IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH MATHAHS, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE Respondent, and THE STATE OF NEVADA, Real Party in Interest.	CASE NO: 61359 D.C. NO: C266587

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Deputy, RYAN J. MACDONALD, on behalf of the above-named respondents and submits this Answer to Petition for Writ of Mandamus in obedience to this Court's order filed August 6, 2012 in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 19th day of September, 2012.

Respectfully submitted,

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BY */s/ Ryan J. MacDonald*
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MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF THE ARGUMENT

Petitioner Keith Mathahs requests extraordinary relief from this Court because, he claims, the Indictment charging him with various crimes related to his criminal negligence and intentional insurance fraud offends due process. Essentially, Mathahs complains that the Indictment is too detailed. Due process, however, only requires notice of what he is being charged with so that he may prepare a defense. The underlying case at issue in this proceeding is quite complex due to Petitioner's wide-ranging acts of fraud and negligence, and the charging document necessarily reflects this. Reviewed in this context, this Court will understand that the pleading provides adequate notice. Since that is the only requirement that the State must meet at this stage, extraordinary intervention in this matter is unwarranted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Clinical Context

Petitioner was a Certified Registered Nurse Anesthetist (CRNA) and an employee of Dipak Desai. Desai was a Las Vegas physician who specialized in gastroenterology, the branch of medicine that studies the digestive system and its disorders. Desai owned Endoscopy Center of Southern Nevada and its related businesses. RA 617-20. At the various locations of the enterprise, Desai and other employee physicians principally performed two procedures: an upper endoscopy and a colonoscopy. RA 7-11. An upper endoscopy involves the insertion of a flexible video camera tube through the patient's mouth to inspect the esophagus, the stomach, and the upper-small intestine (duodenum). Id. A device known as a "bite block" is placed between the patient's teeth in order to keep the mouth open and the tube is inserted through an aperture in the middle of the bite block. RA

14:55.[1] A colonoscopy, the more complicated of the two procedures, entails the insertion of a longer camera-equipped tube through the patient's rectum through to the colon to look for polyps or other signs of disease. RA 7-11.

Although both procedures are sometimes performed without sedation, patients overwhelmingly elect to be anesthetized. RA 519-25. For this, a quick-acting anesthetic called Propofol must be administered by an Anesthesiologist or by a Certified Registered Nurse Anesthetist (CRNA) working under a physician's supervision. RA 315-17. A CRNA is an advanced-practice nurse, licensed by the State of Nevada, who has acquired specialized training and education in the field of Anesthesia. Id. In approximately 2002, Desai decided to hire CRNAs instead of Anesthesiologists to work in his practice. By hiring CRNAs, Desai was not limited to an Anesthesiologist's availability and could independently bill for anesthesia services. RA 620-24.

Anesthesia is billed on the basis of how much face-to-face time the CRNA spends with the patient. RA 321. Anesthesia time begins when the CRNA begins to prepare the patient for the administration of anesthesia and ends when the CRNA is no longer personally attending the patient. RA 381:99. The anesthesia time is then billed in 'units' of 15 minutes, i.e., if the CRNA spends 16 minutes with a patient, the provider could bill for two units above the base rate. Anesthesia is billed separately and in addition to any amount billed for the procedure itself. RA 420-34.

The Criminal Enterprise

Endoscopy Center of Southern Nevada was an ambulatory surgical center where the above-described gastroenterological procedures were preformed. Procedures were performed at two principal locations: one on Shadow Lane and one on Burnham Road, both in Las Vegas. While Desai shared ownership of the

[1]For the Court's convenience, the State will cite to the exact transcript page where applicable in this format—(Appendix page): (Transcript page).

enterprise with some of the other partner-physicians, Desai owned a super-majority stake and exercised complete ownership and managerial control over the enterprise. RA 162:107, 164:114-16, 616:63-64.

Desai, who bragged that he was worth $150-200 million, RA 25:97, was a notoriously stingy micro-manager who was constantly looking to cut costs and cut corners, to wit: (1) Desai would frequently order physicians and CRNAs to use less Propofol in order to save money, even though it was not expensive, RA 19:73, 378:86; (2) Desai would yell at staff for using too much tape to secure IV lines to patients' arms, RA 25:95; (3) Even though a colonoscopy is a "dirty" procedure, Desai complained and would grow angry if staff or physicians changed their coats too often and, as a result, staff felt compelled to perform procedures in previously-soiled outerwear, RA 25:98, 155:79; (4) Desai ordered physicians to use less lubricant even though it was required to safely ease the colonoscope into the patients, RA 155:79, 612:47-48; (5) Desai would constantly complain that staff were using too many alcohol wipes, masks, sheets, and gowns and pressure them to reuse these items, RA 24:95, 498:69-74, 612:47-48; (6) Desai would order the reuse of single-use bite blocks, RA 160:99; (7) Desai would order the reuse of single-use airway tubes, RA 378:86; (8) Desai told staff that he would not permit the purchase of orange juice—which is needed for diabetic patients as they would have been fasting all night—so staff purchased the juice and hid it from Desai, RA 617:67-68. The CRNAs' active participation in these cost-cutting measures was essential; the nurse anesthetists told physicians that they had to use as little Propofol as possible. RA 18:71. This, they explained, would not only result in direct cost savings because less of the drug was used, but would also allow for faster patient recovery and thus greater turnover. RA 19:73.

The practice would also schedule a very large number of patients, sometimes up to 90 a day. RA 16:62, 395:155. Desai constantly pressured all employees and partners to work at a breakneck speed in order to increase sales. RA 146:42-43.

Physicians that did not work fast enough were constantly berated and financially punished. RA 17:65-68. When he was not present, Desai would call in and remotely add patients to the schedule. 147:46-48, 612:43-48. Desai wanted a 3-4 minute patient turnaround, RA 140, despite the fact that the standard of care in the industry is over 10 minutes, RA 519-25. Physicians expressed their inability to safely treat that many patients that quickly, but they were ignored or overruled if they attempted to reduce the schedule. RA 17.

Violation of the Standard of Care and Disease Transmission

It is in this context that Desai and Mathahs ordered, encouraged, or knowingly permitted the reuse of syringes and Propofol vials. The nurse anesthetists re-used these vials and syringes to save their practice money. RA 205-06. Propofol vials, which come in various sizes, are labeled as single-use. The standard of care in the industry—and basic "aseptic technique" that every health professional knows—dictates that the professional administering anesthesia uses a needle-topped syringe to extract the Propofol from the vial. The needle is then injected into the patient through an intravenous port called a heplock. Propofol is a fast-acting and quickly-metabolized agent, so if the patient requires additional sedation, the anesthetist may draw additional medication from the vial. RA 315-16, 376-77. When the patient no longer requires additional sedative, the needle, syringe, and vial must be disposed of. RA 12:48, 205:86, 335-36. Failure to conform to this standard of care results in cross-contamination of patients. Blood from one patient can flush back into the syringe during the injection process. Therefore—even if the needle is changed—the contaminated syringe will contaminate the vial when it is used to extract additional medication. At this point, both the vial and the syringe are contaminated. The use of either one of these items on another patient could result in transmission of any blood-borne agent from one patient to the next. RA 191-93.

Hepatitis C is one such agent. Hepatitis C is a virus that is transmitted

primarily through blood-to-blood contact; other routes of transmission are difficult. RA 194. When attacked by the host's immune system, this virus readily evolves, mutating its enveloping proteins in order to avoid the body's immunological response. RA 219-220. As a result of this constant mutation, one infected person will carry many different strains of the virus. The longer the patient is infected, the more extensive this "cloud of variance" in virus strains will be. Id. If an analysis of the virus strains is performed close in time to the initial infection, experts can calculate the degree of relatedness and attempt to forensically link one person's infection to a source patient. RA 220-23. Mathahs knowingly reused syringes and Propofol vials. RA 192-97. According to co-defendant CRNA Ronald Lakeman, all the nurse anesthetists would do so. Mathahs was aware of the risk, but thought he could mitigate it. RA 205-06. He was constantly pressured to cut costs. Id.

July 25, 2007

On July 25, 2007, Sharrieff Ziyad had an endoscopy procedure done at the Endoscopy Center on Shadow Lane. RA 75-78. He arrived at the clinic at 7:00 am. Id. Dr. Dipak Desai was the doctor who performed his procedure. Id. Mr. Ziyad discussed the fact that he was Hepatitis C positive with Dr. Desai. Id. The CRNA for the procedure was Ronald Lakeman. RA 431. Lakeman administered the anesthesia Propofol to Ziyad intravenously. Ziyad received more than one dose of anesthesia during the procedure. Id.

The next patient who had a procedure done by Dr. Desai on July 25, 2007 was Michael Washington. RA 86. Mr. Washington underwent a colonoscopy. The CRNA who administered his anesthesia was Ronald Lakeman. RA 456-58. Weeks after the procedure, in September of that year, Mr. Washington began having health problems. His right side became swollen, his abdomen was tender, he lost his appetite, and his urine became dark. RA 86-89. He sought assistance from his primary care doctor at the VA hospital and was diagnosed with Hepatitis C. He had not been diagnosed with Hepatitis C before the procedure at the

Endoscopy Center of Southern Nevada. Id.

September 21, 2007

Two CRNAs worked on September 21, 2007 at the Endoscopy Center of Southern Nevada: Ronald Lakeman and Keith Mathahs. RA 445-47.

On September 21, 2007, Kenneth Rubino underwent a colonoscopy at the Endoscopy Center on Shadow Lane. RA 83-85. He arrived at the center for his procedure just after 7:30 in the morning. Id. The doctor who performed the procedure was Dr. Clifford Carrol. Years prior to this procedure, Mr. Rubino had been diagnosed as being Hepatitis C positive. Id. He had discussed this fact with Dr. Carrol. Id. On the day of the procedure, he again informed the staff at the center that he was Hepatitis C positive. Id. The CRNA for his procedure was Keith Mathahs. RA 420. Rubino was administered Propofol intravenously. Mathahs administered more than one dose of anesthesia to Rubino. Id.

Rodolfo Meana had a colonoscopy performed at the Endoscopy Center of Southern Nevada on September 21, 2007. RA 79-82. The doctor who performed his procedure was Dr. Desai and the CRNA who administered his anesthesia was Keith Mathahs. RA 420-25. Sometime after the procedure, Mr. Meana felt nauseous, lost sleep, and suffered from depression, constipation, and diarrhea. His urine also became brownish in color. RA 79-82. He went to see his own doctor and was diagnosed with Hepatitis C. RA 79-82. He did not have Hepatitis C prior to having this procedure done at the Endoscopy Center. RA 79-82.

Sonia Orellana-Rivera had a colonoscopy at the Endoscopy Center of Southern Nevada on September 21, 2007. RA 70:55-58. The doctor who performed the procedure was Dr. Clifford Carrol. RA 71:63. The CRNA who administered her anesthesia was Keith Mathahs. RA 361:18. About six months after the procedure, Ms. Orellana-Rivera was notified of a possible problem by the Health Department. RA 72:66. She saw her family doctor and was informed that she had contracted Hepatitis C. Id.

Gwendolyn Martin had a colonoscopy at the Endoscopy Center of Southern Nevada on September 20, 2007. RA 94:157-58. She had an endoscopy done at the center the next day, on September 21, 2007. RA 94:159. Dr. Carrera performed the endoscopy. Id. The CRNA who administered the anesthesia was Keith Mathahs. RA 423-25. Weeks after the procedure, Martin was sick and her urine became dark. RA 98. Ultimately, she went to a hospital emergency room and was diagnosed with acute Hepatitis C. Id. Since the diagnosis, she has had physical and mental problems. Id.

Carole Grueskin had a colonoscopy done on September 21, 2007 at the Endoscopy Center of Southern Nevada. Her doctor was Dr. Carrera. RA 91-93. The CRNA who administered her anesthesia was Ronald Lakeman. RA 429-30. Before this procedure, she had not been diagnosed with Hepatitis C. RA 91-93. After the procedure, she became jaundiced. RA 91-93. After that, she was diagnosed with Hepatitis C. RA 91-93.

Stacy Hutchinson also had a colonoscopy performed at the Endoscopy Center of Southern Nevada on September 21, 2007. RA 100:173. Dr. Dipak Desai was her doctor. RA 100:174. The CRNA who administered her anesthesia was Ronald Lakeman. RA 429-30. Three weeks after the procedure, Hutchinson was ill, could not hold down food, and lost weight. RA 102: 185. She was admitted to the hospital and became jaundiced. RA 102:186. Later, she was diagnosed with Hepatitis C. Five months earlier, she had been tested for Hepatitis C and the results were negative. RA 103: 186-87.

On September 21, 2007, Patty Aspinwall underwent a colonoscopy at the Endoscopy Center of Southern Nevada. RA 106:200. Dr. Carrera performed the procedure. RA 108:208. The CRNA who administered anesthesia to her was Ronald Lakeman. RA 431. A few weeks after the procedure, Ms. Aspinwall felt nauseated and had no appetite. RA 109:211. A few weeks after that, she was jaundiced and was admitted to the hospital. She later tested positive for Hepatitis

C. Id.

As the outbreak of Hepatitis C infections was reported, state and federal authorities initiated an investigation. RA 186-89; 255-59. Part of the investigation involved an observation of practices at the clinic. During this observation, health authorities observed Mathahs reuse syringes and Propofol vials, RA 192-93, observed other CRNAs re-use Propofol vials, RA 262:54, and identified anesthesia practices as the likely source of the outbreak. RA 266:71. Authorities also observed that the infection moved from one operating room to another along with petitioner Mathahs. 272:93-94; see also RA 551:41-43 (testimony that it was usual practice for CRNAs to take Propofol vials from one operating theater to another). Epidemiologists determined to some statistical probability that Mr. Ziyad's infection was transferred to Michael Washington on July 25, 2007, that Rubino was the source patient on September 21, 2007, and that the clusters were unrelated. RA 222-23.

Fraudulent Billing Practices

Desai and his co-defendants (including petitioner Mathahs) not only acted in reckless disregard for patient safety through their profit-maximizing supply-conservation activities, they also actively defrauded private and governmental health insurers by intentionally presenting false claims for anesthesia services not actually rendered. The average time for a colonoscopy procedure at the center was 8-9 minutes; the average time for an upper endoscopy procedure was 5-6 minutes. RA 391:40. Nevertheless, Desai and Mathahs ordered CRNAs to submit false documents claiming that each procedure lasted at least 31 minutes. RA 388:90, 444:102-04. Only in very rare and complicated cases would the actual anesthesia time be more than 30 minutes. RA 381. On September 21, 2007, for example, every anesthesia time was billed as over 31 minutes. RA 149:53-56. With almost 70 patients seen and two operating theaters, if the billing time were accurate, it would mean that patients were being treated for approximately 33 hours over a 24-

hour period. Id., 152:68.

This fraudulent billing enabled the practice, with the participation of the nurse anesthetists, to bill insurance companies for an additional 2 "units." Desai maintained a "CRNA Account" that received proceeds from the anesthesia billing and employees were bonused from that account at Desai's discretion. RA 24, 620. CRNAs were told that they would receive bonuses, RA 383:103-05, but it is unclear if any of the nurses in fact received money from this account. Regardless, employees were very well paid. RA 614-25.

Desai and Mathahs actively enforced these fraudulent billing practices. Desai would frequently exclaim to the CRNAs: "Remember: 31 minutes!" RA 494:55. Mathahs explained that anesthesia time had to be at least 31 minutes or he would not get paid. RA 381:99. CRNAs who did not comply with this practice were informed that their "time was wrong." RA 382-83. Further, because the private insurer PacifiCare had better fraud detection protocols than other insurance companies, Mathahs instructed that two PacifiCare patients could not be scheduled back-to-back, as their false times would overlap, which could possibly alert the company's auditors. RA 496:61-62, 611:41-42.

Desai's goal was to maximize the profits reflected on the surgical center's balance sheet. This would, in turn, increase the sale price of the practice as the standard sale offer is determined as a multiple of what is reflected on the business' balance sheet. Desai was motivated to sell and, before the outbreak was exposed, anticipated selling the practice for around $100,000,000. RA 624-25.

ARGUMENT

I

STANDARD OF REVIEW IN THIS ORIGINAL PROCEEDING

A writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. See NRS 34.160; Round Hill Gen.

Imp. Dist. v. Newman, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions in excess of its jurisdiction. See NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). Generally, neither writ will issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338. Further, mandamus and prohibition are extraordinary remedies, and the decision to consider a petition for such relief rests within the discretion of this court. State v. Dist. Ct. (Riker), 121 Nev. 112, P.3d 1070, 1074 (2005). "The purpose of neither writ is simply to correct errors." Id. However, even when a remedy at law arguably exists, this Court may exercise discretion to entertain petitions for extraordinary relief under circumstances revealing "urgency and strong necessity," Babayan, 106 Nev. at 176, 787 P.2d at 819, or when an important issue of law requires clarification and sound judicial economy and administration favor the granting of the petition. Riker, 121 Nev. at 112, P.3d at 1074. While Petitioner arguably has a remedy by way of review of the charging document on direct appeal should he be convicted, see West v. State, 119 Nev. 410, 75 P.3d 808 (2003), this Court has often elected to review pretrial claims challenging notice in the interests of judicial economy, see e.g., Gordon v. District Court, 112 Nev. 216, 227, 913 P.2d 240, 247 (1996). Either way, the petition should be denied.

II
THE COUNTS IN THE INDICTMENT ARE SUPPORTED BY SLIGHT OR MARGINAL EVIDENCE

Mathahs' petition is somewhat rambling and unfocused. At various times, he—like his co-petitioner Desai—claims that he is only challenging notice and therefore this Court's review is limited to the four corners of the Indictment. Yet, his petition cites to the grand jury transcript (without providing a record in this Court) on almost every page. Additionally, he appears to challenge the sufficiency

of the evidence supporting the Indictment. These challenges are inartfully raised and liberally sprinkled throughout his text, but the State will attempt to answer those here, without conceding that these sufficiency-of-the-evidence claims are improperly raised.

"The grand jury does not determine guilt or innocence, but instead decides whether probable cause supports the indictment." Sheriff v. Burcham, 124 Nev. 1247, 1257-58, 198 P.3d 326, 332-33 (2008). "The finding of probable cause may be based on slight, even 'marginal' evidence." Perkins v. Sheriff, 92 Nev. 180, 181, 547 P.2d 312, 312 (1976). "The State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense." Burcham, 124 Nev. at 1258, 198 P.3d at 333.

Mathahs essentially makes two arguments about financial gain and what he terms "the economic" counts. First, he claims that there is no proof he personally gained from the fraudulent activity. Second, he claims that there is no proof that the Endoscopy Center gained from the fraudulent activity. NRS 207.400(1)(c) (Racketeering) criminalizes employees of an enterprise who conduct or participate, directly or indirectly, in the affairs of the enterprise through racketeering activity or racketeering activity through the affairs of the enterprise. Put simply, there is no requirement that an employee benefit financially to be held liable under the statute. Nonetheless, it is clear that the Endoscopy Center made money from submitting the false anesthesia records. Mathahs was an employee of the Center who was paid a salary as he acknowledged in his petition. He certainly received some of the proceeds, albeit indirectly, from the fraudulent activity.

Mathahs also claims that there is no proof that the Endoscopy Center of Southern Nevada made a profit from the racketeering activity. Again, with regard to the Racketeering count, this is not an element of the offense.

With regard to Petitioner Mathahs' claim that he was merely an employee and did not personally gain from the falsification of the anesthesia times, Petitioner has misunderstood the elements of Racketeering. First, a plain reading of the statute indicates that employees who participate in racketeering activity can be held liable for fraudulent actions on behalf of the enterprise. In other words, it is not merely directors and those in administrative positions that have liability. Analyzing the federal RICO statute upon which the Nevada statute tracks, see NRS 207.400(1)(c), the United States Supreme Court noted that the portion of the statute which makes it impermissible to "participate, directly or indirectly, in the conduct of such enterprise's affairs," means that RICO liability "is not limited to those with primary responsibility for the enterprises affairs, just as the phrase 'directly or indirectly' makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required." See Reves v. Ernst & Young, 507 U.S. 170, 179, 113 S. Ct. 1163, 1170 (1993). The Court went on to note that liability under the RICO statute is "not limited to upper management" and that an "enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." Id. at 184, 113 S. Ct. at 1173.

In one of the many arguments Petitioner makes with no legal citation or support, Mathahs argues that the "economic charges" cannot be sustained because the State did not prove the amount of actual monetary gain to the Endoscopy Center of Southern Nevada or to Mathahs personally. Petitioner Mathahs is mistaken on the law. NRS 686A.2815 defines Insurance Fraud. Insurance fraud consists of knowingly and willfully presenting a statement to an insurer that the person knows, conceals or omits facts or contains false or misleading information. NRS 686A.2815(1)-(3). The statute does not require a specific dollar amount associated with the fraud.

The evidence presented at the grand jury clearly established Mathahs' liability for insurance fraud. He wrote in anesthesia times himself in some instances. He also clearly knew that this was an ongoing practice at the Center because he instructed others to adopt this procedure. RA 381:99.

Mathahs argues that the State did not establish how transmission of Hepatitis C occurred. Petitioner Mathahs does not tie this proclamation to any particular charge in the Indictment nor analyze how it may affect such a charge. Presumably, Petitioner Mathahs is referring to the allegations of Performance of an Act in Reckless Disregard of Persons or Property and Criminal Neglect of Patients. In each of those counts, among other allegations, the State alleges how the transmission of Hepatitis C occurred: "by administering and/or directly or indirectly instructing employees of the Endoscopy Center of Southern Nevada (ECSN) to administer one or more doses of the anesthetic drug Propofol from a single use vial to more than one patient contrary to the express product labeling of said drug and in violation of universally accepted safety precautions for the administration of said drug." In addition, the State presented the testimony of the local Health District and CDC Investigators who explained how the transmission occurred. The Investigators ruled out other means of transmission. RA 266:71. They saw the reuse of the Propofol bottles. RA 192:34. With regard to Petitioner Mathahs specifically, they saw him reuse bottles of Propofol on more than one patient after he had administered more than one dose of it to a previous patient. RA 192: 35. This is contrary to aseptic technique.

Next, Mathahs complains that other allegations in the "injury charges" do not apply to him. Mathahs notes that he did not set down rules for other employees or create the working environment at the center. In these arguments, Mathahs apparently overlooks the fact that he has been charged with two other individuals. Each committed different acts which resulted in liability for the crimes charged.

Mathahs also challenges the charges by mistakenly stating it was not the "multi-use" of a single use Propofol vial that caused the transmission. In fact, Mathahs states that such a practice was "within the boundaries of the aseptic technique." Petitioner Mathahs misunderstands the problem. Although contrary to packaging instructions, pre-loading multiple syringes before any have been used on a patient from a single vial will not cause transmission of a disease. RA 527:51. That, however, is not what Mathahs did. He used a syringe and needle on a patient. After injecting the patient, he returned to the medicine vial with the same syringe and withdrew more medication, thereby contaminating the medication. Then he used that same vial of medication on a subsequent patient. This violates aseptic technique and caused the transmission.

Later in the petition, Mathahs makes a few other generalized arguments, not specific to any particular element of the charged crimes. Once again, he repeats the erroneous claim that the State cannot establish how transmission occurred. As previously discussed, this argument is without merit. Next, he claims that it was not possible for the transmission to have occurred in two different procedure rooms on the same day. However, testimony from the grand jury indicated that at the Endoscopy Center of Southern Nevada, Propofol was reused from patient to patient. RA 396. At the Center, it was the CRNAs who would draw medication from multiple open vials so contamination could occur in two rooms nearly simultaneously once there was contamination of the vial. RA 268-69. Petitioner claims that with regard to September 21, 2007, the State "is simply unable to trace a single person or act," to the contamination. This is incorrect. It was Petitioner Mathahs who treated the source patient on September 21, 2007. RA 431. Records indicate that Rubino was Hepatitis C positive and he received more than one dose of Propofol from Mathahs. Subsequent patients had the same strain of the Hepatitis C virus as did Rubino. RA 220-22. Thus, in administering the drug to

Rubino in an unsafe manner, Mathahs contaminated the vial used on subsequent patients.

Petitioner Mathahs is also incorrect when he claims that "the State's proof is that they believe one of the two (meaning Mathahs and Lakeman) is responsible but they simply cannot determine which." Mathahs misinterprets the evidence. Mathahs treated the initial source patient and contaminated the anesthesia vial. At that point, he and Lakeman treated patients drawing from the contaminated vial in direct contradiction to accepted universal safety precautions for the administration of Propofol. They both engaged in criminally negligent acts.

With regard to the acts on July 25, 2007, only Lakeman was working. Thus, Petitioner Mathahs argues that he is not criminally responsible. At the time of those acts, Mathahs was employed at the Center. He, like Lakeman and with an understanding with Dr. Desai, had engaged in a practice of insurance fraud and obtaining money under false pretenses and theft. Also with Lakeman and Desai, he engaged in practices that endangered patient health, specifically reusing vials of Propofol on multiple patients. As a member of the conspiracy he is liable for the acts committed by co-conspirators. This is true regardless of whether he was present. NRS 195.020.

In conclusion, slight or marginal evidence supported the grand jury's probable cause determination as to all counts challenged.

III
THE INDICTMENT PROVIDES PETITIONER WITH CONSTITUTIONALLY ADEQUATE NOTICE OF THE CRIMES ALLEGED

Although Petitioner makes many tortured arguments challenging the sufficiency of the charging document, the State asserts that issue is improperly raised and that there is therefore only one issue that this Court should consider at this stage of the proceeding: Does petitioner have adequate notice of the charges against him so that he may mount a defense? See Nevius v. Sumner, 852 F.2d 463, 471 (9th Cir. 1988). NRS 173.075 requires that the charging document "be a plain,

concise and definite written statement of the essential facts constituting the offense charged." This Court has stated that it is "'not concerned with whether the information could have been more artfully drafted, but only whether as a practical matter, the information provides adequate notice to the accused.'" West v. State, 119 Nev. 410, 420, 75 P.3d 808, 814 (2003) (quoting Sheriff v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 234 (1979)). A review of the Indictment demonstrates that it is very detailed and thoroughly explains the State's theory of the case and, therefore, provides an adequate roadmap for the defense. This stands in illumining contrast to the charging documents this Court has rejected in the past. See Simpson v. District Court, 88 Nev. 654, 655, 503 P.2d 1225, 1226 (1972) (indictment fatally flawed where it "alleges nothing whatever concerning the means by which the crime was committed" and where prosecutor admitted State could not prove charged crime); Sheriff v. Standal, 95 Nev. 914, 916-17, 604 P.2d 111, 112 (1979) (indictment phrased in conclusory language of statute is, without more, constitutionally deficient).

A. The Criminal Negligence Counts Are Adequately Pleaded

Petitioner complains that he has inadequate notice of what he is being charged with in the Criminal Negligence Counts—counts 3, 4, 7, 8, 10, 11, 13, 14, 17, 18, 20, 21, and 24 charging Reckless Endangerment and Criminal Neglect of Patients as to each of the infected victims. To the contrary, these counts clearly allege that petitioner, in concert and agreement with his co-defendants, committed criminally reckless acts that caused the Hepatitis C virus to be transmitted from the source patient to the victim alleged separately in each count. Each count alleges that all the co-defendants endeavored to create, cultivate, and maintain a clinical environment where the virus could possibly be spread. The possible means of transmission are then exhaustively detailed in each count: (1) & (2) by re-using single-use Propofol vials; (3) by re-using Propofol and other single-use items contrary to their labeling and intended safe use; (4) by limiting the use and disposal

of necessary medical supplies [for example, the soiled aprons]; (5) by fraudulently pre-charting and rushing patients through procedures; (6) by over-scheduling patients and creating an unsafe environment by treating too many each day; and (7) inadequately cleaning endoscopes. The Criminal-Neglect-Of-Patient counts add an eighth "by methods unknown" alternative.

While listing each possible alternative as to each victim makes the Indictment lengthy and, at upon first impression, complicated, a proper reading of the document shows that it is simple to understand: each charged Defendant is alleged to have directly, or as a co-conspirator, or as an aider/abettor recklessly caused the transmission of the Hepatitis C virus by one of the listed alternative means. A fair critique of the pleading is that it is arguably over-comprehensive. In that vein, petitioner complains that some of the alleged means of transmission—for example the re-use of single-use bite blocks—have been conceded to probably not be the way that the virus was transmitted. See e.g., RA 265:65. However, over-inclusiveness does not speak to notice: petitioner is adequately informed here that he must defend against the allegation that the re-use of single-use items for financial gain made the most-likely method of transmission (contamination by re-use of syringes and Propofol vials) more likely. The re-use of single use forceps, bite blocks, and aprons does in fact make the accusation that syringes and Propofol vials were also re-used more likely. As a review of the evidence submitted to the grand jury reveals. the pleading was drafted in this manner because of the defendants' wide-ranging and multiplicitous acts of reckless and intentional disregard for the safety of their patients in order to satisfy their profit motive, not an attempt to sandbag the defendants by changing prosecution theories in the middle of trial. Cf. Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983).

1. "Methods Unknown"

Petitioner contends that by charging that defendants committed criminal neglect of patients by seven alternative means but also by methods unknown, the

entire count "fails to charge a public offense." This argument must be rejected as this alternative is specifically embraced by Nevada statute and caselaw. See NRS 173.075(2) (stating that charging document must specify the means by which the charged offense was committed or allege that the means are unknown); Simpson, 88 Nev. at 658 n.4, 503 P.2d at 1228 n.4 ("'When matters or things which are ordinarily proper or necessary to be alleged are in fact unknown to the grand jury or the prosecuting attorney, it is proper to allege in the indictment or information that they are unknown.'") (quoting 4 R. Anderson, Wharton's Criminal Law and Procedure, § 1763 (1957)); see also West, 119 Nev. at 419, 75 P.3d at 814; Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985).

Petitioner claims that such a theory cannot be used in the context of criminal negligence because the negligent act must be identified. However, he cites to no case supporting the proposition that precludes the State from alleging a crime occurred by means unknown in crimes premised on criminal negligence. The plain language of the statute certainly does not impose such a limitation and the State asserts that this plain language controls and disposes of the issue. Again, there is no conclusive proof that virus transmission occurred in one particular way, necessitating the pleading of alternatives. Accordingly, this alternative method is entirely appropriate, particularly as it is not the sole method alleged, but only one of eight.

2. Aiding and Abetting

Petitioner claims that the Indictment "offends due process" because it does not contain sufficient facts of "which defendant did what." He errs. Each counts alleges that "defendants" performed the criminal acts of which each and all defendants are accused. Therefore, all three co-defendants are charged with committing the alleged acts directly, or as principals through co-conspirator or aider/abettor theories of liability. This is constitutionally sufficient. See Lane v. Torvinen, 97 Nev. 121, 122, 624 P.2d 1385, 1386 (1981) ("The indictment

contains an introductory paragraph which names all of the various defendants, including Lane. Each count begins with a statement that 'the said defendants' committed the charged offense. We agree with the district court's finding that the indictment gives adequate notice that each and every defendant is included in each count of the indictment.").

Additionally, Petitioner claims that the State must articulate exactly the manner and means of the aiding and abetting. First, the Indictment reflects the means of aiding and abetting in the detailed alternative-means-of-transmission section. For example, Count 4 charges petitioner with responsibility under an aider/abetter theory by "directly or indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other and/or others to commit said acts." "Said acts," of course refers back to—and incorporates—the detailed alternative theories alleged. The specific acts constituting aiding and abetting are sufficiently explained to satisfy due process.

Nevertheless, the Indictment clearly accuses defendants of aiding and abetting each other "with the intent to commit said crime." The means of aiding and abetting are exhaustively detailed and thus constitutionally sufficient to meet the demands of due process. See Gordon v. District Court, 112 Nev. 216, 227, 913 P.2d 240, 247 (1996); cf. Ikie v. State, 107 Nev. 916, 922-23, 823 P.2d 258, 263 (1991) (STEFFEN, J., dissenting) ("Moreover, under the view expressed by the majority, unless the state can plead the specific acts by which an aiding and abetting is accomplished, no prosecution may proceed. This extreme result was never intended by Barren or any other ruling of this Court. It is expressly foreclosed by the statutory latitude accorded the state under NRS 173.075(2), a latitude which this Court has never declared unconstitutional or invalid in any of its cases, including Barren.").

B. The Racketeering Count is Adequately Pleaded

Count 1 charges each defendant with a course of racketeering conduct between June 3, 2005 and May 5, 2008 and alleges the predicate crimes of Insurance Fraud and Obtaining Money Under False Pretenses. Specifically, the predicate crimes are alleged as follows: "by directly or indirectly causing an/or pressuring the employees and/or agents of the Endoscopy Center of Southern Nevada to falsify patient anesthesia records from various endoscopic procedures; and/or to commit insurance fraud by directly or indirectly submitting said false anesthesia records to various insurance companies for the purpose of obtaining money under false pretenses from said insurance companies and/or patients; said fraudulent submissions resulting in the payment of monies to Defendants and/or their medical practice or enterprise, which exceeded the legitimate reimbursement amount allowed for said procedures." Petitioner challenges this count on several grounds.

First, he contends that the predicate crimes are insufficiently pleaded. Once again, the only issue here is whether Petitioner has sufficient notice of what he is being charged with so that he may mount a defense. West v. State, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). By the plain words of the charging document, the predicate crimes alleged are Insurance Fraud and Obtaining Money Under False Pretenses, the same crimes separately charged in counts 2, 5, 9, 12, 15, 16, 19, 22, 25, 27, and 28. These are proper predicate crimes under the racketeering statute. NRS 207.360(26), NRS NRS 207.360(30). Standing alone, the count alleges with specificity the acts underlying these predicate crimes and the range of dates when they occurred.

Further, the allegation inferentially incorporates the other charged counts into this count. An Indictment should be: "(1) read as a whole; (2) read to include facts which are necessarily implied; and (3) construed according to common sense." United States v. Blinder, 10 F.3d 1468, 1471 (9th Cir. 1993). Petitioner

cites to one Ninth Circuit case and argues for an overly-restrictive interpretation of notice. That case, however, only stands for the proposition that a defendant should not be convicted of a felony by inference when the plain language of the charging document only alleges a misdemeanor. United States v. Rodriguez-Gonzales, 358 F.3d 1156, 1159 (9th Cir. 2004). In contrast, this Court has looked to the entire pleading when evaluating the sufficiency of notice as to a racketeering allegation and should likewise do so in this case. See Hale v. Burkhardt, 104 Nev. 632, 637, 764 P.2d 866, 869 (1988) ("Not only is there a basic failure to articulate any misrepresentation on the part of respondents, there is no information provided in the complaint as to when, where or how such false representations are claimed to have been made.") (emphasis supplied).

Second, Petitioner Desai claims that the Indictment improperly alleges racketeering through NRS 207.400(1)(a), which criminalizes receiving funds from racketeering and investing those funds in property or any enterprise. According to Desai, the indictment fails to include language alleging the investment of racketeering funds received. However, the Indictment states: "receive any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds from the racketeering activity." (emphasis added). Petitioner has sufficient notice of the charge against him.

Third, Petitioner renews his claim that he is confused about which defendant is accused of doing what. As argued above, each defendant is accused of committing each act either directly or as a co-conspirator or aider/abettor and this Court has approved similar pleading language in the past. See Lane v. Torvinen, 97 Nev. 121, 122, 624 P.2d 1385, 1386 (1981) ("The indictment contains an introductory paragraph which names all of the various defendants, including Lane. Each count begins with a statement that 'the said defendants' committed the charged offense. We agree with the district court's finding that the indictment

gives adequate notice that each and every defendant is included in each count of the indictment.").

Petitioner cites to State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998), in support of his argument that co-defendants may not be charged in a single count. In Hancock, the indictment at issue alleged racketeering and stated the defendants agreed to the commission of two racketeering acts. In listing the acts, the indictment alleged the defendants violated "NRS 205.380 (obtaining money under false pretenses) and/or NRS 90.570(1) (committing securities fraud by making untrue statements or omitting statements of material fact in connection with an offer to sell a security) by defrauding (or attempting to defraud) Desiano, Kanes, and Williams into investing in the gold scheme." This Court found the pleading defective because it did not specify which respondent made which untrue statements or material omissions to which victims. Id. at 188, 955 P.2d at 186.

By contrast, the instant pleading provides when the predicate crimes occurred: June 3, 2005 through May 5, 2008. The Indictment indicates where the crime occurred, not simply Clark County, but through the enterprise of the Endoscopy Center of Southern Nevada. The Indictment also indicates how: by falsifying anesthesia records from procedures, which amounts to insurance fraud, and obtaining money under false pretenses by submitting records to insurance companies for reimbursement which exceeded the legitimate amount allowed for the procedure. These acts—unlike the untrue statements at issue in Hancock—were performed by each defendant in concert and accord with each other. Accordingly, Lane controls and the notice is constitutionally sufficient.

IV
THE REMEDY FOR ANY DEFICIENCY IN THE INDICTMENT IS AMENDMENT, NOT DISMISSAL

The State asserts that Petitioner has exceedingly-detailed notice of the charges against him so that he may prepare a defense. However, should this Court disagree and be inclined to strike language or an entire count from the Indictment,

the proper remedy is not dismissal of the entire pleading, but an order directing the State to amend the Indictment and strike the offending language. Hidalgo v. District Court, 124 Nev. 330, 340, 184 P.3d 369, 376 (2008). NRS 173. 095(1) provides that "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." See State v. District Court (Taylor), 116 Nev. 374, 378, 997 P.2d 126, 129 (2000); Grant v. State, 117 Nev. 427, 433, 24 P.3d 761 (2001) ("[a]s long the amended information does not involve new or different offenses, and the defendant is not prejudiced, the amendment may be granted); Benitez v. State, 111 Nev. 1363, 904 P.2d 1036 (1995) (the district court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced). Here, there could be no possible prejudice to the defendant because the only reason the amendment would be ordered is if this Court somehow thought the change would inure to his benefit.

CONCLUSION

Although this is a complicated case, when properly placed in context the Indictment is not difficult to understand and provides Petitioner with constitutionally sufficient notice of the charges he is facing. Accordingly, the State requests that this Court order the petition DENIED.

Dated this 19th day of September, 2012.

Respectfully submitted,

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BY */s/ Ryan J. MacDonald*
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 19, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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RJM//ed