

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2

3 LINDSIE NEWMAN,

4 Appellant,

5 v.

6 THE STATE OF NEVADA,

7 Respondent.

8

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Tracie K. Lindeman
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Case No. 67756 &

Case No. 67763

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10 **FAST TRACK RESPONSE**

11 **1. Name of party filing this fast track response:** The State of Nevada.

12 **2. Name, law firm, address, and telephone number of attorney submitting**
this fast track response:

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16 **3. Name, law firm, address, and telephone number of appellate counsel if**
different from trial counsel: Same.

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18 **4. Proceedings raising same issues on appeal:** N/A.

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1 **5. Procedural history:**

2 On June 3, 2013 Lindsie Newman was granted probation after having been
3 convicted of Conspiracy to Commit Grand Larceny, a gross misdemeanor. AA
4 24. Nine months in jail were suspended for a term of probation not to exceed
5 two (2) years. *Id.*

6 On October 4, 2013, Newman was charged with Possession of a Controlled
7 Substance, namely: heroin, a category E felony. AA 1-3. She pled guilty to the
8 charge on November 4, 2013. AA 48. On December 16, 2013, The Honorable
9 James T. Russell granted Newman the opportunity of diversion pursuant to NRS
10 453.3363. *Id.* Pursuant to statute, Newman was declared guilty of the charge, but
11 instead of proceeding to sentencing, she was ordered to complete the Western
12 Regional Drug Court program.¹ AA 48-49. Newman was placed on probation for
13 a term not to exceed three (3) years. AA 28-29.

14 Newman had repeated violations of her probation over a two year period.
15 *See* AA 38-40; *See* AA 48-49. At one point she was sent to the City of Refuge,²
16

17
18 ¹ If Newman had successfully completed her probation, her criminal record would
have remained free of the felony conviction.

19 ² City of Refuge is a program started by Judge Gamble that assists troubled
pregnant women in many ways, one of which is to have a healthy gestation period.
20 Video: "The City of Refuge Story," at: <http://refugenevada.com/index2.html#>

1 but she decided to leave. AA 38 p.3. Newman was also kicked out of the
2 Western Regional Drug Court program. AA 38 p.3.

3 On March 23, 2015, Newman's probation was revoked for the Conspiracy
4 to Commit Grand Larceny conviction (the gross misdemeanor case), and she was
5 sentenced on the Possession of a Controlled Substance charge, (the category E
6 felony case). AA 38-41. As result of the repeated violations of probation, she
7 accumulated two-hundred-sixty-five days (265) in custody, for which she was
8 given credit for time served. AA 40 p.9.

9 **6. Statement of Facts:**

10 On March 23, 2015, at her revocation and sentencing hearing, Newman
11 appeared before Judge Russell six months pregnant.³ She admitted she had left
12 the City of Refuge, that she still had been using drugs, and that she was kicked out
13 of the Western Regional Drug Court program. AA 38-39 p. 2-5; AA 40 p.12.

14 Newman conveyed to the district court, through her counsel, that she was
15 prepared to have her probation revoked for both cases, and that she appreciated
16 the opportunities the district court had given her so her baby would be born safely.
17 AA 39 p.5:9-14.

18 ³ Counsel indicated on April 24, 2015 that Newman was seven months pregnant in
19 a high-risk pregnancy. Emergency Motion for Bail, Page 3, Line 2, filed May 1,
20 2015, in this case with the Nevada Supreme Court.

1 Judge Russell expressed concerns about the safety of Newman's unborn
2 child, and indicated multiple times he was considering ordering consecutive time
3 for Newman's cases so she would remain in custody for the remainder of her
4 pregnancy. AA 39 p.6-7; AA 40 p. 9-10. Defense counsel never objected.

5 In one conversation, Judge Russell stated:

6 Ms. Merideth, do you understand my concern? I just
7 want to make sure above all that she – and I'll sentence
8 her accordingly – make sure she stays in custody until
9 that child is born. Obviously you couldn't trust her at the
City of Refuge. You can't trust her anywhere. I don't
want that child to be put at any risk in respect to this
matter. . .

10 AA 40 p.9: 2-8.

11 In fact, defense counsel indicated she appreciated the court's concern,
12 agreed that anyone would share the same concerns, and stated: "Unfortunately,
13 based on [Newman's] behavior, she's young and she's not making smart
14 decisions." AA 40 p. 9:9-13. Defense counsel further expressed a preference to
15 the district court for Newman's remaining sentence to be served in the prison
16 system due to the prison having better resources for Newman's health and
17 pregnancy. AA 40 p. 10:3-13.

18 Judge Russell sentenced Newman to 12-32 months in the Nevada
19 Department of Corrections for the category E felony Possession of Controlled
20 Substance case; the sentence was ordered consecutive to the Gross Misdemeanor

1 case for which her probation was revoked, and she was ordered to serve nine
2 months in the Carson City Jail. AA 40-41 p. 12-13; AA 46-47. Judge Russell
3 further applied all 265 days Newman had already served on her repeated
4 violations to the Gross Misdemeanor case, which nearly completed the sentence at
5 the Carson City Jail. AA 40 p.11:5-10, AA 41 p.12-13. *See also* AA 46-47.

6 The district court stated:

7 I want to make abundantly clear what's transpired. You
8 had every single benefit that anybody could ever possibly
9 give to anybody. You violated all those benefits in
10 respect to this matter. So I hope you understand why I'm
11 doing this. I'm doing this more than anything to protect
12 that unborn child. I don't want to see you out doing
13 anything until that child is born

14 AA 41 p.13.

15 The defense did not object.

16 Contrary to any sentiment expressed at sentencing, the defense now asserts
17 that the district court abused its discretion when it took the health of Newman's
18 pregnancy into consideration for sentencing purposes. The State does not agree,
19 and respectfully requests the Nevada Supreme Court DENY Newman's appeal for
20 the reasons set forth below.

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1 **7. Issues on Appeal**

2 A. Whether Newman preserved the right to appeal.

3 B. Whether the district court committed plain error.

4 **8. Legal Argument**

5 For the first time on appeal, Newman claims error in the district court's
6 consideration of her pregnancy in determining the appropriate sentence. Newman
7 did not preserve this issue, and so if the Nevada Supreme Court decides to
8 consider Newman's argument, the plain error review standard will apply.

9 As set forth below, the State submits that Newman has not shown that the
10 district court plainly erred. Therefore, the State respectfully requests this Court
11 AFFIRM the order of the district court.

12 **A. Newman did not preserve the right to appeal.**

13 Failure to object at the time of allegedly improper conduct ordinarily
14 precludes appellate review. *Mendoza-Lobos v. State*, 125 Nev. 634, 644 (Nev.
15 2009); *Sullivan v. State*, 115 Nev. 383, 387-88 n.3 (1999). *See also Beccard v.*
16 *Nevada National Bank*, 99 Nev. 63, 65-66 (1983) ("The failure to object to
17 allegedly prejudicial remarks at the time an argument is made, and for a
18 considerable time afterwards, strongly indicates that the party . . . did not consider
19 the arguments objectionable at the time they were delivered, but made that claim
20 as an afterthought."). "If an error is not properly preserved, appellate-court

1 authority to remedy the error (by reversing the judgment, for example, or ordering
2 a new trial) is strictly circumscribed.” *Puckett v. United States*, 556 U.S. 129, 134
3 (2009). If an issue not preserved below is to be considered in the first instance on
4 appeal, review is limited to the plain error standard. *Id.*

5 The State submits that the district court made abundantly clear its concerns
6 and intentions to order consecutive time in an effort to protect the health of the
7 pregnancy; the district court indicated multiple times it was considering ordering
8 consecutive time for Newman’s cases so she would remain in custody for the
9 remainder of her pregnancy. AA 39 p. 6-7; AA 40 p. 9-10. Counsel never
10 objected.

11 In fact, section 21 of Newman’s Fast Track Statement has multiple quotes
12 from the sentencing hearing to highlight both the district court and the State’s
13 comments regarding her pregnant status. Fast Track Statement (“FTS”) at 6-7.

14 Despite the pregnancy being discussed repeatedly, counsel did not object a
15 single time to what is now claimed to be an error of constitutional significance.
16 This Fast Track Appeal is the first time Newman has raised the issue of whether
17 the district court could consider the health of her pregnancy in crafting a sentence.

18 It is also important to note that Newman thanked the court for sending her
19 to the City of Refuge in its previous attempts to help her keep her unborn child
20 safe. AA 40 p. 9:9-13. She also expressed a preference, through her counsel, to

1 serve any remaining time in the prison system due to the prison having better
2 resources for the health of her pregnancy. AA 40 p. 10:3-13. There was no
3 indication that Newman had any problem with the district court's consideration of
4 the health of her pregnancy at the time of sentencing, as it seemed all parties were
5 taking her pregnancy into account in various ways.

6 This appeal is now being brought contrary to those actions as an
7 afterthought. The State submits that Newman did not preserve this issue for
8 appeal. If this Court is nevertheless to address this issue in the first instance, the
9 standard of review must be plain error.

10 **B. Newman has not shown the district court committed plain error.**

11 Plain error review consists of a three part analysis to determine whether
12 plain error will be found, followed by a determination of whether relief should be
13 granted to correct that plain error in the appellate court's discretion:

14 **First**, there must be an error or defect--some sort of
15 "[d]eviation from a legal rule"--that has not been intentionally
relinquished or abandoned, *i.e.*, affirmatively waived, by the
appellant.

16 **Second**, the legal error must be clear or obvious, rather than
subject to reasonable dispute.

17 **Third**, the error must have affected the appellant's substantial
rights, which in the ordinary case means he must demonstrate
18 that it "affected the outcome of the district court proceedings."

19 **Fourth** and finally, if the above three prongs are satisfied, the
court of appeals has the *discretion* to remedy the error--
20 discretion which ought to be exercised only if the error

1 "seriously affect[s] the fairness, integrity or public reputation
2 of judicial proceedings."

3 *Puckett*, 556 U.S. at 135 (internal citations omitted, emphases added).⁴

4 Assuming Newman can establish that consideration of her pregnant status
5 was in error, which the State does not concede, she has not demonstrated that the
6 error was clear, nor that it affected her substantial rights. In addition, the State
7 submits that this Court should decide in its discretion to deny Newman's appeal
8 even if plain error is shown due to Newman's active participation in bringing her
9 pregnancy into consideration.

10 *1. Newman has not shown that the district court committed error.*

11 District court judges have wide discretion to determine the appropriate
12 sentence for each individual defendant. "This discretion enables the
13 sentencing judge to consider a wide, largely unlimited variety of information to
14 insure that the punishment fits not only the crime, but also the individual
15 defendant." *Martinez v. State*, 114 Nev. 735, 738 (1998). "Possession of the
16 fullest information possible concerning a defendant's life and characteristics is

17 ⁴ *Puckett* involved the application of Fed. R. Crim. P. 52(b), but that rule is
18 identical to NRS 178.602. *See Green v. State*, 119 Nev. 542, n. 7 (Nev. 2003)
19 (noting the identical nature of the two rules and applying the United States
20 Supreme Court *Olano* case interpreting Fed. R. Crim. P. 52(b); *Olano* was also
cited by *Puckett* as setting forth the four prongs for plain error analysis).

1 essential to the sentencing judge's task of determining the type and extent of
2 punishment.” *Denson v. State*, 112 Nev. 489, 492 (1996) *citing Williams v. New*
3 *York*, 337 U.S. 241, 247 (1949) (*Williams superseded on other grounds*). This
4 inquiry includes a defendant’s “life, health, habits, conduct, and mental and moral
5 propensities.” *Williams*, 337 U.S. at 245 (*superseded on other grounds*).

6 Of critical relevance here is the issue of health, specifically Newman’s
7 health, as a pregnant person.

8 There has been a great deal of discussion, debate, and litigation regarding
9 the extent to which the government may act in order to protect the health and
10 safety of unborn children. *See, e.g.*, FTS at 9-13 (citing two law review articles
11 and the case *New Jersey v. Ikerd*). One consequence of that activity has been the
12 Supreme Court of the United States’ decision that, as a matter of federal
13 constitutional law binding on every state, an unborn child is not a “person” as the
14 term is used in the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 158
15 (1973). This is an important point, as the Fourteenth Amendment applies the due
16 process and equal protection clauses to the state of Nevada, and it is these
17 protections which Newman claims have been violated. FTS at 9-10.

18 For the purposes of this appeal, then, Newman’s unborn child has no legally
19 cognizable existence distinct from herself. But that is not to say that her unborn
20 child is legally irrelevant, it clearly exists as living tissue of her own body, the

1 same as any organ. Newman’s unborn child is, legally and logically, an extension
2 of herself until birth. Any consideration of the health of the unborn child is
3 therefore legally indistinguishable from consideration of her own health, the same
4 as if the word “heart” or “lungs” were used in the place of “unborn child.”

5 The State submits that a district court is allowed, within limits affixed by
6 statutes, to consider the health of a Defendant when determining sentencing,
7 including any positive or negative effects a particular sentence might have. *See*
8 *Williams*, 337 U.S. at 245 (*superseded on other grounds*).

9 Consider the hypothetical case of a defendant who is addicted to
10 methamphetamines, but who also has a deadly heart condition. Continued use of
11 methamphetamines, and the accompanying increases in heart rate and blood
12 pressure associated with methamphetamine’s stimulant properties, could be
13 deadly. If all attempts at non-custodial drug treatment programs had failed, the
14 State submits it would not be constitutional error for a district judge to base the
15 length of a prison sentence on the amount of time it would take that defendant to
16 obtain medical treatment to correct the heart problem, or alternatively to detox and
17 get clean, as long as the sentence was otherwise within all appropriate ranges and
18 guidelines. Such a consideration of health serves both the interests of a defendant
19 and the public.

1 Newman's case is no different from the above hypothetical. It is common
2 knowledge that pregnancy compromises a woman's health, affecting joints, bones,
3 immunology, organ function, and nearly every other bodily function in ways that
4 make her more prone to poor health. The district court's desire to protect the
5 unborn child, and therefore Newman, for the duration of her compromised state
6 was not improper. Additionally, Newman's consecutive sentence of 12-32,
7 months, with no credit for time served, is indisputably within the time period
8 proscribed by statute for a category E felony. *See* NRS 453.336(2)(a).

9 In her brief, Newman relies upon the *New Jersey v. Ikerd* case, which
10 vacated a probation violation sentence from a lower court. *New Jersey v. Ikerd*,
11 850 A.2d 516, 523-24 (N.J. Super. Ct. App. Div. 2004). Newman tries to say that
12 the circumstances of *Ikerd* are on point with Newman's case. FTS at 11:4-5. The
13 State does not agree. Although *Ikerd* initially appears on point, a careful
14 comparison of Newman's case with *Ikerd* demonstrates that Newman's case is
15 distinguishable on several grounds.

16 First, although her probation was revoked in part for drug use, the same as
17 Newman, *Ikerd* was on probation for welfare fraud, a crime completed unrelated
18 to drug use. *Ikerd*, 850 A.2d at 522. Second, the lower court in *Ikerd* issued a
19 sentence that was contrary to the New Jersey penal code. *Id.* In contrast, in
20 Newman's case, Judge Russell's sentence of 12-32 months was in accordance

1 with NRS 453.336. Third, the lower court wrongly found facts to constitute
2 aggravating factors that were contrary to New Jersey law. *Ikerd*, 850 A.2d at 522.
3 At Newman's sentencing, the Judge did not make any incorrect findings. Finally,
4 *Ikerd* is not Nevada law, and is not binding in Nevada.

5 Newman also argues that, even if the district court is allowed to consider
6 the issue of health, prison is more detrimental than beneficial. FTS at 12. The
7 State does not dispute that there are some who contend that prisons are
8 detrimental to fetal health. However, it cannot be reasonably disputed that the use
9 of illegal drugs, particularly Newman's drug of choice, heroin, is dangerous to
10 Newman's health, including her unborn child.

11 Newman has cited to sources which argue that punishing pregnant drug
12 addicts can deter women from seeking prenatal care and other medical treatment.
13 FTS at 12. The State agrees that pregnant defendants, like all other people in the
14 criminal system, generally avoid situations that increase the chances of getting
15 caught. This can regrettably lead to defendants not getting any of several services
16 that may be beneficial to them, including counseling, addiction treatment, and
17 other medical care.

18 Drug addiction is far from the only criminal conduct that can deter pregnant
19 women from obtaining medical care. For instance, the mandatory reporting and
20 prosecution requirements for domestic abuse might deter pregnant women from

1 receiving medical care in fear that bruises or broken bones would be noticed and
2 reported. This is an unfortunate consequence that is shared among a number of
3 well-intentioned policies. That does not mean that a “free pass” for criminal
4 conduct on the basis of pregnancy is appropriate or constitutional.

5 Newman also argues the district court improperly criminalized drug
6 addiction during pregnancy. FTS at 9. That is simply not the case. The district
7 court judge did not sentence Newman to consecutive time because she was a
8 pregnant addict – he did it because the health of her unborn child (and therefore
9 her direct health) was at risk, and she was a repeat offender who had failed both
10 the Western Regional Drug Court program and had left the City of Refuge:

11 You had every single benefit that anybody could ever
12 possibly give to anybody. You violated all those benefits
13 in respect to this matter. So I hope you understand why
14 I’m doing this.

15 AA 41 p. 13:11-15.

16 The district court’s decision in incarcerating Newman for the duration of
17 her medical vulnerability, for her own good, when all other options had been
18 exhausted, was not error.

19 2. *Newman cannot show that the district court’s error was plain.*

20 For error to be “plain,” it must be clear or obvious, and not subject to
reasonable dispute. *Puckett*, 556 U.S. at 135. As noted above, the extent to which
pregnancy can be considered during sentencing is attracting significant debate

1 across the country, with widely differing schools of thought. Nevada has never
2 addressed this issue. The State submits that this is an instance where reasonable
3 minds can, and currently do, differ – substantially. Without any clear law on the
4 issue, Newman cannot demonstrate that the district court’s error, assuming error is
5 found, was plain error.

6 3. *Newman cannot show that the district court’s error affected her*
7 *substantial rights.*

8 In order to affect a defendant’s substantial rights, the error alleged must
9 generally be prejudicial. *United States v. Olano*, 507 U.S. 725, 734-35 (1993).
10 Newman cannot show that the district court’s consideration of her pregnancy
11 meaningfully changed the outcome of the sentencing such that she was prejudiced.

12 The facts of *Puckett* are instructive. In *Puckett*, the prosecutor reneged on a
13 plea agreement by recommending that he not receive any sentence reduction,
14 when the plea agreement required the prosecutor to request a “level three”
15 reduction. *Puckett*, 556 U.S. at 131-32. In *Puckett*, the defendant did contest the
16 prosecutor’s recommendation, but did not object on the basis of violation of plea
17 agreement, and so plain error review applied. *Id.* at 132-34. The United States
18 Supreme Court found that there was no prejudice to the defendant, as the
19 defendant likely would not have gotten the reduction anyway. *Id.* at 141-42. *See*
20 *also id.* at 133.

1 In this case, Newman cannot show that her sentence would have been any
2 different. At sentencing, the State expressed concern that concurrent sentences
3 would result in very little additional prison time. AA 39 p.8:14-17. In addition,
4 Parole and Probation Services recommended that no good time credits be assigned
5 to the second case. AA 39 p.8:20-24. Newman also had multiple violations – the
6 judge noted that she had violated “every single benefit that anybody could ever
7 possibly give to anybody.” AA 41 p.13: 11-15. Newman admitted to continuing
8 to engage in criminal conduct. AA 38 p.4: 15-22. Given the recommendations of
9 the State and Parole and Probation, in addition to Newman’s consistent criminal
10 conduct, it is likely that Judge Russell would have sentenced Newman to
11 consecutive terms anyway. Since Newman cannot show that she would not
12 otherwise have been sentenced consecutively, she cannot demonstrate prejudice to
13 her substantial rights.

14 Newman also cannot demonstrate prejudice because there is no substantive
15 difference between concurrent and consecutive sentences under the unique facts of
16 her case. Newman was originally sentenced to probation on June 3, 2013 for
17 Conspiracy to Commit Grand Larceny, a gross misdemeanor. AA 24. Nine
18 months in jail (approximately 275 days) were suspended for a term not to exceed
19 two (2) years. *Id.*

1 Newman was subsequently convicted of Possession of a Controlled
2 Substance, initially, she was granted the opportunity of diversion pursuant to NRS
3 453.3363. This caused her sentencing proceedings to be suspended, and the
4 imposition of her judgment of conviction to be delayed until March 24, 2015.

5 At the time of Newman's sentencing for Possession of a Controlled
6 Substance on March 24, 2015, she had accumulated 265 days of incarceration as a
7 result of repeated violations.

8 NRS 176.055(2)(b) disallows time served credits from being applied to a
9 sentence for a new crime committed while the defendant was on probation from a
10 Nevada conviction so long as the first sentence has not yet expired.

11 Newman committed the possession of a controlled substance while she was
12 on probation for the gross misdemeanor charge, and the amount of time she spent
13 in custody on the various violations of probation fell within the time period of the
14 prior sentence.

15 Pursuant to NRS 176.55(2)(b), Judge Russell would have had to apply the
16 265 days to the gross misdemeanor charge, leaving only a few days remaining on
17 the gross misdemeanor sentence. Therefore, regardless of whether concurrent or
18 consecutive time was ordered, the 12-32 month sentence on the possession of a
19 controlled substance charge would not begin running until the day that sentence
20 was ordered.

1 Because the time served credits almost completely expired the original
2 gross misdemeanor charge, there was minimal to no overlap between the two
3 sentences. At most, the difference between consecutive and concurrent sentences
4 is a few days. As a result of the minimal differences in consecutive versus
5 concurrent sentences in this particular case, Newman cannot demonstrate her
6 substantial rights were affected.

7 Newman cannot establish all three prongs of the plain error analysis of the
8 error now raised for the first time on appeal. In addition, Newman has not shown
9 why this Court should correct the error in its discretion even if error were found.
10 Newman's appeal should be denied.

11 **9. Preservation of Issue(s).**

12 For the reasons discussed above, the State submits Newman did not preserve
13 the issues she now raises on appeal.

14 **10. Motion for full briefing.**

15 Nevada has never addressed the issue of whether, or to what extent,
16 pregnancy may constitutionally be considered during sentencing. If this
17 substantive issue is to be addressed, it will require extensive briefing; it is likely
18 *amici* will seek to participate. While the State contends that this issue of first
19 impression need not be reached in this case, as Newman fails the other prongs of
20 plain error review, the State conditionally moves pursuant to NRAP 3C(k)(2) for

1 full briefing if the allowability of considering pregnancy is to be determined as a
2 matter of substantive law.

3 Respectfully submitted this 8th day of June, 2015

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1 **VERIFICATION AND CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this fast track statement complies with the
3 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

5 [X] This fast track statement has been prepared in a proportionally spaced
6 type face using Microsoft Word 2003 in 14 point Times New Roman font.

7 2. I further certify that this fast track statement complies with the type-
8 volume limitations stated in Rule 3C(h)(2), because it is proportionally spaced,
9 has a typeface of 14 points or more, and the document in its entirety is 4,378,
10 words, which is less than the 4,667 word limit.

11 3. Finally, I recognize that pursuant to NRAP 3C I am responsible for
12 filing a timely fast track response and the Supreme Court of Nevada may sanction
13 an attorney for failing to file a timely fast track response, or failing to cooperate
14 fully with appellate counsel during the course of an appeal.

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1 I therefore certify that the information provided in this fast track response is
2 true and complete to the best of my knowledge, information, and belief.

3 Dated this 8th day of June, 2015.

4 JASON D. WOODBURY
5 Carson City District Attorney

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Dated this 8th day of June, 2015.

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