

1                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 JANET SOLANDER,                   )

CASE NO. 76228

3           Appellant,                   )

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4 vs.                   )

**VOLUME XX**

5 THE STATE OF NEVADA,                   )

6           Respondent.                   )

7                   **APPENDIX TO APPELLANT'S OPENING BRIEF**

8                   (Appeal from Judgment of Conviction (Jury Trial))

9 KRISTINA WILDEVELD, ESQ.

STEVEN B. WOLFSON

Nevada Bar No. 005825

Nevada Bar No. 001565

10 CAITLYN MCAMIS, ESQ.

District Attorney

Nevada Bar No. 012616

STEVEN OWENS

11 The Law Offices of Kristina Wildeveld  
& Associates

Nevada Bar No. 004352

Chief Deputy District Attorney

12 550 E. Charleston Blvd., Suite A

Office of the District Attorney

Las Vegas, Nevada 89104

200 Lewis Ave., Third Floor

13 (702) 222-0007

Las Vegas, NV 89155

(702) 671-2750

14 AARON FORD

15 Nevada Bar No. 007704

Nevada Attorney General

16 555 E. Washington Ave., Ste. 3900

Las Vegas, Nevada 89101

17 (702) 486-3420

18 *Attorneys for Appellant*

*Attorneys for Respondent*

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1           A     Yes.

2           Q     Do you remember that?

3           A     Uh-huh.

4           Q     And I think the word choice that was used initially  
5 was you saw some crusting.

6           A     Correct.

7           Q     And then there was a later question that talked about  
8 it in a reference of it being a scar. Do you remember -- did  
9 you -- did you remember that being asked on cross-examination?

10          A     Yes.

11          Q     So initially it was -- the choice of words was  
12 crusting, and then it changed to scar.

13          A     Correct.

14          Q     I know that in your -- in your findings, did you  
15 describe it as kind of being a flaking crust behind the ear?

16          A     Correct. Yes.

17          Q     Okay. Were you able to determine if there had been a  
18 scar underneath that?

19          A     I don't think I did.

20          Q     Would you have had to kind of remove the flaking to  
21 make that determination?

22          A     Yes, I would.

23          Q     Okay. So would it -- would it surprise you if there  
24 potentially may have been a scar behind there? I mean --

25               MR. FIGLER: Objection, Your Honor. Assumes facts not



1 in evidence.

2 MR. HAMNER: That's actually incorrect. We can  
3 approach on that.

4 MR. FIGLER: Approach.

5 MR. HAMNER: Sure.

6 THE COURT: Sure.

7 (Off-record bench conference)

8 BY MR. HAMNER:

9 Q Doctor, since you haven't seen this child subsequent  
10 to March of 2014 --

11 A Yes.

12 Q -- can you say within a reasonable degree of medical  
13 certainty that there is not a scar behind that flaking that you  
14 noted?

15 A No.

16 Q Okay. In line with that question about the ear,  
17 publishing 192. And, again, let me at least show it to you up  
18 close because the quality is not the best.

19 A Thank you.

20 Q Let the record reflect I am showing the witness  
21 State's 192.

22 A Yes.

23 Q Looking at this area of the ear, what are you -- what  
24 are you -- based on your training, what are you seeing there?  
25 What is that marking near the ears or on the ears or around the

1 ears?

2 A So there is a disruption of the skin that appears  
3 consistent with a type of burn that is almost the entire outer  
4 area of the ear, and then behind the ear towards the hairline  
5 itself, and then it starts coming down to the shoulder area,  
6 over the collarbone, and then encompassing the -- the shoulder,  
7 both from the front part, as well as from the back part.

8 Q From what you can see here, are these what appear to  
9 be burns to you? Could these be potentially caused by hot  
10 water?

11 A Yes.

12 Q Okay. Given the -- the degree of what appears to be,  
13 in your opinion, to be a burn behind the ears, could markings  
14 like that, if left untreated, leave a scar?

15 A Yes.

16 Q And if you could, could you mark or at least circle  
17 the areas that you were saying -- you were noting what appeared  
18 to be a burn like around the ear and also behind the ear? Can  
19 you circle those two areas for us? Okay. So those are the two  
20 areas. Does that encompass the ear itself, as well as behind  
21 the ear?

22 A Yes.

23 Q Okay. I want to show you your chart for a second.  
24 Publishing Defense X. And we were kind of -- there were some  
25 questions about what sort of things qualify as accident versus

1 kind of otherwise. With respect to the general appearance,  
2 what's the kind of difference that you see in burns? Does it  
3 matter what type of burn, if it's liquid versus fire versus  
4 chemical?

5 A Yes.

6 Q Okay. So all of those have a factor?

7 A Temperature, timing, the type of, I guess, ingredient  
8 or what causes the burn have a factor, yes.

9 Q Okay. So let me -- let me ask you, this chart that's  
10 in this presentation doesn't make a distinction between those  
11 variables?

12 A It does not.

13 Q Okay. So where it says general appearance and it says  
14 accidental or regular with variable severity, and then  
15 nonaccidental would be regular and more uniform, does that  
16 criteria always apply in the situation of, let's say, a hot  
17 liquid burn?

18 A No.

19 Q Why not?

20 A This is like a 400-slide talk, and this is one of my  
21 slides in this talk. And this is used when I educate people. I  
22 say I understand everybody is really busy, and so I hate  
23 algorithms because I find that common sense actually makes a  
24 better physician or, you know, to interpret something. So this  
25 is not something I've created, but it does come from some burn

1 literature.

2           As a suggestion of a place to start, I always caution  
3 to say, look, we have to do what is it, where is it, context.  
4 And so this is something that I provide to any students to make  
5 sure that they understand that there are some distinctions, but  
6 that we have to make sure we use common sense in order to really  
7 apply it to each specific situation. And so that would be my  
8 reason, I guess.

9           Q     Okay. In cases of people being burned with water,  
10 does it -- does it factor in how it's being done, if you're  
11 immersing skin in water, if it's being poured on you, if you're  
12 being sprayed, or being held under something? Are those all  
13 kind of --

14          A     Those are all factors, yes.

15          Q     Okay. If you have a situation where just  
16 hypothetically it's either being poured or maybe you're being  
17 held under something or some water is coming out, are you going  
18 -- let's just first take the pouring scenario. Are you going to  
19 expect to see a recognizable clear pattern, or may it be  
20 irregular if someone --

21          A     It may be more irregular.

22          Q     Okay. Does that -- does gravity kind of come into  
23 play, I mean, with water?

24          A     Yes.

25          Q     Okay. Let's talk about special locations. There --

1 there were some questions about, well, I think you were asked on  
2 cross, well, I think some of the -- the words that were being  
3 used were, you know, this -- this appears to be in a shower or  
4 bathroom. Do you remember that?

5 A I remember that.

6 Q Okay. You weren't given any facts as to what's the  
7 circumstances surrounding when this picture was taken?

8 A No.

9 Q Or what's happening in this picture?

10 A Correct.

11 Q Or whether a shower even happened?

12 A Correct.

13 Q Let me ask you this, though, Doctor. Publishing 192.  
14 When we -- when you look at these markings, if someone was in a  
15 shower and they're in the shower, they're being sprayed with, I  
16 guess, just hypothetically just a normal kind of shower head and  
17 the water is scalding hot, in your -- based on your training and  
18 experience, would you expect to see this type of pattern being  
19 under a scalding spray of a shower?

20 A This is not consistent with a scalding spray, but more  
21 of a pour or if the water was coming out more solidly out of the  
22 spigot.

23 Q Why -- why, in your opinion, is this not consistent  
24 with a shower, a too hot shower?

25 A So, again, a too hot shower, we see this happen to

1 kids accidentally in the emergency department a lot of times, or  
2 even through child abuse evaluations. And so, again, a shower  
3 spraying distributes the water in a different pattern versus  
4 pouring water if it's coming out of a nozzle or something or  
5 whatever it's coming out has this affect of having larger areas  
6 that are burned. And so that's why I wouldn't think it's  
7 consistent with a spray shower.

8 Q Going back to Defense X. You talked about the  
9 severity. In accidental you may see a predominance of  
10 superficial or first-degree burns versus non-accidental you  
11 might see the predominance of deeper second and third-degree  
12 burns. And I don't know if you're able to determine, but can  
13 you make a determination about what degree this is without -- I  
14 don't know. Based on this photo alone, can you make a  
15 determination of the severity of the burn?

16 A With just the photo I would say it's definitely not a  
17 first-degree burn. First-degree burns are superficial  
18 thickness. A sunburn, that's a sunburn. So that's not that.  
19 Second-degree burns typically look pink and wet and will lots of  
20 times have blisters, so that's your partial thickness that goes  
21 through the skin layers. And so I see evidence of that on this  
22 picture. I'm concerned there are some third-degree, which is  
23 typically more dry and white looking, but I would not feel  
24 comfortable based just on this picture to say it to that extent.

25 Q Okay. But based on your training and experience, it

1 is not a first-degree burn?

2 A Correct.

3 Q Possibly a second-degree burn?

4 A Yes.

5 Q In your -- you've treated kids who have second-degree  
6 burns?

7 A Yeah.

8 Q Or things that are -- when you have kids that have  
9 that level burn, typically how long does it take to go away?

10 A Okay. So it depends on how it's treated. So there's  
11 -- there's several aspects of burns. Burns take away our  
12 barrier. That's our main barrier to infection and to how we get  
13 hydrated, right, so we start losing fluid from our skin. And so  
14 it needs to be wrapped appropriately, and also it can be  
15 infected so it needs to have antibiotics. Pain control is a  
16 component of this, and so without knowing how this was treated,  
17 it's -- you know, a typical burn well-treated would be two to  
18 three weeks to really start seeing some advanced healing where  
19 -- where we're looking more at scar and not this open tissue.

20 Q Based on your training and experience, in your opinion  
21 would you expect there to be kind of a persistent pain level  
22 during those two to three weeks before you start seeing  
23 significant healing?

24 A So second-degree or partial thickness burns are  
25 actually to the level of your nerves, and so that's why they

1 hurt so much, because those nerves typically are fairly exposed.  
2 And so these tend to be extremely painful.

3 Q Doctor, in terms of pain level, what happens if these  
4 are left untreated?

5 A Well, continuing pain with any -- any movement or any  
6 contact with that, or because it's on areas that we just move  
7 naturally with our body movements, potentially pain with that,  
8 as well.

9 Q Going back to Defense X. There were some questions  
10 under the category of numbers and timing. They all appear to be  
11 in different stages of healing. Are you able to make that  
12 determination based on State's 192, what level of healing we're  
13 at?

14 A Not based just on this picture. It appears to be all  
15 about the same time, but I would be uncomfortable to say more  
16 than that.

17 Q Okay. And, also, given the -- if we're talking about  
18 a burn, given the -- what's being used, is that also part of a  
19 factor about whether it's water versus fire or chemical, things  
20 like that? Does that all play a role in it?

21 A It can, yes.

22 Q Okay. I know here on Defense X there's an indication  
23 of edges that in an accidental scenario it's indistinct,  
24 irregular edges versus non-accidental sharp clearly demarked  
25 edges. In the -- in the scenario of pouring water, would you



1 have an expectation that there would be shark, clearly demarked  
2 areas when you're pouring water onto a body?

3 A No, I wouldn't.

4 Q Okay. So even if it's non-accidental, you don't have  
5 an expectation if you're pouring hot water on someone that  
6 they're going to have a water scenario, a water pour, that's  
7 going to have clearly demarked edges?

8 A Correct.

9 Q Is that because of the substance that you're using,  
10 water?

11 A Yes.

12 Q How about being held under like a faucet, would you  
13 have an expectation, based on your training and experience, of a  
14 clearly defined demarked edge?

15 A No.

16 Q Okay. Is that because we're dealing with water?

17 A Water and gravity.

18 Q Okay. And are these clearly demarked edges?

19 A No.

20 Q Okay. Lastly, splash marks present. I know that it  
21 indicates in accidental, yes, you'll have splash marks,  
22 non-accidental, no. In this situation are you able to determine  
23 if there are splash marks present?

24 A There look like some smaller burns kind of around the  
25 neck and maybe the shoulder, and they could -- they could

1 possibly represent splash marks.

2 Q Okay. When dealing with water burns, does this rule  
3 automatically always apply in non-accidental situations with  
4 water you are not going to have splash marks?

5 A No. Again, the title is characteristics suggestive  
6 of. It's a place for, I think, my students and colleagues to  
7 start to look and to understand the dynamics of burns, but  
8 critical thinking needs to be applied, as well.

9 Q Okay. You were asked kind of almost at the end of  
10 cross a little bit about the well checks and that through all  
11 the records have revealed, you know, all the children presented  
12 at being well-nourished. Do you remember that?

13 A I do.

14 Q Did you review Anastasia's records with respect to Dr.  
15 Dewan and a complaint of being a failure to thrive?

16 A That is correct. Dr. Dewan's office did mention that,  
17 yes.

18 Q Okay. So that was a situation where that's precisely  
19 the problem, that there was a lack of -- the child is not  
20 putting on enough weight and they've got to work towards that.  
21 She's losing too much weight.

22 A Correct.

23 Q Okay. So that's not an accurate statement that every  
24 time they came they presented as well-nourished? I mean, I know  
25 there was --

1           A     The way I understood the question as it was asked to  
2 me was in the physical exam portion did anyone write anything  
3 other than well-nourished, and so --

4           Q     Okay. I understand.

5           A     -- that gets complicated because of how medical  
6 records are written or not.

7           Q     Okay. Based on your review of the records, were --  
8 were doctors prescribing more than one time PediaSure for some  
9 of these children?

10          A     Yes.

11          Q     There were some questions about the kind of growth of  
12 these kids. Did you see from the records that you reviewed kind  
13 of after, did you see any records in any visits that they had  
14 after kind of seeing you in March of 2014?

15          A     You mean records of being seen after seeing me?

16          Q     Yeah. So did you review any records that post-date  
17 your visit?

18          A     I believe I saw some, yes, but the majority of it was  
19 to understand at the time that I saw them what had occurred.

20          Q     Sure. And I don't know if you -- if you remember or  
21 not, but did you see any notations if they had any increase in  
22 either height or weight gain in those later visits?

23          A     I believe their height velocity -- their weight was  
24 getting -- it was okay, but their height velocity I believe  
25 started correcting, but I would need to review that again.

1 Q Okay.

2 MR. HAMNER: I have no further questions.

3 THE COURT: All right. Mr. Figler, any recross.

4 RECROSS-EXAMINATION

5 BY MR. FIGLER:

6 Q Doctor, based on that --

7 MR. HAMNER: Want me to leave this for you?

8 MR. FIGLER: Thank you.

9 BY MR. FIGLER:

10 Q Based on this photo alone --

11 A Yes.

12 Q -- can you say to any degree of medical certainty that  
13 that's a non-accidental injury or -- can you?

14 A No.

15 Q You can't. And then talking about Dr. Dewan's notes,  
16 there was a failure to thrive conversation, and then there was a  
17 course of action that Dr. Dewan gave to Janet Solander, isn't  
18 that true?

19 A Yes.

20 Q And then there were follow-ups, isn't that true?

21 A There were a couple of follow-ups, yes.

22 Q Okay. And Ms. Solander met all those follow-ups based  
23 on those records, isn't that true?

24 A I don't know if Dr. Dewan -- I know there were some  
25 follow-ups that were missed. I think with Dr. Dewan she met

1    them, yes.

2           Q     Okay.  And isn't it true that Dr. Dewan noted that it  
3    was working, that the measures that were instructed to Ms.  
4    Solander upon subsequent visits showed that the child was  
5    gaining appropriate weight, was doing everything great, and they  
6    were all very happy about that?  Is anything like that reflected  
7    in his notes, do you recall?

8           A     The weight, yes.  The height, she had no growth for  
9    the entirety of the visits that I reviewed, so that would be  
10   inaccurate.  There were some things that were good, some things  
11   that were not working.

12          Q     Okay.  So with regard to Dr. Dewan's -- if Dr. Dewan  
13    had testified that he noted something, prescribed something, it  
14    appeared as though the prescription was followed and got the  
15    results he was looking for, you would be surprised with that?

16          A     That's a bit vague.  With certain aspects of it, I  
17    would not be surprised with that, but his notes reflected that  
18    there was no height growth.

19          Q     Okay.  And, again, we talked about some of the organic  
20    factors that may be in play here; correct?

21          A     Yes.

22          Q     All right.  The prosecutor asked you a question that  
23    was phrased in a certain way, and I'm going to ask you a  
24    question that was phrased in exactly the same way.  Doctor, can  
25    you say to any degree of medical certainty that there is not a

1 scar behind my right ear?

2 A No.

3 Q Okay. So that is the same answer as when Mr. Hamner  
4 asked you if you can tell to any degree of medical certainty  
5 that there is not a scar right now behind Anastasia's ear;  
6 correct? Same answer?

7 A Yes.

8 Q The same answer was no; right?

9 A The same answer was no.

10 THE COURT: Yes, the same answer was no. Is that your  
11 answer?

12 THE WITNESS: Correct. That is my answer. My final  
13 answer.

14 BY MR. FIGLER:

15 Q Okay. And then you also talked about how -- you  
16 talked about during my cross and it was discussed a little bit  
17 on the redirect, but you were talking about the disclosures of  
18 the -- of the girls, and you also talked about how they had  
19 similar injuries and that was a concern to you; correct?

20 A Yes.

21 Q Okay. And you're aware that these three siblings have  
22 been together in every placement that they've been in; correct?

23 A That is correct.

24 Q Okay. So it is possible, because you can't age the  
25 scars, that they all received similar scars when they were

1 living together in the biological home; correct?

2 A Potentially, yes.

3 Q Okay. Now, you also talked about on redirect that you  
4 looked at all the records, including the psychological records  
5 in making your assessment; isn't that correct?

6 A Certain aspects of my assessment. The physical abuse  
7 and sexual abuse assessments, no, I -- I used what I --

8 MR. HAMNER: Objection.

9 THE WITNESS: -- we were looking at.

10 MR. HAMNER: Objection. This is beyond the scope of  
11 redirect.

12 THE COURT: State your question.

13 MR. FIGLER: I was asking her about the records that  
14 she reviewed in support of her findings, which was definitely  
15 gotten into in redirect.

16 THE COURT: Yeah, the objection is overruled.

17 MR. HAMNER: It was -- it was specifically --

18 THE COURT: I think it was covered already, but --

19 MR. HAMNER: It was a reference to psychological  
20 records, and there was no discussion of that at any point on  
21 direct, cross, or redirect.

22 THE COURT: Counsel approach.

23 (Off-record bench conference)

24 BY MR. FIGLER:

25 Q We had talked about the -- the boxes, the four options

1 of what type of abuse. You remember that?

2 A Yes.

3 Q Okay. And you had talked about that on redirect, as  
4 well, with Mr. Hamner just now; correct?

5 A Yes.

6 Q Okay. And so if you recall, your testimony was that  
7 your checkboxes that you did use were based on the disclosures  
8 of the siblings. You remember that?

9 A Yes.

10 Q Okay. And so would it have been important for you to  
11 look at the psychological records of the child with regard to  
12 their veracity or trauma that they had sustained in the past?

13 A In order to do what?

14 Q In order to confidently check off that box.

15 A No.

16 Q Did you look at the psychiatric records of these  
17 individuals?

18 A Just of the one. I believe -- was it Amaya, I think?

19 Q Okay. So let me bring up Amaya's checkboxes. Will  
20 you accept my representation that that's Amaya's?

21 A Yes.

22 Q And we can tell that because it only has the one box  
23 versus the two boxes checked for probable abuse; correct?

24 A Correct.

25 Q Okay. Now, two things. One, there is a parenthetical



1 next to the single box checked in support of probable abuse for  
2 Amaya; isn't that correct?

3 A That is correct.

4 Q And tell me what that parenthetical says.

5 A Further investigation is recommended.

6 Q Okay. Now, let me ask you this. Hypothetically  
7 speaking, if a child had a past history of exaggeration, would  
8 that be --

9 MR. HAMNER: Objection. It's -- objection. It's  
10 beyond the scope.

11 THE COURT: It is a little beyond the scope. You can  
12 just answer. Don't go too far into this area, but if a child  
13 had a past history for exaggeration, would that have affected  
14 her opinion in checking off the box? Is that your question?

15 MR. FIGLER: That's part one of the question.

16 BY MR. FIGLER:

17 Q Would that have affected your opinion checking off the  
18 box?

19 A No.

20 Q Would that be part of a further investigation that is  
21 recommended?

22 A As I am not an investigator, I am a medical evaluator,  
23 that's for the rest -- yes, that is part of the  
24 multi-disciplinary team recommendation.

25 Q Okay. So even if you learned of lying or trauma or

1 exaggeration, you would not put that on your form in any way?

2 A No.

3 Q So you essentially -- your role is instructed to  
4 accept the child's opinion at face value whether or not there is  
5 contradictory evidence in her file and past?

6 A That's very subjective. My role is to look at her  
7 medically and offer recommendations for the multi-disciplinary  
8 team. So I can only offer medically this is what I see or what  
9 I don't see, and what this means or doesn't mean.

10 Q So in your capacity, you would never recommend see if  
11 this child has made exaggerated accusations in the past, that  
12 doesn't matter to you in your capacity?

13 A In my capacity, it doesn't change my medical  
14 evaluation, no.

15 Q Okay. All right. Last on sexual abuse. You  
16 indicated that -- Mr. Hamner asked you on redirect that -- there  
17 was that question just because you don't see any evidence of it  
18 doesn't mean it didn't happen; right? You remember that?

19 A Correct.

20 Q Okay. And then you talked about there are people who  
21 groom children for sexual abuse and are very careful; correct?

22 A Yes.

23 Q And who are having long-term sexual intercourse type  
24 relationships with children, being careful not to leave any kind  
25 of marks or evidence; correct?

1           A     Potentially, yes.

2           Q     Okay. So that's the typical sexual abuse that you  
3 deal with in your line of work; correct?

4           A     I wouldn't say typical in any way, shape, or form, but  
5 that is a factor, yes.

6           Q     Okay. So what percentage of sexual abuse cases that  
7 you do involve an adult placing their penis inside a child's  
8 vagina?

9           A     I wouldn't dare to guess. I don't know.

10          Q     Is it usually a penis or a finger or a mouth? Is that  
11 what we're looking at?

12          A     Usually, yes.

13          Q     Okay. And there's some degree of sexual gratification  
14 that's involved in that?

15          A     For whom?

16                MS. BLUTH: Objection. Speculation.

17                MR. FIGLER: I'll withdraw.

18                THE COURT: All right.

19 BY MR. FIGLER:

20          Q     What percent of sexual abuse investigations that you  
21 do involve a catheter being placed inside a urethra?

22          A     I don't investigate, but for my evaluations, this is  
23 the first one I have ever heard of somebody using a catheter not  
24 in a medical format.

25          Q     Okay. So this is the first time ever that you've been

1 asked to testify in any kind of sexual abuse case where there's  
2 a catheter being inserted into -- the allegation of a catheter  
3 being inserted, yes or no?

4 A Specifically of a catheter, yes.

5 Q Okay.

6 THE COURT: Pass the witness?

7 MR. FIGLER: Court's indulgence.

8 BY MR. FIGLER:

9 Q One last question. Maybe just one last question. You  
10 did talk about your PowerPoint, and you said, well, I have over  
11 400 slides on there; right?

12 A Just on that one, yes.

13 Q On that one. That's the only one I got, so that's the  
14 only one I have. I looked at every single slide. You're not  
15 saying there were 400 slides about burns and causes of burns;  
16 correct?

17 A Correct.

18 Q Okay. In fact, there's multiple slides that are  
19 overview slides talking about, you know, what is physical abuse,  
20 what are your objectives of physical abuse; correct?

21 A Correct.

22 Q Okay. There's actually lots of photos of your very  
23 adorable dog in there, as well; correct?

24 A My dogs, yes. And they are adorable. Correct.

25 Q Okay. I think we can all stipulate to that. I've

1 seen them. There's probably like about 20 photos of them in  
2 that slide set; right?

3 A At least. Yes.

4 Q Okay. I won't ask you why. They're just cute, and  
5 that's self-explanatory. So you do write in your PowerPoint on  
6 page -- on, well, probably the sixth slide right away is you  
7 talk about physical abuse and you're looking for physical abuse;  
8 right?

9 MR. HAMNER: It's beyond the scope. It's beyond the  
10 scope.

11 MR. FIGLER: We're talking about the slides and the  
12 suggestion that --

13 THE COURT: I think we're getting --

14 MR. FIGLER: One question about the slide and one  
15 slide in particular, Your Honor.

16 THE COURT: It's quicker just to let you ask the  
17 question, so ask the one question. But Mr. Hamner is correct,  
18 we're going beyond the scope of redirect here.

19 BY MR. FIGLER:

20 Q Okay. So one of the -- let's see, so under physical  
21 abuse you list one, two, three, four, five, six categories, and  
22 the first one is skin findings, bruises, burns, bites, etcetera;  
23 correct?

24 A Yes.

25 Q Okay. And you testified about bruises and what

1 potentially could be burns in this particular case; correct?

2 A Yes.

3 Q Okay. Well, you didn't testify to bruises, per se.  
4 You testified about scars that you saw; right?

5 A Scars.

6 Q Okay. Next one is mouth and throat. Is there  
7 anything about mouth and throat in this particular case?

8 A No.

9 Q The next one is eyes. Anything about eyes in this  
10 particular case?

11 A No.

12 Q No. The next one is about internal damage, abdominal  
13 injury, organ damage. Anything about that in this particular  
14 case?

15 A No.

16 Q Next one is head trauma. Anything about head trauma  
17 in this case?

18 A No.

19 Q The next one is skeletal trauma. Anything about  
20 skeletal trauma in this case?

21 A No.

22 Q Okay. And you have testified in a number of  
23 proceedings right here in this very courthouse, this big  
24 17-story courthouse; correct?

25 A Yes.

1 Q Okay. And you have testified about skeletal trauma  
2 and head trauma and internal damage and those type of things in  
3 child abuse prosecutions; right?

4 A Correct.

5 Q And none of that exists in this case; right?

6 A No.

7 Q Okay.

8 MR. FIGLER: With that, I'll pass the witness, Your  
9 Honor.

10 FURTHER REDIRECT EXAMINATION

11 BY MR. HAMNER:

12 Q So the question about that you didn't review the  
13 psychological stuff for your assessment, you remember those  
14 questions?

15 A I remember those questions.

16 Q Doctor, when you're doing a medical exam and you're  
17 physically observing a child's body, do you need a psychological  
18 report on a kid to help you see what you're seeing with your  
19 eyes?

20 A No.

21 Q Okay. And in a similar vein, you're not reviewing all  
22 of these interviews that may happen in a case where people talk  
23 about all the things that they saw; right?

24 A Correct.

25 Q Because that's not the purpose of it?

1 A No.

2 Q You're not reviewing to see what the police collected  
3 from a house; right?

4 A Correct.

5 Q You're not seeing what they may have collected off a  
6 computer; right?

7 A Correct.

8 Q Because that's not your role in this?

9 A No.

10 Q Your role is to observe them medically?

11 A Yes.

12 Q Not connect all the dots?

13 A Correct.

14 Q Then you were asked some question about -- well, about  
15 hearing about catheters being put in for sexual purposes.  
16 Remember that?

17 A I remember that.

18 Q You have reviewed -- made findings in sexual  
19 assessments, sexual abuse assessments, where objects are being  
20 placed inside the genitalia of children; right?

21 A Oh, yeah.

22 Q How often does that happen?

23 A Constantly.

24 Q Okay.

25 A I couldn't give you a number.



1 Q And in some of the cases is there necessarily a sexual  
2 element to it?

3 A No.

4 Q Objects being placed in the genitalia of children?

5 MR. FIGLER: I'm going to objection at that.

6 THE COURT: Yeah, that's sustained. We didn't get  
7 into that on -- you objected on recross. It was sustained,  
8 so --

9 MR. FIGLER: Right.

10 BY MR. HAMNER:

11 Q And let's just be clear about something. You're not a  
12 lawyer?

13 A No.

14 Q All right. So you --

15 THE COURT: And she says, thankfully, I'm not a  
16 lawyer.

17 BY MR. HAMNER:

18 Q You're not a lawyer, so you don't really know what the  
19 law is regarding what certain crimes are; right?

20 A Not specifically, no.

21 Q Okay. So with respect to a sexual abuse crime, you  
22 don't know what the law is because that's not your role?

23 A Generally, but, no, I don't know it.

24 Q Your role is to see if there's physical markings that  
25 might be indicative of sexual abuse?

1           A     Correct.

2           Q     Or physical markings that are indicative of physical  
3 abuse?

4           A     Correct.

5           MR. HAMNER: No further questions.

6           THE COURT: Just based on that, Mr. Figler.

7                         FURTHER RECROSS-EXAMINATION

8 BY MR. FIGLER:

9           Q     Focusing solely on the allegation of sexual abuse and  
10 your finding of probable abuse, the children's veracity has to  
11 be important --

12           MR. HAMNER: Objection. It's asked and answered at  
13 this point, and beyond the scope.

14           THE COURT: I think it is beyond the scope.

15 BY MR. FIGLER:

16           Q     Chris asked you you're not a lawyer, so you know that  
17 a finding of abuse by a doctor doesn't necessarily amount to  
18 criminal abuse; isn't that correct?

19           A     Correct.

20           Q     Okay. And Mr. Hamner had asked none of those  
21 psychological records are important on redirect just now, didn't  
22 he?

23           MR. HAMNER: That's a misstatement of my question.

24           MR. FIGLER: Did he say something along those lines,  
25 Your Honor?

1 THE COURT: I don't remember.

2 But, Doctor, is that consistent with your memory of  
3 what Mr. Hamner's question was?

4 THE WITNESS: No.

5 THE COURT: All right.

6 BY MR. FIGLER:

7 Q What did Mr. Hamner ask you about the psychological --  
8 do you remember what he asked you about psychological records?

9 A Yeah. Does the -- me looking at psychological records  
10 change what I'm going to see on a vagina or on a butt or on the  
11 skin of a child, will that change how my actual medical  
12 evaluation plays out? No. There are multiple factors in this  
13 case where psychological factors may come into it, but for those  
14 specific judgments, that is not important.

15 Q Okay. So I would ask you this. Are those type of  
16 assessments important for -- because you relied solely on the  
17 disclosure of the children, isn't the veracity of the children  
18 or their psychological ability to be truthful important to you?

19 MR. HAMNER: Objection. It's been asked and answered.

20 THE COURT: Overruled. You can -- well, it wasn't --  
21 is that important to you?

22 THE WITNESS: Not to my findings or recommendations  
23 for the rest of the multi-disciplinary team.

24 BY MR. FIGLER:

25 Q Okay. But, again, your findings of probable abuse are

1 solely related to your disclosures, the disclosures of those  
2 girls, weren't they?

3 MR. HAMNER: Asked and answered.

4 THE COURT: Overruled.

5 THE WITNESS: I would never put definitive based on  
6 something that was given in a forensic interview because that's  
7 not objective data, and, therefore, that is why there is a  
8 spectrum to the findings and my recommendations.

9 BY MR. FIGLER:

10 Q And a spectrum that was created by your partner that  
11 you use now?

12 A Based on national standards and literature.

13 Q Okay. And is this a national form, or is this a form  
14 created by your partner?

15 A Created by my partner.

16 Q Thank you.

17 MR. FIGLER: No further questions.

18 MR. HAMNER: Nothing further.

19 THE COURT: Anything based on that?

20 MR. HAMNER: No, Your Honor.

21 THE COURT: Do we have any juror questions for the  
22 witness? No? No additional questions?

23 All right. Doctor, thank you for your testimony. You  
24 are excused at this time.

25 MS. BLUTH: And may we approach very briefly, Your

1 Honor?

2 THE COURT: Sure.

3 (Off-record bench conference)

4 THE COURT: State.

5 MS. BLUTH: Thank you, Your Honor. Subject to any  
6 admissions of exhibits that still may need to be done, the State  
7 is done calling witnesses and we would rest our case in chief.

8 THE COURT: All right. Thank you.

9 Mr. Figler, you had taken a witness in your case in  
10 chief out of order yesterday. Are there any additional  
11 witnesses for the defense?

12 MR. FIGLER: Yes, Your Honor. Right now we'd like to  
13 call Catherine Jorgenson to the stand.

14 THE COURT: All right. Ms. Jorgenson, just follow the  
15 bailiff, please, right up here.

16 And, ladies and gentlemen of the jury, I believe this  
17 is going to be a very brief witness.

18 CATHERINE JORGENSEN, DEFENSE WITNESS, SWORN

19 THE CLERK: Thank you. Please have a seat. State and  
20 spell your first and last name for the record.

21 THE WITNESS: Catherine Jorgenson. And it's first and  
22 last name spelled?

23 THE COURT: Yes, please.

24 THE WITNESS: C-A-T-H-E-R-I-N-E J-O-R-G-E-N-S-O-N.

25 THE COURT: All right. Thank you.

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DIRECT EXAMINATION

BY MR. FIGLER:

Q And, Ms. Jorgenson, where are you currently employed?

A I work for the Clark County District Attorney's Office.

Q Okay. And we've heard that there's a bunch of different divisions. What division do you work for?

A I work in the civil division.

Q Okay. And who is your boss, the top boss?

A The top boss is Steve Wolfson.

Q And he is the Clark County District Attorney?

A Yes.

Q Is he the top boss of the criminal division, as well?

A Yes.

Q Is he the top boss of the family division, too?

A Family support?

Q Yeah.

A Yes.

Q Thank you.

THE COURT: And the juvenile division?

THE WITNESS: Yes.

THE COURT: And are you an attorney?

THE WITNESS: Yes.

BY MR. FIGLER:

Q And, Ms. Jorgenson, as an attorney, I requested

1 procedurally for you to run any emails regarding a specific  
2 search term within County employees, is that fair to say?

3 A Yes. I received subpoenas, or I became aware of  
4 subpoenas that had been served on various county employees, and  
5 within that there were -- was a request for certain documents.

6 Q Okay. And I just want to focus. You very efficiently  
7 and dutifully broke them down into topics. Was there a topic  
8 related to a book called the Foster Care System or Abuse in the  
9 Foster Care System, something along those lines? I don't have  
10 it right this second in front of me.

11 A Yes.

12 Q But something along those lines?

13 A Yes.

14 Q Okay. And were you able to identify Clark County  
15 employee emails that were back and forth with regard to this  
16 particular book?

17 A I believe that any time within those -- that set of  
18 emails I was reviewing, any time I saw a reference to the book I  
19 set those aside into that category of books.

20 Q Okay. And did you produce those to the Court and the  
21 attorneys?

22 A To the Court.

23 Q Okay. And if I were to show you that stack of -- of  
24 documents, do you think you'd be able to identify them?

25 A Yes, I believe so.

1           MR. FIGLER: Approaching the witness with Proposed  
2 Exhibit BB, Your Honor.

3           MS. BLUTH: And, Judge, while she's looking at that,  
4 may we approach?

5           MR. FIGLER: Oh, sure.

6           MS. BLUTH: Thank you.

7                       (Off-record bench conference)

8 BY MR. FIGLER:

9           Q     I'm sorry. You had identified those, Ms. Jorgenson,  
10 as a fair and accurate copy of all the emails given the  
11 requested search term that were focused solely on Janet  
12 Solander's book; is that correct?

13          A     I reviewed through the emails that you had provided to  
14 me. They were out of order, so I didn't actually go and make  
15 sure that every single one was there.

16          Q     And that's my fault. Janet had gone through them.  
17 But otherwise --

18          A     It appears to me to be the entire group of emails that  
19 I provided.

20          Q     And that was approximately -- was that 87 pages on  
21 that topic?

22          A     I believe there was 66 emails that I was aware of, so  
23 I'm not sure how many pages it was.

24          Q     Okay. You know what, that's correct, because it  
25 starts at No. 19. So if it went 19 through 87, that would be 66



1 emails; correct?

2           A     No. I'm sorry. What I meant was I believe there was  
3 66 emails total, there may be multiple pages per email, so 87  
4 would make sense.

5           Q     Thank you.

6           MS. BLUTH: And, Judge, we would stipulate to their  
7 admission.

8           THE COURT: All right.

9           MR. FIGLER: All right.

10          THE COURT: And so we can, then, based on that, admit  
11 Defense Exhibit BB.

12                         (Defense Exhibit BB admitted)

13          MR. FIGLER: Thank you.

14 BY MR. FIGLER:

15          Q     And, Ms. Jorgenson, you are now in the unenviable  
16 task, and I'm sorry you drew the short straw over at the  
17 District Attorney's Office, but what I'm going to need you to do  
18 is go through these emails that all relate -- and some of these  
19 have attachments that were not attached, so it's thinner. The  
20 attachment was typically a .pdf of the book, is that fair to say  
21 generally speaking?

22          A     Yes.

23          Q     Okay. And what I would ask you to do is, if you can,  
24 without being redundant, go through the names of -- you might  
25 want to get your glasses -- the names of the individuals from

1 and to, and if you can identify them or not as a County  
2 employee. So what I'd ask is if you -- if you can't, just read  
3 the name. If you can in any way identify them as a County  
4 employee, then you could indicate that they're a County employee  
5 or if they have a County employee email address. You would be  
6 able to identify a County employee email address; correct?

7 A Yes.

8 Q Okay.

9 MS. BLUTH: So, Judge, I'm going to object to that  
10 because I think the documents speak for themselves, so I don't  
11 understand --

12 THE COURT: Well, that's overruled. I mean, once the  
13 document is in evidence, she's allowed to read from the  
14 document. We don't have to rely on the jurors reading it. And  
15 I think probably there's going to be some follow-up.

16 Now, to be clear, all of the emails were between  
17 County employees; is that correct?

18 THE WITNESS: They were to and from County employees.

19 THE COURT: Okay.

20 THE WITNESS: So I believe that there may have been  
21 some that might have involved outside.

22 THE COURT: Okay. And then just to be clear, you did  
23 not print out the attachment which was the book; correct?

24 THE WITNESS: No, I didn't print out the attachments.  
25 And, in fact, I didn't print these out. An assistant did.

1 THE COURT: Okay. So what we have there is just the  
2 emails and sometimes an attachment of the book, but the actual  
3 attachment wasn't printed?

4 THE WITNESS: Right. Some reference to the  
5 attachment, but not the attachment itself.

6 THE COURT: Okay.

7 THE WITNESS: Yes.

8 THE COURT: All right.

9 MR. FIGLER: And I'm not asking Ms. Jorgenson about  
10 the -- the content or the comments. That does speak for itself.  
11 I'm just trying to get into the record the names of the --

12 THE COURT: That's fine.

13 So, Ms. Jorgenson, you can read the names of the  
14 individuals involved in sending and receiving those emails.

15 THE WITNESS: Okay. And to and from?

16 BY MR. FIGLER:

17 Q To and from.

18 A Just starting from the bottom, going up?

19 Q That would be fine. And if you can, I know there's  
20 going to be a lot of names, if you can avoid redundancies, but  
21 if you do one that's redundant, nobody is going to care.

22 A Okay. To start with --

23 Q Go ahead.

24 A Heather Richardson, Michelle Douglas, Lisa Lamb,  
25 Briana McIntosh, Sara Broo, Lisa Lam, Brittany Mann, and Carmel

1 Sloan.

2 Q Okay. Do you recognize any of those as County  
3 employees?

4 A Heather Richardson, Carmel Sloan are two names I  
5 recognize.

6 Q Okay.

7 A Shannon Edwards, Patrick Barkley, Jolie Courtney. I  
8 recognize all three of them.

9 Q Okay. As County employees.

10 A As County employees.

11 Q Thank you.

12 A Same names. Payal Patel, Brigid Duffy, Kristi  
13 Jourdan, Yvette Gonzalez, Faiza Ebrahim, Julia Bradley, Kristina  
14 Bernat. There's a Metro email address without a name.

15 Q Okay. The next one, please.

16 A Jerico Peterson, Collen Ramirez, Dina Cox, Minnie  
17 Roberson, Nicole Mitchell, Lydia Brown, Devon Butts, Allison  
18 Cannon, a Hotmail address that I don't know, Yolanda Flores,  
19 Sharon Kisling.

20 Q Do any of those look like or sound like County  
21 employees to you, or they all -- most of them do?

22 A I don't recognize them, but it's -- I would assume  
23 they are, but I don't recognize their names.

24 Q Do some of them have County employee email addresses?

25 A Actually, they don't. They just have their names, and

1 those are the ones I would assume are County email, but I  
2 couldn't say that for sure.

3 Q Okay.

4 A There's another Hotmail address that's -- I don't know  
5 the name. Shuuanndy Alvarez, Eduardo Alvarez, Marius Jurani,  
6 Anita Flores-Yanez.

7 Q Okay.

8 A Misty Williamson, Jane Green, Lisa Gibson, Crystal  
9 Patterson, Misty Williamson, Nancy Doyle, Del Rae Augustine,  
10 Sara Evans, Renee Ramberg, Vasa Brockelman. I do know she's  
11 one, a County employee.

12 Q Okay.

13 A Maria Torres, Chris Carrell, Candice Barker, Valerie  
14 Shyface. Jayme Esplin, Jill Anczelowitz, Natasha Jovisevic,  
15 Jessica Marable, Yerie Williams, Dixie Beach, Yvonne Wallace,  
16 Michelle Pollock, Andrea Love, Aya Orenick, Kevin Liu, Naomi  
17 Caterina, Megan Eggers, Maryte Tallent, Chandler Levrach, Sonya  
18 Weathers, Colleen Ramirez, Mariah Boykin, Jerico Peterson, Anita  
19 -- oh, I said that name already. Jane Green, Minnie Roberson,  
20 Tara Trass. Tiffany Nettles, Ms. Drea Love, Del Rae Augustine,  
21 Stephanie Jordan, Taryn LaMaison, Traci Nellis, Tisa Evans,  
22 Tiffany Flowers-Holmes.

23 Q Go back to Tisa Evans for a second. Do you know who  
24 Tisa Evans is?

25 A Yes, she's a County employee.

1 Q And do you know what her role is?

2 A She is an ombudsman.

3 Q For what division?

4 A I believe it's multiple divisions, but I do know she  
5 works with the Department of Family Services.

6 Q Thank you. Keep going.

7 A Kristen Weg, Kechia English, Lani Aitken, Stacie  
8 Dastrup, Viviana Cordeiro, Lisa Begaye, Mary Ellyazidi.

9 Q Okay. Do some of those names sound like County  
10 employees or do you recognize them as County employees?

11 A Kristen Weg and Stacie Dastrup both have County  
12 emails.

13 Q All right. Thank you.

14 A Tiffany Flowers-Holmes, Gloria Flores, Kalena Edwards,  
15 Alison Brasier, Vera Sampson, Elizabeth Stumpf, Candace Barr,  
16 Frances Emery, Candice Barker, Crystal Patterson, Brett Spratt,  
17 Balisa Johnson, Leah Stromberg, Tara Donahue, Richard Nelson,  
18 Lauren Soskin (phonetic), Paula Hammack, Willakemi Frizenmay  
19 (phonetic), Luna Oclue (phonetic), Chris Graham, Gina Albert,  
20 Karen Atlanic (phonetic), Kim Lee, Bosco Sullivan, Terrance  
21 Collier.

22 Q Okay. There was a couple of names that I'm not sure  
23 that you said because I was waiting for them. I'm sure there's  
24 some that -- let's just do this, ask a question. Did you read  
25 that name or do you remember that name?

1 A Faiza Ebrahim?

2 Q Right.

3 A Yes.

4 Q Okay. And -- and that was from Faiza Ebrahim, or to  
5 Faiza Ebrahim?

6 A This one is from.

7 Q And what was the date of that?

8 A March 11, 2014.

9 Q March 11, 2014. And is there an earlier one where she  
10 is the recipient of the subject line J. Solander Book?

11 A Yes.

12 Q And when is that?

13 A March 7, 2014.

14 Q Okay. Do you know who Faiza Ebrahim is?

15 A She works in the Department of Family Services.

16 Q And do you know what her job was on March 11, 2014?

17 A No, I'm not sure.

18 Q Okay. If I showed you a document that might refresh  
19 your recollection of what her capacity was on that date?

20 A The State's forensic specialist.

21 Q Okay. And if you know, do you know that -- well,  
22 first of all, what time did that book email get sent by Faiza  
23 Ebrahim on March 11, 2014?

24 A 7:40 a.m.

25 Q Okay. Do you know that that same day Faiza Ebrahim

1 was --

2 MS. BLUTH: Judge, I would object as to leading and as  
3 to the scope of this witness's knowledge.

4 THE COURT: That's sustained.

5 MR. FIGLER: Fair enough.

6 THE COURT: Yeah. That's sustained.

7 BY MR. FIGLER:

8 Q Do you know what Faiza Ebrahim's involvement in this  
9 particular case was on March 11, 2014?

10 A No.

11 Q Faiza Ebrahim also sent it to somebody -- what was the  
12 last name on there?

13 A Kristina Bernat.

14 Q Okay. Do you know who Kristina Bernat is?

15 A I know she's a Department of Family Services employee.

16 Q Okay. Do you know if she is a forensic specialist who  
17 does interviews of children, too?

18 A No, I don't know.

19 Q Okay.

20 MR. FIGLER: Court's indulgence. Can we approach,  
21 Your Honor?

22 THE COURT: Sure.

23 (Off-record bench conference)

24 BY MR. FIGLER:

25 Q I won't make you go all through it again, but do you



1 have the general time range of when the emails about the book  
2 started, and generally speaking when the last one is in there,  
3 or would you have to look through them again?

4 A I believe they started, if I remember correctly, in  
5 December of 2013.

6 Q Okay.

7 A The bulk of them, I believe, were in March of 2014.

8 Q Okay.

9 A I think there's some in 2018, but I'd have to look  
10 through them.

11 Q Okay. But they -- it's your testimony that they did  
12 go on for years after that; correct?

13 A Well, I think the result -- the bulk of them, like I  
14 said, was 2014, and I think there were a few in 2018. I don't  
15 think there was anything in 2017 or 2016.

16 Q Okay.

17 A But I would have to look through them again to --

18 Q Fair enough. But I think it's fair to say that  
19 generally speaking at least one or a couple will pick up again a  
20 couple years after the -- even the 2014?

21 A I believe there's some in 2018.

22 Q Okay.

23 MR. FIGLER: I'll move for their admission and pass.

24 THE COURT: All right. I think they were already  
25 admitted.

1 MR. FIGLER: Okay.

2 THE COURT: All right. Pass the witness. Cross.

3 MR. HAMNER: Thank you.

4 CROSS-EXAMINATION

5 BY MR. HAMNER:

6 Q Ms. Jorgenson --

7 MR. HAMNER: If I could see those emails.

8 BY MR. HAMNER:

9 Q So, Ms. Jorgenson, and I'm sure you've read all these;  
10 correct?

11 A I actually didn't read through them really carefully.  
12 I was just looking for the marker and then putting it into that  
13 category.

14 Q Isn't it true that virtually -- are you aware that the  
15 children, the Solander children were removed from the home on  
16 February 28, 2014?

17 A I became aware of it as looking -- when I was looking  
18 through these emails.

19 Q Isn't it true the vast majority of all of these emails  
20 actually post dates the decision to remove these children from  
21 the home?

22 A I believe the bulk of them are in March 2014.

23 Q Isn't it true that Gail Anderson's name doesn't appear  
24 in any of these emails? I mean, I heard you read them.

25 A I don't -- didn't recall seeing her name as I was

1 going through that.

2 Q Yvette Gonzalez's name wasn't in there, either.

3 A Whose?

4 Q Yvette Gonzalez.

5 A I don't recall.

6 Q You don't recall reading out Cherina Davidson?

7 A No, I don't recall.

8 Q Lori Wells?

9 A No.

10 Q Gennipher Dowling?

11 A No.

12 Q Riley Lewis-Castro?

13 A No.

14 Q Christina Day?

15 A No.

16 Q Laura Hammack?

17 A No.

18 THE COURT: She --

19 BY MR. HAMNER:

20 Q I know Paula.

21 THE COURT: Oh, I'm sorry. She read Paula.

22 THE WITNESS: There was Paula, but not Laura.

23 BY MR. HAMNER:

24 Q But no Laura.

25 A No.

1 Q Crystal Rosas?

2 A No.

3 Q Sandra Cetl?

4 A No.

5 Q Okay. And isn't it true from reviewing this, the vast  
6 majority of these emails is simply forwarding the book?

7 A That was my impression when I -- when I was looking  
8 through them.

9 Q Isn't it true through reviewing these, isn't it true  
10 that there's -- there's no email that says we need to go get  
11 Janet Solander for writing this book, we're going to remove  
12 those kids, anything like that?

13 A I don't recall seeing anything like that.

14 Q Okay. We've got to do something about this and stop  
15 her?

16 A I didn't see anything like that.

17 Q How dare this book, let's call the authorities,  
18 anything like that?

19 A No.

20 Q Okay.

21 MR. HAMNER: No further questions.

22 THE COURT: Anything based on that?

23 MR. FIGLER: Yes.

24 ///

25 ///

REDIRECT EXAMINATION

BY MR. FIGLER:

Q Do you know the last date that this Clark County District Attorney's Office filed new charges with regard to this case?

A No.

Q Do you have an answer on why? I mean, most of those people were County employees; correct?

A That's my -- yes, that's my impression.

Q Do you know why all those County employees were sending that book back --

MR. HAMNER: Objection.

BY MR. FIGLER:

Q -- and forth to each other?

MR. HAMNER: Speculation.

BY MR. FIGLER:

Q Do you know?

MR. HAMNER: It's speculation.

MR. FIGLER: I asked her if she knows.

THE COURT: All right. Well --

MR. HAMNER: The question --

THE COURT: -- if she knows, that would be a yes or no question.

MR. FIGLER: Correct.

THE COURT: Do you know, yes or no? Then I'm assuming

1 Mr. Figler is going to follow up with is there anything in the  
2 email or not follow up, but the -- and, ladies and gentlemen,  
3 just to remind you, you'll have all that in evidence and review  
4 them yourself.

5 Do you know? Do you have any personal knowledge of  
6 why County emails were -- County employees were sending emails  
7 of the book back and forth?

8 THE WITNESS: No.

9 BY MR. FIGLER:

10 Q Do you have any knowledge, personal knowledge, why  
11 that book would be sent back and forth to and from forensic  
12 interviewers in this case in March of 2014?

13 A No.

14 Q Is email the only way that County employees can  
15 communicate with each other?

16 A No.

17 Q So there's no policy that prohibits them from talking  
18 on the phone to each other; correct?

19 A They need to talk on the phone, so, no.

20 Q Okay. And so my subpoena, there's no transcription,  
21 you guys don't listen in on everyone's phone calls; right?

22 A No.

23 Q Okay. What's an interoffice envelope, or interoffice  
24 mailer?

25 A It is something that's also called a thousand-miler,

1 and it's a large manila envelope that has lines on it where you  
2 can put a to and from. And if you put something within that  
3 envelope, it can be sent from one office to another.

4 Q Okay. Are those documents that are placed in  
5 thousand-milers documented by being copied and put into a file  
6 that can be searchable at some future time?

7 A Documenting what's sent by thousand-miler?

8 Q Correct.

9 A No, not that I'm aware of.

10 Q What about personal text messages between people's  
11 cell phones? Everyone carries a cell phone. Did you search  
12 that, or was that not part of our subpoena request?

13 A That was not part of your subpoena request.

14 Q Could you do personal phones, or they have to be  
15 County phones?

16 A I believe there is some law that if you use it for --  
17 well, that wasn't part of your request.

18 Q Okay. So that could be out there. We just didn't ask  
19 yet?

20 A No.

21 Q Okay.

22 MR. FIGLER: No further questions.

23 THE COURT: Anything else, Your Honor, based on that?

24 MR. HAMNER: No, Your Honor.

25 THE COURT: Any -- wait, you're not done. There may

1 be juror questions.

2 Do we have any juror questions for the witness? All  
3 right. I see no questions.

4 Now you're done. Thank you for --

5 THE WITNESS: Thank you.

6 THE COURT: -- your testimony. Please do not discuss  
7 your testimony with anyone else that may be called as a witness  
8 in this case. Thank you and you are excused.

9 THE WITNESS: Thank you.

10 THE COURT: All right. Ladies and gentlemen, that's  
11 it for today. So we're going to go ahead and take our weekend  
12 recess.

13 MR. FIGLER: Oh. Your Honor, can we approach?

14 THE COURT: Oh. You're not done yet.

15 (Off-record bench conference)

16 THE COURT: Ladies and gentlemen, we're going to go  
17 ahead and take our weekend recess. Obviously, we didn't finish  
18 the trial today. We will finish the trial Monday. So Monday  
19 the Court will be reading to you the instructions on the law,  
20 and then the attorneys will have the opportunity to make their  
21 closing arguments.

22 We anticipate providing lunch for you all on Monday.  
23 So if anyone has any dietary restrictions, please let the  
24 bailiff know if you're a vegetarian or a vegan or anything like  
25 that. I don't think we can do Kosher meals, but if you do have



1 any dietary restrictions, let the bailiff know so we can plan  
2 for that.

3           Before I excuse you for the weekend recess, I must  
4 give you the admonishment. And I may have neglected to state  
5 our start time. We will be starting at 9:00 a.m. on Monday.  
6 9:00 a.m. on Monday. The Court does not have any unrelated  
7 matters on its calendar for Monday. You will be the only thing.  
8 So as soon as everybody is here, we can get started. So 9:00  
9 a.m. Monday.

10           During the weekend recess, you are all reminded you're  
11 not to discuss the case or anything relating to the case with  
12 each other or with anyone else. You're not to read, watch, or  
13 listen to any reports of or commentaries on the case, person, or  
14 subject matter relating to the case. Do not do any independent  
15 research by way of the Internet or any other medium, and please  
16 don't form or express an opinion on the trial.

17           Please place your notepads in your chairs, and follow  
18 the bailiff through the double doors. And Mr. Pistana, please  
19 remain in the courtroom.

20                           (Jury recessed at 2:05 p.m.)

21           THE COURT: And I apologize. How do you say your  
22 surname again?

23           JUROR NO. 5: Pistana.

24           THE COURT: I always --

25           JUROR NO. 5: That's okay.

1 THE COURT: I did better.

2 JUROR NO. 5: I've been called worse.

3 THE COURT: All right. As you heard, we're not  
4 finishing today. We will be finishing up on Monday and it'll be  
5 submitted to the jury for deliberations. I know you have your  
6 trip. You were not one of the alternates, but if you would  
7 prefer to be excused so you can take your trip, I can do that.

8 JUROR NO. 5: It's -- so Monday?

9 THE COURT: Right.

10 JUROR NO. 5: So I could --

11 THE COURT: I mean, look, you know, it could go into  
12 deliberations Tuesday. You know, it's up to the jury how long  
13 they take with deliberations.

14 JUROR NO. 5: Right. Will it go into deliberations  
15 Monday? Like --

16 THE COURT: We would start deliberations Monday, but  
17 it could go into Tuesday. So I can't -- you know, obviously, we  
18 don't want people rushing through deliberations.

19 JUROR NO. 5: Right.

20 THE COURT: You know, we ask that everybody discuss  
21 the evidence. So, you know, I can't promise you --

22 JUROR NO. 5: Right.

23 THE COURT: -- you would be done Monday.

24 JUROR NO. 5: If I was -- yeah, if I was here and  
25 let's say deliberations carried over, that's the big darn

1 deliberations are --

2 THE COURT: Okay.

3 JUROR NO. 5: I mean --

4 THE COURT: Well, here's the thing, once you start  
5 deliberating, unless it's a medical necessity or something like  
6 that --

7 JUROR NO. 5: You've got to sit.

8 THE COURT: -- we would expect you to continue  
9 deliberations until, you know, a verdict is reached or --

10 JUROR NO. 5: Right.

11 THE COURT: -- something like that. So I can't  
12 promise you you will be excused --

13 JUROR NO. 5: Right.

14 THE COURT: -- you know, Monday.

15 JUROR NO. 5: Yeah. Because I was already --

16 THE COURT: It takes how long it takes.

17 JUROR NO. 5: I got it. No, I understand. Can I make  
18 a call? I feel like I've got to phone a friend.

19 THE COURT: Yeah. I mean, that -- that's fine with  
20 me.

21 JUROR NO. 5: I mean, for a few minutes just make a  
22 quick call to talk to -- or --

23 THE COURT: That's fine. That's fine.

24 JUROR NO. 5: Okay.

25 THE COURT: We're still here, so --

1 JUROR NO. 5: I mean, I've got nowhere to go right now  
2 anyway.

3 THE COURT: All right. So --

4 JUROR NO. 5: I'm not going to go -- I'm not going to  
5 go to the office.

6 THE COURT: -- I'm going to ask you to -- I'm going to  
7 have Kenny escort you into the hallway or the vestibule --

8 JUROR NO. 5: Okay. Yeah.

9 THE COURT: -- or wherever you're comfortable and you  
10 can make your phone call.

11 JUROR NO. 5: That would be great.

12 THE COURT: And then come back in and we'll follow up,  
13 okay.

14 JUROR NO. 5: Maybe five minutes. Thank you.

15 (Outside the presence of Juror No. 5)

16 THE COURT: I feel like he's torn. He kind of wants  
17 to see this to the end and --

18 MR. FIGLER: But his job is important to him.

19 THE COURT: -- hear the rest of it. But, yes, his job  
20 is important to him. And I feel like he feels like he's come  
21 this far and he wants to -- he wants to see it to its  
22 conclusion. So let's let him make his call. I feel like we're  
23 on a reality show. Let's let him make his call, tick, tick,  
24 tick, tick, tick.

25 MR. FIGLER: I mean, of course, the defense, just to

1 throw in another penny on the scale, the defense's concern is  
2 that if he chooses not to go based on what he said so far, that  
3 it might weigh on his mind and might be a distraction on some  
4 level.

5 THE COURT: Well, although, I'm giving him a clear  
6 choice, and I've told him it's as long as it takes.

7 MR. FIGLER: Right.

8 THE COURT: You know, if it takes Tuesday. I mean, I  
9 can pretty much guarantee to him right now they're not going to  
10 have a verdict on Monday.

11 MR. FIGLER: No.

12 MS. BLUTH: No.

13 MR. HAMNER: No.

14 THE COURT: Because he -- well, he doesn't -- you  
15 know, he doesn't know what kind of a department we are, so he  
16 doesn't know that we're not a stay past dinner time department.

17 MS. BLUTH: Yeah.

18 MR. HAMNER: And I -- and I don't think he's expressed  
19 anything to indicate that he would be conflicted if  
20 deliberating. He's just trying to decide --

21 THE COURT: No, he knows --

22 MR. HAMNER: -- whether he should --

23 THE COURT: -- I can release him right now. But like  
24 I said, I kind of feel like he wants to see it through to  
25 completion.

1 MS. BLUTH: I think he wants you to make the decision  
2 for him because he's -- he's so torn that he's like whatever she  
3 tells me I'll have to do. But I think he's going to go make a  
4 call and that's going to make his decision for him.

5 THE COURT: Right. And then it is what -- I'm still  
6 going to tell him not to talk to anybody about it because, God  
7 forbid, there's like a plague or something and we lose too many  
8 jurors and we would have to bring him back. We're not doing  
9 this trial again. Well, we may. Okay. I am not, to be clear.

10 MR. FIGLER: Jury instructions may hit the probability  
11 of that one way or the other.

12 THE COURT: Sure. I mean, well --

13 MR. FIGLER: I say that cheekily. We've exchanged  
14 some jury instructions, Your Honor, already.

15 THE COURT: Okay.

16 MR. FIGLER: I told the State I would try to mark up  
17 some that I had, but I haven't had an opportunity to do that,  
18 but I could do that after lunch. I assume --

19 THE COURT: What I was going to say --

20 MR. FIGLER: -- we're going to break for lunch.

21 THE COURT: -- is we're going to break for lunch.

22 Poor Lynn Robinson has been waiting for me.

23 MS. BLUTH: This whole time?

24 THE COURT: All this time.

25 MR. FIGLER: Without food or water?

1 THE COURT: What's that?

2 MR. FIGLER: Or bagels or --

3 THE COURT: No, she -- I don't know. Maybe they have  
4 something on the third floor. We're going to take a lunch  
5 break, and then we'll come back and do the instructions. I like  
6 the lawyers to meet. Excuse me. I like the lawyers to meet  
7 without me to see if you can resolve your differences. I'm  
8 assuming there will be some things you cannot agree to. And  
9 then --

10 MS. BLUTH: Can you give us a little bit longer of a  
11 lunch so we can go eat and then come back with each other here?

12 THE COURT: Sure.

13 MS. BLUTH: And then you come in when you're done?

14 MR. FIGLER: Yeah, since we don't have a jury waiting.

15 THE COURT: How long do you folks need? I know you  
16 don't eat.

17 MS. BLUTH: Yeah.

18 MR. FIGLER: Give us a half hour after however long.  
19 So give us an hour and a half maybe.

20 MR. HAMNER: An hour and a half. That's what I was  
21 thinking.

22 MR. FIGLER: Okay.

23 MR. HAMNER: That way we have an hour, essentially;  
24 right? Because it's 2:00 now.

25 MS. BLUTH: Yeah.

1 MR. HAMNER: So 3:30; right?

2 THE COURT: Well, we need -- at some point we need  
3 somebody to put this stuff on the record, so we'll need a clerk.  
4 I mean, I don't care who the clerk is, but we'll be in session,  
5 so we need somebody.

6 MR. FIGLER: Ms. Wildeveld may have participation in  
7 the trial again soon.

8 THE COURT: That's fine. Did you already give your  
9 instructions to the State?

10 MR. FIGLER: I gave my specials to the State last  
11 night, probably around 9:30 or something.

12 THE COURT: Okay. Just make sure you don't both give  
13 me duplicates.

14 MR. FIGLER: No.

15 THE COURT: I mean, I just want --

16 MR. FIGLER: There's only one that's in common right  
17 now. There's only one that's in common --

18 THE COURT: Okay.

19 MR. FIGLER: -- and we can probably work that one out.

20 THE COURT: Just pull that. I mean, if it's like  
21 changing a word from innocent to not guilty, you know, stuff  
22 like that --

23 MR. FIGLER: We can probably work that.

24 THE COURT: -- you can work that out. And I normally  
25 would make that change.



1 MS. BLUTH: Dayvid has asked if I would ask Krystal if  
2 she would print a copy for him so he doesn't have to go back to  
3 an office. Is that okay?

4 THE COURT: Of course.

5 MS. BLUTH: And I had a copy printed for you, as well.

6 MR. FIGLER: Thank you, Your Honor.

7 THE COURT: Who are we having on Monday, Faiza?

8 MR. FIGLER: Faiza Ebrahim and Kristina Bernat.

9 THE COURT: Okay.

10 MR. FIGLER: They were both the forensic interviewers  
11 of all the children in this case. They -- we had attempted to  
12 subpoenas on both, but we -- our investigator failed and he took  
13 off.

14 THE COURT: Are they no longer with DFS?

15 THE MARSHAL: The juror is here, Judge.

16 THE COURT: Okay. Bring them in.

17 MR. FIGLER: Faiza is, isn't she?

18 MS. BLUTH: Yeah.

19 (Inside the presence of Juror No. 5)

20 JUROR NO. 5: All right. I'm in.

21 THE COURT: Okay. Great. All right. So you'll be  
22 back --

23 JUROR NO. 5: I'm not that important, apparently,  
24 there.

25 THE COURT: Okay. Great. You'll be back Monday at

1 9:00?

2 JUROR NO. 5: Yeah.

3 THE COURT: So obviously the prohibition is very much  
4 in effect that I just read to everybody.

5 JUROR NO. 5: Right.

6 THE COURT: We'll see you back at 9:00. And, once  
7 again, if the other jurors want to know why we made you stay  
8 back and what we discussed, please don't discuss this with them.

9 JUROR NO. 5: No problem.

10 THE COURT: All right. Thank you.

11 JUROR NO. 5: Yeah.

12 THE COURT: Have a good weekend, and we'll see you  
13 back Monday at 9:00 a.m.

14 JUROR NO. 5: 9:00.

15 (Outside the presence of Juror No. 5)

16 THE COURT: So it's 2:15 now. Can we say 3:30? Is  
17 that enough? Or let's say 3:40.

18 MS. BLUTH: But we're going to meet before you.

19 THE COURT: Right. So I'm going to be back at 3:40.

20 MR. HAMNER: Yes.

21 THE COURT: Or 3:45. I'll be back here at 3:45. I  
22 expect the lawyers here at 3:45.

23 Ms. Solander, we're settling jury instructions on the  
24 record at 3:45. Those are legal arguments. You're, obviously,  
25 welcome to be here, but if your attorneys don't think you need

1 to be here and you want me to waive your appearance, that's  
2 fine, as well. So that's up to you and your lawyers. Like I  
3 said, it's an open proceeding. As the defendant, you're welcome  
4 to be here, but your appearance isn't required. So it's up to  
5 you and your lawyers if you want to be here or not. If you're  
6 not here at 3:45, I'm not going to wait. I'm going.

7 MR. FIGLER: No, we'll be here.

8 THE COURT: So it's up to you. If she wants to be  
9 here --

10 MR. FIGLER: Yeah, we'll explain it to her --

11 THE COURT: -- and you want her here --

12 MR. FIGLER: -- what usually happens.

13 THE COURT: -- it's up to -- it's up to you guys.  
14 It's just legal arguments.

15 MR. FIGLER: That's fine, Your Honor. Thank you.

16 MR. HAMNER: Thank you, Your Honor.

17 MR. FIGLER: Thank you, staff.

18 (Court recessed at 2:15 p.m., until 4:01 p.m.)

19 MS. BLUTH: And then if we could just stop when we  
20 don't agree, would that be okay, or what do you want to do?

21 THE COURT: Just --

22 MS. BLUTH: You're the boss.

23 THE COURT: -- can we go to the ones you don't agree  
24 on, or you didn't tab those or --

25 MR. HAMNER: I mean, I've noted them.

1 THE COURT: All right. One, two, three. Are we on  
2 the record?

3 THE RECORDER: Yes.

4 MR. FIGLER: Are you numbering them now?

5 THE COURT: No, no, no. We haven't agreed on them.  
6 I'm just --

7 MR. FIGLER: Okay.

8 MS. BLUTH: Just can we start with -- oh, well, he has  
9 some changes to the information he wants to make.

10 THE COURT: All right.

11 MR. FIGLER: Are we on record here?

12 THE COURT: Yeah.

13 MR. FIGLER: Okay. Your Honor, I'm just going to do a  
14 little prelude here. The defense has -- had concerns from the  
15 onset of when the trial began, at least, that some of the counts  
16 are constitutionally vague as they apply to our client, and  
17 certainly we aren't on notice for certain things, such as how  
18 long is extended period of time for a bucket and things of that  
19 nature.

20 So we did reference earlier, but I just wanted to make  
21 it clear that based on *Ford v. State*, 127 Nev. 608, and some of  
22 the other cases we've cited about vagueness, that the -- the  
23 information as it stands itself is quite vague. I think last  
24 time I went through all the counts, so I'm not going to do that  
25 again. I think the record is made very clear on that.

1           That said, this is a very unique prosecution. I think  
2 that not only is Dr. Cetl, this is the first one that she's seen  
3 as a catheter inserted into a urethra which was purported to be  
4 for medical purposes being charged as a sexual assault, but I  
5 would venture to say this is probably the first catheter in a  
6 urethra ever charged by the State of Nevada as a -- as a sexual  
7 assault. And so it's going to be matters of first impression  
8 with a lot of these instructions that are being given in this  
9 particular case. So that's the prelude.

10           With regard to the instruction itself, the new issue  
11 is that in a multitude of counts the defendant is listed with  
12 Dwight Solander for the child abuse, neglect, endangerment,  
13 substantial bodily harm charges. And the first page of the  
14 information correctly now just lists Janet Solander. The  
15 instructions just list Janet Solander. Dwight Solander has  
16 already pled out and is not in this case, and he has plead to  
17 three counts in the case.

18           The State does allege conspiracy and aiding and  
19 abetting explicitly in the sexual assault. And so my comments  
20 are not related to that because they did plead that, and there  
21 is notice. But I believe that there would be confusion to the  
22 jury, and perhaps confusion during argument, with regard to the  
23 conspiracy that the jury could find, because the count lists  
24 both of them, the defendant guilty for the conduct of Dwight  
25 Solander.

1           THE COURT: Right. Because they don't know when the  
2 scars were caused. Was it Dwight Solander striking the child  
3 with the paint stick, or was it Janet Solander striking the  
4 child with the paint stick? They don't know which striking  
5 would have caused which scar.

6           MR. FIGLER: Right. So unless it's been --

7           THE COURT: Which is why they have to plead it this  
8 way.

9           MR. HAMNER: Right.

10          MR. FIGLER: Well, I mean -- so that's our objection,  
11 that it's plead this way, because the Jury may very well find  
12 that Janet is guilty of child abuse, neglect, even though only  
13 Dwight hit the child with a stick causing a scar, and that would  
14 be abdication of justice.

15          They're not being charged as consorts, they're not  
16 being charged as aiding and abet. But implicit in the State's  
17 argument, is it doesn't matter, and it does matter. And so we  
18 would ask that Dwight Solander's name be stricken from all the  
19 counts where it is listed. And there's also one count where  
20 Danielle Hinton is also listed as an individual.

21          Now, as I stated, the sexual assault, they pled it as  
22 a conspiracy. I understand why Dwight bought the catheters and  
23 all that stuff. I get it. We are on notice of that, but we are  
24 not on notice that if the jury finds beyond a reasonable doubt  
25 that Dwight caused the scarring and did the substantial bodily

1 harm, that Janet would be found guilty. We're not on notice of  
2 that.

3 THE COURT: Does anybody want to respond?

4 MR. HAMNER: Yeah. I think that the -- the manner in  
5 which its plead is -- is entirely appropriate. This is no  
6 different than an unidentified co-conspirator. I mean, we do  
7 this sort of thing all the time. This isn't a situation where  
8 there's been a lack of evidence, either, that's been presented  
9 at trial where both of them engaged in some of these -- these  
10 actions. Additionally, there was extensive testimony that  
11 Dwight would act at the behest of Janet, to kind of enforce  
12 these rules or enforce discipline. Same thing with Danielle, as  
13 well.

14 And so the bottom line is, with respect to naming  
15 these particular, you know, non-parties right now in this case,  
16 specifically Danielle and -- and Dwight, there's nothing  
17 inappropriate with doing this. This is just kind of standard  
18 pleading or conspirator liability, accomplice liability. And  
19 there's nothing really wrong as a matter of law about it, and  
20 they've been on notice about it this entire time since the  
21 prelim. So at this point there's not a legal basis to remove  
22 them from the information.

23 THE COURT: Look, I think there's enough notice. They  
24 were acting together. There's ample evidence of that. I think  
25 it's fine. Just two comments. Whoever your secretary is, there

1 are a lot -- there's not mistakes, really, but on the  
2 formatting, they'll have the lines, you know, the page break is  
3 like in -- I'm looking -- in the middle, between counts, and  
4 stuff like that.

5 MR. HAMNER: Right. Get that --

6 MS. BLUTH: I'll have it --

7 MR. HAMNER: -- cleared up.

8 MS. BLUTH: I'll have it fixed.

9 THE COURT: Clean that up. Also, let me just ask you  
10 this on the record now. Does either side object if when we get  
11 to Instruction 3 I don't reread it, and just say, you know,  
12 Counts 1 through 46 allege various, you know, child abuse, blah  
13 blah blah, and it was read to you by the court clerk at the  
14 beginning, and it's here in Instruction No. 3?

15 MR. FIGLER: Can I inquire, does each juror have their  
16 own copy of the instructions?

17 THE COURT: No, but if you want me to, we can give  
18 them one rather than me reading the whole thing. I would just  
19 note --

20 MR. FIGLER: If that's the Court's --

21 THE COURT: -- Judge Cherry used to do it that way --

22 MR. FIGLER: Yeah.

23 THE COURT: -- when he was a District Court judge.

24 Normally, I reread it, but you know, 47 counts --

25 MS. BLUTH: It takes 30 minutes.



1 THE COURT: -- that's another --

2 MS. BLUTH: It takes 30 minutes to do that.

3 THE COURT: Yeah, I was going to say --

4 MR. FIGLER: For the Court's convenience, the defense  
5 would not have an objection if each juror had a set of their own  
6 instructions.

7 THE COURT: I'm fine doing it that way. Typically, I  
8 don't give the jurors their own instructions because I feel like  
9 sometimes they're reading through the instructions instead of  
10 listening to the closing arguments. That's my own feeling. I  
11 know some judges hand them out and think it's better to do it  
12 that way. My personal view is it's not better, but if  
13 requested, it doesn't really matter to me. We can make 15  
14 copies

15 MR. FIGLER: And we don't mind if the -- if the jury  
16 is admonished. But sometimes both sides would say if you look  
17 at Juror Instruction No. 17 --

18 MS. BLUTH: Yeah. And then --

19 MR. FIGLER: -- it would be convenient for them to  
20 have it in front of them. So --

21 THE COURT: Okay. But, normally when the -- look, if  
22 you want me to do it that way, that's fine. I would just note  
23 that normally, if you say Instruction 17 tells you, blah blah  
24 blah, either it's up in their PowerPoint, it's on the Elmo, or  
25 you're reading it to them.

1 MR. HAMNER: My -- my --

2 THE COURT: So --

3 MR. HAMNER: My request, as far as having -- getting  
4 them a paper copy is, given that there's 46 counts and that it  
5 overlaps with the kids, I think it would be easier, from our  
6 standpoint in terms of explaining the law about which counts,  
7 because as I'm going through it I'm going to be saying things  
8 like this conduct is Counts 5, 13, and 27.

9 THE COURT: Right. Now, of course, they get many  
10 copies of the instructions in the back with them.

11 MR. HAMNER: Okay.

12 THE COURT: Yeah. No, no, no. You're just talking  
13 about handing them 15 copies when I read the instructions --

14 MR. FIGLER: Yes.

15 THE COURT: -- and that they then hold onto when you  
16 guys make your closing arguments. If you like that better, I  
17 don't care. So --

18 MR. HAMNER: I'll submit it to the Court.

19 THE COURT: All right.

20 MS. BLUTH: And then also while we're on this, though,  
21 can I -- we have AS and their date of birth. It's already so  
22 confusing with so many kids, so I'm going to put their -- it --  
23 when we do do these --

24 THE COURT: Their real names.

25 MS. BLUTH: -- I'm going to put their real name, and

1 then can we file it under seal, because the whole -- we can't  
2 file the jury instruction under seal?

3 MR. FIGLER: Well, one set of jury instructions. It  
4 can't be filed under seal, but you can --

5 THE COURT: No.

6 MR. FIGLER: -- redact it --

7 MS. BLUTH: It can't be filed under --

8 MR. FIGLER: -- to their initials.

9 MS. BLUTH: -- seal?

10 MR. FIGLER: You can't file jury instructions under  
11 seal --

12 THE COURT: No.

13 MR. FIGLER: -- because they get transmitted up on  
14 appeal. And --

15 MS. BLUTH: They don't -- they don't have access to it  
16 if you do that?

17 MR. FIGLER: You don't. If they're under seal, no.  
18 Because when they're putting together the appendix, it would be  
19 highly --

20 THE COURT: Right. You have to file --

21 MR. FIGLER: -- complicated.

22 THE COURT: -- the jury instructions. Now --

23 MS. BLUTH: Okay. Fine, I'll just --

24 THE COURT: -- you can have another -- the official  
25 copy, and then an unofficial copy that's filed under seal and

1 that could have their names in it.

2 MS. BLUTH: It's fine. I'll just --

3 MR. FIGLER: We could do that.

4 MR. HAMNER: Don't worry about it.

5 THE COURT: And that's what we'll pass out.

6 MR. HAMNER: We'll just lay out --

7 MS. BLUTH: It's fine.

8 MR. HAMNER: I'll make sure I lay out the birthdays  
9 and the --

10 THE COURT: Okay.

11 MS. BLUTH: No, no, no. We're going to put their  
12 names. It's fine. I'll put their names. Don't even worry  
13 about it.

14 MR. HAMNER: Okay.

15 THE COURT: All right. 4, to constitute --

16 MR. FIGLER: So, anyway, Your Honor, I'm sorry, but  
17 the defense, I just want to make the objection clear that we are  
18 not -- we were never on notice that they were going to allege a  
19 conspirator liability or an aid and abet liability, and it's  
20 certainly not in the language of the amended information or any  
21 preceding charging document. So I appreciate the Court's  
22 ruling, I'm not going to ask you to change it, but our objection  
23 is that we are not on notice, that Janet could be found guilty  
24 if the jury feels that Dwight imposed the conduct that caused  
25 substantial bodily harm.

1 THE COURT: All right. 4, you're fine with, to  
2 constitute to crime charged. 5, the reasonable doubt --

3 MR. FIGLER: Wait. Where are we?

4 THE COURT: -- instruction.

5 MR. FIGLER: Hold on. I'm sorry, Your Honor.

6 MS. BLUTH: No, I think he does have an objection on  
7 it.

8 MR. HAMNER: And just for the record, we know that  
9 there was on that amended information one, one of the paragraphs  
10 at the very end is duplicative. We'll take that out. And I  
11 think you wanted to talk about the must and should, right,  
12 Dayvid --

13 MR. FIGLER: Right.

14 MR. HAMNER: -- before we move on?

15 MR. FIGLER: So at the end of the -- at the end of the  
16 averment of charges instruction, it says each charge and the  
17 evidence pertaining, it should be considered separately.

18 THE COURT: Must be.

19 MR. FIGLER: We like must.

20 MS. BLUTH: Got it.

21 THE COURT: Okay. That'll be changed. All right. To  
22 constitute the crime charged.

23 MR. HAMNER: No objections.

24 THE COURT: No objections?

25 MR. HAMNER: None.

1 THE COURT: The reasonable doubt instruction?

2 MR. FIGLER: We'll submit to Your Honor if you use  
3 unless or until.

4 MR. HAMNER: This is just straight from the Supreme  
5 Court, so --

6 THE COURT: I mean, I just use this one, but I don't  
7 think it matters if you want unless.

8 MR. FIGLER: We like unless.

9 THE COURT: Any objection to unless?

10 MS. BLUTH: So reasonable doubt, the presumption --

11 THE COURT: All right. You are here to determine the  
12 guilt or innocence.

13 MS. BLUTH: Wait. Sorry, you guys. So you want me to  
14 change it to unless, the defendant is --

15 THE COURT: Yeah.

16 MS. BLUTH: -- presumed innocent unless?

17 MR. FIGLER: The contrary is proved. Yep.

18 THE COURT: You are here to determine the guilt or  
19 innocence.

20 MR. FIGLER: The defense likes -- that's fine and  
21 that's a true statement of law. We'd like a second paragraph  
22 that says, conversely, even if you believe beyond a reasonable  
23 doubt that the other people are guilty, that cannot be the sole  
24 reason to find this defendant guilty. It's just the converse of  
25 the last sentence.

1 MS. BLUTH: No, that's not law.

2 THE COURT: I don't think we need to add that.

3 MR. FIGLER: All right. So I'll submit that as a  
4 proposed change. And we'll have it marked as such.

5 THE COURT: Okay. All right. The evidence which you  
6 are to consider.

7 MR. FIGLER: So the defense has an objection to that.

8 THE COURT: So you're basically going to object to all  
9 of the stock instructions, is that where we are on this?

10 MR. FIGLER: With due respect, I don't feel that there  
11 are stock instructions in the Eight Judicial District Court,  
12 none of which have been approved.

13 THE COURT: Okay. Well, except these are the -- what  
14 -- by stock, what I mean --

15 MR. FIGLER: Commonly used.

16 THE COURT: -- is these are the instructions that are  
17 used, I would say, in virtually every criminal Eight Judicial  
18 District Court state prosecution --

19 MR. FIGLER: And with the exception --

20 THE COURT: -- which have been considered on appeal in  
21 pretty much every case, unless maybe people haven't raised those  
22 issues.

23 MR. FIGLER: Correct, Your Honor.

24 THE COURT: And I'm --

25 MR. FIGLER: And with the exception of --

1 THE COURT: No case has been reversed because of them.

2 MR. FIGLER: I understand that. And with the  
3 exception of myself and, I believe, Ms. JoNell Thomas, I don't  
4 know a lot of attorneys who object to this specific language  
5 that's used in these that are used over and over, but we do. So  
6 if I can make that objection on the record.

7 THE COURT: All right. Well, if Ms. Thomas has made  
8 the objection in her cases --

9 MR. FIGLER: Sometimes they get appealed.

10 THE COURT: -- and it's withstood appellate scrutiny,  
11 why are you making it?

12 MR. FIGLER: Well, Ms. Thomas taught me well, that  
13 sometimes in the future in the federal cases, decisions are made  
14 which have an impact, and if it wasn't raised, it's waived, and  
15 so we raise them.

16 So the -- the objection on that one is that on what I  
17 think Your Honor has as line 9, it repeats circumstantial  
18 evidence a second time. So it says the law makes no distinction  
19 between the weight to be given to either direct or  
20 circumstantial evidence, true statement of law; therefore, all  
21 the evidence in this case, including the circumstantial  
22 evidence, which we believe is superfluous language, should be  
23 considered by you --

24 THE COURT: You want me to cross out including the  
25 circumstantial evidence?



1 MR. FIGLER: Yes, Your Honor.

2 THE COURT: That's fine. That doesn't change it.

3 MR. FIGLER: And then to add on to the end of that  
4 sentence, each of you may give any evidence the weight you  
5 believe it deserves.

6 THE COURT: I think that makes it more confusing.

7 MR. HAMNER: Yeah.

8 THE COURT: So I'm willing to cross the one thing  
9 out --

10 MS. BLUTH: That's fine. I noted that.

11 THE COURT: -- but not add the other.

12 MR. FIGLER: Thank you, Your Honor.

13 THE COURT: All right. The credibility or  
14 believability.

15 MR. FIGLER: Your Honor, we have competing ones. So  
16 you can just pick which one, I'm not going to argue it. We have  
17 the Ninth Circuit Pattern Jury Instruction. That's the -- often  
18 referred to as a long form credibility. The State has the short  
19 form one. We will submit it to Your Honor to select which one.  
20 I'm not going to add any additional argument.

21 THE COURT: All right. I'm going to give the one we  
22 always give. Although, yours is perfectly fine, as well. I  
23 don't really see a big difference there. All right. The next  
24 one, the expert witness instruction.

25 MR. HAMNER: It's okay. No objection on either side.

1 MR. FIGLER: That's fine, Your Honor.

2 THE COURT: Person who commits a sexual penetration.

3 MR. FIGLER: Okay.

4 MS. BLUTH: So there's lots of competing on this.

5 MR. FIGLER: So now there's going to be a lot on

6 these. We might want to skip over these and get to the ones

7 that we don't and come back to these.

8 THE COURT: I thought -- well, look, we're going --

9 MR. HAMNER: Let's take them in order.

10 MR. FIGLER: However you want to do it, Your Honor.

11 MS. BLUTH: Let's just take them in order.

12 MR. FIGLER: Okay.

13 THE COURT: Let's just take them in order.

14 MS. BLUTH: Yeah.

15 THE COURT: I mean, I thought we were only going to

16 focus on the ones that there was a dispute about, but since

17 we're going through the whole stack, let's just go in order.

18 MS. BLUTH: Okay.

19 MR. FIGLER: Okay.

20 THE COURT: All right. Do you have an alternative one

21 to this?

22 MR. FIGLER: We have two alternative ones to that.

23 THE COURT: You have a person is guilty of sexual

24 assault.

25 MR. FIGLER: That's correct. And it should be -- oh,

1 well, it's he or she, so that's fine. That's it.

2 THE COURT: All right. Where is your second one?

3 MR. FIGLER: That's it. Just the one, Your Honor.

4 THE COURT: All right. So you've added the medical --

5 MR. FIGLER: Purposes.

6 THE COURT: Well, this is not a correct statement of  
7 the law.

8 MR. FIGLER: Which?

9 THE COURT: Yours.

10 MR. FIGLER: Which one?

11 THE COURT: The definition of sexual penetration is  
12 logically confined to activities which are the product of sexual  
13 behavior or libidinal gratification, not merely the product of  
14 clinical examinations or domestic parental functions.

15 MR. FIGLER: Interestingly enough, the Nevada Supreme  
16 Court, in a case you may have heard of, called Solander v  
17 State --

18 THE COURT: Is this taken from that?

19 MR. FIGLER: Yes. They cited that Mississippi  
20 decision, talking about sexual penetration and its logical  
21 confine. Look, the Supreme Court determined that the sex  
22 assault charge could go forward, and they gave a lot of muddled  
23 and somewhat contradicting language within its own document to  
24 itself.

25 But they made one thing very clear, that despite the

1 fact that the medical purposes language is -- was -- was  
2 codified later, it's always been the intent, and the fair  
3 implication of the sexual assault statute, to have a  
4 disallowance for medical necessity or medical purpose. And so  
5 then the Nevada Supreme Court went all over the place with  
6 regard -- without giving this Court any direction of what type  
7 of instruction should be given in this very unique type of case.  
8 And so it is defense's position --

9 THE COURT: Well, shouldn't it be something like -- I  
10 think there needs to be something saying excluding it from  
11 medical purposes because -- but the sexual behavior -- is this  
12 language directly from the opinion?

13 MR. HAMNER: Well, it's --

14 MR. FIGLER: The definition -- that language is  
15 verbatim from what could either be considered dicta or guidance,  
16 depending --

17 THE COURT: Well, I was --

18 MR. FIGLER: -- on what the Supreme Court intended.

19 THE COURT: I'm sorry. I was thinking we could put  
20 something -- a person is not guilty of sexual assault if the  
21 penetration is for legitimate medical purposes.

22 MR. FIGLER: Well, and it --

23 THE COURT: Something like that.

24 MR. FIGLER: Well, I think --

25 THE COURT: There has to be something because,

1 obviously, any time you, you know, you do a pelvic exam, you're  
2 not committing a sexual assault if maybe the person is  
3 unconscious or a child or something like that.

4 MR. FIGLER: And this -- herein lies the problem with  
5 it being the [indiscernible] way, is what is or isn't  
6 legitimate, and how does that get defined? So now the Nevada  
7 Legislature, in codifying that concept, only used the words  
8 medical purposes. They did not use legitimate medical purposes,  
9 though the Supreme Court --

10 THE COURT: Well --

11 MR. FIGLER: -- in their writ, talk about bona fide  
12 and legitimate in a different context, and this becomes very  
13 convoluted.

14 THE COURT: Well --

15 MR. HAMNER: Your Honor.

16 THE COURT: -- I mean, I agree, they didn't give us a  
17 lot of guidance. I don't agree with the State. I think that  
18 the limited guidance calls for an exception for medical  
19 purposes, which is obviously the case. How we define medical  
20 purposes, I think, was left up in the air. I think it does have  
21 to be a legitimate medical purpose.

22 MS. BLUTH: Can we look at the full language --

23 MR. HAMNER: Yeah.

24 MS. BLUTH: -- though, Judge?

25 MR. HAMNER: Can --

1 MS. BLUTH: Because --

2 MR. HAMNER: Can I --

3 MS. BLUTH: Go ahead. Go ahead.

4 MR. HAMNER: So the -- the language is what -- what  
5 they state, which I think should be added into the State's  
6 instruction. It states, accordingly, we disagree with the  
7 Solanders that the insertion of a catheter into the urethra  
8 cannot constitute sexual assault as a matter of law because  
9 while a catheter has a medical purpose, it does not necessarily  
10 follow that it was used for legitimate medical purposes. So I  
11 think--

12 THE COURT: Isn't that the word I said? The --

13 MR. HAMNER: That is the word that you said, and I  
14 think that's what it -- it should probably state. That unless  
15 the action is for a legitimate --

16 THE COURT: Or --

17 MR. HAMNER: -- medical purpose.

18 THE COURT: -- a person is not guilty of sexual  
19 assault if the penetration is for legitimate medical purposes.

20 MR. HAMNER: Correct.

21 MS. BLUTH: That's fine with the State.

22 THE COURT: I think --

23 MR. FIGLER: Okay.

24 MR. HAMNER: That's fine.

25 THE COURT: -- that's a correct statement of the law.

1           MR. FIGLER: And I'm okay with that so long as the  
2 flipside of the scienter component matches that. And so now  
3 we're left in the unique position, because of this unique  
4 charge, of determining the scienter as being a specific intent  
5 contained within a general intent crime. And so if Ms. Solander  
6 is found to intend to have done this for legitimate purposes,  
7 she should not be found guilty of sexual assault. It's not the  
8 purposes that is to be evaluated, but the intent or the scienter  
9 of the individual. So --

10           THE COURT: I disagree with that because it's a  
11 general intent crime.

12           MR. FIGLER: But that is --

13           THE COURT: And that's the whole -- was the whole  
14 point, to me --

15           MS. BLUTH: Right.

16           THE COURT: -- of the Supreme Court's decision.  
17 Because I said, look, it's pretty clear she's doing this to the  
18 purpose of voiding the bladder. Whether that's legitimate or  
19 illegitimate, it was not for sexual purpose. It was for the  
20 purpose of voiding the bladder.

21           MR. FIGLER: Right.

22           THE COURT: I think that that was undisputed, frankly.

23           MR. FIGLER: And so --

24           THE COURT: But they --

25           MR. FIGLER: -- if the jury finds out --

1 THE COURT: -- disagreed with me.

2 MR. FIGLER: Well, I don't know that they disagreed  
3 with you.

4 MS. BLUTH: No, they --

5 MR. FIGLER: I think they said that's a --

6 MS. BLUTH: Respectfully, they absolutely did.

7 MR. FIGLER: Well, respectfully, I don't know that  
8 they disagreed with you. I think they said it's a jury  
9 question, not a matter of law. And so the question is for the  
10 jury, was her purpose to void the bladder, which is a legitimate  
11 medical thing, or is her purpose violence --

12 THE COURT: That's not --

13 MR. FIGLER: -- or his her purpose sexual?

14 THE COURT: -- what they said, because don't forget how  
15 this got to the Supreme Court. I granted the -- that portion of  
16 the defense's writ based on the evidence presented to the -- at  
17 the prelim, which was -- and I think -- look, I worked on -- the  
18 order had been originally drafted by Craig Mueller, and so I  
19 worked off of that.

20 But I think the point was that I found that it was  
21 undisputed in the evidence before the grand jury that the  
22 purpose of inserting the catheter was for voiding the bladder.  
23 And I think that language was -- may have even been used in the  
24 court order, okay. So that was undisputed. So a matter of law,  
25 not a matter of law, there was no evidence that it was for any



1 purpose other than voiding the bladder put before the grand  
2 jury. So that's what -- or the justice court. That's -- so  
3 it's a writ. I'm saying there's no evidence of anything else,  
4 and they're reversing me on that, on the writ.

5 MR. FIGLER: Right. But --

6 THE COURT: So, to me, they're not -- they're finding  
7 that even if the evidence before the grand -- or the -- I keep  
8 saying grand jury, but before the justice court is the purpose  
9 is voiding the bladder, that that's not enough to say it's not a  
10 sexual assault.

11 MR. FIGLER: Right. But what they really talk about  
12 as the crux of -- of reversing Your Honor in there is saying,  
13 look, we agree with the State that sexual assault doesn't always  
14 mean something sexual when they're talking about the  
15 gratification part.

16 THE COURT: Right, but -- but it was -- you've got to  
17 still remember how it got there, it got there on a writ. There  
18 was no evidence that there had been a sexual purpose --

19 MS. BLUTH: Right.

20 THE COURT: -- or that she was --

21 MR. HAMNER: Correct.

22 THE COURT: -- doing it for any purpose other than  
23 voiding the bladder. That was the whole point of it.

24 MS. BLUTH: And the way it was argued, if you remember  
25 from Mueller's perspective, his whole thing was this is a

1 slippery slope because now we can charge nurses, we can charge  
2 doctors, we can charge this. And our argument was, no, the  
3 point is is you can't insert objects. Because, yeah, when you  
4 have a penis and you have a finger and things like that, you  
5 know, you can always say, oh, there was some sexual intent. But  
6 a lot of our cases actually do -- are sexual assault via  
7 objects. I know it sounds weird, but --

8 THE COURT: Yeah. But I mean, if you stick a broom  
9 handle in someone's vagina --

10 MR. FIGLER: Well, come on, there's no medical --

11 THE COURT: -- there's clearly no --

12 MS. BLUTH: Well, no, of course.

13 THE COURT: -- medical purpose.

14 MR. HAMNER: But there's also -- but there -- but the  
15 contrary is that there may not be a sexual purpose behind it,  
16 either. I mean --

17 THE COURT: No.

18 MR. HAMNER: -- you know what I mean, it --

19 THE COURT: It could be to hurt the person.

20 MR. HAMNER: Right.

21 MS. BLUTH: Right.

22 THE COURT: But --

23 MS. BLUTH: So you never have to have this sexual  
24 intent. So --

25 THE COURT: Right. Well, but what I'm saying is there

1 was no evidence of sexual intent.

2 MS. BLUTH: And there is not now.

3 THE COURT: The only evidence was voiding the bladder.

4 MR. FIGLER: Okay. So --

5 THE COURT: Which a broom handle -- look, let's face  
6 it, how many medical type devices are going to be inserted? Not  
7 probably a whole lot. You can have a speculum, you could have  
8 this catheter. I mean, there's probably other things that I'm  
9 not thinking of, but --

10 MS. BLUTH: Yeah.

11 THE COURT: -- you know, it's not like a huge range of  
12 items that are going to be inserted --

13 MS. BLUTH: Right.

14 THE COURT: -- for --

15 MR. FIGLER: Okay.

16 THE COURT: It could be a gloved finger to --

17 MR. FIGLER: So here comes the ambiguous language of  
18 the Nevada Supreme Court decision in this case. We thus agree  
19 that if -- and -- and so how this is constructed is going to  
20 make all the difference --

21 THE COURT: It is.

22 MR. FIGLER: -- in this case. If --

23 THE COURT: And it'll be different justices.

24 MR. FIGLER: Right. And this is only three -- this is  
25 a three-judge panel.

1 THE COURT: Who was it again?  
2 MR. FIGLER: It was Pickering --  
3 MR. HAMNER: Hardesty, Saitta --  
4 MR. FIGLER: -- Hardesty --  
5 MR. HAMNER: -- and Pickering --  
6 MR. FIGLER: -- and Saitta. So we know at least one  
7 of them is not there. So we agree that if the Solanders  
8 undertook the -- the catheterization for a bona fide medical  
9 purpose, they may avoid criminal liability. So everything  
10 revolves on four. If four describes the intent of the Solanders  
11 -- so if the Solanders thought they were doing it for a bona  
12 fide medical purpose, do they escape liability, or do we have to  
13 show -- does the defense have to show that it is a bona fide  
14 medical purpose when it happened? And that doesn't make any  
15 sense --  
16 MR. HAMNER: Wrong.  
17 MR. FIGLER: -- because that would be burden  
18 shifting --  
19 MR. HAMNER: No.  
20 MR. FIGLER: -- and when you talk about scienter or  
21 intent, then that is on the State for the burden to show that it  
22 wasn't for. And then they go onto explain, look, the State  
23 said, look, it could have been as a form of punishment, not for  
24 medical use, and that is their argument. And so they can argue  
25 that's still under --

1 MR. HAMNER: It's our --

2 THE COURT: Okay. Well why don't we do this, take the  
3 language directly from the case. Read that language again.

4 MR. FIGLER: If the Solanders undertook the  
5 catheterization for a bona fide medical purpose --

6 THE COURT: Okay.

7 MR. FIGLER: -- they may avoid --

8 THE COURT: So if the --

9 MR. FIGLER: -- criminal liability.

10 MS. BLUTH: No, because that is a bona fide medical --  
11 no, it is about -- what Your Honor said, a person is not guilty  
12 of sexual assault if the penetration is for a legitimate medical  
13 purpose, meaning you have a legitimate reason to be doing this.

14 THE COURT: What if we do some --

15 MR. HAMNER: Or if you believe it.

16 THE COURT: I'm just throwing this out. They don't  
17 have any guidance on burden shifting, but if -- you know how in  
18 like an issue of consent, if the defense raises the issue of  
19 consent, the State must prove beyond a reasonable doubt that it  
20 wasn't self-defense or it wasn't --

21 MS. BLUTH: Yeah.

22 THE COURT: -- in self-defense.

23 MR. HAMNER: We should -- I think there should be --

24 THE COURT: Why don't we add that?

25 MR. HAMNER: -- that the burden is --

1 THE COURT: If the defense --

2 MR. HAMNER: I mean, I think you --

3 THE COURT: However that comes from the self-defense  
4 language, just change --

5 MS. BLUTH: The State must prove beyond a reasonable  
6 doubt that no legitimate medical --

7 THE COURT: Right. So --

8 MS. BLUTH: -- purpose existed.

9 MR. HAMNER: The inserting of the --

10 THE COURT: -- what's the language from the  
11 self-defense? If the defendant raises -- you see what I'm  
12 saying? It's how do they phrase that?

13 MS. BLUTH: The standard of which --

14 MR. FIGLER: I don't think we should be --

15 MR. HAMNER: Well --

16 MR. FIGLER: -- creating new --

17 MR. HAMNER: -- like a rebuttable presumption.

18 THE COURT: So you don't want that? That's to your  
19 benefit.

20 MS. BLUTH: Yeah. That's what --

21 THE COURT: That they have to --

22 MR. FIGLER: Well, I do believe it's --

23 THE COURT: -- prove that it's beyond a reasonable  
24 doubt that --

25 MR. FIGLER: But I don't know the -- I don't know what

1 the -- the burden is on the defense to raise. Is it if the  
2 defense raises any evidence that there could be a bona fide  
3 medical purpose, the State has to prove beyond a reasonable --

4 THE COURT: That's what I'm saying.

5 MR. FIGLER: -- doubt that it was not done for a bona  
6 fide medical purpose?

7 THE COURT: How about this, if the defendant presents  
8 any evidence that the penetration was for a medical purpose --

9 MS. BLUTH: A legitimate.

10 MR. HAMNER: No, no, no. Well, for a medical purpose.

11 THE COURT: That --

12 MR. HAMNER: The burden is on the State --

13 THE COURT: -- the penetration -- I mean, that, to me,  
14 helps the defense. I'm saying, well, you have to do this in  
15 other kinds of cases.

16 MS. BLUTH: Can you read it again?

17 THE COURT: I'm writing it. If the defendant presents  
18 any evidence that the penetration was for a medical purpose --

19 MR. HAMNER: It is on -- it is the burden --

20 THE COURT: Okay.

21 MR. HAMNER: The State must prove --

22 THE COURT: The State must prove --

23 MR. HAMNER: -- beyond a reasonable doubt--

24 THE COURT: -- beyond a reasonable doubt --

25 MR. HAMNER: -- that it is not -- that the insertion,

1 or whatever you have, the penetration --

2 THE COURT: I'm using penetration, because that's --

3 MS. BLUTH: Penetration.

4 MR. HAMNER: -- the penetration was not for a  
5 legitimate medical purpose.

6 MR. FIGLER: Was not undertaken for a legitimate  
7 medical purpose. Because they used the word undertook, and I  
8 believe undertook modifies for, which modifies intent. That's  
9 just how I read that.

10 THE COURT: Yeah, that's fine. That the  
11 penetration --

12 MR. FIGLER: Was not undertaken.

13 THE COURT: -- was not undertaken for a legitimate  
14 medical purpose.

15 MS. BLUTH: Okay. So --

16 THE COURT: Because you can still argue she's  
17 punishing these kids, there was no medical purpose --

18 MR. HAMNER: Sure.

19 THE COURT: -- because there --

20 MR. FIGLER: Yeah, they could do that.

21 THE COURT: -- are doctors --

22 MR. HAMNER: Well, I mean there's plenty of evidence  
23 of that.

24 MS. BLUTH: So can you read it for me one more time,  
25 Judge? Because I'm the one who's going to have to change it.



1           THE COURT: Okay. All right. So it's everything in  
2 the State's instruction, and then it says a person is not guilty  
3 of sexual assault if the penetration is for a legitimate medical  
4 purpose. If the defendant presents any evidence that the  
5 penetration was for a medical purpose, the State must prove  
6 beyond a reasonable doubt that the penetration was not  
7 undertaken for a legitimate medical purpose.

8           MS. BLUTH: Any evidence that the penetration --

9           MR. FIGLER: I wanted undertaken --

10          MR. HAMNER: Was -- was undertaken --

11          MR. FIGLER: -- up higher.

12          MR. HAMNER: -- for a legitimate medical purpose.

13          THE COURT: Well, undertaken --

14          MR. FIGLER: Does it work right there?

15          THE COURT: Well, no. It's for a legitimate -- for,  
16 what does for mean? It means it's your purpose.

17          MR. FIGLER: They didn't help us.

18          THE COURT: Huh?

19          MR. FIGLER: They sent it back, but they did not help  
20 us.

21          MS. BLUTH: Judge, can you give me yours real quick?

22 Sorry. Because you read so fast.

23          THE COURT: Mine is messy, but --

24          MS. BLUTH: It's fine. I'll be able to tell.

25          THE COURT: All right.

1 MS. BLUTH: If the defendant presents any evidence  
2 that the penetration was for a medical purpose.  
3 MR. HAMNER: Light in the tunnel.  
4 THE COURT: What's that?  
5 MR. HAMNER: Light at the end of the tunnel.  
6 THE COURT: I'm thinking Monday we're probably going  
7 to probably -- I don't know, have, what, two hours of Faiza?  
8 MS. BLUTH: No.  
9 MR. HAMNER: No.  
10 THE COURT: Is she Israeli? Faiza, that's a --  
11 MR. FIGLER: No, she's Persian.  
12 THE COURT: Oh. I was close.  
13 MS. BLUTH: Are you sure? I thought she was raised in  
14 South Africa?  
15 THE COURT: Oh.  
16 MR. FIGLER: Possibly.  
17 MS. BLUTH: If the defendant -- because she was  
18 like --  
19 THE COURT: What's her surname?  
20 MS. BLUTH: That -- I think that is.  
21 MR. HAMNER: Abraham?  
22 MS. BLUTH: Ebrahim.  
23 MR. HAMNER: Ebrahim?  
24 MS. BLUTH: E-B-R-A-H-I-M. If the defendant presents  
25 any evidence that the penetration was for medical purposes --

1 THE COURT: All right.

2 MS. BLUTH: -- the State must prove beyond a  
3 reasonable doubt that the penetration was not undertaken. Okay.  
4 Got it.

5 THE COURT: Okay.

6 MS. BLUTH: Thank you.

7 THE COURT: All right. So that's more or less what  
8 the defendant wanted, but --

9 MR. FIGLER: Well, but it's not, so --

10 THE COURT: -- not exactly, so you --

11 MR. FIGLER: -- we'll have a proposed.

12 THE COURT: -- can make your exhibit.

13 MR. FIGLER: And then we would like that to go with a  
14 scienter requirement that is in our proposed next, which is --

15 THE COURT: Okay.

16 MR. FIGLER: -- the general --

17 THE COURT: Let's go along -- okay. I don't think  
18 there's a scienter requirement.

19 MS. BLUTH: There's not.

20 THE COURT: I don't think they have to prove what  
21 wasn't going on in Solander's head. I think they just have to  
22 prove that it wasn't undertaken for a legitimate medical  
23 purpose.

24 MR. FIGLER: Can we look at mine for a second? You  
25 can read that.

1 THE COURT: Sure. Which one?

2 MR. FIGLER: The general conditions of criminal  
3 liability. And so when you look at Roby and U.S. v. X-Citement  
4 Video, so both Supreme Court and Nevada Supreme Court decisions,  
5 it guards against in exactly situations where we are, where even  
6 though there's a general intent crime, that it -- it becomes so  
7 broad that the guilty mind or the --

8 THE COURT: Can I throw something out here before --

9 MR. FIGLER: Yeah.

10 THE COURT: -- you make your argument? What if we  
11 were to add something kind of borrowing from civil law, and say  
12 a reasonable -- if a defendant has a reasonable belief, putting  
13 in a reasonable person standard, as to the legitimacy of the  
14 medical procedure, that would be a --

15 MS. BLUTH: No, because --

16 THE COURT: -- defense or something like that.

17 MS. BLUTH: No, because she could, in her head, think  
18 that that's legitimate. We --

19 THE COURT: That's -- wait, the word reasonable --

20 MR. FIGLER: Reasonable --

21 MS. BLUTH: But, in her head, she could think that --

22 THE COURT: That's not what a reasonable person  
23 standard is. A reasonable --

24 MR. HAMNER: An objective standard.

25 THE COURT: -- person standard --

1 MR. HAMNER: Not subjective.

2 THE COURT: -- is what's reasonable. That's why you  
3 say a reasonable person. Her good faith -- it's not a good  
4 faith belief --

5 MS. BLUTH: I see what you're saying.

6 THE COURT: -- it's a -- just like in civil law.

7 MS. BLUTH: Right.

8 THE COURT: You know, it's a reasonable person, so --

9 MS. BLUTH: But --

10 MR. FIGLER: Well, we want ours to go in forward,  
11 because we feel that's an accurate statement of law. We would  
12 not object to --

13 THE COURT: Because I think a true statement is a  
14 reasonable belief as to the legitimacy of a medical procedure is  
15 a defense, something like that. I mean, that would even be like  
16 a doctor. Like if a doctor did something wrong, but reasonably  
17 thought it was appropriate, that's --

18 MR. HAMNER: But the --

19 MS. BLUTH: But my issue is -- sorry. My issue is we  
20 have this, as to constitute the crime charged, there must exist  
21 a union or joint operation of an act forbidden by law, and then  
22 an intent to do that act.

23 THE COURT: Yeah. But that's --

24 MS. BLUTH: I mean --

25 THE COURT: -- not what his --

1 MS. BLUTH: But that's the law. That is not the law.

2 THE COURT: I'm not giving this one. I'm just saying,  
3 you know, like a reasonable person's belief.

4 MR. FIGLER: Well --

5 THE COURT: It's not --

6 MR. HAMNER: The --

7 THE COURT: -- always a reasonable person standard.

8 MR. HAMNER: Well, if I could just --

9 THE COURT: It's not her subjective crazy belief.

10 MR. FIGLER: See, so here's the --

11 MR. HAMNER: If I could -- if I could be heard just  
12 briefly --

13 MR. FIGLER: Okay, Chris.

14 MR. HAMNER: -- for a second. Sorry. I don't mean to  
15 interrupt. But the --

16 THE COURT: Of course, you do.

17 MR. HAMNER: Well, I don't mean to interrupt in that  
18 manner, I guess that's what I'm trying to say. The reliance on  
19 Roby v. State, the problem with it is when you look at Jenkins,  
20 Jenkins is 110 Nev. 865. They -- they eliminate kind of what  
21 they're seeking here in this instruction when you're dealing  
22 with general intent crimes. And that's the problem in this  
23 particular case, because this crime of sexual assault is a  
24 general intent crime. It's not a specific intent crime.

25 THE COURT: Yeah. That's why I'm not --

1 MR. FIGLER: But --

2 THE COURT: -- giving this instruction, but I think it  
3 might be okay to say something like if there is a reasonable  
4 belief in the need for the medical procedure or something like  
5 that, then it's still a reasonable person standard. It's not  
6 some subjective crazy belief, it's what is reasonable. Like if  
7 a reasonable person would think that you needed to do this.

8 MR. FIGLER: The defense sticks by Roby being still a  
9 correct statement of law. Jenkins did not reverse it. But what  
10 Roby does is gives a very -- and I'd ask the Court to review  
11 Roby before making its ultimate decision on it.

12 MR. HAMNER: As well as Jenkins.

13 MR. FIGLER: Well, and Jenkins, as well. I don't have  
14 any fear of Jenkins coming into the discussion because here's  
15 the issue, if this was just a sexual intercourse sexual assault,  
16 or it was even really just the paint stick, I don't have any of  
17 these arguments.

18 THE COURT: Of course not.

19 MR. FIGLER: But I believe that the -- the medical  
20 purpose or the bona fide medical reason or whatever adds a new  
21 component of it that is exactly the type of thing that Roby is  
22 admonishing courts to do when they're talking about what -- when  
23 a -- there -- there is a small category, a narrow category of  
24 criminal liability --

25 THE COURT: What's your cite?

1 MR. FIGLER: -- that falls somewhere between --

2 THE COURT: What is the cite on that?

3 MR. FIGLER: I gave you the cites on that, Your Honor.  
4 There's three. And then Mr. -- if you want to write on that.  
5 And Mr. --

6 THE COURT: I have my own.

7 MR. FIGLER: -- Hamner had -- I gave both the copies,  
8 but that's the Roby cite and the U.S. v. X-Citement cite. And  
9 Mr. -- Mr. Hamner wants you to review Jenkins, Roby in light of  
10 Jenkins, and he'll give you that cite again.

11 THE COURT: Mr. --

12 MR. FIGLER: But the concept is that there is a very  
13 narrow category of offenses that fall somewhere between general  
14 intent, but not -- don't have the specific intent scienter put  
15 in there. And when there isn't the actual language, the courts  
16 are faced with a quandary. And where we have here, this medical  
17 purpose exception, we're thrown into new territory. And so like  
18 the rule of lenity, Roby instructs us that we really don't want  
19 to take away any of the sort of more guilty mind intent analysis  
20 from these type of charges. And I would --

21 THE COURT: Okay.

22 MR. FIGLER: --- suggest that a medical purpose sexual  
23 assault case would demand there to be more than the reasonable  
24 person standard, but simply that there has to be the guilty  
25 mind. In other words, that if she intended to do it as a



1 medical procedure, we're done, and that it --

2 THE COURT: Okay. Well --

3 MR. FIGLER: -- should be limited by reasonable.

4 THE COURT: -- first of all, I didn't get that out of  
5 the Solander decision in this case from the Supreme Court. So I  
6 don't think that's right, according to what we can glean from  
7 that decision. The best you can hope for is some kind of a  
8 reasonable belief in the medical necessity as a defense to if  
9 you believe that the defendant had a reasonable belief that the  
10 insertion or the penetration was medically necessary or  
11 medically required, or some word like that, then you should so  
12 -- you should find her not guilty, or something like that, but  
13 it has to be a reasonable belief.

14 MR. HAMNER: Right.

15 THE COURT: Because anybody's subjective crazy  
16 belief --

17 MR. FIGLER: Correct.

18 THE COURT: I mean, look, you know, if it's a  
19 subjective crazy belief, then who cares? It's always got to be  
20 -- you know, if it's not a specific intent crime, then we're  
21 going to go to a reasonable belief. If she reasonably believed.  
22 I think that's the best you could do here, honestly.

23 MR. FIGLER: I'll submit it to Your Honor.

24 THE COURT: Because -- because you don't get that out  
25 of the Solander --

1 MR. HAMNER: I'll submit it, Your Honor.

2 THE COURT: -- writ decision. What's your cite,  
3 Jenkins?

4 MR. HAMNER: Jenkins is -- do you have Jenkins?

5 MS. BLUTH: Yeah. I've got it. 110 Nev. 865.

6 THE COURT: All right. So --

7 MR. FIGLER: We would --

8 THE COURT: -- the changes -- 110 Nevada what?

9 MS. BLUTH: 865.

10 MR. HAMNER: 865.

11 THE COURT: Okay. So here's the deal. The changes  
12 we've made so far stay. I'm going to look these up. Have your  
13 secretary make these changes, and if we add a line about a  
14 reasonable person standard or whatever, we'll do that Monday.  
15 Okay. Moving on.

16 MR. FIGLER: Oh, there's the last line there. The  
17 labia majora is part of the female genitalia, on that one.

18 THE COURT: Yeah.

19 MR. FIGLER: Okay. So we don't feel that should be  
20 part of instruction, but if it is in instruction, we ask that  
21 the urethra is not a genital.

22 THE COURT: Opening?

23 MR. FIGLER: Is not a genital opening, sure. It's  
24 not. I mean, I get the State's going to argue it doesn't matter  
25 because you go through the labia majora, you've committed your

1 penetration. But I want it. If they're going to get to say the  
2 labia majora is --

3 MS. BLUTH: Well, no --

4 MR. FIGLER: -- part of the genitalia, then I get to  
5 say the urethra is not a genital opening.

6 MS. BLUTH: No, no, no. That's very, very misleading.  
7 The point is is everything beyond the labia majora is fair game  
8 for penetration. So that is very confusing to say the  
9 penetration of a urethra opening is -- is --

10 THE COURT: Well, that's not what he wants. He wants  
11 the urethra is not a genital opening.

12 MS. BLUTH: Okay. But that's not a --

13 MR. FIGLER: You can keep the labia.

14 MR. HAMNER: You can -- I mean, the --

15 MS. BLUTH: This is law. I got it from the -- the  
16 stuff that we argued at the Supreme Court writ. Hutchinson and  
17 Mahia (phonetic) both talk about -- because it was some -- they  
18 lick the outside, like the -- they lick the lip.

19 THE COURT: Right. Well, no, nobody is disputing  
20 that.

21 MR. HAMNER: But, I mean, you would need to have --

22 MR. FIGLER: Right. But it doesn't say urethra being  
23 a genital.

24 MR. HAMNER: You would need -- you would -- then if  
25 you're going to add the line of the urethra is not the genital

1 opening, but it is beyond the general opening, I mean, it's --

2 MS. BLUTH: Yeah.

3 MR. HAMNER: -- it's within the general opening --

4 MR. FIGLER: Well, that's argument for you.

5 MR. HAMNER: -- past --

6 THE MARSHAL: One at a time, counsel.

7 MR. HAMNER: No, no, no.

8 THE MARSHAL: One at a time.

9 MR. HAMNER: If we're talking about -- if we're  
10 talking about pure biology at this point, and you want to have  
11 the strict definition that technically a urethra is not a  
12 genital opening, you need to have the further biological  
13 definition it's beyond and past the genital opening, and it's  
14 within the labia majora. I mean, it's -- it -- the whole point  
15 is this crime deals with penetrating the genital opening, and  
16 it's irrelevant that a urethra is or is not a genital opening  
17 because it is within the general opening of -- of the female  
18 genitalia.

19 MR. FIGLER: But we have to leave something for the  
20 jury to make a factual determination, otherwise, then we're  
21 violation Apprendi. So either I would ask that both get  
22 stricken, or that both remain, but that no further definitions  
23 or presumptions are being placed in front of this jury.

24 MS. BLUTH: No. No, I mean, that -- because here's  
25 the deal. The act of putting the catheter past the labia majora

1 is a sex assault. If they believe that Janet had a reasonable  
2 belief that for a medical purpose, then it's not sex assault.  
3 But it's about what -- with the current jury instructions, it's  
4 about, basically, her mind, or whether she -- she had a  
5 legitimate medical purpose. It's not about there's penetration  
6 every day of the week, so I don't even know why we're arguing  
7 about this. It's about what was in her head and if it was  
8 reasonable.

9 MR. FIGLER: But the jury still has to decide that  
10 there was penetration because that's an element of the offense.

11 MS. BLUTH: But if they find that it had --

12 MR. FIGLER: We can't put that -- we can't make a  
13 presumption. That -- that's reversible. You don't want that in  
14 your instruction, I'm telling you right now, because that would  
15 be a presumption that's not allowed by law.

16 MS. BLUTH: No. I'm --

17 MR. FIGLER: You don't want that. You -- you --

18 MS. BLUTH: Don't want what?

19 MR. FIGLER: You -- you -- so if labia majora is part  
20 of the female genitalia is in there, you're not abdicating  
21 Apprendi. You're fine with that. You can have that from a  
22 jury. But if you tell the jury that any -- that -- that if you  
23 get to the urethra, you have penetrated the female genitalia,  
24 you will be reversed on that because that invades the --

25 THE COURT: Well, we're not going to give that --

1 MR. FIGLER: -- province of the jury?  
2 MS. BLUTH: No, it's not.  
3 THE COURT: -- instruction.  
4 MS. BLUTH: If I argue that to them?  
5 THE COURT: The -- okay.  
6 MR. FIGLER: That way -- no, no.  
7 THE MARSHAL: Counsel. Counsel. Address the Judge.  
8 THE COURT: All right. Let's move on. Okay.  
9 MR. FIGLER: No, you can argue that. You can't --  
10 THE COURT: That's enough.  
11 MR. FIGLER: -- have that instruction.  
12 THE MARSHAL: Counsel.  
13 MS. BLUTH: Okay.  
14 THE COURT: That's enough.  
15 THE MARSHAL: Mr. Figler.  
16 MR. FIGLER: We weren't fighting.  
17 THE COURT: Okay. I don't care if you're fighting or  
18 not, I just don't want to sit here while you're --  
19 MR. FIGLER: Pontificating?  
20 THE COURT: I was going to say bickering, which is  
21 really a synonym of fighting, so you were fighting. I think you  
22 were bickering. But in any event, you're wasting my time --  
23 MR. FIGLER: Got it.  
24 THE COURT: -- while you two are bickering back and  
25 forth. You have, you know, all weekend to bicker. Let's move

1 on. So I'll hold that in the abeyance along with the rest of  
2 the instruction. Let's move to the next one, physical force.

3 MR. FIGLER: Okay. So --

4 THE COURT: Any objection?

5 MR. FIGLER: Yeah. The defense is never going to  
6 argue, and I think that because this is not a traditional sex  
7 assault case, defense is not going to argue that the child  
8 didn't resist, that the child --

9 THE COURT: It doesn't matter. It's still a correct  
10 statement of the law.

11 MR. HAMNER: Right.

12 MR. FIGLER: Okay. So --

13 THE COURT: And if she acquiesced and lay on the  
14 towel, then they're entitled to give it. And so I don't --  
15 whether you argue it or not, I mean, I think you can still give  
16 instructions.

17 MR. FIGLER: Okay. So if we're going to bring consent  
18 into the play, we feel that the next instruction should be  
19 defense proposed. That starts, a parent, including an adoptive  
20 parent.

21 THE COURT: Where did you get this from?

22 MR. FIGLER: Kirkpatrick. It's a care decision case,  
23 where there was a guardian that was imposed in there. It's not  
24 a criminal law case, because you're never going to find a  
25 criminal law case that talks about any of these --

1           THE COURT: But I don't think this applies in criminal  
2 law, because then in a sexual assault case --

3           MR. HAMNER: Correct.

4           MR. FIGLER: No.

5           THE COURT: -- the idea would be --

6           MR. HAMNER: Right.

7           THE COURT: -- oh, well, the parent was consenting for  
8 the kid.

9           MR. FIGLER: No, they can't do that because that's  
10 specifically precluded by case law, and I think even by the  
11 statute. A parent can never give consent for a sexual assault,  
12 but a parent can give consent for any --

13          THE COURT: Medical or --

14          MR. FIGLER: -- hygiene --

15          THE COURT: -- hygiene --

16          MR. FIGLER: -- decision --

17          THE COURT: -- decisions.

18          MR. FIGLER: -- which is not sexual assault.

19          THE COURT: But don't we already cover it? Look, I  
20 mean, I don't see that that comes out of the Solander decision  
21 from the Supreme Court.

22          MR. HAMNER: Yeah.

23          THE COURT: To me, we --

24          MR. FIGLER: It wasn't raised.

25          THE COURT: -- cover the issue -- well, I know, but I



1 don't really think you can argue oh, well, Janet, it doesn't  
2 matter what Janet's intent was or whether it was medically  
3 necessary because she was able to consent because she's the  
4 parent. So I --

5 MR. FIGLER: Well --

6 THE COURT: -- think this is wrong. I mean, it's --  
7 technically, it's right, but that means they're talking about  
8 medical procedures or dental procedures from a doctor --

9 MS. BLUTH: Right.

10 MR. FIGLER: Maybe.

11 THE COURT: -- not -- not her thinking, oh, I'm going  
12 to give this kid a catheter. So I think the arguments covered  
13 in the revision to the sex assault instruction, and if you were  
14 to argue this instruction as, well, she's allowed to give her  
15 consent so she consented to giving the kid the catheter, that  
16 would be incorrect argument. So I don't see how you could  
17 utilize this instruction.

18 MR. FIGLER: All right. We'll submit it on that.

19 THE COURT: All right.

20 MR. FIGLER: So the last one we did object to, the  
21 physical force is not --

22 THE COURT: Okay.

23 MR. FIGLER: -- necessary.

24 THE COURT: A person is not required.

25 MR. FIGLER: And that, again, okay, so this is a very

1 unique set of facts.

2 THE COURT: Sure.

3 MR. FIGLER: This is for a sexual assault. We are not  
4 arguing that any of these three children should have fought  
5 harder because they were so little or any attending  
6 circumstances. This is a sexual assault of the traditional  
7 nature, and -- and it -- it gives undue emphasis that somehow it  
8 -- it puts it on the child. It's not a necessary instruction.  
9 No one is going to argue against it or -- or argue the other way  
10 that somehow the girls should have put up a better fight. So I  
11 think this is --

12 THE COURT: Well, just because you're not --

13 MR. FIGLER: -- all covered.

14 THE COURT: -- going to argue it, doesn't mean they  
15 can't give the instruction.

16 MR. FIGLER: Well, instructions aren't supposed to be  
17 argument, so --

18 MR. HAMNER: Well, it's --

19 THE COURT: Well, except the idea is some juror may  
20 think --

21 MS. BLUTH: Right.

22 THE COURT: -- oh, well, you know, that kid could  
23 have --

24 MR. HAMNER: Right.

25 THE COURT: -- jumped up and run away, or she could

1 have peed on the towel, and --

2 MR. HAMNER: There's other things she could have done  
3 to let her know --

4 THE COURT: Right. So --

5 MR. HAMNER: -- she didn't want this done.

6 THE COURT: -- I think, even if you're not going to  
7 argue it, if it's something a reasonable juror might question,  
8 we can address it in the -- in the instructions. If some juror  
9 will say, like I said, well, why didn't she jump up, why didn't  
10 she just pee and void her bladder, you know, before the catheter  
11 or whatever.

12 MR. FIGLER: And so I would say that that's all  
13 covered in the prior instruction, and that if you give this  
14 instruction, then certainly the next instruction is not  
15 necessary at all. I mean, it's three -- to us, it's three  
16 instructions that say the same thing --

17 MR. HAMNER: No.

18 MR. FIGLER: -- that are -- are straw arguments to  
19 something that we're not even going to be arguing.

20 MR. HAMNER: It's -- it's an accurate statement of the  
21 law, and it ties back in to the very thing that the Court just  
22 pointed out. Sometimes you may -- regardless of whether they  
23 argue it, you could have a juror that sits there and says, hey,  
24 if the kid just lays there, well, they probably should have done  
25 -- put up more of a fight or express what they -- you know, that

1 they didn't want this done to them.

2 MS. BLUTH: And there was testimony of that. These  
3 girls did say that sometimes they would just lay down because  
4 they didn't want to --

5 THE COURT: All right. So --

6 MS. BLUTH: -- get hurt.

7 THE COURT: -- we've gone through submission. The --

8 MR. FIGLER: So we object --

9 THE COURT: All right.

10 MR. FIGLER: -- to the set being given, that it's  
11 cumulative, and undue -- undue emphasis on an area of law that  
12 is not a fact or an argument in controversy in this case.

13 THE COURT: The corroboration.

14 MR. FIGLER: Okay. So we believe, and -- and I've had  
15 this in other cases, while the first part is a true statement of  
16 law, it is also true that the jury -- and we cannot abdicate the  
17 jury's duty to consider the absence of corroboration in  
18 evaluating the credibility or lack of credibility of the  
19 allegations. Just because it isn't corroborated -- so this  
20 makes it seem as though we should be able to find her guilty  
21 even without corroboration, that's fine, but -- if there's no  
22 corroboration, can we still find him not guilty because of that?  
23 So it's confusing to the jury unless you say, yeah, you don't  
24 have to have the corroboration, but if you don't have the  
25 corroboration, you could consider that like any other evidence.

1           MR. HAMNER: I -- I don't think that this  
2 instruction --

3           THE COURT: I don't think we need to do that.

4           MR. HAMNER: -- confuses the jury. It's an accurate  
5 statement.

6           MS. BLUTH: Yeah. This --

7           THE COURT: All right. It is a defense to the charge  
8 of sexual --

9           MR. FIGLER: So that will be a proposed.

10          THE COURT: -- assault. You're fine with that?

11          MR. FIGLER: No. We don't understand why sexual  
12 intercourse is in that instruction. There obviously is  
13 absolutely --

14          THE COURT: Oh, you're right.

15          MS. BLUTH: So penetration.

16          THE COURT: Well, it should just be consented to  
17 penetration --

18          MS. BLUTH: Yeah.

19          THE COURT: -- because there is no sexual penetration.

20          MS. BLUTH: Right. No, you're right. You're right.

21          MR. FIGLER: And -- and so --

22          THE COURT: So it is a defense to the charge of sexual  
23 assault that the defendant entertained a reasonable, there's  
24 that word that we always use, and good faith belief that the  
25 alleged victim consented to penetration. If you find such

1 reasonable good faith belief, even if mistaken, you must give  
2 the defendant the benefit of the doubt. This one is good for  
3 you folks.

4 MR. FIGLER: Right. So I believe that you should take  
5 that language into consideration in fashioning your other  
6 instructions, so that it's not --

7 THE COURT: Well --

8 MR. FIGLER: -- confusing.

9 THE COURT: -- okay. You take them all together.  
10 I've changed in sexual intercourse to consented to penetration.  
11 All right. So I made the change.

12 MR. HAMNER: Is it the penetration, or is it just  
13 penetration?

14 MS. BLUTH: Just --

15 THE COURT: Well, it -- there's nothing here that it's  
16 sexual penetration.

17 MR. HAMNER: No, no, no.

18 MS. BLUTH: Just to engage in -

19 MR. HAMNER: I just meant --

20 MS. BLUTH: -- penetration --

21 MR. HAMNER: I just didn't know --

22 MS. BLUTH: Not the penetration.

23 MR. HAMNER: -- if there was an article "the".

24 THE COURT: No, just to penetration --

25 MR. HAMNER: Okay. Thank you, Your Honor.

1           THE COURT:  -- generally.  Because there's a few  
2 penetrations.  
3           MS. BLUTH:  In penetration, got it.  
4           THE COURT:  All right.  
5           MR. FIGLER:  So what -- I'm sorry, what's the new  
6 language?  
7           MS. BLUTH:  Just --  
8           THE COURT:  Consented to penetration.  
9           MR. HAMNER:  So you're eliminating the words --  
10          THE COURT:  Lines three and four.  
11          MR. HAMNER:  -- engage in sexual intercourse.  Those  
12 words are deleted --  
13          THE COURT:  Right.  
14          MR. HAMNER:  -- and it's replaced by one word,  
15 penetration.  
16          MR. FIGLER:  Okay.  We still --  
17          THE COURT:  All right.  
18          MR. FIGLER:  -- want that -- the Court to play with  
19 that other instruction, but thank you for that change on that.  
20          THE COURT:  All right.  Number -- moving right along.  
21          MS. BLUTH:  Like a herd of turtles.  
22          MR. FIGLER:  We're trying.  
23          THE COURT:  I thought it was funny.  
24          MR. FIGLER:  I didn't hear what you said.  
25          MS. BLUTH:  I said --

1 THE COURT: I said --

2 MS. BLUTH: She said moving right along.

3 THE COURT: I said moving right along, and then we  
4 started laughing. Because we're not --

5 MS. BLUTH: And I said like a herd of turtles.

6 THE COURT: -- moving right along. I didn't have --

7 MS. BLUTH: You guys have gotten to the loopy point.

8 THE COURT: We're getting like punchy, but --

9 MS. BLUTH: Yes.

10 THE COURT: -- the four of us thought it was really  
11 hilarious.

12 THE CLERK: We did have cake for lunch, so it could be  
13 that.

14 THE COURT: I know. We had cake, so in a few minutes  
15 we're just going to run around the room a few times. All right.

16 MS. BLUTH: Where a child.

17 THE COURT: Where a child has been the victim.

18 MR. FIGLER: Okay. So --

19 THE COURT: That's a good statement.

20 MR. FIGLER: I -- no, it's not, because it was a  
21 Supreme Court decision after a jury had already found someone a  
22 victim. Cunningham certainly isn't a jury instruction case. It  
23 talks about lessening the load on the State for the time --  
24 exact date of the act. So at a minimum we would ask to change  
25 the language where a child makes an accusation constituting



1 sexual assault, or makes an allegation of penetration, and is a  
2 minor under the age of 14, but does not remember the exact date  
3 of the act. The State is not required to prove a specific date,  
4 but is required, under Cunningham, to approximate the date as  
5 best as possible.

6 MS. BLUTH: No. That's not --

7 MR. HAMNER: That's not -- that's not --

8 MR. FIGLER: That's what Cunningham says.

9 THE COURT: Well, I think this is a correct statement  
10 of the law. It -- the crime is still called sexual assault with  
11 a minor even though we're only talking about penetration.

12 MR. FIGLER: Sure.

13 THE COURT: So I think it's good. I think as worded,  
14 it's fine.

15 MR. FIGLER: We'd object to the use of the word victim  
16 in there because this child is not --

17 THE COURT: I -- I got it.

18 MR. FIGLER: Okay.

19 THE COURT: An alleged victim.

20 MR. FIGLER: That would be better.

21 MS. BLUTH: Do you want me to add that?

22 THE COURT: Where a child has been the alleged victim  
23 of sexual assault with a minor.

24 MR. HAMNER: That's fine.

25 MS. BLUTH: Okay.

1 THE COURT: All right.

2 MR. FIGLER: The next one is going --

3 THE COURT: A person who willfully --

4 MR. FIGLER: -- to be a mess.

5 THE COURT: -- causes a child. Yes.

6 MR. HAMNER: And with respect to this, there's just a  
7 couple little changes we need to make.

8 THE COURT: On the next one?

9 MR. HAMNER: On the child --

10 MS. BLUTH: On this one that you're on--

11 MR. HAMNER: On the child abuse --

12 MS. BLUTH: -- right now.

13 MR. HAMNER: -- one.

14 MS. BLUTH: A person who willfully.

15 THE COURT: Okay.

16 MR. HAMNER: A person who willfully. So because of  
17 the amended information that we filed, we were going to take out  
18 the paragraph that defines mental injury. We were going to  
19 remove that because we took that out. With respect to the  
20 negligent treatment or maltreatment definition, this is the  
21 definition that was in effect as of 2015, so it's the new  
22 definition. We have the old definition, so we need to replace  
23 that paragraph.

24 MR. FIGLER: And we'd like to take a look at that.

25 MS. BLUTH: It's right here.

1           MR. HAMNER: And I can read it out for the record.  
2 It's defined as negligent treatment -- and this is the 2013  
3 version. Negligent treatment or maltreatment of a child occurs  
4 if a child has been abandoned, is without proper care, control,  
5 and supervision, or lacks the subsistence, education, shelter,  
6 medical care, or other necessary -- other care necessary for the  
7 wellbeing of the child because of the fault or habits of the  
8 person responsible for the welfare of the child, or the neglect  
9 or refusal of the person to provide -- sorry, there's a  
10 highlighting here -- provide them when able to do so. And so,  
11 essentially, it's very similar, but it's --

12           MS. BLUTH: So --

13           MR. HAMNER: -- a little bit differently reworded. So  
14 we need to put that in there.

15           MS. BLUTH: So, Judge, real quick, how this all  
16 happened, was after Clay, when Clay went up to the Supreme Court  
17 on a writ, they defined negligent treatment -- so we had -- we  
18 had to start separating it out physical abuse, negligent  
19 treatment, or maltreatment. So then we had to define negligent  
20 treatment or maltreatment, which was only defined in 432B. We  
21 went to the legislature, Ms. Luzaich and I, in 2015 and got it  
22 changed, but I forgot that the old language was still available  
23 in -- in 2013. So in my jury instructions, I accidentally  
24 included 2015, but the -- the correct statute --

25           THE COURT: So you'll change that?

1 MS. BLUTH: Yeah. For the --

2 THE COURT: Okay. That's fine.

3 MS. BLUTH: So I apologize about that.

4 MR. FIGLER: All right. So here's our objection about  
5 that. I appreciate the -- we were going to object to that  
6 paragraph, so I appreciate the State coming forward with that.  
7 They've offered a 2013 version of negligent treatment and  
8 maltreatment. Our complaint goes back to 2011. Negligent  
9 treatment and maltreatment of the child is not explicitly plead  
10 in the information. Abuse and neglect is, and abuse and neglect  
11 is already in there as negligent treatment or maltreatment. I  
12 don't know.

13 And I'm sorry, Ms. -- Ms. Bluth probably knows way  
14 more about this than I do because she deals with this day in and  
15 day out and I don't, but I appreciate that negligent treatment  
16 or maltreatment are -- is -- is listed in the abuse and neglect  
17 definition, but I don't know if it was ever defined prior to  
18 2013.

19 MS. BLUTH: Yeah. So what happened was Clay -- so  
20 that's what Clay happened. Bryan Clay, besides the death  
21 penalty case, had beaten his pregnant girlfriend while -- while  
22 she was pregnant -- or, sorry, had beaten his pregnant  
23 girlfriend, and she was 17 years old. And so it was charged as  
24 physical abuse. And he punched her in the stomach.

25 At grand jury, she would not say it caused a physical

1 injury, and so the Supreme Court struck the child abuse charge  
2 and said if you're going to -- if you're going to charge abuse  
3 and neglect and there's no physical injury, then it has to be  
4 pled with specificity either as sexual abuse, sexual  
5 exploitation, or negligent treatment, or maltreatment.

6           So now every time we charge child abuse, we have to  
7 put to wit, physical injury of a non-accidental nature, or if we  
8 don't have a physical injury, we have to say child abuse or  
9 neglect to wit, negligent treatment or maltreatment. Therefore,  
10 every time I did not have a physical injury in the criminal  
11 complaint and information, I then charged it to wit, negligent  
12 treatment or maltreatment after Clay because Clay came out right  
13 when this case was happening.

14           MR. HAMNER: And --

15           THE COURT: So what are you asking for, Mr. Figler?

16           MR. FIGLER: Thank you. Our first preference would be  
17 that the entire paragraph of negligent treatment or maltreatment  
18 of a child be stricken. If the Court is unwilling to do that,  
19 the State should be able to replace it then with the 2013 --

20           THE COURT: So they're --

21           MR. FIGLER: -- version.

22           THE COURT: -- going to do that, so just replace it  
23 with the 2013 version.

24           MR. HAMNER: Correct. And just for the record, the  
25 1985 statutes under Nevada page 1370 has the exact same

1 definition that we just read as the 2013 version. So,  
2 essentially, even if the -- some of the alleged conduct is 2011,  
3 it's still under the same definition.

4 MR. FIGLER: Okay. So our objection is noted, but  
5 we'd also object to that first paragraph because we felt that  
6 all of the mental suffering was taken out of the information.

7 THE COURT: Right. So do you want to just say in the  
8 first paragraph on line 3, cross out mental suffering?

9 MR. FIGLER: And then again on line 4, yes. That's  
10 our --

11 MS. BLUTH: Well, no,

12 MR. FIGLER: -- preference.

13 MS. BLUTH: No, no, no, because the mental injury is  
14 what we took out because we didn't allege a mental injury.  
15 That's different than mental suffering. Mental injury --

16 THE COURT: Right.

17 MS. BLUTH: So you can still --

18 THE COURT: Right, you can still have mental  
19 suffering.

20 MS. BLUTH: Right, but not mental injury. Mental  
21 injury has to be pled with specificity, but you could still have  
22 mental suffering.

23 MR. FIGLER: I'm sorry. We need to look --

24 THE COURT: Right. So it could be contemporaneous  
25 mental suffering --

1 MS. BLUTH: Right. Yeah.  
2 THE COURT: -- as opposed to an ongoing mental injury.  
3 MS. BLUTH: Exactly.  
4 MR. HAMNER: Right.  
5 THE COURT: So what they've alleged is contemporaneous  
6 mental suffering --  
7 MR. HAMNER: Correct.  
8 THE COURT: -- like I'm sitting here on a pot for  
9 eight --  
10 MS. BLUTH: Right.  
11 THE COURT: -- hours, I'm suffering.  
12 MS. BLUTH: But no --  
13 THE COURT: But I don't have like long term  
14 psychiatric --  
15 MS. BLUTH: Exactly.  
16 THE COURT: -- problems.  
17 MS. BLUTH: And -- and so I told --  
18 THE COURT: That's the distinction they're making.  
19 MS. BLUTH: I told Mr. Figler that the mental injury  
20 part, I did --  
21 THE COURT: Right.  
22 MS. BLUTH: -- I did cross out, so --  
23 MR. FIGLER: I've got it, Jill. I've got it, Jill.  
24 THE CLERK: Okay. Never mind.  
25 MS. BLUTH: So when it says abuse or neglect means

1 physical or mental injury, I crossed out or mental injury, and  
2 then I crossed out the definition of mental injury because I do  
3 believe -- I do agree with them that that's not appropriate --

4 THE COURT: Right.

5 MS. BLUTH: -- but mental suffering should stay.

6 THE COURT: Right. So the mental suffering is  
7 contemporaneous mental suffering.

8 MS. BLUTH: Right.

9 MR. FIGLER: Except the defense wasn't on notice in  
10 the amended information, Your Honor, that mental suffering --

11 THE COURT: I don't think you have to be.

12 MR. FIGLER: Okay. Well, our position is that we were  
13 absolutely not on notice that we were defending against mental  
14 suffering, only physical pain.

15 THE COURT: Oh, you're right. Because Count 5 you  
16 take out unjustifiable physical pain. Count 6 -- are there any  
17 counts where it says mental suffering?

18 MS. BLUTH: Yeah. Count 1, Count 2.

19 THE COURT: No.

20 MS. BLUTH: What?

21 THE COURT: Not on the amended information, what I'm  
22 looking at. It just says physical pain.

23 MR. FIGLER: Right.

24 MR. HAMNER: No.

25 THE COURT: There's no mental suffering.



1 MR. HAMNER: Yes, there is. If you read -- so if you  
2 look at Count 1 --

3 MS. BLUTH: Well, I'm wondering if -- because --

4 THE COURT: Wait. We've got -- this is what Mr.  
5 Figler has, is --

6 MS. BLUTH: Right.

7 THE COURT: -- working off the amended information.

8 MS. BLUTH: See, but that --

9 MR. FIGLER: That's filed.

10 THE COURT: Isn't there a second amended information?

11 MR. FIGLER: No.

12 THE COURT: No. It's -- it does not say physical. It  
13 just says --

14 MS. BLUTH: Do we only have one amended? Because  
15 remember, he -- I took it out at his request --

16 THE COURT: Well --

17 MS. BLUTH: -- for the mental injury.

18 THE COURT: It says --

19 THE CLERK: This is the one I read them.

20 THE COURT: My copy says or mental suffering in No. 3.

21 So we're going to -- okay. Whatever the filed information,

22 whether it's a second amended, a first amended, whatever.

23 Whatever that says is what we're working off of. So if somebody

24 was mistaken and looked off the wrong thing, that's their -- on

25 them. So we're going to go with whatever the filed document is.

1 So, Jill, you're making a lot of overtime. Do you go to time  
2 and a half or anything? You guys --

3 THE CLERK: It's been a time and a half all day.

4 THE COURT: What do you --

5 THE MARSHAL: I take -- I take comp time.

6 THE COURT: He's on time in the half.

7 THE MARSHAL: I take comp time, though, when it's in  
8 the department.

9 THE COURT: I'm on -- so, again, whatever it says.  
10 What does it say?

11 MS. BLUTH: Well, I didn't go over every -- sorry, I  
12 didn't go over ever single one.

13 THE COURT: Let's just look at Count 1.

14 MS. BLUTH: Well, Count 1 is not there. That's the  
15 stips.

16 THE COURT: Oh.

17 MS. BLUTH: But here's the deal, though. The  
18 information, though, they were on notice. Because I took this  
19 out at -- at Mr. Figler's request, where we were only supposed  
20 to take out mental injury, but they've been on notice the entire  
21 time. It's just my secretary didn't -- she took out -- instead  
22 of taking out every -- where mental injury, she took out  
23 everything that said mental, which was not correct. So to say  
24 that they're on notice is absolutely incorrect because that  
25 language was on the information.

1 MR. FIGLER: I get to rely on February 6, 2018, Your  
2 Honor.

3 MS. BLUTH: Says who?

4 MR. FIGLER: Says the law.

5 MS. BLUTH: What law?

6 MR. FIGLER: The law of notice. This is the one we  
7 went forward on, this is the one that was read to the jury, this  
8 is the one that we based our opening argument on.

9 MS. BLUTH: Well, I don't -- I don't --

10 MR. FIGLER: And, indeed, I have a limiting  
11 instruction that is next in the -- in the packet that talks  
12 about you have -- you may have heard testimony of emotional or  
13 mental impact of acts allegedly constituting abuse or neglect.  
14 You are not to consider any potential or real emotional or  
15 mental impact on any alleged victims in this case in determining  
16 whether or not any crime was committed. Defendant is not  
17 charged with committing acts resulting in emotional or mental  
18 harm or pain.

19 MS. BLUTH: No. That's not law.

20 THE COURT: You're not getting that.

21 MR. FIGLER: That's a limiting instruction.

22 THE COURT: I know, but --

23 MR. FIGLER: That's [indiscernible], so that's going  
24 to be our proposal.

25 MS. BLUTH: We -- we've never -- we've never argued

1 any mental injury, but you can still find that it was, you know,  
2 I sat on buckets or I --

3 THE COURT: Yeah. I mean, I think the mental suffering  
4 is contemporaneous mental suffering.

5 MS. BLUTH: Right, but I'm not --

6 THE COURT: Not like a long-term mental injury, it's  
7 like I'm suffering because I'm here on this bucket and I'm  
8 sitting on a bucket.

9 MS. BLUTH: No, I know.

10 MR. FIGLER: They have plenty to argue without that --

11 MR. HAMNER: Well --

12 MR. FIGLER: -- being in there --

13 MR. HAMNER: -- that -- but that --

14 MR. FIGLER: -- but it's -- the information is the  
15 information.

16 MS. BLUTH: Well, no, we always have leave to amend.

17 MR. HAMNER: We have leave to amend.

18 MS. BLUTH: I mean --

19 MR. FIGLER: Okay. Well --

20 MS. BLUTH: I -- I took the -- I -- at the defense's  
21 request, I agreed with them in regards to the mental injury.  
22 Now, mental suffering, which is -- and this is what I don't  
23 understand because I remember us having this argument and me  
24 specifically saying on the record, no, mental suffering I can't  
25 take out, because that's an actual part of the statutory

1 language, mental injury I can --

2 THE COURT: Yeah. But you --

3 MS. BLUTH: -- take out.

4 THE COURT: -- left it in the title. I couldn't  
5 figure out what you were saying, but I -- because you left it in  
6 the -- oh, right.

7 MS. BLUTH: What are you saying, Judge?

8 THE COURT: I thought -- okay. Yeah. She did say on  
9 the record that she was keeping it in as part of the statutory  
10 language, which --

11 MR. FIGLER: No. And that's when we --

12 THE COURT: -- wasn't kept in.

13 MR. FIGLER: And we objected at that point, if you do  
14 the playback, saying we don't want the mental stuff in there --

15 THE COURT: All right. I'm going to have to --

16 MR. FIGLER: -- and that this is just physical.

17 THE COURT: -- look at a playback. For right now  
18 we're going to keep the instruction as written, with the  
19 deletion of mental injury on lines 12 to 14. As well as the --

20 MR. FIGLER: What about on line 8?

21 THE COURT: -- insertion of the 2013 language on  
22 negligent treatment.

23 MS. BLUTH: And then line 8, as well, I took out  
24 mental injury.

25 THE COURT: Right. Okay. Let's move on. If you find

1 beyond a reasonable doubt, the substantial bodily harm  
2 instruction.

3 MR. FIGLER: I'll -- I'm going to defer to the Court.  
4 Mr. Hamner says that prolonged physical pain, that that is  
5 specific. I'll reserve because I -- I didn't see that in that  
6 statute, but I accept Mr. Hamner's representation that that is  
7 good law. But I just ask for the reservation to object to it if  
8 I find something otherwise. But I accept --

9 THE COURT: All right.

10 MR. FIGLER: -- Mr. Hamner's representation.

11 MR. HAMNER: Yeah, it's pretty --

12 THE COURT: All right. So that's fine.

13 MR. HAMNER: Yeah.

14 THE COURT: The corporal punishment instruction.

15 MR. FIGLER: Okay. So we have a dispute on that.  
16 Your Honor, the -- there is an actual definition of corporal  
17 punishment that's available under NRS 433.546. The second part  
18 of that that the State has in theirs is not the statutory  
19 language. All this stuff about without limitation to each,  
20 that's going to be up for the jury to decide what they feel is  
21 appropriate or not.

22 THE COURT: Where did -- State, where did you get this  
23 instruction from?

24 MR. HAMNER: It actually comes from NRS 432B.150, I  
25 can read it. Excessive --

1 MR. FIGLER: The first sentence does.

2 MR. HAMNER: Okay.

3 THE COURT: Why don't we do this? I'm just proposing  
4 this. Why don't we incorporate the first two lines of Mr.  
5 Figler's instruction. Corporal punishment means the intention  
6 infliction of physical pain, including, without limitation,  
7 hitting, pinching, or striking.

8 MR. FIGLER: That's exact language of the --

9 MS. BLUTH: Well, I don't think --

10 MR. FIGLER: -- statute.

11 MS. BLUTH: -- you have to --

12 THE COURT: And then a parent or guardian of a child  
13 may use corporal punishment as a means of discipline. Excessive  
14 corporal punishment may constitute abuse of a child, and then we  
15 go -- oh, to the --

16 MS. BLUTH: Because it makes it a --

17 THE COURT: -- the reasonable person standard, again,  
18 on lines -- on line 4. So why don't we --

19 MS. BLUTH: Because it --

20 THE COURT: -- include the two of them?

21 MS. BLUTH: Because this makes it a specific intent  
22 crime, and it's not. It means the intentional infliction of  
23 physical pain. So the intent -- the intent to cause pain, and  
24 that's actually not the law. Battery is a general intent crime.  
25 So I'm fine with working on it, but I can't say the intentional

1 infliction of physical pain --

2 MR. HAMNER: That's fair.

3 MS. BLUTH: -- because that's not -- that's contrary  
4 to the law.

5 THE COURT: Why don't we say this -- well, no, because  
6 the intent -- you're intentionally -- oh, I see.

7 MR. FIGLER: Yeah.

8 THE COURT: Corporal punishment means the infliction  
9 of physical pain, including, without limitation, hitting,  
10 pinching, or striking. And then use yours, a parent or guardian  
11 of a child may use corporal punishment.

12 MR. FIGLER: Okay. And then where do we go from  
13 there? Because we want to --

14 THE COURT: Just use the whole thing.

15 MR. FIGLER: Their whole thing?

16 MR. HAMNER: Yes.

17 MR. FIGLER: And what about our whole thing about  
18 implements may be used in lawful corporal punishment?

19 MS. BLUTH: No. That's not --

20 MR. HAMNER: That --

21 MR. FIGLER: They may.

22 MS. BLUTH: -- the law.

23 MR. HAMNER: That's not -- that's not the law.

24 MS. BLUTH: That's argument, but it's not the law.

25 THE COURT: Where did you get that from?



1           MR. FIGLER: Well, they absolutely can be used in  
2 lawful corporal punishment.

3           MS. BLUTH: But where did --

4           MR. HAMNER: Which --

5           MR. FIGLER: And certainly --

6           MR. HAMNER: Which case?

7           MR. FIGLER: -- every -- I could offer --

8           THE COURT: I didn't use --

9           MR. FIGLER: -- additional authority --

10          THE COURT: I don't like --

11          MR. FIGLER: -- where there have been implements used  
12 in cases that have found to be not constituting child abuse.  
13 Implements can be used in lawful corporal punishment. We had  
14 some testimony --

15          THE COURT: All right. So why don't we do this --

16          MR. FIGLER: -- to that effect.

17          THE COURT: -- we'll take the, essentially, the first  
18 sentence of yours, but changing -- deleting the word  
19 intentional.

20          MS. BLUTH: But it still means infliction of physical  
21 pain. I mean, why -- where does it say that the child has to  
22 express physical pain?

23          MR. FIGLER: Corporal punishment, as defined by NRS  
24 433.546 says the intentional -- corporal punishment is the  
25 infliction of physical pain, including, without limitation,

1 hitting, pinching, or striking.

2 THE COURT: So we deleted intentional?

3 MR. FIGLER: That's it, right. And I'm --

4 THE COURT: Do you want to put --

5 MR. FIGLER: -- I'm fine with that.

6 THE COURT: -- corporal punishment means the  
7 infliction of physical pain, no matter how slight?

8 MR. FIGLER: No.

9 THE COURT: Including, without limitation, hitting,  
10 pinching or striking?

11 MR. FIGLER: I mean, I'd like to put popping in there,  
12 too, but that's not from the statute. I'd just put the  
13 statutory language, which is hitting, pinching, and striking.

14 MR. HAMNER: And -- and -- and again, I'd --

15 THE COURT: Okay. And then we can say --

16 MR. HAMNER: What's that statute, again?

17 THE COURT: -- implements. I don't like such as --

18 MR. FIGLER: 433.546.

19 THE COURT: -- paint sticks.

20 MS. BLUTH: No. Yeah, that's not --

21 THE COURT: Maybe -- where did you get that from? Are  
22 you just --

23 MR. FIGLER: Well, that's theory of defense, that  
24 that's an implement, and that is lawful. It is true that a  
25 paint stick, in and of itself, being used in corporal

1 punishment, is not unlawful --

2 MR. HAMNER: That's --

3 MR. FIGLER: -- it's how it's used.

4 THE COURT: Well, why don't we just say implements may  
5 be used in lawful corporal punishment?

6 MR. HAMNER: Thank you.

7 THE COURT: I don't like --

8 MR. FIGLER: That's fine.

9 THE COURT: -- including, like, such as --

10 MR. FIGLER: That's fine.

11 THE COURT: -- paint sticks.

12 MS. BLUTH: Wait, so what is it? Implements --

13 MR. HAMNER: I don't --

14 THE COURT: Implements may be used in lawful  
15 corporal --

16 MS. BLUTH: But there's no law that supports that. I  
17 mean, they can argue that but there's nothing that they can  
18 point to where it says anything about implements.

19 MR. HAMNER: This -- this was -- this is -- to quote  
20 Mr. Figler, this is -- it gets back to the whole Apprendi thing.  
21 I mean, that -- that's kind of a finding effect that needs to be  
22 made by -- by the jury about whether the implement in this  
23 circumstance --

24 THE COURT: Is reasonable.

25 MR. HAMNER: -- is reasonable.

1           MR. FIGLER: Oh, absolutely. But it doesn't -- it's  
2 not --

3           MR. HAMNER: I don't --

4           MR. FIGLER: Just appearance of implement --

5           THE COURT: Why don't we say this, the use of an  
6 implement must be reasonable under the circumstances?

7           MR. FIGLER: That's fine.

8           MR. HAMNER: I mean --

9           MS. BLUTH: No, I don't -- I have a problem with that.  
10 Like, they can argue --

11           THE COURT: I'm fine putting something like the use of  
12 an implement must be reasonable under the circumstances.

13           MS. BLUTH: Or something like the use of an implement  
14 in and of itself is not abuse.

15           THE COURT: It's not unlawful.

16           MR. FIGLER: Yeah.

17           MS. BLUTH: The -- the -- whatever -- some --

18           THE COURT: But must be reasonable under the  
19 circumstances.

20           MS. BLUTH: Okay. That's fine.

21           THE COURT: Why don't we say something like this, the  
22 use of an implement in and off itself is not unlawful, but must  
23 be reasonable under the circumstances.

24           MS. BLUTH: The use of an implement in --

25           THE COURT: Everybody can live with that?

1 MS. BLUTH: -- and of itself is not unlawful.

2 MR. FIGLER: Yeah. I mean, except it already talks  
3 about -- that's fine. If we do that instead of excessive  
4 corporal punishment goes beyond what is reasonable as  
5 additional --

6 THE COURT: Well, we're just going to keep --

7 MS. BLUTH: No. That --

8 THE COURT: -- saying the same thing over and over --

9 MR. FIGLER: Right.

10 THE COURT: -- again.

11 MS. BLUTH: Use of an implement in and off itself --

12 MR. FIGLER: So I'm fine --

13 THE COURT: And it's a reasonable --

14 MS. BLUTH: -- is not unlawful.

15 THE COURT: -- standard.

16 MR. FIGLER: Right, so --

17 MS. BLUTH: Okay. Judge, say it again, the use of an  
18 implement --

19 THE COURT: I was saying --

20 MS. BLUTH: -- in and --

21 THE COURT: -- the use of an implement in and of  
22 itself is not unlawful, but must be reasonable under the  
23 circumstances.

24 MS. BLUTH: That's fine.

25 MR. FIGLER: That's fine.

1 THE COURT: All right. Moving on.

2 MS. BLUTH: Wait. But hold on, so do I add to the top  
3 of it?

4 THE COURT: I would put that as the last sentence.

5 MS. BLUTH: But the --

6 THE COURT: It should read -- I'm going to read what I  
7 think it should it should say. Corporal punishment means the  
8 infliction of physical pain, however slight, including, without  
9 limitation, hitting, pinching, or striking. A parent or  
10 guardian of a child may use corporal punishment as a means of  
11 discipline. Excessive corporal punishment may constitute abuse  
12 of a child. Excessive corporal punishment goes beyond what is  
13 proper or reasonable under the circumstances in light of various  
14 factors, including, without limitations, the age and condition  
15 of the child, the behavior being disciplined, the child's  
16 response, and the amount of force used. The use of an implement  
17 is not in and of itself unlawful, but must be reasonable under  
18 the circumstances.

19 MR. FIGLER: We don't think that the language, no  
20 matter how slight, adds --

21 THE COURT: Okay. So we'll take that out.

22 MR. FIGLER: -- anything to it. And then,  
23 additionally, it's our objection that that sentence about  
24 excessive corporal punishment goes beyond what is proper or  
25 reasonable under the circumstances. If Your Honor wants to

1 offer that, that's fine. In the light of various factors,  
2 that's not -- I don't know where that comes from, that is not  
3 the statute, to my understanding.

4 THE COURT: Where does that come from?

5 MS. BLUTH: Hold on, you guys, I have to fix all  
6 these, so I'm --

7 MR. HAMNER: Sorry, I was trying to look up something  
8 else.

9 MS. BLUTH: It's okay.

10 THE COURT: Where did you, Mr. Hamner, get --

11 MR. FIGLER: In light of, dot, dot, dot.

12 THE COURT: -- in light of various factors? Is that  
13 from a case? I'm guessing it's from a case.

14 MS. BLUTH: I thought we got it from 432B.

15 MR. FIGLER: We looked that up, but we didn't see it  
16 there.

17 THE COURT: If it's not in a case or in the statute,  
18 it'll be stricken.

19 MR. HAMNER: I don't think it is.

20 MS. BLUTH: I don't know. Okay. So --

21 MR. HAMNER: Let me just double check. Because I  
22 don't -- I don't think it's -- I didn't prepare the  
23 instructions, but I don't believe -- I thought I just read that  
24 statute, and I didn't see --

25 THE COURT: Okay.

1 MR. HAMNER: -- the full language there.

2 THE COURT: If it's in a case, we can use it, but if  
3 it's not in a case and it's not in the statute, that portion  
4 will be stricken.

5 MS. BLUTH: Okay. So --

6 THE COURT: Fair enough?

7 MS. BLUTH: -- if that portion is stricken, it was  
8 read like this, corporal punishment means the infliction of  
9 physical pain, including, without limitation, hitting, pinching,  
10 or striking. A parent or guardian of a child may use corporal  
11 punishment as a means of discipline. Excessive corporal  
12 punishment may constitute abuse of a child. The use of an  
13 implement in and of itself is not unlawful, but must be  
14 reasonable under the circumstances.

15 THE COURT: And then also the sentence excessive  
16 corporal punishment goes beyond what is proper or reasonable  
17 under the circumstances --

18 MS. BLUTH: Okay.

19 THE COURT: -- period.

20 MS. BLUTH: So that's a period.

21 MR. HAMNER: That line isn't in there.

22 MS. BLUTH: Okay. Got it.

23 THE COURT: All right.

24 MS. BLUTH: Got it.

25 THE COURT: Moving on. Deadly weapon, any objection?



1 MR. FIGLER: No, Your Honor.

2 THE COURT: In order to use a deadly weapon --

3 MR. FIGLER: No, Your Honor.

4 THE COURT: -- any objection? It is not necessary in  
5 proving a conspiracy?

6 MR. FIGLER: We'll leave it as is, with the noted  
7 objection that the State should not be able to argue conspiracy  
8 on any count but the sexual assault.

9 THE COURT: All right. Well, we've already had a lot  
10 of argument on that, I've ruled against you various times, so I  
11 don't think we need to make a more thorough record at this  
12 point.

13 MR. FIGLER: I just want to preserve that.

14 THE COURT: All right. A person who willfully  
15 attempts to use physical force.

16 MR. FIGLER: That's fine. That's the statute.

17 THE COURT: All right. Battery means.

18 MR. FIGLER: That's the statute.

19 THE COURT: Any person who commits a battery.

20 MR. FIGLER: That's statute.

21 THE COURT: All right. Evidence that the defendant --

22 MS. BLUTH: I -- yeah. I made some changes at  
23 Dayvid's request, so I'm going to take out line 6, opportunity,  
24 preparation, I'm going to add common scheme or plan, and then  
25 cross out identity. So basically, we're only using the words

1 that we used in our OBA motion.

2 THE COURT: Okay.

3 MR. FIGLER: And I'm going to just show you we have an  
4 alternate. And I appreciate the State making those  
5 accommodations. I really thought that the crux of the State's  
6 bad acts motion and the reason that the Court granted it was on  
7 common plan and scheme. And so that's why -- that's why I  
8 offered my alternative. If Your Honor could just take a look at  
9 it, see if there might be a merger, or if the Court doesn't want  
10 to do it, we'll just make it a proposed. But I'll -- I won't do  
11 any more argument on that one. But --

12 THE COURT: Okay.

13 MR. FIGLER: -- do you see which one I'm talking  
14 about? You may have heard testimony concerning actions directed  
15 by the defendant towards the other foster children living in  
16 their home who are not the subject of these criminal charges.

17 THE COURT: Any objection to the one Mr. Figler  
18 offers? Just because it's clearer on the evidence that the  
19 defendant may have committed offenses against other children in  
20 home or something. What was it --

21 MS. BLUTH: I'm sorry. Which one is it, Dayvid? Oh,  
22 this one.

23 MS. McAMIS: The last one.

24 MS. BLUTH: Wait. Where is yours? I don't --

25 MR. HAMNER: Right here.

1 MS. BLUTH: -- see it.  
2 MS. McAMIS: It's the last one.  
3 MS. BLUTH: I don't remember seeing that. I'm sorry.  
4 MR. HAMNER: Which one is this?  
5 MS. McAMIS: The last one.  
6 MS. BLUTH: Could we actually -- that's fine. I would  
7 -- but I would like to add -- just add it to ours.  
8 THE COURT: Right.  
9 MS. BLUTH: Yeah.  
10 THE COURT: I just thought it was cleaner, because --  
11 MS. BLUTH: That's fine.  
12 THE COURT: -- otherwise, I --  
13 MS. BLUTH: Yeah.  
14 THE COURT: -- thought it was a little confusing, so I  
15 kind of liked that one better.  
16 MS. BLUTH: Can I rip this off, Dayvid, so I --  
17 because I don't have that.  
18 MR. FIGLER: That's fine.  
19 MS. McAMIS: Yes.  
20 MR. FIGLER: I thought --  
21 THE COURT: Okay.  
22 MR. FIGLER: -- I sent that to you.  
23 THE COURT: All right. So we'll --  
24 MS. BLUTH: You probably did, but I just don't have  
25 one.

1 THE COURT: So she's going to incorporate the two.  
2 MS. BLUTH: Yeah, that sounds good.  
3 THE COURT: Okay. All right. It is a constitutional  
4 right, you're requesting --  
5 MR. FIGLER: Correct. That's --  
6 THE COURT: -- that one.  
7 MR. FIGLER: -- our request, Your Honor.  
8 THE COURT: All right. Although you are to consider.  
9 MR. FIGLER: That's fine.  
10 THE COURT: In your deliberation.  
11 MR. FIGLER: That's fine.  
12 THE COURT: During the course of the trial.  
13 MR. FIGLER: I've never seen this before, but I don't  
14 have --  
15 THE COURT: You know why --  
16 MR. FIGLER: -- an objection to it.  
17 THE COURT: -- they're adding this? Because there was  
18 that case --  
19 MR. HAMNER: Yep.  
20 THE COURT: -- that came down when there had been an  
21 experiment or something done and then the Supreme Court said,  
22 no, you've got to remind them every time about --  
23 MR. HAMNER: It's the admonishment like don't go  
24 looking on the Internet --  
25 MR. FIGLER: Okay.

1 MR. HAMNER: -- and all that stuff.

2 MR. FIGLER: I'll submit it to Court. I just hadn't  
3 seen it, so it just --

4 THE COURT: Yeah. It's a new thing based on a recent  
5 case. Now we're given it in every --

6 MR. FIGLER: Okay.

7 THE COURT: All right. When you retire to consider  
8 your verdict.

9 MR. FIGLER: That's fine.

10 THE COURT: The playback instruction, pull the  
11 readback.

12 MR. FIGLER: That's fine.

13 MS. BLUTH: Right.

14 THE COURT: Now you will listen.

15 MS. BLUTH: Yep.

16 MR. HAMNER: We're good.

17 MR. FIGLER: Now, with regard to the verdict form,  
18 Your Honor.

19 MS. BLUTH: No, we still have a couple of Dayvid's, I  
20 think.

21 MR. FIGLER: That's instruction --

22 THE COURT: We're doing -- Mr. Hamner and I are doing  
23 our happy dance.

24 MR. HAMNER: That's it.

25 MR. FIGLER: I don't want to belabor and have us here

1 for a long time, so maybe we can settle this issue in the  
2 morning, but I'm just going to throw it out there. The defense  
3 is going to request -- oh, did we hit all of the defense  
4 instructions?

5 THE COURT: No. We hit all of the State's  
6 instructions --

7 MS. BLUTH: We have a few left of yours.

8 THE COURT: -- and some of the defense. So for the  
9 defense one, we already talked to you about the guilty mind.

10 MR. FIGLER: Right.

11 THE COURT: You had parents had a fundamental liberty  
12 interest in the care, custody, and management.

13 MR. FIGLER: Yep. I think that's an important law  
14 which is --

15 THE COURT: Where did you get this?

16 MR. FIGLER: That's from a family court case in Nevada  
17 and a United States Supreme Court case.

18 MR. HAMNER: We've handled this; right?

19 MS. BLUTH: Okay. Yeah.

20 THE COURT: I think what this talks about is parental  
21 rights, not about a defense to committing crimes --

22 MR. FIGLER: Well --

23 THE COURT: -- so I don't really think it's applicable  
24 here.

25 MR. FIGLER: Here's why I wanted this in here for the

1 defense, and that is that adoptive parents have the same rights  
2 as -- as biological parents in how they make decisions with  
3 regard to care, custody, and management of the child.

4           Now, obviously, if it violates the law, they're going  
5 to be found guilty of violating those laws. But they may have  
6 engaged in certain bizarre behaviors or things that are -- don't  
7 rise to the level, such as the toilet paper, two squares, six  
8 squares. They have an absolutely fundamental right to engage in  
9 the management and care of those children in any way they deem a  
10 purpose, so long as it doesn't crossover to criminal.

11           So I think it's very important to instruct the jury  
12 that just because there's some bizarre things like the toilet  
13 paper, which is not chargeable, but which has come out over and  
14 over through many of the witnesses, that they do have that  
15 liberty interest in caring for, just like biological parents.

16           MR. HAMNER: But --

17           MR. FIGLER: And I think that if we don't instruct the  
18 jury on that --

19           THE COURT: Well, we can say --

20           MR. FIGLER: -- that the argument falls --

21           THE COURT: -- something like adoptive parents have  
22 the same rights as natural parents --

23           MS. BLUTH: And we can put that--

24           THE COURT: -- in the care, custody, and management of  
25 their children.

1 MS. BLUTH: Let's add that --  
2 MR. FIGLER: That's fine.  
3 MS. BLUTH: -- under the corporal -- after the  
4 corporal punishment one. Do you want to?  
5 MR. FIGLER: Afterwards --  
6 THE COURT: Or just --  
7 MR. FIGLER: -- but not --  
8 THE COURT: -- have a new one.  
9 MR. FIGLER: -- attached to it. I don't -- wouldn't  
10 mind if it went right in after it.  
11 THE COURT: Okay. So --  
12 MR. FIGLER: That's fine.  
13 MS. BLUTH: Okay. So what do you --  
14 THE COURT: -- but you want is separate.  
15 MS. BLUTH: Tell me -- what do you want me say?  
16 THE COURT: How about something like adoptive parents  
17 have the same rights as natural parents --  
18 MR. HAMNER: I think that's --  
19 THE COURT: -- including the same interest in the  
20 care, custody, and management of their children --  
21 MR. FIGLER: That's fine.  
22 THE COURT: -- or something like that.  
23 MR. HAMNER: Right.  
24 MR. FIGLER: I mean, I did, obviously, take that  
25 evaporate and model parent language from that case, but I



1 appreciate if the Court doesn't want to put that in there, too.

2 THE COURT: Yeah. I mean, I think -- okay. In case  
3 -- now, remember, some of this, if it occurred when they're  
4 foster parents, it's different.

5 MR. FIGLER: It didn't, though. The --

6 THE COURT: Okay.

7 MR. FIGLER: -- the entire --

8 MS. BLUTH: Right.

9 THE COURT: Well --

10 MR. FIGLER: -- charge is --

11 THE COURT: All right. Corporal punishment means the  
12 intentional infliction. We already talked --

13 MR. FIGLER: You already --

14 THE COURT: -- talked about that.

15 MR. FIGLER: -- covered that.

16 THE COURT: Since the law defining child abuse  
17 contains the term unjustifiable physical pain.

18 MR. FIGLER: Right. So two things here, justifiable  
19 or unjustifiable is not defined anywhere in the child abuse  
20 statute. But justifiable is defined in a number of other places  
21 in the Nevada Revised Statutes. The Supreme Court talked about,  
22 and I believe in this case in the sexual assault context, and  
23 I'll get to that when we get to our lesser includeds that we  
24 feel should come in, but that ultimately there are defenses at  
25 law, at common law, including necessity, the desire to aid

1 another, and reasonable reliance on a government agent. Now, if  
2 this isn't placed in -- as an instruction in its entirety, we  
3 would like to discuss the ability to discuss No. 3, under  
4 there --

5 THE COURT: Well, I think you --

6 MR. FIGLER: -- as a separate.

7 THE COURT: Okay. Can I cut to the chase?

8 MR. FIGLER: Yeah.

9 THE COURT: I think you absolutely can discuss No. 3,  
10 regardless of whether or not we give the instruction. I think  
11 you can argue it without objection. Meaning they thought they  
12 were behaving reasonably because all these people were in their  
13 home and they saw the bucket and no one ever complained or said  
14 don't do it or whatever, so that's fair argument.

15 MR. FIGLER: I believe it should be encompassed in one  
16 of the --

17 THE COURT: But I don't know --

18 MR. FIGLER: -- instructions.

19 THE COURT: -- that it's an actual -- it's not -- you  
20 can't abuse your child because you reasonably --

21 MS. BLUTH: Right.

22 THE COURT: -- relied on the lack of action by a  
23 governmental representative.

24 MR. FIGLER: But the bucket -- this goes really -- you  
25 -- you are right.

1 THE COURT: I mean, because --

2 MR. FIGLER: That focuses on bucket, and can we use a  
3 paint stick, yeah, but you can't use it too far --

4 THE COURT: Right.

5 MR. FIGLER: Can we -- you know, no one said --

6 THE COURT: But what I'm saying --

7 MR. FIGLER: -- can't use the bucket.

8 THE COURT: -- is I don't think that's a correct --  
9 look, if a judge were to tell you, yes, it's absolutely -- if  
10 I'm, you know, a family court judge, and if I were to say as a  
11 family court judge, oh, yes, during your visitation, you're  
12 allowed to keep --

13 MS. BLUTH: Right.

14 THE COURT: -- your 13-year-old in a playpen, you  
15 know, with arm ties, then I think you could reasonably rely on  
16 that person as a -- in a position of authority. But I don't  
17 think there's anything in the law that says you can reasonably  
18 abuse your child and behave, quote, unreasonably, because you  
19 thought some governmental --

20 MS. BLUTH: CPS is okay with it.

21 THE COURT: -- employee condoned it or failed to act  
22 or didn't notice it or whatever. So I don't think this is true.

23 MR. FIGLER: So -- well, the cases --

24 THE COURT: I think you could -- I think you can argue  
25 it, though --

1 MR. FIGLER: The cases that we cited in there --

2 THE COURT: -- as part of your reasonable person  
3 argument.

4 MR. FIGLER: The cases that we cited are criminal  
5 cases, and it does say reasonable. And that is the modifier  
6 there, reasonable. It would be unreasonable to suggest that you  
7 can commit actual abuse on someone. That's where reasonableness  
8 comes in to modify. Those were all criminal cases.

9 So it's where -- the cases are where a law enforcement  
10 person or some government official says you can use that money  
11 in that way, and then they did, and then the -- the Court said,  
12 well, that was unreasonable to do. But if they said you can  
13 shoot that person, that would be unreasonable to rely on that  
14 government offers. That's why reasonable modifies that. So  
15 that is a correct statement of law.

16 It's reasonable to rely on the actions, it -- you  
17 know, you take your chances, if -- if -- if it's unreasonable to  
18 the jury, but if it's reasonable reliance that, yeah, they can  
19 continue to sit on buckets, we -- we should be able to have that  
20 on some basis of instruction. But --

21 MS. BLUTH: But no one is --

22 MR. FIGLER: -- necessity -- I'm sorry, Jacqueline --

23 MS. BLUTH: That's okay.

24 MR. FIGLER: The necessity and the desire to aid  
25 another person are definitely common law defenses, and -- and

1 with regard to the idea of justifiable anything. So what is  
2 justifiable pain? What does it mean in that statute when they  
3 say unjustifiable pain? Well, it necessitates that there is  
4 some justifiable pain.

5           So if I take my child to the doctor and the doctor has  
6 to do a procedure that's going to hurt a whole lot, that is  
7 justifiable pain. That is necessity. So we put that in there.  
8 But there are other possible reasons when something can be  
9 painful, but also justified, and the jury has no guidance on  
10 that whatsoever in any of the instructions.

11           THE COURT: Well, I don't think this gives them any  
12 more guidance --

13           MS. BLUTH: No, it's --

14           THE COURT: -- frankly.

15           MS. BLUTH: -- confusing. And if you look at 200.275,  
16 Judge, it's talking about justifiable homicide.

17           MR. FIGLER: Right. And -- and that's why I start --

18           MS. BLUTH: So --

19           THE COURT: I'm not going to give this instruction. I  
20 mean, look, I think it's misleading. In terms of reliance, I  
21 think you can argue it without the instruction. I think the  
22 reasonable desire to aid or assist a child, you know, you can  
23 argue they were trying to assist the child by, I don't know --

24           MS. BLUTH: Voiding her bladder.

25           MR. FIGLER: Everything.

1 THE COURT: Right.

2 MR. FIGLER: But I mean, that's their whole --

3 THE COURT: But I think that --

4 MR. FIGLER: -- freakin' theory, you know that.

5 THE COURT: -- you can argue that anyway. I just  
6 don't --

7 MR. FIGLER: Can I make another run on instruction for  
8 Monday morning --

9 THE COURT: Sure.

10 MR. FIGLER: -- based on our conversation?

11 THE COURT: You can make another run on it, but I  
12 don't see giving this --

13 MS. BLUTH: So Dayvid, what do you want --

14 THE COURT: -- as written.

15 MS. BLUTH: -- about the verdict form, though?

16 MR. FIGLER: Well, hold on, we'll get to that in a  
17 second. So I was just going to say something really quick, Your  
18 Honor.

19 THE COURT: All right. The next one, you may have  
20 heard testimony of emotional or mental impact. We've already  
21 gone over that. You may have heard testimony concerning actions  
22 directed by the defendants towards the other foster children.

23 MR. FIGLER: That's the one you put in.

24 THE COURT: We've already --

25 MS. BLUTH: I added that.

1           THE COURT:  -- covered that.  Do we have a State  
2 instruction in considering the testimony of any witness you may  
3 take into account?  This is -- comes from the opening  
4 instructions that the Court gives.

5           MS. BLUTH:  Which one is it?

6           THE COURT:  This one is in -- some DAs gives them in  
7 the packet, and some don't.

8           MS. BLUTH:  I -- tell me about it.

9           THE COURT:  In considering the testimony of any  
10 witness, you may take into account the witness's opportunity  
11 to --

12           MR. FIGLER:  Yeah, you already rejected that from us,  
13 Your Honor, because we offered that as either being a supplement  
14 to or an alternate to the shorter credibility --

15           THE COURT:  Oh, okay.  We already have it.

16           MR. FIGLER:  -- instruction.

17           MS. BLUTH:  Oh.  Yeah, yeah, yeah.

18           MR. FIGLER:  You already said no.

19           THE COURT:  Okay.  I didn't remember.

20           MR. FIGLER:  Yeah.

21           MS. BLUTH:  Yeah.

22           THE COURT:  Okay.  I didn't remember we already had  
23 that.

24           MR. FIGLER:  I mean, it -- you know, if you wanted to  
25 add it on, that's fine --

1 THE COURT: No.

2 MR. FIGLER: -- but you already said no.

3 THE COURT: I just sometimes -- I didn't remember.

4 MS. BLUTH: Yeah, no. Some DAs --

5 THE COURT: Sometimes some --

6 MS. BLUTH: -- do include it.

7 THE COURT: -- DAs don't put it in the packet. I

8 couldn't remember if you guys had it in the packet. Okay.

9 MR. FIGLER: Okay.

10 MS. BLUTH: All right.

11 THE COURT: I give it if it's in the packet, or

12 anybody wants it.

13 MS. BLUTH: Dayvid, verdict, what do you want?

14 MR. FIGLER: Oh. So verdict form.

15 THE COURT: Okay. I think --

16 MR. FIGLER: I'm just throwing this out.

17 THE COURT: -- that's it. Excuse me. For the record,

18 we've covered every -- all of the defendant's proposed

19 instructions, they've either been rejected, or in many cases,

20 incorporated --

21 MR. HAMNER: Correct.

22 THE COURT: -- into one of the instructions that were

23 given by the State.

24 MR. HAMNER: Correct.

25 MR. FIGLER: But, explicitly, I'll make a stack of



1 proposed but modified and proposed but rejected for the --

2 THE COURT: Okay.

3 MR. FIGLER: -- Court to lodge.

4 THE COURT: Sure.

5 MR. FIGLER: And I'll do that tonight.

6 THE COURT: All right. The verdict form.

7 MR. FIGLER: So the verdict form is fine as stands,  
8 with the exception that the defense desires to -- as a lesser  
9 included, and we can argue this tomorrow, please, with the --

10 THE COURT: Well, you can argue it tomorrow.

11 MR. FIGLER: The child abuse, neglect, and  
12 endangerment charges that battery constituting domestic violence  
13 be a lesser included of those, that with the sexual assault with  
14 a minor under 14 years of age --

15 THE COURT: I have no idea what you're saying.

16 MR. FIGLER: Oh. We're asking for a lesser included.

17 THE COURT: On which -- I got that. On which one? So  
18 on the child abuse, neglect, or endangerment with substantial  
19 bodily harm, do you want a guilty of child abuse, neglect, or  
20 endangerment without substantial bodily harm?

21 MR. FIGLER: Yes.

22 THE COURT: Okay. That isn't on your verdict form.  
23 You just have guilty of and then a blank.

24 MS. BLUTH: I'll add it.

25 THE COURT: Okay. So those will be added on all of

1 that.

2 MR. FIGLER: We'd also like there to be an option for  
3 battery constituting domestic violence and attendant  
4 instructions that describe that to go on all the child abuse --

5 THE COURT: Well --

6 MR. FIGLER: -- neglect and endangerment --

7 THE COURT: -- that's not really a lesser included.

8 State, are you objecting to battery constituting  
9 domestic violence --

10 MS. BLUTH: Yeah.

11 THE COURT: -- as a lesser included?

12 MS. BLUTH: Definitely, yeah.

13 THE COURT: All right. It's not a lesser included, so  
14 I'm not going to give it.

15 MR. FIGLER: Okay.

16 THE COURT: All right. Moving on to sexual assault  
17 with a minor under 14 years.

18 MR. FIGLER: Okay. So this is the defense's request  
19 to have added on there as a lesser included, because of the  
20 unique nature of these charges. And the unique nature of our  
21 instructions that are going with these charges that we allow a  
22 child abuse, neglect, or endangerment charge to be placed into  
23 those sexual assault charges, that this was just an abuse and  
24 neglect by entering the -- the thing.

25 Look, there has never been a catheter in a urethra sex

1 assault. I understand the State's being creative here, but,  
2 typically, this would have been charged as an abuse or neglect,  
3 and so we feel that the elements of abuse and neglect so track  
4 the actual facts of this case, that if it's not a lesser  
5 included, it's an allowable lesser related to be included in the  
6 verdict form to give the jury that option that we don't think  
7 it's sexual, but we do think it's criminal, and so we are going  
8 to find them guilty of the child abuse and neglect. So it's our  
9 request to do that on all of the sexual assault charges.

10 MS. BLUTH: So it's either all or nothing, like, I  
11 didn't --

12 THE COURT: Yeah.

13 MS. BLUTH: -- I chose not to --

14 THE COURT: I don't think -- okay. It's not a lesser  
15 included. They elected to proceed one way. You can argue,  
16 look, even if you don't agree with it, it's not a sexual  
17 assault, and the DAs chose not to charge it correctly, so it's a  
18 not guilty, and that's on them. I mean, that's fair argument,  
19 you can make that argument, but I don't really see it as  
20 something that the Court should give as a lesser --

21 MR. FIGLER: Well --

22 THE COURT: -- included, or even --

23 MR. FIGLER: -- given the unique --

24 THE COURT: -- a lesser related --

25 MR. FIGLER: -- given the unique nature of these

1 charges, we feel it's absolutely appropriate to give the jury  
2 another option here besides guilt or not guilt. Because if they  
3 believe that the insertion was done, but they may not -- it may  
4 be confusing to them as a sexual assault charge, but they might  
5 say this is still child abuse to do this. And if you look at  
6 the elements of child abuse, I mean, this is really very -- not  
7 dissimilar elementwise from --

8 THE COURT: But it's totally --

9 MR. FIGLER: -- any of the other charges --

10 THE COURT: -- it's totally --

11 MR. FIGLER: -- of striking?

12 THE COURT: -- dissimilar from -- I mean, look, it's  
13 not really a lesser related, and it's not a lesser included. So  
14 what legal authority, other than, okay, this is what I thought  
15 it should be, do I have to give it? I don't think I have any  
16 legal authority to give it.

17 MR. FIGLER: Well, I -- I certainly do think it's --  
18 it's absolutely lesser related simply because it is -- it is the  
19 State's theory that this was done as punishment, that they -- it  
20 was an infliction of some discomfort or pain because of  
21 punishment purposes. That's -- that's part of the basis of  
22 their argument. So to say that it's not related to --

23 THE COURT: Yeah. I mean, the conduct --

24 MR. FIGLER: -- how they pled it --

25 THE COURT: -- is related --

1 MR. FIGLER: Yeah.

2 THE COURT: -- but it's not technically a lesser  
3 related charge.

4 MR. HAMNER: Right.

5 THE COURT: So I -- because the elements don't match  
6 up, so I don't think I can give it. But I think you're free, if  
7 you want to, to argue, look, if this is anything, if you think  
8 it was inappropriate child abuse, but the State didn't charge  
9 you with that, so you have to vote not guilty.

10 MR. HAMNER: We bear all the risk, you know, we made  
11 that choice --

12 THE COURT: All right.

13 MR. HAMNER: -- we live with it?

14 THE COURT: Moving on. They did do a lesser included  
15 blank on the sex assault. Do you want a guilty of sexual  
16 assault and take out the age enhancement?

17 MS. BLUTH: Oh.

18 THE COURT: That's up to -- I mean, you have --

19 MS. BLUTH: You don't care about that, do you, Dayvid?  
20 Because I mean, obviously they're under 14.

21 MR. FIGLER: It makes no sense.

22 MS. BLUTH: Yeah.

23 THE COURT: Okay. Well, they left a blank for it.

24 MS. BLUTH: No, she -- I told her not to do the  
25 verdict form yet --

1 THE COURT: Oh.  
2 MS. BLUTH: -- because I felt we would --  
3 THE COURT: Okay.  
4 MS. BLUTH: -- be in so much --  
5 THE COURT: Right. Okay. I was just working off what  
6 you guys --  
7 MS. BLUTH: Yeah. No, I should --  
8 THE COURT: -- had done.  
9 MS. BLUTH: -- have made that clear.  
10 THE COURT: So you don't want that, okay.  
11 MR. FIGLER: But on Count 38, we would take guilty of  
12 battery.  
13 MS. BLUTH: Yeah, I -- I wrote that in. And 39, as  
14 well.  
15 THE COURT: 39 you want --  
16 MS. BLUTH: And then --  
17 THE COURT: -- guilty of battery?  
18 MS. BLUTH: -- what about assault with a weapon,  
19 Dayvid? Did you want without the weapon, or do you just --  
20 going to say that's all or nothing?  
21 MR. FIGLER: I would like just guilty of assault.  
22 MS. BLUTH: Okay.  
23 THE COURT: Right. They can think the paint stick  
24 isn't a deadly weapon.  
25 MS. BLUTH: No, no, no.

1 MR. FIGLER: Oh, no. Razorblade.  
2 MS. BLUTH: It's the razor.  
3 THE COURT: Oh, the razor.  
4 MS. BLUTH: But they could think that about that.  
5 MR. FIGLER: But they might think that --  
6 THE COURT: They could think the --  
7 MR. FIGLER: -- the razorblade wasn't used, but there  
8 was still some manner of assault. That's possible.  
9 THE COURT: Right.  
10 MS. BLUTH: Yeah.  
11 MR. FIGLER: I just had a robbery with use and they  
12 felt that there was just robbery. I mean, it happens --  
13 THE COURT: Well, especially --  
14 MR. FIGLER: -- even though a gun was used.  
15 THE COURT: -- you've got something to --  
16 MS. BLUTH: Yeah.  
17 THE COURT: -- work with there, because Dr. Cetl said  
18 there's no way to insert a catheter with one hand, and she's a  
19 skilled practitioner, so --  
20 MR. FIGLER: Yeah.  
21 THE COURT: -- how is she holding the razorblade? So,  
22 I mean, he has something to work with.  
23 MS. BLUTH: I agree.  
24 THE COURT: He has something --  
25 MR. FIGLER: Right.

1 THE COURT: -- to work with there.

2 MS. BLUTH: I agree.

3 THE COURT: All right. Is that it?

4 MR. FIGLER: For now.

5 MS. BLUTH: So I guess the issue is, though, is  
6 they're coming at -- well, no, because I can -- I can work on  
7 these while --

8 THE COURT: I'm expecting you guys get to work. I  
9 know you're supposed to get be to work no later than 8:00 a.m.  
10 and your secretary may get there as early as 7:00.

11 MS. BLUTH: No, I'm going to do this this weekend.

12 THE COURT: Oh, okay.

13 MS. BLUTH: But my thing is, is you reserved on 2.

14 THE COURT: 2.

15 MS. BLUTH: So will you make that decision -- if you  
16 make that decision this weekend, would you mind emailing --  
17 would that be okay to email us? I -- I have to --

18 THE COURT: I was going to just do it Monday because  
19 we have the two witnesses; right?

20 MR. HAMNER: Right.

21 THE COURT: And so Krystal, before we even start  
22 Monday, I'll just say what I'm going to do, and then --

23 MS. BLUTH: Well then, maybe I'll just email our final  
24 format --

25 THE COURT: Right, to Krystal --



1 MS. BLUTH: -- to Krystal and she can --  
2 THE COURT: -- and then she can make --  
3 MS. BLUTH: -- just type it in.  
4 THE COURT: -- the changes.  
5 MS. BLUTH: That sounds good.  
6 THE COURT: -- and then print them out. And then --  
7 MS. BLUTH: That sounds good.  
8 MR. FIGLER: If there's any additional --  
9 THE COURT: -- we'll have the two witnesses, and maybe  
10 take a break before we move into the instructions; right?  
11 MR. FIGLER: That sounds great.  
12 THE COURT: All right.  
13 MR. FIGLER: We also are going to probably offer a  
14 special interrogatory related to the statute of limitations  
15 issue, and I'll send all the parties something. So there is  
16 still that statute of limitations issue we're -- we're allowed  
17 to raise. There is a date certain when the assault and battery  
18 were charged --  
19 THE COURT: Oh.  
20 MR. FIGLER: -- and it has to be before the three  
21 years. If I don't do this, I waive that I did move to strike  
22 because of the statute of limitations. Your Honor denied that,  
23 but I do still have to, in other words --  
24 THE COURT: Okay.  
25 MR. FIGLER: -- without waiving it, ask the jury was

1 it beyond a reasonable doubt before or after the date of the  
2 complaint that has the charges in it because that's when the  
3 statute would have run. So I believe it was the assault or the  
4 battery, whichever it was --

5 MS. BLUTH: Assault.

6 MR. FIGLER: -- assault was July --

7 THE COURT: Okay.

8 MR. FIGLER: -- of 2014.

9 THE COURT: So you'll prepare that. Can you email  
10 it --

11 MR. FIGLER: Of course, I will.

12 THE COURT: -- to them over the weekend --

13 MR. FIGLER: Yeah, yeah.

14 THE COURT: -- so they can look at it and then see if  
15 they have any objections for when we come back Monday morning?

16 MR. FIGLER: That's fine, Your Honor.

17 THE COURT: All right. I guess that's all. Happy  
18 dance. All right.

19 THE CLERK: Have a good weekend. Bye.

20 (Court recessed at 5:30 p.m., until Monday,  
21 March 12, 2018, at 9:07 a.m.)

22 \* \* \* \* \*

23

24

25

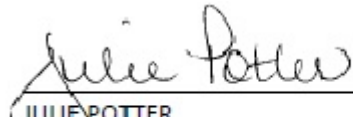
**CERTIFICATION**

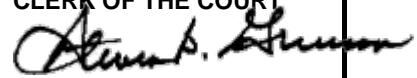
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Kingman, AZ 86402  
(702) 635-0301**

  
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JULIE POTTER  
TRANSCRIBER



TRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA  
\* \* \* \* \*

THE STATE OF NEVADA,

Plaintiff,

vs.

JANET SOLANDER,

Defendant.

CASE NO. C299737-3  
DEPT NO. XXI

**TRANSCRIPT OF  
PROCEEDINGS**

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

**JURY TRIAL - DAY 20**

MONDAY, MARCH 12, 2018

APPEARANCES:

FOR THE STATE:

JACQUELINE M. BLUTH, ESQ.  
CHRISTOPHER S. HAMNER, ESQ.  
Chief Deputy District Attorneys

FOR THE DEFENDANT:

CAITLYN L. MCCAMIS, ESQ.  
DAYVID J. FIGLER, ESQ.

RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER  
TRANSCRIBED BY: JD REPORTING, INC.

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1 LAS VEGAS, CLARK COUNTY, NEVADA, MARCH 12, 2018, 9:07 A.M.

2 \* \* \* \* \*

3 (Outside the presence of the jury)

4 MS. BLUTH: -- will void the bladder.

5 THE COURT: Yeah. But it has to be a legitimate  
6 medical purpose.

7 MS. BLUTH: But we already have that.

8 THE COURT: Well, she doesn't have a reasonable and  
9 good faith -- I mean, she doesn't have a reasonable belief that  
10 it's -- I mean, you can argue, well, how could this belief be  
11 reasonable when the catheters weren't prescribed, when she  
12 didn't discuss it with the pediatrician --

13 MS. BLUTH: Right.

14 THE COURT: -- when it was never ordered.

15 MR. FIGLER: On our side we have a medical -- if it  
16 was actually used, we have a medical device that was used in  
17 the manner it was intended to be used. It wasn't like taking  
18 a --

19 MS. BLUTH: Vacuum.

20 MR. FIGLER: Well, taking some --

21 MS. BLUTH: I've seen that on another page.

22 THE COURT: See but I disagree with that because you  
23 could clearly sexually assault someone with a speculum. Let's  
24 just say you inserted a speculum and opened it up like you  
25 would do in a pelvic exam. You're using it in the way the

1 medical device is designed for, but you could still be  
2 sexually -- you know, let's just say someone randomly grabbed a  
3 woman off the street and is like a freak and says, oh, I'd like  
4 to see -- I'd like to do this pelvic exam with my speculum  
5 here.

6 MR. FIGLER: Well, clearly the intent --

7 THE COURT: Do you see what I'm saying? You're still  
8 using it in the medically designed way.

9 MR. FIGLER: Well, and that would go to the intent  
10 because I don't think anyone could reasonably suggest that the  
11 intent --

12 THE COURT: Yeah. But maybe --

13 MR. FIGLER: -- of the random stranger was to conduct  
14 a medical exam on that individual which is much different than  
15 inputting a catheter into a place where catheters go when there  
16 is a perceived issue.

17 THE COURT: But here's the thing. If that were the  
18 standard, then I wouldn't have been reversed by the --

19 MR. FIGLER: Well, I don't know. I don't know how  
20 that was actually argued. I don't think it was argued  
21 specifically that way. I think that they said it's a fact  
22 question -- I think they just wanted to let the State argue.  
23 This wasn't a medical purpose. This was violence or  
24 punishment. That's what that -- that says all over the place.

25 THE COURT: I mean, that's --

1 MR. FIGLER: That's the decision. And --

2 THE COURT: That's not how I got it. So you don't  
3 like my language. That's fine.

4 MR. FIGLER: No. I like your language fine.

5 MS. BLUTH: But if we look, it says if the defendant  
6 presents any evidence that the penetration was for a medical  
7 purpose, the State must prove beyond a reasonable doubt that  
8 the penetration was not undertaken for a legitimate medical  
9 purpose. That covers what you're saying. I mean, I just -- I  
10 get a little bit nervous about making up instructions because  
11 we always get hit on that.

12 MR. FIGLER: Isn't that what we're doing here with  
13 this particular charge?

14 THE COURT: We're totally making it up. Well, I just  
15 know in other instructions you have a reasonable and good  
16 faith, you know, it has to be reasonable. It has to be in good  
17 faith.

18 MS. BLUTH: Because, I mean, to be honest with you  
19 I'm still -- I don't think that that's actual law. If the --

20 THE COURT: But we've already got that. It is a  
21 defense to the charge of sexual assault that the defendant  
22 entertained a reasonable and good faith belief.

23 MS. BLUTH: Which is actual law.

24 THE COURT: Right. But that's what -- so I mean,  
25 that language.



1           MR. FIGLER: Right. I mean, that's going to be true  
2 in any general intent.

3           THE COURT: That's what I'm saying. So I was just  
4 taking that and putting it -- it is a defense to if the  
5 defendant had a reasonable and good faith belief that the  
6 penetration was for a legitimate medical purpose. I had it  
7 better before but would be a defense. So you're essentially  
8 taking language from other statutes and just -- I mean other  
9 instructions. I misspoke. Because, I mean, to me is it  
10 reasonable that it's for a legitimate medical purpose?

11           MR. FIGLER: Your Honor, before we get too deep in --  
12 and are we on the record yet?

13           THE COURT RECORDER: Uh-huh.

14           MR. FIGLER: Okay. So the defense was looking at the  
15 law of lesser related and lesser included. The theory of the  
16 defense is that Ms. Solander -- that Mr. Solander bought the  
17 catheters, that Ms. Solander did many actions in what could  
18 reasonably be determined to be preparation to use the  
19 catheters, but that her intent was to merely frighten the  
20 children so that they would stop withholding their pee and --

21           THE MARSHAL: We're still waiting on the jury, Judge.

22           THE COURT: Okay.

23           MR. FIGLER: We had previously requested the Court to  
24 allow as either a lesser included or an allowable less related  
25 child abuse and neglect under that and the Court had rejected

1 that. So I'm not going to reargue that.

2 I also looked at the law of battery with related to  
3 that, and battery cannot be included in that. However, there  
4 are fact circumstances here specifically where Ms. Solander may  
5 have attempted by the threat and the purchase and putting the  
6 children in the bathroom to use the catheter but that because  
7 the children were squirming or they started peeing themselves  
8 or whatever that she didn't actually use the catheter, and so  
9 it would be appropriate in this limited circumstance to have an  
10 option for the jury to have attempt sexual assault as one of  
11 the things. Now, I know that the Court suggested we might want  
12 to go for all or nothing on that, but the defense feels that it  
13 is appropriate in this --

14 THE COURT: No. I didn't suggest that you go for an  
15 all or nothing. I said the State doesn't have to have child  
16 abuse and neglect. They are entitled to go for all or nothing  
17 because it's really not a lesser related, but --

18 MR. FIGLER: Oh, I see what you're saying. Well,  
19 that said we would like to request attempt sexual assault as an  
20 option for the jury in the jury verdict.

21 THE COURT: I think there might be facts -- my only  
22 thinking there is if you accept the testimony of the expert  
23 that you would need two hands to insert a catheter, although  
24 all the girls said the bladder was voided, but how would you  
25 insert a catheter if you're holding a razor blade with one --

1 MS. BLUTH: See that's where I --

2 MR. FIGLER: Or pipe it in and then pull it out. I  
3 mean, it doesn't seem like it actually happened, but it does --  
4 there's plenty of evidence that she tried.

5 MS. BLUTH: No. So here's the thing is the girls  
6 never stated that the razor and the catheter were simultaneous.  
7 That's why I was confused at what you guys were saying on  
8 Friday. They said that they were threatened with one, if you  
9 move I will use this. But it was never --

10 THE COURT: Oh, I thought one of the girls said that  
11 she was holding the razor to the throat when she was inserting  
12 the catheter.

13 MS. BLUTH: No. It was never --

14 THE COURT: And I thought that's why Ms. -- who was  
15 it? Mr. Figler?

16 MR. FIGLER: No, it's Ms. McAmis got that out.

17 THE COURT: Ms. McAmis made a big deal about --

18 MR. FIGLER: Right.

19 THE COURT: -- okay, it would take you two hands, and  
20 you've done a lot, and then the witness said oh, it would be  
21 completely unethical to even try to insert a catheter with one  
22 hand.

23 MR. FIGLER: Oh, that was mine.

24 THE COURT: And I remember the testimony being they  
25 held the hand --

1 MR. FIGLER: That's our recollection.

2 THE COURT: -- the razor blade to the throat. Not  
3 every girl said it the exact same way, but I remember testimony  
4 to that effect.

5 MS. BLUTH: I mean, if that's how --

6 THE COURT: That's how I remember it. I could be  
7 wrong, but that's why I thought they were making such a big  
8 deal with Dr. Cetl about, oh, well, you'd have to have two  
9 hands, and you would never try to do this with one hand.

10 MS. BLUTH: Yeah. And I knew that's where they were  
11 going. I just don't -- I don't believe that -- I mean, and  
12 quite honestly, like, you know, I've had this case for so long,  
13 and I've talked to the girls about it, and none -- so I can't  
14 tell you definitively that's not what the testimony said.  
15 That's my belief, but I know, like, in, you know, prelim and in  
16 pretrials they were never saying it was done simultaneously.  
17 But so anyways I don't --

18 Sorry, Kenny. I'll move that. I --

19 THE MARSHAL: You're good. You're fine.

20 MS. BLUTH: Okay. I just -- I don't see the factual  
21 support for an attempt -- I apologize. I thought you were  
22 going to say assault.

23 MR. FIGLER: No. Assault with?

24 MS. BLUTH: No. No, just a misdemeanor assault  
25 because they -- because your thing is they threatened them.

1 MR. FIGLER: Oh, on the razor?

2 MS. BLUTH: No. On the -- on the --

3 MR. FIGLER: SA?

4 THE COURT: Yeah. His thing is, like, if you're  
5 trying to get it in and the girls are squirming, or you've got  
6 your hand with the razor you couldn't --

7 MR. FIGLER: You don't actually make it past the  
8 labia.

9 THE COURT: Right.

10 MR. FIGLER: Then that's an assault. I mean, that's  
11 an attempt.

12 MS. BLUTH: But there's just no -- but there was  
13 never any evidence of that.

14 MR. FIGLER: Well, I think there's plenty of  
15 evidence.

16 MS. BLUTH: How?

17 MR. FIGLER: That the girl said she started peeing  
18 before it happened. That they would squirm. It seems like  
19 there's a lot of evidence of preparation. The dispute is  
20 whether or not it actually went in or not, but that would be to  
21 support an attempt of option for the jury in our opinion, and  
22 that's our offer. I mean, that's our request. So we make a  
23 formal motion to include attempt sexual assault in the verdict  
24 form with the -- with the rest of the instructions. I mean,  
25 necessarily we would have to stick one in on what is an

1 attempt, but I think that's pretty easy.

2 THE COURT: Right. You'd have to --

3 MR. FIGLER: There's a stock on that to the extent  
4 that stocks exist.

5 THE COURT: To what?

6 MR. FIGLER: To the extent that there's stocks. I  
7 mean, there's a statutory definition of attempts. So --

8 MS. BLUTH: Yeah.

9 THE COURT: Right. Well, they haven't a stock on it.  
10 That's not a big deal.

11 MR. FIGLER: Yeah.

12 MS. BLUTH: Right. I just think that in regards  
13 to -- I agree with Mr. Figler that I think it was Amaya that  
14 discussed, you know, one time she was trying and I peed -- I  
15 just started peeing beforehand or something like that, but when  
16 I was doing the questioning of the girls, I discussed the times  
17 that it actually went in, and then I actually had them point on  
18 the times that it went in.

19 So I agree with him in a way. I just don't agree  
20 that that was the conduct charged. I mean, he said it happened  
21 multiple times, but then I went into, you know, where did it  
22 happen, and where did the catheter go the times that it was  
23 used. So I don't believe there's a factual basis for an  
24 attempt.

25 And so but going one step further, what I thought

1 Mr. Figler was asking for was -- because it seems like that the  
2 defense is, well, she threatened them multiple times with it,  
3 but it never was used. So then I thought they were asking for  
4 a misdemeanor assault, like, you know, she threatened them, and  
5 they were scared that it was going to go in but there was no --

6 THE COURT: Yeah. Well, actually what you kind of  
7 would have is a battery with intent to commit sexual assault  
8 because they held -- she held them down, and they were  
9 squirming. So that's really even more than a -- I don't know.

10 MS. BLUTH: But there --

11 MR. FIGLER: Yeah. I mean, either one -- I mean,  
12 they are essentially the same.

13 THE COURT: Do you see what I'm saying? I mean, she  
14 held them down while they were squirming. There was testimony  
15 about that.

16 MS. BLUTH: Except -- but those -- I actually -- only  
17 a couple girls said -- only one girl said that she held her  
18 down which was Anastasia. However, there was testimony from,  
19 like, I believe Danielle and from one of the foster children  
20 that she heard -- they heard the defendant threatening to use  
21 it.

22 MR. FIGLER: Oh, absolutely. I mean, that's where  
23 the defense is going to go. I mean, it's no secret.

24 MS. BLUTH: Right.

25 MR. FIGLER: The defense is going to be argued that

1 this was only a threat to do that. So if the State is willing  
2 to concede assault as being part of the --

3 THE COURT: Your lesser -- lesser related.

4 MR. FIGLER: Or included perhaps, hard to say, and  
5 then is assault part of the sexual assault. Is it contained  
6 therein? Battery with intent --

7 THE COURT: No, because an assault, a misdemeanor  
8 assault, is an attempted battery.

9 MS. BLUTH: Right.

10 MR. FIGLER: Right.

11 THE COURT: And a sexual assault is a completed.

12 MR. FIGLER: Right.

13 THE COURT: So I don't see it as a lesser included  
14 even though it's used in the same word assault because an  
15 assault is an attempt.

16 MR. FIGLER: Well, I just felt there was --

17 THE COURT: Whereas, like I said, the sexual assault  
18 is a completed --

19 MR. FIGLER: Right.

20 THE COURT: -- battery.

21 MR. FIGLER: I just was looking at the case law, and  
22 it did appear as though there is a limited basis when it's  
23 appropriate for the jury to consider attempt if there is a  
24 factual basis in the record, and while we're disagreeing as far  
25 as the nuance, I think the Court understands that generally



1 speaking there is sufficient evidence in the -- in the record  
2 from the testimony cumulatively and from the other witnesses as  
3 well that there very well could have just been an attempt  
4 sexual assault here and that the jury should have that option  
5 available to it. But, you know, we would take a battery with  
6 intent to commit sexual assault as well. I just feel like  
7 there should be some other option than the actual completion of  
8 the act -- which we are disputing.

9 THE COURT: Right.

10 THE MARSHAL: All the jurors are here, Judge.

11 THE COURT: All right. Let's turn to -- on the  
12 sexual assault instruction. We had written that a person is  
13 not guilty of sexual assault if the penetration is for -- I  
14 think we should say then, if we're not going to include the  
15 other language, is undertaken for a legitimate medical purpose.

16 MS. BLUTH: Sorry. [unintelligible].

17 THE COURT: And then that dubs -- that coincides then  
18 with line 18.

19 MR. FIGLER: Which one? I'm sorry.

20 MS. BLUTH: The main sex assault.

21 THE COURT: All right. How long on these next two  
22 witnesses, Mr. Figler?

23 MR. FIGLER: Not very long at all, Your Honor.

24 THE COURT: I mean, should we call them in and finish  
25 with them and then take a break and finish the instructions?

1 MR. FIGLER: I think that would be fine.

2 THE COURT: You want to do -- I mean, if it's only  
3 going to be 10 minutes then that would look goofy, but if it's  
4 going to be 30 or 40 minutes, let's finish with the witnesses.

5 MS. BLUTH: Is it -- I mean, aren't you just asking  
6 them if they did the forensic and then if they've sent e-mails;  
7 right?

8 MR. FIGLER: No. I've got a couple extra  
9 questions --

10 MS. BLUTH: Oh, okay.

11 MR. FIGLER: -- based on the forensic.

12 MS. BLUTH: Okay. Well, then --

13 THE COURT: Why don't you bring them in then. Let's  
14 get started. Let's get everything done and rested.

15 MS. BLUTH: Okay.

16 THE COURT: And then we'll finish the instructions.

17 MS. BLUTH: Got it.

18 THE COURT: What's --

19 MR. FIGLER: I actually have, like, about four or  
20 five little housekeeping things with regards to  
21 [unintelligible] of the closer case.

22 THE MARSHAL: Are you sure your witnesses are here  
23 because there's nobody else in the hallway except for the jury.  
24 Mr. Figler?

25 MR. FIGLER: I'm sorry?

1 THE MARSHAL: Are you sure the witnesses are here  
2 because there's nobody else in the hallway except for the jury.  
3 MR. FIGLER: Oh.  
4 THE COURT: Well, maybe we should finish this.  
5 THE MARSHAL: Unless I missed somebody.  
6 MR. FIGLER: Were you in contact with them?  
7 MS. BLUTH: No.  
8 MR. FIGLER: Jacqueline? Oh, I thought you said you  
9 could have them here at 9:00.  
10 MS. BLUTH: Oh, no. I said if you wanted to, let me  
11 know. You never let me know.  
12 MR. FIGLER: I'm sorry. Absolutely.  
13 MS. BLUTH: Oh, no. I --  
14 MR. FIGLER: Oh, I -- miscommunication. Sorry.  
15 MS. BLUTH: And I don't -- I don't know Christina. I  
16 only know Faiza.  
17 MR. FIGLER: Okay. Well, let's see if we can get  
18 Faiza here.  
19 MS. BLUTH: Oh, I'm sorry -- yeah. I --  
20 MR. FIGLER: I'm sorry. I really thought that on  
21 Friday Ms. Bluth said -- I thought she was actually literally  
22 texting that they could be here on Monday morning.  
23 MS. BLUTH: Oh, no. I'm sorry, no.  
24 THE COURT: This will never end.  
25 MR. HAMNER: I'm just glad we get to spend a little

1 more time together.

2 THE COURT: This will never end.

3 MR. FIGLER: Me too.

4 MR. HAMNER: I don't want this to end. I don't want  
5 it to end.

6 MR. FIGLER: I apologize, Your Honor. I --

7 MS. BLUTH: No. It was just a simple  
8 miscommunication.

9 THE COURT: Well, if we can't get them I don't -- I  
10 mean, what are you going to ask them?

11 MR. FIGLER: I was going to ask her if she got that  
12 e-mail or sent that e-mail ahead of time. I'm also going to  
13 ask about some parameters about the forensic examination, talk  
14 about the forensic examination. So Faiza did the Solander  
15 girls, and so there was some questions around, like, the  
16 disclosure that were interesting to us.

17 THE COURT: Right. I mean, because if we can't get  
18 her here.

19 MR. FIGLER: I don't know that we could stipulate to  
20 that. I know the State doesn't want to stipulate to that.

21 MS. BLUTH: She's probably just down the street.  
22 Just one second.

23 MR. FIGLER: Of the two she is the more vital one  
24 because the other one just did the Stark girls.

25 THE COURT: All right. What language did you want me

1 to add to the sex assault instruction?

2 MR. FIGLER: Your -- Your Honor had come up with her  
3 language. I wasn't going to --

4 THE COURT: Were you fine with that or --

5 MR. FIGLER: Whatever Your Honor said, yeah.

6 THE COURT: Well, I mean, I -- if nobody wants it --

7 MS. BLUTH: I don't.

8 THE COURT: -- I don't have a dog in the fight. I'm  
9 just thinking, okay, that dub -- that kind of corresponds to  
10 the consent language from a different instruction --

11 MR. FIGLER: Whatever Your Honor had come in with a  
12 statement, that was fine with the defense.

13 THE COURT: All right. A reasonable and good faith  
14 belief that the penetration is for a legitimate medical purpose  
15 is a defense. So that's basically the same as --

16 MS. BLUTH: Can you say that again, please.

17 MS. MCAMIS: Yes, please.

18 THE COURT: I'm sorry?

19 MS. BLUTH: Would you mind saying it again.

20 THE COURT: Okay. A person is not guilty of sexual  
21 assault if the penetration is for a legitimate medical purpose.  
22 A reasonable and good faith belief that the penetration is for  
23 a legitimate medical purpose is a defense to sexual assault.  
24 If the defendant presents any evidence that the penetration was  
25 for a medical purpose, the State must prove beyond reasonable

1 doubt that the penetration was not undertaken for a legitimate  
2 medical purpose.

3 MS. BLUTH: Okay. So the only thing that -- so I  
4 mean, that's just -- okay. So what we have on line 17, If the  
5 defendant presents any evidence that the penetration was for a  
6 medical purpose.

7 THE COURT: Right.

8 MS. BLUTH: So we need to add legitimate there or  
9 reasonable because the putting in of a catheter is a medical  
10 purpose. It's not -- so it has to be -- it has to be a  
11 reasonable medical purpose or a legitimate medical purpose.

12 THE COURT: Okay. Well, we've been using the word  
13 legitimate.

14 MS. BLUTH: That's fine. He's doing the first close  
15 so --

16 MR. HAMNER: Hold on a second. Sorry, Your Honor,  
17 give me a second. I was just kind of editing as you were  
18 talking. Well --

19 THE COURT: Although it doesn't actually have to be  
20 for -- I mean, it has to be their reasonable and good faith.  
21 So for example, let's just say a physician or a nurse said,  
22 would you insert this catheter and you think, oh, okay. Well,  
23 it's a nurse telling me. I'm going to do it. If it turns out  
24 it really wasn't medically legitimate, you would still have a  
25 defense because you would have a reasonable and good faith

1 belief based on what a physician or a nurse or somebody like  
2 that -- can you give me a Kleenex -- was telling you. Do you  
3 see what I'm saying?

4 MS. BLUTH: Yeah.

5 THE COURT: So that's why I think the law has to be  
6 written -- the instruction should be written that way because  
7 if your belief is reasonable and in good faith based on the  
8 attending circumstances --

9 MS. BLUTH: Right.

10 MR. FIGLER: Even if mistaken.

11 THE COURT: -- that should -- even if mistaken --  
12 that should be the defense. Because, for example, let's say  
13 you were -- it wasn't really medically necessary or medically  
14 legitimate. That's not the standard. It's your reasonable and  
15 good faith -- do you see --

16 MS. BLUTH: Yeah. But so then we need the word  
17 reasonable though. It can't just be just a medical purpose  
18 because, of course, that obviously -- that a catheter is a  
19 medical purpose, but it has to be -- do you know what I'm  
20 saying, like --

21 THE COURT: Right. Do you see what I'm saying though  
22 because they're not, like, we're putting a person to the same  
23 standard as a physician or a nurse. It has to be their  
24 reasonable good faith belief that it's for a medical purpose.  
25 I mean, it's kind of like a fine distinction.

1 MR. HAMNER: I just -- I just wanted --

2 THE COURT: That's why --

3 MR. HAMNER: I just wanted to be able to approach so  
4 I could see that additional added sentence so I have the  
5 wording right because I type it in.

6 THE COURT: Okay.

7 MR. FIGLER: But I think that if you're going to go  
8 with that standard --

9 THE COURT: See what I'm saying?

10 MR. FIGLER: Yeah. I agree --

11 THE COURT: That to me is a better standard because  
12 it's not what, like, a physician -- what would be medically  
13 legitimate. It's what is reasonable and good faith for the  
14 person --

15 MR. FIGLER: Right.

16 THE COURT: -- who's doing it.

17 MR. FIGLER: That's why I think because your --

18 THE COURT: As opposed to --

19 MR. FIGLER: Right. We're using that standard which  
20 is allowed in many different contexts --

21 THE COURT: Right.

22 MR. FIGLER: -- with regard to general intent and so  
23 I would add -- I would ask that you add in, just like in those  
24 other instructions, even if mistaken. Right in -- you know  
25 exactly where it goes because it flows naturally because I'm



1 sure you've given that instruction a bunch of times.

2 MS. BLUTH: Well, no --

3 MR. FIGLER: So reasonable belief even if mistaken  
4 blah, blah, blah, blah, blah.

5 MS. BLUTH: No, because we have no evidence,  
6 absolutely no evidence, that anyone -- she relied upon anyone.  
7 So we can talk about her reasonable good faith, but not if  
8 mistaken because there's no evidence that supports that.

9 MR. FIGLER: But that's the standard for --

10 MS. BLUTH: No.

11 THE COURT: Well, that's the standard on consent.

12 MR. FIGLER: That is the standard for reasonably --  
13 that's right.

14 THE COURT: I mean, the standard on consent is if you  
15 have a reasonable and good faith belief, that the alleged  
16 victim consented. If you find such a reasonable good faith  
17 belief, even if mistaken, you must give the defendant --

18 MS. BLUTH: Yeah, but that's about consent. That's  
19 about a --

20 MR. HAMNER: Right.

21 MS. BLUTH: -- someone who just lays there and  
22 doesn't fight or someone who is moaning.

23 MR. FIGLER: I don't see the distinction here.

24 MS. BLUTH: I mean that has nothing to do with --

25 THE COURT: Well, that's -- I mean, that's --

1           MR. FIGLER: And mistake of fact is a common-law  
2 defense recognized as well which is why it's usually  
3 incorporated into the reasonable standard. So we'd ask that it  
4 just be there too.

5           THE COURT: Well, I mean, I don't think we should  
6 have a strict medical standard because that wouldn't be the  
7 standard because they're not a physician.

8           MR. FIGLER: Correct.

9           THE COURT: So it can't be legitimate medical purpose  
10 because --

11          MS. BLUTH: But it can be reasonable.

12          THE COURT: It's their reasonable and good faith  
13 belief.

14          MS. BLUTH: Right.

15          MR. FIGLER: Even if mistaken.

16          MS. BLUTH: No.

17          MR. HAMNER: Well, I mean, listen --

18          MR. FIGLER: Even if mistaken.

19          MR. HAMNER: I mean, listen. The Supreme Court  
20 specifically lays out --

21          THE COURT: A reason --

22          MR. HAMNER: -- in their holding that it needs to be  
23 a legitimate medical purpose. So I think --

24          THE COURT: Right.

25          MR. HAMNER: -- if we're trying to at least track the

1 Supreme Court's ruling, that language legitimate medical  
2 purpose needs to be in there.

3 THE COURT: I think the way it's written is fine.  
4 Here's the way it's written up. A person is not guilty of  
5 sexual assault if the penetration is for a legitimate medical  
6 purpose. A reasonable and good faith belief that the  
7 penetration is for a legitimate medical purpose is a defense to  
8 sexual assault. If the defendant presents any evidence that  
9 the penetration was for a medical purpose, the State must prove  
10 beyond reasonable doubt that the penetration was not undertaken  
11 for a legitimate medical purpose.

12 MS. BLUTH: But so why in every other line is it  
13 legitimate medical purpose but 17 is not? Everywhere else we  
14 have legitimate medical purpose. So why on 17 --

15 THE COURT: Well, because I -- it's just whatever --  
16 usually the standard is if they present any slight evidence  
17 like that it's in self-defense. It's not if they present a  
18 reasonable defense of self-defense, then you must prove beyond  
19 a reasonable doubt that it wasn't self-defense. It's if they  
20 present any evidence.

21 So I'm borrowing from these other statutes or these  
22 other instructions. Okay, so say self-defense -- you don't say  
23 if their evidence of self-defense isn't really goofy, then you  
24 have to prove beyond a reasonable doubt. It's if they present  
25 any evidence of self-defense, then you must prove beyond a

1 reasonable doubt. So I think typically to not have any burden  
2 shifting is if they present any evidence, you've got to prove  
3 it beyond a reasonable doubt.

4 MS. BLUTH: Right. And I see what you're saying, but  
5 in this case that's not what the Supreme Court said. The  
6 Supreme Court said it would have to be legitimate in nature.

7 MR. FIGLER: Well, let's get real what the Supreme  
8 Court said about legitimate. They were saying that that is  
9 inherent in the sexual assault.

10 THE COURT: Right.

11 MR. FIGLER: And they were going through a bunch of  
12 cases from other jurisdictions to show, yeah, these legitimate  
13 medical purposes, but let's also not forget they didn't give us  
14 an instruction to give. They told us that the common-law  
15 defenses are available, and while they use that language it is  
16 merely dicta because we know that when it was absolutely  
17 enumerated by the -- or codified by the Nevada legislature,  
18 they did not use the word legitimate, and they felt that  
19 medical purposes was sufficient. So --

20 THE COURT: I mean, I don't think it's making the  
21 State prove any more than they would have had to prove anyway.  
22 I mean, you still have to prove beyond a reasonable doubt that  
23 it's not for a legitimate medical purpose.

24 MR. FIGLER: Right.

25 THE COURT: Like I said, I mean, we never quantify on

1 what the defense has to -- if they put -- it's usually if they  
2 present any evidence, then you have to prove beyond a  
3 reasonable doubt that this wasn't what -- then this isn't it.  
4 I just don't want to have any kind of burden shifting. So to  
5 me I don't see it as creating a greater or lesser burden on the  
6 State. It's if there's any --

7 MR. FIGLER: I don't disagree. I just, you know, not  
8 to keep hitting that trumpet note, but I feel like with the  
9 reasonable belief you have to have even if mistaken in there  
10 because that goes to her mindset, but you're right about the  
11 State and their burden. So I don't see that the State's burden  
12 is lessened if Janet is mistaken.

13 MS. BLUTH: No. I -- I mean, I'll submit on the  
14 other issue, but the if mistaken, no, absolutely not.

15 THE COURT: I think we have to have a reasonable and  
16 good faith again because we're not holding her to the standard  
17 of a physician that it has to be correct. Do you see what I  
18 mean? It has to be subjectively reasonable and in good faith,  
19 but in terms of subjective --

20 MS. BLUTH: That's fine but not it's mistaken.

21 THE COURT: The subjective element, just to be clear,  
22 is the good faith. The reasonable standard is the broad  
23 standard of any, you know, what's reasonable man standard.  
24 So --

25 MS. BLUTH: It's incredibly --

1 THE COURT: Mr. Figler, you've got both. You've got  
2 a subjective standard, and you've got the broader standard. So  
3 I think that's the best I think we can come up with given the  
4 guidance.

5 MR. HAMNER: So just to be clear so I know my -- can  
6 you read it one more time just so I make sure I have my --

7 THE COURT: Sure. Do you want to just look at it?  
8 Would that help you?

9 MR. HAMNER: Sure. Thank you. Yeah, that would be  
10 great.

11 MS. MCAMIS: If I could also approach?

12 MR. HAMNER: Thank you very much.

13 MR. FIGLER: Did you get a response from Faiza?

14 MS. BLUTH: [No audible response].

15 THE COURT: All right. What were the other issues  
16 that were outstanding?

17 MS. BLUTH: So the information in regards to the  
18 mental suffering was number 1. And then just so you guys  
19 know --

20 THE COURT: I thought I'd already ruled on that  
21 because I thought it was clear --

22 MS. BLUTH: You said you needed think about it this  
23 weekend.

24 THE COURT: Oh.

25 MS. BLUTH: Because remember I asked you if you'd

1 e-mail me and you were like, no, I'll tell you guys on Monday.

2 THE COURT: All right. On that one I thought -- I  
3 mean I think they made a mistake in the amended, but I feel  
4 like if you look at the discussion and everything else it was  
5 clear what they intended to do and that mental injury is  
6 prolonged mental injury -- this is what I said Friday as  
7 opposed to the contemporaneous mental suffering.

8 MS. BLUTH: Right. And that -- yeah, just to be  
9 clear, the defense had asked me to take out mental injury which  
10 I totally agreed with, and I did, but in doing that my  
11 secretary accidentally took out mental suffering. Which I had  
12 stated, no, mental suffering needs stay because that's actually  
13 part of the elements of the statute.

14 THE COURT: And this is like such a minor point, and  
15 it doesn't need to be cleaned up, but nobody cleaned up the  
16 spacing on this.

17 MS. BLUTH: What? Where?

18 THE COURT: Well, it's better. Okay, maybe they did.

19 MS. BLUTH: Because that was something I  
20 specifically --

21 THE COURT: I saw one where you still have the  
22 lines -- yeah.

23 MS. BLUTH: That was something I specifically --

24 THE COURT: Above count 18, but they did better. All  
25 right. In any event what were the other issues on the

1 instructions?

2 MS. BLUTH: I can't remember any other issues, but I  
3 did want to let the defense know under negligent treatment or  
4 maltreatment the standard is for a person who is responsible  
5 for the welfare of a child -- and I got dinged on a writ for  
6 not adding that.

7 So just so everybody knows under negligent treatment  
8 or maltreatment I did define per 432B the definition of a  
9 person responsible for the welfare of a child, and it's just  
10 straight out of the statute. It is the child's parent,  
11 guardian, stepparent with whom the child lives, an adult  
12 person, blah, blah, blah. So I mean, it's really kind of cut  
13 and dry. She's their parent, but, like I said, I got dinged  
14 for not doing it in a writ so I figured it --

15 THE COURT: Okay. So you added that.

16 MS. BLUTH: Yeah.

17 THE COURT: That's not really an issue obviously.

18 MS. BLUTH: No. I just want to -- I didn't want  
19 anyone to think I was trying to sneak anything in.

20 MR. FIGLER: Did that -- so on that instruction it  
21 trails at the last -- on line 19 on the version that I got.

22 MS. BLUTH: Yeah. So the one I sent you this morning  
23 I filled it out because I didn't have the language on my  
24 computer at home. So if you want to look at it, it's right  
25 here, Dayvid.



1 THE COURT: Has anybody heard from this Faiza person?  
2 MS. BLUTH: No. I e-mailed her, or I texted her  
3 three times, and I'm not getting anything back.  
4 MR. FIGLER: Okay. That's [unintelligible].  
5 MS. BLUTH: Cool.  
6 MR. FIGLER: So --  
7 THE COURT: In terms of the dates you can argue the  
8 dates because you've got the evidence in. You've got the date  
9 of the e-mail plus the date of the interview. So I mean,  
10 you've got enough there if we can't find Faiza to argue that  
11 she had received the book prior to the interview.  
12 MS. BLUTH: I'm fine with that.  
13 THE COURT: Can we call? I hate texting --  
14 MR. FIGLER: I mean, we just have to stipulate.  
15 MS. BLUTH: Sure.  
16 THE COURT: -- because people don't always take their  
17 phones out of their purses.  
18 MR. FIGLER: Right.  
19 MS. BLUTH: Yeah.  
20 THE COURT: Can you call her secretary or her  
21 supervisor?  
22 MS. BLUTH: I'll just call her.  
23 THE COURT: I like the old-fashioned -- can you run  
24 down the hall and see if they're sitting in there?  
25 MR. FIGLER: Back in the day.

1 THE COURT: I mean, it's like Crystal will e-mail  
2 people, and I just it's, like, no, you know, sometimes people  
3 don't check their e-mails for hours --

4 MS. BLUTH: Yeah.

5 THE COURT: -- or days.

6 (Pause in the proceedings)

7 THE COURT: Is she coming?

8 MS. BLUTH: Yeah. She's like she --

9 MR. FIGLER: I'd rather just put it on the record.

10 THE COURT: Okay. I was just doing this to have  
11 something to do.

12 MR. FIGLER: [unintelligible].

13 MS. BLUTH: Just so you know, she's like a super  
14 obsessive-compulsive preparer. So this has got her like in --  
15 and I kept trying to say this isn't about, you know, so I'm  
16 just letting everybody know.

17 THE COURT: So where is she?

18 MS. BLUTH: She's on her way from Child Haven or  
19 wherever that is down there.

20 THE COURT: So she's -- that's probably.

21 MS. BLUTH: She's at Bonanza and whatever.

22 MR. HAMNER: And Pecos.

23 MS. BLUTH: So, like, 15 minutes.

24 THE COURT: So that's at least 20 minutes. Okay.

25 MS. BLUTH: So let's finish jury --

1           MR. FIGLER: There some more stuff we could do on the  
2 record right now.

3           THE COURT: Okay.

4           MR. FIGLER: So --

5           THE COURT: All right. What was left? I called  
6 counsel to the bench while Ms. Bluth was on the phone to find  
7 out what else was outstanding on the jury instructions.

8           MR. FIGLER: So in addition, Your Honor, I just made  
9 a little list of housekeeping. In addition to -- and I'll just  
10 focus on instructions and the verdict form. The defense's  
11 pending request to have at a minimum attempt sexual assault  
12 listed as an option for the sexual assault charges.

13           Additionally, Your Honor, if you recall the defense  
14 had raised the statute of limitations issue with regard to the  
15 battery with intent to commit sexual assault and the assault  
16 with use of a deadly weapon charges. Both those were done at  
17 different times after the original complaint was filed. I have  
18 the exact dates. I just don't have them on my fingertips. I  
19 believe one was in May, and one was in July of 2014 when they  
20 were filed. So that would have been outside the statute of  
21 limitations if the conduct occurred before those two dates and  
22 the allegations from the State go back to January of 2014. Oh,  
23 I'm sorry. Of a --

24           THE COURT: Refresh my memory.

25           MR. FIGLER: As late -- January 2011.

1 THE COURT: I know you can raise a statute of  
2 limitations defense at any time --

3 MR. FIGLER: Correct.

4 THE COURT: -- but refresh my memory. I don't -- and  
5 I could be mistaken or not remember -- I don't remember this --  
6 was this raised before?

7 MR. FIGLER: It was. So it was raised --

8 THE COURT: Okay. I just don't remember it then, but  
9 as I said, I know you can raise it at any time.

10 MR. FIGLER: We move to strike based on the statute  
11 of limitations because of I think Cunningham or some other  
12 allegation from -- or representation from the State there was  
13 a -- an issue that the jury could easily find it within the --

14 THE COURT: Right.

15 MR. FIGLER: -- statute of limitations, but that it  
16 was still an affirmative defense for the defense. So in lieu  
17 of an instruction that says if you find --

18 THE COURT: If you find that this occurred prior to  
19 this date, you must find the defendant not guilty or something  
20 like that.

21 MR. FIGLER: That would be one option. The other  
22 option is a special interrogatory asking them if they found  
23 beyond a reasonable doubt that it occurred before this date. I  
24 have no preference on how that would be submitted to the Court.

25 THE COURT: My preference would be to do a jury

1 instruction.

2 MS. BLUTH: Right.

3 THE COURT: That something like, if you find that the  
4 assault -- what is it assault with a deadly weapon?

5 MR. FIGLER: I think it's if the State did not prove  
6 beyond a reasonable doubt --

7 THE COURT: Reasonable doubt.

8 MR. FIGLER: -- that this occurred before X date then  
9 you must find --

10 THE COURT: Then you must find the defendant not  
11 guilty.

12 MR. FIGLER: -- then you must find the defendant not  
13 guilty. That's fine.

14 MS. BLUTH: So forgive me because I can't even  
15 remember right now. That was in --

16 MR. FIGLER: I'm going to have to pull -- I have it.

17 THE COURT: Okay.

18 MS. BLUTH: In the assault -- those statutes are two  
19 or three?

20 MR. FIGLER: Three. So they miss it by --

21 MS. BLUTH: Oh, yeah.

22 MR. FIGLER: -- a matter of those months.

23 MS. BLUTH: Yeah. The only thing I'm trying to think  
24 of is, you know, the sex assault --

25 MR. FIGLER: Sex assault is not, but --

1 MS. BLUTH: No. I know, but I'm wondering if by  
2 tying in with a bat with intent --

3 MR. FIGLER: I don't think it does.

4 MS. BLUTH: I do think it does.

5 MR. FIGLER: Because under the limitation of action  
6 statute --

7 THE COURT: Well, you can -- I mean, I don't know how  
8 else to do it. Otherwise you can just dismiss the battery with  
9 intent.

10 MS. BLUTH: What? No.

11 THE COURT: Well, I'm saying I don't know how to not  
12 confuse -- I mean, I don't think it's confusing, but if that's  
13 your concern the only way to address that --

14 MS. BLUTH: No, it's not that I think it's confusing.  
15 What I'm saying is that, you know, the sex assault, those are  
16 all protected because it's like if the child was in a situation  
17 where they didn't feel like they could report it or whatever --

18 THE COURT: Right, right, right.

19 MS. BLUTH: -- and I'm trying to think -- I'm trying  
20 to think back to the case law that I've looked at. If the  
21 battery with intent to commit --

22 THE COURT: Is an also protected.

23 MS. BLUTH: -- is an also protected. I know the AWDW  
24 is not.

25 THE COURT: Right.

1 MS. BLUTH: But I don't know why a bat with intent to  
2 commit SA wouldn't be.

3 THE COURT: Well --

4 MR. FIGLER: Well, it's specifically enumerated and  
5 it's not one of them, and it doesn't say or related to and I --  
6 if Ms. Bluth or Mr. Hamner have case law to the contrary, I'll  
7 concede, but I didn't see that anywhere.

8 THE COURT: Okay. Well, if we're unsure then, then  
9 we have to do it by way of an interrogatory.

10 MS. BLUTH: Yeah, that's fine. I'm fine. No, I --  
11 I'm fine.

12 THE COURT: If so -- okay.

13 MS. BLUTH: It's not like -- honestly, it's not even  
14 worth it. So let's just give them the benefit.

15 THE COURT: Okay. So then we'll have an instruction.  
16 Let's do two different instructions. If the State -- if the  
17 State has failed to prove that the assault with a deadly weapon  
18 occurred prior to --

19 MR. FIGLER: I'll give you those dates in the second.  
20 It's downloading. I've got 26 seconds remaining. I mean,  
21 theoretically it will be in the bind over of when the amended  
22 complaints were done which is what I'm looking at right now.

23 MS. BLUTH: But wouldn't it just be --

24 MR. FIGLER: It's when you filed -- not the original  
25 complaint. It's whenever you did the amended complaint. That

1 would be when the statute triggers for the new offense. You  
2 don't get to backdate from the original.

3 MS. BLUTH: No. I know. I'm just saying -- yeah.

4 THE COURT: What count was it, please? We've been  
5 through all this.

6 MS. BLUTH: 46 -- there's a couple. So --

7 THE COURT: All right. Count 20 --

8 MR. FIGLER: 38, 39.

9 MS. BLUTH: We're doing AW to be first.

10 MR. FIGLER: Oh, okay. That's 46.

11 THE COURT: Well, that's not helping me.

12 MR. HAMNER: That's 13 -- assault with uses are  
13 counts 13, 23 and 46.

14 MR. FIGLER: Correct.

15 MR. HAMNER: One for each of the girls.

16 THE COURT: All right. So --

17 MS. BLUTH: Did it load, Dayvid?

18 MR. FIGLER: Yeah. So it looks like that AWDW were  
19 put in on May 22nd, 2014. So it would have to be before May  
20 22nd --

21 MS. BLUTH: 2011.

22 MR. FIGLER: -- 2011.

23 MS. BLUTH: And then the BW -- the intent?

24 MR. FIGLER: Give me a sec. That appears to be July  
25 23rd. So it would have to be before July 23rd, 2011.



1 THE COURT: Okay.

2 MR. FIGLER: Do you want to confirm that, Jacqueline?

3 I don't want that to be an issue that's --

4 MS. BLUTH: You mean confirm it by looking at yours

5 or do you mean --

6 MR. FIGLER: I mean, you could, yeah. So battery

7 with intent to commit sexual assault first appears on the July

8 22nd --

9 MS. BLUTH: July 22nd, okay.

10 MR. FIGLER: So if we go up to the --

11 MS. BLUTH: July 23rd.

12 MR. FIGLER: Is it the 23rd?

13 MS. BLUTH: Yeah, [unintelligible].

14 MR. FIGLER: Sorry, July -- yeah.

15 MS. BLUTH: And the 11th, yeah. Oh, wait.

16 [unintelligible] the 8th.

17 MR. FIGLER: May 22nd I think it is and then -- oops.

18 AWDW is added there.

19 MS. BLUTH: Go back to that first one then, will you,

20 please.

21 MR. FIGLER: You want the first complaint?

22 MS. BLUTH: Yeah. No, no, no. The first one you

23 just showed me.

24 MR. FIGLER: Oh, sure. Hold on. Sorry, it's so

25 tiny. [unintelligible].

1 MS. BLUTH: It's like [unintelligible].  
2 MR. FIGLER: Right. Oh, that's way better.  
3 MS. BLUTH: Okay, cool.  
4 MR. FIGLER: And then here is the July 23rd and  
5 that's where the --  
6 MS. BLUTH: Yeah. Okay, perfect.  
7 MR. FIGLER: Do you want to look at the, just to  
8 confirm, look at the original complaint that has neither of  
9 those in it, or do you remember that? There's the original  
10 complaint from March.  
11 MS. BLUTH: Yeah. Okay, cool.  
12 MR. FIGLER: Okay.  
13 MS. BLUTH: Thank you for sharing.  
14 MR. FIGLER: Sure.  
15 MS. BLUTH: So, Judge, am I running these out or are  
16 you running them out to Crystal?  
17 THE COURT: On that one I was letting you guys do.  
18 MS. BLUTH: Okay, got it.  
19 THE COURT: Everything else I wrote out, but I  
20 don't --  
21 MS. BLUTH: No, I got it. I just didn't know. I  
22 thought it was going to be --  
23 THE COURT: I assumed you guys -- Mr. Hamner was  
24 going to type them up, and then just e-mail me another clean  
25 set.

1 MS. BLUTH: No. I'm going to.

2 THE COURT: Okay.

3 MR. FIGLER: Okay. So that resolved in addition to  
4 the lesser included or the assault that's still outstanding.  
5 That's it as far as the jury instructions. However, I have a  
6 note here that I was supposed to bring up to the Court. There  
7 was some evidence -- this is an internal note from us. There  
8 was some evidence during the trial from, and I believe it came  
9 from Debbie McClain, that she did receive photos of the  
10 children that would have depicted any injuries on the photos  
11 prior to her receiving the children in 2008.

12 We have searched for them, and they do not appear to  
13 exist. Ms. Bluth, I think, went above and beyond trying to see  
14 if any photos such as that existed, and there were a lot of  
15 photos, but nothing of that ilk. So the Court had invited us  
16 earlier if we felt that it rose to a level of Sanborn that we  
17 could request a failure to preserve or destroyed photograph  
18 instruction.

19 I'm not going to argue it at length. I think Your  
20 Honor knows the fact of basis here. I will put that in our  
21 group of proposed for marking if the Court is unwilling to  
22 allow it, but essentially it's that you've heard evidence that  
23 the Department of Family Services either failed to preserve or  
24 destroyed photographs of the adopted children issued in this  
25 case which would have shown the status of the children prior to

1 the -- the injury status of the children prior to placement in  
2 the foster care system, case law and then as such you may infer  
3 that there was evidence of child abuse in the photos which may  
4 be the same photographic evidence of child abuse testified to  
5 in this trial. So that would be the proposed Sanborn  
6 instruction if the Court feels that we've met the burden on  
7 that. So that --

8 THE COURT: I don't feel that -- State, do you want  
9 to weigh in?

10 MS. BLUTH: Yeah. So in what Ms. Richardson had  
11 said, and forgive me because I can't remember if we spoke to  
12 her outside of the presence or -- that if there were any of  
13 those photos, to her knowledge that there wasn't any, but if  
14 there were they are part of the file 360 which is once adoption  
15 takes place is sent to Carson City, and that takes two months.  
16 I don't know why that takes two months. That seems ridiculous  
17 to me, but it takes two months to get back here. So I don't  
18 think that the defense has met any burden that, A that there is  
19 absolutely photos and B, that they were in any way destroyed.  
20 So I just don't see where a Sanborn would --

21 THE COURT: Yeah. I mean, I don't see it.

22 MR. FIGLER: Okay. We submit that, and then finally,  
23 Your Honor, we had a proposed instruction that did talk about  
24 the reasonable reliance on a government agent as part of  
25 another instruction. Obviously a large portion of the theory

1 of the defense here is that the DFS, which is a government  
2 agency, was in there. They saw numerous things and never told  
3 the Solanders that they needed to stop doing that or even  
4 reported it.

5 None of it was reportable offenses, and again, I went  
6 through all that case law, and it really does talk about any  
7 crime, and it doesn't have limitation, and I would suggest to  
8 the Court that if the government says you're allowed to kill  
9 that person because he is an enemy of the state, and he is  
10 coming at you right now and they did that, that would be  
11 reasonable reliance that would not make them culpable for the  
12 offense.

13 So when they're saying what you're doing with the  
14 buckets, what you're doing with the timers or what you're doing  
15 with even the paint sticks per se, to the extent that that's  
16 what was observed or that was disclosed --

17 THE COURT: But was there any -- I mean, let's really  
18 look at what the evidence was. Was there really evidence that  
19 anybody had said, oh, yeah, what you're -- I mean, the timer is  
20 one thing, but the buckets -- there was the picture of the  
21 buckets.

22 MR. FIGLER: Right.

23 THE COURT: But nobody actually said, oh, yeah, this  
24 is fine for you to use these buckets, or it's fine for you  
25 to --

1 MR. FIGLER: Well, I mean, that --

2 THE COURT: -- let the girls sleep on boards, or it's  
3 fine to dry them off with the fan or -- so I mean, if you look  
4 at what -- what was the evidence actually? The timer --

5 MR. FIGLER: Okay. So there's two -- there's  
6 actually --

7 THE COURT: Right.

8 MR. FIGLER: -- there's a couple different pieces of  
9 evidence. There's the Jan Finnegan testimony that --  
10 allegation rather, that CPS investigated and the investigator  
11 who went out on Jan Finnegan was --

12 MS. BLUTH: Crystal Rosas.

13 MR. FIGLER: Was it Crystal Rosas?

14 THE COURT: Where's the detective?

15 MR. FIGLER: It was Crystal Rosas, and all these  
16 things were admitted to Crystal Rosas -- all these things were  
17 admitted to Crystal Rosas and because of either explicit or  
18 implicit none of it was said to them, oh, you have to stop  
19 doing this. You can't be doing this, and a lot of that is  
20 around the bathrooming issues, et cetera, that the -- or the  
21 toileting issues as the government keeps saying.

22 With regard to the buckets, Gail Anderson was in  
23 there. She did talk to the Solanders. She did take pictures  
24 of it. It's up to the jury as to whether or not there was a  
25 reasonable reliance here, and that's why we feel that

1 instruction is appropriate because the instruction is a simple  
2 two lines. The Department of Family Services, a government  
3 agency, its employers are government agents, one. Two, a  
4 person who reasonably relies on the government for advice  
5 cannot later be prosecuted for a crime explicitly or implicitly  
6 approved by the government.

7           This fact scenario -- this fits the theory of  
8 defense. I don't know that we have to delineate all the  
9 specific ones. That's for argument. So Ms. McAmis with this  
10 instruction in place could argue to the jury, look, they were  
11 in there. They took pictures of the buckets. They saw the  
12 buckets. They didn't say anything about the buckets, or they  
13 did talk to her, and they didn't correct her. She talked to  
14 Crystal Rosas, both Mr. Solander and Mrs. Solander admitted to  
15 all these things, to hitting them with the paint sticks, to  
16 timing them, to limiting their food intake, to all that stuff,  
17 and no correction or sanction was imposed, but all that's a  
18 reasonable reliance on the government for advice not to be  
19 later prosecuted.

20           So we feel it's an appropriate instruction. There is  
21 case law that supports that instruction for government  
22 reliance. Certainly that is all over this case. The State is  
23 going to argue that the Department of Family Services and CPS  
24 was way out of line. They didn't do the right things here, and  
25 we're going to argue that to the extent that they gave explicit

1 or implicit approval the Solanders had a right to rely upon  
2 that because that's reasonable given these circumstances.

3 THE COURT: Well, it would have to be reasonable in  
4 good faith --

5 MR. FIGLER: Reasonable.

6 THE COURT: Because --

7 MR. FIGLER: Okay. I could add in good faith.

8 THE COURT: Well, I'm just saying if you were to even  
9 get that because look, a lot of it was oh, the buckets. Okay,  
10 well, they've got these digestive issues, and that's why the  
11 kid -- and again, I recall one kid, not three kids are having  
12 to sit on the buckets. And oh, they have this that and the  
13 other thing which it turns out they really don't have. So I --  
14 it's not just reasonable. It has to be good faith because if  
15 you're lying to the government and then getting them to approve  
16 things, then that's not good faith.

17 MR. FIGLER: Okay. I could easily put --

18 THE COURT: I'm just saying, I mean --

19 MR. FIGLER: I could put good faith in there. That  
20 doesn't change burdens.

21 THE COURT: Well, I don't know that you're entitled.

22 MS. BLUTH: I -- so first of all, I just want to  
23 really tailor what DFS knew about. Number 1, was the buckets,  
24 but only the --

25 THE COURT: But it was one bucket; right?



1 MS. BLUTH: Well, so, yes, but the showers and the  
2 sleeping -- not those things. I'm trying to --

3 THE COURT: They didn't know about the catheters?

4 MS. BLUTH: Oh, no.

5 MR. FIGLER: Well, no. There was never a disclosure  
6 about catheters.

7 MS. BLUTH: But I'm talking -- okay, so the buckets  
8 was one thing, and then there was -- I thought -- Dayvid,  
9 didn't you say one other thing.

10 MS. MCAMIS: When Jan Finnegan went out they  
11 interviewed and they investigated about the restricted water  
12 usage and also the limited food, that there were only two meals  
13 a day for at least one period of time of three weeks. They did  
14 know about all that.

15 THE COURT: And the blended food.

16 MS. MCAMIS: They knew all about that.

17 THE COURT: Did they know about the blended food?

18 MS. MCAMIS: Yes. Crystal Rosas did interview about  
19 that.

20 MS. BLUTH: Yeah. Yes.

21 MS. MCAMIS: And specifically that was all disclosed  
22 to her.

23 MS. BLUTH: But here's the issue. If Janet had told  
24 them the whole truth, and then the government was like, oh,  
25 okay, you're good, then I agree with the defense that they'd be

1 entitled to it, but when she doesn't tell them the whole truth,  
2 then she knows that they don't know everything, and she can't  
3 have -- she can't rely on their -- them saying okay. Does that  
4 make sense?

5 THE COURT: No. I mean, my bigger issue is well,  
6 have they presented enough evidence, or is there enough  
7 evidence in the record that they are entitled to the  
8 instruction. Even though it's not comprehensive or even though  
9 clearly there are things that the government didn't know about  
10 that are critical to the case.

11 And she, I mean, the evidence was she either  
12 exaggerated or completely misstated things that would have  
13 formed the basis of at least some of the employees saying, oh,  
14 yeah, that's okay -- like the buckets. So, you know, if you're  
15 saying, oh, well, the doctor told me to do this, and then the  
16 employee says oh, well, okay. If the doctor -- now the  
17 employee may have dropped the ball in not saying, well, who's  
18 your doctor, and I need a doctor's letter, and I need the  
19 medical records, but if you're lying to the government and then  
20 they say, oh, yeah, okay, that sounds reasonable, but it's  
21 based on misrepresentation.

22 Why don't we do this? What about something like --  
23 what did you propose? Can you print that out?

24 MR. FIGLER: Okay. I could actually print it right  
25 now and send it to -- let me send that to Crystal. That will

1 take me one second.

2 THE COURT: Do we have an ETA on Faiza?

3 MR. FIGLER: She's right here in the court right now,  
4 I believe.

5 MS. BLUTH: No that's Yvette and Frances.

6 MR. FIGLER: Oh, no. That is Yvette, sorry, and  
7 Detective Emery. I should look before I leap.

8 THE COURT: You folks may be here to watch the  
9 closing arguments. Just so you know Mr. Figler is presenting  
10 one other witness. So we're just finishing up the jury  
11 instructions now. So after the other witness then the Court's  
12 going to read the instructions on the law, which will probably  
13 take about 30 minutes -- 20 minutes maybe, and then we'll move  
14 in. So it's probably going to be conservatively, what, 40  
15 minutes before we move into the actual argument?

16 MR. FIGLER: Oh --

17 MS. BLUTH: Forty minutes?

18 MR. FIGLER: I think that's very optimistic.

19 MS. BLUTH: I would think an hour and a half.

20 MR. FIGLER: I would say an hour and 20 -- hour and  
21 30.

22 THE COURT: An hour and a half. So you folks are all  
23 welcome to sit and watch whatever else, but just to let you  
24 know.

25 MS. BLUTH: Or go to Starbucks.

1 THE COURT: And, of course, the media might be  
2 interested in Faiza and the witness. I don't know if you guys  
3 are. So at least 45 minutes to an hour before the State  
4 actually starts their closing.

5 UNIDENTIFIED SPEAKER: Okay. Thank you. We'll be  
6 back.

7 THE COURT: And like I said, the media, I don't know.  
8 They might be interested in the next witness.

9 (Pause in the proceedings)

10 THE COURT: Dayvid, did you just make this up, or did  
11 you get this from something?

12 MR. FIGLER: I pulled these from a number of  
13 government reliance cases. Obviously there's no child abuse  
14 government reliance case, but there are for fraud. There are  
15 for all sorts of money crimes. There is even an escape charge  
16 that was in there. There's some interesting stuff that was in  
17 there.

18 THE COURT: Is this the language?

19 MR. FIGLER: That is the language. Well, good faith  
20 is -- Your Honor put that in.

21 THE COURT: Right.

22 MR. FIGLER: It was always reasonable and  
23 [unintelligible], but I didn't have a problem with that because  
24 I think that that's always there. They cannot be prosecuted  
25 for the crime if the government approved it, and it's for the

1 jury to determine if the government was reasonable in proof.  
2 So I added explicitly or implicitly because there was no  
3 language that modified. So I figured whatever the jury feels  
4 would be sufficient evidence that would encompass it. So the  
5 only part that I put in was explicitly or implicitly. The rest  
6 comes from those cases, and I have those citations.

7 MR. HAMNER: I mean, the State's position, Your  
8 Honor, is I think the problem with this is that because  
9 Ms. Solander essentially hid the ball and the full extent of  
10 what was going on, I think that this instruction is misleading.  
11 I think they can argue it, but to say that in this case that  
12 the DFS was giving advice, like, hey, it's totally fine to use  
13 the buckets. It's totally fine on the catheters. It's totally  
14 fine withholding food and water.

15 THE COURT: What if we added a sentence then -- just  
16 thinking off the top of my head -- a person who misleads the  
17 government in order to obtain approval and/or acquiescence  
18 cannot use this as a defense or something like that?

19 MS. BLUTH: That's fine with me.

20 MR. HAMNER: I mean, that's fine.

21 MR. FIGLER: If a person intentionally misleads the  
22 government, absolutely. That's fine.

23 THE COURT: A person who intentionally misleads the  
24 government in order to obtain approval and/or acquiescence in  
25 his or her conduct is not absolved from criminal liability.

1           MR. FIGLER: May still -- right. I mean, it doesn't  
2 necessarily mean that they have criminal liability so if we  
3 phrase that carefully, yeah.

4           THE COURT: No, it's --

5           MR. FIGLER: I'm fine with that.

6           THE COURT: -- is not absolved from criminal  
7 liability. What about adding something like that?

8           MR. FIGLER: Or this does not apply to a person who  
9 intentionally misleads the government with the purpose of --  
10 for the purpose of receiving or however you want to do it.

11          THE COURT: Well --

12          MR. FIGLER: I would just say this does not apply.

13          THE COURT: This statute does not apply to a person  
14 who --

15          MR. FIGLER: Yeah.

16          THE COURT: -- intentionally misleads the government  
17 in order to obtain approval and/or acquiescence for his or her  
18 conduct.

19          MS. BLUTH: Yeah.

20          MR. FIGLER: Perfect. We're all on that.

21          THE COURT: Is that good?

22          MR. HAMNER: That works, Your Honor. Yes, Your  
23 Honor.

24          MR. FIGLER: That's a fair modification.

25          THE COURT: That way you can say, okay, it's based on

1 her lying and not doing full disclosure. They can say oh, they  
2 knew about the pots.

3 MR. HAMNER: That's fine.

4 THE COURT: Or whatever.

5 MR. HAMNER: Yes, your Honor.

6 THE COURT: Did you get that? Because I didn't write  
7 it out. Did anyone write that?

8 MS. BLUTH: No, tell me again.

9 THE COURT: Well, okay. A person who intentionally  
10 misleads the government --

11 MS. BLUTH: Okay.

12 THE COURT: -- to obtain approval and/or acquiescence  
13 for his or her conduct is not absolved or -- maybe it was  
14 better -- this instruction does not apply to a person who  
15 intentionally misleads the government to obtain approval and/or  
16 acquiescence for his or her conduct.

17 MR. HAMNER: That works.

18 MS. BLUTH: Okay.

19 MR. HAMNER: It's just that front. That first  
20 sentence.

21 MS. BLUTH: Okay. So we're adding this whole thing  
22 with that.

23 MR. HAMNER: So you're adding this whole thing and  
24 then it should read this instruction does not apply to an  
25 individual who intentionally misleads the government to obtain

1 approval and/or acquiescence for his or her conduct.

2 THE COURT: It should actually grammatically be  
3 approval for and/or acquiescence in his or her conduct.

4 MR. HAMNER: Okay.

5 MR. FIGLER: Okay.

6 THE COURT: Mr. Figler, you're the poet.

7 MR. FIGLER: I believe in free verse, Your Honor. So  
8 unless you want this to rhyme, and I could do that.

9 THE COURT: Everybody fine with the modification that  
10 I think makes it clearer?

11 MS. BLUTH: It's okay.

12 THE COURT: All right.

13 MS. BLUTH: Yeah.

14 THE COURT: What else?

15 MR. FIGLER: All right. The defense had indicated  
16 earlier as we proceeded through this case it became abundantly  
17 clear that more and more documents were relevant based on the  
18 testimony, and all the parties worked as quickly as we could to  
19 secure those documents. That was done in conjunction with  
20 court orders that were occurring throughout the course of the  
21 trial.

22 The defense had learned of some new individuals with  
23 their specific names from the Unity notes as it relates to the  
24 importance of and the interactions of some of the personnel  
25 both through H.O.P.E. Counseling, but more importantly Dr. Lisa



1 Shaffer. The defense has been attempting to locate these  
2 witnesses. These witnesses obviously would have a great deal  
3 of impeachment with regard to Debbie McClain's representations  
4 of the condition of the children at the time of the handoff, if  
5 you will, to Mr. and Mrs. Solander and the foster care system  
6 and some of the representations of Ms. McClain as to why they  
7 were either removed from the case in the case of Lisa Taylor or  
8 why H.O.P.E. was removed from the case when it was transferred  
9 over to what became known as A New Beginning for services, et  
10 cetera, and so the defense has not exhausted all measures.

11 We did, as Your Honor knows, get an investigator  
12 appointed from the office of appointed counsel after a trial  
13 had begun to assist us with various tasks such as serving  
14 subpoenas in locating witnesses. He has been unable to locate  
15 those three witnesses at least, and so we would ask for a  
16 modest continuance in order to find those before we close our  
17 case in chief, and with that I would just submit without  
18 further argument.

19 THE COURT: You need to put the witnesses' names on  
20 the record.

21 MR. FIGLER: Sure. Heidi --

22 MS. MCAMIS: Hanusa, H-a-n-u-s-a; Lisa Taylor, PSR  
23 worker and Dr. Lisa Shaffer. We're not sure of the spelling.  
24 It's either S-c-h-a-f-f-e-r or S-h-a-f-f-e-r. We've seen it  
25 both ways in different records.

1 THE COURT: All right. I know you've been looking,  
2 at least what, over a week for these people?

3 MR. FIGLER: About a week now. I think we got --

4 THE COURT: You haven't found them. So --

5 MR. FIGLER: -- those Monday. We did confirm that  
6 they are not working for H.O.P.E. any longer.

7 THE COURT: Right.

8 MR. FIGLER: We did confirm that.

9 THE COURT: And I don't know if the State even tried  
10 to aid you in finding those people.

11 MS. BLUTH: No. When they told me -- the only way I  
12 can normally do it is that they're still working with the  
13 agency like Faiza. I could get Faiza here, but when they leave  
14 agency it's, like, good luck. I can never find anyone.

15 THE COURT: And then Dr. Shaffer, I guess she's not  
16 practicing anymore. It seems like she would have been really  
17 easy to find. I mean, if she had still been practicing; right?  
18 Just look her up on -- to find her office number. So --

19 MS. MCAMIS: Right. I don't have more information on  
20 that, but I know that we did try to contact, and we've not been  
21 able to.

22 THE COURT: Right. So I mean, I would say there's no  
23 reason to believe --

24 MS. MCAMIS: I don't think she's listed.

25 THE COURT: -- you're going to find these people in

1 two weeks or a day or whatever. So your request is denied.

2 MR. FIGLER: Thank you.

3 THE COURT: Like I said, I mean, she must not be  
4 practicing here, or you have a really bad investigator because  
5 it seems to me like just a simple Google search if she still  
6 has an office would, you know, find such a person. I don't  
7 know if there's -- isn't there some licensing board for  
8 psychologists as well?

9 MR. FIGLER: I mean, we threw a lot at our  
10 investigator.

11 THE COURT: You know what I mean? That that -- it  
12 could have gone that --

13 MR. FIGLER: I don't have a representation of that --

14 THE COURT: -- right, what she did. I'm just saying  
15 who even knows if they're still in the State. So any -- do we  
16 know where Faiza is?

17 MS. BLUTH: She might be outside.

18 MR. HAMNER: Want me to go check?

19 MR. FIGLER: Yeah.

20 MS. MCAMIS: Okay.

21 MR. FIGLER: Go, go, go.

22 THE COURT: Anything else, Mr. Figler?

23 MR. FIGLER: I believe that was it. The only other  
24 outstanding issue is that --

25 THE COURT: Is on the attempts?

1 MR. FIGLER: Oh, besides that, Your Honor, is there  
2 was an outstanding issue that Your Honor had not ruled upon.

3 THE COURT: What was that?

4 MR. FIGLER: It was an e-mail from Ms. Bluth to one  
5 of the BST workers for one of the other foster children as far  
6 as its admissibility or discoverability.

7 THE COURT: Oh, was work product?

8 MR. FIGLER: Yeah.

9 THE COURT: I think I did rule on that on Friday and  
10 said that I didn't see the admissibility of that. So that  
11 request was denied, but I think we covered that on Friday.

12 MR. FIGLER: Okay. Ms. Bluth filing her PowerPoint  
13 from the opening with the court.

14 MS. BLUTH: Yes. I'll do that today. I'm sorry.  
15 Yeah, I've got to print it, but I'll do that today.

16 THE COURT: All right.

17 MR. FIGLER: That was it.

18 THE COURT: All right. So the only issue is whether  
19 or not you're entitled to an attempt sexual assault as a lesser  
20 included, and then we would need to add an instruction on  
21 attempt.

22 MR. FIGLER: Correct. And Your Honor had already  
23 ruled on the -- whether or not Dwight Solander's name and  
24 Danielle Hinton's name gets to continue to appear in the  
25 Information. Did you rule on that?

1           THE COURT: Right. Well, just because they've  
2 been -- they've pled out doesn't mean they have to take their  
3 names from the Information because the evidence that was  
4 presented in the trial pertain to both Dwight and Danielle. So  
5 I don't see why they would have to take that out.

6           MR. FIGLER: All right. Well, as Your Honor may  
7 recall the defense's concern in limine was that those charges,  
8 as opposed to the one that was specifically pled as a  
9 conspiracy, be argued as a conspiracy. So that was our primary  
10 concern. We don't care that his name is in there.

11           We just -- two things. Number 1, conspiracy to  
12 liability is only and explicitly pled as it relates to the  
13 sexual assault charges, but more than that if the jury were to  
14 believe that Dwight Solander caused the substantial bodily harm  
15 on the children, if they even believe there was substantial  
16 bodily harm on the children, that the State not be able to  
17 argue that Janet's on the hook for that if Dwight did it.

18           THE COURT: Right. I remember the arguments, but I  
19 think we discussed this on Friday. And I think I said, well,  
20 they were acting together, and it might be impossible to  
21 discern who hit the stick -- I mean, they both were hit with  
22 sticks, according to the testimony, that caused bleeding. I  
23 mean, both Dwight and Janet hit the girls with sticks, if you  
24 believe the testimony, that caused bleeding, and it would be  
25 impossible, I think, for the State to establish whether it was

1 Dwight or Janet and they were acting together as part of a -- I  
2 mean, I think it was quite clear, and I think the defense was  
3 put on adequate notice, number 1, and number 2, I think that  
4 the evidence bore that out.

5 So in terms of any kind of notice issue, I think the  
6 defense was on adequate notice as to how the State was going to  
7 be proceeding on that.

8 MS. BLUTH: Faiza is walking through security right  
9 now.

10 THE COURT: Okay. So the only other issue is on  
11 whether or not they are entitled to an instruction of attempt  
12 sexual --

13 MR. FIGLER: Right.

14 THE COURT: I have a question for the defense. If  
15 you believe that she was inserting the catheter for a medical  
16 purpose, which is the defense's case, then how could you also  
17 think it might be an attempt sexual assault?

18 MR. FIGLER: Well, we can dispute. We can have --

19 THE COURT: You know, if she's just -- right.

20 MR. FIGLER: We don't believe that the catheter made  
21 it in, but that everything, but that probably did happen. In  
22 other words, the threat, the preparation and actually further  
23 preparation to scare the children, but that didn't go in, but  
24 even if it did go in, her intent was for medical purpose. I  
25 mean, we're allowed to argue it that way.

1           It -- you're going to hear from the closing that we  
2 are adamantly suggesting in our argument that it never went in,  
3 but even if you believe it went in there's that out, and I  
4 think that's fair game.

5           Oh, we still have to talk about the medical records  
6 as long as we're just killing time on the record.

7           THE COURT: Oh, okay.

8           MR. FIGLER: All right. So the defense wanted to  
9 introduce part and parcel as self-authenticating the medical  
10 records that we were provided by the State of the children. In  
11 the alternative, Ms. McAmis and myself, while questioning the  
12 various doctors, did get the doctors who testified to state on  
13 the record that these were their medical records that they kept  
14 in their ordinary course, et cetera. If you recall Ms. McAmis  
15 would always end with that particular question with those  
16 witnesses.

17          THE COURT: Right.

18          MR. FIGLER: So in the alternative if they don't come  
19 in part -- in full we would ask that at least the parts that  
20 correspond to the witnesses who testified be allowed to come  
21 in.

22          MS. BLUTH: We already ruled -- we already ruled on  
23 this on Friday.

24          THE COURT: I don't think we did.

25          MR. FIGLER: No.

1 THE COURT: I think -- what's the State's -- I mean,  
2 you should have moved to admit the medical records when the  
3 witness was here.

4 MS. BLUTH: But are we talking about -- isn't this  
5 the same argument that we had when Dr. Cetl was on the stand  
6 and you moved to put it in --

7 MR. FIGLER: I did.

8 MS. BLUTH: -- and I said if you wanted them in, then  
9 you should have done it --

10 MR. HAMNER: Right.

11 MS. BLUTH: -- brought in your own expert  
12 or -- because I don't have any way -- I didn't, in my medical  
13 record, I didn't have a custodian sheet.

14 THE COURT: Right.

15 MS. BLUTH: And so I can't -- I'm not saying that  
16 defense wasn't given my exact copy, but I don't know if things  
17 are taken out, things are added. So my issue is there's no way  
18 for me to authenticate the medical records.

19 THE COURT: Right.

20 MS. BLUTH: And the defense had the opportunity --

21 THE COURT: I mean, to me I think Mr. Figler  
22 correctly says that some of the records were authenticated by  
23 the physicians themselves who looked at the records and said,  
24 these are my records, but then you should have moved to admit  
25 the records when the witness was here so that Ms. Bluth could



1 have then said, well, wait a minute. Where -- is there --  
2 should there be another record here, and you didn't.

3 So I think, yes, you properly authenticated them at  
4 the time, but what you should have moved to admit right then  
5 and there when the witness was here and could have been  
6 questioned more about the records.

7 Now, had you moved to admit them with the doctor I  
8 would have admitted them because they would have been properly  
9 authenticated, but that would have given the State an  
10 opportunity to question them on voir dire before I admitted  
11 them to see if they were complete or whatever, and so I  
12 don't -- I think your request is actually untimely although,  
13 like I said, I think, yes, they could -- were in some part  
14 properly authenticated through the witnesses, but why didn't we  
15 move to admit them then?

16 MR. FIGLER: Well, it's the State's case in chief and  
17 we thought it would be more impactful to do that in --

18 THE COURT: Right. But what I'm saying --

19 MR. FIGLER: Well, we did try to do it through  
20 Dr. Cetl because Doctor Cetl said she relied on numerous  
21 records, and so that was the defense strategy for whatever, you  
22 know, to whatever end is that it would be best to confront  
23 Dr. Cetl with those particular records at that time. Again, it  
24 was all during the State's case in chief, and the State chose  
25 not to admit the records that they were talking to those

1 witnesses about.

2 THE COURT: Right.

3 MR. FIGLER: We did have those authenticated, and we  
4 thought that it would be appropriate to move in our case in  
5 chief to introduce those. We'll just submit it to the Court.

6 THE COURT: All I'm saying is that I think it should  
7 have been doing contemporaneously with the witness so that the  
8 State would have had an opportunity to question the witness  
9 more on the records, and like I said, they could have even  
10 taken the witness on voir dire prior to the Court admitting the  
11 records, and I would have let them do that if in  
12 cross-examination -- although it frankly would have looked a  
13 little weird in front of the jury as to why the State was not  
14 agreeing to admit the records of their own witnesses, but --

15 MR. FIGLER: I mean, in the alternative --

16 THE COURT: They still could have done it -- yes.

17 MR. FIGLER: In the alternative we would ask for a  
18 modest continuance to be able to pull all those doctors back  
19 in --

20 THE COURT: Let me just -- let's cut to the chase.  
21 Why do you need the records in?

22 MR. FIGLER: Well, I think that the jury needs to see  
23 what was relied upon. The State's argument over and again is  
24 that -- well, no medical documentation was ever provided to you  
25 for any of these things. The Solanders didn't give you any

1 medical documentation about anything.

2 THE COURT: Well, you can still argue, Mr. Figler.  
3 You heard testimony about this big stack of records that the  
4 State chose not to admit, and, you know, it's not -- you saw  
5 doctors sit up here and page through pages of medical records,  
6 and that was the record in this case that Ms. Solander -- so I  
7 mean to me I think you could still -- look, it was done in  
8 front of the jury. They refresh their memory with pages of  
9 medical records. So I don't think it would be inappropriate  
10 argument for the defense to stand up and say, look the State  
11 never admitted these records. So but you saw the doctors read  
12 through these records. I think you could do that.

13 MR. FIGLER: Thank you, Your Honor. We just asked  
14 that --

15 THE COURT: I mean, I don't see that as  
16 inappropriate. You know if it was the State's case in chief  
17 then maybe it would be, but like I said, it happened in front  
18 of the jury. They reviewed the records, so you can talk about  
19 it.

20 MR. FIGLER: All right. Thank you, Your Honor. We'd  
21 asked that they be marked as State's -- or sorry as court  
22 exhibit.

23 THE COURT: As a court exhibit?

24 MR. FIGLER: Yeah.

25 MS. BLUTH: And then I just have one more thing. In

1 regards to the videos, how many nanobytes, gigabytes, whatever,  
2 videos were there that you obtained from Mr. Mueller?

3 MS. MCAMIS: I have no way of estimating.

4 MR. FIGLER: A lot -- a hundred hours maybe.

5 MS. BLUTH: A hundred hours?

6 MR. FIGLER: At least.

7 MS. MCAMIS: More than a hundred. I think it spanned  
8 several months, maybe even up to a year.

9 MS. BLUTH: Okay. So I'm just asking that the Court  
10 make an exhibit of those videos because --

11 MR. FIGLER: You can request those from Mr. Mueller.

12 MS. BLUTH: No. I'm asking -- the defense said I  
13 could have a copy, number 1, and also I'm asking for the Court  
14 to order a copy be made a court's exhibit. I don't need them  
15 for my file, but if there is a conviction, I can see this down  
16 the line someone saying so-and-so was ineffective for not  
17 putting these videos in, and so I would like those made as  
18 court exhibits so down the line if that becomes an issue, then  
19 we have access to those to use with Ms. McAmis or Mr. Figler  
20 should they have to take the stand at a later time.

21 MR. FIGLER: I would ask that -- we don't have the  
22 hard drive. So I would ask that Mr. Mueller be brought in, and  
23 if the Court is inclined to do that, to order Mr. Mueller to  
24 have his client turn it over to the Court or a reasonable  
25 facsimile of it.

1 MS. BLUTH: Why -- I mean, the defense was going to  
2 give me a complete copy. So --

3 MR. FIGLER: At the time when we still had it, and  
4 then it was given back.

5 THE COURT: Mr. Figler, you don't have it?

6 MR. FIGLER: I don't have the hard copy or the hard  
7 drive.

8 MS. BLUTH: I'm not asking for the hard copy. I'm  
9 asking for whatever they have.

10 MR. FIGLER: Oh, I'll give her whatever we have.  
11 That's fine.

12 THE COURT: Okay. So he'll give --

13 MR. FIGLER: But I don't know that's complete,  
14 Jacqueline. I don't --

15 MS. BLUTH: Oh, I'm going to get --

16 MS. MCAMIS: It's the volume of it --

17 THE COURT: Okay. So he'll give you whatever he has,  
18 and then you can have that marked as a court's exhibit, and it  
19 should clearly reflect, number 1, the Court has not viewed it  
20 nor has the Court been requested to view it. Because if  
21 there's something down the road in there that's either  
22 extremely exculpatory or inculpatory, mainly exculpatory, I  
23 don't want anyone to think that the Court has seen it.

24 MS. BLUTH: No.

25 THE COURT: So well, it's just -- you know.

1 MS. BLUTH: Right. Of course. Yeah.

2 THE COURT: I want to make it really, really clear.  
3 So when you put it in say not viewed by Court because I don't  
4 want it to be like, oh, I was asked to look at it, and you know  
5 what I'm saying?

6 MS. BLUTH: Like CPS records.

7 THE COURT: If there's something really exculpatory  
8 on here down the road, I don't want anyone to think that I saw  
9 it and didn't say anything.

10 MR. FIGLER: That's fine. I'll need some time  
11 because I would have to go back to my office, see what we have  
12 saved, haven't saved. I'm not going to ask Mr. Solander to  
13 give me back anything.

14 THE COURT: Right.

15 MR. FIGLER: And whatever I have I will give to the  
16 Court as a court exhibit, and I imagine the State would get  
17 that too.

18 THE COURT: All right. Let's take a quick break.

19 MS. BLUTH: Faiza's outside just so you know.

20 THE COURT: Let's start with Faiza. We'll put the  
21 jury in. We'll finish her, and then we'll take like a 5 or 10  
22 minute break. We'll number the jury instructions. Go ahead  
23 and send me or send Crystal the assault instruction just in  
24 case I'm going to give that.

25 MR. FIGLER: Attempt you mean?

1 THE COURT: Oh, the attempt. Thank you.

2 MS. BLUTH: Okay. So I sent it to -- I typed  
3 everything out, sent it to my secretary to format. I'll tell  
4 her right now at that [unintelligible] to add the attempt  
5 language.

6 THE COURT: Okay.

7 MR. FIGLER: And the SOL stuff.

8 THE COURT: And what?

9 MS. BLUTH: I already -- I did that. I already did  
10 that.

11 MR. FIGLER: Oh, okay, great. The statute of  
12 limitation stuff.

13 THE COURT: Oh, okay. So that was another  
14 instruction. So let's just take a really quick, you know,  
15 couple minute break. Then we'll start with Faiza. Then we'll  
16 take another break assuming that's all we have for this  
17 morning. We'll get this all finalized, and then we'll go to  
18 instructions.

19 Frankly, I have been request -- it had been requested  
20 of me that I pass out 15 copies. Because it's so late, and  
21 that would take time for my staff to print out 15 copies,  
22 they're not getting 15 copies. I'm just going to read from it  
23 because there just isn't time to --

24 MS. BLUTH: Yeah.

25 THE COURT: That would take another 30 minutes.

1 MS. BLUTH: So the way that they are printed right  
2 now they're, like, not in any type of order at all. So may I  
3 ask Crystal to hand them to me? I'll put them in order, make  
4 sure the defense is okay with them before we number them?

5 THE COURT: Sure.

6 MS. BLUTH: Okay.

7 THE COURT: And then give me --

8 MS. BLUTH: Then number them or do you want to number  
9 them or -- some Judges are like I want to number them and so  
10 on.

11 THE COURT: No. I usually number them. We all -- as  
12 long as I get a copy of -- but okay. So that's fine, but don't  
13 number them yet.

14 MS. BLUTH: Okay. I won't. I won't.

15 (Proceedings recessed 10:22 a.m. to 10:29 a.m.)

16 (Outside the presence of the jury)

17 THE COURT: -- and then we'll go into the  
18 instructions.

19 MS. BLUTH: Sounds good.

20 THE COURT: So I'll get a new packet; right?

21 MS. BLUTH: Yeah. She's just making the changes  
22 right now.

23 MR. FIGLER: And then we'll take a second and number  
24 them together.

25 THE COURT: And what?



1           MR. FIGLER: We'll take a second to number them  
2 together.

3           THE COURT: Yes. We're going to take a break with  
4 the jury. We'll number them together, make sure we all have  
5 the same copy of everything, and all the changes have been made  
6 to everybody's satisfaction.

7                               (Pause in the proceedings)

8           MR. FIGLER: Your Honor, we had moved previously to  
9 admit the search warrant but not the application for search  
10 warrant. This is the actual search warrant.

11          THE COURT: Yeah, that's fine.

12          MR. FIGLER: I thought that was admitted.

13          THE COURT: The actual search warrant is admissible.

14          MR. FIGLER: You didn't have any objection to the  
15 actual search warrant?

16          THE COURT: Not the application.

17          MR. FIGLER: Not the application, just the search  
18 warrant itself. We had moved it.

19          MR. HAMNER: I don't even remember that happening,  
20 but that's fine. No objection.

21          MR. FIGLER: That was through Detective Emery.

22          THE COURT: All right.

23                               (Jury entering 10:30 a.m.)

24          THE COURT: All right. Court is now back in session.  
25 The record should reflect the presence of the State through the

1 deputy district attorneys, the presence of the defendant and  
2 her counsel, the officers of the court and the ladies and  
3 gentlemen of the jury.

4 And the defense may call its next witness.

5 MR. FIGLER: Your Honor, the defense would call Faiza  
6 Ebrahim.

7 **FAIZA EBRAHIM**

8 [having been called as a witness and being first duly sworn,  
9 testified as follows:]

10 THE CLERK: Thank you. Please have a seat. State  
11 and spell your first and last name for the record.

12 THE WITNESS: Faiza Ebrahim. F-a-i-z-a,  
13 E-b-r-a-h-i-m.

14 THE COURT: All right. Thank you.

15 THE COURT RECORDER: Could you -- I'm sorry. Could  
16 you do that again.

17 THE WITNESS: Sure. First name is F-a-i-z-a. Last  
18 name E-b-r-a-h-i-m.

19 THE COURT RECORDER: Thank you.

20 THE WITNESS: You're welcome.

21 **DIRECT EXAMINATION**

22 BY MR. FIGLER:

23 Q Ms. Ebrahim, could you tell the jury what you do for  
24 a living right now?

25 A Right now I am a CPS investigator in the west zone of

1 Clark County.

2 Q Okay. And prior to that, what was your -- were you  
3 employed by the county in approximately February of March  
4 of 2014?

5 A Yes.

6 Q And in what capacity did you serve at that time?

7 A I was the forensic interviewer and program  
8 coordinator of the SNCAC.

9 Q And what is that acronym for?

10 A Southern Nevada Children's Assessment Center.

11 Q Okay. That's a government entity that I have heard  
12 referred to as a one-stop shop for people who or children who  
13 are alleging sexual abuse; is that fair to say? I know they do  
14 some other things, but they do that there as well?

15 A Correct. Predominantly sex crimes, but there is,  
16 like, other high profile, torture and murder and all that sort  
17 of stuff.

18 Q Okay. And then working as a forensic interviewer in  
19 that capacity, what were your responsibilities?

20 A As a forensic interviewer, basically it was just to  
21 interview the children. Law enforcement or CPS would set up  
22 appointments with us, and then we would get a bit of a briefing  
23 from them about what the allegations are, and then we would  
24 interview the kids.

25 Q And what safeguards or precautions would you take at

1 that time to make sure that the information that you were  
2 receiving from those children was usable or valid information?

3 A The information that I got from the children --

4 Q Yes.

5 A -- or that was given to me prior?

6 Q No, from the children themselves.

7 A Well, a forensic interview is -- like I wouldn't ask  
8 a whole lot of closed ended questions. It would be, you know,  
9 we were trying to get a narrative response from the children,  
10 and so sometimes we would ask the same question in a slightly  
11 different way, and, you know, depending on the number of  
12 children involved, if there were more kids on the same case,  
13 then we would kind of go through similar questions with each of  
14 them.

15 Q Are there any safeguards that are put in place with  
16 regard to the interview itself? In other words, what would be  
17 a possible -- let me rephrase the question. What would be some  
18 possible sources of tainting information or to have  
19 information -- to avoid having information that wasn't valid or  
20 was maybe influenced by other people? Do you understand my  
21 question?

22 A I think so. Well, when we talk to the kids, one of  
23 the things that we go through is actually to try to suss out if  
24 somebody has led the kids or coached them in some way or, like,  
25 told them, you know, you need to say something. And all of the

1 interviews at the SNCAC that are done are recorded as well, and  
2 as a forensic interviewer, we never do the interview without  
3 either law enforcement or CPS in the observation room watching  
4 it live.

5 Q And when you say it's recorded, is it recorded in  
6 audio or visual?

7 A Both.

8 Q Oh. So there's an audio and a video component to  
9 those interviews. And what is the purpose of that? Why audio  
10 and video or why either?

11 A That's a national standard for all accredited CACs.  
12 You have to have them recorded through NCA which is the  
13 National Children's Alliance, and because we are -- I'm not  
14 interviewing for CPS or for law enforcement. We're a neutral  
15 entity. So it's not, like, my evidence. So we have to be able  
16 to just pass it on.

17 Q Okay. And it's important for you to be a neutral  
18 entity?

19 A Correct.

20 Q And so would you say that you intentionally restrict  
21 the amount of information that is given to you by law  
22 enforcement as to not in any way influence or bias your  
23 forensic interview of the children?

24 A When you say "intentionally restrict," what do you  
25 mean?

1           Q     Is it a policy or is it good practice to limit the  
2 type or the amount of information that you get prior to going  
3 into a forensic interview?

4           A     Yes. And, like, oftentimes when I get a case that,  
5 even now in the capacity of being an investigator, if I have a  
6 case that I know media is involved in, I intentionally don't,  
7 if I see something come up on the news, I don't read it. I  
8 don't watch it because I don't want anything else in my mind  
9 other than what the kids are going to tell me. So even if  
10 somebody gives me information ahead of time, there's no reason  
11 for me to deal with that other than -- all I need to know is  
12 what the basic allegation is, and then I go from there.

13                     Even if they come and tell me the allegation is a  
14 sexual assault that happened in a bedroom and they give me lots  
15 of details with it, I'll still go down the path of abuse,  
16 neglect and everything else.

17           Q     Okay. One last question on this topic. When you are  
18 interviewing a child, especially a young child, is it important  
19 to not suggest the answer to them or to try to prompt a  
20 specific answer out of them?

21           A     Yes.

22           Q     And back in 2014, would it have been your practice to  
23 avoid doing that?

24           A     Yes.

25           Q     Okay. And what happens if you did that? Is the

1 resulting information that's elicited perhaps not as reliable  
2 as if you hadn't done that? Is that fair to say?

3 A Sorry. Say that again.

4 Q Yeah, I know that was a very complicated way to  
5 structure it. Why is it important for you not to suggest the  
6 answer or prompt an answer?

7 A Because as a forensic interviewer or even as an  
8 investigator, my job is to get information from the child that  
9 is their experience, not anybody else's experience or anybody  
10 else's assumption. It's strictly what the child experienced.

11 Q Okay. So now I'm going to draw your attention to  
12 March 11th of -- March 11th of 2014. Do you recall a  
13 interview with a sibling set of three young girls known as the  
14 Solanders?

15 A Yes.

16 Q Okay. And were you the forensic interviewer on that  
17 date for those three young girls?

18 A Yes.

19 Q Okay. And again that was March 11, 2014; is that  
20 your recollection?

21 A Yes.

22 Q Okay. Now, did you interview those girls together in  
23 one room or separately?

24 A The same room separately.

25 Q Okay. At different times presumably?

1           A     Yes.

2           Q     Okay. And so why is it important to have the girls  
3 interviewed separately?

4           A     Well, we want each child to feel comfortable to say  
5 whatever they need to say. If you have them -- if you're  
6 interviewing them at the same time, one child may be less  
7 comfortable than the other; one child may try to stop the other  
8 child from saying certain things; or one may try to encourage  
9 them to say things they're not comfortable with. Each forensic  
10 interview is set up specifically for that child and so that  
11 child feels comfortable, and they're free to say what they  
12 want, how they want as well as if they don't want. Sometimes  
13 we have kids that just aren't ready to divulge certain  
14 information.

15          Q     Do you know whether or not they were interviewed 10  
16 days earlier by a family services representative from a  
17 different state?

18          A     Not that I know of. I know that there was an  
19 arrangement for them to be flown back to Vegas from Florida.

20          Q     Okay.

21          A     But I am unaware of another interview.

22          Q     You are unaware of whether or not there was an  
23 interview --

24          A     Correct.

25          Q     Okay. If I told you that it was 10 days earlier that



1 they were in Florida, would that sound to be part of your  
2 recollection as well?

3 A Yes.

4 Q Okay.

5 A I remember they were in, I think, a boarding school  
6 out there.

7 Q Okay. So it did refresh your recollection. Very  
8 good.

9 Okay. But you don't know what conditions were in  
10 place to allow the girls to be separate or apart during that  
11 10-day period?

12 A Correct. I don't know.

13 Q Okay. And then what about after that 10-day period?  
14 Did you ever interview those girls again or participate in any  
15 interview with those girls?

16 A After I did the forensic interviews in 2014?

17 Q Correct.

18 A I did. Last year I believe there was a case that  
19 came through, but it was unrelated to this situation.

20 Q Okay. Were there additional interviews done?

21 A Not forensic interviews. They were just kind of  
22 checking in with the family.

23 Q Okay.

24 A Where they were staying at the time.

25 Q Oh, I see. So that was in an interview about the

1 subject matter of this case?

2 A Correct. It had nothing to do with this situation or  
3 this -- the Solander family.

4 Q Okay. Are you aware or not as to whether or not the  
5 Clark County District Attorney's office does what's known as  
6 pretrials or interviews with the children prior to coming to  
7 court?

8 A I think they do in pretty much all cases, I would  
9 imagine.

10 Q Okay. Do you know if they utilize the same  
11 safeguards as audio and video and the other national standards  
12 that you referred to in interviewing children?

13 MS. BLUTH: Objection. Speculation.

14 BY MR. FIGLER:

15 Q Do you know?

16 THE COURT: Do you know?

17 THE WITNESS: If the DA's office does that?

18 MR. FIGLER: Yes.

19 THE WITNESS: I don't know, but the national  
20 standards I'm referring to are for CAC specifically. It's not  
21 for any -- it's not even for CPS or law enforcement. It's  
22 strictly for children's advocacy centers.

23 BY MR. FIGLER:

24 Q Okay. But you did testify that recording those  
25 videos and keeping kids separate is important to maintaining

1 the integrity of the information being related to you by the  
2 children; correct?

3 A Yes, for forensic interviewers because of our  
4 position.

5 Q Only if you're aware, are you aware of any audio or  
6 video recording done by the Clark County District Attorney in  
7 meeting with the children in this case?

8 A I have no idea.

9 Q Okay. I want to direct your attention to March 7th  
10 of 2014. Do you know an individual named Payal Patel?

11 A Yes.

12 Q And who is that individual?

13 A I believe she was the DA at the time, maybe in family  
14 court I think.

15 Q Okay. Do you remember receiving an email from Payal  
16 Patel related to this case on March 7th, 2014?

17 A I may have. I'm not sure what the --

18 Q I'm going to show you what has been marked as Defense  
19 Exhibit --

20 MR. FIGLER: Where's the number on it?

21 THE CLERK: On the back.

22 MR. FIGLER: I would assume I kept them in order,  
23 Jill.

24 Well, I know it's going to be a letter.

25 THE COURT: Counsel, approach.

1 (Conference at the bench not recorded)

2 BY MR. FIGLER:

3 Q I'm going to show you what's been marked as Defense  
4 Exhibit BB. I'm going to show you these two emails that have  
5 been admitted. Why don't you review those and see if it  
6 refreshes your recollection.

7 A Oh, I remember this, yeah.

8 Q Okay. So let me ask you just a couple questions  
9 about it. Do you remember receiving then a email from Payal  
10 Patel from the district attorney's office on March 7th, 2014,  
11 referencing Janet Solander's book?

12 A Yes.

13 Q Okay. And do you remember forwarding that to a  
14 number of other individuals at 7:40 a.m. on Tuesday, March  
15 11th?

16 A I don't remember it, but I saw it on there.

17 Q Does that refresh your recollection --

18 A Yes.

19 Q -- that you might have done that?

20 A Yes.

21 Q Okay. And at 7:40 in the morning, would that have  
22 been before or after you think you did the three Solander  
23 girls' interviews, if you can recall?

24 A If that was on March 7th, I --

25 Q Oh, I'm sorry. Let's go back to March 11th. On

1 March 11th, you sent a email -- forwarded the email about  
2 Janet Solander's book. It appears to be at 7:40 to three  
3 people. So would that have been before or after you  
4 committed -- or conducted the forensic interview of the three  
5 children?

6 A That would've been before.

7 Q Okay. Finally, I have the forensic interview of Ava  
8 Solander. I'm going to approach you with page 65. If you  
9 could just review that full-page so you get the context.

10 A Okay.

11 Q If you need a page before or after, just let me know,  
12 but I think that has the context there. So just review that.  
13 See if it refreshes your recollection.

14 A Okay.

15 Q I mean, I'm assuming you don't remember every page of  
16 the forensic interview and what was said with regard to the  
17 specific topic.

18 A I actually wasn't aware that I was going to be  
19 testifying today.

20 Q Fair enough.

21 A So I haven't looked at those --

22 Q That's why --

23 A -- interviews since 2014.

24 Q -- I kind of skipped a step to let you read that.

25 A Okay.

1           Q     So why don't you take your time, and if you need  
2 additional pages, let me know.

3           A     Okay.

4           Q     If you need the cover sheet just to verify that  
5 that's the same one, let me know that as well.

6           A     Okay. Just that one page; right?

7           Q     Just that one page.

8           A     Okay.

9           Q     Okay. In reviewing that, does that refresh your  
10 recollection of that sequence of questions with Ava Solander?

11          A     I believe that had to do with the Home Depot buckets  
12 with the toilet seats attached to it.

13          Q     Okay. And do you remember asking the child if there  
14 was another way of getting the pee out of her body?

15          A     Correct.

16          Q     Okay. And do you remember her not responding to  
17 that?

18          A     Yes.

19          Q     And do you remember prompting her about what her  
20 sister had told her about a tube and a bag?

21          A     Yes.

22          Q     Okay. So is it your testimony that you had to prompt  
23 her to get that response?

24          A     Well, it's not prompting her. It's giving a little  
25 bit of information that her sister said. But the way I

1 provided the information, she could say she doesn't know  
2 anything about what her sister said, and I'm not a hundred  
3 percent sure because, like I said, I haven't looked at these  
4 interviews since 2014. I'm not -- I can't remember if all  
5 three girls had the same experience or not when it came to the  
6 buckets.

7 Q Okay. I'm not talking about the buckets now. I'm  
8 talking about the catheters. I think there's already been a  
9 stipulation between the parties. Do you accept the stipulation  
10 as true that Amaya Solander in her forensic CPS interview did  
11 not mention catheters at all?

12 MS. BLUTH: I'm sorry. In what?

13 MR. FIGLER: In her CPS interview -- Amaya.

14 Can we approach, Your Honor? I just want to make  
15 sure we do this right.

16 THE COURT: Sure.

17 (Conference at the bench not recorded)

18 BY MR. FIGLER:

19 Q Ms. Ebrahim, if I told you there was a stipulation  
20 between the district attorney and the defense that Amaya  
21 Solander, who is the middle child, did not mention anything at  
22 all about catheters or the allegation of insertion of catheter,  
23 anything about that at all in her statement, would you accept  
24 that as being a true stipulation, or do you need to review this  
25 yourself?

1           A     No, I would accept that.

2           Q     Okay. So just focusing on Ava Solander, you do admit  
3 to be the one who brought up her sister telling you something  
4 else in another interview; is that correct?

5           A     Yes.

6           Q     And you were the one who brought up, quote, Some kind  
7 of a tube thing with a bag, as a prelude to her responding  
8 with, Oh, catheter?

9           A     Correct.

10          Q     And then when you asked her what a catheter was, do  
11 you remember her response being, It has a tube, and it has a  
12 bag?

13          A     Only from --

14          Q     Do you remember that now if I showed that to you?

15          A     Yes.

16                 Oh, yes. Uh-huh.

17          Q     And that's her response?

18          A     Yes.

19                 MR. FIGLER: Okay. Pass the witness, Your Honor.

20                 THE COURT: All right. Thank you.

21                 Ms. Bluth.

22                 MS. BLUTH: Yes, Your Honor.

23                         CROSS-EXAMINATION

24           BY MS. BLUTH:

25          Q     Okay. I want to ask you a few questions, but I want



1 to make sure I get the question right. So just one second,  
2 please.

3 All right. Now, in her answer, and I'll approach if  
4 you don't remember it off the hand, after -- your question to  
5 her is, Your sister was telling me about some kind of tube  
6 thing with a bag. And she says, Oh, catheter. And you say, A  
7 catheter, what about a catheter? And isn't it true that her  
8 whole response was, It has a tube, and then it has a bag and,  
9 um, has -- if we have -- if we say we don't have to use the  
10 bathroom but to them it looked like we're pee dancing, they  
11 would put the catheter down in our private area?

12 A Yes.

13 Q So she did provide additional facts and to when the  
14 catheter would be used on her?

15 A Correct.

16 Q Now, you had also -- like you stated, you had  
17 interviewed all three sisters that day; correct?

18 A Yes.

19 Q And so defense brought up that Amaya Solander, the  
20 middle child, did not bring up the catheter, and that was a  
21 stipulation; correct?

22 A Yes.

23 Q But in your interview with Anastasia, the youngest,  
24 she had brought up the catheter?

25 A Yes.