IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S OPENING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Franny A. Forsman, Attorney at Law

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

Dated this 29th day of September, 2014.

Respectfully submitted,

/s/ Franny A. Forsman
Franny A. Forsman, Esq.
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ISSUES PRESENTED FOR REVIEW

1. In a criminal case, can a defendant be guilty of aiding and abetting criminal conduct without proof that the defendant was acting knowing and intentionally, rather than negligently or recklessly?

2. Can a conviction for Second Degree Felony Murder stand when: a) there is undisputed evidence that a source other than Appellant intervened between the actions of Appellant and the death; b) the jury was not instructed that the immediate and direct cause of the death must consist of some conduct of the defendant beyond mere commission of a felony; c) the jury was not instructed to determine whether the underlying felony was of an "assaultive" type and thus it merged with the elements of Second Degree Murder?

3. Is it time to abrogate the judicially-created crime of Second Degree Felony Murder?

4. Were Appellant's rights to confrontation of witnesses violated when: a) a testimonial document containing the opinion as to the cause of death was admitted and there was no opportunity to cross-examine the declarant; b) a surrogate was used to read from an autopsy report prepared by the physician who actually conducted the autopsy; b) the deposition testimony of the decedent was admitted

despite the fact that the deposition was terminated just after cross-examination began?

5. Did the repeated instances of prosecutorial misconduct including deliberate elicitation of a pending federal case against Appellant, and the introduction of deliberately misleading or unsupported evidence, reach such a cumulative level that Appellant was deprived of his right to due process and a fair trial?

6. When there is unrefuted testimony from a court-appointed expert that a defendant suffers from receptive and expressive aphasia due to his most recent series of strokes and will not recover for 9-18 months after therapy, does a reasonable doubt exist as to the defendant's competency to assist counsel requiring a competency evaluation and hearing?

7. Is it a violation of double jeopardy to sentence a defendant for both Second Degree Murder and the underlying felonies which were the basis for the Second Degree Felony Murder conviction?

STATEMENT OF JURISDICTION

This appeal is taken from a final judgment of conviction pursuant to NRS 2.090; 177.015(3). Judgment was entered on November 13, 2013; that Judgment

was amended on November 21, 2013. Notice of Appeal was filed on December 6, 2013. This appeal is taken from a final judgment.

STATEMENT OF THE CASE

1. Introduction

The criminal charges in this case arise from a lengthy Indictment which alleges multiple theories of culpability and layers of accomplice, conspiracy and "transferred intent" liability allegations. Appellant was the primary owner of Endoscopy Center of Southern Nevada ("ECSN"), and other ambulatory surgical centers (collectively, with ECSN, the "Centers") located in Las Vegas, Nevada where colonoscopies and endoscopies were performed. A number of nurses, technicians and nurse anesthetists were employed to carry out the functions of the Centers. Additionally, several doctors other than Appellant also performed procedures at the Centers and held ownership and management positions in the Centers and a related entity, the Gastroenterology Center of Southern Nevada, through which these doctors met with patients and practiced medicine. The core facts in this case arise from allegations that seven patients became infected with hepatitis C due to unsafe injection practices performed by two Certified Registered Nurse Anesthetists ("CRNAs ") at ECSN which caused the transmission of the

infection by contamination of the sedative propofol, from one infected patient on July 25, 2007 to another patient and one infected patient on September 21, 2007 to six other patients.

2. Procedural History

On June 4, 2010, a 28 Count Indictment was returned against Dr. Dipak Kantilal Desai, Ronald Lakeman and Keith Mathahs. App. I, 1-42.[1] The Indictment was amended on June 11, 2010, December 7, 2012, February 12, 2013, February 20, 2013 and May 6, 2013. On August 10, 2012, a separate Indictment was filed alleging Second Degree Murder as a result of the death of Rodolfo Meana. App. Vol. 1, 130-132. That charge was ultimately consolidated with the pending charges. The final version of the Indictment alleged as follows: Insurance Fraud (NRS 686A.2815) (Counts 1, 4, 5, 8, 11, 14, 15, 18, 21, 24); Reckless Disregard Resulting in Substantial Harm (NRS 0.060, 202.595)(Counts 2, 6, 9, 12, 16, 19, 22); Criminal Neglect of Patients Resulting in Substantial Bodily Harm (NRS 0.060, 200.495)(Counts 3, 7, 10, 13, 17, 20, 23); Theft (NRS 205.0832, 202.0835)(Count 25); Obtaining Money under False Pretenses (NRS 205.265,

[1]Citations to the Appendix will be to the Volume and page number as reflected in the Appendix.

205.380)(Counts 26, 27) and Second Degree Murder (NRS 200.010, 200.020, 200.030, 200.070, 200.595, 200.495)(Count 28).[2] App. Vol. 3, 498-533 .

Pretrial litigation resulted in four Petitions for Extraordinary Relief filed with this court: Appeal Docket No. 60038 (filed January 12, 2012- challenge to competency proceedings); Appeal Docket No. 61230 (filed July 9, 2012-challenge to racketeering, and recklessness/neglect counts), Appeal Docket No. 62641 (filed February 20, 2013-challenge to murder count in Indictment) and Appeal Docket No. 63046 (filed April 22, 2013-challenge to denial of competency proceedings).

Prior to trial, Mathahs entered a guilty plea. Lakeman and Appellant proceeded to trial on April 22, 2013. On July 1, 2013, the jury returned a verdict on all pending counts as to this Appellant. App. Vol. 41, 9552-9559. On October 24, 2013, Appellant was sentenced to numerous concurrent and consecutive sentences including a sentence of Life Imprisonment. Judgment was entered on November 13, 2013; that Judgment was amended on November 21, 2013, App. Vol. 41, 590. Notice of Appeal was filed on December 6, 2013. App. Vol. 41, 9596.

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[2]A summary of the Indictment is contained in Exhibit 1 to this brief.

3. Statement of Facts

Because the trial extended over 45 days, the facts, with record references, which are pertinent to each issue are recited in the argument on that issue.

Appellant was born in Gujarat, India.[3] He is a devout follower of the Hindu religion and has contributed much to his native country and his religious community, including the building of a school for disabled children in a village in India. Many people attested to Appellant's spirituality and generosity at the time of sentencing in this case. His contributions to the Las Vegas community, including contributions and assistance to low-income and indigent patients are detailed in the letters of support provided to the lower court.

Appellant first became a physician in 1973 after completing his medical studies in India. He completed a post-graduate training program, internship, residency and fellowship program in gastroenterology in New York and was licensed to practice in Nevada in July 1980. He specialized in gastroenterology. Appellant operated ECSN, an ambulatory surgical center in which endoscopies and colonoscopies were performed, for several years prior to the events which

[3]Facts regarding Appellant's background are found in the Sentencing Memorandum and the Presentence Report.

precipitated this prosecution. CRNAs, who are trained specialists with Master's Degrees in the provision of sedation, provided the anesthesia services for ECSN. App. Vol. 11, 2525. Lakeman and Mathahs were CRNAs who worked at ECSN during the period relevant to the Indictment. Five other CRNAs, who had also worked at ECSN or one of the other Centers and administered anesthetic to the Centers' patients, were given various forms of immunity, were not charged in connection with this case, and testified at trial.

4. The Injection Practices Employed by Two CRNAs Were at the Core of the State's Case

The State presented evidence from investigators and experts that the source of the transmission of the infection was narrowed to "unsafe injection practices" employed by two of the CRNAs: Mathahs and Lakeman. Because the Indictment and resulting evidence alleges numerous, and alternative, kinds of conduct, as a basis for culpability, it is important to understand that the infections, according to the State, were transmitted by, and could only be transmitted by, the injection practices employed by Mathahs and Lakeman.[4]

[4]There has never been a contention that Appellant was directly involved in the sedation of any of the victims named in the Indictment.

5. The Infections

On July 25, 2007, a procedure was performed on Sharrieff Ziyad who was positive for hepatitis C prior to coming to ECSN for his procedure. App. Vol. 5, 144. On that same date, Michael Washington also received a procedure at ECSN and he later tested positive for hepatitis C. App. Vol. 4, 927. On September 21, 2007, Kenneth Rubino received a procedure at ECSN, App. Vol. 11, 2530. Rubino was positive for hepatitis C prior to coming to ECSN for his procedure. App. Vol 5, 1088. Stacy Hutchison, App. Vol. 5, 1183, Patty Aspinwall, App. Vol. 8, 1957, Sonia Orellana Rivera, App. Vol. 10, 2254, Gwendolyn Martin, App. Vol. 10, 2284, Rodolfo Meana, and Carole Grueskin, received procedures on that date and thereafter tested positive for the disease.[5]

Appellant performed the procedures on four of the nine patients at issue in the Indictment: Rodolfo Meana, Stacy Hutchison, Sharrief Ziyad, and Michael Washington. Dr. Carrol and Dr. Carrera, two other physicians who worked at ECSN performed the procedures on the remaining five patients. Lakeman, who was tried with Appellant, injected the sedative for five of the nine patients.

[5]For the purposes of this appeal, Appellant is not contesting the source of the infections-contamination of the propofol.

At the time that Meana contracted hepatitis C, he had already been suffering from kidney disease, prostate problems and high blood pressure. App. Vol. 38, 8930-31. Upon the advice of his physicians, he started treatment but terminated treatment almost immediately even though he was told he had a strong immune system and even though current treatment is 95-100% successful. App. Vol. 14, 3241. Ultimately, Meana returned to his native country, the Philippines, where he died. The Medical Examiner in the Philippines reported a dual cause of death-kidney and liver failure. Dr. Howard Worman, a globally-recognized expert in the field of liver disease, reviewed the medical records of Meana, and in his opinion, the immediate cause of death could not be ascertained. App. Vol. 38, 8928. The State did not call the Phillipine doctor who conducted the autopsy on Meana but instead called Dr. Alane Olson, a Medical Examiner with the Clark County Coroner's Office to read from the Philippine autopsy report. While Dr. Olson was in attendance when the Medical Examiner in the Philippines performed the autopsy, her role was merely to observe and collect samples for later testing, the latter of which she was unable to accomplish, and not opine on the autopsy itself.

6. The Investigation

On January 2, 2008, various public health agencies, including the Southern Nevada Health District ("SNHD"), the Nevada Bureau of Health Care Quality and Compliance ("BHCQ") and the Centers for Disease Control and Prevention ("CDC"), initiated an investigation to determine the source of an identified cluster of hepatitis C infections. The investigators intentionally arrived at ECSN with only 30 minutes' notice. The investigators testified that the employees were cooperative, and surprised by the investigation. During the course of several days, the investigators interviewed employees, inspected ECSN and the other Centers, and observed the practices of all the staff involved in the care of patients. After completing the investigation, the investigators concluded that the likely source of the infections was the unsafe injection practices employed by two specific CRNAs, Lakeman and Mathahs. The investigators ruled out all other potential sources of transmission.

7. "Standards" for Safe Injection Practices

There was voluminous testimony from numerous witnesses that the injection practices employed by the CRNAs at ECSN followed aseptic technique

and were safe.[6] Because the infection was transmitted, though, it is apparent that Lakeman and Mathahs did not always follow the practices which they and others described. Numerous witnesses testified that the injection practices they used at ECSN were commonly used in other clinics and in hospitals, both in Las Vegas and around the country, at the time of the infections. In recent years, as a result of persistent misconceptions and misunderstandings by medical practitioners of what constitutes "safe injection practices," the CDC has recommended a set of "best practices." The CDC does not regulate medical practices or surgery centers and is not an enforcement agency, according to Melissa Schaeffer, one of the CDC investigators involved in the investigation here. App. Vol. 24, 5678. Those "best practices" include using only one vial of sedative for each patient and preclude re-entering the vial at any time with the same syringe, even for the same patient. All of the CRNAs testified that, at the time of the infections, they believed that a vial could be used on more than one patient as long as aseptic technique was used. Aseptic technique was described as using a new syringe for each patient. Each of

[6]Rather than repeating the facts which are set forth in the Argument section infra, the facts are merely summarized here. Detailed record citations can be found in the later section. Additionally, Exhibits 2 to this brief summarizes the testimony on the standards and practices for injection safety; Exhibit 3 summarizes the testimony of witnesses regarding Appellant's knowledge (or lack of knowledge) as to the practices which were employed.

the CRNAs testified that a syringe could be re-used on the same patient but that if the vial had been re-entered, that vial could not be used on another patient. Even Dorothy Sims, a Registered Nurse with the BHQC testified that at the time of the investigation in January 2008, she "did not recognize [multi-use] of propofol vials or re-use of syringes on one patient as creating a health hazard." App. Vol. 38, 8851-2. The physicians who worked at the Centers, who received immunity and were not charged, testified that CRNAs receive specialized training and that they relied on the anesthetists to ensure that patients were being sedated properly and safely. The State's expert medical witness, Dr. Arnold Friedman, testified that the aseptic techniques described by the ECSN CRNAs would not have caused transmission of the infections but that the risk to the patient would occur as result of "human error." and that risk of "human error" was increased when the "best practices" for administering sedation to patients were not employed.

SUMMARY OF ARGUMENT

For five years prior to Appellant's trial, the Las Vegas community was flooded with adverse publicity and sensational reports about the outbreak of hepatitis C infections which were connected to the medical practice of Appellant. By the time the case went to trial, Appellant had already been portrayed by the

media in such a negative light that the prejudice against him was palpable. Because he had suffered a series of strokes over the six years prior to his trial, his affect was flattened giving the appearance to the jury that he was cold and unfeeling. Thus, the jury would not be able to see the empathetic, spiritual human being that his family and community saw and knew him to be. Because of the untreated aphasia, which resulted from the series of strokes Appellant suffered, his ability to assist his counsel was severely, and unconstitutionally, impaired.

This case could have been tried in two weeks, but instead, the trial lasted for over two months, due to the State's tactics and strategy of parading witness after witness before the jury to adduce testimony which had no relevance to the issues in the case. There were seven patients who became infected with hepatitis C on two different dates. The State's theory was that the infections resulted from the unsafe injection practices of two nurse anesthetists who administered the sedative to those patients. That evidence, along with the evidence of cause of death of Rodolfo Meana (one of the seven patients), and four witnesses from the insurance companies, would have been all that was necessary for the State to put on its case. The State had a problem, though. It had no evidence that Appellant had any knowledge of, let alone direct involvement in, the way that the two nurse

anesthetists performed their injection practices. The State could not prove that Appellant intended, or directed, that the nurse anesthetists employ any specific injection practices. Without compensating for that lack of evidence through the introduction of inflammatory testimony designed to demonize Appellant, the ambition of an overzealous prosecutor to convict this high profile defendant would have been thwarted.

Instead of allowing the case to be decided on a comprehensible theory that would allow a jury to determine whether Appellant had the knowledge and criminal intent necessary to be convicted of the crimes alleged, the State constructed a 42 page Indictment littered with allegations that were not related to injection practices of the two nurse anesthetists. In this way, the State was able to introduce a flood of prejudicial and inflammatory evidence to detract from its lack of proof of criminal intent. Adding to the confusing, conflicting and alternative theories presented to the jury was the deliberate introduction of inadmissible evidence that Appellant was facing federal charges (for which the prosecutor was reprimanded by the trial court) and a blatant manipulation of data by the State to show a profit motive.

The State could not show Appellant's direct involvement in any of the crimes charged. Instead, the prosecutors relied on a theory that the "work environment" and "atmosphere" of the practice "indirectly" caused these two nurse anesthetists to risk the safety of Appellant's patients. The State admitted that it did not want to subject the Medical Examiner who performed the autopsy on Meana, who died before trial, to cross-examination, so the State impermissibly called a surrogate to testify from the autopsy report of the uncalled witness. The State introduced Meana's direct testimony despite the inability of Appellant's counsel to complete his cross-examination depriving Appellant of his right to confrontation of the named victim in the Second Degree Murder count.

Nevada's law on Second Degree Felony Murder is ever-evolving, and while this court has attempted to limit its application in order to prevent "untoward" prosecutions, the opportunity to convict under the judicially-created crime was too enticing for the State. To that end, the State tacked together negligent or reckless aiding and abetting of two reckless crimes to create the predicate felony for the Second Degree Felony Murder charge, stretching the already abstruse doctrines of accessory liability and felony murder beyond any limit that either this court or the Nevada Legislature could have intended.

As a result, issues of first impression in this needlessly complex case have been raised. The jury instruction on Aiding and Abetting is not challenged but the proof of knowledge and criminal intent was insufficient. The Second Degree Felony Murder theory of the State is challenged on both instructional error and sufficiency of the evidence grounds. The State ensured a verdict of guilty, without the need to prove criminal intent, by depriving Appellant of the constitutional right to confront witnesses and deliberately eliciting inadmissible and misleading evidence as a means to inflame the jury. The failure of the trial court to safeguard the ability of Appellant to adequately communicate with and understand his trial counsel ensured that his trial counsel's ability to challenge the evidence was compromised.

This case presents a "perfect storm" of due process denial. Reversal is required.

A. CONSPIRACY AND AIDING AND ABETTING MUST BE KNOWING AND INTENTIONAL AND NOT NEGLIGENT OR RECKLESS

1. Standard of Review

The standard of review when analyzing the sufficiency of the evidence "in a criminal case is whether, after viewing the evidence in the light most favorable to

the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." McNair v. State, 825 P.2d 571, 573 (Nev. 1992)(internal quotations omitted).

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The State's theory at trial was that Lakeman and Mathahs recklessly employed unsafe injection practices which endangered the patients of ECSN. Thus, the State argued, if the jury found that either Lakeman or Mathahs was guilty of the two endangerment felonies and a death resulted, he could be found guilty of Second Degree Murder. As to Appellant, the State's theory was that Appellant created an "atmosphere" in which Lakeman and Mathahs were pressured to recklessly employ unsafe injection practices which endangered the patients of ECSN. The State made it clear that their theory of liability was completely based on liability as an accessory to the crime: "Dr. Desai is never the direct actor. He is what's called an aider and abettor or in the conspiracy." App. Vol. 40, 9275. Appellant, the State argued, is guilty of Second Degree Murder because he created an "atmosphere" which pressured Lakeman and Mathahs to recklessly place patients in danger and in the course of that conduct, Meana died. In other words, the State argues, Appellant's alleged recklessness or negligence in

creating an "atmosphere" encouraged Lakeman and Mathahs to be reckless. This is a contortion of the law of accomplice liability which results in a kind of vicarious strict liability for mistakes made by others.

This court cited a Law Review article with approval in clarifying the law of accomplice liability in specific intent crimes: Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, 31 Loy.L.A.L.Rev. 1351, 1362 (June, 1998) (cited with approval in Sharma v. State, 56 P. 3d 868, 872 (Nev. 2002). The article warns against applying accomplice liability to a case like this one, where the "accomplice" does not intend that the principal commit the act. Rogers concludes,

> Applying accomplice liability here raises troubling questions about whether the complicity doctrine is being stretched beyond its proper limits merely to find a means of punishing the owner. This doctrinal contortion creates a risk of excessive punishment and subverts the purpose of derivative liability as a means of punishing a secondary actor only upon proof that the secondary actor has associated himself or herself with the principal's culpable conduct.

Id.

Applying accessory liability to this case is a contortion of the doctrine. The Jury Instruction (Instruction 10)[7] was correct but the proof of knowledge and intent was missing.

There are two fundamental flaws in the State's proof. First, the State failed to prove that Appellant knew that any injection practices employed by Mathahs or Lakeman were a violation of any standard of care which would constitute reckless endangerment or neglect of a patient. Second, the State failed to prove that Appellant intended that Lakeman or Mathahs commit the conduct which constituted the endangerment crimes. The issue presented here is whether, in Nevada, aiding and abetting unintentional crimes (the endangerment crimes) requires knowledge and an intent that the crimes be committed. Clearly, creating an "atmosphere" is not intending that a crime be committed.

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[7]Instruction 10 reads, in pertinent part: "A person aids and abets the commission of a crime if he knowingly and with criminal intent aids, promotes, encourages or instigate by act or advice, or by act and advice, the commission of such crime with the intention that the crime be committed. App. Vol. 41, 9515.

The Evidence Showed That the Aseptic Practices Used by the CRNAs at the Centers Were Common, Were Understood by the Professionals to Be Safe and the Mistakes Made by Lakeman and Mathahs Could not have Been Intended by Appellant

Six CRNAs who were former employees of the Centers testified with regard to their injection practices at ECSN and their understanding of the standard of care in utilizing such practices: Keith Mathahs (former defendant in the case), Vincent Mione, Ralph McDowell, Vincent Sagendorf, Linda Hubbard, and Ann Marie Lobiondo. Each of them testified that the injection practices they used followed aseptic technique and that they understood that the propofol vials could be used on more than one patient as long as aseptic technique was used. [8]See references in Exhibit 2. Aseptic technique, for everyone but Mathahs, allowed for use of one vial of propofol on more than one patient and re-use of a syringe as long as neither the syringe nor the vial was used on another patient. Although the specific injection practices of each CRNA that testified slightly differed based on how each CRNA was trained, each CRNA adhered to the principles of aseptic technique. For instance, Ann Marie Lobiondo would draw up five 10cc syringes at a time from a 50 cc vial and use each syringe separately without re-entering the vial. App. Vol. 28, 6598. Each CRNA testified that the injection practices, he or

[8]References to the record can be found in Exhibit 2 to this brief.

she used were "widely used," were the same techniques they used in other places of employment, or were the same techniques used "in hospitals" in the Las Vegas area. Clearly, the injection practices utilized by the CRNAs were not a product of a "work environment" or a specific policy implement by ECSN, as they were the same practices which the CRNAs used in their other employment and were used by other professionals who did not work at ECSN.

Three former Registered Nurses and Licensed Practical Nurses that formerly worked at ECSN, Johnna Irbin, Lisa Falzone and Rod Chaffee, testified that they "never saw anything to jeopardize patients," and that they believed that the propofol vial could be safely used on more than one patient.

Not only did the CRNAs not know that their injection practices were unacceptable, some of the investigators and experts did not know that use of one vial for multiple patients (with aseptic technique) was not recommended until after the investigation in this case. Dorothy Sims, a Registered Nurse with the Nevada Bureau of Healthcare Quality and Compliance, which did regulate the Centers, testified that at the time of the investigation, she "did not recognize [multi-use] of propofol vials or re-use of syringes on one patient as creating a health hazard." App. Vol. 38, 8851-2. She believed that the practices that Vincent

Mione, Vincent Sagendorf and Linda Hubbard (multi-use of vials with aseptic technique) described to her were "perfectly acceptable." App. Vol. 38, 8870. Even after the outbreak at ECSN, her inspection of another endoscopy clinic revealed that an M.D. anesthesiologist was using the same vial of propofol and the same syringe on more than one patient, a practice far more unsafe than the practice alleged in this case. App. Vol 38, 8882.[9]

All of the uncharged doctors who worked at the Centers that testified, Drs. Carrol, Carrera, Herrero and Vishvinder Sharma, testified that they understood that the use of one vial of propofol on multiple patients was safe and without risk to the patient as long as a clean syringe is used each time the vial is entered. Dr. Satish Sharma, a practicing anesthesiologist in Las Vegas who was contracted to work for one of the Centers, also acknowledged that this was his understanding. App. Vol 9, 2138.

Probably most pertinent to the issue of intent, was the testimony of Dr. Miriam Alter, Ph.D, an infectious disease epidemiologist with the CDC for over 25 years. She testified that if propofol vials were used as multi-dose vials, and an

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[9]Dr. Schaefer, the CDC investigator, testified that a survey revealed that 28% of [ambulatory surgery centers] were using single dose vials for multiple patients after the time of the events in this case. App. Vol. 24, 5688.

anesthetist "used a new needle and syringe every single time [he] entered [the vial], every single time [he] dosed a patient, no problem...as long as there wasn't blood spatter." App. Vol. 35, 8230. The CDC, she testified, in making recommendations or policies "will go a little more to the extreme to...**prevent human error**." App. Vol. 35, 8235. Dr. Alter noted that as recently as 2010, two years after the hepatitis C outbreak in Las Vegas, there still existed " a lack of understanding on the part of clinicians [about safe injection practices]." App. Vol. 35, 8238. The State's expert, Dr. Arnold Friedman (who was hired by the plaintiffs in the civil cases against the pharmaceutical companies), testified that the problem with multi-use of a vial is that "people make mistakes." App. Vol. 31, 7295.

Even the government entities which oversee or regulate public health do not agree that multi-use of a vial is not a recommended practice. Both Dr. Friedman and Dr. Melissa Schaefer, an investigator with the CDC, testified that the standard for provision or administration of anesthesia under Medicare differed from the "best practices" recommended by the CDC of using one propofol vial on one patient only. Medicare explicitly approves the use of one vial of propofol for several patients. App. Vol. 25, 5754. Dr. Friedman described this conflict in the recommendations of the two federal public health agencies as "a perfect example

of one arm of the government not knowing what the other arm is doing...” App. Vol. 31, 7322.

The testimony of CRNAs, doctors, medical experts and public health investigators revealed that the injection practices used at the clinic were not unusual, in fact they were common among practitioners at the time. They were not consistent with CDC “best practices” but, absent “human error” or “mistake,” the techniques used by all of the CRNAs[10] who provided sedation at the Centers, according to practitioners and experts, would not transmit an infection or risk the safety of the patient. Mathahs and Lakeman may have made “mistakes” when they failed to adhere to the practices which were described by the other CRNAs who worked at the Centers, as aseptic and safe.[11] The State’s theory was internally inconsistent. The State claimed that Appellant created a “work environment” where mistakes would occur but maintained that Lakeman and Mathahs acted

[10]With the exception of Keith Mathahs who believed that a vial could be reused on additional patients after re-entry with a syringe to be used on the same patient as long as the needle was replaced. He was so convinced that his technique was safe that he used it while being observed by an investigator from the CDC.

[11]Again, all witnesses who testified for the State agreed that one syringe may be used more than once on one patient and one vial of propofol may be used on multiple patients without risk to the patient. The risk came into play when, by mistake, those practices were combined.

recklessly. There was no evidence that those mistakes were intentionally made or that Appellant intended that they make those mistakes.

The Evidence was Insufficient to Support a Finding that Appellant Had Knowledge of the Practices Which Were Employed by the CRNAs

In order for the verdict to support a finding that Appellant knowingly aided and abetted the conduct of Mathahs and Lakeman, the State must prove that he had knowledge that they were committing the conduct alleged in the Indictment. Trying to find proof of knowledge or intent, the State sought to prove that supplies of propofol and syringes were limited by Appellant and therefore he must have known of the conduct of Mathahs and Lakeman, in order to compensate for the lack of proof that Appellant ever told anyone to use any particular injection practice. [12]

The Registered Nurses and CRNAs who testified all testified that no one at the Centers instructed or directed them to re-use syringes on more than one patient. See Exhibit 3. The only witnesses that the State could point to in Closing

[12]The simple fact that all the CRNAs, other than Lakeman and Mathahs, were found not to have employed practices that risked the safety of patients demonstrated that there was no policy at the Centers with regard to any particular practice. It also refutes the notion that any "atmosphere" existed which pressured the CRNAs to conduct their practice in an unsafe and erroneous manner, when a predominant number of CRNAs employed at the Centers testified to their safe and aseptic practices.

Argument who could testify to any knowledge on the part of Appellant were Linda Hubbard and Keith Mathahs. However, the record does not support that assertion. Linda Hubbard testified under oath that she was never told to re-use syringes. App. Vol. 22, 5197. Detective Whiteley was called by the State to recount what Hubbard had told him and another detective at one of several interviews in 2008. He described an exchange with Linda Hubbard in which she told the detectives that she observed Ron Lakeman utilize the same syringe to "re-inject" the same patient. App. Vol. 36, 8437-8. The detective then asked Hubbard whether she was mentored by anyone when she started in 2005. Whiteley read from the report, "And her response was , It was. It was seeing–it really wasn't–I saw the way he did it." App. Vol. 36, 8437. She told the detectives, according to Whiteley, that when she first started Appellant "wanted me to use, you know, to do it the way that Ron did it." App. Vol. 36, 8438. Thus, Linda Hubbard testified under oath that she was never instructed to re-use syringes and Detective Whiteley testified that she told him that Appellant said to "do it the way" Lakeman did it. The problem with the State's argument that this suggestion of conducting her practice in the manner that Lakeman did somehow showed that Appellant had knowledge that Lakeman and Mathahs were using unsafe injection practices is that the

description of "the way" that Lakeman "did it" is a description of re-use of a syringe on a single patient. Dr. Thomas Yee, an anesthesiologist called by the State, testified that there is no risk to the patient if a syringe is re-used on the same patient. App. Vol. 7, 1496. Vincent Mione specifically testified that with regard to injection practices, Appellant told him to "do what you think is right." App. Vol. 18, 4326.

Mathahs' testimony was not helpful to the State either. The following exchange occurred on direct examination:

Q. Did he [Appellant] ever instruct you to use syringes with propofol remaining in them on another patient?
A. No, I never heard that.
Q. He never asked you to do that?
A. No.
Q. What about the bottles of propofol? If you hadn't used a whole bottle of propofol on one patient, did he [Appellant] ever tell you to save that and use it on the next patient?
A. That was just common practice. That's the way it was done.
Q. Okay. Everybody did it that way?
A. That's what we were instructed to do , yes.

App. Vol. 7, 1691.

Mathahs was describing the use of one vial of propofol on several patients which all of the experts agree will not transmit infection as long as the vial is entered with a fresh needle and syringe each time.

Thus, it is clear from the record that neither Mathahs nor Hubbard provided testimony that Appellant instructed either of them to inject any patient with propofol from a vial that had been entered with a contaminated needle or syringe.

Because of the lack of evidence of direct knowledge of Appellant as to any unsafe practices, and to build its "atmosphere" argument, the State attempted to prove that Appellant limited supplies. With regard to the supply of syringes or propofol, Mione testified that Appellant never complained about his using too many syringes. App. Vol. 18, 4354. Lynette Campbell, a Registered Nurse working at ECSN, testified that she was "always able to get supplies when...needed." App. Vol. 21. 4906. Lobiondo testified that the staff had "plenty of" syringes. App. Vol. 29, 6767. Jeffrey Krueger, the Managing Nurse at ECSN, testified that he ordered syringes and propofol whenever they were needed and there were no limitations placed by management on those supplies. App. Vol. 30, 6980.

Other evidence from the State's witnesses showed that due to the specialized training of CRNAs, physicians were not really in a position to direct the details of the CRNA's practices. Dr. Carrol testified that CRNAs are trained specifically in injection practices and physicians rely on their skill and judgment

because, except for anesthesiologists, physicians, including gastroenterologists, are not trained in administration of anesthetic or safe technique. App. Vol. 11, 2525. Dr. Frank Nemec, a Las Vegas gastroenterologist who operated a separate medical practice from Appellant, testified that physicians rely on the training and expertise of the CRNAs to properly monitor the patient and perform the procedure safely. App. Vol. 32, 7577. Appellant even brought in an outside expert annually to train the staff on "safety and infection control." App. Vol. 22, 4994.

The Indictment itself demonstrates that the State knew that it could not prove that Appellant acted knowingly and with criminal intent-that is, that he knew that unsafe injection practices were being employed at the Centers and that he intended for Lakeman and Mathahs to employ unsafe injection practices. These are necessary elements for establishing criminal liability under the Endangerment statutes at issue here. The problem with the State's Indictment is that "indirectly" creating a "work environment" is not criminally intentional conduct and therefore cannot provide the vehicle for accessory liability.

2. The Law of Aiding and Abetting in Nevada

Nevada's statute on accessory liability, NRS 195.020, provides that it is no defense that the principal does not have criminal intent but provides no guidance

with regard to the mental state required of the aider and abettor. The lack of a legislative standard has caused "[c]onsiderable confusion ...as to what the accomplice's mental state must be in order to hold him accountable for an offense committed by another." Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* §6.7(b), at 579 (2d ed. 1986)(as quoted in Sharma v. State, 56 P.3d 868, 871 (Nev. 2002)). Sharma requires that an accessory is responsible for a specific intent crime committed by the principal only when the aider and abettor knowingly aided the other person with the intent that the other person commit the charged crime. Id. at 872. This court has not issued a published opinion defining the intent required for an accessory to a general intent crime or for an unintentional (negligent or reckless) crime.

3. Criminal Intent is Still Required to be an Accomplice

Some commentators suggest that it is "logically impossible for a person to be an accomplice in the commission of a crime of recklessness or negligence." Daniel G. Moriarty, *Dumb and Dumber: Reckless Encouragement to Reckless Wrongdoers*,34 S. Ill.U. L. J. 647, 653 (Spring 2010). The problem is explained as follows:

> In short, accomplice liability rests on intent. Thus, generally a person is responsible for a crime when, intending to promote its commission,

> that person renders aid to the principal. Although substantial disagreement exists over the meaning and extent of a secondary actor's intent, courts fundamentally seek a sufficiently blameworthy link between the secondary actor and the crime.

Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining within the Constraints of Intent*, 31 Loy.L.A.L.Rev. 1351, 1362 (June, 1998) (cited with approval in Sharma, Supra).

While this court has not applied the Sharma rule to general intent crimes, it does not appear that any case has been presented to the court that involved accessory liability for reckless or negligent crimes. Assuming that this court may not apply the Sharma rule to a general intent crime or to a reckless crime, criminal intent is still required in invoking accessory liability, as "..the intent element is satisfied [when the charge is accessory to a reckless or negligent crime] if the accomplice has the conscious objective that the principal perform certain specific acts which are reckless or negligent. It is not necessary that the accomplice intend that the result occur any more than it is necessary that the principal intend the result." Rogers, Supra, at 1382.

The problem here is that the State's theory was that Appellant created an "atmosphere," or a "work environment" which promoted unsafe practices-in other words, that he negligently caused reckless conduct of the principals. This theory may work in civil cases; it cannot be the standard in criminal cases.

When the evidence is measured against Jury Instruction 10 and against a rule which requires that the accessory acts with a "conscious objective that the principal perform certain acts which are reckless or negligent" it is wholly insufficient. For this reason, the convictions under the Endangerment statutes must be reversed.

The trial court judge viewed the evidence of both aiding and abetting and conspiracy as follows: "... while there was a **paucity** of direct evidence showing that Dr. Desai told someone reuse those syringes, do it this way, I found during the trial that there was an abundance of evidence showing that Dr. Desai consistently demonstrated a callous disregard for the well-being of his patients." App. Vol. 41, 9567 (emphasis added). Appellant was not charged with a general crime of "callous disregard." He was charged and convicted of aiding and abetting/conspiring to commit the specific crimes involving the re-use of syringes. A "paucity of evidence" is not sufficient to support a criminal conviction.

4. The Conspiracy Theory Suffers from the Same Lack of Evidence

Conspiracy is defined in Nevada as "an agreement between two or more persons for an unlawful purpose." Doyle v. State, 921 P.2d 901, 911 (Nev. 1996), overruled on other grounds by Kaczmarek v. State, 92 P.3d 16 (Nev. 2004). Here,

the “unlawful purpose” as alleged in the Indictment was the unsafe injection practices. There was no evidence that Appellant knew that the practices were unsafe or that he had a purpose to have Mathahs or Lakeman employ unsafe injection practices. The State could not prove that an agreement existed between Appellant and Mathahs and Lakeman to endanger patients. It is impossible to agree to commit a mistake.

B. THE CONVICTION FOR SECOND DEGREE MURDER CANNOT STAND

There are three reasons why the conviction of Appellant of Second Degree Murder cannot stand: 1) the evidence was insufficient to prove that there was an immediate and direct causal relationship between Appellant’s actions and Meana’s death; 2) Jury Instruction 27 omitted the third element required for Second Degree Felony Murder-that the causal relationship must extend beyond the simple commission of the felony to an involvement by commission or omission in the act which caused the death; and 3) the trial court committed plain error in failing to instruct the jury to determine whether the underlying felony was “assaultive” in nature.

1. Standard of Review

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

This court will normally review the decision of a trial court to refuse a jury instruction for an abuse of discretion or judicial error. This court reviews de novo whether a particular instruction comprises a correct statement of the law. Cortinas v. State, 195 P.3d 315, 319 (Nev. 2008). When a jury has not been instructed on the essential elements of a crime and there has been no objection, reversal is only required if the error is plain and the error affected the Appellant's substantial rights. See Valdez v. State, 196 P.3d 465, 477 (Nev. 2008).

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The State clearly relied on a theory based on Felony Murder to charge and obtain a conviction for Second Degree Murder.[13] The prosecutors told the jury that

[13]Further, when alternative theories are presented to a jury and a general verdict is rendered, this court presumes that the jury premised its verdict on the felony-murder theory except where the evidence of premeditation and deliberation

it could convict on Second Degree Murder if it found that anyone engaged in inherently dangerous unlawful conduct and death was foreseeable. The jury was told that Appellant could be found guilty of Second Degree Murder, without any finding that he knew of the conduct of others or intended the conduct of others, if he created an "atmosphere" prompting the others to engage in unsafe injection practices. In essence, the prosecutors described a form of criminal vicarious strict liability for Second Degree Murder which stretches the Felony Murder doctrine beyond any acceptable limit. Because the jury instructions were erroneous, confusing and conflicting, the jury was allowed to find Appellant guilty on this "creative" and "untoward" theory of strict vicarious criminal liability.

The Law of Second Degree Felony Murder in Nevada

The State is absolved of proving malicious intent when a murder is committed in the course of certain felonies. The legislature has specified certain felonies which provide the kind of malicious intent which will substitute for a

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is strong. Talancon v. State, 721 P.2d 764, 765 (Nev. 1986)("improper to presume that the jury's verdict was premised on anything but a felony-murder theory" in light of lack of direct evidence of premeditation and closing arguments of the State). In this Second Degree Felony Murder case, a presumption that the jury premised its verdict on the State's felony-murder theory should be applied as the evidence of actual malice is non-existent and the State's arguments at trial relied on its felony-murder theory.

finding that the defendant acted with malice in a First Degree Murder prosecution. NRS 200.030(1)(b). There are no legislatively-determined felonies which provide the element when, as here, the prosecution relies on Felony Murder in the Second Degree. Accordingly, in order to avoid the potential for "untoward" prosecutions, this court has developed an evolving set of restrictions on the availability of Second Degree Felony Murder as a theory of prosecution.

In Sheriff v. Morris, 659 P.2d 852, 859 (Nev. 1983), this court approved the prosecution of Second Degree Felony Murder when certain conditions are met: 1) when there is an immediate and direct causal relationship between the actions of the defendant and the killing; 2) when the felony relied upon "is inherently dangerous when viewed in the abstract;" 3) "the causal relationship must extend beyond [the simple commission of the felony] to an involvement by commission or omission in the act which caused the death." In Morris, this court affirmed the dismissal of an indictment for Second Degree Murder based on the act of furnishing a controlled substance which resulted in a lethal overdose.

In Labastida v. State, 986 P.2d 443, 448-9 (Nev. 1999), the implied malice for Second Degree Murder was based on the commission of felony child neglect. NRS 200.508(1)(b)(2). The court again warned that limitations must be placed on

the use of malice implied by the commission of a felony to support a conviction for Second Degree Murder due to the risk of "untoward prosecutions." In Labastida, the court addressed the meaning of "immediate and direct causal relationship between the actions of the defendant and the victim's death." The court examined the Child Neglect statute and determined that the felony could be based upon both active and passive conduct of the defendant. The court reversed the conviction on the ground that the child did not die as an "*immediate and direct* consequence of Labastida's neglect, without the intervention of some other source or agency." This finding was made because the conduct which caused the death was committed by Labastida's husband.

In Ramirez v. State, 235 P.2d 619, 622-3 (Nev. 2010), this court further clarified and refined the Nevada rule applicable to Second Degree Felony Murder. First, the court abandoned the rule in Labastida that the question of whether a felony is inherently dangerous is to be analyzed in the abstract and held that this question is one for the jury based on the manner in which the felony is committed. Secondly, the court held that a finding of "immediate and direct consequence of the defendant's actions" could not be based on the failure of a caretaker to protect a child under the child neglect statute and therefore, submission to the jury of

Second Degree Felony Murder based on a statute which included conduct not directly committed by the defendant was plain error.

Finally, in Rose v. State, 255 P.3d 291, 296 (Nev. 2011), the court considered the application of the merger doctrine to Second Degree Felony Murder. Referring to the California Supreme Court's decision in People v. Sarun Chun, 203 P.3d 425, 434 (Cal. 2009) this court agreed with that court's concern that allowing felonies that were of the "assaultive" type ("any felony that involves a threat of immediate violent injury") to "form the basis for a second-degree murder conviction based on the felony murder rule would mean that virtually every homicide would occur in the commission of a felony and therefore be murder..." This court held that "assaultive" type felonies merge with the homicide and therefore cannot be used as the predicate offense for Second Degree Felony Murder. The court departed from the California rule, though, and determined that whether the felony is "assaultive" is a question for the jury.

When this court first created the Second Degree Felony Murder rule in Sheriff v. Morris, Supra, at 659 P.2d 859, it stated, "We are not unmindful of the potential for untoward prosecutions resulting from this decision." That language has been picked up in each of the opinions cited above which apply or clarify the

limitations on Second Degree Felony Murder theories of prosecution. The California Supreme Court, as it has applied limitations, has articulated its discomfort with application of Felony Murder doctrine to Second Degree Murder over the years and this court has reflected that uneasiness. The source of the unease is that the felonies which trigger First Degree Felony Murder are enumerated in NRS 200.030(1)(b), while "there are no statutorily enumerated felonies with respect to second-degree felony murder, which is based on the involuntary manslaughter statute" Rose v. State, Supra at 295.

One commentator calls the felony murder rule "one of the most widely criticized features of American criminal law." Binder, Guyora, *Making the Best of Felony Murder*, 91. B.U.L.Rev. 403, 404 (2011). Some Justices of the Calfornia Supreme Court have called for the abrogation of the doctrine on several occasions.

> Legal commentators have been virtually unanimous in their condemnation of the felony-murder rule because it ignores the significance of the actor's mental state in determining criminal liability. As the drafters of the Model Penal Code concluded in 1959, "principled argument in...defense [of the felony-murder rule] is hard to find." [citations omitted].

People v. Burroughs, 678 P. 2d 894, 913 (Cal. 1984)(Bird, J., concurring).

Justice Panelli suggested that the Second Degree Felony Murder rule may well be unconstitutional. Since the legislature in California (and Nevada) have chosen not to enumerate the felonies which will permit the prosecution to convict without proof of *mens rea*, "[t]he second degree felony-murder rule, however, either creates a nonstatutory crime or increases the punishment for statutory crimes beyond that established by the Legislature." People v. Patterson, 778 P.2d 549, 568 (Cal. 1989). Suggesting that the legislature is the body which should determine penalties, Justice Panelli comments, "Since the rule permits a court to increase the punishment for certain dangerous crimes, the temptation to invoke it is great." Id. This must be the risk termed the "risk of untoward prosecutions" in this court's discussion of Second Degree Felony Murder and which has caused this court to uncharacteristically create elements of the burden of proof required under the rule. This case demonstrates the reality of that risk.

This case presents the court with the most extreme application of the Second Degree Felony doctrine presented to any court-aiding and abetting through "creating an atmosphere" resulting in felonious reckless conduct by another, in the course of which a death occurred.

2. The State Proved that the Conduct of Lakeman and Mathahs was an Intervening Source

In Appeal No. 62641, this court denied a Petition for an extraordinary writ challenging the sufficiency of the Indictment. In the order denying the writ, the court rejected Appellant's claim that the Indictment was inadequate because it charged him with being indirectly responsible for Meana's death. The court ruled that it is not the actions of the defendant which must lead directly to the death, rather "[t]he predicate felony must be the immediate and direct cause of the victim's death to sustain a conviction." Order in Desai, No. 62641, *2. That is not a correct statement of the rule and it is not what the jury was instructed. In Labastida, it was the direct connection between the actions of the defendant and the death, not between the underlying felony and the death which must be proved. The court reversed Labastida's conviction for Second Degree Murder. Her conviction for Child Neglect was not disturbed. It was the intervention of another person, her husband, which broke the direct connection and required reversal of the conviction for Second Degree Murder. Here, Meana's death was not caused by any actions of Appellant in creating a "working environment" or "atmosphere" without the intervention of the conduct of Lakeman and Mathahs. Accordingly, just as in Labastida, the conviction for Second Degree Murder must be reversed.

The trial judge described Appellant's involvement in the actual conduct which resulted in Meana's death as follows: "Because while there was a **paucity of direct evidence** showing that Dr. Desai told someone reuse these syringes, do it this way, I found during the trial that there was an abundance of evidence showing that Dr. Desai consistently demonstrated a callous disregard for the well-being of his patients." App. Vol. 41, 9567. A "paucity of evidence" of direct connection to the death is simply insufficient to convict Appellant of Second Degree Murder and sentence him to life in prison.

In order to reduce the risk that the Second Degree Felony Murder rule will result in "untoward" prosecutions in which the prosecutor is not required to prove the mental state of the defendant, this court, in its first opinion addressing the issue, held that, in addition to the requirement that the underlying felony be "inherently dangerous," there "must be an immediate and causal relationship between the felonious conduct of the defendant and the death..." Morris, Supra at 859. When this court applied this limitation to the evidence adduced in Labastida, a reversal was required on the grounds that the evidence was insufficient to prove that direct and immediate connection between the actions of the defendant and the killing of the victim.

Two Nevada cases demonstrate what is required in order to prove the direct connection required. This court contrasted the facts in Labastida, Supra, with those in Noonan v. State, 980 P.2d 637 (Nev. 1999), both Second Degree Murder convictions predicated on felony Child Neglect. In Noonan, the defendant left a baby in a bathtub for a substantial period of time. The conviction was upheld. In Labastida, as this court pointed out, "Labastida's son did not die as an immediate an direct consequence of Labastida's neglect, without the intervention of some other source or agency. Rather, he died from [her husband's] abuse. Labastida, Supra, at 449. Labastida's conviction was reversed because the proof was insufficient to support the Second Degree Murder conviction.

Here, the lack of direct and immediate causal connection is significantly greater. First, the State alleged throughout the Indictment that Appellant's actions related to the transmission of the infection were either direct or indirect. Second, no witness testified that Appellant took any action with regard to the injection administered to Meana, or any other patient in this case. No witness testified that Appellant was aware or observing the injection received by Meana. In fact, the physicians, including those who were not connected with the Centers, testified that they rely on the skill and judgment of the CRNAs to administer anesthesia in a

safe manner. Third, the evidence is clear that the conduct which the State alleges caused the death of Meana did not result from any conduct of Appellant during the procedure but rather resulted from the intervening source, the injection practices of the nurse anesthetist. Just as in Labastida, the evidence is uncontradicted that the infection transmitted to Meana was transmitted by another source or agency, Keith Mathas. Just as in Labastida, reversal of the conviction for Second Degree Murder is required.

Further, in this case, there were other intervening sources, in addition to the actions of the CRNAs: Meana refused treatment which has been proven effective, he suffered from high blood pressure and he suffered kidney disease which, according to the Philippines death certificate, was equally causative of his death. Second Degree Felony Murder doctrine requires that the actions of the defendant be an "immediate" and "direct" cause. Allowing this kind of attenuation between any action and death would completely undermine the limitations which have been placed by the courts on the crime.

3. The Jury was Not Properly Instructed on the Element of Direct and Immediate Causation

When this court initially addressed the availability of Second Degree Felony Murder in Morris, Supra, with the introduction that "[w]e are not unmindful of the

potential for untoward prosecutions resulting from this decision...," this court placed **three** limitations on the availability of transferring intent in a Second Degree Murder case (involving the furnishing of a controlled substance to a minor): 1) the felony must be inherently dangerous; 2) there must be an immediate and direct causal relationship between the felonious conduct of the defendant and the death of the victim without the intervention of some other source or agency; 3) the causal relationship must extend beyond the felonious conduct (the unlawful sale of drugs) "to an involvement by commission or omission in the means that caused the death" (the ingestion of the drugs). This third element has not been mentioned in later cases nor has it been abrogated.[14] Here, the jury was instructed as follows:

> The Second Degree Felony Murder rule only applies when the following two elements are satisfied:
>
> > (1) where the conduct constituting the crime of criminal neglect of patients and/or performance of an unlawful act in reckless disregard of persons or property

[14]Both Labastida and Ramirez involved Second Degree Felony Murder convictions based on application of the felony murder rule to child abuse felonies. In Labastida, the conviction was reversed on sufficiency of the evidence grounds and in Ramirez, the conviction was reversed due to the failure of the trial court to instruct on immediate and direct causation by the defendant's acts, so it appears that the court did not need to reach the third Morris limitation.

> is inherently dangerous, where death or injury is a directly foreseeable consequence of the illegal act;
>
> and,
>
> (2) where there is an immediate and direct causal relationship-without the intervention of some other source or agency–between the actions of the defendant and the victim's death.

Instruction 27, App. Vol. 41, 9533.

Felony Murder prosecutions generally involve action by the defendant–engaging in a robbery when a death results, committing an arson which results in a death–and thus the third limitation is just not at issue. In child neglect cases and drug sales cases, however, the connection between the conduct of the defendant and the death of the victim cannot result in a conviction of Second Degree Murder unless there is both the causal connection--without an intervening source of the death–-and proof of some additional conduct other than the simple commission of the felony. This third element ensures that intent to commit the underlying felony will not become so attenuated from the result that the purposes of the Felony Murder rule will be undermined. The limitation was adopted to prevent the rule

from being exploited by seeking harsher punishment than what has been determined appropriate by the legislature.[15]

The jury was not instructed on the third Morris element. There was no objection made to the failure to include the third limitation in Instruction 27. App. Vol. 41, 9533. However, the analysis employed in Ramirez, Supra at 623, is equally applicable here. When there is a failure to object to an incomplete or inaccurate instruction, "reversal is only required if the error is plain from a review of the record and affected [Appellant's] substantial rights." Ramirez, Supra, at 623.

The court determined that Ramirez's substantial rights were affected because the State did not specify whether the predicate felony was willful or passive child neglect. That is what happened here. The State insisted that it need not specify whether the actions of Appellant were direct or indirect. Count 28 specifies the felonious conduct which is the basis for the Second Degree Felony Murder allegation as: "directly or indirectly using and/or introducing contaminated medical instruments, supplies and/or drugs upon or into the body" of the victim.

[15]The most harsh punishment prescribed by the legislature for Criminal Neglect of Patient when death results is 1-20 years. In order to punish Appellant more harshly than the statutorily-prescribed sentence, the State invoked the Felony Murder rule.

The State's allegation of conduct supporting culpability based on aiding and abetting the commission of the underlying felony is: "directly or indirectly counseling, encouraging, hiring, commanding, inducing, or procuring each other, and/or others to utilize a patient care delivery system which directly or indirectly limited the use of medical instruments, and/or supplies, and/or drugs; scheduled and/or treated an unreasonable number of patients per day, and/or rushed patients or patient procedures all at the expense of patient safety and/or well being, and which resulted in substandard care and/or jeopardized the safety of Rodolfo Meana." Because the State refused to select between direct or indirect action by Appellant, the jury could well have convicted Appellant based on no "direct and immediate" connection between his conduct and the death of Meana. The failure to include the third Morris limitation–that the evidence must demonstrate that Appellant had a "direct" hand in the conduct which resulted in the death (e.g., he employed the unsafe practices or he observed them being employed on Meana)–affected Appellant's substantial rights because he could not be convicted of Second Degree Felony Murder if the jury found that there was not a direct link between his actions and the death of Meana.

4. The Jury was Not Instructed on the Doctrine of "Merger" in Second Degree Felony Murder

In Rose v. State, 255 P.3d 291 (Nev. 2011), this court adopted a version of the doctrine of merger in Second Degree Felony Murder cases, which was articulated by the California Supreme Court in People v. Sarun Chun, 203 P.3d 425, 434 (Cal. 2009). Again, concerned that in Second Degree Murder cases, there are no legislatively-enumerated crimes supporting a felony murder theory, the court narrowed the application of Second Degree Felony Murder cases by determining that "'certain underlying felonies 'merge' with the homicide and cannot be used for purposes of felony murder.'"Rose, Supra, at 296, quoting Sarun Chun, at 203 P.3d at 434-35. The Rose court explained that it has not always followed the California Supreme Court in applying the doctrine of merger. In First Degree Murder cases, this court explained, the court would not override a legislative determination that a certain felony could serve as a predicate for felony murder.

> But the Legislature has not specified the felonies that can be used for purposes of second-degree felony murder, and absent such clear direction, we are convinced that the merger doctrine has a worthwhile place in restricting the scope of the second-degree felony-murder rule to avoid the potential for "untoward" prosecutions that has led us to restrict the rule in other ways.

Rose, Supra, at 297.

While in California, the question of whether the underlying felony is "assaultive" is considered a question of law to be answered by the court, this court in Rose leaves that question to the jury. In Rose, because the jury was not instructed on merger, the conviction for second degree felony murder was reversed.

In Rose, the court turned to the Nevada statute defining assault: "[u]nlawfully attempting to use physical force against another person" or "[i]ntentionally placing another person in reasonable apprehension of immediate bodily harm." NRS 200.471. "Assaultive in nature," the term used by this court, was adopted from the California Supreme Court in Sarun Chun . The purpose for adopting "assaultive in nature" as the linchpin in determining whether the merger doctrine applies was to ameliorate some of the anomalous results in the tortured history of the merger doctrine in California, where, for instance, "a person who merely intends to frighten the victim [is put] in a worse legal position than the person who actually intended to shoot at the victim." Sarun Chun, Supra at 443. So the California court defined an "assaultive felony" as "one that involves a threat of immediate violent injury." Id. The court in Sarun Chun specifically held

that California's Child Neglect statute would merge and could not support a Second Degree Felony Murder conviction. Id. Sarun Chun specifically referenced two other felonies which would merge: Grossly Negligent Discharge of a Firearm and Discharge of a Firearm at an Inhabited Dwelling. Since the Sarun Chun court did not list other felonies which might merge, one commentator has analyzed other California felonies and concluded that Poisoning or Adulterating Food, Drink, Medicine, Pharmaceutical Products, Spring, Well or Reservoir (Cal. Penal Code §347(a)(1) would merge and thus could not be the basis for a Second Degree Felony Murder conviction. Mishook, David, *People v. Sarun Chun–In its Latest Battle with Merger Doctrine, has the California Supreme Court effectively merged second-Degree Felony Murder Out of Existence?*, 15 Berkeley J. Crim. L. 127 (Spring 2010). The felonies which would merge according to Mishook are those in which injury is reasonably foreseeable and the actor has the "present ability" to cause the injury.

The crimes of Reckless Endangerment and Criminal Neglect of Patient cannot be distinguished from the crimes of Child Neglect and Poisoning of Substances for Human Consumption. They are crimes which involve the immediate threat of injury and the present ability of the defendant to carry out the

threat. Therefore, the underlying crimes would merge and the Second Degree Felony Murder theory was not available.

Because the question of whether the two statutory crimes are "assaultive in nature" is a question for the jury, the jury in this case should have been so instructed. However, the Rose rule has not been tested, so it is unclear what additional jury instructions would be required. At a minimum, though, the jury should have been given guidance on the definition of "assaultive in nature" and should have been told that if they found that the underlying felony was "assaultive in nature" then Second Degree Felony Murder could not form the basis for a Second Degree Murder conviction. None of those instructions were given in this case and therefore the conviction for Second Degree Murder based upon Nevada's Felony Murder Rule must be reversed.

5. The Second Degree Felony Murder Rule in Nevada Should Be Abrogated.

This court has consistently confined itself to its role and deferred the creation of crimes and penalties to the legislature, except in the area of felony murder, particularly second degree felony murder. In Morris, Supra, as pointed out by the dissenting Justices, the trial court refused to create the new crime of second degree felony murder. The dissenting Justices agreed that the creation of this new

crime by the court risked "untoward" prosecutions but asserted that, "this danger presents an additional reason for this court to leave the creation of new crimes to the legislative branch of government." Morris, Supra, at 861.

The continued difficulty in applying the rule combined with the ever-evolving application of confusing and conflicting limitations, led one Justice to call for its abrogation in California. She comments:

> The second degree felony-murder rule erodes the important relationship between criminal liability and an accused's mental state. That relationship has been described as "the most basic principle of the criminal law.....The second degree felony-murder rule, as a strict liability concept, violates this most important principle....Not only does it obliterate the distinction between intended and unintended homicides, but it seeks to apply the same ponderous sanction to any participant in the criminal conspiracy or enterprise from which a death results.

People v. Burroughs, 678 P.2d 894, 912 (Cal. 1984)(Bird, C.J. Concurring)[16].

[16]The concurring Justice also commented on the "haphazard" application which would result if the determination of whether the Felony Murder rule applies was left to juries, as exists in Nevada. "In my view, it is far preferable to do away with an irrational doctrine than to permit it to be applied in an irrational manner." Id, at 914.

The Supreme Court of Michigan tackled the question in People v. Aaron, 299 N.W. 2d 304 (1980). In an exhaustive recitation of the history of the felony murder rule, the Aaron court concluded that,

> Whatever reasons can be gleaned from the dubious origin of the felony-murder rule to explain its existence, those reasons no longer exist today. Indeed most states , including our own, have recognized the harshness and inequity of the rule as is evidenced by the numerous restrictions placed on it. The felony-murder doctrine is unnecessary and in many cases unjust in that it violates the basic premise of individual moral culpability upon which our criminal law is based.

Id. at 328.

In Michigan, at the time of the Aaron decision, felony murder was not codified for either first or second degree murder. In Nevada, felony murder is codified for first degree murder. Second degree felony murder is judicially-created. As the dissenting Justices in Morris urged, it is time to declare that the risk of "untoward" prosecutions is too great and that the legislature is the appropriate body to determine that elevation of the penalty for violation of Reckless Endangerment and Criminal Neglect of Patient statutes is one for the legislature, not the court, to decide.

C. APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED WHEN APPELLANT'S COUNSEL WAS PRECLUDED FROM CROSS-EXAMINING MEANA AND HIS DEPOSITION WAS ADMITTED AND WHEN THE CAUSE OF DEATH WAS ADMITTED THROUGH A DOCUMENT

1. Standard of Review

Whether a defendant's Confrontation Clause rights have been violated is "ultimately a question that must be reviewed de novo." Chavez v. State, 213 P.3d 476, 484 (Nev. 2009), quoting U.S. v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007).

Two events occurred during the trial that seriously violated Appellant's constitutional right to the confrontation of witnesses. First, the trial court admitted the deposition of Meana despite the fact that counsel for Appellant had been precluded from completing his cross-examination of Meana. Secondly, the trial court permitted Dr. Alane Olson to testify to the contents of an autopsy report prepared by a Medical Examiner in the Philippines who was not called to testify as to her findings.

2. The Deposition of Meana

On March 20, 2012, the trial court convened a videotaped deposition of Meana. App. Vol. 1, 91. The State completed its direct examination of Meana. On direct examination, Meana testified to his medical condition and to his

understanding of the fact that he had both kidney and liver failure, App. Vol. 1, 104, and that his treatment for hepatitis C had failed, App. Vol. 1, 103. He testified that before the colonoscopy, his health was "normal and strong" App. Vol. 1, 105. Counsel for Appellant began his cross-examination of Meana, commencing with a line of questioning related to his diagnosis and treatment for the infection. The deposition was stopped because Meana's doctor said he could not continue that day. App. Vol. 1, 110. The deposition was never rescheduled.

On March 7, 2013, the State filed a Motion to Use Reported Testimony, seeking to use the depositions of Carole Grueskin and Meana taken in a civil matter and the truncated deposition taken on March 20, 2012 in this matter. App. Vol. 2, 285. On March 25, 2013, Appellant opposed the State's motion and a hearing was held on March 26, 2013. The trial court granted the State's motion in part. The trial court ruled that the partial deposition of Meana was admissible but the two civil depositions would not be admitted. App. Vol. 2, 455. At trial, the court revisited the ruling and determined that the defendants could bring out any evidence that they were not able to elicit from Meana in cross-examination from other witnesses. App. Vol. 3, 600.

3. Philippine Documents Containing Opinions as to Cause of Death

Prior to trial, the State filed a Motion in Limine seeking a pretrial ruling that a death certificate, an autopsy report and medical records from the Philippines regarding Meana could be admitted. App. Vol. 2,450. The Motion ignored the confrontation rights of the defendants and based admissibility solely on hearsay exceptions. Appellant opposed the Motion. App. Vol. 2, 441. On March 21, 2013, the trial court ruled that the medical records would be admitted. The court denied the admission of a medical certificate generated at the request of Meana's family but conditionally admitted the death certificate containing a representation as to the cause of death. App. Vol. 2, 450. The court denied the State's motion to admit the autopsy report of the Philippine Medical Examiner.

At trial, the State called Dr. Alane Olson, a Medical Examiner with the Clark County Coroner's Office. She testified that she went to the Philippines solely to observe the autopsy of Meana and to collect samples for testing on her return to the United States. App. Vol. 37, 8630. She testified that she watched what the Phillipines Medical Examiner was doing and "talked briefly with her after the examination." Dr. Olson testified that the Philippine Medical Examiner "independently prepare[d] an autopsy report..." and that Dr. Olson had no input

into the report. App. Vol. 37, 8635. Despite the ruling of the trial court denying admissibility of the autopsy report, the prosecutor elicited findings from the report through this witness. She was asked to refer to the autopsy report of the Philippine doctor, Exhibit 19, to testify to the findings of the autopsy. App. Vol. 37, 8655. Dr. Olson then used the autopsy report to testify that Meana was positive for hepatitis C at the time of the autopsy. App. Vol. 37, 8657. Dr. Olson testified that she did not list a cause of death in her own report because she did not perform the autopsy. App. Vol. 37, 8658.

On cross-examination, Dr. Olson testified that there were two causes of death: chronic kidney disease, which existed prior to Meana's contraction of hepatitis C and liver failure. App. Vol. 37, 8661-8663. Dr. Olson said that the Philippine Medical Examiner must have reviewed records and spoken to Meana's family as the basis for her opinion that Meana had hepatitis C. App. Vol. 37, 8679. Dr. Olson admitted that her report was never intended to be a report supporting a determination of the cause of death and in fact, it was not her "intent or purpose to determine cause of death." App. Vol. 37, 8728-9. She was unable to testify whether he still had hepatitis C at the time of his death. App. Vol. 37, 8778.

Appellant's counsel moved to strike all of the records from the Philippines before completing cross-examination on the ground that admission would violate Appellant's confrontation rights. App. Vol. 37, 8687-903. The trial judge commented, [Dr. Olson] did view the autopsy, she can testify to the autopsy procedure. She did do her own examination of the liver, limited though it was, she did do something." App. Vol. 37, 8690. When the trial court suggested that Appellant's counsel could cross-examine Dr. Olson on what she saw when she attended the autopsy, he responded that he wanted to confront the witness who actually performed the autopsy. App. Vol. 37, 8698. Both Appellant's counsel and the trial judge were surprised that the Philippine Medical Examiner was not called as a witness. App. Vol. 37, 8700, 8761. The prosecutor admitted that he attempted to authenticate the records from the Philippines in order to "avoid bringing [the Medical Examiner from the Philippines]." App. Vol. 37, 8710. The trial court granted the motion to strike the Philippine autopsy report but denied the motion to strike the death certificate (Ex. 18, App. Vol. 23, 5337) and other medical records from the Philippines. App. Vol. 37, 8713. The trial court ruled, "So I think while there still may be a confrontation issue, I think certainly a lot of the information she's giving and her opinion is based on, in part, significant part I would say, her

own observations and her own conclusions based on those observations. App. Vol. 38, 8786.

4. Testimonial Statements are Inadmissible if the Defendant is Deprived of the Right to Cross-Examine

Testimonial statements of an unavailable witness are inadmissible unless the defendant had an opportunity to previously cross-examine the witness regarding the witness' statement. Crawford v. Washington, 124 S.Ct. 1354 (2004). There is no dispute here that the witness was unavailable for trial or that the statements of Meana made in the deposition are testimonial. The trial court's determination that Appellant's counsel could elicit any additional information he needed from other witnesses reflects a misunderstanding of a defendant's right to confrontation of witnesses secured by the U.S. Constitution.

A defendant is entitled to "an opportunity for...effective cross-examination" in order to satisfy his right to confrontation when testimony of an unavailable witness in a previous proceeding is sought to be admitted by the State. Chavez v. State, 213 P.3d 476, 484 (Nev. 2009). The issue of deprivation of an adequate opportunity to cross-examine has arisen in cases in which a witness who has testified at a preliminary hearing becomes unavailable for trial. In Chavez, at trial, the defendant sought to exclude the recorded preliminary hearing testimony of an

unavailable witness on confrontation grounds on the basis that there had not been an adequate opportunity to cross-examine the witness due to the nature of the preliminary hearing. This court rejected that argument and distinguished People v. Fry, 92 P.3d 970(Colo. 2004) and State v. Stuart, 695 N.W.2d 259 (Wis. 2005), holding that there is nothing in Nevada's law on preliminary hearings that would "hinder a defendant's opportunity to cross-examine a witness at a preliminary hearing." Chavez, Supra at 484. Here, adequate opportunity for cross-examination was precluded by the failure of the State, which sought to introduce Meana's recorded testimony, to reschedule the deposition. When the State was permitted to introduce the complete direct examination of the unavailable witness, Appellant's right to confrontation was violated.

5. Admissibility Pursuant to Hearsay Rules Does Not Render the Statements Non-Testimonial

The prosecutor admitted that he was attempting to avoid calling the Medical Examiner from the Philippines who performed the autopsy on Meana by seeking to admit the autopsy report, death certificate and medical records. The State's Motion in Limine and the trial court's ruling admitting the death certificate

prepared in the Philippines reflect a basic misunderstanding of the Crawford[17] decision. The prosecutor's use of Dr. Olson as a surrogate for the person who actually performed the autopsy is in direct contravention of previous decisions of this court and the United States Supreme Court.

The death certificate was admitted pursuant to NRS 51.155-Public Records and Reports. This is a hearsay exception and does not abrogate the right of a defendant to confrontation. Under Crawford, a statement is testimonial if it "would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Medina v. State, 143 P.3D 471, 476 (Nev. 2006). There is no real question that the statement of cause of death contained in the death certificate would be later used in a trial. The fact that the statement was contained in an official document does not render the statement non-testimonial.[18] There was no attempt to demonstrate that the declarant was unavailable and the State cannot contend that there was an opportunity to cross-examine the declarant.

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[17]Crawford v.Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed. 2d 177 (2004)

[18]The documents in the trial of Sir Walter Raleigh which formed the basis of Justice Scalia's Crawford analysis were all "official" documents.

The infringement on Appellant's constitutional right to confrontation was exacerbated by the prosecutor's violation of the trial court's previous ruling that the autopsy report was inadmissible. Because Dr. Olson did not perform the autopsy, was not tasked with making a determination of cause of death, and was unable to perform testing on the samples she collected, the prosecutor showed Dr. Olson the autopsy report and had her read from the findings. ROA 42-118. The trial court did order Exhibit 19 (the autopsy report) stricken, 42-194 but only after Dr. Olson had already read from it. The trial court merely told the jury to cross out any notes they may have made regarding the autopsy report and that the document would not be going to the jury room. Id. The trial court did not instruct the jury to disregard the testimony of Dr. Olson as to the contents of the report.

The State used the same witness to attempt to avoid the confrontation rights of the defendant in Conner v. State, 327 P.3d 503, 511 (Nev.2014). Although the confrontation issue was not reached, two concurring Justices would reject the State's argument that an autopsy report is not testimonial. Importantly, the concurring Justices noted that "the Sixth Amendment prohibits the State from introducing testimonial evidence through 'surrogate testimony.'" Id. Gibbons, J. and Saitta, J. Concurring.

6. The Confrontation Violation was Not Harmless

"When an error has been properly preserved for review, we traditionally review the prejudicial effects of a Crawford violation under a harmless-error analysis." Vega v. State, 236 P. 3d 632, 638 (Nev. 2010). The prosecutor elicited from Meana on direct that he was "normal and strong" before his colonoscopy procedure and counsel was precluded from cross-examining him on the inaccuracy of that statement. The curtailment of cross-examination of Meana precluded Appellant's counsel from adequately exploring the failure of Meana to accept treatment for the infection, and ultimately, could have been considered an intervening cause of death. Hepatitis C is treatable and not fatal in over 90% of cases. App. Vol. 14, 3241. In this case, the issue of intervening causation was not just a material factual issue on the element of cause of death. Because the prosecution chose to prosecute this case as a Second Degree Felony Murder, whether Meana's hepatitis C infection was the "direct and immediate" cause of his death--a different standard--was critical to the determination of whether this case was correctly prosecuted as a murder case and therefore, the violation of Appellant's constitutional right to confrontation cannot be considered harmless. Appellant has been sentenced to imprisonment for life based on the death of

Meana. As long as the prosecutor sought to introduce the testimony of Meana, Appellant was constitutionally entitled to cross-examine the decedent.

Admission of the cause of death through a death certificate prepared in the Philippines was not harmless. Appellant's counsel explained that the testimony of Dr. Olson could not suffice for the testimony and ability to cross-examine the person who actually performed the autopsy. He explained that although not asked to render an opinion as to cause of death at the time, her opinion at the time of trial was that the cause of death was liver failure. The death certificate contains a dual cause--kidney and liver failure. Because the State did not call the declarant on the death certificate or the autopsy report that Dr. Olson read from, he was unable to challenge her testimony based on those documents. App. Vol. 37, 8759. The admission of the death certificate without the opportunity to cross examine the declarant and the use of the "surrogate" witness to read the contents of an inadmissible document cannot be considered harmless.

D. THIS TRIAL WAS SO RIDDLED WITH PROSECUTORIAL MISCONDUCT THAT APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL

This was a high profile case which had already drawn intense public reaction over the course of over five years prior to the trial date, and the prosecutors set about to exploit the notorious nature of the case by further

inflaming the jury with prejudicial and irrelevant facts, deliberate misconduct and manipulated evidence. As a result of some of the more egregious incidents of misconduct, the court instructed the jury that misconduct had occurred, struck evidence and advised the jury that charts that had been introduced into evidence by the State were wrong. The nature and degree of misconduct so infected the proceedings that the conviction must be vacated to remedy the deprivation of Appellant's right to a fair trial. Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)(quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974).

This court engages in a two step analysis when considering a claim of prosecutorial misconduct: 1) the court must determine whether the prosecutor's conduct was improper; 2) if the court determines the conduct was improper, the court determines whether the improper conduct warrants reversal. Valdez v. State, 196 P.3d 465, 476 (Nev. 2008). To determine whether reversal is warranted, this court looks to whether the misconduct was of constitutional dimension. If it was, then the conviction will be reversed "unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." If the error is not

of constitutional dimension, then reversal is warranted only if the error substantially affects the jury's verdict. Id.

Irrelevant Allegations in the Indictment Resulting in Introduction of Inflammatory Evidence

The State deliberately loaded the Indictment with facts that the State knew were not material to the injury to the patients so that this immaterial, irrelevant and prejudicial information could be elicited from witnesses. Over a month of testimony was devoted to complaints about matters such as full waiting rooms, the cleaning of scopes, and the number of restrooms, but all the while the prosecutor knew that none of those things had anything to do with the issues before the jury-whether unsafe injection practices were used and if they were, whether Appellant knew about them and intended to bring them about. After two months of presenting inflammatory evidence, the prosecutor told the jury in Closing Argument:

> No one in this courtroom is on trial for not following the highest gold standards of the CDC. There was bad scheduling, there was bad charting, patients were rushed through that were [sic] not here because someone didn't get a blanket in recovery, that are not here because someone had to wait a long time before their procedure happened, and were [sic] not even here because of bad charting or bad care overall.

App. Vol. 39, 9247.

The prosecutor then proceeded to tell the jury that the real reason that the defendants were on trial was because seven individuals contracted hepatitis C. Id. On Day 37 of the trial, the State introduced Exhibit 228. App. Vol. 33, 7828. The exhibit was a chart listing all of the sources of the infection which the public health investigators had "ruled out" in the course of their investigation. The following sources or methods of transmission were ruled out: staff-to-patient, any individual physician, any individual CRNA, any technician, biopsy equipment, endoscopes, type of procedure, reuse of bite blocks and IV placement. The only source which was not ruled out was "sedation injection practices."

Despite its knowledge that the only source of infection not ruled out was unsafe injection practices, the State elicited a month of testimony about patient waiting time, App. Vol. 7, 1526, starting procedure before full sedation, App. Vol. 7, 1629, Vol. 15, 3520, App. Vol. 22, 5036, directions to limit KY jelly and tape, App. Vol. 7, 1674, App. Vol. 14, 3423, 2 App. Vol. 15, 3623, excessively fast removal of scopes, App. Vol. 7, 1689, App. Vol. 17, 4026, buckets of water for cleaning scopes and fecal material, App. Vol. 9, 2180, App. Vol. 10, 2241, App. Vol. 13, 2972, App. Vol. 15, 3487, App. Vol. 15, 3495, App. Vol. 15, 3537, App. Vol. 17, 3980, filling out charts early, App. Vol. 10, 2311, limitations on

gowns, App. Vol. 10, 2415, biopsy equipment, App. Vol. 14, 3426, 25-204, not enough bathrooms, App. Vol. 15, 3526, fecal material released when scope removed, App. Vol. 15, 3561, cutting up large pads to save supplies, App. Vol. 16, 3760, App. Vol. 16, 3872, re-use of bite blocks, App. Vol. 17, 4029, crowded waiting rooms, App. Vol. 21, 4876, patient modesty concerns, App. Vol. 22, 5018, and patients not given orange juice, App. Vol. 29, 6832.

So even though the State knew that it would argue to the jury in Closing Argument that none of those things were related to the transmission of the infection, almost a month of testimony was adduced to ensure that the jury despised Appellant when they heard the evidence which was relevant to the case. After days of the highly prejudicial evidence, Appellant's counsel asked the trial court to request the State to articulate its theory so appropriate objections to evidence could be made. The State did not respond before the judge stated her view: "the theory here is that the–that was just a manifestation of the overall view of Appellant with respect to patient care..." App. Vol. 13, 2992. Appellant's counsel stated, "the evidence is going to be the bite blocks had nothing to do with it. Cutting chux in half had nothing to do with it. So that atmosphere that comes in because of the way the indictment is written..." The trial court ruled that all of that

evidence was relevant to motive. App. Vol. 13, 2999. The State was not eliciting the testimony to show motive, rather, the State elicited the testimony to demonize Appellant and to obfuscate the lack of evidence of intent.

Improper Elicitation of Evidence

The State deliberately elicited testimony of privileged communications prompting a motion for mistrial and admonishment of the prosecutor by the trial court as to the lack of disclosure and the elicitation of the testimony, finding that the evidence was prejudicial. App. Vol. 15, 3677-79. In another instance, after telling Appellant's counsel that there would be no Bruton[19] issue in the testimony of a witness, the State elicited inadmissible testimony. App. Vol. 23, 5427. The trial court ruled, "I think the State acted improperly in eliciting the testimony." and admonished the jury to disregard the response of the witness. App. Vol. 23, 5434-5, 5446.

Evidence offered by the State and displayed to the jury was conceded to be inaccurate and misleading. For example, the trial court found that a chart prepared by and testified to by the State's lead financial forensic expert, Nancy Sampson of

[19]Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620. 20 L.Ed. 2d 476 (1968)(admission of co-defendant's statement which implicates defendant at joint trial, violates right to confrontation).

the Las Vegas Metropolitan Police Department, resulted from a flawed analysis and was wrong. App. Vol. 27, 6246. The chart was introduced to show that ECSN had not ordered enough vials of propofol to cover the patients served. Detective Whiteley, however, admitted that the chart prepared by Sampson, did not include at least 2700 vials which were reflected in the documents that were in the possession of the State. App. Vol 36, 8529. The court ruled that Sampson's analysis was flawed and that she did not have the medical expertise to draw the conclusion she made. App. Vol. 27, 6246.

In another instance, the prosecutor, utilizing orders of propofol by the Centers, elicited agreement from Jeff Krueger that the cost per unit of propofol was less if larger vials were ordered. App. Vol. 30, 6948. Because of the "paucity" in the trial court's words, of proof of direct involvement by Appellant, the prosecutor was using the price comparison to show a profit motive. The problem is that the comparison was false and misleading because the prosecutor was comparing orders from two different time periods. The defense created an accurate chart conclusively demonstrating that the State was bench marking the price of propofol against orders placed on different dates, as opposed to the same date, and that if the orders were placed on the same date, the price per cc in a 50cc

vial was exactly the same price per cc in a 20 cc vial. Exhibit W1. Supp. App., 5-6[20].

As a result of the misleading testimony of Sampson with regard to the propofol orders, the court asked if the defense wanted an instruction directing the jury to disregard that portion of her testimony. App. Vol. 28, 6449. When the prosecutor once again began eliciting inadmissible testimony, the court warned, "I just want to be clear on this, because we've had this issue twice, the Bruton problem. We've had this last thing with the federal indictment. ....I don't want these issues cropping up again and again, because at some point in time it's cumulative, Mr. Staudaher." App. Vol. 29, 6804. Because of the misleading nature of the chart prepared by Nancy Sampson, the court agreed to give an instruction to the jury about the chart, because it had already been admitted into evidence. App. Vol. 30, 6917.

During its presentation on the fraud allegations, the State repeatedly produced documents for testimony from records custodians that were not part of the custodian's file. On Day 38, the trial court commented that, "Right now [the

[20] References to "Supp. App." are citations to the Supplemental Appendix filed simultaneously with this brief.

State's theory] is not making a lot of sense, and frankly I don't know why you're handing [a records custodian] a document when the Court says, Well, where did this document come from that you are testifying about? Basically she says I don't know."App. Vol. 34, 7869

Threatening of Witness

The State engaged in strong-arm tactics to get a witness to conform his testimony to the State's position by going so far as approaching the witness' attorney to convey the State's disapproval with the witness' testimony while he was still on the stand and threatening to undo the witness' negotiated plea. Mathahs did not testify the way the State wanted him to because he refused to say that he had been directed by Appellant to utilize unsafe injection practices. So, the prosecutor went to the witness' lawyer in the middle of this testimony and told the lawyer that the witness was in breach of his plea agreement because of his sworn testimony. App. Vol. 8, 1836. The State's approach to Mathahs' attorney occurred before a lunch recess and the witness' testimony was continued after the lunch recess. After this recess, the witness backtracked on his own testimony from earlier in the day. Although the trial court ruled that the prosecutor's conduct was inappropriate, it found that because the witness didn't hear the threat

communicated to his counsel, the threat did not rise to the level of misconduct. App. Vol. 8, 1841. The misconduct occurred when the threat was made.

Deliberate Elicitation of Inadmissible Evidence of Pending Federal Indictment

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

MR. STAUDAHER:

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

App. Vol. 28, 6614.

At that point, Appellant's counsel asked to approach the bench and the court excused the jury. Appellant's counsel moved for a mistrial. App. Vol. 28, 6615 et. seq. The court found that the prosecutor's line of questioning, and specifically the question designed to implicate Appellant constituted misconduct.

Instead of granting a mistrial, the trial court decided to further "ring the bell"and to instruct the jury that the fact of a pending federal indictment should not be considered. The court did instruct the jury that the prosecutor had committed misconduct but gave the jury no guidance as to what they should do with that fact. App. Vol. 29, 6682. The court instructed the jury that the question by the prosecutor was "improper and constituted prosecutorial misconduct." App. Vol. 29, 6696.

The trial record demonstrates that the prosecutorial misconduct in this case was not an isolated instance or an inadvertent misstep which could have been mitigated with curative instructions. Rather, the prosecutors knew long before trial that they did not intend to prove that any injury to patients was caused by cleaning procedures, bite block reuse, biopsy equipment, full waiting rooms or the time it took to perform a procedure. Yet day after day of irrelevant testimony was used to inflame the jury and to demonize Appellant. The conduct was deliberate and designed to deprive Appellant of a fair trial. The prosecutor knew that the pendency of a federal charges against Appellant was not admissible. Yet he deliberately elicited Appellant's inclusion in the federal charges from Tonya Rushing. The State wanted to argue to the jury that Appellant was greedy and

ordered larger vials of propofol because he was motivated by profit so the prosecutor placed documents before Jeff Krueger and asked him to agree that purchasing larger vials of propofol instead of smaller vials would increase profits, despite the truth that the cost per unit was exactly the same. Nancy Sampson of the Metropolitan Police Department, created a chart to show that the number of vials of propofol ordered was not sufficient to safely serve the patients. The chart was deemed "inaccurate" by the detective on the case and the court instructed the jury that the chart lacked foundation and was wrong. The State's witness, Detective Whiteley, who was seated at the State's table during the entirety of the trial and had the access and opportunity to inform the State, knew that this chart was wrong and only conceded this after persistent questioning by defense counsel.

The pervasive misconduct throughout the course of the trial was of constitutional dimension. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." Kelly v. State, 837 P.2d 416, 425 (1992). Three factors are considered in evaluating claims of cumulative error: 1) whether the issue of guilt is close; 2) the quantity and character of the error; 3) the gravity of the crime charged. Valdez, Supra, at 481.

The issue of guilt in this case is close. The court, at sentencing, commented that "... while there was a **paucity** of direct evidence showing that Dr. Desai told someone reuse those syringes, do it this way..." (emphasis added) App. Vol. 41, 9567. Additionally, the lack of any evidence of Appellant's direct involvement in the acts that resulted in the transmission of the infection created a close case. The quantity of instances of misconduct was high; the character of the misconduct was such that the court had to instruct the jury on one occasion that the prosecutor was guilty of misconduct. The case is grave. Appellant, who suffers from serious medical problems, has been sentenced to life in prison. All of the factors weigh in favor of vacating the conviction.

E. UNREFUTED EVIDENCE THAT APPELLANT HAD SUFFERED A SERIES OF STROKES SINCE THE PREVIOUS COMPETENCY EVALUATION AND WOULD NOT RETURN TO HIS PRE-STROKE CONDITION FOR 9-18 MONTHS, WITH COGNITIVE THERAPY, CREATED A DOUBT ABOUT HIS COMPETENCY AND A COMPETENCY EVALUATION AND HEARING WERE REQUIRED

On April 22, 2013, Appellant filed a Petition for Writ of Mandamus to Compel Competency Determination in this court in Appeal No. 63046. This court ordered an Answer to the Petition and on April 29, 2013, this court denied the Petition (Cherry, J. dissenting) and denied a stay of the trial. This court

determined that Appellant had not met the high threshold required of an extraordinary writ. The dissenting Justice would have required the district court to hold a hearing to allow Appellant to present evidence on the extent to which he suffered from aphasia and allow for a fully-informed determination of his competency at the time of trial which began as scheduled on April 22, 2013. The issue raised in this direct appeal is whether the trial court abused its discretion in ruling that unrefuted evidence of a new series of strokes since the prior competency evaluation, evidence of communication and comprehension impediments from Appellant's counsel and his treating neurologist, and findings of a court-appointed doctor that recovery to Appellant's pre-stroke condition would take 9-18 months after cognitive therapy were not sufficient to create a reasonable doubt about Appellant's competency at the time of trial.

1. History of Competency Proceedings

Approximately two years prior to the filing of the first Indictment, Appellant suffered an acute stroke on July 13, 2008, which resulted in his hospitalization and rehabilitative treatment at the University of California Los Angeles Medical Center. He previously suffered a stroke in September, 2007 and has a history of heart problems. Sealed App., p. 41-43 (filed under seal), Supp.

App. 1-4. In 2009, Appellant suffered another neurological episode referred to as a transient ischemic attack (commonly referred to as a mini-stroke) which required hospitalization. Appellant's pertinent medical history and competency evaluations are summarized in the Independent Medical Evaluation prepared by David Palestrant, M.D.

Soon after the original indictment, on July 21, 2010, the trial court granted the State's unopposed motion to refer Appellant to competency court for evaluation pursuant to NRS 178.415. App. Vol. 1, 85-86. Two court-appointed experts, Michael Krelstein, M.D., a forensic psychiatrist, and Shera Bradley, Ph.D., a psychologist, evaluated Appellant. Both determined that Appellant was incompetent and recommended admission to Lake's Crossing for aggressive treatment and comprehensive cognitive testing. On February 8, 2011, competency court found that Appellant was presently incompetent and ordered him to be transported to Lake's Crossing for evaluation and restoration under NRS 178.425 App. Vol. 1, 87. Appellant remained at Lake's Crossing from March, 2011 until October, 2011. The determination of Lake's Crossing that Appellant was competent was based in large part upon his ability to adequately function in the

institutional setting and the perceived exaggeration of his cognitive deficiencies during psychological testing.

Appellant sought a hearing to challenge the competency finding but the trial court restricted the hearing to cross-examination of the Lake's Crossing evaluators and the presentation of evidence of any evaluations after Appellant's return from Lake's Crossing. An extraordinary writ was filed in this court in Appeal No. 60038. By order dated January 24, 2012, this court denied the petition, holding that the lower court did not abuse its discretion in limiting the scope of a hearing pursuant to NRS 178.460. This court noted, however, that Appellant could obtain a broader inquiry into his present competency if a new motion showed sufficient doubt as to his competency based upon subsequent interactions and evaluations pursuant to NRS 178.405 and 178.415. The trial court held the truncated hearing and found that Appellant was competent. The court also found that the medical professionals from Lake's Crossing did not dispute that Appellant suffered cognitive deficiencies secondary to two strokes. However, they concluded that he was exaggerating his deficiencies..

On December 12, 2012, Appellant moved for a competency evaluation by the competency court based upon an evaluation performed by Dr. Thomas Bittker,

a forensic neuropsychiatrist and on representations made by Appellant's counsel with regard to the difficulties he was having in enabling his client to assist counsel.. Dr. Bittker concluded that Appellant was not competent.. On January 8, 2013, a hearing was held on that motion before the trial judge, who denied a competency evaluation on the ground that no information, which was new or different from the information considered by Lake's Crossing had been offered. App. Vol. 1, 244. The trial judge ruled that despite Dr. Bittker's recent determination of lack of competency and the deficiencies reported by Appellant's counsel, she would not find that a doubt as to competency existed absent medical evidence showing a change in Appellant's condition. The trial court explained:

> The way I read NRS 178.40[5], if doubt arises, that means there has to be at least some threshold finding that there is doubt, and who has to find doubt. . . There has to be a finding, and I find that there is no evidence that anything has changed. There's no new, you know, objective diagnostics as Mr. Staudaher has pointed out.
>
> You know, **if there had been a new stroke**, if there had even been a major medical event, open-heart surgery or something like that where you could say, well, maybe that's something that could have, you know, a diabetic emergency where we had something linking some kind of, you know, **extreme medical event to cognitive decline**, I would say, well, okay, we need to visit this. We need to evaluate this. There's something here. But there's no evidence of that. There's no evidence of any change. There's no evidence that there's anything different than what led Dr. Desai to be in front of

Judge Glass, however long ago that was, and then to be sent to Lake's Crossing.

App. Vol. 1, 244. (emphasis added)

2. Appellant Suffers a New New Series of Strokes and an Independent Medical Examiner is Appointed

On February 24, 2013, Appellant suffered another series of strokes. He was hospitalized, placed in the Intensive Care Unit and discharged on March 1, 2013. The trial court was advised that neurological imaging and testing confirmed that Appellant suffered acute multi-focal infarction. Counsel for Appellant reported that Appellant was unable to form recognizable words when attempting to communicate with counsel. Supp. App. 1. Additional evidence before the court was a letter from Appellant's treating neurologist which described the effects of the series of strokes: "The multifocal ischemic stroke in the left cerebral hemisphere . . . had caused him to be confused, disoriented, and has expressive language problems, with left arm and leg weakness." App. Vol. 2, 417, Supp. App. 3-4. Based on this evidence, the trial court appointed an Independent Medical Examiner to review the medical records of the latest series of strokes to determine if new information on competency should be considered. App. Vol. 2, 414-417. Dr David Palestrant was appointed to review the medical records to "...determine the nature and extent of any changes to Desai's brain from the date of his release

from Lake's Crossing on or about October 7, 2011, to the date upon which he was released from Summerlin Hospital on March 1, 2013." Dr. Palestrant was not appointed to examine or evaluate Appellant. His inquiry was limited to a review of the records. App. Vol. 2, 446

After a review of the records, Dr. Palestrant confirmed that on February 24, 2013, Appellant suffered "multiple small left hemispheric stroke involving the frontal, partial, occipital and temporal regions." Sealed App., p. 58. The new series of strokes resulted in both expressive and receptive aphasia. Sealed App., p. 66. The IME defined "aphasia as "the term used to describe a neurologic disturbance of speech, and encompasses both the ability to produce and understand speech." Receptive aphasia[21] involves "difficulty with comprehension." Sealed App., p. 59.

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[21] "Aphasia" is either the partial or complete loss of language. David C. Tanner, *Forensic Aspects of Communications Sciences and Disorders*, 22-23, (Lawyers & Judges Publishing Comp. 2003). Most types of aphasia are classified between two types of communication disorders: "The expressive disorders affect speaking, writing, and using expressive gestures. The receptive disorders affect reading and understanding the speech and gestures of others." Id. at 23. "Receptive language impairment can significantly impede the patient's comprehension of legal and medical issues." Id. at 57. "Verbal paraphasias are common word-retrieval behaviors in aphasic patients." This means that the aphasic patient may use a different word than desired, such as saying "yes" when the desired word is "no," or saying "up" instead of "down." Id. at 56-57.

Although he had not met with Appellant and his inquiry was limited to a records review, Dr. Palestrant concluded that it would take time and therapy before Appellant would return to his pre-stroke level. He stated, "[m]ost of his gains in neurologic function will be seen in the first 9 months, but full recovery can take up to 18 months" with cognitive therapy. Dr. Palestrant admitted, though, that it was "unclear at this point" whether Appellant would return to his previous level of functioning. Sealed App., p. 66.

3. The Court Refuses to Hear Evidence on Competency

At the calendar call on April 16, 2013, the trial court stated that it reviewed Dr. Palestrant's report and concluded that Appellant had "a minor stroke" despite the fact that the IME did not evaluate Appellant or indicate that Appellant's series of strokes were "minor" in his report. The trial court determined that postponement of the trial for a competency evaluation was unwarranted. It interpreted Dr. Palestrant's report to mean that Appellant may have difficulty expressing himself and, therefore, it would make reasonable accommodations for counsel to communicate with Appellant. The judge suggested that "there are other ways of communicating" and counsel and Appellant could communicate by handwriting, texting, or typing on a laptop. App. Vol. 2, 458. Counsel for

Appellant attempted to explain to the judge that the difficulties he was having in receiving assistance from his client were not limited to mere difficulties in expression. The difficulties included Appellant's difficulty in finding words, in processing information and in recall.

Counsel for Appellant renewed the motion for a competency evaluation, and requested an evidentiary hearing so that the impact of expressive and receptive aphasia on the ability to assist counsel could be considered by the court before ruling. App. Vol. 2, 466-7, 477-8. Additionally, Appellant's counsel described his interactions with Appellant following the new series of strokes. While visiting him in the hospital, Appellant made only indiscernible sounds. He explained that Appellant continued to participate in speech therapy, as directed by his doctor, and his speech has improved. However, Appellant's receptive and expressive aphasia still presented a significant barrier to attorney-client communications. Appellant's counsel explained that he had prior experience interacting with people who suffered strokes, such as his former law partner, who struggled with aphasia. Counsel perceived that Appellant genuinely agonized and struggled to communicate with him. App. Vol. 2, 467.

To demonstrate the difficulty in attorney-client communications, Appellant's counsel described his attempts to interact with his client on the morning of the calendar call. Because Appellant's speech was significantly impaired, Appellant's counsel attempted to communicate by handwriting trying to elicit simple facts from Appellant such as the date, his age, the name of his therapist, and the names of doctors with whom he worked. It took 20 minutes for the Appellant to produce answers to these questions and the answers were incorrect and rudimentary. Appellant's counsel introduced into evidence Appellant's handwritten answers. Counsel also was unable to communicate effectively with the Appellant regarding three witnesses that the State identified in its motion to admit prior bad acts. Appellant's counsel offered to take the witness stand to be subjected to cross-examination regarding his observations, but the State declined the offer. App. Vol. 2, 485-6, 493. Defense counsel introduced a sheet of paper showing the crude handwritten responses given by Appellant utilizing the judge's suggested "other ways of communicating." App. Vol. 2, 497.

The trial court denied a motion for a competency evaluation and for a hearing and for a stay of the trial .App. Vol. 2, 486. On April 22, 2013, Appellant

sought relief in this court via an extraordinary writ in Appeal No. 63046. This court held that,

> [a]lthough it may have been reasonable to grant defense counsel's request for an evidentiary hearing to clarify the opinions in the IME report as to the extent of Desai's current aphasia, we are not convinced that the district court's contrary decision amounts to manifest abuse or arbitrary and capricious exercise of discretion.

Order in Desai, No. 63046, *4.

4. Appellant's Counsel Struggled Throughout the Trial With his Client's Limitations

Appellant's counsel, after the jury was selected and before the taking of evidence, described the difficulties he was having in communicating and advising his client. During jury selection, the trial court allowed counsel to confer with his client in a separate room. Appellant's counsel told the trial court that Appellant was better in the morning but the exchange still "was labored. It takes time, but it gets there and sometimes it's almost like pantomime and there are words that are mixed up, like double-negatives and things where I miscommunicated with him, but communicated with him and I believe I got it straight."App. Vol. 3, 540. Appellant's counsel explained that Appellant would mix up words, had difficulty recalling things that had happened that day. Appellant's counsel told the court that after a full day in court, his client was unable to consult with him, 7-39 Citing to

the accommodations made by the trial court described in People v. Phillips, 948 N.E.2d 428, 446, f.n.1 (N.Y. App. 2011), Appellant's counsel requested the following accommodations: 4 day trial week, shortened trial day to permit counsel to confer with client in the afternoon, frequent breaks to allow counsel to confer with his client, disclosure of discovery in advance of any use, direction to attorneys to structure questions to elicit "short, unlayered responses," daily transcripts. App. Vol. 3, 541-545. The court permitted the defense to order partial daily transcripts at defense expense. App. Vol. 3, 585. The trial court denied the request for a shortened trial day, App. Vol. 3, 570, but stated that requests could be made as the trial progressed, App. Vol. 3, 581. The court then scheduled 6 hour trial days. App. Vol. 3, 620.

On Day 9 of the trial, counsel for Appellant reported that he had been unable to consult with his client after a full trial day. He explained that the problem wasn't merely exhaustion but that it took so long to communicate with him due to his condition. App. Vol. 5, 1002-1010. The day after the testimony of a patient who recounted a conversation with Appellant, counsel for Appellant explained that his client was unable to recall the testimony from the day before and confused the testimony of the witnesses. As a result, Appellant's counsel

forewent cross-examination on that issue. App. Vol.6, 1301-1304. On Day 15 of the trial, counsel for Appellant reported that Appellant was unable to recall a meeting with Dr. Herrero which was the subject of testimony. App. Vol. 11, 2492.

While the court made some accommodations (breaks on request, longer lunch hours), those accommodations could not ameliorate the speech, comprehension, and memory difficulties which severely impacted the ability of Appellant to assist his counsel in representing him at trial.

5. Due Process Requires that a Hearing be Held When **Any** Evidence Raises a Reasonable Doubt as to a Defendant's Competency

When a reasonable doubt as to a defendant's competency exists, the failure to order a competency evaluation constitutes an abuse of discretion and a denial of due process. *See* Ford v. State, 717 P.2d 27, 31-32 (1986); Melchor-Gloria v. State, 660 P.2d 109, 113 (1983). The court-appointed evaluator's conclusion that Appellant suffered strokes resulting in expressive and receptive aphasia and counsel's interactions with Appellant cast substantial doubt upon his competency sufficient to trigger the due process protections of NRS 178.405 and 178.415. In keeping with this court's observations in the instant case, these doubts about competency merit a broader inquiry:

> We note that any motion challenging Appellant's present competency (based on interactions and evaluations since his return from Lake's Crossing) would require a broader inquiry should the motion create sufficient doubt as to Appellant's competency to stand trial to warrant such an inquiry. See [State v. Fergusen, 124 Nev. 795, 805, 192 P.3d 712, 719 (2008)], Morales v. State, 116 Nev. 19, 22, 922 P.2d 252, 254 (2000); NRS 178.405; NRS 178.415. But that inquiry is not part of the proceedings under NRS 178.460.

Order in Desai, No. 60038, *2, n. 1.

The trial court, instead of allowing evidence on the limitations created by the aphasia which the IME confirmed, decided the issue without allowing evidence on the issue. The decision that there was no doubt raised was made despite the following evidence: (1) the IME's confirmation that Appellant suffered new multifocal strokes in February 2013, resulting in both expressive and receptive aphasia; (2) the IME opinion that Appellant's recovery time could extend 9-18 months after cognitive therapy; (3) the IME's conclusion that the 2008 stroke likely caused retrograde amnesia for a period of up to two years prior to that stoke; (4) Dr. Bittker's post-Lake's Crossing finding that Appellant was incompetent; and (5) Appellant's counsel's representation describing the inability to effectively communicate with Appellant due to the effects of the strokes.

Under Nevada's competency procedures, if any "doubt arises as to the competence of the defendant, the court shall suspend the proceedings, the trial or

the pronouncing of the judgment, as the case may be, until the question of competence is determined." NRS 178.405(1). The court must fully consider the doubt in light of "all available information, including any prior competency reports and any new information calling the defendant's competency into question." State v. Olivares, 124 Nev. 1442, 1149, 195 P.3d 864, 868 (2008).

Although the trial court has discretion in considering the sufficiency of doubt, its discretion is restrained. This court addressed the reasonable doubt standard applicable to the decision to more fully evaluate a defendant's ability to assist counsel:

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

Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113, quoting, Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972). [Citations omitted and emphasis added.]

The above-quoted rule was derived from federal precedent in Moore and Pate v. Robinson, 383 U.S. 375 (1966). In discerning the existence of reasonable doubt about competency, the trial court should merely make a threshold finding rather than determine the ultimate issue of competency without the required evaluation and due process. The Ninth Circuit explained:

> The function of the trial court in applying *Pate's* substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? *[It's] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency*. . . . It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.

Moore, 464 F.2d at 666. [Emphasis added.]

Here, undisputed facts showed that Appellant suffered a new series of strokes two months prior to the scheduled trial resulting in confinement in the Intensive Care Unit, that those strokes resulted in communication and comprehension problems that affected Appellant's ability to communicate and understand his attorney and that recovery to pre-stroke condition would take 9-18 months after receiving appropriate cognitive therapy. There were no disputed facts for the trial court to resolve in order to find that a reasonable doubt existed as to

Appellant's competency. The court instead made the determination without the process which is due under Nevada statute and the U.S. Constitution.

F. THE ENDANGERMENT CRIMES ARE LESSER INCLUDED OFFENSES OF SECOND DEGREE FELONY MURDER AND THEREFORE IF THE MURDER CONVICTION STANDS, THE CONVICTIONS ON THOSE CRIMES MUST BE VACATED

1. Standard of Review

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

_____

To determine whether Appellant can be convicted of the crimes of Reckless Endangerment and Criminal Patient Neglect and also for Second Degree Felony

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

In Athey v. State, 797 P.2d 956, 958 (Nev. 1990), the court looked to the evidence presented in the case and determined that the same act of child abuse constituted the basis for both the child abuse conviction and the murder conviction, finding that the "first degree murder could not have been committed in this case absent the commission of felony child abuse and therefore the two convictions are based on the same offense." Id.

Here, the State's theory was that the death of Meana would not have resulted absent the unsafe injection practices employed by Lakeman and Mathahs. The first part of the test has been met.

The statutes at issue reflect a legislative intent that the punishment should not be cumulative. NRS 202.595(Reckless Endangerment) provides:

> Unless a greater penalty is otherwise provided by statute, a person who performs any act or neglects any duty imposed by law in willful or wanton disregard of the safety of persons or property shall be

punished....[setting forth misdemeanor and felony penalties based on the degree of harm].

Similar language appears in the Criminal Neglect of Patient statute (NRS 200.495):

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...
...
2. Unless a more severe penalty is prescribed by law for the act or omission which brings about the neglect...[setting forth felony and misdemeanor penalties based on the injury].

Because the plain language of the statutes provides that the statutory penalties are not to be imposed if a more severe penalty is applicable, convictions on both the Endangerment crimes and Second Degree Murder are barred by the prohibition against double jeopardy.

CONCLUSION

The proceedings in this case have produced an unusually large number of uncommon and complicated issues implicating fundamental concepts of accessory liability and theories of "transferred intent" in criminal cases. The reason that this large number of issues arise in this case is that the State, in order to secure what it believed to be just punishment-life in prison-had to be creative. Creativity in the prosecution of crime is dangerous as it necessarily suggests that the boundaries for conduct will not be clear until they are interpreted by a court. Here, the

requirements of criminal intent were deliberately muddled in order to create a kind of criminal vicarious strict liability. The creation of an "atmosphere" in which employees might make mistakes is not contemplated by Nevada's criminal law. This court has consistently warned that limitations are necessary in order to protect against "untoward" prosecutions in the judicially-created crime of Second Degree Felony Murder. This was an "untoward" prosecution; this court must intervene.

Dated this 29th day of September, 2014.

Respectfully submitted,

LAW OFFICE OF FRANNY FORSMAN

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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with this Court's procedural Order of September 25, 2014.

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

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. . .

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

Dated this 29th day of September, 2014.

Respectfully submitted,

/s/ Franny A. Forsman
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CERTIFICATE OF SERVICE

I hereby certify this document was filed electronically with the Nevada Supreme Court on September 29, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven S. Owens
Chief Deputy District Attorney

Catherine Cortez-Masto, Attorney General
State of Nevada

Dated this 29th day of September, 2014

FRANNY A. FORSMAN, ESQ.

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EXHIBIT 1

SUMMARY OF FIFTH AMENDED INDICTMENT

COUNT	CRIME	SUMMARY OF ALLEGATIONS
1	Insurance Fraud	Insurance claim that concealed or omitted facts or contained false or misleading information re: anesthesia time for Sharrieff Ziyad. Theories of liability: 1) directly committing acts; 2) aiding and abetting; 3) conspiracy.
2	Reckless Disregard of Persons/Property	Introduction of contaminated medical instruments, supplies or drugs into Michael Washington. Theories of liability: 1) directly committing acts; 2) aiding and abetting by inducing others to "utilize a patient care delivery system" which "directly or indirectly limited" the use of medical instruments, supplies or drugs, treated too many patients per day "with the intent to commit the crime in order to increase" profit. Theory of liability as to Desai: "directly or indirectly both instructed Defendant Lakeman, and Keith Mathas and said others to perform said acts and created a work environment where Defendant Lakeman, and Keith Mathas and others were pressured to commit the said acts." Conduct of Lakeman "allowed Defendant Desai to directly or indirectly treat and/or perform an unreasonable number of patient procedures in a single day at the expense of patient safety and well being, and which resulted in substandard care and jeopardized the safety of Michael Washington, 3) conspiracy
3	Criminal Neglect of Patient	Failure to provide service by a caretaker "as is reasonable and necessary to maintain the health or safety of Michael Washington, resulting in substantial bodily harm, the acts being a departure from the conduct of an "ordinarily prudent person contrary to proper regard for danger to human life or indifference to foreseeable consequences. Theories of liability: 1) directly committing the acts; 2) aiding and abetting [see language in Count 2 above]; 3) conspiracy.
4	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Michael Washington to the Veterans Administration
5	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Kenneth Rubino to Blue Cross/Blue Shield
6	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Stacy Hutchison

7	Criminal Neglect of Patient	[See language in Count 3 above] as to Stacy Hutchison
8	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Stacy Hutchison to Health Plan of Nevada
9	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Rodolfo Meana
10	Criminal Neglect of Patient	[See language in Count 3 above] as to Rodolfo Meana
11	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Rodolfo Meana to Pacificare
12	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Patty Aspinwall
13	Criminal Neglect of Patient	[See language in Count 3 above] as to Patty Aspinwall
14	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Patty Aspinwall to Blue Cross/Blue Shield
15	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Patty Aspinwall to United Health Care Services
16	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Sonia Orellana-Rivera
17	Criminal Neglect of Patient	[See language in Count 3 above] as to Sonia Orellana-Rivera
18	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Sonia Orellana-Rivera to Culinary Workers Health Fund
19	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Carole Grueskin

20	Criminal Neglect of Patient	[See language in Count 3 above] as to Carole Grueskin
21	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Carole Grueskin to Health Plan of Nevada
22	Reckless Disregard of Persons/Property	[See language in Count 2 above] as to Gwendolyn Martin
23	Criminal Neglect of Patient	[See language in Count 3 above] as to Gwendolyn Martin
24	Insurance Fraud	[See language in Count 1 above] Claim as to anesthesia time for Gwendolyn Martin to Pacificare
25	Theft	Theft of $250 or more by "material misrepresentation from Stacy Hutchison, Kenneth Rubino, Patty Aspinwall, Sharrieff Ziyad, Michael Washington, Carole Grueskin, Rodolfo Meana, Blue Cross/Blue Shield, HPN, United Health Services, VA and Secured Horizons. Theories of liability: 1) directly committing acts; 2) aiding and abetting; 3) conspiracy
26	Obtaining Money Under False Pretenses	Obtaining $250 or more with intent to cheat and defraud from Gwendolyn Martin and/or Pacificare. Theories of liability: 1) directly committing acts; 2) aiding and abetting; 3) conspiracy
27	Obtaining Money Under False Pretenses	Obtaining $250 or more with intent to cheat and defraud from Sonia Orellana-Rivera and/or Culinary Workers Health Fund. Theories of liability: 1) directly committing acts; 2) aiding and abetting; 3) conspiracy
28	Second Degree Murder	Willful and malicious killing of Rodolfo Meana. Theories of liability: 1) abandoned and malignant heart; 2) Second Degree Felony Murder: a) reckless disregard by I) directly committing reckless disregard or criminal neglect of patients, or ii) by inducing others to utilize a patient delivery care system which directly or indirectly limited the use of medical instruments etc. resulting in substandard care or jeopardized safety; iii) conspiracy to commit criminal neglect of patients or reckless disregard.

EXHIBIT 2

WHAT INJECTION PRACTICES ARE SAFE?

A Summary of Witness Testimony on the Practices Employed by the CRNAs at ECSN

Thomas Yee	anesthesiologist	"[using same needle and syringe multiple times on] same patient acceptable...different patient unacceptable." No risk to a patient if a syringe is re-used on same patient. App. Vol. 7, 1496.
Keith Mathahs	CRNA 40 years, Mayo-Clinic trained, at Center since 2003	"Common practice [to save remaining propofol to use on next patient-instructed by Desai]"App. Vol. 7, 1691. Common practice to re-enter vial with sterile needle to re-dose patient. App. Vol. 7, 1693. Same procedure "widely used" in other facilities in Las Vegas. App. Vol. 8, 1773. Believed he was using "safe and aseptic" practices." App. Vol. 8, 1825.
Dr. Carmelo Herrero	M.D. -became partner in gastroenterology clinic in 1998.	"There is a very legitimate safe way to use these large vials on multiple patients." App. Vol. 9, 2024. "[W]e all know from medical school...if you have a large vial, as long as you withdraw from that vial with a new set of needles and syringes, that vial will never be contaminated or cross-contaminated." App. Vol. 9, 2024, App. Vol. 10, 2359. [Lakeman's] practices comported with "reasonably medically safe practices." App. Vol. 9, 2040. 50 cc vials used on multiple patients was "common practice" at "both hospitals" and other facilities. App. Vol. 10, 2404-5.
Dr. Satish Sharma	M.D.-anesthesiologist	A vial can be used on more than one patient as long as "a clean syringe and a clean needle [is used] each time you entered the vial..." App. Vol. 9, 2138.
Johnna Irbin	LPN-employed at Center from 10/06 to 2/2010	Never saw "anybody jeopardize somebody's life." App. Vol. 10, 2321.
Dr. Clifford Carroll	MD-partner in Center since 1997	Did not know that propofol vial was only to be used on one patient until after investigation. App. Vol. 12, 2764-65.

Vishvinder Sharma	MD-partner in Center since 1994-Member, State Bd. of Health	Prior to investigation, he had "no knowledge that using a propofol vial between more than one patient was not allowed." App. Vol. 18, 3109. Never saw Lakeman "do anything medically that would jeopardize the safety of a patient." App. Vol. 18, 3127.
Lisa Falzone	RN- 22years,	Thought that propofol vial was multi-use. App. Vol. 14, 3419.
Eladio Carrera	MD-partner at Center since 1990	"Any multi-use vial can be used on more than one patient as long as aseptic technique is adhered to...it would be fine if new needle, new syringe is used each time you're entering the vial." App. Vol. 16, 3765.
Vincent Mione	CRNA since 1965, at Center from 2003-2008	He practiced what he believed to be aseptic technique. App. Vol. 18, 4337. Because the large vials came with a "spike" that meant "you'd be drawing more than one time from...the large vial." App. Vol. 18, 4350. Mione believed that he was using "universal precautions" App. Vol. 20, 4525.
Ralph McDowell	CRNA since 1967, at Center from 2002-2008	As long as vial was not contaminated, and the needles and syringes were sterile, no need to throw away unused propofol. App. Vol. 20, 4616-4617. Injection practices at Center same as practices that he used when he worked in hospitals. App. Vol. 20, 4636. He did not change any practices when he was told to conserve propofol. App. Vol. 21, 4777.
Vincent Sagendorf	CRNA for 43 years, at Center 2007-2008	He is trained in "universal precautions and aseptic technique;" he used propofol vials on more than one patient but no re-entry of vial with same syringe. App. Vol. 22, 5043. Had used same techniques since 1970. App. Vol. 22, 5061. Techniques at the Center were no different than techniques used throughout his career. App. Vol. 22, 5076.

Linda Hubbard	CRNA for 30 years, at Center 2005-2008	Safe to use vial on multiple patients "when it's drawn under sterile conditions with clean needles and clean syringes." App. Vol. 22, 5177. Observed others re-use syringe but only on the same patient. App. Vol. 22, 5182. "It's totally safe to redraw from that same vial for that same patient." App. Vol. 23, 5246. Her practice was the same before she came to Las Vegas. App. Vol. 23, 5252.
Melissa Schaefer	MD, CDC investigator	"Healthcare personnel may have other interpretations of "single use" vial. App. Vol. 24, 5548. Method observed being used by Linda Hubbard (same vial on multiple patients with sterile syringe and needle for each draw) would not have caused infection. App. Vol. 24, 5550. In 2010, "28% of [ambulatory surgical centers] were using single dose vials for multiple patients." App. Vol. 24, 5688-5689. Medicare standard differs from "best practices" recommendations of CDC:Medicare permits use of vial on several patients with time limitation on open vial. App. Vol. 25, 5754.
Rod Chaffee	RN since 1991, at center 2003-2007 (fired)	"common nursing practice to...use a clean syringe, a clean needle and you can access a bottle more than once." App. Vol. 27, 6357-6358.
Dorothy Sims	RN-BHQC, part of investigation team	At the time of the investigation in January 2008, she "did not recognize [multi-use] of propofol vials or re-use of syringes on one patient as creating a health hazard." App. Vol. 38, 8851-2.
Ann Marie Lobiondo	CRNA since 1994, at Center 2000-2004,2006-2007	50cc vial is too large for 1 patient, so it is aseptic procedure to draw up 5 syringes at once with 10ccs of propofol. App. Vol. 28, 6598. "Everywhere" she has worked, vials are used on multiple patients with the technique she used at Center. App. Vol. 29, 6758

Arnold Friedman		Can safely use one vial on multiple patients but more guarantee of safety if only one vial per patient. App. Vol. 31, 7185. If aseptic technique used, use of one vial on multiple patients would not transmit Hepatitis C. App. Vol. 31, 7267. One vial/one patient is a "preferred method." App. Vol. 31, 7280. Reason for "preferred method" is that a safe injection practice can become unsafe. "Mistakes happen." App. Vol. 31, 7282. The problem with multi-use of vial is that "people make mistakes." App. Vol. 31, 7295. The label on the vial is defective and ineffective. App. Vol. 31, 7300. Medicare bulletin regarding "single use" vial conflicts with CDC standard, and is "a perfect example of one arm of the government not knowing what the other arm is doing...:: App. Vol. 31, 7322, 7326. "I think practices [and the standard of care] changed because of the recent several cases that have occurred because of the transmission of the hepatitis virus." App. Vol. 31, 7351. "Somewhere between the year 2002 and where we are presently...some of those things that happened in 2004 and 2005, we're seeing a much stricter interpretation of re-using a syringe a second time on a patient. I can't tell you an exact date. I can't tell you an exact year. This is an evolution that has occurred...I could not exactly say 2007 or 2006. App. Vol. 31, 7360. He does not know what the standard of practice of CRNA who administer anesthesia in Clark County in July 2007 was with respect to re-use of syringes on single patients. App. Vol. 31, 7362
Mark Silberman	Representative from American Association of Nurse Anesthetists	"Needles and syringes are single-use items and should not be reused on the same patient or from patient to patient. The possible exception is when a syringe and needle are used on the same patient for incremental dosing..." App. Vol. 32, 7514. "Multiple-dose vials should be limited to a single patient use unless strict aseptic technique is used and a new sterile syringe and access device are used each time the vial is penetrated." App. Vol. 32, 7517, 7550 . AANA standard is consistent with CDC standard. App. Vol. 32, 7552.

Miriam Alter	PhD, infectious disease epidemiologist, with CDC for 25 years	"if you reuse [needle and syringe] on the same patient with the same medication, that's fine. But if you reuse it and any part of that is used on another patient, you've broken the barrier of sterility and that next patient is exposed to a non-sterile product." App. Vol. 35, 8149. If propofol vials were used as multi-dose vials, and anesthetist "used a new needle and syringe every single time [he] entered [the vial], every single time [he] dosed a patient, no problem...as long as there wasn't blood spatter." App. Vol. 35, 8230. CDC, in making recommendations or policies "will go a little more to the extreme to...prevent human error." App. Vol. 35, 8235. In 2010, there is still " a lack of understanding on the part of clinicians [about safe injection practices]." App. Vol. 35, 8238.
Dorothy Sims	RN, Bureau of Healthcare Quality and Compliance	At the time of the investigation, she "did not recognize [multi-use of propofol vials and reuse of syringes on same patient] as creating a health hazard." App. Vol. 38, 8851-52. On March 5, 2008, she considered the practices described by Mione, Sagendorf and Linda Hubbard as "perfectly acceptable." App. Vol. 38, 8870. It was not until after that date that she believed that their practices were not "best practices." App. Vol. 38, 8871. In February 2008, inspected an unrelated endoscopy clinic and anesthesiologist was using the same practices used at the Center. App. Vol. 38, 8881-8882.

EXHIBIT 3

DID DR. DESAI KNOW WHAT INJECTION PRACTICES WERE USED AT ECSN?
A Summary of Witness Testimony on Dr. Desai's Knowledge of the Injection Practices Employed by the CRNAs at ECSN

Keith Mathhas	CRNA 40 years, Mayo-Clinic trained, at Center since 2003	Did [Desai] ever instruct you to use syringes with propofol remaining in them on another patient?" "No, I never heard that." App. Vol. 7, 1691.
Eladio Carrera	MD-partner at Center since 1990	Did not see violation of aseptic technique in sedation while he was at Center. App. Vol. 15, 3620, Never observed any nurse violate aseptic technique. App. Vol. 16, 3811.
Clifford Carroll	MD-partner in Center since 1997	Doctors are not trained in administering propofol. "...that's why we have anesthesiologists and nurse anesthetists." App. Vol. 11, 2525. Would not interfere with nurse anesthetist. App. Vol. 11, 2526. Was not aware that any anesthetist was re-using syringes on a patient and then re-entering vial until CDC told him. App. Vol. 11, 2600. Clinic had no policy on method of providing sedation. App. Vol. 11, 2600 because CRNAs spent years training and had Masters Degree. App. Vol. 12, 2771. Did not observe a CRNA doing "anything improper" in 10-12 years with Center. App. Vol. 11, 2655. In his judgment, the CRNAs "always performed safely." App. Vol. 11, 2698-2699.
Lisa Falzone	RN- 22years,	Never instructed to re-use a needle or a syringe. App. Vol. 14, 3434.
Vincent Mione	CRNA since 1965, at Center from 2003-2008	Training not provided because he had been trained in injection procedure. Desai told him "you need to do what you think is right." App. Vol. 18, 4326. He pre-loaded syringes so that syringe and needle were fresh for each draw. App. Vol. 18, 4328. Desai never told him to re-use a needle or syringe. App. Vol. 18, 4335, App. Vol. 20, 4560. No "management or supervisors or anyone [ever told him] to load up syringes the way [he did]." App. Vol. 18, 4352. Desai never complained that he was using too many syringes. App. Vol. 18, 4354.

Ralph McDowell	CRNA	Desai did not tell him to cut corners or to use non-aseptic technique. App. Vol. 20, 4633, 4686.
Peggy Tagle	Nurse, at Center from 2006-2008	Trained others on aseptic technique (in pre-op), never saw anyone violate standards for aseptic technique. App. Vol. 21, 4787. No management direction to limit use of syringes. App. Vol. 21, 4821-4822. Did not observe any unsafe injection practices with Rubino, Meana or Orellano. App. Vol. 21, 4863-4864.
Anne Yost	RN, at Center for 3 days in 2007	Observed no re-use of syringes. App. Vol. 21, 4883 (resigned because of pre-charting)
Lynette Campbell	RN, at Center 2007-2008	"[A]lways able to get supplies when...needed." App. Vol. 21, 4906. Present on 9/21/07, did not observe any unsafe practices and was able to do her job safely despite volume. App. Vol. 21, 4911. She never saw an RN in clinic violate aseptic technique. App. Vol. 21, 4925.
Janine Drury	RN since 1983, at Center in 2007.	Center hired an outside firm to train staff on "safety and infection control." App. Vol. 22, 4994-95. Participated in in-house investigation of events and could not figure out how infection happened. App. Vol. 22, 5008-09.
Vincent Sagendorf	CRNA for 43 years, at Center 2007-2008	Desai told him to use only one 20cc vial of propofol per patient. He did not follow that direction and gave patients "what they needed." App. Vol. 22, 5050-51. He was never told by Desai or anyone else "to reuse syringes and needles." App. Vol. 22, 5062. After the Center closed, he returned to a clinic in California, which employed the same techniques. App. Vol. 22, 5081.
Linda Hubbard	CRNA for 30 years, at Center 2005-2008	She was never told to reuse syringes. App. Vol. 22, 5196-97.
Michelle Schaefer	MD, CDC investigator	Keith Matthas and Ron Lakeman were the only CRNAs at the center who "were reusing needles and syringes to go back into propofol." App. Vol. 25, 5743. Keith Matthas "misunderstood the risks that were involved." App. Vol. 25, 5795-96. Keith Matthas appeared not to know that his practice was wrong. App. Vol. 25, 5844.

Nancy Sampson	LVMPD	"[A]t the time of the infection the two vials [20cc and 50cc] cost the same...per milliliter." App. Vol. 26, 6107.
Rod Chaffee	RN since 1991, at center 2003-2007 (fired)	He did not tell Health Department that he saw re-use of syringes or that Desai ordered re-use of syringes. App. Vol. 28, 6504-05.
Anne Marie Lobiondo	CRNA since 1994, at Center 2000-2004,2006-2007	If she didn't believe something was safe, she wouldn't do it. App. Vol. 29, 6730. They had "plenty of" syringes and there were never any orders or directions to reuse needles and syringes. App. Vol. 29, 6767.
Jeffrey Krueger	Nurse/Managing Nurse at Center 2003-2008	He ordered supplies. Desai never told him to cut back on supply of propofol. App. Vol. 30, 6985. Larger vials were not ordered because of cost difference. App. Vol. 30, 7011-12. Syringes and propofol ordered as needed; there were no inventory caps. App. Vol. 30, 7041.
Arnold Friedman	Anesthesiologist since 1982 (expert for plaintiffs in civil case against drug manufacturer)	Nurse anesthetist makes the decision about the amount of sedation to give "because that is their scope of practice." App. Vol. 31, 7177. CDC articles about unsafe injection practices "were not written in anesthesia journals...the anesthesiologist healthcare professionals, it wouldn't be readily available to them..." App. Vol. 31, 7309 but they were "well vetted in anesthesia journals and through the American Society of Anesthesia and the Anesthesia Patient Safety Foundation. App. Vol. 31, 7314.
Mark Silberman	Custodian of Records, American Assoc. of Nurse Anesthetists	2002 survey showed that 42% of M.D. Anesthesiologists and 18% of CRNAs reused needles and syringes. App. Vol. 32, 7542-43. "65 percent of anesthesiologists responded that there are instances when it is acceptable to reuse needles or syringes." App. Vol. 32, 7546.

Frank Nemec	MD-gastroenterologist since 1984, not affiliated with Center	"CRNA is responsible for the sedation of the patient and the monitoring of vital signs during the examination. And that's the purview of the CRNA. The surgeon or gastroenterologist who has performed the procedure is responsible for the supervision of the nurse anesthetist, but we rely on their training and expertise to properly monitor the patient and perform the procedure safely." App. Vol. 32, 7577. It was a common practice among anesthesiologists prior to infection outbreak in 2007 "to draw up five separate 10cc syringes and then use them throughout the day." App. Vol. 32, 7585.
Brian Labus	Senior Epidemiologist, S. NV Health District	Employees of the Center were "surprised [about investigation] and offered whatever assistance we needed in the investigation. They were very accommodating when we talked to them." App. Vol. 33, 7728. Observed Linda Hubbard using one vial for several patients, re-entering each time with new needle and syringe. He was concerned but did not stop her or talk to her at that time. App. Vol. 33, 7740-41. No observation of any employee reusing needle or syringe on more than one patient. App. Vol. 33, 7750-51. After outbreak and notice, "still multiuse of vials taking place [in health care facilities in Nevada.]" App. Vol. 33, 7783.
Miriam Alter		Keith Matthas conduct in using unsafe practice in front of health investigator suggests that he did not appreciate that the practice was wrong or dangerous. App. Vol. 36, 8310.

Detective Whitely	Detective, LVMPD	Linda Hubbard said that Desai instructed her to do injections like Ron Lakeman did. App. Vol. 36, 8438. Desai observed that she was changing syringes but did not say anything about it. App. Vol. 36, 8438-39. Linda Hubbard told the Grand Jury that no one instructed her to reuse syringes. App. Vol. 36, 8447. She repeatedly denied that Desai requested her to reuse needles and syringes. App. Vol. 36, 8458-59. Both Vince Mione and Vince Sagendorf deny ever saying that they were instructed by Desai to reuse needles and syringes. "The mystery continues." App. Vol. 36, 8476. When detectives told Hubbard, "So I just find it hard to believe this guy is so frugal that he's cutting pads in half, but yet if he sees other people not reusing syringes, I find it hard to believe he's not maybe saying something about that," she responded, "I really don't remember a whole lot of conversation about it." App. Vol. 37, 8586. Hubbard told the Grand Jury and the FBI that noone told her to reuse syringes. App. Vol. 37, 8608.