IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S PETITION FOR REHEARING PURSUANT TO NRAP 40

(Direct Appeal from Judgment of Conviction – Jury Verdict)
Sentencing Judge: The Honorable Valerie Adair

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PETITION FOR REHEARING

COMES NOW Appellant, JANET SOLANDER, by and through her undersigned counsel, CAITLYN MCAMIS, ESQ., of the LAW FIRM OF KRISTINA WILDEVELD AND ASSOCIATES and petitions this Honorable Court to rehear the matter based on the Court overlooking and/or misapprehending points of fact, material questions of law and/or controlling authority pursuant to NRAP (40).

DATED this 20th day of JULY, 2020.

Respectfully submitted,
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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S PETITION FOR REHEARING

This Court will consider rehearing when it has "overlooked or misapprehended material facts or questions of law or when (it) have overlooked, misapplied, or failed to consider legal authority directly controlling a dispositive issue in the appeal." **NRAP 40(c)(2)**; ***Bahena v. Goodyear Tire & Rubber Co.*** 126 Nev. 606, 245 P.3d 1182 (2010). In ***Gordon v. District Court***, 114 Nev. 744, 745, 961 P.2d 142, 143 (1998), this Court discussed the proper purpose for petitions for rehearing: "[u]nder our long established practice, rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to ***promote substantial justice***." (quoting ***In re Herrmann***, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984))(emphasis added).

I. The Misapprehension of *Solander I*
(Consolidated Nevada Supreme Court Appeals 67710 and 67711)

The instant litigation surrounding the sexual abuse counts is tied in this Court's Order of Affirmance to the prior Court order in the State's appeal of the district court's ruling that culminated in the reversal found in Solander I. Indeed, this Court elected to not consider the propriety of the sexual assault charge based on catheterization, because "we have already decided that issue." (Order of Affirmance, Page 2, footnote 2).

However, not as much was decided by this Court as it believes, and certainly no direction was given to the lower court regarding instructions (also discussed in the Order of Affirmance).

In sum, African-American woman, Janet Solander and her white husband, Dwight Solander, were originally charged with the identical offenses, including the sexual assault counts. After reading the statute, the lower court still felt there should be an exemption for catheterization, and the State (without any legal precedent on its side) decided to press the issue and be "innovative" in a prosecution that held a life consequence. Once the State prevailed, Dwight Solander (again the white, male in this family) was offered (and given) a three to ten-year sentence, while only Janet was left to contend with the handiwork of this

"innovative prosecutor," which brings us back to the misapprehension of *Solander I* as applied by this Court.

This Court was (and still is) correct in holding that the clear language of **NRS 200.364** defining sexual penetration does not require a sexual intent to be found for sexual assault, however, this Court also held that there are circumstances inherent in the term "sexual penetration" which are excluded from prosecution. The lower court agreed but in doing so felt that catheterization was *per se* an exclusion. This Court did a lengthy analysis is *Solander I* which gave what it believed to be appropriate guidelines to ultimately "the reasons why a catheter was used, and the manner in which it was used, are questions of fact for the jury, not the court, to decide." This is where reliance on the jury verdict falls apart.

Explicitly, in *Solander I*, this Court drew on sources from other jurisdictions to acknowledge an inherent exemption in the Nevada statute, and as noted in the Order of Affirmance, there seemed to be an emphasis on "legitimate" (or alternately) "bona fide" medical procedures. Indeed, in its questioning at oral argument as well as the Order of Affirmance, the Court emphasized that a "legitmate" medical procedure would be exempt.

However, what this Court may have overlooked is that it drew upon ***two*** sources to draw that conclusions, to wit: ***State v. Lesik***, 780 N.W.2d 210, 214 (Wis. Ct. App. 2009) and ***Roberson v. State***, 501 So. 2d 398, 400 (Miss_ 1987).

The ***Lesik*** quotation does indeed use the word, "legitimate" however that is not the only word it uses. As revealed in *Solander I*, this Court noted from that case that "It would be equally absurd to imagine the legislature intended to include legitimate medical, health care and hygiene procedures within the bounds of 'sexual intercourse' for the assault of a child statute. . .. Accordingly, . . . 'sexual intercourse' as used in the sexual assault of a child statute does not include 'bona fide medical, health care, and hygiene ***procedures.***")(emphasis added).

As noted in every court so far by the Defense, catheterization[1] is a legitimate medical, heath care and hygiene procedure. This Court may have overlooked that to be a truism. The catheter in question, in the light most favorable to the State, was used to enter a body cavity (the bladder) to withdraw urine. This Court made special note of an email depicting "300 cc's" of a "catheter bag partially filled with a yellow liquid and a receipt for a catheter purchased by Dwight Solander (who is doing no time in prison for sexual assault). As such, it appears the catheter was used in the legitimate manner for which it was intended as a medical, health care and hygiene procedure.

What apparently, the Court took issue with (and the jury who heard what a monster the African-American parent was) is the intent behind the otherwise

[1] Catheter is defined by the Merriam-Webseter dictionary as: "a tubular medical device for insertion into canals, vessels, passageways, or body cavities usually to permit injection or withdrawal of fluids or to keep a passage open."

legitimate medical, health care and hygiene procedure of placing a catheter tube into the designated place where catheter tubes go. This seems to be the "fact question" this Court deferred to the jury. Thus, the word "legitimate" is no longer being used by this Court as the *legitimacy* of the procedure, but the "legitimacy" of the mindset of the person who performed the procedure – which is problematic for two reasons: (1) this is the creation of a new *mens rea* attached to a statute by this Court that post-dates the conduct at issue, and (2) that erroneous delineation of who goes to prison for the rest of their life and who doesn't wasn't adequately set forth in a way that showed any lenity towards Janet Solander in the jury instructions for a new *mens rea*.

Indeed, this Court pointed out that the proffered (but rejected) jury instruction was not the law – but really wasn't it? In the Order of Affirmance, this Court noted, "Solander asserts that her proffered instruction defining sexual penetration comports with the court's decision in *Solander I*. It did not." (Order of Affirmance, page 10). This brings us to the second case of two cited in *Solander I*, ***Roberson v. State***, 501 So. 2d 398, 400 (Miss_ 1987). Here's the pull quotation THIS COURT used in *Solander I* in citing ***Roberson***, to wit: "Although, on its face, the definition of sexual penetration announced in § 97-3-97 encompasses any penetration, the Court holds the parameters of the definition of sexual penetration

are **logically confined to activities which are the product of sexual behavior or libidinal gratification, not merely the product of clinical examinations or domestic, parental functions**.")(emphasis added).

If those emphasized words look familiar, it is because it is the EXACT language used in the proffered instruction which this Court mistakenly says does not comport with *Solander I*.

In fact, this Court also overlooked that in evaluating a potential medical exemption to the (in effect at the time of conduct in this case) NRS 200.364, this Court's prior decisions have emphasized and given strong note that a medical procedure loses whatever protection it might otherwise have when the Defendant is acting in a purely sexual manner, or in the words of ***Roberson*** (again cited by this Court in *Solander I*) the product of sexual behavior or libidinal gratification. See ***McNair v. State***, 108 Nev. 53, 825 P.2d. 571 (1992).

As such, both the lower court, the defense and indeed, even this Court have previously understood that there is significance to a sexual and/or libidinous behavior to what could otherwise be exempt from sexual assault as a clinical, domestic or parental function. This Court, however, has changed course and not only singularly focused on the inverse that sexual assault does not require "sexual" behavior, but has ignored its precedent and the cases it cited in *Solander I*, that a medical procedure only loses its exemption when it is "sexual" behavior.

This is not how an "innovative" interpretation as a matter of law should proceed, and this is not how the district court phrased its jury instructions. This Court then goes on to place special emphasis on the fact that the jury was instructed allegedly on cue from some (but not all) of *Solander I* and was instructed (over objection) that:

> A person is not guilty of Sexual Assault if the penetration is for a legitimate medical purpose. A reasonable and good faith belief that the penetration is for a legitimate medical purpose is a defense to sexual assault. If the Defendant presents any evidence that the penetration was for a medical purpose, the State must prove beyond a reasonable doubt that the penetration was not undertaken for a legitimate medical purpose. (Jury Instruction 10).

The first obvious problem with both this instruction and only myopically focusing on the (repeated) word of legitimacy is that legitimacy is never defined. The word "legitimate" which does not appear in the statute either at the time of the instant case, or in the subsequent amendment to **NRS 200.364**, is capable of many interpretations and definitions.

The defense would argue that "legitimate" in terms of prior Nevada case law and the cases cited in *Solander I* actually provide as a matter of law means "being exactly as intended or presented" (Merriam Webster dictionary, definition two). where the medical devise at use was used in the manner intended by the manufacturer in the "canal, vessel, passageway, or body cavities" for which is was

designed without, as the ***Roberson*** and ***McNair*** courts noted "sexual behavior or libidinal gratification." In fact, in the light most favorable to the State, the action of Janet Solander resulted in the removal urine, and in one case, of 300 cc's of urine as is the legitimate use of a catheter.

Based, however, on the State's argument, and, second, the kitchen-sink approach to vilifying Janet Solander with other bad acts to non-named victims and bizarre child rearing punishments (discussed infra), it's much more likely that the jury used an alternative meaning of "legitimate" to wit: "conforming to recognized principles or accepted rules and standards" (Merriam-Webster dictionary, definition 4). And even then, "accepted rules and standards" without a specific "mistake of fact" instruction as proffered but not accepted lends itself to a golden-rule argument, which is the inadvertent implication of this Court's Order of Affirmance on this point.

Of course, the dictionary offers a total of five very different definitions of "legitimate" – so it's impossible to know which one the jury used in this *de facto*, Court-improvised structure for the exemptions that inherently live within **NRS 200.364** and now embraced in the Order of Affirmance as precedent.

Thus, this Court overlooked that it has now created a new, ill-defined framework for what is sexual penetration involving a non-sexual medical procedure. And further, this Court has overlooked that it has applied a standard

which encourages the jury to use the golden-rule for what they deem to be "legitimate." In sum, legitimate as used in the instant case without the rest of ***Lesik***, or any of ***Roberson*** or ***McNair***, leads to the unjust consequence of Janet Solander spending the rest of her life in jail for bizarre parenting and using a medical device in exactly the way it is intended to be used. The lower court's instinct was correct, and this Court's analysis in *Solander I* unfortunately derailed the correct result; however, this Court's Order in the instant matter, has taken *Solander I* to an untenable review standard to Ms. Solander's prejudice. Ms. Solander should not be punished for her actions for life in prison while her white, male husband (who engaged in the same discipline and bought the catheters and encouraged the catheterization through dialogue and emails) is only confined for three to ten years in prison.

The Court likely overlooked that this is the consequence of choosing to not thoroughly examine the assertions of the fallibility of **NRS 200.364** and instead deferring to *Solander I* which doesn't say what this Court implies it says, and which doesn't contradict the proffered instructions as was suggested in the Order of Affirmance.

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II. CORPORAL PUNISHMENT IS ALLOWED IN NEVADA. THE STANDARDS OF HOW LONG IS TOO LONG FOR A PUNISHMENT ARE WHAT IS ILL-DEFINED BY STATUTE AND IN THE JURY INSTRUCTIONS.

It is undisputed that corporal punishment is allowed in Nevada, so long as it does not violate **NRS 200.508(1)**. **NRS 200.508(1)** prohibits a person from causing a child "to suffer unjustifiable physical pain or mental suffering." In the Order of Affirmance, this Court mistakenly applied some manner of *per se* holding that the discipline and/or behavioral medication techniques undisputedly used by the Solanders with their three children "are clearly prohibited under the statute." And yet, the argument overlooked and misapprehended by the Court is that there is no per se standard for conduct at question and the line when it crosses over to "unjustifiable" is ill-defined to a person of reasonable intelligence and is therefore constitutionally defective.

Certainly there is a laundry list of conduct imposed upon the children, but none of it is inherently violative of statute. Specifically, (1) sitting on a bucket is not per se child abuse; (2) having ice poured on a child is not per se child abuse; (3) telling a child to hold their urine or bowels is not per se child abuse; (4) using makeshift bedding for sleeping is not per se child abuse; (5) denying food or water at will is not per se child abuse; and (6) being made to defecate while in a bag is

per se child abuse. (see Order of Affirmance, page 7). The Court also noted the allegation of being hit with a paint stick[2]. (Order of Affirmance, page 4)

No, certainly, this Court misspoke when it declared that each of these items was "clearly" a violation inasmuch as any of those items under *some circumstances* or limited impact and/or duration could be "justified" to the extent that it merely comports with either corporal punishment and/or allowable (albeit admittedly nontraditional) parental discretion regarding responses to misbehavior and/or behavioral deficits in troubled youths. For it must be remembered (but seemingly overlooked in this Court's analysis) that these are not average children, but foster kids who suffered significant abuse and endured immense psychological trauma before they ever came to the Solanders. This Court also seemingly overlooked that the Solanders took the children to countless medical practitioners during the relevant time frames outlined in the Criminal Information and not a single one (all mandatory reporters) noted a single instance of child abuse or neglect.

Therefore, this Court misapprehended the argument of counsel, in that the statute itself is capable of application where a parent is never on notice of what

[2] The Court places sole reliance for the proposition that the paint sticks caused scarring on the testimony of the "former foster mother" that she did not note such scarring prior to the Solanders taking the children, but seems to ignore that no medical practioner noted any fresh scarring, and that prior to the immediately prior

changes the actions from allowable to disallowable. The Court seemingly relies in its Order of Affirmation of the word "extended" periods of time, and that was the time frame complained about as ill-defined as it, or a synonym is used repeatedly in the listing of these charges (Order of Affirmance, page 7). Instead, the Court relied on ***Cunningham v. State***, 100 Nev. 396, 400, 683 P.2d. 500, 502 (1984) for the proposition that time frames (e.g. exact dates) are not required to be plead with exactitude). *Id*. That conflates time as the concept of concern. It is not the day that anything happened that is a concern, but here, and uniquely, how much time is too much that lacks proper notice from a legal perspective, and to that end, how much of any punishment is too much to cross over.

The Court undoubtedly can conjure, for example, tossing a single ice cube (or even a handful of ice cubes) at a child in a shower as not warranting felony child abuse charges. Ice cubes don't linger on the body and likely (if at all) fall immediately to the ground. Sitting on a bucket is a unusual punishment, but, again, how long on the bucket is too long to cross over to felony child abuse? 5 minutes, one hour, five hours? Here, the testimony was during the day when doing their homework they sat on buckets, and were given bathroom breaks. In fact, this bucket sitting was observed by CPS and there was no concern articulated at the time. So the point is, when is someone on notice that the conduct crosses the line?

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foster mother, there was significant physical abuse on the children. Also, the "prior

The statute is vague, and the instructions were not helpful. And while both Solanders engaged in the same conduct here, again, only white, male Dwight Solander received the three-to-ten sentence.

Unless the Court is willing to impose a *per se* standard for the specific acts delineated in the Criminal Information as felonious child abuse, the application of the same to the instant case falls short of a constitutionally sound statute. In light of the fact that no medical witness who actually examined the girls contemporaneous to the conduct occurring noted ANY indicia connected to unjustifiable physical pain or mental suffering, the Solanders could not have been on notice that any of their efforts to help the children were anything but allowable under the law. Moreover, without informing the jury how much "extended" time makes conduct transfer from lawful to unlawful, there can be no integrity in the jury verdicts that seem to gloss over the weakness of at least some of the counts and a suggestion that the overzealous prosecutor was merely highly effective at making Janet Solander out as a monster, thus overshadowing the thoughtful analysis that does not appeal to the passions and prejudices of the jury. The Court has overlooked this argument.

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foster mother" was also the current "adoptive mother" post-Solanders.

III. GIVING CLOSING SUMMATION FROM THE WITNESS STAND IS PER SE MISCONDUCT

Understanding that the Court did not find that the overzealous prosecutor in this action against Janet (but not Dwight) Solander vouched for the witnesses in words uttered, the Court failed to address the fundamental concern about any attorney (defense or State) entering the sacred witness stand to deliver ANY argument. The issue being that that particular space comes with it the authority of a witness telling the truth, the whole truth and nothing but the truth.

There is no proper reason why an attorney would enter that space to deliver summation, but there are ample improper reasons. One would be to re-create the moment of witness testimony in a visceral way to suggest truthfulness. More likely, to step into the "box where truth is given" is to lend credence that the argument should be considered as truthful testimony like sworn witness testimony.

In either event, this Court should (even if it finds it harmless) admonish the prosecutor for engaging in this highly prejudicial tactic not afforded counsel. Otherwise, this Court is endorsing the practice and likely, counsel will point to this decision when it chooses to enter the witness stand to grandstand an argument under this circumstance without fear of reprisal, sanction or concern.

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IV. CVs ARE VITAL FOR CROSS-EXAMINATION

The Court has overlooked that the State (and that pesky overzealous prosecutor) were in fact in technical violation of **NRS 174.234** by not providing the curriculum vitae of their expert when noticed. The Court mistakenly believes that Solander does not allege bad faith and that the prejudice extended to all the named experts, including the treating health care practitioners. (Order of Affirmance, pages 12-13). The Court is mistaken on both accounts.

The concern, here, is solely with Dr. Setl, which as the Court noted was the "doctor who examined the victims after they were removed from Solander's custody." (Order of Affirmance, page 13, footnote 9). The further concern is that in its overzealous and "innovative" prosecution, the State intentionally created an environment where the defense was having to defend against so much beyond the actual application of law and facts relevant to the conduct of Janet Solander and her troubled foster/adoptive children who were the named victims.

The State's expert was vital in the theories of why multiple treating doctors would not have seen any of the abuse that the State's paid for expert saw, and why conduct that could very well be the product of misguided but well-intentioned behavioral modification was "abuse" according to the expert.

Why have the CV requirement at all if the State is afforded the opportunity to eschew reasonable notice to the Defense to research the expert and the expert's

qualifications and writings? The Nevada legislature has decided that 21 days is a reasonable amount of time BEFORE TRIAL to conduct such an investigation and prepare for cross-examination. This Court has now forgiven the requirement of statute and seems to expect the defense already preparing to counter 46 Counts to do so without the benefit of a reasonable time to prepare for the State's best witness because, well, one can only imagine it is because it is the State?

The issue was never, as this Court points out in the Order of Affirmance whether the defense was "unfairly surprise by the testimony due to not having the witnesses' CV" but whether it was unfair to not provide enough time (as provided by statute no less) to prepare to effective cross-examine the witness. This very important point was not analyzed by the Court and made all the difference in that not only was the statute not complied with (which should have been noted), but that the due process rights of Solander were impacted because she was not given enough time to effectively prepare a cross-examination of the witness based on credentials (or lack thereof), training (or lack thereof) or writings (no time to research for impeachable positions taken at trial with prior inconsistent words).

The CV requirement under **NRS 174.234** is not talismanic, it is substantive. The State never offered a rationale for its non-inclusion, and given the rest of the approach to this case and this Defendant, it was certainly an incorrect assumption

to posit that the Defense was not alleging bad faith as was patently inherent in the tone, language and explicit allegations of the appeal.

CONCLUSION

Inasmuch as this Court may have overlooked the gist of both arguments of counsel, application of appropriate law and the record below, rehearing and, ultimately, a new trial where only the events of September 13, 2015 are considered by a jury and the defense has the ability to fully cross-examine the witnesses (and object to efforts by the State to infect the record with inappropriate testimony) is appropriate. The Petition at issue should be granted.

DATED this 18th day of July, 2019.

/Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) as this brief is composed of proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman type style; or

2. I further certify that this petition complies with page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has typeface of 14 pt, and contains no more than 4,667 words and is**, 3,819 words.**

3. Finally, I hereby certify that I have read this rehearing petition and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 20th day of July, 2020.

/s/: Caitlyn McAmis, Esq.
CAITLYN MCAMIS , ESQ.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 20th day of July, 2020, the foregoing **APPELLANT'S PETITION FOR REHEARING** was served upon the appropriate parties by affixing pre-paid postage and placing the Petition in the US Mail addressed to:

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