IN THE SUPREME COURT OF THE STATE OF NEVADA

JANET SOLANDER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	CASE NO. 76228 Electronically Filed Apr 17 2019 08:55 p.m. Elizabeth A. Brown Clerk of Supreme Court

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction (Jury Trial))

KRISTINA WILDEVELD, ESQ.
Nevada Bar No. 005825
CAITLYN MCAMIS, ESQ.
Nevada Bar No. 012616
The Law Offices of Kristina Wildeveld & Associates
550 E. Charleston Blvd., Suite A
Las Vegas, Nevada 89104
(702) 222-0007

Attorneys for Appellant

STEVEN B. WOLFSON
Nevada Bar No. 001565
District Attorney
STEVEN OWENS
Nevada Bar No. 004352
Chief Deputy District Attorney
Office of the District Attorney
200 Lewis Ave., Third Floor
Las Vegas, NV 89155
(702) 671-2750

AARON FORD
Nevada Bar No. 007704
Nevada Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
(702) 486-3420

Attorneys for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

CASES **PAGE NO.**

STATUTE **PAGE NO.**

CONSTITUTIONAL AMENDMENTS & OTHER **PAGE NO.**

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANET SOLANDER,	)	CASE NO. 76228
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

(A) This is an appeal from a Judgment of Conviction (Jury Trial) in the Eighth Judicial District Court.

(B) The Judgment of Conviction (Jury Trial) was filed on June 22, 2018, in the District Court. (AA XXII, 5493-5498 [1].) A Notice of Appeal was timely filed on June 21, 2018. (AA XXII, 5491-5492.)

(C) This appeal is from the Judgment of Conviction (Jury Trial) filed by the District Court and is subject to this Court's jurisdiction pursuant to NRAP 4(b).

[1] References to the one-volume appendix entitled "Appellant's Appendix" are abbreviated "AA" throughout, followed by the appendix volume(s) and page number(s).

ROUTING STATEMENT

Under NRAP 17(b)(1), the Nevada Supreme Court retains exclusive jurisdiction over direct appeals concerning Judgments of Conviction arising from jury trials that involve verdicts for Category A felonies. The principal issue in this case presents a question of first impression under Nevada law as it relates to the prosecution of catheters by way of Sexual Assault without any sexual intent or gratification.

STATEMENT OF THE ISSUES

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF SEXUAL ASSAULT OF A MINOR UNDER FOURTEEN.

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF CHILD ABUSE, NEGLECT OR ENDANGERMENT AS TO ELDEST DAUGHTER'S RETRACTED ALLEGATION IN COUNT 11.

III. NRS 200.508(1) IS AMBIGUOUS AND OVERBROAD, AND AFFORDS NO DEFENDANT PROPER NOTICE AS TO WHAT CONSTITUTES CHILD ABUSE, NEGLECT OR ENDANGERMENT FOR AN "EXTENDED PERIOD OF TIME" TO A CRIMINAL DEGREE.

IV. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT WAS GUILTY OF CHILD ABUSE, NEGLECT OR ENDANGERMENT RESULTING IN SUBSTANTIAL BODILY HARM.

V. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT COMMITTED BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT.

VI. ADMISSION OF PRIOR OR CO-OCCURRING BAD ACTS INVOLVING APPELLANT'S CARE OF THE FOSTER CHILDREN IN HER HOME VIOLATED HER RIGHTS TO DUE PROCESS.

VII. APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF IMPROPER JURY INSTRUCTIONS.

VIII. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS OR ALTERNATIVE JURY INSTRUCTION ON THE CHARGES THAT EXCEEDED THE STATUTE OF LIMITATIONS.

IX. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S ORAL MOTION TO SEVER THE SEXUAL ASSAULT COUNTS.

X. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE STATE'S IMPROPERLY NOTICED EXPERT WITNESSES.

XI. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE CHILDREN'S STATEMENTS TO CHILD PROTECTIVE SERVICES.

XII. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY ENTERING THE WITNESS STAND WHEN SUMMARIZING THE ALLEGED VICTIMS' TESTIMONY, WHICH CONSTITUTED IMPROPER WITNESS BOLSTERING.

XIII. THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING.

XIV. CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

STATEMENT OF THE CASE

The Appellant, JANET SOLANDER (hereinafter "Ms. Solander" or "Appellant"), was charged by way of an Information with forty-six (46) felony counts of criminal conduct, including eleven (11) counts of Sexual Assault with a

Minor Under Fourteen (14), five (5) counts of Child Abuse, Neglect or Endangerment with Substantial Bodily Harm, twenty-five (25) counts of Child Abuse, Neglect or Endangerment, three (3) counts of Assault With a Deadly Weapon, and two (2) counts of Battery With Intent to Commit Sexual Assault. (AA I, 1-19.) She was charged with co-conspirators on some of these counts with her husband, Dwight Solander, and biological daughter, Danielle Hinton. (Id.)

A Petition for Writ of Habeas Corpus was filed on behalf of Ms. Solander on November 5, 2014, challenging the bindover of all charges following a multiple day preliminary hearing. (AA I, 28-46.) The State filed an Opposition and Motion to Dismiss Defendant's Petition for Writ of Habeas Corpus on November 19, 2014. (AA I, 47-52.) The State filed its Return to Writ of Habeas Corpus on December 17, 2014. (AA I, 53-70.) Following oral argument on December 18, 2014, the Court granted the Writ as to the ten (10) counts alleging Sexual Assault With a Minor Under Fourteen by way of a catheter. (AA I, 74-80.) The State filed a Notice of Appeal on March 30, 2015, challenging the Court's decision. (AA I, 71-73.) The Court's written decision was memorialized in a Findings of Fact, Conclusions of Law and Order filed on June 17, 2015. (AA I, 74-80.) The Nevada Supreme Court filed an Order of Reversal and Remand on April 19, 2016. (AA I, 81-90.)

The State filed a Notice of Witnesses and/or Expert Witnesses on January 4, 2018 and January 9, 2018. (AA I, 91-96; 125-127.) The State filed a Motion to Admit Evidence of Defendant Janet and Dwight Solander's Abuse of the Foster Children in their Home on January 8, 2018. (AA I, 97-124.) Ms. Solander filed an Opposition to the State's Motion to admit other bad acts on January 18, 2018. (AA I, 128-142.) The State filed two (2) Supplemental Witness Lists on January 22, 2018. (AA I, 153-155.) Co-Defendant, Dwight Solander, filed a Motion to Suppress on January 22, 2018, and Ms. Solander filed a Joinder to that Motion the same day. (AA I, 145-152; 143-144.) The State filed its Opposition to the Motion to Suppress on February 1, 2018. (AA III, 544-559.) Ms. Solander also filed a Motion to Strike the State's Notice of Expert Witnesses as failing to conform to statutory notice requirements. (AA I, 192-197.) The State filed an Opposition to that Motion on February 2, 2018. (AA III, 554-559.)

A two (2) day evidentiary hearing was held on the other bad acts motion on January 31, 2018 and February 1, 2018. (AA II, 253-371; 372-422.) Jury trial initially began on February 5, 2018, but by February 7, 2018, Ms. Solander's health had failed (an ongoing issue) and she was admitted into the hospital at University Medical Center with a verified blood disorder. Jury Trial began again on February 12, 108 and continued through March 13, 2018. A Verdict finding guilty on all counts was filed March 13, 2018. (AA XXII, 5364-5374.)

Ms. Solander filed a Sentencing Memorandum on June 1, 2018. (AA XXII, 5375-5422.) Sentencing was held on June 5, 2018, at which time Ms. Solander was sentenced to an aggregate total sentence of Life With the Possibility of Parole after Thirty-Five (35) years, with a special sentence of Lifetime Supervision per the Judgment of Conviction. (AA XXII, 5493-5498.)

Appellant filed a timely Notice of Appeal (AA XXII, 5491-5492) and now submits this Opening Brief.

STATEMENT OF THE FACTS

Ms. Solander and her husband adopted three (3) sisters on January 19, 2011, after fostering these girls for the previous six (6) months. (AA XVIII, 4468.) These girls, referred to herein as Eldest, Middle, and Youngest Daughter to avoid confusion, as each daughter has the same initials[2], have a history of behavioral issues that includes trauma from living with their biological relatives, abandonment by their biological mother, tantrums, lying, and retaliatory bathroom behaviors. (AA II, 381-382; AA IV, 739; 799, 801; AA VI, 1360.) These girls had been removed by Child Protective Services due to abuse and neglect suffered at the hands of their biological grandmother and neglect by their biological mother, after

[2] A.S. born 10/21/2001 is referred to as "Eldest Daughter."
A.S. born 1/23/2003 is referred to as "Middle Daughter."
A.S. born 7/25/2004 is referred to as "Youngest Daughter."

their biological father had abandoned them and/or been deported to Mexico. (AA III, 739; AA IV, 798-800; AA VI, 1386.)

Ms. Solander was tried by a jury and convicted of forty-six (46) various counts of Child Abuse, Neglect or Endangerment, Child Abuse, Neglect or Endangerment Resulting in Substantial Bodily Harm, Sexual Assault of Minor Under Fourteen Years of Age, among other counts, for conduct related to the Solanders' unconventional methods of disciplining her adopted children that the jury ultimately found to be unlawful. The Defense highlighted facts at trial that the adopted children were previously foster children, had a history of abandonment, physical and mental abuse by their biological family members, and experienced behavioral issues related to those prior traumas. (AA II, 381-382; AA IV, 739; 799, 801; AA VI, 1360; AA III, 739; AA IV, 798-800; AA VI, 1386.)

The State countered that, and offered witness testimony that while the victims had behavioral issues during their time in foster care, those issues had been resolved prior to their placement in the Solander home. (AA XII, 3852.) The Defense cross-examined the State's witnesses, in particular the children's DFS worker, Heather Richardson, and former foster mother/current adoptive mother, Debbie McClain, who both tried to minimize the effects that foster care had on these children and their prior trauma. (AA XII, 2821-2844.) Moreover, Heather Richardson painted a picture of well-adjusted girls in foster care on direct

examination, and was impeached on cross-examination with the children's counseling records that Ms. Richardson had knowledge of, and also with Ms. Richardson's own reports submitted to the Family Court. (Id.)

The State's theory was that Janet and her husband, Dwight, adopted these children and immediately after the adoption was finalized, began abusing these children. The forms of child abuse were intentional and cruel, and that the Solanders intentionally made it appear that the adopted children were ill or special needs, either for attention, out of a mental illness, or for pure greed, as DFS issues a higher stipend per child under certain criteria. (See AA II, 460.) The State also presented the other bad acts of unconventional behavior and rules the other foster children in the Solander home that were used in the home.

While the Defense continues to assert that the adopted girls exaggerated the more serious allegations they made, the Defense is also mindful that these children came from abused and neglected homes. They had a history of behavior problems and demonstrated some of these behaviors in the Solander home. Ill-equipped to deal with these issues, the Solanders engaged in escalating forms of discipline. The Defense disputed that the insertion of the catheters was ever factually true, but rather, that they were used as a threat to prompt the children to void their bladders instead of withholding their urine. Based on the testimony of the girls when compared to the testimony of the State's own expert, the way the catheters were

alleged to have been inserted could not have happened, with both the Eldest and Youngest Daughters testifying that Ms. Solander single handedly inserted catheters into them and urine "immediately" came out. (AA XIV, 3318; 3320-3323; AA XV, 3370-3581.) The Eldest Daughter could not describe the alleged insertion of the catheter with factually reliable detail. (AA XIV, 3320-3323.)

The State's expert witness, Dr. Sandra Cetl, an emergency room physician, testified as to how catheters are administered. (AA XIX, 4700-4704.) Notably, catheters require two (2) hands to insert, and conceded it would be virtually impossible for a lay person to single handedly insert the tubing into the urethra with the other hand doing something else. (Id.) Additionally, the positioning of the tubing requires some work to insert into the urethra to reach the bladder, so there is a delay before the urine is voided from the bladder. (Id.) Urine would not, therefore, immediately exit out of the tube. (Id. At 4704.) There was also testimony that the children in the house learned about the existence of catheters on TV commercials, despite testifying that they never got to watch TV because they were always doing schoolwork or being abused. (AA XVI, 3888; cf. AA I, 323.)

Regarding the alleged physical abuse, Dr. Cetl noted scarring that was consistent with abuse, but she was unable to determine a time period as to when the girls would have sustained any alleged injuries. (AA XIX, 4706.) Noticeably absent from Dr. Cetl's testimony was any documentation to corroborate the

allegation of trauma or injury to any of the children's vaginas, whose prior claims of abuse included repeated stabbing with a needle, whipping with a belt, and insertion of catheters. (See id.)

While the girls were in the Solanders' care, the girls were evaluated by a number of doctors in order to rule out any medical cause for their incontinence and/or behavioral problems. That included going to specialist, Endocrinologist Dr. Dewan, who diagnosed Eldest Daughter as having hypothyroidism, which causes a decreased growth rate. (AA IX, 2238.) Chron's Disease is an inflammatory autoimmune disease that causes the body to attack itself, makes processing food difficult, decreases one's growth rate, and causes intestinal pain. (AA XI, 2647.) Specifically, Chron's Disease was suspected for Eldest Daughter, and GI doctors evaluated them for this condition over the course of a year. (AA XI, 2647.) As a result of the digestive problems experienced by at least Eldest Daughter, the girls began receiving blended meals, and Appellant disclosed this to at least one (1) doctor. (AA XII, 2957)(See AA XIII, 3111.)

The adopted children's regular medical doctors, including primary care physicians and specialists, were called as witnesses and testified to the frequency and nature of their medical contact with each child; they testified about their ongoing obligations as mandatory reporters and that they never saw anything that rose to the level of reporting. (AA IX, 2043-2044; AA X, 2330; 2460-2461; XI,

2671; 2679; AA XII, 2802; 2807-2809; 2812.) They testified that the girls were generally well-nourished and well-cared for and observed no signs of physical abuse. (AA XIX, 4719; AA XX 4761.)

The alleged victims in this case readily admitted that they did not want to be adopted by the Solanders. (AA XIII, 3250; AA XV, 3711.) Prior to entering the adopted girls in boarding school, Ms. Solander homeschooled the girls five (5) days per week. (AA IX, 2177.) At timed intervals, the girls were asked if they needed to break for the restroom. (Id.) Many times, the girls declined going to the bathroom and would instead soil themselves, sometimes out of spite. (AA XII, 2794; 2804; 2806.) As this pattern continued, a demerit ("points") system was implemented. (AA XV, 3518.) After a certain number of negative points were earned, a form of discipline would follow. (Id.) This included spanking with a paint stick. (AA XV, 3561.)

During the day, and somehow in addition to hours of homeschooling, all three (3) girls alleged they sat in their underwear and shirts on buckets with toilet lids and that the youngest sat on a training potty for long hours. (AA XVI, 3591; 3595; 3748; 3818.)

Despite the horrendous nature of these allegations, all of the other specialists who examined children while they lived with the Solanders, including endocrinologist who conducted not one (1), but two (2) colonoscopies, did not

report the Solanders for child abuse or record any such suspicions in the medical records that were reviewed by Dr. Cetl. (AA VIII, 1835.) Again, as foster parents, the Solander home was subject to unannounced home inspections by employees of the Department of Family Services. (AA VIII, 1900; 1956; XVIII, 4472.)

When the Solanders had ruled out all medical explanations for the children's behaviors, they paid out of pocket to send their children to a private behavioral school. (AA X, 2378.) After spending several months at Marvelous Grace Girls Academy ("MGGA") and not making any reports, the children's behaviors seemed to improve. (AA X, 2354-2355.) They still incurred some disciplinary reprimands and lost privileges, but they seemed to improve with the structure of the program. It was only after Nevada CPS initiated an investigation into the Solanders at the request of a disgruntled MFT intern who was not treating the Solander girls when the Solander girls alleged they had been abused at home. (AA II, 338.)

SUMMARY OF THE ARGUMENT

Appellant's convictions must be reversed because the State failed to prove beyond a reasonable doubt that sexual penetration of a sexual organ within the meaning of Sexual Assault occurred. The Eldest Daughter actually recanted one (1) allegation, specifically admitting to fabricating that Appellant made her lick her urine off of the floor.

Next, the State's pleading put Appellant on no notice what a criminal "extended period of time" constituted under the Child Abuse, Neglect or Endangerment statute. Even assuming adequate notice, the State failed to prove the Child Abuse, Neglect, or Endangerment resulting in Substantial Bodily Harm beyond a reasonable doubt or that it had prosecuted the Assault and Battery charges within the statute of limitations.

These errors were compounded by the refusal to allow the Defense's theory of defense jury instructions, the denial of Appellant's Motion to Suppress the children's statements without an evidentiary hearing, and denying Appellant's Motion to Strike the State's improperly noticed experts, despite ample time prior to trial.

Appellant was further denied a fair trial by the introduction of improper and irrelevant "bad act" evidence, the Court's denial of Appellant's severance motion, and the prosecutorial misconduct that occurred during closing argument wherein the State engaged in witness vouching.

Finally, cumulative error warrants a reversal of Appellant's case for all of these reasons combined, in addition to the errors at sentencing where the district court was deprived of any sentencing discretion, and improperly restricted the Defense's inquiry into the scope of the victim impact statements.

ARGUMENT

"The standard of review for sufficiency of the evidence in a criminal case is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution. A reviewing court will not disturb a verdict on appeal if it is supported by substantial evidence." Jackson v. State, 117 Nev. 116, 122, 17 P.3d 998, 1002 (2001), citing Domingues v. State, 112 Nev. 683, 693, 917 P.2d 1364, 1371 (1996)(citations omitted); see also Cunningham v. State, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978).

The construction of a statute is a question of law subject to de novo review, and by extension, matters of first impression are also subject to de novo review. State v. Lucero, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

Trial errors that were not objected to by trial counsel are nevertheless still subject to appellate review under a plain error analysis. Sullivan v. State, 115 Nev. 383, 388 n.3, 990 P.2d 1258, 1261 n.3 (1999). Sentencing decisions are subject to an abuse of discretion standard of review. See State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). In reviewing a sentence, an appellate court reviews the record to ensure the district court made no procedural errors and then considers the substantive reasonableness of the sentence. Gall v. United States, 552 U.S. 38, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). The reasonableness standard of review is the

same as the deferential abuse of discretion standard, which factors the totality of the circumstances, variance from the sentencing guidelines range, and appropriateness in light of Eighth Amendment protections. Id.; see also U.S. Const. amend. VIII; XIV.

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF SEXUAL ASSAULT OF A MINOR UNDER FOURTEEN.

For a conviction of sexual assault to be lawful, a defendant must have: (1) knowingly, willfully, and unlawfully, (2) without consent, subjected another person, (3) to sexual penetration. Hardaway v. State, 112 Nev. 1208, 1210, 926 P.2d 288, 289 (1996); NRS 200.366. "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. NRS 200.364(5).

The State has the burden to prove each and every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); NRS 175.191.

Over the Defense's objection and after litigation in the Nevada Supreme Court pre-trial, the State was permitted to proceed on a theory of Sexual Assault With a Minor Under Fourteen via a catheter insertion. The Legislative intent and

public policy behind prosecuting sexual offenses has an interest against fabricating criminal liability where none exists, or in the needless overcharging of defendants. This case presents an issue of first impression in the State of Nevada, namely, the propriety of allowing a prosecution under a theory of per se sexual penetration because of a parent's alleged use or threat of use of a catheter with deliberately uncooperative children. This case presents the most absurd result of allowing this kind of prosecution and allowing the State to argue to a jury that insertion of a catheter, assuming any truth to the allegations, to be sexual penetration of a sexual organ. Catheters are inserted for generally medical purposes and the insertion does not entail penetration of a sexual organ, such as the vagina, but rather the urethra opening.

The theory of defense was that the behavior of these girls was so volatile and self-harming that they were putting themselves at medical risk for withholding their urine and bowel movements to the point of constipation and incontinence. There was ample evidence to suggest that catheters were merely a threat to encourage the children to comply with the bathroom rules that allowed for the regular voiding of the bladder. Indeed, the girls confirmed that Appellant did things to scare them to comply with the rules so that corporal punishment was not a first resort. This included scare tactics.

Eldest Daughter, sixteen (16) at the time of her testimony, testified that the first time Appellant used a catheter, she was laying down in a line with her sisters in the loft bedroom. (AA XIV, 3320.) Eldest Daughter could only explain that the catheter went in her private area and declined to elaborate, despite the improper leading questions by the State. (AA XIV, 3321.) "I could feel the tubing stuck inside me, but I don't know what part. I just know it was stuck inside me and peeking out." (AA XIV, 3322.) When pressed more by the State about what she felt in her private area, she could not elaborate: "Oh my God. So basically I don't know the answer to that because I don't know." (AA XIV, 3323.) She initially testified to one (1) occasion, she did not know why, but she alleged Ms. Solander had her lay down on a towel, "Janet had a catheter…and she put it in me." (AA XIV, 3318.) And then immediately, "this pee came out." (Id.) Eldest Daughter could only testified in generalities.

Middle Daughter most accurately described the accusation of the catheter use when she explained that Janet would threaten, "if I put this catheter in you, and you pee, you're going to get a whooping, and so then, like before, like she put the catheter in me I would just pee because, it's like, well, if I pee in the catheter, I'm still going to get whooped or beat. So why pee in the catheter?" (AA XV, 3579.) When the State pressed where the catheter was inserted, Middle Daughter testified that it was placed in her "private part," but that the threat of use of a catheter was

sufficient enough to scare her to pee before any insertion. (AA XV, 3580.) Middle Daughter testified that there were times Ms. Solander did not have a catheter, but the other siblings would wet themselves and receive a spanking with the paint stick. (AA XV, 3581.) In response to specific questions about Appellant's alleged use of a catheter, Middle Daughter testified only about the adopted girls' fear of the use of a catheter, not the actual insertion. (See id.) Middle Daughter also claimed that when Appellant inserted the catheter with one hand, she was holding a razor blade in the other. (AA XVI, 3770.) Middle Daughter confirmed that she was ***threatened*** to have a catheter taken to her multiple times, but that she only ever had a catheter inserted one (1) single time, when she was alone, and that Appellant was simultaneously holding a razor blade at the time of insertion. (AA XVI, 3775.) This testimony squarely contradicted Eldest Daughter's testimony that the lined up in a row to receive catheters.

Youngest Daughter's testimony was very different from the other sisters' testimony. Youngest Daughter testified that she squirmed, kicked, and fought to avoid a catheter being inserted into her. She claimed that Appellant, "would grab one hand and, like, keep me down, and then she would stick it up." (AA XVI, 3884.) She also testified that the insertion of a catheter happened seven or eight times and the tube went into her "vagina." (AA, XVI 3884.) Every single time the catheter went in, pee would come out without Appellant doing anything else with

the device, according to Youngest Daughter's testimony. (AA, XVI 3885.) Youngest Daughter confirmed that each of the seven or eight times a catheter was inserted, Appellant had done so single handedly because one (1) hand was always on Youngest Daughter to pin her down. (AA, XVI 3887.) Youngest Daughter also generally testified about Appellant having to insert catheters single handedly in all of "us," an indicator that they all fought Appellant. (AA, XVI 3887.)

The problem with all of this testimony is that single-handed insertion of a catheter is medically improbable, to the point of being nearly impossible according to the State's own expert witness. There is a process of inserting the tubing into the bladder. The tube is inserted into the urethra and moves between six and ten inches to the bladder. (AA, XIX 4704.) Pee does not generally immediately start flowing out of the bladder upon insertion and the older a child is, the longer the process to extract urine can take. (Id.) When asked about the possibility of single-handed insertion of a catheter, Dr. Sandra Cetl, a medical professional, said "I couldn't even imagine. Probably difficult, yes," and that she had never tried it herself. (AA XIX, 4704.)

Based on the lack of corroboration between the girls' testimony about the catheter insertion, there was not evidence beyond a reasonable doubt that Appellant single-handedly inserted catheters into the vaginal or urethra openings of any of the alleged victims. Moreover, when CPS initially investigated the

children's claims in Florida, there were no parents present and the children made ***no disclosures*** about catheters at that time whatsoever – not even so much as a hint that they had catheters used against them. (AA XII, 2965; AA XIX, 4734.) Finally, the State's own medical expert could not even fathom how a person could single-handedly insert a catheter because of the required threading of the tubing and precision required to insert the mechanism into the urethra. Based on the testimony of the adopted daughters, there is no way beyond a reasonable doubt that the catheters were inserted. What was established beyond a reasonable doubt is that the adopted girls felt scared to hold their pee because they were threatened to have a catheter used on them. The use of a threat over actual insertion explains the lack of corroborating testimony, the lack of ability to describe the insertion of the catheters by each girl, and their mistaken belief that catheters are inserted into the vaginal opening.

Therefore, the convictions for Sexual Assault With a Minor Under Fourteen must be vacated because the State did not meet its burden beyond a reasonable doubt.

II. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF CHILD ABUSE, NEGLECT OR ENDANGERMENT AS TO ELDEST DAUGHTER'S RETRACTED ALLEGATION IN COUNT 11.

The knowing presentation of perjured testimony violates the federal constitution. Mooney v. Holohan, 294 U.S. 103 (1935)(per curiam); Napue v.

Illinois, 360 U.S. 264 (1959)(Holding a prosecutor must correct false evidence whenever it appears); Morris v. Ylst, 447 F.3d 735, 738 (9th Cir. 2006). A conviction will be reversed if: (1) the prosecution knowingly presented false evidence or testimony at trial; and (2) the testimony was material, meaning that there is a reasonable likelihood that the false evidence or testimony could have affected the judgment of the jury. Riley v. State, 93 Nev. 461, 462, 567 P.2d 475, 476 (1977); United States v. Agurs, 427 U.S. 97, 103 (1976). An accused is denied due process of law when a prosecutor either knowingly presents false evidence or "fails to correct the record to reflect the truth facts when unsolicited false evidence is introduced at trial." Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005)(en banc). Moreover, the presentation of false evidence necessarily entails the "corruption of the truth-seeking function of the trial process" and is at odds with the fundamental demands of justice. Agurs, 427 U.S. at 103.

In this case, the State offered the contradictory testimony from Eldest Daughter from the preliminary hearing and then argued at closing that Eldest Daughter was merely embarrassed. That characterization violated the prosecutor's obligation to avoid presenting false testimony; this was not a simple matter of the child being "embarrassed" or that this was the most egregious allegation that the child had trouble describing. In fact, she had already testified about numerous other activities that were arguably "embarrassing" – being directed to sit on a

temporary potty bucket in case of a urine accident or the alleged insertion of a catheter as punishment for withholding urine. If Eldest Daughter was not too embarrassed to testify about those arguably more demeaning or personally invasive discipline methods, she was certainly not minimizing or too embarrassed to tell the jury the truth about lying that she had to lick her own urine. She credibly volunteered on direct examination by the State that she had lied about being forced to lick her own urine and had lied at the preliminary hearing out of anger at the Solanders. (AA XIV, 3316; 3452-3453). It was at that point where the State's ethical obligation was triggered to correct the record and refrain from offering false testimony in the form of impeachment evidence from the preliminary hearing testimony from that witness.

Instead, the State impeached its own witness with a statement she had credibly retracted as untrue and alleged out of anger at Ms. Solander. The State violated its duty to correct the record to reflect only factually true evidence. The State then argued at closing that Eldest Daughter was simply embarrassed and to ignore just that part of her testimony to convict Ms. Solander of Child Abuse, Neglect or Endangerment for Count 11. The testimony was material because the truth of the testimony meant the difference between guilty or not guilty on Count 11. Virtually all of the allegations by the adopted children were not corroborated. The convictions in this case rested entirely on the credibility of the adopted girls'

allegations. By subverting the veracity of the retracted evidence, the State corrupted the truth-seeking mission of the jury trial process. Eldest Daughter admitted that she made allegations against Ms. Solander out of anger and that this allegation in particular was not true.

Therefore, Ms. Solander's conviction must be vacated and the matter remanded for a new trial in which the State is instructed not to knowingly offer false evidence.

III. NRS 200.508(1) IS AMBIGUOUS AND OVERBROAD, AND AFFORDS NO DEFENDANT PROPER NOTICE AS TO WHAT CONSTITUTES CHILD ABUSE, NEGLECT OR ENDANGERMENT FOR AN "EXTENDED PERIOD OF TIME" TO A CRIMINAL DEGREE.

The State must allege specific facts concerning its theories of liability so as to afford a criminal defendant adequate notice to prepare his defense. Walker v. State, 116 Nev. 670 (2000). There were a number of counts (listed hereafter) which fail to place the Defendant on sufficient notice as to what conduct is supposedly criminal and to which the Defense objected: Counts 3, 4, 5, 6, 10, 15, 16, 17, 18, 21, 26, 27, 28, 29, 41, 44, 45. (AA , RT, JT Day 20, p. 210.)

Common to most of these counts is the averment "for extended periods of time." Ostensibly, the State's theory on these various counts was that the "extended" period supports abuse wherein the conduct itself, even in the light most favorable to the State, can never be abuse. The problem, therein, lies without

requiring the State to give even the most basic notice of what is meant by "extended" time. While the Nevada Supreme Court has given some leeway to accusation by a child about dates of conduct, this does not come without limitation or requirement for some greater specificity. Cunningham v. State, 100 Nev. 396, 400, 683 P.2d 500, 502 (1984) (citing Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965); Martinez v. State, 77 Nev. 184, 360 P.2d 836 (1961), and noting that time is not an element for crimes of a sexually deviant nature and that crimes involving the sexual abuse of a child victim often prove especially difficult cases to pin down an exact time frame due to the age of the child and the child's reluctance to testify).

Here, however, time *is* the element of the offense which makes it unlawful and as such it must be plead. As such, the failure here clearly deprives the defendant of adequate notice of the charge against her. Id. citing Grant v. Sheriff, 95 Nev. 211, 591 P.2d 1145 (1979). Moreover, "the state should, whenever possible, allege the exact date on which it believes a crime was committed, or as closely thereto as possible." Id. While the State failed to offer why it hasn't offered a specific or even appropriate date of conduct in the instant offense, the absolute failure to explain what the extended period of time is which makes the conduct criminal is a fatal defect.

To that end, this is not only a pleading deficiency, but it implicates and is a Constitutional failing as well as the conduct alleged to be criminal per the statute is

vague as it applies to this Defendant. See Ford v. State, 127 Nev. 608. In essence, the concern is that the statute as applied here allows for the criminality of more conduct than the legislature could possibly have contemplated, such as the arbitrary application of "extended" period (without delineation) creates severe criminal liability.

The party challenging a statute's constitutionality "has the burden of making a clear showing of invalidity." State v. Castaneda, 126 Nev. ——, ——, 245 P.3d 550, 552 (2010)(internal citations and quotations omitted). A statute is unconstitutionally vague "(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" State v. Castaneda, 126 Nev. –––, ——, 245 P.3d 550, 552 (2010) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, ——, 130 S.Ct. 2705, 2718, 177 L.Ed.2d 355 (2010)); City of Las Vegas v. Eighth Judicial Dist. Ct., 118 Nev. ---, 59 P.3d 477 (2002).

Here, it should be evident that as applied to this Appellant, otherwise non-criminal behavior was pled to expose Ms. Solander to great criminal liability whereas any reasonable person, for example, would never know that it is potentially child abuse to delay a meal or have a long time out. For this reason, NRS 200.508(1) is ambiguous and overbroad because application of the statute can lead to absurd results, such as in this case. The plain meaning of the words

"extended period of time" does not place a reasonable parent on notice as to what forms of deprivation are criminally liable, and deprivation is a common and acceptable form of parental punishment. In Anthony Lee R. v. State, 113 Nev. 1406, 952 P.2d 1 (1997), this Court held, "…the plain meaning of the statute's words are presumed to reflect the legislature's intent in enacting the statute. Nevertheless, statutory language should not be read to produce absurd or unreasonable results." Id. at 6. Absent an unambiguous statutory definition of "extended period of time," the resulting meaning of the plain language becomes a subjective inquiry. Left to the personal application of the jurors, endless absurd results occur; what's a criminally long period of time varies greatly based on the personal experiences, views, and biases of each individual juror. Additionally, the statutory language calls on the juror to exert his or her judgment over the parenting practices in a manner not envisioned by the Nevada Legislature.

Any ambiguity in a statute should be resolved in the accused's favor. Application of Laiola, 83 Nev. 186, 426 P.2d 726 (1967). Therefore, the ambiguity in NRS 200.508(1) that allowed the State to introduce language calling for an extreme result should resolve in the reversal of her convictions for all counts in which "extended period of time" is used, to wit: Counts 3, 4, 5, 6, 10, 15, 16, 17, 18, 21, 26, 27, 28, 29, 41, 44, 45.

IV. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT WAS GUILTY OF CHILD ABUSE, NEGLECT OR ENDANGERMENT RESULTING IN SUBSTANTIAL BODILY HARM.

NRS 200.508 criminalizes conduct constituting child abuse, neglect, or endangerment that results in substantial bodily harm. That statute defines:

> (a) "Abuse or neglect" means physical or mental injury of a nonaccidental nature, sexual abuse, sexual exploitation, negligent treatment or maltreatment of a child under the age of 18 years, as set forth in paragraph (d)and NRS432B.070, 432B.100, 432B.110, 432B.140 a nd 432B.150, under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.
>
> (b) "Allow" means to do nothing to prevent or stop the abuse or neglect of a child in circumstances where the person knows or has reason to know that the child is abused or neglected.
>
> (c) "Permit" means permission that a reasonable person would not grant and which amounts to a neglect of responsibility attending the care, custody and control of a minor child.
>
> (d) "Physical injury" means:
>
> (1) Permanent or temporary disfigurement; or
>
> (2) Impairment of any bodily function or organ of the body.
>
> (e) "Substantial mental harm" means an injury to the intellectual or psychological capacity or the emotional condition of a child as evidenced by an observable and substantial impairment of the ability of the child to function within his or her normal range of performance or behavior.

"Substantial bodily harm" is bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or

impairment of the function of any bodily member or organ, or prolonged physical pain. NRS 0.060.

The State could not prove beyond a reasonable doubt through their expert witness, Dr. Cetl, the timing or source of the linear scars that were identified on the buttocks and backs of the adopted children. (AA XIX, 4646.) There was significant evidence in rebuttal that Child Protective Services and/or Department of Family Services failed to photograph and preserve the injuries and scarring of the foster children in their care prior to placing them with the Solanders. Although the adopted children generally testified that they were spanked with paint sticks until they bled, the level and magnitude of physical abuse they testified to was inconsistent with how they presented for the regular medical examinations from doctors. (See, e.g., AA XIV, 3313; 3423.) If the Solanders were, in fact, so cavalier about beating their children with paint sticks, it would stand to reason that there would be fresh, recent, noteworthy scars on the children when they presented for their physicians, dentists, and specialists, including the medical professional who performed colonoscopies (plural) on the Eldest Daughter. There would have been marks not simply on the girls' buttocks, but up and down their backs, legs, arms, and faces. All of those areas would have been easily viewed by any examining physician, and none of any of the children's doctors testified that they saw recent, fresh scars or any physical indicators of abuse, neglect, or maltreatment

that triggered their duties as mandatory reporters. As the State did not proceed on a theory of substantial mental harm, physical abuse was the focus of the jury's scope. (AA XIII, 3030.)

Unfortunately, the jury's deliberation was necessarily impacted by the needless presentation of the other bad act evidence related to the foster children and that, while the conduct was not criminal, it did not please any of the children in the home. By clouding the issue, the State used bad acts evidence to bolster its weak evidence that the Solanders individually yielded any permanent disfigurement when they used allowable corporal punishment to deter their children from lying, manipulating, or otherwise engaging in bad behavior. The Defense easily rebutted the State's argument that the Solanders' spanking caused the scars Dr. Cetl testified to by pointing out the scars were undated and consistent with beatings with belts. (AA XIX, 4705-4706.) There was no testimony that the Solanders used belts to spank their children; instead, belts were the implement of the adopted children's biological grandmother, and she was known to pinch the girls' ears and leave marks as a form of discipline.

More importantly, there were dozens of people in the Solander home who were trained in investigating and interacting with abused and neglected children. They were well-equipped to identify verbal and non-verbal signs of abuse, and not just as to the foster children they were specifically assigned to investigate. There

were CPS workers, DFS workers, supervisors, therapists, and doctors who all interacted with the adopted girls. The Solander home was subject to inspection by numerous individuals, including Gail Anderson, who observed the temporary portable potties, and Nona Ocloo, who corroborated that the adopted girls had bathroom accidents in her presence. (AA VII, 1743; 1965.) That tacit governmental approval during each home visit or CPS investigation provided tacit governmental approval for the Solanders' known use of paint sticks to spank their children, structured food schedule, structured bathroom schedule, sleeping on cots, and even the use of the portable buckets as temporary potties. Since the government tasked with ensuring the welfare and safety of children did not alert Ms. Solander that her conduct could be criminal, Ms. Solander operated under that government oversight of her conduct and was reasonable to rely on that tacit endorsement. For those reasons, as a matter of law, Ms. Solander cannot be guilty of the offenses relating to the use of paint sticks to spank their children, structured food schedule, structured bathroom schedule, and even the use of the portable buckets as temporary potties.

Therefore, the State failed to prove beyond a reasonable doubt that Appellant was guilty of Child Abuse, Neglect or Endangerment resulting in Substantial Bodily Harm as to any of the adopted girls.

V. THERE WAS INSUFFICIENT EVIDENCE THAT APPELLANT COMMITTED BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT.

Battery With Intent to Commit Sexual Assault is a specific intent crime. In order for the convictions against Appellant to stand, the State would have had to prove beyond a reasonable doubt that Appellant specifically intended to sexually assault each of the adopted daughters. Incorporating the arguments regarding the intent required under Nevada law on sexual assault above, there was not proof beyond a reasonable doubt that Ms. Solander intended to sexually penetrate her adopted children, nor was there any testimony that the catheters were inserted for sexual gratification. Although the Nevada Supreme Court has held that sexual gratification is not an element or required to be proven by statute, Battery With Intent to Commit Sexual Assault under NRS 200.400(4) requires a more specific intent than is required by the general intent crime under NRS 200.366. Absent an intent to penetrate a sexual organ (which the urethra is not), Ms. Solander cannot be convicted of the crimes of Battery With Intent to Commit Sexual Assault.

Conversely, NRS 200.471 defines "assault" as (1) Unlawfully attempting to use physical force against another person; or (2) Intentionally placing another person in reasonable apprehension of immediate bodily harm. The jury was instructed, "A person who unlawfully attempts to use physical force against the person of another or who intentionally places another person in reasonable

apprehension of immediate bodily harm by or through the use of a deadly weapon is guilty of Assault With a Deadly Weapon."

Here, there was ample evidence that Appellant verbally disciplined her adopted children in unconventional ways, and it was testified to by the girls that they were threatened with catheters if they did not void their bladders during the regular bathroom breaks at home school. While such testimony would be sufficient for the elements of assault, namely that the girls were each placed in reasonable apprehension of immediate contact, there was no evidence to corroborate that a battery occurred or that a catheter was inserted into any of the girls based on the way they testified that Ms. Solander inserted them. Thus, the felony battery charges were simply a product of the exaggeration these children were prone to out of spite and a desperate attempt to remain in Florida or otherwise outside the home of their strict parents. There was evidence to suggest that an assault may have occurred that was above and beyond acceptable parental threats of discipline, but not to sustain the convictions of Battery With Intent to Commit Sexual Assault.

Therefore, these convictions must be vacated.

///

///

///

VI. ADMISSION OF PRIOR OR CO-OCCURRING BAD ACTS INVOLVING APPELLANT'S CARE OF THE FOSTER CHILDREN IN HER HOME VIOLATED HER RIGHTS TO DUE PROCESS.

NRS 48.045 prohibits the admission of evidence of other crimes, wrongs, or acts of proof of a person's character. An accused should be tried for the crimes charged, not for her alleged bad character. The Nevada Supreme Court regards the admission of prior bad acts with disfavor, finding their presentation to the jury as often "irrelevant and prejudicial." Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281-82 (2005). The Nevada Supreme Court has reasoned:

> [T]he use of uncharged bad acts to convict a defendant is heavily disfavored in our system of criminal justice. Such evidence is likely to be prejudicial or irrelevant, and forces the accused to defend himself against vague and unsubstantiated charges…Evidence of uncharged misconduct may unduly influence the jury, and result in a conviction of the accused because the jury believes he is a bad person…The use of specific conduct to show a propensity to commit the crime charged is clearly prohibited by Nevada law,…and is commonly regarded as sufficient grounds for reversal.
> Roever v. State, 114 Nev. 867, 872, 963 P.2d 503, 506 (1998), citing Taylor v. State, 109 Nev. 849, 858 P.2d 843 (1993), quoting Berner v. State, 104 Nev. 695, 696-97, 765 P.2d 1144, 1145-46 (1988).

There is good reason for the Supreme Court's comment that the admission of evidence concerning prior bad acts is "commonly regarded as sufficient grounds for reversal." A review of some of the Nevada Supreme Court's decisions reveal

more than twenty (20) case reversals based on the inappropriate admission of evidence concerning prior bad acts.[3]

---

[3] See, e.g., Flores v. State, 116 Nev. 659, 5 P.3d 1066 (2000)(murder conviction reversed because the danger of the unfair prejudice of admitting a prior murder conviction was substantial); Walker v. State, 116 Nev. 442, 997 P.2d 803 (2000)(murder conviction reversed because district court erred in admitting prior bad act of defendant threatening the victim on prior occasions); Sutton v. State, 114 Nev. 1327, 972 P.2d 334 (1998)(Convictions for trafficking in a controlled substance, possession of controlled substance, and possession of firearm were reversed because the district court erred in admitting evidence of defendant's possession of other prescription and non-prescription drugs); Roever v. State, 114 Nev. 867, 963 P.2d 503 (1998)(murder conviction reversed for broad misuse of bad acts evidence as part of improper rebuttal, impeachment, and character evidence); Meek v. State, 112 Nev. 1288, 930 P.2d 1104 (1996)(sexual assault conviction was reversed because of the district court's failure to hold a Petrocelli hearing concerning the defendant's alleged rape of another woman four years earlier); Walker v. State, 112 Nev. 819, 921 P.2d 923 (1996)(Burglary and robbery convictions overturned because district court failed to hold a Petrocelli hearing prior to the admission of other bad acts evidence); Cipriano v. State, 111 Nev. 534, 894 P.2d 347 (1995)(overruled on other grounds)(Attempt Sexual Assault and Open or Gross Lewdness convictions overturned in part because district court erred in admitting evidence of defendant's prior sexual advances); Armstrong v. State, 110 Nev. 1322, 885 P.2d 600 (1994)(Embezzlement conviction overturned because of failure to hold a hearing on the bad acts evidence); Taylor v. State, 109 Nev. 849, 858 P.2d 843 (1993)(Lewdness conviction overturned because district court admitted evidence of prior act of defendant having a child sit on his lap); Winiarz v. State, 107 Nev. 812, 820 P.2d 1317 (1991)(Murder conviction reversed because district court admitted bad act based on prior testimony from defendant's husband that defendant once shot at him); Crawford v. State, 107 Nev. 345, 811 P.2d 67 (1991)(Sexual Assault and related types of convictions overturned because prior bad acts of Sexual Assault charges should not have been admitted); Honkanen v. State, 105 Nev. 901, 784 P.2d 981 (1989)(Child Abuse conviction overturned after district court admitted unduly prejudicial evidence that defendant beat his son); Beck v. State, 105 Nev. 910, 784 P.2d 983 (1989)(Sexual Assault conviction overturned because district court erred in admitting prior bad act of defendant's alleged affair with a student sixteen years earlier); Rembert v. State, 104 Nev. 680,

The framework for the admission or exclusion of "prior bad acts" is fairly straightforward. The general rule is that prior bad act evidence is not admissible, but there are some limited exceptions set forth by NRS 48.045(2). Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001)(modified regarding defendant's ability to request or waive a limiting instruction in Mclellan v. State, 124 Nev. 263, 182 P.3d 106 (2008)). NRS 48.045(2) provides: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes,

---

766 P.2d 890 (1988)(Conviction for Battery With Intent to Commit Sexual Assault reversed after district court allowed extrinsic bad act evidence to be used for impeachment purposes); Kimberly v. State, 104 Nev. 336, 757 P.2d 1326 (1988)(Sexual Assault conviction reversed because of insufficient similarity of evidence of defendant's alleged prior attack on his roommate); Courtney v. State, 104 Nev. 267, 756 P.2d 1182 (1988)(Cheating at gambling conviction was overturned after jury was informed of defendant's prior charge for the same offense); Longoria v. State, 99 Nev. 754, 670 P.2d 939 (1983)(Murder conviction reversed because prosecution elicited testimony that defendant stabbed another individual in an unrelated incident); Kaplan v. State, 99 Nev. 449, 663, P.2d 1190 (1983)(Murder conviction overturned because of the admission of hearsay evidence of other bad acts); Coty v. State, 97 Nev. 243, 627 P.2d 407 (1981)(Grand Larceny conviction reversed after district court erroneously ruled prior similar bad acts would be admissible rebuttal evidence); Cirillo v. State, 96 Nev. 489, 611 P.2d 1093 (1980)(Murder conviction reversed because of admission of evidence of defendant's prior drug dealing); Moore v. State, 96 Nev. 220, 607 P.2d 105 (1980)(Robbery and Burglary convictions reversed because district court erred in admitting evidence of other crimes of defendant forging blank checks); Mayes v. State, 95 Nev. 140, 591 P.2d 250 (1979)(Grand Larceny conviction reversed because of admission of other thefts that were not sufficiently common to establish identity).

such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Before admitting any such evidence under one of the enumerated exceptions, there are three (3) predicates the State must establish: (1) the offered acts are relevant to the crime charged; (2) the offered acts are proven by clear and convincing evidence; and (3) the evidence supporting the offered acts of the evidence is more probative than prejudicial. Salgado v. State, 114 Nev. 1039, 1042 (1998), citing Meek v. State, 112 Nev. 1288, 1292-93, 930 P.2d 1104, 1107 (1996).

Moreover, there are safeguards to prevent the erroneous admission of prior bad acts, as the Nevada Supreme Court has required each of the three (3) predicates to admission to be shown at a hearing outside the presence of the jury. Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-0 (1985); see also, Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061 (1997). The district court is required to make a specific ruling on each of the three (3) predicates prior to the evidence's admission. Id. The hearing, along with its findings, must be included as part of the record so that any decision concerning the admission of prior bad act evidence can later be reviewed on appeal. Armstrong v. State, 110 Nev. at 1323-1324, 885 P.2d at 601. Prosecutors seeking admission of this volatile evidence must do so in pursuit of justice as a servant of the law: "the two-fold aim of which is that the

guilty shall not escape nor innocent suffer…it is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." Berger v. State, 295 U.S. 78, 88 (1935).

In summary, the list of permissible non-propensity uses for prior bad act evidence is not exhaustive; nonetheless, while evidence of other crimes, wrongs or acts may be admitted for a relevant non-propensity purposes, the use of uncharged bad act evidence to convict a defendant remains heavily disfavored, because bad acts are often irrelevant and prejudicial and force the accused to defend against vague and unsubstantiated charges. Newman v. State, 129 Nev. Adv. Op. 24, 298 P.3d 1171 (2013).

In this case, the offered "bad acts" evidence of her care and practices with the foster children prejudiced Ms. Solander because she was portrayed as a bad person who differentiated between her adopted children and her foster children. By law, she was subject to different standards and required to treat her foster children differently. The State put on weeks of testimony about uncharged conduct that did not carry any criminal liability related to how the foster children were either treated "better" or singled out as favorites, depending on how the characterization of the conduct suited the State. (See AA IX, 2187; 2488; AA XV, 3555.)

There was testimony that Ms. Solander pre-sorted toilet paper. The State argued this demonstrated Ms. Solander's hyper-fascination or obsession with toileting. (AA XXI, 5014.) It was not child abuse to pre-tear sheets of toilet paper in a house where the three (3) adopted children had wetting and soiling problems, these problems were disclosed and being treated by doctors, and Ms. Solander frequently lamented about the toileting issues to the CPS workers who came into her home to check on the foster children. Additionally, the number of foster children in the home varied between two (2), the "Stark" children, and four (4), the "Diaz-Burnett" sibling group. That meant that Ms. Solander was primarily responsible for toilet training between five (5) and nine (9) children at a time between two (2) bathrooms. Additionally, Ms. Solander had taken in foster children. The sibling group of four (4) came from a home with no running water or electricity, and the children were not accustomed to the regular use of toilets at first. (AA II, 366.) Moreover, three (3) of them were under the age of four (4) and Ms. Solander was responsible for potty training. (See id.) Her decisions to make bathroom time regimented and organized was out of necessity, not obsession. But, the State was permitted to introduce the confusing testimony of the foster care children to portray Ms. Solander as obsessive about toileting children in general.

The State was also permitted to introduce evidence that Ms. Solander was "obsessive" about what the foster children ate, in order to make her seem like a

controlling, bad person who purposely starved the foster children in her care. Testimony was elicited about how skinny the foster children were. (AA II, 377.) Again, Ms. Solander had taken in malnourished, abused, and neglected foster children. That was how she found her adopted daughters. The children she took in had not been accustomed to eating normal meals, having normal meal times or routines, and were too young to appreciate or be responsible for proper nutrition. By virtue of being the foster parent, Ms. Solander was responsible for all of that. When A.D., the eldest sibling in the Diaz-Burnett sibling group, was deemed overweight by her doctor, Ms. Solander implemented more physical activity (walks) and nutrition. (See AA II, 481.) There was a concern for possible diabetes during one (1) period of time, and so Ms. Solander followed the doctor's suggestion of food logs and blood glucose monitoring. (AA IX, 2022.) She did not come up with these ideas out of the blue and, certainly, DFS would have removed A.D. from Ms. Solander much earlier if there was a true concern. Ms. Solander had documentation from medical doctors to document her conduct. Although the Court precluded the State from introducing evidence that Ms. Solander believed that A.D. had diabetes, the State was permitted to get into how Ms. Solander monitored A.D.'s food and nutrition and that they went on walks together to lose weight.

Ms. Solander was portrayed as so hyper-obsessed with the food intake of the younger foster children that the State presented her as manipulative to the point where she controlled what snacks the foster children brought and ate at their therapy sessions. (See AA II, 350.) In particular, the Diaz-Burnett sibling group came to Ms. Solander malnourished. The youngest children were all very skinny. That condition pre-dated Ms. Solander. When Ms. Solander took these children to the doctor for check ups in compliance with the foster care guidelines, no medical professional deemed the children malnourished or neglected in Ms. Solander's care.

Even the doctors who saw Ms. Solander's adopted children all testified that the children appeared well-nourished and well-hydrated. These doctors were in contact with the adopted children who alleged that they were being starved and beaten all day, that their mouths were so dry that they never had water after a certain time of day and that their food intake was very restricted. Certainly, the evidence proved that the adopted children did not like their regimented food schedule or blended meals, but medically they were healthy.

The contrast between the Solander's adopted children and nutrition issues with the foster children were separate issues. Likewise, the adopted children and foster children had separate toileting needs. The district court committed significant error in allowing testimony about the different treatment of the adopted

children and foster children in the home, and the State offered it for no other purpose than to paint Ms. Solander as controlling, abusive, and generally unlikeable. This confused the issues for the jury, who did not even hear testimony concerning the charged conduct until more than one (1) week intro trial.

Therefore, Appellant is entitled to a new trial where the bad act evidence is excluded in its entirety.

VII. APPELLANT WAS DENIED A FAIR TRIAL BECAUSE OF IMPROPER JURY INSTRUCTIONS.

The Defense is entitled to a theory of defense instruction that is not already covered by another, no matter how strong or weak the evidence may be. Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002). Additionally, any jury instruction that diminishes the State's burden of proof is grounds for reversible error. Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990).

The Defense offered several theory of defense instructions that were denied, despite not truly being covered within the other instructions:

A. "The definition of sexual penetration is logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the product of clinical examinations or domestic, parental functions." (AA XXII, 5284.)

The theory of defense necessarily relied on Ms. Solander's fundamental ability as a parent to be able to perform routine, domestic parental functions, including physical examinations of a child. When a child fevers, parents routinely

monitor that child's temperature, including by inserting a thermometer in the child's anus depending on the age of the child. When a child is constipated, a parent may have cause to insert a suppository into the child's anus to relieve the physical ailment of constipation. It can never be said that a child consents to such parental conduct, nor is there any reason or discussion of that kind of insertion. However, under a very technical application of NRS 200.366, that conduct qualifies as sexual penetration. The purpose of the statute and the medical exception to the statute is clear: there is a public policy against criminalizing conduct that parents must engage in for the betterment of their children, even if that conduct is against the will or comfort of the child. The area of toileting a child qualifies as a valid domestic, parental function. There was evidence that the Solander children regularly withheld their urine to act out against their adopted parents. The State's own medical experts acknowledged that it can be dangerous and it was certainly unhealthy for the children to withhold their urine for extended periods of time. Thus, the Solander parents were presented with a predicament of having to make judgment calls about how to compel healthy toileting practices with children so uncooperative, they were at the point of self-harm.

The district court's limitation in instructing the jury as to the allowable intrusion by a parent into the medical welfare of their child, even if that conduct is not ordered by a doctor but within the available over-the-counter remedies,

improperly denied Ms. Solander her theory of defense instruction on the charge of Sexual Assault With a Minor Under Fourteen.

> **B. "The general conditions of criminal liability requires not only the doing of some act by the person to be held liable, but also the existence of a guilty mind during the commission of the act.**
> **"For instance, if a person inserted or attempted to insert an object into the genital opening of another but had the intent to merely conduct a medical procedure, there is no criminal liability.**
> **"This is true even if later analysis reveals that there was no need to conduct a medical procedure or if there was a mistake of fact about the need to conduct a medical procedure." (AA XXII, 5285.)**

Ms. Solander's mistake of fact defense to the sexual penetration language was not included in any of the other jury instructions and was supported by case law. See Robey v. State, 96 Nev. 459, 611 P.2d 209, 210 (1980); United States v. X-Citement Video, Inc., 513 U.S. 64, 70, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). It was error for the district court to deny this instruction, as there was evidence to suggest that Ms. Solander was mistaken about the need to void the bladder of the children, assuming arguendo any truth to that physically impossible testimony about the catheter's insertion.

VIII. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS OR ALTERNATIVE JURY INSTRUCTION ON THE CHARGES THAT EXCEEDED THE STATUTE OF LIMITATIONS.

"Criminal statutes of limitations are to be liberally construed in favor of the accused." State v. Merolla, 100 Nev. 461, 464, 686 P.2d 244, 246 (1984). The

relevant statute of limitations provides a safeguard against possible prejudice resulting from pre-indictment delay. Jones v. State, 96 Nev. 240, 242, 607 P.2d 116, 117 (1980) citing United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); DuFrane v. Sheriff, 88 Nev. 52, 495 P.2d 611 (1972). This affirmative defense can be made any time in the trial court, but is waived if not waived once the trial court loses jurisdiction. Hubbard v. State, 112 Nev. 946, 920 P.2d 991 (1996).

The Amended Information alleged ambiguous time frames of ALL counts between January 19, 2011 and November 11, 2013. The State does not endeavor to offer any exact, or more exact, dates. The first criminal complaint that mentions assault was filed on May 22, 2014. The first criminal complaint that mentions battery was filed July 23, 2014. The statute of limitations requires charges of this nature to be filed within three (3) years of commission, and that January 19, 2011 was outside the statute of limitations for those offenses. See NRS 171.085. As such, the Defense moved to dismiss Counts 13, 23, 38, 39 and 46 prior to the matter being submitted to the jury. (RT, Day 3 2/14/18, pp. 201-202.)

These specific offenses did not constitute child abuse, and did not constitute a continuous offense subject to the exception for a statute of limitations. The assaults and batteries were each specific instances of conduct that would be able to be completed in one (1) day and that were not being pled as part of an ongoing

pattern or an ongoing continuous offense because they are separately pled as separate counts. The burden is on the State to show to the Court by a preponderance of evidence that these offenses were done in secret. There would be no exception and that those counts should have been stricken because they are violative of the statute of limitations because they were not pled in a timely fashion, which would have been January 19, 2014.

The district court erred in denying the Motion as untimely, in light of the law that permits the affirmative defense of statute of limitations to be raised at any time, and certainly well before closing arguments or the settling of jury instructions. Therefore, Appellant's convictions for Counts 13, 23, 38, 39 and 46 must be vacated, as the alleged conduct fell outside the statute of limitations in which to charge for these offenses.

IX. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S ORAL MOTION TO SEVER THE SEXUAL ASSAULT COUNTS.

NRS 174.165(1) provides that "[i]f it appears that a defendant ... is prejudiced by a joinder of offenses ... in an indictment ..., the court may order an election or separate trials of counts, ... or provide whatever other relief justice requires." The defendant must demonstrate to the district court that the joinder would be unfairly prejudicial; this requires more than a mere showing that

severance may improve his or her chances for acquittal. Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005).

Courts construing NRS 174.165(1)'s federal cognate have identified three related but distinct types of prejudice that can flow from joined counts: (1) the jury may believe that a person charged with a large number of offenses has a criminal disposition, and as a result may cumulate the evidence against him or her or perhaps lessen the presumption of innocence; (2) evidence of guilt on one count may "spillover" to other counts, and lead to a conviction on those other counts even though the spillover evidence would have been inadmissible at a separate trial; and (3) defendant may wish to testify in his or her own defense on one charge but not on another. Id. citing Charles Alan Wright & Andrew D, Leipold, Federal Practice and Procedure § 222 (4th ed.2008).

The Nevada Supreme Court has recognized that the first of these types of prejudice may occur when charges in a weak case have been combined with charges in a strong case to help bolster the former. *Weber*, 121 Nev. at 575, 119 P.3d at 122. And while NRS 174.165(1) "does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro v. United States, 506 U.S. 534, 538–39, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993).

Ms. Solander moved the district court to sever the Sexual Assault counts in light of the weakness of the uncorroborated sexual assault charges (and the inherent confusion of the catheter charges being "sexual assault" by technicality). This was a case about whether or not Ms. Solander engaged in disciplinary practices that constituted felony Child Abuse, Neglect or Endangerment. In this case where Ms. Solander was charged with forty-six (46) counts, it cannot be understated how significant the spillover impact was on her trial. The jury was tasked with determining what a criminally "extended period of time" constituted for time outs on the portable potties, whether the use of corporal punishment exceeded lawful parental authority, and then also whether Appellant committed a per se sexual penetration of a non-sexual organ in order to "punish" her children.

In this case, Ms. Solander was prejudiced by the joinder of the Sexual Assault offenses because the same jury had heard about other more common allegations of excessive parental discipline after it had first sat through weeks of testimony about bad or bizarre (but lawful) conduct involving the other foster children in the home. This juxtaposition of different type of evidence bolstered the weak case for Sexual Assault of a Minor Under Fourteen, based on the impossible way that Ms. Solander was alleged to have inserted the catheters into the children.

Therefore, Appellant's case must be remanded for a new trial with the Sexual Assault counts severed.

X. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO STRIKE THE STATE'S IMPROPERLY NOTICED EXPERT WITNESSES.

NRS 50.275, subtitled, "Testimony by experts" provides that "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."

Of course, NRS 48.035(2) provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

Finally, NRS 174.234(2) provides:

> If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness **shall** file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing: (a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; **(b) A copy of the curriculum vitae of the expert witness**; and (c) A copy of all reports made by or at the direction of the expert witness.
> (emphasis added).

In this case, no copy of ANY curriculum vitae of any expert was attached to any Notice of Expert Witnesses in violation of statute. And despite the fact that this case had been filed in the District Court since July 29, 2014, the State waited until January 4, 2018 to file their expert notice, a mere twenty-five (25) days before trial was set to begin.

The State may not cure its deficiencies by providing late changes to their pleadings and notice to make it complete. To do so would amount to trial by ambush which "is not tolerated" by the Nevada Supreme Court. See Pierce Lathing Co. v. ISEC, Inc., 114 Nev. 291, 956 P.2d 93 (1998)(footnote 5). For all these reasons, Ms. Solander moved to strike the expert notice and disallow testimony at trial. The district court abused its discretion in allowing the State to put on deficiently noticed and cumulative "experts" to deny Ms. Solander a fair trial and an ambush of last-minute, medical and highly technical scientific evidence.

Therefore, based on the State's violation of NRS 174.234(2) and the district court's abuse of discretion in failing to hold the State to its burden under statute, Appellant's convictions must be reversed and a new trial must be ordered.

XI. THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE CHILDREN'S STATEMENTS TO CHILD PROTECTIVE SERVICES.

The children's allegations were initially obtained by way of two (2) interviews, the first in Florida and a second in Nevada. Those interviews were

conducted without notice or an opportunity to object by the parents of those minor children, which violated the Fourth Amendment, Due Process Clauses of the Fifth and Fourteenth Amendments, and denied Ms. Solander the right to a fair trial under the Sixth Amendment.

No criminal actions or evidence of child abuse was alleged to have taken place in the State of Florida; moreover, Florida received no reports from within the State prior to the request from Nevada CPS to interview the children. Nevada CPS never produced any substantiated report of abuse prior to the adopted children's removal on February 28, 2014. In fact, all prior reports and allegations were closed as unsubstantiated after thorough investigation by Nevada CPS.

There are no tapes of these interviews, nor was there an adult or parent present during these interviews to safeguard against any implicit or explicit suggestion by the interrogator. The reports were all created after the children were seized and thus, there was no probable cause present to start any investigation against defendant. The Fourth Amendment protects and secures individuals in their homes and persons against unreasonable search and seizure by the government. The Fourteenth Amendment guarantees that parents and children will not be separated by the state without due process of law except in an emergency. See Wallis v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000). This is not only limited to police, but applies to all persons acting in the name of the government. See

Calabretta v. Floyd, 189 F.3d 808, 814 (9th Cir. 1999). The Wallis Court also held that the "police cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been - or will be - committed." Id. at 1138 (citations omitted)("in the area of child abuse, as with the investigation and prosecution of all crimes, the state is constrained by the substantive and procedural guarantees of the constitution. The fact that a crime may be heinous, whether it involves children or adults-does not provide cause for the state to ignore the rights of the accused or any other parties").

The Ninth Circuit has consistently held that a consent, warrant, court order or exigent circumstances present are needed for the removal or interview of children in an abuse case. See Calabretta v. Floyd, 189 F.3d 808, 814-818 (9th Cir. 1999). The Ninth Circuit has repeatedly ruled that exigent circumstances are the fact that immediate danger and harm would come to the child in the time it would take to obtain a warrant. White v. Pierce County, 19 F.2d 812, 815 (9th Cir. 1986); Wallace v. Spencer, 202 F.3d 1126, 1138 (9th Cir. 2000); Rogers v. County of San Joaquin, 487 F.3d 1288, 1291, 1294-1298 (9th Cir. 2007); Mabe v. San Bernardino Cnty., Dept. Public Svcs., 237 F.3d 1101, 1106-1110 (9th Cir. 2001).

In Ram v. Rubin, 118 F.3d 1306, 1311 (9th Cir. 1997), the court stated:

> A state official cannot remove children from their parents unless that official has a reasonable belief that the

> children are in imminent danger. An indictment or serious allegations of abuse which are *investigated and corroborated* usually gives rise to a reasonable inference of imminent danger sufficient to justify taking children into temporary custody.
> Id. (emphasis added).

Ram supports the position that only upon a complete investigation and it has been indicated by corroborated evidence that abuse has occurred, that there exists sufficient cause to uphold exigent circumstance for removal. This would hold that until a full and complete investigation of the allegations was complete and there was found corroborated evidence of abuse that the children could be taken into custody due to the possibility the abuse would continue until such time as a safety plan were implemented and the case was closed.

In this case, no indictment existed and there was no investigated and corroborated allegations. CPS started this case with a pretextual report of a missing person, when they had contact with both adoptive parents and had been on notice for months that the adoptive parents had been screening out-of-state behavioral schools to enrich their children's lives and structure. After CPS made the report, LVMPD contacted the adoptive father, who informed police that the children were safe in a boarding school in Florida and gave the correct contact information. LVMPD contacted the director of the school, Stephen Blankenship, who reported the girls were there, had been since November 11, 2013, and were

doing well. This should have the end of any further investigation on the children, and certainly did not warrant further investigation without parental notification.

The children were in a private boarding school located on private property. They were not in a public setting where they were under the care and custody of a public official at a public school. Doe v. Heck, 327 F.3d 492, 515-516 (7th Cir. 2003) held that to the extent the law authorized government officials to conduct an investigation of child abuse on private property without a warrant or probable cause, consent or exigent circumstances, the statute was unconstitutional.

Prior to trial, Appellant moved the district court to hold an evidentiary hearing and require the State to prove that the warrantless seizure of the children in this matter satisfied constitutional due process protections under the United States and Nevada Constitutions. See State v. Ruscetta, 163 P.3d 451 (2007); State v. Rincon, 147 P.3d 233 (2006). The district court abused its discretion in declining to do so, holding that the Nevada statutes do not require parental notification and denied Appellant's request for an evidentiary hearing.

In light of the considerable Ninth Circuit case law supporting the need for an evidentiary hearing, Appellant requests this matter be remanded for a new trial with instructions to the district court to conduct an evidentiary hearing on her Motion to Suppress.

///

XII. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT BY ENTERING THE WITNESS STAND WHEN SUMMARIZING THE ALLEGED VICTIMS' TESTIMONY, WHICH CONSTITUTED IMPROPER WITNESS BOLSTERING.

"[T]his court will not reverse a conviction based on prosecutorial misconduct if it was harmless error. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension." Valdez v. State, 124 Nev. 1172, 1188–89, 196 P.3d 465, 476 (2008), Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001). A constitutional dimension error triggers the Chapman v. California standard, which means that reversal is warranted unless the State proves beyond a reasonable doubt that the error did not affect the outcome of the verdict. Id. If the error is not constitutional, reversal is warranted only if the error substantially affects the jury's verdict. Valdez v. State, 124 Nev. 1172, 1188–89, 196 P.3d 465, 476 (2008), citing Tavares, 117 Nev. At 732, 30 P.3d at 1132.

Arguments which tend to inflame the passions of the jury are "plainly improper." Floyd v. State, 118 Nev. 156, 173, 42 P.3d 249, 261 (2002); Arrieta-Agressot v. United States, 3 F.3d 525, 527 (1st Cir. 1993).

In this case, there was little independent corroborating evidence of any of the allegations. Thus, the most important inquiry for the jury was the credibility of the complaining victims. There was significant evidence that the adopted daughters

suffered from physical and emotional abuse prior to entering the Solander home. Additionally, each girl admitted to breaking the rules, wetting or soiling herself, or acting poorly in retaliation for the strict rules of the Solander home. In fact, Eldest Daughter recanted her allegation that Ms. Solander had forced her to lick her own urine off of the floor as a penalty for having a urinary accident. When questioned about the recantation, Eldest Daughter explained that she had been mad at Ms. Solander.

Credibility was key. Knowing that credibility was key, the State engaged in impermissible bolstering during closing argument when Ms. Bluth entered the witness box and summarized how the girls had promised to tell the truth, testified to each of the allegations, and had subjected themselves to cross-examination. Defense immediately objected to the misconduct, and the Court made a middle ground ruling that the State could enter the witness box, but not bolster the credibility of the witnesses. The problem with that ruling is that the damage had already been done. The State is a governmental agency, tasked with prosecuting cases for which there is probable cause. By standing up in the jury box while recalling the testimony of the witnesses, the prosecutor creates an additional aura of credibility. If the government can get in the witness box and relate to the jury that a witness was to be believed at face value, it violates an accused's presumption

of innocence and taints the jury's deliberations as far as whether a witness was credible or not.

Entering the witness stand was intended solely to provoke an emotional response from the jurors that they had heard testimony from three (3) children who had sat in that same stand and promised to tell the truth. The government cannot vouch for its essential witnesses, and by entering the witness stand, the government did exactly that. Even a timely objection could not undo the government's improper witness vouching and bolstering of otherwise uncorroborated testimony.

Therefore, Appellant's convictions are the product of prosecutorial misconduct and must be vacated.

XIII. THE DISTRICT COURT ABUSED ITS DISCRETION AT SENTENCING.

Nevada law creates a liberty interest in sentencing procedures that is protected by due process. Walker v. Deeds, 50 F.3d 670 (1995). The "responsibility on appellate review of a criminal sentence is limited yet important: we are to ensure that a substantively reasonable sentence has been imposed in a procedurally fair way." United States v. Levinson, 543 F.3d 190, 195, (3d Cir. 2008).

"Though a judge is allowed wide discretion in sentencing, if the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." Goodson v. State, 98

Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982). Generally speaking, sentencing requires lower courts to "resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'" Koon v. United States, 518 U.S. 81, 99, 116 S.Ct. 2035, 135 L.Ed.2d 392 (1996)(citations omitted).

With regard to a sentence for a criminal offense, while it is the function of the Legislature to set criminal penalties, Villanueva v. State, 117 Nev. 664, 668, 27 P.3d 443, 445–46 (2001), it is the function of the judiciary to decide what penalty, within the range set by the Legislature, if any, to impose on an individual defendant, see Johnson v. State, 118 Nev. 787, 804, 59 P.3d 450, 461 (2002); Sandy v. Fifth Judicial District Court, 113 Nev. 435, 440, 935 P.2d 1148, 1151 (1997). With regard to that individual defendant in a non-capital case, there is a commonly recognized need for individualized sentencing based on public policy. Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion)). It has long been held that the Sentencing Court should consider all relevant information to ensure that there is a sentence that is no greater than to accomplish the goals of justice. See Martinez v. State, 114 Nev. 735, 961 P.2d 143 (1998), citing United States v. Lai, 944 F.2d 1434, 1440 (9th Cir.1991)("The Eighth Amendment requires that defendants be sentenced individually, taking into account the individual, as well as the charged crime"); see also United States v. Crowe, 563 F.3d 969, 977 n. 16 (9th Cir.2009)(sentences

must be 'sufficient, but not greater than necessary, to comply with the purposes' of punishment). This degree of consideration "enables the sentencing judge to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant." Id. citing Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996); Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989).

Here, the district court had virtually no discretion in tailoring a punishment to fit the severity of the offenses for which the jury convicted Ms. Solander, as she was subject to eleven (11) Life sentences. At Ms. Solander's relatively advanced age, even a single Life sentence is tantamount to a Life Without sentence. This removal of judicial discretion is a feature of this first of its kind criminal prosecution, which in turn removes sentencing discretion from the judge, in violation of Villanueva, Johnson, and related case law.

That error was compounded by the district court's refusal to allow Appellant's counsel to inquire about the current housing or custodial status of the Eldest Daughter at sentencing. There was significant argument by the State about the generally tortured mental state and abuse suffered by the three (3) adopted girls in the Solander home and how these children continued to suffer as a result of the crimes committed against them.

Their next adoptive mother, Debbie McClain, testified that she continued to have problems with the girls, including that they did not like to abide the rules in her house. Ms. McClain never faced criminal prosecution for the rules in her home, but the rules were so objectionable to the Eldest Daughter that she was a repeat runaway and CPS had renewed involvement in her life well after she had been removed from the Solander home. (AA XIV, 3369-3371.) A proper inquiry into the "victim impact" of Ms. Solander's conduct on Eldest Daughter would dictate that Defense Counsel be permitted to inquire about the alleged severity. It was material to case that the Eldest Daughter continued to exhibit behavioral problems even in her second adoptive home, the McClain home, despite the State's argument that all of the girls' problems were attributed to Ms. Solander.

Therefore, Ms. Solander was denied a fair and individualized sentencing based on these errors and requests that this matter be remanded with instructions to permit her to inquire about the juvenile delinquent custodial status of the Eldest Daughter after her removal from the Solander home.

XIV. CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

Where cumulative error at trial denies a defendant his right to a fair trial, this Court must reverse the conviction. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Dechant v. State, 10 P.3d 1108 (2000). In evaluating cumulative error, this Court must consider whether "the issue of innocence or guilt

is close, the quantity and character of the error**,** and the gravity of the crime charged." Id.

Appellant submits that even if each error individually does not compel this Court to reverse her convictions, cumulative error does. The issue of guilt was close, particularly as it relates to the testimony about the penetration of catheters into the girls' "vaginas" in which urine immediately came out of the bladder and filled the bag. The issue of guilt was also close as to legally what constitutes a criminal "extended period of time."

Next, the quantity and character of the error was great: it was inherently confusing for the jury in light of the inadmissible bad act evidence that they heard about the non-criminal, non-abuse of the foster children. The misconduct by the prosecutor in presenting Ms. Solander as a bad person and then entering the jury box to vouch for the adopted children's credibility denied Appellant a fair trial.

Finally, the gravity of these offenses are severe; she was subjected to a prosecution for eleven (11) Life consequence offenses under a theory of prosecution which had never been done before in Clark County or the State of Nevada.

Therefore, cumulative error deprived Ms. Solander of a fair trial and a fair sentence.

///

CONCLUSION

WHEREFORE, the Appellant, JANET SOLANDER, respectfully requests that this Court:

1) Vacate all of her convictions, and

2) Reverse and remand for a new trial that comports with due process of law.

DATED this 17th day of April, 2019.

Respectfully Submitted by:

/s/: Caitlyn McAmis
CAITLYN MCAMIS, ESQ.
Nevada Bar No. 012616
550 E. Charleston Blvd., Suite A
Las Vegas, NV 89104
Attorney for Appellant,
JANET SOLANDER

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 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 3C(h)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 14,000 total words exactly.

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 17th day of April, 2019.

/s/: Caitlyn McAmis
CAITLYN MCAMIS, ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 17th day of April, 2019, the foregoing **APPELLANT'S OPENING BRIEF** and **APPELLANT'S APPENDIX** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List as follows:

STEVEN B. WOLFSON
Clark County District Attorney
STEVEN OWENS
Chief Deputy District Attorney

AARON FORD
Nevada Attorney General

/s/: Caitlyn McAmis
An Employee of The Law Offices of
Kristina Wildeveld, Esq.