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11 *Attorneys for Defendant Michael L. Ham*

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
13 **IN AND FOR THE COUNTY OF YAVAPAI**

14 STATE OF ARIZONA  
15 Plaintiff,  
16 v.  
17 MICHAEL L. HAM,  
18 Defendant.

Case No. P1300 CR2019 01558  
**MOTION TO DISMISS COUNT 49  
OF THE INDICTMENT**  
(Assigned to the Hon. Tina R. Ainley)

19 Defendant Michael L. Ham (“Dr. Ham”), by and through undersigned counsel, hereby  
20 moves, pursuant to Rules 13.1(a) and 16.4(b), Arizona Rules of Criminal Procedure, to  
21 dismiss Count 49 of the Indictment.

22 **ARGUMENT**

23 Count 49 of the Indictment alleges that Dr. Ham engaged in money laundering of  
24 payments received for the performance of cataract surgery on the right eye of “W.G.” or the  
25 “Patient.” The Indictment, which simply tracks the language of the applicable statute, fails to  
26 offer a plain statement of facts. Moreover, the State did not present *any* evidence regarding  
27 Count 49 to the grand jury. Therefore, it must be dismissed under both Rules 16.4(b) and  
28

1 13.1(a).

2 **A. Count 49 Must be Dismissed Under Rule 16.4(b)**

3 Under Rule 16.4(b), the Court must dismiss an indictment if it is insufficient as a  
4 matter of law. An indictment based on a grand jury proceeding that makes no mention of,  
5 much less present evidence about, a crime is legally insufficient. Although a trial court cannot  
6 attack an indictment on the “nature, weight or sufficiency of the evidence presented to the  
7 grand jury,” *Crimmins v. Superior Court*, 137 Ariz. 39, 42-43 (1983), “where the evidence  
8 presented to the grand jury does not constitute criminal conduct, the indictment should be  
9 dismissed,” *State v. Ditko*, No. 1 CA–CR 06–0633, 2007 WL 5187937, at \*1 ¶ 8 (App. 2007)  
10 (citing *Costello v. United States*, 350 U.S. 359, 363 (1956)). Stated differently, “if it is shown  
11 that the grand jury had before it no substantial [] evidence upon which to base its indictment,  
12 that indictment should be quashed. To hold a person to answer to such an empty indictment  
13 for a . . . crime robs the Fifth Amendment of much of its protective value to the private  
14 citizen.” *Costello*, 350 U.S. at 363 (J. Burton, concurring).

15 Here, the grand jury was not presented *any* evidence related to “W.G.”. There was no  
16 presentation of evidence regarding any medical treatment of him or his right eye, nor was  
17 there evidence presented about payment received for such a procedure. Therefore, the Court  
18 must dismiss the indictment for lacking any evidence supporting a finding of probable cause.

19 **B. Count 49 Must be Dismissed Under Rule 13.1(a)**

20 “Few constitutional principles are more firmly established than a defendant’s right to  
21 be heard on the specific charges of which he is accused.” *State v. Martin*, 139 Ariz. 466, 471  
22 (1985). In furtherance of this principle, Rule 13.1(a) requires that an indictment contain “a  
23 plain, concise statement of the facts sufficiently definite to inform the defendant of a charged  
24 offense.” Count 49 alleges, in relevant part, that Dr. Ham “knowingly initiated, organized,  
25 planned, financed, directed, or supervised the acquisition, or maintained an interest in,  
26 transaction, transference, transportation, receipt, or concealment of the existence or nature of  
27 racketeering proceeds[.]”  
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1 In effect, Count 49 is nothing more than a recitation of the statutory elements.  
2 Moreover, because the State did not present any evidence with respect to the Patient,  
3 including his medical care, the billing for his treatment, or the receipt of any payment for said  
4 treatment, Dr. Ham is left without a concise and definite statement of the facts informing him  
5 of the charged offense.

6 Rule 13.1(a) implements Ariz. Const. art. 2, § 24 and § 30, and the Due Process clauses  
7 of our State and Federal Constitutions. Ariz. Const. art. 2, § 30 limits felony prosecutions to  
8 those initiated by indictment or information. Here, the prosecution chose indictment to  
9 commence prosecution. Once the indictment path is chosen, an accused can only be tried on  
10 charges in an indictment returned by a grand jury.

11 In order for a citizen to be charged with a felony, the grand jury must find that probable  
12 cause exists to believe an offense has been committed. To do that, it must find facts, not law.  
13 There is no allegation of fact in Count 49. Nor was the grand jury presented with any facts  
14 regarding Count 49. Absent dismissal, the prosecution is left with carte blanche to seek  
15 conviction on a set of facts that were never decided by the grand jury. Such a result does not  
16 comport with the State's due process protections.

17 For the reasons stated above, the Court must dismiss Count 49.

18 Respectfully submitted this 28th day of July 2020.

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By: /s/ Edward F. Novak  
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**ELECTRONIC FILING VIA EMAIL**

Pursuant to the Court’s April 1, 2020 Administrative Order No. 2020-07, the foregoing is deemed the ORIGINAL and it is deemed filed by email this 28th day of July, 2020, to:

The Clerk of the Court  
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COPY of the foregoing emailed this 28th day of July, 2020 to:

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*/s/ Erika Cano* \_\_\_\_\_