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

RONALD ERNEST LAKEMAN

Appellant,

vs.

THE STATE OF NEVADA

Respondent.

**Supreme Court No. 64609**

District Court No. C265107

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# APPELLANT'S AMENDED OPENING BRIEF

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## TABLE OF CONTENTS

PAGE(S)

## TABLE OF AUTHORITIES

CASES PAGE(S)

**STATUTES**

## STATEMENT OF ISSUES

I. Did the Court err in refusing to grant a change of venue?

II. Did the Court err in refusing to disallow the playing of Descendent, Meana's video deposition even though Lakeman did not have the opportunity to cross-examine Meana?

III. Did the Court err in allowing the testimony of Melissa Schafer, the CDC investigator, regarding Lakeman's telephonic interview with the CDC?

IV. Prosecutorial Misconduct: Did the court err in refusing to grant the defense's motion for mistrial:

1. When the prosecutor in the middle of Mathahs' testimony exited the courtroom and told Mathahs' attorney that he was not testifying in favor of the prosecution and that the State would not honor the deal unless he do did?

2. When the prosecutor directly elicited prohibitive testimony so egregious that the court admonished the conduct in front of the jury?

3. In closing argument when the prosecutor said, "put yourself in the shoes of the victims……"? (Golden Rule Argument)

V. Did the evidence support conviction for criminal negligent of patients NRS 200.495?

VI. Is NRS 202.595 a lesser included offense of NRS 200.495?

## STATEMENT OF JURISDICTION

This appeal is taken from a final judgment of conviction pursuant to NRS 2.090; 177.015(3). Judgment was entered on November 13, 2013; that Judgment was amended on November 21, 2013. (App. 36) Notice of Appeal was filed on December 9, 2013. (App. 357) This appeal is taken from a final judgment.

## STATEMENT OF THE CASE

### 1. Introduction

This case arises out of a Hepatitis C outbreak which occurred at the Endoscopy Center of Southern Nevada (ECSN) Las Vegas, Clark County, Nevada, in 2007. Specifically, on or about July 25, 2007 and September 21, 2007 seven patients at ECSN became infected with hepatitis C.

Ronald Lakeman, the Appellant in this case, was a Certified Registered Nurse Anesthetist (CRNA) employed at ECSN. Mr. Lakeman was employed to administer Propofol, the sedative given to patients prior to the procedure. On the dates in question, Mr. Lakeman administered propofol to four of the seven infected patients. The State alleged that the disease was transmitted through contaminated propofol bottles which Mr. Lakeman used on his patients. (App. 3)

On June 4, 2010, a 28 Count Indictment was returned against Dr. Dipak Kantilal Desai, Ronald Lakeman and Keith Mathahs. The Indictment was amended on June 11, 2010, December 7, 2012, February 12, 2013, February 20, 2013 and

May 6, 2013. On August 10, 2012, a separate Indictment was filed alleging Second Degree Murder as a result of the death of Rodolfo Meana. That charge was ultimately consolidated with the pending charges. The final version of the Indictment alleged as follows: Insurance Fraud (NRS 686A.2815) (Counts 1, 4, 5, 8, 11, 14, 15, 18, 21, 24); Reckless Disregard Resulting in Substantial Harm (NRS 0.060, 202.595)(Counts 2, 6, 9, 12, 16, 19, 22); Criminal Neglect of Patients Resulting in Substantial Bodily Harm (NRS 0.060, 200.495)(Counts 3, 7, 10, 13, 17, 20, 23 ); Theft (NRS 205.0832, 202.0835)(Count 25); Obtaining Money under False Pretenses (NRS 205.265, 205.380)(Counts 26, 27) and Second Degree Murder (NRS 200.010, 200.020, 200.030, 200.070, 200.595, 200.495)(Count 28). (See Fifth Amended Indictment)(App. 1)

Prior to trial, Keith Mathahs entered a guilty plea. Lakeman and Desai proceeded to trial on April 22, 2013. On July 1, 2013, the jury returned a verdict finding Lakeman guilty of the following charges: Count 1; Count 2; Count 3; Count 6; Count 7; Count 8; Count 12; Count 13; Count 14; Count 15; Count 19; Count 20; Count 21; Count 24; Count 25; and Count 26. Judgment of Conviction (App. 36)

Mr. Lakeman was acquitted on Counts 5, 9, 10, 11, 16, 17 18, 22, 23, 27 and 28. Mr. Lakeman appeals from the guilty convictions. (App. 44-45)

## FACTS

Ronald Ernest Lakeman, 67 years of age, was convicted of 16 of 28 counts

ranging from misdemeanors to category B felonies.

Mr. Lakeman is married, the father of one child and two grandchildren. He is a military veteran having served in the USAF on two separate occasions most recently from 1980-1990. In the Air Force Mr. Lakeman was a registered nurse and received anesthesia training becoming a Certified Registered Nurse Anestitician (CRNA). Mr. Lakeman was honorably discharged in 1990 as a Captain. He located to Columbus, Georgia with his wife of 25 years. He practiced in Columbus, GA until 2004 when he and his family moved to Las Vegas to accept a position at the Endoscopy Center of Southern Nevada. He practiced in Las Vegas from 2004-2007.

Prior to the instant conviction Mr. Lakeman had a spotless record performing over 40,000 procedures without a single complaint. Other than the instant conviction, Mr. Lakeman has had no disciplinary action with any licensing boards. He has no criminal history. See Sentencing Brief.

## ARGUMENT

### I. THE COURT ERRED IN REFUSING TO GRANT A CHANGE OF VENUE?

A District court may change the place of trial "when there is reason to believe that an impartial trial cannot be had" in the county designated in the Complaint. NRS 13.050. NRS 174.455(3) allows for appeal from a denial of a

motion for change of venue in a criminal case only on appeal from a Judgment of Conviction.

In *National Collegiate Athletic Ass'n v. Tarkanian*, 113 Nev. 610, 939 P.2d 1049 (1997) the court set forth six factors to consider in evaluating whether a change of venue should be granted. They are:

1. the nature and extent of the pre-trial publicity;
2. the size of the community;
3. the nature and gravity of the lawsuit;
4. the status of the plaintiff and defendant in the community;
5. the existence of political overtones in the case.
6. the amount of time that separated the release if publicity and the trial.

In *Sicor Inc. v. Hutchinson* 127 Nev. Adv. Op.82, 266 P3.3d 608 (2011) the court added several factors;

7. the care used and difficulty encountered in selecting a jury;
8. the familiarity of potential jurors with pre-trial publicity;
9. the effect of the publicity on the jurors;
10. the challenges exercised by the party seeking a change of venue.

In reviewing the factors as applied to this appeal the totality of the factors warranted a change of venue.

**1. The Nature and Extent of the Pre-Trial Publicity**

For five years prior to this trial, the Las Vegas community was flooded with adverse publicity and sensational reports about the outbreak of Hepatitis C infections. The outbreak lead the Southern Nevada Health District to issue letters to over 60,000 patients warning the patients that they may have been exposed to Hepatitis B, C and HIV.

The media had fueled the passions of the public with a constant bombardment of stories on the evening news and in the print media. Dr. Desai was the most despised individual in the community in recent memory.

No case has generated more intense negative publicity than this case. The lesser known of the two Defendants was Ronald Lakeman who was now being tried with Dr. Desai and was subjected to the stigma attached thereto.

In *Sicor,* 266 P.3d 608 this court received a plethora of newspaper and internet articles regarding the initial incidents at the clinics. (Appellant Lakeman requests this court take judicial notice of those articles presented in the *Sicor* case.)

This court acknowledged in *Sicor* that "while some of these articles expressed outrage over the actions of Desai and the clinic employees the same level of emotion was not found in the articles that discussed the civil trials." Well, here we are in the criminal appeal. Certainly, this court must now recognize the level of hostility directed at Dr. Desai and the clinic employees namely, Lakeman as a result of the pre-trial publicity.

**2. Size of the Community**

Las Vegas is a community of some 2 million people county wide. At first blush, it seems like a community in which a fair and impartial jury could be pooled. Not so. Consider:

1. Over 60,000 notices were sent out to residents of Clark County notifying them of the potential risk of exposure to Hepatitis B, C and HIV. (App. 1763) Imagine getting such a letter in the mail. These 60,000 patients had wives, husbands, parents, children, nieces, nephews, aunts, uncles, friends and the list goes on. These notified patients shared their fears, anxieties and apprehensions with their circle of friends and relatives. Imagine the number of people who actually knew someone who was sent a letter. The size of the community suddenly gets significantly smaller.

As juror number 100604914 wrote in her questionnaire, "I know 2 people who had to be tested & have seen this case on the news. I watch the news everyday." (Juror questionnaire App. 72)

**3. The Nature and Gravity of the Lawsuit**

Without a doubt, the facts underlying this case have seriously impacted the lives of tens of thousands of Clark County residents. The gravity of this case is evident in the 28 count felony indictment ranging from insurance fraud to murder. (App. 1) This case has ignited the emotions and passions of the community. One

need only look at the hundreds of news reports, editorials, and juror comments. If ever there were a case where pretrial publicity "corrupted the trial atmosphere" so as to preclude a fair trial it is this case. *Sicor v. Hutchinson*, 286 P.3d 608 (2011)

**4. Care Used and Difficulty Selecting a Jury; challenges used**

Despite the best efforts of the defense it was impossible to remove all those jurors who expressed bias. The defense was given nine total preemptory challenges to use for two defendants. The defense requested more but was denied. (App. 1587-1588) The court erred in not excusing juror number 129, 385, 426, 453, 573, 718, for cause (App. 651)

JUROR 385: Expressed bias toward the medical and legal professions both in her questionnaire and in jury voir dire. (App. 811-815) Despite this recalcitrant and biased prospective juror, the court refused to excuse her for cause. (App. 829)

JUROR: 224: (Empaneled as juror no. 3) (App. 40) This juror was a problem from the beginning. She first attempted to be excused for financial reasons. (App. 1827) The court refused to excuse her. (Id.) She then committed misconduct in front of all the other jurors and was excused and repremanded by the court. (App. 2014)

Juror 224 commented on the defenses' cross examination of victim Michael Washington, saying "I can't believe they asked him to add up the numbers." (App.

2276) Despite this potential jury contamination the court did not interview the entire panel and refused to grant a mistrial.

JUROR 1: (App. 40) On day 26 of the trial Juror No. 1 expressed concern that she could not be unbiased. (App. 46-71) The court interviewed and questioned Juror No. 1. (Id.) The court took no action on Juror No. 1 until the last day of the trial (day 45) and just prior to reading the jury instructions. (App. 5289-5290) At that time the court asked the defense if they wanted to keep Juror No. 1. At this late date in the trial, the defense who had previously objected to Juror No. 1 had no option but to keep her on the jury.

**5. Potential Jurors Familiarity With the Publicity**

By the time the case went to trial, Appellant had already been portrayed by the media in such a negative light that the prejudice against him was palpable. There were some 500 juror questionnaires filled out. Those questionnaires are part of the record. (App. 5090) A review of those questionnaires shows the level of animosity and bias in the community. (App. 94, 116, 138, 160, 182, 204, 226, 247)

These comments are but a small sampling of the prejudice and bias which permeated the jury pool.

The trial court MUST grant a change of venue if there is a "reasonable likelihood" that an impartial trial cannot be had in the original venue. *Tarkanian*, 113 Nev. at 612, 939 P2d at 1051.

**6. The Effect of the Publicity on the Jurors**

The jury selection process revealed that the publicity had an overwhelming effect on the opinions of the venire. What is troubling is that many of the potential jurors formed erroneous opinions as to how the disease was spread. (See App. 269, 291, 313, 335) When jurors are affected by news reports to the extent that they have formed negative and erroneous opinions as to the Defendants, and as to the source and transmission of the disease, it is an insurmountable task for the defense to overcome.

**7. The Challenges Exercised by the Party Seeking Change of Venue**

The jury selection process took the better part of eight days. (App. 1736) During that time period most of the 500 venire were excused by way of stipulation or sua sponte by the court. Lakeman challenged juror 129 for cause. (App. 651) That challenge was denied. (Id at 653) Lakeman challenged juror 426 for cause. (App. 815) That challenge was denied. (Id. at 945) Lakeman challenged juror 385 for cause (as discussed infra) that challenge was denied. (Id. at 829)

Juror 224 first attempted to be excused for financial reasons. (App. 1827) The court refused to excuse her. (Id.) (as discussed infra) Juror 224 was empanelled and later excused for misconduct. (App. 2277) Lakeman challenged juror 523 because a family member was a patient of the clinic. That challenge was denied. (App. 1138-1140) Lakeman challenged juror 633. That challenge was

denied. (App. 1192) Lakeman challenged juror 718. That challenge was denied. (App. 1404)

When reviewing the totality of the circumstances, the law, and the facts there is certainly ample evidence to believe that an impartial trial could not be had in Clark County. NRS 13.050

**II. THE COURT ERRED IN REFUSING TO DISALLOW THE PLAYING OF DESCEDENT, MEANA'S VIDEO DEPOSITION EVEN THOUGH LAKEMAN DID NOT HAVE OPPORTUNITY TO CROSS-EXAMINE MEANA**

Rodolfo Meana attempted to give a video tapped deposition prior to trial. Mr. Meana was questioned by the State and passed the witness to Mr. Wright. Before Mr. Wright had finished his cross examination Mr. Meana was no longer able to continue. The State promised to continue the deposition, however, Mr. Meana returned to the Philippines before finishing his deposition and subsequently died. Lakeman did not have an opportunity to ask one question.

The State attempted to, and was allowed to over the objection of counsel, to play the video tapped deposition before the jury.

> MR. SANTACROCE: ….. I'm formally objecting to the use of the video deposition of Mr. Meana for these reasons. First of all, it violates the confrontation clause of the United States Constitution. Mr. Lakeman, and I as his counsel, didn't have an opportunity to cross-examine Mr. Meana…..
>
> It is patently unfair and a violation of the Confrontation Clause to allow that deposition to be shown to the jury……(App. 1648)
> THE COURT: All right. Well I've already ruled on it. I don't know that I have to make any additional record. You know, if you're—if it's such a

> violation of the Confrontation Clause, then you know, Dr. Desai's conviction or Mr. Lakeman's conviction if we ever get there, **should be reversed….** (emphasis added)
> (App. 1653-1654)

It is black letter law that testimonial statements of an unavailable witness are inadmissible unless the defendant had an opportunity to previously cross-examine the witness regarding the witness' statement. *Crawford v. Washington*, 124 S.Ct. 1354 (2004). There is no dispute here that the witness was unavailable for trial or that the statements of Meana, made in the deposition are testimonial. A defendant is entitled to "an opportunity for...effective cross-examination" in order to satisfy his right to confrontation when testimony of an unavailable witness in a previous proceeding is sought to be admitted by the State. *Chavez v. State*, 213 P.3d 476, 484 (Nev. 2009). Here, adequate opportunity for cross-examination was precluded by the failure of the State, which sought to introduce Meana's recorded testimony, to reschedule the deposition. When the State was permitted to introduce the complete direct examination of the unavailable witness, Appellant's right to confrontation was violated.

## III. THE COURT ERRED IN ALLOWING THE TESTIMONY OF DR. MELISSA SCHAEFER THE CDC INVESTIGATOR, REGARDING LAKEMAN'S TELEPHONIC INTERVIEW WITH THE CDC.

Lakeman sought to exclude the telephonic conversation between Lakeman and Dr. Melissa Schafer of the Centers for Disease Control (CDC). (App. 1639)

On or about January, 2009 CDC inspector, Dr. Melissa Schaefer contacted

Mr. Lakeman by telephone. Schaefer identified herself as an investigator from the CDC and asked if Lakeman would talk to her, Lakeman was reluctant at first, but Schaefer promised Lakeman anonymity, and in fact, told him that his name would never be used, that he would be assigned a number, and that would only be referred to in any CDC reports by that number. (Id.; See also, App. at 3708) On that basis, Mr. Lakeman openly and freely spoke to the investigator. Dr. Schaefer testified as follows:

> Q. Tell me who initiated contact with Mr. Lakeman.
> A, I looked him up on the Internet and found a number and called it…..
> Q. Okay. And how did you identify yourself?
> A. That I was a working CDC employee and—that we had done an investigation at the clinic where he had worked previously.
> Q. Okay. Tell me about some of the promises that you made to him before questioning or talking to him, asking him questions.
> A. So again, I told him that I was not tape-recording the call. And again, since I didn't realize this was going to be a criminal investigating (sic), you know, explaining how we typically do things as far as, you know, any reports—don't list his name; we assign, you know, a number or something else for the information that's provided.
> Q. Well, in your grand jury transcript you talk about how important anonymity is to the CDC in order to gain information for public safety.
> A. Right.
> Q. Okay. So tell me about that.
> A. So, you know, when we do these investigations, we rely on the healthcare providers to be transparent with us and to perhaps tell us things that they wouldn't tell their employer or that they don't want others to know, you know; to take us aside and say, you know, I-please know that- this—I don't want my employer to know this, but this is really what's happening there. And so that's helpful to get honest information for public safety so that if there's a bad practice identified, we can stop it.
> Q. Okay. And you explained that to Mr. Lakeman, correct?
> A. I don't know if I went into the detail that I am explaining here, but I did communicate that we wouldn't use his name in any—anything we generated.

(App. 3706-3709)

Q. Well, he made a statement to you to the effect that, well, if—I'm going to deny talking to you…..
A. It was something along the lines of denying that he had said these things to me if it came down to it.
(App. 3710)

Q. .... And when your investigating and talking to these individuals, you said in your grand—what did you say in your grand jury transcript—or to the grand jury on that issue?
A. That—again, we need healthcare workers to be honest with us and to tell us things and to do—you know, the best we can with—with any public reports that we generate or put out to not list names.
Q. Didn't you say that they don't want retribution from their current employer for reporting someone else's actions, so I guess I wasn't entirely surprised by the statement?
A. I did say that, correct.
(App. 3713)

The defense, moved in limine, to exclude the testimony of Dr. Schaefer's testimony and to the statement that Lakeman would deny ever talking to her. (App. 1639) That motion was denied. (Id. at 1646)

As Dr. Schaefer testified, it is imperative to public safety to "get honest information for public safety so that if there's a bad practice identified, we can stop it." (App. 3706-3709)

To allow the CDC to breach their promises of anonymity could have a chilling effect on the public health safety of every city and town across America and possibly the world. Public health workers will be reluctant to speak if they risk the exposure to criminal prosecution. In this time of increasing concerns over

transmission of deadly diseases such as Ebola and the like we want candor from health care workers and the public. The public safety of our community and nation demands such protection.

The defense further objected to the statement allegedly made by Lakeman, that he would deny ever speaking to Dr. Schaefer. (App. 3710) The statement was made early in the conversation with Dr. Schaefer. (Id.)

NRS 48.035(1) provides in part,

> "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

This statement is more prejudicial than probative and the court erred in allowing the statement to be put before the jury.

## IV. PROSECUTORIAL MISCONDUCT

The nature and degree of misconduct so infected the proceedings that the conviction must be vacated to remedy the deprivation of Appellant's right to a fair trial. *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)(quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974).

This court engages in a two-step analysis when considering a claim of prosecutorial misconduct: 1) the court must determine whether the prosecutor's conduct was improper; 2) if the court determines the conduct was improper, the

court determines whether the improper conduct warrants reversal. *Valdez v. State*, 196 P.3d 465, 476 (Nev. 2008). To determine whether reversal is warranted, this court looks to whether the misconduct was of constitutional dimension. If it was, then the conviction will be reversed "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." If the error is not of constitutional dimension, then reversal is warranted only if the error substantially affects the jury's verdict. *Id*. 46

Three notable events of prosecutorial misconduct occurred during this trial. Keith Matheus was a CRNA who worked at the clinic during the dates in question. Mr. Matheus was criminally indicted along with Mr. Lakeman and Dr. Desai. Mr. Matheus accepted a plea deal and agreed to testify against Dr. Desai and Mr. Lakeman. In the middle of Keith Mathahs testimony one of the prosecutors exited the courtroom and told Mathahs' attorney that he was not testifying in favor of the prosecution and that the State would not honor the plea deal unless he do did.

> MS. WECKERLY: Well, from the State's perspective, and I've advised his counsel, he's now in violation of his proffer because he testified differently on direct than he did on cross.
>
> THE COURT: Meaning that…. He now said, no, he thought it was perfectly safe to reuse the syringe into the bottle of propofol and that was a standard of practice that he'd been doing for 32 years or whatever.
>
> MR. STAUDAHER: Which, is diametrically opposed to what he testified to on---direct examination—
>
> THE COURT: He'd never seen anybody do that before.

MR. STAUDAHER: Right….

(App. 2545-2546)

The defense, Mr. Wright joined by Mr. Santacroce raised objection. (Id. 2563)

> MR. WRIGHT: I believe it is improper for the State to have told the witness or his counsel that he is breaching his plea agreement for testifying truthfully.
>
> MR. WRIGHT: They are threatening him. They are threatening the witness because his testimony changed from direct. And that is prosecutorial misconduct to tell the witness if they vary from their direct examination testimony, we are withdrawing the plea bargain…. And the truth of the matter is, they knew from Gayle Fischer and other witnesses what he said to her. That's her report and her testimony at the grand jury and to metro police as to what he said, that he understood and believed what he was doing was proper and all they did was threaten him, get him to plead guilty and then spoon feed him a version to tell on direct, which is contrary to the truth. And you can't now threaten the witness while he's testifying, which is what they have done. (App. 2548-2549)
>
> MR. SANTACROCE:…I'm going to join Mr. Wright's objection, prosecutorial misconduct…
> (App. 2563-2564)

The court found no misconduct. (App. 2563)

Despite the court's ruling it was misconduct to bring this matter up before the witness and his attorney in the middle of his cross-examination. The prosecution could have attempted to rehabilitee the witness in redirect or brought the matter to the court's attention at the appropriate time. There can be no other interpretation of the State's actions other than misconduct.

**2. When the prosecutor directly elicited prohibitive testimony- so egregious that the court admonished the conduct in front of the jury**

The State DELIBERATELY elicited inadmissible evidence of a pending federal Indictment against Dr. Desai in order to further prejudice Appellant with the jury. During the direct examination of Tonya Rushing, the Office Manager of GCSN, the following exchange occurred:

> MR. STAUDAHER:
> Q: Do you have– are you facing any kind of charges in this particular instance?
> A: I am. I'm facing federal indictment.
> Q: So you're under indictment?
> A: Yes, sir.
> Q: And is that related to the activities of the clinic?
> A: Yes.
> Q: And who is involved with–with you in that indictment?
> A: Dr. Desai and myself.
> (App. 4294)

At that point, Desai's counsel asked to approach the bench and the court excused the jury. Desai's counsel moved for a mistrial and was joined by Lakeman's counsel. (Id. 4297-4299)

The Court was so perplexed by this turn of events that the court said, "I feel like weeping uncontrollably." (Id. 4305) The court was now faced with the unenviable, but fair and just task of declaring a mistrial after 32 days of trial.

Instead of granting a mistrial, the trial court decided to further "ring the bell" and to instruct the jury that the fact of a pending federal indictment should not be considered.

THE COURT:

> Ladies and gentlemen before we begin with the testimony this morning, I must give you the following instruction. Ladies and gentlemen, you are instructed that the last question to Tonya Rushing from Mr. Staudaher was improper and constituted prosecutorial misconduct. You are instructed that you are to disregard the question and the answer given by Ms. Rushing. Whether or not there is a federal indictment against Dr. Desai for the same or similar charges is irrelevant and may not be considered by you as evidence in this case against either defendant. (App. 4376)

In *Carrillo v. State*, 591 SW.2d 896 the court held that association with somebody while under indictment is improper to bring up to the jury. The court clearly erred and mistrial should have been granted.

The court was further compelled to admonish the prosecutor when the prosecutor once again began eliciting inadmissible testimony. The court warned, "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." (App. 4483-4484)

**3. In closing argument when the prosecutor said, "put yourself in the shoes of the victims……(Golden Rule Argument)**

In the States rebuttal argument the state argued, "Michael Washington was infected. You saw him. Who among you would want to have a liver transplant regardless of how much money you got…" (App. 5451) Lakeman objected. (App. 5507-5508) The court agreed that the statement was prosecutorial misconduct but

took no action regarding the misconduct. (Id.)

In *Witter v. State*, 921 P.2d 886 (Nev. 1996); (See also *McGuire V. State*, 100 Nev. 153, 677 P.2d 106 (1984)), this court held that it was improper for a prosecutor to ask a jury to stand in the shoes of the victim. (Golden Rule Argument)

Misconduct that involves an impermissible comment on the exercise of a specific constitutional right has been addressed as constitutional error. Prosecutorial misconduct may also be of a constitutional dimension if, in light of the proceedings as a whole, the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Valdez v. State*, 196 P.3d 465 (Nev. 2008).

In the companion case to *McGuire*, *Levine v. State*, 100 Nev. 153, 677 P.2d 106, the court reversed both convictions of *McGuire* and *Levine* for impermissible comment made in closing argument by the prosecutor. In the case of Levine the comments were of the "Golden Rule Argument."

In the *McGuire* decision the court stated,

> In the past we have publicized our concern over the serious nature of the problem of prosecutorial misconduct. We have emphasized not only the problems such misconduct causes in terms of depriving an accused of his or her right to a fair trial, but also the additional public expense needlessly occasioned by such misconduct…. We have therefore warned and given clear notice to the prosecutors in this state that in appropriate cases not only will misconduct result in reversal of a conviction, but that it may, in certain extreme cases, result in the imposition by this court of personal sanctions

against the prosecutor. (Id.)

In the instant case, the State's zeal for a conviction led the prosecutors down the path of reversible error.

**4. Other Acts of Prosecutorial Misconduct**

The State knew that the only issue relative to the negligent treatment of patients with substantial bodily harm was the mechanism for transmission. The state also knew that the following sources or methods of transmission were ruled out: staff-to-patient, any endoscopes, type of procedure, reuse of bite blocks and IV placement. The only source which was not ruled out was "sedation injection practices." (See States Exhibit 228) On day 37 the State introduced that exhibit. (App. 4660)

Yet, in their opening statement the prosecutors attempted to inflame the passions of the jury thus engaging in prosecutorial misconduct. Note some of the following statements:

1. Referring to patients at the clinic as "cattle." (App. 1759)
2. "Day in and day out, patient in, patient out, as fast as they possibly could. Get them in, get them out, get them out the door… And why were they moving patients? Not for the patients benefit [indicating]. For his benefit, his pocket." (App. 1760)

3. FY Jelly, tape, alcohol pads, gowns gloves, blankets, sheets, "That's the kind of thing that you're going to hear about." (App. 1761)
4. The mention of HIV (App. 1766)
5. Double booking patients. (App. 1775)
6. Showing the jury a "Chux," (a disposable pad) which the State argued cost less than a penny. "He had his staff cut them in half to save money. Cut them in half." (App. 1790)
7. Re-use of biopsy blocks. (Id.)
8. "Desai was so fast at his procedures, you'll hear that—you'll even hear the term 'cracking the whip' that he would yank the scopes out of patients sometimes so quickly that fecal material would come out onto the table, maybe onto the floor and onto the wall…." (App. 1811)

Evidence offered by the State and displayed to the jury was conceded to be inaccurate and misleading. (See States Rebuttal Argument, (App. 5450), where the state admits that they "misinterpreted" evidence that was admitted and shown to the jury)). The State further admitted that the number of patients that they argued were seen at the clinic on a daily basis was wrong. (Id.)

The pervasive misconduct throughout the course of the trial was of constitutional dimension. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless

individually." *Kelly v. State*, 837 P.2d 416, 425 (1992). Three factors are considered in evaluating claims of cumulative error: 1) whether the issue of guilt is close; 2) the quantity and character of the error; 3) the gravity of the crime charged. *Valdez v. State*, 196 P.3d 365, 481 (Nev. 2009).

**1. The issue of guilt in this case is close:**

The jury was deadlocked on Mr. Lakeman up until shortly before the verdict was announced. In fact, the jury sent a question to the judge asking what effect it would have on Desai if they were unable to reach a verdict on Lakeman.[1] Before the judge had an opportunity to respond to the question the jury had announced they reached a verdict. To illustrate how close the issue of guilt was, Mr. Lakeman was acquitted 11 of the 28 counts charged. (App. 45)

**2. The quantity and character of the misconduct:**

The numerous instances of prosecutorial misconduct cited in this brief are testament to the quantity and character of the misconduct. So egregious was the misconduct that the court "felt like weeping uncontrollably." (App. 4305) So egregious was the misconduct that the court took the unprecedented step of admonishing the State in front of the jury. (App. 4326) So egregious was the misconduct that the court cautioned the State at various junctures to proceed with

[1] All questions from the jury are part of the record that have been transmitted to this court; however, those documents were not provided to counsel pursuant to requests for transcripts.

caution when asking question because at some point the conduct becomes cumulative.

> THE COURT: …. And as I said misconduct is cumulative and—you know, don't—I'm just warning you Mr. Staudaher, don't ask a question unless you know the answer , and don't elicit testimony that may be improper.
> (App. 4483-4484)

> THE COURT: ….But you know, I just—you know, going forward, I don't want these issues cropping up again and again, because at some point in time it's cumulative. (Id.)

**3. The gravity of the crime charged:**

The can be no issue as to the gravity of the crimes charged in this case. Mr. Lakeman was indicted on 28 counts ranging from insurance fraud to murder. Mr. Lakeman faced the possibility of life in prison.

## V. THE EVIDENCE DID NOT SUPPORT CONVICTION FOR CRIMINAL NEGLECT OF PATIENTS NRS 200.495

**Standard of Review**

The standard of review when analyzing the sufficiency of the evidence "in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 825 P.2d 571, 573 (Nev. 1992)(internal quotations omitted). NRS 200.495 Provides in part:

> A professional caretaker who fails to provide such service, care or supervision as is reasonable and necessary to maintain the health or safety of a patient is guilty of criminal neglect of patient if:
> (a) The act or omission is aggravated, reckless or gross;

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

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

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

Six CRNAs who were former employees of the Centers testified regarding their injection practices at ECSN and their understanding of the standard of care in utilizing such practices: Keith Mathahs (former defendant in the case), (App. 2517-2519) Vincent Mione, (App. 2922) Ralph McDowell, (App. 2992-2993) Vincent Sagendorf, (App. 3314) Linda Hubbard, (App. 3471) and Ann Marie Lobiondo. (App. 4440) Each of them testified that the injection practices they used followed aseptic technique and that they understood that the propofol vials could be used on more than one patient as long as aseptic technique was used. (Id.) Each CRNA testified that the injection practices, he or she used were "widely used," were the same techniques they used in other places of employment, or were the same techniques used "in hospitals" in the Las Vegas area. (Id.)

Not only did the CRNAs not know that their injection practices were unacceptable, some of the investigators and experts did not know that use of one vial for multiple patients (with aseptic technique) was not recommended until after the investigation in this case.

Dorothy Sims, a Registered Nurse with the Nevada Bureau of Healthcare Quality and Compliance, which regulated the Centers, testified that at the time of the investigation, she "did not recognize [multi-use] of propofol vials or re-use of syringes on one patient as creating a health hazard." (App. 5098) She believed that the practices that Vincent Mione, Vincent Sagendorf and Linda Hubbard (multi-use of vials with aseptic technique) described to her were "perfectly acceptable." (Id.) Even after the outbreak at ECSN, her inspection of another endoscopy clinic revealed that an M.D. anesthesiologist was using the same vial of propofol and the same syringe on more than one patient, a practice far more unsafe than the practice alleged in this case. (Id.)

Dr. Schaefer, the CDC investigator, testified that even after the instant outbreak, Medicare guidelines were not following best practices of the CDC. Medicare guidelines provided one 20cc vial of propofol could be used on 3 patients even though it said single patient use. (App. 3979)

Dr. Miriam Alter, Ph.D. an infectious disease epidemiologist with the CDC for over 25 years, testified that if propofol vials were used as multi-dose vials, and an anesthetist "used a new needle and syringe every single time [he] entered [the vial], every single time [he] dosed a patient, no problem (App. 4908). Dr. Alter noted that as recently as 2010, two years after the hepatitis C outbreak in Las Vegas, there still existed, "a lack of understanding on the part of clinicians [about

safe injection practices]. (App. 4924) Dr. Alter further stated that it cannot be directly shown that the event [contaminated propofol] caused the infection. (App. 5001)

When the CDC conducted their investigation the investigators were not aware of which patients were in which room or that the states theory that infected propfol bottles had gone from room to room.

Mr. Santacroce:

Q. The infected bottle would have had to go into that room correct?
A. An infected vial, whether it was an original one or whether the contamination was erpetuated to other vials somehow, the virus would have had to go from this room to that other room before these patient's procedures, yes.
Q. And when you did your investigation you, you didn't even know what rooms these patients were in, did you?
A. No.
Q. And in fact, when Mr. Staudaher [DA] told you that the propofol was moving from room to room….but the evidence has been that it only moved from room to room in the late afternoon during the last procedure. Okay. Knowing the facts, would it change your opinion?
A. Well, we were told that the propofol didn't move from room to room…..

THE COURT: --If the evidence were, or if your understanding was that the propofol moved at the end of the day, would that affect your opinion or…

THE WITNESS: …. So if the vector of transmission, the contaminated vial, whatever, moved to the room after these patients procedures, that would have an impact on, you know, my conclusion that that's how transmission could have occurred. (App. 3971)

Given all of the evidence in this case, Mr. Lakeman, as well as all the other CRNA's, Doctors and medical experts, may have been under the mistaken

impression that the procedures they had been using for 20, 30 and in some cases 40 years were safe and aseptic. Mr. Lakeman may have made "mistakes" but his conduct did not rise to the level of "aggravated", "reckless" or "gross".

Therefore, that State failed to meet its burden pursuant to NRS 200.495 and the convictions must be reversed.

## VI. IF THE CONVICTION FOR 200.495 IS ALLOWED TO STAND THEN THE CONVICTIONS FOR 202.595 SHOULD BE REVERSED AS IT IS A LESSER INCLUDED OFFENSE

### Standard of Review

"Although failure to object at trail precludes appellate review, this court has the discretion to review constitutional or plain error." *Somee v. State*, 187 P.3d 152, 159 (Nev. 2008). Plain error exists when the error was clear and it affects a defendant's substantial rights. *Mclellan v. state*, 182 P.3d 106, 110 (Nev. 2008). "Because the prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure" a violation threatens the fairness, integrity and public reputation of judicial proceedings, the error should be viewed as plain. *United States v. Davenport*, 519 F. 3d 940, 947 (9th Cir. 2008), cited with approval in *LaChance v. State*, 321 P.3d 919, 926 (Nev. 2014).

To determine whether the appellant can be convicted of the crimes of criminal neglect of patient resulting in substantial bodily harm (NRS 200.495) and also for performance of an act in reckless disregard of persons or property resulting

in substantial bodily harm (NRS 202.595) the court applies a two part test.

First, the court determines whether there are two offenses or only one 'whether each provision requires proof of a fact which the other does not. *Talancon v. State*, 721 P.2d 764, 766 (Nev. 1986). Second, if the offenses meet that test, the court looks to the statutes to determine whether the legislature intended cumulative punishment.

Here the State's theory was that substantial bodily harm would not have resulted but for the unsafe injection practices employed by Lakeman. The first part of the test has been met.

As to the second part of the test, the legislative intent was that punishment should not be cumulative. NRS 202.595 provides in part "unless a greater penalty is otherwise provided by statute. . ." Similar language appears in NRS 200.495. Based on the plain language of statutes conviction on both NRS 202.595 and NRS 200.495 are barred by the prohibition against double jeopardy.

## CONCLUSION

This highly publicized and tragic case has produced enormous pressure on the State, the Southern Nevada Health District and medical providers throughout the state. In the state's zeal to hold someone accountable for what occurred in 2007 in Clark County, Nevada the state failed to live up to their ethical obligation to "do justice." There can be no minimizing the effect this outbreak had on tens of

thousands of residents of Nevada. However, the criminalization of what can be best described as medical malpractice will have a chilling effect on medical providers in this state for years to come.

The errors committed by the State and the court, as outlined herein, are monumental and constitutionally impermissible and demand reversal. In high profile cases such as this it is often the knee jerk reaction by the state which causes the disregard for fairness, equity and the protection of due process afforded every citizen of this great nation. In their zeal for conviction the state and the court's vision is often clouded. It is the duty of this reviewing court to set the record straight to protect and guard the integrity of our system of justice.

To that end, Ronald Ernest Lakeman prays this court "do justice" and reverse his convictions.

Dated this 17th day of October, 2014.

Respectfully submitted,

SANTACROCE LAW OFFICES, LTD.

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## 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). This brief has been prepared in a proportionally spaced typeface using Microsoft Word, size 14, Times New Roman font.

2. I further certify that this brief does comply with the page or type volume limitations of NRAP 32(a)(7). The body of the brief is 30 pages and this entire document contains 8,025 words and 921 lines.

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

Dated this 17th day of October, 2014.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I hereby certify this document was filed electronically with the Nevada Supreme Court on November 17th, 2014. 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

Dated this 17th day of November, 2014

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