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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO III and
ANABEL ESPINDOLA,
Petitioners,

vs.

THE HONORABLE DONALD M. MOSLEY, EIGHTH JUDICIAL DISTRICT COURT JUDGE,
Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

Supreme Court No. 48233

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S ANSWER TO PETITION FOR REHEARING

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Amici Office of the Federal Public Defender for the District of Nevada, Nevada Attorneys for Criminal Justice, Clark County Special Public Defender, and Clark County Public Defender, by and through their undersigned counsel, submit this brief of amici curiae in support of the Answer to the Petition for Rehearing filed by Petitioner Luis Hidalgo III. Amici submit that the interpretation of NRS 200.033(6) urged by the State of Nevada is not supported by either the language of the statute or the constitutional principles that govern capital cases. Amici also submits that the State's arguments concerning the provisions of SCR 250 are without merit and urge this Court to hold that adequate notice of the operative facts and theories of aggravating circumstances must be given to capital defendants.

I. Procedural History

The State of Nevada filed a Notice of Intent to Seek Death Penalty against petitioner Hidalgo in which it asserts as an aggravating circumstance under NRS 200.033(2)(b), that the defendant committed a felony involving violence or threat of violence, based on solicitation to commit murder. Hidalgo contested the district court's refusal to strike this aggravating circumstance in a petition for a writ of mandamus filed in this Court, along with a challenge to the adequacy of the State's notice of intent under SCR 250(4)(c), which charged a receiving money aggravating factor under NRS 200.033(6). This Court ordered the State to answer the petition and then held oral argument before issuing an en banc opinion in which it found that the receiving money aggravating circumstance was not adequately pleaded and that the district court was wrong in not dismissing the violent felony aggravating circumstance from the State's Notice of Intent to Seek the Death Penalty. Hidalgo v. District Court, 123 Nev. ___, 173 P.3d 1191 (2007), opinion withdrawn (February 21, 2008).

The State filed a petition for rehearing, this Court withdrew its opinion and ordered an answer to the rehearing petition on February 21, 2008.

Amici note that the State did not seek rehearing on the issue of whether solicitation is an offense "involving the use or threat of violence" under NRS

200.033(2)(b), and that that issue is therefore not before the Court.

II. Argument

A. The Receiving Money Aggravating Factor Requires any Defendant Charged with it to Share the Motive of Monetary Gain

In the course of its argument that the monetary gain aggravating factor was adequately pleaded, in its answer to the petition for a writ of mandamus, the State argued that applying the aggravating factor did not require the particular defendant against whom it was charged to have the motive of monetary gain required by the statute, as long as someone involved had that motive. Answer to Petition for Writ at 24. The State now argues that this Court misapprehended the law in its determination that NRS 200.033(6) requires a nexus between a defendant and the money or monetary value required by the pecuniary gain aggravating circumstance, Petition for Rehearing at 2. It further argues that "on the face of the statute, the aggravator is applicable to any defendant who participates in a murder that is motivated, at least in part, by pecuniary gain, whether or not the individual defendant was directly involved in the pecuniary gain aspects of the murder." Pet. for Rehearing at 2. The State's argument is without merit and this Court's opinion in this matter interpreted the statute properly. Long-standing principles of statutory interpretation support a narrow interpretation of the aggravating circumstance.

1. The Plain Language of the Statute Limits its Reach to Defendants who Commit Murder for a Specific Monetary Gain

In interpreting a statute, this Court first looks to its plain language. State v. Colosimo, 122 Nev. 950, 142 P.3d 352, 359 (2006) (citing State v. Washoe County, 6 Nev. 104, 107 (1870)). When the statutory language is clear, "there is no room for construction, and courts are not permitted to search for its meaning beyond the statute itself." State, Div. of Insurance v. State Farm, 116 Nev. 290, 293, 995 P.2d 482, 485 (2005) (citations omitted). "Where the language of a statute is susceptible of a sensible interpretation, it is not to be controlled by any extraneous considerations." Latterner v. Latterner, 51 Nev. 285, 290, 274 P. 194, 195 (1929).

NRS 200.033(6) provides that first degree murder may be aggravated if "[t]he murder was committed by a person, for himself or another, to receive money or any other thing of monetary value." Amici submit that this aggravating circumstance is limited by its plain terms to defendants who have a direct nexus to the monetary gain, either by obtaining a direct financial benefit from the murder or by paying for the murder. There is no language suggesting that it applies to defendants who had no financial motivation in committing the murder and who did not pay or offer to pay another to commit the offense.

The statutory language, while perhaps not elegant, is "susceptible of a sensible interpretation," Latterner, 51 Nev. at 290: that is, it applies to the parties to a contract killing, and to individuals who kill for the specific purpose of "receiv[ing]" a financial benefit from it. The language of that statute - - that the murder "was committed by a person. . . to receive money or any other thing of monetary value" - - seems eminently clear in requiring the motivation for the murder to be financial gain. The clause inserted into this sentence - - "for himself or another" - - does not alter the requirement of a financial motive: that clause merely makes it clear that the killing may be committed by the person either "for himself" or "for. . . another." That language adequately describes to recurring situations. When the person commits the murder "for himself", the obvious example is a person who kills the victim for the specific purpose of receiving the proceeds of an insurance policy. See e.g., Byrd v. State, 481 So.2d 468, 469-471, 474 (Fla. 1985). When the person commits the murder "for. . .another," the obvious example is a hired killer, who commits the murder at the behest of "another." See, e.g., Wilson v. State, 99 Nev. 362, 376-377, 664 P.2d 328, 337 (1983); State v. Adamson, 665 P.2d 972, 988 (Ariz. 1983). But in either case, the motivation for the murder is the same: the person must commit the murder "to receive money."

The State's imaginative theory is just that - - it is based solely on imagination. Nothing in the statutory language suggests that it would apply in a situation where an

alleged participant did not commit the murder "to receive money", in flat defiance of the statutory language. As shown below, the State's interpretation of this aggravating factor is inconsistent with every canon of statutory construction and adopting it would entail a significant and unwarranted extension of accomplice liability, well beyond the limits set by this Court's precedents.

The complete absence of any relevant authority to support the State's argument demonstrates its weakness. The State cites to Wilson v. State, 99 Nev. 362, 376-77, 664 P.2d 328, 337 (1983) and asserts that it stands for the proposition that "the defendant need not be the one who gains from the murder, so long as the killer, or someone else, was intended to profit from the murder." Rehearing Petition at page 5. Neither this language, nor the principle it supposedly adopts, is included anywhere in the Wilson opinion. Rather, in Wilson, this Court found the following:

> The third and final aggravating circumstance found by the three judge panel was that the appellants committed the murder for the purpose of receiving money. Appellants claim that the panel erred by finding that robbery and murder for pecuniary gain are two separate aggravating circumstances because murder for pecuniary gain as found in NRS 200.033(6) is limited to the "hired gun" situation.
>
> According to the testimony of Lani, appellants came to the motel room he shared with Stites to discuss the killing of a drug dealer. Wilson told Lani and Stites that they needed some help to kill Hoff and offered to pay them $3,500 for their participation. Pursuant to the agreement, they were given $3,500 for stabbing Hoff. Under these circumstances, we find that the killing of Hoff was in the nature of a "hired gun" situation; therefore, we decline to consider the issue of whether the statute is limited solely to contract-type killings.

Wilson, 99 Nev. at 376-, 664 P.2d at 337. The issue presented here was neither considered nor resolved in Wilson.

The State next asserts that "other courts have recognized that the aggravator applies to the motivation for the murder, not the defendant's personal motivation for pecuniary gain." Pet. for Rehearing at 5 (citing People v. Padilla, 906 P.2d 388 (Cal. 1995); State v. Austin, 87 S.W.3d 447 (Tenn. 2002) and Harris v. State, 632 So.2d 503 (Ala. Cr. App. 1992)). The State does not explain how any of these cases supposedly supports its argument, nor does it even cite to the parts of the decisions

upon which it relies. See State v. Haberstroh, 119 Nev. 173, 187, 69 P.3d 676, 685-686 (2003) ("[c]ontentions unsupported by specific argument or authority should be summarily rejected on appeal.") Each of these cases is also easily distinguishable from the case at issue here.

In Padilla, the California Supreme Court considered the conviction and death sentence of a man who had personally solicited another to murder a woman in exchange for small quantities of drugs. Padilla, 906 P.2d at 398. Thus, the court was not presented with the question of whether someone who was not directly involved the monetary aspect of the case was subject to the special circumstance. Moreover, in addressing whether the person who hires another to kill, the court found that that person is not directly subject to the special circumstance unless he was motivated by financial gain, "but is subject to a special circumstance finding as one 'found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder ... in any case in which ... the special circumstance enumerated in paragraphs (1) ... [is] specially found ... to be true.'" Id. (quoting California Penal Code§ 190.2 subd. (b)). At the time of the murder at issue Penal Code section 190.2 provided that "[e]very person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or [life without parole] in any case in which ... the special circumstance[] enumerated in paragraph[] (1) ... of subdivision (a) of this section has been charged and specially found ... to be true."

In contrast, NRS 200.033 does not include a provision that is equivalent to the California statute and there is no indication that NRS 195.020, which defines aiding and abetting liability in Nevada, by either its plain language or legislative history, was meant to apply to aggravating circumstances that focus upon the principal's motive for the homicide. But see Byford v. State, 116 Nev. 215, 240, 994 P.2d 700, 717 (2000) (finding the aggravating circumstance of torture to be applicable based upon

the conduct of a co-defendant and citing NRS 195.020, but not providing any analysis as to why NRS 195.020 is applicable to aggravating circumstances and not citing any case authority in support of this finding). As Padilla concerned circumstances entirely different than those at issue here, this Court should not find it to be persuasive authority on the issue presented here.

In State v. Austin, 87 S.W.3d 447, the Tennessee Supreme Court rejected a defendant's argument that he should not be subject to the death penalty as he was only the person who hired the killer and the killer did not receive a sentence of death, and that the theory of culpability for the first degree murder duplicated the aggravating factor. Id. at 457-58, 465-66. The defendant had been convicted as a principal on the theory that he was an accessory before the fact, who hired the actual killer. The Tennessee Supreme Court upheld the finding based on the specific terms its own aggravating factor, which applied when the defendant "committed the murder for remuneration . . . or employed another to commit the murder for remuneration. . ." 87 S.W.3d at 464-465; see id. at 483-485. Amici are at loss to understand how this authority is relevant to the issue before this Court, in light of the entirely different terms of the Tennessee aggravating factor.

In Harris, the Alabama Court of Criminal Appeals found sufficient evidence to support the pecuniary gain element of the capital charge based upon the fact that the defendant paid two others $100 to commit the murder and promised more money after she collected the insurance money. 632 So.2d at 537. The case neither supports the State's assertion nor its argument that defendants who are not directly involved in the monetary aspect of the aggravating circumstance are liable for the aggravating circumstance.

In fact, amici have not been able to find any case, in any jurisdiction, in which a pecuniary gain aggravating factor has been found against an accomplice or aider and abetter who did not share the financial motive of the perpetrator of the killing. Amici therefore submit that, based on the plain language of the statute, the State's petition

for rehearing on this point should be denied.

2. The Rule of Lenity Requires Limiting the Receiving Money Factor to Defendants Who are Motivated by Financial Gain

Assuming arguendo that the statute is ambiguous, the choice between competing interpretations must be resolved by application of the traditional "canon of strict construction of criminal statutes." United States v. Lanier, 520 U.S. 259, 266 (1967); see also Nay v. State, 167 P.3d 430, 437 (2007). This "venerable rule," United States v. R.L.C., 503 U.S. 291, 305 (1992), requires that "when choice has to be made between two readings of what conduct [the Legislative Branch] has made a crime, it is appropriate, before we choose the harsher alternative, to require that [the Legislative Branch] should have spoke in language that is clear and definite." United States v. Bass, 404 U.S. 336, 347 (1971) (internal quotations omitted). The United States Supreme Court has consistently held that "this principle of construction applies to sentencing as well as substantive provisions." United States v. Batchelder, 442 U.S. 114, 121 (1979); see also Busic v. United States, 446 U.S. 398, 406 (1980).

The rule of lenity had its origins as a principle of strict construction developed by early English courts to moderate the harshness of contemporary punishments. Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 750 (1935). At that time, the default punishment in the king's court for virtually all felonies was death. J.M. Beattie, *Crime and the Courts in England, 1660-1800* 141 (1986). In contrast, those who associated with the Church could claim the "benefit of clergy," which entitled them to be tried before an ecclesiastical court, where the punishments were less harsh. Id. at 141-42. Eventually, the court expanded access to the benefit of clergy, and in response Parliament began to enact statutes that repealed the benefit, until even relatively minor property crimes were punishable only by death. Id. at 143-45. The courts in turn responded by developing the practice of maintaining the benefit of clergy unless Parliament had repealed it in extremely explicit terms. Hall, *supra*, at 750-51. For example, when Parliament repealed the

benefit of clergy for those who stole "horses," courts interpreted the statute as not applying to those who stole a single horse. William Blackstone, 1 Commentaries on the Laws of England *88 (1765).[1]

The rule of lenity was brought to the colonies and incorporated into the American legal system. Chief Justice Marshall addressed the rule in United States v. Wiltberger, 18 U.S. 76 (1820), in declining to apply a broad construction to a federal criminal statute, while recognizing that it was "extremely improbable" that Congress would have intended the narrow construction the Court adopted. Id. at 105. Chief Justice Marshall explained that the strict application of the rule of lenity serves a broader purpose in ensuring that courts do not wrongly impute upon the Legislative Branch an intent to wield its criminal legislative authority more broadly than the Legislative Branch intended. This rule of strict construction was "founded on the tenderness of the law for the rights of individuals" and the recognition that it "is the legislature, not the Court, which is to define a crime, and ordain its punishment." Id. at 95.

The two justifications for the rule of lenity - protecting individual liberty and maintaining separation of powers - have shaped the application of the rule. For example, in McBoyle v. United States, 283 U.S. 25 (1931), the United States Supreme Court held that a statute criminalizing the transport of any stolen "self-propelled vehicle not designed for running on rails" did not apply to a stolen airplane. Id. at 26. The Court explained that although an airplane fell within the text of the statutory definition, a narrower interpretation - one limiting the word "vehicle" to "a thing moving on land" - was also possible. Id. The Court found that "[a]lthough it is not likely that a criminal will carefully consider the text of the law before he murders or

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[1]Much of the argument presented herein is based upon the Brief for the Petitioner in Burgess v. United States, filed in the United States Supreme Court in Docket No. 06-11429. The primary author of the brief is Laurence H. Tribe, Harvard Law School Supreme Court Litigation Clinic.

steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Id. at 27.

The United States Supreme Court recognizes that these principles are no less important when setting punishments than when defining crimes. In R.L.C., 503 U.S. at 294, the Court examined a statute that allowed a judge to impose "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult" and considered whether this "maximum term" referred to the statutory maximum or the maximum sentence under the federal sentencing guidelines. Id. at 294, 297. Four members of the Court believed that the statute unambiguously referred to the lower maximum under the guidelines, but stated that if the statute had been ambiguous, they would have resolved the question by resort to the rule of lenity. Id. at 305. Three other members believed that the statute was ambiguous and resolved the ambiguity by employing the rule of lenity. Id. at 307-08. As Justice Scalia explained, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not to be imposed." Id. at 309 (Scalia, J. concurring).

Nevada law is in accord. When a penal statute is ambiguous, "'rules of statutory interpretation . . . require that provisions which negatively impact a defendant must be strictly construed, while provisions which positively impact a defendant are to be given a more liberal construction.'" Colosimo, 142 P.3d at 359 (quoting Mangarella v. State, 117 Nev. 130, 134, 17 P.3d 989, 992 (2001)). Specifically, "the rule of lenity demands that ambiguities in criminal statutes be liberally interpreted in the accused's favor." Moore v. State, 126 P.3d 508, 511 (2007); Finger v. State, 117 Nev. 548, 554-555, 27 P.3d 66 (2001); Bradvica v. State, 104 Nev. 475, 477, 760 P.2d 139 (1988); Anderson v. State, 95 Nev. 625, 629, 600 P.2d 241 (1979).

Finally, applying the rule of lenity is required by the due process guarantees of

the state and federal constitutions. The rule of lenity is "not merely a convenient maxim of statutory construction. Rather, it is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Citations]" Dunn v. United States, 442 U.S. 100, 112 (1979); accord, United States v. Lanier, 520 U.S. 259, 266 (1997) (rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. [Citations]"); United States v. Bass, 404 U.S. 336, 348 (1971) (rule of lenity founded on principles of "fair warning" to give notice of scope of statutes and requirement of clarity in penal statutes); White v. State, 102 Nev. 153, 158, 717 P.2d 45, 48 (1986) ("considerations of due process" warrant interpretation in favor of lenity.)

In this case, assuming arguendo that NRS 200.033(6) could be interpreted as the State proposes - - to apply to defendants who do not have the motive "to receive money" as a result of the killing - - the interpretation proposed by amici is certainly a plausible, and not unreasonable, reading of the statute.

Caselaw from other states supports amici's position. In People v. Phillips, 67 P.3d 1228, 1231 (Ariz. 2003) the court held that the fact that Phillips participated in a robbery was not sufficient to show that the murder committed by another participant was for pecuniary gain as to Phillips, because of the lack of evidence of Phillips' own "intent and motivation in Finch's killing of [the victim]." In Sockwell v. State, 675 So.2d 4, 25 (Ala. Cr. App. 1993), the court upheld the pecuniary gain aggravating factor by relying on the evidence showing that the defendant acted "for his own pecuniary benefit." These cases establish that amici's interpretation of the statute, to require that any defendant must have the motive of monetary gain for the aggravating factor to apply to that defendant, is eminently reasonable: and the complete lack of any authority adopting the State's interpretation equally suggests that it is unreasonable. In fact, the absence of any authority supporting the State's position is a likely indication that no one would expect a motive-based aggravating factor to be

applied against a defendant who did not have that motive.

Under the rule of lenity, this Court must strictly construe the statute, and choose the interpretation which is most favorable to the defendant. Accordingly, this Court must reject the novel interpretation of the statute proposed by the State and deny the petition for rehearing.

3. The Rule of Constitutional Avoidance Requires Adopting a Construction of the Receiving Money Factor Limiting it to Defendants Who Have that Motive

The Rule of Constitutional Avoidance also supports the narrow interpretation of NRS 200.033(6) which is urged by amici. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail--whether or not those constitutional problems pertain to the particular litigant before the Court." Clark v. Martinez, 543 U.S. 371, 380-381 (2005). "[O]ne of the canon's chief justifications is that it allows courts to avoid the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the Legislature] did not intend the alternative which raises serious constitutional doubts." Id. at 382 (citing Rust v. Sullivan, 500 U.S. 173, 191 (1991); Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

As shown below, significant constitutional questions are presented by the State's proposed interpretation of this aggravating circumstance. Issues are presented under the Eighth Amendment to the United States Constitution which requires that the State's death penalty schemes narrow the class of persons eligible for the death penalty, provide a rational basis for selecting persons who are subject to the death penalty from those who are not, and provided a meaningful basis of selecting the "worst of the worst." To avoid these issues, this Court should narrowly construe NRS 200.033(6).

a. NRS 200.033(6) Cannot Perform the Constitutionally-Required Narrowing Function of an Aggravating Factor Unless it Requires the Defendant to Have the Motive of Financial Gain

The federal constitution mandates that death penalty statutory schemes narrow the class of individuals eligible to receive a death sentence. They must also provide for "guided discretion" in the imposition of the penalty. The goal of a death penalty scheme must be to ensure individualized sentencing and eliminate the possibility that the death sentence is being imposed automatically, mechanically or arbitrarily. Proffitt v. Florida, 428 U.S. 242, 252 (1976). A person is not eligible for the death penalty simply because he or she commits first-degree murder. There must be something more that warrants the ultimate and irrevocable sentence of death.

Aggravating circumstances must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (citations omitted). An aggravating circumstance must be definite enough to preclude the injection of subjective and illegitimate factors into the sentencing process, and not so broad or vague that it could apply to nearly every first degree murder.

The United States Supreme Court has charged this Court and other state courts with the responsibility of ensuring that statutory aggravators are not so liberally construed that the narrowing function of the statutory scheme is circumvented or eliminated. Walton v. Arizona, 497 U.S. 639 (1990); Maynard v. Cartwright, 486 U.S. 356 (1988). Gregg v. Georgia mandated the constitutional requirement that in capital cases, "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 428 U.S. 153, 189 (1976). This Court recognizes this obligation "to ensure that aggravators are not applied so liberally that they fail to perform their constitutionally required narrowing function[.]" Redeker v. Eighth Judicial Dist. Court, 122 Nev. 164, 127 P.3d 520, 526 & n. 30 (2006) (citing

Zant v. Stephens, 462 U.S. 862, 878 (1983) and Arave v. Creech, 507 U.S. 463, 474 (1993)).

As interpreted by amici and by caselaw interpreting parallel motive-based aggravating factors, NRS 200.033(6) seeks to narrow the class of death-eligible defendants by reserving the ultimate punishment for defendants who kill for money. All the caselaw accepts that applying this aggravating factor to "hit men," or those who hire them for their own financial gain, is a rational way to narrow the class of death-eligible defendants. By contrast, the interpretation proposed by the State would eliminate the narrowing function altogether: it would allow death eligibility to be imposed upon a defendant who is an accomplice to a first degree murder but who does not share the aggravating element of motive. In essence, the State's argument is that the aggravating factor based on the motive of financial gain should be applied even when the defendant does not actually have the motive that makes the murder aggravated. This would make a mockery of the narrowing function of the aggravating factor.

Similarly, the State's interpretation would divorce the finding of death-eligibility from the individual culpability of the defendant. The Eighth Amendment requires that sentencers make individualized decisions concerning whether the death penalty should be imposed. States must permit the jury to make "an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. While this individualization takes place in part through consideration of mitigating circumstances, it is also implicated by the application of aggravating factors; and this principle is violated by application of an aggravating circumstance to a person based upon the conduct and thoughts of a co-defendant, without regard to the person's individual culpability.[2]

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[2] The State's proposed interpretation of NRS 200.033(6) could also impose liability for this aggravating circumstance even if a defendant had no knowledge of the monetary

Simply put, the narrowing function focuses ultimately on the culpability of the offender, not simply on the characteristics of the murder. When, as here, an aggravating factor is based on the motive for the murder, but a particular defendant did not share that motive, the constitutional narrowing function required by the Eighth Amendment does not occur as to that defendant. This result is constitutionally impermissible. See Enmund v. Florida, 458 U.S. 782, 797-798 (1982) ("the focus must be on his [the accomplice defendant's] culpability"(emphasis in original)).

These constitutional violations will be avoided if this Court adopts the interpretation proposed by amici. This Court should therefore reject the State's novel interpretation of NRS 200.033(6), which would lead to constitutional violations (or at minimum to serious and difficult constitutional issues), and deny the petition for rehearing.

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aspect of the murder or specific intent that the murder be committed for financial gain. In other words, a person could be liable for this aggravating circumstance without a finding of mens rea or could be held strictly liable for this aggravating circumstance based upon the conduct or thoughts of other persons. Statutes must be construed against strict liability for criminal acts. See Morissette v. United States, 342 U.S. 246, 250-63 (1952); Schertz v. State, 109 Nev. 377, 380 n.2, 849 P.2d 1058, 1059 n.2 (1993). Measures that impose criminal punishment without a showing of mens rea occupy a "generally disfavored status." United States v. United States Gypsum Co., 438 U.S. 422, 438 (1978) (finding that the Sherman Act should not be construed to mandate a regime of strict-liability criminal offenses). Courts will not infer the absence of a scienter requirement from the "simple omission of the appropriate phrase from the statutory definition, id., but, rather, will insist that a reason to impose strict liability appear in the legislative history or in the structure of the contested legal norms. See Liparota v. United States, 471 U.S. 419, 426-27 (1985) (where there was no express intent conveyed in a statute concerning a defendant's mental state for an offense involving food stamp fraud, the Court held that the government must prove that the defendant knowingly violated the law); United States v. Nofziger, 878 F.2d 442, 452-53 (D.C. Cir. 1989). The presumption against strict liability is founded on the principle that laws that deprive an individual of liberty should be strictly construed. See 3 Sutherland Statutory Construction § 59.04 (D. Sands 4th ed.) (N. Singer rev. ed. 1986). Adopting the State's novel interpretation of NRS 200.033(6), to impose liability in the absence of any specific mental state on the part of a defendant with respect to the motive of financial gain would violate this rule of construction as well.

4. The State's Interpretation of the Receiving Money Aggravating Factor Would Lead to Absurd Results

To the extent that NRS 200.033(6) could be interpreted to apply to all of those found guilty of the murder, without regard to participation in, or even knowledge of, the monetary aspect of the aggravating circumstance, this Court should find that such an interpretation would lead to absurd results and then adopt the narrow construction proposed by amici.

"[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 453-454 (1989) (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)); Leven v. Frey, 123 Nev. ___, 168 P.3d 712, 716 (2007). This Court interprets statutes according to their plain meaning unless such an interpretation would run contrary to the spirit of the statutory scheme. Mineral County v. State, 121 Nev. 533, 535, 119 P.3d 706, 708 (2005) (citing United Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 731, 100 P.3d 179, 193 (2004)).

The State's interpretation of NRS 200.033(6) basically reads out of the aggravating factor the motive - - financial gain - - which is the basis for finding that the defendant's culpability is aggravated. Concluding that the legislature intended this result - - essentially an aggravating factor without the aggravation - - would be absurd on its face.

The absurdity of the construction urged by the State is demonstrated by other aggravating circumstances defined in NRS 200.033 which could be distorted to apply to all defendants in a case, even though common sense, legislative history, and other principles would not support such a construction of the statute. For example, NRS 200.033(1) provides for an aggravating circumstance where "[t]he murder was

committed by a person under sentence of imprisonment." Under the State's reasoning, this aggravating circumstance could be read to mean that a defendant who was not under a sentence of imprisonment is eligible for the aggravating circumstance if any of his co-defendants was under a sentence of imprisonment at the time of the offense. Such a result is absurd and is not supported by the practice of prosecutors in this case or the relevant case authority. See Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985) (case involved four defendants, the State sought the death penalty against Nevius and noticed its intent to seek the death penalty based upon his status of being under a sentence of imprisonment, but did not seek the death penalty or this aggravating circumstances against his co-defendants); Byford, 116 Nev. at 223-224 (applying aggravating circumstance to Byford, who was on probation, but not to co-defendant Williams); State v. Second Judicial Dist. Court (Marshall), 116 Nev. 953, 964, 11 P.3d 1209, 1215 (2000) (noting the State wished to seek the death penalty against defendant Marshall and asserted the existence of this aggravating circumstance, but did not assert this aggravating circumstance against co-defendant Currington who was not under a sentence of imprisonment); compare Doyle v. State, 112 Nev. 879, 902, 921 P.2d 901, 916 (1996) (finding aggravating circumstance for Doyle), and Atkins v. State, 112 Nev. 1122, 1137, 923 P.2d 1119 (1996) (giving no indication that Doyle's incarceration was considered as an aggravating circumstance against his co-defendant Atkins but instead relying upon Atkins' own parole status as basis for factor.)

Likewise, NRS 200.033(2) provides for an aggravating circumstance if "[t]he murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of: (a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony." This language could be distorted to suggest that the aggravating circumstance applies

to all defendants in the case, even though common sense, legislative history, and other principles would not support such a construction of the statute. See Nevius, 101 Nev. 238, 699 P.2d 1053 (aggravating circumstance applied to Nevius, but not his co-defendants); Marshall, 116 Nev. at 964 (noting the State wished to seek the death penalty against defendant Marshall and asserted the existence of this aggravating circumstance, but did not assert the existence of aggravating circumstance against co-defendant Currington who did not have a prior conviction). Other aggravating circumstances present the same problem. The hate crime factor, NRS 200.033(11), depends on the motive for committing the murder. Under the State's reasoning, the factor could be applied to an accomplice to such a murder, even if the accomplice did not have the motive of hate that makes the murder aggravated.

Authority from other States supports amici's position that motive-based aggravating factors cannot be found against a defendant unless he shares the evil motivation. For example, in Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991), the Florida Supreme Court considered the issue of whether its "especially heinous, atrocious, or cruel" aggravating factor was properly applied to a defendant who did not directly participate in the murder and did not know of the actions of his co-defendant:

> We must agree with Omelus that the trial court erred in instructing the jury that it could consider this factor in determining its recommendation. Nowhere in this record is it established that Omelus knew how Jones would carry out the murder of Mitchell, and, in fact, the evidence indicates that Jones was supposed to use a gun. There is no evidence to show that Omelus directed Jones to kill Mitchell in the manner in which this murder was accomplished. Under these circumstances, where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously. We note that the trial judge correctly omitted this aggravating factor from his sentencing order in finding that the death penalty would be appropriate.

Accord Perez v. State, 919 So.2d 347, 380-81 (Fla. 2005) (finding that the defendant could not be held vicariously responsible for the aggravating circumstance, even though he was present, based upon the conduct of his co-defendant which he did not

direct); Williams v. State, 622 So.2d 456, 463 (Fla. 1993) (finding that the aggravating circumstance could not be applied vicariously, absent a showing by the State that the defendant directed or knew how the victim would be killed). See also Hopkinson v. Schillinger, 866 F.2d 1185,1214-15 (10th Cir. 1989) (assuming the Eighth Amendment "forbids imposing the death penalty against a mere accomplice as punishment for the cruel nature of a killing, without proof beyond a reasonable doubt that the accomplice intended the killing be cruel") reh'g granted on other grounds, 888 F.2d 1286 (10th Cir. 1989) (en banc), overruled on other grounds by Sawyer v. Smith, 497 U.S. 227 (1990).

NRS 200.033(6) shares the same construction as NRS 200.033(1) and (2) in that all three aggravating circumstances refer to "the murder" and, under the State's reasoning, would not be limited to the defendant who has a direct nexus to the subject matter of the aggravating circumstance. This Court's construction of NRS 200.033(6) must, to the extent possible, ensure that the statutory scheme of NRS 200.033 is coherent and consistent. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). Just as it would be absurd to find that NRS 200.033(1) and (2) apply to all defendants in a case if one of the defendants is under a sentence of imprisonment or has a prior violent felony conviction, it is also absurd to find that NRS 200.033(6) applies to all defendants in a case if any one of them has a financial motive, even if the other defendants have no financial motive or even knowledge of the financial motivation of another.

Finally, the State's construction of the factor would lead to the absurd result that this Court's precedents limiting the vicarious liability of accomplices and aiders and abettors would be ignored in the most important context of all, in the application of aggravating factors to establish death-eligibility. Aggravating factors are elements of death-eligibility, and they are therefore subject to the same constitutional protections as other elements of criminal offenses. Johnson v. State, 118 Nev. 787, 802-803, 59 P.3d 450, 460 (2002); Ring v. Arizona, 536 U.S. 584, 609 (2002). This Court has

made it quite clear that an accomplice or aider and abettor must share the necessary mental state element of the principal in order to allow imposition of vicarious liability for the principal's offense, Mitchell v. State, 122 Nev. ___, 149 P.3d 33, 37-38 (2006); Sharma v. State, 118 Nev. 648, 652-657, 56 P.3d 868, 870-873 (2002); see Bolden v. State, 121 Nev. 908, 915-924, 124 P.3d 191, 196-202 (2005); and it has been at pains to correct the "confusion. . . that exists as to what the accomplice's mental state must be in order to hold him accountable for an offense committed by another." Sharma, 118 Nev. at 653, quoting Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.7(b), at 579 (2d ed. 1986).[3] What the State is asking this Court to do is to abandon the principles of Sharma and Mitchell at the point where they are most important, and when the consequences are most severe, that is, when a mental state element necessary for the finding of an aggravating factor is in issue. Accepting the State's novel interpretation of NRS 200.033(6), to allow imposition of vicarious liability when an accomplice does not share the motive of the principal, would lead to an absurd, even perverse, result: proving an aggravating factor to make an accomplice eligible for the death penalty would be easier than proving any non-capital offense. This Court cannot assume that the legislature intended such a result without the clearest possible expression of that intent. Accordingly, this Court cannot accept the State's interpretation of the statute.

5. Conclusion

The State has not provided any authority supporting its novel interpretation of NRS 200.033(6). All of the canons of statutory construction, in addition to the language of the statute itself, require this Court to reject the State's far-fetched theory that an accomplice is vagariously liabile for a motive-based aggravating factor when

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[3] In the last session of the legislature, prosecutors attempted to have this Court's decisions in Sharma, Bolden, and Mitchell overruled by statute. The legislature rebuffed that effort. Nev. Legislature, 74th Sess., A.B.19, no action pursuant to Joint Standing Rule 14.3.1 (April 14, 2007).

the accomplice does not actually share that motive. Accordingly, this Court should deny the State's petition for rehearing.

B. The State's Notice of Intent Did Not Provide Adequate Notice of the Facts and Theories of the Alleged Monetary Gain Aggravating Factor and this Court Properly Ordered it Stricken

1. SCR 250(4)(c) Requires Notice of Theories of Culpability

The State argues that this Court was wrong in its opinion when it concluded that SCR 250(4)(c) requires the State to plead theories of culpability for an aggravating circumstance in the notice of intent to seek the death penalty and ordered it stricken. Pet. Rehearing at 7.

Under the Sixth Amendment to the United States Constitution, a criminal defendant is entitled to be informed of the nature and cause of any and all accusations against him. See Faretta v. California, 422 U.S. 806, 818 (1975). The Fifth Amendment also guarantees the right to reasonable notice of the specific charges. Taylor v. Hayes, 418 U.S. 488, 498-99 (1974). Nevada also guarantees these rights by statute. NRS 173.075(1) expressly requires that an indictment or information contain a "plain, concise and definite written statement of the essential facts constituting the offense charged." See also Sheriff v. Levinson, 95 Nev. 436, 596 P.2d 232 (1979). The charging document should also contain, when possible, a description of the means by which the defendant committed the offense. NRS 173.075(2); Simpson v. District Court, 88 Nev. 654, 660, 503 P.2d 1225, 1229 (1972) (the accusation must include a characterization of the crime and such description of the particular act alleged to have been committed by the accused as will enable him properly to defend against the accusation, and the description of the offense must be sufficiently full and complete to accord to the accused his constitutional right to due process of law); 4 R. Anderson, Wharton's Criminal Law and Procedure, § 1760, at 553 (1957).

Citing the constitutional right of due process, this Court has held that where the State seeks to establish a defendant's guilt on a theory of aiding and abetting, the

indictment should specifically allege that the defendant aided and abetted, and should provide additional information as to the specific acts constituting the means of the aiding and abetting so as to afford the defendant adequate notice to prepare his defense. Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983); see also Wright v. State, 101 Nev. 269, 271-272, 701 P.2d 743, 744 (1985) (information invalid based upon its failure to include aiding and abetting allegations); Alford v. State, 111 Nev. 1409, 1413-1415, 906 P.2d 714, 716-717 (1995) (conviction reversed because the charging document did not allege felony murder and the State relied upon that theory at trial).

The aggravating factors are elements of capital-eligibility, Johnson, 118 Nev. at 802-803, and this Court has enacted a specific rule requiring the notice of intent to provide adequate notice of the aggravating factors. SCR 250(4)(c). "[A] defendant cannot be forced to gather facts and deduce the State's theory for an aggravating circumstance from sources outside the notice of intent to seek death. Under SCR 250, the specific supporting facts are to be stated directly in the notice itself." Redeker, 127 P.3d at 523. But even the specification of facts is inadequate if it does not give notice of how the State intends to prove its theory of the aggravating factor. Just as in Alford, when a defendant is not given adequate notice of the factual and legal theory - - the "acts constituting the offense" - - upon which the State intends to proceed, he cannot adequately prepare to defend himself. See Alford, 111 Nev. at 1414-1415; Simpson, 88 Nev. at 659.

The notice of intent in this case was laden with alternative allegations separated by "and/or," a term that is inherently ambiguous. See, e.g., Ex parte Bell, 122 P.2d 22, 29 (Cal. 1942); California Shipbuilding Corp. v. Industrial Acc. Comm'n, 193 P.2d 61, 62 (Cal. App. 1948) ("[a] finding is rendered indefinite uncertain and unintellegible by use of the words 'and/or'. [Citations]"). This ambiguity leaves a defendant unable to identify which facts the State is alleging are the "acts constituting" the aggravating factor, and unable to identify (and therefore to litigate)

whether the State is relying upon an invalid legal theory.

The way in which the issue of the proper interpretation of NRS 200.033(6) arose in this case demonstrates why this Court should require the State to identify legal theories in the notice of intent. Here, the defendants objected to the adequacy of the notice of intent in its pleadings of the monetary gain aggravating factor. In responding to that argument, the State argued, almost in passing, that the alleged confusion in the pleading over whose monetary gain was in issue did not matter, because a particular defendant involved in the homicide did not have to have a financial motive, as long as someone did. Answer to Petition at 24; Pet. for Rehearing at 4-5, 8-9. Nothing in the notice of intent gave the defendants any notice that the State intended to rely on this novel and legally unsupported vicarious liability theory. If the defendants had not challenged the notice before trial, the State would apparently have just sprung this theory on the defense when jury instructions were settled, just as the prosecution sprang the felony murder theory on the defense in Alford. But because the terms of the notice of intent were completely inadequate to put any defendant on notice of the State's erroneous theory, the defendants had no notice that they should litigate the legal adequacy of that theory until now.

As shown above, the State's theory cannot be accepted as a valid means of establishing the aggravating factor; and the notice of intent, as analyzed in this Court's now-withdrawn decision, Hidalgo, 173 P.3d at 1195-1197, does not give the defendant adequate notice that the erroneous interpretation of the statute is in issue. Accordingly, the notice should be stricken.

2. The State has Not Shown Good Cause to Allow the Filing of an Amended Notice of Intent

Finally, the State argues that this Court should allow amendment of the notice of intent rather than ordering it stricken. Pet. for Rehearing at 11-12. This argument is also meritless. Amendment of a notice of intent is governed by SCR 250(4)(d). The State does not allege that it has "good cause," in the form of newly-discovered

evidence, for amending the notice, nor does it suggest that it has just "learn[ed] of the grounds for the . . . amended notice." See Marshall, 116 Nev. at 965-966. This Court made it clear in Bennett v. District Court, 121 Nev. 802, 810-811, 121 P.3d 605, 610-612 (2005), that an intervening decision of this Court altering the interpretation of an aggravating factor, or even "announc[ing] a fundamental departure from death-penalty precedent," 121 Nev. at 811, does not constitute good cause. This Court's resolution of the proper interpretation of NRS 200.033(6) would therefore not constitute good cause in this case. The Bennett decision also emphasized that "[e]verything that the State considered in this case before seeking the death penalty was known to it prior to the arraignment in the district court," id. at 810, quoting Marshall, 116 Nev. at 964, which is also the case here. The Bennett court also held that merely the apparent lack of prejudice to the defense does not justify allowing amendment of the notice, Bennett, 121 Nev. at 810, citing Marshall, 116 Nev. at 964, but the supported lack of prejudice is the basis for the State's argument that amendment should be allowed. Pet. for Rehearing at 12.

The State's petition makes no serious attempt to establish "good cause" to allow the filing of an amended notice of intent. Simply put, the State filed a vague notice of intent, which included unexpressed reliance on an invalid theory of liability for the receiving money aggravating factor, and it is now arguing that its failure to get away with that ploy entitles it to file an amended notice. Nothing in the rule or in this Court's precedents suggests that prosecutorial overreaching establishes good cause to allow amendment of the notice of intent. This Court properly ordered the notice stricken, and it should deny the petition for rehearing.

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III. Conclusion

For the reasons stated above, and in the writ petitioners' answer to the petition for rehearing, amici submit that this Court should deny the petition for rehearing.

Dated this 4th day of March, 2008.

Respectfully submitted,

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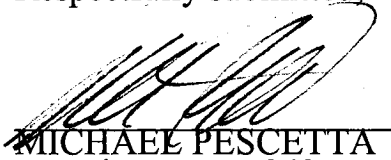
CERTIFICATE OF COMPLIANCE

The typeface used in this brief is proportionately spaced 14-point. The total number of words is 8371.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of March, 2008, he deposited in the United States mail, postage prepaid, a true and correct copy of the foregoing BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER'S ANSWER TO PETITION FOR REHEARING addressed to counsel as follows:

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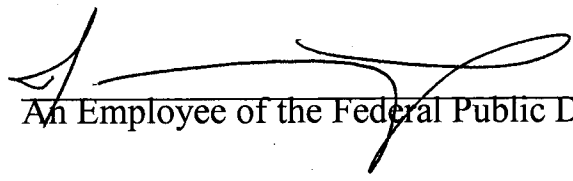

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