IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDSIE NEWMAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 67756 & 67763

Appeal of a Final Judgment of Probation Revocation
First Judicial District Court, Carson City
The Honorable James T. Russell, District Court Judge

Respondent's Answering Brief

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Routing Statement

The State Agrees that the Nevada Supreme Court should retain this appeal under NRAP 17(a)(1)(M), (N).

II. STATEMENT OF THE ISSUES

A. Whether Newman preserved the right to appeal; and,

B. Whether the district court committed plain error.

III. STATEMENT OF THE CASE

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

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

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

Newman had repeated violations of her probation over a two year period. *See* AA 38-40; *See* AA 48-49. At one point she was sent to the City of Refuge,[2] but she decided to leave. AA 38 p.3. Newman was also kicked out of the Western Regional Drug Court program. AA 38 p.3.

On March 23, 2015, Newman's probation was revoked for the Conspiracy to Commit Grand Larceny conviction (the gross misdemeanor case), and she was sentenced on the Possession of a Controlled Substance charge,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

IV. STATEMENT OF FACTS

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

[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. Video: "The City of Refuge Story," at: http://refugenevada.com/index2.html#

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

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

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

In one conversation, Judge Russell stated:

> Ms. Merideth, do you understand my concern? I just want to make sure above all that she – and I'll sentence her accordingly – make sure she stays in custody until 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. . .

AA 40 p.9: 2-8.

In fact, defense counsel indicated she appreciated the court's concern, agreed that anyone would share the same concerns, and stated: "Unfortunately, based on [Newman's] behavior, she's young and she's not making smart decisions." AA 40 p. 9:9-13. Defense counsel further expressed a preference to the district court for Newman's remaining sentence to be served in the prison

system due to the prison having better resources for Newman's health and pregnancy. AA 40 p. 10:3-13.

Judge Russell sentenced Newman to 12-32 months in the Nevada Department of Corrections for the category E felony Possession of Controlled Substance case; the sentence was ordered consecutive to the Gross Misdemeanor case for which her probation was revoked, and she was ordered to serve nine months in the Carson City Jail. AA 40-41 p. 12-13; AA 46-47. Judge Russell further applied all 265 days Newman had already served on her repeated violations to the Gross Misdemeanor case, which nearly completed the sentence at the Carson City Jail. AA 40 p.11:5-10, AA 41 p.12-13. *See also* AA 46-47.

The district court stated:

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

AA 41 p.13.

The defense did not object.

Contrary to any sentiment expressed at sentencing, the defense now asserts that the district court abused its discretion when it took the health of Newman's pregnancy into consideration for sentencing purposes. The State does not agree,

and respectfully requests the Nevada Supreme Court DENY Newman's appeal for the reasons set forth below.

V. SUMMARY OF THE ARGUMENTS

For the first time on appeal, Newman claims error in the district court's consideration of her pregnancy in determining the appropriate sentence. Newman argues primarily under the abuse of discretion standard. OB at 5. However, Newman does not dispute that she did not object to the consideration of her pregnancy during sentencing. OB at 11. Newman did not preserve this issue, and so if the Nevada Supreme Court decides to consider Newman's argument, the plain error standard of review will apply. Newman has not shown the district court plainly erred. Therefore, the State respectfully requests this Court AFFIRM the order of the district court.

VI. ARGUMENTS

STANDARDS OF REVIEW

Failure to object at the time of allegedly improper conduct ordinarily precludes appellate review. *Mendoza-Lobos v. State*, 125 Nev. 634, 644 (Nev. 2009); *Sullivan v. State*, 115 Nev. 383, 387-88 n.3 (1999). *See also Beccard v. Nevada National Bank*, 99 Nev. 63, 65-66 (1983) ("The failure to object to allegedly prejudicial remarks at the time an argument is made, and for a considerable time afterwards, strongly indicates that the party . . . did not consider

the arguments objectionable at the time they were delivered, but made that claim as an afterthought."). "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed." *Puckett v. United States*, 556 U.S. 129, 134 (2009). If an issue not preserved below is to be considered in the first instance on appeal, review is limited to the plain error standard. *Id.*

A. Newman did not preserve the right to appeal.

At sentencing, the district court made abundantly clear its concerns and intentions to order consecutive time in an effort to protect **the health of the pregnancy** (which is legally the same as protecting her own health); the district court indicated multiple times it was considering ordering consecutive time for Newman's cases so she would remain in custody for the remainder of her pregnancy. AA 39 p. 6-7; AA 40 p. 9-10. Counsel never objected.

In fact, Newman's Opening Brief has multiple quotes from the sentencing hearing to highlight both the district court and the State's comments regarding her pregnant status. OB at 3-4.

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

It is also important to note that Newman thanked the court for sending her to the City of Refuge in its previous attempts to help her keep her unborn child safe. AA 40 p. 9:9-13. She also expressed a preference, through her counsel, to serve any remaining time in the prison system due to the prison having better resources for the health of her pregnancy. AA 40 p. 10:3-13. There was no indication that Newman had any problem with the district court's consideration of the health of her pregnancy at the time of sentencing, as it seemed all parties were taking her pregnancy into account in various ways.

This appeal is now being brought contrary to those actions as an afterthought. The State submits that Newman did not preserve this issue for appeal. Newman has not cited to any portion of the record or authority to show that she preserved this issue. If this Court is nevertheless to address this issue in the first instance, the standard of review must be plain error.

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

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

> **First**, there must be an error or defect--some sort of "[d]eviation from a legal rule"--that has not been intentionally relinquished or abandoned, *i.e.*, affirmatively waived, by the appellant.
> **Second**, the legal error must be clear or obvious, rather than subject to reasonable dispute.

> **Third**, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the district court proceedings." **Fourth** and finally, if the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error--discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"

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

Assuming Newman can establish that consideration of her pregnant status was in error, which the State does not concede, she has not demonstrated that the error was clear, nor that it affected her substantial rights. In addition, the State respectfully submits that this Court should deny Newman's appeal based on her active participation in bringing her pregnancy into consideration.

1. Newman has not shown that there was an error or defect.

Newman repeatedly attempts to frame the issue as one of criminalizing drug addiction while pregnant. *See, e.g.,* OB at 4, 6, 7, 8. Newman relies upon *Sheriff v. Encoe*, and correctly points out that Nevada has no specific statute that criminalizes substance abuse during pregnancy. OB at 6. However, this is not a case involving a "judge-made crime" as Newman claims. OB at 7.

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[4] *Puckett* involved the application of Fed. R. Crim. P. 52(b), but that rule is identical to NRS 178.602. *See Green v. State*, 119 Nev. 542, n. 7 (Nev. 2003) (noting the identical nature of the two rules and applying the United States 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).

Newman recognizes this fact, but claims that "there is very little difference in the result . . . ." OB at 8.

That is simply not the case. The district court judge did not sentence Newman to consecutive time because she was a pregnant addict – he did it because the health of her unborn child (and therefore her direct health) was at risk, and she was a repeat offender who had failed both the Western Regional Drug Court program and had left the City of Refuge:

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

AA 41 p. 13:11-15.

There is a critical distinction between information that can be considered in fashioning an appropriate sentence and the acts that can be the foundation for criminal charges, and that distinction applies here. Criminal acts are strictly and solely defined by statute as mandated by due process. *Viereck v. United States*, 318 U.S. 236, 273 (1942). However, judges have wide discretion to determine the appropriate sentence for each individual defendant. "This discretion enables the sentencing judge to consider a wide, largely unlimited variety of information to ensure that the punishment fits not only the crime, but also the individual defendant." *Martinez v. State*, 114 Nev. 735, 738 (1998). "Possession of the fullest information possible concerning a defendant's life and characteristics is

essential to the sentencing judge's task of determining the type and extent of punishment." *Denson v. State*, 112 Nev. 489, 492 (1996) *citing Williams v. New York*, 337 U.S. 241, 247 (1949) (*Williams superseded on other grounds*).

Newman relies upon the *New Jersey v. Ikerd* case, which vacated a probation violation sentence from a lower court. *New Jersey v. Ikerd*, 850 A.2d 516, 523-24 (N.J. Super. Ct. App. Div. 2004). Newman tries to say that the circumstances of *Ikerd* are on point with Newman's case. OB at 8-9. The State does not agree. Although *Ikerd* initially appears on point, a careful comparison of Newman's case with *Ikerd* demonstrates that Newman's case is distinguishable on several grounds.

First, although her probation was revoked in part for drug use, the same as Newman, *Ikerd* was on probation for welfare fraud, a crime completely unrelated to drug use. *Ikerd*, 850 A.2d at 522. Second, the lower court in *Ikerd* issued a sentence that was contrary to the New Jersey penal code. *Id.* In contrast, in Newman's case, Judge Russell's sentence of 12-32 months was in accordance with NRS 453.336. Third, the lower court wrongly found facts to constitute aggravating factors that were contrary to New Jersey law. *Ikerd*, 850 A.2d at 522. At Newman's sentencing, the Judge did not make any incorrect findings. Finally, *Ikerd* is not Nevada law, and is not binding in Nevada.

Newman has failed to cite to any authority that shows a *per se* rule that prohibited the district court from considering Newman's pregnancy during sentencing. In fact, there are several instances in Nevada and elsewhere that allow consideration of pregnancy when it is relevant to the crime committed. In *Givens v. State*, 98 Nev. 573 (1982), this Court ruled that a victim's pregnancy was relevant to whether the defendant used force calculated to produce death. The United States' Sentencing Guidelines Manual provides for sentencing enhancements for drug crimes involving pregnant women. USSG § 2D1.1(b)(15)(B); USSG § 2D1.2. Other examples include the loss of an unborn child as an aggravating factor (*Negrete v. Ryan*, 2009 U.S. Dist. LEXIS 77383 (D. Ariz. 2009)), and pregnancy of the victim as showing particular vulnerability (*People v. Stitely,* 108 P.3d 182 (Cal. 2005)).

In addition, a sentencing judge may consider the defendant's "life, health, habits, conduct, and mental and moral propensities." *Williams*, 337 U.S. at 245 (*superseded on other grounds*). Of central relevance here is the issue of health and habits, specifically Newman's health as a pregnant person and habits as a repeated drug abuser.

There has been a great deal of discussion, debate, and litigation regarding the extent to which the government may act in order to protect the health and safety of unborn children. *See, e.g.,* OB at 7-10 (citing two law review articles

and the case *New Jersey v. Ikerd*). One consequence of that activity has been the Supreme Court of the United States' decision that, as a matter of federal constitutional law binding on every state, an unborn child is not a "person" as the term is used in the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113, 158 (1973). This is an important point, as the Fourteenth Amendment applies the due process and equal protection clauses to the state of Nevada, and it is these protections which Newman claims have been violated. OB at 7.

For the purposes of this appeal, then, Newman's unborn child has no legally cognizable existence distinct from herself. But that is not to say that her unborn child is legally irrelevant, it clearly exists as living tissue of her own body, the same as any organ. Newman's unborn child is, legally and logically, an extension of herself until birth. Any consideration of the health of the unborn child is therefore legally indistinguishable from consideration of her own health, the same as if the word "heart" or "lungs" were used in the place of "unborn child."

The State submits that a district court is allowed, within limits affixed by statutes, to consider the health of a Defendant when determining sentencing, including any positive or negative effects a particular sentence might have, as part of the "wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." *Martinez*, 114 Nev. at 738. *See Williams*, 337 U.S. at 245 (allowing consideration of various

factors unique to a defendant, including their health) (*superseded on other grounds*).

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

Newman's case is no different from the above hypothetical. It is common knowledge that pregnancy compromises a woman's health, affecting joints, bones, immunology, organ function, and nearly every other bodily function in ways that make her more prone to poor health. It cannot be reasonably disputed that the use of illegal drugs, particularly Newman's drug of choice, heroin, is dangerous to Newman's health, including her unborn child. The district court's desire to protect the unborn child, and therefore Newman, for the duration of her

compromised health was not improper. Newman cannot claim that the district court's consideration of her health and pregnancy was plain error when Newman specifically referenced her health as a fact requiring consideration during sentencing, as she specifically requested that her sentence be carried out in prison so she could have better medical care for her pregnancy. AA 40, 10:3-13.

Additionally, Newman's consecutive sentence of 12-32, months, with no credit for time served, is indisputably within the time period proscribed by statute for a category E felony. S*ee* NRS 453.336(2)(a).

Newman has cited to sources which argue that punishing pregnant drug addicts can deter women from seeking prenatal care and other medical treatment. OB at 9. The State agrees that pregnant defendants, like all other people in the criminal system, generally avoid situations that increase the chances of getting caught. This can regrettably lead to defendants not getting any of several services that may be beneficial to them, including counseling, addiction treatment, and other medical care.

Drug addiction is far from the only criminal conduct that can deter pregnant women from obtaining medical care. For instance, the mandatory reporting and prosecution requirements for domestic abuse might deter pregnant women from receiving medical care in fear that bruises or broken bones would be noticed and reported. This is an unfortunate consequence that is shared among a number of

well-intentioned policies. That does not mean that a "free pass" for criminal conduct on the basis of pregnancy is appropriate or constitutional. And it certainly does not mean that a constitutional prohibition exists that prohibited the district court from considering Newman's pregnancy during sentencing.

In addition, Newman's appeal would have this Court create a new constitutional prohibition against the consideration of pregnancy during sentencing. Newman has failed to show that such a sweeping action is appropriate. That is particularly true when this issue was raised for the first time on appeal. Throughout the sentencing, Newman repeatedly made reference to her pregnancy as a fact that should be considered; Newman even specifically requested that any sentence imposed be served in prison instead of jail because prison had better medical care available. AA 40, 9:9-13; AA 40, 10:3-13.

The district court's decision in incarcerating Newman for the duration of her medical vulnerability, for her own good, when Newman had already failed every other treatment option, was not error.

2. Newman cannot show that any error was plain.

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 across the country, with widely differing schools of thought. Nevada has never

addressed this issue. The State submits that this is an instance where reasonable minds can, and currently do, differ – substantially. Without any clear law on the issue, Newman cannot demonstrate that the district court's error, assuming error is found, was plain error.

3. Newman cannot show that any error affected her substantial rights.

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

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

Similarly, the *Martinorellan* case cited by Newman also found no prejudice to the defendant's substantial rights. In *Martinorellan*, the presiding judge had

failed to instruct the jury to restart deliberations anew when an alternate juror joined the jury a little over an hour into deliberations. *Martinorellan v. State*, 343 P.3d 590, 594 (2015). While finding the error to be plain, this Court upheld the conviction because Martinorellan did not show that the error impacted the jury's verdict, as the jury continued to deliberate for nearly four and a half hours after the alternate joined the jury. *Id.*

In this case, Newman cannot show that her sentence would have been any different had the pregnancy not come into consideration. The State would have likely sought consecutive time anyway; the State expressed concern that concurrent sentences would result in very little additional prison time. AA 39 p.8:14-17. The Department of Parole and Probation also recommended that no good time credits be assigned to the second case.[5] AA 39 p.8:20-24. Newman also had multiple violations – the judge noted that she had violated "every single benefit that anybody could ever possibly give to anybody." AA 41 p.13: 11-15. Newman admitted to continuing to engage in criminal conduct. AA 38 p.4: 15-22. Given the recommendations of the State, and Parole and Probation, in addition to Newman's consistent criminal conduct, it is likely that Judge Russell would have

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[5] Although it appears that it was not recognized at the sentencing, NRS 176.055(2)(b) prohibited any good time credits from being applied to the drug conviction in any event. *Gaines v. State*, 116 Nev. 359, 365 (2000).

sentenced Newman to consecutive terms anyway. Since Newman cannot show that she would not otherwise have been sentenced consecutively, she cannot demonstrate prejudice to her substantial rights.

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

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

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

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

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

Pursuant to NRS 176.055(2)(b), Judge Russell would have had to apply the 265 days to the gross misdemeanor charge, leaving only a few days remaining on the gross misdemeanor sentence. Therefore, regardless of whether concurrent or consecutive time was ordered, the 12-32 month sentence on the possession of a controlled substance charge would not begin running until the day that sentence was ordered.

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

Newman has not established, and cannot establish, all three prongs of the plain error analysis of the error now raised for the first time on appeal. In addition, Newman has not shown why this Court should correct the error in its discretion even if error were found.

VII. CONCLUSION

For the reasons discussed above, the State respectfully requests that Newman's appeal be DENIED in full, and the decisions of the district court be affirmed.

Dated: November 16, 2015.

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VIII. VERIFICATION AND CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering Brief complies with the formatting requirements of NRAP 32(a)(7), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This Answering Brief has been prepared in a proportionally spaced type face using Microsoft Word 2003 in 14 point Times New Roman font.

2. I further certify that this Answering Brief statement complies with the page limitations stated in Rule 32(A)(7), because it is proportionally spaced, has a typeface of 14 points or more, and it does not exceed 30 pages.

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

I therefore certify that the information provided in the Respondent's Answering Brief is true and complete to the best of my knowledge, information, and belief.

Dated this 16th day of November, 2015.

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CERTIFICATE OF SERVICE

I certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of November. Electronic service of this document will be made in accordance with the Master Service List as Follows:

ADAM LAXALT
NEVADA ATTORNEY GENERAL

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Dated this 16th day of November, 2015.

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