IN THE SUPREME COURT OF THE STATE OF NEVADA

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DIPAK KANTILAL DESAI,	)	
	)	
Appellant,	)	CASE NO. 64591
	)	
vs.	)	
	)	
STATE OF NEVADA,	)	
	)	
Respondents.	)	
	)	

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DIPAK KANTILAL DESAI, Appellant, vs. STATE OF NEVADA, Respondents.	)	CASE NO. 64591 **NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These

representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Franny A. Forsman, Attorney at Law

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There are no parties which are corporations. On information and belief, any corporations or businesses entities in which appellant had an interest in are currently part of the bankruptcy estate in a bankruptcy proceeding.

Dated this 30th day of April, 2015.

Respectfully submitted,

/s/ Franny A. Forsman
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INTRODUCTION

Multiple violations of Appellant's constitutional rights during trial require reversal of Appellant's convictions. Appellant's constitutional right to confrontation of witnesses was violated on three separate occasions: a testimonial death certificate prepared by a witness who did not appear at trial was admitted into evidence; a "surrogate" coroner was permitted to read from an autopsy report prepared by another coroner who was not called to appear at trial; and the State was permitted to present its entire direct examination of the decedent in a deposition, even though Appellant's counsel was not permitted to complete the last half of his cross-examination. The nature and degree of the State's misconduct during the trial so infected the proceedings that Appellant was deprived of his constitutional right to a fair trial, requiring reversal on all counts. Appellant's constitutional right to due process was violated when the trial court denied a competency evaluation and hearing although unrefuted evidence showed that Appellant had suffered a series of strokes since his prior competency evaluation and he would not recover to his pre-stroke condition for 9-18 months, thereby creating a doubt as to his competency and requiring an evaluation and hearing under the competency statute.

Because the State lacked direct evidence on the essential elements of

knowledge and criminal intent for purposes of the aiding and abetting and conspiracy, the State relied on inferences that were inferred from other inferences. At trial and in its Answering Brief, the State acknowledges that it had to prove that Appellant knew and intended that some CRNAs were reusing a single syringe to reinject the same patient utilizing a vial of propofol and then reusing that same vial on a subsequent patient, and that Appellant knew that the combination of these injection practices posed a risk of infection transmission prior to the Hepatitis C outbreak. The State has failed to point to any direct evidence supporting a finding of knowledge and intent. To compensate for its lack of proof on these essential elements, the State constructed an Indictment and presented a case replete with extraneous and irrelevant "other act" allegations of "atmosphere," which to be relevant at all, would require the type of logical gymnastics and "inference stacking" that this court has recently rejected. Accordingly, this appeal requires an examination of the factual proof not ordinarily called for in many appeals. Finally, the State's theory of Second Degree Felony Murder relied on no evidence of any direct acts by Appellant and its case was the most extreme application of the doctrine ever applied by this state or any other.

A. THE AIDING AND ABETTING AND CONSPIRACY THEORIES WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE OF KNOWLEDGE AND INTENT, AND THUS, THE ENDANGERMENT AND NEGLECT CONVICTIONS CANNOT STAND AND THE SECOND DEGREE MURDER CONVICTION MUST BE VACATED

1. Measurement of the Sufficiency of Evidence in a Wholly Circumstantial Case

The State addresses two kinds of evidence to support its argument that it proved the necessary elements of knowledge and intent with regard to the Endangerment and Neglect convictions: 1) purported "direct" evidence and 2) "atmosphere" or "motive" evidence. The State conceded at trial that "[Appellant] is **never the direct actor**..." 40 AA 9275. Thus, in order to convict Appellant of Reckless Endangerment or Criminal Neglect, the State had to rely on theories of aiding and abetting and conspiracy to commit those crimes. Accordingly, the State was required to prove beyond a reasonable doubt that Appellant had both knowledge and intent that the direct actors commit those crimes. Sharma v. State, 118 Nev. 648, 654, 56 P. 3d 868, 872 (2002). The State had no evidence that Appellant acknowledged that he knew of Mathahs' and Lakeman's particular injection practices, or that he intended that those practices be used. Therefore, the State was forced to rely on evidence of "atmosphere" at the clinic. The inquiry which must be made in order to assess whether the evidence on knowledge and

intent was sufficient in this particular case includes: 1) whether what the State terms as "direct" evidence is sufficient; 2) whether the "atmosphere" evidence is sufficient when it suffers from impermissible inference stacking; and 3) whether the circumstantial evidence excludes to a moral certainty every hypothesis but guilt.

2. The State Presented No Direct Evidence That Appellant Knew of Mathahs' and Lakeman's Particular Injection Practices or Intended for Mathahs and Lakeman to Use Those Particular Practices

The State's theories of aiding and abetting and conspiracy to commit Reckless Endangerment and Criminal Neglect, and ultimately, Second Degree Felony Murder, required the State to prove beyond a reasonable doubt that 1) Appellant knew and intended for CRNAs Mathahs and Lakeman to (a) reuse a single syringe to reinject the same patient utilizing a vial of propofol (what the State terms "double-dipping"), and then (b) reuse that same vial of propofol on a subsequent patient, and (2) Appellant knew that the combination of these injection practices posed a risk of infection transmission prior to the Hepatitis C outbreak. Sharma, Id. The State failed to meet its burden of proof.

The State was required to prove Appellant's knowledge and intent as to the **combination** of injection practices ("double dipping" and use of the same vial of propofol on a subsequent patient) and not merely knowledge and intent of either

practice used in isolation, which the State concedes posed no risk of infection transmission. The State concedes this point in its Answering Brief:

> The risk of contamination occurs when a CRNA administers one dose of propofol using a needle and syringe and takes that same syringe and puts it back in the vial of propofol. If that vial of propofol is later used on another patient, there is a risk that blood from the syringe use on patient number one has contaminated the propofol and will be spread to patient number two.

Respondent's Answering Brief (RAB), p. 10.

The State further concedes that it had to prove that Appellant knew and intended "for Mathahs and Lakeman to unsafely reuse syringes *and* propofol vials on *various* patients." RAB, p. 19 [emphases added]. The State repeatedly acknowledges that there is no risk of contamination from simply reusing a single syringe to reinject the same patient utilizing a vial of propofol or reusing a vial of propofol on multiple patients, so long as the practices are not combined.[1] The uncontroverted evidence showed that reusing syringes on a single patient and using vials of propofol on multiple patients were both common and considered safe when done in isolation. See discussion at AOB, pp. 14-17; Exhibit 2 to AOB.

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[1]See RAB, p. 9-10: "There are multiple ways that a CRNA can administer propofol without risking contamination. The first is to use only one vial of propofol on each patient. The second option is for the CRNA to fill up multiple syringes out of one vial." See also RAB, p. 24: "In order to use appropriate aseptic technique, each CRNA would either have to dedicate one bottle per patient, or use multiple syringes per one vial."

At most, the evidence the State relied upon, viewed in the light most favorable to the State, showed the following:

1. Appellant knew that Mathahs would use the same syringe on the same patient multiple times, but changed the needle before doing so.

2. Prior to the Hepatitis C outbreak, others at the clinic-but not Appellant-knew that propofol vials were sometimes reused, but not vials in which the same syringe had been dipped multiple times to inject the same patient.

3. After the Hepatitis C outbreak, Appellant sought to institute best practices based upon recommendations made by public health investigators.

4. Appellant tried to limit usage of K-Y jelly, gauze, sheets, chux, tape and bite blocks at the clinic to save money.

Viewed together or separately, and in the light most favorable to the State, these facts are not sufficient to support a verdict of guilty of Aiding and Abetting and Conspiracy to Commit Reckless Endangerment and Criminal Neglect and Second Degree Murder. Because the purported "direct" evidence was so weak as to Appellant's knowledge and intent, as explained below, the State presented "atmosphere" evidence which served only to inflame and distract the jury from what the State admits is the determinative question.

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3. The State's Recounting of the "Direct" Evidence of Knowledge and Intent Is Inaccurate and Misleading[2]

Knowledge

The State argues that its burden of proof as to knowledge was fulfilled as follows:

> Desai's knowledge of the actions by Mathahs and Lakeman were proved by the State through direct testimony, the amount of supplies available to the CRNAs in contrast to the amount of patients, and the testimony from multiple witnesses put on by the State that Desai exercised control over every single part of the clinic.

RAB, p. 19.

To support its argument, the State provides the following examples of Appellant's knowledge which are either incomplete or inaccurate representations of the evidence, and are additionally irrelevant to whether Appellant knew that Mathahs and Lakeman were reusing a single syringe to reinject the same patient utilizing a vial of propofol and then reusing that same vial of propofol on a subsequent patient.

> 1. Mathahs testified that he was instructed by Appellant that he could re-enter a bottle of propofol with the same syringe and a fresh needle to incrementally dose the same patient. RAB, p. 20.

Evidence that Appellant knew that the same syringe was being used more

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[2]The references to the State's argument in this section are to only those factual representations which the State contends constitute direct evidence, as the search for direct evidence of knowledge and intent is at the core of the issue raised here. Discussion of the State's reference to evidence other than direct evidence, such as "atmosphere" or "motive" evidence is contained in Section A(3) below.

than once on the same patient – even if true – shows only that Appellant was aware of a practice that the State concedes posed no risk of transmission of infection. The State's own experts and witnesses, which consisted of the other CRNAs and doctors who worked at Appellant's practice, medical experts, including M.D. anesthesiologists, and public health investigators, testified that **use of the same syringe to incrementally dose the same patient was an acceptable practice and would not cause transmission of infection.** Drs. Herrero and Carrera, each of whom practiced at the endoscopy centers with Appellant, testified that the same vial of propofol could be used on multiple patients without risking infection as long as a new syringe was used for each injection. 9 AA 2024, 16 AA 3765. Drs. Thomas Yee and Satish Sharma, M.D. anesthesiologists, testified that there was nothing unsafe about the practice described by Mathahs. 7AA 1496, 9AA 2138. Mark Silberman, a representative from the American Association of Nurse Anesthetists testified that a single syringe can be "used on the same patient for incremental dosing." 32 AA 7514. Miriam Alter, Ph.D., an infectious disease epidemiologist who had worked for the CDC, testified that the practice Mathahs described of reusing a syringe to incrementally dose the same patient was "fine." 35 AA 8149.

2. The State represents that "Vince Mione told Brian Labus of the Southern Nevada Health District that they were instructed to reuse the syringes, but that he refused. 33 AA 7687." RAB, p. 21.

Again, it is uncontested that simple reuse of syringes on the same patient does not create a risk of transmission. Regardless, the State's suggestion that it was Appellant who instructed Mione to reuse syringes is blatantly misleading in light of Labus' testimony that Mione "didn't indicate who instructed him." 33 AA 7687. Labus also told the jury that the conversation would have been considered a significant event but he made no notation or report of the conversation and could not remember whether he talked to Vincent Mione or Vincent Sagendorf, both of whom denied that such a conversation took place. 33 AA 7745-6, 7748; 22 AA 5062; 18 AA 4328, 4335; 20 AA 4560. Further, Labus testified that he was not aware that Melissa Schaefer, an M.D. investigator from the CDC, whom Labus alleged was present during the conversation, had no recollection of the conversation. 33 AA 7747.

3. The State argues that Appellant's knowledge can be inferred because Dr. Carrol wrote a new policy that described using a new vial of propofol for each patient and Appellant did not terminate Linda Hubbard when she violated this new policy by using a vial of propofol, in which no reentry of a syringe had occurred, on more than one patient. RAB, p. 21.

Appellant's knowledge of Hubbard's alleged conduct does not trigger any

criminal liability on the part of Appellant. Hubbard's alleged conduct did not present a risk of infection transmission because Hubbard did not reuse a propofol vial in which she, or anyone, had re-entered with the same syringe. Additionally, the policy referred to by Dr. Carrol was adopted after, not before, the Hepatitis C outbreak, and was based on the recommendations of the public health investigators. 11 AA 2600.[3] Dr. Carrol also testified that when he advised Appellant that Hubbard had violated the new policy, Appellant initially agreed to her termination. 11 AA 2602. Appellant later relented and transferred Hubbard to another facility with a reprimand and a requirement that she undergo further training. 11 AA 2668.

> 4. The State represents that a nurse at ECSN witnessed a confrontation between Hubbard and Appellant "regarding the propofol" in which, according to the State, Appellant told Hubbard that he was in control and she "would do what he told her." RAB, p. 22

An overheard conversation "regarding the propofol" is not probative of Appellant's knowledge of the manner in which injections of propofol were administered. The record is clear that the confrontation with Hubbard was not

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[3]This is one of several instances in which the State conflates the time line of what was known to Appellant and others who worked at the endoscopy centers *prior to* the public health investigation and what became known *during and as a result of* the investigation. See example no. 5 in this section and footnote 4.

about the manner in which injections were administered at all, let alone about combining the reuse of a single syringe on the same patient utilizing a vial of propofol with the reuse of that same vial on a subsequent patient. Rather, it was about "...Hubbard wanting to give more propofol to a patient." 21 AA 4805-4806. Hubbard also testified that Appellant and Drs. Carrol and Carrera, among others, told her during procedures, "no more [propofol], I'm done...or close to done." 23 AA 5240. An accurate presentation of the testimony on this point reveals that a doctor advising a CRNA that no more propofol was needed has nothing to do with the manner in which injections were administered or even of the "atmosphere" of the practice.

> 5. The State asserts that Appellant "told employees to change their practices when the CDC came to observe...Desai understood the techniques he had pushed the CRNAs to use were not appropriate, which is evidenced by his instructions to change those techniques when under observation." RAB, p. 22.

The State failed to accurately represent the testimony of Ralph McDowell, a former CRNA at Appellant's medical practice. McDowell testified:

> Q. Okay. And [when you started with Appellant's group] you started practicing the administration of propofol on the patients the same way you have always been practicing?
> A. Yes, I would say that would be fair to say, yes.
> ....
> Q. And [Appellant and Dr. Sharma] didn't tell you anything to indicate you should cut corners or engage in what you would think is

unsafe, non-aseptic technique?
A. Oh, no. No. Certainly not, no.
Q. Okay. And that–that was when you started and all the way through to when the clinic is closed; correct?
A. Well, around that time, yes.
Q. Okay. Well, I mean **never was there any–any directive that you interpreted or perceived was going to be someone telling you to administer propofol unsafely or in a manner that would put patients at risk?**
A. Oh, no. No. No, No.

20 AA 4633-4 [emphases added].

The State suggests that because Appellant followed the advice of the public health investigators to educate his employees on "best practices," this conduct should lead inexorably to an inference of guilt. This is an example of the misuse of inferences. Rather, the State has merely shown that Appellant became aware of newly recommended best practices *as a result of* the public health investigation and *then* applied those best practices. If Appellant had not followed the advice of the public health investigators, the State would have argued that this fact supports an inference of knowledge and intent.[4]

While conceding that "there are multiple ways that a CRNA can administer

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[4]The State also uses CRNA Sagendorf's testimony that Appellant requested that only one syringe at a time be seen on the counter following the public health investigation to support an inference of Appellant's knowledge. RAB, p. 30. Again, this testimony references Appellant's actions to implement recommendations of the public health professionals following and as a result of the public health investigation, not prior to it.

propofol without risking contamination," the State then contradicts itself by implying in its Answering Brief that there was some universally-known standard for injection practices at the time of the Hepatitis C outbreak to argue that Appellant must have: 1) known that a) Mathahs and Lakeman reused a single syringe to reinject the same patient from a vial of propofol that was later used on a subsequent patient and b) this combination of practices posed a risk of infection transmission, and 2) intended that his patients be put at risk as a result of that specific combination of practices.[5] The State implies that the CDC had established a standard of one vial and one syringe per injection on a single patient and suggests that this was a standard in place prior to the events in this case. However, Melissa Schaefer of the CDC was not surprised to learn that, even at the time of trial in 2013, 28% of ambulatory surgery centers did not utilize this "best practice"recommended by the CDC. 24 AA 5683.[6] By the State's own admission,

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[5]Had the State argued at trial that a standard was universally known and followed, the testimony of Dorothy Sims, a registered nurse with the Nevada Bureau of Healthcare Quality and Compliance, would have completely undermined such a contention. She testified that when she went to ECSN as part of the investigation team, she "did not recognize [multi-use of propofol vials and reuse of syringes on the same patient] as creating a health hazard." 38 AA 8851-2. The State does not reference her testimony at all.

[6]Dr. Arnold Friedman, an expert called by the State, testified that he did not "know what the standard of practice of CRNAs, anesthesiologists who administer anesthesia in Clark County, Nevada, in July, 2007 was with respect to the reuse of

because there are many ways to safely administer propofol without risking contamination, the State's implication that not observing the CDC's recommended "best practices" can be used to infer knowledge and intent is contradicted by the State's own position at trial. The prosecutor conceded in closing argument that "[n]o one is on trial for not following the highest gold standards of the CDC." 39 AA 9247.

> 6. The State asserts that Detective Whiteley recounted a conversation in which CRNA Hubbard is alleged to have said that Appellant wanted her to "do it the way Ron did it." RAB, p. 31.

Reference to this testimony at 22 AA 5191 is an attempt by the State to suggest that Appellant told Hubbard to reuse syringes. Once again, this is completely misleading. "The way Ron did it" was a reference to incremental dosing of the same patient, not to the reuse of the same syringe on a subsequent patient.[7] 36 AA 8437-8. See discussion in AOB, p. 25-6. As with the rest of the State's "direct" evidence, this shows that, at most, Appellant was aware of a practice that the State has conceded posed no risk of infection transmission.

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syringes on single patients." 31 AA 7362.

[7]The reuse of a *syringe* on a subsequent patient was never alleged to have occurred at Appellant's medical practice by the State at trial or in its Answering Brief.

Intent

The State argues that it proved intent as follows:

> Desai did intend for Mathahs and Lakeman to unsafely reuse syringes and propofol vials on various patients. The testimony regarding Desai's control over supplies and cost-cutting served to show both the motive behind Desai's actions and the pressure the CRNAs were under. It also served to bolster the direct testimony with a reasonable inference that Desai was so intimately involved with the ordering and conserving of supplies that he limited syringes and the propofol and encouraged unsafe injection practices.

RAB, p. 19

The State asserts that the following examples are direct evidence of Appellant's intent:

> 1. The State argues that a chart created by Nancy Sampson of the Las Vegas Metropolitan Police Department ("LVMPD") proved intent on the part of Appellant because the number of vials of propofol and syringes that were ordered were not sufficient to provide for two vials of propofol and two syringes per patient.[8] RAB, p. 23-24.

The trial court made the following ruling about Sampson's chart:

> Okay. I'm not comfortable with her saying should have been used and this and that....how many [syringes and vials of propofol] should have been used or this or that, that's medical and she's not allowed in her role to rely on that....I'll just point out **another way her analysis would be flawed,** because let's just say you do 20 in one patient. You could reuse the same syringe as long as that was a complete bottle... **it's wrong**...I 'm not going to let her spin it in something that calls for

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[8]No witness testified that Appellant had any involvement in the ordering of propofol or syringes.

> medical expertise. I asked her, did— you know, was there any consultation with someone as to what the —these numbers mean, she said no.

27 AA 6244-7 [emphases added].

Detective Whiteley testified that, "**As that chart sits there , it's not accurate, no.**" 36 AA 8532 [emphasis added]. Detective Whiteley admitted that almost 3,000 vials of propofol were not accounted for in Sampson's chart. 36 AA 8529, 8530. He also admitted that more vials may well have been missed because "there's thousands of documents." 36 AA 8531. Sampson also admitted that the chart did not account for pre-existing inventory of syringes and propofol left over from the prior year. 27 AA 6259.

There were two fundamental problems with Sampson's chart. First, it did not account for thousands of vials of propofol or any pre-existing inventory. Second, as the trial court identified, Sampson's analysis, which compared the number of patients to the amount of propofol and syringes ordered within a specified time period, started with an assumption that every patient required two vials of propofol and that each injection of the same patient required a new syringe, which are the assumptions that the trial court determined could not be made by Sampson. As the trial court found, because Sampson had not consulted with anyone in creating or applying her assumptions, her analysis was inherently

flawed and inaccurate. The State presented no other witness that testified that two vials of propofol or more than one syringe were needed per patient during a procedure. Yet the State uses the testimony of Sampson for exactly the purpose prohibited by the trial court to support its argument on intent. At the same time, to refute the argument that deliberate use of the misleading chart constituted prosecutorial misconduct, the State characterizes the chart as merely comprised of hard numbers from clinic records and admits that Sampson could not draw conclusions as to the amount of propofol or syringes necessary per patient. See RAB, pp. 59-60. The State cannot have it both ways.

> 2. The State argues that "it is clear based on the amount of propofol and syringes Desai ordered for the Shadow Lane Clinic that the CRNAs were not physically able to use proper aseptic technique due to lack of supplies and number of patients." RAB, p. 25.

No witness testified that he or she was unable to secure supplies of propofol or syringes whenever he or she needed them. Lynette Campbell, a Registered Nurse at ECSN, testified that she was "always able to get supplies when...needed." 21 AA 4906. CRNA Anne Marie Lobiondo testified that the staff had "plenty of" syringes. 29 AA 6767.

Finally, and most critically, the State's own witness, Jeff Krueger, Managing Nurse at ECSN, was called by the State specifically for the purpose of

describing the process for ordering supplies, including propofol and syringes. He testified that, "I was ordering supplies as needed." 30 AA 6980. In particular, as to whether Appellant limited the orders of propofol and syringes, he explained,

> Q. Isn't it the case that Dr. Desai never told you Krueger, stop ordering that expensive propofol, cut it down?
> A. No.
> Q. Dr. Desai never told you to cut back on the order of propofol; is that correct?
> A. Not that I can remember.
> Q. Isn't it the case that you ordered what was needed?
> A. I ordered to maintain inventory so that they wouldn't run out.

30 AA 6985.

4. The "Atmosphere" or "Motive" Evidence is Not Sufficient to Fill the Gap in the State's Proof on Knowledge and Intent Because it Suffers from Impermissible Inference Stacking

The State, likely recognizing as the trial court did, that there was a "paucity" of evidence that Appellant directed anyone to use the practices which the State alleged led to the Hepatitis C outbreak, littered the factual presentation in its Answering Brief with "atmosphere" evidence.[9] The State was unable to present any evidence that Appellant directed any CRNA, including Mathahs or Lakeman, to reuse a single syringe to reinject the same patient utilizing a vial of propofol and then reuse that same vial on a subsequent patient to support its theory of the cause

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[9]The State denies that the convictions were dependent upon "atmosphere" evidence at p. 18 of its Answering Brief but admits that the "atmosphere" evidence proved motive on the part of Appellant. RAB, p. 54, fn. 3.

of the infection transmission. Rather, the "direct" evidence referred to by the State in its Answering Brief is comprised of the inaccurate Sampson chart deemed unreliable by the trial court and two months at trial of inflammatory and irrelevant "atmosphere" evidence of cost-saving measures (e.g., the usage of K-Y jelly, gauze, sheets, Chux, tape and bite blocks), high patient volume and Appellant's micro-management style.

To compensate for its glaring lack of proof, the State resorted to stacking the inferences set forth below to reach the ultimate fact of knowledge and intent, a strategy which this court has deemed insufficient:

- From the evidence of high patient volume, cost-saving measures and micro-management, the State suggests that the fact-finder can draw a first-level inference that Appellant was "intimately involved" in the ordering of supplies.[10]

- From the first-level inference that Appellant was "intimately involved" in the ordering of supplies, the State suggests that the fact-finder can draw a second-level inference that Appellant actually limited the amount of propofol and syringes available to CRNAs in the clinic.[11]

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[10]The State contends that the "atmosphere" evidence bolstered "the direct testimony with a reasonable inference that [Appellant] was so intimately involved with the ordering and conserving of supplies that he limited the syringes and the propofol and encouraged unsafe injection practices." RAB, p. 19. The State seeks to draw this inference despite testimony from its own witness, Jeff Krueger, that Krueger handled all ordering of supplies for the clinic. See Supra, p. 18.

[11]The State seeks to draw this inference despite the testimony of its own witness, Jeff Krueger, that Appellant never limited his ordering of propofol and

- From the second-level inference that Appellant limited the amount of available propofol and syringes, the State suggests that the fact-finder could draw a third-level inference that there was not enough propofol or syringes at the clinic for the CRNAs to use proper aseptic technique. [12]

- From the third-level inference that there was not enough propofol or syringes at the clinic for the CRNAs to use proper aseptic technique, the State suggests that the fact-finder could infer the ultimate fact that Appellant a) knew that Mathahs and Lakeman were reusing a syringe on a single patient from a vial of propofol and then reusing the same vial of propofol on a subsequent patient and that this combination of practices posed a risk of infection transmission, and b) intended that Mathahs and Lakeman use the combination of these practices.

This court has recently embraced the rule that evidence of an ultimate fact is not sufficient if that inference is based upon the stacking of inferences. "A party cannot use one inference to support another inference; only the ultimate fact can be presumed based upon actual proof of the other facts in the chain of proof." Franchise Tax. Bd. Of Cal. v. Hyatt, ___ Nev. ___, 335 P.3d 125, 156 (2014). The court acknowledged that a claim may be proven by circumstantial evidence, "however, [the ultimate fact] cannot be proven through reliance on multiple inferences–the other facts in the chain must be proven." Hyatt involved claims for

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syringes. See Supra, p. 18.

[12]The State seeks to draw this inference despite the lack of testimony from any witness that the supply of propofol and syringes was insufficient and the trial court's determination that the supply analysis presented by the State was thoroughly unreliable and flawed. See Supra, p. 16-17.

intentional torts against the Franchise Tax Board ("the Board") for its actions during an investigation of Hyatt, who held a patent and was alleged by the Board to have failed to pay appropriate taxes on the profits from that patent. Hyatt claimed that the Board wrongfully caused Japanese companies to cease doing business with him. To prove his claim, Hyatt submitted evidence that the Board sent letters to two Japanese companies inquiring about their business with Hyatt. From that evidence, Hyatt resorted to stacking the inferences below to prove the ultimate fact:

- From the evidence that two Japanese companies had received letters of inquiry from the Board, Hyatt asked the court to draw the first-level inference that the letters alerted the two companies that Hyatt was under investigation by the Board.

- From the first-level inference that the letters alerted the Japanese companies that Hyatt was under investigation by the Board, Hyatt asked the court to draw the second-level inference that the companies would have notified the Japanese government of the investigation of Hyatt by the Board.

- From the second-level inference that the companies would have notified the Japanese government that Hyatt was under investigation, Hyatt asked the court to draw the third-level inference that the Japanese government would have informed other Japanese companies doing business with Hyatt about the investigation.

- From the third-level inference that the Japanese government would have informed other Japanese companies doing business with Hyatt of the investigation, Hyatt asked the court to infer the ultimate fact that his loss of business in Japan resulted from the Board's initial letters to the two Japanese companies.

In Hyatt, this court relied on Horgan v. Indart, 41 Nev. 228, 168 P. 953, 953 (1917). Horgan, involved a similar stacking of inferences to infer an ultimate fact and established the principle reaffirmed in Hyatt: "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed."[13]

To support a conviction in this case on any of the State's theories of culpability, the State had to prove the ultimate fact that Appellant knew of the particular injection practices used by Mathahs and Lakeman, as well as that such practices posed a risk of infection transmission and that he intended them to use those practices. Here, assuming *arguendo*, that the State proved that Appellant was a micro-manager and aggressively cut costs and that there were high patient volumes, then the analysis in Hyatt, assists in measuring the proof here. The chain of proof, just as in Hyatt, impermissibly stacks inference upon inference.

Knowledge and intent were essential elements in proving Appellant's

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[13]While this court has had few occasions to address the issue raised here, other courts have adopted the same inquiry when examining sufficiency of evidence claims. See e.g. Entex, a Div. Of Noram Energy Corp. v. Gonzalez, 94 S.W. 3d 1, 7 (Tex. App. 2002)("a vital fact may not be established by piling inference upon inference"); Black Warrior Elec. Membership v. McCarter, 115 So.3d 158, 163 (Ala. 2012)("[A]n inference cannot be derived from another inference....An inference must be based on a *known or proved fact.*")[emphasis in original].

criminal liability based on theories of aiding and abetting and conspiracy. Direct evidence of those elements was noticeably absent, and thus the State resorted to proving these elements by impermissibly stacking one inference upon another and not upon a complete chain of proven facts. Accordingly, the foundation for the convictions for Reckless Endangerment and Criminal Neglect, and ultimately Second Degree Murder, is fatally flawed.

5. The "Proof" Failed to Exclude Every Hypothesis but Guilt

In addition to examining whether the proof suffers from impermissible inference stacking not built upon a complete chain of proven facts, addressed above, because this is a wholly circumstantial case, this court must also determine whether "all the circumstances taken together...exclude to a moral certainty every hypothesis but the single one of guilt." Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (Nev. 2003).

Here, because there was no evidence that Appellant directed anyone to employ specific injection practices that would present a risk of infection transmission, the case was entirely circumstantial. Accordingly, if, for instance, the evidence of micro-management, cost-saving measures, high patient volumes and the other extraneous "atmosphere" and "motive" evidence taken together cannot exclude to a moral certainty that Appellant was just a micro-manager who

exercised control over his practice and was cost-conscious but did not know of the particular injection practices employed by some, but not all, of his employees or did not intend that those practices be used, then Appellant cannot be guilty of aiding and abetting or of conspiracy to commit Reckless Endangerment, Criminal Neglect or Second Degree Murder.

B. THE SECOND DEGREE MURDER CONVICTION CANNOT STAND

Appellant's conviction for Second Degree Murder cannot stand for the following reasons: 1) if the cause of death of Rodolfo Meana resulted from the injection practices of Mathahs, then the causal relationship between the death and any actions of Appellant was interrupted; 2) the jury was not instructed that the causal relationship must extend beyond the simple commission of the felony by Mathahs, in other words, that there must be proof of involvement by Appellant in an act that caused the death; 3) the jury was not instructed to determine whether the underlying neglect and endangerment felonies were "assaultive" in nature, which would determine whether a Second Degree Felony Murder conviction could be predicated on those felonies; and 4) Appellant's right to confrontation of witnesses was violated when (a) his attorney was not permitted to conduct the last half of his cross-examination of the decedent and the decedent's deposition was

admitted into evidence; (b) a death certificate setting forth the cause of death and prepared by a coroner who did not testify was admitted into evidence; and (c) a witness was permitted to read the findings from an autopsy report prepared by the coroner who did not testify.

The State argues that it did not rely on a Second Degree Felony Murder theory alone in seeking a conviction for Second Degree Murder. Because the jury was instructed on both Second Degree Murder and Second Degree Felony Murder, the State argues, it is impossible to tell which theory was relied upon by the jury and thus this court should affirm the conviction for Second Degree Murder even if the evidence was insufficient for Second Degree Felony Murder or the conviction was otherwise fatally flawed. The problem with the State's argument is that the jury was instructed on the definition of Second Degree Murder as follows:

> Murder of the Second Degree is: where an involuntary killing occurs in the commission of an unlawful act, which in its consequences, naturally tends to take the life of a human being.

Instruction 25, 41 AA 9531.

There were general instructions on murder - Instruction 23, 41 AA 9529 (malice aforethought) and Instruction 24, 41 AA 9530 (malice as applied to murder) and there were specific instructions on Second Degree Felony Murder - Instructions 27 and 28. 41 AA 9533, 9534. However, the only instruction which

provided the jury with a definition of Second Degree Murder, other than Second Degree Felony Murder, was the instruction quoted above -Instruction 25, which refers to the commission of an unlawful act (Second Degree Felony Murder). Instruction 26 addressed accomplice liability for Second Degree Murder but did not define Second Degree Murder further.[14] There was no instruction advising the jury that Second Degree Murder could be proven in two alternative ways.

Additionally, the prosecutor's closing argument did not discuss alternative theories of liability. The prosecutor told the jury, "This is second degree murder. It's engaging in an unlawful act..." 40 AA 9454. Nowhere else in the argument does the State argue that it has proven Second Degree Murder in two different ways. Clearly, the prosecutor's theory was one of Second Degree Felony Murder based upon the commission of an underlying unlawful act.

1. Immediate and Direct Causal Relationship

Nevada's law on Second Degree Felony Murder requires that there be an "immediate and direct" causal relationship between the conduct of the accused and the death. This direct causal relationship is required because, unlike First

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[14]Since Appellant was not alleged to have performed the act which resulted in Meana's death, the State relied on accomplice liability for Second Degree Felony Murder. See Section A, Supra, p. 2 et. seq., which discusses the insufficiency of the evidence to support a conviction based on accomplice liability.

Degree Felony Murder, the legislature has not specified the underlying felonies that can serve to imply the necessary element of malice. This court's repeated reference to the need for limitations on the use of Second Degree Felony Murder to prevent "untoward prosecutions" is an acknowledgment that the Second Degree Felony Murder rule could be used by a prosecutor to increase punishment for a crime that has been legislatively determined to carry a lower penalty. That is what happened here. Both NRS 202.595 (Reckless Endangerment) and NRS 200.495 (Criminal Neglect of Patients) provide for specific and lower penalties for the conduct which the State then relied upon for the Second Degree Felony Murder prosecution. This is precisely the kind of prosecution which would fall under the term "untoward" as expressed in Labastida v. State, 115 Nev. 298, 305, 986 P.2d 443, 448-9 (1999).

Review of all of the Nevada cases cited by both parties on the issue presented here reveals that this court has never approved of, or affirmed, a Second Degree Felony murder conviction in which the defendant was not a direct actor. In Noonan v. State, 115 Nev.184, 980 P. 637 (Nev. 1999) (defendant submerged baby in cold water or placed child in a freezer), the defendant was a direct actor and his conviction for Second Degree Felony Murder was affirmed. In Labastida v. State, 115 Nev. 298, 306, 986 P.2d 443, 448-9 (Nev. 1999) (abuse which led to

death committed by another), and Ramirez v. State, ___Nev. ___, 235 P. 3d 619 (Nev. 2010) (conflicting evidence as to identity of direct actor, thus erroneous instruction prejudicial), the defendants were not, or may not have been, direct actors and the convictions were reversed.

The State has conceded at trial that, "Dr. Desai is **never the direct actor**..." 40 AA 9275 [emphasis added]. So the question here is whether the judicially-created crime of Second Degree Felony Murder can be extended to a defendant who is not the direct actor in a case in which the conduct of another actor caused the death.

In his Opening Brief, Appellant applied the reasoning in Labastida, Supra, (Labastida II), to demonstrate that when the actions of the defendant are not the **direct and immediate** cause of the death, then a conviction of Second Degree Felony Murder cannot stand. This court held that, "Labastida's son did not die as an immediate and direct consequence of Labastida's neglect, without the intervention of some other source or agency. Rather, he died from [his father's] abuse." Labastida, Supra, at 449. The State argues that Labastida is not relevant to the issue because, "[i]mportantly, in Labastida the mother had no idea that her husband was abusing the child." RAB, p. 36. This is not an accurate representation of the facts as found by this court, and when the accurate facts of the case are

considered, the holding in Labastida is even more strongly supportive of Appellant's argument because, unlike this case, in Labastida, there was significant evidence that Labastida was aware of the injuries inflicted on the child by his father.[15]

Labastida II, as cited above, was the decision on rehearing of the case. This court, in that opinion, incorporates by reference the recitation of the facts in the original opinion. Id. at 444. The first opinion in Labastida detailed the facts with regard to the mother's knowledge of the father's abuse, which included numerous, serious and obvious injuries committed over time and other evidence proving Labastida's knowledge, including expert testimony that she must have known about the child abuse due to the obviousness of the injuries, her own training in anatomy and physiology and her admission that she saw the baby's father "manhandling" the baby. Labastida v. State, 112 Nev. 1502, 1505, 1508, 931 P. 2d 1334, 1336, 1338 (1996)(Labastida I).

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[15]This court did find that there was insufficient evidence "that she ever knew that her child was in serious or mortal danger prior to the time she telephoned for an ambulance." This finding was made to support a determination that the conviction could not have been based on Second Degree Murder (as distinguished from Second Degree Felony Murder) and is distinct from Labastida's knowledge as to whether the child was being abused (thus the child neglect conviction was left intact). This court still found facts in the first Labastida opinion and incorporated those findings by reference in the second opinion demonstrating that she was aware of her husband's abuse of the child. See argument next, Infra.

There was far more evidence in Labastida of the defendant's knowledge of the abuse of the baby than there is of Appellant's knowledge of the particular injection practices employed by Mathahs and Lakeman. Labastida demonstrates that even with extensive evidence of knowledge of the acts of others, when *another actor* inflicts the injury which causes the death, a conviction for Second Degree Felony Murder cannot stand.[16]

The State argues that the facts of Noonan v. State, Supra are more closely analogous to the facts presented here. RAB, p. 37. In Noonan, the defendant left a baby in a bathtub of cold water (or a freezer) while he left the home and the child died of hypothermia. The issues on appeal did not involve, and this court did not address, the issue of "direct and immediate cause" or the intervention of another actor. In other words, Noonan is simply not pertinent to the issues raised in this case because the defendant in Noonan was the direct actor who caused the death.

This court's most recent case on the issue emphasizes that a defendant cannot be convicted of Second Degree Felony Murder absent proof that the defendant was a direct actor:

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[16]It must be repeated here that after the trial was over, the trial court commented on the lack of evidence that Appellant told anyone to utilize the injection practices which are alleged to have caused Meana's death: "... while there was a **paucity** of direct evidence showing that Dr. Desai told someone reuse those syringes, do it this way..." [emphasis added] 41 AA 9567.

> NRS 200.508(2) [abuse, neglect, endangerment of a child] does not require that the person directly inflict the harm to be found guilty of child abuse or neglect. As a result, in many instances, NRS 200.508(2) cannot serve as a predicate felony to second-degree felony murder.

Ramirez, Supra, at 623.

The endangerment statutes (NRS 200. 495; 202.595) used as the predicate felonies by the prosecution here for the Second Degree Felony Murder charge, like the child abuse statutes in Labastida and Ramirez, do not require that the person directly inflict the harm to be guilty of the crimes of neglect or endangerment. Here, the State has conceded that the Appellant was not the direct actor of the predicate felonies, and therefore, the convictions of the endangerment crimes cannot serve as predicate felonies to Second Degree Felony Murder.

2. An Essential Element Was Missing from the Second Degree Felony Murder Instruction

The linchpin case to which this court consistently returns in assessing the judicially-created crime of Second Degree Felony Murder is Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983), a case in which the defendant sold drugs to the victim who died from an overdose. This court affirmed the dismissal of the charges but took the opportunity to create the crime of Second Degree Felony Murder. Morris required that three conditions be met before the Second Degree Felony Murder theory may be utilized to imply malice:1) there is an immediate

and direct causal relationship between the actions of the defendant and the killing; 2) the felony relied upon "is inherently dangerous when viewed in the abstract;" and 3) **"the causal relationship must extend beyond [the simple commission of the felony] to an involvement by commission or omission in the act which caused the death."** Id. [emphasis added]. In explaining the third element, the court held, "the causal relationship must extend beyond the unlawful sale of the drugs to an involvement by commission or omission in the ingestion of a lethal dosage by the decedent." Id. Recognizing the need for judicial restraint, the court explained,

> ...the [Second Degree Felony Murder] rule would not apply to a situation involving a sale only or a sale with a nonlethal dosage ingested in the defendant's presence. Although it may be argued that an unlawful sale of drugs is inherently dangerous per se, and therefore an appropriate basis for a charge of murder when death occurs, **we leave such a determination to the legislature.**

Id. [emphasis added].

This court clearly found that the third element could not be satisfied in cases in which a defendant committed a felony which might be dangerous (selling drugs) but did not administer the drugs or otherwise participate in the act which caused the death.

The State argues that the third element in Morris may have been abrogated because it was not mentioned in Ramirez v. State, Supra, at 235 P.2d 622-3 or

Labastida II, Supra. Both cases were reversals on grounds other than the absence of the third element in the jury instructions. Accordingly, it is more likely that the court simply didn't reach the issue than that the court eliminated an element *sub silencio*.

The State relies primarily on an argument that Appellant's rights were not prejudiced by the defect in Jury Instruction 27 because Desai was "involved in the re-use of contaminated products." RAB, p. 41. The State's argument that mere "involvement" in the underlying felony is sufficient is exactly what the Morris court declared as insufficient as it specifically required "involvement by commission or omission in the means that caused the death." Accordingly, the jury should have been instructed that the third element of the rule could be satisfied by a finding that the direct administration of an injection by Appellant had caused the death but that a finding of mere "involvement" in the underlying endangerment felonies could not be sufficient.

The analysis in Ramirez v. State, Supra, at 623-4 is applicable here. There was no objection in Ramirez to the jury instruction on Second Degree Felony Murder. The instruction omitted the first Morris element. Here, it is the third element which was omitted. This court held that Ramirez's substantial rights were affected by the omission of the element because Ramirez could have been

convicted of Second Degree Felony Murder even if she was not directly involved in the commission of the injuries, which would have been an impermissible application of the Second Degree Felony Murder rule. Appellant could have been convicted solely because of a finding of his "involvement" with injection practices without finding that he had committed the act (injection of the propofol) that was alleged to have caused the death. Although there was no objection, the error was plain and the impermissible application of the Second Degree Felony Murder rule affected Appellant's substantial rights.

3. In Nevada, Whether Underlying Felonies Merge in a Second Degree Felony Murder Prosecution Is a Question for the Jury

The jury was not instructed on the doctrine of "merger," and thus did not determine whether the felonies of Reckless Endangerment or Criminal Neglect merged with the homicide and therefore could not be used as predicates for Second Degree Felony Murder. The State argues that the doctrine of merger adopted in Rose v. State, ___ Nev. ___, 255 P.3d 291 (2011), is not applicable to this case because the underlying endangerment felonies are "independent" crimes. RAB, p. 42. The State's argument is flawed for two reasons: 1) this court has determined that the question of whether the underlying crimes merge is for the jury to decide; and 2) the State misunderstands the merger doctrine as it has

developed in California jurisprudence and as adopted by this court in Rose.

It is important to understand that in Rose, this court adopted the California doctrine of "merger" with only one difference. In California, the court examines the statute setting forth the elements of the underlying felony and makes the determination as to whether the underlying felony is "assaultive" in nature. In Nevada, under the rule adopted in Rose, the determination of whether a felony is of an "assaultive-type" is "determined by the jury based on the manner in which the felony was committed." Rose, at 293. In Nevada, if a jury determines that a felony is "assaultive" in nature, then that felony would merge with the homicide, and therefore, that felony could not be used as the predicate felony for a Second Degree Felony Murder charge. The State bases its argument of the inapplicability of Rose on the following quote from People v. Sarun Chun, 203 P.3d 425, 434 (Cal. 2009) contained in the Rose opinion: "the underlying felony must be an independent crime and not merely the killing itself." Thus, the State argues, as long as separate crimes are charged, the merger doctrine does not apply. The California Supreme Court defined what it meant by "independent crime" in the next paragraph of the opinion: "a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an

offense included *in fact* within the offense charged." [emphasis in original] Chun, Id. at 435. The Chun court gave three examples of crimes which would merge with the homicide: discharge of a firearm at an occupied house or car; grossly negligent discharge of a firearm at a person; and felony child abuse. Felony child abuse statutes, like the endangerment statutes charged in this case, merge because the crimes are not "independent" of the homicide. Even when statutes include both active (assaultive) conduct and passive conduct, as do the Endangerment and Neglect statutes in this case, under the merger rule, "even 'passive' abuse leading to death merges with any resulting homicide."[17]

The California Supreme Court traced the history of the rulings on merger in Second Degree Murder Felony Murder cases and called the state of its rulings "muddled." While the Chun court used the term "independent" in discussing the history of the merger doctrine in California, it is clear that only those underlying felonies which are "inherently collateral" to the resulting homicide do not merge and can form the basis for a Second Degree Felony Murder conviction. Id. at 443. This court ruled that this determination is a question of fact for the jury based on

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[17]Mishook, David, *People v. Sarun Chun–In its Latest Battle with Merger Doctrine, has the California Supreme Court Effectively Merged Second-Degree Felony Murder Out of Existence?*, 15 Berkeley J. Crim. L. 127, 152 (Spring 2010).

the evidence presented. Here, the question for the jury should have been whether the proof offered to support the endangerment convictions was "collateral" to the death of Meana. The jury should have been instructed that if it found that the endangerment felonies were not collateral to the death of Meana, then they would merge with the Second Degree Felony Murder charge. If the endangerment felonies merged with the Second Degree Felony Murder charge, the jury should have been instructed that the jury could not convict Appellant of Second Degree Felony Murder.[18]

The California court and this court intended to limit the cases in which Second Degree Felony Murder is appropriate. Both jurisdictions have repeatedly expressed concerns about the need for limitations on this judicially-created crime. The Rose decision would have required that in this Second Degree Felony Murder prosecution, the jury decides whether the underlying felonies were collateral to the homicide allegations or whether as a matter of fact, the endangerment offenses merged into the Second Degree Felony Murder charge. The Second Degree Murder charge itself demonstrates that the underlying felonies were not collateral to the allegations regarding the death of Meana, as described to the jury, "the

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[18]There was no other felony charge that could serve as the predicate felony for the Second Degree Felony Murder charge.

killing occurring...during the commission of an unlawful act, to wit: criminal neglect of patients, and/or performance of an unlawful act, to wit: criminal neglect of patients..." 41 AA 9507.

4. The Second Degree Murder Conviction Is Constitutionally Flawed as a Result of Multiple Violations of Appellant's Rights to Confrontation

Deposition of Meana

The State does not dispute that the deposition of Meana was testimonial and subject to Crawford v Washington, 124 S.Ct. 1354, 541 U.S. 36, 158 L.Ed.2d 177 (2004). The State admits that defense counsel was prevented from completing his cross-examination of Meana but argues that his opportunity to cross-examine was sufficient because defense counsel "asked a total of 63 questions and thus had 63 opportunities to elicit information he felt was important." RAB, p. 45. That is just not how the Confrontation Clause works.

The State cites to Pantano v. State, 122 Nev. 782, 790, 138 P. 3d 477, 482 (2006), to support its argument that a deposition of a decedent in a murder case is admissible even though the deposition was cut off and completion of cross-examination barred. Pantano involved a child witness **who testified at trial** but was unresponsive on several occasions. This court noted that when a witness is forgetful, confused or evasive, "the Confrontation Clause is generally satisfied

when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." Id. at 482 (quoting Walters v. McCormick, 122 F.3d 1172, 1175 (9th Cir. 1997)). The opinion in Pantano acknowledges that the right to confrontation, even with an unresponsive witness, is afforded only when counsel has an opportunity to fully explore the infirmities of the testimony.

The State suggests that allowing defense counsel to ask 63 questions which focused on "a variety of issues, including [Meana's] health prior to the colonoscopy," RAB, p. 45, should have satisfied defense counsel and also Appellant's constitutional right to confrontation. As defense counsel explained at the hearing on the State's motion to admit the deposition (which occurred approximately one year after the interruption of Meana's deposition), "I wasn't even halfway through. **I never even got to the real issue in the case which was his election to not undergo treatment, which is going to come into causation. I never got to that...**" 3 AA 599-600. [emphasis added].

The State represents that after defense counsel told the trial court he was only halfway through his cross-examination, "[t]he [Meana] family then determined that cross-examination could continue for thirty more minutes...Wright examined Meana further about the treatment he received, including the interferon treatments prescribed by Dr. Carrol at the clinic." RAB, p. 45. The cross-

examination did not continue for thirty minutes. The only additional examination which was permitted comprises less than three pages of the transcript. See 1 AA 121-123. The court interrupted the examination just as Appellant's counsel was commencing his inquiry on Meana's cooperation with treatment. 1 AA 123.The trial court recessed the deposition at that point and it was never reconvened.

The trial court suggested that defense counsel could deal with the termination of his cross-examination "in other ways," including seeking stipulations or instructions on the facts he could not elicit, 3 AA 600, or "bring[ing] that out through other witnesses." 3 AA 600. That is a plain misunderstanding of how the Confrontation Clause works. Appellant's right to confront Meana could not be fulfilled by allowing him to cross-examine someone else. Crawford and its progeny make it clear that there is no substitute for cross-examination of a witness.

The Death Certificate

Over objection by the defense, the trial court admitted Meana's death certificate under a hearsay exception.[19] It was offered to show the cause of death.

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[19]The right to confrontation of witnesses trumps a hearsay exception. The State references the basis for the trial court's ruling but does not argue that the hearsay exception would permit admission of testimonial statements from a non-testifying witness in violation of the Confrontation Clause.

The State argues that the findings in a death certificate are not testimonial because "the coroner in the Philippines who created the death certificate would not have known that it would be used for trial." RAB, p. 48. The incontrovertible evidence in this case was that Dr. Olson traveled to the Philippines at the direction of the LVMPD and the Clark County District Attorney's office with Detective Maynard Bagang. Upon arriving in the Philippines, Dr. Olson and Detective Bagang met at the Manila office of the National Bureau of Investigation with the coroner who was tasked with preparing Meana's death certificate and performing Meana's autopsy. Dr Olson testified that she and the LVMPD detective were both present during the autopsy. 37 AA 8627-30. The evidence completely refutes any contention that the coroner who prepared the death certificate and the autopsy report did not know that they would be used for trial.

The State cites to a Mississippi Supreme Court decision for its position that a death certificate is non-testimonial for purposes of the Confrontation Clause. Birkhead v. State, 57 So. 3d 1223, 1236 (Miss. 2011). The State fails to advise this court that in Birkhead, the pathologist who prepared the death certificate testified at trial. More egregiously, though, the State failed to advise this court that one year later, the Mississippi Supreme Court decided Beecham v. State, 108 So. 3d 402 (Miss. 2011), distinguished Birkhead and held:

> While *Birkhead* did involve the admissibility of a death certificate in a criminal case, its similarity to this case ends there, and it is neither legally nor factually analogous to the case before us. In *Birkhead*, the pathologist who prepared the death certificate testified and was subject to confrontation. In this case, the absence at trial of the person who prepared the death certificate is the central issue.

Id. at 404.

Because the death certificate was admitted to establish cause of death, it was deemed inadmissible testimonial evidence and the conviction in Beecham was reversed.[20]

The use of the death certificate in this trial was an egregious violation of Appellant's constitutional right to confrontation. The prosecutor handed the death certificate, State's Exhibit 18, to Dr. Alane Olson, who did not prepare the document and asked:

> Q. Now I'm going to show you a copy of the death certificate...because there's some things on here that I want to make sure I understand and the jury does too...Can you tell us [about the categories of cause of death]?
>
> A. Yes....in Mr. Meana's case, the immediate cause of death is listed as hepatic uremic encephalopathy fourth grade or fourth degree. ...and that condition arose because he had hepatitis C and chronic kidney disease....

37 AA 8643-4.

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[20]Other courts have also made the same determination: Browne v. Virgin Islands, 56 V.I. 207, *8,9 (V.I., 2012); Mungo v. United States, 987 A.2d 1145, 1153 (D.C. App. 2010)(death certificate assumed to be testimonial); Comm. v. Carr, 986 N.E.2d 380, 399 (Mass. 2013), abrogated on other grounds in Comm. v. Crayton, 21 N.E.3d 157 (Mass. 2014).

The document was testimonial. The autopsy was performed and the resulting death certificate was prepared under circumstances that were clearly intended to aid the police investigation with an eye toward prosecution. There was no showing that the coroner who opined as to the cause of death was unavailable.[21] Appellant was given no opportunity to cross-examine the absent witness. Additionally, a critical question for the jury was whether the Hepatitis C infection was an immediate and direct cause of the death, or alternatively, whether Meana's failure to follow through with treatment and/or his pre-existing disease were directly causative.[22] Admission of the death certificate violated Appellant's rights under the Confrontation Clause, warranting reversal of his conviction for Second Degree Murder.

The Surrogate Testimony of Dr. Olson

The State argues that Appellant's "...right to Confrontation was not violated

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[21]In fact, the prosecutor admitted that the State purposefully chose not to bring the witness to testify, to the surprise of the trial judge and defense counsel. 37 AA, 8700, 8710.

[22]Appellant called Dr. Howard Worman, Professor of Medicine and Pathology and Cell Biology at Columbia University, who testified that, in his opinion, several factors contributed to Meana's death, but his review of the records revealed that he could not attribute the immediate cause to Hepatitis C. 38 AA 8929. Thus, the opinions of the absent coroner were directly placed in issue but the defendant was deprived of his right to cross-examine those of the State's declarant.

as Dr. Olson only testified to her personal knowledge as a percipient witness." RAB, p. 49. That is simply not an accurate description of her testimony and even the trial court admitted that Dr. Olson's testimony could present a confrontation issue. 38 AA 8786. As described above, Dr. Olson read from and explained the death certificate prepared by a witness, the Philippine coroner, who was deliberately not called by the State to testify. Dr. Olson was asked by the prosecutor to compare her observations and those of the absent witness and opine on whether their separate observations and opinions were consistent. 37 AA 8642. She was shown the autopsy report prepared by the absent witness and asked to read from a section entitled, "Pertinent Postmortem Findings" and she proceeded to list each of the absent witness' findings and explain what the absent witness must have meant by them. 37 AA 8655-6. She was then directed by the prosecutor to the "Remarks" section prepared by the absent witness and asked to testify to the laboratory results from blood tests. 37 AA 8657. More pointedly, Dr. Olson was not asked to read from her own report and she did not even list a cause of death in her own report "because I'm not actually the one who performed the autopsy nor am I the one who filled out the death certificate." 37 AA 8658.

The State represented to this court that "[Dr. Olson] was able to obtain samples for her own investigation...She prepared her own samples and slides."

RAB, p. 49. The State attempts to present the false impression that Dr. Olson collected samples and tested them to form her own opinion that Meana died of Hepatitis C. Dr. Olson made the following admissions at trial:

> A. Well, I wasn't able to test the blood for hepatitis C.
> Q. Because?
> A. Because it was degraded.
> Q. Okay. And so you then tested the tissue, the liver tissue, for hepatitis.
> A. No, I wasn't able to do that either.
> ...
> Q. Okay. And you–you saw liver tissues, kidney tissues, spleen tissues, right?
> A. Yes.
> Q. Did it have hepatitis C?
> A. I couldn't confirm that, no.
> Q. Okay. Kidney disease?
> A. Yes.

37 AA 8672-3.

The State argues that the "only thing that counsel elicited on cross-examination regarding [Dr. Olson's] lack of observation was that she didn't see the actual blood test that confirmed Hepatitis C, and that she was unable to confirm in her testing that there was Hepatitis C in his liver." RAB, p. 51-52. The "only thing" that Dr. Olson could not confirm independently was a central issue at Appellant's trial -- whether Hepatitis C was the cause of Meana's death. The State has thus conceded that Dr. Olson was allowed to testify to the results of critical laboratory tests which were performed by the absent coroner to ascertain the cause

of Meana's death and that Dr. Olson did not observe, and was not able to confirm, the findings of those tests.

When the United States Supreme Court turned confrontation jurisprudence on its head in Crawford v. Washington, Supra, it could not have intended that the State could avoid the constitutional guarantee by simply using surrogate witnesses to introduce testimonial evidence. The concurring Justices in Conner v. State, ___ Nev. ___, 327 P. 3d 503, 511 (Nev. 2014)[23] would hold that "the Sixth Amendment prohibits the State from introducing testimonial evidence through 'surrogate testimony.'" Id., Gibbons, J. And Saitta, J. concurring. The U.S. Supreme Court is clear on this issue:

> ...as this Court stressed in Crawford, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts. 541 U.S., at 54, 124 S.Ct. 1354. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values." Giles v. California, 554 U.S. 353, 375, 128 S.Ct. 2678, 171 L.Ed. 2d 488 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011).

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[23]Ironically, the surrogate witness in Conner is Dr. Alane Olson.

The State contends that, even if the use of Dr. Olson as a surrogate for the absent coroner violated Appellant's rights to confrontation, the violation was harmless because a) Meana testified to his diagnosis and his treatment; b) Meana's primary care doctor testified that he was positive for Hepatitis C; and c) the death certificate contained a reference to Hepatitis C. RAB, p. 52. Meana's primary physician was not asked to render an opinion on cause of death and the introduction of the deposition of Meana and the death certificate both suffer from violations of the Confrontation Clause. The deprivation of Appellant's opportunity to cross-examine the Philippine coroner cannot be cured by reliance on the admission of other evidence that suffers from the same deprivation of the right to cross-examine witnesses.

C. THE ACTIONS OF THE PROSECUTOR WERE IMPROPER AND AFFECTED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

1. The Misconduct of the Prosecutor was Deliberate, Calculated and Repeated *Atmosphere Evidence*

The State inserted inflammatory and prejudicial allegations into the Indictment and convinced the trial court that it needed to present evidence on those allegations in order to prove its theory of the case. The State primed the jury for testimony about the only issue in the case, injection practices, with two months

of testimony on the wait times at the clinic, the cleaning of scopes, the number of restrooms, rough treatment of patients, fast removal of scopes, patient modesty concerns, and the failure to provide orange juice to patients. See Record References at OB, pp. 68-9. Throughout its Answering Brief, the State asserts to this court that the State's theory was **not** that the "atmosphere" of the clinic constituted proof of the culpability of Appellant. Yet on the seventeenth day of trial, when defense counsel begged the court to require the State to articulate its theory, the trial court answered the question:

> ...the theory here is that the – that was just a manifestation of the overall view of Dr. Desai with respect to patient care and with respect to the operation of the clinic, and that that was just one thing that resulted in a transmission of the virus.

13 AA 2992.

The State deliberately avoided the substantive and procedural safeguards on the use of "uncharged misconduct" evidence[24] by inserting "other acts" allegations throughout the charging document and arguing that it was entitled to prove the allegations of the Indictment. The State argues that all of this inflammatory evidence was admissible to "prove the elements of the crimes charged." RAB, p. 56. However, at trial, the State did not seek admission on those grounds, rather,

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[24]See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 507 (Nev. 1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P. 2d 707, 711-12 (Nev. 1996).

the State convinced the trial court that the evidence was relevant to prove motive. Motive is not an element of any of the crimes charged. Instead, motive is one of the bases for admission under NRS 48.045(2) of "other acts" evidence. By creatively drafting the Indictment, the prosecutor avoided notice, hearing and an examination of the prejudicial impact of the evidence prior to its presentation to the jury.

By the time this case reached the jury, the prosecutor ensured that Appellant was so despised by the venire that any examination of the facts or consideration of the jury instructions was severely compromised. The State's tactics therefore ensured that Appellant was deprived of his constitutional right to a fair trial.

> [The prosecutor's] interest...in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 632, 79 L.Ed. 1314 (1935).

Inadmissible Evidence

The prosecutors deliberately elicited the following evidence which was

inadmissible, misleading or inflammatory[25]:

- Evidence that Appellant had "lawyered up" early in the investigation which the trial court found to be prejudicial but denied a mistrial. 15 AA 3678-9.

- A chart analyzing supply ordering from former LVMPD employee, Nancy Sampson which was the foundation for the State's argument that supplies were limited even though the lead detective admitted, "As that chart sits there, it's not accurate, no." 36 AA 8532.

- Testimony from the Nurse Manager of ECSN that cost per unit of propofol was less if larger vials were ordered as a result of the State's manipulation of the prices using a comparison of the prices of the different-sized vials from different purchase dates, when an accurate comparison showed no price differential. Supp AA, 5-6.

- Testimony from a witness that Appellant was under federal indictment at the time of trial.[26]

Additionally, when Mathahs did not testify in the manner desired by the prosecutor, the prosecutor made sure that his lawyer knew that the State would punish Mathahs unless he conformed his testimony to the State's liking.[27] The

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[25]The quotes from the record and record references are not repeated here and can be found in the Opening Brief at pp. 65-77.

[26]The State attempts to excuse the misconduct on the ground that defense counsel cross-examined Mathahs on his cooperation with federal prosecutors. 8 AA 1865. At no point, did defense counsel question Mathahs, or any other witness, about the return of an indictment of Appellant by a federal Grand Jury which was the inadmissible evidence found to constitute misconduct by the trial court. 29 AA 6682.

[27]See detailed discussion of these incidents of misconduct in the AOB at pp. 49-54.

State argues that the threat to revoke Mathahs' plea agreement was not conveyed to Mathahs. The threat was conveyed to his counsel. 8 AA 1841. When Mathahs returned to the stand, he changed his story to conform to the prosecutor's view of the facts.

The State argues that the large number of instances in which the prosecutors threw "foul blows" was not cumulative or harmful because "the issue of guilt was not close." RAB, p. 64. The trial court did not agree with the State's characterization of the state of the evidence. After the trial was over said, the trial court said, "... while there was a **paucity** of direct evidence showing that Dr. Desai told someone reuse these syringes, do it this way, I found during the trial that there was an abundance of evidence showing that Dr. Desai consistently demonstrated callous disregard for the well-being of his patients." [emphasis added] 41 AA 9567. In other words, in the trial court's view, this case was a circumstantial case not based on direct evidence of the most critical issue in the case--Appellant's knowledge of and intent with regard to the injection practices of his employees. Furthermore, the trial court knew that the prosecutor's conduct needed to be curtailed or it would cause a mistrial. As the trial court stated, "I just want to be clear on this, because we've had this issue twice, the Bruton problem. We've had this last thing with the federal indictment. ....I don't want these issues cropping up

again and again, because at some point in time it's cumulative, Mr. Staudaher." 29 AA 6804. That point came and went during Appellant's trial, depriving Appellant of his constitutional right to a fair trial, and the conviction in this case simply is not reliable due to the cumulative "foul blows" thrown by the prosecutor.

D. THE TRIAL COURT MISINTERPRETED THE COMPETENCY STATUTE AND DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS WHEN IT REFUSED TO CONDUCT A COMPETENCY INQUIRY

The issue presented here is not whether the trial court made an erroneous factual finding that Appellant was competent to stand trial. Rather, the issue presented is whether "doubt," as referenced in NRS 178.405(1), must have been created, as a matter of law, when the following evidence was unrefuted: 1) Appellant suffered a new series of strokes only eight weeks prior to the start of his trial ("multiple small left hemispheric strokes involving frontal, parietal, occipital and temporal regions") Sealed App., p. 58; 2) recovery could take up to 18 months (and full recovery may not be possible) Id., p. 66; and 3) comprehension and speech had been significantly impacted by the recent medical events, according to the representations of defense counsel which were unchallenged.

When the facts are undisputed, the issue is one of statutory interpretation. "The interpretation of a statute is a question of law, the proper standard of review

is *de novo*. This court follows the plain meaning of a statute absent an ambiguity." Irving v. Irving, 122 Nev. 494, 496, 134 P.3d 718, 720 (Nev. 2006).

Pursuant to Nevada statute, a person may not be tried "while incompetent." "Incompetent" is defined by statute:

> ...
>
> 2. For the purposes of this section, "incompetent" means that the person does not have the present ability to:
>
> (a) Understand the nature of the criminal charges against the person;
>
> (b) Understand the nature and purpose of the court proceedings; or
>
> (c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

NRS 178.400(2).

The procedural statute provides:

> 1. Any time after the arrest of a defendant, including, without limitation, proceedings before trial, during trial, when upon conviction the defendant is brought up for judgment or when a defendant who has been placed on probation or whose sentence has been suspended is brought before the court, **if doubt arises as to the competence of the defendant**, the court shall suspend proceedings, the trial or the pronouncing of judgment, as the case may be, until the question of competence is determined.

NRS 178.405(1).

Thus, the question remains as to whether the undisputed facts presented to the trial court constituted "doubt" as referenced in the statute.

The undisputed facts were:

- "MRI of the brain showed left hemispheric multifocal infarcts. The infarcts were patchy, small and appear embolic. The largest were the left premotor and the left parietal strokes." Sealed App., p. 52.

- "Speech therapy evaluations...demonstrate severe expressive aphasia and moderate receptive language impairment." Sealed App., p. 53.

- Recovery to his pre-February 2013 condition could take 9-18 months and may not fully recover. Sealed App., p. 66.

- The court accepted defense counsel's perceptions of the impact of the strokes on Appellant's abilities to assist counsel:"I know expressive aphasia and receptive aphasia and I know when I am talking to a man for 30 minutes and he is agonizing and struggling...I can tell fakers from not fakers. I can tell someone that's impaired at the present time and isn't...he is pathetically not competent at the present time and cannot assist me." 2 AA 467. See also detailed recitation of defense counsel's observations at Opening Brief, p. 84-86.

The trial court and the State relied heavily on Dr. David Palestrant's summary and background of competency findings made by others prior to Appellant's February 2013 stroke, instead of properly relying on the conclusions that Dr. Palestrant draws from the damage Appellant suffered as a result of his February 2013 stroke. Dr. Palestrant did not actually meet with or observe Appellant, did not examine him and did not perform a competency evaluation. Rather, Dr. Palestrant was appointed to review the medical records to "...determine the nature and extent of any changes to Desai's brain from the date of his release

from Lake's Crossing on or about October 7, 2011, to the date upon which he was released from Summerlin Hospital on March 1, 2013." 2 AA, 446. The court agreed that the record review performed by Dr. Palestrant was not a competency evaluation:

> MR. WRIGHT: ...He didn't give a competency evaluation.
> THE COURT: Right, because the—
> MR.WRIGHT: That wasn't what he was asked to do.
> THE COURT: Correct...

2 AA 473.

Even so, Dr. Palestrant found the following based on the limited scope of his inquiry:

> His new strokes in February 2013 involve the speech cortex, **with a resultant expressive and receptive aphasia**. Again questions of some degree of embellishment of the symptoms have been raised. Memory should not be further compromised by the new strokes. However, these strokes are small and it's my expectation that he will make significant gains and return close to his level of function prior to February 2013. Most of his gains in neurologic function will be seen in the first 9 months, but full recovery can take up to 18 months.

Sealed App., p. 66 [emphasis added].

The findings of Dr. Palestrant, based on his review of the medical records alone, were sufficient to create "a doubt" under the statute. The State suggests that Appellant failed to avail himself of therapeutic opportunities, suggesting that he had those opportunities following the last series of strokes, just before trial. The record, however, reveals that the State's reference to therapeutic opportunities was

related to a previous series of strokes suffered prior to 2013, not the events which precipitated the request for a competency evaluation that forms the issue on appeal. Nevertheless, whether therapy just before trial was even possible is not relevant to the question of whether the unrefuted evidence constituted "doubt" under the statute.

The State argues that abuse of discretion is the standard of review applicable to the trial court's determination that Dr. Palestrant need not be called or cross-examined, that no further evidence would be taken on the issue of Appellant's competency and that the recent series of strokes did not require a competency evaluation. This is the wrong standard. It is wrong because the argument does not take into account the federal constitutional implications of the decision:

> A formal competency hearing is constitutionally compelled any time there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. In this context, evidence is "substantial" if it "raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence." The trial court's sole function in such circumstances is to decide **whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency.** If such evidence exists, the failure of the court to order a formal competency hearing is an abuse of discretion and a denial of due process.

Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113(1983), quoting,

Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). [Citations omitted and emphasis added.].

Moreover, when facts are undisputed, the question for this court becomes a question of law to be evaluated applying a *de novo* standard. In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1062 (Nev. 2005). Melchor-Gloria makes it clear that the trial court cannot evaluate the evidence presented to it "from any source" but must assume that it is true.[28] Applying that assumption to the evidence presented to the trial court, a competency evaluation and hearing were constitutionally compelled.

CONCLUSION

For the foregoing reasons, the Judgment in this case must be reversed.

Dated this 30th day of April, 2015.

Respectfully submitted,
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[28]Here, the evidence was undisputed so the assumption was not necessary.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect 12 in size 14 Times New Roman font.

2. I further certify that this brief does not comply with the page- or type-volume limitations of NRAP 32(a)(7). Counsel for Appellant has filed a Motion for Permission to Exceed Page/Word Limit for Reply Brief

3. Finally, I hereby certify that I have read this appellate brief, and the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference the page and volume number, if any, of the transcript or appendix where the matter relied on is found. I understand that I may be subject to sanctions

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. . .

in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of April, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify this document was filed electronically with the Nevada Supreme Court on April 30, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney

Catherine Cortez-Masto, Attorney General
State of Nevada

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