELINES RANGE

COMES NOW, the Defendant, Kent Robert Stewart, and pursuant to the Federal Rules of Criminal Procedure and the local Criminal Rules of the Northern and Southern Districts of Iowa, respectfully request that this Court depart or vary downward from the Advisory United States Sentencing Guidelines Range applicable to his sentencing on the above captioned matter. In support of this motion the Defendant respectfully states:

1. That this Motion is made at least five (5) court days before the sentencing hearing.
2. That pursuant to the United States Supreme Court's Decision in Booker the United States Sentencing Commission Guidelines (2009) are advisory and not mandatory and discretion is given to the sentencing court to vary or depart from the guidelines unless prohibited by law.
3. That 18 U.S.C. §3553 also includes factors to be considered by the Court in the imposition of a sentence.

4. That pursuant to U.S.S.G. §1B1.8 this Court should not consider the value of commerce of any bid rigging project made known to the government by the Defendant as part of a cooperation agreement.

5. That pursuant to U.S.S.G. §3E1.1(a) the Court should decrease the offense level by two levels because the Defendant clearly demonstrated acceptance of responsibility for his offense by taking actions well over and above merely agreeing to plead guilty to charges brought against him and the United States agreed in the Defendant's plea agreement at paragraph 8(d) that the Defendant should receive the adjustment for acceptance of responsibility. Said plea agreement is attached hereto pursuant to the requirements of LCrR32(2).

6. Pursuant to U.S.S.G. §5K1.1 the Defendant should receive a three level downward departure for providing substantial assistance to the government in the investigation or prosecution of another person who has committed an offense. Pursuant to paragraph 9 of his plea agreement the Defendant has fully and continually cooperated with the government and in the event that the government disputes otherwise its dispute is arbitrary, capricious, and without foundation in evidence and fact. The Defendant has even requested the certified reporting of his final interview as evidence of his cooperation.

7. The Defendant was not the ringleader, organizer, or directing party in the conspiracy.

8. The Defendant has no previous criminal record.

9. There is nothing to suggest that the Defendant perpetuated the conspiracy over an extended period of time.

10. There is nothing to suggest that the Defendant would again engage in this criminal conduct or any other criminal conduct.

11. Pursuant to U.S.S.G. §2R1.1 and commentary following the Defendant did not engage in this conspiracy for personal profit, increase in salary, increase in bonus, or career enhancement.

12. Pursuant to U.S.S.G. §2R1.1 and commentary following paragraph 7 of the commentary the Defendant did not instigate this conspiracy and further did not cooperate in the conspiracy to restrict output or raise prices as the commentator's note is invariably the purpose of a conspiracy.

13. The Court should consider that pursuant to U.S.S.G. §5K2.11 the Defendant committed the crime in order to avoid a perceived greater harm to-wit the unfair competitive advantage enjoyed by co-conspirator GCC and its threats of extinction of the Defendant's small company and the inevitable loss of jobs by his 40+ employees. In such instances a reduced sentence may be appropriate provided that circumstances significantly diminish society's interest in punishing the conduct. The perceived harm, while merely economic, was not limited to the Defendant himself, but to his employees and their families. Society is not interested in seeing small locally owned businesses succumb to multi-national corporations.

14. Pursuant to U.S.S.G. §5K2.12 (coercion and duress) the Court may depart downward if the Defendant committed the offense because of serious coercion. It is admitted that the Advisory Guidelines do state in the same section, "notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure." However, the perceived financial difficulties extended far beyond the individual defendant to his employees and potentially to his customers if his businesses were unfairly eliminated and GCC was able to establish a virtual monopoly in the territory served by the Defendant's companies. Exhibits are attached hereto evidence the size and business strategy

of GCC to extend its influence specifically in the Midwest not only in the production of concrete, but in the production of cement powder which is a key ingredient not readily accessible from other sources. The monopolistic approach of GCC in eliminating competitors will further be evidenced by the Affidavit of Tara Hanson, which will be submitted with the brief in support of this motion.

15. The Federal Sentencing Guideline Manual generally recognizes that there are exceptions and situations not anticipated by the guidelines which may warrant a downward departure and that the guidelines are advisory as to “heartland” cases. The total context of the Defendant’s actions are not within the contemplation of the guidelines.

16. Great Lakes Concrete, Inc., which will more than likely be charged as well, is a closely held corporation owned one-third by the Defendant and 66% by three other individuals. U.S.S.G. §8C3.4 provides that the Court may offset the fine imposed upon a closely held organization when one or more individuals, each of whom owns at least five percent interest in the organization, has been fined in a federal criminal proceeding for the same offense conduct for which the organization is being sentenced. This section does not specifically address the issue of offsetting the corporate fine against the individual’s fine, but the Court, within its own discretion, should consider a downward departure in fining the Defendant as certainly the corporation will receive a duplicative fine and has already agreed to plead guilty and is awaiting a plea agreement from the United States.

17. The Defendant is the sole officer of Great Lakes Concrete and the business will fail and its 40+ employees and their families will be deprived of incomes totaling over \$1,500,000.00 per year in wages and over \$126,000.00 per year in medical insurance and additional 401k retirement benefits if the Defendant is incarcerated.

RELIEF REQUESTED

18. The Defendant respectfully requests that for the reasons set forth above the Court depart or vary downward from the advisory provisions of the Federal Sentencing Guidelines such that the Defendant is determined to be an individual with no previous criminal history with a final computation of level 8 and a fine as agreed upon by him in his plea agreement of \$20,000.00. Further, that the Court determine the offense level to be within Zone A and that in lieu of incarceration the Defendant be sentenced to such probation or house detention as the Court deems appropriate with such other provisions as the Court deems appropriate so that he may continue the operations of his closely held business.

STATEMENT OF BRIEFING

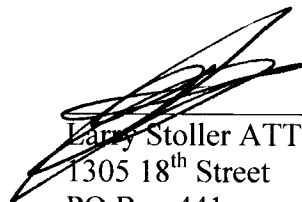
LCrR32(a)(1) requires that the motion be supported by a brief.

This Court has previously ordered that sentencing memorandums be submitted by November 24, 2010, and within that memorandum will be the briefing issues in support of this motion.

WHEREFORE, the Defendant respectfully prays that this Court at sentencing depart or vary downward from the Advisory Sentencing Guidelines in the manner and for the reasons set forth herein and for such other relief as the Court may deem just and equitable.

Dated this 11 day of November, 2010.

Respectfully Submitted,



Larry Stoller ATT0007522
1305 18th Street
PO Box 441
Spirit Lake IA 51360

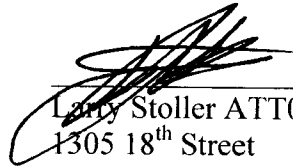
Telephone: 712-336-1752
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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the _____ day of November, 2010, the foregoing Motion of Defendant Kent Robert Stewart for the Court to Depart or Vary Downward from the Advisory United States Sentencing Guidelines Range was filed electronically and to the best of my knowledge, information, and belief counsel for the United States and the United States Probation Office be notified through the Electronic Case Filing System.

Dated November 11, 2010, at Spirit Lake, Iowa.



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ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

UNITED STATES OF AMERICA)	
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KENT ROBERT STEWART,)	
a/k/a KENT STEWART)	Violation: 15 U.S.C. § 1
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Defendant.)	
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PLEA AGREEMENT

The United States of America and Kent Stewart ("defendant") hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P.):

RIGHTS OF DEFENDANT

1. The defendant understands his rights:
 - (a) to be represented by an attorney;
 - (b) to be charged by Indictment;
 - (c) to plead not guilty to any criminal charge brought against him;
 - (d) to have a trial by jury, at which he would be presumed not guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;
 - (e) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;
 - (f) not to be compelled to incriminate himself;
 - (g) to appeal his conviction, if he is found guilty; and
 - (h) to appeal the imposition of sentence against him.

**AGREEMENT TO PLEAD GUILTY
AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(h) above. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b). Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct. The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct. Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to an Information to be filed in the United States District Court for the Northern District of Iowa. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by fixing prices and rigging bids for sales of ready-mix concrete in the Northern District of Iowa beginning at least as early as January 2008 and continuing until as late as August 2009, in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4

below. The United States agrees that at the arraignment, it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.

FACTUAL BASIS FOR OFFENSE CHARGED

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:

(a) For purposes of this Plea Agreement, the "relevant period" is the period beginning at least as early as January 2008 and continuing until as late as August 2009. During the relevant period, the defendant was President of a ready-mix concrete company ("Company A") organized and existing under the laws of Iowa and with its principal place of business in Ocheyedan, IA. During the relevant period, Company A was a producer of ready-mix concrete and was engaged in the sale of ready-mix concrete in the Northern District of Iowa.

(b) During the relevant period, the defendant participated in a conspiracy with other persons and another entity engaged in the manufacture and sale of ready-mix concrete, the primary purpose of which was to fix prices and submit non-competitive, rigged bids for ready-mix concrete sold in the Northern District of Iowa. In furtherance of the conspiracy, the defendant engaged in discussions with representatives of another ready-mix concrete company. During such discussions, agreements were reached regarding the submission of non-competitive and rigged bids for ready-mix concrete to be sold in the Northern District of Iowa.

(c) During the relevant period, ready-mix concrete sold by one or more of the

conspirator firms, equipment and materials necessary to the production and distribution of ready-mix concrete, and/or payments for ready-mix concrete, traveled in interstate commerce. The business activities of Company A and its conspirators in connection with the production and sale of ready-mix concrete that was the subject of this conspiracy were within the flow of, and substantially affected, interstate trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the Northern District of Iowa. Ready-mix concrete that was the subject of this conspiracy were sold by one or more of the conspirators to customers in this District.

POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be imposed against him upon conviction for a violation of Section One of the Sherman Antitrust Act is:

- (a) a term of imprisonment for ten (10) years (15 U.S.C. § 1);
- (b) a fine in an amount equal to the greatest of (1) \$1 million,
(2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and
- (c) a term of supervised release of three (3) years following any term of imprisonment. If the defendant violates any condition of supervised release, the defendant could be required to serve up to two (2) years in prison (18 U.S.C. § 3559(a)(3); 18 U.S.C. § 3583(b)(2) and (e)(3); and United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”) §5D1.2(a)(2)).

6. In addition, the defendant understands that:

- (a) pursuant to U.S.S.G. §5E1.1 or 18 U.S.C. § 3663(a)(3) or 3583(d), the Court may order him to pay restitution to the victims of the offense; and
- (b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a \$100.00 special assessment upon conviction for the charged crime.

SENTENCING GUIDELINES

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing, along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).

SENTENCING AGREEMENT

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B), the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose a sentence requiring the defendant to pay to the United States a criminal fine of \$20,000, payable in full

before the fifteenth (15th) day after the date of judgment; and a period of imprisonment of no more than six months ("the recommended sentence"). The United States calculates the applicable Guidelines as follows:

- a. The base guideline is U.S.S.G. § 2R1.1, with a base offense level of 12.
- b. Pursuant to U.S.S.G. § 2R1.1(b)(1) the base offense level is increased by 1 because the conduct involved participation in an agreement to submit non-competitive bids. There are no increases in the offense level pursuant to U.S.S.G. § 2R1.1(b)(2) because the parties have stipulated the volume of commerce to be less than \$1 million pursuant to U.S.S.G. §1B1.8.
- c. The adjusted offense level would therefore be 13.
- d. The defendant should receive the adjustment for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). The resulting offense level would therefore be 11.
- e. The parties are not aware of any information which would impact the defendant's criminal history category. If no other information were discovered, the defendant's criminal history category would be I. The parties understand that the defendant's criminal history category is determined by the court.
- f. Pursuant to U.S.S.G. §§ 5E1.2(b) and 2R1.1(c)(1) the Guidelines Fine Range for an individual is one to five percent of the volume of commerce (stipulated to be less than \$1 million pursuant to U.S.S.G. §1B1.8), but not less than \$20,000.
- g. The defendant understands that the Court will order him to pay a \$100 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(A), in addition to any fine

imposed.

The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0. The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

9. The United States and the defendant agree that the applicable Guidelines imprisonment range exceeds the term of imprisonment contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §5K1.1, for a three-level downward departure from the Guidelines fine and imprisonment range in this case and will request that the Court impose the fine and term of imprisonment contained in the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the ready-mix concrete industry. With the U.S.S.G. §5K1.1 departure, the resulting offense level is 8. The defendant is free to argue for any sentence within the applicable Sentencing Guidelines range as determined by the Court. The defendant agrees that the \$20,000 fine amount is appropriate.

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 12 of this Plea Agreement, and before sentencing in the case, the United

States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation and his commitment to prospective cooperation with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. To enable the Court to have the benefit of all relevant sentencing information, the United States may request, and the defendant will not oppose, that sentencing be postponed until his cooperation is complete.

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject either party's sentencing recommendation provided in Paragraph 8 of this Plea Agreement. The defendant understands that, as provided in Fed. R. Crim. P. 11(e)(3)(B), if the Court does not impose a sentence consistent with either party's sentencing recommendation contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.

DEFENDANT'S COOPERATION

12. The defendant will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the manufacture or sale of ready-mix concrete in the state of Iowa, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

- (a) producing all non-privileged documents, including claimed personal documents, and other materials, wherever located, in the possession, custody, or control

of the defendant, requested by attorneys and agents of the United States;

(b) making himself available for interviews in the Northern District of Iowa, not at the expense of the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503, *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding; and

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings, fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503, *et seq.*).

GOVERNMENT'S AGREEMENT

13. Subject to the full, truthful, and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense

committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the manufacture or sale of ready-mix concrete in the Northern District of Iowa ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

14. The defendant understands that he may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.

REPRESENTATION BY COUNSEL

15. The defendant has reviewed all legal and factual aspects of this case with his attorney and is fully satisfied with his attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

VOLUNTARY PLEA

16. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

VIOLATION OF PLEA AGREEMENT

17. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations period for such offense shall be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

18. The defendant understands and agrees that in any further prosecution of him resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

ENTIRETY OF AGREEMENT

19. This Plea Agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the criminal charge in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

20. The undersigned attorneys for the United States have been authorized by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

DATED: 4/8/10

Respectfully submitted,

BY: *Kent Stewart*
Kent Stewart
Defendant

BY: *M. Geverola*
Andre M. Geverola
Robert Jacobs
L. Heidi Manschreck
U.S. Department of Justice
Antitrust Division
209 S. LaSalle St., Suite 600
Chicago, IL 60604
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[Signature]
Larry Stoller
Counsel for Kent Stewart