

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 EVARISTO JONATHAN GARCIA,

4 Appellant,

5 vs.
6

7 THE STATE OF NEVADA,

8 Respondent.
9

Supreme Court Case No.: 64221

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11 **APPELLANT'S APPENDIX**

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13 **VOLUME 1 of 11**

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15 **(BATES 1-182)**
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3 EVARISTO JONATHAN
4 GARCIA,

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APPELLANT'S APPENDIX

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<u>VOLUME</u>	<u>PLEADING</u>	<u>PAGE NO.</u>	<u>DATE</u>
1	Amended Indictment	43-44	03-17-2011
11	Case Appeal Statement	2092-2094	10-11-2013
1	Court Minutes (Calendar Call)	45-46	03-17-2011
1	Court Minutes (Calendar Call)	47-48	04-26-2012
1	Court Minutes (Calendar Call)	49-50	09-13-2012
2	Court Minutes (Calendar Call)	292-293	06-27-2013
10	Fourth Amended Indictment	1850-1852	07-12-2013
1	Indictment	1-6	03-19-2010
10	Instructions to Jury	1858-1893	07-16-2013
11	Judgment of Conviction	2088-2089	09-11-2013
2, 3, 4	Jury Trial Transcript	297-700	07-08-2013
4, 5	Jury Trial Transcript	701-972	07-09-2013
5, 6, 7	Jury Trial Transcript	976-1267	07-10-2013
7, 8	Jury Trial Transcript	1268-1515	07-11-2013
8, 9, 10	Jury Trial Transcript	1516-1849	07-12-2013
10, 11	Jury Trial Transcript	1894-2016	07-15-2013

28

11	Motion for Acquittal or in the Alternative, Motion for New Trial	2019-2033	07-22-2013
1	Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Production of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss	68-154	09-27-2012
1	Motion to Suppress In-Court Identification Pursuant to NRS 174-125(1)	51-67	09-25-2012
11	Notice of Appeal	2090-2091	10-11-2013
1	Reply in Support of Motion to Suppress In-Court Identification Pursuant to NRS 174.125(1)	180-182	10-08-2012
1	Reporter's Transcript of Proceedings (All Pending Motions – Motion to Sever, Motion in Limine to Preclude Admission of Photographs, Defendant's Motion for Discovery, Motion to Compel Disclosure of Existence and Substance of Expectations, or Actual Receipt of Benefits or Preferential Treatment for Cooperation with Prosecution, Motion to Federalize All Motions, Objections, Requests and Other Applications, Motion to Exclude Other Bad Acts, Character Evidence and Irrelevant Prior Criminal Activity, Motion to Allow Jury Questionnaire, Motion to Bar Improper Prosecutorial Argument, Motion to Allow Defendant's IQ Assessment to be Utilized at the Time of Trial and Notice of Motion and Motion for Reciprocal Discovery)	7-42	09-21-2010
11	Reporter's Transcript of Proceedings (Motion for Acquittal or in the Alternative, Motion for New Trial)	2034-2058	08-01-2013

2	Reporter's Transcript of Proceedings (Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Production of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss and Motion to Suppress In-Court Identification Pursuant to NRS 174.125(a))	244-291	10-30-2012
11	Reporter's Transcript of Sentencing	2065-2087	08-29-2013
2	Second Amended Indictment	294-296	07-08-2013
11	Sentencing Memo	2059-2064	08-14-2013
10	State's Opposition and Written Record in Response to Defendant's Oral Motion for Mistrial	1853-1857	07-15-2013
2	State's Opposition to Defendant's Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss	183-243	10-23-2012
1	State's Opposition to Defendant's Motion to Suppress In-Court Identification Pursuant to NRS 174.215(1)	155-179	10-04-2012
5	Third Amended Indictment	973-975	07-09-2013
11	Verdict	2017-2018	07-15-2013

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[Signature]
CLERK OF COURT

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4 Nevada Bar #002781
5 SONIA V. JIMENEZ
6 Chief Deputy District Attorney
7 Nevada Bar #008818
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,)

11 Plaintiff,)

12 -vs-)

13 EVARISTO JONATHAN GARCIA,)
14 #2685822,)
15 MANUEL ANTHONY LOPEZ,)
16 #1994518)

16 Defendant(s).)

Case No. C262966
Dept. No. XV

INDICTMENT

18 STATE OF NEVADA }
19 COUNTY OF CLARK } ss.

20 The Defendant(s) above named, EVARISTO JONATHAN GARCIA and MANUEL
21 ANTHONY LOPEZ, accused by the Clark County Grand Jury of the crimes of
22 CONSPIRACY TO COMMIT MURDER WITH THE INTENT TO PROMOTE,
23 FURTHER OR ASSIST A CRIMINAL GANG (Category B Felony - NRS 200.010,
24 200.030, 199.480, 193.168, 193.169) and MURDER WITH USE OF A DEADLY
25 WEAPON WITH THE INTENT TO PROMOTE, FURTHER OR ASSIST A CRIMINAL
26 GANG (Category A Felony - NRS 193.168, 193.169, 200.010, 200.030, 200.450 193.165),
27 committed at and within the County of Clark, State of Nevada, on or about the 6th day of
28 February, 2006, as follows:

APP 000001

1 COUNT 1 – CONSPIRACY TO COMMIT MURDER WITH THE INTENT TO
2 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG

3 Defendants did then and there wilfully, unlawfully, feloniously, and knowingly, for
4 the benefit of, at the direction of, or in affiliation with a criminal gang, to wit: PUROS
5 LOCOS, which has as one of its common activities engaging in felonious criminal activities
6 other than the conduct which constitutes the primary offense, and the defendants with
7 specific intent to promote, further, or assist the activities of the above said gang, did then and
8 there meet with each other and/or GIOVANNY GARCIA aka Yobani Borradas and between
9 themselves, and each of them with the other, wilfully, unlawfully, and feloniously conspire
10 and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy,
11 defendants did commit the acts as set forth in Count 2, said acts being incorporated by this
12 reference as though fully set forth herein.

13 COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO
14 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG

15 Defendants did then and there wilfully, unlawfully, feloniously, and knowingly, for
16 the benefit of, at the direction of, or in affiliation with a criminal gang, to wit: PUROS
17 LOCOS, which has as one of its common activities, engaging in felonious criminal activities,
18 other than the conduct which constitutes the primary offense, and the defendant with specific
19 intent to promote, further, or assist the activities of the above said gang, did then and there
20 wilfully, feloniously, without authority of law, and with malice aforethought, kill VICTOR
21 GAMBOA, a human being, by shooting at and into the body of the said VICTOR
22 GAMBOA, with a deadly weapon, to-wit: a firearm; said killing having been (1) willful,
23 deliberate, and premeditated; and/or (2) said death ensuing following Defendants giving
24 and/or sending and/or accepting a challenge to fight and/or said death ensuing during a fight
25 that occurred upon previous concert and agreement; and/or (3) said killing resulting by
26 Defendants committing an unlawful act which, in its consequences, naturally tends to
27 destroy the life of a human being and/or is committed in the prosecution of a felonious
28 intent, to-wit: discharging firearm where person endangered and/or battery with use of a

1 deadly weapon and/or assault with use of a deadly weapon; said Defendants being
2 responsible under one or more of the following principles of criminal liability, to-wit: (1) by
3 directly committing the act and/or (2) by conspiring with each other and/or with
4 GIOVANNY GARCIA aka Yobani Borradas to commit murder whereby each is vicariously
5 liable for the acts of the other which are the object of the conspiracy and/or (3) by conspiring
6 with each other and/or with GIOVANNY GARCIA aka Yobani Borradas to commit the
7 crimes of battery and/or assault whereby each is vicariously liable for the foreseeable acts of
8 the others made in furtherance of the conspiracy and/or (4) by Defendants aiding or abetting
9 in the commission of the crime by entering into a course of conduct whereby GIOVANNY
10 GARCIA aka Yobani Borradas while at Morris East Sunset High School contacted one or
11 both of the Defendants via cellular telephone to inform them of the fight to take place after
12 school, where both Defendants accompanied each other to the school in the vehicle of
13 Defendant MANUEL ANTHONY LOPEZ, Defendants bringing with them a firearm,
14 whereafter Defendants and GIOVANNY GARCIA aka Yobani Borradas engaged in a fist
15 fight with others, including VICTOR GAMOBA, at the school, Defendants thereafter chasing
16 VICTOR GAMBOA and GIOVANNY GARCIA aka Yobani Borradas telling Defendant
17 EVARISTO JONATHAN GARCIA to give him the handgun, Defendant EVARISTO
18 JONATHAN GARCIA neglecting to do so, whereupon Defendant GIOVANNY GARCIA
19 aka Yobanni Borradas told Defendant EVARISTO JONATHAN GARCIA "shoot him, shoot
20 him fucker" or words to that affect, at which time Defendant EVARISTO JONATHAN
21 GARCIA fired said firearm numerous times at VICTOR GAMBOA, striking him one time,
22 thereafter Defendant EVARISTO JONATHAN GARCIA fleeing from the scene on foot
23 with the firearm, and one or both of Defendants disposing of the firearm in a nearby
24 abandoned toilet, thereafter fleeing the scene together in Defendant MANUEL ANTHONY

25 ///

26 ///

27 ///

28 ///

1 LOPEZ's vehicle, Defendants acting in concert throughout, each supporting, counseling and
2 encouraging the others in the commission fo the crime by their presence, words and actions.

3
4 DATED this 18th day of March, 2010.

5
6 DAVID ROGER
DISTRICT ATTORNEY
7 Nevada Bar #002781

8
9 BY

Sonia V. Jimenez
SONIA V. JIMENEZ
Chief Deputy District Attorney
10 Nevada Bar #008818

11 ENDORSEMENT: A True Bill

12
13 *Paracela Young*
14 Foreperson, Clark County Grand Jury

Names of witnesses testifying before the Grand Jury:

TELGENHOFF, GARY	MD - PATHOLOGIST
SPEAS, WILLIAM	LVMPD - CSI
SPOOR, MONTE	LVMPD - CSI
SZUKIEWICZ, JOSEPH	LVMPD - CSI
GAMBOA, Melissa	217 N. 20 th St., LV, NV
MARQUEZ, GENA	
HARPER, Jonathan	C/O LVMPD #5096
MORALES, ANDREA	
SOUDER, MICHAEL	LVMPD
HARPER, JONATHAN	
MECEO, ALICE	
ROBINSON, Jonathan	4660 Cliff Breeze Dr., LV, NV
PEREZ, CRYSTAL	
MOGG, C. H.	LVMPD #5096
Additional witnesses known to the District Attorney at time of filing the Indictment:	
BORRADAS, Yobani	6307 Elvido Ave., LV, NV
CAVILLO, Edshel	4325 S. Bruce, #19, LV, NV
CUSTODIAN OF RECORDS or Designee	Clark County Detention Center
CUSTODIAN OF RECORDS or Designee	CORONER'S OFFICE
CUSTODIAN OF RECORDS or Designee	LVMPD Communications
CUSTODIAN OF RECORDS or Designee	LVMPD Records
CUSTODIAN OF RECORDS or Designee	UMC RECORDS
EICHELBERGER, Dan	3801 E. Washington Av., LV, NV
GARCIA, Oscar	2225 McCarren St, #B, LV, NV
GRAVES, Betty	2540 Tuskegee, LV, NV
HARDY, K. W.	LVMPD #3031
LOPEZ, Manuel A.	6247 Elvido Ave., LV, NV

1 MARQUEZ, Bryan 200 Cervantes St., LV, NV
2 PARENT or GUARDIAN of Edshel Cavillo 4325 S. Bruce, #19, LV, NV
3 PARENT or GUARDIAN of Melissa Gamboa 217 N. 20th St., LV, NV
4 SIMMS, Larry Clark County Coroner's Office
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27 09BGJ047A-B/06F11378A/10F03640X/mj/GJ
28 LVMPD EV#0602062820;
0602090797
(TK5)

1 CASE NO. C262966-1 and C262966-2

2 DEPT NO. XV

ORIGINAL

OCT 18 3 59 PM '10

3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

JoAnn Melendez
CLERK OF THE COURT

6 THE STATE OF NEVADA,)

7 Plaintiff,)

8 vs.)

9 EVARISTO GARCIA,)

10 MANUEL A. LOPEZ,)

11 Defendant.)

REPORTER'S TRANSCRIPT
OF
PROCEEDINGS

10C262966-1
TRAN
Reporters Transcript
1005337



12 BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

13 SEPTEMBER 21, 2010

14 9:00 A.M.

15
16
17 APPEARANCES:

18 For the Plaintiff: Sonia Jiminez, Esq.
19 Deputy District Attorney

20 For the Defendant: Scott Bindrup, Esq.
21 John Momot, Esq.
22 Lance Maningo, Esq.

23
24 Reported by: JoAnn Melendez, CCR No. 370
25

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OCT 18 2010

JO ANN MELENDEZ (702) 283-2151

CLERK OF THE COURT

APP 000007

1 LAS VEGAS, CLARK COUNTY, NV, SEP. 21, 2010

2 9:00 A.M.

3 -oOo-

4 P R O C E E D I N G S

5
6 THE COURT: All right. Let's start
7 with -- we're on State versus Evaristo Garcia,
8 Manuel Lopez. C262966-1 and 2.

9 Let the record reflect that they're
10 both present in custody with their counsels. Mr.
11 Garcia has Mr. Schieck's office, Mr. Bindrup; and
12 also Mr. Maningo is representing Mr. Lopez. And
13 you're -- and Mr. Momot is --

14 MR. BINDRUP: Mr. Momot is co-counsel on
15 Garcia.

16 THE COURT: Okay. Mr. Momot's also
17 present. So these are on for several motions. And
18 I guess I'll start with what's on calendar, motion
19 to sever trials.

20 MR. BINDRUP: Yes, Your Honor, I think
21 that's clear enough. All I would add to the extra
22 point, if Your Honor remembers, the first time these
23 two appeared in court, there were some problems.
24 And I have two pages --

25 THE COURT: Well, there were two

1 different grand jury's on that, right? There was --
2 I'm sorry. There was a superseding indictment on
3 it.

4 MR. BINDRUP: Yes. And when they went to
5 court, I have two pages of photographs with injuries
6 that were incurred by my client, Mr. Garcia, from
7 that particular day just because of the animosity I
8 guess that was brought up. This is while they were
9 being brought to court and I believe Your Honor had
10 them both separated for that date.

11 That is just an additional factor
12 that I would like to bring to the court's attention
13 that was not in my motion, but I believe that
14 clearly this is a case that should be severed and
15 they're not similarly situated and I believe that a
16 severance is warranted under these circumstances.

17 THE COURT: State?

18 MS. JIMINEZ: Judge, they haven't given a
19 single legal basis to grant the motion for a
20 severance. I mean they claim that negative defenses
21 are sufficient. There hasn't been an allegation of
22 a specific trial right that has been violated.

23 The defendants had been transported
24 together since that first date a couple of occasions
25 with no problems. And that's certainly their choice

1 how they behave with each other or how they should
2 behave around a jury is something that's their
3 choice, but I don't think that that's a basis
4 whatsoever to grant a severance in this case.

5 The law supports and recommends
6 joint trials and I don't think they've given a basis
7 to grant a severance here.

8 THE COURT: All right. The defendants'
9 motion to sever the trial is denied. Pursuant to
10 Richardson versus March, the conversation clause is
11 not violated. There has to -- when there has been
12 sufficient redaction of a co-defendant's confession.

13 And additionally, according to
14 Rolling versus State, the defenses must be
15 antagonistic to the point that they're mutually
16 exclusive. And they have not alleged that to the
17 level where the Court feels it's necessary to sever
18 the trial in regards to conspiracy to commit murder
19 and murder.

20 And at this point, I've read the
21 writs of habeas corpus on this, I don't find that
22 severance is necessary in this particular case. So
23 that motion's denied.

24 All right. The motion, the defense
25 motion in limine to preclude admission of

1 photographs.

2 MR. BINDRUP: I just would like to point
3 out that the victim in this case died and as a
4 result of receiving a single gunshot to the back of
5 the head.

6 Okay. As such, the State normally
7 likes to put in a large number but because of this
8 particular wound, a limited amount of photographs
9 only should be allowed. And we'd ask the State to
10 disclose that once trial starts to us, so we can
11 look at what they're planning on introducing.

12 THE COURT: State?

13 MS. JIMINEZ: Well, I'd just say it's
14 premature at this date -- at this point, Your Honor.
15 I mean, we're gonna get the photos together, we'll
16 show them to the defense, the court's gonna make a
17 ruling on it.

18 Generally we just, for autopsy
19 purposes, we only admit the photos necessary to show
20 the wounds. And we'll have to make a record at that
21 time, but it's premature at this point to ask the
22 court to rule on something that's not even before
23 you.

24 THE COURT: I would agree it's denied at
25 this point without prejudice. I mean, you can

1 certainly renew if it gets to be cumulative or
2 repetitive or -- obviously autopsy photographs,
3 there's a long line of cases that it's proper in
4 murder cases.

5 At this point, it's premature. I'll
6 deny it. And we'll see what they do at trial, but
7 you can renew it at trial if it becomes necessary.

8 MR. BINDRUP: Thank you.

9 THE COURT: All right. Defense motion
10 for discovery.

11 MR. BINDRUP: This is just to make sure
12 that issues --

13 THE COURT: I have --

14 MR. BINDRUP: -- are preserved. I would
15 ask the State -- this was brought up before for a
16 time certain to go to the evidence vault. And so
17 I'd ask the State to please accommodate us if
18 possible --

19 THE COURT: Sure.

20 MR. BINDRUP: -- within the next
21 two-to-three weeks, so that we can review those
22 items.

23 And additionally, although I've
24 reviewed their file, I believe that it was like last
25 year or awhile back.

1 THE COURT: Yeah, you probably need to
2 re-review that.

3 MR. BINDRUP: I'd ask that probably a few
4 weeks before trial that they also accommodate us and
5 set a time that we can go and make sure that we do
6 have any discovery that has straggled in since that
7 point.

8 MS. JIMINEZ: And that's fine, judge.
9 Both counsel are always fine to make an appointment
10 with me to come in and see the file. I know Mr.
11 Maningo's a little late on the case so I'm sure he
12 wants to come and review it. I don't think we've
13 done one before. I'd be happy to facilitate another
14 view as necessary.

15 THE COURT: All right. Defense motion
16 to -- for discovery is granted. It appears at this
17 point State's complied with all the discovery rules
18 in Brady and states she has no opposition to you
19 reviewing her file in her office by appointment as
20 well as the evidence vault which is routine in these
21 types of case. If it becomes a problem, please put
22 it on calendar.

23 All right. Defense motion to compel
24 disclosure of existence and substance of
25 expectations or actual receipt of benefits or

1 preferential treatment for cooperation with
2 prosecution.

3 MR. BINDRUP: I have nothing to add to
4 that, Your Honor.

5 THE COURT: I can go through each one.
6 Well, at least some of the items that I saw. On
7 item number one, all written or recorded statements,
8 confession or admissions made by defendant to any
9 person or copies thereof, including comments at the
10 time of his arrest, et cetera, and transportation to
11 CCDC, I'm gonna grant that. It looks like the State
12 has complied with that.

13 Item two, defense request
14 substantive statements made by defendant which they
15 intend to use as evidence, including jailhouse
16 conversations, I'm gonna grant that. It appears
17 that the State's complied with that.

18 There's another item, item six,
19 copies of statements given by the State witnesses.
20 Just State's witnesses in the case, I'm gonna grant
21 that because I think that complies with the statute.

22 In any case whatsoever in the
23 universe, I don't think that -- I think that's well
24 outside that. I mean unless they, it's, it's within
25 their control, that part's gonna be denied.

1 Item 7(b) which is criminal records
2 of the State's witnesses, what I'm gonna do is deny
3 it in part and grant it in part. It's granted
4 pursuant to NRS 50.095. They certainly have a duty
5 to provide you with that type of impeachment
6 evidence.

7 As far as the NCIC and handing you
8 over and disseminating the NCIC, it's not proper for
9 them to do that. I'm gonna deny the motion in that
10 respect.

11 On item 7(c), motion to compel
12 disclosure of existence and substance of
13 expectation, I'm gonna grant that. It looks like
14 they have in fact complied with that and they've
15 given you all the promises and benefits and
16 cooperation of benefits. So I think that the moving
17 papers reflect that the State has complied with
18 that.

19 Is there anything further for the
20 record on that? So it's basically granted in part,
21 denied in part.

22 MR. MOMOT: Your Honor, just one point as
23 to the scope of the NCIC. Could I make application
24 to the court, if the court just reviewed in camera
25 the NCIC because I think if there are acts of

1 dishonesty, we will be --

2 THE COURT: Here's the thing: NCIC is
3 brutal. Especially you got somebody named Garcia,
4 are you kidding me, you would never even know who
5 they're talking about. It may or may not be the
6 Garcia. I mean, NCIC is just hard. It's so
7 problematic. I just don't know if that would even
8 be the right one.

9 MR. MOMOT: I'll just try to --

10 THE COURT: I couldn't tell, okay. I
11 read them for years and I couldn't tell, you know.
12 I mean, arguably I looked at NCICs for 15 years and
13 to say that this is the same Garcia or the same
14 Lopez, I mean that's like saying Smith. You know,
15 it's just forget it. It's just not gonna be
16 beneficial.

17 And even if it says that there was a
18 crime of dishonesty, how do you know it's the same
19 one unless you get fingerprinted and a pen pack. I
20 mean, it's problematic in NCIC.

21 I've got to believe that witnesses
22 have been run by the investigators using NCIC and
23 using tools. And if in fact they have priors, they
24 have to comply with NRS because then it is at their
25 disposal.

1 I can't give -- I can't order them
2 to give you NCIC, but they are ordered to give any
3 kind of impeachment evidence pursuant to NRS under
4 that impeachment statute.

5 So if, if their investigators have
6 run somebody and they know this person has a felony
7 out of Florida because their investigators do use
8 NCIC and do make confirmation and do make hits and
9 they don't turn that over, it's on record that I've
10 granted it. So I think you're covered.

11 MR. MOMOT: I mean, not necessarily have
12 to have a felony conviction.

13 THE COURT: Correct. Different. I'm
14 sorry, under the NRS for impeachment purposes.

15 MS. JIMINEZ: And I'll just say that,
16 that I don't necessarily run NCIC on my witnesses.
17 If my investigators have for whatever reason, I'll
18 just get over to those and provide you information
19 that's relevant to what the court has ordered.

20 THE COURT: You need to run your NCIC on
21 the witnesses.

22 MS. JIMINEZ: Well --

23 THE COURT: I mean, you need to check and
24 make sure that they don't have priors. Because
25 they're requesting it and I think that they're

1 entitled to that.

2 MS. JIMINEZ: They are requesting that
3 information if I have access to it. And if I have
4 that information, I would provide it.

5 Most of the witnesses, most of them
6 are in fact are juveniles. They may at this point
7 have turned 18, but if they're -- you know, most of
8 them have lived here their entire lives.

9 THE COURT: So it shouldn't be
10 problematic.

11 MS. JIMINEZ: Exactly.

12 THE COURT: It doesn't sound like it's
13 gonna be a problem in this case so and it sounds
14 like she's complied to date.

15 Okay. The defense motion to
16 federalize all motions, objections, requests and
17 other applications.

18 Is there any further arguments on
19 this?

20 MR. BINDRUP: No, Your Honor.

21 MR. MANINGO: (Negative nod of the head.)

22 MS. JIMINEZ: No.

23 THE COURT: I appreciate the defense, you
24 know, making this motion, but it's really premature.
25 I'm gonna deny that.

1 I think that you have to have a
2 proper objection each and every time for the
3 appellate court. Under Lord versus State, and also
4 even under -- I can't believe -- hold on. Leochay
5 (phonetic) which is a civil case, but I mean, you
6 have to make the proper objections at the time that
7 you believe you need to make the objections.

8 So that's gonna be denied without
9 prejudice.

10 Motion to exclude other -- defense
11 motion to exclude other bad acts, character evidence
12 and irrelevant prior criminal activity. I've read
13 both sides. I'd be happy to rule right now, but if
14 anybody has anything further.

15 MR. MANINGO: I have nothing further,
16 Your Honor.

17 MR. JIMINEZ: Judge, except for the few
18 things that we brought up, I kind of took the
19 opportunity to discuss the shooting of one of the
20 witnesses that took place. I don't -- that's not
21 really a prior bad act, but I thought it would make
22 sense to bring it up pretrial, put the information
23 before the court.

24 THE COURT: That would make sense to talk
25 about.

1 MS. JIMINEZ: And I think I've laid it
2 out. Unless there's a specific question, I will
3 submit as to on our opposition in the information
4 that was provided.

5 THE COURT: All right. First of all, the
6 evidence of defendant Garcia's flight to Mexico is
7 gonna be relevant and admissible evidence. It's
8 really not a bad act. It's really part of the crime
9 and they may be entitled to a flight instruction
10 depending on the evidence. So I don't find that
11 that's a prior bad act at all.

12 The criminal gang enhancement is
13 also element of the charges. So it's not a prior or
14 subsequent bad act under the statute for which I
15 need to hold a hearing. They're either gonna prove
16 it or they're not, and it's part of the elements of
17 this case for the gang enhancement.

18 Finally, with the shooting of
19 witness Jonathan Harper, here's how I'm gonna rule:
20 I'm gonna rule that you can, he can testify that he
21 got shot in the head and the timing two weeks later.
22 Regarding his demeanor, his memory, that might be
23 relevant.

24 You know, the circumstances behind
25 it are confusing and also I think that they are

1 prejudicial to these two defendants. I don't think
2 that all the circumstances behind this other
3 shooting, I mean, yeah, they're cousins but that's
4 it. I mean, so what. It's so prejudicial to --
5 it's -- under 48.035, I just think it's overly
6 prejudicial, the circumstances behind the shooting.

7 So, yeah, you can talk, yeah, I got
8 shot in the head, I can't remember things. Yeah, it
9 was two weeks later. I mean, that's, that's fine.
10 But to just go into that whole other ball of wax is
11 prejudicial to these defendants so I'm not gonna
12 allow that part of it.

13 MS. JIMINEZ: And can I ask, judge, if
14 there comes a point as we're in trial as the
15 evidence is coming out, can I ask that that be
16 without prejudice if something comes up that we can
17 bring it up obviously outside the presence of the
18 jury and ask you to reconsider if something
19 different happens?

20 THE COURT: If either side has something,
21 I would always consider that, but just looking at it
22 right now, I think it's looking into other areas and
23 it's just because they're cousins. I mean, I don't
24 think I want to get started on family members, okay?
25 Everybody's got family members. It's overly

1 prejudicial to --

2 MS. JIMINEZ: I understand. I'm just
3 kind of --

4 THE COURT: Unless you can show me some
5 connection, you know. I just, it goes off into a
6 tangent and it starts really becoming like well, I
7 just don't know how to say it. It's just more
8 prejudicial to these two, a whole nother shooting
9 and all the stuff that go with it and he got shot in
10 the head. You know, it doesn't hurt and explains
11 why his demeanor, his memory, all these things, it's
12 fine, he can say he got shot in the head.

13 MS. JIMINEZ: Okay.

14 THE COURT: You know, and he can say when
15 he got shot, okay?

16 MR. BINDRUP: Just before you move to the
17 next one, just point of clarification.

18 THE COURT: Sure.

19 MR. BINDRUP: So my client's alleged
20 flight to Mexico, it's your order that perhaps at
21 time of, you know, conclusion of the case you might
22 allow that as an instruction, but you will --

23 THE COURT: Well --

24 MR. BINDRUP: -- allow that during the
25 case-in-chief, correct?

1 THE COURT: I'm going to allow the
2 evidence in case-in-chief, his flight to Mexico, as
3 long as it stays within not overly prejudicial.

4 And I'm hoping that obviously the
5 State is and they've been very professional because
6 you tiptoe around anything that would cause a
7 mistrial because I don't know all the facts, you
8 know.

9 Did he -- I don't know. I mean, if
10 he just got picked up in Mexico, I mean that's not
11 gonna be, that's part and parcel of, of this crime.
12 It's not my position or the court's ruling that
13 that's another bad act. That's part of this. You
14 know, if he got -- I don't know all the facts. If
15 he got picked up, 'cause he's wanted on a sexual
16 assault down there, you know, I don't think we
17 should get into that.

18 I'm gonna have to leave it up to the
19 State to make sure that they only put in the
20 relevant just the flight.

21 MS. JIMINEZ: Right. And just so you
22 know that it was through an international
23 extradition he was arrested on the warrant to this
24 case.

25 THE COURT: Sure.

1 MS. JIMINEZ: To my knowledge, there's no
2 other bad behavior that got him arrested.

3 THE COURT: Yeah, I just, I mean -- yeah,
4 I think we've hashed it out, but that's relevant
5 evidence and I think it's admissible.

6 And then you guys are obviously
7 gonna later fight about a jury instruction on that
8 and I'll listen to the evidence and see whether or
9 not it's one which should be given.

10 MR. BINDRUP: Thank you.

11 MR. MOMOT: Well, it's an implication
12 that he left this country to flee the jurisdiction
13 in and of itself.

14 THE COURT: Right.

15 MR. MOMOT: And that's where the
16 prejudicial affect is gonna outweigh the probative
17 value.

18 THE COURT: Well, you can get somebody on
19 the stand and say, you know, that he was sending
20 himself there. I don't know. They can make it. It
21 is evidence.

22 MR. MOMOT: Is it relevant --

23 THE COURT: It's still evidence. Well,
24 it's still evidence in the case. I don't think it's
25 another bad act. It's evidence of flight shows

1 consciousness of guilt. I mean, it's in the law,
2 it's a fact.

3 And you can certainly argue
4 something different from that evidence. You know,
5 he's visiting family members. I don't know.

6 MR. BINDRUP: Well, we'll renew the
7 objection prior to --

8 THE COURT: That's fine.

9 MR. BINDRUP: -- to the time. We just
10 hope that we're given a little advance warning
11 before the State just jumps into that area.

12 We still believe that it's very
13 prejudicial and should not come in at all.

14 MR. MOMOT: And it seems like the
15 shifting of the burden to the defense that we have
16 to prove that I went down to a country for some
17 other reason as opposed to the State's burden to
18 show that it wasn't a flight to avoid prosecution.

19 THE COURT: Well, I heard the evidence,
20 but as I recall in the writ, the guy's from here,
21 went to school here and then suddenly is in Mexico,
22 gets picked up in Mexico.

23 I don't think that the inference is
24 just throwing it out there. It isn't a law.
25 Consciousness of guilt is proper evidence to be

1 shown. And I don't know where under 48.045(2) I've
2 got to do a Petrocelli hearing on that.

3 So I'm deeming it to be relevant. I
4 don't think I need to meet clear and convincing and
5 I don't think it's overly prejudicial.

6 MR. MOMOT: You know, I agree with the
7 court if, if his name was O'Brien, but he's a
8 Hispanic male.

9 THE COURT: I can't change the facts.
10 Your objection though is noted for the record.

11 MR. BINDRUP: Thanks.

12 THE COURT: Thank you. All right.
13 Defense motion to allow jury questionnaire, sounds
14 like both sides don't have a problem. This isn't a
15 death case, is it?

16 MS. JIMINEZ: No, it's not.

17 MR. BINDRUP: May I suggest then that if
18 we, if we have --

19 THE COURT: Well, if it's not a death,
20 why are we doing it?

21 MR. BINDRUP: Well, one of the problems,
22 we got two defendants with two different kinds of
23 defenses. You've already denied our motion to
24 sever.

25 THE COURT: All right, I'll grant it.

1 All right, all right. That's fine.

2 MR. BINDRUP: All right. I would ask if
3 we have two weeks, within two weeks. And once both
4 parties agree to what we want to propose, send it to
5 the State, they can review it. I would suggest
6 perhaps --

7 THE COURT: Why don't we do it in a week?
8 We need to have you guys agree on this in a week
9 because you've got to get that out like --

10 MR. BINDRUP: Okay.

11 THE COURT: What 11-1? Yeah, 11-1's the
12 trial.

13 MR. BINDRUP: I've got a case starting
14 next week. The jury questionnaire's being filled
15 out tomorrow so.

16 THE COURT: Okay. I don't know. I was
17 told like months, like a month in advance.

18 MR. BINDRUP: Well, the jury commissioner
19 hates doing stuff at the last minute. I don't blame
20 them.

21 But can we get some sort of setting
22 then perhaps the week of October 11th, if we have
23 any questions that remain, bring it in front of Your
24 Honor?

25 THE COURT: Okay.

1 MR. BINDRUP: Here's the five that we
2 disagree and then you can make your ruling.

3 THE COURT: Okay.

4 MS. JIMINEZ: That's fine.

5 THE COURT: That's fine. Status check
6 jury questionnaire. It's granted though.

7 THE CLERK: When do you want that?

8 MR. BINDRUP: Any time at the court's
9 convenience during the week of October 11th. We
10 should be able to get everything worked out by then.

11 THE CLERK: How about October 12th at
12 9:00?

13 MR. BINDRUP: That's great. Thank you.

14 THE COURT: All right. Defense motion to
15 bar improper prosecutorial argument.

16 Is there anything further?

17 MR. BINDRUP: No, Your Honor.

18 THE COURT: Okay. This is also
19 premature. I'm gonna deny it right now. I think it
20 has to be raised during the argument. I think, I
21 just think it's premature. So we'll note your
22 objection and we're just gonna have to see what
23 happens at trial and hopefully that won't be the
24 case.

25 All right. So that's gonna be

1 denied without prejudice.

2 All right. Defense motion to allow
3 defendant's IQ assessment to be utilized at time of
4 trial. I've read it, I've really looked at this
5 one.

6 MR. BINDRUP: May I just make a few
7 comments?

8 THE COURT: Sure. It appeared originally
9 you had him for a penalty phase notice kind of
10 thing.

11 MR. BINDRUP: Yes. Dr. Paglini is
12 prepared to indicate that our client is mentally
13 impaired and is in the lower percentile levels as to
14 intelligence.

15 And it's our position that such
16 information is admissible if it is limited to those
17 assessments alone and the expert is precluded into
18 getting into other areas.

19 I would note that, I know personally
20 of two courts in this jurisdiction that based upon
21 the recent case of Dumas v. Nevada have indicated
22 and have allowed this to be utilized in during the
23 State's case-in-chief even when the defendant
24 doesn't take the stand and testify.

25 THE COURT: You mean in the defense case?

1 MR. BINDRUP: In the defense case. But
2 even if the defendant does not testify, they're
3 still allowing that.

4 State v. Perez, that's a Judge Glass
5 case that I did personally, my client did not
6 testify, Dr. Paglini though was able to take the
7 stand and very limited focus on his mental levels
8 and his IQ.

9 Also, District Court 8 has granted
10 said motions as well in Grass. I think Grass
11 actually went to trial and that was allowed. And
12 also I have a case, Lawson, that is pending in that
13 department for next year. The judge has already
14 ordered that that be allowed in that case.

15 I don't know if any other judges in
16 this jurisdiction --

17 THE COURT: And I appreciate your
18 comments, but, you know, let me tell you, the
19 endoscopy cases, we have hundreds of them. And
20 you've got 25 district courts, you've got rulings
21 coming out of everybody. And we'll check with
22 somebody else, they do something completely
23 different.

24 So I appreciate that Judge Glass and
25 Judge Gates, I don't know the facts of the case, and

1 those cases I can't really be swayed by them because
2 I just don't know their facts. And the supreme's
3 haven't, haven't ruled on what they're doing in
4 those cases. So I am looking at just the supreme
5 court cases. And what you're gonna do with that at
6 argument, that's really the bigger question. Okay.

7 MS. JIMINEZ: And I guess that's the
8 point that we've been trying to make in our
9 opposition, judge, is that if he's going to call
10 this expert, it's really limited and specific to the
11 type of information that he can testify to.

12 They can't argue diminished
13 capacity. That's clearly not available defense in
14 Nevada. You know, he can't get up there and say,
15 look, the defendant cannot talk to me informed
16 premeditation and deliberation. And in fact did not
17 form premeditation and deliberation. That's not
18 something that he can do. It can't be used to argue
19 diminished capacity type defense.

20 Also, I'm not necessarily saying
21 that the expert cannot testify unless the defendant
22 does. What I am saying is that if Dr. Paglini gets
23 up there and starts talking about the defendant's
24 version of the crime or, you know, statements that
25 he made, obviously they can't admit the defendant's

1 statements to him through Dr. Paglini without
2 subjecting him to cross-examination.

3 So I'm not necessarily saying he
4 can't get up there, but I do think that obviously
5 the Court's aware, that he needs to be really
6 closely watched when he's testifying. Because often
7 times when they get up there and start kind of
8 creeping over the line and suddenly they're saying
9 all sorts of things that she shouldn't be saying.

10 THE COURT: Well, that's my concern to be
11 honest. I mean, you know, if you have a doctor, if
12 Dr. Paglini testifies that his IQ and, you know, he
13 did a IQ test and this gentleman has a low IQ and
14 mentally impaired and stuff and then calls it a day,
15 then it doesn't sound like the State has an
16 objection and even pursuant to Crawford, you know,
17 arguably it could be used for another purpose.

18 Once you start going into closing
19 though, I'm more -- I want to throw this out there.
20 Because here's what I'm gonna end up getting is you
21 guys using that improperly during argument and
22 then -- I mean, I'll just throw it out there. If
23 that's what you guys want to do, you want Paglini to
24 start getting into intent, then I'm just gonna throw
25 it out there because I'm gonna make a record, then

1 the State could technically ask for an independent
2 mental evaluation and get their expert and Paglini
3 and State's expert can hash out whether it's a first
4 or second-degree murder case or something less.

5 I just don't want to go into this
6 yes, yes, we're gonna do the limited IQ and that's
7 it, and then clearly, you know, we can't have Dr.
8 Paglini testify as to the events of the crime and
9 what happened without defendant obviously
10 testifying. You can't boot strap it on there.

11 However, you know, my concern what
12 are you gonna do it with it? And you don't have to
13 tell me, but I'm gonna tell you that if you're
14 thinking of pushing that envelope into argument with
15 intent to kill and premeditation and some diminished
16 capacity, then let's just cut to the chase and, you
17 know, that's fair, you can switch. It appeared on
18 the notice it's a penalty witness. And when I look
19 at that, it looks like a penalty witness.

20 If you're saying, you know what, I
21 made a, I made an absolute decision as the attorney
22 I want Paglini in the case-in-chief, fair enough,
23 but you've got to be fair and allow them -- what I'm
24 gonna do is say alright, that's fair, argue it until
25 the cows come home. But let's just before we get in

1 on mistrial, because I can see it coming, for me not
2 allowing you to argue something -- I'm putting it
3 right out there now. Is that something you want to
4 get into because then I think that out of fairness I
5 would rather say this is not going to trial, let
6 them have an independent -- I'm just throwing out
7 there. Because I know what's gonna happen. I can
8 see it happening.

9 MR. BINDRUP: Okay. I understand and I
10 am willing the restraints that Your Honor is gonna
11 put on Paglini for good cause and he should be
12 restrained to a specific.

13 THE COURT: Okay.

14 MR. BINDRUP: It should be the same
15 restraint that I will be put under or Mr. Momot will
16 be put under for closing argument to not take that
17 and make something out of it that is not permissible
18 such as diminished capacity. There is no such area
19 and it would be improper argument to get into that
20 area.

21 So we're fully prepared to follow
22 the same restraints that we expect Dr. Paglini to
23 follow when he testifies.

24 THE COURT: Fair enough. Make a copy of
25 this transcript because I know it's coming back at

1 some point. Make a copy of this, JoAnn. I want it.
2 The Court wants it.

3 Okay, fair enough. Court will grant
4 it under the limited understanding that the defense
5 agrees that it will only be used as far as the, just
6 bring it out for whatever purposes that he's
7 mentally impaired, has a lower IQ. For that limited
8 purpose.

9 MR. BINDRUP: Thank you.

10 THE CLERK: I need to ask if this is
11 related to both defendants.

12 MR. MANINGO: We join in every motion to
13 save this one.

14 THE COURT: Except this one.

15 MR. MANINGO: Exactly.

16 THE CLERK: Except this one. Thank you.

17 THE COURT: Except this one. And that
18 the defense has now put on the record there's no
19 need for the State to get their own expert
20 independent evaluation.

21 MR. BINDRUP: Well, they're free to if
22 they want to, but, yeah, I'm not going to take
23 that --

24 THE COURT: You're not going to push the
25 argument into the fact that there's a diminished

1 capacity or --

2 MR. BINDRUP: Correct.

3 MS. JIMINEZ: Right.

4 THE COURT: You're not gonna take that
5 and argue that there's a, you know -- okay, fair
6 enough.

7 MS. JIMINEZ: And I'll say this, I mean,
8 I think I -- I haven't brought the motion because I
9 haven't -- I'm waiting to get all the discovery
10 which is kind of our next motion. I think we'd be
11 entitled to it, but I haven't asked for one yet.
12 I'm not necessarily going to ask for one, but I need
13 all the discovery which I don't have which is the
14 next motion.

15 THE COURT: If you're gonna decide to do
16 that are you talking about? Because I thought
17 Paglini's report was attached. I've read Paglini's
18 report at the back which looks to like mitigating
19 factors -- well, we'll get into that.

20 State's motion for reciprocal
21 discovery.

22 MS. JIMINEZ: Okay. We do have his
23 report, judge, but we are entitled to all the actual
24 underlying data from his test, we're entitled to his
25 notes, we're entitled to the actual raw data that he

1 relied on in forming his opinion and making his
2 report.

3 What I've had in the past when this
4 issue has come up is that the doctors usually do ask
5 for a written order obviously with the facts before
6 are provided to Mr. Bindrup or the doctors.

7 But we are -- that's something that
8 he relied on in forming his decision, and we're
9 clearly entitled to have that information and to
10 review it for cross-examination.

11 THE COURT: What case says that?

12 MS. JIMINEZ: It is in, by statute,
13 judge, by NRS 174.245 and 174.234. Also --

14 THE COURT: That's a new one because I
15 never heard of that, but -- I mean, I've not heard
16 of them giving over their notes and their consult
17 stuff and things like that. I mean, it's a --

18 MS. JIMINEZ: I've had it granted in
19 every case, which I'm not saying that you should
20 just because somebody else granted it, but.

21 THE COURT: Well, I don't know. I
22 haven't been, you know, in district court in eight
23 years. That's why I was wondering if something was
24 new, but apparently it is.

25 MS. JIMINEZ: And, judge, in Floyd v.

1 State as well, they discussed the, you know, the
2 notices and information that we're entitled to. And
3 I think I also addressed it in our opposition to --
4 let me quote -- if you give me just a moment, let me
5 quote --

6 MR. BINDRUP: May I just --

7 MS. JIMINEZ: -- the statute for you.

8 MR. BINDRUP: Because we're really not in
9 opposition.

10 THE COURT: Okay.

11 MR. BINDRUP: And I will direct Dr.
12 Paglini to -- now there's a difference between we're
13 talking about the underlying data and charts and --

14 THE COURT: Right.

15 MR. BINDRUP: -- information pertaining
16 to the IQ assessments.

17 THE COURT: Correct.

18 MR. BINDRUP: And his IQ.

19 THE COURT: And he may have had a consult
20 to talk about other things where there might be
21 conversations.

22 MR. BINDRUP: His notes --

23 THE COURT: Regarding --

24 MR. BINDRUP: His personal notes on,
25 interviews with him are not information, but I think

1 the State's just asking that they have supporting
2 documentation for his scientific conclusions that --

3 THE COURT: On the IQ.

4 MR. BINDRUP: On his mental --

5 THE COURT: I'll grant that.

6 MR. BINDRUP: Okay.

7 MS. JIMINEZ: And in fact, I just stated
8 the wrong statute and I want to make sure the record
9 has the right statute. It's NRS 50. -- we have 305,
10 but I think it's 035. The expert may testify in
11 terms of opinion; however, the expert may be
12 required to disclose the underlying facts or data
13 made on cross-examination.

14 THE COURT: Sure.

15 MS. JIMINEZ: So we're entitled to --

16 THE COURT: That's what I'm saying, on
17 cross-examination.

18 MS. JIMINEZ: Right. But we're -- I
19 mean, look, judge, I don't think they're in
20 opposition to it --

21 THE COURT: I'm not --

22 MS. JIMINEZ: Because it takes time for
23 us to be able to re-view it ahead of time rather
24 than saying, okay, you've testified to it, now give
25 us the 300 pages of underlying data, we're gonna

1 need a two-day break to review it, et cetera, et
2 cetera.

3 THE COURT: You wouldn't get a two-day
4 break. But I, as I recall that statute, it's on
5 cross-examination, it's not in the discovery.

6 MS. JIMINEZ: Unless the court orders
7 otherwise. You have the discretion to order.

8 THE COURT: So I'll -- wow, wow. Dang,
9 things are different now. Wow. I never got
10 anything. Wow.

11 MS. JIMINEZ: Well, all I can say is
12 I've --

13 THE COURT: Wow. Things are good.
14 Things are good for the State if you guys are
15 getting all that from the experts. Woo.

16 All right. Well, if they have no
17 opposition, I'm gonna grant it. I'll grant just as
18 far as that.

19 My concern was I could see in his
20 report where he was talking about he had had
21 discussions with him and I didn't know how far it
22 went as far as consulting you for perhaps other
23 mental purposes or issues which was not part of this
24 motion.

25 MS. JIMINEZ: Right. I mean, the

1 distinction, if it's something he relied on in
2 forming his opinions that he's gonna testify, we're
3 entitled to it.

4 If it's something unrelated to that,
5 he didn't rely on it, then we're not entitled to it.

6 THE COURT: I don't know if you're
7 entitled to it in discovery, I would beg to differ,
8 unless there's a case that says that. So I beg to
9 differ with you on that.

10 I'm just gonna make a ruling that
11 the defense, counsel has no opposition to providing
12 that, because I don't think that is -- I don't think
13 that you guys --

14 MR. BINDRUP: I think you're right.

15 THE COURT: Thanks..

16 MR. BINDRUP: You're dead on right. But,
17 you know, quite frankly, the State representatives
18 are, generally speaking, these two are so
19 accommodating.

20 THE COURT: They are. They're very
21 professional.

22 MR. BINDRUP: I don't care giving them
23 the raw data instead of waiting the last minute and
24 causing any delay. So I'm okay with it.

25 THE COURT: Okay. See, it pays off.

1 MR. BINDRUP: It does.

2 THE COURT: Apparently it never paid off
3 for me. All right. Then that's gonna be granted as
4 unopposed.

5 Is there any other motions or we'll
6 just see everybody back on October 11th?

7 MS. JIMINEZ: I believe so. Thank you,
8 judge.

9 MR. BINDRUP: The 12th.

10 THE COURT: I'm sorry. The 12th.

11 MR. MANINGO: Thank you, Your Honor.

12

13 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE
14 PROCEEDINGS.

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Jo Ann Melendez

JO ANN MELENDEZ
CCR NO. 370

ORIGINAL

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FILED IN OPEN COURT

STEVEN D. GRIERSON

CLERK OF THE COURT

MAR 17 2011

BY: 

SUSAN JOVANOVICH, DEPUTY

DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,

11 Plaintiff,

12 -vs-

13 EVARISTO JONATHAN GARCIA,
14 #2685822,

15 Defendant(s).

Case No. 10-C-262966-1
Dept. No. XVAMENDED
INDICTMENT

18 STATE OF NEVADA }

19 COUNTY OF CLARK }

ss.

20 The Defendant(s) above named, EVARISTO JONATHAN GARCIA, accused by the
 21 Clark County Grand Jury of the crimes of SECOND DEGREE MURDER WITH USE OF A
 22 DEADLY WEAPON (Felony - NRS 200.010, 200.030, 193.165), committed at and within
 23 the County of Clark, State of Nevada, on or about the 6th day of February, 2006, as follows:
 24 did then and there wilfully, feloniously, without authority of law, and with malice


25 ///

26 ///

27 ///

28 ///

10C262966-1
AIND
Amended Indictment
1236167



APP 000043

1 aforethought, kill VICTOR GAMBOA, a human being, by shooting at and into the body of
2 the said VICTOR GAMBOA, with a deadly weapon, to-wit: a firearm

3 DATED this 23rd day of February, 2011.

4
5 DAVID ROGER
6 DISTRICT ATTORNEY
7 Nevada Bar #002781

8 BY Sonia V. Jimenez
9 SONIA V. JIMENEZ
10 Chief Deputy District Attorney
11 Nevada Bar #008818

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27 09BGJ047A/06F11378A/10F03640X:abf
28 LVMPD EV#0602062820;
 0602090797
 (TK5)

REGISTER OF ACTIONS

CASE No. 10C262966-1

The State of Nevada vs Evaristo J Garcia

§
§
§
§
§
§
§
§
§

Case Type: **Felony/Gross Misdemeanor**

Date Filed: **03/19/2010**

Location: **Department 15**

Cross-Reference Case Number: **C262966**

Defendant's Scope ID #: **2685822**

1994518

Lower Court Case Number: **09GJ00047**

Supreme Court No.: **64221**

RELATED CASE INFORMATION

Related Cases

10C262966-2 (Multi-Defendant Case)

PARTY INFORMATION

Defendant	Garcia, Evaristo J Other Agency Numbers 2685822 Scope ID Subject Identifier	Lead Attorneys Ross C. Goodman <i>Retained</i> 7023845563(W)
Material Witness	Calvillo, Edshel	
Other	Lopez, Manuel A Other Agency Numbers 1994518 Scope ID Subject Identifier	Lance A. Maningo <i>Retained</i> 702-734-0400(W)
Plaintiff	State of Nevada	Steven B Wolfson 702-671-2700(W)

CHARGE INFORMATION

Charges: Garcia, Evaristo J	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
1. DEGREES OF MURDER	200.030	Felony	01/01/1900
1. FELONY COMMITTED TO PROMOTE ACTIVITIES OF CRIMINAL GANG	193.168	Felony	01/01/1900
1. FURTHER OR ASSIST A CRIMINAL GANG	193.169	Felony	01/01/1900
1. CONSPIRACY TO COMMIT MURDER	200.010	Felony	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. FURTHER OR ASSIST A CRIMINAL GANG	193.169	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
2. FELONY COMMITTED TO PROMOTE ACTIVITIES OF CRIMINAL GANG	193.168	Felony	01/01/1900
2. CHALLENGES TO FIGHT; FIGHTING OR ACTING AS SECOND WHEN DEATH ENSUES.	200.450	Felony	01/01/1900
2. SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON	200.030.2	Felony	02/02/2006

EVENTS & ORDERS OF THE COURT

03/17/2011 **Calendar Call (9:00 AM)** (Judicial Officer Silver, Abbi)

Minutes

03/17/2011 9:00 AM

- State announced being ready for trial. Mr. Momot requested a continuance for further investigation to be done, and for pending negotiations. COURT ORDERED, Def't's oral motion to continue trial DENIED. Court stated findings including that this matter needs to proceed forward for trial, there was additional time, previously, to go forward with the case, and questionnaires have already been sent to Jury Services. Colloquy regarding history of case, including original dates of preliminary hearing and arraignment. COURT FURTHER

APP 000045

ORDERED, trial to begin March 21, 2011 at 1:00 p.m. Further colloquy as to trial schedule for next week, availability, and current prospective jury panel. Statements by Ms. Jimenez and by the Court. Mr. Momot requested this matter be tralled to speak further with Deft. regarding negotiations. COURT ORDERED, matter TRAILED. RECALLED at 11:21 a.m. CONFERENCE AT BENCH. Court TRAILED matter for further discussions between Deft. and counsel. RECALLED AT 1:00 p.m., with all parties present from before. Statements by Mr. Momot and Deft. Matter resolved. Amended Indictment FILED IN OPEN COURT. NEGOTIATIONS are as contained in the Guilty Plea Agreement FILED IN OPEN COURT. DEFT. GARCIA ARRAIGNED AND PLED GUILTY PURSUANT TO THE ALFORD DECISION TO SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (F). State made offer of proof. Court ACCEPTED plea, and ORDERED, matter referred to the Division of Parole and Probation (P&P) and SET for sentencing; trial date VACATED. CUSTODY 5/12/11 9:00 AM SENTENCING

03/17/2011 9:00 AM

Parties Present

Return to Register of Actions

APP 000046

REGISTER OF ACTIONS

CASE NO. 10C262966-1

The State of Nevada vs Evaristo J Garcia

§
§
§
§
§
§
§
§
§
§

Case Type: **Felony/Gross Misdemeanor**

Date Filed: **03/19/2010**

Location: **Department 15**

Cross-Reference Case Number: **C262966**

Defendant's Scope ID #: **2685822**

1994518

Lower Court Case Number: **09GJ00047**

Supreme Court No.: **64221**

RELATED CASE INFORMATION

Related Cases

10C262966-2 (Multi-Defendant Case)

PARTY INFORMATION

Defendant	Garcia, Evaristo J Other Agency Numbers 2685822 Scope ID Subject Identifier	Lead Attorneys Ross C. Goodman <i>Retained</i> 7023845563(W)
------------------	--	---

Material Witness	Calvillo, Edshel
-------------------------	-------------------------

Other	Lopez, Manuel A Other Agency Numbers 1994518 Scope ID Subject Identifier	Lance A. Maningo <i>Retained</i> 702-734-0400(W)
--------------	---	---

Plaintiff	State of Nevada	Steven B Wolfson 702-671-2700(W)
------------------	------------------------	--

CHARGE INFORMATION

Charges: Garcia, Evaristo J	Statute	Level	Date
1. CONSPIRACY TO COMMIT A CRIME	199.480	Felony	01/01/1900
1. DEGREES OF MURDER	200.030	Felony	01/01/1900
1. FELONY COMMITTED TO PROMOTE ACTIVITIES OF CRIMINAL GANG	193.168	Felony	01/01/1900
1. FURTHER OR ASSIST A CRIMINAL GANG	193.169	Felony	01/01/1900
1. CONSPIRACY TO COMMIT MURDER	200.010	Felony	01/01/1900
2. MURDER.	200.010	Felony	01/01/1900
2. DEGREES OF MURDER	200.030	Felony	01/01/1900
2. FURTHER OR ASSIST A CRIMINAL GANG	193.169	Felony	01/01/1900
2. USE OF A DEADLY WEAPON OR TEAR GAS IN COMMISSION OF A CRIME.	193.165	Felony	01/01/1900
2. FELONY COMMITTED TO PROMOTE ACTIVITIES OF CRIMINAL GANG	193.168	Felony	01/01/1900
2. CHALLENGES TO FIGHT; FIGHTING OR ACTING AS SECOND WHEN DEATH ENSUES.	200.450	Felony	01/01/1900
2. SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON	200.030.2	Felony	02/02/2006

EVENTS & ORDERS OF THE COURT

04/26/2012 **Calendar Call** (9:00 AM) (Judicial Officer Silver, Abbi)

Minutes

02/23/2012 9:00 AM

04/26/2012 9:00 AM

- Mr. Goodman moved for Trial to be reset as he has just been granted leave to retain a specialist who needs to conduct his investigation. COURT noted, counsel anticipate this matter taking about 1 to 1 & 1/2 weeks for trial. State announced ready and in opposition to trial being continued. COURT SO NOTED. COURT ORDERED, the Court's is not available as it is presently in trial and at the Defts. request Calendar Call

APP 000047

and Trial dates are RESET. CUSTODY 9/13/12 9:00 A.M. CALENDAR
CALL 9/17/12 1:00 P.M. JURY TRIAL

05/03/2012 9:00 AM

05/03/2012 9:00 AM

Parties Present

Return to Register of Actions

APP 000048

CASE No. 10C262966-1

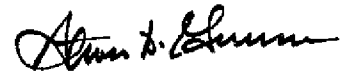
Supreme Court No.: 64221

COURT ORDERED, Deft's Motion to Continue the Trial on an Order Shortening Time is GRANTED and Calendar Call and Jury Trial are RESET. CUSTODY 6/27/13 9:00 A.M. CALENDAR CALL 7/8/13 1:00 P.M. JURY TRIAL

[Parties Present](#)

[Return to Register of Actions](#)

APP 000050



CLERK OF THE COURT

MSPR
Ross C. Goodman, Esq.
Nevada Bar No. 7722
GOODMAN LAW GROUP P.C.
520 S. Fourth Street, Second Floor
Las Vegas, Nevada 89101
Telephone: (702) 383-5088
Facsimile: (702) 385-5088

Attorneys for Defendant
Evaristo Jonathan Garcia

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

EVARISTO JONATHAN GARCIA,
Defendant.

Case No: C262966

Dept. No.: XV

**MOTION TO SUPPRESS IN-COURT
IDENTIFICATION PURSUANT TO NRS
174.125(1)**

COMES NOW, the Defendant EVARISTO JONATHAN GARCIA, by and through his counsel of record, ROSS C. GOODMAN, Esq., of the Goodman Law Group P.C., and hereby files this Motion to Suppress In-Court Identification Pursuant to NRS 174.125(1).

This Motion is made and based upon the pleadings and papers on file herein, the following Memorandum of Points & Authorities, the pleadings and papers on file with this Court, and any oral argument to be made at the time of the hearing of this Motion.

Dated this 25th day of September, 2012.

GOODMAN LAW GROUP

/s/ Ross C. Goodman, Esq.
Ross C. Goodman, Esq.
520 South Fourth St.
Las Vegas, Nevada 89101
Attorney for Defendant

NOTICE OF MOTION

TO: PLAINTIFF, STATE OF NEVADA

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing Motion on for hearing before the Court at the courtroom of the above-entitled Court on the 9 day of October, 2012, at the hour of 9 AM o'clock .m. of said day, in Department XV of said Court.

I.

FACTUAL STATEMENT

The State's proposed eyewitness, Melissa Gamboa ("Melissa"), is the deceased's 14 year old sister, who testified that she was running behind her brother on the night of the fatal shooting. On the night of the shooting, Melissa described the shooter as "wearing a *hoodie that night*, and he was – it was *covered his face*." While admitting that her previous description of the shooter did not match Garcia, the Justice of the Peace allowed Melissa to make an in-court identification of Garcia.

II.

LEGAL ARGUMENT

It is well-settled law that before the prosecution can offer identification evidence from an eyewitness fundamental fairness requires that that identification testimony be reliable. *Bias v. State*, 105 Nev. 869, 871 (1989). Courts follow a two-part inquiry to determine the reliability of eyewitness identification testimony: (1) whether the pre-trial identification procedure was unduly and unnecessarily suggestive that the defendant was the perpetrator; and (2) whether the identification was nonetheless independently reliable. *Id.*

///

///

1 *I. Suggestiveness of the Identification Procedure*

2 The in-court identification of Garcia was unduly suggestive. Under the first step of this
3 analysis, an identification procedure may be deemed unduly and unnecessarily suggestive if it is
4 based on police procedures that create "a very substantial likelihood of irreparable
5 misidentification." *Bolin v. State*, 114 Nev. 503, 522, (1998) (quoting *Simmons v. United States*,
6 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)).
7

8 The Supreme Court has long recognized "[t]he vagaries of eyewitness identification"
9 where "the annals of criminal law are rife with instances of mistaken identification." *United*
10 *States v. Wade*, 388 U.S. 218, 228 (1967). The Court added that "a major factor contributing to
11 the high incidence of miscarriage of justice from mistaken identification has been the degree of
12 suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for
13 pretrial identification." *Id.* In *Stovall v. Denno*, the Court examined a showup procedure in
14 which the suspect was taken to the hospital where a victim was recovering, was presented to the
15 victim alone, and handcuffed to police officers. *Stovall v. Denno*, 388 U.S. 293, 302 (1967)
16 Though noting a showup is inherently suggestive, and for that reason the procedure has been
17 "widely condemned," the Court acknowledged that showups may sometimes be necessary in
18 exigent circumstances. However, the Court then held that an "unnecessarily suggestive"
19 procedure that is "conducive to irreparable mistaken identification" denies due process of law
20 and results in exclusion of the identification from the jury.
21

22 Courts have consistently held that a single photograph as a suggestive practice, and where
23 no extenuating circumstances justify the procedure, as an unnecessarily suggestive one. *Wiggins*
24 *v. Greiner*, 132 F. App'x 861, 865 (2d Cir.2005) (noting that "a 'showup' procedure is inherently
25 suggestive because it involves the presentation of a single suspect to a witness by the police (as
26
27
28

1 opposed to a lineup, in which several individuals are presented to the police, only one of whom
2 is the suspect), and has accordingly been 'widely condemned' ").

3
4 A courtroom identification is not a "reliable" test of the eyewitness's memory, and a
5 courtroom identification is inherently suggestive. It is all too obvious who the defendant is,
6 sitting at counsel's table. In this case, there can be no real dispute that the in-court identification,
7 just the same as a single-photo display, was unreasonably suggestive.

8
9 *2. Independent Basis for Reliability*

10 Although, an earlier courtroom identification was improperly suggestive, an eyewitness
11 may nonetheless be allowed to make an in-court identification if the eyewitness has an
12 independently reliable basis upon which to make the identification. *Bias*, 105 Nev. at 871. To
13 determine whether a witness has, in fact, an independently reliable basis for making such an in-
14 court identification, courts consider the five factors identified by the Supreme Court in *Neil v.*
15 *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Those factors include:

16
17
18 [1] the opportunity of the witness to view the criminal at the time of the crime,
19 [2] the witness' degree of attention, [3] the accuracy of the witness' prior
20 description of the criminal, [4] the level of certainty demonstrated by the
21 witness at the confrontation, and [5] the length of time between the crime and
22 the confrontation.

23 *Id.* at 199-200.

24 The description provided by Melissa of the shooter does not match Garcia. Melissa in
25 her earlier statement described the shooter as having light colored hair and looked clean. *See*
26 Preliminary Hearing Transcript (88:7-10)¹. This generic description contradicts her later
27 testimony which established Gamboa could not identify the shooter. Specifically, Melissa

28
¹ The Preliminary Hearing Transcript, pertaining to Melissa Gamboa's testimony on December 18, 2008,
(68-99) is attached hereto as Exhibit "A."

1 testified that the shooter was "wearing a *hoodie that night*, and he was – it was *covered his face*.
2 And he was like 5-3, 5-3. He was wearing, I believe, shorts that night." *See Preliminary Hearing*
3 *Transcript (81:19-23)*. The State confirmed this misidentification:

4
5 Q. You described the gentlemen that was the shooter as having light hair, correct?

6 A. Correct

7 *See Preliminary Hearing Transcript (89:22-24)*.

8 Q. He doesn't have light hair though, does he?

9 A. No

10 *See Preliminary Hearing Transcript (90:4-6)*.

11 Indeed, Melissa testified to that her description of the shooter does not match Garcia:

12 Q. Were you ever shown a photo spread of any individuals that the police believed were
involved in the shooting?

13 A. No.

14 Q. So this is the first time that you're identifying my client as being the individual that
15 was shooting?

16 A. Yes

17 *See Preliminary Hearing Transcript (94:1-8)*.

18 *Q. Would you acknowledge he does not meet the description that you gave to the police*
19 *that same day it occurred, yes or no?*

20 A. Yes

21 *See Preliminary Hearing Transcript (93:18-21)*.

22 In addition, Melissa was assisted before and during the preliminary hearing by Dawn
23 Barlow Criminal Investigator with the District Attorney's Office. *See Preliminary Hearing*
24 *Transcript (92-93)*. Further, Melissa testified that she was sitting in the court room before she
25 was called as a witness. *See Preliminary Hearing Transcript (91:2-4)*.

26 There is nothing independent about the courtroom identification. There is no evidence to
27 suggest Melissa had an independently reliable basis for making an in-court identification
28

1 especially after the passage of nearly 3 years. Melissa confirmed that her description of the
2 shooter on the same date of the crime - when her memory was most fresh, reliable and accurate -
3 did not match Garcia. Moreover, the only factor that has been clearly established - the length of
4 time between the crime and the identification - weighs *against* concluding that the eyewitness
5 had an independently reliable basis for making the identification.
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III.

CONCLUSION

The thirty-four month span between the crime and the courtroom identification, when combined with the lack of evidence surrounding the other *Biggers* factors, compels the conclusion that the State has failed to establish that Melissa had an independently reliable basis for making the identification.

Accordingly, all evidence derived from the identification of Melissa made from the in-court identification must be suppressed.

Dated this 25th day of September, 2012.

GOODMAN LAW GROUP P.C.

/s/ Ross C. Goodman, Esq.
Ross C. Goodman, Esq.
Nevada Bar No: 7722
520 South Fourth St.
Las Vegas, Nevada 89101
Attorney for Defendant

EXHIBIT “A”

CASE NO. 0628218
DEPT. NO. 5

ORIGINAL

IN THE JUSTICE COURT OF THE LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

Case No. 06F11378A

EMARISTO JONATHAN GARCIA,

Defendant.

REPORTER'S TRANSCRIPT
OF
PRELIMINARY HEARING

BEFORE THE HONORABLE WILLIAM D. JANSEN
JUSTICE OF THE PEACE

TAKEN ON THURSDAY, DECEMBER 10, 2008
AT 8:30 A.M.

APPEARANCES:

For the State:

NORMAN C. NYIKOS and
SANTA V. JIMENEZ
Deputy District Attorneys

For the Defendant:

WILLIAM B. TERRY

Reported by: Gerald De Lucca, C.C.R. #82
Official Court Reporter

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 10, 2008

THE COURT: Now, Mr. Garcia, this is the
time and place for the preliminary hearing in State
of Nevada v. Emaristo Jonathan Garcia.

Let the record reflect that the
defendant is present with his attorney, Mr. Terry,
and we have before us

MS. NYIKOS, MYSELF.

MS. JIMENEZ, LARA SPAIN JIMENEZ.

THE COURT: The attorneys representing

the State.

You said you have two witnesses?

MS. JIMENEZ: There's a possibility of a
third, but I think we'll be able to do it in two.

THE COURT: All the witnesses possibly
that are going to testify, they're all outside?

MS. JIMENEZ: Yes, Judge.

THE COURT: So there's been -- the Court
has been informed all the witnesses who will testify
in the matter are outside in the hallway. So let the
record reflect that the exclusionary rule for
witnesses has been invoked and the witnesses have
been excluded from the courtroom.

INDEX

PAGE

WITNESSES FOR THE STATE

JONATHAN EMANUEL HARPER

Direct Examination by Ms. Nyikos: 7

Cross-Examination by Mr. Terry: 36

Redirect Examination by Ms. Nyikos: 62

Recross-Examination by Mr. Terry: 65

Examination by The Court: 66

~~JONATHAN EMANUEL HARPER~~

Direct Examination by Ms. Jimenez: 69

Cross-Examination by Mr. Terry: 87

Redirect Examination by Ms. Jimenez: 95

Recross-Examination by Mr. Terry: 98

CLIFFORD MOGG

Direct Examination by Ms. Nyikos: 101

Cross-Examination by Mr. Terry: 103

Redirect Examination by Ms. Nyikos: 108

Recross-Examination by Mr. Terry: 108

RECEIVED

EXHIBITS

JAN 12 2009

CLERK OF THE COURT

Marked

Admitted

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78

Do you have any possible

witnesses, Mr. Terry?

MR. TERRY: No, your Honor, but we would
formally for the record ask that all witnesses be
excluded, and I understand the Court's already made
that directive.

THE COURT: Potential witnesses later on
I don't excuse them.

MR. TERRY: Understood.

THE COURT: Okay. State go ahead and
call your first witness.

MS. NYIKOS: Judge, before I call this
witness, his name is Jonathan Harper, I just want to
inform the Court he did have a head injury, so he
speaks a little bit slowly and sometimes mumbles. So
he's not being disrespectful. I'll try and keep him
audible for you, Madam Court Reporter.

While we're waiting for the
witness, Mr. Terry and I do have some stipulations.

THE COURT: Why don't you put those for
the record.

MS. NYIKOS: Thank you.

Your Honor, we have stipulated
that the cause of death was a single gunshot wound to
the back, manner of death to be a homicide. We did

1 counsel heard it, I'll withdraw the objection and let 65
2 him restate it.
3 THE COURT: I don't recall.
4 MS. NYIKOS: I didn't either.
5 THE COURT: Go ahead and ask it.
6 BY MS. NYIKOS:
7 Q. About how long --
8 THE COURT: You may be right. I just
9 can't recall.
10 THE WITNESS: Two weeks.
11 MS. NYIKOS: Nothing further.
12
13 RE-CROSS-EXAMINATION
14 BY MR. TERRY:
15 Q. One last series of questions, Mr. Harper.
16 A. Okay.
17 Q. Counsel asked you questions about you
18 were going there to fight --
19 A. To fight.
20 Q. -- correct?
21 That's a future act, right?
22 A. Yes.
23 Q. Like I would say, I'm going to go
24 shopping tonight, right?
25 A. Yes.

1 Q. But when you got there, there was a fight 66
2 already going on, right?
3 A. Yes.
4 Q. All right. And you participated in that
5 fight, correct?
6 A. Yes.
7 MR. TERRY: Nothing further.
8 THE COURT: Anything else?
9 MS. NYIKOS: No.
10
11 EXAMINATION
12 BY THE COURT:
13 Q. I want to clear up something I think may
14 be important.
15 What kind of a vehicle -- let me
16 go back. Who was all in the car again?
17 A. It was me, Evaristo, Stacy, which is
18 Manuel's girlfriend, and then Manuel.
19 Q. What kind of car was it?
20 A. A black El Camino.
21 Q. Was this a truck-type thing?
22 A. It was like one of them, you know, like
23 you can put the top on. It was like -- it was like a
24 truck.
25

1 (Overlapping speakers) 67
2
3 Q. You said you were in the back. Were you
4 in the back in the bed of the truck?
5 A. Yeah. I was laying down.
6 Q. So you had people who were in the cab
7 sitting, right?
8 A. Yes.
9 Q. And then you were in the back, right?
10 A. Yes.
11 Q. So a lot of things, where you were, you
12 could not hear what was going on in the cab, is that
13 correct?
14 A. Yes.
15 Q. That's what I want to clarify, because an
16 El Camino, which I had owned one, which is like a
17 fancy truck, you know, car-truck thing, and that's
18 when he said in the back, that's what I want to make
19 clear that he was in the back of the bed of the
20 truck, not in like in the back seat?
21 A. Yeah.
22 THE COURT: Now, as a result of that do
23 you have any further questions?
24 MS. NYIKOS: None from the State.
25 MR. TERRY: No.

1 THE COURT: Then you're excused. Thank 68
2 you.
3 (Witness excused)
4
5 Call your next witness.
6 MS. JIMENEZ: ~~MANUEL E. JIMENEZ~~
7 THE COURT: Remain outside. I'm going to
8 have you remain outside. You'll be excused by the ma
9 or the bailiff.
10 THE CLERK: Please be seated.
11 Please be seated. State your full
12 name and spell your name, please.
13 THE WITNESS: My name is Melissa Maria
14 Garbow. M-e-l-i-s-s-a, G-a-m-b-o-a.
15 THE COURT: Now, Melissa, if the question
16 is asked of you by either of one of these attorneys
17 that calls for a yes or no answer, please state yes
18 or no. Don't shake your head and say um-hm, because
19 the court reporter cannot take that type of response.
20 Do you understand that?
21 THE WITNESS: Okay, yes.
22 THE COURT: Now, listen to the questions
23 carefully, and if they call for a yes or no answer,
24 just state yes or no. Do you understand that?
25 THE WITNESS: Yes.

1 THE COURT: Okay. You may proceed. 69
 2 MR. JIMENEZ: Thank you, Judge.
 3
 4
 5 MELISSA MARIA GAMBOSA, having been
 6 first duly sworn to testify to the truth, the whole
 7 truth, and nothing but the truth, testified as
 8 follows:
 9
 10 DIRECT EXAMINATION
 11 BY MS. JIMENEZ:
 12 Q. Miss Gamboa, how old are you?
 13 A. I'm 19.
 14 Q. And, Miss Gamboa, did you have a brother?
 15 A. Yes.
 16 Q. What was your brother's name?
 17 A. Victor Gamboa.
 18 Q. And did something happen to your brother,
 19 Victor?
 20 A. Yes.
 21 Q. And what happened to Victor?
 22 A. He was murdered.
 23 Q. Do you remember when that occurred?
 24 MR. TURNER: Just so we're clear, that's a
 25 legal conclusion.

1 A. No. 71
 2 Q. Is that here in Las Vegas, Clark County,
 3 Nevada?
 4 A. Yes, it is.
 5 Q. And what hours did you go to school at
 6 Morris Academy that day?
 7 A. 2:30 to 8 something, I believe.
 8 Q. What kind of school is Morris Academy?
 9 A. It was adult ed to make up credits.
 10 Q. Were the classes in the afternoon and
 11 evening generally?
 12 A. Yes.
 13 Q. That day what time did you get out of
 14 school?
 15 A. Don't remember.
 16 Q. What time did school generally get out?
 17 A. Like I said, 8 something.
 18 Q. In the evening?
 19 A. At night.
 20 Q. At night.
 21 And did you get out at the regular
 22 time school got out that day?
 23 A. Yes.
 24 Q. When you got out of school what did you
 25 do after you got out of school?

1 THE COURT: It's a legal conclusion. 70
 2 I'll let the record reflect that.
 3 MS. JIMENEZ: That's fine.
 4 THE COURT: Go ahead.
 5 BY MS. JIMENEZ:
 6 Q. When did that occur?
 7 A. The date you mean?
 8 Q. Yes.
 9 A. February 6, 2006.
 10 Q. And in February 6 of 2006, how old were
 11 you at that time?
 12 A. I believe 17.
 13 Q. And how old was your brother, Victor?
 14 A. 15.
 15 Q. On February 6 of 2006, what were you
 16 doing in the afternoon or evening hours?
 17 A. I was attending school.
 18 Q. Where did you attend school?
 19 A. Morris.
 20 Q. Is there a full name to Morris?
 21 A. Morris Academy.
 22 Q. On what street is Morris Academy located?
 23 A. I just know it's up by Washington.
 24 Q. Do you know a cross street for
 25 Washington?

1 A. I was talking to my friend, waiting for 72
 2 my brother.
 3 Q. Your brother, Victor?
 4 A. Yes.
 5 Q. And why were you waiting for Victor?
 6 A. He was picking me up!
 7 Q. Did Victor arrive at the school?
 8 A. Yes, he did.
 9 Q. About how long after you got out of
 10 school did Victor arrive at school?
 11 A. Five minutes or so or less.
 12 Q. Before Victor got there did you notice
 13 anybody else doing anything in particular?
 14 A. Yes.
 15 Q. What did you see?
 16 A. I saw my sixth period student class was
 17 talking about a fight. They were talking about --
 18 MR. TURNER: Judge, that would be hearsay.
 19 the question was clear, what did you see.
 20 BY MS. JIMENEZ:
 21 Q. Right. I'm asking not to talk about what
 22 people were saying, but I want to talk about did you
 23 see somebody do something after school before your
 24 brother got there?
 25 A. Yes.

1 Q. And who was that person? 73
2 A. Just we were just waiting for people to
3 pick us up, so . . .
4 Q. What happened after Victor arrived?
5 A. My brother arrived. I saw that he came
6 with a friend of his.
7 Q. Do you know his friend's name?
8 A. I do now. Then I didn't know his name.
9 Q. What's his name?
10 A. Brian.
11 Q. And what happened after Victor and Brian
12 got there?
13 A. I just heard -- I don't know if you want
14 me to say that.
15 Q. I want you to talk about what you saw
16 happened after Victor and Brian got there.
17 A. I saw that Brian was talking to my
18 brother.
19 Q. And after Brian and your brother were
20 talking, what did you see happen next?
21 A. I saw Brian fighting.
22 Q. Who was Brian fighting with?
23 A. Giovanni Garcia.
24 Q. And how do you know Giovanni?
25 A. I have him for sixth period class at the

one-on-one? 75
2 A. It was no longer than five minutes. It
3 all happened so quick.
4 Q. At some point did something else happen
5 with regard to that fight?
6 A. Yes.
7 Q. What was that?
8 A. More people started jumping in, girls and
9 guys.
10 Q. How many others jumped into the fight?
11 A. For defending Giovanni, I saw a guy, and
12 then after that I saw another guy coming.
13 Q. So when you say defending, do you mean on
14 the same side?
15 A. Giovanni's side, yes.
16 Q. And you said you saw a guy and another
17 guy, so is that two guys?
18 A. Yes, other two guys.
19 Q. Where did these two guys come from?
20 A. They came out of a car.
21 Q. Can you describe the car?
22 A. It was a -- I forgot the color. It was
23 like gray. It was an El Camino, two-door car. I saw
24 two -- four people in that car.
25 Q. And of the four people that you saw in

school I was arriving at, 74
2 Q. He goes to school with you?
3 A. He did.
4 Q. Before -- I want to back up for a second.
5 Before Victor showed up, did you
6 see Giovanni doing something before Victor got there?
7 A. Yes, I did.
8 Q. What did you see him do?
9 A. I saw him making a phone call, and as
10 well he was with girls.
11 Q. Was he on the phone?
12 A. He was on the phone.
13 Q. Was it a cellphone?
14 A. Yes.
15 Q. You said that after Victor and Brian
16 showed up that Brian and Giovanni got into a fight?
17 A. M-hmm.
18 Q. Is that yes?
19 A. Yes.
20 Q. Can you describe what kind of fight it
21 was?
22 A. It was a one-on-one fight, the two guys.
23 Q. Was it with fists or weapons?
24 A. With fists.
25 Q. How long did the two of them fight just

the car, males or females? 76
2 A. There was one female and three males.
3 Q. And about what age were these people?
4 A. Around my age. I can say, 17, 18.
5 Q. And what race were they?
6 A. Hispanic.
7 Q. All of them?
8 A. M-hmm.
9 Q. Is that yes?
10 A. Yes.
11 Q. And so you said that the two people who
12 got in the fight, they came from this gray El Camino
13 you described?
14 A. Yes.
15 Q. What happened after these two people
16 joined in the fight?
17 A. The principal came out.
18 Q. What happened after the principal came
19 out?
20 A. Everybody started running.
21 Q. This is the principal of the school?
22 A. Yes.
23 Q. Where was that fight occurring?
24 A. This was right in front of the school by
25 the parking lot.

1 (State's Proposed Exhibit 1 77
2 marked for identification.)
3
4 MS. JIMENEZ: Judge, I have State's
5 Proposed Exhibit 1, which is a purported map, which
6 I'm showing to defense counsel. May I approach?
7 THE COURT: Sure, you may.
8 BY MS. JIMENEZ:
9 Q. Miss Garbon. I'm going to show you
10 State's Proposed Exhibit 1. Do you recognize that
11 item?
12 A. Yes, I do.
13 Q. What is that?
14 A. The school I was attending.
15 Q. Is that a map of that school?
16 A. Yes.
17 Q. And does that map fairly and accurately
18 show the school and the nearby streets at the time
19 that this happened on February 6 of 2006?
20 A. Yes.
21 MS. JIMENEZ: And, Judge, I'm going to
22 move to admit State's Proposed 1.
23 MR. TERRY: I have to ask for that
24 purpose?
25 THE COURT: What's the purpose for it?

1 Q. Can you put a circle on the map where -- 79
2 THE COURT: Wait until counsel gets
3 there.
4 BY MS. JIMENEZ:
5 Q. Can you put a circle on the map where the
6 fight that you have just described was occurring.
7 A. I believe this is the entrance. There
8 was two entrance for the school.
9 Q. Take a moment to orient yourself.
10 A. I know there was one for daycare. This
11 is the entrance. The fight was right across over
12 here, the parking lot.
13 Q. So you've drawn a circle on the map in
14 the parking lot area, correct?
15 A. Correct.
16 Q. After the individuals -- you said two
17 other people jumped in the fight on the side of
18 Giovanni. What happened after that?
19 A. Can you explain that again?
20 Q. After -- you said two people jumped into
21 the fight on the side of Giovanni, correct?
22 A. Mm-hmm.
23 Q. Is that yes?
24 A. Yes.
25 Q. What happened after that?

1 MR. TERRY: We don't have an adequate 78
2 foundation really to admit it.
3 MS. JIMENEZ: We do. I laid a foundation
4 that it's a fair and accurate map, that this is the
5 location of her school, that it's the location at the
6 time and the date that this happened.
7 THE COURT: Now what is the purpose?
8 MS. JIMENEZ: I'm going to have her
9 describe where people were, what they were doing.
10 THE COURT: I'll allow it in for that.
11 Go ahead.
12
13 (State's Exhibit 1
14 admitted into evidence.)
15
16 BY MS. JIMENEZ:
17 Q. You said that the fight was occurring in
18 the parking lot, correct?
19 A. Correct.
20 MS. JIMENEZ: I'm going to ask her to
21 mark on the map, if counsel wants to watch where
22 she's marking.
23 MR. TERRY: May I approach?
24 THE COURT: Absolutely.
25 BY MS. JIMENEZ:

1 A. They started running because the 80
2 principal came.
3 Q. And did your brother, Victor, run?
4 A. Yes.
5 Q. And did you run?
6 A. Yes.
7 Q. And who else ran?
8 A. Everybody.
9 Q. While the running was happening, what did
10 you see happen?
11 A. I was running towards my brother and --
12 Q. It's okay. Take a tissue if you need it.
13 MR. TERRY: Judge, if counsel's not going
14 to mark on that anymore, I'll return to my seat.
15 MS. JIMENEZ: I'm sorry, we are. I
16 thought we were getting to it a little faster.
17 MR. TERRY: No problem.
18 MS. JIMENEZ: It will be just a moment.
19 THE WITNESS: While crossing the street I
20 was running behind my brother, and then I see
21 somebody just -- I running towards my brother, and I
22 seen somebody else running towards my brother and
23 shaking him.
24 BY MS. JIMENEZ:
25 Q. Can you put a V on the map where your

1 brother was when he was getting shot at. 81
2 Can you put an M -- for the
3 record, Judge, she's mark a V on the street area of
4 Washington. It's towards the upper half, left-hand
5 side of the drawing.
6 And can you put an S for where you
7 were standing when your brother was being shot at.
8 And can you put an S for Shooter,
9 where the person doing the shooting was standing.
10 Okay. I'm done marking on the map
11 at this time.
12 So from where you were standing,
13 could you see the person who was shooting your
14 brother?
15 A. Yes.
16 Q. Can you describe that person?
17 A. Yes.
18 Q. Describe him, please.
19 A. He was wearing a hoodie that night, and
20 he was -- it was covered his face. And he was like
21 5-2, 5-3. He was wearing, I believe, shorts that
22 night.
23 Q. And what race was he?
24 A. Hispanic.
25 Q. And, I'm sorry, you may have said this

1 saw him again? 83
2 A. Yes.
3 Q. Do you see that person here in court
4 today?
5 A. Yes.
6 Q. Could you please point to that person and
7 tell the judge what color shirt he's wearing?
8 A. He's in custody, wearing blue.
9 MS. JIMENEZ: May the record reflect the
10 witness has identified the defendant.
11 THE COURT: So reflect.
12 BY MS. JIMENEZ:
13 Q. How many shots were fired at your
14 brother?
15 A. It was couple of rounds.
16 Q. When you say couple, is that two or is
17 that --
18 A. More than two.
19 Q. And did you actually see the gun that the
20 defendant you identified was holding?
21 A. Yes.
22 Q. Can you describe that gun?
23 A. Holding it right hand. I believe it was
24 a 380.
25 Q. Do you know -- do you have a particular

1 and I didn't catch it. Did you say about what age he 82
2 was?
3 A. No, I didn't.
4 Q. About what age was he?
5 A. 17 or 18.
6 Q. And do you remember what he was wearing?
7 A. Yes. I just --
8 MR. TERRY: Asked and answered.
9 THE COURT: She just said that.
10 MS. JIMENEZ: Judge, I think she just
11 described the shorts. I'm asking about the rest of
12 the clothing.
13 THE COURT: She said he was wearing a
14 hoodie. Didn't say what color.
15 BY MS. JIMENEZ:
16 Q. What color was the hoodie?
17 A. Gray.
18 Q. Can you describe his hair or his face?
19 A. He didn't have facial.
20 Q. And you said this is the person you saw
21 shooting at your brother, correct?
22 A. Mm-hmm.
23 Q. Is that yes?
24 A. Yes.
25 Q. Would you recognize that person if you

1 background in guns, Miss Gantaca? 84
2 A. Just a little.
3 Q. It's not your job to do --
4 A. No, it's not.
5 Q. When I say describe it, can you describe
6 what color the gun was?
7 A. I don't remember what color. I know it's
8 either black or gray. I can guarantee you it was.
9 MS. JIMENEZ: Court's indulgence a
10 moment.
11 BY MS. JIMENEZ:
12 Q. What happened when your brother was shot
13 at?
14 A. I ran towards him.
15 Q. At the time that your brother was being
16 shot at was he facing the shooter?
17 A. He was at -- he wasn't facing directly at
18 the shooter. He was running. Then when he kept
19 getting shot at, he did look back towards us, I
20 believe to see if I was the one getting shot.
21 Q. So initially he was running away from the
22 shooter, you said?
23 A. Mm-hmm.
24 Q. Is that yes?
25 A. Yes.

1 Q. And then you said you turned back and he 85
2 looked in your direction?
3 A. Yes.
4 Q. What happened after he was shot?
5 A. I saw the shooter running.
6 Q. Where -- which direction did you see this
7 shooter run in?
8 A. That would be the left.
9 Q. Could you show it on the map?
10 A. Yes, I can.
11 MS. JIMENEZ: If I can approach again
12 with the map, Judge.
13 THE COURT: You may.
14 You want Mr. Terry there?
15 MS. JIMENEZ: Sure.
16 BY MS. JIMENEZ:
17 Q. Would you be able to draw an arrow
18 showing which direction the shooter ran?
19 Okay. And did you see where he
20 went after he ran?
21 A. I saw him there.
22 Q. And you've drawn a second arrow where you
23 indicated you saw him turn; is that correct?
24 A. Yes.
25 Q. What did you do after your brother was

1 MS. JIMENEZ: Court's indulgence. 87
2 Judge, I have no further
3 questions.
4 THE COURT: Mr. Terry.
5 MR. TERRY: Thank you.
6
7 CROSS-EXAMINATION
8 BY MR. TERRY:
9 Q. Ma'am, you've just identified the
10 gentleman seated to my right --
11 A. Yes.
12 Q. -- as the individual that you described
13 as the shooter, right?
14 A. Yes.
15 Q. What is his name?
16 A. I know his name, but I didn't know --
17 Q. You did not know him as of February of
18 '06, correct?
19 A. Correct.
20 Q. And isn't it true that you're identifying
21 him because he's seated to my right?
22 A. No.
23 Q. Do you remember giving a description to
24 the police?
25 A. Yes.

1 shot? 86
2 A. I was asking him if he was okay, and he
3 was not responding.
4 Q. Could you see any injuries on him?
5 A. I just saw him holding his stomach.
6 Q. And was he -- at that point was he
7 standing up or what position --
8 A. He was sitting down against the wall.
9 Q. And what happened with your brother after
10 that?
11 A. Some students from school brought their
12 car over to try to take him to the hospital, and the
13 police arrived and they just laid him down.
14 Q. How much time passed between when you got
15 out of the school and the time that this shooting
16 happened?
17 A. It was so fast, I don't remember.
18 Q. Did you ever hear the person who shot the
19 defendant who you identified say anything?
20 A. No.
21 Q. Did you hear anybody else say anything
22 leading up to the shooting?
23 A. No.
24 Q. Did your brother have a weapon that day?
25 A. No.

1 Q. Do you remember that description being as 88
2 follows:
3 He was wearing a gray sweater, had a hoodie
4 on, dark shorts, the gun -- I'm sorry, counsel, page 6.
5 MS. JIMENEZ: Thank you.
6 BY MR. TERRY:
7 Q. The gun was, I believe, a 380. It was
8 dark. I think it was black. Had light hair, a face.
9 He -- he -- I don't think he had hairs on his face.
10 He looked clean. I don't think he had a mustache.
11 Is that the description you gave?
12 A. I don't remember.
13 MR. TERRY: May I approach?
14 THE COURT: Sure.
15 MR. TERRY: I believe I read it verbatim.
16 THE COURT: Counsel, is this another
17 recorded statement?
18 MR. TERRY: Correct, Judge.
19 THE COURT: Maybe ask her if she recalled
20 giving a recorded statement.
21 BY MR. TERRY:
22 Q. Do you recall giving a recorded
23 statement, as a matter of fact, shortly after the
24 incident?
25 A. Yes.

1 Q. And, certainly, it would have been within 88
2 a week, correct?
3 A. It was that same night.
4 Q. The same night. So that was the same
5 exact night that you gave that description, correct?
6 A. Yes.
7 Q. And that would have been to Detective
8 Mogg on February 6 at 2326, correct?
9 A. Correct.
10 Q. All right. Now, the original question
11 was, please look at that and tell me if that's the
12 way you described the individual?
13 A. Yes.
14 Q. Yes?
15 A. Mm-hmm.
16 Q. Does the gentleman seated to my left have
17 light hair?
18 A. Has what?
19 Q. Does the gentleman seated to my left have
20 light hair?
21 A. No.
22 Q. You described the gentleman that was the
23 shooter as having light hair, correct?
24 A. Correct.
25 Q. And you indicated that my client's

1 A. No. 91
2 Q. Did you come into the courtroom at any
3 time before you were called as a witness?
4 A. Yes.
5 Q. And isn't it true that you observed me to
6 be talking to the defendant at that time?
7 A. No.
8 Q. Isn't it true you remained in the
9 courtroom during that period of time?
10 A. What do you mean?
11 Q. Stayed in the courtroom.
12 A. Like right now?
13 Q. No, before you were called --
14 A. No.
15 Q. -- as a witness.
16 Were you with an individual that
17 the commonly referred to as a Victim Witness
18 coordinator?
19 A. I'm not understanding.
20 Q. Did somebody help you come to court this
21 morning?
22 A. As a ride or . . .
23 Q. No, when you got to the building did
24 somebody bring you up here?
25 A. No.

1 appearance today is the same as you recall it on that 90
2 day, correct?
3 A. Correct.
4 Q. He doesn't have light hair though, does
5 he.
6 A. No.
7 Q. You described him in that same police
8 report as being 18 or 19 years old, correct?
9 A. Correct.
10 Q. And do you recall how tall you said the
11 individual was?
12 A. Yes.
13 Q. How tall did you tell the police he was?
14 A. I don't remember what I said on my
15 statement.
16 Q. Now, you've been sitting outside the
17 courtroom today, correct?
18 A. Correct.
19 Q. And you've seen me go back and forth,
20 correct?
21 A. Correct.
22 Q. And you've seen me talking to the
23 defendant that's seated to my right, correct?
24 A. No.
25 Q. You never saw that at all?

1 Q. There's a young lady sitting in the 92
2 courtroom, have you had any -- beside the two DA's,
3 have you had any conversations with her today?
4 A. Yes.
5 Q. And would you point to that lady so that
6 we're clear.
7 And I'll ask the lady to identify
8 herself.
9 MS. JENNINGS: I object as to the
10 relevance.
11 MR. TERRY: We'll get to the relevance.
12 THE COURT: It may be. I don't know.
13 I'll give him leeway.
14 THE WITNESS: I couldn't describe over
15 the phone. I did talk to her over the phone.
16 MR. TERRY: I'm just asking you to point
17 to her.
18 THE WITNESS: I spoke with Dawn.
19 BY MR. TERRY:
20 Q. The lady is in the courtroom right now?
21 A. Yes.
22 Q. Would you point to her. Third time.
23 A. Over there.
24 MR. TERRY: Would that lady stand up and
25 identify herself for the record.

1 MS. BARLOW: I'm a criminal investigator 24
2 with the District Attorney's Office. My name is Debra
3 Barlow.
4 THE COURT: Okay.
5 MR. TERRY: Thank you very much.
6 BY MR. TERRY:
7 Q. Now, she's in here while your testifying,
8 right?
9 A. Yes.
10 Q. She's helping you, right?
11 A. Yes.
12 Q. And you met with her before you came into
13 the building today, right?
14 A. Inside the court.
15 Q. Before you came into the court this
16 morning?
17 A. Yes.
18 Q. Courtroom, how about that?
19 A. Yes.
20 Q. And did she come in when you came in?
21 A. No.
22 Q. Did she tell you to remain outside?
23 A. No.
24 Q. But if you came in?
25 A. Yes.

1 REDIRECT EXAMINATION 25
2 BY MS. JIMENEZ:
3 Q. Miss Gamboa, do you recall giving a
4 written statement to the police at the time that this
5 happened, one that you wrote in your own hand?
6 A. Yes.
7 MS. JIMENEZ: And, Judge, if I can
8 approach, I have her handwritten statement.
9 BY MS. JIMENEZ:
10 Q. Do you recall there's a box on the
11 statement that asks if you can identify the suspect,
12 correct?
13 A. Yes.
14 Q. And you marked yes on that box, didn't
15 you?
16 A. Yes.
17 Q. When you came into court earlier today,
18 before you testified, did you recognize the defendant
19 at that time?
20 A. Yes.
21 Q. And was he sitting in the same place that
22 he's sitting now?
23 A. No.
24 Q. Where was he sitting?
25 A. Right there.

1 Q. Were you ever shown a photo spread of any 24
2 individuals that the police believed were involved in
3 the shooting?
4 A. No.
5 Q. So this is the first time that you're
6 identifying my client as being the individual that
7 was shooting?
8 A. Yes.
9 Q. Is that because you want to believe he's
10 the individual that was doing the shooting?
11 A. No.
12 Q. Would you acknowledge he does not meet
13 the description that you gave the police that same
14 day, yes or no?
15 Yes or no?
16 A. Can you explain that again?
17 Q. No. I'll ask the question.
18 Do you acknowledge that he does
19 not meet the description that you gave to the police
20 that same day it occurred, yes or no?
21 A. Yes.
22 MR. TERRY: Nothing further.
23 MS. JIMENEZ: Thank you, Judge.
24
25

1 MS. JIMENEZ: And, for the record, Judge, 26
2 she's pointed toward the jury box.
3 BY MS. JIMENEZ:
4 Q. In the first or the second row?
5 A. The first row.
6 Q. Can you say which seat he was in?
7 A. Either first or second.
8 Q. And you said that you didn't see
9 Mr. Terry, the defense attorney, talking to him?
10 A. No, I didn't.
11 Q. Did anybody tell you who the defendant
12 was?
13 A. No.
14 Q. Did anybody tell you to pick that person?
15 A. No.
16 Q. Do you remember what you wrote in your
17 handwritten statement about how the shooter looked?
18 A. A little.
19 Q. Would it refresh your memory to look at
20 the handwritten statement?
21 A. Yes, please.
22 MR. TERRY: I prefer counsel ask a
23 specific question, and then if she needs to refresh
24 her memory, we don't have a problem with that.
25 MS. JIMENEZ: That's what I just did. I

1 asked her if she called how she described it. She 97
2 said no. I asked if it would refresh her memory to
3 look at the statement.
4 THE COURT: Go ahead.
5 BY MS. JIMENEZ:
6 Q. I want to direct your attention to the
7 first few lines, and let me know when you're done
8 reading that, okay?
9 A. Okay.
10 Q. Are you done?
11 A. Mm-hmm.
12 Q. Is that yes?
13 A. Yes.
14 Q. I'm taking the statement back.
15 Did that help you remember how you
16 described the shooter to the police in your
17 handwritten statement?
18 A. Yes.
19 Q. And what was that description you gave?
20 A. Gray sweater and dark shorts.
21 Q. And do you remember saying what race he
22 was?
23 A. Hispanic.
24 Q. And do you remember saying what color
25 hair he had?

1 A. Black. 98
2 Q. The investigator that you indicated that
3 you spoke with here in the courtroom, Dawn, did she
4 ever tell you who to pick out as the person who
5 committed this?
6 A. No.
7 Q. Why did you point to the defendant and
8 identify him?
9 A. Because I recognized him.
10 MS. JIMENEZ: Judge, I have nothing
11 further.
12
13 RE-CROSS-EXAMINATION
14 BY MR. TERRY:
15 Q. Counsel asked you about a statement that
16 you wrote. Do you recall describing the individual
17 as being an 5-foot-7?
18 A. Don't remember.
19 Q. Yes?
20 MR. TERRY: Show counsel another
21 statement.
22 MS. JIMENEZ: That's fine. I thought he
23 said a statement she wrote, and I think.
24
25 (Overlapping speakers)

1 THE COURT: You said a statement. He did 99
2 say that.
3 BY MR. TERRY:
4 Q. Do you recall telling Detective Mogg on
5 that same date, 2-6-06 at 2050 hours, which would
6 have been before the recorded statement, that the
7 individual was 5-foot-7?
8 A. Like I said, I don't remember telling
9 that to the detective.
10 Q. You acknowledge that that's what his
11 report attributes to you as having said?
12 A. I believe that's his report, but I don't
13 remember.
14 Q. So you're not disputing that, you're just
15 saying you don't remember, correct?
16 A. I don't remember.
17 MR. TERRY: Nothing further.
18 THE COURT: Okay. Do you have anything
19 else?
20 MS. JIMENEZ: No, Judge.
21 THE COURT: You all done, Mr. Terry?
22 MR. TERRY: Yes, Judge.
23 THE COURT: You're excused. You may
24 remain in the hallway.
25

1 (Witness excused) 100
2
3 Call your next witness.
4 MS. JIMENEZ: Could we have the Court's
5 indulgence.
6 THE COURT: Sure.
7 Just remain in the hallway until
8 this hearing is completed, and the bailiff or the DA
9 will excuse you, okay, ma'am?
10 THE WITNESS: Okay.
11 THE COURT: Thank you.
12 MS. JIMENEZ: Judge, can we approach?
13
14 (Side bar discussion)
15
16 (After a recess the following
17 proceedings were had.)
18
19 MR. TERRY: Defendant's present, Judge.
20 THE COURT: Defense is now present. All
21 parties and attorneys are present.
22 So now you go ahead and swear him
23 in, okay?
24 THE COURT: Please be seated.
25 State your full name.


CLERK OF THE COURT

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Evaristo Jonathan Garcia

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

Case No: C262966

Dept. No.: XV

vs.

EVARISTO JONATHAN GARCIA,

Defendant.

**MOTION FOR EVIDENTIARY
HEARING TO DETERMINE
COMPETENCY OF STATE'S PRIMARY
WITNESS AND ORDER COMPELLING
PRODUCTION OF MEDICAL RECORDS
AND PSYCHOLOGICAL
EXAMINATION AND TESTING TO
DETERMINE EXTENT OF MEMORY
LOSS**

COMES NOW the Defendant, Evaristo Garcia ("Garcia"), by and through his undersigned counsel, and respectfully moves this Honorable Court to set an evidentiary hearing to determine competency of Jonathan Harper, the State's primary witness, to testify under NRS 175.221 and an order compelling Harper to produce a complete set of medical records relating to his gunshot injury to the head and to submit to a medical examination by a psychiatrist selected by the defense.

This Motion is made and based upon the attached Affidavit of Ross C. Goodman, Esq., the pleadings and papers on file herein, the following Memorandum of Points & Authorities, the

1 pleadings and papers on file with this Court, and any oral argument to be made at the time of the
2 hearing of this Motion.

3
4 **NOTICE OF MOTION**

5 **TO: PLAINTIFF, STATE OF NEVADA**

6 **YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE** that the undersigned
7 will bring the above and foregoing Motion on for hearing before the Court at the courtroom of
8 the above-entitled Court on the 9 day of Oct., 2012, at the hour of 9:00 o'clock a.m. of
9 said day, in Department XV of said Court.

10 **I.**

11
12 **INTRODUCTION**

13 The State's primary witness, Jonathan Harper ("Harper"), has repeatedly denied under
14 oath of having any memory of the February 6, 2006 shooting at issue in this prosecution. As the
15 record demonstrates, the State nonetheless improperly introduced Harper's unsworn statement of
16 April 1, 2006 to refresh his memory. However, weeks before this questionable statement Harper
17 sustained a gunshot injury to the head where the bullet spread to several different areas resulting
18 in bleeds in the brain matter and in layers above it pressing on the brain.

19
20 This brief window did not allow the swelling and cell reaction to resolve in terms of
21 tissue heaping and general brain reconstitution. In addition, Harper was under pain medications,
22 a physician's care and still recuperating. Harper stated that the prosecutors put words in his
23 mouth after repeatedly telling them that he had no memory. In fact, well after providing this
24 unsworn statement, the record shows that Harper continued having difficulty processing
25 language, producing words and general comprehension all consistent with this type of acute
26 injury.
27
28

1 The relief requested is in part based on *Brady* and the State's obligation under NRS
2 174.235(b) since they produced part of Harper's medical records from his emergency visit to
3 Sunrise Hospital. However, absent the follow-up treatment and prognosis, this Court will not
4 have sufficient information to assess Harper's competency and, if allowed to testify, the defense
5 will be unable under *Brady* to properly impeach Harper.
6

7 The State has already acknowledged Harper's memory infirmities which has permeated
8 almost *every* part of his testimony. This Court cannot allow the State's primary witness to testify
9 that he has no memory of the events resulting from the gunshot head injury – which would have
10 been a factor before providing the unsworn statement - but allow the State to use the unsworn
11 statement to refresh his memory. In other words, Harper's confirmed memory loss pre-dates the
12 unsworn statement which makes it unreliable and any resulting testimony therefrom.
13

14 II.

15 FACTS

16 The allegations against Garcia stem from a February 6, 2006 school shooting over a book
17 throwing incident during fifth period at Morris Academy. A group of 20 or more kids gathered
18 after school and began fighting. The school principal came out to break up the fight and the
19 group of kids scattered where Victor Gamboa ("Gamboa") was fatally shot one time in the back.
20

21 On February 18, 2006, Jonathan Harper ("Harper") suffered a gunshot injury to the head
22 in an unrelated incident resulting in a hemorrhage of the left side of the head with brain matter
23 exposed. At the defense request, the State produced the Sunrise Hospital records of Harper's
24 admission indicating "subdural hematoma" with a "subarachnoid hemorrhage over the left
25 parietal and frontal lobe and in the basal cisterns." See Sunrise Hospital Medical Records
26 attached as Exhibit "A." The State failed to produce any subsequent medical records after his
27 discharge from Sunrise Hospital regarding the extent of Harper's memory loss.
28

1 Harper has repeatedly denied Garcia's involvement in the shooting death of Gamboa yet
2 the State attempts to use his unsworn statement – taken weeks after the head injury – to refresh
3 Harper's memory. However, the memory issues resulting from the gunshot injury to the head
4 would also have been present *before* making the unsworn statement making it unreliable and
5 therefore, improper to use to refresh recollection. The severity of Harper's memory loss
6 permeates the entire record affecting his competency and his ability to be truthful.
7

8 The State's disclosure of limited medical records forecloses this Court's ability to
9 properly assess the extent of Harper's memory loss or the defense ability to meaningfully
10 confront Harper during cross examination.

11 III.

12 LEGAL ARGUMENT

13
14 **A. The Court Should Order Complete Medical Records and An Examination To**
15 **Have Sufficient Evidence to Assess Harper's Competency As a Witness Under**
16 **NRS 175.221**

17 When competency of any witness has been questioned, it is within discretion of trial
18 court to consider facts relative to qualification and to determine if such person is competent to
19 testify. NRS 175.221(2); *see also Fox v. State*, 87 Nev. 567 (1971). This court is inherently
20 vested with the power to promulgate its own rules of procedure when "necessary or desirable to
21 handle the business of the courts or their judicial functions." *State v. Dist. Ct.*, 116 Nev. 953, 959
22 (2000) (quoting *Galloway v. Truesdell*, 83 Nev. 13, 23, 20, (1967) (noting that "any power or
23 authority that is inherent or incidental to a judicial function is properly within the realm of
24 judicial power")). Preliminary questions concerning the qualification of a person to be a witness
25 shall be determined by the judge outside the presence of the jury. NRS 47.060 - NRS 47.080.

26 In addition, the State produced limited medical records but must produce all medical
27 records in its care, custody and control. NRS 174.235(b). "[T]he suppression by the prosecution
28

1 of evidence favorable to an accused upon request violates due process where the evidence is
2 material either to guilt or to punishment, irrespective of the good faith or bad faith of the
3 prosecution.” *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963); *see also Mazzan v. Warden*,
4 116 Nev. 48, 66, 993 P.2d 25, 36 (2000) (*Brady* and its progeny require a prosecutor to disclose
5 evidence “if it provides grounds for the defense . . . to impeach the credibility of the state’s
6 witnesses.”)

8 **B. Harper Advised Prosecutors And Defense He Has No Recollection of Who Fired
9 the Gun**

10 On March 9, 2010, Jonathan Harper explained to defense investigators the following: (1)
11 much of his memory surrounding the event on this case is somewhat muddled; (2) despite being
12 told by police that client was the shooter, he doesn’t remember whether that is what occurred nor
13 if that is what he told police when he was initially interviewed; (3) specifically he said “. . . I
14 don’t know who pulled out the gun . . . or saw who fired it”; and (4) he experiences seizures
15 when under stress. *See* Memo of Interview with Scott Bindrup and J. Galiano attached as
16 Exhibit “B.” In addition, Harper complained that members of the D.A.’s office placed a great
17 deal of stress on him in their efforts to obtain additional specifics from him despite his
18 insistence that he does not remember any specifics surrounding who fired the gun. *Id.*

20 On or about July 26, 2012, the defense attempted to interview Harper again where he
21 confirmed “that he had no idea of who Garcia was or of any shooting that Garcia might have
22 been involved in . . . [and] has no recollection of any fight between Garcia, himself, the victim or
23 other individuals.” *See* Memo Robert Lawson Investigations attached as Exhibit “C”. Further,
24 Harper noted that he is “sick and tired of people putting words in my mouth” after his head
25 injury. *Id.*

27 However, the State seeks to perpetuate the improper introduction of questionable
28

1 testimony through Harper's unsworn voluntary statement despite Harper's admission that he has
2 no knowledge of the events surrounding the February 6, 2006 Gamboa shooting.¹ The reliability
3 of the unsworn statement is directly at issue because any memory loss testified to by Harper and
4 acknowledged by the State would have affected Harper's ability to provide a statement to police
5 just weeks *after* sustaining a gunshot injury to the head, while under a physician's care and under
6 the influence of pain medications.
7

8 **C. The Record Establishes The Severity of Harper's Memory Loss**

9 The State used Harper's memory problems as an excuse to introduce substantive portions
10 from his initial *unsworn* statement to police taken shortly after sustaining head injuries:
11

12 Q. Okay. Now before you got into the car was there any talk about a gun?

13 A. No.

14 Q. Okay. Now Jonathan, you've got this head injury, right?

15 A. Yes

16 Q. Does it cause you to have some memory problems sometimes?

17 A. Yes

18 Q. Now you met with me in my office earlier, yes?

19 A. Yes
20

21 ¹ The issues surrounding Harper's memory, medications and effects on his mental capacity, and
22 therefore his credibility as a witness, further deprives Garcia of a full and fair opportunity to
23 cross examine Harper. Absent a complete production of medical records surrounding his gun
24 shot injury to the head would also render it insufficient for the jury to assess Harper's credibility
25 of the witness. *United States v. Beardslee*, 197 F.3d 378, 383 (9th Cir.1999). Specifically, the
26 Ninth Circuit considers three factors in determining whether a defendant's confrontation rights
27 have been violated: "(1) whether the excluded evidence was relevant; (2) whether there were
28 other legitimate interests outweighing the defendant's interest in presenting the evidence; and (3)
whether the exclusion of evidence left the jury with insufficient information to assess the
credibility of the witness." *See Beardslee*, 197 F.3d at 383.

1 Q. Okay. Do you remember giving a statement to Detective Mogg and Hardy?

2 A. Bits and parts.

3 Q. Okay. So you gave statement to them?

4 A. Yes

5 Q. And that was in April of '06?

6 A. Yes

7 Q. Okay. And your heard yourself on that statement, right?

8 A. Yes

9 Q. Okay. And you also listened to that earlier today, yes?

10 A. Yes.

11 Q. Now on page 18 you were asked by Detective Mogg . . .

12 (GJT 1, 109:19 – 111:9)²

13 Q. Could you hear what they were arguing about?

14 A. They were arguing about something.

15 Q. Do you remember what they were arguing for?

16 A. No.

17 Q. Now Jonathan, I want to go back to your statement that you gave the detectives in
18 April. And again your memory was better back then, yeah.

19 A. Yes.

20 Q. I'm going to page 12 here. Okay? Now at the top of page 12 of your statement you
told the detectives . . .

21 (GJT 1, 117:24 –118:11).

22 Q. All right. So they're chasing this kid and arguing over the gun. What happens next?

23 A. Like I just started hearing gunshots.

24 Q. Do you remember seeing what happened?

25 A. No

26
27 ² Grand Jury Transcript, Volume 1, pertaining to Jonathan Harper's testimony, dated March 4, 2010, is
28 attached hereto as Exhibit "D."

1 Q. Okay. And again was your memory better back then?

2 A. Yes.

3 Q. Okay. Now again on page 12 in our statement about halfway down the detective asks .
4 (GJT 1, 118: 5 -119:9)

5 Q. Okay. Do you remember where E was?

6 A. No.

7 Q. Did you talk to E after the shooting happened?

8 A. No.

9 Q. Okay. Let me go back a little ways. Do you remember what E was wearing?

10 A. No

11 Q. And again your memory was better back when you talked to detectives in April of
12 2006?

13 A. Yes

14 Q. Okay, Jonathan, I want to show you your statement again on page 14 about halfway
15 down. Question . . .

16 Q. Yes. Okay. Now do you remember where E went after the shooting?

17 A. No.

18 Q. Okay. Now Jonathan, page 15 of your statement. Question . . .

19 (GJT 1, 120:15- 121:16)

20 Q. Okay Now I asked you earlier if you remembered talking to E after this. Okay? Now
21 I'm showing you the same page on your statement. Question . . .

22 . . .

23 Q. Okay. Now do you remember what E told you happened to the gun?

24 A. No.

25 Q. Okay, Going back to your statement on page 16. Question . . .

26 (GJT 1, 121:25 -122:15).

27 Q. Did you see him get it from Puppet?

28 A. No.

Q. How do you know he got it from Puppet?

1 A. Because it was black gun and that was Puppet's gun.

2 Q. Do you ever talk to E about how he got the gun?

3 A. No.

4 Mrs. Nyikos: Court's indulgence.

5 Q. Now, Jonathan, do you remember talking to a detective in this case?

6 (PH 20:11-22)³

7 Q. Do you remember telling Detective Mogg that E told you that Puppet gave him the
8 gun?

9 A. Yes

10 (PH 21: 9-12)

11 Q. Now, on the day of shooting can you tell me what E was wearing; do you remember?

12 A. All black, sleeve, long sleeves, pants.

13 Ms. Nyikos: Page 14, counsel.

14 Q. Do you remember telling Detective Mogg that it was a gray sweatshirt?

15 A. To refresh my mind, yes, it was a gray hoodie.

16 (PH 24:15-23)

17 Q. Page 3. Do you remember that when the police did a taped interview you were
asked, who is E, and you stated, I don't know, yes or no?

18 A. Yes

19 (PH 52:7-10)

20 **D. Harper's Memory Is At Issue Weeks Before Giving His Unsworn Statement**

21 In the weeks following his gunshot injury to the head, Harper testified had had no
22 memory of the shooting. However, he suddenly identified the shooter on the same day he
23 allegedly identified Garcia as the shooter in this case which raises further concerns regarding the
24 reliability of the unsworn statement;

25
26 ³ Preliminary Hearing Transcript, pertaining to Jonathan Harper's testimony, dated December 18, 2008, is
27 attached hereto as Exhibit "E."
28

1 Q. How could you, within that two weeks, see that happen or that change of testimony
2 A. Because see, when I was in the hospital, *I was confused because I had a brain injury.*
(Trial Transcript 103:15-16)⁴

3 Q. All right. Do you think you're recovered now?

4 A. Yes

5 Q. You're back on –

6 A. *Not --not--not normal.*

7 (Trial Transcript 104:1-4)

8 *****

9 Q. Okay. *And you think you were screwed up when you made these other statements?*

10 A. Yes

11 (Trial Transcript 105:9-1)

12 IV.

13 CONCLUSION

14 The record is replete with compelling reasons to question the competency of the State's
15 primary witness whom has suffered immeasurable memory loss as a result of the gunshot injury
16 he sustained to his head and brain. This traumatic event *pre-dates* his initial "voluntary"
17 statement which the State has repeatedly and improperly exploited as a substitute for competent
18 reliable evidence consistent with guarantees of due process, a necessary ingredient to the
19 reliability of any outcome of these proceedings. However, such "voluntary" statement is highly
20 suspicious, unreliable and inaccurate and should be excluded based upon Harper's
21 unquestionable memory loss resulting from the brain injury he suffered at the result of being shot
22 in the head.
23
24

25
26 ⁴ Salvadore Garcia Trial Transcript, Volume II, pertaining to Jonathan Harper's testimony, dated August
27 23, 2006, is attached hereto as Exhibit "F."
28

1 In light of the severity of Harper's memory loss, constitutional safeguards consonant with
2 due process and the interests of justice requires this Court to order Harper to produce all medical
3 records surrounding his head injury and submit to a physical examination so that an expert can
4 determine the extent of his memory loss and complete necessary testing which serves to reveal
5 the deficiency in Harper's competency to testify and provide accurate and reliable testimony.
6

7 Dated this 27th day of September, 2012.

8 GOODMAN LAW GROUP P.C.

9
10 /s/ Ross C. Goodman, Esq.
11 Ross C. Goodman, Esq.
12 Nevada Bar No: 7722
13 520 South Fourth St.
14 Las Vegas, Nevada 89101
15 *Attorney for Defendant*
16
17
18
19
20
21
22
23
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25
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27
28

EXHIBIT “A”

RELEASE OF INFORMATION
SUNRISE HOSPITAL AND MEDICAL CENTER
3186 SOUTH MARYLAND PARKWAY
LAS VEGAS, NV 89109
PHONE (702) 731-8663 FAX (702) 892-3686
HOURS MON - FRI 8:00 A.M. - 5:00 P.M.

060218-0045

02/28/06

LAS VEGAS METROPOLITAN PD
400 E STEWART AVE
ATTN: ED ERICKSON
LAS VEGAS, NV 89101

THANKS FOR THE OPPORTUNITY TO ASSIST YOU. IF YOU HAVE ANY QUESTIONS OR
CONCERNS WITH THIS REQUEST, PLEASE CALL US AT (702) 731-8663.

D001632485 JONATHAN E HARPER

RECEIVED
LAS VEGAS METROPOLITAN PD
ON 02/28/06 10:00 AM
JAN 28 2006

Deborah P. Smith
JAN 28 2006

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060218-0045
D8009S

060218-0045



Authorization for Use and Disclosure of Protected Health Information (PHI)
Sunrise Hospital and Medical Center

PATIENT NAME AT TIME OF TREATMENT <u>HARTER, JONATHAN</u>	BIRTHDATE	SOCIAL SECURITY NUMBER
Address		Telephone # Home <u>702-286-7839</u>
		Telephone # Work
City <u>LAS VEGAS</u>	State <u>NV</u>	Zip Code <u>89121</u>
I hereby authorize <u>SUNRISE HOSPITAL</u> <small>Facility or Covered Entity</small>		
To disclose medical record information and/or protected health information of the patient listed above to:		
<u>LAS VEGAS METROPOLITAN POLICE DEPT.</u>		<u>ED ERICSON</u>
<small>Name / Title</small>		
<u>400 E. STEWART AVE. LVN 89101</u>		<u>303-2583</u>
<small>Address</small>		
Purpose: <u>INVESTIGATION / CRIMINAL PROSECUTION</u>		
For treatment date: <u>2-18-06 TO PRESENT</u>		

please call when ready

Type of Access Requested:	Selected Portions of PHI:		
<input checked="" type="checkbox"/> Copies of the record <input type="checkbox"/> Inspection of the record	<input type="checkbox"/> Abstract/Perinent <input type="checkbox"/> Emergency Room <input type="checkbox"/> H & P <input type="checkbox"/> Consult Report <input type="checkbox"/> Operative Report <input type="checkbox"/> Rehab Services	<input checked="" type="checkbox"/> Lab <input checked="" type="checkbox"/> Imaging/Radiology <input type="checkbox"/> Cardiac Studies <input type="checkbox"/> Face Sheet <input type="checkbox"/> Nursing Notes <input type="checkbox"/> Medication Record	<input type="checkbox"/> Progress Notes <input type="checkbox"/> Physician Orders <input checked="" type="checkbox"/> Entire Record <input type="checkbox"/> Other _____

* DRC I acknowledge, and here by consent to such, that the released information may contain alcohol, drug abuse, psychiatric, HIV testing, HIV results or AIDS information.
Initials

EXPIRATION: This authorization shall expire upon this expiration date or event: 1 YEAR

- I understand that this authorization may be revoked by me at any time except to the extent that action has been taken in reliance upon it. The Revoke Authorization Form must be completed and submitted to the HIM Services Department.
- The information used or disclosed pursuant to the authorization may be subject to redisclosure by the recipient and no longer protected.
- Fees/charges will comply with all laws and regulations applicable to release of information. (60% per page except for continuing care requests)

I have read the above and authorize the disclosure of the protected health information as stated.

02-18-06 [Signature] FATHER
Date Signature Relationship to Patient
[Signature] MOTHER
Address and telephone number of requester (if different from patient information)

Sunrise Hospital and Medical Center
 3186 South Maryland Parkway
 Las Vegas, NV 89109

21037417
 ORIGINAL - Facility COPY - Individual (Patient or Patient Representative)
 060095 061401411002

060218-0045

BRIEF HISTORY AND PHYSICAL AS FOLLOWS:

The patient was seen at approximately 1 a.m. on February 18, 2006. The patient is an approximately 15-year-old teenage boy, who was shot in the left side of the head. There is some question as to whether this was self-inflicted from Russian roulette. He was noted to be combative at the scene initially. He was intubated subsequently by EMS in the field. He was brought as a Level I Trauma Activation to Sunrise Hospital.

PAST MEDICAL HISTORY/PAST SURGICAL HISTORY:
Unknown.

SOCIAL HISTORY:
Unknown.

REVIEW OF SYSTEMS:
Unknown.

ALLERGIES:
Unknown.

MEDICATIONS:
Unknown.

PRIMARY SURVEY ON ARRIVAL INDICATED:

As a consequence, the following treatments were initiated:

AIRWAY: The patient was intubated in the field.

BREATHING: The patient was on bag valve.

CIRCULATION: There was hemorrhage from the left side of the head with brain matter exposed. Perfusion was adequate.

DISABILITY: Glasgow Coma Scale was 3.

EXPOSURE: The patient was completely exposed for examination.

PHYSICAL EXAMINATION:

HEENT including scalp and face: Head exam revealed a gunshot wound to the left parietal area of the skull and brain matter exposed.

Neck: The neck was in C collar.

Chest: Revealed was clear to auscultation bilaterally.

Abdomen (including FAST EXAM): Soft, nondistended.

Pelvis: Stable.

GU Exam: Unremarkable.

Rectal Exam: There was no sphincter tone but otherwise unremarkable.

Extremity Exams: Revealed distal pulses were intact and there was no gross deformity.

Back Exam: Showed no deformity or stepoff.

Neurologically: The patient was intubated and again had Glasgow Coma Scale of 3.

LABORATORY DATA:

CT scan of the head revealed a shifting of the midline with intracranial hemorrhage on the left side of the head. There was a skull defect around the parietal area. It appeared that the gunshot went from inferiorly to superiorly along the skull. There was noted to be some metallic fragments on the vertex of the head.

SUNRISE HOSPITAL AND MEDICAL CENTER
SUNRISE CHILDREN'S HOSPITAL
3186 S. Maryland Parkway
Las Vegas, NV 89109
TRAUMA ACTIVATION REPORT

TRAUMA, IMPERIAL021806
D00612363414 /D001652465
KIM, KITAE
ADMITTED: 02/18/06
ROOM: D.E2A

Nevada Market - PCI *LIVE* (PCI: OE Database C00S2)

Run: 02/27/06-13:50 by BARRETT, LAURIE J

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Handwritten signature and date: 02/20/06

Page 1 of 2
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IMPRESSION:

1. This is a gunshot wound to the head.
 2. Glasgow Coma Scale is 3.
 3. Class III hemorrhagic shock.
- Brain matter exposed.

PLAN:

1. Dr. Duke of neurosurgery has been consulted.
2. The patient will be admitted to trauma ICU.
3. We will see if the patient will require operative intervention for brain debridement and also for control of bleeding.

APPENDUM:

The patient will be given 1 unit of packed red blood cells. A triple lumen catheter has been inserted by the Anesthesia service at this time.

KITAE KIM, MD

KK:Spheris14363 CONF #: 186317
D: 02/18/06 01:39 T: 02/18/06 08:48
DOCUMENT: 200602182269579500

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JAN 20 2006

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3186 S. Maryland Parkway
Las Vegas, NV 89109
TRAUMA ACTIVATION REPORT

TRAUMA, IMPERIAL021806
D00612363414 /D001652485
KIM, KITAE
ADMITTED: 02/18/06
ROOM: D, E24

Nevada Market - PCI *LIVE* (PCI: OE Database COCSZ)

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TRAUMA, IMPERIAL021806
D00612363414 /D001652485
KIM, KITAE
ADMITTED: 02/18/06
ROOM: D, E24
DRAFT COPY
Page 2 of 2
COCOA
D80095

Patient Name: HARPER, JONATHAN E
Unit No: D001652485

060218-0045

Exams:

002303223 CT BRAIN W/O CONTRAST

REASON FOR EXAM:

XX NOL XX - NOT ON LIST

CPT CODE:

70450

DATE: 02/18/06

PROCEDURE: CT BRAIN WITHOUT CONTRAST

COMPARISON: None provided.

HISTORY: Gunshot wound.

FINDINGS: A noncontrast enhanced study demonstrates multiple small metallic fragments in the interhemispheric fissure in the high convexity region. These are in close proximity to the superior sagittal sinus. Several additional small metallic fragments and multiple bone fragments extend from the interhemispheric fissure to the left parietal bone where there is a large irregular bony defect consistent with a gunshot injury. The entry wound defect measures about 5 cm in diameter. There is subarachnoid hemorrhage over the left parietal and frontal lobe and also in the basal cisterns. There is a very thin subdural hematoma in the high convexity region of the interhemispheric fissure. There is no hydrocephalus or midline shift. There is marked soft tissue swelling over the skull defect in the high convexity region on the left.

IMPRESSION: GUNSHOT WOUND TO THE HEAD IN THE POSTERIOR FRONTAL REGION ON THE LEFT. SEVERAL METALLIC FRAGMENTS ARE NOTED IN THE INTERHEMISPHERIC FISSURE IN THE HIGH CONVEXITY AREA. MULTIPLE BONE AND BULLET FRAGMENTS ARE NOTED IN THE BRAIN IN THE POSTERIOR ASPECT OF THE LEFT FRONTAL LOBE. THERE IS A LARGE COMMINUTED FRACTURE AT THE BULLET WOUND ENTRY SITE RESULTING IN A DEFECT MEASURING ABOUT 5 CM IN DIAMETER.

** Electronically Signed by Mark R. Laussade M.D. **
** on 02/18/2006 at 2003 **

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Debrah J. Smith

PAGE 1

Signed Report Printed From PCI

(Continued)

Name: HARPER, JONATHAN E

Phys: KIMKT - KTM KITA

DOB:

Sex: M

Acct No: D00612363414 Loc: D.E231 0

Exam Date: 02/18/2006 Status: ADM IN

SUNRISE HOSPITAL ER RADIOLOGY

SUNRISE CHILDRENS HOSPITAL

3186 S MARYLAND PKWY

LAS VEGAS NV 89109

Ph: 731-8060 Fax: 731-8308

D3009S

Patient Name: HARPER, JONATHAN E
Unit No: D001652485

0602180045

Exams:

002303223 CT BRAIN W/O CONTRAST
<Continued>

REASON FOR EXAM:

XX NOL XX - NOT ON LIST

CPT CODE:

70450

Reported and Signed by: Mark R. Laussade M.D.

CC: KITAE KIM

Dictated Date/Time: 02/18/2006 (0553)

Technologist: MARILYNN D FINNIE

Transcribed Date/Time: 02/18/2006 (0553)

Transcriptionist: PTRN.KAB

Electronic Signature Date/Time: 02/18/2006 (2003)

Orig Print D/T: S: 02/18/2006 (2003)

Reprint D/T: 02/27/2006 (1402) Batch No: N/

PAGE 2

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Name: HARPER, JONATHAN E

Phys: KIMKI - KIM, KITAE

DOB:

Sex: M

Acct No: D00612363414 Loc: D.E231 0

Exam Date: 02/18/2006 Status: ADM IN

SUNRISE HOSPITAL ER RADIOLOGY

SUNRISE CHILDRENS HOSPITAL

3186 S MARYLAND PKWY

LAS VEGAS NV 89109

Ph: 731-8060 Fax: 731-8308

D8009S

Patient Name: HARPER, JONATHAN E
Unit No: D001652485

0602180045

Exams:

002303226 CT CERVICAL SPINE W/O C

REASON FOR EXAM:

TRAUMA

CPT CODE:

72125

DATE: 02/18/06

PROCEDURE: CT SCAN OF THE CERVICAL SPINE WITHOUT CONTRAST

COMPARISON: None provided

HISTORY: Gunshot wound.

FINDINGS: Thin-section axial imaging was performed from the level of the foramen magnum through the upper cervical spine. Sagittal and coronal reformatted images were then obtained. There is no acute fracture or destructive bony lesion. There is no canal compromise. No subluxation is seen. No abnormal soft tissue masses or foreign bodies are identified.

IMPRESSION: NO EVIDENCE OF ACUTE TRAUMA TO THE CERVICAL SPINE.
PATIENT IS INTUBATED AND A NASOGASTRIC TUBE IS IN PLACE.

** Electronically Signed by Mark R. Laussade M.D. **
** on 02/18/2006 at 2003 **
Reported and Signed by: Mark R. Laussade M.D.

CC: KITAE KIM

Dictated Date/Time: 02/18/2006 (0117)

Technologist: MARILYNN D FINNIE

Transcribed Date/Time: 02/18/2006 (0554)

Transcriptionist: PTRN.MEJ

Electronic Signature Date/Time: 02/18/2006 (2003)

Orig Print D/T: S: 02/18/2006 (2003)

Reprint D/T: 02/27/2006 (1402) Batch No: N/A

PAGE 1

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Name: HARPER, JONATHAN E

Phys: KIMKI - KIM, KITAE

DOB:

Sex: M

Acct No: D00612363414 Loc: D.E231 0

Exam Date: 02/18/2006 Status: ADM IN

SUNRISE HOSPITAL ER RADIOLOGY

SUNRISE CHILDRENS HOSPITAL

3185 S MARYLAND PKWY

LAS VEGAS NV 89109

Ph: 731-8060

Fax: 731-8308

D8009S

0602180045

70450

APP 000087

Patient Name: HARPER, JONATHAN E
Unit No: D001652485

0602180045

Exams:

002303282 CT BRAIN W/O CONTRAST
<Continued>

REASON FOR EXAM:

HEAD INJURY - 959.01 HEAD I

CPT CODE:

70450

Reported and Signed by: Joseph W. Ziegler M.D.

CC: KITAE KIM

Dictated Date/Time: 02/18/2006 (1338)

Technologist: JOHNNY A PEREA

Transcribed Date/Time: 02/18/2006 (1338)

Transcriptionist: PTRN.MBF/DR.ZIEJO/DRAD.MXA1

Electronic Signature Date/Time: 02/22/2006 (1410)

Orig Print D/T: S: 02/22/2006 (1410)

Reprint D/T: 02/27/2006 (1402) Batch No: N/A

PAGE 2

Signed Report Printed From PCI

Name: HARPER, JONATHAN E

Phys: KIMKI - KIM, KITAE

DOB:

Sex: M

Acct No: D00612363414 Loc: D.E231 0

Exam Date: 02/18/2006 Status: ADM IN

SUNRISE HOSPITAL/MED CTR

SUNRISE CHILDRENS HOSPITAL

3186 S MARYLAND PKWY

LAS VEGAS NV 89109

Ph: 731-8050 Fax: 731-8308

D8009S

0602180045

PAGE 5

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 G.W. HUSSONG, DDS, M.D.
 E.E. KOLKNER, M.D.

*** LABORATORY SUMMARY REPORT ***
 02/27/06 1402

D.P. MARMADUE, M.D.
 T.C. MURRY, M.D., Ph.D.
 S.M. RUHOV, M.D.
 E.F. SCHMIDT, M.D.
 R.J. SLAUGHTER, M.D.
 J.L. UNGER, M.D.
 N.B. YONIAKO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

*** HEMATOLOGY *** (CONTINUED)
 COMPLETE BLOOD COUNT

Date: 02/18/06
 Time: 0500 0050 Reference Units

HGB 18.3 (X) DL 11.8 (11.5-15.5) GM/DL

(X) RESULTS CALLED ON 02/18/06 AT 0854 BY DLAB.VXP. RESULT
 ACCURATELY REPEATED BACK TO CALLER BY JEFF, BARKER, RN.
 RESULTS CONFIRMED ON REPEAT ANALYSIS
 INCUBATE AT 37 DEGREE C.

HCT 24.2 (Y) L 33.2 L (42.0-52.0) %

(Y) RESULTS CALLED ON 02/18/06 AT 0855 BY DLAB.VXP. RESULT
 ACCURATELY REPEATED BACK TO CALLER BY JEFF, BARKER, RN.
 RESULTS CONFIRMED ON REPEAT ANALYSIS
 INCUBATE AT 37 DEGREE C.

MCV	89	91		(80-100)	FL
MCH	30.5	32.3	H	(27.0-32.0)	PG
MCHC	34.4	35.5		(32.0-37.0)	G/DL
RDW	13.0	12.3		(11.5-14.5)	%
PLT	177 (Z)	266		(150-450)	K/MM3

(Z) RESULTS CALLED ON 02/18/06 AT 0956 BY DLAB.VXP. RESULT
 ACCURATELY REPEATED BACK TO CALLER BY JEFF, BARKER, RN.
 RESULTS CONFIRMED ON REPEAT ANALYSIS
 INCUBATE AT 37 DEGREE C.

MEV	7.0	L	7.9	(7.4-10.4)	FL
NEUT %	70.4			(45.0-75.0)	%
LYMPH %	17.8	L		(20.0-44.0)	%
MONO %	8.0			(2.0-9.0)	%
EOS %	3.3			(0.0-4.0)	%
BASO %	0.5			(0.0-2.0)	%
NEUT #	8.8	H		(1.8-7.7)	K/MM3
LYMPH #	2.2			(1.2-6.0)	K/MM3
MONO #	1.0			(0.2-1.0)	K/MM3
EOS #	0.4			(0.0-0.5)	K/MM3
BASO #	0.1			(0.0-0.2)	K/MM3

Pt Name: HARPER, JONATHAN E

SUNRISE HOSPITAL & MEDICAL CENTER

Attend Dr: KIM, KITAE

3186 Maryland Pkwy

Acct#: D00612363414

Age/Sex:

Las Vegas, Nevada 89109

Init#: D001852485

Status:

ADM INPATIENT

Adm Date: 02/18/06

Dis Date:

LABORATORY SUMMARY REPORT

Deborah P. Smith

D8009S

APP 000089

0602180045

PAGE 6

J.T. SIGMAN, M.D., DIRECTOR
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 J.L. UNGER, M.D.
 W.S. YONIAKO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

COAGULATION PROFILE

Date	02/18/06	Reference	Units
Time	0810		
PROTIME	18.4 H	(10.0-14.5)	SECONDS
INR	1.60 (AA) H	(0.80-1.20)	

(AA) INR VALUES ARE ONLY RECOMMENDED FOR USE IN MONITORING PATIENTS ON STABLE DOSES OF ORAL ANTICOAGULANTS. THE CURRENT RECOMMENDED GUIDELINES ARE:

CLINICAL INDICATION

RECOMMENDED INR RANGE

PROPHYLAXIS OF VENOUS THROMBOSIS (HIGH RISK SURGERY)
 TREATMENT OF VENOUS THROMBOSIS
 TREATMENT OF PULMONARY EMBOLISM
 PREVENTION OF SYSTEMIC EMBOLISM INCLUDING
 a) TISSUE HEART VALVES
 b) AMI (prevention of embolization)
 c) VALVULAR HEART DISEASE
 d) ATRIAL FIBRILLATION

2.0-3.0
 2.0-3.0
 2.0-3.0
 2.0-3.0

MECHANICAL PROSTHETIC VALVES (high risk)
 BILEAFLET MECHANICAL VALVE IN AORTIC POSITION

2.5-3.5
 2.0-3.0

(REFERENCE: CHEST/114/5/4458-4698)

PTT	29 (AB)	Reference	Units
		(21-36)	SECONDS

(AB) THE ESTIMATED PTT THERAPEUTIC RANGE FOR TREATMENT OF THROMBOEMBOLIC DISEASE IN PATIENTS RECEIVING UNFRACTIONATED HEPARIN AT SUNRISE HOSPITAL IS CURRENTLY 56 TO 84 SECONDS. THIS RANGE IS BASED ON CORRELATION STUDIES USING A FACTOR Xa ASSAY TO MEASURE HEPARIN AND A PRESUMED HEPARIN THERAPEUTIC DRUG RANGE OF 0.3 TO 0.7 UNITS/ML FOR UNFRACTIONATED HEPARIN.

Delores J. Smith

Pt Name: HARPER, JONATHAN E

SUNRISE HOSPITAL & MEDICAL CENTER

Attend Dr: KIM, KITAB

3186 Maryland Pkwy

Acct#: D00612363414 Age/Sex:

Las Vegas, Nevada 89108

Mlt#: D001652498 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

LABORATORY SUMMARY REPORT

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PAGE 7

J.D. SIGMAN, M.D. - DIRECTOR

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S.M. KOLKER, M.D.

*** LABORATORY SUMMARY REPORT ***

02/27/06 1402

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R.J. SLAUGHTER, M.D.

J.L. UNSTER, M.D.

N.S. YUNZAGO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

*** COAGULATION *** (continued)
COAGULATION PROFILEDate 02/18/06
Time 0810

Reference Units

FIBRINOGEN | 343 (AC) | | (160-550) | MG/DL

(AC) REFERENCE RANGE REFERS TO DISTRIBUTION IN A HEALTHY POPULATION. ASA RECOMMENDS CRYO TRANSFUSION FOR BLEEDING PATIENTS WITH FIBRINOGEN LESS THAN 100 MG/DL. AS LEVELS GREATER THAN THIS ARE SUFFICIENT FOR HEMOSTASIS.

D-DIMER DVT SCREEN | 4748 (AD) H | | NG/ML

(AD) VERIFIED BY DILUTION

See also (AE)

(AE) REFERENCE RANGE:

0-475 NEGATIVE

476-799 LOW LEVEL POSITIVE, CORRESPONDS TO TITER OF 1-2

>= 800: HIGH LEVEL POSITIVE, CORRESPONDS TO TITER OF 2-3 OR GREATER

COAG INTERP | PEND | |

... of the
...
...
... with the Las Vegas Metropolitan Police
Department.

Deborah J. Smith

Pt Name: HARPER, JONATHAN E

Attend Dr: KIM, KITAE

Acct#: D00612363414 Age/Sex:

Mit#: D001652485 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

SUNRISE HOSPITAL & MEDICAL CENTER

3186 Maryland Pkwy

Las Vegas, Nevada 89109

LABORATORY SUMMARY REPORT

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*** LABORATORY SUMMARY REPORT ***
 02/27/06 1402

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 R.J. SLAUGHTER, M.D.
 J.L. UNGER, M.D.
 N.S. YUNICO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

*** COAGULATION *** (Continued)
 ROUTINE COAGULATION

Date	02/20/06	02/19/06	02/18/06	Reference	Units
Time	1027	0226	2000		
PROTIME	17.1 H	17.5 H	18.6 H	(10.0-14.5)	SECONDS
INR	1.48 (AH) H	1.50 (AH) H	1.60 (AH) H	(0.80-1.20)	

(AH) INR VALUES ARE ONLY RECOMMENDED FOR USE IN MONITORING PATIENTS ON STABLE DOSES OF ORAL ANTICOAGULANTS. THE CURRENT RECOMMENDED GUIDELINES ARE:

CLINICAL INDICATION

RECOMMENDED INR RANGE

PROPHYLAXIS OF VENOUS THROMBOSIS (HIGH RISK SURGERY)

2.0-3.0

TREATMENT OF VENOUS THROMBOSIS

2.0-3.0

TREATMENT OF PULMONARY EMBOLISM

2.0-3.0

PREVENTION OF SYSTEMIC EMBOLISM INCLUDING

2.0-3.0

a) TISSUE HEART VALVES

b) AMI (prevention of embolization)

c) VALVULAR HEART DISEASE

d) ATRIAL FIBRILLATION

MECHANICAL PROSTHETIC VALVES (high risk)

2.5-3.5

BILZAPLET MECHANICAL VALVE IN AORTIC POSITION

2.0-3.0

(REFERENCE: CHEST/114/5/445S-469S)

PTT	28 (AI)	31 (AI)	37 (AI)	(21-36)	SECONDS
-----	---------	---------	---------	---------	---------

(AI) THE ESTIMATED PTT THERAPEUTIC RANGE FOR TREATMENT OF THROMBOEMBOLIC DISEASE IN PATIENTS RECEIVING UNFRACTIONATED HEPARIN AT SUNRISE HOSPITAL IS CURRENTLY 56 TO 84 SECONDS BASED ON CORRELATION STUDIES USING A FACTOR Xa ASSAY TO MEASURE HEPARIN AND A PRESUMED HEPARIN THERAPEUTIC RANGE OF 0.3 TO 0.7 UNITS/ML FOR UNFRACTIONATED HEPARIN.

Deborah J. Smith
 Director, Laboratory

Pt Name: HARPER, JONATHAN E

SUNRISE HOSPITAL & MEDICAL CENTER

Attend Dr: KIM, KITA E

3185 Maryland Pkwy

Acct#: D00612363414 Age/Sex:

Las Vegas, Nevada 89102

Init#: D001662485 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

LABORATORY SUMMARY REPORT

D8009S

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V.D. SIGMAN, M.D. - DIRECTOR
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 J.W. HUSSONG, DDS, M.D.
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*** LABORATORY SUMMARY REPORT ***
 02/27/06 1402

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 E.P. SCHMIDT, M.D.
 R.O. SLAUGHTER, M.D.
 J.L. UNGER, M.D.
 N.S. YONIAKO, M.D.

Pt Name: HARPER, JONATHAN E

D.H231-0

*** COAGULATION *** (continued)
 ROUTINE COAGULATION

Date	-----02/18/06-----				Reference	Units
Time	1520		0050			
PROTIME	17.9	H	17.4	H	(10.0-14.5)	SECONDS
INR	1.50 (AJ)	H	1.50 (AJ)	H	(0.80-1.20)	

(AJ) INR VALUES ARE ONLY RECOMMENDED FOR USE IN MONITORING PATIENTS ON STABLE DOSES OF ORAL ANTICOAGULANTS. THE CURRENT RECOMMENDED GUIDELINES ARE:

CLINICAL INDICATION

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 a) TISSUE HEART VALVES
 b) AMI (prevention of embolization)
 c) VALVULAR HEART DISEASE
 d) ATRIAL FIBRILLATION

2.0-3.0

2.0-3.0

2.0-3.0

2.0-3.0

MECHANICAL PROSTHETIC VALVES (high risk)
 BILEAFLET MECHANICAL VALVE IN AORTIC POSITION

2.5-3.5

2.0-3.0

(REFERENCE: CHEST/114/5/4458-4698)

PTT	33 (AK)	(21-36)	SECONDS
-----	---------	---------	---------

(AK) THE ESTIMATED PTT THERAPEUTIC RANGE FOR TREATMENT OF THROMBOEMBOLIC DISEASE IN PATIENTS RECEIVING UNFRACTIONATED HEPARIN AT SUNRISE HOSPITAL IS CURRENTLY 56 TO 84 SECONDS BASED ON CORRELATION STUDIES USING A FACTOR Xa ASSAY TO MEASURE HEPARIN AND A PRESUMED HEPARIN THERAPEUTIC DRUG RANGE OF 0.3 TO 0.7 UNITS/ML FOR UNFRACTIONATED HEPARIN.

Delvash J. Smith
 02/27/06 1402

Pt Name: HARPER, JONATHAN E

Attend Dr: KIM, KITAE

Acct#: D00612363414 Age/Sex:

Mit#: D001692485 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

SUNRISE HOSPITAL & MEDICAL CENTER

3186 Maryland Pkwy

Las Vegas, Nevada 89109

LABORATORY SUMMARY REPORT

080095

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0602180045

S.D. HIGMAN, M.D. - DIRECTOR
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 J.W. HUSSEON, DDS, M.D.
 S.E. KOLZER, M.D.

*** LABORATORY SUMMARY REPORT ***
 02/27/06 1402

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 S.W. RUDY, M.D.
 S.P. SCHMIDT, M.D.
 R.J. SLAUGHTER, M.D.
 J.L. UNGER, M.D.
 N.S. YOUNG, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

*** CHEMISTRY *** (CONTINUED)
 ROUTINE CHEMISTRY

Date	02/20/06	02/19/06	-----02/18/06-----		Reference	Units
Time	0241	0226	2000	1310		
NA	142	137	135 L	135	(136-145)	MMOL/L
K	3.7	3.5	3.7	3.8	(3.4-4.9)	MMOL/L
CL	109 H	108 H	108 H	112 H	(98-107)	MMOL/L
CO2	25	24	22	22	(22-31)	MMOL/L
ANION GAP	12	9	9	6 L	(9-18)	MMOL/L
GLUCOSE RANDOM	129	163 H		121	(70-139)	MG/DL
BUN	4 L	4 L		7	(7-18)	MG/DL
CREATININE	0.6 L	0.8		0.8	(0.8-1.3)	MG/DL
CALCIUM	9.0 L	7.7 L	7.9 L	7.6 L	(8.6-11.0)	MG/DL
PHOSPHORUS	2.8	2.7	3.3	2.7	(2.5-4.9)	MG/DL
MAGNESIUM	1.6 L	1.7 L	1.8	1.4 L	(1.8-2.4)	MG/DL

Date	-----02/18/06-----				Reference	Units
Time	0910	0900	0050			
NA	138(AW)	137	139		(136-145)	MMOL/L
(AW) BMP RESULTS CALLED ON 02/18/06 AT 0901 BY DLAB,VRK. RESULTS ACCURATELY REPEATED BACK TO CALLER BY TERRI MCCORMICK , RN.						
K	4.1	4.0	2.7(AX) *L		(3.4-4.9)	MMOL/L
(AX) RESULTS CALLED ON 02/18/06 AT 0119 BY ELAB,RLE. RESULT ACCURATELY REPEATED BACK TO CALLER BY TISHA, RN.						
CL	115	H	116	H	106	(98-107) MMOL/L
CO2	20	L	20	L	22	(22-31) MMOL/L
ANION GAP	7	L	5	L	14	(9-18) MMOL/L
GLUCOSE RANDOM	119		130		174	H (70-139) MG/DL
BUN	9		11		14	(7-18) MG/DL
CREATININE	0.7	L	0.7	L	1.0	(0.8-1.3) MG/DL
TOTAL PROTEIN					5.7	L (6.4-8.2) GM/DL
ALBUMIN					3.1	L (3.5-4.2) GM/DL
A/G RATIO					1.2	L (1.7-2.2)
CALCIUM	6.9	L	6.6	L	7.5	L (8.6-11.0) MG/DL
PHOSPHORUS			2.8			(2.5-4.9) MG/DL

Pt Name: HARPER, JONATHAN E

SUNRISE HOSPITAL & MEDICAL CENTER

Attend Dr: KIM, KITAE

3186 Maryland Pkwy

Acct#: D00612361414

Age/Sex:

Las Vegas, Nevada 89169

Mitt#: D001652485

Status:

ADM IN

Adm Date: 02/18/06

Dis Date:

LABORATORY SUMMARY REPORT

Delvash J. Smith

D80095

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 J. GARRY, M.D.
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 R.E. KOLKER, M.D.

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 02/27/06 1402

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 R.J. SLAGETER, M.D.
 J.L. UNGER, M.D.
 N.S. YUMIAKO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

*** CHEMISTRY *** (CONTINUED)

ROUTINE CHEMISTRY

Date	02/18/06					
Time	0810	0500	0050	Reference	Units	
TOTAL BILIRUBIN			0.65	(0.10-1.00)	MG/DL	
SGOT/AST			29	(15-37)	IU/L	
SGPT/ALT			20	(27-65)	IU/L	
TOTAL ALK PHOS			87	(43-267)	IU/L	
MAGNESIUM	1.3	L		(1.8-2.4)	MG/DL	

URINE CHEMISTRY

Date	02/19/06					
Time		2000		Reference	Units	

UR OSMO RANDOM		335 (AY)	L		(392-1090)	
----------------	--	----------	---	--	------------	--

(AY) RESULTS CONFIRMED ON REPEAT ANALYSIS

Date	02/18/06					
Time		1310		Reference	Units	

UR OSMO RANDOM		313	L		(392-1090)	
----------------	--	-----	---	--	------------	--

*** TOXICOLOGY ***

THERAPEUTIC DRUG MONITORING

Date	02/28/06	02/27/06	02/22/06			
Time	0402	0100	0035	Reference	Units	

PHENYTOIN	(AZ)	2.73	L	10.69		(10.00-20.00) MCG/ML
-----------	------	------	---	-------	--	----------------------

(AZ) PENDING RECEIPT

Debrah J. Smith
 02/28/06 14:00
 02/28/06 14:00

Pt Name: HARPER, JONATHAN E

Attend Dr: KIM, KITAE

Acct#: D00612363414 Age/Sex:

Mnt#: D001652485 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

SUNRISE HOSPITAL & MEDICAL CENTER

3186 Maryland Pkwy

Las Vegas, Nevada 89109

LABORATORY SUMMARY REPORT

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*** LABORATORY SUMMARY REPORT ***
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 R.J. SLATGETER, M.D.
 J.L. UNGER, M.D.
 H.S. YUMIACC, M.D.

Pt Name: HARPER, JONATHAN E		D, E231-0	
*** URINALYSIS ***			
Date	02/24/06	02/18/06	
Time	1030	1310	
		Reference	Units
UA COLOR	ORANGE *	YELLOW	(YELLOW)
UA APPEARANCE	CLEAR	CLEAR	(CLEAR)
UA GLUCOSE	NEGATIVE	NEGATIVE	(NEGATIVE) MG/DL
UA BILIRUBIN	LARGE *	NEGATIVE	(NEGATIVE)
ICTOTEST	POSITIVE *		(NEGATIVE)
UA KETONES	TRACE	40 *	(NEGATIVE) MG/DL
UA SPECIFIC GRAVITY	1.026	1.009	(1.003-1.030)
UA BLOOD	MODERATE *	TRACE *	(NEGATIVE)
UA PH	6.0	5.0	(5-9)
UA PROTEIN	30 *	NEGATIVE	(NEGATIVE) MG/DL
UA UROBILINOGEN	4.0 *	NORMAL	(NORMAL) E.U./DL
UA NITRITE	NEGATIVE	NEGATIVE	(NEGATIVE)
UA LEUK ESTERASE	NEGATIVE	TRACE *	(NEGATIVE)
UA RBC	20-50 *	0-2	(0-2) /HPF
UA WBC	NONE SEEN	NONE SEEN	(NONE SEEN) /HPF
UA EPITHELIAL CELLS	NONE SEEN	0-2	(2-5) /HPF
UA BACTERIA	TRACE *	NONE SEEN	(NONE SEEN)
UA CRYSTALS OTHER	NONE SEEN	(BA) *	(NONE SEEN)
(BA) AMORPHOUS URATES 1+ *			
UA CASTS	NONE SEEN	NONE SEEN	(NONE SEEN) /LPF
UA OTHER	NONE SEEN	NONE SEEN	(NONE SEEN)
*** IMMUNOLOGY ***			
GENERAL IMMUNOLOGY			
Date	02/27/06		
Time	0100		
		Reference	Units
PREALBUMIN	14.40 L	(20.00-40.00)	MG/DL
<p><i>Delvash P. Smith</i> 02/27/06</p>			
Pt Name: HARPER, JONATHAN E		SUNRISE HOSPITAL & MEDICAL CENTER	
Attend Dr: KIM, KITAE		3186 Maryland Pkwy	
Acct#: D00612363414		Las Vegas, Nevada 89109	
Mit#: D001652485		Status: ADM IN	
Adm Date: 02/18/06		Dis Date:	
LABORATORY SUMMARY REPORT			

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0602180045

PAGE 17

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 J.W. HUSSEY, D.D.S., M.D.
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*** LABORATORY SUMMARY REPORT ***
 02/27/06 1402

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 R.J. SLAUGHTER, M.D.
 J.L. UNSER, M.D.
 N.S. YUMIACO, M.D.

Pt Name: HARPER, JONATHAN E

D.E231-0

BLOOD BANK

BLOOD BANK

COLLECTED: Feb 18, 2006 0:50am Flag Reference Units

BLOOD TYPE	O POS
ANTIBODY SCREEN	NEGATIVE
CROSSMATCH	
PACKED CELLS	221730018 PC LR O POS Comp? Y
PACKED CELLS	221729714 PC LR AS3 O POS Comp? Y
PACKED CELLS	221731939 PC LR O POS Comp? Y
PACKED CELLS	221729205 PC LR O POS Comp? Y <N/A> (CANC)

ISSUED and TRANSFUSED PRODUCTS

COLLECTED: Feb 21, 2006 4:37am Flag Reference Units

FFP DBL THAWED	221734775	PRSMO TRFSD	O POS	02/21/06
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COLLECTED: Feb 20, 2006 11:59am Flag Reference Units

FFP SQL THAWED	221734134	PRSMO TRFSD	O NEG	02/20/06
FFP SQL THAWED	221736159	PRSMO TRFSD	O POS	02/20/06

COLLECTED: Feb 19, 2006 0:49am Flag Reference Units

FFP DBL THAWED	221734762	PRSMO TRFSD	O POS	02/19/06
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COLLECTED: Feb 18, 2006 0:50am Flag Reference Units

PC LR AS3	221729714	PRSMO TRFSD	O POS	02/18/06
PC LR	221730018	PRSMO TRFSD	O POS	02/18/06
** EMERGENCY ISSUED **				
PC LR	221731939	PRSMO TRFSD	O POS	02/18/06

Deborah J. Smith
 02/29/06

Pt Name: HARPER, JONATHAN E

SUNRISE HOSPITAL & MEDICAL CENTER

Attend Dr: KIM, KITAE

3185 Maryland Pkwy

Acct#: D00612363414 Age/Sex:

Las Vegas, Nevada 89169

Alt#: D001652485 Status: ADM IN

Adm Date: 02/18/06 Dis Date:

LABORATORY SUMMARY REPORT

D8009S

Mediowest

Phone 702-792-9111

0602180045

Patient Care Record

DISPATCH DATE

DAY OF WEEK

UNIT REPORTING

BASE RESPONSE NO

INCIDENT NUMBER

INCIDENT LOCATION

ZIP CODE

OTHER UNIT

DESTINATION

DISPATCH RESPONSE AT SCENE DEPT SCENE AT HOSP MILES TRANSPORTED

PATIENT LAST NAME

PATIENT FIRST NAME

MI

GENDER

Female

Male

APT #

PATIENT ADDRESS - NUMBER DIRECTION STREET NAME

CITY

STATE

ZIP CODE

BIRTH DATE

AGE

SOCIAL SECURITY NUMBER

PHONE NUMBER

EMPLOYER NAME

EMPLOYER PHONE NUMBER

Work Related? Yes No

CHIEF COMPLAINT (Nature of the Emergency/Transfer) Pt. Suffering from severe chest pain, shortness of breath, and dizziness. History of hypertension and diabetes.

Source:

PMHx: None Unknown Diabetes Asthma COPD Seizure Cancer of HTN Mx CHF CVA xOASG Hepatitis TB HIV

Other PMHx:

Medications: None Unknown

Allergies: NKDA Unknown PCN Sulfas Codeine Iodine Latex

Mechanism of Injury:

Fall: mph Driver or Passenger
Restrainted: Y N Unknown
Airbag: Y N Unknown
Ejection
Rollover
DOA Same Vehicle
Space Intrusion > 1 ft
Auto vs Ped mph
Other: 1500 15 mph

Exam	Weight	Time	BP	P	Resp	O2 sat	EKG	By
Airway	Patent	48	120	8	100%	✓	FD	
Respiratory	Patent							
Circulation	Strong							
Neuro	Alert							
Extremities	Warm							
Skin	Normal							
Pupils	PERL							
Heart	Normal							
Lungs	Clear							
Abdomen	Normal							
Extremities	Normal							
Back	Normal							
Cardiac Rhythm	SR							
Clinical Impression:								

Clinical Impression:

Course PTA:

Initial Course:

APP 000098

Incident Report

2006-8038897-000

CCFD - Clark County

0602180045

Basic

Alarm Date and Time 00:16:56 Saturday, February 18, 2006
 Arrival Time 00:20:24
 Controlled Date and Time
 Last Unit Cleared Date and Time 01:20:59 Saturday, February 18, 2006
 Response Time 0:03:28
 Priority Response Yes
 Completed Yes
 Release to Public Yes
 Fire Department Station S27
 Shift B
 Incident Type 321 - EMS call, excluding vehicle accident with injury
 Initial Dispatch Code 27D-Stab/Gunshot Wou
 Aid Given or Received N - None
 Alarms 1
 Action Taken 1 33 - Provide advanced life support (ALS)
 EMS Provided Yes
 Apparatus - EMS 1
 Personnel - EMS Personnel 2
 Property Loss \$0.00
 Contents Loss \$0.00
 Property Value \$0.00
 Contents Value \$0.00
 Mixed Use 40 - Residential use
 Property Use 429 - Multifamily dwellings
 Location Type Address
 Address 3070 S Nellis BLVD
 City, State Zip Las Vegas, NV 89122
 Apartment Number 1187
 District 02629-79
 Directions 3070 S Nellis Blvd
 Latitude 36.133812
 Longitude 115.065454

Person Involved - Person, JONATHON

EMS Patient Yes
 Last Name Person
 First Name JONATHON
 Street Address

EMS Scene

Location Type Home/Residence
 Service Type Stab / Gunshot Wound
 Area Type Urban
 Mass Casualty Incident Not Applicable
 Paramedic Response Yes
 'D of First Unit on Scene R27
 Number of Patients This Incident 1
 Response Mode to Scene Emergency

Incident Report

CCFD - Clark County

2006-8035897-000

0602180045

EMS Patient - Person, JONATHON

First Name	JONATHON
Last Name	Person
Street Address	
Gender	1 - Male
Age	16
Race	0 - Other, Includes multi-racial
Ethnicity	1 - Hispanic
Provider Impression / Assessment	38 - Trauma
Cause of Illness/Injury	UU - Unknown
Highest Level of Care	4 - EMT-P (Paramedic)
Patient Status	2 - Remained Same
Disposition	3 - Non-FD transport with FD attendant
Initial Level of Care	4 - EMT-P (Paramedic)
Severity of Injury	Life Threatening
Allergies	UNKNOWN
Current Medications	UNKNOWN
Transporting Unit	SWM
Receiving Facility	6 - Columbia Sunrise Hospital
Receiving Facility Type	Hosp Trauma Ctr
Hospital Chosen By	Protocol
Treatment Authorization	Protocol
Response Mode From Scene	Emergency
Chief Complaint Code	Altered Level of consciousness
Patient Weight	70

EMS Patient - Person, JONATHON Assessment

Assessment - Cardiac	All Relevant Systems Normal
Assessment - Chest	Chest Expansion - Symmetrical
Assessment - Extremities	Moves all extremities normally
Assessment - GI/GU	All Relevant Systems Normal
Assessment - HEENT	Pupils -PERLA
Assessment - Lungs/Respiration	Lung Sounds Clear
Assessment - Neurological	Altered Level of Consciousness
Assessment - Abdomen/Pelvis	All Relevant Systems Normal
Assessment - Skin	Capillary Refill > 2 seconds
Assessment - Skin	Dry
Assessment - Skin	Warm
Assessment - Spine/Back	All Relevant Systems Normal

EMS Patient - Person, JONATHON Symptoms

Symptom 1	Traumatic Injury
Symptom 2	Unresponsive / Unconscious

EMS Patient - Person, JONATHON History

Previous History 1	Unknown
--------------------	---------

EMS Patient - Person, JONATHON Flow Chart

00:21:00 - GCS	Eye = 4; Verbal = 1; Motor = 4; GCS = 9; AVPU = U
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D8009S

Incident Report

2006-6036697-000

CCFD - Clark County

0602180045

EMS Patient - Person, JONATHON Flow Chart

Provider	-
Charge	\$0.00
00:22:00 - Bleeding Control	Attempts = ; Quantity = ; Size = ; MULTI TRAUMA TO OCCIPITAL PART OF HEAD.
Provider	-
Charge	\$0.00
00:23:00 - Oxygen	Attempts = ; Quantity = ; Size = ; 15 L
Provider	-
Charge	\$0.00
00:24:00 - IV - Peripheral	Solution = Normal Saline; Site = R AC; Size = 16; Rate = WO
Provider	-
Charge	\$0.00
00:25:00 - Spinal Immobilization	Attempts = ; Quantity = ; Size = ; PACKAGED
Provider	-
Charge	\$0.00
00:26:00 - Meds - Administered /	Etomidate (Amidate), IV; Dose = 40 MG
Provider	-
Charge	\$0.00
00:27:00 - Intubation - Oral	Attempts = 1; Quantity = ; Size = ; 7.0 TUBE 21 AT TEETH
Provider	-
Charge	\$0.00
00:28:00 - Meds - Administered /	Versed (Midazolam), IV; Dose = 5 MG'S
Provider	-
Charge	\$0.00

EMS Patient - Person, JONATHON Narrative

Narrative Name	New Narrative
Narrative Type	EMS
Narrative Date	18:37:19 Sunday, February 19, 2006
Author	A9364D - Davis, Aaron L
Author Rank	FF
Author Assignment	1
Narrative Text	<p>S- ON ARRIVAL METRO ST'S PT 16 YOM WHO WAS SHOT IN HEAD WITH 357.</p> <p>O- ON ARRIVAL PT WAS GCS OF 8. PT LOOKED AT US BUT WOULD NOT RESPOND. PT HAD A LARGE OPEN HEAD INJURY WITH SKULL FRAGMENTS AND BRAIN MATTER LEAKING OUT. PT WAS SLIGHTLY COMBATIVE WHEN WE APPLIED O2 AND PACKAGED HIM. PT HAD NO OTHER INJURIES NOTED.</p> <p>A- GSW TO HEAD.</p> <p>P- ASSESSED AND MONITORED, HX AND VITALS WERE TAKEN, BLEEDING CONTROLLED, AND PLACED ON BACKBOARD. PT WAS SEDATED AND INTUBATED ENROUTE TO SUNRISE TRAUMA. PT HAD EQUAL BREATH SOUNDS AND HAD POSITIVE CHANGE ON END TIDAL CO2 DETECTOR. PT RECIEVED IV. PT WAS TRANSPORTED TO SUNRISE WHERE PT WAS TURNED OVER TO TRAUMA STAFF.</p>

Debrah J. Smith

DB0095

Printed: 08/02/2006 13:41:18

2006-6035697-000

CCFD - Clark County

0602180045

Apparatus ID	R27
Response Time	0:01:20
Apparatus Dispatch Date and Time	00:17:33 Saturday, February 18, 2006
En route to scene date and time	00:19:04 Saturday, February 18, 2006
Apparatus Arrival Date and Time	00:20:24 Saturday, February 18, 2006
En route to facility date and time	00:34:23 Saturday, February 18, 2006
Arrive facility date and time	00:43:44 Saturday, February 18, 2006
Apparatus Clear Date and Time	01:20:59 Saturday, February 18, 2006
Apparatus priority response	Yes
Number of People	2
Apparatus Use	2
Apparatus Type	71 - Rescue unit
Personnel 1	D6636D - Dillingham, Daniel Position: ENG
Personnel 2	A9364D - Davls, Aaron L Position: FF

Reported By	A9364D - Davis, Aaron L
Officer In Charge	19:04:05 Sunday, February 19, 2006
Reviewer	-

Narrative Name	CAD Narrative
Narrative Type	CAD Narrative
Author	*
Narrative Text	CAD Master Incident Number: 02182006-6035897 Jurisdiction Incident #: CC 20066035897 Primary Jurisdiction Ins.#: CC 20066035897

End of Report

He was born in the village of Krasnoye Selo, Dept. of Rostov, Russia, on 12-11-1907.
He graduated from the Institute of Agriculture in 1934
and lived with the Los Angeles Metropolitan Police
Department.

Delaware & North

The Use and Classification of the
Record is Regulated by the Technology
Department of the United States
and various laws are enforced by the
and Classification.

Printed: 08/02/2006 13:41:21

000095

LOS ANGELES POLICE DEPARTMENT
INCIDENT REPORT - PAGE C

EVENT NUMBER: 060218-0445

INCIDENT: BWDN

DATE/TIME: 02-18-00 / 0841

LOCATION OF OCCURRENCE: 3070 S. NELLIS BLVD. LVN (34)

VICTIM #1: HARPER, JONATHAN

ADDRESS: 11111

DOB: 1/1/1977 SSN: 123-45-6789 RACE: W

SEX: M HT: 5'7" WT: 160 HAIR: BL EYES: BL

RES PHONE: BUS PHONE:

VICTIM #2:

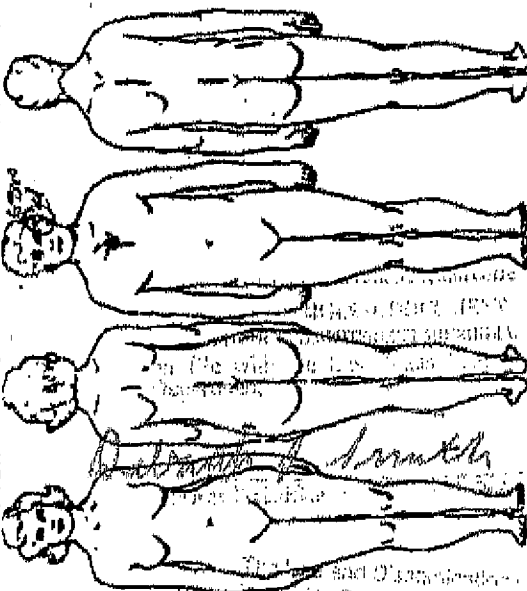
ADDRESS:

DOB: SSN:

SEX: HT: WT: HAIR: EYES:

RES PHONE: BUS PHONE:

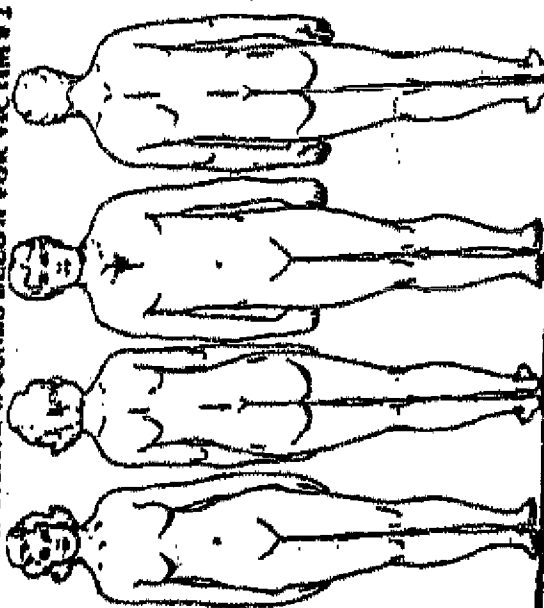
INDICATE WOUNDS BELOW FOR VICTIM #1



Check All That Apply

- ☐ Angry
- ☐ Nervous
- ☐ Aggressive
- ☐ Crying
- ☐ Frightened
- ☐ Threatening
- ☐ Calm
- ☐ Hydrated
- ☐ Irrigated
- ☐ Altered
- ☐ Pain
- ☐ Outward Wounds
- ☐ Self-Inflicted Injury
- ☐ Moderate Injury
- ☐ Minor Injury
- ☐ No Visible Injury
- ☐ Other

INDICATE WOUNDS BELOW FOR VICTIM #2



VOLUNTARY STATEMENT: ☐ TAPE ☐ WRITTEN ☐

VOLUNTARY STATEMENT: ☐ TAPE ☐ WRITTEN ☐

VOLUNTARY STATEMENT: ☐ TAPE ☐ WRITTEN ☐

VOLUNTARY STATEMENT: ☐ TAPE ☐ WRITTEN ☐

080095

LAS VEGAS METROPOLITAN POLICE DEPARTMENT
INCIDENT REPORT - PAGE C

060218-0045

MEDICAL INFORMATION FOR VICTIM # 1		MEDICAL INFORMATION FOR VICTIM # 2	
HOSPITAL: <u>8418</u>	HOSPITAL: _____	AMBULANCE UNIT: <u>592</u>	AMBULANCE UNIT: _____
ARRIVAL TIME: <u>0042</u>	ARRIVAL TIME: _____	NAME/ID#: <u>RANDY CLARK</u>	NAME/ID#: _____
NAME/ID#: <u>W. Z. RABO</u>	NAME/ID#: _____	ATTENDING DOCTOR: <u>KITAE KUM</u>	ATTENDING DOCTOR: _____
MEDICAL RELEASE FORM OBTAINED: YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	MEDICAL RELEASE FORM OBTAINED: YES <input type="checkbox"/> NO <input type="checkbox"/>	RECOVERED EVIDENCE FROM VICTIM # 1 <u>CLOTHING IMPROVED BY CSI P. SCHEBERL</u>	RECOVERED EVIDENCE FROM VICTIM # 2 _____
RECOVERED/IMPOUNDED BY: <u>PS433</u>	RECOVERED/IMPOUNDED BY: _____	TRANSPORTED BY MEANS OTHER THAN AMBULANCE: _____	TRANSPORTED BY MEANS OTHER THAN AMBULANCE: _____
NAME: _____	NAME: _____	ADDRESS: _____	ADDRESS: _____
DOB: _____	DOB: _____	YEAR: _____	YEAR: _____
MAKE: _____	MAKE: _____	MODEL: _____	MODEL: _____
COLOR: _____	COLOR: _____	LIC#: _____	LIC#: _____
STATE: _____	STATE: _____	HOW MANY: _____	HOW MANY: _____
WHO: _____	WHO: _____	WHO: _____	WHO: _____
GANE MEMBERS PRESENT OUTSIDE HOSPITAL: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> MEDIA PRESENT OUTSIDE HOSPITAL: YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> SUBMITTED BY: DETECTIVE/PSR <u>B. B. B. #C275</u>			

D80095

EXHIBIT “B”

OFFICE OF THE SPECIAL PUBLIC DEFENDER



Memo

To: Scott Bindrup

CC: GARCIA File

From: J. Galiano

Date: 03/10/10

Re: 03/09/10 Interview with Jonathan Emmanuel Harper, DOB:

On March 3, 2010 Scott and I visited 7057 Pacific Coast St Las Vegas, NV 89120 to speak with Harper. A young female exited the home to advise that Harper was currently not available. She did provide me with the following cell phone for Harper: (702) 286-7835. I later received a call from Daina Chiappe who is Harper's mother from cell number: (702) 234-3976. Daina informed that Harper lived with his father, Charles at 4855 Joplin Circle Las Vegas, NV 89121. Following this conversation, I called Harper's cell and provided him with our contact information, as well as, the reason why we wanted to speak with him.

On March 4, 2010, Harper returned one of my calls from a private number and advised he was in the lobby of our office building. I repeated our business address to him in hopes of confirming he was at the correct location, which he indicated he was. I then went down to the lobby to look for Harper, but was unable to find him. I called the only number I have for Harper and left him a message to call me back. On this particular occasion, Harper had used a private number therefore I was unable to call him back. March 4, 2010 was the last time I received any contact from Harper.

On Tuesday, March 09, 2010, Scott and I visited 4855 Joplin Circle Las Vegas, NV 89121 in an attempt to speak with Harper. It took us some time to receive a response at the door after several minutes lapsed, one of Harper's friends exited through the garage to inquire who we were. I identified myself as a member of this office before he advised he would notify Harper of our presence. Shortly thereafter, Harper came out through the garage and I identified myself again. He did remember speaking with me over the phone. Harper agreed to speak with us and asked us to follow him back inside to his home. I provided Harper with a business card as I explained we were getting ready for trial and were in the process of conducting interviews.

Harper wanted to let us know that he didn't mind speaking with us; however, after having been shot in the head by Salvador Garcia aka "Chable" much of his memory surrounding the event on this case is somewhat muddled. According to Harper, about a week or two after the shooting at Morris High School, Salvador shot him in the head with a .38 caliber handgun regarding some disagreement. Harper explained that Salvador was pressuring him (Harper) to do "...some of his dirt for him..." We asked Harper exactly what he meant by Salvador's "dirt". He would only say that Salvador was pressuring him to go out and commit crimes for him.

Harper explained that simply refused to follow Salvador's instructions, which created a some resentment. Later on the same given date, Harper was with Salvador when he (Salvador) offered him a beer. Salvador then got up went to the kitchen and when he returned he approached Harper with the gun drawn. At this point, Salvador discharged the gun into his (Harper) head. Harper claimed there was at least seven other people present when this occurred. Some of the same people implicated in our case, such as, Yovanni Borradas, Cavillo Edsheli, and Manuel Lopez. Harper claimed that these individuals did nothing to get help for him after he was shot, claiming they didn't request medical personnel for more than an hour as they tried to convince him to tell police that he

had unintentionally shot himself in the head. We asked Harper if our client was present during this incident and he replied that he (client) was not present when he was shot. *Note: Harper claimed that Salvador is Yovanni's brother.*

Harper informed that following his injuries he now suffers through seizures when he is under stress. He also complained that members of the D.A.'s office have placed a great deal of stress on him in their efforts to obtain additional specifics from him despite his insistence that it is hard for him to remember. We responded that we understood and asked him to go over what he recalled as best as he could.

On the date of the incident (Feb. 6, 2006), Harper decided to visit with "Puppet" aka Manuel Lopez at his house. Harper was uncertain who else was at Lopez' home when he arrived (*provided further specifics in his two statements*). After the decision was made to go down to Morris High School following a call from Yovanni Borradas. A group of the gang members including Lopez (driver), Stacey DeCarolis, Evaristo Garcia and himself drove to the school in Lopez' El Camino. While inside of the vehicle Harper claimed, "...Puppet first had the gun, but then he gave it to E (client)..."

When he arrived at the school, he remembered everyone was fighting. Harper separated himself from the large group to avoid getting "jumped". By his estimate there appeared to be a huge group fighting seven people who were in his group in the gang he referred to as "Puros Locos". According to Harper he was standing approximately "fifty yards away" on the school field, which would be southeast from where Gamboa was shot at the intersection of Washington Ave and Virgil St. He does recall "E" (which he confirmed was client and Yovanni running after Gamboa across Washington Ave. Though he recalled Yovanni and client were "...arguin over the gun." He also remembered Yovanni stated, "...give me that fuckin gun!" to client. He now

doesn't remember which one of them ended up drawing the gun. Harper stated, "...I don't know who pulled out the gun..." neither did he see who discharged the gun into Gamboa. Harper mentioned that while being interviewed by the D.A.'s and being informed of his earlier statements, he presently doesn't remember any further specifics surrounding who had the gun last or who fired the gun. Harper does recall that when he heard the sound of gunshots he immediately began running.

With regard to client, Harper commented that he met him while he (Harper) was involved with the gang, but he didn't have a personal relationship with him. Harper told us he (client) was a "cool" guy. Harper explained that despite being told by police that client was the shooter, he presently doesn't remember whether that is what occurred nor if that is what he told police when he was initially interviewed. He explained that the leader of the "Puros Locos" was Chabie (Salvador Garcia). He told us that Yovanni was a "bitch" and the whole incident at the school occurred because of Yovanni. He was initially introduced into this gang (Puros Locos) through Edshell ("Danger") who he has known since the sixth grade. *Note: I currently have two transcribed statements for Jonathan Harper one is dated 04/01/06 & 06/21/06. Metro's event number off of Salvador's Scope file - #060218-0045 (Feb 18, 2006) suggests Harper sustained his injuries prior to being interviewed by police.*

EXHIBIT “C”

Robert D. Lawson Investigations, LLC

1148 So. Maryland Pwky.
Las Vegas, NV 89104
Telephone: 702-474-4102

Ross Goodman, Esq.
520 South Fourth Street
Las Vegas NV.89101

DATE: July 26, 2012
RE: Garcia, Evaristo

EVARISTO GARICA INVESTIGATION

During the course of an investigation I contacted Jonathan Harper's mother at her residence located at 6940 Pacific Coast ST. LVN 89148. Telephone 702-234-3976.

During the interview Ms. Chiappe (Jonathan Harper's mother) stated that approximately 2 or 3 days after Jonathan was shot she was contacted by Metro and informed of the shooting.

After Jonathan was released from the hospital he stayed with his mother at her residence while he was rehabilitating. She remembers talking to detectives who told her that the reason Jonathan was shot, by Salvador Garcia, was that Salvador wanted Jonathan to shoot Giovanni Garcia's ex-girlfriends new boyfriend and Jonathan refused.

I contacted Jonathan by telephone and identified myself and the purpose of my call. When speaking to him he indicated that he had no idea of who Evaristo Garcia was or of any shooting that our Evaristo might have been involved in. He further stated that he has no recollection of any fight between Evaristo, himself, the victim or other individuals. When pressed he was adamant that he had no idea of what I was talking about.

He further stated that he has no plans to testify against Evaristo as he has no memory or recollection of ever talking to anyone about the shooting that Evaristo was involved in. He further stated that sense being shot by Salvador Garcia he is sick and tired of people

putting words in his mouth and telling him that this is what he had said regarding things that occurred in his past that he has no recollection of.

EXHIBIT “D”

1 BY A JUROR:
2 Q. Who is Crystal? One of your friends? This
3 is how the original altercation started between her and
4 Giovanni?
5 A. Yes.
6 Q. Over a book?
7 A. Yes.
8 Q. Would you know why she would then ask
9 Melissa's boyfriend Jesus -- that's his name, correct?
10 A. Yes.
11 Q. Why does she ask him to intervene into that
12 situation? Are they related or --
13 A. No.
14 THE FOREPERSON: Any further questions?
15 Yes.
16 BY A JUROR:
17 Q. So you left fifth period and then what made
18 you decide to come back after you left?
19 A. We were waiting for Melissa. We went to
20 school together.
21 Q. Yeah, but you went back on campus after you
22 left? With the two boys.
23 A. Yes.
24 Q. And you didn't think anything was going to
25 happen?

1 A. I knew something was going to happen. He
2 was upset with Crystal.
3 THE FOREPERSON: Any further questions?
4 Yes.
5 BY A JUROR:
6 Q. So Victor was there, you said he exited the
7 car with you and your brother?
8 A. Yes.
9 Q. And walked towards the fight?
10 A. Yes.
11 Q. And were you all three walking towards the
12 fight to get involved in the fight or just as
13 spectators?
14 A. No, the fight had only broke out -- we were
15 all already there. The fight wasn't going on when we
16 walked up there.
17 Q. Okay. Thank you.
18 THE FOREPERSON: Any further questions?
19 BY A JUROR:
20 Q. And you were walking up to go back and get
21 Melissa?
22 A. Yes.
23 Q. And her boyfriend was with you?
24 A. No, her boyfriend arrived --
25 Q. He arrived separately?

1 A. Yes.
2 THE FOREPERSON: Any other questions?
3 By law, these proceedings are secret and
4 you are prohibited from disclosing to anyone anything
5 that has transpired before us, including evidence and
6 statements presented to the Grand Jury, any event
7 occurring or statement made in the presence of the Grand
8 Jury, and information obtained by the Grand Jury.
9 Failure to comply with this admonition is a
10 gross misdemeanor punishable by a year in the Clark
11 County Detention Center and a \$2,000 fine. In addition,
12 you may be held in contempt of court punishable by an
13 additional \$500 fine and 25 days in the Clark County
14 Detention Center.
15 Do you understand this admonition?
16 THE WITNESS: Yes, ma'am.
17 THE FOREPERSON: Okay. Thank you. You can
18 be excused now.
19 Please raise your right hand and remain
20 standing, etc.
21 Please raise your right hand.
22 You do solemnly swear the testimony you are
23 about to give upon the investigation now pending before
24 this Grand Jury shall be the truth, the whole truth, and
25 nothing but the truth, so help you God?

1 THE WITNESS: Yes.
2 THE FOREPERSON: You may be seated.
3 You are advised that you are here today to
4 give testimony in the investigation pertaining to the
5 offenses of conspiracy to commit murder with the intent
6 to promote, further or assist a criminal gang, murder
7 with use of a deadly weapon with the intent to promote,
8 further or assist a criminal gang, involving Evanilo
9 Jonathan Garcia and Manuel Lopez.
10 Do you understand this advisement?
11 THE WITNESS: Yes.
12 THE FOREPERSON: Please state your first
13 and last names spelling both for the record.
14 THE WITNESS: I don't know how to spell my
15 middle name. If you want --
16 THE FOREPERSON: Just first and last would
17 be fine.
18 THE WITNESS: Okay. Jonathan Harper.
19 J-O-N-A-T-H-A-N, Harper, H-A-R-P-E-R.
20 THE FOREPERSON: Thank you.
21
22 JONATHAN HARPER,
23 having been first duly sworn by the Jurors of the
24 Grand Jury to testify to the truth, the whole truth,
25 and nothing but the truth, testified as follows:

EXAMINATION

BY ME, NYIKOS:

Q. Jonathan --

A. Yes.

Q. -- I want to take you back to about four years ago. Did you have an injury that happened to you?

A. Yes.

Q. Okay. Specifically to your head?

A. Yes.

Q. And does that cause you to have problems with your speech?

A. Yes.

Q. And does it cause you to have problems with your motor skills?

A. Yes.

Q. Okay. Now before you had your head injury, about two weeks before that, were you involved in a fight at a high school?

A. Yes.

Q. Okay. Now back four years ago were you in a gang?

A. Yes.

Q. What was the name of that gang?

A. EL.

Q. What's the full name?

A. Funes Lemos.

Q. Okay. And when did you join that gang?

A. Like a month before.

Q. A month before the thing at the high school?

A. Yes.

Q. Was a friend of yours in the gang?

A. Pretty much all of them were.

Q. Okay. Let's talk about who was in this gang. Do you know somebody named Giovanni?

A. Yes.

Q. Giovanni Garcia?

A. Yes.

Q. Was he in the gang?

A. Yes.

Q. Okay. Showing you Grand Jury Exhibit Number 8 and it's up there on the screen. Is that Giovanni?

A. Yes.

Q. Did he have a nickname?

A. Yes.

Q. What was his nickname?

A. Little One.

Q. Do you know a person by the name of

Salvador Garcia?

A. Yes.

Q. And is Salvador related to Giovanni?

A. Yes.

Q. And was Salvador in a gang?

A. Yes.

Q. What was Salvador's nickname?

A. Boxer.

Q. Okay. Did he have another one that you guys would call him too?

A. Sal.

Q. Okay. Did you guys sometimes refer to him also as Cravy, C-K-A-V-Y?

A. X.

Q. C-K-A-V-I. Okay.

Do you know a person by the name of Edsel Calvillo?

A. Yes.

Showing you Grand Jury Exhibit 16, is that Edsel?

A. Yes.

Q. Okay. Did he have a nickname?

A. Yes.

Q. What was his nickname?

A. Before Danger he was Boxer and then when he

joined the gang they switched it.

Q. Okay. So before he joined the gang his nickname was Boxer but when you guys joined it got changed?

A. Yes.

Q. So it's Danger?

A. Yes.

Q. Okay. Do you know a person by the name of Manuel Lopez?

A. No.

Q. Emmanuel Lopez?

A. Puppet?

Q. Okay. Was Puppet in the gang?

A. Yes.

Q. Okay. Do you know a person by the name of Evaristo Garcia?

A. Yes.

Q. Was Evaristo in the gang?

A. Yes.

Q. And did he have a nickname?

A. Yes.

Q. What was that?

A. E.

Q. Showing you Grand Jury Exhibit Number 19, is that E?

1 A. Yes.
 2 Q. Okay. Now we talked a second ago about
 3 Emmanuel. Was Emmanuel in the gang?
 4 A. Yes.
 5 Q. Okay. Showing you Grand Jury Exhibit
 6 Number 12. Did he have a nickname?
 7 A. Yes.
 8 Q. Who is that?
 9 A. Puppet.
 10 Q. Puppet. Okay. Now besides the people we
 11 already talked about were there any other members of
 12 this gang?
 13 A. I think there was one more and that was
 14 Stranger.
 15 Q. Stranger?
 16 A. Yes.
 17 Q. Do you know his real name?
 18 A. No.
 19 Q. Okay. Now how did you get into this gang?
 20 A. I was buddies with Edshel and then he
 21 introduced me to Sal and then from that he showed me
 22 that he was in this gang and then it started with fights
 23 and then started tagging.
 24 Q. Now let's talk about fights. You
 25 participated in fights as a member of the gang?

1 A. Well, I was not in the gang yet.
 2 Q. Okay. Was this -- you were doing this with
 3 Edshel?
 4 A. Yes.
 5 Q. And you were doing this with other members
 6 of Puro's Locos?
 7 A. Yes.
 8 Q. And then you said tagging. What's tagging?
 9 A. Going around and writing on the walls with
 10 paint.
 11 Q. What would you write?
 12 A. PL.
 13 Q. Okay. And so you did some fights and some
 14 tagging?
 15 A. Yes.
 16 Q. And then eventually did you become a member
 17 of the gang?
 18 A. Yes.
 19 Q. Okay. And once you became a member did you
 20 do other fights?
 21 A. Yes.
 22 Q. And did you also do some more tagging?
 23 A. No.
 24 Q. No more tagging?
 25 A. No.

1 Q. Okay. So let's talk about February 6th of
 2 2006. Now you already testified that you were involved
 3 in a fight at a high school. But do you remember where
 4 you were before you went to the high school?
 5 A. I was at my house.
 6 Q. Okay. And eventually did you go to someone
 7 else's house?
 8 A. I went to, after my house I went to Sal's
 9 mom's.
 10 Q. Now who was with you at Sal's mom's?
 11 A. It was me, Sal, Edshel and then Stranger.
 12 Q. Okay. Now while you were there with those
 13 people were you told you needed to go somewhere else?
 14 A. Yes.
 15 Q. Okay. Where were you supposed to go?
 16 A. I just heard that there was going to be a
 17 fight.
 18 Q. Do you remember who told you there was
 19 going to be a fight?
 20 A. It was either Sal or Edshel.
 21 Q. Do you know who you were supposed to fight?
 22 A. No.
 23 Q. Did you find out later who you were
 24 supposed to fight?
 25 A. Yeah.

1 Q. Who were you supposed to fight?
 2 A. It was another, like a gang.
 3 Q. Do you remember the name of this gang?
 4 A. PL -- or Brown Pride.
 5 Q. Now how did you get to the school?
 6 A. I rode with Puppet.
 7 Q. Did Puppet drive?
 8 A. Yes.
 9 Q. What kind of car did Puppet have?
 10 A. It was a black El Camino.
 11 Q. Okay. Was it black or just a dark color?
 12 A. Dark color.
 13 Q. Okay. Showing you Grand Jury Exhibit 15,
 14 do you recognize that?
 15 A. Yes.
 16 Q. What is it?
 17 A. An El Camino.
 18 Q. Is that Puppet's El Camino?
 19 A. Yes.
 20 Q. Now who was in the El Camino with you?
 21 A. It was me, Puppet, his girl and I and --
 22 Q. You said his girl. You mean Puppet's girl?
 23 A. Yes.
 24 Q. Do you remember her name?
 25 A. No.

1 Q. Showing you Grand Jury Exhibit 35, do you
2 recognize her?
3 A. Yes.
4 Q. Why do you recognize her?
5 A. Because of the mole.
6 Q. Is that Puppet's girl?
7 A. Yes.
8 Q. So, I'm sorry, it was where in this El
9 Camino were you riding?
10 A. I was in the back.
11 Q. Who was driving?
12 A. Puppet.
13 Q. Okay. And was his girl with him or in the
14 back with you?
15 A. She was in the front.
16 Q. So it was you, Puppet, Puppet's girl. Was
17 anybody else in the car?
18 A. B and Rachel.
19 Q. Okay. Now before you got into the car was
20 there any talk about a gun?
21 A. No.
22 Q. Okay. Now Jonathan, you've got this head
23 injury, yeah?
24 A. Yes.
25 Q. Does it cause you to have some memory

1 problems sometimes?
2 A. Yes.
3 Q. Now you met with me in my office earlier,
4 yes?
5 A. Yes.
6 Q. Okay. Do you remember giving a statement
7 to Detective Wogg and Hardy?
8 A. Bits and parts.
9 Q. Okay. So you gave a statement to them?
10 A. Yes.
11 Q. And that was in April of '66?
12 A. Yes.
13 Q. Okay. And you heard yourself on that
14 statement, yeah?
15 A. Yes.
16 Q. Now was your memory back then better than
17 it is right now?
18 A. Yes.
19 Q. Now showing you your statement on page 18.
20 Okay. This is your statement?
21 A. Yes.
22 Q. Okay. And you also listened to that
23 earlier today, yes?
24 A. Yes.
25 Q. Now on page 18 you were asked by Detective

1 Mogg: Before you left there did you know who had a gun?
2 Answer: Puppet. Question: Did you see it? Answer:
3 Yeah. Question: Where? Answer — it was a little bit
4 unintelligible. A nine. Question: Where did you see
5 the gun? Answer: Here. Question: In his waistband?
6 Answer: Yeah. And then the detective goes on, says:
7 Okay. And then your answer is: Told B to hold it. And
8 then detective asked you: He told B to hold it?
9 Answer: Yeah.
10 So that was your statement back then?
11 correct?
12 A. Yes.
13 Q. So then you guys got in the car and where
14 do you go to?
15 A. We went to the fight.
16 Q. To the fight?
17 A. Yeah.
18 Q. Do you remember where the fight was?
19 A. At a night school.
20 Q. Okay. Do you remember what street it was
21 on?
22 A. On Pacos.
23 Q. Okay. Now showing you Grand Jury Exhibit
24 Number 2, and you can actually get up from your chair if
25 you need to, do you see where the fight was?

1 Okay. And you're pointing toward a school,
2 right?
3 A. Yeah, this is the school.
4 Q. This is Washington Street.
5 A. Okay.
6 Q. And then here's Sanchill Street. So —
7 A. It was right here. You just had the paper
8 flipped down.
9 Q. Sorry about that Jonathan.
10 So in the parking lot of the school?
11 A. Yes.
12 Q. Do you remember where you guys parked that
13 El Camino?
14 A. It was in the corner right there.
15 Q. And that would be the corner of the parking
16 lot?
17 A. Yes.
18 Q. Okay. You can sit back down Jonathan.
19 Okay. Now when you pulled up in that El
20 Camino did you see people outside the school?
21 A. Yes.
22 Q. Did you recognize anybody outside the
23 school?
24 A. No.
25 Q. Okay. Now how many people did you see?

1 A. At least like 18 to 20 people.
 2 Q. What were they doing?
 3 A. All fighting.
 4 Q. Okay. Did you then get out of the car?
 5 A. Yes.
 6 Q. Who else got out of the car?
 7 A. All of us.
 8 Q. So you did?
 9 A. I did, Puppet, E, Stacy, Edshel and me.
 10 Q. And where did you go when you got out of
 11 the car?
 12 A. We ran to the circle.
 13 Q. You're talking, you said, now you just said
 14 the circle. Was that where everybody was fighting?
 15 A. Yes.
 16 Q. So were the people making a circle?
 17 A. Yes.
 18 Q. Now once you ran into the circle did you
 19 see anybody that you recognized inside there?
 20 A. I saw Little One fighting like a bigger guy
 21 than him.
 22 Q. Now Little One is Giovanni?
 23 A. Yes.
 24 Q. And he was fighting a big guy?
 25 A. Uh-huh.

1 Q. Can you describe this big guy?
 2 A. No, I just know he was big.
 3 Q. Okay. So what did you do at that point?
 4 A. Just started fighting and then like at a
 5 point I got sucker punched and then like I tripped from
 6 my fall and then got up and then like it got more
 7 hectic.
 8 Q. Now before it got more hectic do you know a
 9 nicknames of anybody in particular that you were
 10 fighting?
 11 A. One guy that I was fighting, it was
 12 supposed to be Diablo.
 13 Q. And who is Diablo?
 14 A. I was told that he was the leader of Brown
 15 Pride.
 16 Q. Who told you that?
 17 A. Little One.
 18 Q. Giovanni?
 19 A. Yes.
 20 Q. So you're fighting Diablo inside this
 21 circle and it gets more hectic?
 22 A. Yes.
 23 Q. What do you mean by more hectic?
 24 A. Just got more crazier, like more people
 25 started fighting.

1 Q. And at this point it's about more than 20
 2 people fighting?
 3 A. Yeah. Cause by then, you know, the other
 4 ones come.
 5 Q. Now what other ones are you talking about?
 6 A. Arian.
 7 Q. Is that A-T-Y-A-N?
 8 A. Yeah.
 9 Q. And who is Arian?
 10 A. Edshel's brother, older brother.
 11 Q. And was he also in the gang?
 12 A. Yes.
 13 Q. Now did he have a nickname?
 14 A. No.
 15 Q. So Arian starts fighting. Who else?
 16 A. Then there was Stranger and then there was
 17 Chevi.
 18 Q. And Chevi's Salvador?
 19 A. Yeah.
 20 Q. As those people come in and start fighting
 21 what happens next?
 22 A. They got there and we started fighting and
 23 then like as soon as that happened it kind of like broke
 24 up and then like someone ran out of the circle.
 25 Q. Okay. Now let me stop you there. Can you

1 describe for me the person that ran out of the circle?
 2 A. At the time you know he was probably like
 3 the same age as me.
 4 Q. And you were how old back then?
 5 A. Like 15.
 6 Q. And was he white, black or Hispanic?
 7 A. He was like light colored, like light
 8 skinned, so like Mexican.
 9 Q. Can you describe anything else about him?
 10 A. No.
 11 Q. That's okay. So he ran out of the circle,
 12 yeah?
 13 A. Yeah.
 14 Q. I'm going to zoom in a little closer on
 15 this map. If you want to get up again for me.
 16 So can you point again where everybody was
 17 fighting?
 18 A. All right. So which direction does this
 19 kid run?
 20 And you pointed toward Washington Street?
 21 A. Yeah.
 22 Q. And actually at an angle toward Washington
 23 and Virgil, yeah?
 24 A. Yeah.
 25 Q. And when he runs does anybody run after

1 him?
 2 A. E and Little One ran this way.
 3 Q. And ---
 4 A. Just then as soon as I saw that I ran this
 5 way, you know, towards the field.
 6 Q. And you're talking about these baseball
 7 fields here?
 8 A. Yeah, the corner of that. Like right here,
 9 where that white car is. That's pretty much where I
 10 was.
 11 Q. And you said E and Little One followed him.
 12 Did you point in the same direction he was running?
 13 A. Yes.
 14 Q. And they also ran at a diagonal toward
 15 Washington and Virginia?
 16 A. Yes.
 17 Q. You can sit back down Jonathan.
 18 Now as they were running what were they
 19 doing?
 20 A. They were, like where I was at they were,
 21 it sounded like they were arguing.
 22 Q. Could you hear what they were arguing
 23 about?
 24 A. They were arguing for something.
 25 Q. Do you remember what they were arguing for?

1 A. No.
 2 Q. Now Jonathan, I want to go back to your
 3 statement that you gave the detectives in April. And
 4 again your memory was better back then, yeah?
 5 A. Yes.
 6 Q. I'm going to page 12 here. Okay?
 7 Now at the top of page 12 of your statement
 8 you told the detectives: And then Little One screams
 9 kill him. Well kind of. Told him first, um, give me
 10 the gun, cause E, um, had a gun, right. So tell,
 11 screamed out loud shoot him, shoot him fucker.
 12 So that was your statement back then, yes?
 13 A. Yes.
 14 Q. So they were arguing about a gun?
 15 A. Yes.
 16 Q. Okay. Now you heard yourself on that tape
 17 today?
 18 A. Yes.
 19 Q. And the language is a little broken up,
 20 was your speech really bad back then?
 21 A. Yes.
 22 Q. Because this is right after you had been
 23 shot or you had your head injury?
 24 A. Yes.
 25 Q. All right. So they're chasing this kid and

1 arguing over the gun. What happens next?
 2 A. Like I just started hearing gunshots.
 3 Q. Do you remember seeing what happened?
 4 A. No.
 5 Q. Okay. And again was your memory better
 6 back then?
 7 A. Yes.
 8 Q. Okay. Now again on page 12 in your
 9 statement about halfway down the detective asks: Okay.
 10 And then what happened? Answer: And then, um, E runs
 11 right middle street, then claps clips, then, then I seen
 12 kid falls floor. Question: Okay. How many times did E
 13 shoot? Answer: Done with the clip. Question: He shot
 14 all the bullets? Answer: Yeah.
 15 So you told the detectives back then that E
 16 had run into the middle of the street and emptied the
 17 gun shooting at the kid?
 18 A. Yes.
 19 Q. And then the kid fell down?
 20 A. Yes.
 21 Q. Now after the shooting where did you go?
 22 A. After I heard the gunshots I jumped the
 23 fence and started running through the field and by then,
 24 you know there was already a helicopter and there was
 25 already cops surrounding the place and then I got to the

1 end of the field and then jumped the wall and then I got
 2 picked up.
 3 Q. Who picked you up?
 4 A. A girl and this guy in a truck.
 5 Q. Did you know them?
 6 A. No.
 7 Q. Did they wind up taking you somewhere?
 8 A. Yes.
 9 Q. Where did they take you?
 10 A. They took me back to Sal's.
 11 Q. Okay. When you got back to Sal's who was
 12 there?
 13 A. It was me, Chev, Little One, Stranger, and
 14 Edsel and his older brother.
 15 Q. Okay. Do you remember where E was?
 16 A. No.
 17 Q. Did you talk to E after this shooting
 18 happened?
 19 A. No.
 20 Q. Do you remember if you talked to E after
 21 this shooting happened?
 22 A. No.
 23 Q. Okay. Let me go back a little ways. Do
 24 you remember what E was wearing?
 25 A. No.

1 Q. And again was your memory better back when
2 you talked to detectives in April of 2006?
3 A. Yes.
4 Q. Okay, Jonathan, I want to show you your
5 statement again on page 14, about halfway down.
6 Question: Okay. Do you remember what E was wearing?
7 Answer: Um, um, gray sweatshirt. Question: Okay.
8 Do you know if it had a hood on it? Answer: Yes.
9 So you told them E was wearing a gray
10 hooded sweatshirt?
11 A. Yes.
12 Q. Yes. Okay. Now do you remember where E
13 went after the shooting?
14 A. No.
15 Q. Okay. Now Jonathan, page 15 of your
16 statement. Question: Okay. That night after he shot
17 the little boy did you see where he went, where he ran
18 to? And there's not an audible response but the
19 question is: So you're indicating that he ran this
20 would be west on Washington? Your answer: Yeah, this
21 way. Question: And then he ran down a side street?
22 Answer: Yes. And this is the side street right there
23 by the school? Answer: Yeah, told me that. Question:
24 He told you that? Yes, cause, um, Chavi picked him up.
25 Okay. Now I asked you earlier if you

1 remembered talking to E after this. Okay? Now I'm
2 showing you the same page on your statement. Question:
3 What else did E tell you? Answer: Um, scared.
4 Question: Did he tell you why he shot the boy? Answer:
5 Cause, um, Little One. Question: Little One told him
6 to? Answer: No, provoked him. Question: Provoked
7 him? Answer: Yeah.
8 And then you said pressure.
9 So that was your statement back then, yes?
10 A. Yes.
11 Q. Okay. Now do you remember what E told you
12 happened to the gun?
13 A. No.
14 Q. Okay. Going back to your statement on page
15 16. Question: All right. What else did E tell you
16 about the gun? Did he tell you where he put it?
17 Answer: Toilet. Question: In a toilet? Answer: Yes.
18 Question: Did he — and then your answer is: Toilet
19 on the street.
20 Okay. So E told you that he put a gun
21 inside a toilet that was on the street?
22 A. Yes.
23 Q. Okay. Now when you went to the school you
24 knew you were going there to fight?
25 A. Yes.

1 Q. Okay. Did you know that somebody was going
2 to get shot?
3 A. No.
4 Q. Did you go there to shoot anybody?
5 A. No.
6 Q. Jonathan, I'm sorry, I just missed a couple
7 of questions.
8 What was your nickname in the gang?
9 A. Silent.
10 Q. Silent. Okay. And when you joined the
11 gang did you have to get jumped in?
12 A. Yes.
13 Q. And what is jumping in?
14 A. Like six dudes jump you.
15 Q. They beat you?
16 A. Yeah, they beat you in.
17 Q. For how long did you have to do that?
18 A. It was like 25 seconds, 30.
19 MS. HYNDGS: I have no further questions
20 for this witness.
21 THE FOREPERSON: Are there any questions?
22 By law, these proceedings are secret and
23 you are prohibited from disclosing to anyone anything
24 that has transpired before us, including evidence and
25 statements presented to the Grand Jury, any event

1 occurring or statement made in the presence of the Grand
2 Jury, and information obtained by the Grand Jury.
3 Failure to comply with this admonition is a
4 gross misdemeanor punishable by a year in the Clark
5 County Detention Center and a \$2,000 fine. In addition,
6 you may be held in contempt of court punishable by an
7 additional \$500 fine and 75 days in the Clark County
8 Detention Center.
9 Do you understand this admonition?
10 THE WITNESS: Yes.
11 THE FOREPERSON: Thank you. You can be
12 excused now.
13 MS. JIMENEZ: At this time we're going to
14 stop with witnesses for this case. There is another
15 matter, I guess another case that you're going to take
16 under consideration. Depending on how long that takes I
17 may or may not put on one more witness. At least we'll
18 see what the time is. So we're going to pause for now
19 and do not deliberate on this case at this time. We'll
20 continue the presentation either later today or at
21 another date depending on the time. And I will go get
22 the other attorney handling the other matter.
23 (Recess.)
24 MS. JIMENEZ: We're back on our case with
25 another witness.

EXHIBIT “E”

CASE NO. C235218
DEPT. NO. 5

ORIGINAL

IN THE JUSTICE COURT OF THE LAS VEGAS TOWNSHIP
COUNTY OF CLARK, STATE OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

Case No. 06F1176A

EVERISTO JONATHAN GARCIA,

Defendant.

REPORTER'S TRANSCRIPT
OF
PRELIMINARY HEARING

BEFORE THE HONORABLE WILLIAM D. JANSEN
JUSTICE OF THE PEACE

TAKEN ON THURSDAY, DECEMBER 18, 2008
AT 9:30 A.M.

APPEARANCES:

For the State:

NOREEN C. NYIKOS and
SONIA V. JIMENEZ
Deputy District Attorneys

For the defendant:

WILLIAM B. TERRY

Reported by: Gerri De Luca, C.C.R. #82
Official Court Reporter

LAS VEGAS, NEVADA, THURSDAY, DECEMBER 18, 2008

THE COURT: Now, Mr. Garcia, this is the
time and place for the preliminary hearing in State
of Nevada v. Everisto Jonathan Garcia.

Let the record reflect that the
defendant is present with his attorney Mr. Terry,
and we have Norreen

MS. NYIKOS: Nyikos.

MS. JIMENEZ: And Sonia Jimenez.

THE COURT: The attorneys representing
the State.

You said you have two witnesses?

MS. JIMENEZ: There's a possibility of a
third, but I think we'll be able to do it in two.

THE COURT: All the witnesses possibly
that are going to testify, they're all outside?

MS. JIMENEZ: Yes, Judge.

THE COURT: So there's been -- the Court
has been informed all the witnesses who will testify
in the matter are outside in the hallway. So let the
record reflect that the exclusionary rule for
witnesses has been invoked and the witnesses have
been excluded from the courtroom.

INDEX

WITNESSES FOR THE STATE

PAGE

JOSEPH HANCOCK HARPER

Direct Examination by Ms. Nyikos: 7

Cross-Examination by Mr. Terry: 36

Redirect Examination by Ms. Nyikos: 62

Recross-Examination by Mr. Terry: 65

Examination by The Court: 68

MELISSA MARTA CAMBOA

Direct Examination by Ms. Jimenez: 69

Cross-Examination by Mr. Terry: 87

Redirect Examination by Ms. Jimenez: 95

Recross-Examination by Mr. Terry: 98

CLIFFORD MOORE

Direct Examination by Ms. Nyikos: 101

Cross-Examination by Mr. Terry: 103

Redirect Examination by Ms. Nyikos: 108

Recross-Examination by Mr. Terry: 108

JAN 12 2009

CLERK OF THE COURT

Marked

77

Admitted

78

Do you have any possible

witnesses, Mr. Terry?

MR. TERRY: No, your Honor, but we would
formally for the record ask that all witnesses be
excluded, and I understand the Court's already made
that directive.

THE COURT: Potential witnesses later on
I don't excuse them.

MR. TERRY: Understood.

THE COURT: Okay. State go ahead and
call your first witness.

MS. NYIKOS: Judge, before I call this
witness, his name is Jonathan Harper, I just want to
inform the Court he did have a head injury, so he
speaks a little bit slowly and sometimes mumbles. So
he's not being disrespectful. I'll try and keep him
audible for you, Madam Court Reporter.

While we're waiting for the
witness, Mr. Terry and I do have some stipulations.

THE COURT: Why don't you put those for
the record.

MS. NYIKOS: Thank you.

Your Honor, we have stipulated
that the cause of death was a single gunshot wound to
the back, manner of death to be a homicide. We did

1 go ahead and mark a copy of the autopsy report for
2 you.
3 Also, Mr. Terry was kind enough to
4 allow us to just use the victim's name as a purpose
5 for ID rather than having to show a photograph to the
6 victim's sister in this case.
7 MR. TERRY: That's all accurate with the
8 exception of, if counsel's marking the autopsy
9 report, we don't have a problem with that. They're
10 not moving to admit it, however. We did not agree to
11 that.
12 MS. NYIKOS: That's fine. Just for a
13 court exhibit, your Honor.
14 THE COURT: Just for a court exhibit to
15 show here, but it's not -- it won't be admitted.
16 MR. TERRY: That's fine. As an exhibit
17 is fine. Admitted is different.
18 THE COURT: Right. In other words,
19 they'll get it returned. It won't be admitted. It
20 will be returned to them.
21 MS. NYIKOS: That's fine, Judge.
22 THE COURT: Back to the State.
23 MR. TERRY: That's fine, Judge. And not
24 considered by the Court.
25 THE COURT: No. I won't even look at it.

1 ORIGINAL
2
3
4 JONATHAN EMANUEL HARPER, having
5 been first duly sworn to testify to the truth, the
6 whole truth, and nothing but the truth, testified as
7 follows:
8
9 DIRECT EXAMINATION
10 BY MS. NYIKOS:
11 Q. Jonathan, I want to direct your attention
12 to a couple of years ago in 2005. In 2005 were you a
13 member of a particular gang?
14 A. Yes.
15 Q. What was the name of that gang?
16 A. (Unintelligible).
17 THE COURT REPORTER: I didn't even get
18 that.
19 BY MS. NYIKOS:
20 Q. Is that Puro Locos?
21 A. Yes.
22 THE COURT REPORTER: Can you spell that
23 for me?
24 MR. TERRY: Objection. That wasn't
25 directed to the DA. That was directed to the

1 MS. NYIKOS: Thank you, Judge.
2 THE CLERK: Please be seated.
3 State your full name and spell
4 your name, please.
5 THE COURT: I want you to spell your
6 first name and last name. State your legal name
7 first.
8 THE WITNESS: Jonathan Emanuel Harper.
9 THE COURT: Spell your first name.
10 THE WITNESS: J-o-n-a-t-h-a-n.
11 THE COURT: Your last name?
12 THE WITNESS: H-a-r-p-e-r.
13 THE COURT: Now, Jonathan, now, listen to
14 me carefully. If the question that is asked of
15 you -- are you listening to me?
16 THE WITNESS: Yes.
17 THE COURT: -- by either one of these
18 attorneys calls for a yes or no answer, state yes or
19 no. Don't shake your head or say um-huh --
20 THE WITNESS: Okay.
21 THE COURT: -- because the court reporter
22 here cannot take that type of response. Do you
23 understand that?
24 THE WITNESS: Yes.
25 THE COURT: Okay. You may proceed.

1 witness.
2
3 (Overlapping speakers)
4
5 THE COURT: Do you know how to spell it?
6 THE WITNESS: No.
7 THE COURT: It's in the Criminal
8 Complaint.
9 BY MS. NYIKOS:
10 Q. Now, when did you become a member of
11 Puro Locos?
12 A. A few years ago.
13 Q. Do you remember around what year that
14 was?
15 A. 2005.
16 Q. Now, before you became a member of Puro
17 Locos, that gang had already been in existence,
18 right?
19 A. Yes.
20 Q. Do you know where that gang started?
21 MR. TERRY: Judge, objection; it would
22 call for hearsay. He can explain what he did.
23 Anything else --
24 THE COURT: What do we need that for? He
25 said he's a member. What's the difference when it

2 started. What's his participation in it, and I agree
3 with counsel, I don't see we need all that.
4 BY MS. NYIKOS:
5 Q. Okay. Now, how did you become a member
6 of this gang?
7 A. From a friend. Well, I started -- I
8 was -- I started hanging out with him, and then like
9 one day we just went and started tagging, and after
10 that, you know, like probably like a month passes,
11 and, you know, just got -- I just got into the thing
12 more with them.
13 MR. TERRY: Judge, this would all be
14 hearsay. It's all based on out of court testimony.
15 THE COURT: He can say what he's doing.
16 MR. TERRY: He cannot testify as to what
17 somebody else said. The original question was a very
18 broad question, how did you become a gang member.
19 He's going to testify because somebody else asked
20 him. That would be hearsay. Unless it's my client.
21 MS. NYIKOS: That's fine.
22 BY MS. NYIKOS:
23 Q. Jonathan, did you have to do something in
24 order to actually formally be a member of Puros
25 Locos?
A. Get in fights.

1 Q. Do you remember when you got into a
2 fight?
3 MR. TERRY: Judge, this is irrelevant. I
4 don't mean to belabor it.
5 THE COURT: What are you trying to drive
6 at? I agree. Let's just get to the point.
7 BY MS. NYIKOS:
8 Q. You know what, Jonathan, I want to direct
9 your attention to February 6 of 2006. Were you in
10 Puros Locos at that time?
11 A. Yes.
12 Q. Around 9:00 that night --
13 MR. TERRY: Objection, leading.
14 THE COURT: I know it's leading. I'm
15 going to give her a little leeway because of the
16 position he's in. I'll give you a little leeway. Go
17 ahead. But let's try to cut down --
18 MR. TERRY: Respectfully, for the record,
19 the only position he's in is based upon counsel's
20 statements, and I object to that.
21 THE COURT: Well, I can observe it also.
22 Go ahead. I'll give you some
23 leeway.
24 MS. NYIKOS: Thank you.

1 BY MS. NYIKOS:
2 Q. The night of February 6, 2006, did you go
3 somewhere that night?
4 A. Was that the night of the shooting?
5 MR. TERRY: Counsel cannot respond,
6 Judge.
7 THE COURT: That's true.
8 BY MS. NYIKOS:
9 Q. You said the night of the shooting. Talk
10 to me about the night of the shooting.
11 A. Well, I just, you know, it started in the
12 day. I was at Salvador's, I'm pretty sure, and then
13 like, you know, it started because I guess like
14 another gang --
15 Q. Don't tell me about anything anybody told
16 you.
17 A. This is what I know. I'm getting to the
18 point, you know, I don't have to like beat around it.
19 You know, I'm trying to get to the point so we can
20 get this finished, you know, but it was a day, and
21 Little One called his brother and said --
22 MR. TERRY: Objection, Judge.
23 THE COURT: You can't testify -- what
24 happened that night? What did you observe or see?
25 That's what they're talking about.

1 BY MS. NYIKOS:
2 Q. Did you wind up --
3 MR. TERRY: Objection, leading.
4 THE WITNESS: I got in a fight, man. I
5 got in a fight, a big ass brawl, and ended up, you
6 know, the kid ran out of the circle, and then Little
7 One was like, there he is, so like --
8 MR. TERRY: Objection to Little One,
9 Judge.
10 THE COURT: I know it.
11 What did you do, if anything, what
12 did you observe?
13 THE WITNESS: I was in the fight and then
14 I saw the shooting, man.
15 THE COURT: That's what we're driving at.
16 Okay.
17 BY MS. NYIKOS:
18 Q. Where was this fight you were in?
19 A. At the school.
20 Q. Do you know the name of the school?
21 A. Desert Ponds (phonetic). I know it was
22 on Washington and Pecos. I never went there. It was
23 my first time.
24 Q. So at Washington and Pecos,
25 Now, is that here in Clark County,

1 Nevada? 13
2 A. Yes.
3 Q. You're in this fight --
4 MR. TERRY: Objection; leading. She's
5 leading.
6 THE COURT: He said he was in a fight;
7 MR. TERRY: I understand, but, now,
8 you're in this fight, that's a leading introduction.
9 MS. NYIKOS: She hasn't even asked a
10 question, Judge. That's foundational to lead up to
11 her question.
12 THE COURT: Go ahead.
13 BY MS. NYIKOS:
14 Q. Who was fighting?
15 A. At first it was Little One.
16 Q. Do you know Little One's name?
17 A. Giovanni.
18 Q. Do you know his last name?
19 A. Garcia.
20 Q. Sp. who else?
21 A. It was me, Giovanni, Emanuel, and
22 Emanuel's girl, Stacy. I don't know if they're still
23 together, but that's who was there at the time. And
24 then Salvador, Edna, Brian, and I'm pretty sure
25 Adrian. They were on the way, and they got there as

1 THE COURT: What color? 35
2 THE WITNESS: Blue.
3 MS. NYIKOS: Let the record reflect
4 identification of the defendant.
5 THE COURT: So reflect.
6 BY MS. NYIKOS:
7 Q. What happened when E got out of the car?
8 A. He ran in the circle, and I was behind
9 him, and then we started fighting, and then the fight
10 escalated with the kid running out of the circle.
11 MR. TERRY: Objection to escalated,
12 Judge.
13 THE COURT: Just say that you saw a kid
14 running out of the circle.
15 THE WITNESS: Yeah.
16 THE COURT: Okay, go ahead.
17 BY MS. NYIKOS:
18 Q. What happened when the kid ran out of the
19 circle?
20 A. That's when E -- I mean Giovanni was
21 like, that's the kid that started all the shit, and
22 then he was like, all right, so I didn't hear that.
23 Q. Who is he? You said he was like all
24 right?
25 A. Svarieto.

1 soon as -- 14
2 MR. TERRY: That would be hearsay, Judge.
3 The question was who were you with.
4 THE COURT: He said he observed them to
5 get there. He can testify to that.
6 MR. TERRY: I didn't hear him say, I
7 observed them, Judge.
8 THE COURT: He said -- did you observe
9 them get there?
10 THE WITNESS: Yeah, I was talking about
11 before.
12 THE COURT: Let's move on.
13 THE WITNESS: Like I was saying, you
14 know, and they haven't got there, and we were already
15 there. And Giovanni is already fighting. He's in a
16 big ass circle. And, you know, I got out of the car,
17 I got out of the car.
18 BY MS. NYIKOS:
19 Q. Who's E?
20 A. Svarieto.
21 Q. Do you see E in the courtroom today?
22 A. Yes.
23 Q. Can you point to him and tell me
24 something he's wearing?
25 A. Wearing a jumpsuit.

1 Q. Then what happened? 16
2 A. He started running at him, and then
3 Giovanni followed him. And then I ran out of the
4 circle, and then I was probably like 50 feet from
5 him, and then they started arguing and --
6 Q. Who started arguing?
7 A. Giovanni and E.
8 Q. And what were they arguing about?
9 A. About the gun.
10 Q. Specifically, what did you hear E say?
11 A. It was not E at first, it was Giovanni.
12 He was like, I want that fucking gun.
13 THE COURT: What did you hear E say?
14 What did you hear him say?
15 THE WITNESS: Nothing at first.
16 BY MS. NYIKOS:
17 Q. Now, you said Giovanni said something
18 first?
19 A. Yeah.
20 Q. What did Giovanni say?
21 MR. TERRY: Objection; hearsay.
22 MS. NYIKOS: Statement of co-conspirator,
23 Judge.
24 MR. TERRY: Where is he in this charging
25 document? Where is he?

1 THE WITNESS: What? 27
2 MR. TERRY: Is he's a co-conspirator, so
3 is Mr. Harper. Does the State want to stipulate to
4 that? We'll stipulate to it.
5 THE COURT: Go ahead.
6 BY MS. NYIKOS:
7 Q. After Giovanni --
8 THE COURT: He's right. What did you
9 observe? Go ahead.
10 BY MS. NYIKOS:
11 Q. What happened next?
12 A. Like I was saying, they were fighting for
13 the gun, and then he was like, all right, I got him.
14 MR. TERRY: Objection, Judge. When he
15 says he --
16 THE COURT: Who do you mean, he?
17 THE WITNESS: E. I'm talking about
18 Giovanni and E right now. So if I say he, you know,
19 I'm sorry.
20 THE COURT: You can only testify as to
21 what E or the defendant said, what you heard the
22 defendant say.
23 MS. JIMENEZ: That's who he's talking
24 about.
25 THE WITNESS: I'm talking about before he

2 and that's when I, you know, left. 30
3 Q. Did you see E after this?
4 A. Right after?
5 Q. At any time, at any point after this?
6 A. Yeah.
7 Q. About how long after this did you see E?
8 A. I'm thinking I didn't see him. I talked
9 to him.
10 Q. How did you talk to him, on the phone, in
11 person?
12 A. On the phone.
13 Q. Do you talk to him a lot on the phone?
14 A. No.
15 Q. How did you know it was E on the phone?
16 A. Because I was like, hello. He called my
17 house phone. And I was like, hello, and then he was
18 like, what's up, dog? And I was like, what's up,
19 man, you know, and we just started talking, and he
20 was like, hey, man --
21 MR. TERRY: No foundation yet, Judge.
22 THE COURT: Yeah.
23 MS. NYIKOS: That's okay, Judge.
24 BY MS. NYIKOS:
25 Q. Did you recognize his voice?
A. Yeah. He told me it was him, you know.

1 said something. He didn't say nothing before. 28
2 BY MS. NYIKOS:
3 Q. Who's the person who said, that's all
4 right, I got it, man?
5 A. E. He didn't say that in the words, but
6 pretty much in that phrase.
7 MR. TERRY: Then we'll move to strike,
8 Judge.
9 THE COURT: What did you actually hear
10 him say?
11 THE WITNESS: I got it.
12 BY MS. NYIKOS:
13 Q. What happened after that?
14 A. He cocked the gun back and ran in the
15 middle of the street and shot the kid.
16 Q. How many times did he shoot?
17 A. Pretty sure he emptied the clip.
18 Q. Do you remember how many shots you heard?
19 A. Nine, eight.
20 Q. Did you see what happened to the kid?
21 A. After I seen him hit the floor.
22 Q. Did you see where E went?
23 A. After the first shot, you know, he ran up
24 to him, you know, that's what I saw, and then after
25 that the gunshots started, and then the police came,

1 Q. Did you guys talk about what happened at 30
2 the school?
3 A. Not the thing. We didn't talk about it,
4 but he was like, I fucked up, man.
5 Q. Now, when this fight was happening, did
6 you know E had a gun?
7 A. Yes.
8 Q. How did you know that?
9 A. Well, before I got in the car, and, you
10 know, he got it from Puppet, Emanuel.
11 Q. Did you see him get it from Puppet?
12 A. No.
13 Q. How do you know he got it from Puppet?
14 A. Because it was a black gun and that was
15 Puppet's gun.
16 Q. Did you ever talk to E about how he got
17 the gun?
18 A. No.
19 MS. NYIKOS: Court's indulgence.
20 BY MS. NYIKOS:
21 Q. Now, Jonathan, do you remember talking to
22 a detective in this case?
23 A. Mogg or Hardy.
24 Q. Do you remember talking to them?
25 A. Yes.

1 Q. Do you remember being on tape? 21
2 A. Yes.
3 Q. Do you remember telling Detective Mogg --
4 MR. TERRY: Judge, she's now refreshing
5 his memory for anything. I mean we don't have -- all
6 right. Withdraw the objection.
7 MS. NYIKOS: Page 17.
8 BY MS. NYIKOS:
9 Q. Do you remember telling Detective Mogg
10 that E told you that Puppet gave him the gun?
11 A. Yes.
12 Q. Do you know where the gun ended up?
13 A. After the shooting I'm pretty sure he
14 said he put it in the toilet.
15 MR. TERRY: Objection.
16 THE COURT: Who's he?
17 BY MS. NYIKOS:
18 Q. Did you say he or E?
19 A. E.
20 Q. E?
21 A. Yeah. I'm sorry about my speech.
22 THE COURT: That's all right. I thought
23 you said he. You're speaking about the defendant; is
24 that correct?
25 THE WITNESS: Yes.

1 THE WITNESS: Like a day after. 23
2 THE COURT: That's what he's talking
3 about. When did you have your conversation about
4 that.
5 BY MS. NYIKOS:
6 Q. Okay. Now, so the day after this
7 shooting he told you -- I'm sorry again, without the
8 objections and everything --
9 MR. TERRY: Objection, leading.
10 THE COURT: What did he tell you?
11 BY MS. NYIKOS:
12 Q. What did he tell you about what happened
13 to the gun?
14 A. He said that he got rid of it.
15 Q. Did he tell you how?
16 A. He said that he put it in the toilet.
17 Q. Did he tell you where?
18 A. It was like a toilet for like the
19 garbage, you know.
20 Q. That's okay.
21 Did he tell you where this toilet
22 was?
23 A. Around the school.
24 Q. And you said it was for the garbage. Did
25 he tell you -- what led you to believe that it was

1 BY MS. NYIKOS: 22
2 Q. What did he tell you?
3 A. Well, about the gun?
4 Q. Yes.
5 A. He just said, you know, he got it from
6 Puppet.
7 Q. What did E tell you about what happened
8 to the gun after the shooting?
9 MR. TERRY: Could we have a foundation,
10 Judge?
11 THE WITNESS: Got rid of it.
12 THE COURT: Hold it. Do you know about
13 when or where did he tell you this?
14 BY MS. NYIKOS:
15 Q. Do you know when E talked to you about
16 what happened to the gun?
17 A. He told us all, he told us all that he
18 put it in the toilet.
19 MR. TERRY: Excuse me, Judge. Still no
20 foundation.
21 THE COURT: When did he tell you that?
22 THE WITNESS: In prison.
23 THE COURT: When?
24 THE WITNESS: When?
25 THE COURT: Yeah.

1 for the garbage? 24
2 A. No, he just put it in the toilet, and
3 then he told Puppet, and then Puppet, I'm pretty
4 sure, Puppet went there.
5 MR. TERRY: Objection.
6 MS. NYIKOS: Don't talk about what Puppet
7 did.
8 THE WITNESS: This is about the gun
9 though.
10 MS. NYIKOS: I know, but you can't talk
11 about what other people did, only about what you
12 heard.
13 THE WITNESS: Okay.
14 BY MS. NYIKOS:
15 Q. Now, on the day of shooting can you tell
16 me what E was wearing; do you remember?
17 A. All black, sleeve, long sleeves, pants,
18 MS. NYIKOS: Page 14, counsel.
19 BY MS. NYIKOS:
20 Q. Do you remember telling Detective Mogg
21 that it was a gray sweatshirt?
22 A. To refresh my mind, yes, it was a gray
23 hoodie.
24 Q. How did you get to the school that night?
25 A. Manual.

1 Q. Was it Emanuel's car? 25
2 A. Yes.
3 Q. What kind of car was it?
4 A. It was a black Elko -- El Camino.
5 Q. And do you know Emanuel's nickname?
6 A. Puppet.
7 Q. Who else was in that car?
8 A. It was me, Nvaristo, Emanuel, Stacy.
9 Q. Why were you going to that school?
10 A. To fight.
11 Q. Who were you going to fight?
12 A. I didn't know. You know, I know -- I
13 don't know.
14 MR. TERRY: Objection; hearsay. Move to
15 strike. If it was said by my client, I'll withdraw
16 the objection, but that wasn't the question.
17 BY MS. NYIKOS:
18 Q. When you got to the school who did you
19 start fighting with?
20 MR. TERRY: Judge, is that stricken then?
21 THE COURT: That's stricken, yeah.
22 BY MS. NYIKOS:
23 Q. When you got to the school who did you
24 start fighting with?
25 THE COURT: If he knows.

1 they haven't proved anything in reference to it yet, 27
2 Judge. And if he was in a fight on a prior occasion,
3 it is irrelevant.
4 MS. JIMENEZ: Judge, we have alleged a
5 gang enhancement. He can testify to what the gang
6 that he was a member of did, what their activities
7 were. If it's in his personal knowledge, he can
8 testify to it.
9 THE COURT: I'll let him go ahead. He
10 said he was in the gang. He was in that gang. What
11 their activities were, I'll let him go ahead, what he
12 did anyway.
13 MS. NYIKOS: Yes.
14 THE WITNESS: I got there and I started
15 fighting, like I was saying.
16 THE COURT: Wait for the question.
17 BY MS. NYIKOS:
18 Q. That's okay. Is this the only fight you
19 were in as a member of Puros Locos?
20 A. That I can recall, yes. A big fight. It
21 was a big fight. I mean there was probably like one
22 or two other fights that I was in, and I was out of a
23 kickback, but it was nothing serious.
24 Q. So you were in a couple of other fights?
25 MR. TERRY: Objecting; leading.

1 THE WITNESS: I know I fought the leader, 26
2 one of the leaders from the other gang. I don't know
3 his name.
4 You know what, I take that back.
5 It was Diablo.
6 BY MS. NYIKOS:
7 Q. What was the other gang?
8 MR. TERRY: Objection. That assumes
9 facts not in evidence, and it would be hearsay.
10 THE COURT: If he knows. I'll let him
11 answer if he knows.
12 THE WITNESS: Yeah, Brown Pride.
13 MR. TERRY: Assumes facts not in
14 evidence. As long as the record reflects I'm
15 objecting.
16 THE COURT: I'll let the record reflect
17 that.
18 MR. TERRY: Thank you, Judge.
19 BY MS. NYIKOS:
20 Q. Now, is this the only fight you were in
21 as a member of Puros Locos?
22 MR. TERRY: Objection; irrelevant.
23 MS. NYIKOS: Judge, we've alleged a gang
24 enhancement.
25 MR. TERRY: They may have alleged it, but

1 THE COURT: He testified he did, 28
2 MS. NYIKOS: Thank you.
3 BY MS. NYIKOS:
4 Q. What other things did you do as a member
5 of Puros Locos?
6 MR. TERRY: Continuing objection, Judge.
7 THE COURT: It's noted.
8 THE WITNESS: Well, there's a lot, you
9 know, I did -- I mean I know, pretty sure they did
10 it too.
11 THE COURT: Just what you did.
12 MR. TERRY: Objection.
13 THE WITNESS: I got in fights, and I
14 tagged. And I, you know, I made money by selling
15 drugs.
16 BY MS. NYIKOS:
17 Q. Did you do that as a member of Puros
18 Locos?
19 A. Yeah.
20 Q. And did other members of the gang do
21 those things with you?
22 MR. TERRY: Objection; hearsay, without
23 foundation.
24 THE COURT: If he observed it. If he
25 observed them doing the same thing, I'll let him

1 testify to it. 29
2 MR. TERRY: Foundation then, Judge.
3 When, who present.
4 THE COURT: I don't see the relevancy of
5 it, but --
6 THE WITNESS: When?
7 BY MS. NYIKOS:
8 Q. Yes, when?
9 A. Pretty much I mean I was helping Salvador
10 like sell the drugs, and then like, you know, like he
11 had a friend, Little Sak, and I had to pay him back,
12 and that was like during and before, you know, I was
13 doing that before I got in the gang.
14 Q. What was Salvador's role in Puros Locos?
15 MR. TERRY: Objection, hearsay.
16 THE COURT: If he knows. That is
17 hearsay, but if he knows.
18 MS. JIMENEZ: It's not hearsay. He
19 didn't ask for a statement. He asked what his
20 knowledge is of what Salvador's role is. That's not
21 hearsay.
22 THE COURT: I'll let him answer.
23 THE WITNESS: Salvador wanted to take
24 over things, and he wanted to recruit other people.
25 MR. TERRY: Objection, hearsay.

1 this group? 31
2 THE WITNESS: I'm sorry, what?
3 THE COURT: The reason you joined the
4 gang, was that a result of Salvador asking you to
5 or --
6 THE WITNESS: Yeah and no. Yes, because
7 he asked, and on my part, I wanted to.
8 THE COURT: You wanted to?
9 THE WITNESS: At the time.
10 BY MS. NYIKOS:
11 Q. Only if you know this. Is there a
12 relationship between Sal and EP?
13 A. Yes.
14 MR. TERRY: Objection, hearsay.
15 THE COURT: I didn't know how he would
16 know that. How would he know that without having
17 somebody tell him.
18 BY MS. NYIKOS:
19 Q. Did he ever tell you if there was a
20 relationship between E and Sal?
21 MR. TERRY: Foundation.
22 THE WITNESS: No. I just knew.
23 MR. TERRY: No. We'll accept that.
24 MS. NYIKOS: Judge, one second. Court's
25 indulgence.

1 BY MS. NYIKOS: 30
2 Q. Did you answer to Salvador?
3 A. Most of --
4 THE COURT: Hold it. Did you participate
5 in recruiting the members?
6 THE WITNESS: No.
7 BY MS. NYIKOS:
8 Q. Were you recruited by Salvador?
9 A. Yes.
10 Q. Okay.
11 THE COURT: I'll let him answer that.
12 MR. TERRY: It would still be hearsay,
13 Judge.
14
15 (Overlapping speakers)
16
17 THE COURT: He can testify if he's
18 recruited by Salvador.
19 MR. TERRY: It assumes facts not in
20 evidence that Salvador said something. You know,
21 will you join a fraternity? What's the difference
22 between that and somebody saying yes. It has to
23 assume facts not in evidence.
24 THE COURT: Let me put it this way, did
25 you join as a result of Salvador asking you to join

1 BY MS. NYIKOS: 32
2 Q. Now, the kid who got shot that night, can
3 you describe him for me?
4 A. Short, black hair, Mexican.
5 Q. About how old was he?
6 A. 14, 15.
7 Q. Had you ever seen him before?
8 A. No.
9 Q. And just before he got shot what was he
10 doing?
11 A. He was in the circle. He was fighting,
12 pretty sure, and then he ran out of the circle.
13 Q. Now, when he ran out of the circle what
14 did he do?
15 A. He ran after him. And when he was
16 crossing, that's when -- that's -- this is when the
17 kid crossed, this is the --
18 MR. TERRY: Judge, he answered the
19 question. He ran after him. That's the question.
20 That was the answer.
21 THE COURT: Okay, go ahead.
22 BY MS. NYIKOS:
23 Q. So what did he do when he was crossing
24 the street?
25 A. He was trying to run away.

1 Q. And what was E doing? 33
2 A. Chasing him. The same as for Giovanni.
3 Q. And --
4 THE COURT: He testified to this already.
5 We're just going over it.
6 BY MS. NYIKOS:
7 Q. Did you see where this kid got shot,
8 where on his body?
9 A. In his back. He was running and then out
10 of the blue he just fell.
11 Q. Now, you said earlier that E and Giovanni
12 were fighting for the gun. Were they doing this
13 while they were chasing the kid?
14 MR. TERRY: I don't know that that's an
15 accurate characterization of the testimony, Judge.
16 If it is, I yield to you and the record.
17 THE COURT: I don't think they were
18 arguing over it then. I'm not clear on that myself.
19 Let him clear it up. See if you can.
20 BY MS. NYIKOS:
21 Q. Could you hear anything that was
22 happening while E and Giovanni were chasing this kid?
23 A. Yeah. I mean they were fighting for the
24 gun. E had the gun. Giovanni was asking for the
25 gun. And they just stopped like by the stop sign.

1 THE COURT: Hearsay. 35
2 THE WITNESS: What I saw the defendant
3 do, Judge, your Honor --
4 THE COURT: You can testify what you
5 heard him say and what you saw him do.
6 THE WITNESS: What I saw and what I heard
7 is what I'm telling you. They were fighting for the
8 gun.
9 MR. TERRY: Objection.
10 THE WITNESS: Hold on, dude.
11 MR. TERRY: Facts not in evidence.
12 MS. JIMENEZ: He's testifying to it.
13 That's in evidence.
14 THE COURT: That's in evidence. He
15 observed that. Go ahead.
16 THE WITNESS: Like I was saying, they
17 were fighting for the gun, and out of the blue he
18 cocked the gun back and he ran in the street and shot
19 him.
20 THE COURT: Who's he?
21 THE WITNESS: Evaristo.
22 You know, it was --
23 THE COURT: Hold it. There is no
24 question.
25

1 and then like he was like, I got it, because Giovanni 34
2 was like, give me that fucking gun. I'm going to
3 kill him.
4 Q. What tone of voice was Giovanni using
5 when he was saying that?
6 MR. TERRY: That again would be hearsay.
7 Move to strike.
8 MS. NYIKOS: Judge, I'm trying to get in
9 a hearsay objection as excited utterance.
10
11 (Overlapping speakers)
12
13 THE COURT: Ask what the defendant did.
14 Why are we getting into all this. Ask what the
15 defendant did.
16 MS. JIMENEZ: Judge, it's relevant to
17 what's going on. The fact that they're acting
18 together. The fact that they're part of a gang. The
19 fact that --
20 THE COURT: We already know that. We got
21 that established as far as I'm concerned. What did
22 he observe the defendant do.
23 MR. TERRY: So the objection is any
24 statement made by other individuals is sustained,
25 Judge?

1 BY MS. NYIKOS: 36
2 Q. Just for clarification, E is Evaristo?
3 A. Si. Yea.
4 MS. NYIKOS: Pass the witness.
5 THE COURT: Just a minute.
6
7 (After a recess the following
8 proceedings were had.)
9
10 Okay. Mr. Terry, the State has
11 finished direct examination, so you can
12 cross-examine.
13 MR. TERRY: Thank you.
14
15 CROSS-EXAMINATION
16 BY MR. TERRY:
17 Q. Good morning.
18 A. Good morning.
19 Q. Just so we're clear, the gentleman that's
20 seated to my right, what is his full name?
21 A. Evaristo Jonathan --
22 Q. Spell it, please.
23 A. I don't know.
24 Q. Would you pronounce it a little slower?
25 A. Evaristo.

1 Q. Are you saying Evaristo? 37
2 A. Yes.
3 Q. Go ahead.
4 A. Jonathan Garcia.
5 Q. Do you remember when the police asked you
6 what his name was, you had to ask your mother, yes or
7 no?
8 A. I don't think that happened.
9 Q. Well, counsel asked you questions in
10 reference to a statement that you made to the
11 detectives, and just for the purposes of your
12 recollection and counsel, just so you're clear, it's
13 this one here on 4-1.
14 Do you recall that you indicated
15 you knew E's name, but it was too hard to pronounce,
16 at which time your mother provided the name, yes or
17 no?
18 A. Yes.
19 Q. Now, at a point in time prior to February
20 of '05, did you receive a head injury?
21 A. Yes.
22 Q. Were you in fact shot in the head?
23 A. Yes.
24 Q. And which portion of your head received
25 that injury?

1 you, she asked you about an incident on February 5; 39
2 is that right?
3 A. Yes.
4 Q. February 6?
5 A. It was on the 6th?
6 Q. I'm repeating what counsel asked you.
7 When she asked the questions, it was in reference to
8 February 6.
9 A. Okay.
10 Q. Now, my question is when did you receive
11 the head injury?
12 A. Two weeks later.
13 Q. Now, I was not there when you got a head
14 injury, correct?
15 A. No.
16 Q. No, it's not correct or yes, it is
17 correct?
18 A. Yes.
19 Q. E was not present, correct?
20 A. Yes.
21 Q. You were shot in the head, right?
22 A. Yes.
23 Q. When you spoke to the police it wasn't in
24 February, correct?
25 A. Yes.

1 A. My left side right here. 38
2 Q. Let the record reflect he's pointing to
3 his left.
4 And where did the bullet go?
5 A. Well, I'm pretty sure the hollow point
6 went up, that's how my head got split, and then the
7 hollow, it burst in my head.
8 Q. And as a result you had some brain
9 surgery, correct?
10 A. Yes.
11 Q. Fairly extensive, correct?
12 A. Yes.
13 Q. And that affected your memory, correct?
14 A. No.
15 Q. Didn't affect your memory?
16 A. No.
17 Q. Affect your speech?
18 A. A little bit.
19 Q. A little bit. Okay. When did that
20 occur?
21 A. 2006.
22 Q. When in 2006?
23 A. February 18, around 12.
24 Q. February 18.
25 When counsel directed questions to

1 Q. It wasn't in March either, correct? 40
2 April 1?
3 A. It was late April.
4 Q. Your recollection is that it was late
5 April?
6 A. Or early.
7 Q. Now, when they asked you when this
8 alleged shooting occurred at the school that you have
9 described, you didn't know, is that right? You
10 didn't know if it was February, March, or any other
11 month, correct; yes or no?
12 A. I knew.
13 Q. Yes or no?
14 A. I knew -- yes.
15 Q. Now, when you arrived at the school there
16 was already a fight going on, correct?
17 A. Yes.
18 Q. Okay. And you observed that fight,
19 correct?
20 A. Yes.
21 Q. So you weren't going there to start a
22 fight, you were going there, and when you got there,
23 there was a fight already going on, correct?
24 A. Yes.
25 Q. All right.

2 THE COURT: Is that yes? 42
 3 THE WITNESS: Yes.
 4 BY MR. TERRY:
 5 Q. And when you got in the automobile, you
 6 knew that you were going there --
 7 A. To fight.
 8 Q. -- for a reason, correct?
 9 A. To fight.
 10 Q. Is that correct?
 11 A. Yes.
 12 Q. All right. I didn't ask you for what.
 13 A. Okay.
 14 MR. TERRY: So I move to strike that as
 15 nonresponsive, Judge.
 16 THE COURT: Okay.
 17 BY MR. TERRY:
 18 Q. You knew you were going there for a
 19 reason, correct?
 20 A. Yes.
 21 Q. When you got there a fight was already
 22 going on, correct?
 23 A. Yep.
 24 Q. So for whatever reason you would have
 25 went there, it didn't make any difference because
 there was already a fight occurring, correct?

1 A. Yes. 43
 2 Q. All right. Now, when you looked over and
 3 saw that fight, were there men and women involved in
 4 that fight? And when I say men and women, boys and
 5 girls, men and women, teenage women, teenage boys?
 6 A. There was only guys.
 7 Q. Only guys?
 8 A. There was girls there.
 9 Q. Only guys, correct?
 10 A. The school just got out, so there was --
 11 Q. Just answer my question.
 12
 13 (Overlapping speakers)
 14
 15 THE COURT: Hold it, hold it, hold it.
 16 MR. TERRY: I don't care if school just
 17 got out, Judge.
 18 THE WITNESS: Then I answered his
 19 question.
 20
 21 (Overlapping speakers)
 22
 23 THE COURT: Hold it, hold it.
 24 You asked him in relation to the
 25 fight were there girls and guys involved in the

1 fight. That was your question. He was trying to 43
 2 answer it.
 3 BY MR. TERRY:
 4 Q. Were there girls and boys involved in the
 5 fight?
 6 A. Guys.
 7 Q. All guys?
 8 A. Yes.
 9 Q. And just so we're clear, who is in the
 10 vehicle that you went to the school with? Slowly.
 11 A. Again, it was me, Evaristo, Puppet,
 12 Emanuel, and his girl, Stacy.
 13 Q. So there was a girl in the car, right?
 14 A. Yes.
 15 Q. Now, you've testified you are a gang
 16 member, correct?
 17 A. Ex.
 18 Q. Was the girl a gang member?
 19 A. No.
 20 Q. There was any other females in the car?
 21 A. No.
 22 Q. When you got in the car, E, as you refer
 23 to him, did not have a gun, is that correct?
 24 A. Wrong.
 25 Q. When you got in the car?

1 A. He had a gun. 44
 2 Q. When you got in the car?
 3 A. He had a gun.
 4 Q. When you got in the car?
 5 A. I was not in the car, I was in the back,
 6 but he had a gun.
 7 Q. You were in the back of a car?
 8 A. Yeah.
 9 Q. And that's not in the car?
 10 THE COURT: Hold it, hold it. She cannot
 11 take -- let him answer and wait until he finishes the
 12 question before you answer.
 13 MR. TERRY: These are all yes and nos,
 14 Judge.
 15 THE COURT: I know, but just state your
 16 question.
 17 BY MR. TERRY:
 18 Q. Were you in a car?
 19 A. Yes.
 20 Q. Were you in the back seat?
 21 A. Yes.
 22 Q. Before you got in the car I did not have
 23 a gun, correct?
 24 A. I answered that question, man. I said
 25 yes.

1 Q. Answer it one more time. 45
2 A. He had a gun.
3 Q. When did he get the gun?
4 A. Before he got in the car.
5 Q. When?
6 A. Before he got in the car.
7 Q. When? At a house?
8 MS. JIMENEZ: Objection; asked and
9 answered. He's battering the witness.
10 MR. TERRY: It's not battering. It's
11 asking for an answer, Judge.
12 THE COURT: Hold it, hold it. Let's just
13 simmer down here.
14 THE WITNESS: I'm supposed to say like
15 the minutes that he got the gun?
16 THE COURT: Hold it. Just listen to his
17 question. Do you know when he got the gun?
18 THE WITNESS: Before he got in the car.
19 Five minutes before.
20 BY MR. TERRY:
21 Q. Was it directly before?
22 A. Yes.
23 Q. Was it two minutes before?
24 A. It was before he got in the car.
25 Q. Was it two minutes before?

1 A. Again, dude, it was before he got in the 46
2 car. It was five minutes.
3 Q. Five minutes before?
4 A. Before he got in the car.
5 Q. Five minutes before, Mr. Harper, right?
6 A. Yes.
7 Q. And you were aware there was a gun in the
8 car, correct?
9 A. Yes.
10 Q. What are guns used for?
11 A. To protect.
12 Q. And?
13 A. And shoot.
14 Q. As a gang member, you have testified you
15 were a gang member. did you ever carry a gun?
16 A. No.
17 Q. Never carried a gun?
18 A. No.
19 Q. Now, you testified that you got out of
20 the car and you went over to the fight, correct?
21 A. We all did.
22 Q. No, listen to my question.
23 THE COURT: Listen.
24 THE WITNESS: Yes.
25

1 BY MR. TERRY: 47
2 Q. You testified that you got out of the
3 car, correct?
4 A. Yes.
5 Q. And you went over and participated in the
6 fight, correct?
7 A. Yes.
8 Q. And that the fight was already ongoing
9 before you jumped in, correct?
10 A. Yes.
11 Q. Did anybody -- strike that.
12 Did I direct you to participate in
13 that fight verbally in the car after you observed the
14 fight was already going on?
15 A. What do you mean?
16 Q. Exactly what I asked, did I direct you to
17 participate --
18 A. No.
19 Q. The answer is no, correct?
20 A. Yes.
21 MR. TERRY: Could I have the Court's
22 indulgence?
23 THE COURT: Sure.
24 BY MR. TERRY:
25 Q. When you observed an individual that you

1 described as the individual that was ultimately shot, 48
2 when you observed him run from the circle, as you put
3 it, did you also run after him, yes or no?
4 A. No. I got --
5 Q. Where did you remain? Where did you
6 remain?
7 A. What do you mean, like in the circle?
8 Q. Where were you?
9 A. I was in the circle, and then when they
10 ran, I ran out of the circle.
11 Q. You answered my question.
12 My question was where were you,
13 and you stated you were still in the circle, correct?
14 A. Yeah.
15 Q. Yes?
16 Were you still fighting?
17 A. Yeah?
18 Q. When you were in the circle.
19 A. I was fighting when they were fighting.
20 Q. My question is when you observed E in
21 effect go after the individual that had left the
22 circle --
23 A. Yes.
24 Q. -- that was already shot, that was shot,
25 where were you?

1 A. There E was running after, I was running 49
2 out of the circle.
3 Q. You were running after the same boy,
4 correct?
5 A. I was just running out of the circle.
6 Q. Where were you running?
7 A. Out of the circle. And then --
8 Q. Let me try this one more time. Where
9 were you running?
10 A. To the street.
11 Q. Okay. Were you going after E; yes or no?
12 A. No.
13 Q. Were you going after Sal; yes or no?
14 A. No.
15 Q. Were you headed in the same direction as
16 the boy that you indicated was shot; was running; yes
17 or no?
18 A. Can you phrase the question before I
19 answer that question?
20 Q. I'll ask it again.
21 A. Yeah.
22 Q. Were you also running after the
23 individual that you testified that was ultimately
24 shot; yes or no?
25 A. Yes.

1 Q. So you were chasing him, correct -- 50
2 A. Yes.
3 Q. -- yes or no?
4 Yes?
5 A. I was running out of the circle.
6 Q. And you were chasing the boy; yes or no?
7 A. I was chasing. I was running with them.
8 Q. You were running in the same direction as
9 Sal and E?
10 A. Yep.
11 Q. Were you also chasing the boy; yes or no?
12 A. No.
13 Q. You weren't chasing the boy?
14 A. No.
15 Q. You were just running after E and Sal?
16 A. Yes. I was just trying to get out of the
17 circle.
18 Q. These are yes and nos.
19 A. Okay.
20 THE COURT: He answered.
21 BY MR. TERRY:
22 Q. Now, you indicated when you observed the
23 police you left, you ran; is that correct?
24 A. Yes.
25 Q. Did you actually see the police arrive on

1 that occasion? 51
2 A. No.
3 Q. Okay. So did you run before the police
4 arrived or when you observed them?
5 A. I ran when I heard gunshots.
6 Q. Listen to my question, Mr. Harper.
7 Your testimony on direct
8 examination was that when you saw the police, you
9 ran.
10 My question is did you actually
11 see the police and that is what caused you to run?
12 A. I heard sirens.
13 Q. My question is did you actually see the
14 police --
15 A. No.
16 Q. -- and is that what caused you to run?
17 A. No.
18 Q. But you obviously heard --
19 A. I ran --
20 Q. Listen to the question.
21 MS. WYNOS: Judge, asked and answered at
22 this point. He already said he heard the sirens, and
23 that's not -- he didn't run because he saw the
24 police.
25 THE COURT: That's what he said.

1 MR. TERRY: That's fine. 52
2 BY MR. TERRY:
3 Q. Do you remember that this taped
4 interview -- this is going to be page 3, counsel.
5 MS. WYNOS: Thank you.
6 BY MR. TERRY:
7 Q. Page 3. Do you remember that when the
8 police did a taped interview you were asked, who is
9 E, and you stated, I don't know; yes or no?
10 A. Yes.
11 Q. Do you remember being asked if anybody
12 was talking in the car while you were driving to the
13 school?
14 MS. WYNOS: Page, counsel.
15 MR. TERRY: Page 6.
16 BY MR. TERRY:
17 Q. Do you remember being asked that question
18 by the police --
19 A. Did I hear --
20 Q. -- on April 1?
21 A. Yes.
22 Q. The question is were you asked if you
23 recalled anybody talking in the car when you were
24 going to the school?
25 A. And I just said yes.

Q. And you said no. 53

A. In the statement?

MR. TERRY: May I approach?

THE COURT: Sure. Show him the statement.

MR. TERRY: I will.

BY MR. TERRY:

Q. I show you the bottom, page 6, the question was: And was anybody talking in the car while you were going to the school, and your response was no, correct?

A. Okay.

Q. Is that correct?

A. Yes.

Q. So all the way from where you left to when you got to the school nobody was talking, right?

Right?

A. Yes.

Q. Do you remember being asked by the police: And you were going to the school because of a fight, not to fight, do you remember that?

A. Yes.

Q. And your response was yeah -- page 7, counsel. Your response was yeah, right?

A. Yes.

boy? 55

And your response was:

Cus, um, Little One

(unintelligible) him, continuing, police.

Little One told him to?

ANSWER: No, provoked him.

QUESTION: Provoked him?

ANSWER: Yeah.

QUESTION: Okay --

THE COURT: Is this his statement, what he's saying?

MR. TERRY: That's correct.

THE COURT: Okay.

BY MR. TERRY:

Q.

QUESTION: Okay, um.

ANSWER: Peer pressure.

QUESTION: Pressure?

Yeah.

QUESTION: Why would there be pressure?

ANSWER: Because Little One told him.

Do you recall telling the police all that?

Q. All right. So just so we're clear, you 54

were going to the school because of a fight, correct?

A. Yes.

Q. Do you recall being asked whether or not you jumped in the fight that was going on already at the school?

A. Yes.

Q. And do you remember your response was yes?

A. Yes.

Q. Do you remember telling the police that after this incident I told you he was scared?

A. Yes.

Q. Do you remember telling the police that he shot the boy because somebody provoked him?

MS. MYTOS: Objection.

MR. TERRY: Page 15 and 16.

MS. MYTOS: Was this coming out of --

MR. TERRY: Is this an objection?

BY MR. TERRY:

Q. The question is do you remember telling the police?

A. No.

Q. Do you recall being asked the question: Did he tell you why he shot the

A. Yes. 56

Q. Because I was pressured, that's what your indication was to the police, correct?

A. Peer pressure, yeah.

Q. By whom?

A. Giovanni. Little One.

Q. Do you recall telling the police in response to this question:

Before you got there, there being the school, did you know who had the gun?

And your response was Puppet.

Do you recall telling the police all that?

A. No.

Q. Okay. Page 19, counsel.

Just so we're clear, so the Court knows, who was Puppet, what was the name?

A. Emmanuel.

Q. Who is Emmanuel? What's Emmanuel's --

A. Puppet.

Q. What's Emmanuel's last name?

A. Don't know.

Q. Don't know?

A. No.

Q. Okay. Page 19.

1 Before you got there, did you know 57
2 who had a gun?
3 ANSWER: Puppet.
4 Is that your answer?
5 A. Yes.
6 Q. Just so we're clear, Puppet is not the
7 gentleman that's seated at that same table with me,
8 correct?
9 A. Yes.
10 Q. Do you remember being asked: Did you see
11 it, and your response being yes or yeah; do you
12 remember that?
13 A. Yes.
14 Q. Do you remember being asked: Where was
15 the gun, and your response was -- well, you were
16 asked two questions: Where was the gun, and then the
17 officer asked you, in his waistband, and your
18 response was yeah; do you remember that?
19 A. Yes.
20 Q. And we're referring to Puppet, correct?
21 A. Yes, but can I say something?
22 Q. Do you remember --
23 THE COURT: No.
24
25

1 BY MR. TERRY:
2 Q. The question is did you ever tell the
3 police you sold drugs, and your answer was yes,
4 correct?
5 A. Yes.
6 Q. The young ladies to my left are not
7 police, they're deputy district attorneys.
8 Now, do you want to change your
9 testimony?
10 A. Why would I do that?
11 Q. Okay. Which police officer or detective
12 did you tell that you sold drugs?
13 A. Only thing I'm pretty sure -- I said that
14 to the police?
15 Q. You just said that you did.
16 A. Yeah, but she's not a police.
17 Q. Let try this again.
18 A. She asked me a question and I told her.
19 Q. You indicated on direct examination.
20
21 (Overlapping speakers)
22
23 THE COURT: Hold it, hold it, hold it.
24 One at time. Wait until he gets finished, then you
25 can answer, okay?

1 BY MR. TERRY: 58
2 Q. Do you remember telling the police that
3 Puppet told B to hold the gun; yes or no?
4 A. Can you rephrase that question?
5 Q. Sure.
6 Do you remember telling the police
7 that Puppet told B to hold the gun?
8 A. Yes.
9 Q. Now, did you tell the police that you
10 sold drugs?
11 A. Yes.
12 Q. Where in that statement do you tell the
13 police that you are or were a seller of drugs?
14 A. They never asked.
15 Q. So when did you tell the police you sold
16 drugs?
17 A. When she just told me, when she asked me.
18 Q. When she just told you?
19 A. She asked me.
20 Q. I didn't hear her say to you, you're a
21 drug seller. She asked you a question.
22 MR. JIMENEZ: Judge, he's clarifying
23 himself.
24 THE COURT: Hold it, hold it, hold it.
25 MR. JIMENEZ: Objection.

1 Do ahead. 60
2 BY MR. TERRY:
3 Q. You indicated on direct examination that
4 you sold drugs, correct?
5 A. Yes.
6 Q. My question's simple, simple question.
7 Did you tell the police that?
8 A. No.
9 Q. Never told the police that?
10 A. No.
11 Q. Is that because they didn't ask?
12 A. Yes.
13 Q. So you didn't volunteer that, right?
14 A. No. There was more --
15 Q. Now, were you promised that you wouldn't
16 be prosecuted for this?
17 A. What do you mean?
18 Q. Exactly what the question says. Were you
19 promised you would not be prosecuted for this?
20 A. This?
21 Q. Yes.
22 A. Yes.
23 Q. Okay. Who made you that promise? One of
24 these nice young ladies to my left?
25 And if the answer is no, that's

1 fine.
2 A. No.
3 Q. Who made you that promise?
4 A. Mogg.
5 Q. The police officer, right?
6 A. Yes.
7 Q. In fact, you haven't been prosecuted,
8 right?
9 A. Yes.
10 Q. Even though you were in the car? Yes?
11 A. Yes.
12 Q. And you knew there was a gun? Yes?
13 A. Yes.
14 Q. And you participated in the fight? Yes?
15 A. Yes.
16 MR. TERRY: Nothing further.
17 Judge, just so we're clear, I
18 would like a copy of any documents where this young
19 man has been offered a promise not to testify, and
20 I'm not attributing that to these DA's.
21 THE COURT: If there's a document, if
22 there's one in existence.
23 MR. TERRY: Correct.
24 MS. NYIKOS: There is no document.
25

61 1 statement when Detective Mogg on the bottom of page 3 62
2 asked you, who is E, you said, I don't know?
3 A. I knew -- can I --
4 THE COURT: No.
5 BY MS. NYIKOS:
6 Q. Can you clarify that? Did you know E's
7 name?
8 A. I knew it, but I couldn't say it because
9 my speech problem. That's why my name --
10 MS. NYIKOS: Page 6 and 7, counsel.
11 BY MS. NYIKOS:
12 Q. Now, counsel asked you about your
13 statement earlier that started with, was anybody
14 talking in the car when you were going to school, and
15 your answer was no.
16 He also asked you about whether
17 you were going there for a fight.
18 Do you remember telling the
19 detective when asked, Was there any research you were
20 to go up there, and you said yeah?
21 QUESTION: Why?
22 Fight.
23 Were you going there to fight?
24 A. To fight.
25 Q. Now, counsel had asked you about your

1 (Overlapping speakers) 62
2
3 MR. TERRY: They can't represent that
4 unless they've checked.
5 THE COURT: I said if there's one in
6 existence. They said there isn't. I don't know if
7 they checked on it or --
8 MS. NYIKOS: Judge, Miss Jimenez and I
9 went to homicide, looked through the entire homicide
10 file, copied every single piece of paper in it, and
11 provided those copies to Mr. Terry as well, so
12 there's nothing in that binder.
13 MR. TERRY: That doesn't mean they
14 were -- they asked the question of the officer,
15 Judge. That would be clear break.
16
17 REDIRECT EXAMINATION
18 BY MS. NYIKOS:
19 Q. Jonathan, when you talked to Detective
20 Mogg in April, how were your communication skills
21 back then?
22 A. Horrible.
23 MS. NYIKOS: And page 3 and 4, counsel.
24 BY MS. NYIKOS:
25 Q. Mr. Terry had asked you about your

63 1 statement that Puppet had told E to hold the gun.
2 Did you see the gun back then
3 before you went to the school?
4 A. Yes.
5 Q. What kind of a gun was it?
6 A. A 9.
7 Q. Now, when you say 9 --
8 A. I don't know what kind. It was a
9 9-millimeter.
10 Q. So it was a handgun?
11 A. Yeah.
12 Q. What color was it?
13 A. Black.
14 Q. Now, this shooting you're testifying
15 about today, was this before or after you were shot
16 in the head?
17 A. Before.
18 Q. About how long before?
19 A. Two weeks.
20 MR. TERRY: Asked and answered, Judge.
21 Two weeks is what he said.
22 MS. NYIKOS: Okay. I didn't hear it.
23 THE COURT: I didn't hear that either.
24 If that's the case --
25 MR. TERRY: If neither the Court nor

1 counsel heard it, I'll withdraw the objection and let 65
2 him restate it.
3 THE COURT: I don't recall.
4 MS. NYIKOS: I didn't either.
5 THE COURT: Go ahead and ask it.
6 BY MS. NYIKOS:
7 Q. About how long --
8 THE COURT: You may be right. I just
9 can't recall.
10 THE WITNESS: Two weeks.
11 MS. NYIKOS: Nothing further.
12
13 RE-CROSS-EXAMINATION
14 BY MR. TERRY:
15 Q. One last series of questions, Mr. Harper.
16 A. Okay.
17 Q. Counsel asked you questions about you
18 were going there to fight --
19 A. To fight.
20 Q. -- correct?
21 A. That's a future act, right?
22 A. Yes.
23 Q. Like I would say, I'm going to go
24 shopping tonight, right?
25 A. Yes.

1 Q. But when you got there, there was a fight 66
2 already going on, right?
3 A. Yes.
4 Q. All right. And you participated in that
5 fight, correct?
6 A. Yes.
7 MR. TERRY: Nothing further.
8 THE COURT: Anything else?
9 MS. NYIKOS: No.
10
11 EXAMINATION
12 BY THE COURT:
13 Q. I want to clear up something I think may
14 be important.
15 What kind of a vehicle -- let me
16 go back. Who was all in the car again?
17 A. It was me, Evaristo, Stacy, which is
18 Emanuel's girlfriend, and then Emanuel.
19 Q. What kind of car was it?
20 A. A black El Camino.
21 Q. Was this a truck-type thing?
22 A. It was like one of them, you know, like
23 you can put the top on. It was like -- it was like a
24 truck.
25

1 (Overlapping speakers) 67
2
3 Q. You said you were in the back. Were you
4 in the back in the bed of the truck?
5 A. Yeah. I was laying down.
6 Q. So you had people who were in the cab
7 sitting, right?
8 A. Yes.
9 Q. And then you were in the back, right?
10 A. Yes.
11 Q. So a lot of things, where you were, you
12 could not hear what was going on in the cab, is that
13 correct?
14 A. Yes.
15 Q. That's what I want to clarify, because an
16 El Camino, which I had owned one, which is like a
17 fancy truck, you know, car-truck thing, and that's
18 when he said in the back, that's what I want to make
19 clear that he was in the back of the bed of the
20 truck, not in like in the back seat?
21 A. Yeah.
22 THE COURT: Now, as a result of that do
23 you have any further questions?
24 MS. NYIKOS: None from the State.
25 MR. TERRY: No.

1 THE COURT: Then you're excused. Thank 68
2 you.
3 (Witness excused)
4
5 Call your next witness.
6 MS. JIMENEZ: Melissa Garbon.
7 THE COURT: Remain outside. I'm going to
8 have you remain outside. You'll be accused by the DA
9 or the bailiff.
10 THE CLERK: Please be seated.
11 Please be seated. State your full
12 name and spell your name, please.
13 THE WITNESS: My name is Melissa Maria
14 Garbon. M-e-l-i-s-s-a, G-a-r-b-o-n.
15 THE COURT: Now, Melissa, if the question
16 is asked of you by either of one of these attorneys
17 that calls for a yes or no answer, please state yes
18 or no. Don't shake your head and say no-then, because
19 the court reporter cannot take that type of response.
20 Do you understand that?
21 THE WITNESS: Okay, yes.
22 THE COURT: Now, listen to the questions
23 carefully, and if they call for a yes or no answer,
24 just state yes or no. Do you understand that?
25 THE WITNESS: Yes.

EXHIBIT “F”

1 MR. HARPER: Yeah. Right here?
2 THE BAILIFF: That's fine. Just stand right there.
3 THE COURT: Can you raise your right hand?
4 MR. HARPER: (No audible response.)
5 THE COURT: As best you can will be fine. Thank you. Go
6 ahead.
7 THE CLERK: You do solemnly swear the testimony you're
8 about to give in this action shall be the truth, the whole
9 truth, and nothing but the truth, so help you God?
10 MR. HARPER: Yes.
11 THE COURT: Thank you. Have a seat.
12 Arthur, would you close that door for me, please.
13 Okay.
14 And Mr. Harper, right there is that microphone, and
15 so that the ladies and the gentlemen of the jury can hear you,
16 please try and speak into that microphone for us. Thank you.
17 MR. HARPER: Okay.
18 THE COURT: Thank you very much. Go ahead.
19 JONATHAN HARPER
20 having been called as a witness by the State and being first
21 duly sworn, testified as follows on:
22 DIRECT EXAMINATION
23 BY MS. VILLEGAS:
24 Q Can you state your name for the record?

1 THE COURT: Yes.
2 BY MS. VILLEGAS:
3 Q How long have you known Salvadore?
4 A Well, probably one month or two.
5 Q One month or two. So is this on February 18th, a
6 month or two before that day?
7 A Yes.
8 Q Okay. So how many times?
9 A Now, he's a boxer, and I
10 Q And how many times?
11 A I don't know, but I know he's a boxer, and I
12 know he's a boxer, and I know he's a boxer, and I
13 know he's a boxer, and I know he's a boxer, and I
14 know he's a boxer, and I know he's a boxer, and I
15 know he's a boxer, and I know he's a boxer, and I
16 know he's a boxer, and I know he's a boxer, and I
17 know he's a boxer, and I know he's a boxer, and I
18 know he's a boxer, and I know he's a boxer, and I
19 know he's a boxer, and I know he's a boxer, and I
20 know he's a boxer, and I know he's a boxer, and I
21 know he's a boxer, and I know he's a boxer, and I
22 know he's a boxer, and I know he's a boxer, and I
23 know he's a boxer, and I know he's a boxer, and I
24 know he's a boxer, and I know he's a boxer, and I

Jonathan Harper

1 A Jonathan Emmanuel Harper.
2 Q Okay. Spelling of Harp --
3 A Huh?
4 THE COURT: Is the -- can you spell Harper?
5 THE WITNESS: Yeah. H-a-r-p-e-r.
6 THE COURT: Thank you.
7 BY MS. VILLEGAS:
8 Q Now Jonathan, how old are you?
9 A 15.
10 Q Now drawing your attention to February 18, 2006 --
11 first of all, do you know Salvadore Garcia?
12 A Yes.
13 Q Do you see him in court today?
14 A Yes.
15 Q Can you point him out and tell us what he's wearing
16 in court today?
17 A I guess a jumpsuit.
18 Q No, what is he wearing today?
19 THE COURT: Can you see -- can you see him?
20 THE WITNESS: No. Gray colored shirt.
21 MS. VILLEGAS: What's that?
22 THE COURT: A gray-colored shirt.
23 MS. VILLEGAS: Okay. For the record, the witness has
24 identified the Defendant.

1 Q And can you explain to the jury what is a kickback?
2 A Kickback is when like the friends go to the house or
3 apartment and they have like beer there and we -- and, you
4 know, some girls, and there's the homies, you know.
5 Q Okay. So it was like a get-together?
6 A Yes.
7 Q Now who was at the apartment that night?
8 A Me, Sal or Boxer, Little One, his brother --
9 Q Okay. Hold on, Little One. Do you know what his
10 real name is?
11 A Yes.
12 Q And what is that?
13 A Giovanni.
14 Q And is that, you said, his brother. Is that Sal's
15 brother?
16 A Yes.
17 Q And then who else?
18 A And then Manuel. That's Puppet. And Manuel's girl,
19 Stacy. And then Danger. That's Edshel. And then Edshel's
20 two brothers. Adrian. That's Angel. And then Little
21 Scrappy. That's Brian.
22 Q Brian. Okay. And what time was it that you got to
23 the apartment?
24 A Probably 10:00.

Drain Copy

1 Q Ten o'clock in the morning or at night?
 2 A Night.
 3 Q Okay. And how did you get there?
 4 A We had a ride.
 5 Q Okay. You -- you got a ride?
 6 A Yeah.
 7 Q Who did you get a ride from?
 8 A From Sal.
 9 Q Oh, did -- Sal himself picked you up?
 10 A Yeah. No, I met him on the bus at his mom's.
 11 Q Okay. And then from there, who took you there?
 12 A We went there. Huh?
 13 Q Who took you there?
 14 A Sal.
 15 Q Sal himself?
 16 A Yeah.
 17 Q Okay. Now do you know whether Sal has a girlfriend?
 18 A Yes.
 19 Q And what's her name?
 20 A I don't know her name, but it's a -- Emanuel's
 21 sister.
 22 Q Emanuel's sister?
 23 A Yeah.
 24 Q Now is Sal's girlfriend, has -- does she have a

72

1 A Yeah, three.
 2 Q Okay. Now was everybody -- was -- were you the only
 3 one drinking?
 4 A No. Everyone there, you know.
 5 Q Everyone there.
 6 A And we were smoking weed, and only three people were
 7 taking pills. It was me, Sal, and his brother Little One.
 8 Q Now let me stop you for a moment. You said that you
 9 were also smoking what?
 10 A Weed.
 11 Q Weed. And where did you get this weed?
 12 A Puppit.
 13 Q And --
 14 A He brought it to the party.
 15 Q And Puppit, again, is?
 16 A Manuel.
 17 Q Manuel. Do you know Manuel's last name?
 18 A No.
 19 Q Okay. And how long have you known Manuel?
 20 A Like two months like Sal --
 21 Q Okay.
 22 A -- because I met Sal and Manuel the same time.
 23 Q Okay. Now who else was smoking weed that night
 24 besides yourself?

74

1 baby?
 2 A Two.
 3 Q Two. Now at that time, how many did she have?
 4 A One.
 5 Q Okay. Was she pregnant at the time?
 6 A Yes.
 7 Q And was she pregnant of -- who's the father of the
 8 baby that she was taking care of?
 9 A Sal's.
 10 Q Okay. And now at this party, you said that you were
 11 drinking?
 12 A Yes.
 13 Q Okay. What were you drinking?
 14 A Corona and Budweiser.
 15 Q Now you were how old at that time?
 16 A 13.
 17 Q And did you buy this beer?
 18 A No.
 19 Q Okay. Where did this beer come from?
 20 A From Sal.
 21 Q Okay. And do you recall how much beer you drank
 22 that night?
 23 A Like three.
 24 Q Three -- three bottles?

73

1 A Everyone there.
 2 Q Even the girls?
 3 A Chelsea. Chelsea.
 4 Q (Indiscernible - simultaneous speech) -- yes.
 5 A Yeah. But --
 6 Q Okay. You said everyone, but everyone --
 7 A Yeah.
 8 Q -- you just named?
 9 A Yeah.
 10 Q Okay. What were you doing that night?
 11 A Playing dominos on the table.
 12 Q Now this apartment, the -- was this the first time
 13 you've been to this apartment?
 14 A No. That was like -- I've been there several times.
 15 Q Okay. And do you know -- can you describe the --
 16 well actually, what I'm going to do is -- I'm going to show
 17 you States Proposed Exhibit Number 55 and --
 18 MR. BUCHANAN: No objection if they want to offer it.
 19 THE COURT: Okay.
 20 MS. VILLEGAS: Then move to offer.
 21 THE COURT: All right. It's admitted. And you can go
 22 ahead and continue.
 23 BY MS. VILLEGAS:
 24 Q Now, let's see. In your screen right in front of

75

1 you, Jovan -- I mean Jonathan.
 2 A Oh, yeah.
 3 THE COURT: Let me show him. You can, with your finger
 4 (demonstrates) --
 5 THE WITNESS: Oh.
 6 THE COURT: She'll ask you to point things out. You can
 7 take your finger and make Xs and show --
 8 THE WITNESS: Okay.
 9 THE COURT: -- her where things are, all right? And I'll
 10 erase things when we need to.
 11 THE WITNESS: Okay.
 12 BY MS. VILLEGAS:
 13 Q Now as you walked in, you said that you were in the
 14 dining room area?
 15 A Yes.
 16 Q Okay. And do you see that on State's Exhibit 55?
 17 A (Indicates.)
 18 Q Now over there, was there a table?
 19 A Yes.
 20 Q And then -- now do you recall where you were
 21 seated --
 22 A Yes.
 23 Q -- that night?
 24 A Yes.

76

1 Q Can you point?
 2 A (Indicates.)
 3 Q Okay. So -- and then who was to your left?
 4 A Sal, right here like (Indicates).
 5 Q And who's to your right?
 6 A Edshel (ph).
 7 Q And who's across from you?
 8 A Puppet.
 9 Q How many people were at the table?
 10 A Four.
 11 Q Just the four of you.
 12 A Yeah.
 13 Q Where were everybody else?
 14 A Little One, and Chelsea, and Brian, and the -- the
 15 other girls, and Adrian was in the living room.
 16 Q Now is this a ground floor apartment?
 17 A Yes.
 18 Q Then the -- to get to this apartment, there's a
 19 front door?
 20 A Yes.
 21 Q Can you just show us where the front door is?
 22 A (Indicates.)
 23 Q And there's also a patio door.
 24 A (Indicates.)

77

1 Q Now while you were at this dining room table, tell
 2 us, was -- what were you doing?
 3 A Playing dominos and passing a blunt. We -- we --
 4 It's a just a cigar rolled up with weed.
 5 Q Okay. Who rolled up this cigar?
 6 A Puppet.
 7 Q Now you also mentioned that you were taking --
 8 A Xanax.
 9 Q -- besides -- Xanax?
 10 A Yeah.
 11 Q Okay. Where did you get the Xanax?
 12 A A friend of mine, Edgar.
 13 Q What's his name?
 14 A Edgar.
 15 Q Edgar. Was Edgar at this party?
 16 A No.
 17 Q So you brought the Xanax with you?
 18 A Yes.
 19 Q And how many Xanax was this?
 20 A Three.
 21 Q Three tablets?
 22 A Yeah.
 23 Q And what did you do with the Xanax?
 24 A Me, I gave one to Chavé (ph) and one to Little One.

78

1 Q So you gave it to -- Chavé is Sal?
 2 A Yes.
 3 Q And Little One is his brother?
 4 A Yes.
 5 Q Now while you were playing dominos, what happened?
 6 A Well, we were playing and then me and Sal got in --
 7 in a argument.
 8 Q What was the argument about?
 9 A He wanted me to do something, a mission.
 10 Q Okay. What is this mission?
 11 A To kill someone.
 12 Q Okay. And what happened?
 13 A I told him I refused.
 14 Q When he was telling you this, was this in front of
 15 everyone at the table?
 16 A Yes.
 17 Q And when you refused -- first of all, did he say who
 18 it was that he wanted killed?
 19 A Yes.
 20 Q Who?
 21 A Little One's baby mamma boyfriend.
 22 Q Okay. Little -- Little One's baby's mamma's
 23 boyfriend?
 24 A Yeah.

79

1 Q And was Little One, which is Giovanni, was he also
2 part of this conversation?
3 A Yes, but he didn't -- he was not in it. He was
4 sitting down with the -- the girl.
5 Q And is this by the living room?
6 A Yes.
7 Q How far away -- let's say where you're seated is
8 where you were seated in the dining room area.
9 A Yeah.
10 Q Where is the living room couch to where Little One
11 was -- was seated?
12 A Like right here to the like board thing right there
13 before you leave this part.
14 Q Before I leave the court -- courtroom so this --
15 this --
16 A Yeah.
17 Q -- board right here?
18 A Yes.
19 Q So this is where the couch would be if that --
20 A Yes.
21 Q And then when Sal was telling you this and you
22 refused, what happened next?
23 A Well, he was mad, and then he pulled a gun out, and
24 he was like so you're not going to do it, and I told him no.

80

1 Q Now describe to me, first of all, where was this gun
2 located?
3 A On his hip.
4 Q Okay. On his hip. And when he pulled it out, can
5 you describe this gun?
6 A It was like -- it was a .38 Ruby, and it goes like a
7 wooden tip -- I mean handle, but it's not wood. It's like
8 color the wood, and it's a revolver, six-shooter, and I think
9 the barrel's like six inches.
10 Q Okay. So there's a -- you mean the six -- you can
11 put six like --
12 A Bullets.
13 Q -- cartridges and bullets in it?
14 A Yeah.
15 Q Okay. And what color is the rest of the gun?
16 A Black.
17 Q Now you say it's a Ruby Special?
18 A Yeah.
19 Q Why do you say it's a Ruby Special?
20 A Because that's the brand of the gun.
21 Q Does it have Ruby --
22 A Yes, on the handle.
23 Q It's written on there?
24 A Yeah.

81

1 Q Now have you seen this gun before?
2 A Yes. Every time I saw Sal, he had it.
3 Q I'm sorry. Sal has this?
4 A Yeah. Every time I saw him.
5 Q So it's his gun?
6 A Yes.
7 (WHEREUPON, COUNSEL CONFERRED BRIEFLY.)
8 MS. VILLEGAS: At this time, I'm going to have this
9 marked.
10 THE CLERK: Exhibit 56.
11 THE COURT: What number?
12 THE CLERK: 56.
13 MS. VILLEGAS: 56.
14 BY MS. VILLEGAS:
15 Q I'm going to show you what's been marked as State's
16 Proposed Exhibit Number 56. Now it's a picture of a gun. Is
17 that what the gun looked like?
18 A Yes.
19 MR. BUCHANAN: To which I object until there's a
20 foundation that that's the same gun. If it's just a gun, a
21 picture of a gun somewhere, I don't think it's material or
22 relevant. He described the gun --
23 THE WITNESS: Yes, that is the --
24 MR. BUCHANAN: -- but that is evidently --

82

1 THE COURT: Hold on. Hold on.
2 MR. BUCHANAN: -- not the gun.
3 THE COURT: Hold on.
4 MS. VILLEGAS: I'm not offering it right now, number one.
5 Number two, I'm just asking him if it looks like the gun.
6 MR. BUCHANAN: Well, then she's --
7 THE COURT: So --
8 MR. BUCHANAN: -- asking him to comment or give evidence
9 on a document that is not evidence.
10 THE COURT: She's trying to lay a foundation for the
11 picture. Thank you. I -- so have a seat, Mr. Buchanan.
12 Thanks a lot. Go ahead.
13 BY MS. VILLEGAS:
14 Q So on this gun, you said that there's a -- words
15 Ruby on it, right?
16 A Yes.
17 Q And where is the Ruby, as you recall? Without
18 looking at this photo, where is that Ruby?
19 A On the handle.
20 Q Handle of the gun. And then showing you State's
21 Proposed Exhibit Number 56, do you see a Ruby on it?
22 A Yes.
23 Q And is that also similar to where you've seen the
24 Ruby of what you recall?

83

1 A Yes.
2 Q Okay. Which is also on the handle?
3 A Yes.
4 Q And you said it's a six-shot revolver?
5 A Yes.
6 Q Now when he pulled out this -- this gun, what
7 happened next?
8 A He pointed it at me, and I was like you're going to
9 not shoot me so put it away, and he put it away, and he put it
10 away. When he put it away, he like walked in the to --
11 towards the kitchen and a little bit before he got like in the
12 angle to point the gun at my head, he pulled it out when he
13 was walking.
14 Q Okay. Looking at the picture in front of you in
15 your screen --
16 THE COURT: Do you want me to take off the marks that are
17 already there?
18 MS. VILLEGAS: Yes, please.
19 THE COURT: Sure.
20 BY MS. VILLEGAS:
21 Q Okay. Can you show us, again, where -- put an X or
22 put -- point to where you were at.
23 THE COURT: Put the mark on there where you were.
24 THE WITNESS: (Witness Indicates.)

84

1 Q And at that point when -- he pointed in which
2 direction, the gun?
3 A At my head.
4 Q At you. Now how tall --
5 THE COURT: You can sit down.
6 BY MS. VILLEGAS:
7 Q How tall is Sal?
8 A Probably 6-10.
9 Q And how tall are you?
10 A 5-8.
11 Q And you were seated?
12 A Yes.
13 Q Now when he pointed that gun at you, and this is
14 that same revolver that you saw him pull out at the table --
15 A Yes.
16 Q -- what happened next?
17 A Well, he shot me.
18 Q Okay. Did you see him shoot you?
19 A Yes.
20 Q Now what were you feeling? Could you remember?
21 A The part, I didn't even feel, but I like went
22 unconscious and I was like trying to take a deep breath and I
23 couldn't, and my head was like leaned on the thing. I
24 couldn't straighten my head, and I tried to touch my head to

86

1 BY MS. VILLEGAS:
2 Q Okay. And where was Sal walking towards? Just make
3 an arrow. Can you do that?
4 A (Witness Indicates.)
5 Q Okay. And then when -- when he was walking towards
6 the kitchen, were you looking at him, or were you looking
7 straight at where the table was at?
8 A I was looking at the table, and I was -- in my
9 corner eye, I saw him walking by me behind me.
10 Q Now using your left hand and your fingers, can you
11 show me at what direction where you saw him pull out the gun
12 and point it at you?
13 A Do you want me stand up?
14 Q Sure.
15 THE COURT: If that'll help, stand up.
16 BY MS. VILLEGAS:
17 Q So you're looking straight as if you were at the
18 table, okay. Then what?
19 A All right. He started right here, and he was like
20 this (indicating). Right here, he pulled the gun out, and
21 right here he pointed the gun.
22 Q And so and you're still looking straight and you
23 could still see that?
24 A Yeah.

85

1 -- I was seeing, and I couldn't.
2 Q So you're trying to touch the back of your head?
3 A Yeah.
4 Q So when you were -- now after -- you said that you
5 lost consciousness --
6 A Yes.
7 Q -- and then when you woke up --
8 MR. BUCHANAN: Well, I'm going to object to leading. I
9 -- I haven't objected very much, but she's leading now on a
10 very critical part.
11 MS. VILLEGAS: Okay.
12 BY MS. VILLEGAS:
13 Q No, I'm just asking, now when you woke up, who was
14 around you?
15 A Sal.
16 Q Sal? Who else?
17 A Sal and that's all.
18 Q Where was Sal when you woke up?
19 A Looking at me.
20 Q Which side of you?
21 A At the like -- where he was sitting, like he was
22 looking at me.
23 Q So he's sit -- so he's -- he went back to his seat?
24 A Yeah, but he didn't sit.

87

2 Q So he was what? Standing?
 2 A Yeah.
 3 Q And he's looking at you?
 4 A Yeah.
 5 Q Who else was around the table that you can remember?
 6 A That's all.
 7 Q That's all. What else do you remember at the
 8 apartment after the shooting?
 9 A I saw him, and he was like -- he said something, you
 10 know, and he said I think he's dead, you know.
 11 Q Okay. You heard that from --
 12 A Sal.
 13 Q -- Sal. Who else do you remember, if you can
 14 remember anything else at that apartment?
 15 A No one because everyone ran out of the door. I
 16 remember Chelsea looked at me when I was taking that deep
 17 breath.
 18 Q You saw her come up to you?
 19 A No, she was like -- she like just glanced at me.
 20 Q And who else do you remember? What else do you
 21 remember?
 22 A That's all.
 23 Q That's all?
 24 A Yeah.

88

1 Q Now what's the next thing that you remember after
 2 that?
 3 A Well, I remember when -- I don't remember the whole
 4 part at the Sunrise because, you know, I was like in critical
 5 condition. I woke up at the -- like -- I woke up when they
 6 were transferring me to HealthSouth.
 7 Q Okay. So you don't even know how long you were at
 8 Sunrise Hospital?
 9 A No.
 10 Q And so the only thing you can remember now is when
 11 you were being moved --
 12 MR. BUCHANAN: Object. Leading.
 13 THE COURT: And overruled.
 14 BY MS. VILLEGAS:
 15 Q You were now being moved from Sunrise to where?
 16 A HealthSouth.
 17 Q Okay. And at that point, who was with you when you
 18 were being moved?
 19 A No one. Only the ambulance people.
 20 Q And when you got to HealthSouth, do you know how
 21 long you were at HealthSouth?
 22 A 20 -- no, 43 days.
 23 Q 43 days. Now during this time, do you remember
 24 meeting with some detectives?

89

1 A No.
 2 Q At HealthSouth?
 3 A Yes, at HealthSouth.
 4 Q At HealthSouth. And do you recall who -- what the
 5 names of the detectives are that you met?
 6 A I know one. That's Ericson.
 7 Q Okay. Now Detective Ericson came to you at
 8 HealthSouth?
 9 A Yes.
 10 Q And how many times did you meet with Detective
 11 Ericson?
 12 A At HealthSouth?
 13 Q Yeah, at HealthSouth.
 14 A Once.
 15 Q Did you meet with Detective Ericson elsewhere
 16 besides HealthSouth?
 17 A After I left HealthSouth, at my mom's.
 18 Q Now Jonathan, are you right-handed or left-handed?
 19 A Right.
 20 Q And as a result of this injury, can you still use
 21 your right hand?
 22 A No. I'm going to therapy to rehabilitate, yeah.
 23 But it -- I can't use it now. I --
 24 Q Now --

90

1 A -- can't like open my hand.
 2 Q On that night of February 18, 2006, do you remember
 3 even touching that gun?
 4 A I didn't touch that gun.
 5 Q Do you -- not at all? The revolver?
 6 A Yes.
 7 Q You never looked at it, played around with it?
 8 A That night?
 9 Q Yes.
 10 A No.
 11 Q But you've touched it before that night?
 12 A Yes.
 13 Q Do you -- would you -- when you hold the gun, would
 14 you hold it -- which hand?
 15 A Right.
 16 Q Never your left?
 17 A No.
 18 Q Now did you -- what was the condition of your left
 19 hand that evening of the 18th?
 20 A Well, my index finger and my middle finger --
 21 Q Can you show that to the jury, the two fingers that
 22 you're holding up, yes.
 23 A I got in a fight like I think two weeks before this
 24 happened. I jammed my finger when I was fighting at school.

91

1 When I punched the kid, like -- like I hit his like right here
 2 (Indicating forehead) wrong, and I jammed my finger.
 THE COURT: On his left hand?
 4 MS. VILLEGAS: On his left hand?
 5 THE WITNESS: Yes.
 6 BY MS. VILLEGAS:
 7 Q And as a result of that, what was your condition on
 8 the 18th?
 9 A I couldn't bend my finger. Both these fingers was
 10 like stiff and swollen.
 11 Q Now are you positive who shot you that night on
 12 February --
 13 A Yes.
 14 Q -- 18th? You did not shoot yourself?
 15 A Yes.
 16 Q And who shot you?
 17 A Salvadore Garcia.
 18 MS. VILLEGAS: No further questions. Pass the witness.
 19 THE COURT: Go ahead, Mr. Buchanan.
 20 MR. BUCHANAN: Thank you, Your Honor.
 21 CROSS EXAMINATION
 22 BY MR. BUCHANAN:
 23 Q All right. Jonathan, do you might if I call you
 24 that?

92

A Yes.
 2 Q That's fine?
 3 A Yes.
 4 Q Okay. All right. Jonathan, on the 16th (sic) of
 5 February, how long had you known Sal?
 6 A 16th?
 7 Q Yeah, from the -- February 16th? That's the
 8 incident.
 9 A Yeah.
 10 Q How long had you known him?
 11 A Two months.
 12 Q Okay. Did he give you a job?
 13 A Yes.
 14 Q Did he take you in when you were homeless?
 15 A I was never homeless.
 16 Q You were still living at home?
 17 A Yeah.
 18 Q All right. Now you said you got in a fight, but
 19 isn't it the fact that you were kicked out of school?
 20 A No, I was not kicked out. I just didn't go.
 21 Q Okay. So the two weeks before when you jammed your
 22 finger in a fight at school, you didn't go to school, did you?
 23 A No.
 24 Q All right. Then why did you have a fight at school?

Draft

93

1 A It was not my school. It was his brother's school.
 2 He was in a fight with these like -- another gang, Brown
 3 Pride.
 4 Q Okay. How long had you been out of school?
 5 A Well, this year, that's all.
 6 Q Okay. When --
 7 A Like I used --
 8 Q -- when you were 15 --
 9 THE COURT: Hold on. Hold on.
 10 MR. BUCHANAN: Excuse me.
 11 THE COURT: Hold on a second, Mr. Harper.
 12 THE WITNESS: Okay.
 13 THE COURT: Mr. Buchanan, you're asking a question, and
 14 then you're asking another question, and you're not giving him
 15 time to answer.
 16 MR. BUCHANAN: All right.
 17 BY MR. BUCHANAN:
 18 Q How long have you been out of school?
 19 A Well, I would go to school, but I wouldn't go
 20 everyday. Like I would go, and I would -- on Monday, example,
 21 I would go on Monday, and then like when my dad -- he always
 22 took me to school, but I refused to go. I would just walk off
 23 the campus.
 24 Q All right. Now what gang were you in at that time?

94

1 A MPL. I was not going to school. See this was --
 2 THE COURT: Wait, wait. Mr. Harper.
 3 THE WITNESS: Oh, I'm sorry.
 4 THE COURT: Mr. Buchanan's asking you a question.
 5 THE WITNESS: Yeah.
 6 THE COURT: What gang were you in?
 7 THE WITNESS: MPL.
 8 BY MR. BUCHANAN:
 9 Q And what's -- what kind of gang is that.
 10 THE COURT: Excuse me. Who's got the cell phone that's
 11 vibrating?
 12 (WHEREUPON, DEFENDANT MOVES MR. BUCHANAN'S CELL PHONE.)
 13 MR. BUCHANAN: Okay.
 14 THE COURT: Thank you.
 15 MR. BUCHANAN: It's on silent, but it was close to the
 16 microphones.
 17 THE COURT: Yeah.
 18 MR. BUCHANAN: Okay.
 19 THE COURT: Go ahead.
 20 BY MR. BUCHANAN:
 21 Q How long had you been in that gang?
 22 A One month.
 23 Q Pardon me?
 24 One month.

95

1 Q A month? Okay. Who else was in the gang?
2 A Me, Chavé (ph), Little One, Danger, and E.
3 Q Okay. Now as far as Keith, was he a good friend?
4 A Who?
5 Q Or Brian? How about Brian? Is Brian a good friend
6 of yours?
7 A He was.
8 Q Okay. And how long had you known Brian?
9 A Five years.
10 Q Okay. And in fact, you almost considered yourself
11 brothers, correct?
12 A Yes.
13 Q Okay. And what about his brother, Nexter (ph)?
14 A Edshel (ph)?
15 Q Yeah.
16 A The same, you know.
17 Q How long had you known him?
18 A Since fifth grade.
19 Q Okay. And -- well, how many years?
20 A Five.
21 Q Okay. Did you also consider him almost your
22 brother?
23 A Yeah, I used to.
24 Q Okay. He was your best friend?

96

1 A One of them.
2 Q Okay. And when you came to the party that night,
3 you were good friends?
4 A Yes.
5 Q Okay. If Nexter (ph) comes in and says that you
6 shot yourself, would he be lying?
7 A Yes.
8 Q Why would Nexter (ph) lie if he was your best friend
9 for five years?
10 MS. VILLEGAS: Objection. Speculation. How --
11 THE COURT: And we haven't had that testimony, have we?
12 MR. BUCHANAN: Well, we haven't had it yet.
13 THE COURT: So --
14 MR. BUCHANAN: It's a hypothetical question.
15 THE COURT: It's sustained.
16 MR. BUCHANAN: All right.
17 THE COURT: Don't answer that question.
18 THE WITNESS: Okay.
19 BY MR. BUCHANAN:
20 Q What about Manuel?
21 A What about him?
22 Q Was he a good friend of yours?
23 A I didn't know him.
24 Q Okay. What about Chelsea?

97

1 A The same.
2 Q Pardon me?
3 A The same. I --
4 THE COURT: The same.
5 THE WITNESS: I never knew her. I knew her but, you
6 know, I didn't like everyday like Edshel. I wouldn't hang out
7 with her. I just see her at his house hanging out with
8 Edshel.
9 BY MR. BUCHANAN:
10 Q All right. Did you go to Edsel's (sic) house very
11 often?
12 THE COURT: Edro (ph), not Edsel --
13 MR. BUCHANAN: Pardon.
14 THE COURT: -- like the car. Edro (ph).
15 BY MR. BUCHANAN:
16 Q How do you say his name?
17 A Edshel.
18 Q XO?
19 THE COURT: Hech -- is it XO or is it Edro (ph)?
20 THE WITNESS: Edshel.
21 MR. BUCHANAN: Edshel?
22 THE COURT: Not Edsel.
23 THE DEFENDANT: No, Edshel.
24 MR. BUCHANAN: Edshel. All right. I'm not good at these

98

1 names.
2 THE COURT: No, you're not.
3 MR. BUCHANAN: Okay.
4 BY MR. BUCHANAN:
5 Q All right. Did you ever hang out at Edshel's house?
6 A Yes.
7 Q Okay. Did you stay there on occasions?
8 A Mostly the time -- like I would just like on the
9 weekends, I would go over there and hang out, probably spend
10 the night is (sic) it too late to go home.
11 Q All right. Now let's take the February 18th.
12 A Yes.
13 Q Now this party started about what time? Ten you
14 think you said?
15 A Yes.
16 Q Had you been drinking before then?
17 A No.
18 Q Had you been smoking marijuana before then?
19 A No. At the party, yes.
20 Q Okay. You were smoking at the party, but I'm saying
21 before you went to the party, were you drinking?
22 A No.
23 Q Were you doing marijuana?
24 A No.

99

1 Q Were you taking the pills?
 2 A No.
 3 Q Xanax?
 4 A No.
 5 Q Okay. So you got to the party, and you said you had
 6 three beers?
 7 A Yes.
 8 Q You were also smoking a blunt, correct?
 9 A Yes.
 10 Q Could you tell the ladies and gentlemen of the jury
 11 what a blunt is?
 12 A It's a -- you know, it's a cigarillo. It's that.
 13 They cut it with a razor or they split it with their fingers
 14 and put weed in it, and then roll it like a joint.
 15 Q Okay. So it's a cigar wrapped in marijuana?
 16 A Yes.
 17 Q Okay. And you had that?
 18 A Yes.
 19 Q Okay. And then you had Xanax?
 20 A Yes.
 21 Q All right. Now the combination of alcohol,
 22 marijuana, and Xanax, what did that do to you?
 23 A Well, it just had me in a like buzz, you know. I
 24 was not a -- like lightweight, you know. I wouldn't take

100

1 something I can't handle. I don't like to let the beer
 2 control me and the weed.
 3 Q Okay. Do you remember when I asked you about that
 4 at the preliminary hearing?
 5 A Yes.
 6 Q And you said you were very messed up?
 7 A Yes.
 8 Q Were you messed up?
 9 A Yes. That's --
 10 Q All right.
 11 A -- what buzz means.
 12 Q Okay. So you had a buzz or were messed up?
 13 A Yes.
 14 Q Okay. Did you see the gun prior to this time?
 15 A Yes, on his hip.
 16 Q Okay. And now you made several statements to the
 17 police, correct?
 18 A When?
 19 Q All right. Let's take -- let's take the first
 20 statement. Do you ever recall making a statement to Officer
 21 Ericson that when he asked you if you had shot yourself in an
 22 accident, and you said yes?
 23 A Where at? Like at HealthSouth?
 24 Q In the hospital. Yes.

Draft

101

1 A No.
 2 Q Okay. Do you ever recall when he asked you if
 3 anyone else had shot you, and --
 4 A Yes.
 5 Q -- you said no?
 6 A I didn't say that.
 7 Q Okay. You deny saying that?
 8 A I said yes, someone shot me.
 9 Q Okay. Well if Ericson says something different,
 10 then he would be telling a lie?
 11 A No.
 12 Q Okay. Now do you remember having another statement
 13 on March 10th with Ericson?
 14 A No.
 15 Q Okay. Do you remember telling him that although he
 16 didn't see who shot him, he knows the only person behind him
 17 was Garcia?
 18 THE COURT: Well, why don't you -- instead of putting it
 19 in that context, you're talking about what he said, correct?
 20 MR. BUCHANAN: Yes, what he told Ericson.
 21 THE COURT: So -- okay so you said what he said instead
 22 of what you -- put -- make it what he said.
 23 MR. BUCHANAN: Okay. What you said.
 24 THE COURT: All right, please.

102

1 BY MR. BUCHANAN:
 2 Q Did you tell Officer Ericson on March 10th that you
 3 didn't see who shot you, but Garcia was -- Garcia was behind
 4 you?
 5 A Yes.
 6 Q Okay. Now on the next day, April 1st, about three
 7 weeks later, then you come up with a different story. Now if
 8 you didn't see him on March 10th, on April 1st, did you tell
 9 Officer Garcia that you saw him out the corner of your eye?
 10 A Yes.
 11 Q Okay. And that you saw him shot [sic] you?
 12 A Yes.
 13 Q. How could you, within that two weeks, see that
 14 happen or that change of testimony?
 15 A Because see, when I was in the hospital, I was
 16 confused because I had a brain injury. I didn't know like
 17 that -- what that tape, I don't know what happened with that
 18 tape. I don't know -- I didn't remember that he came to me at
 19 the Health -- no -- Sunrise. I didn't know that, you know. I
 20 didn't, you know -- I didn't remember that whole thing when I
 21 was in there. I remember when I went to HealthSouth, and I
 22 -- I woke up, and I was like -- I don't know. Like I couldn't
 23 speak. I knew something like -- I couldn't speak now like I
 24 could speak before.

103

1 Q All right. Do you think you're recovered now?
2 A Yes.
3 Q You're back on --
4 A Not -- not -- not normal. But --
5 Q Okay.
6 A -- neutral.
7 Q All right. Are you back on the street again?
8 A No.
9 Q Do you go out at all?
10 A No.
11 Q Do you see your friends?
12 A No.
13 Q Okay. Do you ever recall talking with Anthony
14 Waters in the last couple weeks?
15 A Who?
16 Q Anthony Waters?
17 A No.
18 Q Okay. Have you in the last couple of weeks or are
19 you now accusing Nexter (ph) of shooting you?
20 A Edshel?
21 Q Yes.
22 A I didn't say that.
23 Q Are you accusing him now?
24 A No. I didn't --

104

1 Q Have you told your homies --
2 A I never --
3 Q -- that he shot you?
4 A -- sent him -- I never said Edshel shot me. I said
5 Sal shot me.
6 Q You're positive you never told anybody that Nexter
7 (ph) shot you?
8 A Yes.
9 Q Okay. And you think you were screwed up when you
10 made these other statements?
11 A Yes.
12 Q Could you be screwed up today?
13 A No. I have a mind -- it's straight --
14 Q Okay.
15 A -- you know, and that's why I'm talking better, you
16 know. When I was in here -- no. The other -- downstairs, it
17 was on April the 25th, and I -- I was like not confused, but I
18 didn't have the words to say it. I would say me instead of I.
19 Q Okay. Do you recall taking the five bullets out of
20 a gun?
21 A I didn't touch that gun that night.
22 Q That's not what I asked you. I said did you recall
23 taking five bullets out of that gun?
24 MS. VILLEGAS: Judge, I think he just answered it.

105

1 THE COURT: Yeah, he said I didn't touch the gun.
2 MR. BUCHANAN:
3 BY MR. BUCHANAN:
4 Q Do you know what Russian Roulette is?
5 A Yes, and I never played that game.
6 Q What is it?
7 A When you take bullets out of the gun, and you leave
8 one bullet, and you put the gun to your head. I'm not, you
9 know, a person -- I wouldn't do that because I don't think
10 about committing suicide, you know. I was about to turn 15,
11 you know. I was like anxious to turn 16 to drive, you know.
12 Why would I do that?
13 Q All right. Now when you say that you saw this -- on
14 your third statement, you saw the gun being pointed at your
15 head?
16 A Yes.
17 Q All right.
18 A He walked around me. When he walked -- he was
19 walking, he pulled the gun out, and then he got a angle, and
20 then he pointed the gun at me.
21 Q All right. And now --
22 MR. BUCHANAN: Could I approach the witness, Judge?
23 THE COURT: Yes.
24 MR. BUCHANAN: All right.

106

1 BY MR. BUCHANAN:
2 Q Where would -- and if you could stand up. Were you
3 seated or were you stood up when you were shot?
4 A No, I was sitting.
5 THE COURT: He was seated.
6 BY MR. BUCHANAN:
7 Q Okay. Now according to your testimony, Sal was
8 behind you like this, correct?
9 A Yes.
10 Q Okay. Now were you playing dominos?
11 A Yes.
12 Q And which way would your head be?
13 A (Demonstrates.)
14 Q Would it be like that?
15 A No.
16 Q Would it be looking at the dominos?
17 A No, because I --
18 Q I'm behind you now. Can you see me?
19 A Yes.
20 Q Okay. At that point, you said he took a gun out
21 like this --
22 A He was walking.
23 Q Okay. Walking. He took a gun out and fired,
24 correct?

107

1 A Yes.
 2 Q He would be above you?
 3 A Yes.
 4 Q And if he fired like this and the bullet went behind
 5 your ear, correct?
 6 A Yes.
 7 Q The bullet would necessarily go like that?
 8 A He was --
 9 THE COURT: Show -- you can --
 10 MS. VILLEGAS: Judge, I would object as far as
 11 speculation.
 12 MR. BUCHANAN: Well --
 13 THE COURT: Right.
 14 MS. VILLEGAS: How would he know where the bullet would
 15 go?
 16 THE COURT: He -- he wouldn't so, that's sustained --
 17 MR. BUCHANAN: All right.
 18 THE COURT: -- and he doesn't need to answer that.
 19 BY MR. BUCHANAN:
 20 Q Is the gun up here where my hand is right now?
 21 A You're not in the -- his angle --
 22 Q Okay.
 23 A -- when he shot me.
 24 Q Put me in it. Here?

108

1 THE COURT: Yeah.
 2 MR. BUCHANAN: Okay. Let's move you a little closer to
 3 the steps, but don't fall off. Okay. Be careful.
 4 MS. VILLEGAS: No, no. I was thinking --
 5 THE COURT: Mr. Buchanan, don't be pushing the witnesses
 6 off -- the witness off the steps, okay.
 7 MR. BUCHANAN: No.
 8 THE BAILIFF: Judge, you want them down here?
 9 THE COURT: You want -- you want them down here in front
 10 of the jury?
 11 MR. BUCHANAN: Well, let's see if this is all right right
 12 here. I --
 13 THE COURT: Is that -- is that --
 14 MR. BUCHANAN: -- I don't want to [inconvenience him. Is
 15 that --
 16 THE COURT: Mr. Harper, is that --
 17 MR. BUCHANAN: -- would that be about right?
 18 THE COURT: -- about right?
 19 THE WITNESS: No. More like -- more. See, he was in
 20 that angle, but he was like -- like two more steps back.
 21 THE COURT: Okay. So you need more room.
 22 THE WITNESS: Yeah.
 23 MR. BUCHANAN: All right. Could -- then I -- I would --
 24 can we, please?

110

1 A Like right here.
 2 Q All right. Right here. Okay. Now turn straight.
 3 A This --
 4 Q Right there.
 5 A Right there.
 6 Q All right. Now turn straight where you're looking.
 7 All right.
 8 THE COURT: Excuse me --
 9 MR. BUCHANAN: Now --
 10 THE COURT: -- Mr. Buchanan. Is that the distance he was
 11 from you?
 12 THE WITNESS: No.
 13 THE COURT: Okay.
 14 BY MR. BUCHANAN:
 15 Q How close was he?
 16 A Like -- more like --
 17 Q Move over that way, if you would. Let me help you.
 18 THE COURT: Don't fall off the thing.
 19 MR. BUCHANAN: No.
 20 BY MR. BUCHANAN:
 21 Q Okay. Would that be about right?
 22 A A little more.
 23 Q Okay.
 24 MS. VILLEGAS: Judge, I think it may be better to --

109

1 THE COURT: Yes. Arthur, could you help us with the
 2 chair and have Mr. Harper go down.
 3 MR. BUCHANAN: Okay. Stand up, sir. Okay.
 4 THE BAILIFF: No, sit down.
 5 THE COURT: Help him down.
 6 MR. BUCHANAN: Okay. Go down there.
 7 THE COURT: And why don't you put it in front of the ELMO
 8 there, Arthur, for me, and make sure there's nothing he's
 9 going to trip over. Okay.
 10 MR. BUCHANAN: It should be --
 11 MS. VILLEGAS: You should probably go that way.
 12 MR. BUCHANAN: That's okay.
 13 THE BAILIFF: Okay. Let's scoot over this way. Okay.
 14 Don't sit down.
 15 THE WITNESS: Okay.
 16 THE BAILIFF: Don't sit down. (Bailiff moves chair.)
 17 Okay. Now sit down.
 18 MR. BUCHANAN: All right.
 19 THE COURT: Okay. Now Mr. Harper.
 20 THE WITNESS: Yes.
 21 THE COURT: Why don't you just see if Mr. Buchanan can be
 22 in the distance --
 23 MR. BUCHANAN: Okay. Tell me when -- when you thought it
 24 would be.

111

1 THE COURT: And you can look at him right now while he's
2 there.
3 BY MR. BUCHANAN:
4 Q Yeah. Would that be about right?
5 A All right. He was right here.
6 Q Okay. He was right here.
7 A And -- follow my finger.
8 Q Okay.
9 A Right here, he took the gun out, right here pointed
10 it --
11 Q Okay. Would that be about right?
12 A Yeah.
13 Q Within -- would this be about --
14 THE COURT: And which way is your head facing?
15 THE WITNESS: (Witness Indicating.)
16 THE COURT: Okay.
17 BY MR. BUCHANAN:
18 Q Would that be about the distance?
19 A No, more.
20 Q Okay.
21 A One more step. Right there.
22 Q All right. And this would be like the way the gun
23 was pointed, correct?
24 A Yes.

112

1 THE COURT: Does he --
2 BY MR. BUCHANAN:
3 Q Did your head go back or forward?
4 A Back.
5 Q You're sure this is the distance and that's where it
6 hit you?
7 A Yeah.
8 Q Okay. Thank you.
9 MR. BUCHANAN: Can he take the stand again?
10 THE COURT: Okay. Arthur, can you help him back up.
11 (PAUSE.)
12 THE COURT: We've got to wait for the chair.
13 MR. BUCHANAN: I think we need his chair.
14 THE COURT: Arthur's getting it.
15 THE WITNESS: Thank you.
16 THE COURT: You're welcome.
17 THE WITNESS: Thank you.
18 BY MR. BUCHANAN:
19 Q All right. Now, if you could look at this diagram
20 which is right in front of you.
21 A Yes.
22 Q All right. Now could you place where the table was
23 that you saw?
24 A (Witness Indicates.)...

114

1 Q All right. So now if he pointed the gun at you like
2 that, can you point to where it hit you?
3 A Right here.
4 Q Where?
5 A Right here.
6 Q On the top of the head?
7 A Yeah.
8 Q Okay. Are you sure, or was it behind the ear?
9 A Right here. Right here.
10 THE COURT: Do you want to look at his scar?
11 MR. BUCHANAN: Well.
12 BY MR. BUCHANAN:
13 Q Okay. Point to the ladies and gentlemen of the jury
14 and show where you think the entry wound was.
15 A Right here.
16 Q Okay. On-top of your head above -- about three
17 inches above your ear, correct?
18 A Yes.
19 Q Is that where you think it would be?
20 A I know. I don't have to think.
21 Q Okay. So then it would be that a bullet went like
22 that and went three inches above your -- your head?
23 A Yes.
24 Q Okay. And where did the blood go, or anything else?

113

1 Q What? Could you mark it? I don't -- I didn't see
2 it, Okay.
3 THE COURT: It's the big pink circle there, Mr. Buchanan.
4 BY MR. BUCHANAN:
5 Q Now if -- if that is correct, how far do you think
6 it was from where the table is to that back wall?
7 A What do you mean?
8 Q Well you were saying that he's on your left side,
9 correct?
10 A Yeah.
11 Q He's on your left side, and he's walked back as far
12 as you had me from you. But how much room was there to that
13 wall?
14 A See, he didn't go back to me.
15 Q Pardon?
16 A He couldn't fit. You couldn't --
17 Q He couldn't fit behind you, could he?
18 A No, he went in the kitchen.
19 Q All right. So now you're saying that he's all the
20 way in the kitchen?
21 A No. He was like (witness indicates on ELMO).
22 Q Well, if it's -- that's the way. Now when this shot
23 occurred, who all else was seated at the table?
24 A Edshel and Puppert.

115

1 Q Okay. Wouldn't they be in a crossfire?
2 A Yeah.
3 Q And that's what you're saying happened?
4 A Yeah.
5 Q But now you're saying he went all the way into the
6 kitchen?
7 THE COURT: Well, I would --
8 MS. VILLEGAS: Judge --
9 THE COURT: That's a misrepresentation of his testimony.
10 He didn't say he went all the way over here in the kitchen,
11 Mr. Buchanan. What he said --
12 MR. BUCHANAN: Well, he's saying went --
13 THE COURT: -- was he went over here.
14 MR. BUCHANAN: He's saying he went right here, which
15 would be in the kitchen.
16 THE COURT: Well, yeah, but not -- you said all the way
17 in the kitchen, and that's not what he said. We're talking
18 about --
19 MR. BUCHANAN: Or to the entry of the kitchen then.
20 THE COURT: Thank you.
21 BY MR. BUCHANAN:
22 Q How far would that be?
23 A Like two -- two steps from me.
24 Q Two steps from you?

116

1 A Yeah. Because I was right here like -- like I could
2 lean my chair on the wall. That's how close I was at that
3 wall. You couldn't squeeze in the -- in the middle of this
4 part. I don't know what it's called, but it's like -- was
5 -- that thing was holding his fish tank.
6 THE COURT: The wall?
7 THE WITNESS: Yeah, this part.
8 THE COURT: Right. It's called a pony wall.
9 THE WITNESS: Oh.
10 THE COURT: What else, Mr. Buchanan?
11 BY MR. BUCHANAN:
12 Q Are you receiving assistance from the State now for
13 your injuries?
14 A What do you mean?
15 Q Did you make application for aid to victims of a
16 crime?
17 A Me?
18 Q Or your father?
19 A I don't know. I'm not my father.
20 Q Who's paying your bills?
21 A My dad.
22 Q Okay. And he's outside, right?
23 A Yes.
24 Q Okay.


117

1 MR. BUCHANAN: Nothing further.
2 THE COURT: Ms. Villegas.
3 MS. VILLEGAS: Just briefly.
4 REDIRECT EXAMINATION
5 BY MS. VILLEGAS:
6 Q Jonathan, what do your friends or people that were
7 at the party call you?
8 A Silent.
9 Q And was there -- when you were mentioning the names
10 of the people there, was there a Casper?
11 A No.
12 Q Do you know of a Casper?
13 A Yes, but no one in that party knows this Casper I
14 know. He was not there because he's another like -- he's not
15 a gang. He's like a click.
16 Q A click. So he's not part of the Puros Locos you
17 just mentioned?
18 A No.
19 Q Okay. Is -- when you -- strike that.
20 MS. VILLEGAS: No further questions.
21 THE COURT: Okay.
22 RECROSS EXAMINATION
23 BY MR. BUCHANAN:
24 Q Are you in the gang now with Casper?

118

1 A I don't do that, you know. I'm -- I'll tell you
2 this. I straightened my life out. I'm ready to go back to
3 school and succeed, you know. I want to have a career and a
4 life, you know.
5 Q Okay. You haven't been hanging out with Casper?
6 A No, I --
7 Q You haven't --
8 A -- dropped that life when that -- I was shot. That
9 life died in that apartment. Now this is the new me.
10 Q Okay. And so you're rehabilitated now? You're not
11 doing drugs?
12 A No.
13 Q You're not hanging out with gang members?
14 A No.
15 Q You're not out on the street?
16 A No.
17 Q And you never said to Anthony Waters that you
18 thought Nexter (ph) shot --
19 MS. VILLEGAS: Objection. This is going beyond redirect.
20 I think --
21 THE COURT: It is. This --
22 MS. VILLEGAS: -- that was asked and answered --
23 MR. BUCHANAN: All right.
24 THE COURT: Sustained.

119



CLERK OF THE COURT

1 **OPPS**

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DISTRICT COURT
CLARK COUNTY, NEVADA

12 THE STATE OF NEVADA,

13 Plaintiff,

14 -vs-

15 EVARISTO GARCIA,
16 #2685822

17 Defendant.

CASE NO: 10C262966-1

DEPT NO: XV

18 STATE'S OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS IN-COURT

19 IDENTIFICATION PURSUANT TO NRS 174.215(1)

20 DATE OF HEARING: 10/9/2012

21 TIME OF HEARING: 9:00 AM

22 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County
23 District Attorney, through NOREEN DEMONTE, Chief Deputy District Attorney, and
24 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion To
25 Suppress In Court Identification Pursuant To NRS 174.125(1).

26 This opposition is made and based upon all the papers and pleadings on file herein,
27 the attached points and authorities in support hereof, and oral argument at the time of
28 hearing, if deemed necessary by this Honorable Court.

POINTS AND AUTHORITIES

Evaristo Garcia, hereinafter Defendant, was charged by way of Criminal Complaint
with Conspiracy to Commit Murder and Murder with Use of a Deadly Weapon with co-

1 Defendant Giovanni Garcia. At the time of the filing of the complaint, Defendant had fled to
2 Mexico. An Arrest warrant was issued for Defendant on June 21, 2006. Following a
3 lengthy extradition process, Defendant was booked into the Clark County Detention Center
4 on October 16, 2008.

5 An Amended Complaint was filed and Preliminary hearing was held on December 18,
6 2008. Defendant was held to answer on the murder charge.

7 SUMMARY OF PRELIMINARY HEARING TESTIMONY

8 Melissa Gamboa:

9 On February 6, 2006, Melissa Gamboa was waiting outside desert Pines High School
10 for her brother, Victor Hugo Gamboa, to pick her up. (PHT 72-73). As she was waiting, she
11 observed another student, Giovanni Garcia, place a phone call from a cellular phone. (PHT
12 74). Victor arrived with his friend Bryan, and Bryan and Giovanni began to engage in a
13 fistfight. (PHT 73). A short time later, two other young males emerged from an El Camino
14 vehicle and began to assist Giovanni in this fight. (PHT 74-75). The fight continued until
15 the principal came out of the school, and everyone began to run away. (PHT 76). Melissa
16 began to run toward her brother, when she noticed Defendant running toward her brother,
17 and shooting him. (PHT 80-83). Parties stipulated that Victor Gamboa died from a single
18 gunshot wound to the back and that the manner of death was homicide.

19 Jonathan Harper:

20 Jonathan Harper is a former a member of Puros Locos recruited by Salvador Garcia in
21 2005. (PHT 8, 30). Harper testified that in order to gain entry into Puros Locos, he had to
22 "get in fights". (PHT 9). As a member of Puros Locos, he would sell drugs (PHT 28, 29),
23 place graffiti (PHT 28), and get into fights (PHT 9, 27). Harper was an active member of
24 Puros Locos in February of 2006 when this shooting occurred. (PHT 7).

25 On the night of the shooting, Haper was at Salvador Garcia's home (PHT 11). He left
26 Salvador's home in an El Camino vehicle driven by Manuel, "Puppet", with Defendant, and
27 a girl named Stacy to go to Desert Pines High school for a fight. (PHT 25). Harper testified
28 that they were supposed to fight another gang called Brown Pride. (PHT 26, 41).

1 Prior to entering the car, Defendant obtained a gun from Puppet. (PHT 20, 44-46).
2 Once they arrived at Desert Pines High School, Giovanni (Little One) Garcia was already
3 fighting in a circle. (PHT 14, 43). Jonathan and Defendant exited the car and began to fight
4 in the same circle. (PHT 14-15). Jonathan testified that the person he personally was
5 fighting with was the leader of Brown Pride, Diablo. (PHT 26).

6 Jonathan then saw a young Hispanic male run out of the circle being chased by
7 Defendant and Giovanni. (PHT 15-16). As Defendant and Giovanni chased the victim, they
8 began fighting over the gun – Giovanni was demanding the gun, and defendant was saying “I
9 got it.” (PHT 16-17, 32-35). Defendant then cocked the gun and shot at the victim several
10 times. (PHT 35). Defendant later told Jonathan that he shot the victim because Little One
11 provoked him. (PHT 55-56).

12 The case was proceeding to trial under case C226218, when the State of Nevada
13 presented the case to the Clark County Grand Jury on March 4 and 18, 2010. The Grand
14 Jury returned a true bill against Defendant and Manual Lopez for one count of Conspiracy to
15 Commit Murder with Gang Enhancement, and one count of Murder with Use of a Deadly
16 Weapon with Gang Enhancement on March 19, 2010.

17 SUMMARY OF GRAND JURY TESTIMONY

18 Dr. Gary Telgenhoff

19 Clark County Medical Examiner Gary Telgenhoff testified that an autopsy of Victor
20 Gamboa was performed by Dr. Larry Simms. Dr. Telgenhoff reviewed the report and
21 findings of Dr. Simms, and concurred that the cause of Gamboa’s death was a single gunshot
22 wound to the back and the manner of death was a homicide. Reporter’s Transcript of Grand
23 Jury Proceedings, March 4, 2010 (GJT1), 15-20.

24 William Speas

25 Las Vegas Metropolitan Police Department (LVMPD) Crime Scene Analyst (CSA)
26 William Speas testified that he responded to a shooting incident at Morris Sunset East
27 Academy on Washington Boulevard on February 6, 2006 with other CSAs, including Daniel
28 Proietto. Speas and Proietto photographed six (6) 9mm Makarov shell casings on

1 Washington Boulevard. GJT1, 25-27. Speas and Proietto also photographed and recovered
2 a 9mm Makarov Imez firearm inside a toilet tank located at 865 Parkhurst Avenue near the
3 school. Speas processed the toilet tank for latent fingerprints. GJT1, 28.

4 Monte Spoor

5 CSA Monte Spoor testified that he obtained major case prints, which are prints of full
6 lengths of fingers, extreme tips of fingers, and palm prints, from Manuel Lopez in
7 connection with this investigation. GJT1, 34-35.

8 Joseph Szukiewicz

9 CSA Joseph Szukiewicz obtained major case prints from Defendant in connection
10 with this investigation. GJT1, 39-40.

11 Melissa Gamboa

12 Melissa Gamboa testified that on February 6, 2006 she was attending night school at
13 Morris Sunset Academy on Washington Boulevard. GJT1, 43-44. On that day, there was a
14 problem during 6th period between her friend Gena and a person named Giovanni Garcia.
15 GJT1, 44-45. After 6th period, Melissa observed Giovanni Garcia making a phone call.
16 GJT1, 47.

17 Her brother, Victor Gamboa, was supposed to pick her up from school that day.
18 GJT1, 46. Brian Marquez, Gena's brother, arrived at school with her brother. Her
19 boyfriend, Jesus "Diablo" Alonso, also arrived. Alonso is a member of the gang Brown
20 Pride who uses the moniker "Diablo". GJT1, 48-50.

21 Brian Marquez began fighting with Giovanni Garcia, and the fight quickly turned into
22 a large fight among many people. GJT1, 50-51.

23 The principal came out of the school, and everyone started running away. Melissa
24 and Victor ran across Washington. GJT1, 52. As they were running, a teenage Hispanic
25 male with short hair wearing a gray hooded sweatshirt began shooting at Victor. GJT1, 54.

26 Melissa first noticed this individual arriving at the school in a gray El Camino with
27 two other Hispanic males and one female, and joining the fight between Brian and Giovanni
28 Garcia. GJT1, 57-58. After the shooting, the shooter ran West on Washington toward

1 Parkhurst. GJT1, 59.

2 Melissa previously testified in a hearing for this matter and identified the shooter in
3 court. GJT1, 62-63.

4 Gena Marquez

5 Gena Marquez attended Morris Sunset Academy in February of 2006. There had
6 been a fight between Giovanni Garcia and a girl named Crystal Perez. After this fight, Jesus
7 Alonso had confronted Giovanni Garcia who was a member of the gang Puros Locos. GJT1,
8 79-80. After class on February 6, 2006, Gena observed Giovanni talking on the phone with
9 a person called "Puppet", telling Puppet to "bring Stacy because there's a girl acting like a
10 man that's going to get handled like a man." GJT1, 86. Giovanni then told Gena that her
11 friends are going to "get theirs tonight." GJT1, 86.

12 Gena called her brother Bryan and also attempted to contact Jesus Alonso. GJT1, 87-
13 88. Bryan and Victor Gamboa picked her up near the school, and the three of them waited
14 for Melissa Gamboa. GJT1, 88-90.

15 As school let out, they approached the school. A fistfight broke out involving many
16 people including Jesus Alonso. GJT1, 91-93.

17 The fight broke up suddenly, and people began to scatter. Gena ran back to the car
18 with Bryan and Jesus Alonso; she heard approximately five (5) gunshots as they were
19 driving off. GJT1, 94-96.

20 Jonathan Harper

21 In 2006, Jonathan Harper was a member of a gang called Puros Locos, and went by
22 the moniker "Silent". GJT1, 101-102, 106. Other members of Puros Locos at the time were
23 Giovanni Garcia, who used the moniker "Little One"; Salvador Garcia, who went by
24 "Boxer"; Edshel Calvillo, who went by "Danger"; Manual Lopez, who used the moniker
25 "Puppet"; and Evaristo Garcia, who went by "E". GJT1, 102-106.

26 Harper became a member of the gang through his friend Edshel Calvillo by
27 participating in fights and tagging "PL" in various places until he was finally "jumped into"
28 the gang. GJT1, 106, 123.

1 On February 6, 2006, he participated in a fight at a high school as part of the gang.
2 GJT1, 107. Harper was at Salvador Garcia's home and was told that he was going to fight a
3 gang called "Brown Pride". Harper rode to the school in Lopez's El Camino with Lopez,
4 Defendant, Edshel, and Lopez's girlfriend. GJT1, 108-109.

5 Harper testified that no one discussed a gun. GJT1, 109. Harper had previously
6 given a statement to police that Puppet had a "nine" and "told E to hold it." GJT1, 111.

7 As they parked in the parking lot, Harper saw between fifteen and twenty people
8 outside the school fighting. All four of them then got out of the car, and Harper saw
9 Giovanni fighting. Harper then joined the fight by fighting with a person named "Diablo".
10 GJT1, 112-113.

11 Other members of Puros Locos then showed up and joined the fight. GJT1, 115.

12 The fight started to break up and a young kid ran out of the circle. Defendant and
13 Giovanni then ran out of the circle after him. Defendant and Giovanni were arguing. GJT1,
14 116-117. Harper testified that he did not remember what they were arguing about. GJT1,
15 117. Harper had previously told detectives that Defendant and Giovanni were arguing over a
16 gun. GJT1, 117.

17 Harper testified that he then heard gunshots, but did not see anything. GJT1, 119.
18 Harper previously told detectives that E ran into the middle of the street and emptied the gun
19 shooting at the kid. GJT1, 119.

20 Harper testified that he did not remember what Defendant was wearing. GJT1, 120.
21 Harper previously told detectives that Defendant was wearing a gray hooded sweatshirt.
22 GJT1, 121.

23 Harper also testified that he does not remember speaking with Defendant after the
24 shooting. GJT1, 122. Harper previously stated that Defendant told him that he felt like
25 Giovanni provoked him into shooting the kid, and that after the shooting he put the gun in a
26 toilet that was in the street. GJT1, 122.

27 Harper identified Defendant and Manual Lopez in photo lineups for Detective Mogg.
28 Reporter's Transcript of Grand Jury Proceedings, March 18, 2010 (GJT2), 7-9.

1 Ondrea Morales

2 Ondrea Morales, custodian of records for Home Depot, testified that in early February
3 of 2009, Home Depot had processed a work order for tiling bathrooms, and removing and
4 replacing toilets at 865 Parkhurst in Las Vegas, Nevada. GJT1, 128-131.

5 Michael Souder

6 LVMPD Detective Michael Souder¹ testified that he is employed as a detective in the
7 gang unit, and has received specialized training regarding gangs and gang subculture for this
8 assignment. GJT1, 133-138.

9 Puros Locos was identified by the gang unit as a gang in 2004, and claims the east
10 side of Las Vegas as its territory – commonly using “east side” in tattoos. GJT1, 139-141.

11 Puros Locos has eight primary members and affiliates, including Salvador Garcia,
12 Giovanni Garcia, Manual Lopez, Jonathan Harper, and Edshel Calvillo; and commonly
13 engages in felonious activities. GJT1, 139-141, 145.

14 Detective Souder displayed and explained the meaning behind the numerous Puros
15 Locos tattoos on Giovanni Garcia and Manual Lopez, and the “jump in” process and gang
16 culture. GJT1, 141-145, 150.

17 Detective Souder also testified that he is quite familiar with Brown Pride Locates
18 (BPL), which is a much larger gang than Puros Locos. GJT1, 152. In February of 2006,
19 Puros Locos was struggling to make a name for themselves, and that getting into a fight with
20 a larger gang would improve their reputation. GJT1, 152-153.

21 When questioned about the lack of tattoos or field interview cards for Defendant
22 Evaristo Garcia, Detective Souder explained that the lack of a field interview card does not
23 mean that one is not a member of a gang, and that only the member in higher positions in the
24 gang would have tattoos, as one must earn the right to place the gang name on one’s body.
25 GJT1, 154-155.

26 Alice Maceo

27
28 ¹ The statement in Defendant’s Statement of Facts that Michael Souder is a patrol officer is inaccurate.

1 LVMPD latent print examiner Alice Maceo testified that she processed and compared
2 latent prints from the Inez 9mm pistol in connection with this investigation. In her analysis,
3 she was able to collect a latent print from the upper portion of the grip where one would hold
4 the gun, a palm print on the back strap of the gun, and a fingerprint on the side of the grip.
5 GJT2, 17-18

6 After comparing the latent prints she collected against the major case prints of
7 Defendant, she identified Defendant Evaristo Garcia's right ring finger on the fingerprint
8 from the left side of the grip, and Evaristo Garcia's palm "web area between the thumb and
9 index finger" on the back strap of the gun. GJT2, 18-19.

10 Jonathan Robinson

11 Jonathan Robinson worked with Manual Lopez at Mikes Drain and Plumbing in
12 2006. GJT2, 21-22. After the shooting, Lopez told Robinson that he had been with a bunch
13 of people, and there was a conflict with a young kid. Lopez stated he had given his 9mm to
14 his friend who then shot the kid. GJT2, 23-24. Lopez also told him that he had taken the
15 gun back, and placed it inside a toilet tank from a job he had been working. GJT2, 24.
16 Robinson testified that Lopez was proud of the shooting. GJT2, 25-26.

17 Crystal Perez

18 Crystal Perez was attending school at Morris Academy in February of 2006. Perez
19 got into a fight with Giovanni Garcia on a Friday afternoon. The following Monday,
20 Giovanni told her that she was going to "get hers". GJT2, 30-31. Crystal later saw Giovanni
21 talking on the phone telling his friends to "bring Stacy". GJT2, 33.

22 Crystal left school early that day, but returned to meet with Melissa Gamboa, Victor
23 Gamboa, Bryan Marquez, and Gena Marquez. GJT 34-35. A large fight broke out, and
24 Victor Gamboa was fighting among the group. GJT2, 35-36. When the principal and school
25 police officer came out, everyone started running. Crystal ran through the parking lot and
26 fell down. As she was on the ground, she observed Victor Gamboa getting shot. GJT2, 39-
27 40. Crystal previously told police that Giovanni Garcia was the shooter, but admitted that
28 was not true. She did not know the identity of the shooter. GJT2, 40-41.

1 Clifford Mogg

2 LVMPD Homicide Detective Clifford Mogg was assigned to investigate the shooting
3 death of Victor Gamboa on February 6, 2006. GJT2, 46-47. During his investigation, he
4 developed three suspects: Giovanni Garcia, Manuel Lopez, and Evaristo Garcia. GJT2, 48.

5 During his investigation, Mogg obtained the cellular phone records for a phone being
6 used by Giovanni Garcia. GJT2, 52.

7 At 8:01 pm on February 6, 2006, Giovanni called Manuel Lopez. There are several
8 calls from Giovanni Garcia to Manuel Lopez and Salvador Garcia's girlfriend Melinda
9 between 8:32 pm and 8:59 p.m.

10 LVMPD dispatch received a 911 call reporting the shooting at 9:02 p.m.

11 Several calls of short duration (between 4 and 6 seconds) were then placed from
12 Melinda Lopez to Giovanni Garcia between 9:06 and 9:39 p.m.

13 Detective Mogg interviewed Manuel Lopez on two occasions. During the first
14 interview, Lopez told Mogg he went to the school with his girlfriend to pick up Giovanni
15 Garcia, but he did not get out of the car and had no other members of Puros Locos with him.
16 GJT2, 57-59. During the second interview, Lopez told Mogg that the gun used in the
17 shooting was his 9mm, but he had not seen it for a few days prior to the murder. Lopez told
18 detectives that he had heard on the streets that E had used the gun to commit the murder.
19 Lopez also changed his story about who was with him in the car. Lopez stated that he was
20 with Stacy, E, Jonathan, and Edshel, and that Giovanni had told him to bring people. Lopez,
21 however, denied involvement in the fight. GJT2, 65.

22 Melissa Gamboa's identification of the Defendant as the shooter was tied in through
23 the testimony of Detective Cliff Mogg who testified that the Defendant present in court on
24 the date Melissa Gamboa testified was, in fact, Evaristo Garcia. GJT2, 52.

25 This case is presently set for trial for July 8, 2013. Defendant filed the instant motion
26 on September 25, 2012.

27 **ARGUMENT**

28 Defendant asks this Court to prevent the victim's sister from identifying him in Court.

1 The primary error of law upon which the motion is based is that, quite simply, the entire line
2 of cases flowing from Neil v. Biggers, 409 U.S. 954, 92 S.Ct 1167 (1972), does not speak to
3 in court identifications at all, but to suggestive out-of-court identification techniques.
4 Federal decisions often refer to "pre-trial" identifications, but that is because, in the federal
5 systems, preliminary hearings are virtually never conducted. That is because a favorable
6 ruling in a preliminary hearing in the federal system does not eliminate the necessity of
7 presentation to a grand jury, which is the only way a criminal case may be brought into
8 United States District Court.

9 Needless to say, the defendant cites no authority that an in court identification at
10 preliminary hearing is within the ambit of "suggestive pre-trial identification." There is
11 none. The reason that an in court identification is not subject to the same considerations as a
12 street show-up or a photo-lineup is because in a preliminary hearing, unlike those situations
13 (and unlike a grand jury proceeding) the witness' identification can be tested by the
14 defendant's counsel through cross-examination.

15 In Baker v. State, 88 Nev. 369, 372 fn.1, 498 P.2d 1310, 1311 (1972), the court noted
16 that the Arizona courts had held that Wade-Gilbert did not apply to an identification at
17 preliminary hearing. The court declined to decide on the case presented whether Stovall was
18 applicable to identifications at preliminary hearing.

19 Baker then took his case to the federal courts. In Baker v. Hocker, 496 F.2d 615 (9th
20 Cir. 1974), the Court of Appeals for the Ninth Circuit, affirming the District Court's denial
21 of petition for writ of habeas corpus, stated that the defendant failed "to clear even the first
22 hurdle" of a Stovall violation. The defendant had not been identified in an earlier physical
23 lineup, but was identified at preliminary hearing, where he was seated between the two co-
24 defendants who had been identified in that physical lineup. The court held that the risk of a
25 mistaken identification at preliminary hearing becoming "fixed" and tainting trial
26 identification "is far less present in the court proceeding because, as here, the identification
27 can be immediately challenged by cross-examination." 496 F.2 at 617.

28 The Ninth Circuit further considered the issue, and reaffirmed Baker, in Johnson v.

1 Sublett, 63 F.3d 926 (9th Cir 1995), cert. denied, 516 U.S. 1017, 116 S.Ct. 582). In so
2 affirming the court stated:

3 While conceding that courtroom procedures are
4 undoubtedly suggestive, we stress that only "unnecessary" or
5 "impermissible" suggestion violates due process. We balanced
6 the state's strong interest in conducting the court procedure
7 against the dangers of misidentification, which were already
8 mitigated by cross-examination, and held that the suggestive
9 character of courtroom logistics was not unnecessarily
10 suggestive. (63 F.3d at 929, emphasis in original)

11 As early as 1969, the Nevada Supreme Court held, in Craig v. State, 85 Nev. 130, 451
12 P.2d 365 (1969) that a defendant's claim that he was prejudiced by being identified at a
13 preliminary hearing without having had a lineup was without merit. The court added that the
14 nature of the prejudice he claimed was not clear. Id.

15 A year later, the court implied that testimony at preliminary hearing did not constitute
16 a "pre-trial" identification. In Sanchez v. State, 86 Nev. 142, 143, 466 P.2d 670, 671 (1970),
17 the court indicated in dicta that it considered pre-trial identification by a robbery victim and
18 the subsequent preliminary hearing testimony of that victim as two different things.

19 In Lamb v. State, 96 Nev. 452, 454, 611 P.2d 206, 207 (1980), the court implicitly
20 recognized the difference between an in-court and out-of-court identification, by rejecting
21 that defendant's claim that trial identification was based upon an arguably improper photo-
22 lineup by stating, inter alia, that the witness' preliminary hearing identification was
23 unequivocal.

24 In Hicks v. State, 96 Nev. 82, 84, 605 P.2d 219, 220 (1980), the court again
25 distinguished in-court identifications (at preliminary hearing or trial) from out-of-court
26 identifications which may have been suggestive.

27 As the law directly related to this identification is clearly not on his side, Defendant
28 points to a few selective and brief lines of text from the preliminary hearing in an attempt to
29 persuade this Court that Gamboa's identification was a suggestive procedure because
30 Defendant was seated at counsel table as when she made the identification, and Gamboa's
31 description of the shooter given to police "does not match Garcia." Defendant also
32 insinuates that she had been assisted in her identification by an investigator from the District

1 Attorney's Office.

2 Defendant's selective use of the testimony bears is not a complete portrayal of how
3 the testimony actually occurred. To complete the record, the State has attached the ENTIRE
4 transcript of Gamboa's testimony as Exhibit 1, and will illustrate Defendant's flawed
5 translation of the facts herein.

6 When first questioned regarding the description of the shooter, Gamboa's testimony
7 was as follows:

8 Q So from where you were standing could you see the
person who was shooting your brother?

9 A Yes.

10 Q Can you describe that person?

11 A Yes.

12 Q Describe him, please.

13 A He was wearing a hoodie that night, and he was -- it
14 covered his face. And he was like 5-2, 5-3. He was wearing, I
15 believe, shorts that night.

16 Q And what race was he?

17 A Hispanic.

18 ...

19 Q About what age was he?

20 A 17 or 18.

21 ...

22 Q What color was the hoodie?

23 A Gray.

24 Q Can you describe the hair on his face?

25 A He didn't have facial.

26 And you said this is the person that you saw shooting at your
27 brother?

28 A Mm-hmm.

Q Is that a yes?

A Yes.

Q Would you recognize that person if you saw him again?

A Yes.

Q Do you see that person here in court today?

A Yes.

Q Could you please point to that person and tell the judge
what color shirt he is wearing?

A He's in custody. Wearing blue.

MS. JIMINEZ May the record reflect the witness has
identified the Defendant.

THE COURT So reflect.

25 PHT 81-83.

26 Upon cross examination, Defendant's counsel confronted Gamboa with the recorded
27 statement she gave to Detective Mogg.

28

1 Q Do you remember that description being a follows:
2 He was wearing a gray sweater, had a hoodie on, dark shorts, the
3 gun . . .

4 The gun was, I believe, a 380. It was dark. I think it was black.
5 He had light hair, a face. He -- he -- I don't think he had hairs on
6 his face. He looked clean. I don't think he had a mustache.
7 Is that the description you gave?

8 A I don't remember.

9 PHT 88.

10 Defendant's counsel (and not the State as Defendant wrote in his motion), then further asked
11 Gamboa about the difference in description:

12 Q Does the gentleman seated to my left have light hair?

13 A Has what?

14 Q Does the gentleman seated to my left have light hair?

15 A No.

16 Q You described that gentleman that was the shooter as
17 having light hair, correct?

18 A Correct.

19 Q And you indicated that my client's appearance today is the
20 same as you recall it on that day, correct?

21 A Correct.

22 Q He doesn't have light hair thought does he?

23 A No.

24 PHT 89-90.

25 Upon redirect examination, the State asked Gamboa about the
26 written voluntary statement she provided to police in her own
27 handwriting prior to giving her recorded statement:

28 Q Miss Gamboa, do you recall giving a written statement to
the police at the time that this happened, one that you wrote in
your own hand?

A Yes.

Q Do you recall there's a box on the statement that asks if
you can identify the suspect, correct?

A Yes.

Q And you marked yes on that box, didn't you?

A Yes.

Q When you came to court earlier today, before you
testified, did you recognize the defendant at that time?

A Yes.

Q And was he sitting in the same place as he is now?

A No.

Q Where was he sitting?

A Right there.

MS JIMINEZ And for the record, Judge, she pointed
toward the jury box.

Q In the first or second row?

A The first row.

Q Can you say which seat he was in?

A Either first or second.

1 Q And you said that you did not see Mr. Terry, the defense
2 attorney, talking to him?

3 A No, I didn't.

4 Q Did anybody tell you to pick that person?

5 A No.

6 PHT 96.

7 The State then questioned Gamboa about the description she wrote in her own hand of the
8 shooter.

9 Q And what was that description you gave?

10 A Gray sweater and dark shorts.

11 Q And do you remember saying what race he was?

12 A Hispanic.

13 Q And do you remember saying what color hair he had?

14 A Black.

15 PHT 97-98.

16 Regarding the presence of a District Attorney Investigator, Gamboa testified as follows:

17 Q before you were called . . . as a witness Were you with an
18 individual referred to as a Victim Witness coordinator?

19 A I'm not understanding.

20 Q Did somebody help you come to court this morning?

21 A As a ride or . . .

22 Q No. When you got to the building did somebody bring you
23 up here?

24 A No.

25 There's a young sitting in the courtroom. Have you had any --
26 beside the two Da's have you had any conversations with her
27 today?

28 A Yes.

29 I couldn't describe over the phone. I did talk to her over the
30 phone.

31 I spoke with Dawn.

32 Q The lady is in the courtroom now?

33 A Yes.

34 At that point the woman in the courtroom identified herself as Dawn Barlow, and
35 investigator with the District Attorney's Office.

36 Q Now, she's in here while you're testifying, right?

37 A Yes.

38 Q She's helping you, right?

39 A Yes.

40 Q And you met her before you came into court this
41 morning?

42 A Yes.

43 Q Courtroom, how about that?

44 A Yes.

45 Q And she came in when you came in?

46 A No.

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Q Did she tell you to remain outside?
A No.
Q But I you came in?
A Yes.

PHT 91-93.

Upon redirect examination, Gamboa was asked by the State about the investigator.

Q The investigator that indicated that you spoke with here in the courtroom, Dawn, did she ever tell you who to pick out as the person who committed this?
A No.
Q Why did you point to the Defendant and identify him?
A Because I recognized him.

PHT 98.

No one told Gamboa who to identify or suggested her identification in any way. Gamboa first recognized Defendant while he was seated in the box with other in custody inmates prior to being moved to the defense table. Additionally, Gamboa never saw the defense attorney talking to Defendant prior to the preliminary hearing. There was absolutely nothing suggestive about the circumstances in which she made her initial identification.

While Defendant -- just as his original counsel did during the preliminary hearing -- wishes to stress the reference to light hair contained in a transcription from an audio recording, Gamboa's original description of the shooter *written in her own hand* matched the description of Defendant.

Gamboa's identification at preliminary hearing should not be set aside, and she should be permitted to identify Defendant in court at trial if she is able to do so.

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1 **CONCLUSION**

2 For the foregoing reasons, the State respectfully requests that this Honorable Court
3 deny Defendant's Motion to Suppress.

4 DATED this 4th day of October, 2012.

5 Respectfully submitted,

6 STEVEN B. WOLFSON
7 Clark County District Attorney
8 Nevada Bar #001565

9 BY /s/NOREEN DEMONTE
10 NOREEN DEMONTE
11 Chief Deputy District Attorney
12 Nevada Bar #8213

13 **CERTIFICATE OF FACSIMILE TRANSMISSION**

14 I hereby certify that service of the above and foregoing, was made this 4th day of
15 October, 2012, by facsimile transmission to:

16
17 ROSS GOODMAN, ESQ.
18 FAX: 385-5088

19 /s/Deana Daniels
20 Secretary for the District Attorney's
21 Office
22
23
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EXHIBIT 1

1 THE COURT: Okay. You may proceed. 69
2 MS. JIMENEZ: Thank you, Judge.
3
4
5 MELISSA MARIA GAMBOA, having been
6 first duly sworn to testify to the truth, the whole
7 truth, and nothing but the truth, testified as
8 follows:
9
10 DIRECT EXAMINATION
11 BY MS. JIMENEZ:
12 Q. Miss Gamboa, how old are you?
13 A. I'm 19.
14 Q. And, Miss Gamboa, did you have a brother?
15 A. Yes.
16 Q. What was your brother's name?
17 A. Victor Gamboa.
18 Q. And did something happen to your brother,
19 Victor?
20 A. Yes.
21 Q. And what happened to Victor?
22 A. He was murdered.
23 Q. Do you remember when that occurred?
24 MR. TERRY: Just so we're clear, that's a
25 legal conclusion.

1 A. No. 71
2 Q. Is that here in Las Vegas, Clark County,
3 Nevada?
4 A. Yes, it is.
5 Q. And what hours did you go to school at
6 Morris Academy that day?
7 A. 2:30 to 8 something, I believe.
8 Q. What kind of school is Morris Academy?
9 A. It was adult ed to make up credits.
10 Q. Were the classes in the afternoon and
11 evening generally?
12 A. Yes.
13 Q. That day what time did you get out of
14 school?
15 A. Don't remember.
16 Q. What time did school generally get out?
17 A. Like I said, 8 something.
18 Q. In the evening?
19 A. At night.
20 Q. At night.
21 And did you get out at the regular
22 time school got out that day?
23 A. Yes.
24 Q. When you got out of school what did you
25 do after you got out of school?

1 THE COURT: It's a legal conclusion. 70
2 I'll let the record reflect that.
3 MS. JIMENEZ: That's fine.
4 THE COURT: Go ahead.
5 BY MS. JIMENEZ:
6 Q. When did that occur?
7 A. The date you mean?
8 Q. Yes.
9 A. February 6, 2006.
10 Q. And in February 6 of 2006, how old were
11 you at that time?
12 A. I believe 17.
13 Q. And how old was your brother, Victor?
14 A. 15.
15 Q. On February 6 of 2006, what were you
16 doing in the afternoon or evening hours?
17 A. I was attending school.
18 Q. Where did you attend school?
19 A. Morris.
20 Q. Is there a full name to Morris?
21 A. Morris Academy.
22 Q. On what street is Morris Academy located?
23 A. I just know it's up by Washington.
24 Q. Do you know a cross street for
25 Washington?

1 A. I was talking to my friend, waiting for 72
2 my brother.
3 Q. Your brother, Victor?
4 A. Yes.
5 Q. And why were you waiting for Victor?
6 A. He was picking me up.
7 Q. Did Victor arrive at the school?
8 A. Yes, he did.
9 Q. About how long after you got out of
10 school did Victor arrive at school?
11 A. Five minutes or so or less.
12 Q. Before Victor got there did you notice
13 anybody else doing anything in particular?
14 A. Yes.
15 Q. What did you see?
16 A. I saw my sixth period student class was
17 talking about a fight. They were talking about --
18 MR. TERRY: Judge, that would be hearsay.
19 The question was clear, what did you see.
20 BY MS. JIMENEZ:
21 Q. Right. I'm asking not to talk about what
22 people were saying, but I want to talk about did you
23 see somebody do something after school before your
24 brother got there?
25 A. Yes.

1 Q. And who was that person? 73
 2 A. Just we were just waiting for people to
 3 pick us up, so . . .
 4 Q. What happened after Victor arrived?
 5 A. My brother arrived, I saw that he came
 6 with a friend of him.
 7 Q. Do you know his friend's name?
 8 A. I do now. Then I didn't know his name.
 9 Q. What's his name?
 10 A. Brian.
 11 Q. And what happened after Victor and Brian
 12 got there?
 13 A. I just heard -- I don't know if you want
 14 me to say that.
 15 Q. I want you to talk about what you saw
 16 happened after Victor and Brian got there.
 17 A. I saw that Brian was talking to my
 18 brother.
 19 Q. And after Brian and your brother were
 20 talking, what did you see happen next?
 21 A. I saw Brian fighting.
 22 Q. Who was Brian fighting with?
 23 A. Giovanni Garcia.
 24 Q. And how do you know Giovanni?
 25 A. I have him for sixth period class at the

1 one-on-one? 75
 2 A. It was no longer than five minutes. It
 3 all happened so quick.
 4 Q. At some point did something else happen
 5 with regard to that fight?
 6 A. Yes.
 7 Q. What was that?
 8 A. More people started jumping in, girls and
 9 guys.
 10 Q. How many others jumped into the fight?
 11 A. For defending Giovanni, I saw a guy, and
 12 then after that I saw another guy coming.
 13 Q. So when you say defending, do you mean on
 14 the same side?
 15 A. Giovanni's side, yes.
 16 Q. And you said you saw a guy and another
 17 guy, so is that two guys?
 18 A. Yes, other two guys.
 19 Q. Where did these two guys come from?
 20 A. They came out of a car.
 21 Q. Can you describe the car?
 22 A. It was a -- I forgot the color. It was
 23 like gray. It was an El Camino, two-door car. I saw
 24 two -- four people in that car.
 25 Q. And of the four people that you saw in

1 school I was arriving at. 74
 2 Q. He goes to school with you?
 3 A. He did.
 4 Q. Before -- I want to back up for a second.
 5 Before Victor showed up, did you
 6 see Giovanni doing something before Victor got there?
 7 A. Yes, I did.
 8 Q. What did you see him do?
 9 A. I saw him making a phone call, and as
 10 well he was with girls.
 11 Q. Was he on the phone?
 12 A. He was on the phone.
 13 Q. Was it a cellphone?
 14 A. Yes.
 15 Q. You said that after Victor and Brian
 16 showed up that Brian and Giovanni got into a fight?
 17 A. Mm-hmm.
 18 Q. Is that yes?
 19 A. Yes.
 20 Q. Can you describe what kind of fight it
 21 was?
 22 A. It was a one-on-one fight, the two guys.
 23 Q. Was it with fists or weapons?
 24 A. With fists.
 25 Q. How long did the two of them fight just

1 the car, males or females? 76
 2 A. There was one female and three males.
 3 Q. And about what age were these people?
 4 A. Around my age, I can say, 17, 18.
 5 Q. And what race were they?
 6 A. Hispanic.
 7 Q. All of them?
 8 A. Mm-hmm.
 9 Q. Is that yes?
 10 A. Yes.
 11 Q. And so you said that the two people who
 12 got in the fight, they came from this gray El Camino
 13 you described?
 14 A. Yes.
 15 Q. What happened after those two people
 16 joined in the fight?
 17 A. The principal came out.
 18 Q. What happened after the principal came
 19 out?
 20 A. Everybody started running.
 21 Q. This is the principal of the school?
 22 A. Yes.
 23 Q. Where was that fight occurring?
 24 A. This was right in front of the school by
 25 the parking lot.

1 (State's Proposed Exhibit 1 77
2 marked for identification.)
3
4 MS. JIMENEZ: Judge, I have State's
5 Proposed Exhibit 1, which is a purported map, which
6 I'm showing to defense counsel. May I approach?
7 THE COURT: Sure, you may.
8 BY MS. JIMENEZ:
9 Q. Miss Gamboa, I'm going to show you
10 State's Proposed Exhibit 1. Do you recognize that
11 item?
12 A. Yes, I do.
13 Q. What is that?
14 A. The school I was attending.
15 Q. Is that a map of that school?
16 A. Yes.
17 Q. And does that map fairly and accurately
18 show the school and the nearby streets at the time
19 that this happened on February 6 of 2006?
20 A. Yes.
21 MS. JIMENEZ: And, Judge, I'm going to
22 move to admit State's Proposed 1.
23 MR. TERRY: I have to ask for what
24 purpose?
25 THE COURT: What's the purpose for it?

1 Q. Can you put a circle the map where -- 79
2 THE COURT: Wait until counsel gets
3 there.
4 BY MS. JIMENEZ:
5 Q. Can you put a circle on the map where the
6 fight that you have just described was occurring.
7 A. I believe this is the entrance. There
8 was two entrance for the school.
9 Q. Take a moment to orient yourself.
10 A. I know there was one for daycare. This
11 is the entrance. The fight was right across over
12 here, the parking lot.
13 Q. So you've drawn a circle on the map in
14 the parking lot area, correct?
15 A. Correct.
16 Q. After the individuals -- you said two
17 other people jumped in the fight on the side of
18 Giovanni. What happened after that?
19 A. Can you explain that again?
20 Q. After -- you said two people jumped into
21 the fight on the side of Giovanni, correct?
22 A. Mm-hmm.
23 Q. Is that yes?
24 A. Yes.
25 Q. What happened after that?

1 MR. TERRY: We don't have an adequate 78
2 foundation really to admit it.
3 MS. JIMENEZ: We do. I laid a foundation
4 that it's a fair and accurate map, that this is the
5 location of her school, that it's the location at the
6 time and the date that this happened.
7 THE COURT: For what is the purpose?
8 MS. JIMENEZ: I'm going to have her
9 describe where people were, what they were doing.
10 THE COURT: I'll allow it in for that.
11 Go ahead.
12
13 (State's Exhibit 1
14 admitted into evidence.)
15
16 BY MS. JIMENEZ:
17 Q. You said that the fight was occurring in
18 the parking lot, correct?
19 A. Correct.
20 MS. JIMENEZ: I'm going to ask her to
21 mark on the map, if counsel wants to watch where
22 she's marking.
23 MR. TERRY: May I approach?
24 THE COURT: Absolutely.
25 BY MS. JIMENEZ:

1 A. They started running because the 80
2 principal came.
3 Q. And did your brother, Victor, run?
4 A. Yes.
5 Q. And did you run?
6 A. Yes.
7 Q. And who else ran?
8 A. Everybody.
9 Q. While the running was happening, what did
10 you see happen?
11 A. I was running towards my brother and --
12 Q. It's okay. Take a tissue if you need it.
13 MR. TERRY: Judge, if counsel's not going
14 to mark on that anymore, I'll return to my seat.
15 MS. JIMENEZ: I'm sorry, we are. I
16 thought we were getting to it a little faster.
17 MR. TERRY: No problem.
18 MS. JIMENEZ: It will be just a moment.
19 THE WITNESS: While crossing the street I
20 was running behind my brother, and then I see
21 somebody just -- I running towards my brother, and I
22 seen somebody else running towards my brother and
23 shooting him.
24 BY MS. JIMENEZ:
25 Q. Can you put a V on the map where your

1 brother was when he was getting shot at. 81
2 Can you put an M -- for the
3 record, Judge, she's mark a V on the street area of
4 Washington. It's towards the upper half, left-hand
5 side of the drawing.
6 And can you put an M for where you
7 were standing when your brother was being shot at.
8 And can you put an S for Shooter,
9 where the person doing the shooting was standing.
10 Okay. I'm done marking on the map
11 at this time.
12 So from where you were standing,
13 could you see the person who was shooting your
14 brother?
15 A. Yes.
16 Q. Can you describe that person?
17 A. Yes.
18 Q. Describe him, please.
19 A. He was wearing a hoodie that night, and
20 he was -- it was covered his face. And he was like
21 5-2, 5-3. He was wearing, I believe, shorts that
22 night.
23 Q. And what race was he?
24 A. Hispanic.
25 Q. And, I'm sorry, you may have said this

1 saw him again? 83
2 A. Yes.
3 Q. Do you see that person here in court
4 today?
5 A. Yes.
6 Q. Could you please point to that person and
7 tell the Judge what color shirt he's wearing?
8 A. He's in custody, wearing blue.
9 MS. JIMENEZ: May the record reflect the
10 witness has identified the defendant.
11 THE COURT: So reflect.
12 BY MS. JIMENEZ:
13 Q. How many shots were fired at your
14 brother?
15 A. It was couple of rounds.
16 Q. When you say couple, is that two or is
17 that --
18 A. More than two.
19 Q. And did you actually see the gun that the
20 defendant you identified was holding?
21 A. Yes.
22 Q. Can you describe that gun?
23 A. Holding it right hand. I believe it was
24 a 380.
25 Q. Do you know -- do you have a particular

1 and I didn't catch it. Did you say about what age he 82
2 was?
3 A. No, I didn't.
4 Q. About what age was he?
5 A. 17 or 18.
6 Q. And do you remember what he was wearing?
7 A. Yes. I just --
8 MR. TERRY: Asked and answered.
9 THE COURT: She just said that.
10 MS. JIMENEZ: Judge, I think she just
11 described the shorts. I'm asking about the rest of
12 the clothing.
13 THE COURT: She said he was wearing a
14 hoodie. Didn't say what color.
15 BY MS. JIMENEZ:
16 Q. What color was the hoodie?
17 A. Gray.
18 Q. Can you describe his hair or his face?
19 A. He didn't have facial.
20 Q. And you said this is the person you saw
21 shooting at your brother, correct?
22 A. Mm-hmm.
23 Q. Is that yes?
24 A. Yes.
25 Q. Would you recognize that person if you

1 background in guns, Miss Gamboa? 84
2 A. Just a little.
3 Q. It's not your job to do --
4 A. No, it's not.
5 Q. When I say describe it, can you describe
6 what color the gun was?
7 A. I don't remember what color. I know it's
8 either black or gray. I can guarantee you it was.
9 MS. JIMENEZ: Court's indulgence a
10 moment.
11 BY MS. JIMENEZ:
12 Q. What happened when your brother was shot
13 at?
14 A. I ran towards him.
15 Q. At the time that your brother was being
16 shot at was he facing the shooter?
17 A. He was at -- he wasn't facing directly at
18 the shooter. He was running. Then when he kept
19 getting shot at, he did look back towards me, I
20 believe to see if I was the one getting shot.
21 Q. So initially he was running away from the
22 shooter, you said?
23 A. Mm-hmm.
24 Q. Is that yes?
25 A. Yes.

1 Q. And then you said you turned back and he 85
2 looked in your direction?
3 A. Yes.
4 Q. What happened after he was shot?
5 A. I saw the shooter running.
6 Q. Where -- which direction did you see the
7 shooter run in?
8 A. That would be the left.
9 Q. Could you show it on the map?
10 A. Yes, I can.
11 MS. JIMENEZ: If I can approach again
12 with the map, Judge.
13 THE COURT: You may.
14 You want Mr. Terry there?
15 MS. JIMENEZ: Sure.
16 BY MS. JIMENEZ:
17 Q. Would you be able to draw an arrow
18 showing which direction the shooter ran?
19 Okay. And did you see where he
20 went after he ran?
21 A. I saw him there.
22 Q. And you've drawn a second arrow where you
23 indicated you saw him turn; is that correct?
24 A. Yes.
25 Q. What did you do after your brother was

1 MS. JIMENEZ: Court's indulgence. 87
2 Judge, I have no further
3 questions.
4 THE COURT: Mr. Terry.
5 MR. TERRY: Thank you.
6
7 CROSS-EXAMINATION
8 BY MR. TERRY:
9 Q. Ma'am, you've just identified the
10 gentleman seated to my right --
11 A. Yes.
12 Q. -- as the individual that you described
13 as the shooter, right?
14 A. Yes.
15 Q. What is his name?
16 A. I know his name, but I didn't know --
17 Q. You did not know him as of February of
18 '06, correct?
19 A. Correct.
20 Q. And isn't it true that you're identifying
21 him because he's seated to my right?
22 A. No.
23 Q. Do you remember giving a description to
24 the police?
25 A. Yes.

1 shot? 86
2 A. I was asking him if he was okay, and he
3 was not responding.
4 Q. Could you see any injuries on him?
5 A. I just saw him holding his stomach.
6 Q. And was he -- at that point was he
7 standing up or what position --
8 A. He was sitting down against the wall.
9 Q. And what happened with your brother after
10 that?
11 A. Some students from school brought their
12 car over to try to take him to the hospital, and the
13 police arrived and they just laid him down.
14 Q. How much time passed between when you got
15 out of the school and the time that this shooting
16 happened?
17 A. It was so fast, I don't remember.
18 Q. Did you ever hear the person who shot the
19 defendant who you identified say anything?
20 A. No.
21 Q. Did you hear anybody else say anything
22 leading up to the shooting?
23 A. No.
24 Q. Did your brother have a weapon that day?
25 A. No.

1 Q. Do you remember that description being as 88
2 follows:
3 He was wearing a gray sweater, had a hoodie
4 on, dark shorts, the gun -- I'm sorry, counsel, page 6.
5 MS. JIMENEZ: Thank you.
6 BY MR. TERRY:
7 Q. The gun was, I believe, a 380. It was
8 dark. I think it was black. Had light hair, a face.
9 He -- he -- I don't think he had hairs on his face.
10 He looked clean. I don't think he had a mustache.
11 Is that the description you gave?
12 A. I don't remember.
13 MR. TERRY: May I approach?
14 THE COURT: Sure.
15 MR. TERRY: I believe I read it verbatim.
16 THE COURT: Counsel, is this another
17 recorded statement?
18 MR. TERRY: Correct, Judge.
19 THE COURT: Maybe ask her if she recalled
20 giving a recorded statement.
21 BY MR. TERRY:
22 Q. Do you recall giving a recorded
23 statement, as a matter of fact, shortly after the
24 incident?
25 A. Yes.

1 Q. And, certainly, it would have been within 89
2 a week, correct?
3 A. It was that same night.
4 Q. The same night. So that was the same
5 exact night that you gave that description, correct?
6 A. Yes.
7 Q. And that would have been to Detective
8 Mogg on February 6 at 2326, correct?
9 A. Correct.
10 Q. All right. Now, the original question
11 was, please look at that and tell me if that's the
12 way you described the individual?
13 A. Yes.
14 Q. Yes?
15 A. Mm-hmm.
16 Q. Does the gentleman seated to my left have
17 light hair?
18 A. Has what?
19 Q. Does the gentleman seated to my left have
20 light hair?
21 A. No.
22 Q. You described the gentleman that was the
23 shooter as having light hair, correct?
24 A. Correct.
25 Q. And you indicated that my client's

1 appearance today is the same as you recall it on that 90
2 day, correct?
3 A. Correct.
4 Q. He doesn't have light hair though, does
5 he.
6 A. No.
7 Q. You described him in that same police
8 report as being 18 or 19 years old, correct?
9 A. Correct.
10 Q. And do you recall how tall you said the
11 individual was?
12 A. Yes.
13 Q. How tall did you tell the police he was?
14 A. I don't remember what I said on my
15 statement.
16 Q. Now, you've been sitting outside the
17 courtroom today, correct?
18 A. Correct.
19 Q. And you've seen me go back and forth,
20 correct?
21 A. Correct.
22 Q. And you've seen me talking to the
23 defendant that's seated to my right, correct?
24 A. No.
25 Q. You never saw that at all?

1 A. No. 91
2 Q. Did you come into the courtroom at any
3 time before you were called as a witness?
4 A. Yes.
5 Q. And isn't it true that you observed me to
6 be talking to the defendant at that time?
7 A. No.
8 Q. Isn't it true you remained in the
9 courtroom during that period of time?
10 A. What do you mean?
11 Q. Stayed in the courtroom.
12 A. Like right now?
13 Q. No, before you were called --
14 A. No.
15 Q. -- as a witness.
16 Were you with an individual that
17 the commonly referred to as a Victim Witness
18 coordinator?
19 A. I'm not understanding.
20 Q. Did somebody help you come to court this
21 morning?
22 A. As a ride or . . .
23 Q. No. When you got to the building did
24 somebody bring you up here?
25 A. No.

1 Q. There's a young lady sitting in the 92
2 courtroom. Have you had any -- beside the two DA's,
3 have you had any conversations with her today?
4 A. Yes.
5 Q. And would you point to that lady so that
6 we're clear.
7 And I'll ask the lady to identify
8 herself.
9 MS. JIMENEZ: I object as to the
10 relevance.
11 MR. TERRY: We'll get to the relevance.
12 THE COURT: It may be. I don't know.
13 I'll give him leeway.
14 THE WITNESS: I couldn't describe over
15 the phone. I did talk to her over the phone.
16 MR. TERRY: I'm just asking you to point
17 to her.
18 THE WITNESS: I spoke with Dawn.
19 BY MR. TERRY:
20 Q. The lady is in the courtroom right now?
21 A. Yes.
22 Q. Would you point to her. Third time.
23 A. Over there.
24 MR. TERRY: Would that lady stand up and
25 identify herself for the record.

1 MS. BARLOW: I'm a criminal investigator 93
2 with the District Attorney's Office. My name is Dawn
3 Barlow.

4 THE COURT: Okay.

5 MR. TERRY: Thank you very much.

6 BY MR. TERRY:

7 Q. Now, she's in here while your testifying,
8 right?

9 A. Yes.

10 Q. She's helping you, right?

11 A. Yes.

12 Q. And you met with her before you came into
13 the building today, right?

14 A. Inside the court.

15 Q. Before you came into the court this
16 morning?

17 A. Yes.

18 Q. Courtroom, how about that?

19 A. Yes.

20 Q. And did she come in when you came in?

21 A. No.

22 Q. Did she tell you to remain outside?

23 A. No.

24 Q. But I you came in?

25 A. Yes.

REDIRECT EXAMINATION

1 BY MS. JIMENEZ:

2 Q. Miss Gamboa, do you recall giving a
3 written statement to the police at the time that this
4 happened, one that you wrote in your own hand?

5 A. Yes.

6 MS. JIMENEZ: And, Judge, if I can
7 approach. I have her handwritten statement.

8 BY MS. JIMENEZ:

9 Q. Do you recall there's a box on the
10 statement that asks if you can identify the suspect,
11 correct?

12 A. Yes.

13 Q. And you marked yes on that box, didn't
14 you?

15 A. Yes.

16 Q. When you came into court earlier today,
17 before you testified, did you recognize the defendant
18 at that time?

19 A. Yes.

20 Q. And was he sitting in the same place that
21 he's sitting now?

22 A. No.

23 Q. Where was he sitting?

24 A. Right there.

1 Q. Were you ever shown a photo spread of any 94
2 individuals that the police believed were involved in
3 the shooting?

4 A. No.

5 Q. So this is the first time that you're
6 identifying my client as being the individual that
7 was shooting?

8 A. Yes.

9 Q. Is that because you want to believe he's
10 the individual that was doing the shooting?

11 A. No.

12 Q. Would you acknowledge he does not meet
13 the description that you gave the police that same
14 day; yes or no?

15 Yes or no?

16 A. Can you explain that again?

17 Q. No. I'll ask the question.

18 Do you acknowledge that he does
19 not meet the description that you gave to the police
20 that same day it occurred; yes or no?

21 A. Yes.

22 MR. TERRY: Nothing further.

23 MS. JIMENEZ: Thank you, Judge.

1 MS. JIMENEZ: And, for the record, Judge, 96
2 she's pointed toward the jury box.

3 BY MS. JIMENEZ:

4 Q. In the first or the second row?

5 A. The first row.

6 Q. Can you say which seat he was in?

7 A. Either first or second.

8 Q. And you said that you didn't see
9 Mr. Terry, the defense attorney, talking to him?

10 A. No, I didn't.

11 Q. Did anybody tell you who the defendant
12 was?

13 A. No.

14 Q. Did anybody tell you to pick that person?

15 A. No.

16 Q. Do you remember what you wrote in your
17 handwritten statement about how the shooter looked?

18 A. A little.

19 Q. Would it refresh your memory to look at
20 the handwritten statement?

21 A. Yes, please.

22 MR. TERRY: I prefer counsel ask a
23 specific question, and then if she needs to refresh
24 her memory, we don't have a problem with that.

25 MS. JIMENEZ: That's what I just did. I

1 asked her if she called how she described it. She 97
 2 said no. I asked if it would refresh her memory to
 3 look at the statement.
 4 THE COURT: Go ahead.
 5 BY MS. JIMENEZ:
 6 Q. I want to direct your attention to the
 7 first few lines, and let me know when you're done
 8 reading that, okay?
 9 A. Okay.
 10 Q. Are you done?
 11 A. Mm-hmm.
 12 Q. Is that yes?
 13 A. Yes.
 14 Q. I'm taking the statement back.
 15 Did that help you remember how you
 16 described the shooter to the police in your
 17 handwritten statement?
 18 A. Yes.
 19 Q. And what was that description you gave?
 20 A. Gray sweater and dark shorts.
 21 Q. And do you remember saying what race he
 22 was?
 23 A. Hispanic.
 24 Q. And do you remember saying what color
 25 hair he had?

1 A. Black. 98
 2 Q. The investigator that you indicated that
 3 you spoke with here in the courtroom, Dawn, did she
 4 ever tell you who to pick out as the person who
 5 committed this?
 6 A. No.
 7 Q. Why did you point to the defendant and
 8 identify him?
 9 A. Because I recognized him.
 10 MS. JIMENEZ: Judge, I have nothing
 11 further.
 12
 13 RE-CROSS-EXAMINATION
 14 BY MR. TERRY:
 15 Q. Counsel asked you about a statement that
 16 you wrote. Do you recall describing the individual
 17 AS being as 5-foot-7?
 18 A. Don't remember.
 19 Q. Yes?
 20 MR. TERRY: Show counsel another
 21 statement.
 22 MS. JIMENEZ: That's fine. I thought he
 23 said a statement she wrote, and I think.
 24
 25 (Overlapping speakers)

1 THE COURT: You said a statement. He did 99
 2 say that.
 3 BY MR. TERRY:
 4 Q. Do you recall telling Detective Mogg on
 5 that same date, 2-6-06 at 2050 hours, which would
 6 have been before the recorded statement, that the
 7 individual was 5-foot-7?
 8 A. Like I said, I don't remember telling
 9 that to the detective.
 10 Q. You acknowledge that that's what his
 11 report attributes to you as having said?
 12 A. I believe that's his report, but I don't
 13 remember.
 14 Q. So you're not disputing that, you're just
 15 saying you don't remember, correct?
 16 A. I don't remember.
 17 MR. TERRY: Nothing further.
 18 THE COURT: Okay. Do you have anything
 19 else?
 20 MS. JIMENEZ: No, Judge.
 21 THE COURT: You all done, Mr. Terry?
 22 MR. TERRY: Yes, Judge.
 23 THE COURT: You're excused. You may
 24 remain in the hallway.
 25

1 (Witness excused) 100
 2
 3 Call your next witness.
 4 MS. JIMENEZ: Could we have the Court's
 5 indulgence.
 6 THE COURT: Sure.
 7 Just remain in the hallway until
 8 this hearing is completed, and the bailiff or the DA
 9 will excuse you, okay, ma'am?
 10 THE WITNESS: Okay.
 11 THE COURT: Thank you.
 12 MS. JIMENEZ: Judge, can we approach?
 13
 14 (Side bar discussion)
 15
 16 (After a recess the following
 17 proceedings were had.)
 18
 19 MR. TERRY: Defendant's present, Judge.
 20 THE COURT: Defense is now present. All
 21 parties and attorneys are present.
 22 So now you go ahead and swear him
 23 in, okay?
 24 THE CLERK: Please be seated.
 25 State your full name.

RPLY

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CLERK OF THE COURT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

10C262966-1

THE STATE OF NEVADA,

Plaintiff,

vs.

EVARISTO JONATHAN GARCIA,

Defendant.

Case No: ~~C262966~~

Dept. No.: XV

**REPLY IN SUPPORT OF MOTION TO
SUPPRESS IN-COURT
IDENTIFICATION PURSUANT TO NRS
174.125(1)**

The unique facts of this case scream for this Court to exclude the in-court identification as a violation of due process. The State's legal authority is strikingly in contrast with the eyewitness in this case who admits that her description of the shooter - at night wearing a hoodie from 3 years earlier - does not match Garcia. In *Hicks v. State*, 605 P.2d 219, 221 (Nev. 1980), the photographic identification was permitted since the manager of the motel originally identified Hicks as the perpetrator of the robbery from approximately 400 photographs shown to him at the police department. Shortly thereafter, he again identified Hicks from a group of six photographs. Likewise, in *Lamb v. State*, 96 Nev. 452, 611 P.2d 206 (1980), the victim identified Lamb out of photographic lineup but complained that date on his photograph was soon after the crime compared to the other photographs that displayed dates before the crime. This Supreme Court held that such disparity in dates did not invalidate the photographic lineup because the witness testified he did not notice the numbers on the photographs. Moreover, the Court held the record

1 reflects an independent basis for identification of Lamb as the man who came to victim's car lot.

2 Contrary to selecting the defendant from a 400 photographic lineup in *Hicks* or meeting a
3 defendant the day before in daylight and selecting him from a photographic lineup in *Lamb*, the
4 State does not provide any facts establishing an independent basis of reliability for the inherently
5 suggestive in-court identification. Instead, the State attempts to short-circuit the due process
6 inquiry by completely ignoring the eyewitness' admission that the independent basis for the in-
7 court identification did *not* match Garcia.
8

9 The State's response omits any facts supporting a finding that an independent basis
10 existed for Melissa's in-court identification of Garcia 3 years later. The point of these
11 constitutional safeguards is to prevent a due process violation and resulting prejudice from an
12 unreliable identification. Accordingly, the lack of independent reliability prevents Melissa from
13 recounting the prior courtroom identification at trial.
14

15 Dated this 8th day of October, 2012.

16 GOODMAN LAW GROUP P.C.

17 /s/ Ross C. Goodman, Esq.
18 Ross C. Goodman, Esq.
19 520 South Fourth St.
20 Las Vegas, Nevada 89101
21 Attorney for Defendant
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the GOODMAN LAW GROUP, and that on the 8th day of October, 2012, I served a true and correct copy of **REPLY IN SUPPORT OF MOTION TO SUPPRESS IN-COURT IDENTIFICATION PURSUANT TO NRS 174.125(1)** by:

- ☐ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below.
- ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☒ Courtesy copy by email on the parties in said action by causing a true copy thereof to be emailed to the email address indicated after the address(es) noted below.
- ☐ Federal Express or other overnight delivery

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