

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

2
3 DIPAK KANTILAL DESAI,

4 Petitioner,

5 vs

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

9 Respondent,

10 and

11 THE STATE OF NEVADA,
 Real Party In Interest.

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No. Tracie K. Lindeman
 Clerk of Supreme Court

Consolidated District
Court Nos. 10C265107
 12C283381

12 **PETITION FOR WRIT OF MANDAMUS**
13 **OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION**

14 DIPAK KANTILAL DESAI, by and through his attorneys, Richard A.

15
16 Wright, and Margaret M. Stanish, WRIGHT STANISH & WINCKLER,

17 petitions this Honorable Supreme Court to issue a writ of mandamus to compel

18 the district court to dismiss a constitutionally defective second-degree murder

19 charge, or alternatively, a writ of prohibition to prevent further proceedings on

20 the defective murder count. More particularly, Petitioner seeks relief from the

21 district court's order, entered on January 8, 2013, denying his petition for writ of

22 habeas corpus and alternative motion to dismiss the murder count.

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24 Counsel requests a one-hour oral argument to address the constitutional
25 issues of first impression which are raised in this petition.
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1 Trial in this matter is set for April 22, 2013. This is Petitioner's third
2 request for extraordinary relief in this matter. The prior petitions were Case
3 Nos. 61230 and 60038. Petitioner has satisfied the requirements of verification
4 and proof of service. See Attachments A and B.
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7 This petition is based upon the Due Process clauses of the Fifth, Sixth, and
8 Fourteenth Amendments to the United States Constitution, the similar clauses in
9 Article I, Section 8, of the Nevada Constitution; Article 6, Section 5 of the
10 Nevada Constitution; NRS 6.110 to 6.140, 172.045 to 172.065, 172.255,
11 172.275, and 173.075, and the following Points and Authorities.
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13
14 DATED this 19th day of February 2013.

15 Respectfully Submitted,

16 WRIGHT STANISH & WINCKLER

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18 By:

19 
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POINTS AND AUTHORITIES

I. ISSUES PRESENTED

- A. Is the second degree murder charge constitutionally defective on its face when it (1) it omits the immediate-and-direct-causal-relationship element; (2) alleges, in the alternative, that the defendants indirectly performed negligent acts causing the death; and (3) fails to aver sufficient facts showing which defendant performed what acts or omissions based on alternative theories of criminal liability?
- B. Did the State violate the grand jury right to due process by improperly instructing the grand jurors on the elements of second degree felony murder?
- C. Should the murder charge be dismissed based on the due process and statutory violation of the right to a properly impaneled grand jury?

II. JURISDICTION

This petition for extraordinary relief is properly before this Court pursuant to NRS 34.320 and 34.160. A petition for a writ of mandamus or prohibition is the appropriate method of challenging a defective indictment. *See, Gordon v. Eighth Judicial District Court*, 112 Nev. 216, 227, 913 P.2d 240, 247 (1996) (review of writ challenging sufficiency of indictment); *Lane v. Torvinen*, 97 Nev. 121, 122, n.1, 624 P.2d 1385 (1981) ("prohibition is an appropriate remedy to resolve a claim that the indictment does not charge a public offense"); *Garnick v. District Court*, 81 Nev. 531, 407 P.2d 163 (1965)(review of writ challenging ambiguous information). If the Petitioner did not present this writ,

1 he would arguably waive his right to hereafter challenge the validity of the
2 indictment. *See, Simpson v. District Court*, 88 Nev. 654, 661, 503 P.2d 1225
3 (1973).
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5 This Court's intervention is merited in light of the significant issues of
6 procedural and substantive due process and issues of first impression. As a
7 matter of public interest, a defendant should not be subjected to second-degree
8 felony murder charges predicated upon vague and imprecise allegations of the
9 Reckless Endangerment statute, NRS 202.595, and the Criminal Neglect of
10 Patient statute, NRS 200.495. Furthermore, the interests of justice would be
11 advanced if the Court would reaffirm the due process necessity of alleging the
12 judicially-created element of immediate-and-direct-casual-relationship in
13 second-degree felony murder, which was first recognized in *Sheriff v. Morris*, 99
14 Nev. 109, 118, 659 P.2d 852, 859 (1983). Stated differently, the Court should
15 clarify that the State cannot rely upon its customary practice of notice pleading
16 when charging second-degree felony murder.
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22 Finally, the Court is petitioned to protect the constitutional and statutory
23 right to a randomly selected grand jury in the Eighth Judicial District Court. The
24 district court improperly re-impaneled the 2009 grand jury to investigate the
25 murder charge. This is an issue of first impression.
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1 **III. STATEMENT OF PROCEDURAL FACTS**

2 **A. The First Indictment - District Court Case No. 10C265107, and**
3 **Petition for Mandamus– Supreme Court Case No. 61230**

4 On June 4, 2010, the Grand Jury sitting in Clark County returned an
5 indictment in Case No. 10C265107, against the Petitioner and two certified
6 registered nurse anesthetists (“CRNA”), Keith Mathahs and Ronald Lakeman,
7 stemming from the medical procedures and billing practices at gastroenterology
8 clinics operated by Petitioner and other doctors. The case focused on seven
9 patients who were treated at one of the clinics in 2007, and subsequently tested
10 positive for Hepatitis C.
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12 On June 11, 2010, the indictment was amended to make non-substantive
13 changes to the dates in certain charges. The Amended Indictment charged the
14 defendants with the following: a single count of Racketeering; seven counts of
15 Performance of Act in Reckless Disregard of Person; seven counts of Criminal
16 Neglect of Patients; 10 counts of insurance fraud; one count of Theft; and two
17 counts of Obtaining Money Under False Pretenses. Amended Indictment
18 attached to Exhibit 7 (96-137). From July 23, 2010, to February 2, 2012,
19 Petitioner’s competency evaluation and determination stayed the proceedings.¹
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26 ¹ On January 24, 2012, this Court denied Petitioner’s Writ of Mandamus in
27 Case No. 60038, which raised due process challenges to the competency
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1 Petitioner unsuccessfully challenged the first indictment in district court
2 based on procedural and substantive due process grounds. On July 9, 2012, he
3 filed a petition for writ of mandamus or prohibition in this Supreme Court in
4 Case No. 61230. By Order dated December 12, 2012, this Court granted the
5 petition in part, granting habeas relief from the racketeering count (Count 1) on
6 the grounds that it was facially defective. It also ruled that that the criminal
7 neglect of patients counts (Counts 4, 8, 11, 14, 18, 21, and 24) and reckless
8 endangerment counts (Counts 3, 7, 10, 13, 17, 20, and 23) were insufficiently
9 precise and ambiguous. [The reckless endangerment and criminal neglect of
10 patient offenses shall hereinafter be collectively referred to as “criminal neglect
11 offenses.”] This Court ordered the district court to permit the State to amend
12 these counts by reducing the theories of liability and resolve ambiguities
13 regarding how Petitioner engaged in the remaining theories. Order Granting
14 Petition in Part, pp. 6-7, Exhibit 1 (6-7).

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21 On January 31, 2013, this Court summarily denied Petitioner’s request for
22 rehearing on the issue of whether dismissal of the facially defective criminal
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26 proceedings. Petitioner subsequently moved the district court for a competency
27 determination, raising doubt to Petitioner’s present ability to assist counsel. On
28 January 8, 2013, the district court denied the motion. Petitioner intends to seek
extraordinary relief from this order once the district court enters its written order.

1 neglect counts was the appropriate remedy as opposed to permitting the State to
2 amend the counts.
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4 **B. The Second Indictment – Case No. 12C283381**

5 On August 10, 2012, the majority of the grand jurors who returned the first
6 indictment in Case C265107, reconvened to return a separate indictment against
7 the same three defendants for the alleged murder of Rudolfo Meana in Case No.
8 12C283381. Murder Indictment, Exhibit 2 (#6-9). Meana was one of the
9 patients named in criminal neglect counts (Counts 10 and 11) of the first
10 indictment. (The procedures used to reconstitute the grand jury following the
11 expiration of its one year term of service are more fully described below in
12 Section IV.C.)
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16 Prior to reconvening, the grand jurors were each furnished a copy of the
17 grand jury transcript and exhibits from the earlier grand jury investigation and
18 instructed to review them. On August 10, 2012, the grand jurors affirmed that
19 they reviewed the previous grand jury materials and then heard the testimony of
20 a detective and medical examiner. Grand Jury TR, p. 6, Exhibit 3 (11); Grand
21 Jury Instr., pp. 3-4, Exhibit 4 (29-30). These two witnesses testified that they
22 traveled to the Philippines to observe the autopsy of Rodolfo Meana. The
23 medical examiner opined that Meana died from a hepatitis C infection. A true
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1 bill for second degree murder was returned in Case No. Case No. 12C283381.
2 Grand Jury TR, pp. 48-49, Exhibit 3 (21-22); Murder Indictment, Exhibit 2 (6-9).
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4 The indictment contained a single count of second degree murder based
5 on alternative theories of criminal liability and alternative means. More
6 particularly, it charged that defendants directly committed, aided and abetted,
7 “and/or” conspired to commit second degree murder of Meana. It alleged three
8 alternative theories of murder: malignant heart murder, felony-murder, and
9 felonious intent murder. The felony-murder and felonious murder theories are
10 both predicated on criminal neglect of patient “and/or” reckless disregard.
11 Murder Indictment, Exhibit 2 (6-9).
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15 Petitioner was summoned to appear for arraignment on the murder
16 indictment in Department 23 on August 22, 2012. The State moved for bail in
17 the amount of \$500,000, in addition to the \$1 million dollar cash bail posted in
18 the first prosecution. The Court ordered \$250,000 cash bail. Subsequently,
19 Petitioner moved for consolidation of the two related cases to protect against
20 unfair successive prosecutions arising from the same set of facts, which this
21 Court granted on October 4, 2012. Extracts of Dist. Ct. Minutes, pp. 5-6, Exhibit
22 5 (53-54); Arraignment TR, pp. 19 & 28, Exhibit 12 (230 & 239).
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26 On October 29, 2012, Petitioner filed a Petition for Writ of Habeas Corpus
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1 and Alternative Motion to Dismiss Murder Indictment based on (1) facially
2 defective indictment violating procedural and substantive due process; (2)
3 improper and prejudicial grand jury instructions; (3) admission of hearsay; (4)
4 failure to disclose exculpatory evidence; and (5) the constitutional and statutory
5 violation of the right to a properly impaneled grand jury. Exhibit 6 (55-82). The
6 State filed its Return to Writ of Habeas Corpus on November 20, 2012. Exhibit
7 7 (83-145). Petitioner filed a reply brief on December 4, 2012. Exhibit 8 (146-
8 52). On December 7, 2012, the State filed a Second Amended Indictment in
9 Case No. 10C265107 to consolidate the Second Degree Murder charge by
10 adding Count 29. Exhibit 9 (153-195).

11 A hearing on the petition for habeas relief and dismissal of the murder
12 indictment was held before Department 21 on December 11, 2012. After hearing
13 arguments, the district court denied the petition with respect to the admission of
14 hearsay and failure to introduce exculpatory evidence.² It also ruled that it was
15 permissible for the original grand jury to be re-impaneled. The district court
16 took under advisement the issues on the defective indictment and grand jury
17 instructions. Hearing TR., p. 13, Exhibit 10 (208).

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27 ² The instant petition does not seek relief from the lower court's ruling on
28 the hearsay and exculpatory evidence.

1 On December 19, 2012, the district court denied the petition without
2 explanation and directed the State to prepare an Order. Excerpts of Dist. Ct.
3 Minutes, p.4, Exhibit 5 (52). On January 8, 2013, an abbreviated order, "based
4 on good cause shown," was entered which denied the petition. Order Denying
5 Defendant's Petition for Writ of Habeas Corpus, Exhibit 11 (210-11).
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8 On February 6, 2013, the State filed the Third Amended Indictment.
9 Exhibit 13 (248-84). The language of the murder count is essentially the same as
10 the original Murder Indictment at Exhibit 2.
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12 IV. DISCUSSION OF ISSUES 13

14 **A. The Second Degree Murder charge is constitutionally defective**
15 **because it (1) it omits the immediate-and-direct-casual-relationship**
16 **element; (2) alleges, in the alternative, that the defendants indirectly**
17 **performed negligent acts causing the death; and (3) fails to aver**
18 **sufficient facts showing which defendant performed what acts or**
19 **omissions based on alternative theories of criminal liability.**

20 1. Introduction

21 The second degree murder count must be dismissed because it is
22 constitutionally defective on its face. The defect is fatal because it impairs the
23 right to procedural due process with respect to fair notice; the right to
24 substantive due process; and the right to grand jury process.
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26 The alternatively pleaded theories of felony murder and felonious intent
27 murder omit the essential element of immediate-and-direct causal relationship
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1 and specific facts connecting Petitioner to this element. Moreover, the murder
2 charge suffers from the same due process defects previously found by this Court
3 with respect to the criminal neglect offenses in Case No. 61230. Order Granting
4 Petition in Part, Exhibit 1 (3-4). It fails to specifically allege which defendant
5 committed what act in support of the alternatively pleaded theories of criminal
6 liability.
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9 Finally, the indictment also violates substantive due process because it
10 pleads in the alternative that Petitioner *indirectly* performed acts that lead to the
11 patient's death and was *indirectly* responsible for the death. As a matter of
12 substantive law, Petitioner's acts cannot be the indirect cause of Meana's death
13 under theories of second degree felony murder or felonious intent, both of which
14 require a direct and immediate causal connection between the Petitioner's acts
15 and Meana's death.
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19 The omission of an essential element, along with the ambiguity and
20 imprecision of the alternatively pled theories of second degree murder, negligent
21 acts, and theories of criminal liability warrant dismissal of the second degree
22 murder charge. The State cannot attempt to cure the facial defect without
23 infringing upon the due process right to a grand jury determination by a
24 concurrence of 12 or more jurors. *See*, Article I, Section 8 of the Nevada
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1 Constitution and NRS 177.255; State v. Hancock, 114 Nev. 161, 167-68, 955
2 P.2d 183, 187 (1998) (denying State's request to amend imprecise indictment
3 based on right to indictment upon on concurrence of 12 or more jurors); *see also*,
4 Ex parte Rovnianek, 41 Nev. 141, 168 P. 327, 328 (1917)(ruling that if an
5 essential element is not charged, no crime is in fact charged and the defective
6 charge must be dismissed).
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10 **2. The judicially-created elements of second-degree felony murder**
11 **and felonious intent murder**

12 This Court has specifically limited the application of second-degree felony
13 murder and felonious intent murder to protect against the potential for "untoward
14 prosecution" of people for the commission of an unlawful act that results in
15 unintended death. Ramirez v. State, 126 Nev. Adv. Op. 22, 235 P.3d 619, 621-
16 23 (2010); Labastida v. State, 115 Nev. 298, 306-07, 986 P.2d 443, 448-49
17 (1999); Sheriff v. Morris, 99 Nev. 109, 118, 659 P.2d 852, 859 (1983). In
18 limiting the scope of the second degree felony murder offense, the Court created
19 essential elements that bear upon the predicate felonies and proximate cause of
20 death.
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25 In Morris, this Court first recognized the offense of second-degree felony
26 murder. *See*, Ramirez, 235 P.3d at 621-22 (explaining the judicial evolution of
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1 the elements of the second-degree felony murder rule). Like the instant case,
2 Morris involved a pretrial petition for writ of habeas corpus challenging the
3 validity of a second degree murder indictment. 99 Nev. at 109, 659 P.2d at 854.
4 The Morris Court expressly limited the application of second degree felony
5 murder and felonious intent murder by creating the following three elements: (1)
6 the predicate felony must be inherently dangerous in the abstract; (2) the death
7 must be a directly foreseeable consequence of the felony; and (3) the defendant's
8 conduct must be the immediate and direct cause of the death without the
9 intervention of some other source or agency. Id. at 118-19, 659 P.2d at 859.
10 Morris ruled that the restrictions on second-degree murder rule applied to both
11 the felony murder and felonious intent prongs of the involuntary murder statute.
12 Id. at 119, 659 P.2d at 859.

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14 This Court subsequently clarified first element in Labastida, stating that
15 nature of the predicate felony must be analyzed by looking at the manner in
16 which the defendant committed the felony as opposed to analyzing the felony in
17 the abstract. 115 Nev. at 307, 986 P.2d at 859. This element limits the kinds of
18 felonies upon which the second-degree murder is predicated, restricting it to
19 those felonies that are inherently dangerous, i.e., "the death or injury is a directly
20 foreseeable consequence of the illegal act." Ramirez, 235 P.3d at 622 n.2.
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1 The second element, which is at issue in the instant case, serves as a
2 restriction upon the proximate or legal cause. The second degree felony murder
3 rule only applies when the defendant's act is the immediate and direct cause of
4 the death. Labastida, 115 Nev. at 306-07, 986 P.2d at 448-49; Morris, 99 Nev. at
5 118-119, 659 P.2d at 859. Morris defined "immediate" as meaning "without
6 intervention of some other source or agency." 99 Nev. at 118-119, 659 P.2d at
7 859. Hence, even though an act or felony may be inherently dangerous, a
8 defendant cannot be held liable for second degree felony murder or second
9 degree felonious intent murder if the acts of the victim or a third party were the
10 direct cause of death. Labastida, 115 Nev. at 307, 986 P.2d at 448-49
11 (defendant's felony child neglect was not the immediate and direct result of her
12 son's death when her boyfriend's abuse killed the child); *see*, Morris, 99 Nev. at
13 118-119, 659 P.2d at 859 ("[T]he causal relationship must extend beyond the
14 unlawful sale of the drugs to the involvement by commission or omission in the
15 ingestion of a lethal dosage by the decedent.")

16 A central issue of dispute below was whether the judicially-created
17 element of the direct and immediate causal relationship must be pled in the
18 indictment. Petitioner argued that Morris and federal law supported the
19 dismissal of the murder charge based on the omission of this essential element.
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1 Desai's Reply, pp. 1-4, Exhibit 8 (146-49); Hearing TR, pp. 2-8, Exhibit 10
2 (197-203). The State contended that Nevada law only required notice pleading
3 patterned after the statutory language. The State appeared to argue that the
4 elements set forth in Morris and its progeny were only applicable to the
5 consideration of the petit jury and not the grand jury. State's Return, pp. 5-8,
6 Exhibit 7 (87-90); Hearing TR, pp. 4-6, Exhibit 10 (199-201).

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9 As stated above, Morris involved the pretrial challenge to the validity of a
10 second-degree felony murder indictment. Although the indictment in Morris
11 contained the statutory language, this Court ruled that it was fatally defective
12 because it failed to allege specific facts to satisfy the necessary elements
13 articulated by the Court. *See*, 99 Nev. at 112 & 119-20, 659 P.2d at 855 & 860.
14 It concluded, "In view of our holding concerning the necessary elements of proof
15 in a criminal prosecution under the subject provisions of NRS 200.070, in the
16 fact-specific setting of this case, it is apparent that the language of the indictment
17 is fatally defective." Id. at 120. 659 P.2d at 860.

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20 Federal case law and secondary authority also supports the rule that
21 judicially-created elements must be alleged in the indictment to satisfy due
22 process requirements. *See*, United States v. Keith, 605 F.2d 462, 463 (9th
23 Cir.1979) (dismissing involuntary murder indictment that tracked involuntary
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1 murder statute but did not include the judicially-created “gross negligence”
2 element); United States v. Parisien, 515 F. Supp. 24, 25-26 (N.D. D.C.
3 1981)(same); W. LaFave, 5 Crim.Proc., §19.3(a)(3d ed.), “Failure to Allege
4 Essential Elements,” p. 3 (2012)(judicial interpretations that limit the scope of a
5 criminal statute are essential elements that must be specifically pled).
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8 Reciting the statutory language meets due process notice requirement only
9 when the statute “fully, directly, and expressly, without any uncertainty or
10 ambiguity, set forth all the elements necessary to constitute the offense.”
11 Hamling v. United States, 418 U.S. 87, 117 (1977). Tracking the statutory
12 language is insufficient if the indictment does not include the essential elements
13 of the offense established in case law. Keith, 605 F.2d at 463-64. The Ninth
14 Circuit in Keith rejected an argument similar to the one posed by the State in the
15 district court:
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19 The Government contends that the indictment is sufficient because
20 it tracks the language of [the federal involuntary murder statute].
21 The Government’s contention is incorrect. Although an indictment
22 tracking the language of the statute is usually adequate because
23 statutes usually include all the elements of a crime, *an indictment is*
24 *inadequate when it fails to allege an essential element of the offense*
even when it tracks the language of the statute.

25 Keith, 605 F.2d at 464. [Emphasis added.]
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1 **3. The defective murder indictment in the instant case**

2 An indictment, on its face, must contain each and every element of the
3 offense and must allege facts showing how the defendant allegedly committed
4 each of the elements. Hancock, 114 Nev. at 164, 955 P.2d at 185; NRS 173.075.
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6 As discussed above, the judicially-created elements in Morris and its progeny
7 must be also be alleged with specificity in an indictment alleging second degree
8 felony murder and felonious intent murder. If the indictment omits an essential
9 element of the offense, no crime is in fact charged and the defective charge must
10 be dismissed. Rovnianek, 41 Nev. 141, 168 P. 327, 328.
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13 Additionally, where a defendant is charged with aiding and abetting, the
14 indictment must specify the manner and means by which the defendant aided and
15 abetted the commission of an offense. Ikie v. State, 107 Nev. 916, 919, 823 P.2d
16 258, 261 (1991); Barren v. State, 99 Nev. 661, 667, 669 P.2d 725, 728 (1983).
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18 The lumping together of multiple defendants in a single count without
19 delineating what acts or omissions each committed raises due process concerns.
20
21 *See*, Hancock, 114 Nev. at 165-66, 955 P.2d at 185-86.
22

23 The following attempts to diagram the murder count. Second Amended
24 Indictment, Exhibit 2. The murder count begins with citations to the pertinent
25 statutes and then alleges that the three defendants committed second degree
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1 murder pursuant to alternatively pleaded theories of second degree murder:

2 (1) *by the killing occurring under circumstances showing an*
3 *abandoned and malignant heart; and/or*

4 (2) *during the commission of an unlawful act, to wit: criminal neglect*
5 *of patients, and/or performance of an unlawful act in reckless disregard*
6 *of persons or property, which in its consequences, naturally tends to*
7 *destroy the life of a human being; and/or*

8 (3) *the killing being committed in the prosecution of a felonious intent,*
9 *to wit: criminal neglect of patients and/or performance of an act in*
10 *reckless disregard of persons or property, which in its consequences, naturally*
11 *tends to destroy the life of a human being.*

12 Without distinguishing who did what, the murder charge then appears to
13 allege alternative means by which the murder was committed:

14 *The defendants committed murder by directly or indirectly using and/or*
15 *introducing contaminated medical instruments, supplies, and/or drugs upon or*
16 *into Meana's body which were contaminated with Hepatitis C virus.*

17 The charging language than contains alternatively pleaded theories of
18 criminal responsibility:

19 Defendant are responsible **under one or more** of the following theories of
20 criminal liability: (1) by directly committing said acts; and/or (2) by aiding and
21 *betting each other and/or others, including uncharged confederates in the*
22 *commission of criminal neglect of patients and/or reckless endangerment;*
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1 *and/or conspiracy to commit these criminal neglect offenses.*

2 Without distinguishing which defendant did what act, the clause
3
4 pertaining to the aiding and abetting theory recites the language similar to NRS
5 195.010, along with a list of alternatively pleaded acts:
6

7 *The defendants aided and abetted each other and/or uncharged*
8 *confederates in committing criminal neglect of patient and/or reckless*
9 *endangerment “by directly or indirectly counseling, encouraging, hiring,*
10 *commending, inducing, or procuring each other, and/or others to”:*

- 12 • *utilize a patient care delivery system which directly or indirectly*
13 *limited the use of medical instruments and/or supplies, and/or*
14 *drugs;*
- 15 • *scheduled and/or treated an unreasonable number of patients per*
16 *day; and/or*
- 17 • *rushed patients or patient procedures*

18
19 The above acts are alleged to have been performed at the expense of
20 patient safety and resulted in substandard care of Meana.

21 Similar to the 2010 indictment, the murder indictment uses the imprecise
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23 “and/or” approach to prosecution, stringing together a number of alleged
24 negligent acts that multiple defendants “directly or indirectly” performed
25 pursuant to multiple theories of criminal responsibility. (Emphasis added.) See,
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1 Hildalgo v. Eighth Judicial Dist. Ct., 124 Nev. 330, 338, 184 P.3d 369, 375
2 (2008)(“repeated use of “and/or” to connect the numerous allegations undercuts
3 rather than bolsters the notice’s specificity.”) The alternatively pled theories of
4 criminal liability make it impossible to distinguish which of the three defendants,
5 if any, performed an act that was the immediate and direct cause of Meana’s
6 death. The indictment, in a conclusory manner, lumps together the defendants,
7 alleging that they are criminally liable by directly committing the acts; “and/or”
8 aiding and abetting each other and uncharged confederates in the performance of
9 the acts; “and/or” conspiracy to commit the predicate offenses of criminal
10 neglect of patients and reckless disregard. This boilerplate language of
11 alternative theories of liability is fatal since it fails to give notice as to which
12 defendant committed what act to immediately and directly cause Meana’s death.
13
14 The indefinite charging language can be read to charge Petitioner with second-
15 degree murder for acts which were neither the immediate nor direct cause of
16 Meana’s death. Stated differently, the indictment impermissibly charges
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18 Petitioner with second degree murder based on the intervention of some other
19 source or agency. *See*, Ramirez, 235 P.3d at 623-24; Labastida, 115 Nev. at
20 307, 986 P.2d at 508.
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26 The allegation that the defendants “indirectly” performed various
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1 alternative acts also gives rise to a substantive due process violation in the light
2 of the immediate-and-direct-causal-relationship element. Second degree felony
3 murder cannot be grounded on the indirect performance of negligent acts. The
4 causal relationship must extend beyond the negligent act to immediate and direct
5 involvement by commission or omission of the act that caused the death. *See*,
6 Morris, 99 Nev. at 118-119, 659 P.2d at 859.

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9 **B. The State violated the grand jury right to due process by improperly**
10 **instructing the grand jurors on the elements of second degree felony murder**
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12 The State did not instruct the grand jury on the essential element of the
13 second-degree felony murder and felonious intent offense, i.e., the judicially-
14 created direct-and-immediate-causal-relationship element. Moreover, the
15 prosecution misstated the law to the grand jury.
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18 The State is obligated to instruct the grand jurors on the essential elements
19 of the offense pursuant to NRS 172.095(2). This section reads in pertinent part:
20 “Before seeking an indictment, . . . [t]he district attorney shall inform the grand
21 jurors of the specific elements of any public offense which they may consider the
22 basis of the indictment or indictments.” [Emphasis added.]
23

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25 As this Court ruled in Ramirez, second-degree felony murder instructions
26 must address both the inherently dangerous felony element and the immediate-
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1 and-direct- causal- relationship element. 235 P.3d at 622. “Because we have
2 repeatedly expressed disapproval at the potential for untoward prosecutions
3 resulting from our decision to recognize the second-degree felony-murder rule
4 and consciously limited application of the rule, *these two elements are critical to*
5 *any second-degree felony-murder jury instruction.*” Id. (emphasis added).
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7 Although Ramirez addressed erroneous trial instructions, it also supports the
8 State’s obligation to instruct the grand jury on the judicially-created elements of
9 second degree felony murder and felonious intent murder.
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11

12 At the beginning of the grand jury proceeding, the prosecutor read the
13 pertinent statutory provisions and provided the grand jury with copies of the
14 statutes. Grand Jury TR, pp. 6-10, Exhibit 3 (11-12). These introductory
15 instructions did not mention the direct-and-immediate-causal-relationship
16 element.
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18

19 After approximately five minutes of deliberation, the grand jury requested
20 clarification on whether it could consider the prior grand jury evidence and
21 further instruction on the elements of second degree murder. The prosecutor
22 explained that the grand jurors had previously returned a true bill on the
23 predicate offenses related to Meana and needed to make a determination on
24 whether these were dangerous felonies that resulted in harm or death. Grand
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1 Jury TR, pp. 59-60, Exhibit 3 (24). The prosecutor gave the following
2 instruction in an apparent attempt to explain the elements of the second degree
3 felony murder:
4

5 You're here to determine whether or not second degree murder,
6 because that's what we're proceeding on, not a first degree murder,
7 but a second degree murder, and the different theories under that
8 that we brought forth to you, whether or not they apply in this
9 particular case. **Now you have previously found related to this**
10 **victim, because you returned a true bill as to both the criminal**
11 **neglect of patient charge as well as performance of an act in**
12 **reckless disregard, you have to make a determination under one**
13 **scenario whether or not those are dangerous felonies. Did they**
14 **result in harm or death to someone?** The other aspect of it is
15 based on all the information you have, were the actions of the
16 individuals either directly, or by aiding and abetting each other, or
17 by conspiring, reckless to the point that they caused someone to
18 have a depraved heart or reckless indifference to human life, that
19 kind of thing, and that's what you're here to decide.

20 Grand Jury TR, pp. 60-61, Exhibit 3 (24-25). [Emphasis added.]

21 This instruction not only misstated the essential elements of the second-
22 degree felony murder and felonious intent murder, it also boot-strapped the many
23 constitutional infirmities in the criminal negligence counts pertinent to Meana in
24 the first indictment (Counts 10 and 11), which this Court has already ruled to be
25 facially defective in Case No. 61230. Order Granting Petition in Part, pp. 2-4,
26 Exhibit 1.

27 The above highlighted text of the instruction is an incorrect and
28

1 incomplete statement of second-degree felony murder. First, it directs the grand
2 jury to determine whether the predicate offenses were “dangerous felonies.”
3

4 This appears to direct the grand jury to make an abstract finding of whether the
5 predicate offenses in and of themselves are dangerous felonies. Labastida
6 requires that the dangerous felony element be analyzed by looking at the manner
7 in which a defendant committed the predicate offense as opposed to analyzing
8 the felony in the abstract. 115 Nev. at 307, 986 P.2d at 859.
9
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11 Secondly, the highlighted phrase questioning, “Did they result in harm or
12 death to someone?” does not equate to the direct-and-immediate-causal-
13 relationship element developed by the Nevada Supreme Court. At best, it is an
14 imprecise and impermissibly watered down instruction on factual cause. In
15 short, the incomplete and incorrect elements of the second-degree murder and
16 felonious intent murder impinged on Petitioner’s due process procedural rights to
17 a fair grand jury, as required by NRS 172.095(2) and the Due Process Clause of
18 the Nevada Constitution.
19
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21

22 In district court, the State argued that it was not required to give
23 instructions to the grand jury based on Hylar v. Sheriff, 93 Nev. 561, 571 P.2d
24 114 (1977). State’s Return, p 5, Exhibit 10 (202-03); Hearing TR., pp. 5-6,
25 Exhibit 7 (87-88). Hylar, however, is no longer good law on this point in light of
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1 a subsequent amendment to the grand jury statute. In 1985, the Legislature
2 added the statutory provision that mandated the prosecution to instruct the grand
3 jury on the elements of the offense: “Before seeking an indictment, or a series of
4 similar indictments, the district attorney shall inform the grand jurors of the
5 specific elements of any public offense which they may consider as the basis of
6 the indictment or indictments.” NRS 172.095(2), added by SB 107, 63d Sess.,
7 Nev. Stat., p.1028 (1985).

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11 The State also relied heavily on Schuster v. Dist. Ct., 123 Nev. 187, 160
12 P.3d 873 (2007) to support its argument that it was not obligated to instruct the
13 grand jury on the immediate and direct causal relationship element. This case
14 held that the prosecution was not obligated to instruct the grand jury on the
15 affirmative defense of self-defense. State’s Return, p 5, Exhibit 10 (202-03).
16 This case is inapposite since the grand jury instructions omitted an essential
17 element of the offense.
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21 **C. The murder charge should be dismissed based on the due process and**
22 **statutory violations of the right to a properly impaneled grand jury**

23
24 ***1. The Constitutional and Statutory Framework***

25 The grand jury that returned the murder indictment was impaneled
26 contrary to the constitutional and statutory scheme protecting the right to grand
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28

1 jury. As a matter of due process, Petitioner is entitled to a grand jury that is
2 impaneled by a district court judge “under such rules and regulations as may be
3 prescribed by law.” Nev. Const., Art. 1, §8, Art. 6, §5. “Grand juries shall be
4 impaneled as provided in chapter 6 of NRS.” NRS 172.045; NRS 6.110 to
5 6.140. Petitioner challenges the array of the grand jurors on the “ground that is
6 was not selected, drawn, or summoned in accordance with law.” NRS 172.055.
7 Dismissal of the murder indictment is the appropriate remedy. NRS 172.065.
8 The lack of procedures governing the recall of the grand jury after the expiration
9 of its one-year term violates procedural due process.
10

11 Under NRS 6.110, the clerk of the court randomly selects at least 500
12 persons to be called as prospective grand jurors and sends them a questionnaire
13 prepared by the district court judge that estimates the time required for service
14 and describes the duties to be performed. The recipients of the questionnaire
15 indicate their willingness and availability to serve.
16

17 The clerk continues to randomly select potential jurors until a list of 100
18 persons willing to serve is established. The district judges in rotation, according
19 to seniority, each select one name from the list until a 50 person venire has been
20 established. From the venire, the district judge presiding over the grand jury
21 then randomly selects 17 persons to constitute the grand jury and 12 alternates.
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1 NRS 6.110.

2 “Upon the completion of its business for the time being, the court may, at
3 the request of or with the concurrence of the grand jury, recess that grand jury
4 subject to recall at such time as new business may require its attention.” NRS
5 6.145. Under NRS 172.275, a “grand jury shall serve until discharged by the
6 court and may be so discharged at any time after the expiration of 1 year.”
7
8

9
10 **2. *The Improper Recall of the 2009 B Grand Jury***

11 By letter dated July 2, 2012, the district attorney’s office wrote Judge
12 Bell and requested that she recall the 2009 B Grand Jury, which returned the
13 indictment in Case C265107. The State represented to the judge that it would
14 seek a superseding indictment to add a murder charge pertaining to Meana. The
15 State opined that it would cost too much money for the State and court to present
16 the entire case to a new grand jury. It contemplated that the jurors would need
17 time to review transcripts and exhibits. Attachment to Petition/Memorandum for
18 Writ of Habeas Corpus, Exhibit 6 (81-82); Attachment to State’ Return,
19 Exhibit 7 (141-42).
20
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23 By order dated July 11, 2012, Judge Bell granted the State’s request in
24 Case No. A-09-595107-P. The Court gave the State two weeks to locate the
25 prior grand jurors and provide their contact information to the Court. The Court
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1 thereafter summoned the majority of the 2009 B Grand Jury to appear on August
2 10, 2012. The Court further directed that the grand jurors to review the
3 transcripts and evidence of the previous grand jury proceedings before that date.
4 Attachment to Petition/Memorandum for Writ of Habeas Corpus, Exhibit 6 (78-
5 79); Attachment to State' Return, Exhibit 7 (143-44).
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8 On August 10, 2012, the Court informed the grand jurors that it was never
9 intended that they be called back to grand jury service, but explained that the
10 previous grand jury involved 10 days of testimony over a period of time and it
11 was more efficient to bring back the same grand jurors. The Court confirmed
12 that each grand juror reviewed the materials from the first grand jury. Grand
13 Jury Instr., 8/10/12, pp. 3-4, 20-21, Exhibit 4 (29-30, 46-47). The Court then
14 instructed the grand jurors on the law pertaining to the powers and duties of the
15 grand jury. There was no inquiry into whether the members of the grand jury
16 developed any bias against the defendants or discussed with anyone their
17 previous deliberations. All of the above-described proceedings were
18 accomplished *ex parte* without notice or participation by Petitioner.
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24 After the indictment, defense counsel requested that the grand jury
25 supervising judge, the Honorable Linda Bell, provide an explanation as to the
26 internal procedures employed to reinstate the grand jury. Judge Bell provided a
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1 letter dated October 11, 2012. She generally explained that two grand juries are
2 impaneled for one-year terms, with the "A Grand Jury" commencing in May and
3 the "B Grand Jury" beginning in October.³ As a matter of practice, the grand
4 juries are released at the end of the one-year term. There is not a formal
5 proceeding in which the grand jury is either discharged or recessed. There is
6 not an order issued that either discharges or recesses the grand jury. Given the
7 lack of formal discharge, the district court believes that it may recall the grand
8 jury should the need ever arise. At the end of the one-year term, the district court
9 holds an informal ceremony to thank the grand jurors for their service.
10

11 Attachment to State' Return, Exhibit 7 (139-40).
12

13 The above procedures to recall the original grand jurors following the
14 termination of their term of service in October 2010 violates Article 6, §5, and
15 the due process clause of the Nevada Constitution. Although the district court
16 has supervisory power over grand juries, it is restrained by the constitutional and
17 statutory framework described above. More particularly, there is no indication
18 or order that the 2009 B Grand Jury was recessed or discharged after the
19 expiration of its term in October 2010. Even if it is assumed that it was
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25 ³ A questionnaire is sent to the potential grand jurors pursuant to NRS
26 6.110(1). This questionnaire typically identifies the dates of service as either May
27 or October of one year to May or October of the next year.
28

1 informally recessed in apparent perpetuity, there is no indication that the grand
2 jurors consented to return to grand jury service as required by NRS 6.145.
3

4 The granting of the district attorney's request to recall the 2009 B Grand
5 Jury circumvented the random and periodic selection of grand juries to ensure
6 the independence of the grand jury from the executive branch. Here, the above
7 procedures essentially created a "special grand jury" with an indefinite term of
8 service to investigate only these three defendants.
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11 Moreover, the State's request to recall the grand jury was suspect.
12 Contrary to the representations in its request, the State sought a separate
13 indictment rather than superceding the original indictment. It apparently did so,
14 amongst other strategic reasons, to avoid a unfavorable ruling from the then
15 pending petition for writ of mandamus in Case No. 61230; avoid delaying the
16 trial of the original indictment; and avoid the extension of the previously posted
17 cash bails to the murder charge.
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21 At the arraignment on the murder indictment, the State opposed the
22 defendants' motion to stay the prosecution of the murder indictment pending a
23 decision of this Court's decision in Case No. 61230. The State emphasized that
24 the murder indictment was separate and distinct from the earlier indictment and,
25 therefore, it would not be affected by an unfavorable ruling by the Nevada
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1 Supreme Court. Arraignment TR, pp.5-6, Exhibit 12 (216-17).

2
3 The State also used the separate murder indictment as a justification to
4 attempt to detain Petitioner until he could post a \$500,000 cash bail. Petitioner
5 argued that the indictment was a *de facto* superceding indictment and it was
6 appropriate to extend the \$1,000,000 cash bail already posted in the first case
7 pursuant to NRS 178.502. The State contended that the second indictment was
8 separate and distinct from the first prosecution and moved for bail in the amount
9 of \$500,000 for Petitioner. The Court ordered a cash bail of \$250,000.
10
11 Arraignment TR, pp. 15-19, Exhibit 12 (226-30).
12

13
14 Had the State disclosed in its original request to Judge Bell that it sought
15 an unfair advantage in bringing a successive and separate indictment instead of
16 just being cost conscious, it is unlikely that the district court would have
17 considered the recall of the grand jury to be fair.
18

19 In short, the recall of the 2009 B Grand Jury after the expiration of its one-
20 year term of service undermined constitutional and statutory mandates and
21 permitted the State to impede the due process right to a fair grand jury.
22

23 V. CONCLUSION

24
25 Extraordinary relief in the form a writ or prohibition or mandate is
26 necessary to protect the public interest in justice, as well as Petitioner's
27

1 fundamental right to substantive and procedural due process. The murder
2 indictment disregards this Court's limitations on second degree felony murder
3 and felonious intent murder. In so doing, it violated Petitioner's right to fair
4 notice and fair grand jury process. The recall of the grand jury without regard
5 for procedural due process also merits dismissal of the murder indictment.
6
7

8 Petitioner, therefore, respectfully requests this Court to direct the district
9 court to dismiss the second degree murder charge.
10

11 DATED this 19th day of February 2013.
12

13 Respectfully Submitted,
14

15 WRIGHT STANISH & WINCKLER
16

17 By: 
18

19 RICHARD A. WRIGHT
20 Nevada Bar No. 886

21 MARGARET M. STANISH
22 Nevada Bar No. 4057

23 300 S. Fourth Street, Suite 701
24 Las Vegas, NV 89101
25 (702) 382-4004
26 Attorneys for Dipak Desai
27
28

1
2 **VERIFICATION OF COUNSEL**
3

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

5 2. I am an attorney licensed to practice law in the State of Nevada. I
6
7 am retained to represent Petitioner Dipak Desai in State v. Dipak Kantilal Desai,
8 Consolidated Case Nos. 10C265107 and 12C283381(8th Jud. Dist. Ct., Clark Cty.
9 Nev.).
10

11 3. I am familiar with the procedural and substantive history of the
12 case. I attest and verify that the foregoing PETITION FOR WRIT OF
13 MANDAMUS OR, IN THE ALTERNATIVE, WRIT OF PROHIBITION
14 contains true and accurate facts to the best of my knowledge.
15

16 4. I further attest and verify that I am authorized to file this Petition to
17 protect the interest of my client.
18

19 5. I further certify that this petition comports with the requirements of
20 NRAP 21 and (a) and 32(c)(2).
21

22 DATED this 19th day of February 2013.
23

24 
25 RICHARD A. WRIGHT
26

27 Attachment A
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The Honorable Valerie Adair District Court, Department 21 200 Lewis Avenue Las Vegas, NV 89101	Michael V. Staudaher Clark County District Attorney's Office 200 Lewis Avenue, 3d Floor Las Vegas, NV 89155
Catherine Cortez Masto Attorney General State of Nevada, Criminal Justice Division 100 North Carson Street Carson City, NV 89701-4717	

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

Debra K. Caroselli
DEBRA K. CAROSELLI

Attachment B