

Dwight Conrad Solander,
Appellant

State of Nevada,
Respondent.

Supreme Court Case No.: 76405

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DATED this 24th day of April, 2019.

/s/ Craig Mueller
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9 JURISDICTIONAL STATEMENT

10 This Appeal relates to a plea of guilty to three (3) counts of child abuse,
 11 neglect and endangerment with substantial bodily harm, in order to avoid going to
 12 trial and facing the possibility of a sentence of life in prison.

14 Notice of Appeal was timely filed and this Court has jurisdiction. (Appellant's
 15 Appendix pp.) Appellant was Ordered to file the Opening Brief by April 25, 20`9.
 16
 17 28, 2019.

18 ROUTING STATEMENT

19 This case should be routed to the Court of Appeals pursuant to NRAP
 20
 21 17(b)(3).

22 STATEMENT OF THE CASE

23
 24 March 25, 2014 Appellant was charged with 46 felony counts.
 25
 26
 27
 28

1 September 16, 2014 Appellant filed a Petition for Writ of Habeus Corpus,
2 which was granted by the District Court, which found that inserting catheter into a
3 third party not a sexual assault under NRS 200.366 and NRS 200.364.
4

5 March 30, 2015 The State appealed the District Court's Order to the Nevada
6 Supreme Court.
7

8 April 19, 2016 the Nevada Supreme Court reversed the Order of the District
9 Court and remanded the case back to the District Court for proceedings consistent
10 with its Order
11

12 January 23, 2018, after Janet Solander, the wife of Appellant, went to trial for
13 the identical charges facing Appellant, she was and was sentenced to 35 years to
14 life in prison.
15

16 January 23, 2018, after Appellant entered a plea of guilty to three (3) counts
17 of child abuse, neglect and endangerment with substantial bodily harm, in order to
18 avoid a possible life sentence, he was sentenced to 36 to 120 months in the Nevada
19 Correctional Center.
20
21

22 **STATEMENT OF THE ISSUES**

- 23 1. Whether inserting a catheter into a third party constitutes sexual assault
24 under NRS 200.366 and NRS 200.364.
25
- 26 2. Whether Appellant's conviction should be vacated because he was induced
27 into entering a plea of guilty to three (3) felony counts in order to avoid the
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1 excessive penalty, i.e. a life sentence, which could be imposed for inserting a
2 catheter into a third party in a medically approved manner.
3

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **A. Statement Facts**

6
7
8 The instant issue on appeal is whether use of a catheter as medically intended
9 constitutes sexual assault under Nevada Revised Statute 200.366 and NRS 200. 364.
10
11 Appellant Dwight Solander was charged with 36 felony counts by way of
12 information before the Honorable Judge Valerie Adair in Clark County District
13 Court, Department 21. (Appellant's Appendix pp. 81-82). Ten of those counts are
14 Sexual Assault with a Minor Under Fourteen Years of Age. (Appellant's Appendix
15 pp. 81-82).
16

17
18 On September 16, 2014, Appellant filed a pretrial Petition for Writ of Habeas
19 Corpus (Appellant's Appendix pp.69-70; 83) challenging, among other things, the
20 inclusion of these ten counts. The counts revolve around allegations that his wife,
21 Janet Solander used urinary catheters as medically intended by the manufacturer.
22
23 The Petition for Writ of Habeas Corpus (Appellant's Appendix pp. 70; 74) claimed
24 that, even if true as alleged, the conduct did not constitute the crime of sexual assault.
25
26 (Appellant's Appendix pp. 70; 74). Such a distortion of the Nevada Statute would
27 result in absurd results that blatantly contravenes the intent of the legislature in
28

1 passing the statute and subsequent amendment, which explicitly excludes use of
2 medical devices (such as catheters) from the definition of sexual assault.
3

4 NRS 200.366 provides, in pertinent part, as follows:
5

6 Sexual assault: Definition; penalties.

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

12 2. Except as otherwise provided in subsections 3 and 4, a person who commits
13 a sexual assault is guilty of a category A felony and shall be punished:

14 (a) If substantial bodily harm to the victim results from the actions of the
15 defendant committed in connection with or as a part of the sexual assault, by
16 imprisonment in the state prison:

17 (1) For life without the possibility of parole; or

18 (2) For life with the possibility of parole, with eligibility for parole beginning
19 when a minimum of 15 years has been served.

20

21 3. Except as otherwise provided in subsection 4, a person who commits a
22 sexual assault against a child under the age of 16 years is guilty of a category
23 A felony and shall be punished:

24 (a) If the crime results in substantial bodily harm to the child, by imprisonment
25 in the state prison for life without the possibility of parole.

26 (b) Except as otherwise provided in paragraph (c), if the crime does not result
27 in substantial bodily harm to the child, by imprisonment in the state prison for
28

1 life with the possibility of parole, with eligibility for parole beginning when a
2 minimum of 25 years has been served.

3 (c) If the crime is committed against a child under the age of 14 years and
4 does not result in substantial bodily harm to the child, by imprisonment in
5 the state prison for life with the possibility of parole, with eligibility for
6 parole beginning when a minimum of 35 years has been served. . . .

7 NRS 200.364 provides in pertinent part as follows:

8 4. “Sexual offense” means any of the following offenses:

9 (a) Sexual assault pursuant to NRS 200.366.

10 (b) Statutory sexual seduction pursuant to NRS 200.368.

11 5. “Sexual penetration” means cunnilingus, fellatio, or any intrusion,
12 however slight, of any part of a person’s body or any object manipulated or
13 inserted by a person into the genital or anal openings of the body of another,
14 including sexual intercourse in its ordinary meaning. **The term does not**
15 **include any such conduct for medical purposes.** . . . (Emphasis added).

16 In 2015 NRS 200. 364 was amended to include the provision that “[t]he term
17 [sexual penetration] does not include. . . conduct [involving penetration] for medical
18 purposes.”

19
20 After oral arguments, Judge Adair requested the State provide a bench
21 memorandum with legal support for how medically correct use of a catheter may
22 constitute sexual assault, which the State filed on October 15, 2014. (Appellant’s
23 Appendix page 84). After duly considering the State’s position, on January 28,
24 2015, Judge Adair granted Appellant Solander’s Petition in part, holding that
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1 medical use of a catheter does not constitute sexual assault under Nevada law.
2 (Appellant's Appendix pp. 70; 84)
3

4 The State filed a Notice of Appeal on March 30, 2015. (Appellant's Appendix
5 p. 85).
6

7 On Appeal, the Nevada Supreme Court reversed the ruling of Judge Adair.
8 (Appellant's Appendix pp. 69-77).
9

10 Thereafter, Appellant entered a plea of guilty to Count 1, (child abuse, neglect
11 or endangerment resulting in substantial bodily harm); Count 2, (child abuse, neglect
12 or endangerment resulting in substantial bodily harm); and Count 3 (child abuse,
13 neglect or endangerment resulting in substantial bodily harm). He was sentenced to
14 36 to 120 months in the Nevada Department of Corrections (Appellant's Appendix,
15 pp. 63-64; 91-92).
16
17

18 His wife, Janet Solander, chose to go to trial rather than to enter into plea
19 negotiations. The jury found her guilty of 46 felonies, including sexual assault,
20 and was sentenced to 35 years to life in the Nevada Department of Correction.
21 (Appellant's Appendix pp. 52-60)
22

23 The reason Appellant chose to enter guilty pleas to three (3) Counts of child
24 abuse, neglect or endangerment resulting in substantial bodily harm, was because of
25 the possible life sentence which he might have faced if he had chosen to go to trial,
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1 and was found guilty of sexual assault as a result of the medically correct use of
2 catheters.

3
4 This Appeal Followed.

5 6 **ARGUMENT**

7 8 **A. STATUTES MUST BE INTERPRETED TO AVOID AN ABSURD** 9 **RESULT**

10
11 Even when the language of a statute *appears* facially clear, an overriding
12 canon of statutory interpretation is that the language cannot be constructed to reach
13 an absurd result. This necessary component of language construction is replete
14 throughout Nevada law, and in fact has been often regarded as a superior canon of
15 construction over blindly obeying a statute's "plain language" without thought to
16 logic and intent.
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18

19
20 The leading rule for the construction of statutes is to ascertain the
21 intention of the legislature in enacting the statute, and the intent,
22 when ascertained will prevail over the literal sense. The meaning
23 of words used in a statute may be sought by examining the context
24 and by considering the reason or spirit of the law or the causes
25 which induced the legislature to enact it. The entire subject matter
26 and the policy of the law may also be involved to aid in its
27 interpretation, and it should always be construed so as to avoid
28 absurd results. *Moody v. Manny's Auto Repair*, 110 Nev. 320, 325,
871 P.2d 935, 938 (1994) (quoting *Welfare Div. v. Washoe Co.*
Welfare Dep't, 88 Nev. 635, 503 P.2d 457 (1972)).

1 A statute's language must give way when interpreting it literally leads to
2 absurd results, as it does in the instant matter. "A statute should always be construed
3 to avoid absurd results." *Gen. Motors v. Jackson*, 111 Nev. 1026, 1029, 900 P.2d
4 345, 348 (1995). "This is an absurd result, and the Nevada Supreme Court does not
5 interpret statutes in this manner." *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 414,
6 132 P.3d 1022, 1025 (2006). "[W]e construe unambiguous statutory language
7 according to its plain meaning *unless doing so would provide an absurd result.*" *Cal.*
8 *Commercial Enters. v. Amedeo Vegas I, Inc.*, 119 Nev. 143, 145, 67 P.3d 328, 330
9 (2003); *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 331 P.3d 850, 854
10 (Nev. 2014). The Court interprets statutes "to avoid unreasonable or absurd results
11 and give effect to the Legislature's intent." *S. Nev. Homebuilders Ass'n v. Clark*
12 *Cnty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005).

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18 Judge Adair rightfully decided that medically intended use of catheters does
19 not constitute sexual assault within the meaning of NRS 230.366. Any other
20 conclusion would defy logic and produce an astoundingly absurd result. For
21 example, a medical rape kit performed on a minor would itself constitute sexual
22 assault; a routine gynecological medical procedure performed while the patient was
23 under sedation would constitute sexual assault; the use of catheters on an patient or
24 one who is in a comatose state would constitute sexual assault; any invasive
25 ultrasound to determine the health of an unborn child, some recommended cancer
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1 screenings, and many preventative medical exams performed without the patient's
2 full ability to consent (whether it be on a minor or a person under anesthesia) would
3 constitute sexual assault; the list goes on and on.

4
5 What sets these situations and the scenario at hand apart from the object sexual
6 assault envisioned by the legislature is the distinct lack of sexual intent. When using
7 a medical device for a non-sexual purpose, the only logical result is that such action
8 cannot be statutory sexual assault. Were this not the case, virtually every doctor,
9 nurse, caretaker, and parent would be committing sexual assault on their patients,
10 wards and children. This patently absurd result simply cannot have been what was
11 anticipated or envisioned by the legislature when drafting NRS 200.366.
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13
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15 **B. EVEN UNDER THE PLAIN LANGUAGE OF THE STATUTE, A**
16 **SEXUAL INTENT IS REQUIRED**

17
18 NRS 200.366(1) provides in pertinent part as follows:

19
20 A person who subjects another person to **sexual** penetration, or
21 who forces another person to make a **sexual** penetration on
22 himself or herself or another, or on a beast, against the will of the
23 victim or under conditions in which the perpetrator knows or
24 should know that the victim is mentally or physically incapable of
25 resisting or understanding the nature of his or her conduct, is guilty
26 of sexual assault. NEVADA REVISED STATUTE 200.366(1)
27 (emphasis added).
28

1 The explicit word “sexual” must be considered. As a direct descriptive
2 adjective, elementary rules of grammar require that it be read to describe the term
3 immediately subsequent; “sexual” thus describes “penetration,” which can only be
4 logically inferred to mean that any act of penetration must have a *sexual intent* to
5 fall under the purview of the statute.
6
7

8 Nevada case law amply demonstrates the significance of statutory adjectives
9 regarding general means of interpretation. “In pertinent part, NRS 193.165 enhances
10 the penalty imposed on any person ‘who uses a firearm or other deadly weapon’...
11 The term ‘deadly’ is an adjective that describes the kind of weapon that will actuate
12 an enhancement.” *Zgombic v. State*, 106 Nev. 571, 580-81, 798 P.2d 548, 554 (1990)
13 (overruled on other grounds). “The inclusion of ‘any breach of a consumer contract’
14 in NRS 482.345(5) as a basis for claiming against the bond does not decrease the
15 scope ... The adjective ‘consumer’ modifies only the term ‘contract’ and not the other
16 violations listed.” *W. Sur. Co. v. ADCO Credit, Inc.*, 251 P.3d 714, 717-18 (Nev.
17 2011). “The adjective ‘municipal,’ as used in section 1 of article VIII of the
18 constitution of the State of Nevada, and elsewhere, is generally interpreted to include
19 any agency or body which is in its nature public or governmental as distinguished
20 from private.” *In re Scott*, 53 Nev. 24, 31, 292 P. 291, 292 (1930). “NRS
21 616C.180(2) excludes from coverage stress-related injuries caused by ‘any gradual
22 mental stimulus.’ The adjective ‘gradual’ refers to a process of ‘moving, changing,
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1 or developing by fine, slight, or often imperceptible gradations or modulations.”
2 *McGrath v. State Dep't of Pub. Safety*, 123 Nev. 120, 126, 159 P.3d 239, 243 (2007).
3

4 In the instant matter, the facts as alleged, even if true, do not constitute sexual
5 assault because there is no evidence of sexual intent when medical devices are used
6 as professionally intended, even when used by lay persons. Similar to the above
7 examples of a doctor, parent, nurse or caretaker, the lack of sexual intent inherent in
8 their conduct is what removes them from the scope of Nevada’s sexual assault
9 statutes. For an identical reason, so too in this case Respondent Solander is removed
10 from the statute’s audience. On the counts challenged in this appeal, there is simply
11 no evidence of sexual intent.
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15 **C. THE SUBSEQUENT STATUTORY AMENDMENT SHEDS GREAT**
16 **LIGHT ON THE LEGISLATURE’S INTENT TO EXCLUDE**
17 **MEDICAL DEVICES FROM THE SEXUAL ASSAULT STATUTE**

18 In the instant matter, the recent amendment to NRS 200.366 makes quite clear
19 the legislature’s intent that the statute does not apply to medical devices, such as
20 catheters. The new amendment adds the following language: “The term [sexual
21 penetration] does not include any such conduct for medical purposes.” NEVADA
22 REVISED STATUTE 200.366.
23
24

25 “[S]ubsequent legislation declaring the intent of an earlier statute is entitled
26 to great weight in statutory construction.” *Red Lion Broadcasting v. FCC*, 395 U.S.
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28

367, 380-81, 89 S. Ct. 1794, 1801 (1969). Furthermore, “[t]he persuasive force of such an interpretation is strengthened when the legislature, by its failure to amend a statute, ‘silently acquiesces’ in the administrative interpretation.” *City of Las Vegas Downtown Redevelopment Agency v. Crockett*, 117 Nev. 816, 831, 34 P.3d 553, 563 (2001); and “where the legislature has silently acquiesced in the administrative construction by failing to amend the particular act, the executive construction is accepted generally by the courts as persuasive.” *Id.* (citing *Smith v. N. P. R. Co.*, 7 Wash. 2d 652, 665, 110 P.2d 851, 856 (1941)).

Clearly, the Nevada Legislature passed the amendment and added the medical language because this is an issue of first impression in Nevada, as pointed out by Judge Adair. Perhaps a more logical alternative to Appellant’s explanation is that the Legislature did not want the statute construed in any preposterously unreasonable interpretation, as occurred in the present instance.

D. APPELLANT ENTERED A PLEA OF GUILTY IN ORDER TO AVOID AN EXCESSIVE, UNCONSTITUTIONAL PRISON SENTENCE. HIS CONVICTION SHOULD BE REVERSED

Excessive sentences often force a person to strongly consider a guilty plea because they expose an individual to a harsh sentence for a particular offense.

1 Excessive sentences are so coercive that innocent people feel they have no
2 option but to plead guilty. Thus, our legal system makes it a rational choice to plead
3 guilty to something a defendant did not do.
4

5
6 Here, Appellant was accused of inserting catheters into minors who were
7 under his care, and was facing a possible life sentence if he decided to go to trial.
8

9 His wife, Janet Solander, chose to go to trial instead of entering a plea of
10 guilty, was found guilty, and was sentenced to 35 years to life in prison. Facing such
11 a possibility, Appellant chose not to go to trial, but rather, to enter a plea of guilty to
12 three (3) counts of child abuse, neglect and endangerment with substantial bodily
13 harm, in order to avoid a possible life sentence.
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16
17 A life sentence for inserting catheters, in a medically approved manner, is
18 clearly excessive and violates the Eighth Amendment of the United States
19 Constitution which prohibits the government from imposing excessive bail,
20 excessive fines, or cruel and unusual punishments to criminal defendants who have
21 been convicted of a crime. As a result, the government cannot impose a penalty that
22 is grossly disproportionate to the seriousness of the offense.
23
24

25
26 The 8th Amendment states that in a criminal case:

- 27 • Excessive bail shall not be required

- Excessive fines shall not be imposed
- Cruel and unusual punishment shall not be inflicted

United States Supreme Court rulings have also held that criminal sentences that are barbarous, outrageous, inhumane, or that shock the social consciousness are unconstitutional. The constitutional limitations must be followed in every state.

The limitations on cruel and unusual punishment require that criminal sentences be in proportion to the severity of the crime committed. For example, criminal punishments that are disproportionate to the crime will likely be overturned on appeal.

For example, the courts have determined the following:

- **Death Penalty for Kidnapping or Rape:** The death penalty is prohibited for the crime of rape or kidnapping if the rape was neither intended to result in death or the victim did not actually die as a result of the rape. See, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Coker v. Georgia*, 433 U.S. 584 (1977).
- **Insane Defendant:** The Eighth Amendment prohibits the imposition of the death penalty to defendants who are insane, even if they were sane at the time of the crime. *Atkins v. Virginia*, 536 U.S. 304 (2002),
- **Minors:** Anyone under the age of 18 cannot be imposed the death penalty. *Roper v. Simmons*, 543 U.S. 551 (2005).

1 The Eighth Amendment’s prohibition of cruel and unusual punishment
2 “guarantees individuals the right not to be subjected to excessive sanctions.” *Roper*
3 *v. Simmons*, Ibid. That right “flows from the basic ‘precept of justice that punishment
4 for crime should be graduated and proportioned’ ” to both the offender and the
5 offense. Ibid.
6
7

8 There is a categorical ban on sentencing practices based on mismatches
9 between the culpability of a class of offenders and the severity of a penalty. See, e.g.,
10 *Kennedy v. Louisiana*, *supra*. Several cases have specially focused on juvenile
11 offenders, because of their lesser culpability. Thus, *Roper v. Simmons*,, *supra*, held
12 that the Eighth Amendment bars capital punishment for children, and *Graham v.*
13 *Florida*, 560 U.S. 48 (2010), concluded that the Amendment prohibits a sentence of
14 life without the possibility of parole for a juvenile convicted of a nonhomicide
15 offense. Graham further likened life without parole for juveniles to the death penalty,
16
17 In those decisions, this Court has required sentencing authorities to consider the
18 characteristics of a defendant and the details of his offense before sentencing him to
19 death.
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CONCLUSION

The law governing statutory interpretation is clear – the statute’s “plain language” should generally be entitled to deference, *but not when blind obedience to the plain words leads to patently absurd results*. In the instant matter, the prosecutor’s statutory interpretation would mean that doctors, nurses, parents, police officers, and other guardians would be guilty of sexual assault when using medical devices, such as catheters, on minors or people under sedation. Such a result is the very definition of absurd, and therefore the statute simply cannot be construed meaning that the insertion of catheters constitutes sexual assault, pursuant to NRS 200.366.

The Nevada legislature’s preferred interpretation of the statute, which comports with Judge Adair’s conclusion in the lower court, is made very clear. Inclusion of the adjective “sexual” in the statute means, by basic English grammar rules, that any penetration must be “sexual” in nature to be considered a sexual assault.

In no manner is the use of catheters or any other medical devices considered “sexual”; this is exactly why the legislature cemented its preferred interpretation when it passed the amendment excluding medical devices from the statute’s scope.

1 Furthermore, the only reason Appellant entered a plea of guilty to three (3)
2 counts was to avoid a sentence of life in prison, an absurd but very real possibility.
3

4 For the foregoing reasons, Appellant respectfully requests this Honorable
5 Court vacate his conviction, and determine that the manufacturer's approved use of
6 a medical device such as a catheter cannot constitute "sexual assault" within the
7 meaning of NRS 200.366.
8

9 DATED this 24rd day of April, 2019.
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11

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1 **CERTIFICATE PURSUANT TO NRAP 28.2**

2 I hereby certify that this brief complies with the formatting requirements
3
4 of [NRAP 32](#)(a)(4), the typeface requirements of [NRAP 32](#)(a)(5) and the type style
5 requirements of [NRAP 32](#)(a)(6) because:

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7
8 Microsoft Word in Arial; or

9 ☐ This brief has been prepared in a monospaced typeface using [*state name*
10 *and version of word-processing program*] with [*state number of characters per inch*
11 *and name of type style*].

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13 2. I further certify that this brief complies with the page- or type-volume
14 limitations of [NRAP 32](#)(a)(7) because, excluding the parts of the brief exempted
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18
19 4,428 words; or

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21 words or _____ lines of text; or

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23
24 3. Finally, I hereby certify that I have read this appellate brief, and to the best
25 of my knowledge, information, and belief, it is not frivolous or interposed for any
26 improper purpose. I further certify that this brief complies with all applicable Nevada
27
28

1 Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every
2 assertion in the brief regarding matters in the record to be supported by a reference
3 to the page and volume number, if any, of the transcript or appendix where the matter
4 relied on is to be found. I understand that I may be subject to sanctions in the event
5 that the accompanying brief is not in conformity with the requirements of the Nevada
6 Rules of Appellate Procedure.
7
8

9 DATED this 24th day of April, 2019.
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