

IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS HIDALGO, III and
ANABEL ESPINDOLA

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR
THE COUNTY OF CLARK, AND THE
HONORABLE DONALD M. MOSLEY,
DISTRICT JUDGE

Respondents,

And

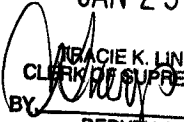
THE STATE OF NEVADA,

Real Party in Interest.

Case No. 48233

FILED

JAN 23 2008

GRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

STATE PETITION FOR REHEARING

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5 LUIS HIDALGO, III and
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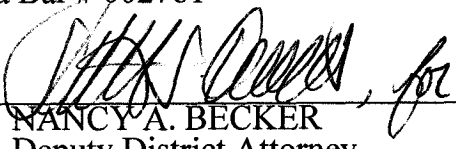
15 **STATE PETITION FOR REHEARING**

16 COMES NOW, the State of Nevada, Real Party in Interest, by DAVID ROGER,
17 District Attorney, through his deputy, NANCY A. BECKER, on behalf of the above-named
18 respondents and submits this Petition for Rehearing of the Opinion filed on December 27,
19 2007 in the above-captioned case as it pertains to the interpretation of SCR 250(4)(c) and its
20 application to the monetary gain aggravator under NRS 200.033(6). This Petition is based
21 on the following memorandum and all papers and pleadings on file herein.

22 Dated January 14, 2008.

23 DAVID ROGER
24 Clark County District Attorney
Nevada Bar # 002781

25 BY

26 
NANCY A. BECKER
27 Deputy District Attorney
Nevada Bar #000145
28 Attorney for Real Party in Interest

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**MEMORANDUM OF
POINTS AND AUTHORITIES**

The State respectfully submits the Court has misapprehended the law in its determination¹ that NRS 200.033(6) requires a direct nexus between a defendant and the money or monetary value required by the pecuniary gain aggravator. From language in the opinion, this Court appears to be interpreting NRS 200.033(6) to require that a charged defendant obtain direct financial benefit from the murder, paid for the murder or was personally motivated to participate in the murder to achieve a pecuniary benefit for some person or entity. The State concurs that all three of these conducts or "theories" are encompassed in NRS 200.033(6). However, 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.

In addition, the opinion language also suggests that in a "murder for hire" situation, there must be some specific agreement reached between the person who pays for the murder and the persons who are paid to commit the murder before the murder occurs; that payment must exchange hands before the murder and that some payment or gain is actually obtained as a result of the murder.² The plain language of NRS 200.033 does not contain such a requirement. The statute simply requires that the murder be motivated by pecuniary gain.

These misapprehensions of the aggravator affect this Courts analysis of the sufficiency of the Notice of Intent.

The State respectfully submits that the Court's opinion also misapprehends the language of SCR 250(4)(c). While the rule is a notice rule, it is does not require the State to set forth theories of criminal culpability for an aggravator, such as conspiracy or aiding and

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¹ While the Court does not directly interpret NRS 200.033(6) in its Opinion, statements in the Opinion referencing alleged defects in the Notice of Intent under SCR 250(4)(c) imply certain interpretations of NRS 200.033(6).

² Opinion, p. 11 (notice fails to say to whom the offer of money was made); p. 12 (notice fails to state that Carroll or Counts were promised remuneration before Hadland's death.)

1 abetting. No such culpability is required, but it appears from the Opinion that this Court may
2 now be imposing such a requirement.

3 The rule is designed give notice of the facts the State will rely upon to prove the
4 aggravator. In situations where the language of the aggravator contains multiple methods or
5 "theories" for application of an aggravator to a defendant, the factual allegations are intended
6 to permit the defendant to know what method or "theory" the State will argue. The
7 construction of SCR 250(4)(c) necessarily affects the Court's analysis of the sufficiency of a
8 notice of intent.

9 The State asserts this Honorable Court has also misapprehended a material fact, that
10 being that the statements contained in the notices of intent contain theories of liability for the
11 monetary gain aggravator rather than a series of factual statements which, when read as a
12 whole, indicate what conduct the State is relying upon to support the aggravator.

13 Finally, the appropriate remedy for pre-trial insufficiency of notice challenges is to
14 permit the State to amend the notice. Only if the State is unable to allege any facts to
15 support the aggravator should it be stricken.

16 ARGUMENT

17 I

18 FACTUAL BACKGROUND

19 Mindful of NRAP 40, the State will not repeat of the Statement of Facts contained in its
20 Answer. (Answer, pp. 13-12). However, for purposes of the Petition for Rehearing,
21 essentially the State has evidence supporting the following facts.

22 Luis Hidalgo, Jr. ("Mr. H") owner of the Palomino Club, told Deangelo Carroll, an
23 employee of the Palomino Club, in the presence of Anabel Espindola, a key employee of the
24 Palomino Club, that he would pay money to have Timothy Hadland ("T.J.") beaten or killed.
25 At the same meeting Mr. H also said his son, Luis Hidalgo, III (Hidalgo), manager of the
26 Palomino Club, wanted T.J. taken care of. T.J. was talking to cab drivers to discourage them
27 from bringing customers to the Palomino and the Palomino had suffered a marked decline in
28 customers. On the same day, Hidalgo told Carroll to come to work with bats and garbage

1 bags which Carroll assumed, based on Mr. H's statements, meant T.J. was to be beaten to
2 death.

3 Carroll enlists two other people, Jayson Taoipu and Kenneth Counts to help him kill
4 T.J. While in route to find T.J., Espindola calls Carroll and tells him to kill T.J. if he is
5 alone, but only beat T.J. if he is with other people. Carroll lures T.J. away from his
6 girlfriend and Counts kills T.J. in the presence of Carroll and Taoipu. Mr. H directs
7 Espindola to pay Counts for the killing. Espindola gives six thousand dollars to Carroll who
8 gives the money to Counts. Espindola and Hidalgo also give several sums of money to
9 Carroll and promise additional things of monetary value, savings bonds, to Carroll.

10 **I**
THE PECUNIARY GAIN AGGRAVATING CIRCUMSTANCE

11 The State respectfully contends that the Opinion impliedly misconstrues NRS
12 200.033(6) in two ways: (1) it suggests that for the aggravator to be applicable to a
13 particular defendant that defendant must have personnel connection to the pecuniary gain
14 achieved, and (2) it appears to require a specific agreement and a pre-murder exchange of
15 money or monetary value in a murder for hire scenario and that monetary value actually be
16 received. These issues were not the focus of the motions to strike in the district court or on
17 the writs before this Court. If the Court is interpreting the aggravator in this fashion, the
18 State argues this is in contradiction to the plain directive of the legislative language and this
19 Court's previous case law and therefore grounds for rehearing.

20 **1. Personal Nexus is not Required by the Pecuniary Gain Aggravator**

21 The pecuniary gain aggravator applies to the facts of the murder itself and not the
22 background of the individual charged with the murder. That is, the aggravator does not
23 require that a defendant be the person who gained, or was intended to gain, from the murder,
24 the person who paid for the murder, the actual killer or have pecuniary gain as the personal
25 reason for the defendant's participation in the murder. NRS 200.033(6) states:

26 **The murder** was committed by a person, for himself or another,
27 to receive money or any other thing of monetary value.
28

1 On its face, the plain language of the statute indicates the aggravator applies
2 whenever the murder was perpetrated so that someone could receive money or any monetary
3 gain. It is not ambiguous. If the Legislature intended that the aggravating factor be that the
4 defendant be motivated by financial gain, it could easily have written the statute to say so.

5 This Court recognized that the aggravator applies to the murder, not the defendant's
6 role in the murder, when it rejected the concept that a murder for hire was not a murder for
7 pecuniary gain. In Wilson v. State, 99 Nev. 362, 376-77, 664 P.2d 328, 337 (1983) this
8 Court noted that the defendant need not be the one who gains from the murder, so long as the
9 killer, or someone else, was intended to profit from the murder.

10 In addition, other courts have recognized that the aggravator applies to the
11 motivation for the murder, not the defendant's personal motivation for pecuniary gain.³
12 People v. Padilla, 11 Cal 4th 891, 906 P.2d 388 (Cal. 1995), overruled on other grounds by
13 People v. Hill, 17 Cal. 4th 800, 952 P.2d 656 (Cal. 1998); see also Tenn. v. Austin, 87
14 S.W.3d 447 (Tenn. 2002); see also Harris v. Ala., 632 So.2d 503 (Ala. Cr. App. 1992)
15 (where a defendant has been convicted of the capital offense of murder for hire, even though
16 that person was the hirer and was convicted of the offense as an accomplice pursuant to the
17 complicity statute, the aggravating circumstance that the capital offense was committed for
18 pecuniary gain is established as a matter of law). In fact, the California Supreme Court has
19 held that its financial gain statute does not require that anyone actually receive a direct
20 financial gain as long as a financial gain is contemplated. See People v. Michaels, 28 Cal.
21 4th 486, 49 P.3d 1032 (Cal. 2002).

22 2. Potential Gain

23 NRS 200.033(6) does not require that some type of agreement to pay money be
24 reached prior to the murder or that payment for the murder be made in advance. In fact, the
25 statute does not require that someone actually receive a financial gain from the murder, only
26 that the murder be motivated, in some part, by financial gain.

27
28 ³ California's financial gain aggravator reads "The murder was intentional and carried out for financial gain." Cal. Penal Code 190.2(1).

1 Pecuniary gain aggravators encompass the motivation for the murder, that is, a
2 promise of compensation or expectation of monetary value. Whether murder results in an
3 actual gain is evidence, but not a requirement, of the aggravator. Thus when someone lets it
4 be known that they will pay to have a person killed and a killer commits the murder with the
5 expectation the bounty will be paid, it is murder committed for pecuniary gain, regardless of
6 whether the killer gets paid or not, the killer ever met the offering party or a specific
7 agreement as to price was reached.

8 3. NRS 200.033(6) Applicability

9 In the instant case, the facts support two types of conduct evidencing the motive for
10 the murder was pecuniary gain. Once that is established, the aggravator applies to a
11 defendant who was a major participant in the murder.⁴

12 First - murder for hire. Carroll, Taoipu and Counts, individually or collectively,
13 killed T.J. for a financial reward they expected to receive from the Palomino Club, Luis
14 Hidalgo, Jr. ("Mr. H."), Luis Hildago, III ("Hidalgo") or Espindola, again individually or
15 collectively. If the State proves that any one of these people intended to collect a bounty for
16 killing T.J., the aggravator applies to the murder. If Hidalgo and Espindola are convicted of
17 first degree murder, it applies to them, regardless of their reasons for participating in the
18 murder.

19 Second - murder for gain. The Palomino Club, Mr. H, Hidalgo, or Espindola,
20 individually or collectively, wanted T.J. killed because his activities were negatively
21 impacting the business of the Palomino Club, causing it to lose customers. Eliminating T.J.
22 would increase customers resulting in financial gain. So long as the State proves that any
23 one of these entities intended to boost the Palomino Club's revenues by killing T.J., the
24 aggravator applies to the murder and Hidalgo or Espindola's personal motives are irrelevant.

25
26 ⁴ The State acknowledges that before the jury could consider the death penalty, they would still have to find that Hidalgo
27 and Espindola were major participants in the murder itself, as distinguished from the aggravator, under the holdings of
28 Edmund v. Florida, 458 U.S. 782, 797 (1982) and Tison v. Arizona, 481 U.S. 137 (1987). However there is no
requirement that a defendant be a major participant in the aggravator, i.e. that a defendant be the killer or the person who
financially benefited from the murder.

Because the Court appeared to be considering a more restrictive view of the aggravator in analyzing the sufficiency of the notice, the Court should grant rehearing, clarify its interpretation of NRS 200.033(6) and reanalyze the notice accordingly.

II

PURPOSE UNDERLYING SCR 250(4)(C)

The Court's Opinion suggests that SCR 250(4)(c) requires the State to plead theories of culpability for an aggravating circumstances. The State respectfully contends that this is a misapprehension of the rule and thus rehearing is warranted.

On its face, SCR 250(4)(a) requires that the State “allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance.” It does not speak of theories of criminal culpability, such as conspiracy or aiding/abetting or that a defendant must be personally liable for an aggravator before that aggravator may be applied to a defendant in a given case.

Whether an aggravator refers to the circumstances of the crime or the background of the defendant is a statutory/legislative decision. For example, NRS 200.033(1), referring to sentence of imprisonment, involves the background of a defendant, not the circumstances of the crime. Whereas NRS 200.033(7) – murder of a peace officer – refers to the circumstances of the crime and specifically states that it cannot be applied to a defendant who did not know or reasonably should have known the victim was a peace officer. No such caveat exists in the pecuniary gain provision.

Prior to January 27, 1999, SCR 250 only required the State to list the aggravating circumstances the State intended to present. SCR 250(II)(A)(1) and (2) (ADKT 109, 6/17/93). In 1995, this Court instituted a review of the existing Rule 250 provisions. A committee was appointed for this purpose which later became known as the Fondi Commission as it was chaired by the Honorable Michael Fondi from the First Judicial District Court. Based on numerous meetings, the Fondi Commission issued a report on July 24, 1997 detailing its recommendations. After this Court considered those

1 recommendations, the existing version of SCR 250 was repealed and a new version adopted.
2 (ADKT 219, 260 and 261, Order Adopting December 30, 1998, Effective date January 27,
3 1999.) The current language of the rule stems from these proceedings.

4 The new version, SCR 250(4)(a) was intended to address two perceived problems
5 with the administration of Rule 250.

6 The first dealt with the inability of defense counsel to challenge the legal sufficiency
7 of the aggravator in pre-trial proceedings – that is, without the factual basis for the
8 aggravator, there was no way to assert that those facts, even if true, did not legally support
9 the aggravating circumstances. This policy was involved in the portion of the Court's
10 Opinion dealing with solicitation of murder as a crime of violence.

11 The second issue arose with aggravators that involve multiple conduct or "theories"
12 such as the instant aggravator. As the Court notes the language "[t]he murder was
13 committed by a person, for himself or another, to receive money or any other thing of value"
14 incorporates two distinct concepts, murders for hire and murders for gain. Without a factual
15 predicate, it was possible for the defense to believe the State was pursuing one course of
16 conduct or "theory" based upon defense counsel's interpretation of the discovery, only to
17 find out in the middle of trial that the State had a different interpretation of the facts and their
18 application to the aggravating circumstance. To avoid this, the Rule now requires the State
19 to plead the facts so that defense counsel knows which course of conduct or conducts the
20 State intends to prove. Final Report of the Fondi Commission, ADKT 219, p. 14 (July 24,
21 1997)

22 Thus SCR 250(4)(a) is a "notice" rule for these purposes. The State must allege
23 sufficient facts to give notice of whether the State intends to prove that the aggravator
24 applies because this is a murder for hire or a murder for gain or, if the facts warrant, both.
25 Neither the NRS 200.033(6) nor SCR 250(4)(a) require that the State assert a criminal
26 culpability theory of the defendant's involvement aggravator, i.e. as a conspirator, aider and
27 abettor, direct actor or that the defendant intended or received pecuniary gain. Rather the
28 State must show that that the murder was committed for monetary value or to achieve

1 something of monetary value for some person. Thus the facts required in the notice would
2 be the facts, when taken as a whole, support one or both of these concepts.

3 If the Court is construing SCR 250(4)(c) to require theories of personal culpability for
4 an aggravating circumstance, then the State asserts this is inconsistent with the policy behind
5 the Rule's adoption. The Court should grant rehearing and reconsider the notice in light of
6 the intent behind the Rule. In that light, the State asserts that the notices give ample
7 forewarning that the State is alleging Counts and/or Carroll committed the murder with an
8 expectation of being paid, i.e. the murder was committed for hire; and/or the murder was
9 committed for gain, i.e. to stop Hadland's interference with the Palomino's customer base
10 and thus increase the profits of the club.

11 III

12 **THE COURT HAS MISAPPREHENDED A MATERIAL FACT BY** 13 **CONSIDERING THE STATEMENTS IN THE NOTICE AS THEORIES** 14 **RATHER THAN FACTUAL ALLEGATIONS**

15 Because the Court appears to interpret SCR 250(4)(c) to require pleading of
16 culpability theories, rather than the factual allegations as stated in the rule, it assumed the
17 notices were stating separate theories of culpability, none of which were legally sufficient to
18 support the aggravator. This is a misapprehension of the facts of this case and the notice
19 itself.

20 The instant notice, while not the epitome of clarity, performs the function intended by
21 SCR 250(4)(c) – it states the facts upon which the State is relying and thereby gives notice
22 that the State is pursuing two methods or “theories” for applicability of the aggravator –
23 murder by hire or murder for gain or both. The State uses “and/or” language, together with
24 semi-colons and the word “thereafter” to indicate that the allegations are to be read as a
25 whole. The allegations are not theories; they are facts that support the theories, i.e. murder
26 for hire or murder for gain or both.

27 The first clause indicates that persons affiliated with the Palomino Club let it be
28 known, individually or collectively, to Carroll that they wanted Carroll to beat or kill T.J..
The second clause indicates Mr. H offered money to have T.J. beaten or killed, that is, an

1 open ended contract on T.J., leaving it up to the individual or individuals who accepted the
2 contract to decide whether to kill or beat T.J.. The third clause indicates Mr. H was also
3 interested in having T.J. killed to further the business of the Palomino Club.⁵ The fourth
4 clause states that Hidalgo told Carroll to come to work with bats and garbage bags. (A fact,
5 if believed by the jury, would be circumstantial evidence that the plan was to beat T.J. to
6 death, hence the need for garbage bags.) Read together, these clauses indicate that the State
7 intends to prove that these persons, individually or collectively, intended to pay money to
8 someone to kill T.J. and/or to gain monetary value for the Palomino Club.

9 The fourth clause is followed by the word "thereafter." The Notice then goes on to
10 state that Carroll enlisted Counts and Taoipu to kill T.J., a fact from which a jury could
11 conclude that Carroll, Counts and Taoipu, individually or collectively, were accepting the
12 open-ended contract and killed T.J. to collect the bounty referred to in the first through
13 fourth clauses or to further the business of the Palomino Club.

14 The fifth clause is again followed by the word "thereafter" and indicates Counts
15 shoots T.J.. The sixth clause is preceded by the word "thereafter" and states that Mr. H and
16 Espindola, individually or collectively, give Carroll six thousand dollars to pay Counts. The
17 seventh clause is also preceded by "thereafter" and states Counts received the six thousand
18 dollars. The Seventh Clause also sets forth a series of payments to Carroll by Espindola and
19 Hidalgo, individually or collectively, as well as promises of future payments of salary or
20 savings bonds. The fifth through seventh clauses, when read together, reflect that either
21 Counts or Carroll or both were paid to kill T.J., thus supporting a murder for hire theory.

22 Read as whole, the Notice complies with SCR 250(4)(c). It gives the facts upon
23 which the State intends to rely in proving that persons affiliated with the Palomino Club
24 wanted T.J. beaten or killed and were willing to pay money for either result. Carroll was
25 directed by one or more of those persons to see that this was accomplished. Carroll enlisted

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27 ⁵ The State recognizes that this Court in Hidalgo ruled that "further the business" is too vague and does not give notice
28 of how the murder would result in a pecuniary gain to the Palomino Club or any other person. However, as noted below,
the appropriate remedy for a pre-trial challenge relating to inadequate notice is giving the State leave to amend the
notice, rather than striking the aggravator.

1 the aid of two persons, Counts and Taoipu to help him carry out his orders. Counts fired the
2 shots that killed T.J. and is paid Six Thousand Dollars. Additional sums of money and
3 things of value (savings bonds) are paid or promised to Carroll for accomplishing the
4 murder.

5 Finally the Notice of Intent indicates an additional motive for the killing was to
6 further the business of the Palomino Club thus making defense counsel aware that the State
7 was also intending to prove murder for gain to another person, the Palomino Club or its
8 principals.

9 These are not legal theories, they are factual statements, plead in the alternative
10 because several different individuals took different steps and it does not matter whether the
11 jury believes Hidalgo, Mr. H or Espindola ordered and paid for the murder individually,
12 acting together or acting as agents of the Palomino Club. The State's "theory" is that this
13 was a murder for hire. The State alleged every fact in the alternative that would support this
14 "theory" – i.e. people paid money for T.J.'s murder. The defense is free to argue that the
15 monies were for something else, to keep witnesses silent, to take the rap, etc. It is for the
16 jury to decide what inferences are to be drawn from these facts and whether they prove
17 murder for hire or gain. A Notice is not deficient because the facts are complicated.⁶ This
18 Court misapprehended the nature of the notice and should grant rehearing.

19 IV

20 APPROPRIATE REMEDY

21 Finally, even if this Court still concludes the Notice of Intent is too confusing and
22 does not give adequate notice under SCR 250(4)(c), then the appropriate remedy is to
23 remand the case with instructions to permit the State to amend its notice in accordance with
24 this Court's concerns, not to strike the aggravator. Since the Rule is based on the notice

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26 ⁶ The Court also seems to be requiring more than notice pleading because the Opinion states that the State failed to plead
27 specific details of every conversation, where they occurred, who was present, what agreements were reached. This goes
28 beyond facts to support how the conduct implicates the aggravator, the purpose of the rule. It is more akin to the kind of
information required by SCR 250(4)(f), evidence in aggravation. If SCR 250(4)(c) is to be read to require every
evidentiary fact, then this is much broader than notice pleading and another reason why leave to amend should be
granted.

1 concepts derived from case law involving informations or indictments, the same remedy
2 considerations should apply as well.

3 Generally an information or indictment may be amended at anytime if no additional
4 or different offense is charged and substantial rights are not prejudiced. NRS 173.095. Pre-
5 trial complaints about lack of notice can be remedied by the State and so dismissals should
6 be without prejudice or the State should be given leave to amend. This is because there is no
7 prejudice to the defendant in such a case. State v. Hancock, 114 Nev. 161, 955 P.2d 183
8 (1998). Indeed amendments on a pre-trial basis are generally recognized as the appropriate
9 remedy for lack of notice allegations. State v. District Court, 116, Nev. 374, 997 P.2d 126
10 (2000). This is especially true when the defense has had notice of the charges or theory of
11 the case and only the specifics of the notice have been challenged. Shannon v. State, 105
12 Nev. 782, 783 P.2d 942 (1989)(amendment permitted to allege different facts in support of
13 same charge).

14 A different standard should not apply to the notice provisions of NRS 250(4)(c). The
15 appropriate remedy is to permit the State to amend the Notice of Intent to clean up any
16 confusing language, not to strike the aggravator. Amendment is more in line with the
17 purpose and intent of SCR 250(4)(c) and the reasons for its promulgation. Thus even if the
18 Court does not accept the State's other arguments and still believes the notices are too
19 confusing, it should grant rehearing and remand the case with instructions to permit the State
20 to amend the notices rather than striking the aggravators and then the notices. The Rule was
21 never intended to permit form to govern over substance, especially in a clear case of murder
22 for hire.

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1 CONCLUSION

2 For the reasons cited above, the State respectfully submits the Court should grant
3 rehearing.

4 Dated January 14, 2008.

5 DAVID ROGER
6 Clark County District Attorney
7 Nevada Bar # 002781

8
9 BY



10 NANCY A. BECKER
11 Deputy District Attorney
12 Nevada Bar #000145

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1 CERTIFICATE OF MAILING

2 I hereby certify and affirm that I mailed a copy of the foregoing Petition for
3 Rehearing to the attorney of record listed below on January 14, 2008.

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5 Christopher Oram
6 Attorney at Law
7 520 South Fourth Street, 2nd Floor
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13 CERTIFICATE OF SERVICE

14 I hereby certify and affirm that a on January 14, 2008 copy of the foregoing Petition
15 for Rehearing was delivered via facsimile and hard copy sent to:

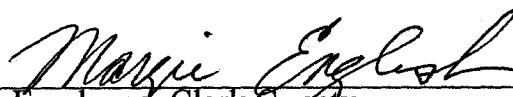
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