

EXHIBIT 4

EXHIBIT 4

1 **ORDR**

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3 Nevada Bar No. 886
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FILED

APR 2 1 37 PM '12

Ann L. Shuman
CLERK OF THE COURT

7
8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

10 THE STATE OF NEVADA

11 Plaintiff,

12 vs.

13 DIPAK DESAI,

14 Defendant.
15

Case No. C265107
Dept. No. XXI

**ORDER TO ISSUE WRIT OF
HABEAS CORPUS**

16 The Petition for Writ of Habeas Corpus for defendant DIPAK DESAI was duly filed in
17 this case.

18 It is ordered that the Clerk of the District Court for Clark County, Nevada issue a Writ of
19 Habeas Corpus, as is attached hereto.

20 DATED this 2nd day of April 2012.

21
22 VALERIE ADAMS
23 DISTRICT COURT JUDGE

24 The defendant Dipak Desai is not in custody and is released on bail.

25 Submitted by:

26 *Richard A. Wright*
27 Richard A. Wright, Esquire
28

EXHIBIT 5

EXHIBIT 5

TO: Richard A. Wright, Esq. COMPANY:

1 **RET**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 PAMELA WECKERLY
6 Chief Deputy District Attorney
7 Nevada Bar #006163
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 State of Nevada

8 DISTRICT COURT
9 CLARK COUNTY, NEVADA

10 In the Matter of Application,
11 of

12 DIPAK KANTILAL DESAI,
13 #1240942

14 for a Writ of Habeas Corpus.

CASE NO: C265107

DEPT NO: XXI

16
17 **RETURN TO WRIT OF HABEAS CORPUS**

18 DATE OF HEARING: APRIL 23, 2012

19 TIME OF HEARING: 9:30 A.M.

20 COMES NOW, DOUGLAS C. GILLESPIE, Sheriff of Clark County, Nevada,
21 Respondent, through his counsel, STEVEN B. WOLFSON, Clark County District Attorney,
22 through PAMELA WECKERLY, Chief Deputy District Attorney, in obedience to a writ of
23 habeas corpus issued out of and under the seal of the above-entitled Court on the 30th day of
24 March, 2012, and made returnable on the 17th day of April, 2012, at the hour of 9:30 o'clock
25 A.M., before the above-entitled Court, and states as follows:

26 1. Respondent admits the allegations of Paragraph 1 of the Petitioner's Petition
27 for Writ of Habeas Corpus.
28

TO: Richard A. Wright, Esq. ○ COMPANY: ○

1 2. Respondent denies the allegations of Paragraph 4 of the Petitioner's Petition
2 for Writ of Habeas Corpus.

3 3. Paragraphs 2, 3, 6 & 7 do not require admission or denial.

4 4. The Petitioner is in the actual custody of DOUGLAS C. GILLESPIE, Clark
5 County Sheriff, Respondent herein, pursuant to a Criminal Amended Indictment, a copy of
6 which is attached hereto as Exhibit 1 and incorporated by reference herein.

7 Wherefore, Respondent prays that the Writ of Habeas Corpus be discharged and the
8 Petition be dismissed.

9 DATED this 13th day of April, 2012.

10 Respectfully submitted,

11 STEVEN B. WOLFSON
12 Clark County District Attorney
13 Nevada Bar # 001565

14 BY /s/ Pamela Weckerly
15 Pamela Weckerly
16 Chief Deputy District Attorney
17 Nevada Bar #006163

18 POINTS AND AUTHORITIES

19 STATEMENT OF FACTS

20
21 July 25, 2007

22 On July 25, 2007, Sharrieff Ziyad had an endoscopy procedure done at the Endoscopy
23 Center of Southern Nevada on Shadow Lane. GJ1A at 75, 77. He arrived at the clinic at
24 7:00 am. GJ1A at 75B. Dr. Dipak Desai was the doctor who performed his procedure.
25 GJ1A at 78. Mr. Ziyad discussed the fact that he was Hepatitis C positive with Dr. Desai.
26 GJ1A at 80. The Certified Registered Nurse Anesthetist ("CRNA") for the procedure was
27 Ronald Lakeman. GJ5 at 58. Lakeman administered the anesthesia Propofol to Ziyad
28

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1 intravenously. Ziyad received more than one (1) dose of anesthesia during the procedure.
2 See GJ Exhibit 18, page 193.

3 The next patient who had a procedure done by Dr. Desai on July 25, 2007 was
4 Michael Washington. GJ5 at 106-07. Mr. Washington underwent a colonoscopy at the
5 Endoscopy Center of Southern Nevada. GJ at 119. The doctor who performed his
6 procedure was Dr. Dipak Desai. GJ at 127. The CRNA who administered his anesthesia
7 was Ronald Lakeman. GJ5 at 159. Weeks after the procedure, in September of that year,
8 Mr. Washington began having health problems. His right side became swollen, his abdomen
9 was tender, he lost his appetite, and his urine became dark. GJ at 131-32. He sought
10 assistance from his primary care doctor at the VA hospital and was diagnosed with Hepatitis
11 C. He had not been diagnosed with Hepatitis C before the procedure at the Endoscopy
12 Center of Southern Nevada. GJ at 133.

13 September 21, 2007

14 Two (2) CRNAs worked on September 21, 2007 at the Endoscopy Center of Southern
15 Nevada: Ronald Lakeman and Keith Mathahs. GJ5 at 112.

16 On September 21, 2007, Kenneth Rubino underwent a colonoscopy at the Endoscopy
17 Center of Southern Nevada on Shadow Lane. GJ at 105. He arrived at the center for his
18 procedure just after 7:30 in the morning. GJ at 107. The doctor who performed the
19 procedure was Dr. Clifford Carrol. Years prior to this procedure, Mr. Rubino had been
20 diagnosed as being Hepatitis C positive. GJ at 105. He had discussed this fact with Dr.
21 Carrol. GJ at 106. On the day of the procedure, he again informed the staff at the center that
22 he was Hepatitis C positive. GJ at 108. The CRNA for his procedure was Keith Mathahs.
23 GJ5 at 64. Mathahs administered Propofol to Rubino intravenously. Mathahs administered
24 more than one (1) dose of anesthesia to Rubino. See GJ Exhibit 18, page 193.

25 Rodolfo Meana had a colonoscopy performed at the Endoscopy Center of Southern
26 Nevada on September 21, 2007. GJ1A. The doctor who performed his procedure was Dr.
27 Desai. GJ Exhibit 41. The CRNA who administered his anesthesia was Keith Mathahs.
28 GJ5 at 18. Sometime after the procedure, Mr. Meana felt nauseous, lost sleep, and suffered

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1 from depression, constipation, and diarrhea. His urine also became brownish in color. GJ1A
2 at 99. He went to see his own doctor and was diagnosed with Hepatitis C. GJ1A at 100. He
3 did not have Hepatitis C prior to having this procedure done at the Endoscopy Center. GJ1A
4 at 102.

5 Sonia Orellana-Rivera had a colonoscopy done at the Endoscopy Center of Southern
6 Nevada on September 21, 2007. GJ1A at 58, GJ Exhibit 35. The doctor who performed the
7 procedure was Dr. Clifford Carrol. GJ1A at 63. The CRNA who administered her
8 anesthesia was Keith Mathahs. GJ4A at 16. About six (6) months after the procedure, Ms.
9 Orellana-Rivera was notified of a possible problem by the Health Department. GJ1A at 66.
10 She saw her family doctor and was informed that she had contracted Hepatitis C. GJ1A at
11 66.

12 Gwendolyn Martin had a colonoscopy performed at the Endoscopy Center of
13 Southern Nevada on September 20, 2007. GJ at 158. She had an endoscopy done at the
14 center the next day, on September 21, 2007. GJ at 159. Dr. Carrera performed the
15 endoscopy. GJ at 159. The CRNA who administered the anesthesia was Keith Mathahs.
16 GJ5 at 25. Weeks after the procedure, Martin was sick and her urine became dark. GJ at
17 165. Ultimately, she went to a hospital emergency room and was diagnosed with acute
18 Hepatitis C. GJ at 166. Since the diagnosis, she has had physical and mental problems. GJ
19 at 170.

20 Carole Grueskin had a colonoscopy done at the Endoscopy Center of Southern
21 Nevada on September 21, 2007. Her doctor was Dr. Carrera. GJ at 141. The CRNA who
22 administered her anesthesia was Ronald Lakeman. GJ5 at 49. Before this procedure, she
23 had not been diagnosed with Hepatitis C. GJ at 144. After the procedure, she became
24 jaundiced. GJ at 150-51. After that, she was diagnosed with Hepatitis C. GJ at 153.

25 Stacy Hutchinson also had a colonoscopy performed at the Endoscopy Center of
26 Southern Nevada on September 21, 2007. GJ at 173. Dr. Dipak Desai was her doctor. GJ at
27 174. The CRNA who administered her anesthesia was Ronald Lakeman. GJ5 at 42. Three
28 (3) weeks after the procedure, Hutchinson was ill, could not hold down food, and lost

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1 weight. GJ at 185. She was admitted to the hospital and became jaundiced. GJ at 186.

2 Later, she was diagnosed with Hepatitis C. Five (5) months earlier, she had been
3 tested for Hepatitis C and the results were negative. GJ at 186-87.

4 On September 21, 2007, Patty Aspinwall underwent a colonoscopy at the Endoscopy
5 Center of Southern Nevada. GJ at 200. Dr. Carrera performed the procedure. GJ at 208.
6 The CRNA who administered anesthesia to her was Ronald Lakeman. GJ5 at 69. A few
7 weeks after the procedure, Ms. Aspinwall felt nauseous and had no appetite. GJ at 211. A
8 few weeks after that, she was jaundiced and was admitted to the hospital. She later tested
9 positive for Hepatitis C.

10 **Procedures: Endoscopy and Colonoscopy**

11 The procedures all of these individuals underwent were out-patient procedures known
12 as an endoscopy or colonoscopy.

13 An endoscopic exam involves inserting an endoscope into the patient's mouth. The
14 scope has a camera on one end and it displays images on a monitor for the doctor to view.
15 The scope is passed through the patient's mouth, esophagus, stomach, small intestine and
16 duodenum. GJ1 at 35. A colonoscopy entails passing a scope through the patient's rectum
17 and into the large bowel. GJ1 at 35. If polyps or other abnormalities are found, the doctor
18 either removes them or takes a biopsy sample. GJ1 at 39. During both procedures, the
19 patient is typically sedated. GJ1 at 36. For both procedures, the patient is interviewed about
20 their medical history prior to sedation. Once the history has been taken, the patient is
21 sedated and the scope is inserted. GJ1 at 37.

22 At the Endoscopy Center of Southern Nevada, nurses in the pre-op area of the facility
23 would typically start the IV on the patient. GJ1 at 44. The CRNA would be responsible for
24 obtaining the patient's medical history and administering Propofol to sedate the patient. GJ1
25 at 43-44. At the conclusion of the procedure, the CRNA would monitor the patient and,
26 once satisfied that the patient was stable, would transfer the patient to the recovery room.
27 GJ1 at 54.

28 //

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1 **Propofol**

2 The medication used to sedate patients at the Endoscopy Center of Southern Nevada
3 in 2007 was almost always Propofol. Propofol is rapidly metabolized by the body so
4 additional dosing is often required during procedures. GJ1 at 47. Vials of Propofol come in
5 various sizes. Propofol can act as a growth medium for bacteria if contaminated so it is
6 labeled and directed to be single use only. GJ1 at 50.

7 Administering Propofol or any injected medication safely requires the practitioner to
8 utilize "aseptic technique" which means prevention of infection or bacterial contamination;
9 therefore, any device that enters the body cannot be reused. GJ1 at 48. To administer
10 Propofol safely, the practitioner uses a new needle and new syringe to draw up the
11 medication from a new vial and injects it into the patient via an intravenous catheter. If
12 additional medication is needed, the practitioner can access the vial again and repeat the
13 process. GJ1 at 49. The needle and syringe can be reused on the same patient only. It is
14 common knowledge that syringes are to be used only on one patient. GJ3 at 53. It would
15 never be professionally acceptable to use the same syringe on two (2) patients. GJ3 at 55.
16 Moreover, a vial of Propofol should not be used on more than one patient because of
17 potential for contamination. GJ1 at 49-50.

18 At the Endoscopy Center, Propofol was reused from patient to patient. GJ4A at 153.
19 In fact, Keith Mathahs instructed another CRNA to reuse Propofol on subsequent patients,
20 contrary to packaging instructions and aseptic technique. GJ4A at 82. CRNAs at the
21 Endoscopy Center would be offered opened or used bottles of Propofol to use on subsequent
22 patients. GJ6 at 47.

23 **Transmission of Infection**

24 The Southern Nevada Health District tracks cases of Hepatitis C infections. By law,
25 doctors are required to report such cases. GJ3A at 30. In an average year, the district
26 receives reports of two (2) to four (4) cases. GJ3A at 30. Each case of Hepatitis C is
27 investigated according to the District's protocol. GJ3A at 31. In December 2007, the Health
28 District received reports of two (2) cases of individuals who had both contracted Hepatitis C

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1 and who both had gone to the Endoscopy Center of Southern Nevada on different days—one
2 (1) in July and one (1) in September. GJ3A at 34, 36. The Health District officials
3 contacted the Centers for Disease Control ("CDC") for technical advice to investigate this
4 matter. While the District was in contact with the CDC, a third case was identified. GJ3A at
5 36-37. At that point, the District requested assistance from the CDC in investigating these
6 cases. GJ3A at 39.

7 Ultimately, investigators from the Health District and CDC went to the Endoscopy
8 Center of Southern Nevada and observed procedures and investigated. GJ3A at 50-53.
9 While at the clinic, investigators observed a number of unsafe practices.

10 The Health District investigated how the infection could have been transmitted. The
11 Health District tested all employees at the clinic to discern whether an employee could have
12 transmitted the virus. GJ3A at 61. Evidence of Hepatitis C was not found in any of the
13 clinic staff. They considered whether the biopsy equipment was used on an infected patient
14 and then used on a subsequent patient. This also was not found to be the cause of the
15 Hepatitis C transmission. They considered whether the endoscopes were cleaned improperly
16 and thus caused the transmission. This was also determined not the cause of the
17 transmission. They looked at procedures in the pre-op area of the center and found no
18 indication that any of these practices caused the transmission. GJ3A at 62-67. The last thing
19 the District investigators looked at was anesthesia injection practices. GJ3A at 69.
20 Ultimately, the Health District investigators concluded that vials of Propofol and syringes
21 were being reused. On July 25, 2007, there were twenty (20) Propofol bottles used on sixty-
22 five (65) patients. GJ5 at 137. On September 21, 2007, there were twenty-four (24) vials
23 used on sixty-three (63) patients. GJ5 at 137. They were able to rule out everything else.
24 GJ3A at 71.

25 The investigation was somewhat challenged by the fact that the patient chart times
26 were inconsistent. The nurses' charts and anesthetist chart times were not in agreement,
27 indicating that patients and staff were in two (2) places at one (1) time. GJ3 at 25. In the
28 procedure room, however, CDC representatives actually observed individual Propofol

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1 bottles being used on multiple patients, even though the medication is labeled as a single use
2 only drug. An investigator also saw syringe reuse on an individual patient. GJ3 at 34. The
3 CRNA who was observed reusing a syringe was Mathahs. GJ3 at 35. Mathahs's method
4 was dangerous based on the following: if a CRNA opens a new Propofol bottle and has a
5 new needle, the CRNA injects the syringe and needle into the patient; there can be some
6 flush back of blood from the patient's body into the needle or syringe. If the CRNA removes
7 the needle but keeps the same syringe, whatever blood was in the needle could have flushed
8 back into the syringe. If the CRNA then puts a new needle on that syringe and returns to the
9 Propofol bottle for additional anesthesia, the CRNA has a contaminated syringe and needle
10 going into a vial of medicine. The vial of medicine can then be contaminated. If that bottle
11 is then used on the next patient, there is possible transference of the Hepatitis C virus. GJ3
12 at 37. From what the CDC observed, that is the only way the transmission of Hepatitis C
13 could have occurred in this instance. GJ3 at 37-38. The common factor was shared
14 Propofol and the fact that source patients were identified as having more than one (1) dose of
15 Propofol. GJ3A at 105-109.

16 When a CDC investigator spoke to Mathahs, he claimed not to understand that the
17 procedure he used was dangerous. He stated that he believed discarding the needle was
18 enough of a precaution. He claimed that he did not understand that the syringe could be
19 contaminated as well and should not be reused for a subsequent draw of medication. GJ1 at
20 39.

21 Another CDC investigator spoke with CRNA Lakeman telephonically. Lakeman was
22 cooperative with the investigator, but said he would deny that the conversation ever took
23 place in the future. GJ3 at 85. Lakeman told the investigator that he would not use
24 medication that had been drawn up by another CRNA, but he would use partially used vials
25 of Propofol. GJ3 at 90. In other words, if he walked into a room and there was a partially
26 used vial of the medication, he would use it. GJ3 at 90. He also acknowledged that he
27 would "double dip," or use the same syringe to draw up medication from a vial and then use
28 those same vials on other patients. GJ3 at 91. He even acknowledged to the CDC

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investigator that he was aware of the risk, but felt he was careful and maintained pressure on the syringe plunger such that he prevented any backflow into the syringe or contamination of the syringe into the vial. GJ3 at 91.

Epidemiology

Hepatitis C has RNA genome. From the arrangement of the RNA genome, scientists can tell Hepatitis A from C and B. GJ3 at 142. As the Hepatitis C virus replicates in an individual, it mutates. GJ3 at 144. Because areas of the Hepatitis C genome mutate rapidly, scientists can look at these highly variable regions to see how closely two (2) viruses are related. GJ3 at 144. In this manner, different strains of Hepatitis C can be identified. GJ3 at 145.

In the instant case, the forms of Hepatitis C from the two (2) source patients—Ziyad (July 25, 2007) and Rubino (September 21, 2007)—varied greatly. GJ3 at 147. The patients from September 21, 2007, however, all were closely related to the strain of the virus which was present in Rubino. GJ3 at 158. Likewise, the Hepatitis C virus strains infecting both Ziyad and Washington were consistent (July 25, 2007).

The Endoscopy Center Business/Insurance Fraud

Dr. Dipak Desai started the business of the Gastroenterology Center decades ago. GJ1 at 33. By 2002, the business included the Endoscopy Center of Southern Nevada at Shadow Lane and the Endoscopy Center of Southern Nevada II located on Burnham Lane. GJ1 at 33-34. The Shadow Lane location included medical offices as well as a procedure location where doctors performed endoscopy exams and colonoscopies.

The Endoscopy Center of Southern Nevada utilized the services of Certified Registered Nurse Anesthetists (CRNA), rather than medical doctor anesthesiologists. A CRNA is a registered nurse with training in anesthesia services. GJ1 at 40. The CRNAs were under the supervision of Dr. Desai. GJ1 at 79.

Dr. Desai was a micro-manager with regard to all aspects of the practice. GJ2 at 79. Dr. Dipak Desai was very concerned with expenses. He would caution doctors not to use too many surgical gowns. GJ1A at 45. Some of the equipment used for procedures included

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1 bite blocks and biopsy forceps. Most of the equipment was intended for single use, or was
2 disposable. GJ1 at 56. Nonetheless, at the direction of Dr. Desai, this equipment was
3 cleaned and reused. GJ1 at 57. Desai also complained when he believed too much surgical
4 tape was being used by nurses to secure IV lines. GJ1 at 95. At the center, surgical pads, or
5 "chux" were cut in half so the center would get double use from them. GJ8 at 50.

6 There also was a heavy caseload at the Shadow Lane facility. GJ1 at 64. Dr. Desai
7 insisted on scheduling four (4) patients for the 7:00 am start time, creating an immediate
8 backlog at the start of the day at the facility. GJ1 at 64. Dr. Desai was very demanding of
9 technicians that they clean equipment quickly so that it could be used on the next patient.
10 GJ2 at 43. Dr. Desai would also tell doctors that they were too slow with procedures and
11 that they were not seeing a sufficient number of patients. GJ1 at 68. He would sometimes
12 mention a particular doctor's lack of speed in front of other colleagues. GJ1 at 70.

13 Dr. Desai also was concerned about the amount of medication given to a patient
14 during a procedure. GJ1 at 71. He thought Propofol was expensive. GJ1 at 74.

15 Timing of Procedures

16 As an industry practice, anesthesia for procedures such as endoscopies and
17 colonoscopies is billed in fifteen (15) minute increments or units. If a procedure lasts one
18 (1) to fifteen (15) minutes, it is one unit. If it lasts sixteen (16) to thirty (30) minutes, it is
19 two (2) units. If it goes over thirty (30) minutes, it is three (3) units.

20 CRNAs were responsible for documenting the anesthesia used, times, and quantities.
21 GJ1 at 60. Dr. Desai, however, made mention of the times that needed to be placed on the
22 records in 2005. GJ6 at 54. The directive was to note thirty-one (31) minutes for a
23 procedure time regardless of how long it took. GJ6 at 55. There was pressure to note thirty-
24 one (31) minutes. GJ6 at 60.

25 The actual procedure time was five (5) to six (6) minutes for an endoscopy and eight
26 (8) to nine (9) minutes for a colonoscopy. GJ4A at 140. Keith Mathahs told another CRNA
27 that Dr. Desai insisted that the procedure times be thirty-one (31) minutes. So, the CRNAs
28 "juggled" the numbers to make sure it always came up to around thirty-one (31) minutes.

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1 GJ4A at 99. Thus, Mathahs was well aware that he and others were falsely reporting
2 anesthesia times.

3 The Endoscopy Center of Southern Nevada had an associated business called Health
4 Care Business Solutions handle its billing with insurance companies. GJ4A at 119. The
5 owner of Health Care Business Solutions was Tonya Rushing, the business manager of the
6 Endoscopy Center of Southern Nevada. GJ4A at 119-20. Employees for Rushing entered
7 the data from anesthesia records submitted by the Endoscopy Center of Southern Nevada
8 and transmitted it to insurance companies for billing. GJ4A at 121. An employee who
9 physically entered the data noticed a dramatic change in the times reported for procedures in
10 2008. GJ4A at 127. The times which were previously reported to be thirty-one (31)
11 minutes, GJ4A at 124, suddenly changed to around ten (10) or twelve (12) minutes per
12 procedure in 2008. GJ4A at 128. Interestingly, this change corresponded with the Health
13 District's Investigation of the Endoscopy Center.

14 In fact, in 2008, Dr. Clifford Carrol was alerted to the times recorded by CRNAs as a
15 result of unrelated litigation. GJ2 at 51. Sometime after that, Dr. Carrol performed an
16 endoscopy and looked at the anesthesia chart and noticed the times for the procedure were
17 pre-written and that the amount of time indicated was longer than what the actual procedure
18 time would take. GJ2 at 54. During the time period alleged in the Indictment, almost all of
19 the anesthesia records indicated a time of thirty-one (31) to thirty-two (32) minutes. GJ2 at
20 55. The notes on the records suggested that the patient was still in the procedure room when
21 the patient could not have been; illustrating the records had been falsified. GJ2 at 57. If they
22 had lasted as long as the recorded time, there would not have been enough hours in the day
23 to do all of the procedures. GJ2 at 68. At one point, Dr. Carrol went to Dr. Desai to discuss
24 the issue. GJ2 at 62. Dr. Desai acknowledged the false timing had been a practice at the
25 Center, but agreed to start recording the correct times. GJ2 at 63.

26 In 2007, however, as alleged in the Indictment and before the Health District
27 investigation, the times of procedures were reported to be thirty-one (31) minutes or slightly
28 more. During that time period, Blue Cross/Blue Shield was the insurance provider for

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1 Sharrieff Ziyad, Kenneth Rubino, and Patty Aspinwall. The company paid \$206.82 on
2 Ziyad's claim. The listed charge was \$560.00. GJ5 at 59. For Kenneth Rubino, the
3 company paid \$245.12 on the \$560.00 charge. GJ5 at 63. For Patty Aspinwall, the company
4 was a secondary payer. The charged amount for the procedure was \$560.00. GJ5 at 69. The
5 primary payer, United Health, paid \$249.92. GJ5 at 71. Blue Cross paid \$56.48. GJ5 at 72.

6 Carole Grueskin and Stacy Hutchinson were insured by HPN and Sierra Health, or the
7 company Sierra Health Services. Grueskin's procedure was charged at \$560.00 and the
8 payment was \$70.00. GJ5 at 49-50. Hutchinson's bill was \$560.00 and \$90.00 was paid on
9 the claim. GJ5 at 45.

10 Michael Washington was insured by the Veterans Administration. His bill was for
11 \$560.00. The amount paid on the claim was \$100.00. GJ5 at 164. Gwendolyn Martin was
12 insured by Secure Horizons/Health Care partners. The amount of her bill was \$560.00 and
13 \$304.00 was paid on the claim. GJ5 at 25-6. Sonia Orellana's insurance was through the
14 Culinary Union. Her bill was \$560.00 and the amount paid on the claim was \$306.00.
15 GJ4A at 18.

16 The instant case was presented to the grand jury over the course of several days in
17 2010. The grand jury indictment was filed on June 4, 2010.

18 ARGUMENT

19 On June 23, 2010, Petitioner Desai appeared for his initial arraignment in district
20 court and was provided with an indictment charging him with Racketeering and Theft, as
21 well as multiple counts of Criminal Neglect of Patients, Insurance Fraud, Obtaining Money
22 Under False Pretenses and Performance of Act in Reckless Disregard of Persons or Property.
23 The defendant pled not guilty and waived his right to a speedy trial. Desai was subsequently
24 sent to Lake's Crossing for a competency evaluation. On September 20, 2011, Lake's
25 Crossing doctors reported that Desai was competent. On January 27, 2012, at Desai's
26 request, Judge Delaney held a hearing regarding the findings of those doctors. On February
27 2, 2012, Judge Delaney issued her Findings of Competency. On March 30, 2012, nearly two
28

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(2) months after the Findings of Competency, Desai filed his pretrial petition for writ of habeas corpus or, alternatively, motion to dismiss indictment.

I. The Defendant's Petition Should Not Be Considered When the Defendant (1) Filed the Petition After the Required Time and (2) Lacks Good Cause For the Granting of an Extension To File His Petition.

NRS 34.700 provides in pertinent part:

1. Except as provided in subsection 3, a pretrial petition for a writ of habeas corpus based on alleged lack of probable cause or otherwise challenging the court's right or jurisdiction to proceed to the trial of a criminal charge may not be considered unless:

- (a) The petition and all supporting documents are filed within 21 days after the first appearance of the accused in the district court[.]

A pretrial habeas corpus petition based on an alleged lack of probable cause or jurisdiction needs to be filed within twenty-one (21) days after the "first appearance of the accused in the district court." NRS 34.700(1)(a). In addition, if the accused does not file a habeas corpus petition within the time allowed, the accused needs to show good cause for an extension to file his petition. NRS 34.700(3). For example, good cause exists when the transcript of the preliminary hearing or Grand Jury presentment is unavailable within fourteen (14) days of the accused's initial appearance. *Id.* All other applications for an extension of time, however, require notice to the State. *Id.*

Here, the transcript of the Grand Jury Presentment was filed on June 8, 2010 and the defendant first appeared in District Court in this renewed matter on June 23, 2010. Furthermore, the State actually provided copies of the Grand Jury Transcripts, as well as copies of the Grand Jury Exhibits on June 16, 2010. While Desai did spend several months at Lake's Crossing, he returned in January 2012. The Competency Findings were issued on February 2, 2012. Even if the Court uses that date for calculate the timing of the filing of the pretrial writ, Desai is well beyond the statutory deadline.¹

¹ Eighth Judicial District Court Rule 3.4 provides that the State has 10 days to answer a pretrial writ. Rule 1.14 provides that in calculating the number of days, if the provided response time is under 11 days, weekends and holidays are not counted.

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1 The defendant has never requested an extension of time to file his Writ, nor has he
2 provided the required good cause for such an extension. In fact, the mandatory language of
3 the NRS 34.710 requires this Court to deny the defense petition.

4 NRS 34.710 provides in pertinent part:

5 1. A district court shall not consider any pretrial petition for
6 habeas corpus:

7 (a) Based on alleged lack of probable cause or
8 otherwise challenging the court's right or
9 jurisdiction to proceed to the trial of a criminal
charge unless a petition is filed in accordance
with NRS 34.700.

10 Because the petitioner has exceeded the statutory time limit for the filing of a petition
11 and because he has never attempted to petition this Court for an extension, to the State's
12 knowledge, the defendant's petition is time-barred and the State respectfully requests that the
13 writ be denied.

14 Nonetheless, if this Court chooses to address the arguments on the merits, Desai
15 presents this Court with no legally valid reason upon which to grant the writ or dismiss the
16 indictment.

17 **II. Alleged Deficiencies Can Be Cured By Amendment Rather than Dismissal**

18 At the outset, the State notes that Desai's entire petition challenges the adequacy of
19 the pleading in the indictment. Even Section IV, Petition at 17, which makes mention of
20 "insufficient evidence" is an argument about the inclusion of some allegations in the
21 charging document. See infra. Desai's argument is that the State did not establish how
22 many of the negligent acts at the Endoscopy Center caused transmission of Hepatitis C. In
23 addition, it appears that Desai does not challenge COUNTS 2, 5, 6, 9, 12, 15, 16, 19, 22, 25,
24 26, 27, and 28 (Insurance Fraud, Obtaining Money Under False Pretences and Theft).
25 Further, Desai argues that the only remedy for alleged defects in an indictment is dismissal.

26 NRS 173.075 which addresses the nature and contents of an Information or
27 Indictment, states that it must "state for each count the official or customary citation of the
28 statute, rule, regulation or other provision of law which the defendant is alleged therein to

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1 have violated." It further states that any error or omission is not a ground for dismissal or
2 reversal of a conviction if it did not mislead the defendant to his prejudice. Id.

3 Each count in the Indictment contains the required statutory language of NRS
4 207.350, 207.360, 207.370, 207.380, 207.390, 207.400, 202.595, 200.495, 686A.2815,
5 205.0832, 205.0835, 205.265, 205.380, as appropriate for the particular charge. Specifically,
6 with regard to the counts concerning acts in reckless disregard of persons and the criminal
7 neglect of patients, each count incorporates almost word for word the elements of the crime
8 as well as detailed factual descriptions of the charged conduct. To assert that the defense has
9 no idea of what crimes the defendant is alleged to have committed, therefore, is without
10 merit.

11 With regard to the pled theories of criminal liability (directly committing, aiding and
12 abetting or conspiring) Desai is on notice that he must prepare to defend against the charges
13 that he directly committed the act, conspired to commit the act, or aided and abetted in the
14 commission of the act. As the Court is aware from the Nevada Supreme Court cases of
15 Bolden v. State, 121 Nev. 908, 124 P.3d 191 (2005), overruled on other grounds, conspiracy
16 theory of liability, and Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002), aiding and
17 abetting theory of liability, the State is required to specifically plead those theories in the
18 alternative if the State wishes to proceed on them.

19 As such, the beginning and end of each of the counts charged contain the required
20 statutory language comprising the charged crime and the applicable theories of criminal
21 liability for each crime respectively, which the State asserts is required for notice pleading.
22 What remains in each count are the factual averments which comprise the specific alleged
23 criminal conduct pertaining to each of the counts. All of these parts for each count, when
24 viewed together, provide sufficient notice of the defendant of the crimes charged, the State's
25 theory of criminal liability and the pertinent facts related to the specific count. Moreover,
26 even if this Court determines that the Indictment is somehow deficient, pursuant to NRS
27 173.075 the appropriate remedy is to permit amendment. Dismissal is not appropriate
28 because the Defendant has suffered no prejudice.

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1 "NRS 173.075 provides that a charging document 'must be a plain, concise and
2 definite written statement of the essential facts constituting the offense charged.'" Hidalgo v.
3 District Ct., 124 Nev. 330, 184 P.3d 369, 375 (2008). Phrased another way, "a charging
4 document should provide a statement of the acts constituting the offense in ordinary and
5 concise language, and in such manner as to enable a person of common understanding to
6 know what is intended." Sheriff v. Spagnola, 101 Nev. 508, 514, 706 P.2d 840, 844 (1985)
7 (internal citations omitted). "To satisfy this requirement, 'the [charging document] standing
8 alone must contain the elements of the offense intended to be charged and must be sufficient
9 to apprise the accused of the nature of the offense so that he may adequately prepare a
10 defense.'" Hidalgo, 124 Nev. At 338-39, 184 P.3d at 375-6.

11 The Hidalgo Court, addressing the factual specificity necessary in a Notice of Intent
12 to Seek the Death Penalty, analogized it to the specificity necessary in a charging document,
13 and in so doing found that "the State is not required to include exhaustively detailed factual
14 allegations... the notice of intent must provide a simple, clear recitation of the critical facts
15 supporting the alleged aggravator." Id. at 339, 184 P.3d at 376. This analogy necessarily
16 implies that the same is true for the Information or Indictment; the State need only provide
17 the critical facts supporting the charge.

18 "[T]he accusation must include a characterization of the crime and such description of
19 the particular act alleged to have been committed by the accused as will enable him properly
20 to defend against the accusation, and the description of the offense must be sufficiently full
21 and complete to accord to the accused his constitutional right to due process." Simpson v.
22 District Ct., 88 Nev. 654, 660, 503 P.2d 1225, 1229-30 (1973). This does not mean,
23 however, that the document must allege each and every fact which will subsequently be
24 proven at trial. In determining the sufficiency of a charging document, the "test is not
25 whether the [document] could have been made more definite and certain" but instead is
26 simply if the elements of the offense have been alleged with enough specificity to inform the
27 accused of the charges such that he may prepare a defense. Laney v. State, 86 Nev. 173,
28 178, 466 P.2d 666, 669 (1970). NRS 173.075 requires that the document include the

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1 elements of the crime charged and the essential facts showing how the defendant committed
2 the element. State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998).

3 The State Supreme Court has further explained other requirements of the Information
4 or Indictment. "The charging document should also contain, when possible a description of
5 the means by which the defendant committed the offense" or a statement that the method is
6 unknown. Spagnola, 101 Nev. at 514, 706 P.2d at 844. While a precise date is not required,
7 a general time period in which the offense occurred is necessary to enable [the defendant] to
8 adequately defend against the charge." Id. In Spagnola, each count of the charging
9 document alleged that the defendant obtained money under false pretenses with the intent to
10 defraud by obtaining payment in a specific amount by means of submitting duplicate travel
11 expense claims with regard to certain specified patients and that each count delineated the
12 month during which the act occurred. Id. Based on this information, the Court found that a
13 sufficient statement of the acts was provided and the defendant had adequate notice of the
14 theory of guilt on which the State would rely. Id.

15 Here, the essential elements of the crime charged and the mechanism by which the
16 crime was committed are alleged. The Indictment in this case is similar to the charging
17 document in Spagnola, which the Court found to provide sufficient notice of the charges.
18 Furthermore, the time period is sufficiently clear, both with the general statement of range at
19 the commencement of the Indictment and with each count providing a defined period of
20 time.

21 Because the Indictment is particularly detailed, it provides more than is required by
22 both notice and due process and, therefore, there is no basis to dismiss the Indictment on the
23 grounds of insufficiency or lack of notice. However, should this Court determine that in
24 some way the allegations set forth are insufficient, the appropriate remedy is not dismissal
25 but rather leave to amend the Indictment.

26 "Amendment before trial is an appropriate method for giving the accused the notice to
27 which he or she is entitled." State v. District Ct., 116 Nev. 374, 378, 997 P.2d 126, 129
28 (2000). The Supreme Court found that an amendment on the day of trial to include a theory

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1 of aiding and abetting was improper, but to include the theory of Felony Murder was
2 appropriate because for the latter the Defendant had received adequate actual notice of the
3 State's theory in that particular case based upon the Information already filed. Id. However,
4 the Court's power to permit amendment does not cease when trial begins. Where an
5 amendment does not allege a new or different offense, the Court may permit it any time
6 before a verdict or finding, if the substantial rights of the defendant are not prejudiced.
7 Shannon v. State, 105 Nev. 782, 785, 783 P.2d 942, 944 (1989) (citing NRS 173.095(1)).

8 In Shannon, the Information charged the defendant with Sexual Assault alleging that
9 the act of sexual penetration occurred by the defendant inserting his penis in the victim's
10 mouth. Id. During trial, the State was allowed to amend the Information to allege instead
11 that the penetration occurred when the victim's penis was inserted into the defendant's
12 mouth. Id. The Nevada Supreme Court found that "[t]he substantial rights of the defendant
13 were not prejudiced by the amendment" and that the original Information which alleged
14 penetration by fellatio remained the same after amendment. Id.; Grant v. State, 117 Nev.
15 427, 433, 24 P.3d 761 (2001) ("[a]s long the amended information does not involve new or
16 different offenses, and the defendant is not prejudiced, the amendment may be granted");
17 Benitez v. State, 111 Nev. 1363, 904 P.2d 1036 (1995) (the district court may permit an
18 indictment or information to be amended at any time before verdict or finding if no
19 additional or different offense is charged and if substantial rights of the defendant are not
20 prejudiced).

21 Similarly, in Hidalgo, the case discussing specificity in the Notice of Intent, the State
22 Supreme Court found, that the notice did not provide sufficient detail in factual allegations to
23 support an aggravator, and concluded that the appropriate remedy was to allow the State to
24 amend the notice of intent to remedy the deficiency. Hidalgo, 124 Nev. at 339-40, 184 P.3d
25 at 375. In so doing, the Court stated that there would be no prejudice in that the State would
26 be merely clarifying rather than adding events or circumstances not already alleged in the
27 notice. Id. The Court, in that opinion, as discussed previously, analogized the Notice of
28 Intent to a charging document. Following the analogy to completion, the appropriate remedy

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1 where a charging document does not provide sufficient factual detail is to allow the State to
2 amend.

3 Desai cites to State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998) for the
4 proposition that the State cannot be allowed to amend an indictment but for clerical errors.
5 In Hancock, the State filed a criminal complaint alleging racketeering and securities fraud.
6 After a preliminary hearing, the magistrate dismissed charges against some of the
7 defendants, but bound others over. In doing so, the magistrate informed the State that the
8 complaint seemed defective. The State then filed an information against the remaining
9 defendants. Once in district court, the trial judge dismissed the information pertaining to the
10 bound-over defendants on grounds that it was vague and ambiguous. Rather than appeal the
11 dismissal, the State took the case against all defendants to the grand jury. The defendants
12 filed pretrial writs complaining about the pleading language in the indictment, among other
13 issues. Id., 955 P.2d at 184-85. The State acknowledged that it had erred by pleading
14 alternative offenses in a single count and moved to amend the indictment. Id. This motion
15 was denied by the trial court. The State appealed.

16 In affirming the trial court's denial of the motion to amend the indictment, the Nevada
17 Supreme Court noted that the proposed amendments "were more than clerical and would
18 have materially altered the indictment. We conclude that were the State to be granted leave
19 to amend the indictment so as to add previously alternately pleaded offenses as separate
20 counts, the respondents would be denied due process because it cannot be said that the grand
21 jury found probable cause on each and every amended count." Id. at 168, 955 P.2d 183.
22 Thus, amendment was denied because the proposed amendment added counts—materially
23 altering the indictment. It was not an amendment concerning theories of liability for a
24 particular count or adding greater specificity, to the charging document.

25 **III. Reckless Endangerment and Criminal Neglect of Patients**

26 Regarding counts of reckless endangerment and criminal neglect of patient, Desai
27 claims that the indictment is so vague as to violate due process. Desai argues this affects
28 COUNTS 4, 8, 11, 14, 18, 21 and 24 and 3, 7, 10, 13, 17, 20, and 23. Petition at 8.

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Desai claims that although NRS 173.075 allows charging crimes by "means unknown", such a theory cannot be used in the context of criminal negligence because the negligent act must be identified. Desai cites to no case supporting the proposition that the State is precluded from alleging a crime occurred by means unknown in crimes premised on criminal negligence. The plain language of the statute certainly does not impose such a limitation. Nevertheless, if the Court deems this theory legally faulty given the instant charges, the remedy is to strike the theory, not the indictment. See State v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978) ("[w]here, as here, a single offense may be committed by one or more specified means, and those means are charged alternatively, the state need only prove one of the alternative means in order to sustain a conviction").

Desai next complains that the indictment fails to adequately describe the aiding and abetting theory. In the indictment, the State charges aiding and abetting and describes the conduct in factual terms as follows: "by directly or indirectly counseling, encouraging, hiring, commanding, inducing or procuring" the commission of the act. Such language meets the requirements of Barren v. State, 99 Nev. 661, 668, 669, P.2d 725, 729 (1983), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 818 (2002). See also Mitchell v. State, 114 Nev. 1417, 1425, 971 P.2d 813, 819 (1998) (finding pleading which described aiding and abetting as "aiding or abetting its commission through counsel and encouragement in order to carry out the acts set forth in COUNT IV" and "aiding or abetting in its commission by acting in concert with other by taking some money from Wilma Beck and/or acting as a look-out during the entire incident" sufficient).

IV. Racketeering

With regard to certain counts, the State charged an overall count of Racketeering. NRS 207.400(1) provides as follows:

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

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1 directly or indirectly, any part of the proceeds, or
2 the proceeds derived from the investment or use
thereof, in the acquisition of:

3 (1) Any title to or any right, interest or equity in
4 real property or

5 (2) Any interest in or the establishment or
operation of any enterprise.

6 (b) Through racketeering activity to acquire or
7 maintain, directly or indirectly, any interest in or
control of any enterprise.

8 (c) Who is employed by or associated with any
9 enterprise to conduct or participate, directly or
indirectly, in:

10 (1) The affairs of the enterprise through
11 racketeering activity; or

12 (2) Racketeering activity through the affairs of
the enterprise.

13 (d) Intentionally to organize, manage, direct, supervise
14 or finance a criminal syndicate.

15 (e) Knowingly to incite or induce others to engage in
16 violence or intimidation to promote or further the
criminal objectives of the criminal syndicate.

17 (f) To furnish advice, assistance or direction in the
18 conduct, financing or management of the affairs of
the criminal syndicate with the intent to promote or
further the criminal objectives of the syndicate.

19 (g) Intentionally to promote or further the criminal
20 objectives of a criminal syndicate by inducing the
21 commission of an act or the omission of an act by a
public officer or employee which violates his
official duty.

22 (h) To conspire to violate any of the provisions of this
23 section.

24 The Nevada Racketeering statute, NRS 207.400, requires predicate crimes.
25 According to NRS 207.360, the crimes which are related to racketeering are limited.
26 Pursuant to 207.360(26), obtaining money under false pretences qualifies as such a crime as
27 does insurance fraud. NRS 207.360(30). Therefore, in the instant Indictment, the
28 Racketeering count applies only to the Insurance Fraud and Obtaining Money Under False

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1 Pretenses counts. It does not apply to the count which focus on the criminal activity that
2 caused the Hepatitis C to be transmitted to other individuals, namely Performance of an Act
3 in Reckless Disregard of Persons or Property and Criminal Neglect of Patients or the
4 comprehensive Theft count.

5 Under the Racketeering statute, as applied to Petitioner Desai, he was a knowing
6 owner/participant in the criminal enterprise of defrauding insurance companies and patients
7 by falsifying the anesthesia times on the procedures. He directly participated in the
8 racketeering activity by having others falsify the anesthesia times on the endoscopies or
9 colonoscopies. He also profited from this activity because owned the enterprise.

10 On the days charged in the indictment, the Endoscopy Center of Southern Nevada
11 treated sixty-five (65) and sixty-three (63) patients respectively. GJ5 at 137. The procedure
12 times noted in the anesthesia records are almost all thirty-one (31) minutes or over. The
13 Center had two (2) procedure rooms on each of the days. With those numbers, the Center
14 billed for more hours than they were actually open for business on each day.

15 Desai claims that the pleading of the RICO count is defective in three respects: 1)
16 that it does not specify the two predicate crimes or otherwise allege with specificity the
17 elements of the predicate crimes necessary for a racketeering charge; 2) the pleading does
18 not particularize the acts with regard to each defendant; 3) the pleading improperly charges a
19 violation of NRS 207.400(1)(a).

20 The indictment properly alleged two predicate crimes. The first predicate crime
21 alleged in the indictment is Insurance Fraud. The second is Obtaining Money Under False
22 Pretenses. In the RICO count, the predicate crimes are alleged as follows: "by directly or
23 indirectly causing an/or pressuring the employees and/or agents of the Endoscopy Center of
24 Southern Nevada to falsify patient anesthesia records from various endoscopic procedures;
25 and/or to commit insurance fraud by directly or indirectly submitting said false anesthesia
26 records to various insurance companies for the purpose of obtaining money under false
27 pretenses from said insurance companies and/or patients; said fraudulent submissions
28

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1 resulting in the payment of monies to Defendants and/or their medical practice or enterprise,
2 which exceeded the legitimate reimbursement amount allowed for said procedures.”

3 In State v. Hancock, 114 Nev. 161, 955 P.2d 183 (1998), the Nevada Supreme Court
4 discussed the notice required for an indictment. In Hancock, the indictment at issue alleged
5 racketeering and stated the defendants agreed to the commission of two racketeering acts. In
6 listing the acts, the indictment alleged the defendants violated “NRS 205.380 (obtaining
7 money under false pretenses) and/or NRS 90.570(1) (committing securities fraud by making
8 untrue statements or omitting statements of material fact in connection with an offer to sell a
9 security) by defrauding (or attempting to defraud) Desiano, Kanes, and Williams into
10 investing in the gold scheme.” The Nevada Supreme Court found the pleading defective
11 because it did not specify which respondent made which untrue statements or material
12 omissions to which victims. Id. at 188, 955 P.2d at 186.

13 In Hale v. Burkhardt, 104 Nev. 632, 764 P.2d 866 (1988), the Nevada Supreme Court
14 analyzed a civil RICO pleading and found the pleading defective because although criminal
15 complaint alleged criminal schemes, it did not alleged a false pretense. The court noted, “we
16 are unable to determine just what, if any, untrue representations Burkhardt is charged with
17 having criminally made to Hale. Even where conclusory statements hint at what might relate
18 to some kind of misrepresentation, the statements are so lacking in content as to render them
19 unintelligible as accusatory averments. Absent allegations of false pretenses, pleading of the
20 so-called predicate crimes is jurisdictionally deficient.” The court explained the pleading
21 needed to when, where, and how the predicate crimes occurred.

22 By contrast, the instant pleading provides when the predicate crimes occurred: June 3,
23 2005 through May 5, 2008. The indictment indicates where the crime occurred, not simply
24 Clark County, but through the enterprise of the Endoscopy Center of Southern Nevada. The
25 indictment also indicates how: by falsifying anesthesia records from procedures, which
26 amounts to insurance fraud, and obtaining money under false pretenses by submitting
27 records to insurance companies for reimbursement which exceeded the legitimate amount
28 allowed for the procedure.

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Desai also claims that the RICO count pleading is defective because it fails to utilize the words "intent to defraud" when describing the underlying or predicate crimes. In State v. Benigas, 95 Nev. 358, 594 P.2d 724 (1979), the district court dismissed an indictment which alleged elements of two types of embezzlement in a single count. By way of indictment, the State charged defendants with embezzlement and conspiracy to commit embezzlement. The wording of the indictment was: Defendants did then and there wilfully, unlawfully and feloniously embezzle \$100.00, or more, lawful money of the United States, or the equivalent thereof, to-wit: gaming chips, the property of . . . Hotel . . . in the following manner . . . Defendants, as agents and employees of . . . Hotel, being entrusted with gaming chips for the purpose of conducting gaming activities, to-wit: baccarat, did appropriate and use said chips for purposes other than that for which the same was entrusted with intent to steal the same and defraud the owner thereof." The defendants successfully persuaded the trial court that the indictment failed to inform them of the nature and cause of the accusations against them. Id. at 359, 594 P.2d at 725.

The Nevada Supreme Court noted that the type of embezzlement charged by the State did not require an intent to steal. Id. at 360, 594 P.2d at 725. Even though that language was included in the indictment, the high court did not find the indictment provided insufficient notice. Instead, the court explained, "[i]ndictments, such as these before us, which set out statements of the acts constituting the offenses in such a manner as to inform the accused with reasonable certainty of the specific offense with which the is charged are sufficient." Id.

Based on the above case law, it is clear that the RICO count in the instant case provides Desai with adequate notice of the State's allegations of the predicate offenses. With regard to the instruction of Grand Jury as to the applicable law, the State specifically instructed the Grand Jury on the requirements of NRS 207.360 and included as Exhibit 2 the entirety of the racketeering statute during that instruction on the law. The passages infra illustrate the fact that the State properly instructed the grand jury on the racketeering statute and further, that the State gave specific instruction as to which predicate crimes were to be

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1 considered and the specific findings which were required before the Grand Jury could find
2 probable cause regarding the racketeering charge.

3 We'll start off by looking specifically at NRS 207.360. This is
4 entitled Crime related to racketeering defined. And in this it's
5 the commission of, attempt to commit, or conspiracy to commit
6 any of the following crimes. The ones that apply, there's a
7 whole list of them under this statute, the one's that apply in this
8 case which we have already gone over and which you have to
9 make specific findings about, there are two, insurance fraud and
10 obtaining money under false pretenses. GJ1 at 22-23. (emphasis
11 added)

12 The grand jury was then again specifically instructed as to the need for the grand jury to
13 make specific findings regarding these predicate crimes. The grand jury was instructed as
14 follows:

15 So in this particular instance we have two predicate crimes under
16 the racketeering statute which are charged, we don't have to have
17 two, we only have to have one, but in this case there are two, and
18 in order for you to come back with a finding, under the
19 racketeering statute you have to find at least that we have
20 brought forth enough evidence to support our burden of probable
21 cause as to one or the other or both, but you have to make a
22 finding that we've either, shown obtaining money under false
23 pretenses or insurance fraud. Is that clear? If we don't show that
24 you don't even get to the rest of the analysis. GJ1 at 23-24.
25 (emphasis added)

26 . . . So in review on the racketeering, remember, two predicate
27 crimes are important. In this case, the two that are charged are
28 obtaining money under false pretenses and insurance fraud.
29 There has to be at least two acts, either two of one, or one of each
30 of the two I've described to you. Those are the ones that are
31 charged, those are the ones that you're looking for as the
32 information is presented to you to see if the State has supported
33 its argument. GT1 at 26. (emphasis added)

34 Are there any questions at this point regarding any of the statutes
35 as we've gone over them?

36 And again I see no indications, hands up by any of the Grand
37 Jurors indicating a question.

38 As we go through this, if there are questions of law at any time
39 please ask. We will be revisiting this with you. I'll ask you
40 multiple times to make sure that everybody is clear on what it is
41 we are asking you to look at in the statutes that applies to the
42 various charges as outlined in the criminal Indictment. GT1 at
43 26-27.

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1 In this section, Desai also claims that he has inadequate notice of the State's aiding an
2 abetting theory. Again, the language utilized in the indictment has been deemed sufficient
3 by the Nevada Supreme Court. See supra.

4 Desai claims that the indictment alleges racketeering through NRS 207.400(1)(a),
5 which criminalizes receiving funds from racketeering and investing those funds in property
6 or any enterprise. According to Desai, the indictment fails to include language alleging the
7 investment of racketeering funds received.

8 The indictment states: "receive any proceeds derived, directly or indirectly, from
9 racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds
10 from the racketeering activity." (emphasis added). Moreover, the use of funds obtained from
11 racketeering activity for investment (NRS 207.400(1)(a)) is not the only conduct prohibited
12 by the statute or alleged in the indictment. Sections (b) through (h) criminalize maintaining
13 an interest or control of a criminal enterprise, being an employee of the enterprise and
14 participating in the racketeering activity, organize or manage a criminal syndicate, induce
15 others through violence to promote the syndicate, promote the syndicate with advice and
16 financing, promote the syndicate by attempting to induce a public official from violating his
17 official duty, and to conspire to violate this section.

18 **V. The State Elicited How Transmission Occurred**

19 Lastly, Desai argues that the indictment must be dismissed because the State did not
20 present sufficient evidence to establish that particular negligent acts caused the transmission
21 of the disease.

22 At the grand jury, the State presented the testimony of the local Health District and
23 CDC investigators who explained how the transmission occurred. The investigators ruled
24 out other means of transmission. GJ3A at 71. They also saw the reuse of the Propofol
25 bottles. GJ3 at 34. With regard to Mathahs, they saw him reuse bottles of Propofol on more
26 than one (1) patient after he had administered more than one dose of it to a previous patient.
27 GJ3 at 35. This is contrary to aseptic technique. With regard to Lakeman, he not only
28 admitted to the conduct but also indicated his awareness of the risk. GJ3 at 91.

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1 On July 25, 2007, Lakeman treated source patient Ziyad, who was Hepatitis C
2 positive. Lakeman administered more than once dose of Propofol to Ziyad. Thereafter,
3 Lakeman treated victim Washington and violated universally accepted safety precautions by
4 administering Propofol which he had previously contaminated while treating patient Ziyad.
5 Lakeman, therefore, transmitted Hepatitis C to Washington.

6 On September 21, 2007, Mathahs treated the initial source patient and contaminated
7 the anesthesia vial. At that point, however, both he and Lakeman violated universally
8 accepted safety precautions by reusing contaminated vials of Propofol on subsequent patient
9 and serially transmitting the Hepatitis C virus to those patients. They both, therefore,
10 engaged in criminally negligent acts. Desai's liability does not stem from directly
11 committing the act as he did not personally administer the Propofol. His liability is as an
12 aider and abettor and co-conspirator.

13 In the pleading, in addition to the Propofol injections, the State lists other negligent
14 acts which took place at the Center that the Health District studied in an effort to determine
15 the mechanism of transmission. Desai's position is that because there was insufficient
16 evidence to support the contention that those other acts causes the transmission, the
17 indictment must be dismissed. This is incorrect. A conviction, not simply a probable cause
18 determination, can be sustained if one of the specified means of commission is valid. State
19 v. Kirkpatrick, 94 Nev. 628, 630, 584 P.2d 670, 671-72 (1978) ("[w]here, as here, a single
20 offense may be committed by one or more specified means, and those means are charged
21 alternatively, the state need only prove one of the alternative means in order to sustain a
22 conviction").

23 CONCLUSION

24 The Endoscopy Center of Southern Nevada engaged in practices that endangered
25 patients every day. The Center also defrauded patients and their insurance companies. The
26 practice was able to engage in these crimes because Dr. Desai and CRNAs Lakeman and
27 Mathahs agreed to cut corners on safety in order to avoid discarding unused medicine and
28 supplies. The practice was economically successful not just because it was frugal with

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1 regard to wasting supplies, but also because the parties agreed to overbill their patients and
2 the patients' insurance companies. In all these acts, Petitioner Desai, like his co-
3 conspirators, has criminal liability.

4 DATED this 13th day of April, 2012.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar # 001565

9 BY /s/ Pamela Weckerly

10 Pamela Weckerly
11 Chief Deputy District Attorney
12 Nevada Bar #006163

13 CERTIFICATE OF FACSIMILE TRANSMISSION

14 I hereby certify that service of Return To Writ of Habeas Corpus, was made this 13th
15 day of April, 2012, by facsimile transmission to:

16 Richard A. Wright, Esq.
17 382-4800

18 BY: /s/ Stephanie Munoz

19 Stephanie Munoz
20 Employee of the District Attorney's Office
21
22
23
24
25
26
27
28

EXHIBIT 6

EXHIBIT 6

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FILED

MAY - 4 2012

Alvin D. Johnson
CLERK OF COURT

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,

10 Plaintiff,

11 vs.

12 DIPAK KANTILAL DESAI, #1240942,

13 Defendant.
14

Case No. C265107
Dept. No. XXI

15 **DEFENDANT'S REPLY TO**
16 **STATE'S RETURN TO WRIT OF HABEAS CORPUS**

17 DIPAK KANTILAL DESAI, by and through his attorneys, Richard A. Wright and
18 Margaret M. Stanish, WRIGHT STANISH & WINCKLER, replies to the State's response to the
19 defendant's Petition for Writ of Habeas Corpus and Alternative Motion to Dismiss Indictment.

20 DATED this 4th day of May 2012.

21 Respectfully Submitted,

22 WRIGHT STANISH & WINCKLER

23
24 By: *Richard A. Wright*
25 RICHARD A. WRIGHT
26 Counsel for DESAI
27
28

1 **1. AMENDMENT OF THE FACIALLY DEFECTIVE COUNTS WOULD**
2 **SUBSTANTIALLY PREJUDICE THE DUE PROCESS RIGHTS ASSOCIATED**
3 **WITH THE GRAND JURY PROCESS**

4 **A. Introduction**

5 The facial defects in the criminal negligence and racketeering counts violate the due process
6 rights to fair notice and grand jury process.¹ See, Desai's Memorandum in Support of Petition for
7 Habeas Corpus and Alternative Motion to Dismiss Indictment, pp. 1-2, 11 [hereinafter cited as
8 "Defendant's Memorandum"]. The defendant replies to the State's argument that it should be
9 permitted to amend the indictment to cure any deficiencies found by this Court. The defendant will
10 respond to the timeliness of his petition of habeas corpus and alternative motion to dismiss.

11 By way of overview, the State wholly ignores the procedural posture of this case and the
12 prejudice inuring to due process requirements governing the return of indictment by the grand jury.
13 Desai brings a pretrial challenge to a facially defective indictment returned by the grand jury. Desai
14 also challenges the criminal negligence counts based on lack of probable cause pertaining to the
15 essential *actus rea* elements. As discussed more fully below, the lack of probable cause is
16 intertwined with the prejudice inuring from the facially defective criminal negligent counts.

17 Like all defendants charged through the grand jury process, Desai is entitled to an indictment
18 that clearly and concisely states the elements of the offense and means by which he allegedly
19 committed the offenses *as determined by a concurrence of 12 or more jurors -- not the State's or*
20 *Court's best guess as to what was on the jurors' minds when they returned the indictment. See,*
21 Russell v. United States, 369 U.S. 749, 770 (1962); Simpson v. Eighth Judicial Dist. Ct., 88 Nev.

22
23 ¹ To clarify the defendant's "Memorandum in Support of Petition for Habeas Corpus
24 and Alternative Motion to Dismiss Indictment," the defendant moves to dismiss the racketeering
25 charge in Count 1; the criminal neglect of patient charges in Counts 4, 8, 11, 14, 18, 21, and 24;
26 and the reckless endangerment charges in Counts 3, 7, 10, 13, 17, 20, and 23. The defendant
27 does not seek dismissal of the insurance fraud charges in Counts 2, 5, 6, 9, 12, 15, 16, 19, 22, and
28 28.

654, 660, 503 P.2d 1225, 1229 (1972); State v. Hancock, 114 Nev. 161, 167-68, 955 P.2d 183, 187 (1998).

B. The Substantial Right to Due Process in Grand Jury Proceedings

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 requirements 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 grand jury's determination be based upon probable cause. *See, Sheriff, Clark County v. Hughes*, 99 Nev. 541, 543, 665 P.2d 242, 244 (1983). 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).

An amendment which necessarily requires the State or Court to speculate upon what facts the grand jury found to establish probable cause substantially impairs the "basic protection which the guaranty of the intervention of a grand jury was designed to secure." *See, Id.*

The State ignores the due process underpinnings of Hancock and attempts to distinguish it on the facts. *See, State's Return*, p. 19. Hancock prohibits amendments to an indictment that would require the Court to second guess the grand jurors' probable cause determination. In Hancock, the State sought leave to amend the indictment by placing into separate counts offenses

1 that were originally charged in the alternative within a single count. In support of its motion for
2 leave to amend, the State relied on Jenkins v. District Court, 109 Nev. 337, 339-40, 849 P.2d 1055,
3 1057 (1993), which permitted amendment of a criminal information to separate alternatively
4 pleaded offenses in separate counts. Hancock, 114 Nev. at 167, 955 P.2d at 187. It also relied upon
5 NRS 173.075, which reads in pertinent part: "The court may permit an indictment . . . to be
6 amended at any time before verdict or finding *if no additional or different offense is charges and*
7 *if substantial rights of the defendant are not prejudiced.*" Id. [Emphasis in original.]

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

20 C. Prejudice to Grand Jury Due Process by Amendment in the Instant Case

21 Contrary to the due process ruling in Hancock, the State urges the Court grant leave to
22 correct the deficiencies on the face of the indictment that would impinge upon the due process
23 guarantees of the grand jury process.² To accomplish the task of amending the indictment to a

24
25 ² The State specifically proposes to strike the "theory" of criminal neglect of patients "by
26 methods unknown" if the Court find this language defective. It does not specify what other amendments
27 it would make to cure the other defects in the indictment. The defendant, therefore, reserves his right to
28 present additional arguments and points and authorities in opposition to other amendments that the State
may more specifically propose.

1 point where it is clear and concise, the State and this Court would need to second guess what was
2 on the minds of the grand jury when they returned the facially defective indictment. With respect
3 to the criminal negligence counts, this would necessitate the State and Court to speculate upon
4 which of the alternatively alleged acts of negligence the grand jury based its probable cause finding
5 when it returned the indictment. An amendment to the criminal negligence and racketeering counts
6 would also require speculation as to what facts, if any, did the grand jurors find as to which
7 defendant and whether said facts were established by direct commission, aiding and abetting, or by
8 participation in a conspiracy. In essence, the amendment would require a vast rewrite of the
9 challenged counts and usurp the function of the grand jury.

10 The defects in the criminal negligence counts are further compounded by the inclusion of
11 allegations of several negligent acts, pleaded in the alternative, that were not supported by sufficient
12 evidence linking each of the alleged acts as the proximate cause of the hepatitis transmission.
13 Relying on the grand jury transcripts, the State now asserts that Propofol injections allegedly
14 administered by the CNRA two co-defendants were the proximate cause of the hepatitis transmission
15 and Desai's liability is based on aider and abettor and conspiracy. The indictment, however, does
16 not so concisely state this theory and is drafted in such a way to permit the State to alter its theory
17 during trial.

18 In a feeble attempt to explain the inclusion of alternatively pleaded acts, the State writes,
19 "In the pleading, in addition to the Propofol injections, the State lists other negligent acts which
20 took place at the Center that the Health District studied in an effort to determine the mechanism of
21 transmission." State's Return, pp. 26-27. The indictment makes no such distinction. On its face,
22 the indictment alleges, in the alternative, that each of the numerous negligent acts and "methods
23 unknown" caused the hepatitis transmission.

24 If the State seeks to "clean up" the criminal negligence counts to allege its above-stated
25 theory, this Court would need to materially alter the indictment by speculating which of the many
26 alternatively pleaded acts, including "by methods unknown," were the basis of the grand jurors'

determination. It would also need to guess upon which facts, if any, did the grand jurors rely when determining which defendant did what act by direct commission, aiding and abetting, or by participation in a conspiracy. The Court would also have to engage in this type of guessing game for amendment of the racketeering count.

Amendments to the indefinite criminal negligence counts would be especially prejudicial because the specific negligent acts or omissions define the essential *actus rea* elements in NRS 202.595 and 200.495. See, Defendant's Memorandum for discussion on elements of the criminal negligence statutes, pp. 3-7. These statute generally prohibit criminal negligence resulting in substantial bodily harm. Since the statutes themselves do not define the specific facts that constitute the offense, due process requires the indictment to allege facts that particularize the criminal act. See, 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) ("If 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."). To amend these counts, this Court would need to pick and choose what allegations necessarily form the essential elements of the criminal negligence and, thereby decide how to charge each of the defendants. This would usurp the role of the grand jury under the circumstances of this case.

D. The State's Reliance on Inapposite Case Law

The State's general response to the above constitutional defects is essentially "so what," any deficiency in the indictment can be cured by amendment without prejudice to the defendant; and the inclusion of allegations unsupported by evidence before the grand jury can be simply ignored since there was evidence supporting at least one of the alleged negligent acts. See, State's Return, pp. 17-20, and 26-27.

The State primarily relies upon six cases to support its argument for amendment. In discounting the inclusion of allegations of negligent acts unsupported by probable cause, the State primarily relies upon one of these cases, State v. Kirkpatrick, 94 Nev. 628, 584 P.2d 670 (1978).

1 See, State's Return, pp. 26-27. These cases are inapposite to the procedural posture of the instant
2 case. Desai seeks to protect his due process right to fair notice and grand jury process through this
3 pretrial challenge to the facial validity of a criminal indictment. He does not waive the facial
4 defects in the indictment. See, NRS 174.105 (raising objections to defects in the prosecution before
5 trial and failure to present objections constitute waiver thereof).

6 Five of the six cases do not implicate the due process right to grand jury because they
7 involved amendments to criminal informations or notice of death penalty: Shannon v. State, 105
8 Nev. 782, 783 P.2d 942 (1989)(amending information during trial); State v. Eighth Judicial Dist.
9 Ct., 116 Nev. 374, 997 P.2d 126 (2000)(amending information before trial); Grant v. State, 117
10 Nev. 427, 24 P.3d 761 (2001)(same); Kirkpatrick (pretrial challenge to sufficiency of information);
11 and Hidalgo v. Eighth Judicial Dist. Ct., 124 Nev. 330, 184 P.3d 369 (2008)(amending notice of
12 death penalty). None of these cases addressed the grand jury rights implicated in the instant case.

13 The sixth case upon which the State relies is Benitez v. State, 111 Nev. 1363, 904 P.2d
14 1036 (1995). In Benitez, the defendant was originally charged with attempted murder but pleaded
15 guilty to the lesser included offense of battery with use of a deadly weapon. The indictment was
16 amended in open court to accommodate the plea. 111 Nev. 1364, 904 P.2d at 1363. In a post-
17 conviction petition, the defendant in Benitez claimed that his counsel was ineffective for failing to
18 inform him that the statute of limitations had run on the lesser-included offense. Id. The Benitez
19 court denied the petition on the grounds that the amendment involved a lesser-included offense of
20 the pending attempted murder charge and, therefore, the statute of limitation did not bar the battery
21 count. Id. at 1365, 904 P.2d at 1038. Thus, Benitez did not involve a pretrial amendment requiring
22 the district court to speculate on the probable cause finding of the grand jury.

23 Finally, the State relies on Kirkpatrick to support its proposal to strike the negligence "by
24 methods unknown" allegation. It also relies on this case for authority for the apparent proposition
25 that it is acceptable to allege negligent acts unsupported by probable cause so long as at least one
26 of the means of committing the crime is valid. See, State's Return, p. 20 & 27.

1 The information in Kirkpatrick charged the defendant with robbery, and use of a deadly
2 weapon. It charged the robbery by setting forth alternative means: the defendant took property
3 “from the person of Jaye Joseph, Or in her presence, by means of force Or violence Or fear of
4 injury.” 94 Nev. at 629-30, 584 P.2d at 671[emphasis in the original]. The defendant filed a pretrial
5 motion to dismiss the information, arguing that the pleading in the disjunctive failed to give him
6 adequate notice of the offense and subjected him to double jeopardy. Id. The Kirkpatrick Court
7 rejected the defendant’s due process challenge, holding “Where, as here, a single offense may be
8 committed by one or more specified means, and those means are charged alternatively, the state
9 need only prove one of the alternative means in order to sustain a conviction.” Id. at 630, 584 P.2d
10 at 671-72. The Court concluded that the defendant had adequate notice of the charged offense
11 whether it was alleged in the disjunctive or conjunctive. Id.

12 Again, Kirkpatrick does not implicate the grand jury rights since it involved an information.
13 Nor, did the case involve a challenge of insufficient evidence supporting the alternative means at
14 the preliminary hearing. Thus, Kirkpatrick has little value in the analysis of the instant case. If
15 there is any persuasive value in Kirkpatrick, it is the stark contrast of the concise use of alternative
16 charging in Kirkpatrick compared to the indefinite and confusing alternative charging in the instant
17 case.

18 While Kirkpatrick permits the concise and clear use of alternative charging, its progeny
19 noted in dicta that an issue arises as to “whether a charging document alleging numerous alternative
20 theories of prosecution or means by which a crime has been committed would be invalid as failing
21 to provide an accused with adequate notice.” Sheriff v. Aesoph, 100 Nev. 477, 479 n. 3, 686 P.2d
22 237, 239 n. 3 (1984). In the instant case, the multiple pleading of both alternative means and
23 alternative theories of prosecution as to three defendant blatantly violates the due process right of
24 fair notice, especially when several of the alternative means were not supported by probable cause
25 in the grand jury.

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

2. The Pretrial Challenge to the Facially Defective Counts is Properly before this Court

The State argues that the defendant's petition of habeas corpus is untimely and, therefore, should not be considered. State's Return, pp. 13-14. It correctly acknowledges, however, that the petition primarily challenges the adequacy of the indictment, including the challenge to the lack of probable cause that impacts on the criminal negligence counts. State's Return, p. 14.

In an abundance of caution to protect Desai's due process rights, defense counsel has characterized this challenge to the indictment as a petition of habeas corpus and alternative motion to dismiss the indictment. Other than insufficiency of the evidence to warrant an indictment, a defendant must raise "objections based on the defects in the institution of the prosecution" or else such objections are waived. NRS 174.105. Motions to dismiss must be raised before trial. NRS 174.075. Thus, the motion is properly before this Court as a motion to dismiss facially defective counts.

To the extent that the pretrial pleading raises insufficiency of evidence before the grand jury, the pleading is also characterized as a habeas corpus petition. It is timely given the fact that the case was suspended pending the competency evaluation and determination and the stipulation of the parties. The following chronology relates to defense counsel's efforts to preserve the right to file a habeas corpus petition. This chronology was substantially set forth in the Petition for Habeas Corpus. Additional detail is provided below, some of which is derived from counsel's personal notes of the court proceedings and communications with the State.

The grand jury indictment was returned on or about June 4, 2010. The undersigned and prosecutor agreed on June 22, 2010, that the defense could have a 60-day extension to file the petition and the parties would relate the agreement to the district court on July 21, 2010. This

1 agreement was memorialized in an email from defense counsel to the prosecutor, a copy of which
2 will be made available should the Court deem it necessary.

3 On July 21, 2010, the trial judge ordered the defendant to be transferred to competency court
4 upon motion of the State. By operation of law, the prosecution was stayed as to the defendant. *See*,
5 NRS 178.405. On September 20, 2010, defense counsel requested a status check to address the
6 filing of a habeas corpus petition. Counsel made a record of the July 22, 2010 agreement with the
7 prosecutor regarding the 60-day extension and noted that the competency proceedings suspended
8 the prosecution pursuant to NRS 178.405. The writ would have to be filed following the
9 determination of competency. On January 19, 2011, Judge Mosely acknowledged that the
10 defendant was unable to assist in the preparation of the writ and, therefore, no writ was filed and
11 could not be scheduled until the competency issue was resolved.

12 On February 8, 2011, the competency court found that Desai was incompetent and ordered
13 him to surrender to custody on March 17, 2011, to be transferred to Lake's Crossing. Following
14 a competency hearing held on January 27, 2012, the competency court entered an order finding
15 Desai to be competent on February 2, 2012. Judge Mosely announced his retirement and the case
16 was subsequently assigned to the Honorable Valerie Adair on March 2, 2012. At the status hearing
17 on March 8, 2012, the defense counsel explained that the writ of habeas corpus had not been filed
18 due to the competency proceedings but would be filed in the upcoming weeks. On March 30, 2012,
19 the Petition for Writ of Habeas Corpus and Memorandum in Support of Petition for Writ of Habeas
20 Corpus and Alternative Motion to Dismiss Indictment was filed.

21 Under the above recited circumstances, the pretrial challenge to the indictment is properly
22 before this Court.

23 **3. Conclusion**

24 Based on the foregoing and Memorandum previously submitted, the Court should dismiss
25 the defective criminal negligence and racketeering counts. This Court must jealously protect the
26
27
28

1 right of due process to fair notice and grand jury process. It cannot usurp the role of the grand jury
2 to salvage a constitutionally defective indictment.

3
4 DATED this 4th day of May 2012.

5 Respectfully Submitted,

6 WRIGHT STANISH & WINCKLER

7
8 By: 

9 RICHARD A. WRIGHT
Counsel for DESAI

10
11 **CERTIFICATE OF SERVICE**

12 I HEREBY CERTIFY that on the 4th day of May, 2012, I caused a copy of the foregoing
13 **DEFENDANT'S REPLY TO STATE'S RETURN TO WRIT OF HABEAS CORPUS** to be
14 hand delivered to the following persons at their last known address as listed below:

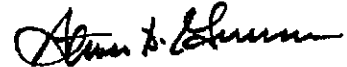
15 Michael V. Staudaher
16 Chief Deputy District Attorney
200 Lewis Ave
17 Las Vegas, NV 89101

18
19 By: 

20 An employee of Wright Stanish & Winckler
21
22
23
24
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26
27
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EXHIBIT 7

EXHIBIT 7



CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

STATE OF NEVADA,)	
)	
Plaintiff,)	CASE NO. C265107-1
)	CASE NO. C265107-3
vs.)	DEPT. NO. XXI
)	
DIPAK KANTILAL DESAI,)	
KEITH H. MATHAHS,)	
)	Transcript of
Defendants.)	Proceedings

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS
DEFENDANT'S JOINDER TO PETITION FOR WRIT OF HABEAS CORPUS AND
ALTERNATIVE MOTION TO DISMISS INDICTMENT

THURSDAY, MAY 10, 2012

APPEARANCES:

FOR THE STATE:

PAM WECKERLY, ESQ.
MICHAEL V. STAUDAHER, ESQ.
Chief Deputy District Attorneys

FOR THE DEFENDANTS:

RICHARD A. WRIGHT, ESQ.
MARGARET M. STANISH, ESQ.
MICHAEL V. CRISTALLI, ESQ.
FREDERICK A. SANTACROCE, ESQ.

RECORDED BY: JANIE OLSEN, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

JRP TRANSCRIPTION

1 LAS VEGAS, NEVADA, THURSDAY, MAY 10, 2012, 11:16 A.M.

2 * * * * *

3 THE COURT: All right. We are -- and Dr. Desai is
4 present and we have a joinder filed as well. And this is the
5 time for the hearing on the habeas petition, as well as the
6 motion to dismiss.

7 And I have viewed everything, and just a couple of
8 preliminary comments, I guess, which may or may not help to
9 focus and direct the arguments. I have read everything with
10 respect to the issues as to the sufficiency of the evidence
11 that were raised by way of the petition. I believe that those
12 matters have to be raised by way of petition, and I'm
13 concerned that, in fact, they are time-barred.

14 With respect to the issues regarding the pleading in
15 the amended indictment and the sufficiency of the notice and
16 what have you, I agree that those could be raised by way of a
17 motion to dismiss and so the Court is comfortable entertaining
18 argument on that.

19 However, as I said, in terms of sufficiency of the
20 evidence with respect to the presentation before the grand
21 jury, I think that that has to be raised by way of petition,
22 and I don't see a justification for being outside the window
23 that the defense has given. So that's where we are.

24 Mr. Wright, if you want to address the timing issue
25 as to the sufficiency you may do so. As I said, you know, I

JRP TRANSCRIPTION

1 think you can raise the other claims by way of a motion to
2 dismiss and so I'm perfectly comfortable hearing and
3 litigating that portion of your argument at this time.

4 MR. WRIGHT: Okay. I'll -- I'll start on the
5 timeliness or the time frame for the writ.

6 THE COURT: Right. Which, again, only, in my view,
7 concerns the evidence and the sufficiency there before the
8 grand jury.

9 MR. WRIGHT: Well, the --

10 THE COURT: Not -- and obviously we can consider
11 that separately as it goes to the notice and whether or not
12 the State needs to amend, and if they do need to amend,
13 whether or not they should be given that opportunity. So
14 that's a different issue and we certainly can look to the
15 transcript for that issue.

16 MR. WRIGHT: Okay. On the timeliness I think it was
17 just laid out and the Court can rule on it. I'm not going to
18 belabor it. The indictment, I think, was June 4th the way I
19 recall it. By June 22nd I had discussed with Mr. Staudaher an
20 extension of time to file a writ. And I talked to him June
21 22, 2010, I think, and he agreed to an extension of about 60
22 days which I confirmed to him by email. And then on June 22nd
23 Dr. Desai was referred to competency court.

24 THE COURT: Right. And that --

25 MR. WRIGHT: And pursuant --

1 THE COURT: -- stayed everything.
2 MR. WRIGHT: -- to statute, the way I read it,
3 everything is suspended as to him.
4 THE COURT: And I agree.
5 MR. WRIGHT: Okay. And then he remained in
6 competency court, oh -- or -- or he remained suspended, for
7 lack of a better word, the proceedings against him until he
8 was adjudicated competent. That was February 2nd, I think,
9 this year.
10 THE COURT: Right.
11 MR. WRIGHT: And then, to me, if you add the 60 days
12 that was agreed to end of February 2nd because he was
13 unavailable, and then I came before this Court, I think around
14 March 2nd, or March, it took a month. Judge Mosley retired --
15 THE COURT: Right.
16 MR. WRIGHT: -- and it was reassigned. And I told
17 the Court I'd be filing writs and motions to this mess because
18 they had not been filed in a couple of weeks, and I filed it
19 in a couple of weeks. So I -- and -- and I raised it with
20 Judge Mosley on a couple of occasions just to confirm that I
21 wasn't doing the writ and everything was stayed as to Dr.
22 Desai.
23 THE COURT: Are you saying you confirmed it with
24 Judge Mosley that you didn't have an obligation to count the
25 days from the time Dr. Desai was returned from mental health

1 court -- I'm sorry, was found competent?

2 Because I would count that that would be the date
3 that we would start counting, regardless of the fact that
4 Judge Mosley was retiring and you knew the case had to be
5 assigned because regardless of where the case was assigned,
6 you knew that you were going to be filing a writ.

7 So, to me, you look to the day that Dr. Desai was
8 found -- when the case again begins, for lack of a better
9 word, when Dr. Desai is found to be competent even though you
10 knew Judge Mosley wouldn't be hearing it. To me, that has no
11 impact on the timing. You agree?

12 MR. WRIGHT: Yeah.

13 THE COURT: Okay. All right. So basically what
14 you're saying is you started counting the 60 days and you felt
15 that the 60 days would begin anew based on your discussions
16 with Mr. Staudaher. Is that essentially what you're saying?

17 MR. WRIGHT: Correct. When I spoke with him I said
18 about 60 days. That's what I said in my email. He agreed
19 with that and he says he wouldn't be a stickler about it.

20 THE COURT: Mr. Staudaher, do you want to respond on
21 the --

22 MR. STAUDAHER: Certainly, Your Honor.

23 THE COURT: -- timing issue?

24 MR. STAUDAHER: On the timing issue. To -- to a
25 large degree he is correct that back then he had asked me

1 early on for some additional time. I agreed to that. I said
2 I wouldn't -- I wouldn't be -- you know, give him a hard time
3 about that.

4 However, what he failed to mention is that we were
5 in court when he raised the issue of staying the entire case.
6 And I -- it was the State's position at that time that even
7 though he -- or Dr. Desai was going to go up to Lake's
8 Crossing potentially, or at least we were going to shift it
9 over to competency court before that ever was contemplated,
10 that that was not a reason to stay a determination of whether
11 or not there was probable cause at the grand jury.

12 I made it very clear that at that point that I felt
13 that we should be going forward. I did not extend any
14 additional 60-day window or say that he could then have his 60
15 days start when he returned once a determination was made in
16 competency court. At that point I felt that we should go
17 forward.

18 He was successful before Judge Mosley in having the
19 entirety of the case stayed, but I don't think there was any
20 question that I wanted it to move forward within that window
21 and that I wasn't saying that I would give him two years and
22 then give him another 60 days or 70 days or whatever he
23 wanted.

24 After Dr. Desai was returned from Lake's Crossing,
25 he never contacted me again to ask me for any extension or to

1 have a specific date by which he -- he could reply. I would
2 not at that time granted that given the time period in
3 question that we had gone through up to that point and at
4 least where we had been in the case.

5 So I think that he is correct at the time that
6 things started that there was an offer of an extension for a
7 period of time, but that long expired and certainly I believe
8 he was aware of it in court when we discussed the matter.

9 THE COURT: All right.

10 Mr. Wright, anything else on that point?

11 MR. WRIGHT: No.

12 THE COURT: All right. It seems to me that given
13 the history of the case and the fact that there was no further
14 communication between the defense and the State when Dr. Desai
15 was returned from competency court granting another extension
16 of 60 days, and based on the fact that an objection had been
17 made by the State in front of Judge Mosley and the State had
18 indicated their desire to go forward with adjudicating the
19 issue of the sufficiency of the evidence and the presentation
20 before the grand jury, it seems to me that at that point it
21 would've been clear that the time started running, the 21 days
22 from the time that Dr. Desai was returned and found to be
23 competent in front of Judge Mosley.

24 And we're not talking about a week of time here,
25 just a few days difference. It was a relatively substantial

1 amount of time between when the writ was filed and -- it's not
2 one or two days or three days is what the Court's saying. So
3 I think that in view of the history of the case as I
4 understand it, it seems that you largely agree on what
5 happened.

6 I think it is time-barred as to, again, the one
7 issue that would've had to be raised by petition. With
8 respect to the other issues, as I said at the outset, you can
9 bring those by way of a motion to dismiss at any time. So the
10 Court is perfectly comfortable hearing those issues and
11 entertaining argument and ruling on that today.

12 MR. WRIGHT: Okay.

13 THE COURT: All right? So you may proceed, this
14 being your motion.

15 MR. WRIGHT: Okay. Going forward it really doesn't
16 change my motion. I mean, because the State, as I read their
17 reply, concedes that -- talking about the criminal negligence
18 counts, that the only two there was evidence of would be
19 number one and number two, and the other five allegations
20 there was no evidence of.

21 THE COURT: Right. And that's -- I guess I had a
22 question for the State. I mean, it -- and I'm sorry to cut
23 you off, but -- and I -- I think I alluded to this when we
24 were first in here on this on the charging. It seemed pretty
25 clear that it was the use of the propofol that led to the

1 infection and that was the theory and everything.

2 So why in the charging document are we getting into
3 all of these other things? .I mean, wasn't the State pretty
4 much aware of what the theory of transmission was? And so why
5 are we adding all of these other things to potentially create
6 confusion?

7 MR. STAUDAHER: It's not -- the reason that the
8 other areas were added, Your Honor, is not to create confusion
9 specifically, but because --

10 THE COURT: Well, I know that wasn't the intent, but
11 I think that may be the result.

12 MR. STAUDAHER: Well --

13 THE COURT: And I --

14 MR. STAUDAHER: -- in a large part I will tell the
15 Court that predominantly we believe the mode of transmission
16 in this case came through the syringes, needles, propofol,
17 that -- that mode. We believe there's support for that.
18 That's what the conclusions of the CDC were.

19 However, in going through the case beforehand,
20 the -- how the case was at least initially brought to
21 authorities and how the case was actually investigated
22 thereafter, there were other areas of potential transmission
23 that the CDC and the health district investigated.

24 Now, they concluded at the time that those were not
25 valid means of transmission because it did not cover all of

1 the patients in question. The issue is whether or not some of
2 the -- some of the patients, I think, at least from the
3 defense, because there has been a telegraphing at some point
4 early on of where the defense would be from the civil side of
5 things.

6 And part of it was, hey, look, it wasn't the
7 propofol, it was these other forms of transmission. And
8 because they were the other forms of transmission, despite
9 what the health district said, we think we can prove that.
10 This all came from essentially the civil -- civil litigation
11 that's going on.

12 THE COURT: Right. Because obviously the drug
13 manufacturers who are involved in --

14 MR. STAUDAHER: Correct.

15 THE COURT: -- trying the cases that have gone to
16 trial in the civil arena are going to say that because, you
17 know, they're going to try to deflect transmission away from
18 anything involving the propofol.

19 MR. STAUDAHER: Correct. And so because there were
20 other areas tested or other potential areas of transmission,
21 all of it goes to the underlying conduct and how the pressure
22 under all these actors were playing at the time, how they were
23 affected and how they treated patients and the -- and the
24 mechanism, the sort of cattle car mentality that was going on
25 within the clinic relates to those other areas that were

1 potential.

2 And because there were other potential modes of
3 transmission that were actually investigated, that were used
4 as a defense, that we believe that regardless of what it ends
5 up being, we think we know which one it is and we think we can
6 prove that.

7 But if the defense was successful at arguing that,
8 hey, it was not this, it was another method, it does not
9 negate the fact that the reason that we're here is because of
10 what was going on in general in the clinic, and that's where
11 the racketeering charge comes in. It was an economic
12 motivation to do things within the clinic to make money at the
13 expense of the -- of the insurance companies and that the
14 result was harm to the patients, which was foreseeable.

15 So in this instance those alternatives are pled
16 because they are -- they are essentially putting the defense
17 on notice that, hey, look, this is what we think it is, but if
18 you believe and if you think you're going to try and confuse
19 the jury by arguing it's something else, you're on notice that
20 any one of these things, it doesn't matter which one it is, we
21 don't have to prove one or the other specifically, we just
22 have to prove one, that you're on notice of each one that we
23 think is proper.

24 THE COURT: I mean, I guess one of the things, you
25 know, the defense has to be prepared to defend --

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1 MR. STAUDAHER: Certainly.

2 THE COURT: -- against all of these things. And in
3 each of the criminal neglect counts you're talking about
4 different patients. And so, you know, it looks like, well,
5 it's -- the syringes in everything and/or the needles, but
6 then are you also saying, well, for everybody it could've been
7 the forceps or it could've been the bit blocks as well? Or
8 what -- what is the State saying?

9 MR. STAUDAHER: Well, again --

10 THE COURT: You know what I'm saying? Because, you
11 know, maybe you could have narrowed it down according to each
12 patient. Well, in this patient forceps were used, in this
13 patient, you know, a bit block was used in addition. Do you
14 understand what I'm asking?

15 MR. STAUDAHER: Exactly. It's -- it's not just that
16 we're saying that in every single patient all of those things
17 happened. Obviously they did not.

18 THE COURT: Right.

19 MR. STAUDAHER: But in -- in a sense every patient
20 that comes through, some of them had some of those things
21 added to them and some of them did not.

22 However, putting -- the purpose of the charging
23 document is to put the defense on notice of the potential
24 areas that the State may try to bring forth evidence to
25 support the -- the elements of the crimes charged and the

1 factual averments that we put in to show that is to put them
2 on notice of things that they might have to defend, not just
3 with one patient, but with multiple patients. Clearly a bit
4 block was not used on a person who just had a colonoscopy.

5 THE COURT: Right.

6 MR. STAUDAHER: But one who used -- who had an upper
7 endoscopy and a colonoscopy or just an upper endoscopy had a
8 bite block used. It's to put those patients on notice, or not
9 the patients, but the defendant on notice of what he is
10 potentially exposed to as far as the factual basis under which
11 the State intends to prove the elements of the crimes charged.

12
13 Not specifically saying that this particular
14 method -- and that's why, Your Honor, even in -- I know that
15 counsel has an argument about the methods unknown for the --
16 as a -- as an averment, so to speak. Although, the Supreme
17 Court has said in certain instances, and we believe this is
18 one of those, where that is appropriate you can do that.
19 That's not an end all for the State. I mean, if the Court
20 felt that that was something that needed to be withdrawn or
21 struck, we don't have an opposition to that necessarily.

22 The issue is to put them on notice that we believe
23 essentially that the environment that was essentially put
24 forth by this man with his staff in this particular case
25 caused the harm and that these are the things that are

1 essentially the facts that go to support that. This whole
2 mentality of action and harm against the patients which
3 resulted -- which the harm which resulted was due to what they
4 were doing in the clinic and why.

5 THE COURT: All right. Thank you.

6 Mr. Wright?

7 MR. WRIGHT: Yes, Your Honor. I -- I think his
8 explanation explains the deficiency in the indictment about
9 leaving them -- allowing them to switch theories as the case
10 evolves. Either they -- they -- and I say they, the grand
11 jury found something happened, and that is their case, meaning
12 the grand jury's, and that is the limits of the case or they
13 don't.

14 I've never heard of the theory where the State is
15 saying I don't have evidence to support certain allegations,
16 but in the events it pops up or the defense contends it, I'm
17 going to throw it into the indictment anyway even though we
18 contend it didn't occur that way.

19 That's like I'm charged with murder and they're
20 going to say but if this guy is going to say someone else did
21 it, I'm going to charge him with aiding and abetting even
22 though there's no evidence of that.

23 THE COURT: Well, I don't think that's what the
24 State is saying. I think what the State is conceding is they
25 used sort of -- I don't want to say stock language, but they

1 used the same pleading language for each patient even though
2 they recognized that some patients, by way of whatever
3 procedure was performed wouldn't have had all of the same
4 tools.

5 But it's their -- and they kind of expect that
6 everybody would be of a mutual understanding as to that
7 because for certain procedures, such as a colonoscopy, you're
8 going to be using different -- you're not going to use a bite
9 block as Mr. Staudaher pointed out just a moment ago.

10 MR. WRIGHT: All of them were colonoscopies.

11 THE COURT: I'm sorry?

12 MR. WRIGHT: All of them were colonoscopies.

13 MR. STAUDAHER: Actually, some patients had --

14 THE COURT: Dual.

15 MR. STAUDAHER: -- upper endoscopies as well.

16 MR. WRIGHT: One the day before where it wasn't a
17 transmission.

18 THE COURT: Well, in any event, so I don't -- I
19 think that's what, you know, he's saying. And he's conceding
20 that, well, they could've maybe pled this in a tighter fashion
21 in terms of only referring to those instrumentalities that
22 were actually used on specific patients. But I don't think
23 they're saying they willy-nilly are going to be changing their
24 theory.

25 And I think what the State is saying is that there

1 was a -- according to them there was a pattern in practice of
2 insufficient sterilization and negligent things regarding not
3 just the vials, but regarding forceps and the bite blocks and
4 other things in this as part of a money saving scheme, if you
5 will.

6 Is that essentially, Mr. Staudaher, your argument?

7 MR. STAUDAHER: It is, Your Honor. It goes -- it's
8 not just to say that the -- that the actual negligent act was
9 a specific act of -- of propofol reuse or needle reuse or
10 syringe reuse or bite block reuse or whatever.

11 It's to say that the reason under the negligence
12 portion of this that we have a transmission caused by, let's
13 say, the propofol in this case, that the reason that that's
14 such an issue is because of all of this other action that was
15 going on within the clinic that essentially set up a
16 circumstance by which that would've happened.

17 And it shows essentially giving the defense notice
18 that we're going to -- we intend to raise these other issues
19 to show what the atmosphere was, what the actions and
20 inactions that were taken by their staff were which all led to
21 what happened to these patients, and that this man, Desai,
22 orchestrated and, through his nurses that are charged in this
23 case, actually caused harm to those patients.

24 THE COURT: I think what they're trying to say, Mr.
25 Wright, is that it's a part of a pattern in practice of

1 neglect of, you know, standard procedures that cut across
2 patients and -- and that that's what this is all evidence of.
3 That it wasn't an isolated thing, that this was, as Mr.
4 Staudaher said, the atmosphere and the pattern and the
5 practice of -- of essentially neglecting sanitary procedures
6 and -- and their standard of care and what they needed to do
7 to preclude transmission from patient to patient.

8 Is that what you're saying, Mr. Staudaher?

9 MR. STAUDAHER: Yes, Your Honor, and I think --

10 THE COURT: All right.

11 MR. STAUDAHER: -- that's a fair characterization.

12 THE COURT: I'm sorry?

13 MR. STAUDAHER: I think that's a fair
14 characterization.

15 THE COURT: All right. Mr. Stau -- I'm sorry, Mr.
16 Wright, continue. I just tried to focus on some of the
17 things --

18 MR. WRIGHT: Okay.

19 THE COURT: -- the Court --

20 MR. WRIGHT: Well, we aren't arguing --

21 THE COURT: -- noted. Yes.

22 MR. WRIGHT: I'm sorry.

23 THE COURT: Go ahead.

24 MR. WRIGHT: We aren't arguing about the
25 admissibility of evidence by which --

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1 THE COURT: No, I understand.

2 MR. WRIGHT: -- they may prove their case. We're
3 arguing about -- I mean, to me, the -- the entire case falls
4 on one sentence of 173.075. The indictment must be a plain,
5 concise, and definite written statement of the essential facts
6 constituting the offense charged. What does definite mean?
7 Clearly defined, precise, having fixed limits, and certain.

8 If -- if you read count one, start with it, the
9 racketeering indictment, see if that is a definite fixed
10 certain giving notice as to what the two predicate acts are
11 within that 35-month period. There has to be two predicate
12 acts, they have to be pled, that means by element, like one of
13 the elements of -- of [indecipherable] under false pretenses
14 is in excess of \$250. The element isn't even pled.

15 And then if the elements were pled in count one, you
16 then have to allege the facts definitely, what date, what
17 patient, what amount of money. Not during 35 months there
18 were two. And I'm being generous by saying I'm relying on
19 their response to presume that the two predicate acts were
20 obtaining money under false pretenses and insurance fraud. I
21 don't see that in that indictment.

22 That's not a plain, concise statement of the
23 elements of a RICO count with the two predicate acts pled out
24 and it is not a definite statement, meaning precise, limiting,
25 giving me notice of which billing, which patient. We are

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1 speculating in here. The Court and the State have been
2 speculating about which the grand jury found. It isn't --
3 THE COURT: I haven't speculated about anything, Mr.
4 Wright.
5 MR. WRIGHT: I thought when you were saying I think
6 the State is saying this or that --
7 THE COURT: Oh, I'm saying the State is saying --
8 MR. WRIGHT: That's --
9 THE COURT: -- that Mr. Staudaher's --
10 MR. WRIGHT: -- speculating to me.
11 THE COURT: -- argument are -- no, I'm saying let me
12 make sure I understand the State's argument.
13 MR. WRIGHT: Okay.
14 THE COURT: I -- I already said I'm not -- you know,
15 in terms of, again, the evidence for each count, I've already
16 said, you know, with respect to whether or not the counts can
17 be amended, that's something we need to consider. With
18 respect to whether or not the proof was sufficient, that's --
19 I've already found that to be time-barred. So I haven't said
20 anything to indicate --
21 MR. WRIGHT: Okay.
22 THE COURT: -- that I'm speculating as to what the
23 grand jury found or didn't find. What I'm saying is I
24 understand what Mr. Staudaher --
25 MR. WRIGHT: Okay.

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1 THE COURT: -- and the State's argument is, that
2 they are pleading this as part of an overall pattern and
3 practice to show negligent care of these patients that
4 resulted in the infection and that's why they've pled it the
5 way they have.

6 MR. WRIGHT: Okay. I -- I withdraw the speculating
7 of the Court.

8 In count one, by necessity one would have to
9 speculate as to what the -- which predicate acts offenses they
10 are talking about, which patient, which billing, which amount
11 of money, which is over \$250, which one do I -- which am I
12 defending against?

13 THE COURT: Well, Mr. Wright, isn't it fair to
14 assume that the insurance fraud is all of the counts that are
15 pled in the indictment? Because you can read the indictment
16 as a whole. And, you know, to me --

17 MR. WRIGHT: Only if you --

18 THE COURT: -- it's pretty clearly referring to
19 counts two, count five of insurance fraud that do set that
20 out.

21 MR. WRIGHT: Well, then why does it say for 35
22 months when those all occurred on two specific dates? And
23 you're telling me what you're sure the grand jury found when
24 they didn't incorporate by reference any other count.

25 THE COURT: Well, Mr. Wright --

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20

1 MR. WRIGHT: I don't know.

2 THE COURT: -- what I'm telling you is what I think
3 a reasonable person reading this indictment would believe
4 they're talking about for insurance fraud, that they're
5 talking about the insurance fraud counts that have actually
6 been pled here.

7 To me, a reasonable person looking at this would
8 say, well, okay, they're saying that the pattern and practice
9 of RICO is insurance fraud. So what insurance fraud are we
10 talking about? It's the insurance fraud that's pled actually
11 here in the indictment in the subsequent pages.

12 I don't think I need to infer anything about what
13 the grand jury may or may not have thought. I think, you
14 know, again, a reasonable person reading this, to me, that's
15 what that -- that would mean and suggest.

16 MR. WRIGHT: Well, if that's what it means and
17 suggests under 173.075 they're supposed to incorporate by
18 reference. Because each count stands on its own unless it is
19 incorporated. You're to take this and lay out 28 counts as 28
20 separate indictments unless I incorporate by reference the
21 other counts, and I'm allowed to do that if I plead it. And
22 it has not been pled and the grand jury did not so find.

23 When we -- when we go to -- when I start --

24 THE COURT: Well, Mr. Wright, certainly you're not
25 suggesting that in the insurance fraud that, well, maybe it's

1 counts two and counts five, but not, you know, a subsequent
2 count, a count 12 of insurance fraud. I mean, to me, it
3 would -- you know, whatever count -- whatever insurance fraud
4 they want to --

5 MR. WRIGHT: Read -- read count one to the exclusion
6 of the other counts --

7 THE COURT: No, I understand what you're saying.

8 MR. WRIGHT: Okay.

9 THE COURT: It doesn't --

10 MR. WRIGHT: And then what --

11 THE COURT: -- specifically say --

12 MR. WRIGHT: -- am I to conclude?

13 THE COURT: -- as more specifically alleged in count
14 number two, for instance.

15 MR. WRIGHT: Correct.

16 THE COURT: It clearly --

17 MR. WRIGHT: That's what you're allowed to plead.

18 THE COURT: It clearly does not say that. You're
19 right.

20 MR. WRIGHT: Okay. Right. I understand it's 35
21 months is the time frame in the racketeering count. And so
22 I -- I don't -- I read that and -- and I've read it over and
23 over until I start taking any indictment and dissect it by the
24 elements and try to figure out what is my client charged with
25 and is he -- because they have charged in this principal,

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1 accomplice, aider and abettor, liability, plus conspirator.
2 Which is he and what act am I defending against in count one?

3 And so in count one is Dr. Desai the principal,
4 aider and abettor, conspirator, and what did he do, on which
5 acts for the two predicate acts? Two that I have to have
6 notice of and should've been pled in -- in the racketeering
7 count. I don't know what they are and I can't find any way of
8 learning it.

9 And I'm supposed to -- this is a pretrial motion to
10 dismiss indictment. I'm not even to look at the grand jury
11 transcript to learn it because that's irrelevant. It's either
12 on the face of the pleading or it isn't, and I don't see it.

13 When I move to the 14 criminal negligence counts,
14 I -- I have the same problem manifestly when I charted out,
15 figuring out, okay, take a criminal negligence, a given
16 patient on a given date, and the criminal negligence means I
17 had to have done some act, me, meaning the defendant, and it
18 had to have been negligent to such a degree that it's beyond
19 the pale of what an ordinary person would do in the
20 circumstances and I was conscious of all of that and
21 consciously disregard it knowing there was a risk of life
22 anyway. I mean, that's essentially what the offenses are.

23 And so I think, okay, what -- what did Dr. Desai do?
24 If you start with count four, is he a principal? I mean,
25 because someone has to be a principal if there's aiders and

1 abettors. You cannot have an aider and abettor without a
2 principal. The principal need not be convicted. He could've
3 died or he could've been unknown. Or unless it's a corporate
4 entity where you can mix and match the elements, you have to
5 have a principal.

6 I read count four and try to figure out who's the
7 principal the State is alleging in there? Is it Mr. Lakeman,
8 Mr. Mathahs, and Dr. Desai is an aider and abettor? That's
9 what Ms. Weckerly in her response, the return to the
10 pleadings, said we're contending that Mathahs, the way I read
11 the response, and Lakeman injected the propofol, double --
12 double dipping of the vial, and that was the proximate cause,
13 and Dr. Desai is an aider and abettor.

14 The amazing part is I had read count four over and
15 over and there -- the State is doing in their response exactly
16 what they're prohibited from doing in an indefinite
17 indictment. They are changing theories from what the grand
18 jury found. If you read the indictment, count four of the
19 acts, that the negligent acts are all listed.

20 And trying to figure out who is the principal, who
21 is the aider and abettor, I think we ended up understanding
22 that only -- I'm on page 8 of my petition. I mean, on page 8
23 I laid out the eight acts of negligence that came out of count
24 four. And so I -- I think the State conceded that there was
25 only evidence on number one and number two, and not three

1 through seven, and of course eight is the mystery one.

2 But if I read one and two, and the way I had read
3 it, the act isn't injecting propofol. The only act alleged is
4 directly or indirectly instructing employees to do it, or
5 number two, creating an employment environment where they were
6 pressured to do it. Okay. That's what the grand jury alleges
7 is the offense, the negligent act.

8 Well, who would've instructed employees or created
9 the environment? I thought they were alleging Dr. Desai was
10 the principal, they, meaning the grand jury, and then
11 instructed or had created this negligent environment and
12 Lakeman and Mathahs were aiders and abettors.

13 But now the state in their response say, no,
14 we're -- we're charging injection by Mathahs and Lakeman and
15 aiding and abetting by Desai. In a criminal medical
16 negligence, neglect of patients counts, there is no act
17 alleged of injection of the propofol, nowhere in the eight
18 unless that's one of the unknown methods.

19 And the whole purpose of having a definite certain
20 indictment so I know if I'm defending an aider and abettor or
21 a conspirator or a principal, it's so that they can't waffle
22 and switch theories and so that I can prepare to defend the
23 case. I read this over and over, these counts, and I can't
24 determine the -- I think I can determine the acts the State is
25 now contending, meaning the -- the two propofol allegations,

1 and the others were -- I don't even know what you'd call them.
2 Accusations for which the evidence refuted them is
3 what those accusations are. But then when you get to the
4 catchall unknown means, I mean, that's impossible to me on a
5 criminal negligence count because a criminal negligence is
6 saying you, Mr. Defendant, engaged in a negligent act which
7 you knew you were doing that act, knew it was beyond the pale
8 of standard practice, and you were able to reasonably foresee
9 that death could come from it and you did that unknown act.
10 How -- how can you defend that? How can the State
11 bring a case of unknown act? How -- how do we know what the
12 grand jury found? By reading the indictment. And so they
13 found an unknown act. Where did they find one and two, or
14 number six? This goes to the issue of trying to salvage this
15 indefinite pleading.
16 Can we simply read the -- ask the State what -- what
17 do you all really intend to do, and strike things as
18 surplusage? Not without going back to the grand jury.
19 That's -- that's what the case is. Once -- once the State
20 opted to go and present the case to the grand jury, that was
21 their choice. They could've done it by prelim. We could've
22 argued about it in justice court. The court could've said I
23 find this, this, this, and this, bind it over and that's the
24 information.
25 But they went the grand jury route. They don't get

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1 to change the document. This isn't an issue of erroneous
2 omission of a citation which we can correct by amendment under
3 paragraph three of 175 -- or 173.075. That -- in fact, the
4 indictment we have is an amended indictment because it was
5 amended because of -- properly because of mis -- either date
6 or citation or something.

7 THE COURT: Right.

8 MR. WRIGHT: But on those negligence counts, I -- I
9 don't know how. If this was an information, different story.
10 But this is a grand jury indictment and are Nevada Supreme
11 Court cases, just like the U.S. Supreme Court cases, due
12 process, the right, to me, have the case specifically,
13 definitively pled, and then only tried on what the grand jury
14 found and to be locked into that.

15 And this idea that we don't want to get locked in so
16 we're just going to throw everything in, plus unknown, and if
17 something pops up during the trial, then that's what we'll
18 utilize; that violates due process. And in my opinion, one
19 plus the -- count one plus the 14 counts of criminal
20 negligence are deficient, and I can't even tell if I'm an
21 aider and abettor or principal or conspirator.

22 Thank you, Your Honor.

23 THE COURT: All right. State?

24 MR. STAUDAHER: I'll go back in, I think, the order
25 that Mr. Wright had some of his arguments. The first one

1 related to the racketeering if you do go to count one, and I
2 will concede that there is not relation back to the specific
3 counts. I think that that is certainly something that counsel
4 is correct on. The Court has even pointed that out.

5 However, on -- if the Court goes to the second page
6 of the indictment, which is the racketeering count, on both
7 lines 13 and 14 the State does specifically put in that
8 racketeering count the two predicate crimes that we're talking
9 about, insurance fraud and obtaining money under false
10 pretenses.

11 Clearly from the indictment as a whole, the actual
12 obtaining money under false pretenses and insurance fraud that
13 are referred to in the racketeering count are the ones that
14 were pled. Certainly at this point, if the Court and counsel
15 wishes to, we can certainly move to amend to refer back to the
16 specific ones that we're referring to, but it's not to say
17 that they were not included in here.

18 In addition, on page, I believe it is 25 of the
19 return by the State, the actual transcript of the testimony --
20 or of the instruction to the grand jury pertaining to the
21 predicate crimes and the racketeering count is laid out.

22 It is, I believe, completely clear from that that
23 the grand jury had to, as a first step in even making a
24 determination as to whether they were going to consider
25 racketeering as a possibility, that they had to find, one,

1 that there were two acts, separate acts, meaning an obtaining
2 money under false pretenses or a racketeering or an insurance
3 fraud act, that we had shown them evidence of those or
4 multiple acts of, one, insurance fraud, or two, obtaining
5 money under false pretenses or combinations thereof.

6 If, and only if, those factual information -- or
7 that factual information came before the grand jury and they
8 found that there was probable cause on those two specific
9 predicate crimes did they ever even get to the analysis of the
10 racketeering. And clearly they're instructed on that not
11 once, not twice, but multiple times and throughout the
12 entirety of the presentation. At almost every instance, and
13 there were multiple presentations.

14 As I -- as I think the Court is aware, they're --
15 the grand jury is asked specifically about any questions they
16 have regarding the racketeering accounts, regarding the law,
17 regarding anything that was presented to them. They were
18 provided with the entirety of the statutes, of each one of the
19 charged statutes in this case, as well as had specific
20 instruction on them, and not only were those specific
21 enumerated crimes listed in the racketeering account, but they
22 were directly, specifically instructed on finding -- of
23 findings of those two crimes before they could even get to the
24 racketeering account.

25 Now, with regard to whether or not Dr. Desai is a

1 principle or an aider and abettor or conspirator, he's all of
2 those. It depends on what aspect of the case you're talking
3 about.

4 I mean, the fact that he is potentially directing
5 someone to then tell staff to do a certain act or emails are
6 sent out or saying that they are going to get the times for
7 various anesthesia record times and other things by taking a
8 certain time, subtracting certain number of minutes to get to
9 the next time, adding a certain number of minutes to get to
10 the next time in a memo form in his practice, even if he was
11 not the one who actually physically offered that, does not
12 mean that he is not involved in the process.

13 He is the one who was running the show. He was the
14 one who was directing certain people. The fact that we have a
15 nurse or someone down in the trenches actually doing a
16 procedure who may or may not have heard him come in and
17 directly claim we're going to commit fraud today, I want you
18 to reuse propofol today on that particular occasion doesn't
19 mean that, one, it didn't happen earlier, or, two, didn't
20 happen through other people.

21 He is an aider and abettor, he is a principal, he is
22 a conspirator in these crimes. And the reason that all three
23 are alleged is because we are required to do so if we are
24 going to proceed under one or more of those theories.

25 His crimes are not clean crimes in the sense -- and

1 when I say that, his crimes are not something where he walks
2 into a convenient store, we've got him on video pulling out a
3 gun and robbing the attendant. These are something -- these
4 are crimes where the activity, his specific role in each
5 overlaps with other persons, with the way his -- his setup was
6 in the organization, and how patients were treated.

7 Because of that, he is all of those things, and
8 that's why he is charged in various counts with either aiding
9 and abetting or conspiring or as a principal. The way that we
10 lay out those factual averments for those various crimes are
11 important and we feel that they can be supported, but they are
12 to put the defense on notice of what crimes he has -- or at
13 least the defendant is subject to in this particular case.

14 Now, I think that there was one other issue. He had
15 mentioned that if we -- for some reason, if the Court felt
16 that we needed to strike certain portions of -- of the crimes,
17 to take surplusage out, which would be a request of the
18 defense, the State can't just, you know, laterally do that.

19 That has to be the defense asking for certain things
20 to be removed if we got to that stage. That is not something
21 that's required to go back to the grand jury. That is
22 something the Court can do, the counsel and the State can do
23 in agreement without going back to the grand jury because
24 there's no additional facts or circumstances that are being
25 alleged.

1 There's no additional crimes that are being
2 proffered in the case against the defendant in all of these
3 cases whether we refer back to crimes that are already pled in
4 this case in the racketeering count to make it more defined
5 for counsel despite the fact that they are in the racketeering
6 count in the first place, none of that adds to, alters,
7 enhances one of the pled crimes in this particular case.

8 We're not adding anything, we're not enhancing
9 anything, hence, there is no reason to go back before the
10 grand jury. There is only a reason to amend if that is the
11 order of the Court to do so. And we should have leave of the
12 Court to amend if, in fact, we need to do so on any one or
13 multiple counts.

14 THE COURT: All right. Thank you.

15 Mr. Wright, anything else?

16 MR. WRIGHT: Yes. As I understand it, if I want a
17 clear, plain, definite indictment of the allegation I'm
18 supposed to say, State, flesh it out for me. We'll be happy
19 to amend it, and we, the prosecutors, will plug in the way we
20 want to do it. That -- that isn't what is the posture of this
21 case. This is an indictment by the grand jury.

22 For all I know from the confusing evidence that was
23 presented, the grand jurors all agree with number eight, that
24 in an unknown manner people got hepatitis, and so, therefore,
25 we're indicting because clearly it happened at the clinics on

1 those dates, but we don't know how it happened, so it's an
2 unknown.

3 That's not surplusage; that is what the grand jury
4 found. How do we know that? It's in the indictment. This
5 isn't something about the State getting to clean it up. The
6 State is going to the transcript and talking about the
7 evidence. The cases that I cited state you look at the face
8 of the indictment. Where on -- I agree this isn't a clean,
9 simple case like a guy going into a liquor store because that
10 can be pled and I'm on notice.

11 When it's not a clean, clear case, factually and by
12 theory of liability, it's all the more reason for clear
13 pleading as opposed to saying, well, you're everything.
14 You're an aider and abettor, you're a principal, you're a
15 conspirator for our theories. Where are the facts pled in the
16 indictment, not the evidence presented to the grand jury, in
17 the indictment on each of those as to my client? They're not
18 there.

19 Thank you.

20 THE COURT: All right. Anything else, Mr.
21 Staudaher?

22 MR. STAUDAHER: No, Your Honor.

23 THE COURT: All right. I agree with the defense in
24 one respect, that this could've been pled better. It could've
25 been pled tighter. Given the fact that the State knew what it

1 was going to be presenting to the grand jury and I don't think
2 they had to plead this, you know, well, it could've been
3 something else, it could've been this or that, particularly
4 when they knew for certain patients, as the Court pointed out
5 at the beginning, you know, bite blocks weren't even used. So
6 why not plead it in a cleaner fashion, more specifically
7 directing the information to those particular patients.

8 However, the standard here is notice pleading and
9 whether a person of ordinary intelligence could read this and
10 understand what the allegations are that the State is making.
11 While agreeing that the pleading could've certainly been much
12 tighter, it could've been much better, the Court does find
13 that the State has met statutory, as well as constitutional
14 notice requirements.

15 With respect to the racketeering and the obligation
16 on count number one to incorporate by reference, they
17 should've done that. However, the grand jury did find
18 probable cause as to the subsequent counts of insurance fraud.
19 And for that reason I don't think it's reasonable to assume,
20 well, they may have found this one is a predicate act but not
21 that one is a predicate act. That just doesn't make any
22 sense.

23 I mean, I think, Mr. Wright, you make a good point.
24 You know, again, they could've been more specific with the
25 dates and whatnot. But looking at the totality of the

1 indictment, notwithstanding that deficiency, I think that it's
2 clear what they're charging.

3 And the reason I said, well, they did find probable
4 cause for the other counts of insurance fraud, if the Court
5 were to order them to amend to incorporate by reference, I
6 don't think this is one of those situations where we would
7 have to conjecture as to what the grand jury's finding was or
8 where they found evidence.

9 And I agree with you, Mr. Wright, we can't do that.
10 We can't -- if it requires the Court to go back and try to
11 conjecture what was the grand jury thinking, that would be
12 inappropriate. In this case, though, I don't think it's
13 reasonable to think, well, maybe they found this one was a
14 predicate act, but not that one was a predicate act. And so,
15 you know, there's -- they found insurance fraud on numerous
16 counts.

17 And for that reason, again, I think that they've met
18 their burden with respect to the notice and the indictment.
19 So it's denied on the motion to dismiss grounds. As I said,
20 on the petition grounds, I think that that was time-barred,
21 and so that is denied as well on that reason without
22 considering the sufficiency of the evidence and other things
23 that, as I've said, had to be raised by way of petition and
24 could not be raised by way of motion to dismiss.

25 Mr. Wright?

1 MR. WRIGHT: Yes. I'm not going to argue with you,
2 I just want to make clear on the record on the unknown, on the
3 criminal medical -- on the criminal neglect of patients, I
4 mean, to me it's also -- it's not only procedural due process,
5 it's substantive due process. I don't believe I can charge
6 someone with a crime, an unknowing act of negligence. And so
7 I just don't know how you can scope around that with due
8 process substantive -- substantively as well as --

9 THE COURT: No, I --

10 MR. WRIGHT: -- procedurally.

11 THE COURT: -- understand what you're saying.
12 You're saying, well, what if the grand jury didn't find that
13 the means of transmission was through one or more of these
14 methods charged, meaning the reuse of the propofol without
15 observing appropriate sanitary -- sanitary, excuse me,
16 measures, or reusing the, you know, bite blocks or what have
17 you, that they just said, well, there was transmission,
18 therefore, it had to have been.

19 Mr. Staudaher, finally on the record do you want to
20 say anything regarding that? Again, you know --

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

24 Again, we've offered to -- if counsel feels that he
25 doesn't want to have to deal with that at trial, to strike

1 that particular portion out of those counts, that unknown, but
2 we feel that the grand jury had, based on the evidence
3 presented to them, and at least the way it was pled for -- for
4 different factual averments that we were seeking to go forward
5 on, that there was plenty of evidence presented to them, and
6 we believe that their findings were -- were a result of that.

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

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

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

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

23 MR. WRIGHT: Yeah, what I'm saying --

24 THE COURT: -- without just saying, well, obviously
25 there was abundant evidence and so it had to have been -- had

1 to have been through one or more of the devices that they
2 presented evidence on, specifically the propofol.

3 MR. WRIGHT: Well, I understand the State is saying
4 there was sufficient evidence before the grand jury to charge
5 that it was unknown methods. And that's exactly my point.
6 You can't charge an unknown criminal negligence act count.

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

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

17 THE COURT: All right. Thank you.

18 MR. WRIGHT: Thank you.

19 THE COURT: Mr. --

20 MR. STAUDAHER: Just one last --

21 THE COURT: You indicated you were --

22 MR. STAUDAHER: -- point on that -- on that. I know
23 that we're short on time, but I --

24 THE COURT: Well, we're not short on time. I have
25 all day.

1 MR. STAUDAHER: As far as that issue, that single
2 issue there, it's not just that with regard to the counts
3 where -- where there is an unknown element there, it is the
4 contention of the State the -- what was presented not only to
5 the grand jury in the evidence, and I'm not talking about that
6 specifically, but what's averred in the actual pleading itself
7 that it was essentially the negligence results from what the
8 actual atmosphere that was created by this -- by this man and
9 how he conducted his operation, which leads into all of the
10 things that came before the grand jury. That's -- that's the
11 issue.

12 And because of that atmosphere, it sets up the fact
13 that you can have people that cut corners and do things that
14 create risk and that that is known by the defendant based on
15 the evidence that came in.

16 So the information is there to show that we've
17 got -- we're pleading by the staff being pressured by the
18 general atmosphere of the -- of the organization, how they ran
19 patients through the clinic, what risks were put upon the
20 patients, and then we end up with patients being harmed as a
21 result.

22 And we believe we have presented evidence that shows
23 what -- how that transmission occurred, but we also feel that
24 it's not the transmission by itself that is the negligent act.
25 It is all the accoutrements around that actual transmission

1 act that are part of what is charged in this case.

2 THE COURT: All right. And just a final comment
3 from the Court. I think it's obvious that they're charging
4 that these people were infected as a result of their treatment
5 at the facility and as a result of the facility's ongoing
6 failure and disregard of appropriate medical and sanitary
7 practices. And I think that that's quite obvious.

8 They're not -- you know, it's not an inference,
9 well, this person was treated there and had hepatitis, and
10 then you were treated and you got hepatitis, therefore, it
11 must've been. I mean, I think it's quite clear from the
12 indictment itself that it is as a direct result of this
13 pattern and practice according to the State that was in place
14 at the time. These patients were treated at the facility that
15 caused the infection.

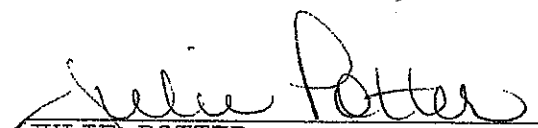
16 And so reading the totality of the negligence counts
17 I think clearly puts the defendant on notice as I said before,
18 and I don't think creates the opportunity for the fact finder
19 in this case, the grand jury to have made some sort of
20 conjecture, oh, well, we don't know what it is, it must've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

22 So if you read it in the totality, it was the
23 failure to utilize accepted practices and the disregard of
24 patient safety and whatnot that the State is alleging
25 permeated, if you will, the facility. So for that reason I

1 think that the pleading does not violate substantive due
2 process requirements either.
3 And I believe that that covers everything. Thank
4 you.
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ATTEST: I hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.


JULIE POTTER
TRANSCRIBER

JRP TRANSCRIPTION
702.635.0301

EXHIBIT 8

EXHIBIT 8

ORIGINAL

ORDR

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Nevada Bar #008273
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FILED

MAY 22 2012

John J. Blum
CLERK OF COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

10C265107-1
ODM
Order Denying Motion
1857529



THE STATE OF NEVADA,
Plaintiff,

-vs-

DIPAK KANTILAL DESAI,
#1240942

Defendant.

CASE NO: 10C265107-1

DEPT NO: XIV

ORDER DENYING DEFENDANT'S MOTION TO DISMISS & DEFENDANT'S
PRE-TRIAL WRIT OF HABEAS CORPUS

DATE OF HEARING: 05/10/2012
TIME OF HEARING: 10:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the 10th day of May, 2012, the Defendant being present, represented by RICHARD WRIGHT, ESQ., the Plaintiff being represented by STEVEN B. WOLFSON, District Attorney, through MICHAEL V. STAUDAHER, Chief Deputy District Attorney, and the Court having heard the arguments of counsel and good cause appearing therefor,

FINDINGS OF FACT

THE COURT FINDS 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 they would face, as well as the theories of criminal liability on which the State is proceeding.

RECEIVED
MAY 22 2012

1 THE COURT FURTHER FINDS THAT, the State has met the statutory and
2 constitutional requirements of notice pleading.

3 NOW, THEREFORE, it is hereby ORDERED, that the Defendant's Motion to
4 Dismiss, shall be, and it is DENIED.

5 THE COURT FURTHER FINDS THAT, the defendant's Writ of Habeas Corpus is
6 untimely and that the defendant is statutorily barred from challenging the sufficiency of the
7 evidence presented to the grand jury for the puposes of a probable cause challenge.

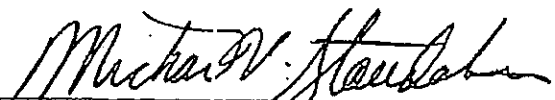
8 NOW, THEREFORE, it is hereby ORDERED, that the Defendant's Pre-Trial Writ of
9 Habeas Corpus, shall be, and it is DENIED.

10 DATED this 17th day of May, 2012.

11
12 
13 DISTRICT JUDGE
14 J.H.

15 STEVEN B. WOLFSON
16 Clark County District Attorney
Nevada Bar #001565

17
18 BY


19 MICHAEL V. STAUBER
20 Chief Deputy District Attorney
Nevada Bar #003273

21
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24
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27
28 10F03793A: sam-MVU

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**
3

4 Electronically Filed
5 Jul 09 2012 01:56 p.m.
6 Tracie K. Lindeman
7 Clerk of Supreme Court

8 DIPAK KANTILAL DESAI,)
9)
10 Petitioner,)
11)
12 vs.)
13)
14 THE EIGHTH JUDICIAL DISTRICT)
15 COURT OF THE STATE OF NEVADA,)
16 COUNTY OF CLARK, DEPARTMENT 21,))
17)
18 Respondent.)
19)
20 and)
21 THE STATE OF NEVADA,)
22 Real Party In Interest.)
23)
24)
25)
26)
27)
28)

No.

(District Court No. C265107)

17 **PETITIONER'S APPENDIX**

18 Richard A. Wright
19 Nevada Bar No. 886
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21 300 S. Fourth Street
22 Suite 701
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24 (702) 382-4004
25 Attorneys for Petitioner
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1 **CERTIFICATE OF MAILING**

2 I HEREBY CERTIFY that on the 9th day of July, 2012, I caused a copy of the
3 foregoing Petitioner's Appendix to be placed in the United States mail, postage
4 prepaid, hand delivered or e-filed to the following persons at their last known address
5 as listed below:
6

7
8 The Honorable Valerie Adair
9 District Court, Department 24
10 200 Lewis Avenue
11 Las Vegas, NV 89101

12 Michael V. Staudaher
13 Clark County District Attorney's Office
14 200 Lewis Avenue
15 Third Floor
16 Las Vegas, NV 89155

17 Catherine Cortez Masto
18 Attorney General
19 State of Nevada, Criminal Justice Division
20 100 North Carson Street
21 Carson City, NV 89701-4717

22 BY Debra K. Caswell
23 An employee of Wright Stanish & Winckler
24
25
26
27
28

EXHIBIT 1

EXHIBIT 1

6/11/10

1 AIND
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5 MICHAEL V. STAUDAHER
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9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

8 DISTRICT COURT

9 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

AMENDED
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
27 Clark, State of Nevada, on or between June 3, 2005, and May 5, 2008, as follows:

28 ///

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 NEGLIGENCE OF PATIENTS

24 Defendants, on or about September 25, 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 NEGLIGENCE 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 NEGLIGENCE 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

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 (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 needles and/or biopsy forceps and/or snares and/or bite blocks contrary to the express product labeling of said items, and/or in violation of universally accepted safety precautions for the use of said items; 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) by 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 express manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or in violation of universally accepted safety precautions for the use of said scopes; and/or (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 KENNETH RUBINO to patient GWENDOLYN MARTIN, who was not previously infected with the Hepatitis C virus; 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

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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 between September 20, 2007 and September 21, 2007,
5 knowingly and willfully present, or cause to be presented a statement as a part of, or in
6 support of, a claim for payment or other benefits under a policy of insurance issued pursuant
7 to Title 57 of the Nevada Revised Statutes, knowing that the statement concealed or omitted
8 facts, or contained false or misleading information concerning a fact material to said claim;
9 and/or did assist, abet, solicit or conspire to present or cause to be presented a statement to
10 an insurer, a reinsurer, a producer, a broker or any agent thereof, knowing that said statement
11 concealed or omitted facts, or did contain false or misleading information concerning a fact
12 material to a claim for payment or other benefits under such policy issued pursuant to Title
13 57 of the Nevada Revised Statutes, by falsely representing to PACIFIC CARE that the
14 billed anesthesia time and/or charges for the endoscopic procedure performed on
15 GWENDOLYN MARTIN were more than the actual anesthetic time and/or charges, said
16 false representation resulting in the payment of money to Defendants and/or their medical
17 practice and/or the racketeering enterprise which exceeded that which would have normally
18 been 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 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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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 ____ day of June, 2010.

4
5 DAVID ROGER
6 DISTRICT ATTORNEY
7 Nevada Bar #002781

8 BY

9 MICHAEL V. STAUDAHER
10 Chief Deputy District Attorney
11 Nevada Bar #008273
12
13
14
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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 BLEMINES, 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

FILED

MAR 30 2 25 PM '12

Ann D. Blum
CLERK OF THE COURT

PETN
RICHARD A. WRIGHT, ESQUIRE
Nevada Bar No. 886
WRIGHT STANISH & WINCKLER
300 S. Fourth Street
Suite 701
Las Vegas, NV 89101
(702) 382-4004
Attorneys for Dipak Desai

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

DIPAK KANTILAL DESAI, #1240942,

Defendant.

Case No. C265107
Dept. No. XXI

DATE OF HEARING: 4-17-12
TIME OF HEARING: 9:30 A.M.

PETITION FOR WRIT OF HABEAS CORPUS

DIPAK KANTILAL DESAI, by and through his attorney, Richard A. Wright, WRIGHT STANISH & WINCKLER, petitions this Court to grant a writ of habeas corpus.

1. The above counsel are duly qualified, practicing and licensed attorneys in the State of Nevada.

2. Counsel is authorized to represent the defendant in this matter.

3. The place where the defendant's liberty is restrained is Clark County, Nevada. Desai is released on bail.

4. The restraint of liberty is unlawful because:

A. The racketeering charge in Count 1; the criminal neglect of patient charges in Counts 4, 8, 11, 14, 18, 21, and 24; and the reckless endangerment charges in Counts 3, 7, 10, 13, 17, 20, and 23 are facially defective and violate due process notice requirements.

///

1 B. The various criminal neglect of patient counts and reckless endangerment
2 counts were not supported by sufficient evidence in the grand jury because the State failed to
3 establish proximate cause between some of the alleged acts and substantial bodily harm.

4 6. No other Petition for a Writ of Habeas Corpus has been filed on behalf of the
5 defendant.

6 7. This Petition is supported by a Memorandum of Points and Authorities which is
7 concurrently filed with this Petition.

8 8. The defendant waives the 60-day limitation for bringing an accused to trial.

9 9. The grand jury indictment was returned on June 4, 2010. The parties had agreed
10 to continue the due date for the filing of the habeas corpus petition. On July 21, 2010, the trial
11 judge ordered the defendant to be transferred to competency court upon motion of the State. By
12 operation of law, the prosecution was stayed as to the defendant. On February 8, 2011, the
13 competency court found that Desai was incompetent and ordered him to surrender to custody on
14 March 17, 2011, to be transferred to Lake's Crossing. Following a competency hearing held on
15 January 27, 2012, the competency court entered an order finding Desai to be competent on
16 February 2, 2012. The original trial judge announced his retirement and the case was
17 subsequently assigned to the Honorable Valerie Adair on March 2, 2012. At the status hearing
18 on March 8, 2012, the undersigned explained that the writ of habeas corpus had not been filed
19 due to the competency proceedings but would be filed in the upcoming weeks.

20 10. The defendant respectfully urges this Court to enter an Order directing the County
21 Clerk to issue a Writ of Habeas Corpus directed to the Clark County Sheriff, commanding him to

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1 return the cause of the defendant's restraint. The defendant also urges this Court to dismiss the
2 above referenced counts based on violation of due process.

3 DATED this 30th day of March 2012.

4 WRIGHT STANISH & WINCKLER

5
6 By 

7 RICHARD A. WRIGHT
8 Attorney for DIPAK DESAI
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VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss:

Richard A. Wright verifies:

That he is the lawyer in the above-entitled action and that he has read Defendant's Petition for Writ of Habeas Corpus, knows the contents thereof, and that the same is true of his own knowledge except for those matters stated on information and belief and as to those matters he believes it to be true.

RICHARD A. WRIGHT

Subscribed and Sworn to before me
this 30th day of March 2012.

Notary Public in and for said
County and State

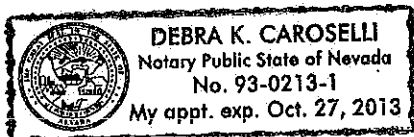


EXHIBIT 3

EXHIBIT 3

1 MEMO
2 RICHARD A. WRIGHT, ESQUIRE
3 Nevada Bar No. 886
4 WRIGHT STANISH & WINCKLER
5 300 S. Fourth Street
6 Suite 701
7 Las Vegas, NV 89101
8 (702) 382-4004
9 Attorneys for Dipak Desai

FILED

MAR 30 2 25 PM '12

John D. Johnson
CLERK OF THE COURT

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 vs.

15 DIPAK KANTILAL DESAI, #1240942,

16 Defendant.

Case No. C265107
Dept. No. XXI

17 MEMORANDUM IN SUPPORT OF
18 PETITION FOR WRIT OF HABEAS CORPUS AND
19 ALTERNATIVE MOTION TO DISMISS INDICTMENT

20 DIPAK KANTILAL DESAI, by and through his attorney, Richard A. Wright, WRIGHT
21 STANISH & WINCKLER, petitions this Court to grant writs of habeas corpus or, alternatively,
22 to dismiss the certain counts from the indictment. This petition and motion are based on the
23 Sixth Amendment Due Process Clause and NRS 178.075, and the following Points and
24 Authorities.

25 DATED this 30th day of March 2012.

26 Respectfully Submitted,

27 WRIGHT STANISH & WINCKLER

28 By: *[Signature]*

RICHARD A. WRIGHT
Counsel for DESAI

1
2 **POINTS AND AUTHORITIES**

3 **I. Introduction: Constitutionally Defective Counts**

4 The various criminal negligent and racketeering counts fail to satisfy fundamental due
5 process notice requirements. This constitutional defect affects the racketeering charge in Count
6 1; the criminal neglect of patient charges in Counts 4, 8, 11, 14, 18, 21, and 24; and the reckless
7 endangerment charges in Counts 3, 7, 10, 13, 17, 20, and 23. [The criminal neglect of patient
8 counts and reckless endangerment counts will hereinafter be jointly referred to the "criminal
9 negligence counts".] Additionally, the criminal negligence counts were not supported by
10 sufficient evidence in the grand jury because certain alleged acts of negligence were not shown
11 to be the proximate cause of the substantial bodily harm. It appears that the State has taken a
12 "throw it on the wall and see what sticks" approach to prosecution without regard for
13 fundamental principles of criminal law and due process.

14 Under the Sixth Amendment, an indictment must adequately inform a defendant of the
15 nature and cause of the accusations against the defendant. West v. State, 119 Nev. 410, 419, 75
16 P.2d 808, 814 (2003). Additionally, NRS 173.075 requires that an indictment "must be a plain,
17 concise and definite written statement of the essential facts constituting the offense charged."
18 "The indictment, standing alone, must contain: (1) each and every element of the crime charged
19 and (2) the facts showing how the defendant allegedly committed each element of the crime
20 charged." State v. Hancock, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998). The description of
21 the particular acts giving rise to the offense must be sufficient to enable the defendant to
22 properly defend against the accusations, thereby protecting the constitutional right to due
23 process of law. Id.; *see also*, Simpson v. Eighth Jud. Dist. Ct., 88 Nev. 654, 659 503 P.2d
24 1225, 1229 (1973). In pretrial challenges to the sufficiency of the indictment, the determination
25 of sufficiency of the indictment is limited to a review of the indictment itself. Simpson, 88 Nev.
26 at 660-61; 503 P.2d at 1230. The State cannot defend the sufficiency of the indictment by
27 referring to evidence presented at the grand jury and asserting that the defendants can figure it
28 out. Id.

///

1 The sufficiency of an indictment not only protects an accused's due process right to fair
2 notice, it also prevents the prosecution from impermissibly changing theories of prosecution and
3 usurping the role of the grand jury. Simpson, 88 Nev. 654, 660-61, 503 P.2d at 1229-30. An
4 indefinite and broadly drafted indictment gives free rein to the prosecutor to change its factual
5 theory of the case. "To allow the prosecutor, or the court, to make a subsequent guess as to
6 what was in the minds of the grand jury at the time they returned the indictment would deprive
7 the defendant of a basic protection which the guaranty of the intervention of a grand jury was
8 designed to secure." Id., quoting Russell v. United States, 369 U.S. 749, 770 (1962). Aside
9 from minor clerical errors, an indefinite indictment cannot be amended without impinging on
10 the grand jury function. Hancock, 114 Nev. at 168, 955 P.2d at 187. As such, the indefinite
11 counts must be dismissed.

12 **II. The Reckless Endangerment and Criminal Neglect of Patient Counts are** 13 **Unconstitutionally Vague**

14 **A. Elements of the Offenses**

15 Before examining the due process violations, discussion will begin with the essential
16 elements of the offense under NRS 202.595 and 200.495, neither of which have been the subject
17 of a published legal opinion. This discussion is necessary to show how the indictment fails to
18 allege sufficient facts showing that Desai committed each of the elements of the two criminal
19 neglect statutes. It is also pertinent to the following discussion on the insufficiency of evidence
20 of the proximate cause respecting some of the alleged negligent acts and the hepatitis.

21 It goes without saying that Desai cannot be prosecuted for any ordinary negligence of
22 himself or co-defendants. See, Bielling v Sheriff, 89 Nev. 112, 508 P.2d 546 (1973)(involuntary
23 murder indictment insufficient when alleging ordinary negligence). Instead, NRS 193.190
24 requires a union of an *actus rea* and *mens rea* of criminal negligence. Id. "In every crime or
25 public offense there must exist a union, or joint operation of act and intention, or *criminal*
26 *negligence*." NRS 193.190 [emphasis added]. To convict a person of a felony without proving
27 both the criminal act and culpable mental state violates due process. Robey v. State, 96 Nev.
28 459, 461, 611 P.2s 209, 210 (1980). As discussed more fully below, both the reckless

1 endangerment statute and criminal neglect of patient statute require that Desia have subjective
2 knowledge of the facts and circumstances that create an unreasonable risk of substantial bodily
3 harm and that he consciously disregarded the risk.

4 **1. Elements of the General Reckless Endangerment Statute**

5 The essential elements of the reckless endangerment statute, as charged,¹ are:

6 First: The defendant performed an act;

7 Second: the defendant acted in willful or wanton disregard to the safety of
a person; and

8 Third: the act proximately caused substantial bodily harm to another
person.

9 See, NRS 202.595.

10
11 The reckless endangerment statute is patterned after the reckless driving statute and
12 mimics the *mens rea* of "willful or wanton disregard to the safety of a person." See, NRS
13 484B.653(1)(a). Unlike the reckless driving statute, the "catch-all" reckless endangerment
14 statute does not identify a particular type of act that constitutes the offense. Instead, the *actus*
15 *rea* is the performance of an act that proximately causes substantial bodily harm to another. It
16 is, therefore, essential that the indictment alleges the criminally negligent act with precision.

17
18
19 ¹ The reckless endangerment statute, known as the "Fan Man statute," reads in its entirety:

20
21 Unless a greater penalty is otherwise provided by statute and except under the
22 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:

23 1. If the act or neglect does not result in the substantial bodily harm or death of a person,
24 for a gross misdemeanor.

25 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.

26 Nev. Rev. Stat. 202.595.

27 The reckless endangerment counts in the instant indictment do not refer to the commission of the
28 offense by means of "neglect of lawful duty." Rather, each of the reckless endangerment counts allege
that the defendants did "willfully and unlawfully perform acts in a willful or wanton disregard of safety
of persons or property resulting in substantial bodily harm . . ."

1 The *actus rea* of a criminal negligence offense is assessed objectively. In other words,
2 the defendant's conduct significantly deviates from the manner in which a reasonable person
3 would act under similar circumstances and the risk of a substantial harm is foreseeable. See
4 generally, Williams v. State, 100 Md. App. 468, 495, 641 A.2d 990, 1003 (1994)(discussing
5 *actus rea* and *mens rea* of reckless endangerment statutes in various jurisdictions).

6 With respect to the *mens rea*, the defendant must be subjectively aware of the risk
7 created by his conduct, but proceed to act in conscious disregard of such risk. Although
8 research disclosed no case law analyzing NRS 202.595, the *mens rea* element in the Maryland
9 reckless endangerment statute was described as follows:

10 Reckless endangerment is a crime that has not eliminated the requirement of a
11 *mens rea*. It is not a strict liability crime. One is not guilty if he is oblivious to the
12 fact that there is a risk and oblivious to the fact that he is disregarding the risk; it
13 is not enough that the ordinary prudent person would be thus aware. It is required
14 that the defendant on trial be aware of a risk and then consciously disregard it.
That much is indisputably subjective. In shortest form, the critical *mens rea*
would be "the conscious disregard of a substantial risk." "Conscious disregard"
is *ipso facto* subjective.

15 Williams v. State, 100 Md. App. 468, 503, 641 A.2d 990, 1007 (1994).

16 The above definition of the criminal mental element of "conscious disregard of a substantial
17 risk" is similar to the civil tort definition of wanton misconduct in Nevada. In a wrongful death
18 suit stemming from a car accident, the Supreme Court stated:

19 Thus we see that wanton misconduct involves an intention to perform an act that
20 the actor knows, or should know, will very probably cause harm. In substance,
21 this is the same definition approved by this court in Crosman v. Southern Pacific
22 Co., supra, where it was stated, "the party doing the act . . . though having no
23 intent to injure, *must be conscious, from his knowledge of surrounding*
circumstances and existing conditions, that his conduct will naturally and
probably result in injury."

24 Rocky Mountain Produce Trucking Comp. v. Johnson, 78 Nev. 44, 51-52, 369 P.2d 198, 202
25 (1962), quoting, Crosman v. Southern Pacific Co., 44 Nev. 286, 301, 194 P.2d 839, 843 (1921).
[Emphasis added].

26 As stated in Rocky Mountain, the defendant must be conscious that his conduct will likely result
27 in a reasonably foreseeable harm. Of course, the negligent act must also be the factual and
28 proximate cause of the alleged substantial bodily harm. See, NRS 202.595.

1 **2. Elements of the Criminal Neglect of Patient Statute**

2 Similar to the general reckless endangerment offense, the criminal neglect of patient
3 statute, when read in its entirety, also has *actus rea* and *mens rea* elements that are dependent on
4 a subjective awareness of the circumstances and conditions resulting in an objectively
5 foreseeable harm. The statute reads in pertinent part:

6 1. A professional caretaker who fails to provide such service, care or supervision
7 as is reasonable and necessary to maintain the health or safety of a patient is
8 guilty of criminal neglect of a patient if:

9 (a) The act or omission is aggravated, reckless or gross;

10 (b) The act or omission is such a departure from what would be the conduct of an
11 ordinarily prudent, careful person under the same circumstances that it is contrary
12 to a proper regard for danger to human life or constitutes indifference to the
13 resulting consequences;

14 (c) The consequences of the negligent act or omission could have reasonably
15 been foreseen; and

16 (d) The danger to human life was not the result of inattention, mistaken judgment
17 or misadventure, but the natural and probable result of an aggravated reckless or
18 grossly negligent act or omission.

19 2. Unless a more severe penalty is prescribed by law for the act or omission
20 which brings about the neglect, a person who commits criminal neglect of a
21 patient:

22 . . .
23 (b) If the neglect results in substantial bodily harm, is guilty of a category B felony and
24 shall be punished by imprisonment in the state prison for a minimum term of not less
25 than 1 year and a maximum term of not more than 6 years, or by a fine of not more than
26 \$5,000, or by both fine and imprisonment.

27 NRS 200.495.

28 The *actus rea* in NRS 200.495 is the act or omission in failing to provide reasonable and
necessary service, care or supervision to the patient which proximately causes substantial bodily
harm. NRS 200.495(1)(b). The *actus rea* is evaluated by an objective standard in two respects:
the defendant's act represented a gross deviation from the standard of conduct of a careful
person under the same circumstances (subparagraph 1(b)); and it is reasonably foreseeable that
the negligent conduct endangers life (subparagraph 1(c)). Finally, the criminal act must be the
proximate cause of a substantial bodily harm to the patient. NRS 200.495(2)(b).

1 The *mens rea* element of NRS 200.495 requires "aggravated, reckless or gross"
2 negligence. NRS 200.495(1)(a). The *mens rea* element is further developed in subparagraph
3 (d), which prohibits criminal liability in instances where the danger to human life was due to the
4 defendant's "inattention, mistaken judgment or misadventure" as opposed to the endangerment
5 resulting from "an aggravated reckless or grossly negligent act or omission." Subparagraph (d)
6 necessarily presupposes that the defendant has subjective knowledge of the risks posed by the
7 defendant's act or omission.

8 The above discussion on the reckless disregard embodied in the general reckless
9 endangerment statute is also applicable to NRS 200.495, which uses similar concepts, such as
10 "aggravated reckless or grossly negligent act or omission" and "indifference to the resulting
11 consequences". Although the statute does not define the term "gross negligence," civil tort law
12 defines it as follows:

13 Gross negligence is much more than ordinary negligence. Gross negligence
14 demonstrates a failure to exercise even a slight amount of care. Gross negligence
15 is very aggravated and extreme negligence that demonstrates the person gave
little, if any, thought to the consequences of his behavior.

16 Nev. Jury Instr. (Civil), §4NG.18 (2011).

17 In conclusion, both the general recklessness statute and criminal neglect of patient
18 statute require far more than ordinary negligence or strict liability. The defendant must have a
19 subjective awareness of the facts and circumstances that makes his conduct a danger to human
20 life and act in conscious disregard of the known risk. From an objective stand point, the
21 defendant's conduct is assessed by the reasonable person standard acting under similar
22 circumstances. Both statutes require the criminally negligent act to be the factual and proximate
23 cause of the substantial bodily harm. Given the *mens rea* element in both statutes, a person
24 cannot be criminally liable for ordinary negligence, inattention, mistaken judgment, or
25 misadventure. That is the stuff of civil tort law, not criminal law.

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1 **B. The Constitutional Defects in the Criminal Negligence Counts**

2 **1. The Charging Language: Prosecution by Multiple Guess and/or Mystery**

3 In the instant case, the various criminal negligence counts are vague, imprecise, and
4 confusing and, therefore, violate the due process notice requirements. This constitutional defect
5 affects the Criminal Neglect of Patient charges in Counts 4, 8, 11, 14, 18, 21, and 24, and the
6 Reckless Disregard charges in Counts 3, 7, 10, 13, 17, 20, and 23. The structure of these
7 charges are substantially similar. Each count begins with the statutory charging language and
8 then states that the "Defendants performed one or more of the following acts". Each count then
9 lists seven or eight acts, which the defendants did either "directly or indirectly." "One or more"
10 of these acts are alleged to have resulted in substantial bodily harm to the patients. The criminal
11 neglect of patient counts specifically allege that "one or more" of the acts caused the
12 transmission of Hepatitis C virus to the named patient.

13 Following the enumeration of various acts, each of the counts alleges multiple theories
14 of criminal liability by adding the following language:

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

21 By way of example, the following is the charging language extracted from Count Four, a
22 violation of the criminal neglect of patient statute. The defendants, "either directly or
23 indirectly," performed "one or more" of the following eight acts of criminal negligence that
24 proximately caused the Hepatitis C transmission from one patient to another:

25 (1) by directly or indirectly instructing employees of the Endoscopy Center of
26 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
28 product labeling of said drug and in violation of universally accepted safety
29 precautions for the administration of said drug; and/or

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

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

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

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

13 (6) by directly or indirectly scheduling and/or treating an unreasonable number of
14 patients per day which resulted in substandard care and/or jeopardized the safety and/or
15 well being of said patients; and/or

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

22 (8) by methods unknown;

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

27 2. The Mystery Prosecution: "By Methods Unknown" Allegation

28 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 direct commission, aiding and abetting, or conspiracy, caused the hepatitis
transmission "by methods unknown." (The reckless endangerment counts do not contain the
"by methods unknown" language, but otherwise mimics the first seven acts recited above.)

Under NRS 173.075, an indictment "may" allege that the means by which the offense
was committed are unknown or allege one or more specified means. In the context of a criminal
negligence case identifying the essential element of a negligent act "by methods unknown"
undermines the very purpose of NRS 173.075. It requires concise and definite pleading to
permit the defendant to adequately prepare a defense. Williams v. State, 118 Nev. 536, 550, 50

1 P.3d 1116, 1125 (2002). As the Bielling Court ruled when finding an involuntary manslaughter
2 charge to be defective: "In order to properly charge appellant with the offense of involuntary
3 manslaughter, the information must specify the acts of criminal negligence upon which the state
4 is relying to try to obtain a conviction. Bielling, 89 Nev. at 112, 508 P.2d at 546. The "by
5 methods unknown" allegation subverts this most fundamental principal of due process because
6 it fails to identify the specific act of criminal negligence against which the defendant must
7 defend.

8 Desai cannot adequately prepare a defense to criminal neglect "by methods unknown."
9 The very nature of the criminal neglect offense requires the State to allege with specificity the
10 *actus rea* to enable the defendant to develop evidence pertaining to the elements of the offense,
11 including the subjective awareness of the risk associated with the act or omission; the degree of
12 negligence or deviation from reasonable standards of conduct; and the causal connection
13 between the "unknown method" and the hepatitis transmission. None of these elements can be
14 addressed when the indictment claims criminal neglect of patient "by methods unknown." This
15 due process defect is further exacerbated by the state's reliance on accomplice and conspiracy
16 theories of liability, as discussed more fully below.

17 In essence, the instant prosecution is akin to a complex medical malpractice case which
18 will require expert and scientific evidence to prosecute and defend. The State's inclusion of the
19 "by methods unknown" language converts the criminal neglect of patient charges into a strange
20 mutation of the civil tort concept of *res ipsa loquitur*, i.e, something went wrong at the clinic
21 that caused harm to patients, therefore, the jury can infer that the defendants committed, aided
22 and abetted, or conspired to engage in some kind of unknown negligent conduct. In the same
23 vein, the inclusion of the "by methods unknown" allegation impermissibly shifts the burden of
24 proof to require the defendants to show that they did nothing criminally negligent. Finally, the
25 methods unknown allegation impermissibly permits the state to introduce new theories of
26 prosecution during the course of the trial. See, Simpson, 88 Nev. at 660-61, 503 P.2d at 1230.

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1 Given the use of the alternative conjunctive and disjunctive charging language, the “by
2 methods unknown” allegation is fatal to the criminal neglect of patient charges because this
3 Court cannot speculate upon which of the eight enumerated acts and methods the jurors relied.
4 To do so, would allow the Court to usurp the grand jury function. *See, Russell*, 369 U.S. at 770,
5 *Simpson*, 88 Nev. at 660; 503 P.2d at 1229. Accordingly, the Criminal Neglect of Patient
6 charges in Counts 4, 8, 11, 14, 18, 21, and 24 must be dismissed.

7 3. Prosecution by Multiple Guess

8 The various criminal neglect charges are imprecise and vague because they do not
9 adequately inform the defendants as to who did what negligent act and how. The lumping
10 together of multiple defendants in a single count without delineating what acts or omissions
11 each committed raises due process concerns. *See, Hancock*, 114 Nev. at 165-66, 955 P.2d at
12 185-86. Additionally, where a defendant is charged with aiding and abetting, the indictment
13 must specify the manner and means by which the defendant aided and abetted the commission
14 of an offense. *Ikie v. State*, 107 Nev. 916, 919, 823 P.2d 258, 261 (1991); *Barren v. State*, 99
15 Nev. 661, 667, 669 P.2d 725, 728 (1983). Conclusory allegations that a defendant aided and
16 abetted are insufficient. *West*, 119 Nev. at 419, 75 P.2d at 814.

17 In order for a defendant to be criminally responsible for the acts of an accomplice, the
18 defendant must have the same *mens rea* required of the principle. *Sharma v. State*, 118 Nev.
19 648, 654-55, 56 P.3d 868, 871-72 (2002). As discussed above, the *mens rea* for the criminal
20 negligence offenses is a conscious disregard of a known substantial risk of bodily injury.
21 Hence, to be held vicariously liable for the criminal negligence of the principal, the aider and
22 abetter must have an awareness of the unreasonable risks presented by his own conduct and
23 possess knowledge of the facts and circumstances surrounding the principal’s conduct. The
24 aider and abetter would need to act in conscious disregard of the consequences of both his
25 conduct and the principal’s conduct. If there are other aiders and abettors, the defendant would
26 also have to act with knowledge and conscious disregard of the risks presented by the other
27 accomplices.

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

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

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

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

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

1 to a jury who must undertake the complex analysis of the facts pertaining to the subjective and
2 objective elements of the offenses. With eight alleged acts of negligence, including a "by
3 methods unknown", and three defendants, there is a great potential for a grand or petit juror to
4 confuse the elements of the criminal negligence offenses. There is no legitimate reason why the
5 State could not provide a more concise and definite description of which defendant committed
6 what act that resulted in the harm and which defendant committed what act to aid and abet that
7 act.

8 The State's "throw it on the wall and see what sticks" approach to prosecution is
9 prejudicial and unfair as a matter of Due Process. Accordingly, the Court should dismiss as
10 facially invalid the Criminal Neglect of Patient charges in Counts 4, 8, 11, 14, 18, 21, and 24,
11 and the Reckless Disregard charges in Counts 3, 7, 10, 13, 17, 20, and 23.

12 **III. The Defective Racketeering Count: Loosey-Goosey Prosecution**

13 **A. Introduction**

14 Count One alleges a violation of the Nevada Racketeering Act ("RICO"), NRS 207.350
15 to 207.400. The RICO count runs far afoul from the mandates that an indictment must be "a
16 plain, concise and definite written statement of the essential facts constituting the offense
17 charged." NRS 173.075. It is defective in at least three respects. First, it does not specify the
18 required two predicate crimes or otherwise allege with specificity the elements of the predicate
19 crimes. Second, similar to the criminal negligent counts, Count One lumps the defendants
20 together without particularizing which defendant did what racketeering act. Third, it improperly
21 charges a violation of NRS 207.400(1)(a).

22 **B. The Charging Language**

23 To assist in the analysis of the RICO count, the following attempts to diagram and
24 decipher it. The first part of the count recites the statutory language of various substantive
25 RICO violations set forth in NRS 207.400:

26 Defendants, did on or between June 3, 2005, and May 5, 2008, then and there,
27 within Clark County, Nevada, knowingly, wilfully and feloniously

28 while employed by or associated with an enterprise, conduct or participate
directly or indirectly in racketeering activity though the affairs of said enterprise;

1 and/or [Conducting or participating in enterprise through racketeering, NRS
2 207.400(1)(c)(1)]

3 with criminal intent receive any proceeds derived, directly or indirectly, from
4 racketeering activity to use or invest, whether directly or indirectly, any part of
5 the proceeds from racketeering activity; and/or [Investment in enterprise with
6 racketeering proceeds, NRS 207.400(1)(a), but omitting subparagraphs (1)
7 and (2) of this provision]

8 through racketeering activity to acquire or maintain, directly or indirectly, any
9 interest in or control of any enterprise; and/or [Acquisition or maintenance of
10 enterprise through racketeering, NRS 207.400(1)(b)]

11 intentionally organize, manage, direct, supervise or finance a criminal syndicate;
12 and/or [Control of criminal syndicate, NRS 207.400(1)(d)]

13 did conspire to engage in said acts, [Conspiracy to commit prohibited acts, NRS
14 207.400(1)(j)]

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

17 to-wit: by directly or indirectly causing and/or pressuring the employees and/or
18 agents of the Endoscopy Center of Southern Nevada to falsify patient anesthesia
19 records from various endoscopic procedures; to commit insurance fraud by directly or indirectly
20 submitting said false anesthesia records to various insurance companies for the purpose of
21 obtaining money under false pretenses from said insurance companies and/or patients; said
22 fraudulent submissions resulting in the payment of monies to Defendants and/or their medical
23 practice and/or the enterprise, which exceeded the legitimate reimbursement amount allowed for
24 said procedures;

25 [The last portion of Count One tags on alternative theories of criminal responsibility:]

26 Defendants being responsible under one or more of the following principles of
27 criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding
28 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.

29 C. The Constitutional Defects in the RICO Count

30 1. Failure to sufficiently allege two predicate crimes

31 The RICO count fails to sufficiently plead two crimes relating to racketeering. Under
32 NRS 207.390, racketeering is defined as engaging in at least two crimes relating to racketeering
33 which are enumerated in NRS 207.360. Hancock, 114 Nev. at 165 n. 2, 955 P.2d at 186 n.2. To
34 plead a RICO violation, the indictment must allege at least two crimes relating to racketeering
35 with specificity. 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 is loosey-goosey. It 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 poorly drafted 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
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1 essential elements of the crimes and the facts pertaining to each of the elements. *See, Hale*, at
2 638-39, 764 P.2d at 870.

3 **2. Failure to allege which defendant did what**

4 Like the criminal negligence counts, the RICO count lumps the three defendants together
5 without alleging who did what act. The Supreme Court in Hancock ruled that a racketeering
6 count based on securities fraud and obtaining money by false statements was fatally defective
7 because it failed to specify which of the four defendants engaged in which type of racketeering
8 activity. Hancock, 114 Nev. at 166, 955 P.2d at 183. The Hancock Court also found a
9 racketeering count fatally defective because it lumped the defendants together without alleging
10 which defendant made false statements to the victims. *Id.* at 165, 955 P.2d at 186.

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

16 **3. Incomplete allegation of the prohibited act of investing racketeering**
17 **proceeds**

18 The RICO count improperly alleges that the defendants received racketeering proceeds
19 under NRS 207.400(1)(a). This provision reads:

20 1. It is unlawful for a person;

21 (a) Who has with criminal intent received any proceeds derived, directly or
22 indirectly, from racketeering activity to use or invest, whether directly or
23 indirectly, any part of the proceeds, *or the proceeds derived from the investment*
or use thereof, in the acquisition of:

24 (1) *Any title to or any right, interest or equity in real property; or*

25 (2) *Any interest in or the establishment or operation of any enterprise*

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

27 On its face, this provision prohibits the investment of racketeering proceeds, not merely
28 the receipt of such proceeds. *See, Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th

1 Cir. 1989)(similar federal RICO provision requires investment, not merely receipt of
2 racketeering proceeds). The received proceeds must be invested or used to acquire an interest in
3 real estate or any enterprise, as provided for in subparagraphs (1) and (2) of NRS 207.400(1)(a).

4 The RICO count in the instant case omits the language that is set forth above in italics
5 which refers to the investment of the racketeering funds received. This omission is fatal
6 because the incomplete allegation of NRS 207.400(1)(a), purports to criminalize the mere
7 receipt of racketeering proceeds. Once again, since the prohibited racketeering acts are plead in
8 the alternative, it is uncertain on which act the grand jury based its determination.

9 Based on the above defects, individually and in combination, the RICO count should be
10 dismissed for failing to sufficiently state the elements of the offense and facts showing the
11 defendant's commission of each element.

12 **IV. Insufficient Evidence Linking Certain Alleged Negligent Acts to the Proximate**
13 **Cause of the Hepatitis Transmission**

14 The State failed to present slight or marginal evidence to the grand jury showing a causal
15 connection between certain alleged negligent acts and the substantial bodily harm. *See, Sheriff,*
16 *Clark County v. Hughes*, 99 Nev. 541, 543, 665 P.2d 242, 244 (1983). The substantial harm
17 alleged is the transmission of hepatitis to the patients identified in each of the criminal
18 negligence counts. Evidence of factual and proximate cause must link each of the alleged
19 negligent acts to the substantial bodily harm of hepatitis contamination. Since the evidence was
20 insufficient to establish the proximate cause, the criminal negligence counts must be dismissed.

21 Of the seven *known* negligent acts enumerated in the indictment, the State failed to
22 submit to the grand jury sufficient evidence of proximate cause to link the following alleged acts
23 to the hepatitis transmission to the named patients:

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

27 (4) by 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
necessary to conduct safe endoscopic procedures; and/or

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

5 (6) by directly or indirectly scheduling and/or treating an unreasonable number of
6 patients per day which resulted in substandard care and/or jeopardized the safety and/or
7 well being of said patients; and/or

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

14 The above acts allege misuse of bite blocks, biopsy forceps, snares, endoscopy scopes, and
15 unspecified medical supplies, as well as acts related to medical charting, cleaning scopes, and
16 the number of patients scheduled. Aside from mere conjecture and the inflammation of emotions,
17 insufficient evidence was presented that linked any of these activities to the hepatitis
18 transmissions to the eight patients who were treated on the two relevant dates alleged in the
19 indictment.

20 To the contrary, Brian Lubas, the Senior Epidemiologist from the Southern Nevada
21 Health District (SNHD), testified that the SNHD, with the assistance of the Center for Disease
22 Control, ruled out as the cause of the hepatitis outbreak the bite blocks, biopsy equipment,
23 endoscopy scopes, and intravenous placement of heplocks. Mr. Lubas explained that bite blocks
24 are only used in upper endoscopy procedures, not in the lower colonoscopies performed on the
25 patients who contracted hepatitis. He explained that the biopsy equipment was ruled out
26 because not all the infected people had biopsies. He also explained that the endoscopy scopes
27 were ruled out because different scopes were used on the patients and it would be unlikely that a
28 dirty scope would cause a hepatitis transmission. The intravenous procedures were not suspect
because the nurses used one syringe of saline to flush the heplock. Furthermore, the source
patient on July 25, 2007, did not have the IV inserted in the preparation room. Mr. Lubas
displayed a chart to the grand jury showing that the various above items were ruled out as a
source of the transmission. G.J. Tr., Vol. 3A, pp. 60-71; G.J. Exhibit 13, p. 76, table 20-I.
There was no evidence submitted to show that the number of patients treated on the two relevant

1 dates or the medical charting had any factual or proximate connection to the hepatitis
2 transmission.

3 The inclusion of the unsupported acts of negligence proves fatal to each of the criminal
4 neglect counts because the indictment alleges them in the alternative. This insufficiency of
5 evidence cannot be lightly swept aside since it impinges on the due process rights associated
6 with the grand jury. The Court and parties cannot speculate as to which of the alleged acts
7 served as the grand jurors' proximate cause determination. Simpson, 88 Nev. at 660-61, 503
8 P.2d at 1229-30. Accordingly, the Criminal Neglect of Patient charges in Counts 4, 8, 11, 14,
9 18, 21, and 24, and the Reckless Disregard charges in Counts 3, 7, 10, 13, 17, 20, and 23 should
10 be dismissed based on the lack of sufficient evidence of proximate cause as to certain acts of
11 negligence.

12 Based on the foregoing due process violations, the defendant urges this Court to grant
13 this petition of habeas corpus and alternative motion to dismiss the RICO count and criminal
14 negligence counts.

15 DATED this 30th day of March 2012.

16 Respectfully Submitted,

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