

Exhibit 8

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1 **MEMO**

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**FILED**

DEC 6 3 16 PM '11

*Alan L. Schuman*  
CLERK OF THE COURT

9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

11 THE STATE OF NEVADA,

12 Plaintiff,

13 vs.

14 DIPAK KANTILAL DESAI, #1240942,

15 Defendant.

Case No. C265107  
Dept. No. XXV

**DEFENDANT'S MEMORANDUM  
ON COMPETENCY STANDARDS AND  
HEARING PROCEDURES**

16 DIPAK KANTILAL DESAI, by and through his attorney, Richard A. Wright, WRIGHT  
17 STANISH & WINCKLER, submits this pre-hearing brief, pursuant to this Court's order on  
18 November 15, 2011, which set forth the constitutional requirements governing competency  
19 hearings.

20 This memorandum is based upon the Due Process clauses of the Fifth and Fourteenth  
21 Amendments and the Right to Counsel clause in the Sixth Amendment to the United States  
22 Constitution and the corresponding clauses in Article 1, Section 8, of the Nevada Constitution.

23 DATED this 6<sup>th</sup> day of December 2011.

24 Respectfully Submitted,

25 WRIGHT STANISH & WINCKLER

26 By: *Richard A. Wright*

27 RICHARD A. WRIGHT  
28 Counsel for DESAI

## POINTS AND AUTHORITIES

### 1. Introduction

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 130-140 (1992), J. Kennedy, concurring, *citing* Drope v. Missouri, 420 U.S. 162 (1975).

This Court must jealously protect these fair trial rights through the proper application of the constitutional standard of competency established in Dusky v. United States, 362 U.S. 402 (1960) and Drope. A legal determination of Desai's present ability to stand trial is not simply a matter of adopting a medical or psychological diagnosis. It requires a contextual analysis of Desai's present ability to sufficiently participate in the exercise of the above fair trial rights in the light of the specific demands of the instant case.

This prosecution is essentially a complex criminal medical malpractice case coupled with allegations of racketeering and insurance fraud. It involves voluminous discovery, scientific evidence, and numerous state witnesses. It will involve issues of specific intent and knowledge on the part of Desai. Trial is likely to last several weeks. Desai's competent participation is critical to the fair trial rights. Defense counsel continues to have bona fide doubt as to Desai's competency. Due to the brain damage caused by strokes, Desai lacks the present ability to sufficiently function during both the preparation of his defense and trial.

At the upcoming competency hearing, due process requires that the defense be permitted to introduce independent evidence of incompetency. Additionally, the defense will seek to introduce expert testimony to challenge the methodology of evaluation employed by Lake's Crossing, as well as assist in the proper application of the constitutional competency standards.

1 **2. Dusky-Drope Standard of Competency**

2  
3 NRS 178.400<sup>1</sup> recites a basic definition of competency derived from Dusky. The Nevada  
4 Supreme Court ruled that the statutory definition must be applied consistently with the due  
5 process requirements in Dusky. Calvin v. State, 122 Nev. 1178, 1183, 147 P.3d 1097, 1100  
6 (2006). Dusky is the governing standard of competency in Nevada. Id. The Dusky standard  
7 was further developed in Drope, which the Nevada Supreme Court found to be applicable to  
8 competency determinations. *See, Calvin*, 147 P.3d at 1100; Ferguson, 124 Nev. 795, 192 P.3d  
9 712, 718 (2008)(citing Drope's requirement to assess the defendant's present ability to consult  
10 with his lawyer).

11 Dusky requires that a defendant have "sufficient present ability *to consult with his lawyer*  
12 *with a reasonable degree of understanding*" and "a rational as well as factual understanding of  
13 the proceedings against him." 362 U.S. at 402 [emphasis added]. In Drope, the United States  
14 Supreme Court added another prong to the competency test, stating that the defendant must have  
15 the ability to assist counsel in preparing a defense. 420 U.S. at 171. The Drope Court  
16 recognized, "It has long been accepted that a person whose mental condition is such that he lacks  
17 the capacity to understand the nature and object of the proceedings against him, to consult with  
18 counsel, *and to assist in preparing his defense* may not be subject to a trial. . . [I]t suffices to  
19 note that the prohibition is fundamental to an adversary system of justice." Id. 171-72 (emphasis

20  
21  
22 <sup>1</sup> NRS 178.400(2) reads:

23 For the purposes of this section, "incompetent" means that the person does not have the  
24 present ability to:

- 25 (a) Understand the nature of the criminal charges against the person;  
26 (b) Understand the nature and purpose of the court proceedings; or  
27 (c) Aid and assist the person's counsel in the defense at any time during the  
28 proceedings with a reasonable degree of rational understanding.

1 added).

2 Thus the Dusky-Drope standard has been defined as a four-prong test: To meet the  
3 substantive right of due process, a defendant must have the sufficient present ability to (1)  
4 consult with the lawyer with a reasonable degree of rational understanding; (2) otherwise assist in  
5 the preparation of the defense; (3) possess a rational understanding of the criminal proceedings;  
6 and (4) possess a factual understanding of the of the proceedings. See, U.S. v. Duhon, 104 F.  
7 Supp. 663, 670 (W.D. La. 2000); ABA Criminal Justice Mental Health Standard 7-4.1(b) (1989).  
8 Attached hereto for the Court's convenience is a copy of Commentary, ABA Mental Health  
9 Standard 7-4.1, which discusses the case law and scholarly medical-legal writings on competency  
10 determination.

11 The Dusky-Drope standard does not provide specific guidance on how to determine  
12 competency. Instead, it establishes a constitutional norm that permits a judge to analyze each  
13 individual defendant's level of functioning relative to give to the specific demands of the case.  
14 The competency determination, therefore, is far more than a medical or psychological diagnoses.  
15 It is a legal analysis of the sufficiency of the defendant's present ability to function within the  
16 context of the particular case. See, Wilson v. United States, 391 F.2d 460, 463-64 (D.C. Cir.  
17 1968); Commentary, ABA Mental Health Standard 7-4.1, pp. 167-75 (discussing case law and  
18 scholarly writings on the functional applications of the competency standard). For the Court's  
19 convenience, a copy of this ABA standard is attached hereto.

20 **3. Desai Inability to Consult with Counsel and Assist in the Preparation of His Defense**

21 During the upcoming competency hearing, this Court will need to accurately assess  
22 Desai's present ability to function in the context of the instant complex prosecution consistent  
23 with the above constitutional standards. Counsel's expressed doubt as to his client's competency  
24 is especially relevant given his close contact with the defendant. Calvin, 147 P.3d at 1100, *citing*  
25 Drope, 420 U.S. at 177n. 13. On behalf of his client, the undersigned counsel continues to  
26 express a bona fide doubt as to Desai's competency.

1 Due to the brain damage caused by strokes, Desai lacks the present ability to sufficiently  
2 function during both the preparation of his defense and trial. By way of example, and not  
3 limitation:

4 (1) Desai cannot sufficiently accept advice from counsel regarding legal strategy for  
5 the trial or consider any possible pretrial resolution;

6 (2) Desai cannot sufficiently recall or communicate pertinent facts necessary to  
7 present a defense;

8 (3) Desai cannot sufficiently assist counsel in analyzing discovery and grand jury  
9 evidence;

10 (4) Desai cannot sufficiently follow the anticipated testimony at trial in order to assist  
11 counsel confront the witnesses against him; and

12 (5) Desai cannot sufficiently testify in his defense.

13 **4. The Due Process Right to Present Independent Evidence of Incompetency**

14 Pursuant to NRS 178.460, the defense has made a timely request for a competency  
15 hearing following the receipt of the Lake's Crossing report of competency. Given the  
16 constitutional magnitude of the competency determination, the defense must be afforded the  
17 opportunity to not only cross exam the court-appointed experts, but to also present independent  
18 evidence of incompetency subject to the usual evidentiary rules of relevancy. Calvin, 147 P.3d at  
19 1100.

20 In Ferguson, the Nevada Supreme Court addressed the defendant's due process right to a  
21 competency hearing following the defendant's return from Lake's Crossing. 192 P.3d at 719.  
22 The competency court denied the defendant's untimely request for a competency hearing under  
23 NRS 178.460, despite counsel's expressed doubts as to the defendant's competency to stand  
24 trial. Id. The defense sought to introduce expert testimony of a psychologist to establish  
25 incompetency despite the claim of restoration to competency made by Lake's Crossing  
26 personnel. Id. The Nevada Supreme Court held that the competency court violated the

1 defendant's right to a fair trial by failing to hold a competency hearing and denying the defense  
2 counsel the opportunity to present the evidence relevant to the ultimate issue of the defendant's  
3 competency to assist counsel and understand the nature of the proceedings. Id.

4 To accurately assess Desai's present ability under the above-discussed constitutional  
5 standards, this Court must afford defense counsel the opportunity to present independent  
6 evidence of incompetency. Additionally, the defense should be permitted to introduce evidence  
7 relevant to contest the methodology of evaluation employed at Lake's Crossing. It would be  
8 fundamentally unfair to limit the defense counsel's ability to establish competency to the mere  
9 cross-examination of the Lake's Crossing experts.

10 **5. Conclusion**

11 An accurate assessment of Desai's present ability to exercise his fair trial rights requires  
12 a careful analysis of Desai's level of functioning in the light of the specific demands of this  
13 complex prosecution. Fundamental due process mandates that the defense have the opportunity  
14 to present relevant evidence independent of court-appointed experts.

15  
16 DATED this 6<sup>th</sup> day of December 2011.

17 Respectfully Submitted,

18 WRIGHT STANISH & WINCKLER

19  
20 BY 

21 RICHARD A. WRIGHT  
22 Counsel for DESAI

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27 Attorneys for Dipak Desai

**CERTIFICATE OF SERVICE  
OF DEFENDANT'S MEMORANDUM  
ON COMPETENCY STANDARDS  
AND HEARING PROCEDURES**

I HEREBY CERTIFY that on December 6, 2011, I caused a copy of the foregoing DEFENDANT'S MEMORANDUM ON COMPETENCY STANDARDS AND HEARING PROCEDURES to be served by hand-delivery and facsimile to:

Michael V. Staudaher  
Chief Deputy District Attorney  
200 Lewis Avenue  
Third Floor  
Las Vegas, NV 89101  
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William K. Carroll  
An Employee of Wright Stanish & Winckler



If they are not committable under laws governing civil involuntary hospitalization, they must be released even though they may have committed serious offenses. Standard 7-4.13 proposes that permanently incompetent defendants charged with felonies causing or seriously threatening serious bodily harm be subjected to a hearing to determine factual guilt. If guilt is not established, or if any other less serious offense underlies pending criminal charges, the defendant should be discharged and could be hospitalized only on the basis of independent civil commitment proceedings. If factual guilt of a requisite felony is determined, then the special commitment proceedings envisioned for dangerous persons acquitted of criminal charges because of mental nonresponsibility [insanity] may be invoked.<sup>38</sup>

A final issue addressed by the standards is the validity of a trial of a defendant on psychotropic medication. Rejecting the "absolute bar" rule followed by many courts, which automatically prohibits the trial of defendants whose competence depends upon continuous psychotropic medication, the standards look to the ultimate issue to be resolved: a defendant's actual competence or incompetence. A defendant who is competent — whether through psychotropic medication or otherwise — is triable.<sup>39</sup> If a medication adversely affects trial processes, for example, through distorting a defendant's demeanor either in the courtroom or on the witness stand, a court must take appropriate steps to correct the distortion, perhaps through testimony about the medication and its effects or through appropriate jury instructions.<sup>40</sup>

#### **Standard 7-4.1. Mental incompetence to stand trial; rules and definitions**

(a) No defendant shall be tried while mentally incompetent to stand trial.

(b) The test for determining mental competence to stand trial should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and otherwise to assist in the defense, and whether

38. See standard 7-7.4.

39. Standard 7-4.4(a).

40. Standard 7-4.4(b).

the defendant has a rational as well as factual understanding of the proceedings.

(c) The terms *competence* and *incompetence* as used within Part IV of this chapter refer to mental competence or mental incompetence. A finding of mental incompetence to stand trial may arise from mental illness, physical illness, or disability; mental retardation or other developmental disability; or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings.

### ***Commentary Introduction***

The issue of triability of defendants determined to be mentally incompetent or "insane at time of trial" was one of the earliest criminal mental health issues addressed in both English and American common law jurisprudence, probably second only in historical importance to that of mental nonresponsibility [insanity] at the time of an offense. Today the issue of present mental incompetency, quantitatively speaking, is the single most important issue in the criminal mental health field, based on the frequency of present mental incompetency cases in comparison to those involving the defense of mental nonresponsibility [insanity], and the statistical prevalence of mental illness and mental retardation among inmates of penal institutions. Standard 7-4.1 addresses the two most fundamental issues of the consideration of incompetence: (1) the basic rule of nontriability of mentally incompetent defendants and (2) the legal criteria for determining when incompetence exists. The standard clarifies the definition of mental incompetency, thus demonstrating by design that it is a matter of legal and not medical or psychological definition and indicating that incompetence is to be determined according to functional rather than diagnostic criteria.

### ***Related Standards***

ABA, Standards for Criminal Justice 7-4.13, 7-4.14, 7-5.1, 7-5.2, 7-5.3  
ALI, Model Penal Code 4.04

### ***Commentary***

Standard 7-4.1 reflects the fundamental constitutional principle prohibiting trial of defendants determined to be mentally incompetent to

stand trial. This principle of nontriability conforms to the apparent conclusion of the Supreme Court that the prohibition is absolute: One determined to be incompetent to stand trial cannot be tried. In *Drope v. Missouri*,<sup>1</sup> the Court analyzed its rule in terms of due process and characterized it as "fundamental to an adversary system of justice."<sup>2</sup> In *Pate v. Robinson*,<sup>3</sup> the Court noted and apparently concurred with the government's stipulation "... that the conviction of an accused person [who] is legally incompetent violates due process ... and that state procedures must be adequate to protect this right."<sup>4</sup>

In *Jackson v. Indiana*,<sup>5</sup> the Court delineated procedures permissible "despite the defendant's incompetency," but notably omitted a reference to a possible substantive determination of the ultimate factual issue of guilt. The pragmatic consequences resulting from the adoption of a rule of absolute nontriability are not entirely satisfactory. Nonetheless, the standards accept that position as constitutionally mandated by *Robinson*, *Drope*, and *Jackson*.<sup>6</sup>

Standard 7-4.1(b) sets forth a test for incompetence to stand trial taken virtually verbatim from the decisions in *Dusky v. United States*<sup>7</sup> and *Drope v. Missouri*.<sup>8</sup> In *Dusky*, the Court established the standard in these terms:

... [The] test must be whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and ... a rational as well as factual understanding of the proceedings against him.<sup>9</sup>

1. 420 U.S. 162 (1974).

2. *Id.* at 172.

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

*Id.* at 171.

3. 383 U.S. 375 (1966).

4. *Id.* at 378. The Court concluded that the trial judge's failure to make sufficient inquiry into the issue "deprived Robinson of his constitutional right to a fair trial." *Id.* at 385.

5. 406 U.S. 715, 740 (1972). See standards 7-4.12 and 7-4.13 and commentary for a more complete discussion of procedures that might be available despite a defendant's incompetence.

6. See commentary to standard 7-4.13, notes 9-20 and accompanying text, for a discussion of various alternatives suggested by commentators and adopted by some states.

7. 362 U.S. 402 (1960).

8. 420 U.S. 162 (1974).

9. *Dusky v. United States*, 383 U.S. at 402.

Standard 7-4.1(b) combines with the *Dusky* formulation language taken from *Drope v. Missouri* that a defendant be able to "assist in his defense."<sup>10</sup> Decisional law and commentators consider the *Dusky* test adequate to meet the policy demands undergirding the incompetence to stand trial doctrine. Because the fundamental purpose of the rule is to promote accurate factual determinations of guilt or innocence by enabling counsel to evaluate and present available defenses to factfinders, defendants should have at least the intellectual capacity necessary to consult with a defense attorney about factual occurrences giving rise to criminal charges. Obviously, to accomplish that, defendants require a minimal understanding of the nature of criminal proceedings, the importance of presenting available defenses, and the possible consequences of either conviction or acquittal. The incompetence rule serves, as well, a broader societal interest in maintaining a certain dignity in the administration of criminal justice.<sup>11</sup> It rests on the assumption that a defendant will be a conscious participant in presenting the defense case; the trial of one incapable of fulfilling that expectation does not reflect "a reasoned interaction between an individual and his community" but societal "in-ventive against an insensible object."<sup>12</sup>

Utilization of the basic *Dusky* language as the criterion to determine procedural competence hardly terminates consideration of the issue. Indeed, a careful reading of the language of the test shows three separate factors to be requisite: Defendants must be able (1) to consult with defense counsel, (2) to "otherwise assist with [their] defense," and (3) to have both a rational and factual understanding of the proceedings. The interpretation of these discrete elements of the *Dusky* test has been the subject of much scholarly and decisional analysis; while all concede the general language of the test, few agree on its more specific applications. Some jurisdictions have attempted with varying results to codify more particularly the test for incompetence. Illustrations are found in the extensive criteria adopted by statute in New Jersey<sup>13</sup> and a decision of the United States District Court for the Western District of Missouri.<sup>14</sup>

10. *Drope v. Missouri*, 420 U.S. at 171. See Weiner, *Mental Disability and the Criminal Law*, in *THE MENTALLY DISABLED AND THE LAW* 693, 694-696 (S. Brakel, J. Parry & B. Weiner eds., 3d ed. 1985). State legislation as of October 1982 may be found in *id.* at 744-754, Table 12.1.

11. See Winick, *Incompetency to Stand Trial: Developments in the Law, Mentally Disordered Offenders*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 3 (J. Monahan & H. Steadman eds. 1983) [hereinafter cited as Winick].

12. *Id.* at 5; Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967) [hereinafter cited as Harvard Note].

13. N.J. STAT. ANN. §2C:4-4 (West 1982).

14. *Wieter v. Settle*, 193 F. Supp. 318, 321-322 (W.D. Mo. 1961).

1. A defendant must have the mental capacity to appreciate his or her presence in relation to time, place, and things.
2. A defendant's elementary mental processes must be adequate to comprehend (a) that the defendant is in a court of justice charged with a criminal offense; (b) that a judge is on the bench; (c) that a prosecutor is present who will seek to convict the defendant of a criminal charge; (d) that the defendant has a lawyer who will undertake to defend against that charge; (e) that the defendant is under no duty to testify in personal defense but that, if he or she chooses to testify, the defendant will be expected to relate to the best of his or her mental ability the surrounding facts at the time and place of the alleged criminal violation; and (f) that there will or may be a jury present to pass upon evidence adduced as to guilt or innocence of the charge.
3. A defendant must have the mental capacity to participate in an adequate presentation of his or her defense.
4. A defendant electing to enter into plea negotiations or plead guilty must comprehend the consequences of a guilty plea and be able knowingly, intelligently, and voluntarily to waive rights that legally are no longer applicable upon entry of a guilty plea.

Mental health professionals at the Harvard Medical School Laboratory of Community Psychiatry produced a list of thirteen "quantifiable clinical criteria" to assess competence<sup>15</sup> that, slightly paraphrased, were adopted by court rule in Florida.<sup>16</sup> The Nebraska Supreme Court proposed yet another list of twenty similar yet differing criteria.<sup>17</sup> Arizona, in endeavoring to codify the *Dusky* rule, has directed examining experts to file with trial courts reports addressing seven specific matters.<sup>18</sup>

Lists of this sort, replete with factors more specific than, but as ambiguous as, those in *Dusky*, appear to establish objective criteria. In fact, however, they fail to address two fundamental issues: (1) the standard by which to assess defendants' rational assessments of the criminal trial

15. HARVARD MEDICAL SCHOOL LABORATORY OF COMMUNITY PSYCHIATRY FINAL REPORT, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (1973) [hereinafter cited as LABORATORY OF COMMUNITY PSYCHIATRY REPORT].

16. FLA. R. CRIM. PROC. 3.211 (1980).

17. *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980).

18. ARIZ. REV. STAT. ANN. §13-1621(A) (1970) (abrogated by ARIZ. R. CRIM. P. 11.1 (1973) (utilizing the *Dusky* test)). The Arizona codification was couched in somewhat conclusory language, requiring that an evaluator determine such facts as "the defendant's ability to assist in his own defense" and "whether the defendant's ability to reason or to control his conduct is substantially impaired." Wexler, Scoville, et al., *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 163-164 (1971) [hereinafter cited as Wexler et al.].

process; and (2) the assistance to be required from them. An inquiry whether a defendant "comprehends . . . that there is a judge on the bench" is certainly insufficient. A nonbinding compilation of many specific factfindings corresponding to a lengthy list of suggested criteria may limn an overall picture of a defendant's mental state and give significant aid to a court in making a final determination of competence. However, to crystallize such a list in the form of a statute or rule requirement proves counterproductive because it causes courts to substitute particularized judgments on discrete and superficial aspects of defendant's mental state for a far more important ultimate conclusion of competence. Standard 7-4.1(b), rather than formulating specific criteria to be addressed by courts and evaluators, recognizes that the Supreme Court in *Dusky* and *Drope* has established a basic norm, understandably and necessarily imprecise, that permits individual judges to evaluate each case in the light of an individual defendant's level of functioning in relation to the complexity of that case.<sup>19</sup>

The *Dusky* test, accepted as legally adequate by judges and attorneys, has proven far less satisfactory to professional evaluators who try to apply it to individual defendants. In the course of their efforts to translate clinical diagnostic findings into the legal conclusions required by the test for legal competence, mental health and mental retardation professionals usually have taken one of two roads. They have either translated clinical diagnostic labels into conclusions couched in legal terms or have attempted to construct their own diagnostic criteria to permit application of clinical findings to legal requirements.<sup>20</sup> Another difficulty experienced by professional examiners arises from a confusion of the issues of competence and sanity. For want of guidance from appointing or authorizing courts, examining experts often have confused criteria governing present mental incompetence with those defining mental nonresponsibility [in-

19. See Slovenko, *The Developing Law on Competency to Stand Trial*, 5 J. PSYCHIATRY & L. 165 (1977) [hereinafter cited as Slovenko].

20. Roesch and Golding, for example, pointed out that their study had uncovered a significant relationship between clinical diagnoses and determinations of competence: "Those defendants considered incompetent by hospital staff received labels of either psychosis or mental retardation, while competent defendants were viewed as being without psychosis." Roesch, *A Brief, Immediate Screening Interview to Determine Competency to Stand Trial*, 5 CRIM. JUST. & BEHAV. 241 (1978). Geller and Lister related that, despite specific instructions to examiners to report on the issues of competence and sanity, the majority of reports submitted to courts made no mention of either issue. Geller & Lister, *The Process of Criminal Commitment for Pre-Trial Psychiatric Examination and Evaluation*, 135 AM. J. PSYCHIATRY 53 (1978).

sanity].<sup>21</sup> The most widely known checklist of diagnostic criteria designed to promote accurate clinical assessment of competence is that developed by the Harvard Medical School Laboratory of Community Psychiatry.<sup>22</sup> The Laboratory staff developed two instruments to test competence, the Competency Screening Test and the Competency Assessment Instrument. The creators of those instruments have been criticized severely, chiefly because they allegedly injected their own political and philosophical beliefs into what they proposed as devices to attain objective assessments: competence to stand trial was equated with an understanding and acceptance of an idealistic view of the criminal justice system that might well not be shared by defendants brought into the process.<sup>23</sup> More recently, critics have acknowledged that the Laboratory's instruments probably can effectively screen out defendants who are competent to stand trial but are less effective in determining actual incompetence.<sup>24</sup> Whatever the particular value of test instruments of this sort, they exemplify the difficulties inherent in attempting to translate the nuances of legal definitions into specific, objective diagnostic criteria.

A review and analysis of precedent and commentary from legal and mental health or mental retardation professionals reveals a general trend toward certain categories of analysis to determine competence. Most commentators feel that criteria to determine competency under the general *Dusky* formulation should be "functional," in that they require an evaluation of a particular defendant's skills rather than a general determination of that defendant's mental condition.<sup>25</sup> An evaluation should touch on at least five different areas:

1. Defendants should have a perception of the process not distorted by mental illness or disability. Whether phrased in terms of (a) an ability to perceive rationally and without dis-

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21. Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCHIATRY 713 (1963); Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatry*, 122 AM. J. PSYCHIATRY 616 (1965) [hereinafter cited as Robey].

22. See generally LABORATORY OF COMMUNITY PSYCHIATRY REPORT, *supra* note 15.

23. See Brakel, *Presumption, Bias and Incompetency in the Criminal Process*, 1974 WIS. L. REV. 1105, 1109-1110, 1128.

24. Nottingham & Mattson, *A Validation Study of the Competency Screening Test*, 5 LAW & HUM. BEHAV. 329 (1981).

25. Bennett, *Comment: Competency to Stand Trial: A Call for Reform*, 59 J. CRIM. L.C. & P.S. 569 (1968); Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, 17 CAL. W.L. REV. 365 (1981) [hereinafter cited as Mickenberg].

tortion,<sup>26</sup> (b) an "understanding" of the process,<sup>27</sup> or (c) an "awareness" of the charge and possible verdicts,<sup>28</sup> or (d) couched in a codified requirement that defendants understand that there is a judge on the bench, a prosecutor who will try to convict, and defense counsel who will defend against criminal charges, the thrust of the requirement is that defendants understand the nature of the process and their functions as participants within that process free from undue perceptual distortion.

2. Defendants require a capacity to maintain the attorney-client relationship, embracing an ability to discuss the facts of a case with counsel "without paranoid distrust,"<sup>29</sup> to advise and accept advice from counsel, to elect an appropriate plea, and to approve the legal strategy of the trial. The relationship requires an ability to consult rationally about a pending case which is something more than a superficial capacity to converse with others.<sup>30</sup>
3. A third requirement, somewhat akin to the second, bears on the ability to recall and relate factual information. If a primary purpose of the prohibition against trying incompetent defendants is to preserve accuracy in factfinding, then defendants must be able to recall and relate factual occurrences. If they are not, they cannot reveal exonerating circumstances to their attorneys.<sup>31</sup> This requirement has been variously phrased: that a defendant have "sufficient memory to relate answers to questions posed" to him or her, that "he [or she] can follow the testimony reasonably well," and that there be a "capacity

26. Mickenberg, *supra* note 25, at 382.

27. H. STEADMAN, BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 113 (1979).

28. Robey, *supra* note 21, at 619.

29. *Ibid.*

30. Mickenberg, *supra* note 25, at 385. This requirement has been expressed in terms of (1) defendants' ability "both [to] give and receive advice from [their] attorneys" and to "confer coherently with some appreciation of the proceedings," *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538, 545 (1980) (Krivosh, C. J., concurring), (2) their capacity to "relate to the attorney" and to "assist the attorney in planning [a] defense." FLA. R. CRIM. P. 3.211 (1980).

31. Harvard Note, *supra* note 12, at 457. This criterion should include the ability to listen to witnesses and to "inform [a] lawyer of distortions or misstatements." Robey, *supra* note 21, at 619.



to realistically challenge prosecution witnesses." Without that capacity, defendants realistically are unable to exercise the rights to consult with counsel, testify in personal defense, and confront accusers.<sup>32</sup>

4. Defendants should be capable of testifying in personal defense if that should prove appropriate.<sup>33</sup>
5. A final factor is a defendant's abilities to meet the competency criteria in the setting of the particular charges, the extent of the defendant's needed participation in trial proceedings, and the complexity of the case. Therefore, an evaluator should consider a defendant's mental ability in relation to the severity of the charge and the complexity of the case.<sup>34</sup>

Standard 7-4.1(c) establishes a clear dichotomy between mental health or mental retardation concepts and legal principles governing present mental competency. If defendants are capable of meeting the articulated requirements for competence, the presence or absence of mental illness is irrelevant. Conversely, defendants may not be mentally ill yet may be incompetent to stand trial. Legal criteria, not medical or psychological diagnostic categories, govern competency. Hence, the presence or absence of mental illness, while certainly significant in evaluating defendant competence, is by no means conclusive.<sup>35</sup> Even though a defendant in a criminal case may be severely psychotic, "if the patient is able to comprehend those aspects of the court procedure listed, and able to work with his lawyer in conducting a defense, he should go back to trial."<sup>36</sup> The standard, therefore, clearly adopts the position that a finding of incompetence does not depend on a preliminary diagnosis of mental illness. A determination of competence or incompetence is functional in nature, context-dependent and pragmatic in orientation, and should be viewed as such by both courts and mental health and mental retardation professionals.

32. Harvard Note, *supra* note 12, at 458.

33. This criterion has been couched in varying ways, e.g., "defendant's capacity to testify relevantly," FLA. R. CRIM. P. 3.211 (West Supp. 1985), and an expectation that defendants will be expected to tell to the best of their mental ability the facts surrounding them at the time and place of an alleged violation. See LABORATORY OF COMMUNITY PSYCHIATRY REPORT, *supra* note 15, at 103.

34. See Robey, *supra* note 21, at 620.

35. B. ENNIS & R. EMERY, THE RIGHTS OF MENTAL PATIENTS 100 (1978).

36. Robey, *supra* note 21, at 617.

Exhibit 9

Exhibit 9

  
CLERK OF THE COURT

**BREF**  
DAVID ROGER  
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Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
  
Plaintiff,  
  
-vs-  
  
DIPAK KANTILAL DESAI,  
#1240942  
  
Defendant.

CASE NO: 10C265107-1  
DEPT NO: XXV

**STATE'S BRIEF TO PRECLUDE THE DEFENSE FROM CALLING ITS OWN  
WITNESSES AT AN NRS 178.460 HEARING**

DATE OF HEARING: January 27, 2012  
TIME OF HEARING: 9:00 a.m.

COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through PAMELA WECKERLY, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in support of the State's Brief To Preclude The Defense From Calling Its Own Witnesses At An NRS 178.460 Hearing.

This brief is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

///

///



1 incompetency “and that commitment is required for a determination of his ability to receive  
2 treatment to competency and to attain competence, the judge” orders the defendant into  
3 custody of the Administrator for “detention and treatment at a division facility that is secure.  
4 The order may include the involuntary administration of medication if appropriate for  
5 treatment to competency.” NRS 178.425 (1). The defendant is held in such custody until a  
6 court orders his release or he is returned for trial as provided in NRS 178.450, 178.455, and  
7 178.460. NRS 178.425 (2).

8 NRS 178.455 provides the procedure for evaluating defendants following a finding of  
9 incompetence. Section (1) states that the Administrator shall appoint a licensed psychiatrist  
10 and psychologist from the treatment team, who are certified, to evaluate the defendant. The  
11 Administrator “shall also appoint a third evaluator” who is not a member of the treatment  
12 team. Upon completion of the evaluation, the Administrator shall report to the court in  
13 writing his specific findings regarding the defendant’s ability to understand the nature of the  
14 offense charged, understand the nature of the court proceedings, and aid and assist counsel.  
15 If the Administrator finds the defendant does not have those abilities, the Administrator  
16 “shall include in the written report the reasons for the finding and whether there is a  
17 substantial probability that he can receive treatment to competency and will attain  
18 competency in the foreseeable future.” NRS 178.455 (2).

19 NRS 178.460 provides that upon the request of either side after the report from the  
20 Administrator is issued, the court shall hold a hearing “at which the district attorney and the  
21 defense counsel may examine the members of the treatment team on their report.”

22 In the instant case, Defendant Desai asks this Court to allow him to present evidence  
23 and evaluations of different doctors at his post-Lake’s Crossing hearing. Such an allowance  
24 is beyond the scope of the clear provisions of NRS 178.460(1). Thus, the State opposes any  
25 admission of evidence or testimony beyond questioning the doctors from Lake’s Crossing  
26 who completed a report on Desai and the questioning of any pre- Lake’s Crossing doctors.

27 The State could find no Nevada Supreme Court case directly addressing the issue of  
28 limiting what evidence is permissible at a hearing pursuant to NRS 178.460. The Nevada

1 Supreme Court, however, has interpreted other statutes related to competency issues,  
2 however. In interpreting the statutes dealing with defendant competency, the Nevada  
3 Supreme Court has looked to the plain language of the statutes. In Sims v. State, 125 Nev.  
4 126, 206 P.3d 980 (2009), two defendants raised competency issues shortly after being  
5 charged. The justice court bound the defendants over to Department 5 for resolution of the  
6 competency issues. The district court appointed two psychologists to evaluate the  
7 defendants. The experts reported that the defendants were competent. The defense  
8 apparently still had concerns regarding competency so it sought out its own experts to  
9 evaluate the defendants. These experts were certified pursuant to NRS 178.417. These  
10 evaluators concluded the defendants were not competent. Id. at 128, 206 P.3d at 982.

11 Upon receiving these evaluations, defense counsel raised the competency issue again  
12 before the trial judge and the trial judges referred the cases back to Department V. The  
13 defendants were evaluated a second time by court appointed examiners. Prior to the hearing  
14 on competency, defense counsel moved to admit the results from the experts it had retained.  
15 The court denied the motion. At issue, was whether NRS 178.415(3) permitted defense  
16 counsel to introduce competency evaluations it secured during a competency hearing. The  
17 district court, Department V, interpreted NRS 178.415(3) to limit the admissibility of  
18 evidence during the competency hearing to not include evaluations outside the court  
19 appointed experts. Id. at 130, 206 P.3d 982.

20 Upon review, the Nevada Supreme Court noted that the issue was one of statutory  
21 interpretation, not constitutional rights or a due process claim. Id. The court also stated that  
22 in “examining a statute, this court will look first to the statute’s plain language. . . If the plain  
23 language of the statute is ambiguous, or if the plain meaning of the statute was clearly not  
24 intended by the Legislature, this court will then turn to legislative intent for guidance.” Id. at  
25 130, 206 P.3d at 982 (internal citations omitted); State v. State Employees Assoc., 102 Nev.  
26 287, 289-90, 720 P.2d 697, 699 (1986) (“plain and unambiguous” language within a statute  
27 “must be given effect” unless from the language of the statute “it clearly appears that such  
28 [an interpretation] was not so intended”). The court went on to quote the wording of NRS

1 178.415(3), noting that it provides that the court “shall permit counsel for both sides to  
2 examine the person or persons appointed to examine the defendant” and that “[t]he  
3 prosecuting attorney and the defendant may: (a) Introduce other evidence including, without  
4 limitation, evidence related to treatment to competency and the possibility of ordering the  
5 involuntary administration of medication; and (b) Cross-examine one another’s witnesses.”  
6 Id. at 130, 206 P.3d at 983.

7 The Nevada Supreme Court stated that the “plain and unambiguous language of NRS  
8 178.415(3) is expansive and in no way limits the prosecuting attorney’s or defense counsel’s  
9 ability to introduce evidence during the competency hearing. The plain meaning of the  
10 statute is evidenced by the phrases ‘other evidence’ and ‘without limitation’ which denote  
11 expansive legislative intent.” Id. Further, the court noted that given that the statute’s  
12 meaning was clear, there was no reason to examine the legislative intent of the statute.  
13 However, the court did so and found “no intent beyond that which is clearly delineated in the  
14 plain language of the statute.” Id. Thus, the court concluded that both sides may present  
15 other evidence at a pre-Lake’s Crossing commitment competency hearing, including  
16 evaluations done outside of the court appointment.

17 In stark contrast to NRS 178.415(3) (a) and (b), NRS 178.460, the statute dealing with  
18 a post-commitment return from Lake’s Crossing situation, does not have expansive  
19 language. The statute only allows the parties to “examine the members of the treatment team  
20 on their report.” NRS 178.460(1). Unlike NRS 178.415(3) (a), NRS 178.460 contains no  
21 provision of the introduction of “other evidence” . . . “without limitation.” NRS 178.460  
22 restricts the inquiry to allowing each side to question the experts on the report they provided  
23 to the court.

24 If a statute is clear and unambiguous, courts must give its terms their plain meanings  
25 and not resort to rules of construction. Cromer v. Wilson, 225 P.3d 788, 790 (Nev. 2010);  
26 MGM Mirage v. Nevada Ins. Guaranty Ass’n, 125 Nev. 223, 228-29, 209 P.3d 766, 769  
27 (Nev. 2009); State v. Cantanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). Thus, when  
28 the language of a statute is plain and unambiguous, courts should not construe that statute

1 otherwise. Nevada Power Co. V. Public Serv. Comm'n, 102 Nev. 1, 4, 711 P.2d 867, 869  
2 (1986).

3         Nonetheless, the Nevada Supreme Court has implied that the district court has wide  
4 discretion to consider issues of competency at all stages of the proceeding. In Ferguson v.  
5 State, 124 Nev. 795, 192 P.3d 712 (2008), the defendant was committed to Lake's Crossing  
6 which ultimately deemed him competent to stand trial. Id. at 798, 192 P.3d at 798. Upon his  
7 return court date, a public defender present in court asked that his case be continued so his  
8 assigned public defender could be present. The district court denied the request, conducted  
9 the competency hearing, and sent the case to the trial department. Once in front of the trial  
10 judge, defense counsel argued, among other issues, that Ferguson was still not competent to  
11 stand trial. The trial court instructed counsel to file a motion. Two months later, defense  
12 counsel filed. Id. at 799, 192 P.3d at 715. Department 5 heard the arguments on the motion  
13 which challenged the Lake's findings. The State objected to the motion as it was untimely  
14 pursuant to statute. The State also argued that the alleged new evidence in possession of the  
15 defense concerned evaluations completed prior to Ferguson's commitment to Lake's.  
16 Ultimately, Department 5 informed counsel that it would not grant defendant's motion.  
17 Department 5 then transferred the case to the trial department, Department 7.

18         Once in Department 7, defense counsel filed another motion for a competency  
19 hearing. The trial court held a hearing on the motion and denied the motion. Shortly before  
20 trial, defense counsel informed the court that it was having Ferguson talk to some doctors  
21 who would possibly deem him incompetent to stand trial. The district court stated that trial  
22 would proceed and it would not consider evidence relating to competency from doctors who  
23 were not appointed by Department 5. Id. at 800, 192 P.3d at 716. On the first day of trial,  
24 defense counsel filed a motion to strike all determinations as to competency and to compel a  
25 competency hearing. Id. Trial proceeded and a jury convicted Ferguson. At sentencing,  
26 defense counsel asserted that Ferguson was not competent and should be sent to Lake's for  
27 an evaluation. The district court disagreed. Id. at 801, 192 P.3d at 717.

28 ///



1        Among other issues, on appeal, Ferguson argued that the district court erred by not  
2 allowing him a hearing to challenge the report as to competency under NRS 178.455 and  
3 178.460 after he returned from Lake's Crossing. He also argued that the court's refusal to  
4 grant a hearing as to competency violated his due process rights. In describing Ferguson's  
5 claims, the Nevada Supreme Court explained, "in addition to his right to a hearing as to  
6 competency under NRS 178.460, which allowed him to examine and contest the report  
7 prepared by Lake's Crossing, he should have been afforded a hearing because counsel had  
8 also raised competency concerns as to his ability to aid and assist counsel at that time." Id.  
9 at 803, 192 P.3d at 718.

10        With regard to Ferguson's claim that NRS 178.460 afforded him a right to challenge  
11 the Lake's Crossing conclusions, the Nevada Supreme Court noted that "NRS 178.460  
12 provides that 'the judge shall hold a hearing after the defendant has returned from a mental  
13 health facility such as Lake's Crossing, which would allow counsel to examine and contest  
14 the report prepared by the treatment team. And as we have recently recognized in Calvin v.  
15 State, evidence received at every stage of the competency proceedings may be relevant to the  
16 defendant's competence and should be considered at such a competency hearing." Id. at  
17 804, 192 P.3d at 719.

18        The Nevada Supreme Court found fault with Department 5 because upon Ferguson's  
19 return from Lake's Crossing, the district court did not allow Ferguson a continuance for his  
20 counsel to be present to challenge the findings. Id. at 805, 192 P.3d at 719. Thus, the court  
21 found Ferguson "was denied a meaningful opportunity to be heard and was denied a  
22 meaningful opportunity to challenge the findings made in the Lake's Crossing report." Id.

23        The court also addressed Ferguson's second claim, that the district court erred in not  
24 granting him a competency hearing upon his counsel's motion, presumably under NRS  
25 178.455. With regard to this issue, the court stated that Department 5 should have afforded  
26 defense counsel the opportunity to present their evidence relating to Ferguson's competency  
27 during a hearing." Id. at 805, 192 P.3d at 720.

28        ///

1 In conducting a competency hearing, the district court has the wide authority  
2 regarding what evidence is admissible. Sims, 125 Nev. at 131, 206 P.3d at 983. The Nevada  
3 Supreme Court has stated that “the competency process will be much better ‘served when the  
4 district court and any appointed experts consider a wide scope of relevant evidence at every  
5 stage of the competency proceeding.’” Id., citing Calvin v. State, 122 Nev. 1178, 147 P.3d  
6 1097 (2006). However, “[t]his does not compel the district court to consider ‘every record  
7 and hear testimony from every witness the State or defense may wish to present; all evidence  
8 must still be relevant to the ultimate issues of whether the defendant understands the nature  
9 of the proceedings against him and can assist his counsel in his defense.’” Id., citing Calvin  
10 v. State. Further, “[e]ven if the evidence being proffered is relevant, the district court may  
11 still exclude the evidence ‘if its probative value is substantially outweighed by  
12 considerations of undue delay, waste of time or needless presentation of cumulative  
13 evidence.’” Id. citing NRS 48.035(2).

14 Defendant Desai is limited by the provisions of NRS 178.460 to cross-examine the  
15 Lake’s Crossing doctors on their reports. If defense counsel’s position is that Desai is not  
16 competent, the proper course is for defense counsel to file a motion for a competency  
17 hearing. Assuming a hearing were granted, the district court has wide discretion regarding  
18 what type of evidence is permissible to present. The court can consider issues of intentional  
19 delay and a waste of resources in limiting such evidence.

20 In the instant case, the Lake’s Crossing doctors evaluated Desai for months. Included  
21 in their review were the initial competency evaluations done by local doctors. In addition,  
22 Desai’s treatment team also carefully reviewed all of Desai’s prior medical records and  
23 reports. Because Desai’s claim of incompetency specifically related to his impairment  
24 secondary to a stroke, as well as other medically related factors, his evaluation included  
25 specific observation over an extended period of time. Moreover, to further evaluate the  
26 possible medical aspects of Desai’s claimed impairment, the Lake’s Crossing evaluators sent  
27 Desai out for additional medical testing. These medical evaluations were performed  
28 specifically to see if there was some other evidence that would change their opinion

1 regarding Desai's competency. The evaluation was extensive; the conclusion, of course,  
2 was that Desai is competent.

3 CONCLUSION

4 Based on the foregoing, the State asks the Court to limit the nature of this proceeding  
5 to the directives of NRS 178.460.

6 DATED this 6<sup>th</sup> day of December, 2011.

7 Respectfully submitted,

8 DAVID ROGER  
9 Clark County District Attorney  
Nevada Bar #002781

10  
11 BY /s/PAMELA WECKERLY  
12 PAMELA WECKERLY  
13 Chief Deputy District Attorney  
14 Nevada Bar #006163  
15

16 CERTIFICATE OF FACSIMILE TRANSMISSION

17 I hereby certify that service of the above and foregoing was made this 6th day of  
18 December, 2011, by facsimile transmission to:

19  
20 RICHARD A. WRIGHT, ESQ.  
FAX #382-4800

21 BY: /s/ A. FLETCHER  
22 Secretary for the District Attorney's Office  
23  
24  
25  
26  
27

28 10F03793A:abf

Exhibit 10

Exhibit 10

DISTRICT COURT **FILED IN OPEN COURT**  
STEVEN D. GRIERSON  
CLARK COUNTY, NEVADA CLERK OF THE COURT

DEC 20 2011

**COPY**

BY, \_\_\_\_\_  
ALICE POLCI, DEPUTY

THE STATE OF NEVADA,

Plaintiff,

vs.

DIPAK DESAI,

Defendant.

Case No: C265107

Dept No.: XXV

BEFORE THE HONORABLE KATHLEEN DELANEY

TUESDAY, DECEMBER 13, 2011, 10:00 A.M.

REPORTER'S TRANSCRIPT  
OF  
PROCEEDINGS

APPEARANCES:

For the STATE:

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PAMELA WECKERLY, ESQ.  
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For the DEFENDANT:

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MARGARET M. STANISH, ESQ.  
WRIGHT STANISH & WINCKLER  
300 S. Fourth Street, #701  
Las Vegas, Nevada 89101

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 LAS VEGAS, CLARK COUNTY, NEVADA  
2 TUESDAY, DECEMBER 13, 2011, 10:00 A.M.

3 PROCEEDINGS

4 \* \* \*

5 THE COURT: Please state your appearances for  
6 the record.

7 MR. WRIGHT: Richard Wright and Margaret  
8 Stanish. And we waived Dr. Desai's presence --

9 THE COURT: We did. Thank you.

10 MS. WECKERLY: Pam Weckerly and Mike Staudhauer  
11 on behalf of the State.

12 THE COURT: The Court has reviewed the briefings  
13 that were submitted and the Court has independently  
14 reviewed, by my count, the nine cases that are the  
15 entirety of cases that the State of Nevada has issued  
16 that reference what I believe to be the operative  
17 statutory provisions.

18 I also looked at all the cases that were  
19 submitted by their respective parties and their  
20 briefings, and I am ready to proceed today with my  
21 decision as far as the extent and procedure for the  
22 hearing itself. I want to avoid substantive discussion  
23 as to what might occur at the time of the hearing as far  
24 as the substance of it because that is obviously for the  
25 time of the hearing we already set.

1 But I do want to give counsel the opportunity to  
2 weigh in with any oral argument today, if they have it,  
3 to either shed specific light on parts of their arguments  
4 or any arguments that you want to make to fine tune, if  
5 you wish, what is in your briefings.

6 But I just want to assure you that I have not  
7 only read the briefings, I have done quite a bit if  
8 independent review as well.

9 We'll go ahead and start with the defense.

10 MR. WRIGHT: Well, Your Honor, just briefly  
11 since you have read Ferguson --

12 THE COURT: Yes.

13 MR. WRIGHT: -- and I think despite the poorly  
14 drafted statute and issues between what a 178415 hearing  
15 authorizes and a 178460 hearing authorizes we are here,  
16 as I understand it, on a 178460 hearing, and under  
17 Ferguson I have the right to a hearing to contest the  
18 findings of Lake's Crossing. And I believe I have the  
19 right under Ferguson under, I guess, it's Calvin v.  
20 State, Sims and Scarborough to present not only  
21 cross-examine the Lake's Crossing evaluators but to  
22 present independent evidence relevant to the competency  
23 of Dr. Desai.

24 THE COURT: And, Mr. Wright, can you be specific  
25 of what independent evidence relevant to the competency

1 of Dr. Desai that you would want to present.

2 MR. WRIGHT: Oh, I'm looking. I have not  
3 determined that which I will present, but I am looking  
4 towards Dr. Kinsora, who is a prior evaluator. I am  
5 looking towards Dr. Krelstein, a prior evaluator whose  
6 reports have all been here. And I am looking toward  
7 other independent evaluations and testing done of  
8 Dr. Desai, which may or may not be independent  
9 evaluations, reaching a recommendation or a determination  
10 as to competency.

11 I may put on like a neurologist explaining  
12 stroke, the area damaged, a presentation about it, MRIs,  
13 et cetera, without necessarily -- with the neurologist  
14 without making an ultimate determination as to  
15 competency. Possibly a another neuropsychologist and an  
16 expert who would have evaluated all of the evidence that  
17 went with Dr. Desai to Lake's Crossing and that which we  
18 received back from Lake's Crossing and opine on all of  
19 that evidence and what Lake's Crossing did right and  
20 wrong.

21 THE COURT: Okay. Thank you, Mr. Wright.

22 MR. WRIGHT: Generally.

23 THE COURT: Okay. And I was just looking for a  
24 general answer because the hearing isn't obviously until  
25 January 27th and there is time to still pull that



1       together.

2               Now let me hear from the State with regard to  
3       their position.

4               MS WECKERLY: Just briefly, because I know the  
5       court has indicated that you read all the relevant cases.  
6       We do not have a problem, as we indicated in our brief,  
7       with him introducing -- or the defense introducing the  
8       prior evaluations done by the doctors, because to a  
9       certain extent those were relied upon and looked at by  
10      the doctors at Lake's Crossing.

11              To the extent that the defense wants to  
12      introduce evidence beyond that and beyond questioning the  
13      Lake's Crossings doctors I think that's where we differ  
14      on our interpretation of Ferguson. I think all the cases  
15      in totality; Sims, Calvin, Ferguson indicate that the  
16      court has wide discretion on what evidence it is to  
17      receive.

18              But the specific wording of the statute on 460  
19      is pretty specific and it only allows for that limited  
20      questioning of the doctors. I think you could arguably  
21      read it more broadly to include the prior evaluators.  
22      But when I read Ferguson, my interpretation of it is that  
23      it's not providing for additional evidence at a return  
24      from a Lake's Crossing hearing. It's not precluding the  
25      defense from ever presenting that evidence, just at this

1 type of hearing, what is allowed to be presented under  
2 the statute is limited and the statute's wording is  
3 pretty clear from the State's perspective.

4 That doesn't leave the defense without a remedy,  
5 however, they can raise competency, of course, at anytime  
6 by way of motion and the other statutory provisions allow  
7 for it.

8 So the State's position at this point remains  
9 that other than the prior evaluators and the doctors at  
10 Lake's notwithstanding Ferguson, it's the State's  
11 position that the hearing should be limited to that.

12 THE COURT: All right. Thank you. I have heard  
13 both sides. I asked for simultaneous briefings. This,  
14 of course, is ultimately the defendant's request for the  
15 hearing, and the defendant's request for the scope of the  
16 hearing to be interpreted as broadly as possible.

17 Do you have any final comments, Mr. Wright, or  
18 do you rest on what you have stated today?

19 MR. WRIGHT: Yes. I just point out factually in  
20 Ferguson it was a 460 hearing in which the court denied a  
21 hearing, and that which was intended to be produced at  
22 the hearing, and I am reading from page 719 of Pacific  
23 2nd.

24 Additionally, defense counsel's proffered  
25 affidavit indicates that if there had been a hearing,

1 defense counsel would have had a psychologist testify and  
2 opine that Ferguson was not competent to stand trial or  
3 assist counsel despite his treatment at Lake's Crossing.

4 This was an independent evaluation that had been  
5 done. As such, Department 5 should have afforded defense  
6 counsel the opportunity to present their evidence  
7 relating to Ferguson's competency during a hearing. This  
8 evidence was relevant in addressing the ultimate issue of  
9 whether Ferguson understood the nature of the proceedings  
10 against him and whether he should assist counsel in his  
11 defense.

12 Ferguson did address this precise issue and  
13 state that, and what I call, "out independent evidence"  
14 of the defense is admissible at the hearing. Thank you.

15 THE COURT: All right. Thank you. The court,  
16 when we were before, indicated its inclination because it  
17 was very familiar with the statute and the language  
18 specifically stated in the statute and it indicated that  
19 it was inclined to limit the hearing scope to the  
20 cross-examination of the doctors from Lake's who issued  
21 the reports in this case.

22 I went back separately, obviously, subsequent to  
23 the briefing to review the briefing and to go back again  
24 independently over this statute and all the case law that  
25 I could find to make this determination today. And it is

1 in the statute that the judge, if requested in a timely  
2 fashion, shall hold a hearing at which the district  
3 attorney and defense counsel may examine the members of  
4 the treatment team on their report.

5 What stood out to me in that statute, in light  
6 of the reading of the other cases, most predominantly  
7 Ferguson, was that it doesn't indicate shall only allow  
8 that. It does not have any qualifying language. There  
9 is a very good point, I think, made by the State. There  
10 is another statute talking about pre-transport to Lake's  
11 and goes into some detail and opens the door for  
12 additional defense evidence and expert testimony, et  
13 cetera. And that language is not contained here and  
14 obviously statutory readings would be that if the  
15 legislature intended to include language it would have  
16 done so.

17 But I have to take and I started first with the  
18 statute, which says what can be done at the hearing but  
19 does not appear to have limiting language beyond that.  
20 So then I went to the other case law or to the case law  
21 that that interpreted the statute and I do think and I  
22 have highlighted that portion of Ferguson that Mr. Wright  
23 highlighted today, and I do think that it is able to be  
24 implied.

25 I do not think it is as directly stated as maybe

1 just argued, but I do think that it is able to be implied  
2 that had that hearing taken place or that the hearing  
3 should have taken place, obviously, that is the ruling of  
4 the Supreme Court, but had that hearing taken place the  
5 Supreme Court would have allowed.

6 I would think it appropriate to allow the  
7 defense to have some evidence as to the current  
8 competency of the defendant in question, however, I think  
9 that that is extremely limited in what Ferguson allows  
10 and that's why I asked you, Mr. Wright, for a general  
11 statement of what it was that you intended to perhaps  
12 want to provide at the time of the hearing because the  
13 Court does not interpret this ultimately case law  
14 interpreting that statute as broadly as you have.

15 I think what Ferguson allows is the issue  
16 because it is always relevant at any given time the issue  
17 of the competency of the defendant to stand trial that  
18 Ferguson would allow, again, particularly in that  
19 Ferguson case would have allowed on a fair reading was a  
20 psychologist to testify and opine that Mr. Ferguson was  
21 not competent to stand trial or assist counsel despite  
22 treatment at Lake's Crossing.

23 Clearly, what is focused there is a doctor who  
24 may opine that even though the individual was at Lake's,  
25 even though the individual received treatment at Lake's

1 and was determined to be competent at Lake's subsequent  
2 to the return from Lake's that there is still an issue as  
3 to competency.

4 I think it is relevant and I will allow the  
5 defense to have one witness, if they have one, who can if  
6 they do so similarly testify and opine as to Dr. Desai's  
7 competency to stand trial subsequent to his treatment and  
8 return from Lake's Crossing.

9 I also think it is appropriate that obviously  
10 any evaluations, and any documentation that came into  
11 play for the doctors at Lake's to make their reports is  
12 relevant, but anything beyond that this court will not  
13 allow at the time of the hearing. So, again, just to be  
14 clear what the Court will allow at the time of the  
15 hearing is the defense and State to examine the doctors  
16 who issued reports from Lake's.

17 The Court will also allow pursuant to the  
18 Ferguson decision, and I think a fair reading of that  
19 decision, the defense to provide one additional witness,  
20 if it is available to the defense, to opine and testify  
21 as to Dr. Desai's current competency to stand trial  
22 subsequent to his return and treatment from Lake's. And  
23 that will be the entirety of the scope of the hearing  
24 that we will be having.

25 The Court does not read the statute and the case

1 law together to open the door to the defense to have  
2 other experts to testify. I believe that that testimony,  
3 certainly the Calvin case, gives this court very broad  
4 discretion as to what the scope of the hearing should be  
5 and certainly allows the court to exclude even what might  
6 arguably be relevant evidence if there are issues that  
7 would arise that are potential for undue delay,  
8 unnecessary presentation or cumulative evidence.

9 And while I am not going to categorize any of  
10 the additional pieces of evidence that Mr. Wright  
11 indicates he might wish to present I think in the  
12 totality of the circumstances this court can do what it  
13 needs to do by having the cross-examination of the  
14 doctors, which you have already had your opportunity to  
15 be with your experts and continuing opportunity to have  
16 your experts help you, Mr. Wright, on the  
17 cross-examination of those doctors. And then, again, you  
18 can have one additional witness that might testify or  
19 opine as to Dr. Desai's competency.

20 Beyond that, however, I think we would be  
21 getting into a territory that is not contemplated by the  
22 statute, is not contemplated by our Supreme Court and is  
23 not necessary for us to make the determination to  
24 proceed.

25 So we will have the hearing as scheduled on

1 January 27th with those parameters.

2 Is there any question from either side as to  
3 clarification on that?

4 Mr. STAUDAHER: Yes, there is one from the  
5 State. Obviously, it has been a couple of months since  
6 Dr. Desai came from Lake's Crossing, and it is my  
7 understanding that he is either in the process of or may  
8 have actually gone through some further evaluation  
9 process that has been initiated by the defense. If that  
10 is to be at the center, if that person is going to come  
11 forward and give some testimony the State would like as  
12 soon as possible, at least the information regarding any  
13 reports or documents that were relied upon or used or  
14 testing, including the raw data, as has been provided for  
15 the other evaluators, in addition to the name, obviously,  
16 of that individual.

17 THE COURT: Well, let's not unnecessarily  
18 confuse things by going back to the raw data issue. I  
19 don't believe there was raw data that --

20 MR. STAUDAHER: Well, I don't know what has been  
21 done.

22 THE COURT: But your request is a fair one in  
23 that, obviously, if there is going to be a witness  
24 proffered and that witness relied on information to  
25 provide the testimony other than just the examination of



1 Dr. Desai, then it would be appropriate to have some  
2 disclosure and some ability of the State to review that  
3 in advance of the hearing.

4 Mr. Wright, what is your position on that  
5 question the State asked and do you have any further  
6 clarification?

7 MR. WRIGHT: When a determination is made as to  
8 that single witness, I will provide discovery at that  
9 time.

10 MR. STAUDAHER: That's fine. We just want to  
11 make sure.

12 THE COURT: Right. And I assumed that you  
13 would. But let's just have some sort of date by which  
14 that determination needs to be made I think in fairness  
15 to the State, because, again, I do intend to proceed with  
16 that hearing as scheduled on January 27th, so I would say  
17 in fairness I would give the State at least a couple of  
18 weeks to know who that witness is and to be able to  
19 review whatever there might be available from that  
20 witness.

21 MS. WECKERLY: So we would have until the  
22 beginning of January?

23 THE COURT: What's two weeks?

24 THE COURT CLERK: January 13th.

25 THE COURT: Let's just back it up to the

1 Wednesday of that week. What date is that?

2 THE COURT CLERK: The 11th.

3 THE COURT: January 11th. I would like the  
4 defense to have indicated if it has a witness to call in  
5 that regard, who that witness is and to disclose any  
6 appropriate matters that that individual relied on in  
7 terms of documentation for the State to review.

8 MR. STAUDAHER: Thank you, Your Honor.

9 MR. WRIGHT: I have a question.

10 THE COURT: Yes, Mr. Wright.

11 MR. WRIGHT: I want to be clear on the  
12 limitation to one witness. I am allowed a hearing to  
13 contest the report prepared by Lake's Crossing, and I  
14 want to be clear that my sole ability to contest it is  
15 through my cross-examination of those witnesses and  
16 calling one other evaluator who may have a contrary  
17 opinion at the present time, meaning, at the time of the  
18 hearing, and I will be precluded from having experts here  
19 during the hearing to hear the testimony of the Lake's  
20 Crossing witnesses and then I cannot contradict their  
21 testimony with witnesses, correct?

22 THE COURT: I think that is a fair restatement,  
23 but let me make some qualifications. First of all, what  
24 you are entitled pursuant to the statute is a hearing at  
25 which you may examine the members of the treatment team

1 on their report. That's what the statute says. You used  
2 the language "contest the findings." I don't know that  
3 those are not the same thing but I want to be clear that  
4 the language of the statute is a hearing in which members  
5 of the treatment team may be examined on their reports.

6 Beyond that, I have read the case law and I have  
7 indicated that I'm going to give you as was contemplated  
8 in the Ferguson case because there was an opening I think  
9 by the Supreme Court that it may be relevant if you have  
10 subsequent evaluation of Dr. Desai as to his current  
11 competency upon his return from Lake's and upon his  
12 either restoration to competency or however you want to  
13 phrase it, that his current status of competence to  
14 proceed with adjudication and assist counsel that if you  
15 have a doctor that will opine that that is not the case  
16 that you can have that.

17 Beyond that I did not indicate that your experts  
18 could not be present with you to guide you in your  
19 cross-examination of those witnesses, however, there is  
20 nothing that I can see from our case law or our statutory  
21 law that will enable you to put further experts on the  
22 stand to further opine with regard to those reports or  
23 what the determination was by the court-appointed  
24 experts.

25 What this process is set up to do is have the

1 court appoint its doctors, its evaluators, receive those  
2 evaluations and then to the extent that there is a desire  
3 to cross-examine and flush out where that came from, so  
4 be it. And these are the court-appointed evaluators and  
5 you can cross-examine, but, no, there will be no  
6 additional testimony by any experts or anyone else as to  
7 that cross-examination. But to the extent that you have  
8 experts that can assist you in that cross-examination I'm  
9 not going to preclude them from being present, but they  
10 cannot independently testify.

11 MR. WRIGHT: Okay. But -- and I don't want to  
12 be argumentative -- I just want to be clear --

13 THE COURT: Let's be clear.

14 MR. WRIGHT: So that if a lake's Crossing  
15 witness says, Mr. Witness, is it is dark outside, and I  
16 cross-examine him and I cross-examine him and he sticks  
17 to his stupid answer when the sun is shining, I cannot  
18 put on contradictory evidence to prove it. I have to  
19 merely rely on my cross-examination skills at this  
20 contested hearing, correct?

21 THE COURT: You may cross-examine the doctors  
22 and you may present a doctor, if you have such doctor to  
23 opine as to Dr. Desai's competency, and that is the  
24 extent of the hearing, that is correct.

25 MR. WRIGHT: Okay. And what I was quoting from

1 was Ferguson. I mean, I did not make that up.

2 "Thus, upon a timely request the district  
3 court must afford a defendant a hearing after the  
4 defendant has returned from a mental health facility  
5 such as Lake's Crossing, which would allow counsel  
6 to examine and contest the report prepared by the  
7 treatment team."

8 THE COURT: And I believe that that is exactly  
9 the hearing that I am providing to you, and I do not  
10 believe that this court is required, nor would it be  
11 necessary in this case, or frankly, in any other case  
12 based on what I can review of the case law and the  
13 statute to broaden the scope of that hearing any further.

14 MR. WRIGHT: So I do not need to subpoena -- I  
15 am not going to have Dr. Kinsora or Dr. Krelstein.

16 THE COURT: Again, to the extent that you do  
17 have those reports and that they were relevant to the  
18 evaluations ultimately determined by the Lake's Crossing  
19 doctors I think I do not want there to be any confusion  
20 that those prior evaluations aren't relevant, and that  
21 they themselves can't be discussed.

22 But do those doctors themselves need to be  
23 called and questioned? I don't believe so. We have  
24 those reports and to the extent that they informed upon  
25 the Lake's doctors, that is the relevant testimony that

1 we were looking for, the Lake's doctors, their  
2 evaluations, their treatment, their ultimate conclusions  
3 and whether or not there is a basis to challenge that.  
4 And then, ultimately, again, the current status of Dr.  
5 Desai subsequent to his return from Lake's should you  
6 have independent evidence of that.

7 MR. WRIGHT: So I cannot call them.

8 THE COURT: I do not see any reason to call  
9 them.

10 MR. WRIGHT: Thank you very much, Your Honor.

11 MS. WECKERLY: Thank you, Your Honor.

12 THE COURT: All right. Thank you all. We'll  
13 see you on January 27th.

14 \* \* \*

1 REPORTER'S CERTIFICATE

2  
3 STATE OF NEVADA )  
4 COUNTY OF CLARK ) ss.  
5

6 I, BRENDA SCHROEDER, a certified court reporter  
7 in and for the State of Nevada, do hereby certify that  
8 the foregoing and attached pages 1-19, inclusive,  
9 comprise a true, and accurate transcript of the  
10 proceedings reported by me in the matter of THE STATE OF  
11 NEVADA, Plaintiff, versus DIPAK DESAI, Defendant, Case  
12 No. C265107 on December 13, 2011.  
13  
14  
15

16 Dated this 19th day of December, 2011.  
17

18 Brenda Schroeder  
19 BRENDA SCHROEDER, CCR NO. 867  
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Exhibit 3

Exhibit 3



RSPN

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**FILED**

JUL 14 2 36 PM '10

*Ann L. Johnson*  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DIPAK KANTILAL DESAI, #1240942,

Defendant.

CASE NO. C265107

DEPT. NO. XIV

**DIPAK DESAI'S RESPONSE TO STATE'S JUNE 16, 2010 MOTION TO  
COMPEL DISCLOSURE OF MEDICAL PROVIDERS, FOR THE TRANSFER  
TO DEPARTMENT FIVE FOR A COMPETENCY EVALUATION AND FOR  
AN ORDER FOR THE RELEASE OF MEDICAL RECORDS AND ORDER  
FOR INDEPENDENT MEDICAL EVALUATION**

COMES NOW DEFENDANT DIPAK DESAI, by and through his attorney, Richard A. Wright, Esquire, and responds to the State's June 16, 2010 Motion to Compel Disclosure of Medical Providers, for Transfer to Department Five for a Competency Evaluation and for an Order for the Release of Medical Records and Order for an Independent Medical Evaluation.

This response is made and based upon all the papers and pleadings on file herein, the attached Points and Authorities, and oral argument at the time of hearing.

**POINTS AND AUTHORITIES**

**I. FACTUAL BACKGROUND**

On July 13, 2008, many months after the occurrence of the conduct alleged in the indictment, Dipak Desai suffered a stroke and was hospitalized at UCLA Medical Center. The stroke located in the left medial - temporal area of the brain resulted in cognitive impairment which diminished his

1 ability to assist counsel in ongoing state and federal criminal investigations, the defense of numerous  
2 civil law suits, the defense of disciplinary malpractice charges pending before the Board of Medical  
3 Examiners of the State of Nevada (hereafter Board of Medical Examiners), and ultimately in  
4 bankruptcy proceedings. Dipak Desai's counsel, including Richard A. Wright, having determined  
5 that Dipak Desai had diminished capacity, continued with the legal representation pursuant to Rule  
6 1.14 (Client with Diminished Capacity) of the Nevada Rules of Professional Conduct.

7 A continuance of the disciplinary proceedings before the Board of Medical Examiners  
8 resulted in independent neurological evaluations by Dr. Thomas K. Kinsora, a Clinical  
9 Neuropsychologist and Specialist in Neurocognition, to assess the ability of Dr. Dipak Desai to  
10 meaningfully participate in the preparation and presentation of his answer to the malpractice charges  
11 pending before the Board of Medical Examiners. The Board of Medical Examiners Hearing Officer,  
12 Patrick D. Dolan, Esquire, in an Order filed on July 28, 2009, after having reviewed the confidential  
13 Assessment of Neurocognitive Processing report by Dr. Kinsora, summarized Dr. Kinsora's opinion  
14 as follows:

15 Based on this multidisciplinary approach, Dr. Kinsora found that, pursuant  
16 to NRS 178.400<sup>1</sup>, the Respondent "does not seem to fulfill the first two criteria for  
17 incompetency, and is in the borderline with regard to his ability to assist counsel.  
18 Thus, he is clearly aware of the charges against him, has a good knowledge of the  
19 facts of the case and understanding the role of all the keys [sic] players in the judicial  
20 system. While he is not clearly 'unable to assist counsel', he can be considered  
21 'impaired in his ability to assist counsel'".

22 In so opining, Dr. Kinsora proceeded to note that Respondent is "squarely on  
23 the borderline with regard to his ability to assist counsel" and that, although "[a]  
24 sound argument can be made either way", the Respondent is in his opinion "likely  
25 acceptably competent, but certainly not optimally competent".

---

26 <sup>1</sup>NRS 178.400 Incompetent person cannot be tried or adjudged to punishment for public offense.

- 27 1. A person may not be tried or adjudged for punishment for a public offense while he is  
28 incompetent.  
2. For the purposes of this section, "incompetent" means that the person does not have the present  
ability to:  
(a) Understand the nature of the criminal charges against him;  
(b) Understand the nature and purpose of the court proceedings; or  
(c) Aid and assist his counsel in the defense at any time during the proceedings with a  
reasonable degree of rational understanding.

1 According to Dr. Kinsora, the current treatment of the Respondent may  
2 improve his ability to assist legal counsel, but will in all likelihood not significantly  
3 improve over time.

(Order, Board of Medical Examiners, July 28, 2009, P.9)

4 It should be noted that Dr. Kinsora referenced the competency standard for criminal  
5 proceedings (NRS 178.400) by analogy although the issue he opined on dealt with the ability to  
6 participate in an administrative proceeding as opposed to criminal litigation.

## 7 **II. THE STATE'S REQUEST FOR A COMPETENCY EVALUATION**

8 NRS 178.405 dictates the procedure for inquiry into the competence of a defendant as  
9 follows:

10 "NRS 178.405 Suspension of trial or pronouncement of judgment when doubt  
11 arises as to competence of defendant; notice of suspension to be provided to other  
12 departments.

13 1. Anytime after the arrest of a defendant, including, without limitation,  
14 proceedings before trial, during trial, when upon conviction the defendant is brought  
15 up for judgment or when a defendant who has been placed on probation or whose  
16 sentence has been suspended is brought before the court, if doubt arises as to the  
17 competence of the defendant, the court shall suspend the proceedings, the trial or the  
18 pronouncing of the judgment, as the case may be, until the questions of competence  
19 is determined.

20 2. If the proceedings, the trial or the pronouncing of the judgment are  
21 suspended, the court must notify any other departments of the court of the suspension  
22 in writing. Upon receiving such notice, the other departments of the court shall  
23 suspend any other proceedings relating to the defendant until the defendant is  
24 determined to be competent".

25 The State's motion for a competency evaluation is not opposed by Dipak Desai since there is clearly  
26 a doubt as to his competence.

## 27 **III. THE STATE'S REQUEST FOR AN INDEPENDENT 28 MEDICAL EVALUATION BY AN EVALUATOR CHOSEN BY THE STATE**

29 The failure of the State to cite any authority whatsoever for the proposition that the District  
30 Attorney can compel a defendant to undergo a medical evaluation by the District Attorney's chosen  
31 evaluator in addition to the competency evaluation to be conducted by the Court pursuant to NRS  
32 178.405 belies the State's request. The procedure to be utilized to determine the adjudicative

33 ///

competency of Dipak Desai is dictated by statute, not the whim of the prosecutor. The competency evaluators are appointed by the Court as mandated by NRS 178.415 as follows:

"NRS 178.415 Appointment of person or persons to examine defendant; hearing; finding.

1. Except as otherwise provided in this subsection, the court shall appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant. If the defendant is accused of a misdemeanor, the court of jurisdiction shall appoint a psychiatric social worker, or other person who is especially qualified by the Division, to examine the defendant.

2. Except as otherwise provided in this subsection, at a hearing in open court, the court that orders the examination must receive the report of the examination. If a justice court orders the examination of a defendant who is charged with a gross misdemeanor or felony, the district court must receive the report of the examination.

3. The court that receives the report of the examination shall permit counsel for both sides to examine the person or persons appointed to examine the defendant. The prosecuting attorney and the defendant may:

(a) Introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication; and

(b) Cross-examine one another's witnesses.

4. The court that receives the report of the examination shall then make and enter its finding of competence or incompetence.

5. The court shall not appoint a person to provide a report or an evaluation pursuant to this section, unless the person is certified by the Division pursuant to NRS 178.417".

The issue before the court is one of adjudicative competence, or competence to stand trial, which is to determine the accused's ability to meaningfully participate in criminal proceedings, and not the separate issue of competence for criminal responsibility which determine's the accused's mental state when the alleged offense took place. Dipak Desai has not asserted any type of insanity defense and will not be presenting medical evidence or experts at trial pertaining to any mental impairment at the time of the alleged offenses.

By placing the competency evaluation in the control of the Court, the above statutory scheme seeks to ensure the independence of the evaluation and protect an accused's right to due process. This Court should be especially suspect of the District Attorney's attempt to meddle in this evaluation process given the prosecution's numerous and unethical interviews with the media on the topic of Dr. Desai's medical condition and other issues. By way of example, during the pendency

1 of the grand jury investigation, a deputy district attorney related to the press that a medical expert  
2 working for law enforcement examined Dr. Desai's medical records and did not find evidence of  
3 residual effects from the stroke and was back to normal. (Las Vegas Review Journal, *Dr. Dipak*  
4 *Desai: Severity of Stroke Doubted*, January 26, 2009). The prosecution medical expert's opinion is  
5 dubious since it contradicts with Dr. Kinsora's later (July, 2009) opinion for the Board of Medical  
6 Examiner's. As such, the State "extra-statutory" request to choose its own "independent" evaluator  
7 represents a clear disregard for due process. Dipak Desai requests the Court to follow the statutory  
8 procedure for a judicially supervised competency evaluation.

9  
10 **IV. THE STATE'S REQUEST FOR A DISCOVERY ORDER**  
11 **COMPELLING DIPAK DESAI TO IDENTIFY AND PRODUCE**  
12 **A COMPLETE LIST OF ALL MEDICAL, PHARMACY AND**  
13 **MEDICAL INSURANCE TREATMENT AND PROVIDERS**  
14 **FOR 23 YEARS AND AN ORDER FOR THE RELEASE OF**  
15 **THOSE MEDICAL, PHARMACY AND INSURANCE RECORDS**

16 The State's novel request in a criminal proceeding for an order compelling the accused to  
17 essentially answer a prosecutor's interrogatory is once again undermined by the State's failure to cite  
18 authority supporting its position in a criminal prosecution rather than in civil litigation. Ironically,  
19 the State resorts to rules of civil procedures to support its position while cavalierly ignoring the  
20 statutes governing criminal discovery. *See*, NRS 174.233-174.295. It simply declares that since the  
21 Nevada Supreme Court has not addressed the criminal discovery of a defendant's medical records,  
22 guidance should come from cases establishing how the discovery issue is resolved pursuant to the  
23 Nevada Rules of Civil Procedure in civil litigation between private parties. Of course, the Nevada  
24 Rules of Civil Procedure and the civil cases cited by the State are irrelevant because the criminal  
25 discovery obligations of a defendant are governed by NRS Chapter 174, as well as the Bill of Rights  
26 of the United States Constitution and Nevada Constitution.

27 The State's efforts to compel the disclosure of all of Dr. Desai's medical records wholly  
28 ignores the controlling criminal rules of discovery and fundamental principles of constitutional law.  
In fact, the Nevada Supreme Court has discussed a criminal defendant's discovery obligations and

1 the constraints thereon imposed by the Fourth and Fifth Amendments in Binegar v. District Court,  
2 112 NV. 76, 915 P.2d 889(1996). In Binegar the Nevada Supreme Court, applying United States  
3 Supreme Court precedent, declared Nevada's then new reciprocal discovery statute to be  
4 unconstitutional. The teaching of Binegar is obvious and simple: an accused in a criminal  
5 proceeding, afforded the protections of the Fourth and Fifth Amendments, cannot be ordered to  
6 produce any information whatsoever unless the accused intends to introduce that information  
7 (witness statements, expert reports, test results) in the defendant's case in chief at trial. This Court  
8 should deny the State's discovery request as exceeding the obligations imposed on defendants by  
9 NRS 174.234 and violative of the Constitution.

10 While requesting the Court to deny the State's discovery request, Dr. Desai is mindful of the  
11 necessity of the court appointed competency evaluators having access to the medical history and  
12 medical records of Dr. Desai. The Court can properly expect that Dr. Desai will provide appropriate  
13 releases for relevant medical records just as he cooperated with his competency evaluation for the  
14 Board of Medical Examiners. With appropriate dissemination to the competency evaluators under  
15 the control of the Court, the lawful use and dissemination of the medical records can be maintained.  
16 Dr. Desai's confidence in the competency evaluation being conducted under the auspices of the  
17 Court relieves Dr. Desai's concerns about the District Attorney's access to the medical evidence,  
18 utilization of such evidence for other purposes and improper dissemination.

19 This Court should be suspect of the District Attorney's request for direct access (as opposed  
20 to the medical records being available to court appointed competency evaluators) to 23 years of  
21 medical and insurance history. Based on the District Attorney's revelations to the media, it is  
22 apparent that the State already has Dr. Desai's medical records through January 2009 and Dr.  
23 Kinsora's report. The State's method of acquisition of these medical records by law enforcement  
24 is unknown to the defense.

25 The State's motion for production of the medical records outside of the rules of criminal  
26 procedure is perplexing and suspicious. The State's instant motion completely ignores its own  
27  
28

expert's evaluation of Dr. Desai's medical records which purportedly showed Dr. Desai "back to normal" and also completely ignores Dr. Kinsora's opinion that Dr. Desai is "impaired in his ability to assist counsel" (although not "unable" to participate in an administrative hearing). Instead, the State weakly and inappropriately relies on the grand jury testimony of an immunized, antagonistic, former partner of Dr. Desai who has not seen Dr. Desai since his July, 2008 stroke, has not treated or consulted with Dr. Desai, has not seen Dr. Desai's medical records (to our knowledge), yet who was allowed to opine, in clearly inadmissible testimony (lack of foundation for expert opinion; NRS 50.285 and 50.305), as follows:

"Q. Based on your professional opinion how do you view the health of Dr. Desai right now? Is he really as sick as the papers make him out to be or --

A. I don't believe so. I don't believe so. Because when he had his previous stroke he recovered completely. The other stroke he had he supposedly was a similar event so I would assume his recovery followed a similar course and I would think he is well. Additionally my kids have friends in the same neighborhood, the same gated complex that he lives in and I --

(G.J. Tr., Dr. Eladio Carrera, 3/11/10, p. 127)

It is baffling that the State trots out rank, uninformed, foundationless, purported "expert" grand jury testimony to accuse Dr. Desai of malingering, totally ignores the medical records and evaluations that law enforcement already possesses, and then asks for access to the records as if they don't already have them.

### CONCLUSION

Dipak Desai is not opposed to the State's motion for a statutory, Court controlled competency evaluation and requests the Court to deny the balance of the State's motion. It would seem that the

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1 Court conducting the competency evaluation would be best suited to resolve any competency  
2 evaluation discovery issues.

3 Dated this 14 day of July, 2010.

4 Respectfully submitted:

5 WRIGHT STANISH & WINCKLER

6  
7 BY 

8 RICHARD A. WRIGHT, ESQUIRE  
9 300 S. Fourth Street  
10 Suite 701  
11 Las Vegas, NV 89101  
12 Attorneys for Desai  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4<sup>th</sup> day of July, 2010, I caused a copy of the foregoing  
DIPAK DESAI'S RESPONSE TO STATE'S JUNE 16, 2010 MOTION TO COMPEL  
DISCLOSURE OF MEDICAL PROVIDERS, FOR THE TRANSFER TO DEPARTMENT FIVE  
FOR A COMPETENCY EVALUATION AND FOR AN ORDER FOR THE RELEASE OF  
MEDICAL RECORDS AND ORDER FOR INDEPENDENT MEDICAL EVALUATION to be  
served via electronic filing or facsimile or placed in the United States mail, postage prepaid, to the  
following persons at their last known address as listed below:

Michael V. Staudaher  
Chief Deputy District Attorney  
200 Lewis Avenue  
Third Floor  
Las Vegas, NV 89101

Frederick A. Santacroce, Esquire  
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Attorneys for Keith H. Mathahs

BY Debra K. Carroll  
An employee of Wright Stanish & Winckler

# Message Confirmation Report

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Results : O.K

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### TELECOPY TRANSMITTAL COVER SHEET

DATE: JULY 14, 2010

TIME: 2:46 PM

FROM: RICHARD A. WRIGHT

TO: MICHAEL V. STAUDAHER  
FIRM:

TELECOPY NUMBER: 477-2994

CONFIRMATION NUMBER: (702) 382-4004 SENDER: DEBBIE

TOTAL NUMBER OF PAGES: 10

MESSAGE: Re: Dipak Desai - Response to State's June 16, 2010 Motion to Compel  
Disclosure etc.

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Exhibit 4

Exhibit 4

**REGISTER OF ACTIONS**  
**CASE No. 10C265107-1**

## The State of Nevada vs Dipak K Desai

Case Type: **Felony/Gross  
Misdemeanor**  
Date Filed: **06/04/2010**  
Location: **Department 14**  
Conversion Case Number: **C265107**  
Defendant's Scope ID #: **1240942**  
Lower Court Case Number: **09GJ00049**

### RELATED CASE INFORMATION

## Related Cases

10C265107-2 (Multi-Defendant Case)

10C265107-3 (Multi-Defendant Case)

## PARTY INFORMATION

**Defendant     Desai, Dipak K**

**Lead Attorneys**  
**Richard A. Wright**

Retained

7023824004(W)

Other	Nevada Mutual Insurance Co
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**Mark B. Bailus**

Retained

7027377702(W)

**Plaintiff            State of Nevada**

**David J. Roger**  
702-671-2700(W)

### CHARGE INFORMATION

Charges: Desai, Dipak K	Statute	Level	Date
1. UNLAWFUL RACKETTEERING.	207.400	Felony	01/01/1900
1. AS USED IN NRS 207.360-207.520, INCLUSIVE, UNLESS CONTEXT OTHERWISE REQUIR	207.350	Felony	01/01/1900
1. "CRIME RELATED TO RACKETERRING" MEANS THE COMMISSION OF ATTEMPT TO	207.360	Felony	01/01/1900
1. "CRIMINAL SYNDICATE" MEANS ANY COMBINATION OF PERSONS, SO STRUCTURED	207.370	Felony	01/01/1900
1. "ENTERPRISE" INCLUDES ANY NATRAL PRSN, SOLE PRPRIETRSHIP, PRTNRSHP, CORP	207.380	Felony	01/01/1900
1. RACKETEERING ACTIVITY MEANS ENGAGING IN AT LEAST 2 CRIMES RELATED TO	207.390	Felony	01/01/1900
2. PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
3. RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900
4. CRIMINAL NEGLIGENCE OF PATIENTS	200.495	Felony	01/01/1900
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**EVENTS & ORDERS OF THE COURT**


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07/21/2010 **All Pending Motions (9:00 AM) ()**  
*ALL PENDING MOTIONS 7/21/10*

**Minutes**

07/21/2010 9:00 AM

(1) STATE'S MOTION TO COMPEL DISCLOSURE OF MEDICAL PROVIDERS, FOR TRANSFER TO DEPARTMENT FIVE FOR A COMPETENCY EVALUATION AND FOR AN ORDER FOR THE RELEASE OF MEDICAL RECORDS AND ORDER FOR AN INDEPENDENT MEDICAL EVALUATION...(2) DEFT'S MOTION TO QUASH GRAND JURY SUBPONEA AND TO COMPEL DISCLOSURE OF ANY OTHER ABUSE OF GRAND JURY PROCESS...(3) NEVADA MUTUAL INSURANCE COMPANY'S MOTION TO QUASH SUBPONEA AS TO #3: Mr. Bailus appeared on behalf of

Nevada Mutual Insurance, advised he has spoken with Mr. Staudaheer and requested this be taken OFF CALENDAR. COURT SO ORDERED. AS TO #2: Mr. Wright advised this has already been removed and requested it be taken OFF CALENDAR. COURT SO ORDERED. AS TO #1: Mr. Wright advised there is an issue of Dr. Desai's competency and stated he does not oppose giving the medical records to the Dept. 5 team for their evaluation, however, he does object to giving them to the State as some medical information was "leaked" to the press. Arguments by Mr. Staudaheer including that there have been several hearings set for Dr. Desai to testify, however, due to his mental/physical condition, he has been unable to do so. Mr. Staudaheer stated he would like to find out if Dr. Desai is malingering and would like to see the records of his condition. Colloquy as to independent physical examination. Mr. Wright had no objection. COURT ORDERED, matter REFERRED to Dept. 5 next week. Mr. Staudaheer stated he would like a doctor to verify Dr. Desai's condition and would like some input as to what doctor is selected. Mr. Wright advised he had no objection as long as it was controlled by the Court. Court requested Judge Glass coordinate both physical and mental examinations. COURT ORDERED, Motion held in ABEYANCE until there has been a decision from Dept. 5. Mr. Staudaheer requested that Dr. Desai be present for all hearings to show his stature to the Court. Mr. Wright advised he usually does not have Defendants come to Court for motions. FURTHER, any outstanding bench warrant is QUASHED. H.A. 7/29/10 9:30 AM STATUS CHECK: COORDINATE COMPETENCY EXAM

Parties Present

Return to Register of Actions

## REGISTER OF ACTIONS

**CASE No. 10C265107-1**

## The State of Nevada vs Dipak K Desai

www.ck12.org

Case Type: **Felony/Gross  
Misdemeanor**  
Date Filed: **06/04/2010**  
Location: **Department 14**  
Case Number: **C265107**  
Case Scope ID #: **1240942**  
Case Number: **09GJ00049**

### RELATED CASE INFORMATION

## Related Cases

10C265107-2 (Multi-Defendant Case)

10C265107-3 (Multi-Defendant Case)

## PARTY INFORMATION

**Defendant** Desai, Dipak K

**Lead Attorneys**  
**Richard A. Wright**

*Retained*

7023824004(W)

Other	Nevada Mutual Insurance Co
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**Mark B. Bailus**

*Retained*

7027377702(W)

**Plaintiff      State of Nevada**

**David J. Roger**  
702-671-2700(W)

### CHARGE INFORMATION

**Charges: Desai, Dipak K**

Charges: Desai, Dipak R	Statute	Level	Date
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EVENTS & ORDERS OF THE COURT

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07/29/2010 Further Proceedings: Competency (9:30 AM) (Judicial Officer Glass, Jackie)

## Minutes

07/29/2010 9:30 AM

07/29/2010 9:30 AM

\* APPEARANCES CONTINUED: Christina Greene of the Specialty Courts present. Defendant DESAI present out of custody on bail/house arrest. Both counsel have records they would like to provide to the evaluating doctors. Mr. Wright will obtain the information from UCLA regarding the stroke that happened after the incidents alleged in the Indictment and the MRIs/records from the prior stroke here as well as the evaluation by the Board of Medical Examiners. Mr. --



Staudaher requests all records regarding any rehabilitative efforts, further treatment or subsequent events since the time of the stroke as well anything related to any prior medical conditions that could contribute or affect defendant's competency or ability to aide and assist counsel. COURT SO ORDERED. FURTHER, counsel are to forward all records to the Court who will then provide them to Ms. Greene who will in turn provide them to the evaluating doctors. Matter SET for STATUS CHECK in two (2) weeks. Judge Mosley has requested this Court oversee an independent medical evaluation (IME) to review possible medical conditions that could affect competency which Mr. Staudaher believes is three-part: 1) a neuroradiologist (MRI/radiological review), 2) a neurologist to review the prior and recent stroke and then subsequent fainting spells, transit ischemic attack, and 3) a cardiologist. Mr. Wright has no objection to the IME. Court NOTED it will have the competency evaluation done first and, depending on what is found, there could be further litigation on the issue. Mr. Staudaher requested the competency evaluators not have any connection with Dr. Desai noting malingering is a huge issue and the COURT SO ORDERED. Ms. Greene is DIRECTED to inquire of the doctors to make sure they have no relationship and/or connection with the defendant. Mr. Staudaher requested defendant be present at all hearings because of the issues raised regarding defendant's ability to aide and assist. Mr. Wright objects to the State's request as it pertains to status checks. COURT ORDERED, defendant's presence is WAIVED at the next date. BAIL/HOUSE ARREST CONTINUED TO: 8/12/10 9:30 AM

Parties Present

Return to Register of Actions

## REGISTER OF ACTIONS

### CASE NO. 10C265107-1

The State of Nevada vs Dipak K Desai

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Case Type: **Felony/Gross Misdemeanor**  
 Date Filed: **06/04/2010**  
 Location: **Department 14**  
 Conversion Case Number: **C265107**  
 Defendant's Scope ID #: **1240942**  
 Lower Court Case Number: **09GJ00049**

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#### RELATED CASE INFORMATION

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**Related Cases**

10C265107-2 (Multi-Defendant Case)  
 10C265107-3 (Multi-Defendant Case)

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#### PARTY INFORMATION

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**Defendant** Desai, Dipak K**Lead Attorneys**  
Richard A. Wright*Retained*

7023824004(W)

**Other** Nevada Mutual Insurance Co**Mark B. Bailus***Retained*

7027377702(W)

**Plaintiff** State of Nevada**David J. Roger**  
702-671-2700(W)

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#### CHARGE INFORMATION

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**Charges: Desai, Dipak K**

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EVENTS & ORDERS OF THE COURT

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02/08/2011 Further Proceedings: Competency (9:30 AM) (Judicial Officer Glass, Jackie)  
FURTHER PROCEEDINGS: COMPETENCY//STATUS CHECK: RECEIPT OF THE EVALUATIONS

## Minutes

02/08/2011 9:30 AM

- APPEARANCES CONTINUED: Christina Greene of the Specialty Courts present. Conference at the Bench. Court stated it had a discussion with counsel regarding procedural matters; the reports came back finding the deft. not competent and in cases where the deft. is found not competent, the deft's are sent to Lakes Crossing in Reno, NV for restoration under NRS 178.425, therefore, the deft. has to be remanded as that is the only way for the deft. to be admitted to Lakes Crossing since there is no mental facility in Clark County. Court further stated that there are people

who are severely mentally ill that are on the waiting list and the deft. will be sent to Lakes Crossing in the order the deft. is placed in as this Court will not bump anyone out of order. Court has checked with the jail and the next available transport date is in March, 2011, therefore, the deft. will have to surrender to the Court to be remanded, to have medical testing and a clearance done prior to admission. COURT ORDERED, matter CONTINUED for the deft. to surrender himself; FURTHER ORDERED, deft. is not to travel outside of Clark County. Court stated it will send all documentation that has been gathered and will have it transmitted to Lakes Crossing; deft. will remain in Lakes Crossing until a determination is made that either the deft. is competent and returned or not competent without probability and at that time parties will receive notice and either side can challenge the findings, depending on the findings. Upon Court's inquiry, Mr. Wright stated that he believes the deft's passport has been surrendered. Court Clerk advised the Court that the passport has been surrendered and is being held in the Vault. BAIL (H.A.) 3/17/11 9:30 AM FURTHER PROCEEDINGS: COMPETENCY/SURRENDER

Parties Present

Return to Register of Actions


Logout My Account Search Menu New District Civil/Criminal Search Refine Search Back

Location : District Court Civil/Criminal Help

**REGISTER OF ACTIONS**

CASE NO. 10C265107-1

The State of Nevada vs Dipak K Desai



Case Type: **Felony/Gross Misdemeanor**  
 Date Filed: **06/04/2010**  
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10C265107-3 (Multi-Defendant Case)

**PARTY INFORMATION**

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Lead Attorneys  
Richard A. Wright

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7023824004(W)

Other Nevada Mutual Insurance Co

Mark B. Bailus

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Plaintiff State of Nevada

David J. Roger  
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10. RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900

10.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
11.CRIMINAL NEGLECT OF PATIENTS	200.495	Felony	01/01/1900
11.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
12.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
13.RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900
13.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
14.CRIMINAL NEGLECT OF PATIENTS	200.495	Felony	01/01/1900
14.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
15.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
16.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
17.RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900
17.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
18.CRIMINAL NEGLECT OF PATIENTS	200.495	Felony	01/01/1900
18.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
19.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
20.RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900
20.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
21.CRIMINAL NEGLECT OF PATIENTS	200.495	Felony	01/01/1900
21.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
22.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
23.RECKLESS ENDANGERMENT	202.595	Felony	01/01/1900
23.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
24.CRIMINAL NEGLECT OF PATIENTS	200.495	Felony	01/01/1900
24.SUBSTANTIAL BODILY HARM.	0.060	Felony	01/01/1900
25.PRESENTING ANY STATEMENT TO AN INSURER OR AGENT THAT CONTAINS FALSE OR	686A.2815	Felony	01/01/1900
26.ACTIONS WHICH CONSTITUTE THEFT	205.0832	Felony	01/01/1900
26.THEFT-PENALTIES	205.0835	Felony	01/01/1900
27.OBTAINING MONEY, PROPERTY, RENT OR LABOR BY FALSE PRETENSES.	205.380	Felony	01/01/1900
27.IT SHALL BE NO DEFENSE TO A PROSECUTION FOR LARCENY THAT THE ACCUSED WAS	205.265	Felony	01/01/1900
28.OBTAINING MONEY, PROPERTY, RENT OR LABOR BY FALSE PRETENSES.	205.380	Felony	01/01/1900
28.IT SHALL BE NO DEFENSE TO A PROSECUTION FOR LARCENY THAT THE ACCUSED WAS	205.265	Felony	01/01/1900

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**EVENTS & ORDERS OF THE COURT**


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03/17/2011 Further Proceedings: Competency (9:30 AM) (Judicial Officer Glass, Jackie)  
**FURTHER PROCEEDINGS: COMPETENCY/SURRENDER**

**Minutes**

03/17/2011 9:30 AM

- Ms. Stanish provided the Court with a list of the deft's medications. COURT ORDERED, Deft. REMANDED TO CUSTODY to be sent up to Lakes Crossing. Court advised counsel that they will receive communication from Lakes Crossing regarding the deft's status by way of a letter or report. CUSTODY (L.C.)

**Parties Present**

[Return to Register of Actions](#)



Exhibit 5

Exhibit 5



1 MOTN

2 RICHARD A. WRIGHT, ESQUIRE

3 Nevada Bar No. 886

4 WRIGHT STANISH & WINCKLER

5 300 S. Fourth Street

Suite 701

Las Vegas, NV 89101

(702) 382-4004

Attorneys for Dipak Desai

SEP 29 1 30 PM '11

*Ann L. Lamm*  
CLERK OF THE COURT

FILED

SEP 29 1 08 PM '11

*Ann L. Lamm*  
CLERK OF THE COURT

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 THE STATE OF NEVADA,

11 Plaintiff,

12 vs.

13 DIPAK KANTILAL DESAI, #1240942,

14 Defendant.

CASE NO. C265107  
DEPT. NO. XXV

DATE OF HEARING: \_\_\_\_\_

TIME OF HEARING: \_\_\_\_\_

DEFENDANT'S MOTION AND  
NOTICE OF MOTION FOR  
COMPETENCY HEARING  
AND DISCOVERY OF COMPETENCY  
EVALUATION RECORDS

16 DIPAK KANTILAL DESAI, by and through his attorney, Richard A. Wright, WRIGHT  
17 STANISH & WINCKLER, moves this Court to set a competency hearing and order the  
18 discovery of any and all records connected to the competency evaluations and treatment of  
19 DESAI. The request for competency hearing and discovery is based on state and federal due  
20 process principals and the provisions on NRS 178.3981 to 178.482.

21 The undersigned certifies that this motion is filed in a timely manner, that is, within ten  
22 days of receipt of the competency evaluations on September 20, 2011.

23 DATED this 29th day of September 2011.

24 Respectfully Submitted,

25 WRIGHT STANISH & WINCKLER

26 BY *Richard A. Wright*  
27 RICHARD A. WRIGHT  
28 Counsel for DESAI

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District Court, Department 25, on the 11<sup>th</sup> day of Oct  
1983 or as soon thereafter as counsel may be heard.

Dated this 29th day of September, 2011.

WRIGHT STANISH & WINCKLER

ARD A. WRIGHT, ESQ.

**RICHARD A. WRIGHT, ESQUIRE**  
Nevada Bar No. 886  
300 S. Fourth Street  
Suite 701  
Las Vegas, NV 89101  
Attorneys for Dipak Desai

1 **1. Procedural Facts**

2 On or about June 16, 2010, the State filed an unopposed motion to transfer this matter to  
3 Department 5 for a competency evaluation. Simultaneously, the State moved, *intra alia*, for an  
4 order compelling DESAI to provide copies of all his medical records to the State. On July 21,  
5 2010, the trial court referred the matter to competency court. On July 29, 2010, former District  
6 Court Judge Jackie Glass ordered the defendant to collect and provide all his medical records to  
7 the competency court and State.

8 On February 8, 2011, Judge Glass pronounced that DESAI was deemed incompetent by  
9 the two court-appointed evaluators, Michael S. Krelstein, M.D., and Shera D. Bradley, Ph.D.  
10 The Court ordered DESAI to surrender to custody on March 17, 2011, for purposes of  
11 transporting him to Lake's Crossing for further competency evaluation. At the time, DESAI was  
12 released on a cash bail in the sum of \$1 million. He reported as ordered and was subsequently  
13 transported. At the time of this writing, he is still at Lake's Crossing awaiting transportation  
14 back to Las Vegas. On September 20, 2011, the undersigned received, via facsimile from Lake's  
15 Crossing, the competency evaluations.

16 **2. Request for Competency Hearing**

17 Based on the findings of the evaluations, the DESAI requests that the Court set this  
18 matter for a competency hearing to permit the defense an opportunity to examine and challenge  
19 the conclusions of the Lake's Crossing evaluators pursuant to NRS 178.455.

20 **3. Request for Pre-hearing Discovery and Status Check Hearing**

21 To meet due process standards and permit a meaningful review of the findings of the  
22 Lake's Crossing evaluators, DESAI moves for pre-hearing disclosure of any and all records  
23 pertaining to the competency evaluation, observation, and treatment of DESAI which are in the  
24 possession and control of Lake's Crossing and other facilities and providers to which DESAI  
25 may have been referred for examination or treatment. Additionally, DESAI requests such  
26 records in connection with the pre-competency evaluations performed by Drs. Krelstein and  
27 Shera Bradley.

28 ///

1 This request should be broadly construed to include any and all records pertaining to the  
2 competency evaluation, including but not limited to the raw data from the psychological testing;  
3 the tests results; all notes by mental health, medical, and security staff; radiology records and  
4 images; medical examinations; and counseling, treatment, and rehabilitation records.

5 To ensure that complete records are produced and adequate time afforded to review the  
6 records, DESAI further requests that the Court set a status check hearing on the production of  
7 records before the date of the competency hearing.

8 DATED this 29th day of September 2011.

9 Respectfully Submitted,

10 WRIGHT STANISH & WINCKLER

11  
12 BY 

13 RICHARD A. WRIGHT  
14 Nevada Bar No. 886  
15 300 S. Fourth Street, Suite 701  
16 Las Vegas, NV 89101  
17 (702)382-4004  
18 (702)382-4800 (fax)  
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Exhibit 6

Exhibit 6

DISTRICT COURT

CLARK COUNTY, NEVADA DEC 20 2011

COPY BY ALICE POLCI, DEPUTY

THE STATE OF NEVADA, )  
 )  
Plaintiff, ) Case No: C265107  
 )  
vs. ) Dept No.: XXV  
 )  
DIPAK DESAI, )  
 )  
Defendant. )  
 )  
 )  
 )

BEFORE THE HONORABLE KATHLEEN DELANEY

TUESDAY, OCTOBER 11, 2011, 10:00 A.M.

REPORTER'S TRANSCRIPT  
OF  
PROCEEDINGS

APPEARANCES:

For the STATE:

For the DEFENDANT:

MICHAEL STAUDAHER, ESQ.  
PAMELA WECKERLY, ESQ.  
CHIEF DEPUTY DAS - CRIMINAL  
200 E. Lewis Avenue  
Las Vegas, Nevada 89101

RICHARD A. WRIGHT, ESQ.  
MARGARET M. STANISH, ESQ.  
WRIGHT STANISH & WINCKLER  
300 S. Fourth Street, #701  
Las Vegas, Nevada 89101

REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

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LAS VEGAS, CLARK COUNTY, NEVADA  
TUESDAY, OCTOBER 11, 2011, 10:00 A.M.  
PROCEEDINGS

\* \* \*

THE COURT: Call the matter on page 11, State of Nevada versus Dipak Desai.

Please state your appearances for the record.

MS. WECKERLY: Good morning, Your Honor. Pam Weckerly on behalf of the State.

MR. STAUDAHER: Michael Staudaher on behalf of the State.

MR. WRIGHT: Richard Wright appearing with Dr. Desai -- and Margaret Stanish also.

THE COURT: Okay. Thank you very much.

What I have on calendar today was set for further proceedings upon receipt of reports from Lake's Crossing regarding Defendant's return having been found competent to stand trial.

I also have what was filed on September 29th, I believe, Defendant's Motion for a Competency Hearing and Discovery of Competency Evaluation Records.

Is the State in receipt of Defendant's motion?

MR. STAUDAHER: Yes, Your Honor.

THE COURT: I did not see any opposition to that

1 motion in the record, but if there was one filed, the  
2 Court has not seen it yet.

3 MR. STAUDAHER: We do not oppose, Your Honor.

4 THE COURT: Okay. And at this time the Court,  
5 obviously, can see from the statute, and I think what I  
6 do want to note in the motion that the statute that has  
7 been referred to I do not believe was the correct  
8 statute. What was referred to as far as the entitlement  
9 to the competency hearing was NRS 178.455. It's actually  
10 NRS 178.415 that does give the basis upon return of the  
11 Court's indicating competency, the ability of counsel to  
12 challenge those findings.

13 Specifically, the way the statute is worded in  
14 Subsection 3 is that the receipt of the report the  
15 examination shall permit counsel from both sides to  
16 examine the person or persons appointed to examine the  
17 defendant and the prosecuting attorney and/or the  
18 defendant may introduce other evidence or cross-examine  
19 one another's witnesses.

20 I also noted in the motion that there was a  
21 request for discovery of records. I was a little  
22 surprised, Counsel, and I want to ask Mr. Wright why was  
23 the subpoena not issued to these agencies to get these  
24 records otherwise in advance of today's court date,  
25 because a significant period of time has gone by now



1       since the motion has been filed, and my understanding is  
2       the standard practice would be the subpoena would be  
3       issued rather than putting in the motion to request the  
4       court then to request documents, and so maybe there has  
5       been a subpoena issued and I just haven't seen it.

6               MR. WRIGHT: I have not issued a subpoena. The  
7       only records outstanding are the records that are the two  
8       evaluations before Lake's Crossing, that would be  
9       Dr. Krelstein. His psychologist, Bradley, did the  
10      evaluations and their records need to be acquired. They  
11      were court appointed, and then all of the records of  
12      Lake's Crossing. I can issue a subpoena to them; I just  
13      did not want to subpoena them if they were court  
14      appointed. I just thought the Court would have ordered  
15      all of the records be turned over.

16             THE COURT: Well, and the reason I asked about  
17      it would certainly expedite things if a subpoena had been  
18      issued, and one is certainly entitled to be issued. I am  
19      going to suggest that we go that route.

20             Did either side have any discussion or have any  
21      opinion when this matter might be able to be returned for  
22      the hearing on the competency that has been requested?

23             MR. STAUDAHER: Well, we have not discussed  
24      that, Your Honor, obviously, at this point because, at  
25      least from the State's perspective, the records

1 themselves, I would think, Mr. Wright would want to get  
2 ahold of before we set a hearing. I don't know what he  
3 intends to do specifically with those, who he wants to  
4 have review those.

5 One other issue I did note and probably pertains  
6 to the pre-Lake's Crossing evaluations that were done  
7 here locally, were the requests at least for the raw data  
8 related to some of the testing and evaluation that was  
9 done. I know that there were requests made by the State  
10 even prior to Dr. Desai going out to Lake's Crossing, and  
11 although the reports and information were allowed to be  
12 provided by the various medical providers in this  
13 instance, the raw data was specifically excluded by the  
14 Court.

15 And I think that there is some issue with regard  
16 at least to the psychologist and psychiatrist who  
17 evaluate that they do not just let out the raw data  
18 unless it is to a like professional.

19 THE COURT: The Court undertook in preparation  
20 for today to speak with counsel for Lake's Crossing in  
21 terms of trying to determine how much material would need  
22 to be produced and what the time frame would be  
23 appropriate for them to produce that documentation. And  
24 if there were to be any exclusions of the documentation  
25 to be provided what would they be.

1                   And the reference that I was provided by counsel  
2                   for Lake's Crossing, the Attorney General's office, was  
3                   that raw data and that would be applicable to the  
4                   court-appointed doctors in Southern Nevada. Raw data  
5                   could not be provided because it is a copyright issue.  
6                   It is how the raw data is ultimately inputted into the  
7                   assessments and the tools that provide the copyright  
8                   issue for those tests and those provisions.

9                   So we can give you more details on that if need  
10                  be, but the Court will continue to exclude any request  
11                  for raw data, otherwise all other documentation provided,  
12                  as Dr. Desai did spend a significant period of time at  
13                  Lake's Crossing.

14                  I have been advised that the records are quite  
15                  voluminous and that it would probably take approximately  
16                  20 to 30 days for those documents to be provided, so the  
17                  Court does not want to overburden the agency in terms of  
18                  mandating a sooner return on records than would be  
19                  feasible for them, however, the Court does want it to be  
20                  clear that the statute, as well as the case law in this  
21                  arena, do not mandate that every piece of evidence or  
22                  every piece of information that either side may wish to  
23                  put before the court is required to be put before the  
24                  court.

25                  The key issue, of course, is ultimately

1       addressing if there are any continuing doubts as to the  
2       competency of this defendant. And clearly, these reports  
3       were quite detailed in terms of the doctor's belief of  
4       the defendant's competency at this time. However, if it  
5       is within the defense purview, and the Court will  
6       independently review any new information that the defense  
7       brings forward, but I am not going to unreasonably delay  
8       proceeding with this matter for purposes of a hearing. I  
9       will set the hearing, and we will have the hearing.

10               But I ask in terms of the remaining discussion,  
11       and I would like to hear from Mr. Wright in terms of what  
12       time frame he thinks is going to be necessary for us to  
13       be able to proceed with the hearing in light of  
14       information that it may take up to a maximum of 30 days  
15       for you to get the record.

16               MR. WRIGHT: Okay. And I will go back to the  
17       raw data. As I understand it, we will be getting all of  
18       the records from Lake's Crossing absent the part you  
19       indicated.

20               MR. STAUDAHER: Absent the raw data.

21               MR. WRIGHT: And also the two prior examiners,  
22       court-appointed, Dr. Krelstein and psychologist Bradley.

23               THE COURT: Well, we are going to discuss how  
24       you are going to get those, but you do get those records  
25       within a 30-day time frame. What's your request?

1 MR. WRIGHT: I need all of those to then turn  
2 over to several experts I have to evaluate and to also  
3 evaluate Dr. Desai with those records.

4 So I am saying I need the records and then I  
5 will have experts, and I envision a hearing in which the  
6 three doctors from Lake's Crossing, plus I am looking at  
7 Dr. Thomas Kinsora, the evaluator before the  
8 court-appointed evaluators, Dr. Roitman, plus  
9 Dr. Krelstein who found him not competent, Dr. Zuchowski,  
10 and Dr. Bradley the psychologist. And so I do not know  
11 their availability.

12 When I had spoken to Lake's Crossing they said  
13 for all of them to be available -- now bear in mind, if  
14 defense counsel asked them, they said they need a month's  
15 advance --

16 MR. STAUDAHER: Well, Your Honor, if I may pipe  
17 in on that. I don't think that there is a requirement  
18 that they physically appear. I know that Lake's Crossing  
19 has at least a mechanism by which they can appear on like  
20 a videoconference type of thing, and I think they are  
21 more available in that sense. Pulling those  
22 practitioners away from Lake's Crossing to bring them  
23 physically down to Las Vegas for a hearing would  
24 certainly unduly disrupt the operations of Lake's  
25 Crossing.

1           THE COURT: We certainly have had and it does  
2 not sound like we have had their presence in the sense of  
3 them being able to be examined and cross-examined, but  
4 whether it is by videoconference or in person it would be  
5 subject to convenience and the court to arrange as far as  
6 that goes, and we certainly have done that in the past.

7           My bigger concern, and what I want to address  
8 here for a moment is, again, the statute. It's thin,  
9 frankly, on the information that it gives us for guidance  
10 on these types of hearings. But the statute indicates  
11 that counsel can examine the person or persons appointed  
12 to examine the defendant, and they may introduce other  
13 evidence, including without limitation, evidence related  
14 to treatment to competency and the possibility that this  
15 would not be in this circumstance of ordering  
16 involuntarily administration of medication. It also  
17 talks about cross-examining other witnesses.

18           There's nothing in here that says that this  
19 process entailed let's gather all the reports and then  
20 let's go have a whole panel of experts review these  
21 reports again to come back and say whatever the State  
22 wants to say about it.

23           The process here is look at all the information,  
24 examine, cross-examine these evaluators, and you can  
25 certainly introduce other information that might indicate

1 prior assessments. You have talked about the prior  
2 doctors, but I am unclear what is your legal basis. And  
3 Mr. Wright, to indicate that this proceeding should be  
4 further delayed to allow expert review to come into  
5 play.

6 MR. WRIGHT: First of all, I need the experts to  
7 review the reports, not the written reports you have but  
8 the common report, those other evaluations that they did  
9 to educate me on how to cross-examine them.

10 THE COURT: So for cross-examine purposes. You  
11 are not intending, and believe that you are going to be  
12 calling all of these experts to try to provide other  
13 additional new evaluations?

14 MR. WRIGHT: Yes, I am.

15 THE COURT: On what legal basis would you do  
16 that?

17 MR. WRIGHT: As I understand it, I have the  
18 burden by a preponderance of demonstrating he is not  
19 competent. I believe he is not competent.

20 THE COURT: On what basis; that he does not  
21 understand the charges against him or he is unable to aid  
22 or assist or both?

23 MR. WRIGHT: That he does not have the cognitive  
24 ability to factually understanding the evidence and the  
25 proceedings and all the tens of thousands of pages of

1 testimony and interviews, and the assistance of counsel  
2 is the main prong I am dealing with. He knows what a  
3 court is. He knows who we are.

4 THE COURT: Okay. This is what we are going to  
5 do. I am going to order the defense to issue subpoenas  
6 and I will give you to Friday to issue them so you have  
7 time to gather the information. I would like them to be  
8 issued and served by noon on Friday to all doctors with  
9 whom you wish to obtain the records or Lake's Crossing  
10 for which you obtain the records.

11 If you have any questions about how to get the  
12 subpoena to the doctors that are court appointed, the  
13 court officer that oversees the competency evaluations,  
14 Christina Greene, your office can contact her and get  
15 information on how to serve the subpoena. But I think  
16 your office since you want to gather this information  
17 should issue the subpoena in normal course. But I would  
18 like it done by Friday and I would like it to have a  
19 30-day return time frame. So that's more of the time  
20 frame that Lake's Crossing indicated they might need to  
21 be able to provide any records.

22 I am certain that the local doctors who have far  
23 less voluminous records could provide that documentation  
24 within that time frame, so I would like you to have a  
25 return date for the information by the 14th. I will set



1 a status check for the next day for our court to check  
2 back in with you to determine if you received all of  
3 those reports and that you are in the process of  
4 providing those reports to experts so that we can set a  
5 firm date by which we would continue with this hearing.

6 MR. WRIGHT: Did you indicate that I should also  
7 serve Lake's Crossing, or just the --

8 THE COURT: Yes. Any records that you wish to  
9 obtain that you referenced in your motion you need to  
10 serve all potential holders of that documentation, which  
11 would include Lake's Crossing and the two doctors that  
12 are here in Southern Nevada with subpoenas for those  
13 records, and then they can respond accordingly to the  
14 subpoena.

15 If there is any issue, which I don't think there  
16 will be because I get through counsel with the Attorney  
17 General's office that showed my staff provided the copies  
18 of the motion. So it's understood what it was that you  
19 would be asking for, but I do think it is appropriate at  
20 this time that we have you, since you wish to challenge  
21 these findings, you issue the subpoena, you get the  
22 records back. You should have them all back by the time  
23 we check back in with court and then we can go from there  
24 to determine when we return for the competency challenge  
25 hearing.

1 MR. WRIGHT: Yes.

2 MR. STAUDAHER: Your Honor, are the records  
3 going to be lodged with the court or -- I mean, they're  
4 going to be due back on the 14th --

5 THE COURT: Well, they are due back no later  
6 than the 14th, that's why we put a 30-day return time  
7 frame on it. But they may be received sooner and I think  
8 they may be provided as with any other subpoena in that  
9 response. And if they come to the party that subpoenaed  
10 them, then they would need to be provided to the other  
11 side as well.

12 MR. STAUDAHER: Fair enough.

13 THE COURT: So the Court is going to step out of  
14 the role of gathering you the information. Mr. Wright,  
15 you will gather the information and likewise provide it  
16 to the other counsel.

17 The issue on the 15th will be: Do you have all  
18 documents now, have you provided them to the State, and  
19 when can we proceed with the hearing. And the Court does  
20 expect to proceed forthwith with this hearing thereafter.

21 So have good information at that time that you  
22 have identified what experts you intend to have review  
23 it. The Court will assess that information that you have  
24 provided. And then to the extent that you have received  
25 the records and you have already provided them to those

1 experts to get them started at the time we come together  
2 on the 15th to check-in where we are.

3 MR. STAUDAHER: Okay. Thanks, Your Honor.

4 MR. WRIGHT: I will be subpoenaing all including  
5 the data. I will subpoena everything and then they will  
6 respond to that which they believe --

7 THE COURT: Exactly. Make it as specific and as  
8 detailed as you wish it to be. And then if they cannot  
9 provide something, such as we've discussed and anticipate  
10 with the raw data, then they'll have to provide  
11 explanation as to why.

12 MR. WRIGHT: Yes, Your Honor.

13 THE COURT: All right.

14 MR. STAUDAHER: Thank you, Your Honor.

15 THE COURT CLERK: That will be November 15th at  
16 10:00 a.m.

17 MR. WRIGHT: Thank you.

18 \* \* \*

REPORTER'S CERTIFICATE

STATE OF NEVADA )  
COUNTY OF CLARK ) ss.

I, BRENDA SCHROEDER, a certified court reporter  
in and for the State of Nevada, do hereby certify that  
the foregoing and attached pages 1-15, inclusive,  
comprise a true, and accurate transcript of the  
proceedings reported by me in the matter of THE STATE OF  
NEVADA, Plaintiff, versus DIPAK DESAI, Defendant, Case  
No. C265107 on October 11, 2011.

Dated this 19th day of December, 2011.

Brenda Schroeder  
BRENDA SCHROEDER, CCR NO. 867

Exhibit 7

Exhibit 7

DISTRICT COURT  
CLARK COUNTY, NEVADA

**FILED IN OPEN COURT**  
**STEVEN D. GRIERSON**  
**CLERK OF THE COURT**  
**DEC 20 2011**

**COPY**

BY, ALICE POLCI, DEPUTY

THE STATE OF NEVADA, )  
 )  
Plaintiff, ) Case No: C265107  
 )  
vs. ) Dept No.: XXV  
 )  
DIPAK DESAI, )  
 )  
Defendant. )  
 )  
\_\_\_\_\_ )

BEFORE THE HONORABLE KATHLEEN DELANEY  
TUESDAY, NOVEMBER 15, 2011, 10:00 A.M.

REPORTER'S TRANSCRIPT  
OF  
PROCEEDINGS

APPEARANCES:

For the STATE:

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REPORTED BY: BRENDA SCHROEDER, CCR NO. 867

1 LAS VEGAS, CLARK COUNTY, NEVADA

2 TUESDAY, NOVEMBER 15, 2011, 10:00 A.M.

3 PROCEEDINGS

4 \* \* \*

5 THE COURT: State of Nevada versus Dipak Desai.

6 This matter is on for further proceeding, status check  
7 regarding whether documents that have been subpoenaed  
8 have been received and the setting of a hearing date for  
9 the challenge to the competency findings.

10 Let's have representations of counsel and then  
11 we are ready to proceed.

12 MS. WECKERLY: Good morning, Your Honor. Pam  
13 Weckerly and Michael Staudaheer on behalf of the State.

14 THE COURT: Good morning.

15 MR. WRIGHT: Richard Wright and I would like to  
16 waive Dr. Desai's presence for the status check.

17 THE COURT: I don't remember that we did  
18 previously so I would appreciate those requests to be  
19 made in advance to the Court, and it is also my  
20 impression and I would request that Defendant be present  
21 at all proceedings and the Court expects the defendant be  
22 present at the time we set the hearing date. I will  
23 waive his appearance today, as prior appearances have  
24 been made so I have no concerns in that regard.

25 Do we have an update in terms of receipt of the

1 documents and date certain by which we can set the  
2 hearing based on what time frame the experts need it? It  
3 is my understanding that all documents have been  
4 provided. There were follow-ups to chambers in terms of  
5 documents being made ready, and some clarifications made;  
6 one of them made to the counsel and we immediately  
7 confirmed and sent to counsel and those requests were  
8 made over a week ago to the Court, so it is my assumption  
9 that all documents have been received and we just need to  
10 know now what date and time frame we are looking at the  
11 experts to provide their input to use so we can proceed.

12 MR. WRIGHT: Okay. We did receive just over the  
13 weekend Lake's Crossing's records, which were the final  
14 and most voluminous records. I have received them all,  
15 approximately 1200 pages of records, which includes  
16 Krelstein, Bradley, Lake's Crossing and outsourced Lake's  
17 Crossing records. I believe they are all there. But we  
18 don't know that.

19 We had discussed previously whether raw data was  
20 somehow protected and they were not produced. There is  
21 nothing in their transmittal that indicates that they did  
22 not produce anything, so I am assuming everything is  
23 there. If it isn't, I would get back to the Court on it.

24 THE COURT: Okay.

25 MR. WRIGHT: Copies are being made as we speak



1       because there are like copies of an MRI, et cetera.

2       Duplicate copies are made, one for the Court, one for the  
3       District Attorney, one multiple going to our experts and  
4       so they do not have those yet.

5               THE COURT:   Okay.

6               MR. WRIGHT:   I am envisioning a competency  
7       hearing in approximately two month's time.

8               THE COURT:   And I just want to make sure that we  
9       are very clear on the record it is not a competency  
10      hearing that is going to take place in whatever time  
11      frame we set.   What will take place in the time frame  
12      that we set is what the statute allows, which is the  
13      ability of the counsel of either side, frankly, but the  
14      ability of counsel who requested this hearing by the  
15      defense to challenge the competency findings that have  
16      been made by these doctors at Lake's Crossing, okay?

17              We are not having a new bite at the apple on the  
18      competency findings in that sense.   I just want to be  
19      clear.   You have the ability to cross-examine these  
20      doctors.   You requested the time frame, and I think it is  
21      important that you have it to have more experts review  
22      the documentation that has supported those findings so  
23      that they can inform you on how to best cross-examine  
24      those doctors, and to the extent that you have evidence  
25      to put forward that may bring into challenge those

1 doctor's findings, then so be it. But I just don't want  
2 there to be any confusion that this Court is having a  
3 brand-new competency hearing.

4 MR. WRIGHT: We haven't had the competency  
5 hearing yet, if I could respectfully disagree with the  
6 Court. What you have is an opinion coming from lake's  
7 Crossing. This Court will make a finding as to  
8 competency. The judge previously before you found him  
9 incompetent based upon Bradley. That's the one finding  
10 of a court thus far.

11 Then when he went to Lake's Crossing and you  
12 have doctors there who opined that he is competent. They  
13 don't make a finding. There has been no competency  
14 determination. This court will, I believe, after a  
15 competency hearing, which is how these things occur, in  
16 my opinion, respectfully.

17 THE COURT: And I appreciate that, Mr. Wright,  
18 and maybe we are just talking semantics. I just want to  
19 be clear, and maybe we'll set another status check  
20 immediately prior to the date set for the hearing to be  
21 clear on the parameters of the hearing.

22 The statute, I believe, sets forth the  
23 parameters of the hearings. Yes, of course, this court  
24 needs to make the ultimate findings based on the reports  
25 that had been provided. Three various extensive reports

1 have been provided to this Court, and you will have the  
2 opportunity to challenge the doctors who provided this  
3 report prior to this Court making that finding, and this  
4 Court will make that finding.

5 But what we have discussed before is these  
6 experts that you are hiring to help advise and assist  
7 you, they are not going to be revisiting and providing  
8 brand-new testimony as to competency. That is not what  
9 this Court believes is the appropriate parameter of that  
10 hearing.

11 And if that is what the defense is seeking to  
12 have occur, then, we may have to address that and you may  
13 have to provide some briefing and a motion on that so  
14 that we can take a look at that. But that is not what  
15 this court has reviewed in the statute as being in the  
16 parameters of this hearing as we proceed.

17 So, again, it may be semantics. This court will  
18 certainly ultimately issue the findings, and I did not  
19 mean to suggest otherwise, but how we are going to go  
20 about doing that? That may be where we still have some  
21 disagreements on.

22 MR. WRIGHT: Could we brief it? I mean, because  
23 that is the ball game as to what the hearing will be and  
24 my belief as to what it is. Our Nevada statute is so far  
25 out of touch with the constitutional determination of

1 competency under due process. I believe it has been held  
2 by the United States Supreme Court that Dr. Desai is  
3 presumed competent, and if competency has arisen as an  
4 issue, it is then required under due process of a full  
5 and fair adversary hearing with witnesses by both sides.

6 My experts, I can have him evaluated again and I  
7 believe then the Court will find by a preponderance of  
8 the evidence if he is incompetent. But I think I do have  
9 the right and I intend to call -- and the State can  
10 disagree within ranges as you read it in the statute. So  
11 if we could have a brief in a couple weeks, either  
12 simultaneous to whatever the Court's discretion is of  
13 what we believe the hearing will entail.

14 THE COURT: Let me hear from the State. Does  
15 the State have anything to add in terms of the parameters  
16 of the upcoming hearing?

17 MR. STAUDAHER: As far as the statute is  
18 concerned, Your Honor, I believe the Court's reading, at  
19 least from our perspective, is correct. This is not the  
20 procedure whereby once a finding comes back that one side  
21 doesn't agree with that they can then go out and start  
22 their own new evaluating process.

23 The issue here is whether or not the evaluation  
24 that took place was a good evaluation, whether to provide  
25 that information to the Court to make that determination,

1       and if so, we have a hearing if it's requested by either  
2       party. Those individuals who did the evaluation along  
3       with the data that they obtained are reviewed and  
4       cross-examined and then this court can make a  
5       determination.

6               It is not for a separate hearing process,  
7       separate evaluator process outside of the Court's  
8       directing the prescribed methods of doing so. It would  
9       just essentially open the flood gates from anybody that  
10      came back from Lake's Crossing for whatever reason to  
11      then delay the process and engage in their own  
12      evaluations, their own experts being brought in during a  
13      hearing, having all of that being brought forth. I do  
14      not believe that is where we are at in this case.

15             At this stage he's been up six months at Lake's  
16      Crossing. He has had extensive evaluations. The purpose  
17      of this hearing, as the State believes the statute reads  
18      and supports, is that those individuals who evaluated him  
19      both in the past before he went to Lake's Crossing, as  
20      well as when he did go up to Lake's Crossing, as all the  
21      data that now apparently has been obtained, that that is  
22      what we are here to examine and cross-examine before the  
23      Court makes a determination.

24             THE COURT: And that is the Court's reading of  
25      the statute as well. But I do not have a problem if the

1 defense wishes to brief this issue. I am not sure it was  
2 a suggestion, but I think the reference to the  
3 simultaneous briefing is the best way to go, that maybe  
4 we should have one date certain by which we received  
5 simultaneous briefing from the parties to the Court so  
6 that we can be sure that we set forth clearly and  
7 accurately to the best of our ability the parameters for  
8 the hearing when it does in fact proceed.

9 I don't want there to be any confusion on that  
10 point and I want to make sure that we establish that  
11 record as well.

12 My thought process would be that we would have  
13 briefing submitted and then heard on this issue in 30  
14 days, and then the actual hearing date set in 60 days in  
15 keeping with what the defense had indicated the time  
16 frame that they need to work with their experts.

17 Does anybody have a problem with that in the  
18 context before we do the date certain?

19 MR. WRIGHT: No problem.

20 MR. STAUDAHER: No.

21 THE COURT: Okay. Why don't we have briefs due  
22 simultaneously three weeks from today.

23 THE COURT CLERK: December 6th.

24 THE COURT: And then why don't we have the  
25 hearing on those briefs four weeks from today.

1 THE COURT CLERK: December 13th at 10:00 a.m.

2 THE COURT: And then we'll have the actual  
3 hearing on the competency findings at the time we have  
4 the hearing on the 13th. Perhaps, a better way to  
5 identify that hearing and clarify the parameters of that  
6 hearing and that would be in 60 days.

7 We would be looking at a Friday date based on  
8 this court's schedule and availability. That would be  
9 our best opportunity to have a full day of hearing. So  
10 we would start at 9:00 a.m. and continue until we are  
11 concluded. So what would be a Friday?

12 THE COURT CLERK: January 20th.

13 THE COURT: January 20th.

14 MR. WECKERLY: Is it possible -- I have a  
15 hearing that's already set on that date, Your Honor. Is  
16 it possible go a week earlier or a week later?

17 THE COURT: A week earlier or a week later,  
18 which do you want -- because a word of caution in working  
19 with these experts because I don't want there to be any  
20 further concerns about time frames, so let's just have  
21 the additional week, and then, that way we can be a  
22 hundred percent sure that everything's on track and  
23 copies get over to the experts early this week or the  
24 remainder of this week since they are being copied  
25 already. They have them all and that should give them

1        ample time to get back to you and to prepare.

2                THE COURT CLERK:    January 27th at 9:00 a.m.

3                THE COURT:    And I will look forward to the

4        briefs.    And just by close of business day and provide a

5        copy to the Court and then we will have you on the 6th of

6        December.    And then we'll have the hearing on the

7        follow-up status check on parameters of the hearing.

8                MR. WRIGHT:    Thank you, Your Honor.

9                MR. STAUDAHER:    Thank you, Your Honor.

10               THE COURT:    Did you have another question?

11               MR. WRIGHT:    On the 13th, I would like to waive

12        Dr. Desai's presence.

13               THE COURT:    At that times in terms of the setup

14        of preliminary hearing, I do not have a problem that.

15        His presence will not be waived for the January 27th

16        hearing date but it can be waived on the 13th.

17               MR. WRIGHT:    Thank you very much.

18               MR. STAUDAHER:    Thank you, Your Honor.

19                                \*   \*   \*

20

21

22

23

24

25



REPORTER'S CERTIFICATE

STATE OF NEVADA )  
COUNTY OF CLARK ) ss.

I, BRENDA SCHROEDER, a certified court reporter  
in and for the State of Nevada, do hereby certify that  
the foregoing and attached pages 1-12, inclusive,  
comprise a true, and accurate transcript of the  
proceedings reported by me in the matter of THE STATE OF  
NEVADA, Plaintiff, versus DIPAK DESAI, Defendant, Case  
No. C265107 on November 15, 2011.

Dated this 19th day of December, 2011.

Brenda Schroeder  
BRENDA SCHROEDER, CCR NO. 867

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

3  
4 Electronically Filed  
Jan 12 2012 03:39 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

5 DIPAK KANTILAL DESAI, )

6 Petitioner, )

7 vs. )

No.

(District Court No. C265107)

8 )  
9 THE EIGHTH JUDICIAL DISTRICT )  
COURT OF THE STATE OF NEVADA, )  
10 COUNTY OF CLARK, THE )  
11 HONORABLE KATHLEEN DELANEY, )  
DISTRICT COURT JUDGE, )  
12 )

13 Respondent. )

14 and )

15 THE STATE OF NEVADA, )  
16 Real Party In Interest. )  
17 )

18 **PETITIONER'S APPENDIX**

19  
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28

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Judge Kathleen Delaney  
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Exhibit 1

Exhibit 1

ORIGINAL

FILED

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*Ann. J. L. L. L.*  
CLERK COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 DIPAK KANTILAL DESAI, #1240942,  
14 RONALD ERNEST LAKEMAN,  
15 KEITH H. MATHAHS,

16 Defendant(s).

Case No. C265107  
Dept. No. XIV

INDICTMENT

17 STATE OF NEVADA }  
18 COUNTY OF CLARK } ss.

19 The Defendant(s) above named, DIPAK KANTILAL DESAI, RONALD ERNEST  
20 LAKEMAN and KEITH H. MATHAHS accused by the Clark County Grand Jury of the  
21 crime(s) of RACKETEERING (Felony - NRS 207.350, 207.360, 207.370, 207.380, 207.390,  
22 207.400), PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS OR  
23 PROPERTY (Felony - NRS 0.060, 202.595), CRIMINAL NEGLECT OF PATIENTS  
24 (Felony - NRS 0.060, 200.495), INSURANCE FRAUD (Felony - NRS 686A.2815),  
25 THEFT (Felony - NRS 205.0832, 205.0835) and OBTAINING MONEY UNDER FALSE  
26 PRETENSES (Felony - NRS 205.265, 205.380), committed at and within the County of  
Clark, State of Nevada, on or between June 3, 2005, and May 5, 2008, as follows:

CLERK OF THE COURT

JUN 20 4 28 PM '10

RECEIVED

1     COUNT 1 - RACKETEERING

2             Defendants, did on or between June 3, 2005, and May 5, 2008, then and there, within  
3     Clark County, Nevada knowingly, willfully and feloniously while employed by or associated  
4     with an enterprise, conduct or participate directly or indirectly in racketeering activity  
5     through the affairs of said enterprise; and/or with criminal intent receive any proceeds  
6     derived, directly or indirectly, from racketeering activity to use or invest, whether directly or  
7     indirectly, any part of the proceeds from racketeering activity; and/or through racketeering  
8     activity to acquire or maintain, directly or indirectly, any interest in or control of any  
9     enterprise; and/or intentionally organize, manage, direct, supervise or finance a criminal  
10    syndicate; and/or did conspire to engage in said acts, to-wit: by directly or indirectly causing  
11    and/or pressuring the employees and/or agents of the Endoscopy Center of Southern Nevada  
12    to falsify patient anesthesia records from various endoscopic procedures; and/or to commit  
13    insurance fraud by directly or indirectly submitting said false anesthesia records to various  
14    insurance companies for the purpose of obtaining money under false pretenses from said  
15    insurance companies and/or patients; said fraudulent submissions resulting in the payment of  
16    monies to Defendants and/or their medical practice and/or the enterprise, which exceeded the  
17    legitimate reimbursement amount allowed for said procedures; Defendants being responsible  
18    under one or more of the following principles of criminal liability, to wit: (1) by directly  
19    committing said acts; and/or (2) aiding or abetting each other in the commission of the crime  
20    by directly or indirectly counseling, encouraging, hiring, commanding, inducing, or  
21    procuring each other, and/or others to commit said acts, Defendants acting with the intent to  
22    commit said crime.

23    COUNT 2 - INSURANCE FRAUD

24             Defendants did, on or about July 25, 2007, knowingly and willfully present, or cause  
25    to be presented a statement as a part of, or in support of, a claim for payment or other  
26    benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
27    Statutes, knowing that the statement concealed or omitted facts, or contained false or  
28    misleading information concerning a fact material to said claim; and/or did assist, abet,

1 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
2 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
3 facts, or did contain false or misleading information concerning a fact material to a claim for  
4 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
5 Revised Statutes, by falsely representing to ANTHEM BLUE CROSS – BLUE SHIELD  
6 that the billed anesthesia time and/or charges for the endoscopic procedure performed on  
7 SHARRIEFF ZIYAD were more than the actual anesthetic time and/or charges, said false  
8 representation resulting in the payment of money to Defendants and/or their medical practice  
9 and/or the racketeering enterprise which exceeded that which would have normally been  
10 allowed for said procedure; Defendants being responsible under one or more of the  
11 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
12 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
13 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
14 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
15 (3) pursuant to a conspiracy to commit this crime.

16 COUNT 3 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
17 OR PROPERTY

18 Defendants did on or about July 25, 2007, then and there willfully and unlawfully  
19 perform acts in willful or wanton disregard of the safety of persons or property resulting in  
20 substantial bodily harm to MICHAEL WASHINGTON, in the following manner, to-wit: by  
21 Defendants performing one or more of the following acts: (1) by directly administering  
22 and/or directly or indirectly instructing employees of the Endoscopy Center of Southern  
23 Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol from a  
24 single use vial to more than one patient contrary to the express product labeling of said drug  
25 and in violation of universally accepted safety precautions for the administration of said  
26 drug; and/or (2) by creating an employment environment in which said employees were  
27 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
28 vial to more than one patient contrary to the express product labeling of said drug and in



1 violation of universally accepted safety precautions for the administration of said drug;  
2 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
3 creating an employment environment in which said employees were pressured to reuse  
4 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
5 the express product labeling of said items, and/or in violation of universally accepted safety  
6 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
7 indirectly instructing said employees, and/or creating an employment environment in which  
8 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
9 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
10 patients through said endoscopy center and/or rushing patient procedures at the expense of  
11 patient safety and/or well being and/or directly or indirectly instructing said employees,  
12 and/or creating an employment environment in which said employees were pressured to  
13 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
14 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
15 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
16 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
17 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
18 contrary to the express manufacturers guidelines for the handling and processing of said  
19 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
20 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
21 employment environment in which said employees were inadequately trained and/or  
22 pressured to provide endoscopy scopes for patient procedures that were not adequately  
23 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
24 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
25 precautions for the use of said scopes; Defendants being responsible under one or more of  
26 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
27 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
28 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,

1 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
2 and/or (3) pursuant to a conspiracy to commit this crime.

3 COUNT 4 - CRIMINAL NEGLECT OF PATIENTS

4 Defendants, on or about July 25, 2007, being professional caretakers of MICHAEL  
5 WASHINGTON, did act or omit to act in an aggravated, reckless or gross manner, failing to  
6 provide such service, care or supervision as is reasonable and necessary to maintain the  
7 health or safety of said MICHAEL WASHINGTON, resulting in substantial bodily harm to  
8 MICHAEL WASHINGTON, said acts or omissions being such a departure from what would  
9 be the conduct of an ordinarily prudent, careful person under the same circumstances that it  
10 is contrary to a proper regard for danger to human life or constitutes indifference to the  
11 resulting consequences, said consequences of the negligent act or omission being reasonably  
12 foreseeable; said danger to human life not being the result of inattention, mistaken judgment  
13 or misadventure, but the natural and probable result of said aggravated reckless or grossly  
14 negligent act or omission, by performing one or more of the following acts: (1) by directly  
15 or indirectly instructing employees of the Endoscopy Center of Southern Nevada, (ECSN) to  
16 administer one or more doses of the anesthetic drug Propofol from a single use vial to more  
17 than one patient contrary to the express product labeling of said drug and in violation of  
18 universally accepted safety precautions for the administration of said drug; and/or (2) by  
19 creating an employment environment in which said employees were pressured to administer  
20 one or more doses of the anesthetic drug Propofol from a single use vial to more than one  
21 patient contrary to the express product labeling of said drug and in violation of universally  
22 accepted safety precautions for the administration of said drug; and/or (3) by directly or  
23 indirectly instructing said employees, and/or creating an employment environment in which  
24 said employees were pressured to reuse syringes and/or needles and/or biopsy forceps and/or  
25 snares and/or bite blocks contrary to the express product labeling of said items, and/or in  
26 violation of universally accepted safety precautions for the use of said items; and/or (4) by  
27 directly or indirectly instructing said employees, and/or creating an employment  
28 environment in which said employees were pressured to limit the use of medical supplies

1 necessary to conduct safe endoscopic procedures; and/or (5) by directly or indirectly  
2 instructing said employees, and/or creating an employment environment in which said  
3 employees were pressured to falsely prechart patient records and/or rush patients through  
4 said endoscopy center and/or rush patient procedures at the expense of patient safety and/or  
5 well being; and/or (6) by directly or indirectly scheduling and/or treating an unreasonable  
6 number of patients per day which resulted in substandard care and/or jeopardized the safety  
7 and/or well being of said patients; and/or (7) by directly or indirectly instructing said  
8 employees, and/or creating an employment environment in which said employees were  
9 inadequately trained and/or pressured to provide endoscopy scopes for patient procedures  
10 that were not adequately cleaned and/or prepared contrary to the express manufacturers  
11 guidelines for the handling and processing of said endoscopy scopes, and/or in violation of  
12 universally accepted safety precautions for the use of said scopes; and/or (8) by methods  
13 unknown; for the purpose of enhancing the financial profit of ECSN, said act(s) or  
14 omission(s) causing the transmission of Hepatitis C virus from patient SHARRIEFF ZIYAD  
15 to patient MICHAEL WASHINGTON, who was not previously infected with the Hepatitis  
16 C virus; Defendants being responsible under one or more of the following principles of  
17 criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding or abetting  
18 each other in the commission of the crime by directly or indirectly counseling, encouraging,  
19 hiring, commanding, inducing, or procuring each other, and/or others to commit said acts,  
20 Defendants acting with the intent to commit said crime, and/or (3) pursuant to a conspiracy  
21 to commit this crime.

22 COUNT 5 - INSURANCE FRAUD

23 Defendants did, on or about July 25, 2007, knowingly and willfully present, or cause  
24 to be presented a statement as a part of, or in support of, a claim for payment or other  
25 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
26 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
27 misleading information concerning a fact material to said claim; and/or did assist, abet,  
28 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a

1 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
2 facts, or did contain false or misleading information concerning a fact material to a claim for  
3 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
4 Revised Statutes, by falsely representing to VETERANS ADMINISTRATION that the  
5 billed anesthesia time and/or charges for the endoscopic procedure performed on MICHAEL  
6 WASHINGTON were more than the actual anesthetic time and/or charges, said false  
7 representation resulting in the payment of money to Defendants and/or their medical practice  
8 and/or the racketeering enterprise which exceeded that which would have normally been  
9 allowed for said procedure; Defendants being responsible under one or more of the  
10 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
11 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
12 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
13 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
14 (3) pursuant to a conspiracy to commit this crime.

15 COUNT 6 - INSURANCE FRAUD

16 Defendants did, on or about July 25, 2007, knowingly and willfully present, or cause  
17 to be presented a statement as a part of, or in support of, a claim for payment or other  
18 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
19 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
20 misleading information concerning a fact material to said claim; and/or did assist, abet,  
21 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
22 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
23 facts, or did contain false or misleading information concerning a fact material to a claim for  
24 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
25 Revised Statutes, by falsely representing to ANTHEM BLUE CROSS AND BLUE  
26 SHIELD that the billed anesthesia time and/or charges for the endoscopic procedure  
27 performed on KENNETH RUBINO were more than the actual anesthetic time and/or  
28 charges, said false representation resulting in the payment of money to Defendants and/or

1 their medical practice and/or the racketeering enterprise which exceeded that which would  
2 have normally been allowed for said procedure; Defendants being responsible under one or  
3 more of the following principles of criminal liability, to wit: (1) by directly committing said  
4 acts; and/or (2) aiding or abetting each other in the commission of the crime by directly or  
5 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
6 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
7 and/or (3) pursuant to a conspiracy to commit this crime.

8 COUNT 7 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
9 OR PROPERTY

10 Defendants did on or about September 21, 2007, then and there willfully and  
11 unlawfully perform acts in willful or wanton disregard of the safety of persons or property  
12 resulting in substantial bodily harm to STACY HUTCHINSON, in the following manner, to-  
13 wit: by Defendants performing one or more of the following acts: (1) by directly  
14 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
15 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
16 from a single use vial to more than one patient contrary to the express product labeling of  
17 said drug and in violation of universally accepted safety precautions for the administration of  
18 said drug; and/or (2) by creating an employment environment in which said employees were  
19 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
20 vial to more than one patient contrary to the express product labeling of said drug and in  
21 violation of universally accepted safety precautions for the administration of said drug;  
22 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
23 creating an employment environment in which said employees were pressured to reuse  
24 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
25 the express product labeling of said items, and/or in violation of universally accepted safety  
26 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
27 indirectly instructing said employees, and/or creating an employment environment in which  
28 said employees were pressured to limit the use of medical supplies necessary to conduct safe

1 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
2 patients through said endoscopy center and/or rushing patient procedures at the expense of  
3 patient safety and/or well being and/or directly or indirectly instructing said employees,  
4 and/or creating an employment environment in which said employees were pressured to  
5 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
6 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
7 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
8 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
9 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
10 contrary to the express manufacturers guidelines for the handling and processing of said  
11 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
12 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
13 employment environment in which said employees were inadequately trained and/or  
14 pressured to provide endoscopy scopes for patient procedures that were not adequately  
15 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
16 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
17 precautions for the use of said scopes; Defendants being responsible under one or more of  
18 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
19 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
20 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
21 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
22 and/or (3) pursuant to a conspiracy to commit this crime.

23 COUNT 8 - CRIMINAL NEGLECT OF PATIENTS

24 Defendants, on or about September 21, 2007, being professional caretakers of  
25 STACY HUTCHINSON, did act or omit to act in an aggravated, reckless or gross manner,  
26 failing to provide such service, care or supervision as is reasonable and necessary to  
27 maintain the health or safety of said STACY HUTCHINSON, resulting in substantial bodily  
28 harm to STACY HUTCHINSON, said acts or omissions being such a departure from what

1 would be the conduct of an ordinarily prudent, careful person under the same circumstances  
2 that it is contrary to a proper regard for danger to human life or constitutes indifference to  
3 the resulting consequences, said consequences of the negligent act or omission being  
4 reasonably foreseeable; said danger to human life not being the result of inattention,  
5 mistaken judgment or misadventure, but the natural and probable result of said aggravated  
6 reckless or grossly negligent act or omission, by performing one or more of the following  
7 acts: (1) by directly or indirectly instructing employees of the Endoscopy Center of  
8 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
9 from a single use vial to more than one patient contrary to the express product labeling of  
10 said drug and in violation of universally accepted safety precautions for the administration of  
11 said drug; and/or (2) by creating an employment environment in which said employees were  
12 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
13 vial to more than one patient contrary to the express product labeling of said drug and in  
14 violation of universally accepted safety precautions for the administration of said drug;  
15 and/or (3) by directly or indirectly instructing said employees, and/or creating an  
16 employment environment in which said employees were pressured to reuse syringes and/or  
17 needles and/or biopsy forceps and/or snares and/or bite blocks contrary to the express  
18 product labeling of said items, and/or in violation of universally accepted safety precautions  
19 for the use of said items; and/or (4) by directly or indirectly instructing said employees,  
20 and/or creating an employment environment in which said employees were pressured to limit  
21 the use of medical supplies necessary to conduct safe endoscopic procedures; and/or (5) by  
22 directly or indirectly instructing said employees, and/or creating an employment  
23 environment in which said employees were pressured to falsely prechart patient records  
24 and/or rush patients through said endoscopy center and/or rush patient procedures at the  
25 expense of patient safety and/or well being; and/or (6) by directly or indirectly scheduling  
26 and/or treating an unreasonable number of patients per day which resulted in substandard  
27 care and/or jeopardized the safety and/or well being of said patients; and/or (7) by directly or  
28 indirectly instructing said employees, and/or creating an employment environment in which

1 said employees were inadequately trained and/or pressured to provide endoscopy scopes for  
2 patient procedures that were not adequately cleaned and/or prepared contrary to the express  
3 manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or  
4 in violation of universally accepted safety precautions for the use of said scopes; and/or (8)  
5 by methods unknown; for the purpose of enhancing the financial profit of ECSN, said act(s)  
6 or omission(s) causing the transmission of Hepatitis C virus from patient KENNETH  
7 RUBINO to patient STACY HUTCHINSON, who was not previously infected with the  
8 Hepatitis C virus; Defendants being responsible under one or more of the following  
9 principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding  
10 or abetting each other in the commission of the crime by directly or indirectly counseling,  
11 encouraging, hiring, commanding, inducing, or procuring each other, and/or others to  
12 commit said acts, Defendants acting with the intent to commit said crime, and/or (3)  
13 pursuant to a conspiracy to commit this crime.

14 COUNT 9 - INSURANCE FRAUD

15 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
16 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
17 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
18 Statutes, knowing that the statement concealed or omitted facts; or contained false or  
19 misleading information concerning a fact material to said claim; and/or did assist, abet,  
20 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
21 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
22 facts, or did contain false or misleading information concerning a fact material to a claim for  
23 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
24 Revised Statutes, by falsely representing to HEALTH PLAN OF NEVADA that the billed  
25 anesthesia time and/or charges for the endoscopic procedure performed on STACY  
26 HUTCHINSON were more than the actual anesthetic time and/or charges, said false  
27 representation resulting in the payment of money to Defendants and/or their medical practice  
28 and/or the racketeering enterprise which exceeded that which would have normally been



1 allowed for said procedure; Defendants being responsible under one or more of the  
2 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
3 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
4 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
5 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
6 (3) pursuant to a conspiracy to commit this crime.

7 COUNT 10 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
8 OR PROPERTY

9 Defendants did on or about September 21, 2007, then and there willfully and  
10 unlawfully perform acts in willful or wanton disregard of the safety of persons or property  
11 resulting in substantial bodily harm to RUDOLFO MEANA, in the following manner, to-  
12 wit: by Defendants performing one or more of the following acts: (1) by directly  
13 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
14 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
15 from a single use vial to more than one patient contrary to the express product labeling of  
16 said drug and in violation of universally accepted safety precautions for the administration of  
17 said drug; and/or (2) by creating an employment environment in which said employees were  
18 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
19 vial to more than one patient contrary to the express product labeling of said drug and in  
20 violation of universally accepted safety precautions for the administration of said drug;  
21 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
22 creating an employment environment in which said employees were pressured to reuse  
23 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
24 the express product labeling of said items, and/or in violation of universally accepted safety  
25 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
26 indirectly instructing said employees, and/or creating an employment environment in which  
27 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
28 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing

1 patients through said endoscopy center and/or rushing patient procedures at the expense of  
2 patient safety and/or well being and/or directly or indirectly instructing said employees,  
3 and/or creating an employment environment in which said employees were pressured to  
4 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
5 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
6 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
7 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
8 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
9 contrary to the express manufacturers guidelines for the handling and processing of said  
10 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
11 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
12 employment environment in which said employees were inadequately trained and/or  
13 pressured to provide endoscopy scopes for patient procedures that were not adequately  
14 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
15 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
16 precautions for the use of said scopes; Defendants being responsible under one or more of  
17 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
18 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
19 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
20 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
21 and/or (3) pursuant to a conspiracy to commit this crime.

22 COUNT 11 - CRIMINAL NEGLECT OF PATIENTS

23 Defendants, on or about September 21, 2007, being professional caretakers of  
24 RUDOLFO MEANA, did act or omit to act in an aggravated, reckless or gross manner,  
25 failing to provide such service, care or supervision as is reasonable and necessary to  
26 maintain the health or safety of said RUDOLFO MEANA, resulting in substantial bodily  
27 harm to RUDOLFO MEANA, said acts or omissions being such a departure from what  
28 would be the conduct of an ordinarily prudent, careful person under the same circumstances

1 that it is contrary to a proper regard for danger to human life or constitutes indifference to  
2 the resulting consequences, said consequences of the negligent act or omission being  
3 reasonably foreseeable; said danger to human life not being the result of inattention,  
4 mistaken judgment or misadventure, but the natural and probable result of said aggravated  
5 reckless or grossly negligent act or omission, by performing one or more of the following  
6 acts: (1) by directly or indirectly instructing employees of the Endoscopy Center of  
7 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
8 from a single use vial to more than one patient contrary to the express product labeling of  
9 said drug and in violation of universally accepted safety precautions for the administration of  
10 said drug; and/or (2) by creating an employment environment in which said employees were  
11 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
12 vial to more than one patient contrary to the express product labeling of said drug and in  
13 violation of universally accepted safety precautions for the administration of said drug;  
14 and/or (3) by directly or indirectly instructing said employees, and/or creating an  
15 employment environment in which said employees were pressured to reuse syringes and/or  
16 needles and/or biopsy forceps and/or snares and/or bite blocks contrary to the express  
17 product labeling of said items, and/or in violation of universally accepted safety precautions  
18 for the use of said items; and/or (4) by directly or indirectly instructing said employees,  
19 and/or creating an employment environment in which said employees were pressured to limit  
20 the use of medical supplies necessary to conduct safe endoscopic procedures; and/or (5) by  
21 directly or indirectly instructing said employees, and/or creating an employment  
22 environment in which said employees were pressured to falsely prechart patient records  
23 and/or rush patients through said endoscopy center and/or rush patient procedures at the  
24 expense of patient safety and/or well being; and/or (6) by directly or indirectly scheduling  
25 and/or treating an unreasonable number of patients per day which resulted in substandard  
26 care and/or jeopardized the safety and/or well being of said patients; and/or (7) by directly or  
27 indirectly instructing said employees, and/or creating an employment environment in which  
28 said employees were inadequately trained and/or pressured to provide endoscopy scopes for

1 patient procedures that were not adequately cleaned and/or prepared contrary to the express  
2 manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or  
3 in violation of universally accepted safety precautions for the use of said scopes; and/or (8)  
4 by methods unknown; for the purpose of enhancing the financial profit of ECSN, said act(s)  
5 or omission(s) causing the transmission of Hepatitis C virus from patient KENNETH  
6 RUBINO to patient RUDOLFO MEANA, who was not previously infected with the  
7 Hepatitis C virus; Defendants being responsible under one or more of the following  
8 principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding  
9 or abetting each other in the commission of the crime by directly or indirectly counseling,  
10 encouraging, hiring, commanding, inducing, or procuring each other, and/or others to  
11 commit said acts, Defendants acting with the intent to commit said crime, and/or (3)  
12 pursuant to a conspiracy to commit this crime.

13 COUNT 12 - INSURANCE FRAUD

14 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
15 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
16 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
17 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
18 misleading information concerning a fact material to said claim; and/or did assist, abet,  
19 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
20 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
21 facts, or did contain false or misleading information concerning a fact material to a claim for  
22 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
23 Revised Statutes, by falsely representing to SECURE HORIZONS and/or PACIFICARE that  
24 the billed anesthesia time and/or charges for the endoscopic procedure performed on  
25 RUDOLFO MEANA were more than the actual anesthetic time and/or charges, said false  
26 representation resulting in the payment of money to Defendants and/or their medical practice  
27 and/or the racketeering enterprise which exceeded that which would have normally been  
28 allowed for said procedure; Defendants being responsible under one or more of the

1 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
2 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
3 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
4 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
5 (3) pursuant to a conspiracy to commit this crime.

6 COUNT 13 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
7 OR PROPERTY

8 Defendants did on or about September 21, 2007, then and there willfully and  
9 unlawfully perform acts in willful or wanton disregard of the safety of persons or property  
10 resulting in substantial bodily harm to PATTY ASPINWALL, in the following manner, to-  
11 wit: by Defendants performing one or more of the following acts: (1) by directly  
12 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
13 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
14 from a single use vial to more than one patient contrary to the express product labeling of  
15 said drug and in violation of universally accepted safety precautions for the administration of  
16 said drug; and/or (2) by creating an employment environment in which said employees were  
17 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
18 vial to more than one patient contrary to the express product labeling of said drug and in  
19 violation of universally accepted safety precautions for the administration of said drug;  
20 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
21 creating an employment environment in which said employees were pressured to reuse  
22 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
23 the express product labeling of said items, and/or in violation of universally accepted safety  
24 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
25 indirectly instructing said employees, and/or creating an employment environment in which  
26 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
27 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
28 patients through said endoscopy center and/or rushing patient procedures at the expense of

1 patient safety and/or well being and/or directly or indirectly instructing said employees,  
2 and/or creating an employment environment in which said employees were pressured to  
3 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
4 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
5 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
6 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
7 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
8 contrary to the express manufacturers guidelines for the handling and processing of said  
9 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
10 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
11 employment environment in which said employees were inadequately trained and/or  
12 pressured to provide endoscopy scopes for patient procedures that were not adequately  
13 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
14 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
15 precautions for the use of said scopes; Defendants being responsible under one or more of  
16 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
17 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
18 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
19 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
20 and/or (3) pursuant to a conspiracy to commit this crime.

21 COUNT 14 - CRIMINAL NEGLECT OF PATIENTS

22 Defendants, on or about September 21, 2007, being professional caretakers of  
23 PATTY ASPINWALL, did act or omit to act in an aggravated, reckless or gross manner,  
24 failing to provide such service, care or supervision as is reasonable and necessary to  
25 maintain the health or safety of said PATTY ASPINWALL, resulting in substantial bodily  
26 harm to PATTY ASPINWALL, said acts or omissions being such a departure from what  
27 would be the conduct of an ordinarily prudent, careful person under the same circumstances  
28 that it is contrary to a proper regard for danger to human life or constitutes indifference to

1 the resulting consequences, said consequences of the negligent act or omission being  
2 reasonably foreseeable; said danger to human life not being the result of inattention,  
3 mistaken judgment or misadventure, but the natural and probable result of said aggravated  
4 reckless or grossly negligent act or omission, by performing one or more of the following  
5 acts: (1) by directly or indirectly instructing employees of the Endoscopy Center of  
6 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
7 from a single use vial to more than one patient contrary to the express product labeling of  
8 said drug and in violation of universally accepted safety precautions for the administration of  
9 said drug; and/or (2) by creating an employment environment in which said employees were  
10 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
11 vial to more than one patient contrary to the express product labeling of said drug and in  
12 violation of universally accepted safety precautions for the administration of said drug;  
13 and/or (3) by directly or indirectly instructing said employees, and/or creating an  
14 employment environment in which said employees were pressured to reuse syringes and/or  
15 needles and/or biopsy forceps and/or snares and/or bite blocks contrary to the express  
16 product labeling of said items, and/or in violation of universally accepted safety precautions  
17 for the use of said items; and/or (4) by directly or indirectly instructing said employees,  
18 and/or creating an employment environment in which said employees were pressured to limit  
19 the use of medical supplies necessary to conduct safe endoscopic procedures; and/or (5) by  
20 directly or indirectly instructing said employees, and/or creating an employment  
21 environment in which said employees were pressured to falsely prechart patient records  
22 and/or rush patients through said endoscopy center and/or rush patient procedures at the  
23 expense of patient safety and/or well being; and/or (6) by directly or indirectly scheduling  
24 and/or treating an unreasonable number of patients per day which resulted in substandard  
25 care and/or jeopardized the safety and/or well being of said patients; and/or (7) by directly or  
26 indirectly instructing said employees, and/or creating an employment environment in which  
27 said employees were inadequately trained and/or pressured to provide endoscopy scopes for  
28 patient procedures that were not adequately cleaned and/or prepared contrary to the express

1 manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or  
2 in violation of universally accepted safety precautions for the use of said scopes; and/or (8)  
3 by methods unknown; for the purpose of enhancing the financial profit of ECSN, said act(s)  
4 or omission(s) causing the transmission of Hepatitis C virus from patient KENNETH  
5 RUBINO to patient PATTY ASPINWALL, who was not previously infected with the  
6 Hepatitis C virus; Defendants being responsible under one or more of the following  
7 principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding  
8 or abetting each other in the commission of the crime by directly or indirectly counseling,  
9 encouraging, hiring, commanding, inducing, or procuring each other, and/or others to  
10 commit said acts, Defendants acting with the intent to commit said crime, and/or (3)  
11 pursuant to a conspiracy to commit this crime.

12 COUNT 15 - INSURANCE FRAUD

13 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
14 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
15 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
16 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
17 misleading information concerning a fact material to said claim; and/or did assist, abet,  
18 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
19 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
20 facts, or did contain false or misleading information concerning a fact material to a claim for  
21 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
22 Revised Statutes, by falsely representing to ANTHEM BLUE CROSS AND BLUE  
23 SHIELD that the billed anesthesia time and/or charges for the endoscopic procedure  
24 performed on PATTY ASPINWALL were more than the actual anesthetic time and/or  
25 charges, said false representation resulting in the payment of money to Defendants and/or  
26 their medical practice and/or the racketeering enterprise which exceeded that which would  
27 have normally been allowed for said procedure; Defendants being responsible under one or  
28 more of the following principles of criminal liability, to wit: (1) by directly committing said



1 acts; and/or (2) aiding or abetting each other in the commission of the crime by directly or  
2 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
3 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
4 and/or (3) pursuant to a conspiracy to commit this crime.

5 COUNT 16 - INSURANCE FRAUD

6 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
7 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
8 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
9 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
10 misleading information concerning a fact material to said claim; and/or did assist, abet,  
11 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
12 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
13 facts, or did contain false or misleading information concerning a fact material to a claim for  
14 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
15 Revised Statutes, by falsely representing to UNITED HEALTH SERVICES that the billed  
16 anesthesia time and/or charges for the endoscopic procedure performed on PATTY  
17 ASPINWALL were more than the actual anesthetic time and/or charges, said false  
18 representation resulting in the payment of money to Defendants and/or their medical practice  
19 and/or the racketeering enterprise which exceeded that which would have normally been  
20 allowed for said procedure; Defendants being responsible under one or more of the  
21 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
22 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
23 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
24 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
25 (3) pursuant to a conspiracy to commit this crime.

26 COUNT 17 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
27 OR PROPERTY

28 Defendants did on or about September 21, 2007, then and there willfully and

1 unlawfully perform acts in willful or wanton disregard of the safety of persons or property  
2 resulting in substantial bodily harm to SONIA ORELLANA-RIVERA, in the following  
3 manner, to-wit: by Defendants performing one or more of the following acts: (1) by directly  
4 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
5 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
6 from a single use vial to more than one patient contrary to the express product labeling of  
7 said drug and in violation of universally accepted safety precautions for the administration of  
8 said drug; and/or (2) by creating an employment environment in which said employees were  
9 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
10 vial to more than one patient contrary to the express product labeling of said drug and in  
11 violation of universally accepted safety precautions for the administration of said drug;  
12 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
13 creating an employment environment in which said employees were pressured to reuse  
14 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
15 the express product labeling of said items, and/or in violation of universally accepted safety  
16 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
17 indirectly instructing said employees, and/or creating an employment environment in which  
18 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
19 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
20 patients through said endoscopy center and/or rushing patient procedures at the expense of  
21 patient safety and/or well being and/or directly or indirectly instructing said employees,  
22 and/or creating an employment environment in which said employees were pressured to  
23 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
24 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
25 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
26 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
27 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
28 contrary to the express manufacturers guidelines for the handling and processing of said

1 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
2 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
3 employment environment in which said employees were inadequately trained and/or  
4 pressured to provide endoscopy scopes for patient procedures that were not adequately  
5 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
6 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
7 precautions for the use of said scopes; Defendants being responsible under one or more of  
8 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
9 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
10 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
11 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
12 and/or (3) pursuant to a conspiracy to commit this crime.

13 COUNT 18 - CRIMINAL NEGLIGENCE OF PATIENTS

14 Defendants, on or about September 21, 2007, being professional caretakers of SONIA  
15 ORELLANA-RIVERA, did act or omit to act in an aggravated, reckless or gross manner,  
16 failing to provide such service, care or supervision as is reasonable and necessary to  
17 maintain the health or safety of said SONIA ORELLANA-RIVERA, resulting in substantial  
18 bodily harm to SONIA ORELLANA-RIVERA, said acts or omissions being such a  
19 departure from what would be the conduct of an ordinarily prudent, careful person under the  
20 same circumstances that it is contrary to a proper regard for danger to human life or  
21 constitutes indifference to the resulting consequences, said consequences of the negligent act  
22 or omission being reasonably foreseeable; said danger to human life not being the result of  
23 inattention, mistaken judgment or misadventure, but the natural and probable result of said  
24 aggravated reckless or grossly negligent act or omission, by performing one or more of the  
25 following acts: (1) by directly or indirectly instructing employees of the Endoscopy Center  
26 of Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug  
27 Propofol from a single use vial to more than one patient contrary to the express product  
28 labeling of said drug and in violation of universally accepted safety precautions for the

1 administration of said drug; and/or (2) by creating an employment environment in which  
2 said employees were pressured to administer one or more doses of the anesthetic drug  
3 Propofol from a single use vial to more than one patient contrary to the express product  
4 labeling of said drug and in violation of universally accepted safety precautions for the  
5 administration of said drug; and/or (3) by directly or indirectly instructing said employees,  
6 and/or creating an employment environment in which said employees were pressured to  
7 reuse syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary  
8 to the express product labeling of said items, and/or in violation of universally accepted  
9 safety precautions for the use of said items; and/or (4) by directly or indirectly instructing  
10 said employees, and/or creating an employment environment in which said employees were  
11 pressured to limit the use of medical supplies necessary to conduct safe endoscopic  
12 procedures; and/or (5) by directly or indirectly instructing said employees, and/or creating an  
13 employment environment in which said employees were pressured to falsely prechart patient  
14 records and/or rush patients through said endoscopy center and/or rush patient procedures at  
15 the expense of patient safety and/or well being; and/or (6) by directly or indirectly  
16 scheduling and/or treating an unreasonable number of patients per day which resulted in  
17 substandard care and/or jeopardized the safety and/or well being of said patients; and/or (7)  
18 by directly or indirectly instructing said employees, and/or creating an employment  
19 environment in which said employees were inadequately trained and/or pressured to provide  
20 endoscopy scopes for patient procedures that were not adequately cleaned and/or prepared  
21 contrary to the express manufacturers guidelines for the handling and processing of said  
22 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
23 of said scopes; and/or (8) by methods unknown; for the purpose of enhancing the financial  
24 profit of ECSN, said act(s) or omission(s) causing the transmission of Hepatitis C virus from  
25 patient KENNETH RUBINO to patient SONIA ORELLANA-RIVERA, who was not  
26 previously infected with the Hepatitis C virus; Defendants being responsible under one or  
27 more of the following principles of criminal liability, to wit: (1) by directly committing said  
28 acts; and/or (2) aiding or abetting each other in the commission of the crime by directly or

1 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
2 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
3 and/or (3) pursuant to a conspiracy to commit this crime.

4 COUNT 19 - INSURANCE FRAUD

5 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
6 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
7 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
8 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
9 misleading information concerning a fact material to said claim; and/or did assist, abet,  
10 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
11 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
12 facts, or did contain false or misleading information concerning a fact material to a claim for  
13 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
14 Revised Statutes, by falsely representing to CULINARY WORKERS HEALTH FUND that  
15 the billed anesthesia time and/or charges for the endoscopic procedure performed on SONIA  
16 ORELLANA-RIVERA were more than the actual anesthetic time and/or charges, said false  
17 representation resulting in the payment of money to Defendants and/or their medical practice  
18 and/or the racketeering enterprise which exceeded that which would have normally been  
19 allowed for said procedure; Defendants being responsible under one or more of the  
20 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
21 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
22 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
23 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
24 (3) pursuant to a conspiracy to commit this crime.

25 COUNT 20 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
26 OR PROPERTY

27 Defendants did on or about September 21, 2007, then and there willfully and  
28 unlawfully perform acts in willful or wanton disregard of the safety of persons or property

1 resulting in substantial bodily harm to CAROLE GRUESKIN, in the following manner, to-  
2 wit: by Defendants performing one or more of the following acts: (1) by directly  
3 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
4 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
5 from a single use vial to more than one patient contrary to the express product labeling of  
6 said drug and in violation of universally accepted safety precautions for the administration of  
7 said drug; and/or (2) by creating an employment environment in which said employees were  
8 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
9 vial to more than one patient contrary to the express product labeling of said drug and in  
10 violation of universally accepted safety precautions for the administration of said drug;  
11 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
12 creating an employment environment in which said employees were pressured to reuse  
13 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
14 the express product labeling of said items, and/or in violation of universally accepted safety  
15 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
16 indirectly instructing said employees, and/or creating an employment environment in which  
17 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
18 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
19 patients through said endoscopy center and/or rushing patient procedures at the expense of  
20 patient safety and/or well being and/or directly or indirectly instructing said employees,  
21 and/or creating an employment environment in which said employees were pressured to  
22 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
23 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
24 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
25 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
26 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
27 contrary to the express manufacturers guidelines for the handling and processing of said  
28 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use

1 of said scopes and/or directly or indirectly instructing said employees, and/or creating an  
2 employment environment in which said employees were inadequately trained and/or  
3 pressured to provide endoscopy scopes for patient procedures that were not adequately  
4 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
5 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
6 precautions for the use of said scopes; Defendants being responsible under one or more of  
7 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
8 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
9 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
10 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
11 and/or (3) pursuant to a conspiracy to commit this crime.

12 COUNT 21- CRIMINAL NEGLECT OF PATIENTS

13 Defendants, on or about September 21, 2007, being professional caretakers of  
14 CAROLE GRUESKIN, did act or omit to act in an aggravated, reckless or gross manner,  
15 failing to provide such service, care or supervision as is reasonable and necessary to  
16 maintain the health or safety of said CAROLE GRUESKIN, resulting in substantial bodily  
17 harm to CAROLE GRUESKIN, said acts or omissions being such a departure from what  
18 would be the conduct of an ordinarily prudent, careful person under the same circumstances  
19 that it is contrary to a proper regard for danger to human life or constitutes indifference to  
20 the resulting consequences, said consequences of the negligent act or omission being  
21 reasonably foreseeable; said danger to human life not being the result of inattention,  
22 mistaken judgment or misadventure, but the natural and probable result of said aggravated  
23 reckless or grossly negligent act or omission, by performing one or more of the following  
24 acts: (1) by directly or indirectly instructing employees of the Endoscopy Center of  
25 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
26 from a single use vial to more than one patient contrary to the express product labeling of  
27 said drug and in violation of universally accepted safety precautions for the administration of  
28 said drug; and/or (2) by creating an employment environment in which said employees were

1 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
2 vial to more than one patient contrary to the express product labeling of said drug and in  
3 violation of universally accepted safety precautions for the administration of said drug;  
4 and/or (3) by directly or indirectly instructing said employees, and/or creating an  
5 employment environment in which said employees were pressured to reuse syringes and/or  
6 needles and/or biopsy forceps and/or snares and/or bite blocks contrary to the express  
7 product labeling of said items, and/or in violation of universally accepted safety precautions  
8 for the use of said items; and/or (4) by directly or indirectly instructing said employees,  
9 and/or creating an employment environment in which said employees were pressured to limit  
10 the use of medical supplies necessary to conduct safe endoscopic procedures; and/or (5) by  
11 directly or indirectly instructing said employees, and/or creating an employment  
12 environment in which said employees were pressured to falsely prechart patient records  
13 and/or rush patients through said endoscopy center and/or rush patient procedures at the  
14 expense of patient safety and/or well being; and/or (6) by directly or indirectly scheduling  
15 and/or treating an unreasonable number of patients per day which resulted in substandard  
16 care and/or jeopardized the safety and/or well being of said patients; and/or (7) by directly or  
17 indirectly instructing said employees, and/or creating an employment environment in which  
18 said employees were inadequately trained and/or pressured to provide endoscopy scopes for  
19 patient procedures that were not adequately cleaned and/or prepared contrary to the express  
20 manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or  
21 in violation of universally accepted safety precautions for the use of said scopes; and/or (8)  
22 by methods unknown; for the purpose of enhancing the financial profit of ECSN, said act(s)  
23 or omission(s) causing the transmission of Hepatitis C virus from patient KENNETH  
24 RUBINO to patient CAROLE GRUESKIN, who was not previously infected with the  
25 Hepatitis C virus; Defendants being responsible under one or more of the following  
26 principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding  
27 or abetting each other in the commission of the crime by directly or indirectly counseling,  
28 encouraging, hiring, commanding, inducing, or procuring each other, and/or others to



1 commit said acts, Defendants acting with the intent to commit said crime, and/or (3)  
2 pursuant to a conspiracy to commit this crime.

3 COUNT 22 - INSURANCE FRAUD

4 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
5 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
6 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
7 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
8 misleading information concerning a fact material to said claim; and/or did assist, abet,  
9 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
10 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
11 facts, or did contain false or misleading information concerning a fact material to a claim for  
12 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
13 Revised Statutes, by falsely representing to HEALTH PLAN OF NEVADA that the billed  
14 anesthesia time and/or charges for the endoscopic procedure performed on CAROLE  
15 GRUESKIN were more than the actual anesthetic time and/or charges, said false  
16 representation resulting in the payment of money to Defendants and/or their medical practice  
17 and/or the racketeering enterprise which exceeded that which would have normally been  
18 allowed for said procedure; Defendants being responsible under one or more of the  
19 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
20 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
21 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
22 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
23 (3) pursuant to a conspiracy to commit this crime.

24 COUNT 23 - PERFORMANCE OF ACT IN RECKLESS DISREGARD OF PERSONS  
25 OR PROPERTY

26 Defendants did on or about September 21, 2007, then and there willfully and  
27 unlawfully perform acts in willful or wanton disregard of the safety of persons or property  
28 resulting in substantial bodily harm to GWENDOLYN MARTIN, in the following manner,

1 to-wit: by Defendants performing one or more of the following acts: (1) by directly  
2 administering and/or directly or indirectly instructing employees of the Endoscopy Center of  
3 Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol  
4 from a single use vial to more than one patient contrary to the express product labeling of  
5 said drug and in violation of universally accepted safety precautions for the administration of  
6 said drug; and/or (2) by creating an employment environment in which said employees were  
7 pressured to administer one or more doses of the anesthetic drug Propofol from a single use  
8 vial to more than one patient contrary to the express product labeling of said drug and in  
9 violation of universally accepted safety precautions for the administration of said drug;  
10 and/or (3) by directly reusing and/or directly or indirectly instructing said employees, and/or  
11 creating an employment environment in which said employees were pressured to reuse  
12 syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary to  
13 the express product labeling of said items, and/or in violation of universally accepted safety  
14 precautions for the use of said items; and/or (4) by directly limiting and/or directly or  
15 indirectly instructing said employees, and/or creating an employment environment in which  
16 said employees were pressured to limit the use of medical supplies necessary to conduct safe  
17 endoscopic procedures; and/or (5) by falsely precharting patient records and/or rushing  
18 patients through said endoscopy center and/or rushing patient procedures at the expense of  
19 patient safety and/or well being and/or directly or indirectly instructing said employees,  
20 and/or creating an employment environment in which said employees were pressured to  
21 falsely prechart patient records and/or rush patients through said endoscopy center and/or  
22 rush patient procedures at the expense of patient safety and/or well being; and/or (6) by  
23 directly or indirectly scheduling and/or treating an unreasonable number of patients per day  
24 which resulted in substandard care and/or jeopardized the safety and/or well being of said  
25 patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes,  
26 contrary to the express manufacturers guidelines for the handling and processing of said  
27 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
28 of said scopes and/or directly or indirectly instructing said employees, and/or creating an

1 employment environment in which said employees were inadequately trained and/or  
2 pressured to provide endoscopy scopes for patient procedures that were not adequately  
3 cleaned and/or prepared contrary to the express manufacturers guidelines for the handling  
4 and processing of said endoscopy scopes, and/or in violation of universally accepted safety  
5 precautions for the use of said scopes; Defendants being responsible under one or more of  
6 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
7 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
8 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
9 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
10 and/or (3) pursuant to a conspiracy to commit this crime.

11 COUNT 24 - CRIMINAL NEGLECT OF PATIENTS

12 Defendants, on or about September 21, 2007, being professional caretakers of  
13 GWENDOLYN MARTIN, did act or omit to act in an aggravated, reckless or gross manner,  
14 failing to provide such service, care or supervision as is reasonable and necessary to  
15 maintain the health or safety of said GWENDOLYN MARTIN, resulting in substantial  
16 bodily harm to GWENDOLYN MARTIN, said acts or omissions being such a departure  
17 from what would be the conduct of an ordinarily prudent, careful person under the same  
18 circumstances that it is contrary to a proper regard for danger to human life or constitutes  
19 indifference to the resulting consequences, said consequences of the negligent act or  
20 omission being reasonably foreseeable; said danger to human life not being the result of  
21 inattention, mistaken judgment or misadventure, but the natural and probable result of said  
22 aggravated reckless or grossly negligent act or omission, by performing one or more of the  
23 following acts: (1) by directly or indirectly instructing employees of the Endoscopy Center  
24 of Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug  
25 Propofol from a single use vial to more than one patient contrary to the express product  
26 labeling of said drug and in violation of universally accepted safety precautions for the  
27 administration of said drug; and/or (2) by creating an employment environment in which  
28 said employees were pressured to administer one or more doses of the anesthetic drug

1 Propofol from a single use vial to more than one patient contrary to the express product  
2 labeling of said drug and in violation of universally accepted safety precautions for the  
3 administration of said drug; and/or (3) by directly or indirectly instructing said employees,  
4 and/or creating an employment environment in which said employees were pressured to  
5 reuse syringes and/or needles and/or biopsy forceps and/or snares and/or bite blocks contrary  
6 to the express product labeling of said items, and/or in violation of universally accepted  
7 safety precautions for the use of said items; and/or (4) by directly or indirectly instructing  
8 said employees, and/or creating an employment environment in which said employees were  
9 pressured to limit the use of medical supplies necessary to conduct safe endoscopic  
10 procedures; and/or (5) by directly or indirectly instructing said employees, and/or creating an  
11 employment environment in which said employees were pressured to falsely prechart patient  
12 records and/or rush patients through said endoscopy center and/or rush patient procedures at  
13 the expense of patient safety and/or well being; and/or (6) by directly or indirectly  
14 scheduling and/or treating an unreasonable number of patients per day which resulted in  
15 substandard care and/or jeopardized the safety and/or well being of said patients; and/or (7)  
16 by directly or indirectly instructing said employees, and/or creating an employment  
17 environment in which said employees were inadequately trained and/or pressured to provide  
18 endoscopy scopes for patient procedures that were not adequately cleaned and/or prepared  
19 contrary to the express manufacturers guidelines for the handling and processing of said  
20 endoscopy scopes, and/or in violation of universally accepted safety precautions for the use  
21 of said scopes; and/or (8) by methods unknown; for the purpose of enhancing the financial  
22 profit of ECSN, said act(s) or omission(s) causing the transmission of Hepatitis C virus from  
23 patient KENNETH RUBINO to patient GWENDOLYN MARTIN, who was not previously  
24 infected with the Hepatitis C virus; Defendants being responsible under one or more of the  
25 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
26 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
27 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or  
28 ///

1 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
2 (3) pursuant to a conspiracy to commit this crime.

3 COUNT 25 - INSURANCE FRAUD

4 Defendants did, on or about September 21, 2007, knowingly and willfully present, or  
5 cause to be presented a statement as a part of, or in support of, a claim for payment or other  
6 benefits under a policy of insurance issued pursuant to Title 57 of the Nevada Revised  
7 Statutes, knowing that the statement concealed or omitted facts, or contained false or  
8 misleading information concerning a fact material to said claim; and/or did assist, abet,  
9 solicit or conspire to present or cause to be presented a statement to an insurer, a reinsurer, a  
10 producer, a broker or any agent thereof, knowing that said statement concealed or omitted  
11 facts, or did contain false or misleading information concerning a fact material to a claim for  
12 payment or other benefits under such policy issued pursuant to Title 57 of the Nevada  
13 Revised Statutes, by falsely representing to PACIFIC CARE that the billed anesthesia time  
14 and/or charges for the endoscopic procedure performed on GWENDOLYN MARTIN were  
15 more than the actual anesthetic time and/or charges, said false representation resulting in the  
16 payment of money to Defendants and/or their medical practice and/or the racketeering  
17 enterprise which exceeded that which would have normally been allowed for said procedure;  
18 Defendants being responsible under one or more of the following principles of criminal  
19 liability, to wit: (1) by directly committing said acts; and/or (2) aiding or abetting each other  
20 in the commission of the crime by directly or indirectly counseling, encouraging, hiring,  
21 commanding, inducing, or procuring each other, and/or others to commit said acts,  
22 Defendants acting with the intent to commit said crime, and/or (3) pursuant to a conspiracy  
23 to commit this crime.

24 COUNT 26 - THEFT

25 Defendants did, between July 25, 2007 and December 31, 2007, then and there  
26 knowingly, feloniously, and without lawful authority, commit theft by obtaining personal  
27 property in the amount of \$250.00, or more, lawful money of the United States, from  
28 STACY HUTCHINSON, KENNETH RUBINO, PATTY ASPINWALL, SHARRIEFF

1 ZIYAD, MICHAEL WASHINGTON, CAROLE GRUESKIN and RODOLFO MEANA,  
2 and/or ANTHEM BLUE CROSS AND BLUE SHIELD, HEALTHCARE PARTNERS OF  
3 NEVADA, UNITED HEALTH SERVICES, VETERANS ADMINISTRATION and  
4 SECURED HORIZONS, by a material misrepresentation with intent to deprive those  
5 persons of the property, in the following manner, to-wit: by falsely representing that the  
6 billed anesthesia time and/or charges for the endoscopic procedure performed on STACY  
7 HUTCHINSON, KENNETH RUBINO, PATTY ASPINWALL, SHARRIEFF ZIYAD,  
8 MICHAEL WASHINGTON, CAROLE GRUESKIN and RODOLFO MEANA, were more  
9 than the actual anesthetic time and/or charges, said false representation resulting in the  
10 payment of money to Defendants and/or their medical practice and/or the racketeering  
11 enterprise, which exceeded that which would have normally been allowed for said  
12 procedure, thereby obtaining said personal property by a material misrepresentation with  
13 intent to deprive them of the property, Defendants being responsible under one or more of  
14 the following principles of criminal liability, to wit: (1) by directly committing said acts;  
15 and/or (2) aiding or abetting each other in the commission of the crime by directly or  
16 indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other,  
17 and/or others to commit said acts, Defendants acting with the intent to commit said crime,  
18 and/or (3) pursuant to a conspiracy to commit this crime.

19 COUNT 27 - OBTAINING MONEY UNDER FALSE PRETENSES

20 Defendants, did on or between September 20, 2007, and December 31, 2007, with  
21 intent to cheat and defraud, wilfully, unlawfully, feloniously, knowingly, designedly, and by  
22 use of false pretenses, obtain \$250.00, or more, lawful money of the United States from  
23 GWENDOLYN MARTIN and/or PACIFICARE, within Las Vegas, Clark County, Nevada,  
24 in the following manner, to-wit: by falsely representing that the billed anesthesia times  
25 and/or charges for the endoscopic procedures performed on GWENDOLYN MARTIN were  
26 more than the actual anesthetic times and/or charges, said false representation resulting in the  
27 payment of money to Defendants and/or the medical practice and/or the racketeering  
28 enterprise, which exceeded that which would have normally been allowed for said

1 procedures Defendants being responsible under one or more of the following principles of  
2 criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding or abetting  
3 each other in the commission of the crime by directly or indirectly counseling, encouraging,  
4 hiring, commanding, inducing, or procuring each other, and/or others to commit said acts,  
5 Defendants acting with the intent to commit said crime, and/or (3) pursuant to a conspiracy  
6 to commit this crime.

7 COUNT 28 - OBTAINING MONEY UNDER FALSE PRETENSES

8 Defendants, did on or between September 21, 2007, and December 31, 2007, with  
9 intent to cheat and defraud, wilfully, unlawfully, feloniously, knowingly, designedly, and by  
10 use of false pretenses, obtain \$250.00, or more, lawful money of the United States from  
11 SONIA ORELLANA-RIVERA and/or CULINARY WORKERS HEALTH FUND, within  
12 Las Vegas, Clark County, Nevada, in the following manner, to-wit: by falsely representing  
13 that the billed anesthesia times and/or charges for the endoscopic procedures performed on  
14 SONIA ORELLANA-RIVERA were more than the actual anesthetic times and/or charges,  
15 said false representation resulting in the payment of money to Defendants and/or the medical  
16 practice and/or the racketeering enterprise, which exceeded that which would have normally  
17 been allowed for said procedures Defendants being responsible under one or more of the  
18 following principles of criminal liability, to wit: (1) by directly committing said acts; and/or  
19 (2) aiding or abetting each other in the commission of the crime by directly or indirectly  
20 counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or

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28 ///

1 others to commit said acts, Defendants acting with the intent to commit said crime, and/or  
2 (3) pursuant to a conspiracy to commit this crime.

3 DATED this 3<sup>rd</sup> day of June, 2010.

4  
5 DAVID ROGER  
DISTRICT ATTORNEY  
6 Nevada Bar #002781

7  
8 BY Michael V. Staudaher  
MICHAEL V. STAUDAHER  
9 Chief Deputy District Attorney  
Nevada Bar #008273

10  
11 ENDORSEMENT: A True Bill

12  
13 David V. [Signature]  
14 Foreperson, Clark County Grand Jury



1 Names of witnesses testifying before the Grand Jury:  
2 CARRERA, HILARIO  
3 DESAI, SAEHAL  
4 RIVERA, SONIA ORELLONO  
5 ZIYAD, SHARRIEFF  
6 MEANA, RODOLFO  
7 RUBINO, KENNETH  
8 WASHINGTON, MICHAEL  
9 GRUESKIN, CAROLE  
10 MARTIN, GWENDOLYN  
11 HUTCHINSON, STACY  
12 ASPINWALL, PATTY  
13 CAROL, CLIFFORD  
14 LANGLEY, GAYLE, CDC PHYSICIAN  
15 SCHAEFER, MELISSA, CDC PHYSICIAN  
16 DROBENINE, JAN, CDC LAB SUPERVISOR  
17 KHUDYAKOV, YURY, CDC  
18 ARMOUR, PATRICIA, NV. HEALTH DISTRICT  
19 LABUS, BRIAN, NV HEALTH DISTRICT  
20 HAWKINS, MELVIN  
21 YEE, THOMAS, ANESTHESIOLOGIST  
22 SHARMA, SATISH, ANESTHESIOLOGIST  
23 DUENAS, YERENY, INSURANCE CLAIMS  
24 YOST, ANNE, NURSE  
25 SAGENDORF, VINCENT, CRNA  
26 CERDA, RYAN, HEALTH CARE BUSINESS SOLUTIONS  
27 VANDRUFF, MARION, MEDICAL ASSISTANT  
28 MYERS, ELAINE, CLAIMS DIRECTOR

1 SPAETH, CORRINE, CLAIMS DIRECTOR  
2 GONZALES, PATRICIA, BLUE CROSS DIRECTOR DEPT.  
3 SAMPSON, NANCY, LVMPD  
4 SAMS, JOANNE, VET ADMIN. CODER  
5 LOBIANBO, ANNAMARIE, CRNA  
6 NEMEC, FRANK, GASTROENTEROLOGIST  
7 CAMPBELL, LYNETTE, RN  
8 SIMS, DOROTHY, BUREAU OF LICENSING AND CERTIFICATION  
9 KALKA, KATIE, UNITED HEALTH GROUP INV.  
10 KRUEGER, JEFFREY ALEN, RN  
11 RUSHING, TONYA, OFFICE MGR.  
12 Additional witnesses known to the District Attorney at time of filing the Indictment:  
13 WHITELY, R. LVMPD  
14 FORD, MIKE, LVMPD  
15 HANCOCK, L., LVMPD #7083  
16 KELLEY, J., LVMPD #3716  
17 COE, DANIEL, LVMPD  
18 ARNONE, ANTHONY, LVMPD  
19 GRAY, WARREN, LVMPD  
20 MCILROY, ROBIN, FBI  
21 DESAI, DIPAK, 3093 RED ARROW, LVN 89135  
22 LAKEMAN, RONALD, 700 SHADOW LN #165B, LVN 89106  
23 MATHAHS, KEITH, 10220 BUTTON WILLOW DR., LVN 89134  
24 HERRERO, CARMELO, 1864 WOODHAVEN DR., HNV 89074  
25 KHAN, IKRAM, 3006 S. MARYLAND PKWY, #465 LVN 89109  
26 ANWAR, JAVAID, 3006 MARYLAND PKWY #400, LVN 89109  
27 FISHCHER, GAYLE, 1600 CLIFTON MAIL STOP #G37, ATLANTA, GA. 30333  
28 SHARMA, VISHVINDER, DR. 3212 CEDARDALE PL., LVN 89134

1 COHAN, DR. CHARLES, POB 4144, SAYLORSBURG, PA  
2 LOPEZ, J. JULIAN, 7106 SMOKE RANCH RD. #120 LVN 89128  
3 MALEY, KATIE, 4275 BURNHAM #101, LVN  
4 HANSEN, IDA  
5 PETERSON, KAREN, 2138 FT. SANDERS ST., HNV  
6 BIEN, KATHY, 3800 DALECREST DR. #1117, LVN 89129  
7 CAVETT, JOSHUA, 7829 TATTERSALL FLAG ST., LVN 89139  
8 HARRIS, ORELENA (HOLLEMAN), 2816 DESERT SONG, LVN 89106  
9 GREGORY, MARTHA  
10 HIGUERA, LILIA, 3504 FLOWER, NLVN 89030  
11 CARAWAY, ANTOINETTE, 1407 BAREBACK CT., HNV 89014  
12 DRURY, JANINE  
13 JOHNSON, SHONNA S., 22 VIA DE LUCCIA, HNV 89074  
14 BAILEY, PAULINE, 3416 MONTE CARLO DR., LVN 89121  
15 FALZONE, LISA, 8024 PEACEFUL WOODS STREET, LVN 89143  
16 IRVIN, JOHNNA  
17 MCDOWELL, RALPH, 388 SANTA CANDIDA ST., LVN  
18 RICHVALSKY, KAREN, 3325 NIGUL WAY, LVN 89117  
19 HUBBARD, LINDA, 515 PARK ROYAL DR., NLVN 89031  
20 MURPHY, MAGGIE, 10175 W. SPRING MTN RD. #2012 LVN 89117  
21 RUSSOM, RUTA, 4854 MONTERREY AVE., LVN 89121  
22 SCHULL, JERRY, 5413 SWEET SHADE ST., LVN  
23 MCDOWELL, RALPH, 388 SANTA CANDIDA ST., LVN 89138  
24 SUKHDEO, DANIEL, 3925 LEGEND HILLS ST. #203, LVN 89129  
25 CLEMMER, DANA MARIE, 4913 FERRELL ST., NLVN 89034  
26 WEBB, KAREN, 1459 S. 14TH ST., OMAHA, NE  
27 MIONE, VINCENT, 2408 W. EL CAMPO GRANDE AVE., NLVN 89031  
28 CHAFFEE, ROD, 9303 GILCREASE #1080, LVN 89149

1 MCGOWAN, SHANNON, 5420 CARNATION MEADOW ST., LVN 89130  
2 KOSLOY, LESLEE, RN, HEALTH FACILITIES SURVEYOR  
3 HOWARD, NADINE, HEALTH FACILITIES SURVEYOR  
4 WHITAKER, GERALDINE, 701 CARPICE DR. #17B, BOULDER CITY, NV 89005  
5 HUYNH, NGUYEN, 3004 HAZY MEADOW LN., LVN 89108  
6 MANTHEI, PETER, 7066 AZURE BEACH AZURE ST., LVN 89148  
7 PRESTON, LAWRENCE, 801 S. RANCHO DR., STE C-1, LVN  
8 SHEFNOFF, NEIL, 755 E. MCDOWELL RD., PHOENIX, AZ 85006  
9 GREER, MARY, 3462 SHAMROCK AVE., LVN 89120  
10 SCAMBIO, JEAN, 2920 YUKON FLATS CT., NLVN 89031  
11 LATHROP, CAROL, 1741 AUGUSTA ST., PAHRUMP, NV 89048  
12 PHELPS, LISA, 784 MORMON PEAK ST., OVERTON, NV 89040  
13 ZIMMERMAN, MARILYN, 550 SEASONS PKWY, BELVIDERE, IL 89040  
14 BLEMININGS, RENATE, 2100 PLAIN ST., PAHRUMP, NV 89060  
15 ELLEN, DIANE  
16 CARRERA, ELADIO, 612 CANYON GREENS DR., LVN 89144  
17 CARROLL, CLIFFORD, 10313 ORKINEY DR., LVN 89144  
18 JONES, LISA, CHIEF NSB OF LICENSURE AND CERTIFICATION (BLC)  
19 WILLIAMS, SKLAR, RESIDENT AGENT, 8363 W. SUNSET RD. #300, LVN 89113  
20 DESAI, KUSAM, MD  
21 FARIS, FRANK  
22 WAHID, SHAHID, MD  
23 NAYYAR, SANJAY, MD  
24 MUKHERJEE, RANADER, MD  
25 OM, HARI, LLC MGR  
26 COOPER, DOUG, CHIEF INV., NV. ST. BOARD OF ME  
27 MASON, ALBERT  
28 HIGGINS, HEATHER, INV. NV. ST. BOARD OF ME

1 HUGHES, LAURA, AG S/A  
2 FRANKS, LISA, PHYSICIAN ASST.  
3 ECKERT, PHYSICIAN ASST.  
4 KAUL, DR.  
5 PATEL, DR.  
6 QUANNAH, LAKOTA  
7 HUYNH, NGUYEN  
8 COOK, KATIE, FBI S/A  
9 VAZIRI, DR.  
10 BUI, DR.  
11 SAMEER, DR. SHEIKH  
12 MANUEL, DR. DAVID  
13 MANUEL, DR.  
14 RICHVALSKY, KAREN, RN  
15 CALVALHO, DANIEL CARRERA  
16 JURANI, DR.  
17 CASTLEMAN, DR. STEPHANIE  
18 SENI, DR.  
19 FALZONE, NURSE  
20 TONY, DR.  
21 LOPEZ, DR.  
22 ALFARO-MARTINEZ, SAMUEL  
23 WISE, PATTY  
24 TERRY, JENNIFER, LVMPD INTERPRETER  
25 MOORE, DAVID  
26 DIAZ, ALLEN, LVMPD INTERPRETER  
27 LEWIS, DR. DANIEL  
28 O'REILLY, TIM

1 O'REILLY, JOHN  
2 MARTIN, LOVEY  
3 MALMBERG, GEORGE  
4 ASHANTE, DR.  
5 KNOWLES, DR.  
6 SAPP, BETSY, PHLEBOTOMIST  
7 PAGE-TAYLOR, LESLIE, CDC  
8 HUBBARD, LINDA, CRNA  
9 ROSEL, LINDA, FBI SA  
10 LOBIONDA, CRNA  
11 YAMPOLSKY, MACE  
12 POMERANZ, AUSA  
13 FIGLER, DAYVID  
14 BUNIN, DANIEL  
15 TAGLE, PEGGY, RN  
16 BLEMINGS, RENATE  
17 LUKENS, JOHN  
18 KOSLOY, LESLEE, RN  
19 HAHN, JASON, LVMPD  
20 SMITH, CHARNESSA  
21 HITTI, DR. MIRANDA  
22 NAZARIO, DR. BRUNILDA  
23 BARCLAY, DR. ROBERT  
24 REXFORD, KEVIN  
25 CAVETT, JOSHUA, GI TECH  
26 ARBOREEN, DAVE, LVMPD  
27 BURKIN, JERALD, FBI SA  
28 NAZAR, WILLIAM

1 PHELPS, LISA  
2 HARPER, TIFFANY  
3 SCAMBIO, JEAN, NURSE  
4 HUGHES, LAURA, AG INV.  
5 MAANO, PETER, RN  
6 MILLER, JAMES  
7 CRANE, AUSA  
8 DIBUDUO, CHARLES  
9 GLASS-SERAN, BARBARA, CRNA  
10 PENSAKOVIC, JOAN  
11 KIRCH, MARLENE  
12 KAUSHAL, DR. DHAN  
13 LATHROP, CAROL  
14 LATHROP, WILLIAM  
15 SHARMA, DR. SATISH  
16 STURMAN, GLORIA  
17 GASKILL, SARA  
18 BROWN, DAVID  
19 DORAME, JOHN  
20 GENTILE, DOMINIC  
21 ARMENI, PAOLA  
22 CREMEN, FRANK  
23 SAGENDORF, VINCENT  
24 TAGLE, PEGGY  
25 IRVIN, JOHNNA  
26 SOOD, RAJAT  
27 09BGJ049A-C/10F03793A-C/GJ/mj  
28 LVMPD EV #080229-2576  
(TK11)

Exhibit 2

Exhibit 2



ORIGINAL

14

1 **MOT**  
2 DAVID ROGER  
3 Clark County District Attorney  
4 Nevada Bar #002781  
5 MICHAEL STAUDAHER  
6 Chief Deputy District Attorney  
7 Nevada Bar #008237  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2211  
10 (702) 671-2500  
11 Attorney for Plaintiff

**FILED**  
JUN 16 2010  
Clerk of Court

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 DIPAK KANTILAL DESAI, #1240942,  
14 RONALD ERNEST LAKEMAN,  
15 KEITH H. MATHAHS,

16 Defendants.

CASE NO: C265107

DEPT NO: XIV

17 **MOTION TO COMPEL DISCLOSURE OF MEDICAL PROVIDERS, FOR**  
18 **TRANSFER TO DEPARTMENT FIVE FOR A COMPETENCY EVALUATION**  
19 **AND FOR AN ORDER FOR THE RELEASE OF MEDICAL RECORDS AND**  
20 **ORDER FOR AN INDEPENDENT MEDICAL EVALUATION**

21 **DATE OF HEARING: 06/28/2010**

22 **TIME OF HEARING: 9:00 AM**

23 COMES NOW, the State of Nevada, by DAVID ROGER, District Attorney, through  
24 MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and files this Notice of  
25 Motion and Motion to Compel disclosure of Medical Providers, for Transfer to Department  
26 Five for a Competency Evaluation and for an Order for the Release of Medical Records and  
27 Order for an Independent Medical Evaluation.

///

///

CLERK OF THE COURT

JUN 16 2010

RECEIVED

1 This Motion is made and based upon all the papers and pleadings on file herein, the  
2 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
3 deemed necessary by this Honorable Court.

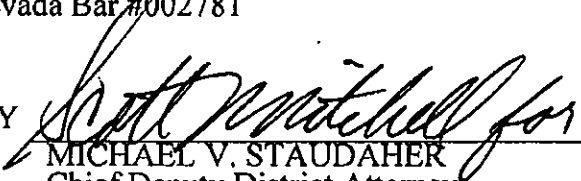
4 **NOTICE OF HEARING**

5 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned  
6 will bring the foregoing motion on for setting before the above entitled Court, in Department  
7 XIV thereof, on Monday, the 28th day of June, 2010, at the hour of 9:00 o'clock AM, or as  
8 soon thereafter as counsel may be heard.

9 DATED this 16th day of June, 2010.

10  
11 DAVID ROGER  
12 Clark County District Attorney  
13 Nevada Bar #002781

14 BY

  
15 MICHAEL V. STAUDAHER  
16 Chief Deputy District Attorney  
17 Nevada Bar #008237

18 **POINTS AND AUTHORITIES**

19 **Procedural Background**

20 On June 4, 2010, defense counsel for Defendant Dipak Desai appeared before this  
21 Court and represented that Defendant Desai was medically fragile. At that hearing, defense  
22 counsel provided to this Court and to the State a list of medications that the defendant was  
23 taking along with a list of medical events and conditions that the defendant had experienced  
24 since 1987. (See Exhibit 1)

25 In fact, defense counsel cited Nevada Rule of Professional Conduct 1.14 regarding the  
26 representation of a client with diminished capacity and said that his client, Dipak Desai, was  
27 mentally impaired. Defense counsel went on to state that both he and the defendant's wife  
28 were acting for Defendant Desai because he was unable to do so for himself. Defense  
counsel also requested and was granted special leave to facilitate the processing of the

1 defendant at the Clark County Detention Center (CCDC) because of his alleged medically  
2 fragile condition.

3 On June 11, 2010, Defendant Desai made his initial appearance in district court and  
4 entered a plea of not guilty to the charges outlined in the amended criminal indictment.  
5 Once again, counsel represented that Defendant Desai was suffering from various medical  
6 conditions and could not address the Court. Defense counsel answered for Defendant Desai  
7 as to all inquiries by the Court despite the fact that Defendant Desai walked into the Court  
8 under his own power and appeared to be unimpaired.

9 During the June 11, 2010 hearing, the State raised this motion orally, but the Court  
10 and defense counsel requested that the State file a formal written motion. The State now  
11 files the instant motion.

12 **Factual Background Pertaining To The Instant Motion**

13 On February 27, 2008, a press conference took place at the Southern Nevada Health  
14 District offices announcing that a Hepatitis C outbreak had occurred in Las Vegas, Nevada.  
15 Dr. Dipak Desai did not attend. Dr. Eladio Carrera represented the Endoscopy Center of  
16 Southern Nevada as their spokesperson and delivered a prepared statement. Grand Jury  
17 Testimony (GJT), Volume 1 (V1), pgs 101-105.

18 Just prior to that press conference, however, Dr. Carrera had been on vacation with  
19 his family and was in the process of returning to Las Vegas. During his drive back to Las  
20 Vegas, Dr. Carrera received a phone call from the endoscopy clinic asking him to return to  
21 Las Vegas immediately and attend a group meeting at the clinic. Id. When Dr. Carrera  
22 arrived at the endoscopy offices Dr. Desai asked him to be their spokesperson and to deliver  
23 a prepared statement concerning the Hepatitis C outbreak. Id. Dr. Desai told Dr. Carrera  
24 that, although he was the medical director and CEO of the clinic, his Cardiologist would not  
25 allow Dr. Desai to read the prepared statement. Id. Dr. Carrera believed that Dr. Desai was  
26 being disingenuous and that Dr. Desai looked "hale and hardy" according to Dr. Carrera.  
27 Id.

28 ///

1 Dr. Desai was present for and participated in all meetings prior to the press  
2 conference, with the exception of one at R&R partners. Id. Dr. Carrera did not want to be  
3 the lone doctor reading the prepared statement and insisted that Dr. Desai stand by Dr.  
4 Carrera as he delivered the statement. Id. Dr. Desai agreed, but just before they were to go  
5 to the press conference, Dr. Desai conveniently developed an illness which prevented him  
6 from attending. Id.

7 With regard to Dr. Desai's prior history of strokes, it is true that Dr. Desai had  
8 suffered a stroke a couple of years before the Hepatitis C outbreak. This stroke apparently  
9 affected the sensation and the strength in one of his hands and arms for a period of time.  
10 GJT-V1 pgs 81-82. Although Dr. Desai was purportedly disabled following this stroke, he  
11 was able to manage the office, come in every day and watch everything at the clinic very  
12 closely. Id. Dr. Desai recovered completely from that stroke and returned to his full duties.  
13 Id.

14 Dr. Carrol said that this stroke had occurred in October of 2007 while Dr. Desai was  
15 on a trip to India. GJT-V2 pg 26. Dr. Carrol said that Dr. Desai did not return to Las Vegas  
16 for a week because of the stroke and when he did return to the practice, he informed the staff  
17 that he would not be running the practice or making day to day decisions for approximately  
18 three to six months. GJT-V2 pgs 27-28. However, within two weeks Dr. Desai was back at  
19 the clinic and took over making all decisions pertaining to the practice. GJT-V1 pg 36. Dr.  
20 Desai made a fast recovery and not only took over the management of the practice, but he  
21 also saw and treated patients. Dr. Desai did not, however, return to performing endoscopy  
22 procedures for five to six weeks following his stroke. GJT-V2 pgs 38-39, 44.

23 Dr. Carrol also said that following the October 2007 stroke, Dr. Desai did not appear  
24 to have any difficulty speaking, recognizing objects, or understanding conversation. GJT-V2  
25 pg 45. In fact, Dr. Carrol said Dr. Desai was lucid, clear and intelligent during that time. Id.

26 Dr. Carrera was asked his opinion about Dr. Desai's health as of the time of his grand  
27 jury testimony in March of 2010 following a second stroke which had occurred in September  
28 of 2007. (see Exhibit 1) Dr. Carrera stated that based on his knowledge of the type of

1 stroke that Dr. Desai had previously experienced, that Dr. Desai had fully recovered from  
2 that stroke, that his most recent stroke was very similar in nature, and for other reasons, he  
3 felt that Dr. Desai was not as sick as he was making himself out to be. GJT-V1 pg 127.

#### 4 Argument

##### 5 **I. Defendant Desai's Medical Records are Discoverable Because He has Placed His** 6 **Mental and Physical Condition at Issue**

7 While the issue of criminal discovery of a defendant's medical records has not been  
8 addressed by the State criminal courts, the Nevada Supreme Court has discussed it in the  
9 civil context. In Schlatter v. Eighth Judicial District Court, 93 Nev. 189, 561 P.2d 1342  
10 (1977), a case involving a plaintiff who claimed that he was injured while on the private  
11 property of the defendant, the defendant requested blanket discovery of both medical and tax  
12 return records. The Court in Schlatter denied a broad "carte blanche" discovery request;  
13 however, the Court held that "discovery of medical records containing information relevant  
14 to the injury complained of or any pre-existing injury related thereto" was appropriate under  
15 the following circumstances: (1) where the litigant put his physical condition at issue; (2) it  
16 was relevant to that issue; and (3) the information was otherwise unobtainable. Id. at 93  
17 Nev. at 192, 561 P.2d at 1344. The Court went on to state that "we think the court could  
18 properly compel disclosure of matters in petitioner's [] medical records relating to issues  
19 raised by her motion." Id.

20 In the instant case, the State is not seeking a blanket authorization for "all" medical  
21 records for Defendant Desai, but rather only those records which pertain in any way to the  
22 conditions listed by defense counsel in the paperwork provided to the Court on June 4, 2010.  
23 In addition, the State is seeking medical records pertaining to medical conditions which have  
24 been referred to by counsel and which may impact Defendant Desai's ability to understand,  
25 communicate or otherwise participate in his own defense.

26 The United States District Court for the District of Nevada has also adopted a similar  
27 position concerning psychotherapy records in the case of Potter v. West Side Transportation,  
28 Inc., 188 F.D.R. 362 (D. Nev. 1999). In Potter, a case involving a wrongful death claim

1 where the plaintiffs claimed emotional distress from seeing their siblings die in a vehicle  
2 accident fire, the court found that the plaintiffs had placed their emotional distress in issue.  
3 The court, in that context, held that the medical records requested by the defense were  
4 "relevant to the 'subject matter' involved in the litigation" and appeared "reasonably  
5 calculated' to lead to the discovery of admissible evidence." Id. at 363. Further, although  
6 the court agreed that the records sought were considered privileged, the court found that the  
7 records were discoverable because the Plaintiffs had waived their privilege by voluntarily  
8 putting their mental and emotional condition in issue. Id.

9 The Potter court in arriving at its determination of whether privilege had been waived  
10 discussed NRS 49.209 (psychologist patient privilege), NRS 49.225 (doctor patient  
11 privilege) and NRS 49.246 (marriage and family therapist privilege). Specifically, in  
12 addressing NRS 49.209 the court said that once emotional distress is placed in issue, the  
13 privilege no longer exists or is waived. Id. at 365.

14 Besides Schlatter, the Potter court also turned to Tramm v. Porter Memorial Hospital,  
15 128 F.R.D 666 (N.D.Ind. 1989) in their analysis regarding access to mental health records  
16 and used that decision as well to support their holding that placing mental and emotional  
17 health at issue provides the basis and rational for the opposing party to obtain those records.  
18 Id.

19 In the instant case, the State respectfully requests that this Court order the defendant  
20 to provide a list of the names and addresses of all of his medical care providers, the locations  
21 and dates of all procedures performed and any treatments received by him for his various  
22 described medical conditions from 1987 to the present. In addition, the State requests that  
23 this Court order the defendant to disclose the names and locations of any pharmacies or other  
24 sources of prescription drugs that he has utilized since 1987 for any of the ailments he  
25 described in the information he provided to the Court on June 4, 2010.

26 The State also requests that this Court order the defendant to disclose any additional  
27 medications he may currently be taking beyond those he previously provided to the Court  
28 and to the State on June 4, 2010. (See Exhibit 1). The State further requests that this Court

1 order the defense to disclose the names and addresses of any insurance providers the  
2 defendant has paid insurance premiums to or otherwise utilized pertaining to any treatment,  
3 disability or other medical care which necessarily relates to the various medical conditions  
4 the defendant has disclosed and/or may have experienced since 1987.

5 While it is true that defense counsel said on June 11, 2010, that he had been able to  
6 communicate with Defendant Desai sufficiently to represent to the Court that Defendant  
7 Desai understood the amended criminal indictment and the nature of the charges he faces,  
8 defense counsel also stated that Defendant Desai suffers from some impairment that will  
9 affect his ability to assist in his defense. In fact, defense counsel spoke for Defendant Desai  
10 during his initial arraignment because of this supposed impairment.

11 Defense counsel for Defendant Desai has told this Court that his client has  
12 experienced multiple medical events and that Defendant Desai has medical issues dating  
13 from 1987 which impair his ability to communicate with and/or understand his attorney.  
14 Because these issues may have a significant impact on this case, the State, in addition to  
15 disclosure of the information described *supra*, specifically requests that this Court grant an  
16 order for the release of those medical, pharmacy and insurance records.

17 It is the State's belief and position that Defendant Desai is malingering and does not  
18 possess the level of impairment which might prevent him from understanding and/or  
19 participating in his defense. This is not the first time that Defendant Desai has engaged in  
20 this type of convenient deception. For example, as discussed *supra*, the instance when Dr.  
21 Eladio Carrera read the prepared statement at the press conference announcing the Hepatitis  
22 C outbreak. The circumstances behind Dr. Carrera's reading of that statement certainly  
23 highlight one of the reasons why the State believes that Defendant Desai malingering.

24 Defendant Desai has continually tried to hide behind a curtain of mental and physical  
25 impairment so he can avoid facing the consequences of his actions. The State asserts,  
26 therefore, that the nature and scope of its request is completely reasonable under the  
27 circumstances.

28 ///

1     **II. Defendant Desai Should be Referred to Department Five to Assess His**  
2     **Competency**

3             Because of the representations that defense counsel made before this Court, as well as  
4     the multiple communications the State has had with defense counsel about Defendant  
5     Desai's competency/mental/physical status prior to the indictment being handed down, the  
6     State feels that it is essential to evaluate Defendant Desai's competency. In fact, the State, at  
7     Defendant Desai's June 11, 2010 arraignment, addressed the probable need to have this case  
8     transferred to department five for a competency evaluation. The State now formally requests  
9     that this Court transfer this case for that evaluation.

10    **III. Defendant Desai Should Undergo an Independent Medical Evaluation Because**  
11    **of the Subjective Nature of His Claims of Impairment**

12            Because Dr. Desai has put both his physical and mental state at issue, in addition to  
13    the various records, the State asks that this Court order the defendant to submit himself for  
14    an independent medical evaluation in order to fully determine the extent, if any, of Dr.  
15    Desai's alleged physical, mental and psychological impairment. The State's request is  
16    based, in part, on the completely subjective type of impairment that Dr. Desai is claiming he  
17    has.

18            In addition, defense counsel claimed, at the June 4, 2010 hearing that Dr. Desai had  
19    experienced a Transient Ischemic Attack (TIA) in June of 2009 and a fainting spell in  
20    November of 2009. (see Exhibit 1) The symptoms and/or manifestations for both of these  
21    conditions can easily be faked and there is necessarily great reliance on the historian,  
22    Defendant Desai in this case, to accurately provide information about what subjectively may  
23    have happened. Because objective manifestations for either of these conditions are not often  
24    present, it is imperative that an independent medical evaluation be performed on Defendant  
25    Desai.

26            Furthermore, the last evaluation of Defendant Desai by an independent medical  
27    provider found that Defendant Desai was competent, but recommended additional medical  
28    testing, as well as a review of additional medical records. The defense now claims that



1 Defendant Desai is no longer able to assist in his defense. In fact, the defense represented to  
2 the Court that Defendant Desai had become so impaired that he needed to have special  
3 treatment to speed the booking process along at CCDC. In addition, Defendant Desai either  
4 couldn't or wouldn't speak during his initial arraignment because of this alleged impairment.  
5 The State, therefore, requests that this Court order an independent medical evaluation of the  
6 defendant by an evaluator of the State's choosing.

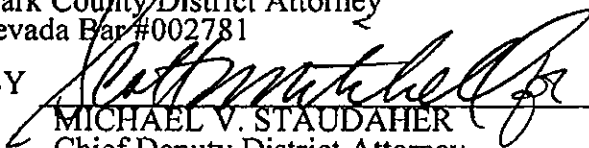
7 **CONCLUSION**

8 The State respectfully requests that this Court order the defendant to make the  
9 disclosures referenced *supra* and to issue an order for the release of records delineated by  
10 said disclosures. In addition, the State respectfully requests that this matter be transferred to  
11 department five for a competency evaluation and that this Court order an independent  
12 medical evaluation of Dr. Desai to assess his alleged impairment.

13 DATED this 16th day of June, 2010.

14 DAVID ROGER  
15 Clark County District Attorney  
16 Nevada Bar #002781

17 BY

18   
19 MICHAEL V. STAUDAHER  
20 Chief Deputy District Attorney  
21 Nevada Bar #008237

22 **CERTIFICATE OF FACSIMILE TRANSMISSION**

23 I hereby certify that service of MOTION TO COMPEL DISCLOSURE OF  
24 MEDICAL PROVIDERS, FOR TRANSFER TO DEPARTMENT FIVE FOR A  
25 COMPETENCY EVALUATION AND FOR AN ORDER FOR THE RELEASE OF  
26 MEDICAL RECORDS AND ORDER FOR AN INDEPENDENT MEDICAL  
27 EVALUATION, was made this 16th day of June, 2010, by facsimile transmission to:

28 RICHARD A. WRIGHT  
ATTORNEY FOR DEFENDANT  
Fax #: 382-4800

BY:

  
Employee of the District Attorney's office

### Diagnosis

1. Heart Attack - Surgery  
CAD - CABG 1987
2. Stroke  
- September 2007  
- July 2008
3. TIA - Transient Ischemic Attack  
- June 2009
4. Syncope, Dehydration  
- November 2009

Need to take blood pressure everyday, twice a day

Need to hydrate well

Need to rest

### Medications

Dipyridamole  
75 mgs. twice a day for stroke

Atorvastatin  
40 mgs. once a day for cholesterol

Ramipril  
2.5 mgs. once a day for heart and blood pressure

Magnesium Taunate  
One tablet a day for heart

Vitamin C - One a day

Vitamin E - One a day

Multivitamin - One a day

EXHIBIT" 1 "

\*\*\*\*\*  
\*\*\* TX REPORT \*\*\*  
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TRANSMISSION OK

TX/RX NO 2617  
CONNECTION TEL 3824800  
CONNECTION ID  
ST. TIME 06/16 09:32  
USAGE T 04'34  
PGS. SENT 10  
RESULT OK

1 MOT

2 DAVID ROGER

3 Clark County District Attorney  
Nevada Bar #002781

4 MICHAEL STAUDAHER

Chief Deputy District Attorney

5 Nevada Bar #008237

200 Lewis Avenue

6 Las Vegas, Nevada 89155-2211

(702) 671-2500

Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

CASE NO: C265107

12 -vs-

DEPT NO: XIV

13 DIPAK KANTILAL DESAI, #1240942,  
14 RONALD ERNEST LAKEMAN,  
KEITH H. MATHAHS,

15 Defendants.

17 MOTION TO COMPEL DISCLOSURE OF MEDICAL PROVIDERS, FOR  
18 TRANSFER TO DEPARTMENT FIVE FOR A COMPETENCY EVALUATION  
19 AND FOR AN ORDER FOR THE RELEASE OF MEDICAL RECORDS AND  
ORDER FOR AN INDEPENDENT MEDICAL EVALUATION

20 DATE OF HEARING: 06/28/2010

21 TIME OF HEARING: 9:00 AM

53

22 COMES NOW the State of Nevada, by DAVID ROGER, District Attorney, through