

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

LAW COURT DOCKET NO. ARO-16-241

STATE OF MAINE,

Appellee

v.

KIRK E. GOULD,

Appellant

ON APPEAL FROM THE SUPERIOR COURT

**BRIEF OF
APPELLANT KIRK E. GOULD**

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 23, 2007, Kirk E. Gould was charged by complaint in the Aroostook County Superior Court with one count of Class A Gross Sexual Assault, in violation of 17-A M.R.S. § 253(1)(B) (2007), and one count of Class B Gross Sexual Assault, in violation of 17-A M.R.S. § 253(2)(H) (2007). (A. 1) The charges involved allegations that Gould had repeatedly sexually abused and assaulted his stepdaughter from the time she was 11 years old until she was 16 years old, when he was arrested.¹ *State v. Gould*, 2012 ME 60, ¶ 8, 43 A.3d 952.

Gould was indicted on both counts by the Aroostook County Grand Jury in July 2007. (A. 2, 27) Following jury trial, Gould was convicted of both counts in July 2009 and was subsequently sentenced in August 2009. (A. 3, 4) The court (Hunter, J.) sentenced Gould on the Class A conviction to 25 years in prison, with all but 12 years suspended, with four years of probation.² (A. 4-5) The court also

¹ Additional details of Gould's crimes can be found in this Court's opinion in *State v. Gould*, 2012 ME 60, 43 A.3d 952, but such details—apart from the age and the relationship of Gould's victim—are not necessary to recite in detail for this Court to rule on the issues before it in the present appeal.

² Subsequent to the dates on which Gould was alleged to have sexually assaulted his stepdaughter—and therefore not in effect for the present case--the Legislature enacted in 2007 provisions that would have allowed a trial court to impose a maximum probationary sentence of six years for a Class A sexual assault conviction involving a family or household member and four years of probation for a Class B sexual assault conviction involving a family or household member. 17-A M.R.S. § 1202(1-A)(A-1)(1, 2) (2007).

The Legislature also increased the maximum period of probation for those convicted of sexually assaulting children under the age of 12: Class A convictions for such conduct now carry a maximum probationary period of 18 years; Class B convictions can bring with them up to

sentenced Gould to 10 years of concurrent prison time on the Class B conviction. (A. 5-6) Conditions of Gould's probation included that he be registered as a lifetime registrant on Maine's sex offender registry, that he have no contact with his victim, her mother, or their relatives, and that he have no contact with children under the age of 18. (A. 6-7, 25)

Gould was also charged with one Class C count of Violation of Conditions of Release, in violation of 15 M.R.S. § 1092(1)(B) (2007), in June 2007, for allegedly having contact with a potential witness against him in the sexual assault prosecution; he was also indicted on that charge in July 2007. (A. 14, 28) Following a tortured procedural history, Gould ultimately entered a nolo contendere plea to the charge on October 31, 2011. (A. 17) The court sentenced Gould to three years in prison, all suspended, with two years of probation to be served consecutively to his gross sexual assault convictions, with conditions that mirrored his previous probation conditions, specifically "no contact with children under the age of 18." (A. 18, 26)

This Court denied Gould's application for discretionary review of his sentence on the Gross Sexual Assault convictions on February 15, 2011. (A. 9); LAW-SRP-10-599. This Court affirmed Gould's convictions for gross sexual assault on direct appeal on May 1, 2012. *Gould*, 2012 ME 60; LAW-ARO-10-598.

12 years of probation; and Class C convictions may result in the defendant being on probation for up to 6 years. 17-A M.R.S. § 1202(1-A)(A)(1-3) (2009).

This Court also denied Gould's application for discretionary review of the trial court's denial of his petition for post-conviction review on June 23, 2014. LAW-ARO-14-110.

While still incarcerated at Maine State Prison,³ on March 4, 2016, Gould filed a motion to amend the conditions of his probation and a request for appointment of counsel. (A. 10, 19) Gould requested that the probation condition that he have no contact whatsoever with children under the age of 18 be modified to "no unsupervised contact with children under the age of 16." (A. 19) Gould explained in his motion, which consisted of a "fill-in-the-blank" form, that the current condition was "unrealistic." (A. 19) On March 18, 2016, the court summarily denied Gould's motion to modify without hearing and without providing any reasons for the denial; Gould's request for the appointment of counsel was rendered moot by the court's denial of his motion. (A. 10, 19)

Gould filed a notice of appeal from the court's denial of his motion on April 1, 2016; the trial court returned that notice to Gould, as it was unsigned. Gould filed a signed notice of appeal on April 13, 26 days after the order denying his motion had been issued. Though technically filed outside the 21-day window, this

³ According to the Maine Department of Corrections' "Prisoner/Probationer Search" on its website, the earliest Gould would be eligible for release from the Maine State Prison is December 13, 2019. He has been incarcerated since August 26, 2009, the date of his sentencing on the gross sexual assault convictions. Gould will be 52 years old on the date of his release.

Court found good cause to extend the appeal period and accepted Gould's notice of appeal as timely.

On June 12, 2016, this Court appointed counsel to represent Gould in this appeal, and ordered that in addition "to any issues that Gould raises," the parties must address:

Whether the Law Court has jurisdiction to hear an appeal from an order denying a defendant's motion to modify conditions of probation and, if so, whether, given that an appeal from a revocation of probation is only a discretionary appeal pursuant to M.R. App. P. 19, the appeal from the denial of the motion to modify probation is an appeal as of right or a discretionary appeal.

The Court also directed the Clerk of the Law Court "to issue an invitation for any interested person or entity to file an amicus brief" on this issue.

STATEMENT OF ISSUES

- I. Whether Gould's appeal of the trial court's denial of his motion to modify probation conditions should be heard by the Law Court, provided the Court has jurisdiction, on direct appeal or through discretionary review?**
- II. Whether the trial court abused its discretion in denying Gould's request, without hearing or explanation, to modify his probation conditions to allow supervised contact with children under the age of 16?**

SUMMARY OF ARGUMENT

Gould, and all probationers in this state, should be provided a clear appellate avenue to address denials of motions to modify the terms and conditions of their probation. Given the Law Court's current rules that allow only for discretionary

review from a defendant's probation revocation and discretionary review of the imposition of sentence, it is reasonable and logical to permit defendants to petition this Court for certificates of probable cause when their motions to modify their probation conditions are denied by the trial court. Allowing defendants this avenue protects their due process rights while harmonizing the Maine Rules of Appellate Procedure on similar and related appellate issues.

The court abused its discretion in denying Gould's motion to modify his probation conditions; the current conditions are overly broad and not necessary to further the goals of probation. Additionally, the court denied the motion without hearing or explanation. Gould is entitled to a hearing on his motion and should have the court's order vacated and remanded in order to be properly addressed.

ARGUMENT

I. This Court should grant probationers the right of discretionary review of denials of motions to modify conditions of probation.

This Court has considered denials of motions to modify the terms of probation on direct appeal before. *See, e.g., State v. Collins*, 2015 ME 52, 115 A.3d 604; *State v. Spencer*, 2003 ME 112, 831 A.2d 419. The Law Court did not question in those appeals the propriety or procedure of the probationers who pursued them at that time. This Court has also considered direct appeals from defendants who were aggrieved by modifications of or additions to their original probation conditions. *See, e.g., State v. Telford*, 2010 ME 33, 993 A.2d 8; *State v.*

Collins, 681 A.2d 1168 (Me. 1996). However, in its instructions to counsel on Gould’s appeal, the Court asked that the parties address whether the Court had jurisdiction to hear such appeals and, if so, whether such appeals should be heard directly or only after discretionary review.

A. This Court has jurisdiction to decide Gould’s appeal.

There can be no dispute that the Law Court has jurisdiction to consider appeals from denials of motions to modify probation conditions. “In any criminal proceeding in the Superior Court, any defendant aggrieved by a judgment of conviction, ruling or order may appeal to the Supreme Judicial Court sitting as the Law Court.” 15 M.R.S. § 2115 (2016). “The Supreme Judicial Court shall provide by rule the time for taking the appeal and the manner and any conditions for the taking of the appeal.” *Id.* “When the issues of law presented in any case before the Law Court can be clearly understood, *they must be decided.*” 4 M.R.S. § 57 (2016) (emphasis added). “[A] case may not be dismissed by the Law Court for technical errors in pleading alone or for want of proper procedure if the record of the case presents the merits of the controversy between the parties.” *Id.*

The Law Court has the right to decide appeals from denials of a variety of motions, orders, and judgments: it is statutorily authorized to create and promulgate its own rules on how it chooses to address different types of trial court orders. In the present case, the Law Court simply has not yet promulgated a

specific rule to address the issue of how appeals from denials of motions to modify probation conditions should be presented to the Court.

Further, this Court has addressed its authority to hear appeals on such matters previously. As this Court has explained, “Appellate review in Maine is strictly statutory as the common law provided no appeal. The right of review by the Law Court is not a constitutional one and must, as a matter of jurisdictional concern, rest upon enabling legislation empowering the Court to act.” *Dow v. State*, 275 A.2d 815, 818 (Me. 1971). “Although neither [17-A M.R.S. § 1207] nor any Maine statute specifically addresses a probationer’s right of direct appeal of a court’s decision to modify probation, [4 M.R.S. § 57] sets forth a general legislative grant of jurisdiction to the Law Court to entertain appeals.” *Collins*, 681 A.2d at 1169. As the *Collins* Court explained:

Given that a probation revocation decision can be appealed pursuant to [section 1207], and that the original imposition of a condition of probation can be appealed either as part of a direct appeal from a judgment of conviction or as part of a sentence appeal, see *State v. Coreau*, 651 A.2d 319, 320-22 (Me. 1994) (in a sentence appeal defendant challenged a condition of his probation); *State v. Plante*, 623 A.2d 166, 167-68 (Me. 1993) (in an appeal from a judgment of conviction defendant challenged court’s order to pay restitution as a condition of his probation), it would be illogical to conclude that a decision to modify a condition of probation is not subject to appeal pursuant to [4 M.R.S. § 57].

Id. at 1170.

This Court has jurisdiction to decide such appeals; it has been granted by the Legislature the rulemaking authority necessary to determine whether it wants to do so on direct appeal or through discretionary review.

B. This Court has created discretionary appellate processes for appeals that raise similar or related issues to that of Gould.

This Court has created and utilized well-established processes to decide specific criminal appeals and appeals from certain sentences that are discretionary and allow for full appellate review should petitioners articulate sufficient reasons to garner the Court's attention.

Pursuant to M.R. App. P. 19(a), criminal defendants may file memoranda in support of petitions for certificate of probable cause—known by rule as “discretionary criminal appeals”—in a variety of matters. When a defendant's probation, supervised release, or administrative release is revoked, he may appeal that decision only by leave of the Court.⁴ *Id.* Defendants have discretionary appellate rights from a trial court's finding that they have inexcusably failed to

⁴ Pursuant to 17-A M.R.S. § 1207 (2015), “Review of a revocation of probation . . . must be by appeal.”

Following probation revocation proceedings in Superior Court, “a person whose probation is revoked may not appeal as of right. The time for taking the appeal and the manner and any conditions for the taking of the appeal are as the Supreme Judicial Court provides by rule.” 17-A M.R.S. § 1207(2) (2015).

When revocation of probation is reviewed on appeal, this Court determines whether the finding of the violation was made in the exercise of sound judicial discretion from the evidence presented to the court or if the revocation was the result of “whim or caprice.” *Dow v. State*, 275 A.2d 815, 824 (Me. 1971).

comply with conditions of a deferred disposition, from a trial court's denial of a petition and entry of final judgment for post-conviction review, from a trial court's final judgment in an extradition proceeding, from a ruling by the trial court on a motion for DNA analysis, and from an order on post-judgment motions concerning factual innocence or correction of court records. *Id.* When the Superior Court rules on a motion to correct or reduce a sentence, pursuant to M.R.U. Crim. P. 35(a) or (c), a defendant may request that the Law Court in its discretion grant the petition for probable cause. *Id.*

In such cases, the defendant (and in rare instances, the State) need only file a memorandum "giving specific and substantive reasons why the issue or issues identified for prosecution of the appeal warrant the issuance of a certificate of probable cause authorizing consideration of the appeal on the merits by the Law Court." M.R. App. P. 19(c). The memorandum is all that is filed with the Court: no appellee brief or reply memorandum is authorized. *Id.* No appendix is allowed. *Id.* The streamlined process allows this Court to make efficient and final decisions regarding which appeals it would like to consider on these narrow issues without having to burden itself by hearing all criminal appeals on the merits. This process is particularly necessary in this state because Maine has no intermediate appellate court with jurisdiction to adjudicate appellate issues such as these.

Similarly, criminal defendants must file an application for leave to appeal certain sentences. M.R. App. P. 20. Only if the Court, via its Sentencing Review Panel, grants the application—which is entirely at the Court’s discretion—will a criminal defendant be allowed to fully brief the sentencing issues for the Court’s consideration and determination. M.R. App. P. 20(g). If the Court denies the application, “the denial is final and subject to no further review.” M.R. App. P. 20(f). Defendants who initiate a Sentencing Review Panel appeal in this manner, which is constrained by the time when the judgment was rendered, can challenge probation conditions as they were initially imposed. *See, e.g., State v. King*, 1997 ME 85, 692 A.2d 1384.

This Court has a well-established and clear procedure for addressing discretionary review appeals: appeals from a trial court’s denial of a motion to modify probation conditions would fit neatly into such a framework. It would make little sense to allow a criminal defendant a direct appeal of a denial of a motion to modify probation conditions while limiting his right to appeal from a complete revocation of his probation to the Court’s discretion. This Court should also make clear that defendants are entitled to discretionary appellate review from modifications of probation conditions imposed on them by trial courts upon the courts’ own motions or from motions by probation officers. Discretionary review

of such orders would be procedurally adequate to ensure that such denials or modifications are not the result of caprice or whim.

C. Despite differing approaches from federal courts and other state appellate courts, Maine should adopt a discretionary appellate review procedure for these types of appeals that would bring them in line with how Maine’s Law Court addresses similar appeals.

Pursuant to 18 U.S.C. §§ 3563, 3583, the denial of modification of conditions of probation or supervised release, as with any portion of a defendant’s sentence, may be challenged on appeal at any time prior to the expiration of supervision.⁵ *See also U.S. v. White*, 244 F. 3d 1199, 1204 (10th Cir. 2001). The federal Circuit Courts of Appeals review challenges to conditions of supervised release for abuse of discretion. *U.S. v. Webster*, 819 F.3d 35, 39 (1st Cir. 2016); *U.S. v. Morales-Cruz*, 712 F.3d 71, 72 (1st Cir. 2013); *U.S. v. Davies*, 380 F.3d 329, 332 (8th Cir. 2004). The United States District Courts enjoy “significant discretion to impose special conditions of supervised release,” as long as the conditions are “reasonably related to [sentencing guideline factors], involve[] no greater deprivation of liberty than is reasonably necessary . . . , and is consistent with any pertinent policy statements issued by the Sentencing Commission.”

⁵ “Both in statutes and in the sentencing guidelines, provisions for conditions of supervised release are cross-referenced with provisions for conditions of probation. Thus, cases interpreting issues concerning conditions of probation provide standards for issues related to conditions of supervised release as well.” *U.S. v. Pugliese*, 960 F.2d 913, 915 n.3 (10th Cir. 1992) (internal citations omitted).

Webster, 819 F.3d at 40. The federal Circuit Courts of Appeal thus address appeals from modification of probation conditions on direct appeal.

Massachusetts, like Maine, also suffers from some procedural inconsistencies in addressing defendant's appeals from the imposition or modification of probation conditions. In Massachusetts, defendants who file motions to modify conditions of probation due to changes in circumstances do so in the Superior Court in which they were convicted. *Commonwealth v. Morales*, 70 Mass. App. Ct. 839, 839, 877 N.E.2d 938 (2007). The intermediate appellate court, the Massachusetts Court of Appeals, reviews such claims for an abuse of discretion. *Id.* at 842. The Massachusetts Supreme Judicial Court has also heard challenges to conditions of probation on direct appeal on its own motion when it had already reviewed the case and "when the case has been fully briefed and presents issues of public interest." *Commonwealth v. Lapointe*, 435 Mass. 455, 457, 458-59, 759 N.E.2d 294 (2001). The Massachusetts Law Court, however, has emphasized that the "better practice" in challenging probation conditions would be to file a motion in the trial court "or to have sought review of the challenged conditions before the Appellate Division of the Superior Court." *Id.* at 458-59. Thus, in the majority of cases that address modification of probation conditions, such appeals are handled by Massachusetts's intermediate appellate courts.

New Hampshire, which, like Maine, lacks an intermediate appellate court, appears to consider appeals from denials of motions to modify probation conditions directly. *State v. Perfetto*, 160 N.H. 675, 7 A.3d 1179 (2010). New Hampshire, again, like Maine, reviews revocation of probation on a discretionary basis only, as well as appeals from a post-conviction review proceeding or orders from a collateral challenge to a conviction or sentence. N.H. Sup. Ct. R. 3 (definition of “mandatory appeals” also includes proceedings from which appeals are discretionary). It is unclear how New Hampshire will deal with the inconsistency between allowing direct appeals of denials of motions to modify with discretionary appeals for full probation revocation.

Though the federal circuit courts and other state courts have adopted different procedures—including, at times, permitting direct appeals of denials of motions to modify probation or supervised release conditions—it makes the most sense in Maine to allow such appeals through the discretionary appellate process. It is unnecessary to do a survey of how each state handles appeals from denials of motions to modify probation conditions to determine how Maine should best address this issue on appeal: simplicity is key. The discretionary appellate process has proven to be effective in addressing (and prioritizing) many claims of criminal defendants without burdening the Court with full appellate review of each issue raised by defendants.

II. The sentencing court erred when it declined to conduct a hearing on Gould’s motion to modify the conditions of his probation; it abused its discretion when it unceremoniously denied the motion.

The Law Court reviews a motion court’s construction of law de novo. *State v. Nastvogel*, 2002 ME 97, ¶ 6, 798 A.2d 1114, 1117. It reviews a court’s factual findings in support of a decision to modify or to decline to modify conditions of probation for clear error. *Telford*, 2010 ME 33 at ¶ 7; *Collins*, 681 A.2d at 1171. This Court has also declared that it reviews the “conditions of probation imposed by the Superior Court for abuse of discretion.” *State v. Nolan*, 2000 ME 165, ¶ 8, 759 A.2d 721, 728, *citing Coreau*, 651 A.2d at 320.

A court is authorized to remove or modify a condition of probation if the court concludes that the condition “imposed on the person an unreasonable burden.” *Spencer*, 2003 ME 112 at ¶ 7 (citation omitted).

Conditions of probation, if imposed, must be “reasonable and appropriate to assist the convicted person to lead a law-abiding life.” 17-A M.R.S. § 1204(1) (2015). Conditions, including prohibiting “consorting with specified persons,” must be “reasonably related to the rehabilitation of the convicted person or the public safety or security.” 17-A M.R.S. § 1204(2-A)(F),(M) (2015) The court must “impose conditions designed to rehabilitate an offender who has the capacity to benefit from ‘the supervision, guidance, assistance or direction that probation can provide.’” *Collins*, 2015 ME 52, ¶ 18, 115 A.3d 604, *quoting State v. Black*,

2007 ME 19, ¶ 14, 914 A.2d 723. “Probation is a device designed to assist individuals in reintegrating into society and may be premised on *reasonable* conditions that are tailored to a particular probationer’s needs,” *Nolan*, 2000 ME 165 at ¶ 9 (emphasis added). Due to the “substantial limits on individual liberties,” probation “cannot be seen as entirely benignly rehabilitative.” *Black*, 2007 ME 19 at ¶ 14, n.3.

Once a defendant is sentenced to probation, the modification of probation adheres to the following procedure: “upon application of a person on probation or the person’s probation officer, or upon its own motion, the court may, *after a hearing* upon notice to the probation officer and the person on probation, modify the requirements imposed by the court . . . , or relieve the person on probation of any requirement imposed by the court . . . that, in its opinion, imposes on the person an unreasonable burden.” 17-A M.R.S. § 1202(2) (2015) (emphasis added). *See also Spencer*, 2003 ME 112, ¶ 8, 831 A.2d 419 (“A court addressing a motion to modify conditions of probation has three options. It may modify a condition, add a condition, or relieve the defendant from a condition entirely.”) No change in the probationer’s circumstances is necessary to justify a court’s modification, addition, or termination of probation conditions. *Collins*, 681 A.2d at 1170.

In Gould’s case, his probation conditions—which will be in effect for six years following his release from prison—completely prohibit any contact with

anyone under the age of 18. This is a breathtakingly broad prohibition that will likely affect Gould's ability to secure housing or employment, as well as simple routine tasks such as going to the grocery store, attending community events, interacting with family members: it is an unreasonable and unnecessary burden. Gould's proposal for modification—prohibiting him from having *unsupervised* contact with children under the age of 16—would further the goals of probation in both protecting the public safety and encouraging rehabilitation of the offender by allowing him to work and reintegrate into society.

Contrary to the mandates of section 1202(2), the Superior Court did not conduct a hearing to allow Gould to explain on the record—with opportunity for the probation officer to be heard as well—his reasons in seeking the modification. Denial of the motion without hearing was an abuse of judicial discretion. Further, the court failed to explain at all why it was denying Gould's motion to modify. Without articulation of its factual findings and legal conclusions on the record, it is difficult—if not impossible—to discern the reasons behind the court's denial.

From the record presented to it, this Court cannot determine whether the trial court's ultimate conclusion regarding the denial of the motion to modify was in error. However, this Court can and should vacate and remand the order of the trial court so that a proper hearing may be conducted and the court can provide its

factual and legal reasoning in determining whether or not to grant the motion to modify conditions of probation.

CONCLUSION

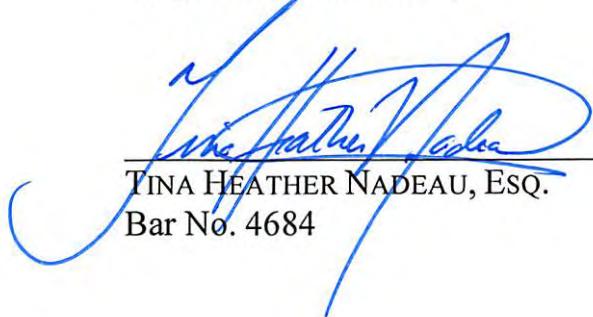
Gould respectfully requests that this Court provide him and all probationers a right to discretionary appellate review from denials of their motions to modify the conditions of their probation. The discretionary process would allow those probationers, for good cause shown, to challenge the conditions of their probation if the trial court that originally imposed the conditions declines to modify them. Such a ruling would bring the procedure in such appeals in line with other similar discretionary appeals, preserving judicial economy, and ensuring appellate review of serious claims.

Gould further requests that this Honorable Court determine that the trial court abused its discretion in summarily denying Gould's request to modify the conditions of his probation. Amending the "no contact" provision to "no unsupervised contact with children under the age of 16" would ensure the public safety and further the goals of probation without being unduly broad or burdensome. Because the trial court did not conduct a hearing on the motion nor provide reasons for denying the motion, the record is inadequate to address whether the court's denial was an abuse of discretion or clear error.

For the foregoing reasons, Gould respectfully requests that this Court vacate the order of the trial court and remand for further proceedings.

Dated in Portland, Maine, on this 24th Day of August, 2016.

Respectfully submitted,



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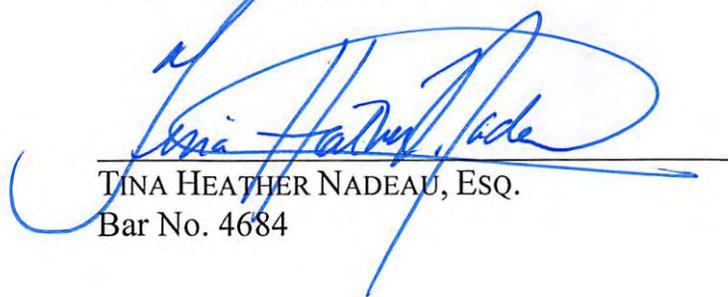
CERTIFICATE OF SERVICE

I, Tina Heather Nadeau, attorney for Appellant Kirk E. Gould, hereby certify that on August 24, 2016, two copies of the *Brief of Appellant Kirk E. Gould* were served via first-class upon the attorneys for the Appellee State of Maine as indicated below, pursuant to M.R. App. P. 7(c)(1):

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Dated in Portland, Maine, this 24th Day of August, 2016.

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