IN THE SUPREME COURT OF THE STATE OF NEVADA

DIPAK KANTILAL DESAI,

Petitioner,

vs

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, COUNTY OF CLARK, DEPARTMENT 21,

Respondent,

and

THE STATE OF NEVADA,
Real Party In Interest.

No.

(District Court No. C265107)

PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION

DIPAK KANTILAL DESAI, by and through his attorneys, Richard A. Wright, and Margaret M. Stanish, WRIGHT STANISH & WINCKLER, petitions this Honorable Supreme Court to issue a writ of mandamus to compel the district court to dismiss constitutionally defective counts from the indictment or, in the alternative, to issue a writ of prohibition to preclude the district court from conducting any further proceedings on the defective counts in the indictment.

More particularly, Petitioner seeks relief from the district court's order, filed on May 22, 2012, denying his motion to dismiss one count of racketeering

(Count 1), seven counts of criminal neglect of patient (Counts 4, 8, 11, 14, 18, 21, and 24), and seven counts of reckless endangerment (Counts 3, 7, 10, 13, 17, 20, and 23). [The criminal neglect of patient counts and reckless endangerment counts will hereinafter be jointly referred to the "criminal negligence counts".]

Counsel requests a one-hour oral argument to address the constitutional issues of first impression which are raised in this petition. Petitioner has satisfied the requirements of verification and proof of service. See Attachments A and B.

Trial in this matter is set for October 22, 2012. Petitioner filed a Motion to Stay the Proceedings in District Court on June 27, 2012. This motion is pending below. If the District Court denies the motion to stay, Petitioner intends to file a motion to stay the trial date in this Court.

This petition is based upon the Due Process clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the similar clauses in

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Article l, Section 8, of the Nevada Constitution, NRS 173.075, and 172.255, and the following Points and Authorities.

DATED this 9th day of July 2012.

Respectfully Submitted,

WRIGHT STANISH & WINCKLER

By: _____

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POINTS AND AUTHORITIES

I. ISSUES PRESENTED

A. Are the criminal negligence counts facially defective when: (1) substantive and procedural due process prohibits the charging of criminal neglect of patients "by methods unknown;" and (2) the indictment fails to aver sufficient facts showing which defendant performed what acts or omissions based on alternative theories of criminal liability?

B. Is the racketeering count facially defective when: (1) essential elements of the offense are omitted; (2) the mere receipt of proceeds is alleged to be a racketeering activity; and (3) the indictment fails to aver sufficient facts showing which defendant performed what acts based on alternative theories of criminal liability?

II. JURISDICTION

This petition for extraordinary relief is properly before this Court pursuant to NRS 34.320 and 34.160. A petition for a writ of mandamus or prohibition is the appropriate method of challenging a defective indictment. *See,* Gordon v. Eighth Judicial District Court, 112 Nev. 216, 227, 913 P.2d 240, 247 (1996) (review of writ challenging sufficiency of indictment); State v. Lane, 97 Nev. 121, 122-23, 624 P.2d 1385, 1386 (1981)(same); Garnick v. District Court, 81 Nev. 531, 407 P.2d 163 (1965)(review of writ challenging ambiguous information).

The District Court exceeded its jurisdiction by permitting further proceedings on the blatantly defective counts contrary to the due process rights

of fair notice and grand jury process. His substantive due process rights are also implicated by the charging of conduct that does not constitute a public offense. If the Petitioner did not present this writ, he would arguably waive his right to hereafter challenge the validity of the indictment. Simpson v. District Court, 88 Nev. 654, 661, 503 P.2d 1225 ("An element of waiver is involved when an accused proceeds to trial without challenging the indictment. Thereafter, he should not be heard to complain if the indictment . . . gave notice of what later transpired at trial[.]"). Further, NRS 174.105(3) provides that "Lack of jurisdiction of the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

This Court's intervention at this juncture in the proceeding is merited in light of the significant issues of procedural and substantive due process and issues of first impression. The State's utilization of alternative pleading in the criminal negligence and racketeering offenses raises the constitutional issue left open by this Court concerning the adequacy of due process notice when the State alleges numerous alternative theories of prosecution or means by which a crime has been committed. *See,* Sheriff v. Aesoph, 100 Nev. 477, 479 n. 3, 686, P.2d 237, 239 (1984).

In addition to failing to give notice as to which of the three defendants committed what acts or omissions in support of three alternative theories of liability, both the criminal neglect of patient and racketeering counts allege, in the alternative, conduct that does not constitute a public offense. More particularly, the challenged indictment charges the Petitioner with non-existent offenses, *viz.,* criminal neglect of patients "by methods unknown" and racketeering based on mere receipt of proceeds from an alleged criminal enterprise. *See,* Lane v. Torvinen, 97 Nev. 121, 122, n.1, 624 P.2d 1385 (1981) ("prohibition is an appropriate remedy to resolve a claim that the indictment does not charge a public offense").

The instant petition presents issues of first impression regarding the sufficiency of the charging language as it pertains to the elements of the two criminal negligence statutes. Neither the Reckless Endangerment statute, NRS 202.595, nor the Criminal Neglect of Patient statute, NRS 200.495, have been subject to scrutiny by this Court. This petition invites the Court to decide significant issues of public interest in ensuring that criminal charges under these negligence statutes are adequately pleaded to avoid the criminalization of ordinary negligence, strict liability, and innocent conduct.

Finally, direction is needed from this Court to establish the permissible

boundaries of the lower court's jurisdiction to salvage defective pleadings. More particularly, this petition challenges the District Court's implicit amendment of the indictment to incorporate by reference substantive counts of insurance fraud into the racketeering count.

III. STATEMENT OF PROCEDURAL FACTS

On June 4, 2010, the Grand Jury sitting in Clark County returned an indictment against the Petitioner and two certified registered nurse anesthetists ("CRNA"), Keith Mathahs and Ronald Lakeman, stemming from the medical procedures and billing practices at gastroenterology clinics operated by Petitioner and other doctors. The case focuses on seven patients who were treated at one of the clinics in 2007, and subsequently tested positive for Hepatitis C. The indictment also charges racketeering occurring over a period of time from June 2005 to May 2008.

On June 11, 2010, the indictment was amended to make non-substantive changes to the dates in certain charges. The Amended Indictment charges the Petitioner and the two co-defendants with the following: a single count of Unlawful Racketeering; seven counts of Performance of Act in Reckless Disregard of Person; seven counts of Criminal Neglect of Patients; 10 counts of insurance fraud; one count of Theft; and two counts of Obtaining Money Under

False Pretenses.[1] [The bate-stamp numbers on Petitioner's Appendix appear in parentheses following the reference to the exhibits.] Exh. 1, Amended Indictment. Substantive charges of insurance fraud and theft are connected with the billings of the insurers of each of the seven patients.

From July 23, 2010, to February 2, 2012, Petitioner's competency evaluation and determination stayed the proceedings.[2] On March 30, 2012, Petitioner filed a Petition for Writ of Habeas Corpus, along with a Memorandum in Support of Petition for Writ of Habeas Corpus and Alternative Motion to Dismiss Indictment. Exhs. 2 and 3. The Order to Issue Writ of Habeas Corpus was entered on 2, 2012. Exh. 4. On April 13, 2012, the State filed a Return to the Writ of Habeas Corpus, which also replied to the motion to dismiss counts in the indictment. Exh. 5. Petitioner filed a reply brief on May 4, 2012. Exh. 6.

A hearing before the Honorable Valerie Adair, Department 21, on the Petition for Writ of Habeas Corpus and Alternative Motion to Dismiss Indictment was held on May 10, 2012. Exh. 7, Hearing Transcript. The "Order

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[1] The Petitioner did not challenge the insurance fraud and theft charges in Counts 2, 5, 6, 9, 12, 15, 16, 19, 22, 25, 26, 27, and 28.

[2] On January 24,2012, this Court denied Petitioner's Writ of Mandamus in Case No. 60038, which raised due process challenges to the competency proceedings.

Denying Defendant's Motion to Dismiss & Defendant's Pre-trial Writ of Habeas Corpus" was filed on May 22, 2012. Exh. 8. The District Court ruled that the indictment satisfied due process notice requirements, finding that "although it is true that the language of the indictment could have been tighter and more specific, when looking at the totality of the indictment as a whole, that a reasonable person would be on notice of charges the would face, as well as the theories of criminal liability on which the State is proceedings." Exh. 8 (148-49).

IV. DISCUSSION OF ISSUES

A. The criminal negligence counts are facially defective because (1) substantive and procedural due process prohibits the charging of criminal neglect of patients "by methods unknown;" and (2) insufficient facts are averred showing which defendant performed what acts or omissions based on multiple theories of criminal liability.

1. The Indefinite Alternative Charging Language

The fatal defect in the criminal negligence counts primarily stems from the confusing and indefinite use of alternative charging and lack of factual averments in this prosecution of multiple defendants based on multiple theories of criminal responsibility. These counts raise the constitutional issue left open by the Aesoph Court on whether the allegation of numerous alternative theories of prosecution or means by which a crime has been committed impinges upon

due process notice requirements. Aesoph, 100 Nev. at 479 n. 3, 686 P.2d at 239 n. 3. In the context of a multi-defendant criminal negligence case, the alternative charging of multiple negligent acts and multiple theories of liability requires specificity of facts identifying which defendant performed what act or omission, including particular facts describing how one defendant aided and abetted another.

The criminal negligence counts vaguely and imprecisely charge three defendants with committing "one or more" of seven alternative negligent acts, based on three alternative theories of criminal liability, that is, direct commission, aiding and abetting, and conspiracy theories. The due process problems are further compounded in the criminal neglect of patient counts which, in addition to the seven enumerated negligent acts, also alternatively charge that the defendants committed, aided and abetted, and/or conspired "by methods unknown" to cause the hepatis transmission. Finally, the alternative charging pummels due process because several of the alleged acts of negligence were not the cause of the hepatis transmission, as conceded below by the State.

The structure of the criminal negligence counts are substantially similar. See Amended Indictment, Exh. 1 (3-6, 8-11, 12-32). Each count begins with the statutory charging language and then states that the "Defendants performed one

or more of the following acts". Each count then lists seven acts, pleaded in the alternative, which the defendants did either "directly or indirectly." "One or more" of these acts are alleged to have resulted in substantial bodily harm to the patients, that is, "causing the transmission of Hepatis C." Notably, the criminal neglect of patient counts specifically allege an eighth alternative means, stating that the defendants, either directly or indirectly, caused the harm by "methods unknown."

Following the enumeration of the alternative acts, including the "methods unknown," each of the counts alleges three alternative theories of criminal liability by adding the following language, which largely regurgitates NRS 195.020:

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

[Emphasis added.]

By way of example, the following is the charging language extracted from Count Four, a violation of the criminal neglect of patient statute. Exh. 1 (5-6). The defendants, "either directly or indirectly," performed "one or more" of the

following eight alternative acts of negligence that proximately caused the Hepatitis C transmission from one patient to another:

(1) by directly or indirectly instructing employees of the Endoscopy Center of Southern Nevada, (ECSN) to administer one or more doses of the anesthetic drug Propofol from a single use vial to more than one patient contrary to the express product labeling of said drug and in violation of universally accepted safety precautions for the administration of said drug; **and/or**

(2) by creating an employment environment in which said employees were pressured to administer one or more doses of the anesthetic drug Propofol from a single use vial to more than one patient contrary to the express [sic.] product labeling of said drug and in violation of universally accepted safety precautions for the administration of said drug; **and/or**

(3) by directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were pressured to reuse syringes and/or biopsy forceps and/or snares and/or bite blocks contrary to the express product labeling of said items, and in violation of universally accepted safety precautions for the administration of said drug; **and/or**

(4) by directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were pressured to limit the use of medical supplies necessary to conduct safe endoscopic procedures; **and/or**

(5) by directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were pressured to falsely prechart patient records and/or rush patients through said endoscopy center and/or rush patient procedures at the expense of patient safety and/or well being; **and/or**

(6) by directly or indirectly scheduling and//or treating an unreasonable number of patients per day which resulted in substandard care and/or

jeopardized the safety and/or well being of said patients; **and/or**

(7) directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were inadequately trained and/or pressured to provide endoscopy scopes for patient procedures that were not adequately cleaned and/or prepared contrary to the expressed manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or violation of universally accepted safety precautions for the use of said scopes; **and/or**

(8) **by methods unknown**;

for the purpose of enhancing the financial profit of ECSN, said act(s) or omission(s) causing the transmission of Hepatitis C virus from patient SHARRIEFF ZIYAD to patient MICHAEL WASHINGTON, who was not previously infected with the Hepatitis C virus. . . .

[Emphasis added.]

2. General Principles of Due Process Notice and Grand Jury Process

Under the Sixth Amendment, an indictment must adequately inform a defendant of the nature and cause of the accusations against the defendant. Id. Additionally, NRS 173.075 requires that an indictment "must be a plain, concise and definite written statement of the essential facts constituting the offense charged." "The indictment, standing alone, must contain: (1) each and every element of the crime charged and (2) the facts showing how the defendant allegedly committed each element of the crime charged." State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998). The description of the particular acts

giving rise to the offense must be sufficient to enable the defendant to properly defend against the accusations, thereby protecting the constitutional right to due process of law. Id.; *see also,* Simpson v. Eighth Jud. Dist. Ct., 88 Nev. 654, 659 503 P.2d 1225, 1229 (1973).

In pretrial challenges to the sufficiency of the indictment, the determination of sufficiency of the indictment is limited to a review of the indictment itself. Simpson, 88 Nev. at 660-61; 503 P.2d at 1230. The State cannot defend the sufficiency of the indictment by referring to evidence presented at the grand jury and asserting that the defendants can figure it out. Id.

The sufficiency of an indictment not only protects an accused's due process right to fair notice, it also prevents the prosecution from impermissibly changing theories of prosecution and usurping the role of the grand jury. Simpson, 88 Nev. at 660-61, 503 P.2d at 1229-30. An indefinite and broadly drafted indictment gives free rein to the prosecutor to change its factual theory of the case.

The State elected to present this case to the grand jury rather than proceed before a judge in a preliminary hearing. The State must, therefore, adhere to the due process requirement pertaining to the grand jury process. Due process requires that an indictment be returned upon the concurrence of 12 or more

jurors. NRS 172.255(1); State v. Hancock, 114 Nev. 161, 167-68, 955 P.2d 183, 187 (1998). Due process requires that the indictment returned by the grand jury sufficiently describes the facts constituting the offense so that the defendant is not convicted on facts not found by, or presented to, the grand jury. Simpson v. Eighth Judicial Dist. Ct., 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972). As the Simpson Court ruled, an indefinite indictment impairs the defendant's right to fair notice and grand jury process.

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Id., *quoting,* Russell v. United States, 369 U.S. 749, 770 (1962).

3. Due Process Principles and Criminal Negligence

It is essential to recognize that the challenged criminal negligence counts are based on statutes that do not specifically define the facts that constitute the offenses. "(I)f the statute does not sufficiently set out the facts which constitute the offense, so that the defendant may have notice with what he is charged, then *a more particular statement of facts is necessary.*" Sheriff v. Standal, 95 Nev. 914, 916 & n.1, 604 P.2d 111, 112 & n.1 (1979), *citing,* People v. Donacy, 586

P.2d 14, 16 (Col. 1978) (emphasis added).

Neither the criminal neglect of patient, NRS 200.495, nor the reckless endangerment statute, NRS 202.595, have been the subject of a published opinion by this Court.[3] The felony provisions of these statutes generally prohibit

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[3] The criminal neglect of patient statute reads in pertinent part:

> 1. A professional caretaker who fails to provide such service, care or supervision as is reasonable and necessary to maintain the health or safety of a patient is guilty of criminal neglect of a patient if:
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> (a) The act or omission is aggravated, reckless or gross;
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> (b) The act or omission is such a departure from what would be the conduct of an ordinarily prudent, careful person under the same circumstances that it is contrary to a proper regard for danger to human life or constitutes indifference to the resulting consequences;
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> (c) The consequences of the negligent act or omission could have reasonably been foreseen; and
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> (d) The danger to human life was not the result of inattention, mistaken judgment or misadventure, but the natural and probable result of an aggravated reckless or grossly negligent act or omission.
>
> 2. Unless a more severe penalty is prescribed by law for the act or omission which brings about the neglect, a person who commits criminal neglect of a patient:
>
> . . .
>
> (b) If the neglect results in substantial bodily harm, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, or by a fine of not more than $5,000, or by both fine and

criminal negligence resulting in substantial bodily harm. While NRS 200.495 applies to criminal negligence committed by certain health care providers, the reckless endangerment statute is a generalized criminal negligence statute applicable to a broad range of conduct.

Relying on the statutory language and principals of criminal culpability, it is clear that both criminal negligence statutes require that a defendant possess a subjective awareness of the facts and circumstances that makes his conduct a risk to human life and he acts in conscious disregard of this risk. From an objective

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imprisonment.

NRS 200.495.

The reckless endangerment statute, known as the "Fan Man statute," reads in its entirety:

> Unless a greater penalty is otherwise provided by statute and except under the circumstances described in NRS 484B.653, a person who performs any act or neglects any duty imposed by law in willful or wanton disregard of the safety of persons or property shall be punished:
>
> 1. If the act or neglect does not result in the substantial bodily harm or death of a person, for a gross misdemeanor.
>
> 2. If the act or neglect results in the substantial bodily harm or death of a person, for a category C felony as provided in NRS 193.130.

Nev. Rev. Stat. 202.595.

standpoint, the substantiality or degree of the risk will be determined by a reasonable person standard. Both statutes require the criminally negligent act to proximately cause substantial bodily harm. *See generally,* Williams v. State, 100 Md.App. 468, 495, 641 A.2d 990, 1003 (1994)(discussing *actus rea* and *mens rea* of reckless endangerment statutes in various jurisdictions); *cf.,* Rocky Mountain Produce Trucking Comp. v. Johnson, 78 Nev. 44, 51-52, 369 P.2d 198, 202 (1962)(defining wanton misconduct as a party who lacks intent to injure but is conscious of surrounding circumstances that will likely result in injury.) For further analysis of the elements of the criminal negligence statutes, see Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus and Alternative Motion to Dismiss, Exh. 3 (49-53).

Since the two criminal negligence statutes themselves do not define the specific facts that constitute the offense, due process requires the indictment to contain a more particularized statement of facts. *See,* Standal, 95 Nev. at 916 & n.1, 604 P.2d at 112 & n.1. In the context of an indictment charging criminal neglect, the particularity of the negligent act is critical because a poorly drafted indictment can easily mislead the grand jury to return an indictment, and the petit jury to convict, based upon ordinary negligence or strict liability. *See,* Bielling, 89 Nev. 112, 508 P.2d 546 (1973)(involuntary manslaughter indictment

insufficient when alleging ordinary negligence and failing to specify act of negligence causing death).

Criminal negligence based on accomplice and conspirator theories further emphasize the need for precise pleading so that the elements of the offenses, including the degree of negligence, may be properly analyzed and applied to each defendant. *See generally,* Ikie v. State, 107 Nev. 916, 919, 823 P.2d 258, 261 (1991)(due process requires pleading of facts showing how defendant aided and abetted principal; Barren v. State, 99 Nev. 661, 667, 669 P.2d 725, 728 (1983)(same). The lumping together of multiple defendants in a single count without delineating what acts or omissions each committed offends due process principals. *See,* Hancock, 114 Nev. at 165-66, 955 P.2d at 185-86. Conclusory allegations that a defendant aided and abetted are insufficient. West v. State, 119 Nev. 410, 419, 75 P.2d 808, 814 (2003).

4. The Alternative Charging of Criminal Neglect of Patient "by methods unknown" violates procedural and substantive due process

The above charging language is constitutionally defective in a number of respects. Beginning with the most flagrant, each of the criminal neglect of patient counts allege that the defendants "by methods unknown" caused the hepatis transmission. This mystery *actus rea* is charged as an alternative

negligent act. The defendants are accused of committing the unknown negligent act under the alternative theories of direct commission, aiding and abetting, and conspiracy. Charging a person with criminal negligence based on an unknown act creates both procedural and substantive due process issues, as the Petitioner argued below. Exh. 7 (141-43).

As to the substantive due process challenge, the Petitioner argued that a person cannot be charged with committing criminal negligence based on an unknown negligent act. The criminal neglect of patient counts are fatally defective because the defendants cannot be criminally culpable for the results of an unknown negligent act. For an offense to arise under NRS 200.495, the defendant's act or omission must be aggravated, reckless or gross; the consequences of the negligent act or omission must be reasonably foreseeable; and the defendant must act in conscious disregard of the risks created to human life. NRS 200.495(1). As a matter of statutory application, none of these elements can exist when the act or omission is unknown. This statute is not a strict liability statute and criminal law does not rely of principles of *res ispa loquitur.*

From a procedural due process prospective, for criminal negligence offenses the negligent act must be specified in order to permit the defendant to

prepare a defense and prevent the State from introducing a new theory of prosecution that was not considered by the grand jury. *See,* Simpson, 88 Nev. at 660-61, 503. The Petitioner cannot adequately prepare a defense to the charge that he committed, aided and abetting, or conspired to commit criminal neglect of patients by "methods unknown." Morever, such a vague allegation gives the State free rein at trial to change theories of prosecution and obtain a conviction on the "basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." Russell, 369 U.S. at 770; *see also,* Simpson, 88 Nev. at 660-61.

In an attempt to salvage the criminal neglect of patient counts from the fatal defect of the alternatively charged "methods unknown" allegations, both the District Court and State resorted to the evidence presented to the grand jury to speculate upon what evidence the grand jurors based their determination. Exh. 7 (141-43). After defense counsel argued that the unknown act of negligence violated substantive and procedural due process, the District Court invited argument from the State. The following dialogue about the grand jury evidence and deliberations ensured:

> MR. STAUDAHER: Well, I know that we don't get into the factual issues, but there were – there was a lot of testimony and a lot of evidence presented to the grand jury.

Again, we've offered to – if counsel feels that he doesn't want to have to deal with that at trial, to strike that particular portion out of those counts, that known, but we feel that the grand jury had, based on the evidence presented to them, and at least the way it was pled for – for different factual averments that we were seeking to go forward on, that there was plenty of evidence presented to them, and we believe that their findings were – were the result of that.

I don't think that there's any basis to think that anybody who came in and testified said that, you know, we just [don't] know what happened kind of thing.

THE COURT: Right, or that the grand jury said, well, it must've been this. I mean, I think if you look at the transcript and everything, it was very clear what the State was presenting and – and what they wanted the grand jury to find.

MR. STAUDAHER: And there was not a single question from a grand juror that indicated that there was some confusion on that point as well. And the grand jury asked a number of questions throughout the presentation.

THE COURT: And I understand, Mr. Wright, you're saying that – you know, that that forces us to conjecture into what the minds of the grand jury may have been. Is that essentially what you want to say –

MR. WRIGHT: Yeah, what I'm saying –

THE COURT: – without just saying, well, obviously there was abundant evidence and so it had to have been – had to have been through one or more of the devices that they presented evidence on, specifically the propofol.

MR. WRIGHT: Well, I understand the State is saying there was sufficient evidence before the grand jury to charge that it was unknown methods. And that's exactly my point. You can't charge

an unknown criminal negligent act count.

And the State is saying there was sufficient evidence there to support it. And, of course, they keep acknowledging we can't look at the transcripts, we can't talk about the evidence that was there, but in the courtroom between the Judge and the prosecutor we talk about the abundance of evidence that was before the grand jury, which is exactly what we cannot do, but that's what we've done here.

And so what – what's clear from looking at the indictment is that there's a substantive charge of negligence by unknown means. I think that violates due process.

Exh. 7 (141-43).

The District Court rejected the substantive due process argument concerning the unknown negligent act by assuming that the grand jury did not rely on such conjecture:

THE COURT: And so reading the totality of the negligence counts I think clearly puts the defendant on notice as I said before, and I don't think [it] creates the opportunity for the fact finder in this case, the grand jury to have made some sort of conjecture, oh, well we don't know what it is, it must've been something.

So if you read it in the totality, it was the failure to utilize accepted practices and the disregard of patient safety and whatnot that the State is alleging permeated, if you will, the facility. So for that reason I think that the pleading does not violate substantive due process requirement either.

Exh. 7 (145-46).

Thus, the District Court second guessed the grand jury in assuming that it did not conclude that the hepatis transmission was caused by something

unknown. Instead, the District Court substituted its own interpretation of the indefinite charging language, finding that it alleged that the facility was so permeated with unsafe practices that the hepatis resulted. The indictment does not say this and the District Court cannot speculate that the grand jurors agreed with this interpretation.

The District Court's reading of "the totality of the negligent counts" and the "totality of the indictment" ignores the charging device that renders the criminal neglect of patient acts fatally defective – the disjunctive charging of known and unknown acts. By virtue of the use of the disjunctive "or," each negligent act, including the "methods unknown," is separately alleged to be the proximate cause of the hepatis transmission. Thus, it is just as easy to surmise that the grand jurors all agreed that the Petitioner committed an unknown act of negligence while the co-defendants committed one of the known enumerated acts.

The District Court's and State's reliance on the grand jury evidence and the speculation that the grand jurors did not rely upon the 'methods unknown" allegation when returning the indictment impinges upon Petitioner's right to grand jury determination. That is to say, the Petitioner is entitled to an indictment that clearly and concisely states the elements of the offense and the

facts showing how he allegedly committed each element of the evidence – *as determined by a concurrence of 12 or more jurors – not the State's or District Court's restatement of the charges beyond the four corners of the indictment.* *See,* Russell, 369 U.S. at 770; Simpson, 88 Nev. at 660, 503 P.2d at 1229; Hancock, 114 Nev. at 167-68, 955 P.2d at 187; NRS 172.255(1).

As the Bielling Court ruled when finding an involuntary manslaughter charge to be defective: "In order to properly charge appellant with the offense of involuntary manslaughter, the information must specify the acts of criminal negligence upon which the state is relying to try to obtain a conviction. Bielling, 89 Nev. at 112, 508 P.2d at 546. The alternatively charged unknown act of negligence subverts this most fundamental principal of procedural and substantive due process. The Petitioner, therefore, seeks extraordinary relief to prohibit prosecution on the defective neglect of patient counts and mandate the dismissal of the same.

4. The Indefinite Alternative Charging of Multiple Defendants and Multiple Theories of Criminal Liability

The reckless endangerment and criminal neglect of patient counts run afoul of due process notice requirements by failing to aver facts showing which defendant committed what act or omission. In a conclusory fashion, the

indictment charges alternative theories of liability (direct commission, aiding and abetting, and conspiracy) and impermissibly lumps together the three defendants in each count without specifying who did what act. *See,* Hancock, 114 Nev. at 165-66, 955 P.2d at 185-86.

Where a defendant is charged with aiding and abetting, the indictment must specify the manner and means by which the defendant aided and abetted the commission of an offense. Ikie v. State, 107 Nev. 916, 919, 823 P.2d 258, 261 (1991); Barren v. State, 99 Nev. 661, 667, 669 P.2d 725, 728 (1983). Conclusory allegations that a defendant aided and abetted are insufficient. West, 119 Nev. at 419, 75 P.2d at 814.

In order for a defendant to be criminally responsible for the acts of an accomplice, the defendant must have the same *mens rea* required of the principle. Sharma v. State, 118 Nev. 648, 654-55, 56 P.3d 868, 871-72 (2002). As discussed above, the *mens rea* for the criminal negligence offenses is a conscious disregard of a known substantial risk of bodily injury. Hence, to be held vicariously liable for the criminal negligence of the principal, the aider and abetter must have an awareness of the unreasonable risks presented by his own conduct and possess knowledge of the facts and circumstances surrounding the principal's conduct. The aider and abetter would need to act in conscious

disregard of the consequences of both his conduct and the principal's conduct. If there are other aiders and abetters, the defendant would also have to act with knowledge and conscious disregard of the risks presented by the other accomplices.

The indictment in Hancock charged various racketeering violations in connection with securities fraud. It listed 25 untrue statements and omissions and alleged that the four defendants "either directly or indirectly" made "one or more" of these statements or omissions. Id. at 165, 955 P.2d at 185. The Supreme Court found that such charging language made it "very difficult to decipher who is alleged to have done what." Id. It held, *intra alia,* that various racketeering counts were defective because they did not specify which defendant made what statements to the victims and also failed to specify which defendants engaged in which type of criminal activities." Id. at 166, 955 P.2d at 186.

Like the indictment in Hancock, the indictment in the instant case is a conglomeration of imprecise allegations against multiple defendants. The various criminal negligence counts impermissibly lump the three defendants together and states that the they "either directly or indirectly" did "one or more" of the seven or eight enumerated acts or omissions. The defendants are left to guess who did what and by what means and what known risks were consciously

disregarded by whom.

The confusion and vagueness caused by the imprecise lumping together of the defendants in the context of this criminal negligence case raises the same the due process problems identified in Hancock. The "multiple guess" allegations are especially problematic given the elements of the criminal negligence offenses because there are three defendants, accused of committing "one or more" of seven negligent acts and by unknown methods, based on three different theories of criminal liability.

It is, therefore, essential that the indictment particularize what acts each defendant performed to aid and abet the other. Barren, 99 Nev. at 667. Without the concise and definite statement of how each defendant aided and abetted the principle, the defendants cannot adequately prepare a defense against the vicarious liability theories of criminal negligence.

The lumping together of the defendants without specifying precisely who did what act and omission makes it "very difficult to decipher who is alleged to have done what." *See,* Hancock, 114 Nev. at 165, 955 P.2d at 185. The multiple guess charging language is imprecise and confusing not only to the defendants for purposes of preparing an adequate defense, but also to a jury who must undertake the complex analysis of the facts pertaining to the subjective and

objective elements of the offenses. With eight alleged acts of negligence, including a "by methods unknown", and three defendants, there is a great potential for a grand or petit juror to confuse the elements of the criminal negligence offenses. There is no legitimate reason why the State could not provide a more concise and definite description of which defendant committed what act that resulted in the harm and which defendant committed what act to aid and abet that act.

In the context of the criminal negligent offense, it is not enough to repeat the State's mantra that the Petitioner must be prepared to defend against any and all the various combinations of alternatively pled theories of liability and known and unknown acts of negligence. The broad and conclusory allegation of criminal liability permit the State to alter its theories of prosecution, as it did in the proceedings below.

A reading of the transcript of the motion hearing below demonstrates that the imprecise charging in the criminal negligence counts undermines and will likely continue to undermine the protections against altering theories of prosecution and usurpation of the grand jury process.

The first part of the hearing was devoted to the State trying to explain and justify why the indictment charged several negligent acts which clearly were not,

as established in the grand jury, the proximate cause of the hepatis transmission. Exh. 7 (113-22). More particularly, the State conceded below that the grand jury evidence ruled out the following alleged negligent acts as the cause of the hepatis transmission: misuse of bite blocks, biopsy forceps, snares, endoscopy scopes, and unspecified medical supplies, as well as acts related to medical charting, cleaning scopes, and the number of patients scheduled. The State acknowledged that it predominately believed that the mode of transmission was the administration of Propofol. Exh. 5 (72-75); Exh. 7 (113-14).

To overcome the District Court's concerns that the charging of the other negligent acts (for which there was admittedly no probable cause of causation) created potential confusion, the State articulated various theories of prosecution. This impermissible changing of prosecutorial theories is precisely what the fundamental principals of due process notice requirements were designed to prevent. *See,* Simpson, 88 Nev. at 660-61, 503 P.2d at 1229-30.

Theory #1: In its Return to Writ of Habeas Corpus, the State argued that the co-defendants, Mathahs and Lakeman, were the principals who negligently administered anaesthesia by contaminating vials of Propofol while Desai was an aider and abetter. The State attempted to explain that the other negligent acts pertaining to the misuse of bite blocks, biopsy forceps, snares, endoscopy

scopes, and unspecified medical supplies, and the medical charting, cleaning scopes, and the number of patients scheduled were merely included in the criminal negligence counts to show what the health inspectors studied and ruled out in determining the cause of the hepatis transmission. Exh. 5 (93).

State's Theory #2: The State next theorized that the indictment charged these other negligent acts to diffuse an anticipated defense. In explaining this odd theory of prosecution, the State related that in the civil lawsuits between patients and the manufacturers of Propofol, the defendants attempted to blame the hepatis transmission on the other negligent acts that the health inspectors ruled out. The State, therefore, decided to charge these other acts in an effort to defeat an anticipated ploy by the defense to confuse the jury about the cause of the hepatis transmission. Exh. 7 (113-16).

State's Theory #3: The District Court observed that some of the alleged negligent acts, such as misuse of bite blocks and forceps, did not apply to each of the identified patients. Exh. 7 (117). The State argued that the other acts were included to put the defense on notice of the evidence that it intended to introduce: "The issue is to put them on notice that we believe essentially that the environment that was essentially put forth by this man [Desai] with his staff in this particular case caused the harm and that these are the things that are

essentially the facts that go to support that. This whole mentality of action and harm against the patients which resulted – which resulted was due to what they were doing in the clinic [sic.]." Exh. 7 (118-19).

The State further discussed this theory, explaining that the reason the Propofol caused the hepatis transmission was because of the atmosphere in the clinic. And, the indictment gave the defendants notice that "we intend to raise these other issues to show what the atmosphere was, what the actions and inactions that were taken by their staff were which all led to what happened to these patients, and that this man, Desai, orchestrated and, through his nurses that are charged in this case, actually caused harm to those patients." Exh. 7 (121).

State's Theory #3 Restated: The District Court translated and refined this theory in the following dialogue:

> THE COURT: "I think what they're trying to say, Mr. Wright, is that it's a part of the of a pattern in practice of neglect of, you know, standard procedures that cut across patients and – and that that's what this is all evidence of. That it wasn't an isolated thing, that this was, as Mr. Staudaher said, the atmosphere and the pattern and the practice of essentially neglecting sanitary procedures and – their standard of care and why they needed to do to preclude transmission from patient to patient. Is that what you're saying, Mr. Staudaher?
>
> . . .
>
> MR. STAUDAHER: I think that's a fair characterization.

Exh. 7 (121-22).

State's Theory #4: In addressing the multiple theories of liability alleged in the criminal negligence counts and the racketeering count, the State explained: "Now, with regard to whether or not Dr. Desai is a principle or an aider and abettor or conspirator, he's all of those. It depends on what aspect of the case you're talking about." Exh. 7 (134-35). The Petitioner should not be placed in a position of guessing what aspect of the case the State is talking about. The indictment must specify the manner and means by which the Petitioner acted to aid and abet the commission of the offenses. *See,* Barren, 99 Nev. at 667.

The State elected to take a "throw it all on the wall and see what sticks" approach to charging the criminal negligence offenses. The State has demonstrated its willingness to alter its theory of prosecution in disregard of the grand jury process. The District Court was correct in stating that the indictment could have been pled with greater specificity. The lack of factual averments specifying which of the defendants committed what acts or omissions, however, violates due process.

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B. The racketeering count is facially defective because it (1) omits essential elements of the offense; (2) improperly alleges that merely receiving proceeds of an enterprise constitutes racketeering; and (3) fails to aver sufficient facts showing which defendant performed what acts based on alternative theories of criminal liability.

1. Introduction

Count One alleges a violation of the Nevada Racketeering Act ("RICO"), NRS 207.350 to 207.400. The RICO count runs far afoul of the mandate that an indictment must be "a plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075. It is defective in at least three respects. First, it does not specify the required two predicate crimes or otherwise allege with specificity the elements of the predicate crimes. Second, it incorrectly charges that the mere receipt of proceeds from an enterprise constitutes racketeering when NRS 207.400(1)(a) requires the investment of such funds. Third, similar to the criminal negligence counts, Count One impermissibly lumps the defendants together without particularizing which defendant did what racketeering act.

In an effort to cure the RICO count of its facial deficiencies, the District Court impermissibly "read the indictment as a whole" to implicitly incorporate by reference the substantive insurance fraud and theft counts into the

racketeering count.[4] Exh. 7 (138-40). Although this Court has not squarely addressed this issue, it is a well established rule of due process that each count of the indictment must stand on its own and cannot be supplemented by reference to another count unless done so expressly. *See,* United States v. Rodriguez-Gonzales, 358 F.3d 1156, 1159 (9th Cir. 2004). Each count of an indictment is treated as though it is a separate indictment and, therefore, must "stand or fall on its own allegations without reference to other counts not expressly incorporated by reference." Id., *quoting,* United States v. Walker, 176 F.2d 796, 798 (9th Cir. 1949). Although NRS 173.075(2) permits allegations in one count to incorporate by reference another count, the District Court cannot properly imply the such a pleading device. *See,* Rodriguez-Gonzales, 358 F.3d at 1159.

2. The Charging Language

To assist in the analysis of the RICO count, the following attempts to

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[4] In finding that the racketeering count satisfied due process requirements, the District Court found:

> With respect to the racketeering and the obligation on count number one to incorporate by reference, they should've done that. However, the grand jury did find probable cause as to the subsequent counts of insurance fraud. And for that reason I don't think it's reasonable to assume, well, they may have found this one is a predicate act but not that one is a predicate act. That just doesn't make any sense. . . . But looking at the totality of the indictment, notwithstanding that deficiency, I think that it's clear what they're charging.

Exh. 7 (139-40).

diagram and decipher it. The first part of the count recites the statutory language of various substantive RICO violations set forth in NRS 207.400:

> Defendants, did on or between June 3, 2005, and May 5, 2008, then and there, within Clark County, Nevada, knowingly, wilfully and feloniously
>
> while employed by or associated with an enterprise, conduct or participate directly or indirectly in racketeering activity though the affairs of said enterprise; and/or **[Conducting or participating in enterprise through racketeering, NRS 207.400(1)(c)(1)]**
>
> with criminal intent receive any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds from racketeering activity; and/or **[Investment in enterprise with racketeering proceeds, NRS 207.400(1)(a), but omitting subparagraphs (1) and (2) of this provision]**
>
> through racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise; and/or **[Acquisition or maintenance of enterprise through racketeering, NRS 207.400(1)(b)]**
> intentionally organize, manage, direct, supervise or finance a criminal syndicate; and/or **[Control of criminal syndicate, NRS 207.400(1)(d)]**
>
> did conspire to engage in said acts, **[Conspiracy to commit prohibited acts, NRS 207.400(1)(j)]**

[The second part of Count One attempts to identify the acts that constitute the violation of the various provisions of NRS 207.400(1):]

> to-wit: by directly or indirectly causing and/or pressuring the employees and/or agents of the Endoscopy Center of Southern Nevada to falsify patient anesthesia records from various endoscopic procedures;

to commit insurance fraud by directly or indirectly submitting said false anesthesia records to various insurance companies for the purpose of obtaining money under false pretenses from said insurance companies and/or patients; said fraudulent submissions resulting in the payment of monies to Defendants and/or their medical practice and/or the enterprise, which exceeded the legitimate reimbursement amount allowed for said procedures;

[The last portion of Count One tags on alternative theories of criminal responsibility by reciting NRS 195.020:]

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

3. The Failure to Allege Essential Elements of the Offense

Count One fails to sufficiently plead two crimes relating to racketeering. Under NRS 207.390, racketeering is defined as engaging in at least two crimes relating to racketeering which are enumerated in NRS 207.360. Hancock, 114 Nev. at 165 n. 2, 955 P.2d at 186 n.2. To plead a RICO violation, the indictment must specifically allege at least two crimes relating to racketeering. Id., at 164-65, 955 P.2d at 185-86; Brown v. Gold, 378 F. Supp. 1280, 1287 (D.C. Nev. 2005); Hale v. Burkhardt, 104 Nev. 632, 634-35, 764 P.2d 866, 869-70 (1988). The same degree of specificity is required in pleading civil and criminal RICO actions. Hale, 104 Nev. at 869-70, 764 P.2 at 869-70.

The portion of the pleading describing the two predicate crimes must set forth the essential elements of the predicate crimes and the particular facts supporting each element. Id. If an element of the predicate offense requires the making of a false representation, such as obtaining monies by false pretenses, the RICO count must set forth the specific false representation that induced the victim to be defrauded. Id., at 638-39, 764 P.2d at 870. A vague and conclusory statement that a "false or fraudulent" statement was made is insufficient. Id.

Like its federal counterpart, the Nevada RICO statute requires willful commission of the predicate offenses, but does not require specific intent to commit the prohibited racketeering acts in NRS 207.400. *See,* United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), *cert. denied,* 452 U.S. 91 (1981). However, the *mens rea* of the predicate crimes must be alleged. Copper Sands Homeowners Assoc. v. Copper Sands Realty, Slip Opinion, 2011 WL 1300192,*3 (March 31, 2011)(civil RICO action under Nevada law); *see,* United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995) (holding *mens rea* of RICO is that required of the predicate offense).

The RICO count in the instant case fails to adequately identify two predicate crimes. Second, it does not allege the elements of two predicate offenses. Third, it does not allege facts establishing each element of the two

predicate offenses. It appears that the State is alleging insurance fraud based on the submission of false anesthesia records for the purpose of obtaining money under false pretenses. Such language fails to give adequate notice of the two predicate crimes.

To the extent that the Court interprets the count to allege insurance fraud and obtaining money under false pretenses, the defective RICO count still cannot pass constitutional muster. Both offenses require specific "intent to defraud" and the making of a false statement upon which the victim relies. *See,* NRS 205.380 and 686A.2815. The count fails to state the essential elements of the crimes and the facts pertaining to each of the elements. *See,* Hale, at 638-39, 764 P.2d at 870.

In response to the due process challenge to the RICO count, the State argued that the racketeering count refers to insurance fraud and obtaining money under false pretenses and, therefore, the Court should read the indictment as a whole to conclude that these offenses are the predicate offenses of the racketeering count. Exh. 7 (132-34). As stated above, the District Court implied that the RICO count incorporated by reference the insurance fraud counts. Exh. 7 (34-35).

4. The Mere Receipt of Racketeering Proceeds is not a

Crime

The RICO count improperly alleges that the defendants engaged in racketeering by merely receiving racketeering proceeds in of NRS 207.400(1)(a). This provision, however, criminalizes the *investment* of such proceeds, not the mere receipt. The provision reads:

> 1. It is unlawful for a person:
>
> (a) Who has with criminal intent received any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds, *or the proceeds derived from the investment or use thereof, in the acquisition of:*
>
> *(1) Any title to or any right, interest or equity in real property; or*
>
> *(2) Any interest in or the establishment or operation of any enterprise*

NRS 207.400(1)(a) [emphasis added].

The Nevada racketeering statute is patterned after the federal racketeering statute in 18 U.S.C. §§1961-1968. Hale, 104 Nev. At 634, 764 P.2d at 867. The investment of racketeering proceeds provisions in the Nevada statute is patterned after the similar federal provision in 18 U.S.C. 1962(a). Accordingly, federal law interpreting the investment of racketeering proceeds is instructive to the analysis of the RICO charge in the instant case.

On its face, NRS NRS 207.400(1)(a) provision prohibits the investment

of racketeering proceeds, not merely the receipt of such proceeds. *See,* Grider v. Texas Oil & Gas Corp., 868 F.2d 1147, 1149 (10th Cir. 1989)(similar federal RICO provision requires investment, not merely receipt of racketeering proceeds). The received proceeds must be invested or used to acquire an interest in real estate or any enterprise, as provided for in subparagraphs (1) and (2) of NRS 207.400(1)(a).

The RICO count in the instant case omits the language that is set forth above in italics which refers to the investment of the racketeering funds received. This omission is fatal because the incomplete allegation of NRS 207.400(1)(a), purports to criminalize the mere receipt of racketeering proceeds. In other word, the mere receipt of racketeering proceeds is not a public offense. Once again, since the prohibited racketeering acts are plead in the alternative, it is uncertain on which act the grand jury based its determination.

5. The RICO count fails to aver sufficient facts showing which defendant performed what acts based on alternative theories of criminal liability

Like the criminal negligence counts, the RICO count lumps the three defendants together without alleging who did what act. The Supreme Court in Hancock ruled that a racketeering count based on securities fraud and obtaining money by false statements was fatally defective because it failed to specify

which of the four defendants engaged in which type of racketeering activity. Hancock, 114 Nev. at 166, 955 P.2d at 183. The Hancock Court also found a racketeering count fatally defective because it lumped the defendants together without alleging which defendant made false statements to the victims. Id. at 165, 955 P.2d at 186.

Like the defective RICO counts in Hancock, the RICO charge in this case does not specify which defendant committed which racketeering act. To the extent that the predicate crimes are based on false statements, the indictment does not allege which defendants made what false statements or otherwise show how the defendants engaged in the alleged racketeering acts, and is therefore fatally defective.

Based on the above defects, individually and in combination, this Court should prohibit further proceedings on the RICO count and mandate the dismissal of the facially defective racketeering count.

V. CONCLUSION

Extraordinary relief in the form an a writ or prohibition or mandate is necessary to protect the interests of both the public and Petitioner in the protection of the substantive and procedural due process. This Court should entertain this petition for an extraordinary writ to prevent violations of the right

VERIFICATION OF RICHARD A. WRIGHT

1. I, Richard A. Wright, declare under penalty of perjury the following.

2. I am an attorney licensed to practice law in the State of Nevada. I am retained to represent Petitioner Dipak Desai in State v. Dipak Kantilal Desai, Cae No. 10C265107-1 (8th Jud. Dist. Ct., Clark Cty. Nev.).

3. I am familiar with the procedural and substantive history of the case. I attest and verify that the foregoing PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION contains true and accurate facts to the best of my knowledge.

4. I further attest and verify that I am authorized to file this Petition to protect the interest of my client.

DATED this 9th day of July 2012.

RICHARD A. WRIGHT

Attachment A

DECLARATION OF MAILING

DEBRA K. CAROSELLI, an employee of Wright Stanish & Winckler, hereby declares that she is, and was when the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 9th day of July, 2012, declarant deposited in the United States mail at Las Vegas, Nevada, a copy of Dipak Desai's **PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION** enclosed in a sealed envelope upon which first class postage was fully prepaid, hand delivered or e-filed addressed to:

The Honorable Valerie Adair
District Court, Department 24
200 Lewis Avenue
Las Vegas, NV 89101

Michael V. Staudaher
Clark County District Attorney's Office
200 Lewis Avenue
Third Floor
Las Vegas, NV 89155

Catherine Cortez Masto
Attorney General
State of Nevada, Criminal Justice Division
100 North Carson Street
Carson City, NV 89701-4717

That there is a regular communication by mail between the place of mailing and the

place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on the 9th day of July 2012.

Debra K. Caroselli

DEBRA K. CAROSELLI

Attachment B

to fair notice and fair grand jury determination, as well as preventing the State from prosecuting conduct that does not constitute an offense.

DATED this 9th day of July 2012.

Respectfully Submitted,

WRIGHT STANISH & WINCKLER

By: _____

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