IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 68710 **E-File**

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LUIS PIMENTEL,	)	NO. 68710
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REHEARING

COMES NOW, Deputy Public Defender WILLIAM M. WATERS, on behalf of the Appellant, LUIS PIMENTEL, petitions this court for rehearing, pursuant to NRAP 40, in the above-referenced case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 5th day of July, 2017.

Respectfully submitted,

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CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
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POINTS AND AUTHORITIES

NRAP 40(c)(2)(A),(B) permits this Court to consider rehearing, "[w]hen the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or [w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will consider rehearing only when "necessary to promote substantial justice." Gordon v. Eighth Judicial Dist. Court, 114 Nev. 744, 745, 961 P.2d 142 (1998).

I. This Court Overlooked, Ignored, and Misapprehended Material Facts and Law in Affirming PIMENTEL's Conviction.

This Court's Opinion affirming PIMETEL's conviction turned *dicta* into legal precedent and simultaneously contradicted this *dicta*/precedent. The Opinion also overlooked or ignored material facts in the record which distinguish PIMENTEL's case from authority this Court relied upon in affirming PIMENTEL's conviction. Re-hearing is warranted because this Court's Opinion creates an impossible and/or incomprehensible legal standard which lower courts

will be unable to apply. Likewise, the Opinion results in a substantial injustice for PIMENTEL, a United States Army Veteran who honorably served his Country in Afghanistan.[1] PIMENTEL was unjustly convicted for first degree murder after he honorably attempted to intervene when a deranged methamphetamine addict battered a woman.

A. NRS 200.450's constitutionality

In his briefing PIMENTEL argued Nevada's prohibition against Challenge to Fight[2] is both unconstitutionally vague and overbroad. See AOB 30-37; ARB 8-15. Yet it appears this Court believed PIMENTEL only claimed NRS 200.450 is facially vague. As proof, when rejecting PIMENTEL's arguments this Court noted, "Pimentel challenges the language of the statute itself, which is the same language we previously held to be not vague." Pimentel v. State, 133 Nev. Adv. Op. 31, 2017 WL 2733777, *4 (June 22, 2017). However, PIMENTEL challenged NRS 200.450 as both facially vague and vague as-applied. Specifically, PIMENTEL argued NRS 200.450's terms did not, and could not, give **him** sufficient notice that he entered

[1] Curiously, the Opinion affirming PIMENTEL's conviction never acknowledges PIMENTEL's heroic service even though this Court discussed PIMENTEL's post-traumatic stress disorder.
[2] NRS 200.450.

into a "previous concert and agreement" to fight. See ARB 9-10 ("NRS 200.450 did not provide PIMENTEL notice that his response 'you know where I be' to Holland's threat to 'kick [Appellant's] ass,' would be an acceptance and/or a challenge to fight.").

Additionally, this Court rejected PIMENTEL's argument that NRS 200.450 allows for arbitrary enforcement by claiming, "Pimentel has put forth no evidence, nor is there anything in the record, to indicate that some fight participants would be more or less likely to be charged under NRS 200.450 than others." Pimentel, 2017 WL 2733777, *4. Similarly, "[w]e are not persuaded that NRS 200.450 ***leads*** to arbitrary or discriminatory enforcement." Id. PIMENTEL does not have to put forth evidence or demonstrate from the record that some fight participants "would be more or less likely to be charged" than others. Likewise, PIMENTEL is not required to prove a vague statute actually ***leads*** to arbitrary or discriminatory enforcement. Rather, PIMENTEL is only required to show NRS 200.450 "lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." Silvar v. Eighth Judicial District Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006). Essentially, PIMENTEL need only demonstrate NRS 200.450 could

possibly encourage, authorize, permit, or risk, arbitrary or discriminatory enforcement.

By requiring PIMENTEL to show the State actually charges some fight participants and not others, or that NRS 200.450 actually leads to arbitrary or discriminatory enforcement, this Court held PIMENTEL to a standard it does not hold other litigants. Nevertheless, PIMENTEL actually demonstrated how the State arbitrarily charged him under NRS 200.450. Specifically, the State did not initially charge PIMENTEL for violating NRS 200.450 even though the supposed challenge and acceptance was apparently obvious. The State only charged PIMENTEL under NRS 200.450 after PIMENTEL elicited evidence Holland initiated the physical altercation. See ARB 12. Thus, relying upon *dicta* in Wilmeth v. State, 96 Nev. 403, 640 P.2d 735 (1980), the State attempted to deprive PIMENTEL of his right to claim self-defense by arbitrarily charging him under a statute which originally applied to duels.[3]

This Court also rejected PIMENTEL's over breath claim suggesting NRS 200.450 does not criminalize speech but rather "uses" speech to provide the *mens rea* for a murder when a killing occurs

[3] See Revised Laws of Nevada § 6426 (1912).

during an agreed upon fight. Pimentel, 2017 WL 2733777, *5. However, this Court overlooked NRS 200.450(2)'s plain language which also punishes "a person who **acts for another** in giving, sending, or accepting either verbally or in writing any challenge to fight." Under this language a person who does not fight, offer, or agree to fight, but instead simply delivers another person's offer or acceptance to fight, is liable for First Degree Murder regardless of whether that person specifically intended that a fight occur. Because this Court overlooked or misapprehended the aforementioned facts and law it should grant rehearing.

B. NRS 200.450 and self-defense.

Throughout the Opinion this Court repeatedly claims Wilmeth "held" self-defense is not available when the State charges murder under a theory of challenge to fight.[4] Specifically: (1) "In Wilmeth v. State, 96 Nev. 403, 405-06, 610 P.2d 735, 737 (1980), we **held** that where a challenge to fight is accepted and the decedent unilaterally escalated the fight with a deadly weapon, the survivor was not entitled to a self-defense jury instruction." Pimentel, 2017 WL 2733777, *1; (2) "We have previously **held** that self-defense was not available as a

[4] Challenge to fight is not a "theory" of murder. Rather, it is a separate offense with the same punishment as murder. See subsection E below.

defense to a violation of NRS 200.450 when a defendant voluntarily places himself in a situation where he issues or accepts a challenge to fight and a fight occurs, even if the decedent unilaterally escalated the situation." Id. at *6; (3) "Although the holdings from O'Bryan, Friday, and Gill and not entirely unpersuasive, the fact remains that we have previously **held** that self-defense does not apply in a challenge-to-fight murder case merely because the decedent unilaterally escalated a fistfight to one using a deadly weapon. Pimentel, 2017 WL 2733777, *6. (citing See Wilmeth, 96 Nev. at 405, 610 P.3d at 737, and incorrectly claiming Wilmeth **held** "that one participant in a fight who kills the other may not claim self-defense if the decedent went beyond the agreed upon terms and introduced a deadly weapon)."

Wilmeth never held self-defense is not available when the State charges Challenge to Fight Murder or when one party to an agreed upon fight unilaterally escalates the fight by introducing a deadly weapon. Wilmeth only addressed three issues. First, "whether the challenge to fight statute is void for vagueness." Id. at 403, 610 P.2d at 736. Second, whether the trial court erred in failing to instruct the jury that the defendant was not required to retreat." Id. Third,

"whether the trial court erred in failing to instruct on lesser included offenses."[5] Id.

1. This Court misapplied Wilmeth to PIMENTEL's case.

A holding is "The legal principle derived from a judicial decision." See, <http://legal-dictionary.thefreedictionary.com/Judicial+holding>, last accessed June 29, 2017. Specifically, "[t]hat part of the written opinion of a court in which the law is specifically applied to the facts of the instant controversy." Id. A "holding is then, "relied upon when courts use the case as an established precedent in a subsequent case." Id. Conversely, *dictum* is "a comment by a judge in a decision or ruling which is not required to reach the decision, but may state a related legal principle as the judge understands it." See, <http://dictionary.law.com/Default.aspx?selected=514>, last accessed June 29, 2017.

[5] The Court **held** the defendant was not entitled to instructions on misdemeanor disturbing the peace and provoking commission of a breach of the peace. Id. at 408, 610 P.2d at 739. In resolving that issue this Court did not offer any *dicta* concerning self-defense.

In resolving NRS 200.450's alleged vagueness, Wilmeth **held** NRS 200.450 was not vague because "in the context of this case, we believe that the statute provided Appellant with sufficient warning of the proscribed behavior." Id. at 405, 96 Nev. at 737. Unfortunately, in announcing this **holding**, the court also briefly addressed, in *dicta*, the defendant's "further" argument that NRS 200.450 was vague because it fails to give adequate notice "when a participant may use self-defense when weapons are used and an agreement to use weapons was not previously reached." Id. In addressing this related argument this Court noted, "[a]lthough we can envision innumerable factual situations on which the warnings in the statute might be considered ambiguous, **on the instant facts**, self-defense is no defense to the violation of this statute." Id. However, this was not the "holding." The statement did not announce a legal principle which could then be relied upon by other courts as it was limited to the facts of that case. Additionally, this statement was not necessary in resolving whether NRS 200.450 was facially vague.

In fact, the Wilmeth defendant's claim that "he would not have encountered the decedent had he known [the decedent] was going to be armed," only **implied** the decedent unilaterally escalated the terms

of the fight. Id. at 407, 610 P.2d at 738. In rejecting this implication the Court noted, "The record places the credibility of this assertion in serious doubt. For months prior to the killing, the participants in this unfortunate affray were on hostile terms, and there was evidence that each had uttered threats to kill each other." Id. at 407 fn. 4, 610 P.2d at 738 fn.4. Therefore, Wilmeth did not hold a participant in a fight is not entitled to assert self-defense when the other participant introduces a weapon, but rather under the **specific facts** in that case, i.e., the parties' previous threats to kill each other, the defendant's claim he did not know the decedent would introduce a weapon lacked credibility. Id. at 407 fn. 4, 610 P.2d at 738 fn.4. The court never addressed whether **any** defendant would be entitled to a self-defense jury instruction when the decedent unilaterally escalated the fight by introducing a deadly weapon. Accordingly, the court's *dicta,* that **under Wilmeth's facts** self-defense was not a defense to NRS 200.450, was not part of the opinion necessary to reach the decision concerning the Statute's facial vagueness. See Judith M. Stinson, Why Dicta Becomes Holding and Why it Matters, 76 Brook. L. Rev. 219, 223 (2010).

Regarding Wilmeth's second claim that the trial court erred in failing to instruct the jury that the defendant was not required to retreat, this Court **held** the district court did not err by refusing to give the defendant's proposed instruction. Id. at 407, 112 P.2d at 738. In explaining this **holding**, the Court noted the defendant's proffered instruction applied in non-mutual combat situations where a person is not required to retreat when he reasonably believes he is confronted with imminent danger of death. Id. In *dicta*, this Court noted the defendant was given a self-defense jury instruction "which substantially embodied appellant's proposed instruction for the purposes of this case." Id. Again, in *dicta*, the Court noted "[h]ere, neither the defense of self-defense nor the no-retreat rule **was relevant**, and the [self-defense] instructions given improperly benefitted appellant." Id. Neither one of these announcements were part of the holding because the defendant never argued he was not given a self-defense instruction for which he was entitled. Again, the *dicta* simply suggested under Wilmeth's specific facts, i.e. the long history of animosity and threats to kill each other, the district court's discretionary decision to give a self-defense instruction improperly

benefitted the defendant. This Court did not hold that self-defense never applies to allegations involving NRS 200.450.

Here, after acknowledging persuasive authorities from other jurisdictions which allow self-defense for mutual combatants, this Court nevertheless claimed "the fact remains that we have previously *held* self-defense does not apply in a challenge-to-fight murder case merely because the decedent unilaterally escalated a fistfight to one using deadly weapons...[w]e hold no differently now. Id. at *7. However, this Court also noted that Wilmeth acknowledged "there could be some cases in which a mutual combatant could be entitled to such an instruction." Pinentel, 2017 WL 2733777, *1. This Court then explicitly stated, "Although we agree that self-defense **might not always be unavailable as a defense to the challenge-to-fight theory of murder,** we conclude it was unavailable in the instant case." Id. at *6 (emphasis added). This Court refused to offer examples of situations or circumstances where self-defense would be available when a defendant is charged with Challenge to Fight. Id. at *6, fn. 8.

Problematically, if Wilmeth indeed "held" self-defense is not available under NRS 200.450, yet this court believes "self-defense might not always be unavailable as a defense" to NRS 200.450, then

the Court had an obligation to explicitly overrule Wilmeth. By not doing so, this Court created legal precedent suggesting self-defense is never available under NRS 200.450 yet could be available under NRS 200.450. These contradictory announcements will not provide any guidance for the district courts.

Finally, if this Court believes self-defense could be available under NRS 200.450 then it should have also addressed the propriety of instruction 19 in Appellant's case. See AOB 43-48, ARB 19-24. Instruction 19 stated, "Under the theory of challenge to fight for First Degree Murder, the right of self-defense is not available to someone who engages in a challenge to fight and a death results." AA IV 819. Instruction 19 essentially instructed the jury that when the State *alleges* Challenge to Fight, self-defense is unavailable. If however self-defense could apply under NRS 200.450, as this Court stated, then instruction 19 was an incorrect statement of law which usurped the jury's fact-finding role. A proper instruction should have instructed the jury to first determine if there was a challenge to fight with resulting death and then whether PIMENTEL could assert self-defense.

2. *This Court overlooked and misapprehended material facts in the record which distinguish Appellant's case from Wilmeth.*

This Court acknowledges self-defense could apply in cases involving mutual combatants under NRS 200.450. Pimentel, 2017 WL 2733777, *6. However, the Court claims Appellant's case is factually different than Wilmeth and therefore PIMENTEL was not entitled to argue self-defense for the challenge to fight allegation. See Id. ("the factual differences in [Appellant's] case and Wilmeth are not legally consequential."); Id. at *4 ("Looking to the statute as applied to the facts of the case, Pimentel is unable to distinguish the facts of this case from those in Wilmeth."); Id. at *6 ("Pimentel does not, however, explain how his case differs from Wilmeth to entitle him to assert self-defense under the challenge to fight theory."); Id. at *7, (Nguyen required facts that are not present in the instant case, i.e., the defendant's intent to stop fighting and his communication of that intent to the decedent.").

First, it is ironic that this Court claims Wilmeth did not provide much factual detail (see Pimentel, 2017 WL 2733777, *4, fn. 5) while simultaneously claiming PIMENTEL failed to factually distinguish his case from Wilmeth. Nevertheless, Wilmeth did provide an

enormously significant fact not present in Appellant's case. In Wilmeth, the defendant claimed his requested no duty to retreat instruction was consistent with NRS 200.200 ("Killing in Self Defense") and that he "would not have encountered the decedent had he known he was going to be armed." Wilmeth, 96 Nev. at 407, 610 P.2d at 738. In rejecting this argument this Court noted, "The record places the credibility of this assertion in serious doubt. For months prior to the killing, the participants in this unfortunate affray were on hostile terms, and there was evidence that each had uttered threats to kill the other." Id. at 407 fn. 4, 610 P.2d at 738 fn. 4. In contrast, here, PIMENTEL only encountered Holland after Holland battered Amanda Lowe. There was no history of animosity between PIMENTEL and Holland. See AOB 48. Likewise, PIMENTEL never threatened to kill Holland. Id. at 47-48 (citing AA VIII 1754-55, 1833, 1843, 1850, 1951, AA X 2353, 2368, 2370-71; AA XI 2585); ARB 35 (citing AA VIII 1767). Insofar as Holland may have threatened to kill Appellant, PIMENTEL responded "I don't want any problems." AOB 12 fn. 9 (citing AA X 2353). Moreover, this Court acknowledged Appellant's supposed challenge or acceptance did not contemplate weapons. See Pimentel, 2017 WL 2733777, *2, fn.2.

Specifically, PIMENTEL "either challenged Holland or accepted Holland's challenge" by shouting "All right, you know what, that's enough, Dude. I mean seriously, you want to hit Aman – I mean, you want to hit a woman **why don't you just come hit a man then**." If the above exchange was a challenge or acceptance, clearly PIMENTEL only suggested Holland attempt to "hit" him, not pull a gun on him. More importantly, although this Court claims PIMENTEL either challenged or accepted a challenge, the State only alleged PIMENTEL **"challenged"** Holland to fight. See AA I 185, AA IV 784. Thus, if this Court believed PIMENTEL "accepted" Holland's challenge, PIMENTEL is entitled to reversal as the State never alleged or proved the essential fact that PIMENTEL "accepted" Holland's challenge.

Additionally, unlike Wilmeth -- where this Court rejected the defendant's claim he would not have encountered the decedent had he known the decedent would be armed, nothing suggests PIMENTEL knew, suspected, or understood Holland's threats included the use of a firearm. Although this Court devalues the jury's decision to acquit PIMENTEL of carrying a concealed weapon (see Pimentel, 2017 WL 2733777, *2, fn. 3), the jury's verdict actually confirms PIMENTEL

did not know Holland would introduce a gun. Furthermore, even if there was a challenge and acceptance this Court ignored the uncontroverted fact that both Holland and PIMENTEL either expressed they did not want to fight or repudiated any agreement to fight. AOB 12 (citing AA X 2323, 2353); AOB 13 (citing AA XI 2585); AOB 47-48 (citing AA VIII 1833, 1850, 1951; AA XI 2585). Thus, this Court incorrectly claimed Appellant's case was distinguishable from the test announced in People v. Nyugen, 354 P.3d 90, 112 (Cal. 2015) -- which ironically, this Court did not expressly adopt.

C. This Court failed to consider law directly controlling a dispositive issue in Appellant's case.

In affirming Appellant's conviction this Court ignored the numerous other issues PIMENTEL raised by claiming they were "without merit." Pimentel, 2017 WL 2733777, *1, fn. 1. Among the ignored arguments, PIMENTEL contended the district court erred by refusing his jury instructions regarding Nevada's stand your ground law and defense to commission of felony. AOB 52-57; ARB 25-33. Although PIMENTEL contends the district court erroneously instructed the jury self-defense did not apply under NRS 200.450, instructions on stand your ground and defense to commission of

felony would nevertheless apply to the State's other claim that PIMENTEL killed Holland with premeditation and deliberation. Indeed, this Court believed the jury could have convicted PIMENTEL under a theory of deliberate and premeditated murder by noting "the totality of the admissible evidence presented was sufficient to convict Pimentel under either theory of murder." Pimentel, 2017 WL 2733777, *8. If true, PIMENTEL was entitled to his proposed instructions.

The district court rejected the proposed instructions claiming NRS 200.120 and NRS 200.160 only applied to one's dwelling. AA XIII 3031, 3032-33. The district court's clearly erroneous decision usurped the legislature's prerogative to expand use of force outside one's dwelling. See RAB 26-27 (citing Hearing on S.B. 175 Before Senate Judiciary Comm., 78th Leg. (Nev., February 25, 2015); RAB 31 (citing Newell v. State, ___ Nev. ___, ___, 364 P.3d 602, 603 (2015)). Accordingly, by claiming PIMENTEL's arguments "lacked merit," this Court overlooked law directly controlling a dispositive issue in Appellant's case. Moreover, because this Court refused to address this dispositive issue District Court Department 5 will continue to deny theory of defense jury instructions regarding stand your ground and

defense to commission of felony in all cases occurring outside a dwelling. This Court cannot allow this ineptitude to stand uncorrected.

D. This Court overlooked material facts regarding Piasecki's testimony.

In his brief PIMENTEL argued State's expert witness Melissa Piasecki improperly opined PIMENTEL was guilty of the charged crimes.[6] RAB 18-19. In affirming Appellant's conviction this Court agrees Piasecki's testimony was improper but claims the error was harmless because Piasecki did not opine as to "the ultimate question of any element of the charged offense, including whether Pimentel intended to fight or intended to kill." Pimentel, 2017 WL 2733777, *8. This statement is categorically untrue.

[6] In rejecting PIMENTEL's claim Piasecki violated the exclusionary rule the Court noted, "The State confirmed that this particular district court department requires parties to request recorded bench conferences prior to trial and claimed that Pimentel did not, in fact, invoke the exclusionary rule." Pimentel, 2017 WL 2733777, *7. However, there was no instance in the record disproving PIMENTEL invoked the exclusionary rule. The only mention of the exclusionary rule occurred when the prosecutor implied the rule had been invoked. See AOB 39 fn. 24 (citing AA X 2251); ARB 15 (citing AA X 2251). It is deeply troubling that this Court explicitly relied upon the State's assertion of facts outside the record. This Court would never accept a defendant's representation concerning a fact outside the record and it should not have accepted the State's in this case.

Although Piasecki did use the exact words "intended to fight" or "intended to kill," she nevertheless testified to the ultimate question concerning the charged elements. Piasecki testified PIMENTEL's statement "really," upon witnessing Holland at the apartment, meant PIMENTEL was "challenging" Holland. AA XII 2946. Additionally, Piasecki testified PIMENTEL had the "capacity to make decisions unrelated to the threat" and had the "ability to consider consequences of his actions unrelated to the threat." AA XII 2950. This testimony was a direct comment upon PIMENTEL's ability to premeditate and deliberate which directly implicated the "the ultimate question of any element" of premeditated and deliberate murder. Likewise, whether or not PIMENTEL "challenged" Holland was an essential element of NRS 200.450, which the State had to prove beyond a reasonable doubt. Therefore, Piasecki actually testified to the ultimate questions "of any element of the charged offense."

E. The Court overlooked or misapprehended the law by repeatedly referring to Challenge to Fight as a "theory" of First Degree Murder.

This Court repeatedly refers to Challenge to Fight as a "theory" of First-Degree Murder. See Pimentel, 2017 WL 2733777, *2 ("After the preliminary hearing, the State added a charge of carrying a

concealed weapon, see NRS 202.350, and a **theory** of first degree murder involving the killing as a result of a challenge to fight, see NRS 200.450.); Pimentel, 2017 WL 2733777, *5 ("NRS 200.450, like the felony-murder rule, does not create a strict liability crime because the initial intent to fight must be found to sustain a murder charge under the challenge-to-fight **theory**."). However, Challenge to Fight is not a theory of murder but rather a separate crime.

NRS 200.030 explains the various "theories" of first degree murder including premeditated and deliberate murder, felony murder, or murder by poison or lying in wait. In contrast, NRS 200.450 is a distinct criminal offense with unique elements called Challenge to Fight. If a person engages in an agreed upon fight, the punishment is a gross misdemeanor. If a person dies during an agreed upon fight, the crime is complete and the **punishment** for that crime is the same punishment as First-Degree Murder as stated in NRS 200.030(4).

Pleading NRS 200.450 as a theory of murder within a count alleging premeditated and deliberate murder under NRS 200.030 violates the prohibition against duplicity. See Jenkins v. District Court, 109 Nev. 337, 339-40, 849 P.2d 1055, 1057 (1993) (while "a charging document may set forth alternative means of committing a

crime within a single count, **alternative offenses must be charged in separate counts**."); Gordon v. Eighth Jud. Dist. Ct., 112 Nev. 216, 228, 913 P.2d 240, 247-48 (1996) ("Duplicity concerns joining in a single count two or more distinct and separate offenses."). Duplicity prejudices a defendant by failing to provide adequate notice,[7] produces an inadequate record concerning jeopardy,[8] creates prejudicial evidentiary rulings,[9] and potentially leads to convictions based on non-unanimous verdicts as to one charge or the other.[10]

In the Mandamus proceeding prior to PIMENTEL's trial this Court noted challenge to fight is a theory of First-Degree murder similar to felony murder (see case # 66304, Order Granting Petition in Part, p. 1, fn. 1). On appeal PIMENTEL argued jury instruction 11 incorrectly conflated Challenge to Fight with Felony Murder. AOB 49-51. PIMENTEL did not explicitly argue charging Challenge to Fight as a theory of murder violates duplicity. PIMENTEL believed based upon the Mandamus proceeding doing so would be barred by law of the case. However, PIMENTEL should have explicitly raised duplicity on direct appeal as this Court misunderstood the law

[7] United States v. Kimberlin, 781 F.2d 1247, 1250 (7th Cir. 1985).
[8] United States v. Starks, 515 F.2d 112, 116 (3d. Cir. 1975).
[9] Id. at 116-117.
[10] Id. at 117.

regarding duplicity versus alternate theories.[11] See Gonzalez v. State, 131 Nev. Adv. Op. 99, ___ P.3d ___ (2015) (implicitly recognizing Challenge to Fight and First-Degree Murder are separate offenses, '[t]he district court merged the convictions of challenge to fight resulting in death with the use of a deadly weapon and second-degree murder with the conviction of first-degree murder with the use of a deadly weapon.").

Here, had the State correctly charged NRS 200.450 as a separate offense the jury would have deliberated on NRS 200.450 separately from NRS 200.030. This would have ameliorated this Court's concerns regarding special verdict forms. See Pimentel, 2017 WL 2733777, *2 ("The jury, however, was not asked to indicate which theory of first-degree murder it used to convict."). Although PIMENTEL did not explicitly raise this issue on direct appeal, this Court's Opinion unfortunately repeats an incorrect assertion of law which the district courts will rely upon in the future. Thus, the Court should grant rehearing and clarify that NRS 200.450 is not a "theory" of first-degree murder.

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[11] This issue was addressed during Oral Argument on March 6, 2017.

CONCLUSION

This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and this Court will consider rehearing only when "necessary to promote substantial justice. Gordon, 114 Nev. at 745, 961 P.2d at 142. Unfortunately, this Court's Opinion overlooks or misconstrues legal precedent and significant facts and in doing so creates confusion which did not previously exist.[12] Wilmeth never **held** self-defense is unavailable under NRS 200.450. When the district court clearly erred by instructing the jury PIMENTEL could not assert self-defense to Challenge to Fight, PIMENTEL was obligated to raise this issue on direct appeal. See ATKT 411 Nevada Indigent Defense Standards of Performance, Standards 2-10(a), 3-1, 3-2(c). However, by doing so PIMENTEL apparently presented this Court an opportunity to turn *dicta* into legal precedent. Thus, this Court's Opinion disincentivizes raising meritorious issues on direct appeal. Nevertheless, because this Court overlooked material facts and misapprehended controlling law

[12] The Opinion even failed to correctly spell PIMENTEL's name. PIMENTEL's full name is Luis **Godofredo** Pimentel III, not Luis *Godoredo* Pimentel III.

in affirming PIMENTEL's conviction, substantial justice requires re-hearing in PIMENTEL's case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition rehearing complies with the formatting requirements of NRAP32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6), because:

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DATED this 5th day of July, 2017.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 5th day of July, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office