ORIGINAL

IN THE SUPREME COURT OF
THE STATE OF NEVADA

KEITH MATHAHS,

Petitioner,

Vs.

HONORABLE VALERIE ADAIR,
EIGHTH JUDICIAL DISTRICT COURT JUDGE,

Respondent

_____/

STATE OF NEVADA,

Real Party in Interest

_____/

S.Ct. No. 61359

FILED

JUL 27 2012

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PETITION FOR WRIT OF MANDAMUS

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IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH MATHAHS, S.Ct. No._____

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HONORABLE VALERIE ADAIR,
EIGHTH JUDICIAL DISTRICT COURT JUDGE,

Respondent

_____/

STATE OF NEVADA,

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_____/

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

Petitioner Keith H. Mathahs, by and through undersigned counsel, requests from this Court either a Writ of Mandamus compelling the district court to dismiss the Indictment filed against Petitioner, or in the alternative, a Writ of Prohibition precluding the district court from conducting any further proceedings based upon the Grand Jury's Indictment of Petitioner.

Petitioner has satisfied the procedural requirements of verification and proof of service. (Verification of Eunice M. Morgan, Appendix Vol. 2, pg. 417) In a separately filed document, Petitioner requests this Court stay the district court proceedings pending this Court's resolution of this petition. Petitioner requests that this Court entertain a one hour oral argument for consideration of this Petition.

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ISSUES PRESENTED

I. WHETHER A PETITION FOR AN EXTRAORDINARY WRIT IS THE APPROPRIATE VEHICLE TO CHALLENGE THE DISTRICT COURT'S JURISDICTION TO PROCEED BASED ON THE CRIMINAL CHARGES PENDING AGAINST PETITIONER REGARDING PETITIONER'S ARGUMENT THAT THE INDICTMENT IS CONSTITUTIONALLY AND STATUTORY DEFECTIVE.

II. WHETHER THE INDICTMENT MUST BE DISMISSED AS AGAINST MATHAHS BECAUSE IT IS CONSTITUTIONALLY AND STATUTORILY DEFECTIVE AND DOES NOT PROVIDE ADEQUATE NOTICE SUFFICIENT FOR MATHAHS TO DEFEND HIMSELF AGAINST THE CHARGES ALLEGED.

INTRODUCTION

Defendant Mathahs ("Mathahs"), a Certified Registered Nurse Anesthetist ("CRNA"), is a seventy-six year old man with no criminal history and an unblemished professional nursing career of thirty-five years. He was charged along with co-Defendants Lakeman (also a CRNA), and Desai, who is alleged to have been the criminal mastermind behind the charges alleged against all three Defendants.

The State is unable to prove either criminal causation or criminal agency in its quest to hold Mathahs criminally responsible for the transmission of the blood-borne pathogen, Hepatitis-C.[1]

....

[1] Patients are alleged to have been infected on July 25, 2007 and September 21, 2007 at the Endoscopy Center of Southern Nevada (hereinafter ECSN). The grand jury record did not establish that Mathahs had any contact with certain patients at ECSN that he is charged to have both defrauded and injured. The record proves the following complainants were not treated, nor billed by Mathahs for anesthesia services: **Sharrieff Ziyad** (Counts 1, 2, 4 and 26) (See Transcript of Grand Jury Proceedings, attached as Report Transcript – Grand Jury – Volume 5; pg.58, Appendix, Vol. 2, pg. 0339; service provider CRNA Lakeman); **Michael Washington** (Counts 1, 3, 4, 5 and 26) (Report Transcript – Grand Jury – Volume 5, pg. 156-59, Appendix Vol 2, pgs. 0345, 0346; service provider CRNA Lakeman); **Stacy Hutchison** (Counts 1, 7, 8, 9 and 26) (Report Transcript – Grand Jury – Volume 5, pg. 42, Appendix, Vol 2, pg. 0337 service provider CRNA Lakeman); **Pattie Aspinwall** (Counts 1, 13, 14, 15, and 16) (Report Transcript – Grand Jury – Volume 5, pg. 64, Appendix Vol 2, pg. 0342 and Report Transcript – Grand Jury – Volume 8, pg. 113, Appendix Vol. 2, pg. 0354, service provider CRNA Lakeman); **Carole Grueskin** (Counts 1, 21, 22 and 26)(Report Transcript – Grand Jury – Volume 5, pg. 49, Appendix Vol. 2, pg. 0339 service provider CRNA Lakeman); **Gwendolyn Martin** (Counts 1, 23, 24, 25, 26 and 27, service provider CRNA Lakeman).

In its effort to sustain probable cause, the State began its presentation of evidence on March 11, 2010 and concluded it on June 3, 2010. Multiple exhibits and depositions were given to the grand jury for consideration. On June 3, 2010 the grand jury returned a true bill on a twenty-eight count indictment. The charges include: Racketeering, Performance of Act in Reckless Disregard of Persons or Property, Criminal Neglect of Patients, Insurance Fraud, Theft and Obtaining Money Under False Pretenses.[2] (Indictment, Appendix Vol. 1, pgs. 1-42).

Because the charges contain innumerable alternative theories of liability, Mathahs cannot understand the charges as stated in the Indictment and is unable to defend himself against the same.

The three Defendants were charged without distinction between the three. As such, it appears that Mathahs is being charged with criminal liability for patients he did not even see, for dates and times of service where he was not even working (he was only a part-time employee), and for utilizing medical equipment that may have been in the possession or control of another defendant but were not utilized by the CRNAs.

The multiple and overlapping charges of Racketeering, Insurance Fraud, Theft, and Obtaining Money Under False Pretenses, are singularly premised upon the supposition of unjust enrichment based upon a falsely expanded "anesthesia time." This anesthesia time was billed from ECSN to various insurance companies. The State opines that the "anesthesia time" is inaccurate. This inaccuracy, according to the State's theory, caused monetary gain. This monetary gain allegedly constitutes a fraud. The State alleges this conduct occurred in so many different possible alternative methods that is impossible

[2] A detailed review of the charging document in this matter leads to the inescapable conclusion that the State is uncertain as to how the outbreak of Hepatitis-C occurred, or who is responsible for it. The means or acts of criminal responsibility include so many potential acts that appropriate notice to defend these charges is lacking. A cogent explanation as to how this voluminous and contradictory evidence fits into these potential acts of criminal liability is simply not possible. The acts of potential criminal liability all include alleged omissions and multiple theories of alleged criminal liability. These multiple theories of criminal liability include principal liability, accomplice liability (through directly or indirectly "counseling, encouraging, hiring, commanding, inducing, or procuring each other and or others to commit the acts") (as taken from each charge of the Indictment, attached as Indictment, Appendix Vol. 1, pg. 1-42) and also through conspirator liability.

to understand exactly what it is charging against any of the Defendants, much less Mathahs.

This simple theory is used to ostensibly sustain not only Insurance Fraud charges, but also the charges of Theft and Obtaining Money Under False Pretenses. The same allegation of inflating anesthesia time of the infected patients is also aggregated into a single Racketeering count. The State made no charging distinction between the CRNA responsible for treating the alleged victims. In fact, CRNA Mathahs was charged for CRNA Lakeman's patients despite the fact he had no contact with these individuals.

In regard to the allegation of racketeering, there are approximately twenty-five instances of "or" or "and/or" within count one alone. There are no specific factual allegations made. The RICO count fails because it does not adequately identify two predicate crimes, nor does it allege the elements of two predicate offenses, or even the facts establishing the necessary elements. Because the State has no viable theory of racketeering, the State proposes innumerable hypothetical scenarios by which racketeering "could have" occurred, stringing along incomprehensible, confusing "and/or" or "or" strings in an attempt to explain a theory that is not substantiated by any facts presented to the grand jury.

The injury counts are characterized by the conclusion that certain patients were criminally exposed to the blood-borne pathogen of Hepatitis-C. The State is unable to prove how these patients were infected or who infected them.[3]

The State's proof is uncertain and equivocal as to how the transmission occurred and who, if anyone, is criminally responsible. Because of this uncertainty, it has aggrandized the grand jury record with a plethora of irrelevant and inconsequential information.

[3] The State's evidence on September 21, 2007, indicates that within the two procedure rooms at ECSN, where separate patients were being treated, the same genetically traceable virus was simultaneously being transmitted. Apparently, because the State is unable to explain or prove how or why this happened, the decision was made to charge the Doctor and both CRNAs in the vicinity without evidentiary or logical distinction.

Hepatitis-C is a blood-borne pathogen. Its transmission does not occur because of reused bite blocks or busy procedure schedules.[4] Yet, these spurious, irrelevant and unsupported claims clutter the Indictment. Rather than explain how Mathahs is criminally responsible for the acts alleged, most of the record appears to be directed at inflaming the grand jury by demonstrating that Dr. Desai was both mean-spirited and frugal.[5]

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[4] A representative sampling of the superfluous and prejudicial language actually contained within the injury counts is found within the text of Count 10—Performance of Act in Reckless Disregard of Persons or Property:

> ...creating an employment environment in which said employees were pressured to reuse syringes and/or needles and/or biopsy forceps and /or snares and/or bite blocks contrary to the express product labeling of said items, and/or in violation of universally accepted safety precautions for use of said items; and/or (4) by directly limiting and/or directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were pressured to limit the use of medical supplies necessary to conduct safe endoscopic procedures; and/or (5) by falsely pre-charting the patient records and/or rushing patients through said endoscopy center and/or rushing patient procedures at the expense of patient safety and/or wellbeing and/or directly or indirectly instructing said employees, and/or creating an employment environment in which said employees were pressured to falsely pre-chart patient records and/or rush patients through said endoscopy center and/or rush patient procedures at the expense of patient safety and/or wellbeing; and/or (6) by directly or indirectly scheduling and/or treating an unreasonable number of patients per day which resulted in substandard care and/or jeopardized the safety and/or wellbeing of said patients; and/or (7) by directly failing to adequately clean and/or prepare endoscopy scopes, contrary to the express manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or in violation of universally accepted safety precautions for the use of said scopes and/or directly or indirectly instructing said employees, and/or creating and employment environment in which said employees were inadequately trained and/or pressured to provide endoscopy scopes for patient procedures that were not adequately cleaned and/or prepared contrary to the express manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or in violation of universally accepted safety precautions for the use of said scopes.

(Indictment, Appendix Vol. 1, pgs. 1-42).

Mathahs had nothing to do with patient scheduling, the use or maintenance of bite blocks, biopsy forceps or snares. He never touched or maintained the scopes used in these procedures. There is no evidence to suggest that he had any control over the pace of patient care or the use of medical supplies "to conduct safe endoscopic procedures." It is unconscionable to criminally charge someone for acts they had nothing to do with.

[5] Dr. Carrera described Dr. Desai as very concerned with the bottom line (Reporter's Transcript - Grand Jury - Volume 1, pgs. 67-68, Appendix, Vol. 2, pg. 0317) He later went on to call him a "skinflint and stingy." (Reporter's Transcript - Grand Jury - Volume 1, pg. 74, Appendix Vol. 2, pg. 0319). Dr. Desai would scold his employees for using too many wipes, gowns, masks or other supplies. (Reporter's Transcript - Grand Jury - Volume 6, pgs. 70-72, Appendix Vol. 2, pg. 0348). More than one witness described Dr. Desai as "intimidating." (Reporter's Transcript - Grand Jury - Volume 6, pg. 81, Appendix Vol. 2, pg. 0349; Reporter's Transcript - Grand Jury - Volume 8, pg. 48, Appendix Vol. 2, pg. 0354; Reporter's Transcript - Grand Jury - Volume 10, pg. 35, Appendix Vol. 2, pg. 0356).

The most troubling aspect of these tangential accusations is that Mathahs had absolutely nothing to do with these events. Mathahs did not schedule patients, order or manage medical supplies, or use or cleanse endoscopy scopes or snares, nor was there any testimony provided that Mathahs was part of any "criminal enterprise." Because the State could not formulate specific acts that Mathahs committed for which he could be criminally liable, the State instead alleged vague, hypothetical possibilities combined in an incomprehensible string of and/or's, in an effort to sustain charges against Mathahs.

STATEMENT OF FACTS

A. THE ECONOMIC CHARGES

The first witness to testify at the grand jury proceedings was Dr. Eladio Carrera.[6] Dr. Carrera testified under a grant of immunity. He testified that Dr. Desai was the managing partner of the clinic and that "everyone else was subordinate."[7] The business eventually morphed into ECSN.[8] Dr. Carrera went on to describe the details of the colonoscopy procedure, stating that the procedure's average time was "at least 20 minutes."[9] (Emphasis added). Dr. Carrera testified that a CRNA (Certified Registered Nurse Anesthetist) specializes in anesthesia services.[10] A CRNA is not a doctor, rather a CRNA is a nurse with several years of additional education beyond nursing school.[11]

Dr. Carrera made it clear though that no matter what the billing time, the CRNA did not benefit economically, and the CRNAs were salaried employees who received no monetary remuneration, aside from their fixed salary, for anesthesia time billed.[12]

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[6] (Reporter's Transcript - Grand Jury - Volume 1, pg. 30, Appendix Vol. 2, pg. 0311).

[7] (Reporter's Transcript - Grand Jury - Volume 1, pg. 32, Appendix Vol. 2, pg. 0311).

[8] (Reporter's Transcript - Grand Jury - Volume 1, pg. 33, Appendix Vol. 2, pg. 0312).

[9] (Reporter's Transcript - Grand Jury - Volume 1, pg. 37, Appendix Vol. 2, pg. 0313).

[10] (Reporter's Transcript - Grand Jury - Volume 1, pg. 40, Appendix Vol. 2, pg. 0314).

[11] (Reporter's Transcript - Grand Jury - Volume 1, pg. 31, Appendix Vol. 2, pg. 0314).

[12] (Reporter's Transcript - Grand Jury - Volume 1, pg. 93, Appendix Vol. 2, pg. 0322).

The State repeatedly made assertions that the billing practices amounted to more billable time than actually existed. However, as acknowledged by Dr. Carrera, the practice of extending anesthesia time for overlapping cases or simultaneous patient care was an explainable practice:

> By a Juror:
> Q: Back to the billing for the anesthesia, the 15 minute increments. Theoretically more than eight hours could have been billed in a day; correct?
> A: Yes, that seems to be the case.
> Q: And that would have been ethical or unethical?
> A: I think you have to look at it as to how it's structured on the face of it. Of course it looks unethical, but a patient in the recovery room is still the responsibility of the anesthetist or anesthesiologist and he may start a new case at that time. Really I don't think they should be doing that but there would be some overlap that could be explained on that basis.[13]

The State's next witness was Dr. Snachal Desai.[14] Dr. Desai was employed by the Gastroenterology Center of Nevada. He was presented as an expert in the area of gastroenterology.[15] Dr. Desai testified that the average time for a colonoscopy procedure from start to finish averaged 25 to 30 minutes.[16]

Even assuming, *arguendo,* that there was fraudulent anesthesia time, for which Mathahs received no benefit, the State failed throughout its voluminous presentation to the grand jury to put a monetary cost to this alleged fraud.

A provable amount of an alleged fraud is obviously a necessary element of any fraud in which a statutorily created minimum amount is an element. Similarly, when that fraud constitutes the predicate act of a racketeering allegation and that fraud lacks a proven element then the racketeering charge must fail.

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[13] (Reporter's Transcript - Grand Jury - Volume 1, pg. 132, Appendix Vol. 2, pg. 0324).

[14] No familial relation to Defendant Desai.

[15] (Reporter's Transcript - Grand Jury - Volume 1A, pgs. 9-16, Appendix Vol. 2, pgs. 0326, 0327).

[16] This 25-30 minute average colonoscopy procedure time did not contemplate the entire anesthesia time, which would also include a pre-operation interview and clinical history, as well as post-procedure recovery check. The Pacificare claims processor testified that the dollar amount coming back to ESCN would not have changed regardless of how much time was placed in the billing form. (Reporter's Transcript - Grand Jury - Volume 5, pgs. 46, 47, Appendix Vol. 2, pg. 0338).

Because the State has no viable theory to support the allegation of racketeering, it has attempted to utilize the "kitchen sink" strategy of vaguely alleging a myriad of scenarios all connected by "and/or" possibilities, thus making it impossible to understand the charge of what Mathahs specifically is supposed to defend himself against.

B. THE INJURY CHARGES

Mathahs is charged with the criminally negligent transmission of the Hepatitis-C virus. The actual charges form and reform this theory into multiple criminal counts that include: Performance of Act in Reckless Disregard of Persons or Property ("Reckless Endangerment") and Criminal Neglect of Patients ("Criminal Neglect") (cumulatively, the "Injury Counts").

Again, it is impossible to defend against the myriad of different scenarios the State has alternatively pled. The confusing, incomprehensible string of "or" or "and/or" allegations are violative of Mathahs' due process rights, and undercuts (rather than bolsters) the specificity required on the notice. The innumerable combinations of "or" and "and/or" strings connecting vague allegations of misconduct on behalf of unnamed Defendants is utterly incoherent.

There is no clear statement of facts or how the facts support the elements of the crime charged. In fact, aside from all the various means and methods that Mathahs could be criminally liable for the Injury Charges, the State attempts to utilize a "catch all" method at the conclusion of the charge stating that Mathahs could be liable for transmission "by unknown methods." It is impossible to understand how Mathahs is supposed to defend himself against the allegation when the State itself has no idea how the transmission occurred.

The first theory used to support the allegation that Mathahs is criminally responsible for the transmission of Hepatitis-C virus is that Mathahs "directly or indirectly administered or instructed employees of ECSN to administer one or more doses of the anesthetic drug Propofol from a single-use vial to more than one patient contrary to the express product labeling of said drug and in violation of universally accepted safety

precautions for the administration of said drug."[17] There is no direct evidence to support the allegation that Mathahs did this, or that this act was the cause of the transmission of Hepatitis-C in Counts 3, 7, 10, 13, 17 and/or 20. The State simply has targeted certain people based on several purportedly possible modes of transmission in the vicinity that can be blamed.

The State's theory is simply false. The multiple use of a single-use vial, within the boundaries of the aseptic technique, was a readily accepted and encouraged practice, and the State's attempt to criminalize it after an outbreak is disingenuous and opportunistic. This was the State's evidence at grand jury as heard through its first witness, Dr. Eladio Carrera:

> BY A JUROR:
> Q: When you were talking originally in the beginning earlier on this morning you were talking about they had different types of multi-use vials, different medicines that were allowed to be multi-used with new syringes, right?
> A: Saline which was used to flush the IV lines was a multi-use vial.
> Q: Okay. So my question was are there any multi-use vials of Propofol?
> A: My understanding is that at one time there were multi-use vials of Propofol but because of concerns over bacterial colonization of Propofol as a drug eventually it became available in single use vials only.
> BY MR. MITCHELL:
> Q: When do you think that happened?
> A: When did that change occur with the manufacturer? I don't know.
> Q: What was the change that was made public so that every doctor knew that change had been made?
> A: **No, no, it was not widely disseminated information.**
> Q: Okay. Did the Endoscopy Center have a rule, whether followed or not, that propofol was supposed to be single use only?
> A: There was a rule, a very specific rule that was put in place in the policies and procedures manual and **I believe that was put there in January or so of 2008 and that would have postdated the investigation by the Bureau of Licensing and Certification. But prior to that there was no specific rule in place.**[18]

[17] See parenthetical (1) in Counts 3, 7, 10, 13 and 20. (Indictment, Appendix Vol. 1, pgs. 1-42). (Emphasis added). The identical language is used to support the same theory in the Criminal Neglect of Patients allegations contained in Counts 4, 11, 14, 18, 21 and 24. (Indictment, Appendix Vol. 1, pgs. 1-42). (Emphasis added).

[18] (Reporter's Transcript - Grand Jury - Volume 1, pgs. 110-111, Appendix Vol. 2, pg. 0323). (Emphasis added). Dr. Carrera testified under a grant of immunity. The testimony that there was no specific rule against multiple use of singular use Propofol vials, within the parameters of the aseptic technique, must be considered within the context that, by law, the doctors supervised the CRNAs.

The allegations in the Indictment are alleged to have occurred in 2007. Yet, given this testimony, Mathahs is accused of violating "universally accepted safety precautions for the administration of said drug".[19]

The allegations contained in the first parenthetical of the Injury Counts were openly dismissed by others testifying before the grand jury. Dr. Satish Sharma, an anesthesiologist, testified as follows:

> Q: What about in a situation where you had a big vial that you didn't use all of the propofol, what would you do with the rest of it?
> A: Either you throw it or—there are two ways. This question was asked earlier also. If you have a big vial you can, if you're drawing syringes again it has nothing to do with this particular case, it's common sense thing, you can draw like, let's say you have, what 50cc vial, you can draw them in like two or three different syringes, and now all those syringes are clean, I can use one on you, I can use one on myself, because those, so it is not the size of vial, **it is the aseptic technique that is important.**[20]

Dr. Frank Nemec, a gastroenterologist with over twenty-five years of experience testified to the universally accepted practice of multiple entry to Propofol dispensers when pre-loading syringes:

> Q: We've had some previous testimonies from them. Is it acceptable in your practice, say, we talked about the 50 on the Propofol, if, I know it's not recommended to reuse syringes, reuse needles, but we've heard testimony where a 50, **that you'd be able to take maybe five**

(continued)

[19] Prior to the outbreak that generated the review of practices at ECSN, the prevailing view was exactly contrary to the allegations contained in parenthetical 1 of the Injury counts. As explained by Dr. Carrera:

> BY A JUROR:
>
> Q: First in regards to the Propofol single use vials, If a new syringe was used every time then that wouldn't expose an infection or wouldn't cause an infection between patients, correct?
>
> A: If a new syringe and needle had been used each time that medication was withdrawn from the vial theoretically no it should not have occurred.

(Reporter's Transcript - Grand Jury - Volume 1, pg. 121, Appendix Vol. 2, pg. 0323).

[20] (Reporter's Transcript - Grand Jury - Volume 4, pg. 96, Appendix Vol. 2, pg. 0334). (Emphasis added).

different individual withdrawals and be able to use those on individual patients. Would that be something that you would recommend, would concern you, what?

A: **I have seen in the hospital where anesthesiologists will pre-load syringes and then use those syringes throughout the day.** They'll have a whole bag full of these syringes and then use it for the patients throughout the day. **So that, yes, I have seen that done.**

Q: Is that more common in the hospital than a outpatient setting or is it the same?

A: **I think it's the same.** I have seen anesthesiologists come to the facility with multiple preloaded syringes. **Now you have to understand that since this whole thing happened we've all changed our protocols and I think there has been a high sensitivity towards, you know, these types of errors and mistakes so that practice is no longer done even in the hospital.**

Q: Today?

A: **Correct. But it was common to pre-load the syringes, yes, I would say that was a common practice.**[21]

The second parenthetical act contained in all Injury Counts alleges that Mathahs created "an employment environment in which said employees were pressured to administer one or more doses of the anesthetic drug Propofol from a single-use vial to more than one patient contrary to the express product labeling of said drug and in violation of universally accepted safety precautions for the administration of said drug."[22] This allegation has no application to Mathahs because Mathahs was a salaried employee without the capability to create such an environment.[23]

The same factual analysis is directly applicable to parenthetical three. This third criminal act allegation, present in all of the Injury Counts, says nothing by attempting to say everything. According to the allegation, Mathahs is criminally responsible for the

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[21] (Reporter's Transcript - Grand Jury - Volume 7, pgs. 50, 51, Appendix Vol. 2, pg. 0351). (Emphasis added). Mathahs respectfully submits there is no distinction between these acts and those alleged as criminal acts in parenthetical (1) of the injury counts.

[22] This language describes the second act alleged in the second parenthetical, of each and every injury count alleged against Mathahs, Counts 3, 4, 7, 8, 10, 11, 13, 14, 18, 20, 21 and 23. (Indictment, Appendix Vol. 1, pgs. 1-42).

[23] This is another example of an allegation of a criminal act that has no factual basis when applied to Mathahs. It is respectfully submitted that these unsupported criminal allegations be stricken from the language of the indictment as surplusage. **NRS 173.085 Surplusage.** The court on motion of the defendant may strike surplusage from the indictment or information.

transmission of Hepatitis-C by "directly reusing **and/or** directly or indirectly instructing said employees, **and/or** indirectly instructing said employees, **and/or** creating an employment environment in which said employees were pressured to reuse syringes **and/or** needles **and/or** biopsy forceps **and/or** snares **and/or** bite blocks contrary to the express product labeling of said items, **and/or** in violation of universally accepted safety precautions for the use of said items."[24]

As explained earlier, Mathahs was a salaried employee who had no voice in how medical supplies were ordered or reused. The State's evidence at the grand jury clearly showed that Dr. Desai made all the decisions and called all the shots. Dr. Carrera testified that "he (Dr. Desai) was the boss; everyone else was subordinate to him."[25] This witness stated that there was no general practice of unsafe injection practices.[26] Even if such a policy did exist, Mathahs was never shown to have any hand in its development or implementation.[27] The testimony presented at grand jury was that no one but Dr. Desai

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[24] (Indictment, Appendix Vol. 1, pgs. 1-41). Emphasis added. The only manner in which subsection (3) differs between the Reckless Endangerment Count and the Criminal Negligence Count is that the Reckless Endangerment Count includes the language that Mathahs is liable for "directly reusing," whereas the Criminal Negligence Count does not include this language.

[25] (Reporter's Transcript - Grand Jury - Volume 1, pg. 32, Appendix Vol. 2, pg. 0311).

[26] The record is confused with practices where items are reused such as syringes, bite blocks and forceps and snares. However, there is no inconsistency with aseptic technique. Dr. Carrera pointed this distinction out during his testimony but the charging document purposefully mixes this concept of reuse with violation of aseptic technique:

> A: If I were aware of the fact that syringes were being used in an inappropriate fashion, that means anything not consistent with aseptic technique, I would have talked to the individual about stopping that activity, whoever it may have been, that was engaging in it and I would have reported it to management of the facility.
>
> ...
>
> A: The reuse of the bite blocks because even though it's not a risky thing my understanding of FDA regulations is that if a medical device does not invade the body tissue such as a bite block of course, it's not actually piercing the skin or the surfaces of the gastrointestinal track, it may be cleaned, sterilized and reused if necessary. Generally though it's not a practice that is carried, that is followed in the community and they are generally disposed of immediately after use.

(Reporter's Transcript - Grand Jury - Volume 1, pgs. 58, 59, Appendix Vol. 2, pg. 0315).

[27] Dr. Desai was described as "a skinflint, he was very stingy." (Reporter's Transcript - Grand Jury - Volume 1, pg. 74, Appendix Vol. 2, pg. 0319).

had any "constructive power." Dr. Desai was "fully in charge."[28]

When asked at the grand jury whether Defendant Dr. Desai was the "clear leader or the guy in charge," Dr. Clifford Carrol responded, "absolutely, yes."[29]

Mathahs did not have any power, authority, or control to dictate the management and use of supplies. The evidence presented to the grand jury shows that the reuse of such things as biopsy needles, snares, forceps and bite blocks, had nothing to do with the transmission of Hepatitis-C. This language does not belong in this Indictment and Defendant Mathahs moves that it be stricken as surplusage.

Aside from having nothing to do with the transmission of the virus, there was no evidence adduced in the grand jury record that Mathahs ever touched a scope. That simply was not his job. Thus, there is no evidence to support this alleged criminal act as to Mathahs.

Similarly, Mathahs had no authority, nor did he ever exercise any control, in the scheduling of patients. The grand jury record proves that these decisions were made only by Dr. Desai.[30] In parenthetical 4, the State charged that Mathahs is criminally responsible for the transmission of Hepatitis-C: (4) by directly limiting **and/or** directly **or** indirectly instructing said employees, **and/or** creating an employment environment in which said employees were pressured to limit the use of medical supplies necessary to

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[28] (Reporter's Transcript - Grand Jury - Volume 1, pg. 81, Appendix Vol. 2, pg. 0320). Dr. Carrera said Dr. Carrol would fill in when Dr. Desai was absent but he had no real authority. Even after his stroke Dr. Desai never relinquished any power or control of the way operations were managed. (Reporter's Transcript - Grand Jury - Volume 1, pg. 84, Appendix Vol. 2, pg. 0320).

[29] (Reporter's Transcript - Grand Jury - Volume 2, pg. 22, Appendix Vol. 2, pg. 0329). The record is replete with evidence proving that Mathahs had nothing to do with any facet of how ECSN was managed or operated. All allegations contained in the indictment that suggest otherwise are unsupported by any evidence and are prejudicial. Mathahs moves to have these allegations stricken as surplusage.

[30] Each witness who addressed the issue of patient scheduling testified, without equivocation, that Dr. Desai was the single voice that dictated patient numbers. This included Dr. Carrera (Reporter's Transcript - Grand Jury - Volume 1, pgs. 64-69, Appendix Vol. 2, pgs. 0316-318), and Dr. Carrol (Reporter's Transcript - Grand Jury - Volume 2, pgs. 37-44, Appendix Vol. 2, pgs. 0330-0331). Dr. Carrol testified that he was afraid of Dr. Desai. Dr. Desai was vindictive and he yelled at doctors and employees. (Reporter's Transcript - Grand Jury - Volume 2, pg. 115, Appendix Vol. 2, pg. 0332). Aside from failing to prove that Mathahs had any hand in patient scheduling, the State also failed to show any factual nexus between the number of patients seen at ECSN and the outbreak of Hepatitis-C.

conduct safe endoscopic procedures.[31] Nothing in the grand jury record supports this charge against Mathahs. Nothing in the grand jury record links this allegation with the criminally negligent transmission of Hepatitis-C.

The fifth alleged criminal act is contained in parenthetical (5) of each and every injury count. There, the State alleges that Mathahs is criminally responsible for the transmission of Hepatitis-C: "(5) by falsely pre-charting patient records **and/or** rushing patients through said endoscopy center **and/or** rushing patient procedures at the expense of patient safety **and/or** wellbeing **and/or** directly **or** indirectly instructing said employees, **and/or** creating an employment environment in which said employees were pressured to falsely prechart patient records **and/or** rush patients through said endoscopy center **and/or** rush patient procedures at the expense of patient safety and/or wellbeing."[32]

Although the concept of pre-charting was never adequately explained, this allegation appears to be a crossover of the theory contained in the economic counts. Essentially, the State is alleging a fraud by increased anesthesia time.[33] However, the

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[31] This language describes the fourth act alleged in the fourth parenthetical of the Injury Counts alleged against Mathahs. See Counts 3, 4, 7, 8, 10, 11, 13, 14, 18, 20, 21 and 23. (Indictment, Appendix Vol. 1, pgs. 1-42) In that this allegation has no factual basis in the record, as to Mathahs, he respectfully moves this Honorable Court to strike it in its totality pursuant to NRS 173.085. The language in the Injury Counts is the same but for the Reckless Endangerment Count also includes the language "by directly limiting" whereas the Criminal Negligence Count does not.

[32] This language describes the fifth act, in the fifth parenthetical breach of the Injury Counts. See Counts 3, 4, 7, 8, 10, 11, 13, 14, 18, 20, 21 and 23. (Indictment, Appendix Vol. 1, pgs. 1-42). (Emphasis added). The language in the Injury Counts is the same but for the Reckless Endangerment Count also includes the language "by falsely precharting patient records and/or rushing patients through said endoscopy center and/or rushing patient procedures at the expense of patient safety and/or wellbeing and/or. . ." whereas the Criminal Negligence Count does not.

[33] Tonya Rushing was the chief billing administrator and executive assistant to Dr. Desai. She testified under a grant of immunity that she never directed a CRNA to fabricate a record or anesthesia times. (Reporter's Transcript - Grand Jury - Volume 10, pgs. 82-84, Appendix Vol. 2, pg. 0358). This witness ran the entire business of billing of CRNA time. (Reporter's Transcript - Grand Jury - Volume 10, pg. 77, Appendix Vol. 2, pg. 0357). She testified that she was not aware of any pre-charting of anesthesia records. She was paid between 5% and 10% of the monies she collected for Dr. Desai for anesthesia services. (Reporter's Transcript - Grand Jury - Volume 10, pg. 102, Appendix Vol. 2, pg. 0359). The State alleges that there was fraud and some economic gain by using 31 minutes as an artificial benchmark, for anesthesia time.

actual time spent by Mathahs on patients seen on September 21, 2007, is never factually established.[34]

Subsection 6 continues that Mathahs is criminally responsible for the transmission of Hepatitis-C:

> (6) By directly or indirectly scheduling **and/or** treating an unreasonable number of patients per day which resulted in substandard care **and/or** jeopardized the safety **and/or** wellbeing of said patients.[35]

Subsection 7 states that Mathahs is criminally responsible for the transmission of Hepatitis-C:

> (7) by directly failing to adequately clean and/or prepare endoscopy scopes, contrary to the express manufacturers guidelines for the handling and processing of said endoscopy scopes, **and/or** in violation of universally accepted safety precautions for the use of said scopes, **and/or** directly or indirectly instructing said employees, **and/or** creating an employment environment in which said employees were inadequately trained **and/or** pressured to provide endoscopy scopes for patient procedures that were not adequately cleaned **and/or** prepared contrary to the express manufacturers guidelines for the handling and processing of said endoscopy scopes, and/or in violation of universally accepted safety precautions for the use of said scopes."[36]

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[34] This created concern by the grand jury:

> A JUROR: I have one and it concerns the last witness. You talked about fraud and she talked about 31 minutes. But have you shown anything where the fraud is? I mean all we saw what that there was 31 minutes. How do I now that's right or wrong or how do we know—
> MR. STAUDAHER: I am not at liberty to supplement the information from that particular witness. The only thing I would direct you to especially in this afternoon is review the actual charts of the times and the people that were there, the information that you have in the documents that have been provided for that witness as well as the other for Miss Aspinwall and anyone else and review the information and exhibits you have to arrive at your—
> A JUROR: You're saying in the exhibits there is possibly some information that it wasn't 31 minutes?

[35] (Indictment, Appendix Vol. 1, pgs. 1-42). (Emphasis added).

[36] This language describes the seventh act in the seventh parenthetical of each and every injury count alleged against Mathahs. See Counts 3, 4, 7, 8, 10, 11, 13, 14, 18, 20, 21 and 23. (Indictment, Appendix, Vol. 1, pgs. 1-42). (Emphasis added).

Finally, subsection (8) in the Criminal Negligence Count contends that Mathahs may alternatively be liable for the transmission "by methods unknown."[37]

As stated above, the confusing, incomprehensible string of "or" or "and/or" allegations are violative of Mathahs' due process rights, and actually undercuts rather than bolsters the specificity required on the notice. There is no clear statement of facts or how the facts support the elements of the crime charged. In fact, the opposite is true considering the last possible method of alleged transmission is by the "unknown" method.

On May 22, 2012, the parties came before the court on Petitioner's Motion to Dismiss Indictment.[38] The court agreed with Mathahs' counsel that the Indictment could have been pled "much better."[39] The court stated that Mathahs' argument to dismiss the Indictment was "more compelling" than Desai's argument because the State did not "really try to distinguish why the argument applies to the nurse clients."[40]

> Counsel for Mathahs argued:
> The other counts for which he's charged with as it relates to fraud are Counts 1, 2, 3, 4, 5, 7, 8, 9, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27. He never treated or billed for any of those patients, yet he's charged in the fraud as it relates to them. I mean, certainly there's nothing contained within the indictment to suggest why we're charged with that, with those charges.
>
> There's no information contained within the indictment to put us on notice to defend against as it relates to the evidence when it comes in with regard to the billing fraud.[41]
>
> Counsel for Mathahs continued:
> As far as the fraud is concerned, there is a number of fraud charges contained in this indictment that we don't believe have been pled with particularity, and we don't believe should be alleged against Mr. Mathahs. Why is he being charged with a myriad of counts as it relates to patients he never even saw or billed? . . . .
>
> If the theory against Mr. Mathahs is that he re-used Propofol inconsistent with aseptic techniques, which ultimately caused the infections associated with these days in question, or this day in question—there's another day he's being charged

[37] (Indictment, Appendix Vol. 1, pgs. 0001-0042).

[38] (Transcript of Proceedings, May 22, 2012, Appendix Vol. 2, pgs. 0402-0416).

[39] (Transcript of Proceedings, May 22, 2012, pg. 2, Appendix Vol. 2, pg. 0403).

[40] (Transcript of Proceedings, May 22, 2012, pg. 2, Appendix Vol. 2, pg. 0403).

[41] (Transcript of Proceedings, May 22, 2012, pg. 7, Appendix Vol. 7, pg. 0408).

which he wasn't even on, as far as the infection counts were concerned. But then they should plead that. . . .

There's a myriad of alternative theories. . . .[The State has pled] a myriad of problems associated with this organization, which led to aseptic techniques within the organization. But in reality, as the charge and the theory of the case goes for Mr. Mathahs and Mr. Lakeman, is that there was—there was a failure to use aseptic techniques as it related to the Propofol on that day in question, which led to an infection. That's it.[42]

The Court responded:

I think your best point is it's so broad that, you know, do you have to separate each and every thing. . . .[43]

In conclusion, the Court stated:

So I think a lot of this goes to proof issues, which the State, they pled it. Now they got to prove it this way. And I think just on the issue of the sufficiency of the notice, could it have been better? Certainly. I think they've met the threshold. And so, Mr. Cristalli, it's denied as to your claim as well the joinder is denied.[44]

DISCUSSION

I. A PETITION FOR AN EXTRAORDINARY WRIT IS THE APPROPRIATE VEHICLE TO CHALLENGE THE DISTRICT COURT'S JURISDICTION TO PROCEED ON THE CRIMINAL CHARGES PENDING AGAINST PETITIONER BASED ON PETITIONER'S ARGUMENT THAT THE INDICTMENT IS CONSTITUTIONALLY AND STATUTORILY DEFECTIVE

A petition for an extraordinary writ is the appropriate method for challenging the district court's jurisdiction to proceed with the criminal charges pending against Petitioner. NRS 34.160 provides that a writ of mandamus may be issued by this Court to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station. NRS 34.170 provides that the writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of the law. Similarly, NRS 34.320 provides that a writ of prohibition is available to arrest the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such

[42] (Transcript of Proceedings, May 22, 2012, pg. 9-10, Appendix Vol. 2, pgs. 0410, 411).

[43] (Transcript of Proceedings, May 22, 2012, pg. 12, Appendix Vol. 2, pg. 0413).

[44] (Transcript of Proceedings, May 22, 2012, pg. 14, Appendix Vol. 2, pgs. 0415).

tribunal, corporation, board or person. NRS 34.330 provides that this Court may issue a writ of prohibition in all cases where there is not a plain, speedy and adequate remedy in the course of the law.

Petitioner acknowledges that under both the Court's original constitutional jurisdiction of Article 6, § 4 and the statutory provisions that the issuance of a writ is discretionary. *Hickey v. Eighth Judicial Dist. Ct.*, 105 Nev. 729,731, 782 P.2d 1336, 1338 (1989) ("mandamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court") (citing *Poulos v. District Court*, 98 Nev. 453,455 652 P.2d 1177,1178 (1982)). This Court has a long history of exercising its discretion in favor of granting writs where clarifications of issues of law are required and no factual dispute exists. *Smith v. Eighth Judicial Dist. Ct.*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).

The Court has also granted writs where matters of public policy are served by the Court's invocation of its original jurisdiction. *Diaz v. Eighth Judicial Dist. Ct.*,116 Nev. 88, 92, 993 P.2d 50, 54 (2000) (citing *Business Computer Rentals v. State Treas.*, 114 Nev. 63, 65, 953 P.2d 13, 15 (1998)). The Court will also issue a writ to prevent a "gross miscarriage of justice." *State v. Babayan*, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (Nev. 1990) (granting a writ of mandamus dismissing an indictment for grand jury function violations). A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Round Hill Gen. Imp. Dist v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

A petition for an extraordinary relief is the proper method for challenging the blatantly defective indictment. The district court lacks jurisdiction to proceed on the indictment due to the numerous and significant statutory and constitutional defects in the indictment.

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As this Court concluded long ago, "It is hard to conceive of a greater legal wrong which might be imposed upon a person charged with a grave and serious offense than to compel him to undergo trial by a court or under a procedure wholly void in law." *Bell v. District Court*, 28 Nev. 280, 295, 81 P. 875 (1905) (availability of an appeal following a judgment of conviction not an adequate remedy; writ of prohibition is appropriate remedy to prohibit the trial court from conducting criminal proceedings based upon an unconstitutional statute). The fact that an appeal might be available from a judgment of conviction does not preclude issuance of the writ, particularly in the circumstances presented here because the district court has exceeded its jurisdiction by permitting proceedings based upon the obviously defective indictment. *See G.M. Properties v. District Court*, 95 Nev. 301, 304, 594 P.2d 714 (1979).

A petition for a writ of prohibition is the proper method of challenging this defective indictment. In fact, if Petitioner did not present this writ, he would arguably waive the right to hereafter challenge the Grand Jury proceedings. *Simpson v. District Court,* 88 Nev. 654, 661, 503 P.2d 1225 ("An element of waiver is involved, when an accused proceeds to trial without challenging the indictment. Thereafter, he should not be heard to complain if the indictment . . . gave notice of what later transpired at trial[.]"). Further, NRS 174.105(3) provides that "Lack of jurisdiction of the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding."

II. THE INDICTMENT MUST BE DISMISSED AS AGAINST MATHAHS BECAUSE IT IS CONSTITUTIONALLY AND STATUTORILY DEFECTIVE

In this case, Petitioner is unable to prepare any meaningful defense based upon the defective indictment. The state seeks to conduct a trial for non-existent offenses and has presented an Indictment that fails to define the alleged conduct with any degree of specificity or clarity, in violation of the due process clause. The state presents an indictment which either presents duplicitous counts or suffers from multiplicity, either of

which is impermissible, and which erroneously charges counts against Petitioner for patients that Petitioner never treated.

Under the Sixth Amendment, an indictment must adequately inform a defendant of the nature and cause of the accusations against the defendant. *West v. State*, 119 Nev. 410, 419, 75 P.3d 808, 814 (2003). Additionally, NRS 173.075 requires that an indictment be a "plain, concise, and definite written statement of the essential facts constituting the offense charged." The indictment, standing alone and on its face, must contain: (1) each and every element of the crime charged; and (2) the facts showing how the defendant allegedly committed each element of the crime charged. *State v. Hancock*, 114 Nev. 161, 164, 955 P.2d 183, 185 (1998).

The description of the particular act giving rise to the offense must be sufficient to enable the defendant to properly defend against the accusations, thereby protecting the constitutional right to due process of law. *Id.*

The State cannot defend the sufficiency of the indictment by referring to evidence presented at the grand jury and asserting the defendants can figure it out. *Simpson v. Eighth Jud. Dist. Ct.*, 88 Nev. 654, 659, 503 P.2d 1225, 1230 (1973). In *Simpson*, the Nevada Supreme Court noted that considering the language of Fed. R. Crim. P. 7, from which NRS 173.075 is derived, the U.S. Supreme Court has also held an indictment is deficient unless it "sufficiently apprises the defendant of what he must be prepared to meet." *Id.*; citing *Russell v. U.S.*, 369 U.S. 749 (1962). Furthermore, the U.S. Supreme Court noted an indefinite indictment not only deprived a defendant of such notice but in effect, allowed a prosecutor or court to usurp the function of the grand jury. *Id.*

The Nevada Supreme Court noted, "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Id.* (quoting *Russell v. U.S.*, 369 U.S. 749, 770) (1962).

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As such, the Nevada Supreme Court stated that the following formulation of the law correctly states the principle that must govern its decision:

> Whether at common law or under statute, the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process.

Simpson, 88 Nev. at 660, 503 P.2d at 1230 (*citing to* 4 R. Anderson, Wharton's Criminal Law and Procedure s 1760, at 553 (1957)).

In *Simpson*, the State attempted to suggest a definite indictment was unnecessary because the petitioner had access to the transcript of proceedings before the grand jury. *Simpson*, 88 Nev. at 660, 503 P.2d at 1230. The Nevada Supreme Court rejected this contention for several reasons. First, it stated that a fundamental vice of indefinite charges is that it permits prosecutors to try cases on theories totally different from those propounded earlier. *Id.* Second, since NRS 173.075(1) entitles an accused to a definite written statement of essential facts, the statute repels the idea that the Court may countenance an indefinite indictment when it feels the defendant might glean the prosecutor's theory of means from whatever he presented to show probable cause. *Id.* The Court further noted that some theories will always be suggested by such evidence; if that justifies noncompliance with the statutes, the statutes would have no real force at all. *Id.*

Thus, the *Simpson* Court stated:

> The indictment under consideration would allow the prosecutor absolute freedom to change theories at will; it affords no notice at all of what petitioner may ultimately be required to meet; thus, it denies fundamental rights our legislature intended a definite indictment to secure. Furthermore, in this case, the indefinite indictment obscures the reality that **the prosecution may be unable to frame a proper indictment** . . . consistently with facts [then] known.

Id. (Emphasis added).

Thus, aside from minor clerical errors, an indefinite indictment cannot be amended without impinging on the grand jury function. *Hancock*, 114 Nev. at 168, 955 P.2d at 187.

Moreover, the indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. Fed. R. Crim. P. 7(c)(1). As to what facts are essential, an indictment must set forth each element of the crime that it charges. *U.S. v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (quoting *Almendarez-Torres v. U.S.*, 523 U.S. 224, 228 (1998)).

In the case of an indictment alleging conspiracy, the indictment must allege the illegal object of the conspiracy. *Wong Tai v. U.S.*, 273 U.S. 77, 81 (1927).

The purposes of an indictment are twofold. First the indictment must provide the defendant with enough information so that he can prepare his defense. *Resendiz-Ponce*, 549 U.S. at 108. *See also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation.") Second, the indictment must protect against double jeopardy, so it must be specific enough to enable the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Resendiz-Ponce*, 549 U.S. at 108.

Generally, it is sufficient to track the language of the charging statute, but the indictment must also include sufficient facts to pin down the specific conduct at issue. As put by the Supreme Court in *Hamling:*

> It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. Undoubtedly the language of the statue may be used in the general description of the offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

Hamling v. U.S., 418 U.S. 87, 117-18 (1974) (internal citations and quotation marks omitted). In other words, although the indictment need not allege "every factual nugget necessary for conviction," it must "provide some means of pinning down the specific conduct at issue." *U.S. v. Fassnacht*, 332 F.3d 440, 445 (7th Cir. 2003).

Additionally, some crimes must be charged with greater specificity. *Resendiz-Ponce*, 549 U.S. at 109 (citing *Hamling*, 418 U.S. at 117); *see also Russell v. U.S.*, 359

U.S. 749, 764 (1962). The cases in which an indictment merely parrots the statute is held to be insufficient when a determination that the factual information that is not alleged in the indictment goes to the very core of criminality under the statute. *U.S. v. Kay*, 359 F.3d 738, 756-57 (5th Cir. 2004).

Each count is considered separately, or, as the Supreme Court has put it, "is regarded as if it was a separate indictment." *Dunn v. U.S.*, 284 U.S. 390, 393 (1932). Thus, generally, each count must stand on its own and cannot depend for its validity on the allegations of any other count not specifically incorporated. *See U.S. v. Caldwell*, 302 F.3d 399, 412 (5th Cir. 2002); *U.S. v. Conley*, 291 F.3d 464, 471 (7th Cir. 2002); *U.S. v. Stoner*, 98 F.3d 527, 535-36 (10th Cir. 1996); *U.S. v. Yefsky*, 994 F.2d 885, 894 (1st Cir. 1993); *U.S. v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *U.S. v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991); *U.S. v. Italiano*, 837 F.2d 1480, 1492 (11th Cir. 1988); *U.S. v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980).

When an indictment fails to allege an element, it fails to state an offense. *U.S. v. Wylie*, 919 F.2d 969, 972 (5th Cir. 1990); *U.S. v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988). Also, an indictment fails to state an offense if the specific facts alleged in it fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation. *U.S. v. Hediathy*, 392 F.3d 580, 587 (3d Cir. 2004).

While most motions alleging defects in the indictment or information must be raised before trial, there are exceptions for motions to dismiss based on a claim that the indictment or information fails to state an offense; these motions may be raised "at any time" while the case is pending. NRS 174.105(1).

A. THE ECONOMIC CHARGES

Count 1-Racketeering states:

> Defendants, did on or between June 3, 2005, and May 5, 2008, then and there, within Clark County, Nevada knowingly, willfully and feloniously while employed by or associated with an enterprise, conduct or participate directly or indirectly in racketeering activity through the affairs of said enterprise; and/or with criminal intent receive any proceeds derived, directly or indirectly, from

racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds from racketeering activity; and/or through racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise; and/or intentionally organize, manage, direct, supervise or finance a criminal syndicate; and/or did conspire to engage in said acts, to wit: by directly or indirectly causing and/or pressuring the employees and/or agents of the Endoscopy Center of Southern Nevada to falsify patient anesthesia records from various endoscopic procedures; and/or to commit insurance fraud by directly or indirectly submitting said false anesthesia records to various insurance companies for the purpose of obtaining money under false pretenses from said insurance companies and/or patients; said fraudulent submissions resulting in the payment of monies to Defendants and/or their medical practice and/or the enterprise, which exceeded the legitimate reimbursement allowed for said procedures; Defendants being responsible under one or more of the following principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding or abetting each other in the commission of the crime by directly or indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other and/or others to commit said acts, Defendants acting with the intent to commit said crime.

(Indictment, Appendix Vol.1, pgs. 1-42). (Emphasis added).

In *Hidalgo v. State*, the Nevada Supreme Court found that a notice was ineffective even if it included specific allegations when the State repeatedly used "and/or" to connect the numerous allegations, which undercut rather than bolstered the notice's specificity. *Hidalgo v. State*, 124 Nev. 330, 338, 184 P.3d 369, 375 (2008). The Court noted that although the State was permitted to plead alternative facts, the notice was still required to be coherent, with a clear statement of facts and how the facts supported the elements. *Id.*

Although the notice in *Hidalgo* was in relation to a notice of intent to seek death, the Court looked to other notice pleading requirements for guidance, such as a charging document, which the Court explained served a similar purpose to a notice of intent. *Id.* The Court stated:

> NRS 173.075 provides that a charging document must be a plain, concise and definite written statement of the essential facts constituting the offense charged. To satisfy this requirement, the [charging document] standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may be adequately prepare a defense. Although there are obvious differences in the purpose of a charging document and a notice of intent to seek the death penalty, their primary function is the same, i.e., to provide the defendant with notice of what he must defend against at trial. . . .

Id. at 338-39, 184 P.3d at 375-76.

The Court continued, "The notice of intent must provide a simple clear recitation of the critical facts." The *Hidalgo* Court observed that the problem with the notice of intent was not the lack of factual detail, it was that the factual allegations were pled in an incomprehensible format (the confusing and/or format) such that it failed to meet the due process requirements. *Id.* at 339, 184 P.3d at 376.

In the case at bar, there are approximately twenty-five instances of "or" or "and/or" within count one alone. There are no specific factual allegations made. The RICO count fails because it does not adequately identify two predicate crimes. Moreover, it does not allege the elements of two predicate offenses, or the facts establishing the necessary elements. It attempts to address the racketeering count by stringing along incomprehensible, confusing "and/or" or "or" strings in an attempt to explain a theory that is not substantiated by any facts presented to the grand jury.

The economic fraud charges are unsupported by intent, benefit or proof. The theory is that the ECSN received more money for having the CRNAs put down an anesthesia time of 31 minutes. The clinic uniformly billed $560 per procedure.[45] The amount that was actually received by the clinic was never proven to be linked to the alleged inflated 31 minute time period.[46] This testimony underscores the failure of proof to derive economic fraud from the 31 minute theory:

> Q: In the payment, I know that the amount that was submitted to you was for either 32 or I think it was—
> A: Thirty-one
> Q: Thirty-one minutes, 31 or 32 minutes, and the billed amount was $560 on both of those, but you paid the same amount on both; is that correct?
> A: Yes it is.
> Q: If they had billed, or if they had billed out, I don't know, $120 for ten minutes of anesthesia time, how much would you have paid?
> A: We would have still paid $90.

[45] (Reporter's Transcript - Grand Jury - Volume 5, pgs. 12, 41, 56, Appendix Vol. 2, pgs. 0336, 0337, 0340).

[46] The State failed to approximate proof that anesthesia time of patients Rubino, Meana, and Orellana was not 31 minutes.

Q: So you are telling us that you paid a flat amount of $90 regardless of what was billed to you?
A: Yes, we did.
Q: **So did it matter how many minutes were placed in the boxes?**
A: **It still matters but it wouldn't have in regard to the payment out the door it would not have changed it.**
Q: **So the dollar amount coming back to the Endoscopy Center would not have changed regardless of what they put in?**
A: **Correct.**[47]

The sworn testimony of the Pacificare claims processor disproves the notion that an alleged inflated anesthesia time translated into economic loss. Without economic loss there is no fraud. Without economic fraud there is no racketeering.

The Nevada Racketeering offense is directly patterned after the federal Racketeer Influenced and Corrupt Organizations Act (RICO).[48] Both the Nevada Racketeering

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[47] (Reporter's Transcript - Grand Jury - Volume 5, pgs. 46, 47, Appendix Vol. 2, pg. 0338). (Emphasis added).

[48] *See* NRS 207.350-400. *See also* 18 U.S.C § 1961. The pertinent parts of the Nevada Racketeering Statute are as follows:

NRS 207.350 Definitions. As used in NRS 207.350 to 207.520, inclusive, unless the context otherwise requires, the words and terms defined in NRS 207.360 to 207.390, inclusive, have the meanings ascribed to them in those sections.

NRS 207.360 "Crime related to racketeering" defined. "Crime related to racketeering" means the commission of, attempt to commit or conspiracy to commit any of the following crimes:

1. Murder;
2. Manslaughter, except vehicular manslaughter as described in NRS 484B.657;
3. Mayhem;
4. Battery which is punished as a felony;
5. Kidnapping;
6. Sexual assault;
7. Arson;
8. Robbery;
9. Taking property from another under circumstances not amounting to robbery;
10. Extortion;
11. Statutory sexual seduction;
12. Extortionate collection of debt in violation of NRS 205.322;
13. Forgery;
14. Any violation of NRS 199.280 which is punished as a felony;
15. Burglary;
16. Grand larceny;
17. Bribery or asking for or receiving a bribe in violation of chapter 197 or 199 of NRS which is punished as a felony;
18. Battery with intent to commit a crime in violation of NRS 200.400;
19. Assault with a deadly weapon;
20. Any violation of NRS 453.232, 453.316 to 453.3395, inclusive, or 453.375 to 453.401, inclusive;
21. Receiving or transferring a stolen vehicle;
22. Any violation of NRS 202.260, 202.275 or 202.350 which is punished as a felony;
23. Any violation of subsection 2 or 3 of NRS 463.360 or chapter 465 of NRS;

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———————— (continued)

24. Receiving, possessing or withholding stolen goods valued at $250 or more;
25. Embezzlement of money or property valued at $250 or more;
26. Obtaining possession of money or property valued at $250 or more, or obtaining a signature by means of false pretenses;
27. Perjury or subornation of perjury;
28. Offering false evidence;
29. Any violation of NRS 201.300 or 201.360;
30. Any violation of NRS 90.570, 91.230 or 686A.290, or insurance fraud pursuant to NRS 686A.291;
31. Any violation of NRS 205.506, 205.920 or 205.930;
32. Any violation of NRS 202.445 or 202.446; or
33. Any violation of NRS 205.377.

NRS 207.370 "Criminal syndicate" defined. "Criminal syndicate" means any combination of persons, so structured that the organization will continue its operation even if individual members enter or leave the organization, which engages in or has the purpose of engaging in racketeering activity.

NRS 207.380 "Enterprise" defined. "Enterprise" includes:

1. Any natural person, sole proprietorship, partnership, corporation, business trust or other legal entity; and
2. Any union, association or other group of persons associated in fact although not a legal entity. The term includes illicit as well as licit enterprises and governmental as well as other entities.

NRS 207.390 "Racketeering activity" defined. "Racketeering activity" means engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.

NRS 207.400 Unlawful acts; penalties.

1. It is unlawful for a person:

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

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

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

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

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

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

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

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

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

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

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

(h) To transport property, to attempt to transport property or to provide property to another person knowing that the other person intends to use the property to further racketeering activity.

(i) Who knows that property represents proceeds of, or is directly or indirectly derived from, any unlawful activity to conduct or attempt to conduct any transaction involving the property:

(1) With the intent to further racketeering activity; or

(2) With the knowledge that the transaction conceals the location, source, ownership or control of the property.

(j) To conspire to violate any of the provisions of this section.

statute and the federal RICO Act were designed for selective charging to dismantle organized criminal syndicates or organizations that operated through the statutory definition of a "pattern of racketeering." This pattern is established by proving the commission of two or more predicate offenses through racketeering activity.[49]

1. The RICO Count Fails Because it Does Not Adequately Identify Two Predicate Crimes.

In Mathahs' racketeering charge, he (alongside his co-Defendants with no distinction made between any co-Defendants) is alleged to have participated in "racketeering activity," and/or with "criminal intent" to have received proceeds from racketeering activity to use or invest, and/or through racketeering activity to acquire or maintain an interest in or control of an enterprise, and/or intentionally organize, manage, direct, supervise or finance a criminal syndicate, and/or to have conspired to engage in certain acts.[50]

The certain acts alleged are to have pressured employees to falsify patient anesthesia records, and/or to have committed insurance fraud.[51]

The charge of Racketeering is one of the most serious and punitive provisions in criminal law. These facts do not support the allegation that any "racketeering" occurred.[52]

(continued)

2. A person who violates this section is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years, and may be further punished by a fine of not more than $25,000.

3. As used in this section, "unlawful activity" has the meaning ascribed to it in NRS 207.195.

[49] NRS 207.390.

[50] (Indictment, Appendix Vol. 1, pgs. 1-42).

[51] (Indictment, Appendix Vol. 1, pgs. 1-42).

[52] Mathahs is alleged to have treated and billed for three of the nine complainants. His alleged fraud is an alleged inflation of anesthesia time for Rudolph Meana, Kenneth Rubino and Sonia Orellana-Rivera. All other counts involving all other complainants must be similarly dismissed against Mathahs as the State has utterly failed to establish criminal agency. These Counts include 1, 2, 3, 4, 5, 7, 8, 9, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, and 27. Mathahs never billed for these patients because he did not threat these patients. No fraud or deceit is traceable to Mathahs for the complainants or these counts. They must be dismissed as to Mathahs as he had nothing to do with their care.

Further, without a fraud with discernible and provable economic loss, there is no racketeering. Without economic benefit or knowledge of potential economic loss, Mathahs cannot be proven to be a racketeer.

As previously stated, there is no evidence that the alleged inflated anesthesia time translated into any economic loss. The Pacificare claims processor stated that the dollar amount coming back to the Endoscopy Center was a flat rate, regardless of what was billed.[53] Without economic loss, there is no economic fraud. Without fraud, there is no racketeering charge that can be sustained.

Even should the State attempt to argue that the two predicate crimes are stated in the Indictment as "false pretenses" and "insurance fraud" (notwithstanding the fact it cannot meet its burden of proof), pursuant to *Hancock* and *Simpson*, the Indictment is still fatally defective as there is no description of each and every element of the crime charged, or the facts showing how Mathahs allegedly committed each element of the crime. As such, the vague and indefinite description provided by the State makes it impossible for Mathahs to properly defend against the accusations, in violation of his constitutional right to due process of law.[54] Moreover, the confusing, incomprehensible string of "or" or "and/or" allegations are violative of Mathahs' due process rights, as held in *Hidalgo*, and actually undercuts rather than bolsters the specificity required on the

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[53] (Reporter's Transcript - Grand Jury - Volume 5, pgs. 46, 47, Appendix Vol. 2, pg. 0338).

[54] Count 1-Racketeering states:

> Defendants, did on or between June 3, 2005, and May 5, 2008, then and there, within Clark County, Nevada knowingly, willfully and feloniously while employed by or associated with an enterprise, conduct or participate directly or indirectly in racketeering activity through the affairs of said enterprise; and/or with criminal intent receive any proceeds derived, directly or indirectly, from racketeering activity to use or invest, whether directly or indirectly, any part of the proceeds from racketeering activity; and/or through racketeering activity to acquire or maintain, directly or indirectly, any interest in or control of any enterprise; and /or intentionally organize, manage, direct, supervise or finance a criminal syndicate; and/or did conspire to engage in said acts, to wit: by directly or indirectly causing and/or pressuring the employees and/or agents of the Endoscopy Center of Southern Nevada to falsify patient anesthesia records from various endoscopic procedures; and/or to commit insurance fraud by directly or indirectly submitting said false anesthesia records to various insurance companies for the purpose of obtaining money under false pretenses from said insurance companies and/or patients; said fraudulent submissions resulting in the payment of monies to Defendants and/or their medical practice and/or the enterprise, which exceeded the legitimate reimbursement allowed for said procedures; Defendants being responsible under one or more of the following principles of criminal liability, to wit: (1) by directly committing said acts; and/or (2) aiding or abetting each other in the commission of the crime by directly or indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other and/or others to commit said acts, Defendants acting with the intent to commit said crime. (Indictment, Appendix Vol. 1, pgs. 1-42)

notice. The twenty-five "or" and "and/or" strings connecting vague allegations of misconduct on behalf of unnamed Defendants is utterly incoherent. There is no clear statement of facts and how the facts support the elements of the crime charged.

As described in *Simpson*, the State cannot defend the sufficiency of the Indictment by simply referring to the evidence presented at the grand jury and telling the defendants to "figure it out." Yet, this is precisely what the State is asking Mathahs to do. Mathahs cannot reasonably be expected to defend himself against the racketeering count(s) based upon the information (or lack thereof) provided in the Indictment. The Indictment does not contain the elements of each predicate crime with enough specificity to allow Mathahs to prepare a proper defense; he is not required to sift through the grand jury proceedings to attempt to "figure out" what the charges are against him.

The RICO count runs afoul from the mandate that the indictment must be a plain, concise, and definite written statement of the essential facts constituting the offense charged, pursuant to NRS 173.075. Based on the fact that the indictment does not sufficiently allege two predicate crimes, the elements of those crimes, and the facts that support that Mathahs had any involvement whatsoever, directly or indirectly, as a participant, or conspirator, this count must be dismissed.

The RICO count should be dismissed for failing to advise the accused of the nature and cause of the accusation and for failing to sufficiently state the elements of the offense, and facts showing Mathahs' commission of it.

2. <u>The RICO Count Fails Because it Lumps the Defendants Together Without Particularizing Which Defendant Did What Act.</u>

In *Hancock*, the Nevada Supreme Court held that a racketeering count based on securities fraud and obtaining money by false statements was fatally defective because it failed to specify which of the four defendants engaged in which type of racketeering activity. *Hancock*, 114 Nev. at 166, 955 P.2d at 183. The *Hancock* Court also found a racketeering count was fatally defective because it lumps the defendants together without alleging which defendant made false statements to the victims. *Id.* at 165, 955 P.2d at

186.

In the case at bar, there is absolutely no distinction between the defendants as to who did what. All defendants purportedly engaged in several different possible methods of racketeering, either directly or indirectly, and/or as part of a conspiracy. Similar to *Hancock*, there is no distinction between the defendants who are all essentially lumped together. As such, it is impossible for Mathahs to know what he is trying to defend against and which acts are purportedly attributed to him as well as what part he allegedly took in such acts.

The RICO count should be dismissed for failing to sufficiently state what role Mathahs played in the alleged perpetration of racketeering. It is the State's burden to explain what role each Defendant had in the charges against the Defendants, and to demonstrate what facts are in their knowledge to specifically support the counts alleged against Mathahs. Because the State does not have any evidence that Mathahs engaged in any type of racketeering activity, it attempts to make Mathahs culpable of this count by blindly lumping him in with the other Defendants.

Case law is clear that failure to allow a defendant the right to adequately prepare his defense by informing him of the charges against him is a violation of a defendant's constitutional right. On this basis alone, the Indictment is fatally defective and must be dismissed as to Mathahs.

B. THE INJURY CHARGES

Distilled to its simplest denominator, the State is unable to prove either how Hepatitis-C was transmitted or who is responsible for its transmission.

The State maintains that multiple use of single-use Propofol vials somehow caused contamination. Assuming *arguendo*, this to be true, there were two CRNAs on duty, as well as a pre-op nurse drawing from a multi-use saline bottle. The alleged transmission of Hepatitis-C on September 21, 2007, was (according to the State's accusations) occurring simultaneously in two different procedure rooms, with the same genetically identified strain of Hepatitis-C. The State is simply unable to trace a single person or act to these

alleged transmissions. Accordingly, all those in the vicinity are indicted.

Petitioner was a salaried employee who had no voice in how medical supplies were ordered or used. The State's evidence at the grand jury clearly showed that Dr. Desai made all the decisions and called the shots. At the grand jury proceedings, Dr. Carrera testified that "he (Dr. Desai) was the boss; everyone else was subordinate to him."[55] This witness stated that there was no general practice of unsafe injection practices.[56]

Even if such a policy did exist, Petitioner was never proven to have any hand in its development or implementation. The testimony presented to the grand jury was that no one but Dr. Desai had any "constructive power" and that Dr. Desai was "fully in charge."[57] When asked whether Dr. Desai was the "clear leader or the guy in charge," Dr. Carrol responded, "absolutely, yes."[58]

Petitioner did not have any power, authority, or control to dictate the management and use of supplies. Aside from having nothing to do with the transmission of the virus, there was no evidence adduced in the grand jury record that he ever touched a scope; that simply was not his job.

As such, if the State wants to argue that Dr. Desai, as the "criminal mastermind" or "person in charge" of ECSN created an "atmosphere" of negligence, that is an issue between the State and Dr. Desai; however, the State cannot demonstrate in any manner, how salaried employees hired to do specific tasks, were responsible for creating an "atmosphere" of criminal negligence.

At the hearing on Dr. Desai's motion to dismiss, the Court stated that the State could have "narrowed" down the charges according to each patient. (Transcripts of Proceedings, May 10, 2012, pg. 12, Appendix Vol. 2, pg.)

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[55] (Reporter's Transcript - Grand Jury - Volume 1, pg. 32, Appendix Vol. 2, pg. 0311).

[56] (Reporter's Transcript - Grand Jury - Volume 1, pgs. 58, Appendix Vol. 2, pg. 0315).

[57] (Reporter's Transcript - Grand Jury - Volume 1, pgs. 81, 84, Appendix Vol. 2, pg. 0320).

[58] (Reporter's Transcript - Grand Jury - Volume 2, pg. 22, Appendix Vol. 2, pg. 0329).

In response, the State argued that the act was not specific to each patient necessarily but "because of all this other action that was going on within the clinic that essentially set up a circumstance by which that would've happened."[59] The State continued that it intended to raise issues to show what the atmosphere was, what the actions and inactions taken by staff were which led to what happened to these patients, and **that this man Desai orchestrated. . .**"[60] If the State is going to show "what actions and inactions" were taken by the staff, why could they not allege it in the Indictment so Petitioner is able to understand what he is being alleged to have committed? To blindly argue an "atmosphere" was created by Dr. Desai, the man who "orchestrated" an atmosphere is one thing, but if the State is actually arguing that he made "orchestrations" through his staff, his staff should be entitled to know what these "orchestrations" were, as to them specifically.

Petitioner was not in charge of the "atmosphere," nor was he in charge of "orchestrating." According to the State's own argument, they followed Dr. Desai's direction.

At the hearing on Dr. Desai's motion to dismiss, the State offered to strike "the unknown means" element of the criminal negligence, because there is no way to sufficiently defend against "unknown means."[61] Thus, there seems to be no dispute that at least some of the charges are completely unidentifiable to defend against.

The remainder, as to Dr. Desai, appeared to be "sufficient" according to the district court because of the State's argument that Dr. Desai "orchestrated" the events at issue by creating an "atmosphere" at ECSN. However, that same argument cannot be used to support the allegations against the employees who had nothing to do with orchestration or atmospheric creation.

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[59] (Transcripts of Proceedings, May 10, 2012, pg. 16, Appendix Vol. 2, pg. 0375)

[60] (Transcripts of Proceedings, May 10, 2012, pg. 16, Appendix Vol. 2, pg.0375)

[61] (Transcripts of Proceedings, May 10, 2012, pg. 37, Appendix Vol. 2, pg. 0396)

The charges against Petitioner are insufficient as stated, they are impossible to defend against, and violative of Petitioner's constitutional rights. He cannot be blindly lumped in with Dr. Desai when there is no dispute that the two men had very different levels of responsibility at the clinic; one was in charge and the other was simply hired to perform very specific tasks at Dr. Desai's direction. None of those tasks are alleged in the Indictment, nor is it alleged which tasks were performed with "criminal negligence."

At the grand jury proceeding, the prosecutor, while asking the witness not to speculate, asks for speculation about how the transmission happened and who is responsible:

> Q: And I wouldn't want you to speculate as to how, what he brought with him or didn't bring with him or whatever, but at least we have the CRNA, if I understand you correctly, we have the CRNA where the source patient originates and infected patients after that in that same room?
> A: Yes.
> Q: And then we have around the time that the infection starts in the second room we have evidence that shows that Mr. Mathahs is the CRNA that moves to that room at least for a period of time?
> A: That's correct.
> Q: Now was there any indication that he in fact had been involved in any way with Stacy Hutchinson's procedure?
> **A: Not according to the records. And the records that I used were the ones that were generated and signed off on in the procedure files.**[62]

> The final report generated by the Southern Nevada Health District states: On September 21, 2007, a total of 64 procedures were performed on 63 patients (one patient underwent both an EGD and colonoscopy), including 33 procedures in room "A" and 31 procedures in room "B". The first procedure started at 06:59 and the last procedure ended at 17:03.
>
> Anesthesia times recorded for the patients ranged from 25 minutes to 41 minutes, with a mean and median time of 32 minutes. Sixty one of the 63 procedures (97%) had a recorded anesthesia time of between 30 and 34 minutes. The total amount of anesthesia time recorded was 33 hours, 25 minutes, a per-room average of 16 hours, 42 minutes.
>
> The source patient underwent a procedure mid-morning, and all infected patients underwent procedures within about three hours and thirty minutes of the source patient's procedure...
>
> A total of four physicians performed procedures on September 21, 2007, and two CRNAs administered anesthesia in the two procedure rooms. The IVs of the source patient and five of the case patients were started by RN 1, and the IVs of the other two case patients were started by RN 2. Case patients had procedures performed in both procedure rooms on that day, and the procedures were performed using several endoscopes. No case patients had a procedure performed with the same endoscope as was

[62] (Reporter's Transcript - Grand Jury - Volume 5, pg. 117, Appendix Vol. 2, pg. 0344).

used on the source patient. Four of the case patients had biopsies performed during their procedures, and three did not.

> **None of the following place the patients at a statistically significant increased risk for infection (calculated among patients who had procedures subsequent to the source patient's procedure): having a biopsy, the physician performing the procedure, the CRNA administering the anesthesia, the technician assisting, the nurse starting the IV, the type of procedure, or the room in which the procedure was performed.**[63]

The July 25, 2007 charges were factually summarized by the Outbreak Team of the Southern Nevada Health District. It should be noted that CRNA 4 is not Mathahs:

> **July 25, 2007 Cluster Investigation Results**
>
> As with the September 21, 2007 records, procedure rooms were not recorded on the charts of patients from July 25, 2007. For this date, a date error was not reported, and it was not possible to identify the room in which procedures had occurred. A total of 67 procedures were conducted on 65 patients on July 25, 2007; two patients underwent both an EGD and colonoscopy.
>
> The genetically-identified source patient was the first patient to have a procedure performed on July 25, 2007 by Physician B and CRNA 4. The procedure on the one newly-infected patient began 1 hour and 11 minutes after the source patient's procedure began, and was also performed by Physician B and CRNA 4. Three additional patients had procedures performed by physician B and CRNA 4 during the time between when procedures were performed on the source patient and the newly-infected patient. According to the records of the infected patient, the IV was started by CRNA 4.[64]

This factual reconstruction underscores the fact that Mathahs could not be, even according to the State's flawed theory, criminally responsible for the negligent transmission of Hepatitis-C. The evidence shows that he was not the CRNA responsible for the infected patient's care or for the care of the source patient.

....

....

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[63] Outbreak of Hepatitis-C at Outpatient Surgical Centers, Public Health Investigation Report, December 2009, Southern Nevada Health District; Brian Labus, MPH, Senior Epidemiologist at p. 22; p. 198 of grand jury evidence record, Appendix Vol. 1, pg. 0069. (emphasis supplied).

[64] Outbreak of Hepatitis-C at Outpatient Surgical Centers, Public Health Investigation Report, December 2009, Southern Nevada Health District; Brian Labus, MPH, Senior Epidemiologist at p. 21; p. 197 of grand jury evidence record, Appendix Vol. 1, pg. 0068.

Because the State was unable to demonstrate the elements required for reckless endangerment and/or criminal negligence as to Mathahs, it attempted to put forth these charges in the Indictment by alleging multiple theories of liability as to all Defendants, specifically for "reckless endangerment" and "criminal negligence" without distinction between the co-Defendants.

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

(1) The defendant performed an act;

(2) The defendant acted in willful or wanton disregard to the safety of a person; and

(3) The act proximately caused substantial bodily harm to another person.

NRS 202.595.

Further, the reckless endangerment statute, when read in its entirety, has the *actus rea* and *mens rea* elements that are dependent on a subjective awareness of the circumstances and conditions resulting in an objectively foreseeable harm.

The criminal negligence statute, NRS 200.495, states in relevant part:

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

Both the general recklessness statute and the criminal neglect of patient statute require far more than ordinary negligence or strict liability. The defendant must have a subjective awareness of the facts and circumstances that makes his conduct a danger to human life and act in conscious disregard of the known risk.

....

Additionally, the reckless endangerment statute imposes a *mens rea* requirement of "willful or wanton disregard to the safety of a person." *See* NRS 484B.653(1)(a). The *actus rea* is the performance of an act that proximately causes bodily harm to another.

The *actus rea* of a criminal negligence offense is assessed objectively and is found when a defendant's conduct significantly deviates from the manner in which a reasonable person would act under similar circumstances and the risk of substantial harm is foreseeable. *See generally Williams v. State*, 641 A.2d 990 (Md. App. 1994).

With respect to *mens rea*, the defendant must be subjectively aware of the risk created by his conduct, but act in disregard of it.

Both statutes require the criminally negligent act to be the factual and proximate cause of the substantial bodily harm; given the mens rea element in both statutes, a person cannot be criminally liable for "ordinary" negligence, inattention, mistaken judgment, or misadventure.

Here, the reckless endangerment counts (3, 7, 10, 13, 17, 20, 23) and criminal neglect counts (4, 8, 11, 14, 18, 21, 24) are insufficient for Mathahs to be able to defend against the charge.

The structure of these charges is substantially similar. Each charge begins with the statutory charging language and then states that Defendants performed "one or more" of the following acts, then listing seven or eight acts, which were either performed directly or indirectly.

Each of the counts allege multiple theories of criminal liability by adding the following language:

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

As stated above, in *Hidalgo*, the Nevada Supreme Court found that notice was ineffective even if it included specific allegations when the State repeatedly used

"and/or" to connect the numerous allegations, which undercut rather than bolstered the notice's specificity. *Hidalgo*, 124 Nev. at 338, 184 P.3d at 375. The Court observed that the problem was not the lack of factual detail, but that the factual allegations were pled in an incomprehensible, confusing, and/or format such that it failed to meet due process requirements. *Id.* at 339, 184 P.3d at 376.

In the case at bar, Mathahs could be liable for one **or more** of the following acts:

- Directly committing "said acts"
- Aiding in committing "said acts" by directly:
  - Counseling and/or
  - Encouraging and/or
  - Hiring and/or
  - Commanding and/or
  - Inducting and/or
  - Procuring each other and/or
  - Procuring others and/or
    -and-
  - Acting with the intent to commit said crime **and/or**
  - Acting pursuant to a conspiracy to commit said crime
- Aiding in committing "said acts" by indirectly:
  - Counseling and/or
  - Encouraging and/or
  - Hiring and/or
  - Commanding and/or
  - Inducting and/or
  - Procuring each other and/or
  - Procuring others and/or
    -and-
  - Acting with the intent to commit said crime **and/or**
  - Acting pursuant to a conspiracy to commit said crime
- Abetting in committing "said acts" by directly:
  - Counseling and/or
  - Encouraging and/or
  - Hiring and/or
  - Commanding and/or
  - Inducting and/or
  - Procuring each other and/or
  - Procuring others and/or
    -and-
  - Acting with the intent to commit said crime **and/or**
  - Acting pursuant to a conspiracy to commit said crime
- Abetting in committing "said acts" by indirectly:
  - Counseling and/or
  - Encouraging and/or
  - Hiring and/or
  - Commanding and/or

- Inducting and/or
- Procuring each other and/or
- Procuring others and/or

-and-

- Acting with the intent to commit said crime **and/or**
- Acting pursuant to a conspiracy to commit said crime

It is impossible to defend against the myriad of different scenarios the State has alternatively pled. The confusing, incomprehensible string of "or" or "and/or" allegations are violative of Mathahs' due process rights. The innumerable combinations of "or" and "and/or" strings connecting vague allegations of misconduct on behalf of unnamed Defendants is utterly incoherent. There is no clear statement of facts and/or how the facts support the elements of the crime charged.

1. <u>The Criminal Negligence Counts are Insufficient for Mathahs to Defend Against the Charges.</u>

Similarly, the criminal negligence counts basically state the following:

Defendants either directly **or** indirectly performed one **or more** of the following eight acts that proximately caused the transmission:

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

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

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

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

(5) By directly **or** indirectly instructing said employees, **and/or** creating an employment environment in which said employees were pressured to falsely pre-chart patient records **and/or** rush patients through said endoscopy center

and/or rush patient procedures at the expense of patient safety **and/or** wellbeing; **and/or**

(6) By directly **or** indirectly scheduling **and/or** treating an unreasonable number of patients per day which resulted in substandard care **and/or** jeopardized the safety **and/or** wellbeing of said patients; **and/or**

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

(8) By methods unknown. . . .[65]

The charging language is constitutionally defective for several reasons. First, as stated above, the confusing, incomprehensible string of "or" or "and/or" allegations are violative of Mathahs' due process rights. There is no clear statement of facts and how the facts support the elements of the crime charged.

Second, each of the criminal neglect of patient counts allege the defendants may have by direct commission, or aiding and abetting, or through a conspiracy, caused the hepatitis transmission by "methods unknown."[66]

The State's Indictment is violative of Mathahs' constitutional right that the Indictment must adequately inform him of the nature and cause of the accusations against him, as set forth in *West v. State*, 119 Nev. at 419, 75 P.3d at 814. Here, the essential element of a negligent act by "methods unknown" undermines the purpose of NRS 173.075 and leaves Mathahs attempting to defend "unknown" elements of charges against him.

The nature of the charges for criminal negligence and reckless endangerment require the *actus rea* to be specifically identified so as to allow the defendants to defend against the elements of the offense, including the subjective awareness of the risk associated with the act, the degree of negligence or deviation from reasonable standards of conduct, and the causal connection between the "methods unknown" and the hepatitis

[65] Indictment, Appendix Vol. 1, pgs. 1-42; Count 4 of the Indictment.

[66] The reckless endangerment counts do not contain the language "by methods unknown" but otherwise mimic the charge as set forth in criminal negligence.

transmission.

By utilizing the language "methods unknown," the defendants have no idea how to defend against the acts alleged to have been committed by them. This, in effect, forces them to prove that they did not commit criminal negligence in any possible manner whatsoever. This runs afoul of the actual burden of proof placed on the State in a criminal manner: to establish, beyond a reasonable doubt, that the crimes have been committed by Defendants. Instead, the burden is now unfairly being placed on the Defendants to prove that they are not guilty of committing any crimes by whatever "unknown" methods the State may or may not introduce at time of trial. Because the State cannot make these vague, unfounded accusations without violating Mathahs' constitutional right to be able to properly defend against the counts alleged, the criminal negligence counts 4, 8, 11, 14, 18, 21, and 24, should be dismissed.

2. The Charges are Defective as to the Aiding, Abetting, and Accomplice Theories for Mathahs to Defend Against the Charges.

The Defendants are charged with criminal negligence and reckless endangerment without distinction between the Defendants as to who did what. In *Hancock*, the Nevada Supreme Court held that a count was defective because it failed to specify which of the four defendants engaged in which activity. *Hancock*, 114 Nev. at 166, 955 P.2d at 183. The *Hancock* Court also found the count was fatally defective because it lumped the defendants together without alleging which defendant took what course of action. *Id.* at 165, 955 P.2d at 186.

Where a defendant is charged with aiding and abetting, the indictment must specify the manner and means by which the defendant aided and abetted the commission of the offense. *Ikie v. State*, 107 Nev. 916, 919, 823 P.2d 258, 261 (1991); *Barren v. State*, 99 Nev. 661, 667, 669 P.2d 725, 728 (1983). Conclusory allegations that a defendant aided and abetted are insufficient. *West*, 119 Nev. at 419, 75 P.3d at 814.

In order for a defendant to be criminally responsible for the acts of an accomplice, the defendant must have the same *mens rea* required of the principle. *Sharma v. State*,

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118 Nev. 648, 56 P.3d 868 (2002). The *mens rea* here would be a conscious disregard of a known substantial risk of bodily injury.

In the case at bar, the various counts for criminal negligence and reckless endangerment impermissibly lump the defendants together without distinction as to who did what, and further allege they directly or indirectly performed seven or eight various enumerated acts or omissions including transmitting hepatitis through "methods unknown."

Because Mathahs is unaware of which charges he is attempting to defend against directly or indirectly, and is unaware of which methods are being alleged against him, or whether he allegedly conspired to, aided and abetted or personally performed said acts, he is unable to defend himself against the Indictment.

As such, the criminal negligence counts (4, 8, 11, 14, 18, 21, 24) and the reckless endangerment counts (3, 7, 10, 13, 17, 20, 23) must be dismissed.

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CONCLUSION

Petitioner respectfully requests that this Court issue a Writ of Mandamus compelling the district court to dismiss the Indictment against him. In the alternative, Petitioner respectfully requests that this Court issue a Writ of Prohibition precluding the district court from conducting any criminal proceedings against Petitioner premised on the Grand Jury Indictment.

Dated this 10 day of July, 2012.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Gordon Silver, hereby certifies that on the 20th day of July, 2012, she served a copy of Defendant, Mathaths' Petition for Writ of Mandamus with Exhibits, by placing said copy in an envelope addressed as follows:

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