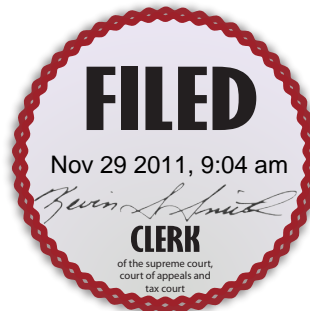


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSE RODRIGUEZ,)
)
Appellant-Defendant,)
)
vs.) No. 49A05-1006-CR-410
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Senior Judge
Cause No. 49G02-0811-FA-264751

November 29, 2011

MEMORANDUM DECISION ON REHEARING – NOT FOR PUBLICATION

VAIDIK, Judge

On September 9, 2011, we issued a memorandum decision in this case in which we held, among other things, that the evidence was sufficient to sustain Rodriguez's gang-affiliation sentencing enhancement according to Indiana Code section 35-50-2-15. As for Rodriguez's argument that the State must prove that the defendant committed the predicate offense with a specific intent to further the gang's criminal goals, we held that "[w]e need not resolve that question here, however, for even if we adopted Rodriguez's interpretation, we would still find a sufficient showing of 'nexus' in this case to sustain Rodriguez's sentencing enhancement." *Rodriguez v. State*, Cause No. 49A05-1006-CR-140, slip op. at 12 (Ind. Ct. App. Sept. 9, 2011); *see also id.* ("And assuming without deciding that proof of 'nexus' was required . . .").

Rodriguez neither proffered an instruction on specific intent during the sentencing phase of trial nor did he object when the trial court did not give one. *See* Tr. p. 607, 640-41. Rodriguez now seeks rehearing arguing, among other things, that it was "fundamental error" "for the trial court to fail to properly instruct the jury" on specific intent. Appellant's Reh'g Br. p. 6. Rodriguez claims that he is entitled to a new trial for the sentencing phase "so that the jury may be properly instructed that specific intent is required." *Id.* Rodriguez, however, did not raise the failure to instruct issue in his Appellant's Brief. Although Rodriguez raised this issue in his reply brief, he did so only in a footnote appended to the very last sentence in the argument section of his brief with absolutely no citation to authority.¹ *See* Appellant's Reply Br. p. 16 n.12 ("At a minimum, Rodriguez should receive a new trial so that the jury may be properly

¹ We also would find this issue waived for lack of cogent argument. *See* Ind. Appellate Rule 46(a)(8)(A).

instructed as to the intent element of the criminal gang sentence enhancement. The jury was not properly instructed that the criminal gang sentence enhancement required the specific intent or purpose to further the gang's criminal purposes.”).

A party cannot raise an argument for the first time on appeal in his reply brief. Ind. Appellate Rule 46(C) (“No new issues shall be raised in the reply brief.”); *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 593 n.6 (Ind. 2001). Rodriguez therefore waived this issue on appeal. *See Felsher*, 755 N.E.2d at 593 n.6. And Rodriguez’s attempt to resurrect this issue on rehearing is likewise insufficient. “A petition for rehearing is a vehicle that affords the reviewing court the opportunity to correct its own omission or errors. A petitioner may seek rehearing only on points raised in the original brief.” *Sheehan Const. Co. v. Continental Cas. Co.*, 938 N.E.2d 685, 687 n.1 (Ind. 2010). Because Rodriguez waived the failure to instruct issue by not raising it in his original brief, we do not address it on rehearing.

We therefore grant rehearing for the limited purpose of clarifying that the failure to instruct issue is waived.² We affirm our original opinion in all respects.

KIRSCH, J., and MATHIAS, J., concur.

² Rodriguez points out that our original decision contains a typographical error. Specifically, on page twelve of our memorandum decision, we stated that “Sorn proceeded to shoot Cabrales-Cantreras repeatedly.” This sentence should have provided that Rodriguez, and not Sorn, shot Cabrales-Cantreras repeatedly.