IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

v.

DWIGHT CONRAD SOLANDER,

Respondent.

CASE NO: 67710

APPELLANT'S OPENING BRIEF

Appeal From Findings of Fact, Conclusions of Law, and Order Granting, in Part, Defendant's Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider an appeal from the granting of a pre-trial Petition for Writ of Habeas Corpus under NRS 34.575. Further, as the case concerns an issue of statewide public importance involving a Category A felony, it is appropriate for the Nevada Supreme Court to retain jurisdiction.

ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(a)(14) because it raises as a principal issue a question of statewide public importance. Further, this appeal is not presumptively assigned to the Nevada Court of Appeals as this case does not involve the granting of a pretrial writ for failure to comply with discovery statutes. See NRAP 17(b)(8).

STATEMENT OF THE ISSUE

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THE INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

STATEMENT OF THE CASE

On March 25, 2014, a Criminal Complaint was filed charging Dwight Solander ("Dwight"), Janet Solander ("Janet"), and Danielle Hinton ("Hinton") with the following offenses: Counts 1-3, 16-22: Child Abuse, Neglect, or Endangerment with Substantial Bodily Harm (Category B Felony – NRS 200.508(1)); Counts 4-15: Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)); and Count 23: Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366). 1 AA 1-8. A Preliminary Hearing was held over the course of five separate days. Afterwards, on July 23, 2014, the State filed a Second Amended Criminal Complaint based on the evidence presented at the preliminary hearing charging the Defendants as follows: Counts 1-2, 14, 24-25: Child Abuse, Neglect, or Endangerment with Substantial Bodily Harm (Category B Felony – NRS 200.508(1)); Counts 3-6, 9-12, 15-18, 20-22, 26-29, 40-45: Child Abuse, Neglect, or Endangerment (Category B Felony – NRS 200.508(1)); Counts 7-8, 19, 30-37: Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Counts 13, 23, 46: Assault with a Deadly

Weapon (Category B Felony – NRS 200.471); and Counts 38-39: Battery with Intent to Commit Sexual Assault (Category A Felony – NRS 200.400.4). 4 AA 763-79. Defendants were bound over on all charges included in the Second Amended Criminal Complaint.

On July 28, 2014, the State filed an Information charging the same offenses included in the Second Amended Criminal Complaint. 4 AA 780-98. On August 8, 2014, Dwight filed a Motion to Extend Time to File Petition for Writ of Habeas Corpus. 4 AA 799-803. The State filed an Opposition on August 13, 2014. 4 AA 804-07. On August 19, 2014, the District Court granted Dwight's request and required him to file a pretrial Petition for Writ of Habeas Corpus no later than September 16, 2014. 4 AA 808-09.

On September 16, 2014, Dwight filed a pretrial Petition for Writ of Habeas Corpus. 4 AA 810-29. The State filed its Return on September 25, 2014. 4 AA 830-51. At a hearing on Dwight's Petition on September 30, 2014, the Court expressed concern regarding the use of catheters to commit sexual assault and invited both parties to submit supplemental briefs. 4 AA 854-55. The State filed a Bench Memorandum Pursuant to Court's Request Regarding Issue in Pretrial Writs of Habeas Corpus on October 15, 2014. 4 AA 857-64. On October 16, 2014, Janet filed a Joinder to Dwight's pretrial Petition for Writ of Habeas Corpus. 4 AA 865-67. On

November 5, 2014, Dwight filed a Response to the State's Bench Memorandum. 4 AA 868-75.

On November 5, 2014, Janet filed a pretrial Petition for Writ of Habeas Corpus. 4 AA 876-94. The State filed an Opposition and Motion to Dismiss Janet's Petition on November 19, 2014. 4 AA 929-34. The State's Motion to Dismiss was denied and the State subsequently filed a Return to Janet's Petition on December 17, 2014. 4 AA 935-71. On January 28, 2015, the District Court issued a minute entry granting both Petitions in part, and denying them in part. 4 AA 972-73.

The State filed a Notice of Appeal on March 30, 2015. 4 AA 974-76. The District Court issued Findings of Fact, Conclusions of Law, and Order on June 17, 2015. 4 AA 977-82.

STATEMENT OF THE FACTS

A.S. (10/21/01), A.S. (1/23/03), and A.S. (7/25/04) are sisters. 1 AA 21-22, 245-46; 2 AA 418-19. All three sisters were initially foster children of Dwight and Janet but were subsequently adopted on January 19, 2011. 1 AA 30.

Before the three victims were fostered by Dwight and Janet, they lived with a couple by the name of Miss Debbie and Mr. Mack. 1 AA 25. During the time period the children lived with Miss Debbie and Mr. Mack, A.S. (10/21/01) had no issues

with going to the bathroom, and none of the children had any digestive issues. Id.; 1 AA 248-49.

Once the victims were adopted by Dwight and Janet, certain rules were put in place regarding the bathroom. 1 AA 26-27. First, the children would have to ask Dwight, Janet, or Hinton to use the bathroom and the children were not allowed to use the restroom whenever they needed to. Id. Janet, Dwight, and Hinton then began using timers to regulate when the children were allowed to use the bathroom. 1 AA 37-37, 192-93. The children were forced to hold their urine and feces until the timer went off. Id. The children were also timed as to how long they could be in the restroom. 3 AA 712. Because of these rules, the children were often too scared or frustrated to take the opportunity when they were given a chance to use the restroom because if they admitted they needed to use the restroom, they would get in trouble for not saying they had to go earlier. 1 AA 121-22; 2 AA 383-84, 395. On the other hand, if the children asked to use the restroom before the timer had gone out, they were likewise often yelled at or punished and told to wait. 1 AA 29-30, 250; 2 AA 251. Thus, there was no way to escape getting into trouble over toileting.

There were also rules regarding use of the bathroom at nighttime. At first, the children were allowed to knock on Janet and Dwight's door and ask to go to the bathroom, however, they would get in trouble with Janet. 1 AA 28. Then Dwight

and Janet put a gate blocking the children's sleeping area and an alarm on the bathroom door so the children could not get access to the bathroom during the night. 1 AA 28-29.

As a result, A.S. (10/21/01) became too scared to ask so she started holding "it," then after a while she started having accidents in her pants. 1 AA 29-32. Similarly, A.S. (1/23/03) and A.S. (7/25/04) became increasingly frustrated and scared as a result of Defendants actions and would intentionally or accidentally soil their pants. 1 AA 250; 2 AA 251, 395, 423-25. If the children soiled themselves, they would be beaten by Janet or Dwight. 1 AA 32-33, 2 AA 253, 423-25. The children would be ordered to disrobe and "get in the position" which meant to act as though they were doing a push-up on the ground. 1 AA 32; 2 AA 431. The children would then be spanked on their bare bottoms with a wooden Home Depot paint stick. Id. Dwight wrote "Board of Education" on at least one of the sticks used. 1 AA 29-32. Sometimes, the children were hit on different parts of their body, such as their backs, arms, legs, and wrists. 2 AA 252, 393, 425-26. When the children were hit with the stick, it would often break their skin, causing them to bleed. 1 AA 33; 2 AA 256, 427. On certain occasions, the children would be hit so hard the stick would actually break. 1 AA 33, 79; 2 AA 254-55. When the paint stick would break, another would be retrieved and the beating would continue. Id. The girls were spanked until

they stopped crying. 2 AA 255. All three girls still have scars on their bodies as a result of these beatings. 1 AA 33-34; 2 AA 255; 3 AA 502-03, 513, 521.

During the day, A.S. (10/21/01) and A.S. (1/23/03) were forced to sit on Home Depot buckets with a toilet seat placed on top of the bucket while A.S. (7/25/04) was forced to sit on a "potty training" chair for long periods of time throughout the day. 1 AA 37-38, 119-20; 2 AA 257-59, 432; 3 AA 626-27. Dwight bought the Home Depot buckets and the toilet lids that were placed on top of them. 1 AA 40. The buckets had mocking names on them for each of the girls. 3 AA 510. The girls would be naked from the waist down whenever they sat on the buckets or "potty training" chair and would sometimes sit on the improvised toilets from the time they woke up until the time they went to bed. 2 AA 259.

Janet took A.S. (10/21/01) to a doctor because she believed A.S. (10/21/01) was having "stomach issues." 1 AA 41. After that, Janet starting blending ALL of the children's food. Id.; 2 AA 260-61. The children were fed this "blended meal" three times a day. Id. If they had an accident, sometimes their food would be reduced to twice a day, then once a day, and sometimes they would not be given anything to eat at all. 1 AA 41; 2 AA 263. The denial of food would also sometimes extend to the day after the children had an accident. 2 AA 263, 434. Janet also withheld water from the children as punishment for accidents and most days they were only given

water if they were taking medicine. 1 AA 42; 2 AA 262. Although Janet primarily monitored the children during the day, both Janet and Dwight would withhold food and water from the children. 1 AA 42; 2 AA 264.[1]

Besides being beaten, if any of the girls soiled themselves, they would routinely be required to put their soiled underwear in their mouths. 1 AA 43; 2 AA 264, 436. On other occasions, the children would be forced to put their underwear on their head, dance around, and make baby noises for the amusement of Defendants and any foster children who happened to be living in the home at the time. 2 AA 265-66; 3 AA 713.

On one occasion, A.S. (7/25/04) had a bowel movement on her "potty training" chair, which was only intended for urine. 2 AA 281. Janet and Hinton became upset and ordered A.S. (7/25/04) to the upstairs bathroom, with Janet kicking her as she went. Id. Once in the bathroom, Janet emptied the contents of the "potty training" chair into the toilet and then forced the child's face into the toilet with the feces while Hinton laughed. Id., 2 AA 445. On other occasions, when A.S. (7/25/04) soiled her underwear with feces, Janet would force her to stand completely naked in a garbage bag in the bathroom for the remainder of the day. 3 AA 629-30,

[1] Later in the preliminary hearing A.S. (10/21/01) testified that Dwight did not withhold food and water from her or her siblings.

659-61. If A.S. (7/25/04) urinated or defecated in the garbage bag, she was forced to stay in the garbage bag with her own excrement. 3 AA 628-29. Janet also became frustrated with A.S. (7/25/04) over her complaining one time about the water coming out of the bathroom faucet being too hot. Id. Janet grabbed A.S. (7/25/04) and tried to force her hands in the hot water. Id. When A.S. (7/25/04) resisted, Janet picked her up and put her face and ear in the hot water, causing her to receive burns that resulted in scarring. Id., 3 AA 524, 549.

Once, A.S. (10/21/01) accidentally urinated on the bathroom floor while waiting for permission to use the restroom. 1 AA 154. As punishment, Janet forced A.S. (10/21/01) to lick her own urine off the bathroom floor. Id. On another occasion, A.S. (10/21/01) had an accident. 1 AA 52, 60. Janet became furious and repeatedly slammed the child's head into the kitchen counter, injuring her face and causing her eye to swell shut. Id.

After the children had accidents, they would either be taken outside and sprayed down with a hose, or they would be given a cold shower. 1 AA 54-55; 2 AA 268, 437. Along with being placed in the cold shower, Janet would also pour buckets of ice water on the children while they were showering. Id. After the children were done showering Janet or Dwight would then take a special light to the shower. 1 AA 55-56; 2 AA 268-69. If it showed that they had urinated in the shower they would

get hit with the stick. Id. Janet and Dwight would also force them to dry off by placing a fan on them, or they were told to shake the water off, they would not be given towels. Id.

When the children would sleep at night, they were frequently given boards to sleep on, unless the nannies were there, then they would give them a cot. 1 AA 56-57; 2 AA 270-73, 440-41. When sleeping on the boards, most of the time the children were made to sleep with no blankets, no sheets, wearing nothing other than their underwear, while a large fan blew on them. Id.

At a certain point the Defendants made the decision to home school the children. When the children would get answers to their homework wrong, Defendants would hit them with the stick or deprive them of food or sleep. 1 AA 51, 52; 2 AA 273-74, 447.

At some point in 2012 or 2013, Janet and Dwight decided to start using catheters on the children. Dwight ordered the catheters from his work computer. 3 AA 714, 715-16, 732-33. The girls would be asked if they needed to use the restroom. 1 AA 53-60; 2 AA 275-77, 449-52. If they denied needing to use the restroom, Janet would tell them she was going to "check" and order them to go upstairs to a bedroom or the bathroom and lie on the floor. Id. Once upstairs, Janet would wipe the children's vaginal area and insert a catheter into their genital

opening. Id. If urine came out into the catheter, the girls would be struck or otherwise punished for denying they needed to go to the restroom. Id. If the children objected or physically resisted the insertion of the catheter, Janet would threaten to cut their "front part" with a razor blade. Id. Janet showed the children a razor blade and online pictures of women who had suffered genital mutilation in association with this repeated threat. 1 AA 57, 59-60; 2 AA 277, 455-56; 3 AA 623. Janet would also sometimes move the catheter around while inside the children as punishment for any resistance or crying. 2 AA 450. Insertion of catheters happened at least twice as to A.S. (10/21/01), at least once as to A.S. (1/23/03) and at least seven times as to A.S. (7/25/04). 1 AA 47, 55; 2 AA 275-76; 3 AA 608. There were times when Dwight stood just outside the open door during the insertion of a catheter and there were times when he was downstairs or not at home. 1 AA 56; 2 AA 451-52.

On one occasion, A.S. (7/25/04) had an accident and Janet inserted a paint stick into her vagina. 2 AA 453-54; 3 AA 621. A.S. (7/25/04) testified she was in the bedroom belonging to A.S. (1/23/03) at the time and that the paint stick went inside her vagina and it was painful. Id.

After disclosing the abuse to a teacher, the children were eventually seen by Dr. Sandra Cetl who is a pediatric emergency physician and a Child Abuse and Neglect specialist. 2 AA 494. Dr. Cetl spoke to and evaluated each of the girls. She

found numerous scars all over the body of each victim, particularly on the buttocks and back. 3 AA 503, 513, 521. Pictures of the scarring on each of the girls were admitted at the preliminary hearing. Dr. Cetl noted the fact that all the scars were somewhat linear in nature and that all three girls had the same marks and stated that such was indicative of non-accidental injuries. 3 AA 529. Dr. Cetl also noted that both A.S. (1/23/03) and A.S. (7/25/04) suffered a significant decrease in their height velocity while under the Solanders' care and opined that malnutrition was the likely cause. 3 AA 516-18, 527-28.

Detective Emery, of the Las Vegas Metropolitan Police Department Child Abuse and Neglect Division was the lead Criminal Investigator. During her investigation, she conducted a search warrant on Dwight's work computer. Pursuant to that search, she found several receipts related to the purchase of catheters. 3 AA 715-16, 732-33. Also on the computer were emails going back and forth between Dwight and Janet discussing the children having accidents, pictures were attached, and comments stating the children were going to get punished. 3 AA 714, 715. Detective Emery's investigation also confirmed that Janet was not a nurse or otherwise medically trained. 3 AA 716.

Also during the investigation, Detective Emery interviewed Hinton. Initially, Hinton denied any incidents of child abuse. However, when Detective Emery

showed Hinton a photograph of an orange Home Depot bucket, Hinton's denial stopped and she acknowledged the children were forced to sit on the bucket throughout the day and use it as a toilet. 3 AA 710-11. Hinton stated that any accidents by the children were punished by hitting them with the paint stick on their buttocks. 3 AA 711. She acknowledged this would often cause the children's buttocks to bleed. Id. Hinton also confirmed the use of timers to regulate the children's bathroom activities and stated the girls' bathroom problems increased as a result. 3 AA 711, 712. Hinton said the children were threatened with catheterization if they held their urine and the bathroom rules were "very contradictory" because the children were also punished if they did not hold their urine. 3 AA 713. Hinton admitted the girls were often punished with cold showers and ice buckets if they had an accident and they frequently slept on bare boards wearing only underwear with a large fan blowing on them. 3 AA 712, 713. Hinton confirmed the girls were sometimes made to put soiled underwear on their head or in their mouth, crawl around and say "goo goo, ga ga, I'm a baby" as punishment for accidents. 3 AA 713. Hinton called the victims the "definition of abused kids." 3 AA 714.

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SUMMARY OF THE ARGUMENT

The district court erred in granting Dwight's pretrial Petition for Writ of Habeas Corpus in part, dismissing Counts 7-8, 19, and 30-36 of the Information. The plain language of NRS 200.364 and NRS 200.366 prohibits the actions charged in the dismissed counts. Further, other canons of statutory construction support the position that the plain language of NRS 200.364 and NRS 200.366 include the intentional insertion of catheters into a genital opening without consent. The district court's erroneous conclusion that NRS 200.364 and NRS 200.366 do not include the charged conduct precludes the jury from determining potential issues of fact concerning intent, consent, and necessity. Allowing a jury to determine whether Janet and Dwight had the requisite *mens rea*, whether the victims consented, or whether the insertion was medically necessary eliminates the concerns raised by the Defendants' pleadings below and cited by the district court in its decision. As such, the State respectfully requests that the decision of the district court be reversed, the charges be reinstated as in the Information, and the matter proceed to trial on all counts as charged in the original Information.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THE INSERTION OF A CATHETER INTO A GENITAL OPENING CANNOT CONSTITUTE SEXUAL ASSAULT AS A MATTER OF LAW

The relevant statutes include the charged conduct. NRS 200.366(1) provides:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct, is guilty of sexual assault.

NRS 200.364(5) defines sexual penetration, in relevant part, as "any intrusion, however slight, of any part of a person's body or any object manipulated or inserted by a person into the genital or anal openings of the body of another." Under Nevada law, Sexual Assault is a general intent crime. Winnerford Frank H. v. State, 112 Nev. 520, 525-26, 915 P.2d 291, 294 (1996). Because the crime requires general, and not specific, intent, the *mens rea* of the crime is "said to be found in the doing of the acts which constitute the offense." Manning v. Warden, 99 Nev. 82, 84, 659 P.2d 847, 848 (1983).

On September 16, 2014, Dwight filed a pretrial Petition in which he argued, in part, that all but one of the charges of Sexual Assault of a Minor Under Fourteen Years of Age must be dismissed because the charged conduct fell outside NRS 200.366. 4 AA 818-22. Dwight contended the insertion of catheters into the victims' genital openings "[had] a therapeutic rather than sexual intent." 4 AA 818. Dwight argued interpreting the statute to include the catheterization of the victims would be

against public policy and reason and cited various hypothetical examples to support his argument. 4 AA 819-22.

On September 24, 2014, the State filed its Return to Dwight's Petition. 4 AA 830-51. The State contended, in part, there was sufficient evidence presented at the preliminary hearing to support the catheter counts. 4 AA 843-45. Specifically, the State contended that the intent Defendants had at the time they catheterized the children was for a jury to decide and argued the facts of this case were significantly distinguishable from the examples cited in Dwight's Petition for Writ of Habeas Corpus. Id.

Argument was initially scheduled for September 30, 2014. 4 AA 852-56. However, the Court granted Dwight time to Reply to the State's Return and asked the State to prepare an additional Bench Memo concerning whether penetration of the urethra could constitute sexual assault. 4 AA 854-55. The State filed the requested Bench Memorandum on October 15, 2014. 4 AA 857-64. In the Bench Memorandum, the State contended that penetration of the urethra would necessitate penetration of the genital opening, and thus could constitute sexual penetration under NRS 200.366 and sexual assault under NRS 200.364 if the penetration was against the will of the victim. Id.

On November 5, 2014, Dwight filed a Response to the State's Bench Memorandum. 4 AA 868-75. In his Response, Dwight contended again that the State's interpretation of NRS 200.364 and NRS 200.366 was against public policy and the issue was one of law, not fact. Id.

On November 6, 2014, the district court heard argument on Dwight's Petition. 4 AA 895-928. At that time, the district court acknowledged that the charged offenses could be included within the plain language of NRS 200.366. 4 AA 897-98. However, the district court expressed reservation about the legislative intent and noted "[u]nfortunately, there is no guidance on this issue really anywhere else." 4 AA 898-99. Without making an explicit ruling, the Court took the argument under advisement. 4 AA 895-99.

On June 17, 2015, the district court issued a written Findings of Fact, Conclusions of Law, and Order. 4 AA 977-82. In it, the court dismissed Counts 7-8, 19, and 30-36 of the Information. Id. The court reasoned as follows:

> It would not be proper for a jury to consider a question of law as to the legislative intent behind the Sexual Assault statute and to request that the jurors be admonished to follow the law and determine whether or not the insertion of a catheter should be considered a Sexual Assault. For that reason, it is the District Court's duty to decide whether the act of inserting a catheter into a urinary opening for the purpose of voiding the bladder is within the statutory meaning and legislative intent of a Sexual Assault. No precedent exists that an insertion of a catheter into the

> urethra is consistent with the Nevada Legislature's intent for NRS 200.366. The Court finds that it is not within the statutory meaning or legislative intent for the insertion of a catheter to meet the elements of a Sexual Assault.

4 AA 981.

A. The charged conduct is included in the plain language of NRS 200.364 and NRS 200.366

As acknowledged by the district court, the charged conduct is included within the plain language of NRS 200.364 and NRS 200.366. Questions of statutory interpretation are reviewed *de novo*. State Dep't of Bus. & Indus. v. Check City P'ship, 130 Nev. Adv. Rep. 90, 337 P.3d 755, 756 (2014). This Court "will not look beyond the plain language of a statute to determine its meaning when the statute is unambiguous." Id. A statute is ambiguous only when its language is capable of two or more reasonable interpretations. Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. Adv. Rep. 276, 265 P.3d 688, 690 (2011). When the statutory language is plain, courts are not permitted to search for meaning beyond the statute itself. Attorney Gen. v. Nevada Tax Comm'n, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008). Absent a clearly expressed legislative intention to the contrary, the language of a statute must ordinarily be found conclusive. Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056 (1980).

The statutory language of NRS 200.364 and NRS 200.366 is clear and unambiguous. NRS 200.366 clearly prohibits one person subjecting another person to sexual penetration against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct. Further, included in the definition of "sexual penetration" in NRS 200.364(5) is "***any object*** manipulated or inserted by a person into the genital or anal openings of the body of another." (emphasis added). The Nevada Supreme Court has previously rejected vagueness challenges to this definition, finding it a clear delineation of proscribed conduct. Fields v. Sheriff, 93 Nev. 640, 641, 572 P.2d 213, 213-14 (1977).

Here, Dwight and Janet were charged under NRS 200.366 with inserting an object, namely a catheter, into the genital opening of each victim, without their consent. At the preliminary hearing, evidence was presented that the girls were forced to lay on the floor and have the catheter inserted and that, if they resisted or objected, they were threatened with spankings or genital mutilation. Evidence was also presented that Janet was not a nurse and had no medical training. Neither was there evidence presented that any licensed doctor recommended the use of catheters for any medical purpose whatsoever. To the contrary, evidence adduced at preliminary hearing illustrated that the catheters were used as a form of punishment,

not for any medical use. In fact it was often after the children had urinated in their pants that they were then forced to lay down and have the catheter inserted. As such, Dwight's claim, and the District Court's implicit holding, that the sexual penetration was for a medical purpose could not be further from the truth and evidence presented.

Because the statute is clear and unambiguous and includes the insertion of "any object" into a genital opening, the insertion of a catheter into the genital opening of each of the victims against their consent constituted sexual assault.

A statute is only considered ambiguous if there are two or more reasonable interpretations of its provisions. However, a ***reasonable alternative*** interpretation of the language of NRS 200.364 and NRS 200.366 has never been provided by Dwight, Janet, or the district court. The district court never found that the broad language included in NRS 200.366 was capable of any interpretation other than the one provided by the State. Indeed, the district court even acknowledged that the charged conduct fell within the plain language of the statutes. 4 AA 898-99. Instead, Janet and Dwight merely argued, and the district court found, that the plain language of the statute as applied to this case was against public policy. However, when a statute's language is plain, courts are not to look beyond that language to determine the statute's meaning. Check City P'ship, 337 P.3d at 756. As the language of NRS 200.364 and NRS 200.366 was clear and unambiguously included the charged

conduct, the district court erred in looking beyond the plain language to interpret the relevant statutes.

A corollary of the plain-language principle is the well-recognized proposition that a statute's omissions, or silence, is considered to be intentional. See S. Nev. Homebuilders Ass'n v. Clark Cnty, 121 Nev. 446, 450-51, 117 P.3d 171, 173-74 (2005). It is not the job of the judiciary "to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done." McKay v. Bd. Of City Comm'rs, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987).

Here, NRS 200.366 does not require a specific intent. Further, at the time of the crimes, NRS 200.364 did not include a requirement that sexual penetration be perpetrated for a specific purpose. Although Dwight successfully argued the catheter counts should be dismissed because the catheters were inserted with "a therapeutic rather than sexual intent," the State was not required to prove a specific purpose for the penetration at the time. Similarly, the district court implicitly found the plain language "any object" in NRS 200.364 excluded objects that could be used in a medical setting for a medical purpose. However, at the time, NRS 200.364 contained no "medical exception" for object rape.[2]

[2] The legislature has recently passed an amended version of NRS 200.364 that does include such a "medical exception." The subsequent amendment of NRS 200.364 will be discussed *infra*.

Further, the Legislature could have required a specific intent in NRS 200.366 if it so wished. Crimes requiring a specific intent are replete throughout the criminal code. See, e.g., NRS 199.480, NRS 205.060, NRS 205.220, NRS 205.222, NRS 200.320, NRS 201.230. Specifically, by contrast, NRS 201.230 criminalizes the commission of lewd and lascivious acts upon the body of a child under the age of fourteen "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child." The Legislature's ability to require a specific intent concerning one sexual offense demonstrates that the absence of any such specific intent for another sexual offense, such as sexual assault, was intentional.

Further, the legislature could have included a medical exception in NRS 200.364 prior to the instant case. The Legislature knew how to carve out a medical exception in the context of other criminal statutes. See NRS 453A.310 (creating a medical exception as an affirmative defense to charges related to the possession, delivery, or production of marijuana). Indeed, the legislature has recently created a medical exception within the definition of sexual penetration. See A.B. 49, 78th Sess. (Nev. 2015) (enacted and effective Oct. 1, 2015). However, at the time of the crimes, the legislature had not yet chosen to create such a medical exception to NRS

200.364 or NRS 200.366.[3] This omission should be considered intentional. See FCC v. NextWave Pers. Commc'ns, 537 U.S. 293, 302, 123 S. Ct. 832, 839 (2003) (noting a legislature's ability to clearly and expressly provide exceptions in one context weighs in favor of finding the absence of a similar exception in another context intentional). Instead, the district court improperly exercised conjecture and presumed what the legislature would or should have done, creating a medical exception to NRS 200.364 and NRS 200.366 out of whole cloth. Such was an improper overreaching by the judiciary.

B. The plain language of NRS 200.364 and NRS 200.366 is supported by other canons of statutory construction

The proposition that the term "any object" in NRS 200.366 included items that can be used for medical purposes is supported by subsequent legislative actions. "Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-

[3] Further, the concept of a medical exception to sexual assault is hardly novel throughout other jurisdictions. Numerous other state legislatures had expressly provided a medical exception at the time of the instant offense. See, e.g., Cal Pen Code § 11165.1(b)(4); C.R.S. 18-3-402(1)(g); Conn. Gen. Stat. § 53A-71(a)(7); Fla. Stat. § 794.011(1)(h); Md. Crim. Law Code Ann. § 3-301(e)(2)(ii), (f)(2)(ii); MCLS § 750.520b(f)(iv); Minn. Stat. § 609.348; Or. Rev. Stat. § 163.412; Tex. Penal Code § 22.011(d); Utah Code Ann. § 76-5-406(12); Rev. Code Wash. 9A.44.010(1)(b). As such, this is not a case where absence of a medical exception in NRS 200.364 and 200.366 was due to legislative oversight.

81, 89 S. Ct. 1794, 1801 (1969). In the most recent legislative session, NRS 200.366 was amended as follows:

> "Sexual penetration" means cunnilingus, fellatio, or any intrusion, however slight, of any part of a person's body, or any object manipulated or inserted by a person into the genital or anal openings of the body of another, including sexual intercourse in its ordinary meaning. ***The term does not include any such conduct for medical purposes***.

A.B. 49, 78th Sess. (Nev. 2015) (enacted and effective Oct. 1, 2015) (emphasis added). By its plain language, this statutory amendment excluded objects used for medical purposes from the term "any object." This exclusion demonstrates a legislative intent that, prior to the amendment, the purpose for which the object was inserted was not included in the definition of sexual penetration. To find otherwise and argue that the final sentence of NRS 200.366 makes explicit what was implicit within the statute prior to the most recent legislative session would violate the rule against surplusage. See Albios v. Horizon Cmties, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006). As such, the express inclusion of a medical exception in the most recent version of NRS 200.366 stands for the proposition that the previous absence of such language was intentional.

Additionally, the legislative amendment to NRS 200.366 also reveals a legislative intent that the medical exception be an issue of fact, not law. Whether an act defined by NRS 200.364 as sexual penetration was "for a medical purpose"

depends on the facts and circumstances surrounding the act, not an exclusively legal analysis. Here, the district court improperly concluded, based solely on the general nature of catheters, that the catheterization of the young victims was for a medical purpose. 4 AA 981. Such is an issue of fact, not law, and is for the jury to decide. The most recent amendment to NRS 200.364 affirms this position.

Further, the principle that ambiguous statutes should be interpreted in accordance with reason and public policy likewise supports the plain language interpretation of the statute. The State notes at the outset that, considerations of public policy should only occur if the statute is found ambiguous on its face, which is not the case here. See Check City P'ship, 337 P.3d at 756 (finding consideration of public policy can be considered in determining a legislature's intent ***only*** when the statute is determined to be ambiguous). However, public policy weighs in favor of finding the term "any object" includes items that can have a medical purpose.

To find that the insertion of medical objects into the genital opening of a person against their will cannot constitute sexual assault as a matter of law, as the district court held, is against reason and public policy. Accepting the district court's erroneous interpretation of the statute would mean that sex offenders could escape criminal liability by inserting objects that can have a medical purpose. Indeed, under the district court's interpretation, a perpetrator wearing surgical gloves could commit

digital penetration at will without violating NRS 200.366. Not only is this interpretation against public policy, it has also been rejected by the Nevada Supreme Court. In McNair v. State, 108 Nev. 53, 825 P.2d 571 (1992), the defendant was a licensed physician specializing in Obstetrics and Gynecology. Id. at 54, 825 P.2d at 572. Under the guise of conducting medical examinations in his office, the defendant would insert his gloved fingers and penis into the rectum of his patients. Id. at 55-56, 825 P.2d at 573. On appeal, the defendant contended the State failed to provide sufficient evidence that his digital and penile insertions were against the will of his patients. Id. at 56, 825 P.2d at 573. The Nevada Supreme Court found sufficient evidence to show lack of consent, holding "[t]he language of our statute is sufficiently broad and explicit to encompass conduct as a result of fraud and deceit in the course of a medical examination and without the consent of the patient." Id. at 59, 825 P.2d at 575. The district court's conclusion that, as a matter of law, the insertion of medical objects cannot be considered sexual penetration is in direct contradiction to McNair and public policy.

C. Dwight's arguments against interpreting NRS 200.366 to include the relevant charges raise issues of fact to be considered, if at all, by the jury

In Dwight's pretrial Petition, he contended the inclusion of catheterization as sexual penetration was against public policy and provided several hypothetical situations in support of his contention. 4 AA 820-22. Specifically, Dwight contended

that, under the State's interpretation of NRS 200.364 and NRS 200.366, the following would be susceptible to criminal prosecution: 1) all parents and medical professionals who catheterize others against their will; 2) law enforcement personnel who perform cavity searches or catheterize inmates or suspects pursuant to search warrants or policies relating to correctional facilities. However, these hypothetical situations actually demonstrate that the issue is one of fact, not law, and the contention that the catheterization was medically necessary would be available to the defendants at trial.

First, Dwight's claims that the catheterization of the children was medically necessary or appropriate would go to the *mens rea* of the charged offenses. The *mens rea* of crimes has historically incorporated an element of wrongfulness. Finger v. State, 117 Nev. 548, 575, 27 P.3d 66, 84 (2001). The Finger Court found that the term "unlawfully" when used to describe prohibited conduct likewise required an element of wrongfulness. Id. at 574, 27 P.3d at 83-84. See also, Robey v. State, 96 Nev. 459, 461, 611 P.2d 209, 210 (1980) ("The word 'willful' when used in criminal statutes with respect to proscribed conduct relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently, ***or innocently***.") (emphasis added).

Here, all of the dismissed counts included the following language: "Defendants DWIGHT CONRAD SOLANDER and JANET SOLANDER did then and there willfully, unlawfully, and feloniously sexually assault. . ." 4 AA 783, 787, 790-94. As such, the State would be required to prove at trial that Defendants inserted catheters into the genital openings of the charged victims against their will and with a "guilty mind." *Mens rea* is a question of fact and it is within the province of the jury to determine whether an action was committed with the requisite intent. NRS 193.190, NRS 193.200. Dwight is free to offer evidence and argument at trial that he did not commit the charged offense with a guilty mind and he therefore should be acquitted. Similarly, the complete absence of the requisite *mens rea* distinguishes all of the examples Dwight offered to the district court from this case. Although the actions of medical professionals, parents, and law enforcement officers in Dwight's examples would form the necessary *actus reus* of sexual assault, they would still not be criminally liable if they were acting in good faith to provide medical treatment or investigate criminal offenses. If the actions were done "innocently" as distinguished from "wrongfully" the actions would not constitute the crime of Sexual Assault. See NRS 193.190 (requiring a unity of action and intent to compose a crime). Following this logic, if the acts were presented to a jury, it would be the jury's province to decide whether the sexual penetration was done

"innocently" or "wrongfully." However, that determination is one of fact, not law, and is for a jury to decide.

Further, like in McNair, the element of consent provides ample room for Dwight to contend his actions do not constitute sexual assault. The McNair Court acknowledged that a person could consent to sexual penetration as defined in NRS 200.364 for medical purposes. See 108 Nev. at 59, 825 P.2d at 575. Dwight is free to argue that the charged victims consented to the catheterization to assist with their incontinence and the catheterization was completed for that purpose. Further, like *mens rea* above, the element of consent distinguishes the provided examples from this case. Medical professionals who insert medical objects into the genital openings of their consenting patients for medical purposes would not be held criminally liable.

Finally, the defense of necessity may be available to Dwight depending on the evidence presented at the time of trial. The defense of necessity is "a utilitarian defense that 'justifies criminal acts taken to avert a greater harm[.]'" Hoagland v. State, 126 Nev. Adv. Rep. 37, 240 P.3d 1043, 1046 (2010) (quoting United States v. Schoon, 971 F. 2d 193, 196 (9th Cir. 1991). Nevada recognizes the common law defense of necessity to criminal actions. Id. at 1046-47. Other jurisdictions have found the defense of necessity available against a charge of Sexual Assault when the defendant claims the penetration was committed out of medical necessity. See

Downs v. State, 244 S.W.3d 511, 516-17 (Tex. App. 2007). In Downs, the defendant, a hospital nurse, was charged with Sexual Assault after he penetrated a patient's anus with an unknown object. Id. at 514. The defendant testified at trial that he inserted a rectal thermometer into the victim's anus to measure her temperature and that she consented. Id. On appeal, the defendant contended counsel was ineffective for not requesting an instruction on the defense of necessity based on his trial testimony. Id. at 516. The Texas Court of Appeals found the defense of necessity could be available against a charge of Sexual Assault if a defendant admits the offense but reasonably believed their conduct was immediately necessary to avoid imminent harm. Id. However, the Court held that sufficient evidence is required to justify the instruction and found that the defendant did not admit the criminal conduct nor provide sufficient evidence that harm was imminent. Id. at 516-17.

Here, depending on the evidence presented at trial, the defense of necessity may be available to Dwight. More importantly, however, the defense of necessity also clearly distinguishes this case from the hypothetical cases Dwight provided to the district court. Cavity searches and the catheterization of suspects by law enforcement personnel pursuant to search warrant are necessary to investigate and prosecute criminal offenses. Further, medical professionals may catheterize someone against their consent, or when their consent is not possible because they

are unconscious or incapacitated, based on the necessity to perform legitimate medical services. Whether or not the defense of necessity is available and excuses Dwight's actions in this case are issues of evidence and facts to be determined at trial and are not susceptible to disposition through a purely legal analysis. Because Dwight's intent, the charged victims' consent, and the availability and appropriateness of a necessity defense are issues of fact, the district court erred in dismissing the charges of sexual assault related to catheterizing the victims as a matter of law.

CONCLUSION

Based on the foregoing, the State respectfully requests the district court's decision to grant, in part, Dwight's Petition be REVERSED and the relevant charges be reinstated.

Dated this 24th day of September, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 7,209 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 24, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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