No. 00-56520

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLIVERIO MARTINEZ,

Plaintiff-Appellee,

v.

BEN CHAVEZ,

Defendant-Appellant.

On Remand from the United States Supreme Court and
On Appeal from the United States District Court
for the Central District of California

PETITION FOR REHEARING EN BANC

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

Counsel for Defendant-Appellant Ben Chavez

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The panel's for-publication order of July 30, 2003, conflicts with *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003), *Anderson* v. *Creighton*, 483 U.S. 635 (1987), *Saucier* v. *Katz*, 533 U.S. 194 (2001), and *Wilson* v. *Layne*, 526 U.S. 603 (1999). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Following reversal by the Supreme Court of this Court's prior decision in this case, the panel – without briefing or argument on remand – promptly reinstated its original judgment, albeit on modestly different grounds. The panel reached that result in a two-paragraph opinion that grappled with none of the difficult issues that had been identified in the six different opinions that this case produced in the Supreme Court. Most troubling of all, the panel held that the existence of a constitutional violation in this case is *so clear* that appellant Ben Chavez (a police officer acting in the course of his official duties) violated a "clearly established" constitutional right that at least three Justices of the Supreme Court concluded does not even exist.

That last conclusion, especially, is impossible to reconcile with several binding Supreme Court precedents. It is impossible to reconcile with *Chavez* v. *Martinez* itself, in which the Supreme Court found the existence of the postulated constitutional right so difficult – so *unclear* in its status as an "established" right –

that the Court divided 3-3-3 on the question, with three Justices deeming the constitutional claim meritless, three expressing either uncertainty or no views at all, and (only) three contending (as the panel now concludes) that Chavez did violate a constitutional right of Oliverio Martinez. The "middle" group of Justices regarded the substantive due process question – the question the panel found so easy to resolve on remand – sufficiently difficult that they did not resolve it either way after full briefing and argument. The most they were willing to say was that Martinez's argument is "serious."

The panel's conclusion is also impossible to reconcile with a line of several qualified immunity decisions beginning with *Anderson* v. *Creighton*, 483 US. 635 (1987), which reversed the Eighth Circuit precisely because it considered only whether the constitutional right at issue was clearly established *in the abstract*: "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 640. The panel in the present case rejected Chavez's position with the highly general observation that "[a] clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation." Slip op. 10390. Even if it were an accurate statement of the law

(and we explain below why it is not), that statement would not *begin* to answer the relevant question under *Anderson* v. *Creighton*, because it does not address "what a reasonable official would understand" *on the facts of this case.*

I. STATEMENT

A. This case arises on review of a summary judgment decision of the district court, and the facts – viewing genuine disputes in the light most favorable to appellee Martinez – have been stated several times. See *Martinez* v. *City of Oxnard*, 270 F.3d 852, 854-855 (9th Cir. 2001); *Chavez* v. *Martinez*, 123 S. Ct. 1994, 1999-2000 (2003) (plurality opinion); *id*. at 2010-2011 (Stevens, J., concurring in part and dissenting in part); 7/30/03 Order, slip op. 10390. Yet the panel on remand managed to state the facts more favorably to Martinez than even Martinez himself has ever asserted. According to the panel,

> Martinez *alleges* that Chavez *brutally and incessantly* questioned him, after he had been shot in the face, back, and leg and would go on to suffer blindness and partial paralysis, *and interfered with his medical treatment* while he was "screaming in pain . . . and going in and out of consciousness." Chavez allegedly continued this "interrogation" over Martinez's pleas for him to stop so that he could receive treatment.

Slip op. 10390 (emphasis added).

Whether the questioning was "brutal" is perhaps a characterization about which reasonable people may differ, but the record flatly contradicts the notions

that the questioning was "incessant[]" or that Chavez "interfered with [Martinez's] medical treatment." As the Supreme Court plurality opinion correctly stated:

> Chavez accompanied Martinez to the hospital and then questioned Martinez there while he was receiving treatment from medical personnel. The interview lasted a total of about 10 minutes, over a 45-minute period, *with Chavez leaving the emergency room for periods of time to permit medical personnel to attend to Martinez*.

123 S. Ct. at 1999 (emphasis added).

What this Court previously called "an incontrovertible account of the interview," 270 F.3d at 855, the transcript of the interrogation, shows persistent but *not* incessant questioning. When medical personnel wished to treat Martinez, Chavez got out of the way. See also E.R. 482 (determination by the district court that "the interview was conducted intermittently for approximately 45 minutes"). Indeed, although Martinez alleged *in his pleadings* that there was interference with his medical treatment (E.R. 90, 115, 271, 272), he completely abandoned that contention in the appellate briefing after a summary judgment record was developed. As the Supreme Court plurality put it (123 S. Ct. at 2005 (emphasis added)):

> [T]here is *no evidence* that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment. Medical personnel were able to treat Martinez throughout the interview, App. to Pet. for Cert. 4a, 18a, and Chavez ceased his questioning to allow tests and other procedures to be performed. *Id.*, at 4a. Nor is there evidence that Chavez's

> conduct exacerbated Martinez's injuries or prolonged his stay in the hospital.

In addition to including facts that have no support in the record, the panel omitted several important and undisputed facts from its most recent description of this case. Those facts pertain, not to what happened when Chavez interrogated Martinez, but to *why* Chavez interrogated Martinez. As the Supreme Court plurality succinctly put it (*ibid.*):

> [T]he need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.

B. The district court held in pertinent part that Martinez was entitled to summary judgment denying Chavez qualified immunity as against Martinez's claims of "Fifth and Fourteenth Amendment" violations through the interrogation. E.R. 485. Under this Court's jurisprudence as it then stood – see *Cooper* v. *Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992) – all the court needed to conclude to find a constitutional violation, and all it did conclude, was that, "considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne." E.R. 476 (quoting *Derrick* v. *Peterson*, 924 F.2d 813, 817 (9th Cir. 1990)). The court did not address the

question whether Chavez's conduct violated substantive due process, though *Cooper* v. *Dupnik* had provided a roadmap for making a substantive due process claim in general, 963 F.2d at 1244-1250, and a "shocks the conscience" argument in particular, *id*. at 1248-1250. In deciding whether the constitutional violation it found was "clearly established," the district court wrote that "[t]he law against coerced confessions was clearly established at the time of plaintiff's interview" and that "no reasonable officer would believe that an interview of an individual receiving treatment for life-threatening injuries that resulted in blindness, paralysis, and excruciating pain was constitutionally permissible." E.R. 484.

On appeal, Martinez argued – and this Court held – that "coercive behavior of law-enforcement officers in pursuit of a confession" is sufficient, without more, to constitute a violation of the privilege against compelled self-incrimination and a due process violation. 270 F.3d at 857 (quoting *Cooper*, 963 F.2d at 1244-1245). The Court did not reach a separate conclusion that Chavez's interrogation shocked the conscience or violated substantive due process. Indeed, the phrases "shocks the conscience" and "substantive due process" were *completely absent* from both Martinez's brief and this Court's opinion.

In addressing whether the constitutional rights in question were "clearly established," this Court relied exclusively (270 F.2d at 858-859) on a comparison

between the facts of this case and those of *Mincey* v. *Arizona*, 437 U.S. 385 (1978). But *Mincey* involved the question whether evidence should be excluded – and thus it was a relevant precedent if, but only if, this Court had been correct in *Cooper* in holding that any interrogation whose fruits must be suppressed also gives rise to an independent claim under the Fourteenth Amendment.

C. The Supreme Court reversed this Court's judgment in a fractured set of opinions that left certain questions open on remand. The lead opinion concluded flatly "that Chavez did not deprive Martinez of a constitutional right." 123 S. Ct. at 1999. The opinion of Justice Souter, Part II of which was the opinion of the Court, concluded that Martinez could not make the showing "necessary to expand protection of the privilege against compelled self-incrimination to the point of the civil liability he asks us to recognize here" (123 S. Ct. at 2007), but that "[w]hether Martinez may pursue a claim of liability for a substantive due process violation is * * * an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him" (123 S. Ct. at 2008). Immediately preceding the latter conclusion – which spoke for the Court – Justice Souter observed, on behalf of himself and Justice Breyer, that Martinez's claim, "*if* it is to be recognized as a constitutional one that may be raised in an action under § 1983, must sound in substantive due process." *Ibid.* (emphasis

added). In further explanation of the sort of inquiry he and Justice Breyer had in mind on remand, Justice Souter quoted *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), to the effect that "conduct *intended* to injure in some way *unjustifiable by any government interest* is the sort of official action most likely to rise to the conscience-shocking level." 123 S. Ct. at 2008 (emphasis added) (quoting 523 U.S. at 849).

The two opinions that, between them, control this case on remand thus reached two particularly pertinent conclusions. Six Justices (four in the plurality opinion and two in Justice Souter's opinion) flatly rejected the rule this Court had adopted in *Cooper* v. *Dupnik*, equating all interrogations that lead to the suppression of evidence with interrogations that violate the privilege against compelled self-incrimination and due process. Five Justices (three in the plurality opinion, which Justice O'Connor did not join in pertinent part, and two in Justice Souter's opinion) offered guidance about how this Court should evaluate the substantive due process claim – if any – that Martinez might be able to raise on remand. According to Justices Souter and Breyer, the necessary inquiry on remand would include examination of *intent* and whether Chavez's interrogation was "unjustifiable by any government interest." 123 S. Ct. at 2008. The plurality went further and offered its answers to those questions. 123 S. Ct. at 2005 ("we cannot agree

with Martinez's characterization of Chavez's behavior as 'egregious' or 'conscience shocking'").

Neither opinion explicitly reached the question whether the alleged constitutional right at issue is "clearly established." Because Justice Thomas and the other two Justices who joined his plurality opinion believed it not to exist, however, it follows *a fortiori* that they would not deem it clearly established. Justices Souter and Breyer, without agreeing with the plurality, phrased the issue as whether such a constitutional right "is to be recognized." 123 S. Ct. at 2008.

Justice Scalia's opinion, concurring in part in the judgment, observed that "Martinez's 42 U.S.C. § 1983 action is doomed." 123 S. Ct. at 2008. Although Justice Scalia disagreed with the Court's decision to remand the case, he observed that "[m]y disagreement with the Court, however, is of little consequence, because Martinez will not be able to prevail on remand by raising anew his substantive-due-process claim. Not only is the claim meritless, * * * but Martinez already had his chance to press a substantive-due-process theory in the Court of Appeals and chose not to * * *. [T]hat claim has been forfeited." 123 S. Ct. at 2009-2010.

Justices Stevens, Kennedy, and Ginsburg wrote three separate opinions. All three Justices would have affirmed rather than reversed the judgment of this Court. All three Justices concurred, however, in the decision to remand the case to this

Court for further proceedings on the substantive due process claim. Justice Stevens would have preferred to resolve that issue in Martinez's favor. 123 S. Ct. at 2011-2013. Justices Kennedy and Ginsburg would have resolved the case on self-incrimination grounds but were willing to go along with a remand for further consideration of substantive due process. *Id*. at 2018.

D. After the Supreme Court's mandate issued on June 26, 2003, the parties filed short motions (three and five pages) expressing their views as to what should happen next to implement the Supreme Court's mandate. Chavez argued that the case should be remanded to the district court, as had been done in *Morgan* v. *National R.R. Passenger Corp.*, 300 F.3d 1144 (9th Cir. 2002); *Barnett* v. *U.S. Air, Inc.*, 297 F.3d 1106 (9th Cir. 2002); and *Alameda Books, Inc.* v. *City of Los Angeles*, 295 F.3d 1024 (9th Cir. 2002), following Supreme Court reversals. Martinez argued that this Court should instead "set the briefing and argument as soon as possible." 7/21/03 Opposition at 5.

The panel, however, followed neither party's suggestion. Just nine days after Martinez suggested additional briefing, the panel issued a for-publication order resolving the entire appeal in Martinez's favor on substantive due process grounds in two paragraphs. The panel did not acknowledge, let alone give any reason to disagree with, Justice Scalia's suggestion that Martinez had procedurally

forfeited any substantive due process claim. The panel said nothing about the intent requirement of the *Sacramento* case, a requirement Justice Thomas had said Martinez could not meet and Justice Souter had treated as an open question to be addressed seriously on remand. The panel said nothing about the governmental interests that might have justified Chavez's interrogation, interests Justice Thomas had accepted as conclusively resolving the issue against Martinez and Justice Souter had treated as a key portion of the analysis to be addressed on remand. Instead, after describing the facts, the panel announced: "If Martinez's allegations are proven, it would be impossible not to be shocked by Sergeant Chavez's actions." Slip op. 10390.

The panel then addressed the question whether the rights it had just held Chavez had violated (if the facts are as Martinez "alleges") were "clearly established," as they must be for Chavez to be denied qualified immunity. After receiving full briefs and hearing oral argument on the question whether those rights even exist, the Supreme Court of the United States had been unable to reach any definitive resolution of that question. Yet the panel concluded that Chavez, arriving on a shooting scene and having to decide immediately whether to interrogate a possibly dying person, should have known the answer to that question, and should have known that questioning was constitutionally impermissible. The panel's

entire discussion of the "clearly established" prong of the qualified immunity test was as follows:

> A clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation. *See, e.g., Darwin v. Connecticut*, 391 U.S. 346 (1968); *Beecher v. Alabama*, 389 U.S. 35, 36 (1967); *Reck v. Pate*, 367 U.S. 433, 439-40 (1961); *Leyra v. Denno*, 347 U.S. 556 (1954); *Malinski v. New York*, 324 U.S. 401 (1945). Because, under the facts alleged by Martinez, Chavez violated Martinez's clearly established due process rights, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), we affirm the district court's denial of qualified immunity to Chavez.

Slip op. 10390-10391.

II. THE PANEL ERRED AND ACTED INCONSISTENTLY WITH BINDING SUPREME COURT PRECEDENT IN CONCLUDING THAT CHAVEZ VIOLATED MARTINEZ'S "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHTS

The Supreme Court found this to be a very hard case. This Court on remand, by contrast, treated the case as an exceptionally easy one. In resolving the constitutional merits against Chavez, the panel erred (we respectfully submit) for the reasons given in the opinions of Justices Thomas and Scalia in the Supreme Court. The panel further erred by failing to address the questions Justice Souter identified as likely to be dispositive of the constitutional merits on remand. These errors would justify rehearing en banc in their own right.

What makes the case for rehearing en banc extraordinary, however, is that the panel's discussion of "clearly established" rights flies in the face of Supreme

Court precedent. The right that the panel held is "clearly established" – freedom from coercive police interrogation, even when the results of the interrogation are never used in a criminal case – is the very right that the Supreme Court held *does not exist.* The *different* right that the Supreme Court said *might* be recognizable on remand – a right to be free of "conduct intended to injure in some way unjustifiable by any government interest" that "rise[s] to the conscience-shocking level" (123 S. Ct. at 2008 (opinion of Souter, J.)) – is not even clearly established in the abstract, let alone at the level of particularity necessary to defeat qualified immunity. To conclude otherwise, the panel had to resort to describing the constitutional right at a high level of generality, a stratagem flatly foreclosed by *Anderson* v. *Creighton*, 483 U.S. 635 (1987); *and* the panel had to conclude that no reasonable police officer could agree with three Justices of the Supreme Court of the United States, or even be in as much doubt as three other Justices.

Anderson is the proper starting point for analysis of the "clearly established" prong of the qualified immunity test. In that case, a warrantless search was of doubtful legality. The Eighth Circuit held that the FBI agent who conducted the search was not entitled to qualified immunity because "the right Anderson was alleged to have violated – the right of persons to be protected from warrantless searches of their home unless the searching officers have probable cause and there

are exigent circumstances – was clearly established." 483 U.S. at 638. Describing the relevant constitutional right at that level of generality, however, was unacceptable to the Supreme Court: "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id*. at 639.

The Eighth Circuit was reversed precisely because its "brief discussion of qualified immunity consisted of little more than an assertion that a general right Anderson was alleged to have violated * * * was clearly established" and because it "specifically refused to consider the argument that it was *not* clearly established that the circumstances with which Anderson was confronted" rendered his action invalid. 483 U.S. at 640. "The principles of qualified immunity that we reaffirm today require that Anderson be permitted to argue that * * * he could, as a matter of law, reasonably have believed that the search of the Creightons' home was lawful." *Id*. at 641. The Supreme Court reversed *this* Court for making the same mistake in *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). Curiously, the panel on remand cited *Saucier* while making the very same mistake for which this Court was reversed in *Saucier* and the Eighth Circuit was reversed in *Anderson.* See also *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) ("the right allegedly violated must

be defined at the appropriate level of specificity before a court can determine if it was clearly established").

Application of those principles to this case is straightforward – and completely inconsistent with the panel's reasoning. Chavez must be permitted to argue that he could, as a matter of law, reasonably have believed that the questioning of Martinez was lawful. Whether "freedom from coercive police interrogation" is, in the abstract, "[a] clearly established right" (slip op. 10390) is irrelevant. By posing the wrong question, the panel has issued an opinion in direct conflict with the binding Supreme Court decision in *Anderson.*

And how could Chavez *not* have been reasonable in believing that the questioning of Martinez was lawful? Three Supreme Court Justices believe it was lawful. 123 S. Ct. at 2005-2006 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J.). Were those Justices not just *wrong* in their views, but *unreasonable* in their views? That is the unmistakable implication of the panel's order on remand. But, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U.S. at 618; cf. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (if "officers of reasonable competence could disagree on th[e] issue, immunity should

be recognized"); *Haugen* v. *Brosseau*, 339 F.3d 857, 885 (9th Cir. 2003) (Gould, J., dissenting).

The inconsistency between the panel's remand order and the views expressed by the Justices does not end there. If the substantive constitutional merits are as easy as the panel has claimed – if it is "impossible" (slip op. 10390) not to reach the substantive constitutional conclusion the panel reached – then how does one explain the positions taken by Justices O'Connor, Souter, and Breyer? Justice O'Connor expressed no views at all on the substantive due process question after full briefing and argument. Was she derelict in not recognizing what any reasonable police officer should have known while making quick decisions in the field? The panel so implies. Justices Souter and Breyer stated, in their *strongest* words in favor of Martinez, that "Justice Stevens shows that Martinez has a serious argument" that the Constitution was violated. 123 S. Ct. at 2008. Did those Justices choose their words so carelessly that what they called a "serious argument" is in reality a no-brainer such that any reasonable police officer should have known it? The panel so implies.

We submit that the panel's remand order fails to show sufficient respect for the Supreme Court. Six Justices, by implication, know less (or at least are willing to say less) than what any reasonable police officer should have known. That

conclusion cannot possibly be correct. See *Savard* v. *Rhode Island*, 338 F.2d 23, 30 (1st Cir. 2003) (en banc) (opinion of Selya, J.) ("The law does not expect a public official, faced with the need to make an objectively reasonable real-world judgment, to anticipate precisely the legal conclusions that will be reached by a panel of federal appellate judges after briefing, arguments, and full-fledged review."); *id*. at 33; *id*. at 40 (opinion of Bownes, J.); see also *Graves* v. *City of Coeur d'Alene*, 339 F.3d 828, 847-848 (9th Cir. 2003).

The path of reasoning by which the panel reached its conclusion is profoundly disturbing for another reason. By the panel's own reasoning (reasoning inconsistent with *Anderson* and *Saucier*, but that is not the focus of the present argument), for Chavez to be denied qualified immunity there must be a clearly established constitutional right of "freedom from coercive police interrogation." Slip op. 10390. This Court once *thought* there was such a right. See *Cooper* v. *Dupnik*, 963 F.2d at 1244-1245 ("The due process violation caused by coercive behavior of law-enforcement officers in pursuit of a confession is complete with the coercive behavior itself."). *But that is the very proposition that the Supreme Court rejected in this very case.* 123 S. Ct. at 2000-2004 & n.5 (Thomas, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ.); *id*. at 2006-2008 (Souter, J., joined by Breyer, J.). Cf. *Cooper* v. *Dupnik*, 963 F.2d at 1255-1256 (Brunetti,

J., dissenting). The Supreme Court left it open to this Court to assess Martinez's substantive due process claim for "outrageous conduct" that was "intended to injure" (123 S. Ct. at 2007 (Souter, J.)) under *Sacramento* v. *Lewis*, not to adopt once again – let alone to treat as "clearly established" law – the very proposition the Supreme Court rejected.

The string citation of Supreme Court cases decided between 1945 and 1968 in the panel's remand order (slip op. 10390-10391) certainly does not suffice to "establish" the right that the Supreme Court in 2003 has declared not to exist. The error of *Cooper* v. *Dupnik* – it is now apparent – was that it treated admissibility cases as if the interrogation, and not the admission of the fruits of that interrogation, was the constitutional violation. See 123 S. Ct. at 2006 (Souter, J.) ("Martinez's testimony would clearly be inadmissible if offered in evidence against him. But Martinez claims more than evidentiary protection in asking this Court to hold that the questioning alone was a completed violation of the Fifth and Fourteenth Amendments subject to redress by an action for damages under § 1983."). But *every case* the panel has cited in support of its conclusion that a constitutional freedom-from-coercive-interrogation right exists is a case reviewing a question of admissibility. The Supreme Court has made clear that admissibility precedents do *not* decide – let alone clearly establish – the unconstitutionality of

the interrogation itself. Yet this Court has denied Chavez qualified immunity citing only such precedents.

CONCLUSION

The Court should grant rehearing en banc or panel rehearing.

Respectfully submitted,

ALAN E. WISOTSKY
JEFFREY HELD
Law Offices of Alan E. Wisotsky
300 Esplanade Drive
Suite 1500
Oxnard, CA 93036
(805) 278-0920

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

GARY L. GILLIG
City Attorney
City of Oxnard
300 West Third Street
Oxnard, CA 93030
(805) 385-7483

Counsel for Defendant-Appellant Ben Chavez

Appendix:

Martinez v. *City of Oxnard*,
No. 00-56520 (9th Cir. July 30, 2003)
[published at 337 F.3d 1091]

Certificate of Compliance Pursuant to Circuit Rules 35-4 and 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more, and contains 4166 words.

_____

Roy T. Englert, Jr.

Certificate of Service

I hereby certify that on the 10th day of September, 2003, two copies of the foregoing Petition for Rehearing En Banc were sent by Federal Express to each of the following counsel for plaintiff-appellee Oliverio Martinez:

R. Samuel Paz, Esq.
Law Offices of R. Samuel Paz
5601 W. Slauson Avenue
Suite 280
Culver City, CA 90230

Sonia M. Mercado, Esq.
Sonia Mercado & Associates
5601 W. Slauson Avenue
Suite 280
Culver City, CA 90230

_____

Roy T. Englert, Jr.