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This Motion is based on the following Memorandum of Points and Authorities, and all papers and pleadings on file herein.

Dated this 24<sup>th</sup> day of September, 2012.

GORDON SILVER

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 **RELEVANT BACKGROUND**

4 Defendant Mathahs (“Mathahs”), a Certified Registered Nurse Anesthetist  
5 (“CRNA”), is a seventy-six year old man with no criminal history and an  
6 unblemished professional nursing career of thirty-five years. He was charged  
7 along with co-Defendants Lakeman (also a CRNA), and Desai, who is alleged to  
8 have been the criminal mastermind behind the charges alleged against all three  
9 Defendants.

10 The State is unable to prove either criminal causation or criminal agency in  
11 its quest to hold Mathahs criminally responsible for the transmission of the blood-  
12 borne pathogen, Hepatitis-C. However, in its effort to sustain probable cause, the  
13 State began its presentation of evidence on March 11, 2010 and concluded it on  
14 June 3, 2010. Multiple exhibits and depositions were given to the grand jury for  
15 consideration.

16 On June 3, 2010 the grand jury returned a true bill on a twenty-eight count  
17 indictment. The charges include: Racketeering, Performance of Act in Reckless  
18 Disregard of Persons or Property, Criminal Neglect of Patients, Insurance Fraud,  
19 Theft and Obtaining Money Under False Pretenses.

20 Because the charges contain innumerable alternative theories of liability,  
21 Mathahs cannot understand the charges as stated in the Indictment and is unable to  
22 defend himself against the same.

23 The three Defendants were charged without distinction between the three.  
24 As such, it appears that Mathahs is being charged with criminal liability for  
25 patients he did not even see, for dates and times of service where he was not even  
26 working (he was only a part-time employee), and for utilizing medical equipment  
27 that may have been in the possession or control of another defendant but were not  
28

1 utilized by the CRNAs.

2 The multiple and overlapping charges of Racketeering, Insurance Fraud,  
3 Theft, and Obtaining Money Under False Pretenses, are singularly premised upon  
4 the supposition of unjust enrichment based upon a falsely expanded “anesthesia  
5 time.” This anesthesia time was billed from ECSN to various insurance companies.  
6 The State opines that the “anesthesia time” is inaccurate. This inaccuracy,  
7 according to the State’s theory, caused monetary gain. This monetary gain  
8 allegedly constitutes a fraud. The State alleges this conduct occurred in so many  
9 different possible alternative methods that is impossible to understand exactly what  
10 it is charging against any of the Defendants, much less Mathahs.

11 This simple theory is used to ostensibly sustain not only Insurance Fraud  
12 charges, but also the charges of Theft and Obtaining Money Under False Pretenses.  
13 The same allegation of inflating anesthesia time of the infected patients is also  
14 aggregated into a single Racketeering count. The State made no charging  
15 distinction between the CRNA responsible for treating the alleged victims. In fact,  
16 CRNA Mathahs was charged for CRNA Lakeman’s patients despite the fact he had  
17 no contact with these individuals.

18 In regard to the allegation of racketeering, there are approximately twenty-  
19 five instances of “or” or “and/or” within count one alone. There are no specific  
20 factual allegations made. The RICO count fails because it does not adequately  
21 identify two predicate crimes, nor does it allege the elements of two predicate  
22 offenses, or even the facts establishing the necessary elements. Because the State  
23 has no viable theory of racketeering, the State proposes innumerable hypothetical  
24 scenarios by which racketeering “could have” occurred, stringing along  
25 incomprehensible, confusing “and/or” or “or” strings in an attempt to explain a  
26 theory that is not substantiated by any facts presented to the grand jury.

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1 The injury counts are characterized by the conclusion that certain patients  
2 were criminally exposed to the blood-borne pathogen of Hepatitis-C. The State is  
3 unable to prove how these patients were infected or who infected them.

4 The State's proof is uncertain and equivocal as to how the transmission  
5 occurred and who, if anyone, is criminally responsible. Because of this uncertainty,  
6 it has aggrandized the grand jury record with a plethora of irrelevant and  
7 inconsequential information.

8 Hepatitis-C is a blood-borne pathogen. Its transmission does not occur  
9 because of reused bite blocks or busy procedure schedules.<sup>1</sup> Yet, these spurious,  
10 irrelevant and unsupported claims clutter the Indictment. Rather than explain how  
11 Mathahs is criminally responsible for the acts alleged, most of the record appears

12 <sup>1</sup> A representative sampling of the superfluous and prejudicial language actually contained within the injury counts  
13 is found within the text of Count 10—Performance of Act in Reckless Disregard of Persons or Property:

14 ...creating an employment environment in which said employees were pressured to reuse  
15 syringes and/or needles and/or biopsy forceps and /or snares and/or bite blocks contrary to the  
16 express product labeling of said items, and/or in violation of universally accepted safety  
17 precautions for use of said items; and/or (4) by directly limiting and/or directly or indirectly  
18 instructing said employees, and/or creating an employment environment in which said employees  
19 were pressured to limit the use of medical supplies necessary to conduct safe endoscopic  
20 procedures; and/or (5) by falsely pre-charting the patient records and/or rushing patients through  
21 said endoscopy center and/or rushing patient procedures at the expense of patient safety and/or  
22 wellbeing and/or directly or indirectly instructing said employees, and/or creating an employment  
23 environment in which said employees were pressured to falsely pre-chart patient records and/or  
24 rush patients through said endoscopy center and/or rush patient procedures at the expense of  
25 patient safety and/or wellbeing; and/or (6) by directly or indirectly scheduling and/or treating an  
26 unreasonable number of patients per day which resulted in substandard care and/or jeopardized  
27 the safety and/or wellbeing of said patients; and/or (7) by directly failing to adequately clean  
28 and/or prepare endoscopy scopes, contrary to the express manufacturers guidelines for the  
handling and processing of said endoscopy scopes, and/or in violation of universally accepted  
safety precautions for the use of said scopes and/or directly or indirectly instructing said  
employees, and/or creating and employment environment in which said employees were  
inadequately trained and/or pressured to provide endoscopy scopes for patient procedures that  
were not adequately cleaned and/or prepared contrary to the express manufacturers guidelines for  
the handling and processing of said endoscopy scopes, and/or in violation of universally accepted  
safety precautions for the use of said scopes.

(Indictment, Appendix Vol. 1, pgs. 1-42).

Mathahs had nothing to do with patient scheduling, the use or maintenance of bite blocks, biopsy forceps or snares.  
He never touched or maintained the scopes used in these procedures. There is no evidence to suggest that he had any  
control over the pace of patient care or the use of medical supplies "to conduct safe endoscopic procedures." It is  
unconscionable to criminally charge someone for acts they had nothing to do with.

1 to be directed at inflaming the grand jury by demonstrating that Dr. Desai was both  
2 mean-spirited and frugal.

3 The most troubling aspect of these tangential accusations is that Mathahs  
4 had absolutely nothing to do with these events. Mathahs did not schedule patients,  
5 order or manage medical supplies, or use or cleanse endoscopy scopes or snares,  
6 nor was there any testimony provided that Mathahs was part of any “criminal  
7 enterprise.”

8 Because the State could not formulate specific acts that Mathahs committed  
9 for which he could be criminally liable, the State instead alleged vague,  
10 hypothetical possibilities combined in an incomprehensible string of and/or’s, in an  
11 effort to sustain charges against Mathahs.

12 On or about July 27, 2012, Mathahs filed a writ of mandamus (the “Writ”)  
13 before this Court. No determination has been made by this Court. Mathahs  
14 respectfully requests that the Writ be heard on oral argument.

## 15 II.

### 16 ARGUMENT

17 Rule 34(f) of the Nevada Rules of Appellate Procedure (“NRAP”) governs  
18 oral argument before the Nevada Supreme Court. In essence, the rule states that  
19 the Court may direct that the case be orally argued. The Nevada rule does not  
20 prescribe any standards or criteria for consideration by this Court in making a  
21 determination to order a case submitted for decision on the briefs, without oral  
22 argument. However, its federal counterpart does. Thus, Rule 34(a)(2) of the  
23 Federal Rules of Appellate Procedure (“FRAP”) provides as follows:

24 **(2) Standards.** Oral argument must be allowed in every  
25 case unless a panel of three judges who have examined  
26 the briefs and record unanimously agrees that oral  
27 argument is unnecessary for any of the following  
reasons:

28 **(A)** the appeal is frivolous;

1 (B) the dispositive issue or issues have been  
authoritatively decided; or

2 (C) the facts and legal arguments are adequately  
3 presented in the briefs and record, and the decisional  
4 process would not be significantly aided by oral  
argument.”

5 Although NRAP 34(f) does not prescribe standardized criteria for the  
6 submission of a case for decision without oral argument, the jurisprudence of this  
7 Court does reflect consideration of factors similar to those set forth in the above-  
8 quoted federal rule. See *e.g.*, *In re Discipline of Winter*, 2012 WL 642837 (Nev.  
9 February 24, 2012) (ordering appeal submitted on the record without oral argument  
10 where parties did not submit briefs challenging findings and recommendation of  
11 state bar panel or inform the Court of intent to contest the same); *Simpson v. State*,  
12 No. 58435, 2011 WL 5827791 (Nev. Nov. 17, 2011) (ordering appeal submitted on  
13 the record without oral argument where “there were no non-frivolous issues . . . on  
14 appeal”); *Luckett v. Warden*, 91 Nev. 681, 541 P.2d 910 (1975) (denial of oral  
15 argument with respect to successive application for post-conviction relief absent  
16 explanation as to why issues were not previously raised).

17 Petitioner Mathahs respectfully submits that circumstances justifying the  
18 submission of a case for decision without oral argument do not obtain in this  
19 instant case, and that for the reasons hereinafter stated, the Court should therefore  
20 grant Petitioner’s request for oral argument on the Writ.

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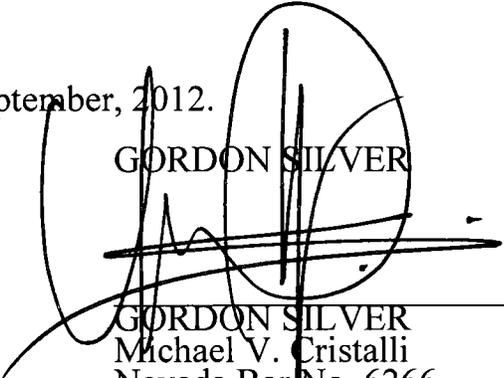
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**III.**  
**CONCLUSION**

Based on the foregoing, it is requested that the Petitioner be granted oral argument on the Writ.

Dated this 24th day of September, 2012.



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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 24<sup>th</sup>, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

- CATHERINE CORTEZ MASTO  
Nevada Attorney General
- RYAN J. MACDONALD  
Deputy District Attorney

BY:   
An employee of  
Gordon Silver