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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| **STATE OF IDAHO,** | ) | |
| | ) | **Supreme Court Case NO. 45759** |
| **Plaintiff-Respondent,** | ) | |
| | ) | **ADA COUNTY** |
| **v.** | ) | **NO. CR01-17-01623** |
| | ) | |
| **COLTYNE DANIELS CONLEY,** | ) | **APPELLANT'S BRIEF** |
| | ) | |
| **Defendant-Appellant.** | ) | |
| | ) | |

**BRIEF OF APPELLANT**

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**HONORABLE JASON SCOTT**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Coltyne Conley entered a guilty plea to felony Aggravated Assault. The district court sentenced him to five (5) years, with one (1) year fixed, and imposed that sentence. Mr. Conley and the state had previously entered into a plea agreement wherein the prosecutor agreed to recommend local jail time and probation, if Mr. Conley obtained a psychosexual evaluation, by a specified evaluator, and he was evaluated to be a low-risk to re-offend. At the sentencing hearing, the prosecutor acknowledged his obligation to follow the plea agreement and asked the district court to follow the plea agreement. However, the prosecutor's comments and arguments to the district court impliedly disavowed the state's promised sentence and breached the plea agreement. The district court did not place Mr. Conley on probation. The district court imposed a prison sentence of five (5) years, with the first year being fixed and gave him credit for two (2) days in custody. Mr. Conley now appeals from his Judgment of Conviction, contending the prosecutor's statements and argument during the sentencing hearing breached the plea agreement and violated his right to due process. Mr. Conley also contends that the district court abused its discretion by imposing an excessive sentence. Mr. Conley asks for a new sentencing hearing before a different judge.

### Statement of the Facts and Course of Proceedings

Mr. Conley had no criminal history prior to the date of incident in the instant offense. (PSI, pg. 5.) Aside from this conviction, his criminal history is limited to a misdemeanor conviction for

resisting and obstructing, which occurred shortly after this case. (Tr., pg. 50, Ls. 1-18.; PSI, pg. 5.) The state filed an Information charged Mr. Conley with one count of Rape pursuant to Idaho Code § 18-6101. (R., pg. 24.) Pursuant to plea negations, the state ultimately filed a Second Amended Information that charged Mr. Conley with one count of Aggravated Assault, pursuant to I.C. §§ 18-901(b) and 18-905(b), for the conduct of "putting a pillow over B.H.'s face causing B.H. to have difficulty breathing." (R., pp.77–78; Tr., pg. 5, L. 12 - pg. 6, L.13.) Pursuant to the terms of the plea agreement with the state, Mr. Conley entered a guilty plea to the charge of Aggravated Assault. (R., pp.87–88; Tr., p.15, L.17 – p.17, L.8.) Additionally, Mr. Conley was required to obtain a psychosexual evaluation to be conducted by Dr. Engle or Dr. Johnston as part of the plea agreement. (R., pp. 87-88; Tr., pg. 17, Ls. 9-14). In exchange, the State agreed to recommend probation if the psychosexual evaluation came back as low risk. (R., pg. 87; Tr., pg. 7, Ls. 5-7; Tr., pg. 8, L. 24 – pg. 9, L.2.) Additionally, the state was not limited to recommend any number of jail days, but the state would recommend that Mr. Conley have the option of work release for any jail time asked for by the state in excess of thirty (30) days. (R., pg. 87; Tr., pg. 7, L. 5 – pg. 8, L. 14.) Mr. Conley was free to argue for less. (R., pg., 87; Tr., pg. 8, Ls. 19-21.)

Mr. Conley obtained a psychosexual evaluation, conducted by Dr. Johnston, that was included in the presentence investigation ("PSI"). (PSI, pp. 25-65.) The psychosexual evaluation determined Mr. Conley was a low risk, this information was reflected in the PSI. (PSI, pg. 13.) Mr. Conley's Level of Service Inventory-Revised score also placed him in the low risk category. (PSI, pg. 12.) The PSI also reflected that there were eleven (11) offenders in the sentencing database that had similar factors as Mr. Conley. (PSI, pg. 13.) The sentencing database reflected

that seven (7) of those offenders were sentenced to probation and four (4) of those offenders we sentenced to retained jurisdiction. (PSI, pg. 13.) The PSI recommended probation, specifically that Mr. Conley "could be successful in the community under supervision." (PSI, pg. 14.)

At the outset of the sentencing hearing, the district court stated that the plea agreement called for the state to cap its recommendation a probation, if the psychosexual evaluation returned as low risk, which it did. (Tr., pg. 19, Ls. 10-15.) Further, that the state had the right to argue the number of jail days, but that the agreement was that the state would not recommend that any more than thirty (30) days be served without options. (Tr., pg. 19, Ls. 16-20.) At the outset of the prosecutor's sentencing argument the prosecutor asked that the district court follow the plea agreement and recommended 365 days in jail, with the first thirty (30) days to be served forthwith with no options. (Tr., pg. 36, Ls. 14 -19.) Notably, the prosecutor did not use the word probation a single time during the entirety of his sentencing argument. (Tr., pg. 36, L. 14 – pg. 46, L. 12.)

The state additionally made a number of inflammatory statements and remarks. For example, the prosecutor described defense actions in the case as an attempt to "harass" the victim. (Tr., pg. 27, Ls. 22-24; Tr., pg. 38, L. 2.) He described letters of support written by Mr. Conley's mother and stepfather as "offensive and victim-blaming," suggested that the content of those letters "likely came from him," and argued that Mr. Conley had "told a lot of people untrue versions of what happened, which further victimizes [the victim]." (Tr., pg. 41, Ls. 6-13.) The prosecutor also described Mr. Conley's response to the PSI investigator's inquiry as to whether he had a criminal history prior to this incident as "dishonest in the PSI, not telling them about his other criminal conviction, actually having the gall to say 'I have never actually been in trouble.'" (Tr., pg. 41, Ls.

14-17.) The prosecutor characterized Mr. Conley's statement regarding his plans to avoid future legal trouble as "really nothing more than just blatant victim blaming." (Tr., pg. 41, Ls. 22-24.)

The prosecutor personally attacked Mr. Conley repeatedly. He stated "in the beginning, he flat out lied over and over." (Tr., pg. 39, Ls. 11-12.) He called Mr. Conley's apology "false." (Tr., pg. 42, Ls. 11-12.) Despite the psychosexual evaluation coming back low risk, the prosecutor argued that Mr. Conley tried to skew the results. (Tr., pg. 43, Ls. 10 – 20.) The prosecutor described Mr. Conley as "unsympathetic, impulsive, and hostile." (Tr., pg. 43, Ls. 17-18.) He described Mr. Conley's statements during the psychosexual evaluation as "terrifying" and "dangerous" and said "[i]f that is true, nobody would be safe from him, so I hope he is simply lying to make himself look good." (Tr., pg. 44, 1-13.) The prosecutor discussed the set over of the first sentencing hearing as he described that the victim was "absolutely traumatized" as result, and he sat with her for about 45 minutes as she cried. (Tr., pg. 36, L. 22 – pg. 37, L. 4.) The prosecutor referred to the two victim impact statements submitted by the victim and continued to repeatedly emphasize the content of those statements to the district court. (Tr., pg. 45, Ls. 2-25.)

Following the state's argument and recommendation, Mr. Conley's counsel objected to the prosecutor's argument. (Tr., pg. 46, L. 15 – pg. 47, L. 4; Tr., pg. 62, Ls. 13-21.) Conley's counsel stated that the prosecutor had offered to resolve the case as an aggravated assault from the preliminary hearing stage, which was indicative of a number of issues with the state's case. (Tr., pg. 54, L. 15 – pg. 55, L. 10.) Mr. Conley's counsel also noted that the case as originally charged by the state would have been "extremely problematic" for the prosecution at trial and pointed out numerous facts that supported that proposition. (Tr., pg. 56, L. 15 – pg. 58, L. 4.) Mr. Conley's

counsel also argued there had not been a single incident of contact with, or harassment of, the victim during the pendency of the case. (Tr., pg. 47, L. 14 – pg. 48, L. 8.)

Mr. Conley's counsel also noted concern with the prosecutor's characterization that the defense investigation of the case should be attributed to, or considered for, the purposes of punishment as defendants do not generally have the financial resources of the prosecutor's office and the police. (Tr., pg. 48, Ls. 8 – 23; *see also* Tr., pg. 56, Ls. 3-14; Tr. pg. 58, Ls. 5 – 24.) His counsel further commented that the defense had been blind-sided by the prosecutor's notification to the defense the day before the original sentencing hearing that restitution would be sought for emergency room visits that occurred nine (9) or more months after this incident. (Tr., pg. 48, L. 24 – pg. 49, L. 16.) Mr. Conley's counsel argued to the court Mr. Conley was an appropriate candidate for probation based on the PSI and psychosexual evaluation. (Tr., pg. 61, Ls. 13 – 22.) Mr. Conley's counsel stated that the prosecutor's argument implied that the plea agreement should be disregarded. (Tr., pg. 62, Ls. 13-21.)

Mr. Conley also had a number of protective factors that would be a deterrence for any future criminal conduct. (Tr., pg. 63, L. 16 – pg. 64, L. 22; *See also* PSI, pg. 13; PSI, pg. 14.) Mr. Conley expressed remorse for his actions and the impact of his actions on the victim. (PSI, pg. 12; PSI, pg. 14; Tr., pg. 68, L. 11- pg. 69, L. 13.) The district court sentenced Mr. Conley to an aggregate term of (5) five years, with one (1) year fixed, and imposed that sentence. (R., pg. 96 - 99; Tr., pg. 78, Ls. 1-17.) Mr. Conley filed a timely notice of appeal from the district court's Judgment of Conviction and Order of Commitment. (R., pp. 109 - 113.)

<u>ISSUES</u>

1. Did the state breach the plea agreement by making statements that impliedly disavowing its promised sentencing recommendation?

2. Did the district court abuse its discretion when it imposed a unified sentence of five years, with one year fixed, upon Mr. Conley, following his guilty plea to Aggravated Assault?

# ARGUMENT

## I.

## The State Breached The Plea Agreement By Making Statements During Argument That Unequivocally Conflicted With The Sentencing Recommendation The State Was Required To Recommend

### A. Introduction

In exchange for a plea of guilty, the defendant is entitled to rely on the on the promise of the state to make a certain recommendation at the sentencing hearing. It is impermissible for a prosecutor to make statements during the sentencing argument that unequivocally conflict with the prosecutor's recommendation. The prosecutor was required to make a recommendation for probation if the psychosexual evaluation came back low risk. (R., p. 87; Tr., pg. 7, Ls. 5-7; Tr., pg. 8, L. 24 – pg. 9, L.2.) The prosecutor's statements at Mr. Conley's sentencing hearing categorically departed from the probation recommendation that the prosecutor was required to make. In fact, the prosecutor only asked that the court follow the plea agreement and launched into an argument in which he did not give a single reason why Mr. Conley was an appropriate candidate for probation. The prosecutor never even used the word "probation" during his sentencing argument. The prosecutor's statements fundamentally and unequivocally departed from the recommendation the prosecutor was required to make pursuant to the plea bargain. This constituted a breach of the plea agreement and deprived Mr. Conley of the benefit of his plea bargain.

B. Standard of Review

The determination as to whether the prosecutor breached the plea agreement in this case is a question of law that is to be reviewed by this Court *de novo*, in accordance with contract law standards. *State v. Gomez*, 153 Idaho 253, 255 (2012) (citing *State v. Peterson*, 148 Idaho 593, 595 (2010).

Mr. Conley's counsel objected to the prosecutor's statements in the district court and specifically stated that the objection was to preserve the issue for appeal. (Tr., pg. 46, L. 15 – pg. 47, L. 4; *see also* Tr., pg. 62, Ls. 13 -21.) When there is no objection to the alleged breach of the plea agreement, the defendant may raise the issue for the first time on appeal under the fundamental error standard. *State v. Jafek*, 141 Idaho 71, 74 (2005); *State v. Halbesleben*, 147 Idaho 161, 164-65 (Ct. App. 2009); *State v. Wills*, 140 Idaho 773, 775 (Ct. App. 2004); *State v. Daubs*, 140 Idaho 299, 300 (Ct. App. 2004); *State v. Jones*, 139 Idaho 299, 301 (Ct. App. 2003). However, if "a constitutional violation occurs at trial, and is followed by a contemporaneous objection, a reversal is necessitated, *unless* the state proves 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" *State v. Perry*, 150 Idaho 209, 221 (2010) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

The *Chapman* harmless error test was further extended to apply to all objected-to error. *Id*. The grounds for an objection must be clearly stated or the basis of the objection must be apparent from the context in order to preserve the issue for appeal. *State v. Sheahan*, 139 Idaho 267, 277 (2003) (citing *State v. Norton*, 134 Idaho 875, 880 (Ct. App. 2000); *State v. Cannady*, 137 Idaho 67, 72 (2001)). A timely objection must be posed in response to the alleged improper statements

and the best practice in criminal cases is for such an objection to be made at the earliest opportunity. *State v. Camp*, 107 Idaho 36, 38 (Ct. App. 1984). In this case, Mr. Conley's counsel objected to the state's argument at sentencing at the outset of her sentencing argument and subsequently reiterated the issue again. (Tr., pg. 46, L. 15 – pg., 47 L. 4; Tr., pg. 62, Ls. 13-21.) Therefore, this issue is reviewed under the harmless error standard.

C. The Prosecutor Breached The Plea Agreement By Making Statements That Were Fundamentally At Odds With The Sentence The Prosecutor Was Mandated To Recommend

It is mandated that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Gomez*, 153 Idaho at 255 (citing *State v. Peterson*, 148 Idaho 593, 595 (2010)). Importantly, "this principle is derived from the Due Process Clause and the fundamental rule that, to be valid, a guilty plea must be both voluntary and intelligent." *Halbesleben*, 147 Idaho at 165 (citing *Mabry v. Johnson*, 467 U.S. 504, 508–09 (1984); *State v. Rutherford*, 107 Idaho 910, 913 (Ct. App. 1985)). "If the prosecution has breached its promise given in a plea agreement, whether that breach was intentional or inadvertent, it cannot be said that the defendant's plea was knowing and voluntary, for the defendant has been led to plead guilty on a false premise." *Id.* A breach of a plea agreement "goes to the foundation or basis of a defendant's rights" because it affects whether the plea agreement was entered into knowingly, voluntarily, and intelligently. *Jafek*, 141 Idaho at 74 (citing *State v. Knowlton*, 123 Idaho 916, 918 (1993)).

A prosecutor is not required to recommend a sentence enthusiastically. *Jones*, 139 Idaho at 302 (citations omitted). However, a prosecutor is prohibited from circumventing a plea

agreement through words or actions that convey reservation about the recommendation or implied disavowing the recommendation. *Id*. A prosecutor is not required to use a certain form of expression when making a sentencing recommendation, but "their overall conduct must be reasonably consistent with making such a recommendation, rather than the reverse." *Halbesleben*, 147 Idaho at 165 (citing *Jones*, 139 Idaho at 302) .

In *State v. Lankford*, the prosecutor described the defendant as "manipulative, dishonest, and dangerous." 127 Idaho 608, 617 (1995)). In *Jones,* the prosecutor described the case as "one of the most disturbing" she had ever dealt with. 139 Idaho at 300-01. The prosecutor also emphasized the violence of the offense, the defendant's history of violence, and the defendant's refusal to accept responsibility. *Id*. at 301. There, the Court of Appeals held that the prosecutor had violated the plea agreement because her statements during her sentencing argument were "fundamentally at odds" with the sentencing recommendation she had promised to make. *Id*. at 303 (quoting *Lankford*, 127 Idaho at 617). The Court of Appeals concluded that the prosecutor had "uttered the recommendation required by the plea agreement," but she had disavowed the recommendation and advocated for a harsher recommendation through her other statements. *Id*. The Court of Appeals held that Jones had not received the benefit of the plea bargain, vacated his sentence, and remanded his case for resentencing before a different judge. *Id*.

Further, in *Daubs*, the Court of Appeals held that it was an error for the prosecutor to "emphasize" the prison recommendation in the PSI and "embellish" the victim impact statements made by the victim's parents when the prosecutor had agreed to make a rider recommendation. 140 Idaho at 301. Additionally, the prosecutor should not provide vigorous argument that is

inconsistent with the sentence recommendation the prosecutor agreed to make. *Wills*, 140 Idaho at 775-76. In *Wills*, the prosecutor specified that the recommended sentence was the "minimum" that the court should impose, described the recommendation as one made with "great restraint," and described the defendant as a "predator" with a high risk of reoffending. *Id*. at 774. As a result, the Court of Appeals held that the prosecutor breached the plea agreement because the prosecutor's sentencing recommendation was undermined by the prosecutor's argument at the sentencing hearing. *Id*. at 776. Accordingly, the defendant's sentence was also vacated and his case remanded for resentencing by a different judge. *Id.*

Here, the prosecutor completely disavowed the plea agreement. Through the entirety of his argument, the prosecutor did not ever use the word "probation." (Tr., pg. 36, L. 14 – pg. 46, L. 12.) At the outset and tail end of the prosecutor's argument, he only asked the court to "follow the plea agreement." (Tr., pg. 36, L. 15; Tr., pg. 46 Ls. 10-11.) The prosecutor did not give a single reason why Mr. Conley was an appropriate candidate for probation or why the state agreed to recommend probation pursuant to the plea agreement. (Tr., pg. 36, L. 14 – pg. 46, L. 12.) The prosecutor did not articulate why the state had offered to resolve the case as an Aggravated Assault. The prosecutor failed to state that Mr. Conley had no criminal history prior to this incident. The prosecutor's references to the PSI and psychosexual evaluation minimized the fact that Mr. Conley was deemed to be a good candidate for probation and posed a low-risk to reoffend. (Tr., pg. 41, L. 14 – pg. 42, L. 7; Tr., pg. 42, L. 13 – pg. 44, L. 23.)

Further, the prosecutor repeatedly emphasized highly disputed conduct that Mr. Conley had not pled guilty to during his argument. (Tr., pg. 38, L. 11 – pg. 41, L. 5.) The prosecutor used

repeatedly used inflammatory language like "dishonest," engaging in "victim blaming," "terrifying," "lying," "dangerous," "unsympathetic," "impulsive," and "hostile" to describe Mr. Conley and his actions (Tr., pg. 41, Ls. 14 -24; Tr., pg. 43, Ls. 3-18; Tr., pg. 44, Ls. 3-10.) The prosecutor also departed from the plea agreement by stating "if that is true, nobody would be safe from him, so I hope he is simply lying to make himself look good." (Tr., pg. 44, Ls. 11-13.) The prosecutor criticized letters of support from Mr. Conley's family as "offensive and victim-blaming." (Tr., pg. 41, Ls. 6-8.) He described the defense of Mr. Conley's case as an attempt to "harass my victim or to try to take the focus off of what actually happened in January of last year." (Tr., pg. 37, L. 23 – pg. 38, L. 4.) Further, the prosecutor referred to the victim impact statements and the demeanor of the victim in court and drew the court's attention to them in a manner that completely departed from the plea agreement. (Tr., pg. 45, L. 2 – pg. 46, L. 7.) The court specifically addressed the "very distressing, concerning information as to how this event has affected [the victim]" before Mr. Conley's sentence was pronounced. (Tr., pg. 76, Ls. 19 – 21.) The court also stated that "the fact that it presents such risk of emotional damage to the victim is what makes it so terribly wrong and what makes it so worthy of punishment." (Tr., pg. 77, Ls. 6 – 9.)

In this case, the prosecutor's conduct and statements were not consistent with the state's promise pursuant to the plea agreement to recommend probation. The prosecutor asked the court to follow the plea agreement. However, the prosecutor absolutely disavowed the state's obligation to recommend probation by making statements that advocated for a much harsher sentence. Accordingly, Mr. Conley respectfully requests that this Court conclude that the state breached the

plea agreement by failing to fulfill its side of the bargain. Mr. Conley respectfully requests that the Court vacate his sentence and remand for resentencing before a different judge.

## II.

## The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Five Years, With One Year Fixed, Upon Mr. Conley, Following His Guilty Plea To Aggravated Assault

The district court imposed a sentence of five years, with one year fixed. Mr. Conley's sentence did not exceed the statutory maximum. The evaluation as to whether a sentence is excessive is evaluated under an abuse of discretion standard. *State v. McIntosh*, 160 Idaho 1, 8 (2015) (citing *State v. Stevens*, 146 Idaho 139, 148 (2008)). "It is well-established that '[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Pierce*, 150 Idaho 1, 5 (2010) (quoting *State v. Jackson*, 130 Idaho 293, 294 (1997) (internal citation omitted)). To establish that the sentence imposed was unreasonable, Mr. Conley "must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts." *State v. Strand*, 137 Idaho 457, 460 (2002). The factors considered are protection of society, deterrence of the defendant and of others, the possibility of rehabilitation, and punishment or retribution of the defendant. *Id*. at 460-61 (quoting *State v. Howard*, 135 Idaho 727 (2001)).

Mr. Conley asserts that the district court should have sentenced him to a lesser term of imprisonment or probation in light of the mitigating factors. The district court specified that there were mitigating factors to consider. (Tr., pg. 75, Ls. 19-20.) Specifically, that Mr. Conley had a "limited criminal history," that he was not someone that had "ongoing criminal tendencies," he

was "well liked and respected" by a lot of people, and he was evaluated as a "low risk to re-offend." (Tr., pg. 75, L. 21 – pg. 76, L. 5.) The district court indicated that these things "suggest that [Mr. Conley] ultimately is someone who can refrain from engaging in like behavior in the future, that he could generally conform himself to the law, and that he can do productive things in the community." (Tr., pg. 76, Ls. 5 – 10.) However, the district court determined that a sentence other than prison would "depreciate the seriousness of the offense." (Tr., pg. 77, Ls. 22-25.)

However, Mr. Conley was evaluated as a low risk to re-offend by the PSI and the psychosexual evaluation. (PSI, pg. 14.) Pursuant to the sentencing database information contained in the PSI, no other offender who met similar criteria to Mr. Conley has received a prison sentence. (PSI, pg. 13.) Mr. Conley expressed remorse for his actions and understood the gravity of his offense. (PSI, pg. 14; Tr., pg. 68, L. 1 – pg. 69, L. 13.) Further, Mr. Conley has the foundation and resources to succeed on probation. The PSI listed Mr. Conley's support system, accommodations, financial stability and good use of time as protective factors. (PSI, pg. 13.) Accordingly, the district court's sentence was unreasonable because it was not necessary for the protection of society or to accomplish the other objectives of criminal sentences. Jail time followed by probation would have achieved these objectives by providing an opportunity for rehabilitation under strict supervision in the community, as well as punishment and deterrence.

## CONCLUSION

Mr. Conley respectfully requests that this Court vacate his sentence and remand his case for a new sentencing hearing before a different district judge with instructions that the state recommend a sentence that strictly adheres to the plea agreement. Alternatively, he respectfully requests that this Court reduce his sentence as it deems appropriate.

DATED this 15th day of June, 2018.

EDWINA E. WAGER
Attorney for Defendant-Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of June, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail and/or delivering in the manner listed below, addressed to:

COLTYNE DANIELS CONLEY
INMATE #125939
IDAHO STATE CORRECTIONAL CENTER
P.O. BOX 70010
BOISE, ID 83707

JASON SCOTT
DISTRICT COURT JUDGE
E-MAILED BRIEF AND MAILED A COPY

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
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EDWINA E. WAGER