

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

3
4 **DIPAK KANTILAL DESAI,**)
5 **Petitioner,**)
6 **vs**)
7 **THE EIGHTH JUDICIAL DISTRICT**)
8 **COURT OF THE STATE OF NEVADA,**)
9 **COUNTY OF CLARK, DEPARTMENT 21,**)
10 **Respondent,**)
11 **and**)
12 **THE STATE OF NEVADA,**)
13 **Real Party In Interest.**)

Electronically Filed
Dec 27 2012 09:45 a.m.
Tracie K. Lindeman
No. 61230 Clerk of Supreme Court
(District Court No. C265107)

14 **PETITION FOR REHEARING OF ORDER**
15 **GRANTING HABEAS CORPUS PETITION IN PART**

16 **DIPAK KANTILAL DESAI**, by and through his attorneys, Richard A.
17 **Wright**, and Margaret M. Stanish, **WRIGHT STANISH & WINCKLER**, petitions
18 this Honorable Supreme Court to reconsider its Order Granting Petition in Part,
19 dated December 21, 2012, pursuant to NRAP 40.

20 After ruling that the criminal neglect of patients counts (Counts 4, 8, 11, 14,
21 18, 21, and 24) and reckless endangerment counts (Counts 3, 7, 10, 13, 17, 20, and
22 23) were insufficiently precise and ambiguous, the Court overlooked the
23 constitutional grand jury right to indictment by the concurrence of 12 or more
24 jurors and directed that the State amend these counts to cure the facial defects.
25
26

27 Given the ambiguity and imprecision of the alternatively pled negligent acts
28

1 and theories of criminal liability, the State cannot amend the indictment without
2 second guessing the grand jury and infringing upon the due process right to a
3 grand jury determination by a concurrence of 12 or more jurors. Petitioner,
4 therefore, urges the Court for rehearing on the remedy of dismissal of the facially
5 defective neglect counts.
6
7

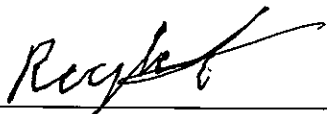
8 This petition is timely filed within 18 days of the date of the Order.
9
10 Petitioner has satisfied the certification of compliance with formatting
11 requirements and proof of service. See Attachments A and B. Trial in this matter
12 is set for April 22, 2013.
13

14 This petition is based upon the Due Process clauses of the Fifth, Sixth, and
15 Fourteenth Amendments to the United States Constitution, the similar clauses in
16 Article 1, Section 8, of the Nevada Constitution, NRS 173.075, and 172.255, and
17 the following Points and Authorities.
18

19 DATED this 26th day of December 2012.
20

21 Respectfully Submitted,

22 WRIGHT STANISH & WINCKLER
23

24
25 By: 
26 Richard A. Wright
27 Margaret M. Stanish
28

1 **POINTS AND AUTHORITIES**

2 **I. ISSUES PRESENTED**

3
4 Is dismissal of the facially defective criminal neglect counts the appropriate
5 remedy when the charging document is an indictment and the ambiguity and
6 imprecision of the charging language cannot be amended without substantially
7 impairing the Petitioner's constitutional right to an indictment found upon the
8 concurrence of 12 or more grand jurors?

9 **II. ARGUMENT**

10 **A. Rehearing is Appropriate**

11 This Petition for Rehearing is properly before the Court pursuant to NRAP
12 40(c). The Court's order to amend the criminal neglect charges overlooks or
13 misapprehends the constitutional protection of the grand jury right which is
14 implicated and prejudiced by the State amending the charges. Moreover, the
15 State's alternative argument in support of amendment, contains inapposite
16 authority which may have led the Court to misapprehend material issues of
17 constitutional law.
18
19
20

21 In his original petition for habeas relief, Petitioner argued that the criminal
22 neglect counts should be dismissed because the imprecise and vague charging of
23 multiple defendants based on alternatively pled negligent acts, including "by
24 methods unknown," and multiple and conclusory theories of criminal liability
25 violated not only due process notice requirements, but also violated Petitioner's
26
27
28

1 due process right to an indictment returned upon the concurrence of 12 or more
2 grand jurors pursuant to the Article I, Section 8 of the Nevada Constitution and
3 NRS 177.255. Original Petition, pp. 2-3, 14-15, 18, 24-25. In its Answer to
4 Petition, the State raised, as an alternative argument, that the Court should permit
5 the State to amend the indictment and strike the offending language. The State
6 concluded that Petitioner could not possibly suffer any possible prejudice should
7 the Court permit it to amend the indictment. Answer to Petition, pp. 19.

8
9
10
11 Petitioner seeks rehearing to bring to the Court's attention the prejudice that
12 he will indeed suffer if the State is permitted to rewrite the criminal neglect
13 charges in contravention of his due process right to grand jury process. Further,
14 Petitioner seeks to inform the Court of the flaws in the State's argument made in
15 support of amending the indictment.
16
17

18 **B. Amending the Indictment Prejudices Petitioner's Grand Jury Right**

19 Article 1, Section 8, of the Nevada Constitution establishes the right to
20 grand jury. The due process procedures governing the grand jury are set forth in
21 Chapter 172 of the NRS. Of particular relevance is the due process right to an
22 indictment found "only upon the concurrence of 12 or more jurors." NRS
23 172.255(1); *see, State v. Hancock*, 114 Nev. 161, 167-68, 955 P.2d 183, 187
24 (1998) (denying State's request to amend imprecise indictment based on right to
25
26
27
28

1 indictment upon on concurrence of 12 or more jurors).

2
3 The State elected to present the instant case to the grand jury rather than
4 proceed before a judge in a preliminary hearing. The State must, therefore,
5 adhere to the due process requirement pertaining to the grand jury process. Like
6 all defendants charged through the grand jury process, Petitioner is entitled to an
7 indictment that clearly and concisely states the elements of the offense and means
8 by which he allegedly committed the offenses *as determined by a concurrence of*
9 *12 or more jurors – not the State’s best guess as to what was on the jurors’ minds*
10 *when they returned the indictment. See, Russell v. United States, 369 U.S. 749,*
11 *770 (1962); Simpson v. Eighth Judicial Dist. Ct., 88 Nev. 654, 660, 503 P.2d*
12 *1225, 1229 (1972); Hancock, 114 Nev. at 167-68, 955 P.2d at 187.*

13
14
15
16 In Hancock, the State sought leave to amend the indictment by placing into
17 separate counts offenses that were originally charged in the alternative within a
18 single count. In support of its motion for leave to amend, the State relied on
19 Jenkins v. District Court, 109 Nev. 337, 339-40, 849 P.2d 1055, 1057 (1993),
20 which permitted amendment of a criminal information to separate alternatively
21 pleaded offenses in separate counts. Hancock, 114 Nev. at 167, 955 P.2d at 187.
22 It also relied upon NRS 173.075, which reads in pertinent part: “The court may
23 permit an indictment . . . to be amended at any time before verdict or finding if no
24
25
26
27
28

1 additional or different offense is charged and if substantial rights of the defendant
2 are not prejudiced.” Id.

3
4 Significantly, the Hancock court found that Jenkins was inapplicable
5 because it involved the amendment of a criminal information rather than
6 indictment by grand jury. Id. at 168, 955 P.2d at 187. In so doing, the Hancock
7 court emphasized that “an indictment may be found *only* upon the concurrence of
8 12 or more jurors,” pursuant to NRS 172.255(1). *See, Id.* [emphasis in original].
9 The crux of the Hancock ruling was that the proposed amendment materially
10 altered the indictment because it infringed upon the due process right set forth in
11 NRS 172.255(1). *See, Id.* The Court held, “We conclude that were the State to
12 be granted leave to amend the indictment so as to add previously alternately
13 pleaded offenses as separate counts, *the respondents would be denied due process*
14 *because it cannot be said that the grand jury found probable cause on each and*
15 *every amended count.” Id.* [Emphasis added.]; *see also, Russell*, 369 U.S. at 770
16 (indefinite indictments impinge on due process right of grand jury determination
17 of facts); Simpson, 88 Nev. at 660, 503 P.2d at 1229.

18
19
20
21
22
23 In the instant petition, the Court directs the State to amend the facially
24 defective criminal neglect counts “to reduce the number of theories of liability
25 alleged and resolve ambiguity regarding how Desai engaged in the remaining
26
27
28

1 theories. . . . The district court should permit the State to amend [these] counts to
2 narrow the breadth of those charges and provide more detail as to how Desai
3 engaged in the remaining theories.” Order, pp. 1 & 5.

4
5 The State’s use of the “and/or” pleading device when listing both the
6 negligent acts (i.e., the *actus reas*) and theories of criminal liability render the
7 indictment irreparable through amendment. As this Court has previously
8 observed, State’s use of “and/or” to connect the numerous allegations undercuts
9 rather than bolsters due process notice requirements. Hidalgo v. Eighth Jud.
10 Dist. Ct., 124 Nev. 330, 338, 184 P.3. 369, 375 (2008); Sheriff v. Morris, 99
11 Nev. 109, 118, 659 P.2d 852, 859 (1983).

12
13
14
15 To accomplish the task of amending the indictment to a point where it is
16 clear and concise, the State would need to second guess what was on the minds of
17 the grand jurors when they returned the facially defective indictment. The State
18 would need to speculate upon which of the alternatively alleged acts of
19 negligence (including “by methods unknown”) the grand jury based its probable
20 cause finding when it returned the indictment. It would also require the State to
21 speculate as to what facts, if any, the grand jurors found as to which defendant
22 and whether said facts were established by direct commission, aiding and
23 abetting, or by participation in a conspiracy.

1 Amendments to the indefinite criminal negligence counts would be
2 especially prejudicial because the specific negligent acts or omissions define the
3 essential *actus rea* elements in NRS 202.595 and 200.495. These statutes
4 generally prohibit criminal negligence resulting in substantial bodily harm. Since
5 the statutes themselves do not define the specific facts that constitute the offense,
6 due process requires the indictment to allege facts that particularize the criminal
7 act. *See, Sheriff v. Standal*, 95 Nev. 914, 916 & n.1, 604 P.2d 111, 112 & n.1
8 (1979), *citing, People v. Donacy*, 586 P.2d 14, 16 (Col. 1978)(“(I)f the statute
9 does not sufficiently set out the facts which constitute the offense, so that the
10 defendant may have notice with what he is charged, then a more particular
11 statement of facts is necessary.”).

12
13
14
15
16 To amend these counts, the State would need to pick and choose what
17 alternatively pleaded allegations necessarily form the essential elements of the
18 criminal negligence and, thereby decide how to charge each of the defendants.
19 Permitting the State to amend in such a manner usurps the independent role of the
20 grand jury and Petitioner’s constitutional right to an indictment based upon a
21 concurrence of 12 or more jurors. Dismissal of the facially defective counts is the
22 only appropriate remedy to protect this valuable constitutional right.
23
24
25
26
27
28

1 **C. The State's Reliance on Inapposite Case Law**

2 In its Answer, the State relied upon four cases to support its alternative
3 argument for amendment. State's Answer, p. 19. These cases are inapposite to
4 the procedural posture of the instant case.
5

6
7 Three of the four cases do not implicate the due process right to grand jury
8 because they involved amendments to criminal informations or notice of death
9 penalty: State v. Eighth Judicial Dist. Ct. (Taylor), 116 Nev. 374, 997 P.2d 126
10 (2000)(amending information before trial); Grant v. State, 117 Nev. 427, 24 P.3d
11 761 (2001)(same); and Hidalgo v. Eighth Judicial Dist. Ct., 124 Nev. 330, 184
12 P.3d 369 (2008)(amending notice of death penalty). None of these cases
13 addressed the grand jury rights implicated in the instant case.
14
15

16 The fourth case upon which the State relies is Benitez v. State, 111 Nev.
17 1363, 904 P.2d 1036 (1995). In Benitez, the defendant was originally charged
18 with attempted murder but pleaded guilty to the lesser included offense of battery
19 with use of a deadly weapon. The indictment was amended in open court to
20 accommodate the plea. 111 Nev. 1364, 904 P.2d at 1363. In a post-conviction
21 petition, the defendant in Benitez claimed that his counsel was ineffective for
22 failing to inform him that the statute of limitations had run on the lesser-included
23 offense. Id. The Benitez court denied the petition on the grounds that the
24
25
26
27
28

1 amendment involved a lesser-included offense of the pending attempted murder
2 charge and, therefore, the statute of limitations did not bar the battery count. Id.
3 at 1365, 904 P.2d at 1038. Thus, Benitez did not involve a pretrial amendment
4 requiring the district court to speculate on the probable cause finding of the grand
5 jury.
6
7

8 None of the case authority cited by the State supports the pretrial
9 amendment of a grand jury indictment to bring clarity to an otherwise indefinite
10 indictment. The only viable remedy to cure the due process violations is to
11 dismiss the facially defective counts.
12

13
14 DATED this 26th day of December 2012.

15 Respectfully Submitted,

16 WRIGHT STANISH & WINCKLER
17

18
19 By: 

20 RICHARD A. WRIGHT

21 Nevada Bar No. 886

22 MARGARET M. STANISH


23 Nevada Bar No. 4057
24
25
26
27
28

1
2 **Certification of Compliance**
3

4 1. I hereby certify that this Petition for Rehearing complies with the
5 formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP
6 32(a)(5), and the type style requirements of NRAP 32(a)(6). It has been prepared
7 in a proportionally and doubled-spaced typeface using Wordperfect X3, in 14-
8 point, Time New Roman font.
9
10

11 2. I further certify that this Petition complies with the page limitations
12 of NRAP 40 because it does not exceed 10 pages, excluding this Certificate and
13 the Declaration of Service, and it contains less than 4,667 words.
14

15 DATED this 26th day of December 2012.
16

17
18 
19 Margaret M. Stanish
20 Nevada Bar No. 4057
21 WRIGHT STANISH & WINCKLER
22 300 S. Fourth St., Ste. 701
23 Las Vegas, NV 89101
24 (702)382-4004
25
26
27
28

Attachment A

