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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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12 **APPELLANT'S APPENDIX**

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1 correct, you do not want to take the stand?

2 THE DEFENDANT: I do not want to take the
3 stand.

4 THE COURT: Thank you, sir. Okay. We
5 won't reopen the defense case, but based on what
6 I've heard from that doctor, Dr. Duke is a fair
7 rebuttal witness and is gonna be able to competently
8 testify as to brain injury and any resulting damage
9 of the brain.

10 MR. FIGLER: Okay. And I just want to
11 make a real quick record on that. Number one, we
12 didn't object because we didn't anticipate that they
13 were gonna try to do rebuttal, but Ms. Demonte made
14 quite effective use of the fact that Mr. -- I'm
15 sorry. That Dr. Roitman did not examine Jonathan
16 Harper. It was repeated at least a dozen times.

17 Your Honor understands that we had
18 asked for the ability to -- the defense had asked
19 for the ability to examine Mr. Harper, but that was
20 denied. That motion was denied. Mr. Goodman made
21 the motion. So they are taking advantage of a Court
22 motion. That was fine, but now they want to kind of
23 go to the next level and say well you examined him
24 but Dr. Roitman didn't.

25 THE COURT: Now they're bringing up a

1 good point. He never got examined.

2 MS. DEMONTE: Well, now that --

3 THE COURT: You know, you're putting on a
4 treating doctor who examined him, it was his
5 patient. And I denied it because you guys all said
6 you're not gonna, you know, you're not gonna -- I
7 mean, obviously you are at an advantage because had
8 I known you were gonna put on a treating doctor,
9 now, if this was a medical malpractice case, I
10 would, you know, the other side gets a crack at a
11 witness, okay. Yeah, they do.

12 MS. DEMONTE: Okay. I --

13 THE COURT: They do.

14 MS. DEMONTE: I understand that, but it's
15 not that the --

16 THE COURT: Tell me your offer of proof.
17 What is your offer of proof?

18 MS. DEMONTE: That Dr. Duke actually
19 previously testified that the injury to Jonathan's
20 Harper's brain did not affect memory, the portions
21 of his brain that were affected were not memory.
22 They were motor skills to the other side of his body
23 and the speech skills. That was Dr. Duke's
24 testimony. And he was the treating physician. He
25 hasn't examined Jonathan Harper since then either.

1 So he's actually not in any more of a -- he doesn't
2 have continuing access to John Harper. He was the
3 treating physician at Sunrise Hospital which are the
4 same records that Dr. Roitman had.

5 And the reason the Court denied the
6 motion to compel a psychiatric evaluation of
7 Jonathan Harper is that Jonathan Harper is not the
8 property of the State or this Court to have
9 jurisdiction to order that.

10 THE COURT: Oh, no, no, no, you're very
11 wrong there. I can definitely order somebody to
12 have a psychiatric exam.

13 MS. DEMONTE: Yes, but under the law
14 that, that was being cited in that motion, and I've
15 got the transcript from that motion, we went through
16 very clearly --

17 THE COURT: It's okay. I see through a
18 little farther than you. And I'm gonna tell you
19 right now, I'm gonna preclude you from saying
20 something to the effect in closing or during your
21 whole examination you're the treating doctor so
22 you're better than Roitman.

23 MS. DEMONTE: Oh, I'm not gonna say he's
24 better.

25 THE COURT: If it's merely to rebut

1 memory, if it's only -- if you ask him 10 questions,
2 okay, could this type of injury --

3 MR. FIGLER: Impact.

4 THE COURT: -- impact very benign, could
5 this type of injury impact memory. No.

6 MR. FIGLER: Then that's rebuttal.

7 THE COURT: Then that's a fair rebuttal.

8 MR. FIGLER: And if he says confabulation
9 can't exist, that's a fair rebuttal.

10 THE COURT: Correct. But I want to stop
11 the State from arguing to the jury that somehow --
12 okay. All you're gonna have is two experts saying
13 two different things.

14 MS. DEMONTE: Right.

15 THE COURT: But I don't think it's fair
16 that you're then gonna be able to say at closing he
17 was the treating doctor, he's seen Jonathan, he
18 could talk to Jonathan, he's a better expert to give
19 you an opinion.

20 MS. DEMONTE: I was not gonna argue that
21 way, ever. Ever. Those were the questions I posed
22 to Dr. Roitman because he's sitting there on the
23 stand saying he didn't review anything. And, you
24 know --

25 MR. GOODMAN: He said he reviewed 2100

1 pages of Sunrise Hospital records and Healthsouth
2 records of everything that the State was able to
3 provide us and that we got from subpoenas which was
4 everything.

5 THE COURT: I have to really think about
6 this.

7 MR. FIGLER: Because I don't think Dr.
8 Duke was has reviewed that stuff frankly.

9 THE COURT: Well, here's the thing: If
10 they got another expert, okay, that wasn't Dr. Duke,
11 that's strictly rebutted, whether it -- so let's
12 just pretend it wasn't Dr. Duke but it's just a
13 neuro whoever that comes in and says it doesn't
14 affect memory, this brain injury, it doesn't do
15 this, it doesn't do that. It's fair rebuttal. They
16 would be able to do that. He happens to be
17 subpoenaed, he happens to be noticed.

18 MR. FIGLER: Right.

19 THE COURT: If he was only limited to
20 that and the State is prevented from --

21 MR. FIGLER: Trying to --

22 THE COURT: -- somehow arguing or bolster
23 his testimony as he was the treating doctor, I think
24 then they should be able to do rebuttal because, you
25 know, then it's not up to independent examination.

1 MR. FIGLER: I mean, the cat's out of the
2 bag that Dr. Duke was his treating. If they put it
3 together, fine. I just don't want --

4 MS. DEMONTE: Well, I did ask it that way
5 because he didn't -- he reviewed all this but didn't
6 remember the name Dr. Duke. And so I did ask him
7 that, isn't that the guy from Sunrise Hospital, you
8 know, to impeach his -- how thoroughly he reviewed
9 this. Because I don't know how you can miss that it
10 was Dr. Duke.

11 MR. FIGLER: Let them check to make sure
12 that Dr. Duke is really going to be --

13 THE COURT: That's fine. I just don't
14 see how the State isn't saying oh, gee, we need to
15 call him for rebuttal. Of course you're gonna call
16 him for rebuttal.

17 MS. DEMONTE: They told us he was not
18 gonna testify memory.

19 MR. FIGLER: And with due respect --

20 MR. GOODMAN: It was information
21 processing.

22 MR. FIGLER: And with due respect to the
23 State, the work memory got used in different ways
24 from what I think Dr. Duke would testify to what Dr.
25 Roitman did. And I think Dr. Roitman explained it

1 when she said at the end about the memory, he said
2 oh, let me explain this, we're talking about
3 different things.

4 So what he's saying is that look,
5 and then he used that air traffic controller example
6 that, you know, if one part's down, another part's
7 impacted, et cetera.

8 He did not say -- and I think what
9 Dr. Duke would testify is that there are hemispheres
10 of the brain. The hemisphere that got blown away in
11 Harper was not the one that controls memory. That
12 does not rebut or contradict anything that Dr.
13 Roitman said.

14 I don't think Dr. Roitman -- sorry.
15 I don't think Dr. Duke is gonna be able to say
16 there's no possibility of confabulation in a patient
17 who suffered the injury that Jonathan Harper did,
18 okay. So he's not gonna be able to rebut that I
19 would bet you whatever would be an appropriate bet
20 with the judge.

21 And then the second part is I don't
22 think that their doctor's gonna say it would have no
23 impact whatsoever on recalling information or
24 processing or thought processing which is what
25 Dr. --

1 THE COURT: Why do you need him? I'm
2 starting to think about it. He acknowledged all
3 everything you said on recross. You got him to say
4 he could have memories.

5 MR. FIGLER: Yeah.

6 THE COURT: The jurors asked could he
7 have memories. Yes, he could have memories.

8 MR. FIGLER: Could they be --

9 THE COURT: You're opening --

10 MR. FIGLER: -- he even said yes.

11 THE COURT: -- up just a can of worms for
12 rebuttal. You got everything out of him that you
13 need, including he wasn't his treating doctor.

14 Once again, you're gonna put an
15 issue into the record that doesn't otherwise need to
16 be put into it.

17 MS. DEMONTE: I don't believe I'm putting
18 this issue into the record.

19 THE COURT: Oh, come on. You know what,
20 I'm just gonna make a hard call and say no, no
21 rebuttal.

22 I'm tired of the State pushing and
23 pushing and pushing me into an error. No. No
24 rebuttal. We're done. Bring the jury back in.
25 Done. Get her off the phone with Duke and then --

1 thanks. And then we're just -- I'm just not even
2 gonna put it in there.

3 MR. FIGLER: When do you want to settle?

4 THE COURT: We're gonna do it right now.

5 MR. FIGLER: Got it.

6 THE COURT: I'm just tired of it. You
7 guys push and wanna take, take, take, and then I'm
8 gonna get reversed and they didn't get a crack at
9 it. It's just it's one thing after another. I'm
10 tired of being pushed into some weird reversal when
11 you don't need it.

12 Go ahead and have a seat. We're
13 back on the record of State of Nevada versus
14 Evaristo Garcia. Case No. C262966.

15 Let the record reflect that the jury
16 is present, we have the defendant present. Mr.
17 Figler and Mr. Goodman are present. For the State,
18 Ms. Pandukht and Ms. Demonte.

19 And at this time, ladies and
20 gentlemen, with the defense resting, the case is now
21 submitted almost to you.

22 On 9 a.m. on Monday morning, I'm
23 going to instruct you on the law in the State of
24 Nevada and we're gonna go right into closing
25 arguments and you'll start deliberating probably

1 close to lunch, okay?

2 So have a good weekend.

3 During this recess, ladies and
4 gentlemen of the jury, you're admonished not to talk
5 or converse among yourselves or with anyone else on
6 any subject connected with this trial.

7 Or read, watch or listen to any
8 report of or commentary on the trial or any person
9 connected with this trial by any medium of
10 information, including, without limitation,
11 newspapers, television, radio or internet.

12 Or form or express any opinion on
13 any subject connected with the trial until the case
14 is finally submitted to you.

15 Have a great weekend. Thank you.
16 See you on Monday at 9.

17 I'll see the attorneys. We're gonna
18 go off the record, we'll start settling
19 instructions.

20 (Whereupon, a recess was had.)

21 THE COURT: All right. We're back on the
22 record on State of Nevada --

23 MR. FIGLER: Do we need the defendant for
24 the settling?

25 THE COURT: No, not --

1 MR. FIGLER: Okay.

2 THE COURT: I never do. That's why I
3 said he could leave.

4 MR. FIGLER: Fair enough. I don't want
5 him here.

6 THE COURT: Yeah, I never have a
7 defendant in here for settling.

8 State of Nevada versus Evaristo
9 Garcia. Case No. C262966.

10 Let the record reflect that the
11 defendant is not present, that his attorneys Mr.
12 Figler and Mr. Goodman are present, along with the
13 State's attorneys Ms. Pandukht and Ms. Demonte.

14 It's now the time set for settling
15 of instructions.

16 Is the State familiar with the
17 Court's proposed Jury Instructions 1 through 35?

18 MS. DEMONTE: I am, Your Honor.

19 THE COURT: Does the State object to the
20 giving of any of those instructions?

21 MS. DEMONTE: Your Honor, the State
22 objects to the giving of Instruction 28. While we
23 agree that the language in the first two paragraphs
24 about the accomplice liability is a correct
25 statement of the law, the language starting at line

1 11, you are instructed that Jonathan Harper, while
2 not charged as an accomplice under the law given the
3 prosecutes -- is an accomplice under the law given
4 the prosecution's theory of criminal culpability.

5 We've charged that either Evaristo
6 Garcia directly committed it or conspired or aided
7 and abetted.

8 Under conspiracy on aiding and
9 abetting, which would be the alternative theories,
10 Jonathan Harper could not be charged with the exact
11 same crime under the statute and is not an
12 accomplice as a matter of law because under Bolden
13 and Sharma, Jonathan Harper would have to have the
14 specific intent that a murder be committed. And
15 there's absolutely zero evidence of that. And no
16 evidence from the State's perspective that that was
17 ever the case.

18 So we are objecting to that language
19 at lines 11 and 12.

20 THE COURT: Mr. Figler, do you have a
21 response to that?

22 MR. FIGLER: Yes, Your Honor. I mean,
23 Your Honor heard the evidence as it was revealed.
24 They still are going under a conspiracy theory and
25 aiding and abetting and people who basically

1 travelled over there to do it. That's what they're
2 trying to get Mr. Garcia on as well. It's
3 absolutely appropriate to give this particular
4 instruction.

5 THE COURT: The Court heard all the
6 testimony. It was Giovanny Garcia that called over
7 the defendant and Puppet, Manuel Lopez, and Jonathan
8 Harper was right there. All of them were fighting
9 together.

10 And, in fact, Jonathan Harper was
11 right there and saw the shooting as well. Albeit he
12 was running the other way, they all came together,
13 they left together. It was some time until Jonathan
14 Harper even talked to the police.

15 The State has selectively picked who
16 they were charging in this case it's the Court's
17 position. How you divide up the three that you did,
18 they all came together and you conveniently chose to
19 not prosecute Jonathan Harper. But he's clearly --
20 had you have prosecuted him, he could have been
21 prosecuted for the exact same crimes that they were
22 prosecuted under a conspiracy theory.

23 It makes no sense to this Court that
24 only three of them who were in the car had a quote,
25 conspiracy to commit murder in Count I, but the

1 other, you know, two individuals who came and were
2 there and were fighting and were there during the
3 shooting could not have been charged.

4 There's absolutely no rhyme or
5 reason why they couldn't have been charged as well
6 in the Court's -- the way the Court sees the
7 evidence. It appears that you conveniently picked
8 the three that you did. Albeit that perhaps they
9 did a couple more things.

10 Giovanny only did one. He made a
11 phone call. Manuel Lopez only did one more thing,
12 maybe two. He handed him the gun, the defendant the
13 gun, prior to them getting in the car and then
14 allegedly, or as they were running, Jonathan Harper
15 stated that he said like give me the gun, give me
16 the gun or something like that.

17 But they were all together. So you
18 either have to believe they were all in on a
19 conspiracy -- I just -- it's the Court's position
20 there's no rhyme or reason why Jonathan Harper
21 wasn't selected for prosecution except for the fact
22 that he talked to the police and the prosecution
23 decided not to prosecute him. But he certainly
24 could have been prosecuted for this crime.

25 So that's the Court's ruling and

1 that's a defense instruction that the defense wish
2 the Court to give and the Court's gonna give it,
3 okay?

4 MS. DEMONTE: Okay.

5 THE COURT: Does the State have any
6 additional instructions to propose?

7 MS. DEMONTE: No, Your Honor.

8 THE COURT: Is the defendant familiar
9 with the Court's proposed Jury Instructions No. 1
10 through 35?

11 MR. FIGLER: Yes, Your Honor.

12 THE COURT: Does the defendant object to
13 the giving of any of those instructions?

14 MR. FIGLER: Yes, Your Honor. We did
15 have an objection to Instruction No. 30. If I could
16 be heard. That's the --

17 THE COURT: You may.

18 MR. FIGLER: -- flight instruction.

19 THE COURT: Go ahead.

20 MR. FIGLER: Your Honor, I appreciate
21 that there was a preliminary oral motion made by
22 prior counsel with relation to the idea of flight.
23 That's before the Court had all of the evidence.

24 As it came out at trial, the actual
25 arrest warrant didn't come out until over five

1 months after the incident, and the State did not
2 establish that Evaristo Garcia left after an arrest
3 warrant had been issued for him.

4 Also, there was testimony that upon
5 contact with the federal enforcement both on the
6 Mexican side of the border and the American side
7 that he waived extradition to come back. There is
8 no indication that in any way he was trying to
9 avoid -- that he was accused of a crime during the
10 time that he left for Mexico or that this should be
11 considered by the jury any consciousness of guilt.

12 Indeed the Ninth Circuit Court of
13 Appeals has indicated through their pattern
14 instructions and their modern instructions as well
15 as the case law that followed that this type of
16 instruction should only be given rarely when it is
17 very clear that the person escaped the jurisdiction
18 for the purpose of avoiding prosecution. And here
19 there wasn't that sufficient basis.

20 So we feel that it's unduly
21 prejudicial to Mr. Garcia to have this instruction
22 even in there.

23 THE COURT: State wish to respond?

24 MS. DEMONTE: Your Honor, there's no
25 requirement that we know exactly when he fled to

1 Mexico, there's no requirement that the State prove
2 that the defendant knew there were charges against
3 him.

4 He fled to Mexico and he remained
5 there for a period of two-and-a-half years and had
6 to be extradited back after being picked up on a
7 provisional warrant several months. Several months
8 after his arrest on a provisional warrant is when he
9 waived formal extradition. But it does not mean he
10 did not flee to Mexico.

11 Also, it should be noted that he's
12 16 years old and February's the middle of a school
13 year. So we know that people weren't seeing him
14 around. No one testified that they saw Evaristo
15 Garcia after that shooting.

16 There's absolutely -- while the
17 State can't prove he was in Mexico, we knew that
18 there's no solid evidence that he was still here in
19 the United States.

20 He did not actually return
21 voluntarily. He didn't get a phone call from his
22 parents and come back to the United States through
23 the border crossing and turn himself in. He was
24 arrested on a warrant and he -- in another country.

25 And so we believe we've met that

1 flight burden for this instruction and we ask that
2 it be given.

3 THE COURT: All right. The Court has
4 made a determination that it's a proper instruction.
5 This defendant was a United States citizen through
6 his birth certificate and it appears that an arrest
7 warrant was issued several months after the, the
8 crime had occurred.

9 And by that time, many of the
10 witnesses had identified the defendant as being the
11 shooter in this and taking part in this case.

12 In fact, there were arrest warrants
13 for both Giovanni and Manuel Lopez as well, which
14 they were arrested on.

15 Thereafter, so right around June of
16 2006, the CAT team is unable to locate the
17 defendant. That CAT team is comprised of both FBI
18 and LVMPD and he's literally off the map, he's gone.
19 Conveniently and coincidentally at the same time an
20 arrest warrant is issued.

21 The defendant appears to be in
22 Mexico two years later in which he has to be
23 apprehended by the FBI and extradited back.

24 Albeit he waived extradition, he was
25 still extradited back to the United States after

1 federal warrants of his arrest had been received by
2 the Mexican officials.

3 So there is evidence of flight in
4 this case and it's a proper instruction under the
5 law.

6 Does the defense have any additional
7 instructions to propose?

8 MR. FIGLER: There was just one, Your
9 Honor. We had proposed a more detailed version of
10 the credibility of the witnesses that we pulled from
11 the Ninth Circuit.

12 THE COURT: Shall I have this marked as
13 an exhibit for you?

14 MR. FIGLER: Thank Your Honor. Yes,
15 please.

16 THE COURT: Okay.

17 MR. FIGLER: And we would submit that the
18 more detailed one is the preferable one by the
19 defense.

20 Understanding that, we can argue
21 some of those things under the instruction, but with
22 the weight of the instruction I thought it was
23 appropriate and so we submitted it.

24 THE COURT: Is there any response by the
25 State?

1 MS. DEMONTE: Your Honor, we believe that
2 the credibility instruction given by the Court is
3 quite thorough and covers the instruction that had
4 been proposed by Mr. Figler.

5 And so we suggest that the
6 credibility instruction as being provided covers the
7 same information.

8 THE COURT: All right. The Court is
9 gonna mark that as a Court's exhibit. The proposed
10 instruction comes from the Ninth Circuit pattern
11 instruction. It somewhat mirrors our credibility
12 instruction which is now provided as Instruction No.
13 26 in this packet.

14 Because it's covered by another
15 instruction, this Court declines to give of the
16 defense proposed instruction; however, the Court
17 will note that the defense is free to argue any of
18 the points that are in -- that's in that instruction
19 at any time during their argument.

20 MR. FIGLER: Thank Your Honor.

21 THE COURT: Additionally, I want to make
22 a record that the State and the Court have offered
23 the defense two different instructions. And I'm
24 gonna read them into the record and we're gonna make
25 each of them a Court's exhibit.

1 The offer was: Evidence of other
2 crimes, wrongs or acts is not admissible to prove
3 the character of a person in order to show that the
4 person acted in conformity therewith. It may
5 however be admissible for other purposes such as
6 proof of motive, opportunity, intent, preparation,
7 plan, knowledge, identity or absence of mistake or
8 accident.

9 The other instruction alternatively
10 was: Evidence of other crimes, wrongs or acts is
11 not admissible to prove the character of a person in
12 order to show that a person acted in conformity
13 therewith. It may however be admissible for other
14 purposes such as proof of motive, opportunity,
15 intent, preparation, plan, knowledge, identity or
16 absence of mistake or accident.

17 You have heard evidence that some of
18 the individuals may have belonged or did belong to a
19 gang in this case.

20 You are instructed you are not to
21 consider that evidence for purposes of determining
22 whether the defendant is guilty or not guilty of the
23 crimes charged.

24 Both of those instructions are now
25 gonna be marked as Court's exhibits. And I'll let

1 the counsel make a record as to why strategically
2 defense has decided not to give those to the jury as
3 limiting instructions.

4 MR. FIGLER: Thank Your Honor. Mr.
5 Goodman and I spent a, a good deal of the break and
6 some additional time after that talking about
7 whether or not the defense wants to take advantage
8 of what is typically a limiting instruction to the
9 benefit of the defense and why we wouldn't want it
10 in this particular case.

11 It was a strategic and tactical
12 decision on the part of the defense now that the
13 gang enhancement has been removed from the State's
14 theory of prosecution that we do not put undue
15 attention on the gang evidence that may have been
16 received by the jury.

17 This was a strategic decision in
18 that we weighed the pros and the cons of that
19 limiting instruction coming in and it was our
20 decision to just not have that come in at all,
21 especially since no other bad acts of our client
22 were raised or suggested by, by the State or by any
23 of the witnesses.

24 THE COURT: Anything further by the
25 State?

1 MS. PANDUKHT: I just wanted to, for the
2 record, that we offered either instruction and just
3 for the record that we would have agreed to either
4 one of those.

5 THE COURT: All right. And the Court
6 also said it would give it, but it's been declined
7 by the defense.

8 Does the State object to the
9 proposed verdict forms of the Court?

10 MS. DEMONTE: No, Your Honor.

11 THE COURT: Does the defense object to
12 the proposed verdict forms of the Court?

13 MR. FIGLER: No, Your Honor.

14 THE COURT: Okay. At this time then,
15 we've settled instructions.

16 I will instruct the jury on Monday
17 and you guys will go into closing arguments on
18 Monday.

19 If there's anything glaringly wrong
20 with the instructions since we went through them
21 quite quick today, you'll bring it to my attention
22 prior to court and we'll take care of that ahead of
23 time.

24 MS. PANDUKHT: Yes.

25 THE COURT: And have a good evening then

1 and we can go off the record.

2 MR. FIGLER: Thank Your Honor.

3 MS. PANDUKHT: Thank you.

4 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE
5 PROCEEDINGS.

6 /s/ JoAnn Melendez

7 JO ANN MELENDEZ

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ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 12 2013

BY 
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DISTRICT COURT

CLARK COUNTY, NEVADA

10 THE STATE OF NEVADA,
11 Plaintiff,

12 -vs-

Case No. 10-C-262966-1
Dept. No. XV

13
14 EVARISTO JONATHAN GARCIA,
15 #2685822,

16 Defendant.

FOURTH AMENDED
INDICTMENT

17
18 STATE OF NEVADA }
19 COUNTY OF CLARK } ss.

20 The Defendant above named, EVARISTO JONATHAN GARCIA, accused by the
21 Clark County Grand Jury of the crimes of **CONSPIRACY TO COMMIT MURDER**
22 **(Category B Felony - NRS 200.010, 200.030, 199.480)** and **MURDER WITH USE OF A**
23 **DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165)**, committed
24 at and within the County of Clark, State of Nevada, on or about the 6th day of February,
25 2006, as follows:

26 //

27 //

28 //

APP 001850

1
2 COUNT 1 - CONSPIRACY TO COMMIT MURDER

3 did then and there wilfully, unlawfully, felonously, and knowingly meet with
4 GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ and
5 between themselves, and each of them with the other, did conspire and agree to commit a
6 crime, to-wit: murder, and in furtherance of said conspiracy, did commit the acts as set forth
7 in Count 2, said acts being incorporated by this reference as though fully set forth herein.


8 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON WITH THE INTENT TO
9 PROMOTE, FURTHER OR ASSIST A CRIMINAL GANG *JK DR*

10 did then and there wilfully, unlawfully, felonously, and knowingly, did without
11 authority of law, and with premeditation and deliberation and with malice aforethought, kill
12 VICTOR GAMBOA, a human being, by shooting at and into the body of the said VICTOR
13 GAMBOA, with use of a deadly weapon, to-wit: a firearm; said Defendant being responsible
14 under one or more of the following principles of criminal liability, to-wit: (1) by directly
15 committing the act and/or (2) by conspiring with GIOVANNY GARCIA, aka Yobani
16 Borradas and/or MANUEL ANTHONY LOPEZ to commit murder whereby each is
17 vicariously liable for the acts of the other which are the object of the conspiracy and/or (3)
18 by Defendant aiding or abetting in the commission of the crime by entering into a course of
19 conduct whereby GIOVANNY GARCIA, aka Yobani Borradas, while at Morris Sunset East
20 High School contacted one or both Defendant and MANUEL ANTHONY LOPEZ via
21 cellular telephone to inform them of the fight to take place after school, where Defendant
22 and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ
23 accompanied each other to the school in the vehicle of MANUEL ANTHONY LOPEZ,
24 Defendant and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL
25 ANTHONY LOPEZ bringing with them a firearm, whereafter Defendant and/or
26 GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ
27 engaged in a fist fight with others, including VICTOR GAMBOA, at the school, Defendant
28 and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ

1 thereafter chasing VICTOR GAMBOA, at which time Defendant fired a firearm numerous
2 times at VICTOR GAMBOA, striking him one time, thereafter Defendant fleeing from the
3 scene on foot with the firearm, Defendant and/or GIOVANNY GARCIA, aka Yobani
4 Borradas and/or MANUEL ANTHONY LOPEZ disposing of the firearm in a nearby
5 abandoned toilet, thereafter fleeing the scene together in MANUEL ANTHONY LOPEZ's
6 vehicle, Defendant and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL
7 ANTHONY LOPEZ acting in concert throughout, each supporting, counseling and
8 encouraging the others in the commission of the crime by their presence, words and actions.

9 DATED this 12th day of July, 2013.

10 STEVEN B. WOLFSON
11 DISTRICT ATTORNEY
12 Nevada Bar #001565

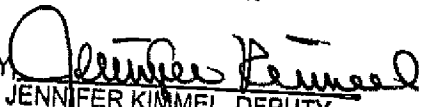
13 BY  /s/ TALEEN R. PANDUKHT
14 TALEEN R. PANDUKHT
15 Chief Deputy District Attorney
16 Nevada Bar #005743

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21 LVMPD EV#0602062820; 0602090797
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CLERK OF THE COURT

JUL 15 2013

BY 
JENNIFER KIMMEL, DEPUTY

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DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

Case No. 10-C-262966-1
Dept. No. XV

EVARISTO JONATHAN GARCIA,
ID#2685822,

Defendant.

STATE'S OPPOSITION AND WRITTEN RECORD IN RESPONSE TO
DEFENDANT'S ORAL MOTION FOR MISTRIAL

Where the State moves for a mistrial or the court declares a mistrial on its own motion, double jeopardy bars retrial unless the "declaration of the mistrial was dictated by manifest necessity or the ends of justice." Hylton v. District Court, 103 Nev. 418, 422, 743 P.2d 622, 625 (1987). On the other hand, a defendant's request for a mistrial constitutes a clear and deliberate election to forgo one's valued right to a trial by the first jury. United States v. Scott, 437 U.S. 82, 93, 98 S.Ct. 2187 (1978); *see also* Rudin v. State of Nevada, 120 Nev. 121, 86 P.3d 572, 586 (2004) and Melchor-Gloria v. State of Nevada, 99 Nev. 174, 178, 660 P.2d 109, 112 (1983) (noting that, when the defense seeks a motion for a mistrial, an exception to the general rule that the mistrial removes any double jeopardy bars to

APP 001853

1 reprosecution arises where "the prosecutor intended to provoke a mistrial or otherwise
2 engaged in 'overreaching' or 'harassment'"). When the defense has moved for a mistrial,
3 reliance upon Hylton is entirely misplaced. Taylor v. State, 109 Nev. 849, 861, 858 P.2d
4 843, 851 (1993). In addition, whether a prosecutor's conduct constitutes "overreaching" or
5 "harassment" intended to goad a defendant into moving for a mistrial is a factual question to
6 be resolved by the trial court. Melchor-Gloria v. State, 99 Nev. 174, 660 P.2d 109 (1983),
7 citing United States v. Green, 636 F.2d 925, 928 (4th Cir. 1980); United States v. Calderon,
8 618 F.2d 88, 90 (9th Cir. 1980).

9 Under NRS 193.168(1), a criminal gang enhancement may be added for "any person
10 who is convicted of a felony committed knowingly for the benefit of, at the direction of, or
11 in affiliation with, a criminal gang, with the specific intent to promote, further or assist the
12 activities of the criminal gang." The criminal gang enhancement must be found beyond a
13 reasonable doubt by the trier of fact. NRS 193.168(4)(b). The trier of the fact makes the
14 decision as to whether the elements of the gang enhancement have been met.

15 NRS 193.168(7) and (8) further provides:

16 7. In any proceeding to determine whether an additional penalty may be
17 imposed pursuant to this section, expert testimony is admissible to show
18 particular conduct, status and customs indicative of criminal gangs, including,
19 but not limited to:

- 20 (a) Characteristics of persons who are members of criminal gangs;
- 21 (b) Specific rivalries between criminal gangs;
- 22 (c) Common practices and operations of criminal gangs and the members of
23 those gangs;
- 24 (d) Social customs and behavior of members of criminal gangs;
- 25 (e) Terminology used by members of criminal gangs;
- 26 (f) Codes of conduct, including criminal conduct, of particular criminal gangs;
27 and
- 28 (g) The types of crimes that are likely to be committed by a particular criminal
gang or by criminal gangs in general.

8. As used in this section, "criminal gang" means any combination of persons,
organized formally or informally, so constructed that the organization will
continue its operation even if individual members enter or leave the
organization, which:

- 1 (a) Has a common name or identifying symbol;
2 (b) Has particular conduct, status and customs indicative of it; and
3 (c) Has as one of its common activities engaging in criminal activity
4 punishable as a felony, other than the conduct which constitutes the primary
5 offense.

6 Under the original Case No. in this case C226218, Defendant filed a Petition for Writ
7 of Habeas Corpus challenging the gang enhancement, which was set for hearing on March 3,
8 2009 and which the Court denied in its Order filed on March 9, 2009. After the State
9 presented the case to the Clark County Grand Jury on March 4, 2010 and March 18, 2010
10 and the Grand Jury returned a true bill against Defendant and Co-Defendant Manual Lopez,
11 Defendant filed a second Petition for Writ of Habeas Corpus challenging the gang
12 enhancement, which was set for hearing on May 25, 2010 and which this Court denied on
13 that date. Detective Michael Souder had testified as a Gang Expert at the grand jury
14 proceedings. Except for the two Petitions for Writ of Habeas Corpus challenging the gang
15 enhancement, which were both denied, the defense filed no other motions prior to the start of
16 trial with reference to the introduction of any evidence regarding the gang enhancement.

17 During the fourth day of trial in this case, on July 11, 2013, the Court precluded the
18 State's noticed gang expert Detective Michael Souder from testifying at the trial based upon
19 the fact that no one testified that Defendant was a member of Puros Locos during the trial
20 and that the power point presentation he had prepared was overly prejudicial. The State
21 knows that based upon the current state of the law in the Nevada Supreme Court decision
22 Origel-Candido v. State, 114 Nev. 378 (1998), that the State could not present sufficient
23 evidence to sustain the gang enhancement without calling a Gang Expert. Therefore, the
24 State felt required to withdraw the gang enhancement, which was done. The Court made
25 findings during the hearing outside the presence of the jury that that the State is an ethical
26 prosecutor and bring things because you think it's there (Trial Transcript Dated 7/11/13,
27 page 12), that the State proceeded in good faith (Page 23), that it was not the Prosecution's
28 fault as the State believed Defendant was in the gang (Page 25), and that the State has not in
any way acted in bad faith, has brought this in good faith (Page 26).

1 Based on the discovery in this case, the State proceeded in good faith with regard to
2 the gang enhancement and presenting gang related evidence at the trial. This Court
3 specifically requested the State list references in the discovery where witnesses referred to
4 Defendant belonging to the gang Puros Locos. First, in Edshel Calvillo's recorded statement
5 on July 26, 2006, he said Evaristo Chucky was from my same gang, from PL, in the same
6 gang as him (Page 4). PL stands for Puros Loco (Page 5).

7 In Jonathan Harper's April 1, 2006 recorded statement, he said they went to the
8 school to fight with Brown Pride. He was in the gang Puros Locos, which goes by PL.
9 Edshel, E, Puppet, Sal, leader was also in that gang (Page 7). He referred to Evaristo Garcia
10 as E. Diablo from Brown Pride was fighting (Page 9). Diablo was identified as Jesus
11 Alonzo, the decedent's sister's boyfriend and leader of Brown Pride (Page 22), who is now
12 deceased and unable to testify at the trial in this matter. E was in our gang PL Puros Locos
13 (Page 24).

14 Jonathan Harper testified at Preliminary Hearing that they were supposed to fight
15 another gang called Brown Pride. (PHT 26, 41). Prior to entering the car, Defendant
16 obtained a gun from Puppet. (PHT 20, 44-46). Once they arrived at Desert Pines High
17 School, Giovanni (Little One) Garcia was already fighting in a circle. (PHT 14, 43).
18 Jonathan and Defendant exited the car and began to fight in the same circle. (PHT 14-15).
19 Jonathan testified that the person he personally was fighting with was the leader of Brown
20 Pride, Diablo. (PHT 26).

21 Jonathan Harper testified before the Grand Jury that in 2006, he was a member of the
22 gang Puros Locos and went by the nickname Silent (GJT1, 101-102, 106). Other members
23 of Puros Locos at the time were Giovanni Garcia, who used the nickname Little One;
24 Salvador Garcia, who went by Boxer; Edshel Calvillo, who went by Danger; Manuel Lopez,
25 who used the nickname Puppet; and Evaristo Garcia, who went by "E" (GJT1, 102-106). On
26 February 6, 2006, he participated in a fight at a high school as part of the gang (GJT1, 107).
27 Harper was at Salvador Garcia's home and was told that he was going to fight a gang called
28 Brown Pride. Harper rode to the school in Lopez's El Camino with Lopez, Defendant,

1 Edshel, and Lopez's girlfriend (GJT1, 108-109).

2 In his March 30, 2006 recorded statement, Manuel Lopez stated that Chucky ran with
3 the set Puros Locos (Page 5). In Giovanni Garcia's February 7, 2006 recorded statement, he
4 said Melissa's boyfriend hit him up where he was from. Garcia told him he was from Puros
5 Locos (Page 7). Melissa's boyfriend said he was Brown Pride (Page 8).

6 Crystal Perez testified at grand jury proceedings that the week before the shooting,
7 she saw Jesus Alonzo go up to Giovanni Garcia and hit him up to see what gang he was
8 from, that Giovanni said his gang was Puros Locos and Jesus said he was from Brown Pride
9 (Grand Jury Transcript, Page 37-38).

10 The State's conduct under the circumstances of the instant case did not constitute
11 "overreaching" or "harassment" intended to goad Defendant into moving for a mistrial. The
12 State proceeded with the gang enhancement in good faith and Defendant's oral motion for a
13 mistrial was properly denied.

14 DATED this 14 day of July, 2013.

15 STEVEN B. WOLFSON
16 DISTRICT ATTORNEY
Nevada Bar #001565

17
18 BY



19 TALEEN R. PANDUKHT
20 Chief Deputy District Attorney
21 Nevada Bar #005734
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@ 3:45 pm
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

JUL 15 2013

BY Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA,
#2685822

Defendant.

Case No. C262966

Dept No. XV

10C262966 - 1
INST
Instructions to the Jury
2712976



INSTRUCTIONS TO THE JURY (INSTRUCTION NO. 1)
MEMBERS OF THE JURY:

It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

An Amended Indictment is but a formal method of accusing a person of a crime and is not of itself any evidence of his guilt.

In this case, it is charged in an Amended Indictment that on or about the 6th day of February, 2006, the Defendant committed the offenses of CONSPIRACY TO COMMIT MURDER (Category B Felony - NRS 200.010, 200.030, 199.480) and MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165), in the following manner, to-wit:

COUNT 1 - CONSPIRACY TO COMMIT MURDER

did then and there wilfully, unlawfully, feloniously, and knowingly meet with GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ and between themselves, and each of them with the other, did conspire and agree to commit a crime, to-wit: murder, and in furtherance of said conspiracy, did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

did then and there wilfully, unlawfully, felonously, and knowingly, did without authority of law, and with premeditation and deliberation and with malice aforethought, kill VICTOR GAMBOA, a human being, by shooting at and into the body of the said VICTOR GAMBOA, with use of a deadly weapon, to-wit: a firearm; said Defendant being responsible under one or more of the following principles of criminal liability, to-wit: (1) by directly committing the act and/or (2) by conspiring with GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ to commit murder whereby each is vicariously liable for the acts of the other which are the object of the conspiracy and/or (3) by Defendant aiding or abetting in the commission of the crime by entering into a course of conduct whereby GIOVANNY GARCIA, aka Yobani Borradas, while at Morris Sunset East High School contacted one or both Defendant and MANUEL ANTHONY LOPEZ via cellular telephone to inform them of the fight to take place after school, where Defendant and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ

1 accompanied each other to the school in the vehicle of MANUEL ANTHONY LOPEZ,
2 Defendant and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL
3 ANTHONY LOPEZ bringing with them a firearm, whereafter Defendant and/or
4 GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ
5 engaged in a fist fight with others, including VICTOR GAMBOA, at the school, Defendant
6 and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL ANTHONY LOPEZ
7 thereafter chasing VICTOR GAMBOA, at which time Defendant fired a firearm numerous
8 times at VICTOR GAMBOA, striking him one time, thereafter Defendant fleeing from the
9 scene on foot with the firearm, Defendant and/or GIOVANNY GARCIA, aka Yobani
10 Borradas and/or MANUEL ANTHONY LOPEZ disposing of the firearm in a nearby
11 abandoned toilet, thereafter fleeing the scene together in MANUEL ANTHONY LOPEZ's
12 vehicle, Defendant and/or GIOVANNY GARCIA, aka Yobani Borradas and/or MANUEL
13 ANTHONY LOPEZ acting in concert throughout, each supporting, counseling and
14 encouraging the others in the commission of the crime by their presence, words and actions.

15 It is the duty of the jury to apply the rules of law contained in these instructions to the
16 facts of the case and determine whether or not the Defendant is guilty of one or more of the
17 offenses charged.

18 Each charge and the evidence pertaining to it should be considered separately. The
19 fact that you may find a defendant guilty or not guilty as to one of the offenses charged
20 should not control your verdict as to any other offense charged.
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3 A conspiracy is an agreement between two or more persons for an unlawful purpose.
4 A person who knowingly does any act to further the object of a conspiracy, or otherwise
5 participates therein, is criminally liable as a conspirator.

6 Evidence of a coordinated series of acts furthering the underlying offense may be
7 sufficient to infer the existence of an agreement and support a conspiracy conviction,
8 however, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere
9 knowledge of, acquiescence in, or approval of that purpose does not make one a party to
10 conspiracy.

11 Even if you find that a conspiracy existed for some unlawful purpose, a person may
12 not be found criminally liable for Murder committed by another conspirator unless you find
13 beyond a reasonable doubt that he, too, possessed the specific intent to commit Murder.
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3 In order for a person to be held accountable for the specific intent crime of another
4 (such as Murder) under an aiding or abetting theory of principal liability, the State must
5 prove beyond a reasonable doubt that the aider or abettor knowingly aided the other person
6 with the intent that the other person commit the charged crime of Murder.

7 A person who aids and abets the commission of a crime is someone who aids,
8 promotes, encourages or instigates, by act or advice, the commission of such specific
9 crime(s) with the specific intention that the crime(s) be committed.

10 Mere presence at or near the scene of the crime or even knowledge that a crime is
11 being committed is not sufficient to establish that a defendant is guilty of an offense as an
12 aider and abettor unless you find beyond a reasonable doubt that a defendant was a
13 participant and not merely a knowing spectator.

14 Proof that the defendant knew that some crime would be committed is not enough.
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INSTRUCTION NO. 6

In this case the defendant is accused in an Indictment alleging an open charge of murder. This charge may include murder of the first degree, murder of the second degree and voluntary manslaughter.

The jury must decide if the defendant is guilty of any offense and, if so, of which offense.

INSTRUCTION NO. 7

Murder in the First Degree is a specific intent crime. Defendant cannot be liable under conspiracy and/or aiding and abetting theory for First Degree Murder for acts committed by a co-conspirator, unless, Defendant also had a premeditated and deliberate specific intent to kill.

INSTRUCTION NO. 8

Murder is the unlawful killing of a human being with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

Malice aforethought means the intentional doing of a wrongful act without legal cause or excuse or what the law considers adequate provocation. The condition of mind described as malice aforethought may arise, from anger, hatred, revenge, or from particular ill will, spite or grudge toward the person killed. It may also arise from any unjustifiable or unlawful motive or purpose to injure another, proceeding from a heart fatally bent on mischief or with reckless disregard of consequences and social duty. Malice aforethought does not imply deliberation or the lapse of any considerable time between the malicious intention to injure another and the actual execution of the intent but denotes an unlawful purpose and design as opposed to accident and mischance.

INSTRUCTION NO. 10

Express malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart.

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2 Murder of the first degree is murder which is perpetrated by means of any kind of
3 willful, deliberate, and premeditated killing. All three elements -- willfulness, deliberation,
4 and premeditation -- must be proven beyond a reasonable doubt before an accused can be
5 convicted of first-degree murder.

6 Willfulness is the intent to kill. There need be no appreciable space of time between
7 formation of the intent to kill and the act of killing.

8 Deliberation is the process of determining upon a course of action to kill as a result of
9 thought, including weighing the reasons for and against the action and considering the
10 consequences of the actions.

11 A deliberate determination may be arrived at in a short period of time. But in all
12 cases the determination must not be formed in passion, or if formed in passion, it must be
13 carried out after there has been time for the passion to subside and deliberation to occur. A
14 mere unconsidered and rash impulse is not deliberate, even though it includes the intent to
15 kill.

16 Premeditation is a design, a determination to kill, distinctly formed in the mind by the
17 time of the killing.

18 Premeditation need not be for a day, an hour, or even a minute. It may be as
19 instantaneous as successive thoughts of the mind. For if the jury believes from the evidence
20 that the act constituting the killing has been preceded by and has been the result of
21 premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.
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2 The law does not undertake to measure in units of time the length of the period during
3 which the thought must be pondered before it can ripen into an intent to kill which is truly
4 deliberate and premeditated. The time will vary with different individuals and under varying
5 circumstances.

6 The true test is not the duration of time, but rather the extent of the reflection. A cold,
7 calculated judgment and decision may be arrived at in a short period of time, but a mere
8 unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation
9 and premeditation as will fix an unlawful killing as murder of the first degree.

INSTRUCTION NO. 13

All murder which is not Murder of the First Degree is Murder of the Second Degree.
Murder of the Second Degree is Murder with malice aforethought, but without the admixture
of premeditation and deliberation.

You are instructed that if you find that the State has established that the defendant has committed first degree murder you shall select first degree murder as your verdict. The crime of first degree murder includes the crime of second degree murder. You may find the defendant guilty of second degree murder if:

1. You have not found, beyond a reasonable doubt, that the defendant is guilty of murder of the first degree, and

2. All twelve of you are convinced beyond a reasonable doubt the defendant is guilty of the crime of second degree murder.

If you are convinced beyond a reasonable doubt that the crime of murder has been committed by the defendant, but you have a reasonable doubt whether such murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict of murder of the second degree.

Voluntary Manslaughter is the unlawful killing of a human being, without malice aforethought and without deliberation. It is a killing upon a sudden quarrel or heat of passion, caused by a provocation sufficient to make the passion irresistible.

The provocation required for Voluntary Manslaughter must either consist of a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.

For the sudden, violent impulse of passion to be irresistible resulting in a killing, which is Voluntary Manslaughter, there must not have been an interval between the assault or provocation and the killing sufficient for the voice of reason and humanity to be heard; for, if there should appear to have been sufficient time for a cool head to prevail and the voice of reason to be heard, the killing shall be attributed to deliberate revenge and determined by you to be murder. The law assigns no fixed period of time for such an interval but leaves its determination to the jury under the facts and circumstances of the case.

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2 The heat of passion which will reduce a homicide to Voluntary Manslaughter must be
3 such an irresistible passion as naturally would be aroused in the mind of an ordinarily
4 reasonable person in the same circumstances. A defendant is not permitted to set up his own
5 standard of conduct and to justify or excuse himself because his passions were aroused
6 unless the circumstances in which he was placed and the facts that confronted him were such
7 as also would have aroused the irresistible passion of the ordinarily reasonable man if
8 likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of
9 the accused was obscured or disturbed by passion to such an extent as would cause the
10 ordinarily reasonable person of average disposition to act rashly and without deliberation and
11 reflection and from such passion rather than from judgment.
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When a person kills another after an attempt by the person killed to commit a serious personal injury on the person killing that does not rise to the level of self-defense or justifiable homicide, it is not murder, but the offense of Voluntary Manslaughter.

Voluntary manslaughter also exists where there is unlawful killing of a human being without malice upon heat of passion or a sudden quarrel.

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2 If you find the State has established that the defendant has committed murder you
3 shall select the appropriate degree of murder as your verdict. The crime of murder may
4 include the crime of voluntary manslaughter. You may find the defendant guilty of
5 voluntary manslaughter if:

6 (1) some of you are not convinced beyond a reasonable doubt that the defendant is
7 guilty of murder of either the first or second degree, and

8 (2) all twelve of you are convinced beyond a reasonable doubt the defendant is guilty
9 of the crime of voluntary manslaughter.

10 If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you
11 have a reasonable doubt whether the crime is murder or voluntary manslaughter, you must
12 give the defendant the benefit of that doubt and return a verdict voluntary manslaughter
13 whichever is appropriate based on the facts of this case.

"Deadly weapon" means any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death, or, any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death.

You are instructed that a firearm is a deadly weapon.

You are instructed that if you find a defendant guilty of 1st or 2nd Degree Murder, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.

If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon".

If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

INSTRUCTION NO. 21

The Defendant is presumed innocent unless the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

INSTRUCTION NO. 22

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, the decision as to whether he should testify is left to the defendant on the advice and counsel of his attorney. You must not draw any inference of guilt from the fact that he does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.

INSTRUCTION NO. 23

You are here to determine whether or not the State of Nevada has met the burden of proof from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

To constitute the crime charged, there must exist a union or joint operation of an act forbidden by law and an intent to do the act.

The intent with which an act is done is shown by the facts and circumstances surrounding the case.

Do not confuse intent with motive. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done.

Motive is not an element of the crime charged and the State is not required to prove a motive on the part of the Defendant in order to convict. However, you may consider evidence of motive or lack of motive as a circumstance in the case.

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted or agreed to by counsel.

There are two types of evidence; direct and circumstantial. Direct evidence is the testimony of a person who claims to have personal knowledge of the commission of the crime which has been charged, such as an eyewitness. Circumstantial evidence is the proof of a chain of facts and circumstances which tend to show whether the Defendant is guilty or not guilty. The law makes no distinction between the weight to be given either direct or circumstantial evidence. Therefore, all of the evidence in the case, including the circumstantial evidence, should be considered by you in arriving at your verdict.

Statements, arguments and opinions of counsel are not evidence in the case. However, if the attorneys stipulate to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

The credibility or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

INSTRUCTION NO. 27

The fact that a witness has been convicted of a felony may be considered by you only for the purpose of determining the credibility of that witness. The fact of such a conviction does not necessarily destroy that witness' credibility. It is one of the circumstance that you may take into consideration in weighing the testimony of such a witness.

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3 A conviction shall not be had on the testimony of an accomplice unless the
4 accomplice is corroborated by other evidence which in itself, and without the aid of the
5 testimony of the accomplice, tends to connect the defendant with the commission of the
6 offense; and the corroboration shall not be sufficient if it merely shows the commission of
7 the offense or the circumstances thereof.

8 An accomplice is hereby defined as one who is liable to prosecution, for the identical
9 offense charged against the defendant on trial in the cause in which the testimony of the
10 accomplice is given.

11 You are instructed that Jonathan Harper, while not charged is an accomplice under the
12 law given the prosecution's theory of criminal culpability.
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A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

You should consider such expert opinion and weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if, in your judgment, the reasons given for it are unsound.

INSTRUCTION NO. 30

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

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2 Although you are to consider only the evidence in the case in reaching a verdict, you
3 must bring to the consideration of the evidence your everyday common sense and judgment
4 as reasonable men and women. Thus, you are not limited solely to what you see and hear as
5 the witnesses testify. You may draw reasonable inferences from the evidence which you feel
6 are justified in the light of common experience, keeping in mind that such inferences should
7 not be based on speculation or guess.

8 A verdict may never be influenced by sympathy, prejudice or public opinion. Your
9 decision should be the product of sincere judgment and sound discretion in accordance with
10 these rules of law.
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INSTRUCTION NO. 32

In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the defendant.

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2 If, during your deliberation, you should desire to be further informed on any point of
3 law or hear again portions of the testimony, you must reduce your request to writing signed
4 by the foreperson. The officer will then return you to court where the information sought
5 will be given you in the presence of, and after notice to, the district attorney and the
6 Defendant and his/her counsel.

7 Read backs of testimony are time-consuming and are not encouraged unless you deem
8 it a necessity. Should you require a read back, you must carefully describe the testimony to
9 be played back so that the court ^{Reporter} recorder can arrange his/her notes. Remember, the court is
10 not at liberty to supplement the evidence. AS
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When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

Your verdict must be unanimous. As soon as you have agreed upon a verdict, have it signed and dated by your foreperson and then return with it to this room.

INSTRUCTION NO. 35

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

GIVEN:


Abbi Silver
DISTRICT JUDGE

July 15, 2013

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CASE NO. C262966-1

DEPT. NO. XV



CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,)
Plaintiff,)

) Reporter's Transcript
) of

vs.) Jury Trial
)

EVARISTO GARCIA,)
Defendant.)

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

MONDAY, JULY 15, 2013

9:00 A.M.

APPEARANCES:

For the Plaintiff: Taleen Pandukht, Esq.
Noreen Demonte, Esq.
Deputies District Attorney

For the Defendant: Ross Goodman, Esq.
Dayvid Figler, Esq.

Reported by: JoAnn Melendez, CCR No. 370

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1 LAS VEGAS, CLARK COUNTY, NV, MON, JULY 15, 2013

2 9:00 A.M.

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

5
6 THE COURT: Do you want her to sit and
7 transcribe this or --

8 MR. FIGLER: Oh, the giving of the
9 instructions? You can give her a break on that. If
10 we hear anything wrong, we'll make a record
11 afterwards.

12 THE COURT: You can correct me in the
13 middle of it if you hear something wrong.

14 MS. DEMONTE: That's fine.

15 MS. PANDUKHT: That's fine.

16 MR. FIGLER: Yes.

17 THE COURT: Go ahead and be seated. Good
18 morning, ladies and gentlemen. We are back on the
19 record of State of Nevada versus Evaristo Garcia.
20 Case No. C262966.

21 Let the record reflect the
22 defendant's present with Mr. Figler and Mr. Goodman.
23 And for the State, Ms. Pandukht and Ms. Demonte. We
24 are in the presence of the jurors.

25 It's now set for the jury

1 instructions. Next to you you'll each find a copy
2 of the original set which I will read to you.

3 THE CLERK: They're still being made.
4 The copies are on their way. I'll run down.

5 THE COURT: I can start reading them.
6 Trust me. Back in my day when I was an attorney, we
7 didn't do this. So everybody just got it read to
8 them and they listened very closely.

9 I'd rather start to be quite frank.
10 Pretty much an amended. It's just rereading the
11 amended.

12 MR. FIGLER: That's fine. Can we
13 approach just really briefly, Your Honor?

14 THE COURT: Sure.

15 MR. FIGLER: Thanks.

16 THE COURT: I don't know. I don't have
17 her here for the bench conference. So hold on.

18 (Whereupon, the following proceedings
19 were had in open court outside the
20 presence of the jury panel.)

21 MR. FIGLER: Ms. Demonte thoughtfully
22 gave me her power point ahead of time to ask if
23 there's any problems or concerns that we had. And
24 we don't. It's not our intention to object during
25 her opening.

1 There was one point though, however,
2 and I want to make sure we're preserving our record.
3 So I thought I would just do it ahead of time.

4 THE COURT: That was really nice of you.

5 MR. FIGLER: Mr. Goodman had previously
6 made a motion to suppress the in-court
7 identification of Melissa Gamboa at the preliminary
8 hearing if you recall. You were not --

9 THE COURT: Not really.

10 MR. FIGLER: You said it could come in.

11 THE COURT: So she couldn't I.D. him in
12 court so it's of no value anyway.

13 MR. FIGLER: But out of an abundance, we
14 have an objection. And I know Ms. Demonte is gonna
15 mention that in her thing and I want to make sure
16 that the objection is contemporaneous.

17 THE COURT: That would be an issue had
18 she then again identified him in court.

19 MR. FIGLER: I think --

20 THE COURT: I guess you're making a
21 record, but because she didn't even identify him in
22 court, it's truly moot.

23 MR. FIGLER: I think so, true, but since
24 Ms. Demonte is gonna be saying Ms. Gamboa is gonna
25 be identifying him at the preliminary hearing, I

1 didn't want to jump and object to her.

2 THE COURT: I'm gonna allow it to count
3 as a contemporaneous so that he doesn't actually do
4 that in the middle of your trial. For purposes if
5 there is an appeal, I'll allow that now.

6 MR. FIGLER: Thank you.

7 MS. DEMONTE: And then when I'm finished,
8 I did print it out for the court.

9 THE COURT: And we'll make it a Court's
10 exhibit.

11 MR. FIGLER: And that was really it.
12 Thanks.

13 THE COURT: Okay, thank you.

14 (Whereupon, the bench conference ended.)

15 THE COURT: Is it ready or not?

16 THE CLERK: We're, we're down to the last
17 copy.

18 THE COURT: What I'm gonna do is I'm
19 gonna start reading and then you go ahead and hand
20 it to them.

21 We're having some technical
22 difficulty with the copier, but what I'm gonna do is
23 I'm gonna start reading you the Instructions.

24 And when I see them getting passed
25 out, I can stop and then we'll get on whatever

1 number we are, okay?

2 (Whereupon, the Instructions were read to
3 the jury panel but not reported per
4 stipulation of the attorneys.)

5 THE COURT: Just let the record reflect
6 everybody is holding a set of instructions right
7 now, a copy.

8 (Whereupon, the Instructions were read to
9 the jury panel.)

10 THE COURT: It should be court reporter,
11 not recorder. I'll put reporter on this with my
12 initials on 33. So that the court reporter.

13 (Whereupon, the Instructions were read to
14 the jury panel.)

15 THE COURT: We'll hear first from the
16 State of Nevada in closing arguments.

17 MS. DEMONTE: Thank Your Honor.

18 THE COURT: Ms. Demonte.

19 MS. DEMONTE: Good morning, ladies and
20 gentlemen. Less than a week ago, my co-counsel
21 stood before you. And the very first words out of
22 her mouth were that on February 6th of 2006,
23 Evaristo Garcia shot Victor Gamboa in the back while
24 he was running away.

25 We're asking you today to return

1 verdicts of guilty for conspiracy to commit murder
2 and first degree with use of a deadly weapon for
3 those actions.

4 Now, in order to get there, you've
5 just read through all those Instructions. And we
6 are gonna go through them one by one.

7 In every criminal case across the
8 country, the State must prove two things beyond a
9 reasonable doubt. One, that crimes have been
10 committed; and two, that it was the defendant
11 himself that committed those crimes.

12 Now, reasonable doubt means, and I'm
13 gonna quote it directly to you, A reasonable doubt
14 is one based on reason. It is not mere possible
15 doubt but is such a doubt as would govern or control
16 a person in the more weighty affairs of life.

17 If in the minds of the jurors after
18 the entire comparison and consideration of all the
19 evidence are in such a condition that they can say
20 they feel an abiding conviction as to the truth of
21 the charge, there is not a reasonable doubt.

22 Doubt to be reasonable must be
23 actual, not mere possibility or speculation.

24 And so we approach every single
25 charge with those.

1 And I'll start with conspiracy
2 because it's the first one charged. Now, as you can
3 see from the instructions that there is more than
4 one way to prove that somebody committed a crime.

5 Someone's liable for a commission of
6 a crime if they themselves are the ones who did it
7 or if they conspired with the person who actually
8 did it with the intent that that be done or that
9 they aided or abetted that person who did it with
10 the intent that that crime be done.

11 Conspiracy is an agreement between
12 two or more persons for an unlawful purpose. If
13 somebody knowingly does any act to further the
14 conspiracy or participates therein and you can find
15 the conspiracy by evidence of a coordinated series
16 of events in furtherance of that conspiracy.

17 We don't need to show to you that
18 they got together and said okay, you're gonna kill
19 the person on this day. That's not what you need.
20 You can draw from all the evidence in the case and
21 the coordinated series of events; however, you
22 cannot find the defendant guilty if someone else
23 shot unless you believe he intended that that crime
24 be committed.

25 To aid and abet is to aid, promote,

1 encourage or instigate the crime. That's it. And
2 again, if you do not believe that the defendant
3 himself committed the act, you cannot use aiding and
4 abetting to convict him unless you believe that he
5 had the specific intent that the crime occur.

6 In this case, we charged murder.
7 Now, murder is the unlawful killing of a human being
8 with malice aforethought. And you got an
9 instruction on malice aforethought. It's very long,
10 wordy one. Basically it's the intentional doing of
11 a wrongful act without legal cause or excuse. You
12 did something that you knew was wrong. That's it.
13 It can be expressed or it can be implied by the
14 circumstances surrounding how the person was killed.

15 And in this state, we charge open
16 murder. Open murder includes first-degree murder,
17 second-degree murder and voluntarily manslaughter.
18 And it's up to you, ladies and gentlemen of the
19 jury, to determine which one it was.

20 So let's talk about first-degree
21 murder first. First-degree murder has three
22 elements: Willful, deliberate, premeditated.

23 Ms. Pandukht and I have to show you
24 all three. All three together in order for you to
25 convict him of first-degree murder.

1 Willfulness just means the intent to
2 kill. Now, do not confuse it with motive. It just
3 means that when he shot Victor Gamboa he intended to
4 kill him. We don't have to show you why. That is
5 not the State's burden. And Instruction 24 tells
6 you that. Just means that he intended it.

7 Deliberation is determining upon a
8 course of action to kill. And it can be arrived at
9 at a very, very short period of time. You think
10 about it, then you do it. It's as simple as that.

11 Premeditation. Need not be it for a
12 day, an hour, even a minute. And it can be as
13 instantaneous as successive thoughts of the mind.

14 And let me give you an example of
15 successive thoughts of the mind. You're driving
16 down the road, you're coming up on a traffic light.
17 And you see it go from green to yellow and you know
18 it's gonna go from yellow to red. And in your mind
19 you know you've got a split second to make a
20 decision, do I hit the gas, do I hit the brake, do I
21 try to make it or do I stop. Successive thoughts of
22 the mind. It can happen that fast.

23 As fast as you're determining
24 whether or not to stop or go at a stoplight, it's as
25 fast as you can determine whether or not you're

1 gonna kill somebody and it's first-degree murder.

2 Second-degree murder is all other
3 kinds of murder. So if you don't believe we've met
4 our burden of proving premeditation, deliberation,
5 and willfulness, then you jump to second degree
6 murder. It's willful and it's the unlawful killing
7 of a human with malice aforethought, but it does not
8 have premeditation and deliberation. It does not
9 have that.

10 But, ladies and gentlemen of the
11 jury, when the defendant got in the car and rode to
12 that school with a gun in his pocket that he got
13 from Puppet and he continued to fight holding on to
14 that gun, swinging with that left hand, and he
15 chased Victor Gamboa across the street, stopped in
16 the middle of the street, then pulled out that gun
17 and fired not one, not two, not three, but six
18 shots, because that's how many shell casings we
19 have, that is willful, deliberate and premeditated.

20 Voluntary manslaughter is the
21 unlawful killing of a human being. And this one is
22 without malice aforethought and without willfulness,
23 premeditation and deliberation.

24 Voluntary manslaughter comes from a
25 sudden quarrel or heat of passion sufficient --

1 sorry. Sudden quarrel or heat of passion brought on
2 by a highly provoking injury sufficient to make that
3 passion irresistible to the reasonable person.

4 He doesn't get to set up his own
5 standards. You don't get to say well, he might have
6 been thinking this. No, no, no. If a reasonable
7 person in the same circumstance can identify with an
8 irresistible passion that there is no time for
9 thought, because there must not be an interval
10 between the assault and the killing sufficient for
11 the voice of reason to be heard.

12 And let me give you an example of
13 irresistible passion. A man is sitting outside
14 watching his son play in the pool. And like many
15 backyards in the Las Vegas Valley, he's got that
16 block wall. And behind that block wall is a street.
17 And as he's watching his son play in the pool, he
18 sees a car come crashing through that block wall,
19 pinning his son to the bottom of that pool. He
20 knows his son is dead instantly. He knows. And
21 just as he's processing that, the driver of the
22 car's head bobs to the surface. And without time to
23 think, without time for that voice of reason to say
24 overcome this irresistible passion, don't do it, he
25 takes his hand and shoves that driver's head under

1 the water. Irresistible passion from a highly
2 provoking injury that a reasonable person can
3 identify with. And there is no time. There was no
4 interval for that voice of reason to be heard before
5 that killing took place.

6 This case is not voluntary
7 manslaughter, ladies and gentlemen.

8 You also have an instruction on what
9 a deadly weapon is. A firearm is a deadly weapon.
10 And you'll have your verdict form where you have the
11 option of not selecting a deadly weapon, but ladies
12 and gentlemen, a firearm was used in this case, a
13 firearm is a deadly weapon and you must return that
14 verdict of guilty.

15 Now, let's talk about the witnesses
16 and evidence in this case and how we've proven to
17 you that the defendant himself is the one who
18 committed these crimes.

19 Now, I'm gonna start with Jonathan
20 Harper. And I'm not starting with Jonathan Harper
21 because he's the State's star witness, and I'm not
22 starting with Jonathan Harper because the State
23 believes that he's the most important part of the
24 case.

25 But I'm starting with Jonathan

1 Harper because his credibility was the one attacked
2 by the defense when Dr. Roitman was called to the
3 stand to say that Jonathan Harper confabulated his
4 memory when he made those statements, that Dr.
5 Roitman didn't actually review any of those
6 statements, that Dr. Roitman who did this medical
7 record review didn't read any of Jonathan's CT
8 scans. He just said what was said in the
9 radiologist's report, but Dr. Roitman who didn't
10 remember who the treating neurosurgeon was in the
11 medical record review, and the Dr. Roitman who
12 contradicts his own findings where he wrote down
13 that this injury won't affect memory and then takes
14 the stand and says otherwise. Well, he writes down
15 that the interview took place three weeks after the
16 injury when in fact it was five.

17 And the reason I'm starting with
18 Jonathan Harper is that his testimony must be
19 corroborated. You have that as Instruction 28.

20 So I'm gonna start with Jonathan and
21 then we'll go through all the other witnesses and
22 all the other evidence so you can see how his
23 testimony is corroborated.

24 Jonathan Harper said that on
25 February 6th of 2006 he was at Salvatore Garcia's

1 house with Manuel Lopez and Evaristo Garcia.

2 Now, he didn't know Evaristo's last
3 name. He called him E. And he identified this
4 person as E.

5 And Jonathan told you that while
6 they are at Salvador's house Little One called and
7 that Salvador said they had to go, and that they
8 were gonna go to the school and that he and Evaristo
9 and Stacy, Puppet's girlfriend, got into Puppet's El
10 Camino, and that before they left, he saw Puppet's
11 9mm tucked into Puppet's pocket and that Puppet gave
12 that gun to E, and that he and the defendant and
13 Puppet and Stacy then went to the school together,
14 and that Sal and Edshel and Sal's brother -- and
15 Edshel's brother were in Sal's car behind them, that
16 they got there first in Puppet's car and that when
17 they got there, there was a big brawl out in front
18 of the school and Little One was fighting with a big
19 and fat guy and that he started fighting with that
20 big and fat guy, too, up until he got sucker punched
21 by someone he knows as Diablo.

22 He also told you that when they went
23 to the school, defendant was wearing a gray hoody.

24 He next tells you that everyone
25 started running, that a kid ran out across the

1 street. And he referred to that kid as the one who
2 started everything and that Giovanny and he chased
3 that kid. And that as they were chasing that kid,
4 they were fighting over the gun. And he hears E
5 say, because he says yes, they were far away but
6 they were yelling loud enough I could hear it, I got
7 it. He says E shot the kid and E dumped the clip.
8 And that later on E tells him I got him. And he
9 also overheard people at Sal's house talking about
10 the gun that was hidden in the toilet. That's
11 Jonathan Harper's testimony.

12 And it's corroborated because
13 Jonathan tells you that it was as they were running
14 across the street that those shots were heard. Six
15 shell casings and four bullets found there in the
16 street. They were bullet strikes to that wall. One
17 bullet embedded in the wall, one bullet that came
18 across the street after striking the wall. And then
19 down here is the gun hidden in the toilet. And
20 there they are. There's your shell casings and
21 bullets on the median. More shell casings and
22 bullets in the street. The one that bounced off the
23 wall and the four bullet strikes to the wall right
24 where the kid was shot.

25 And then over on Park Hurst. And

1 remember Jonathan told you E ran towards the
2 neighborhood. That's where the neighborhood was.
3 There's the toilets, there's the gun.

4 And Dinah Moses testified that that
5 was indeed the gun that fired at least two of those
6 bullets. The other two bullets that were found were
7 too damaged possibly from the wall and that the six
8 shell casings found at the scene were of the similar
9 characteristics and the correct caliber for that
10 gun. That is the murder weapon.

11 Crystal Perez and Gina Marquez told
12 you that the week before there was an altercation
13 between Crystal and Giovanny over the book and that
14 on the day of the murder between 5th and 6th period
15 that Giovanny got on his cell phone. And remember,
16 Jonathan told you they got a call from Giovanny
17 while he was at Sal's.

18 Crystal overheard Giovanny say bring
19 Stacy. Remember, Jonathan told you Stacy came with
20 them, that they returned after school with Brian and
21 Victor because after hearing that they left school
22 early to go get help and that Brian approached
23 Giovanny and started fighting and that there was a
24 brawl. Crystal got knocked to the ground. And as
25 she was down on the ground, she saw a person run

1 past her with a gun and heard shots.

2 Now, Crystal admitted to you that
3 she lied to the police. She wanted that person to
4 be Giovanni. She was angry at Giovanni. But it
5 wasn't.

6 Brian Marquez told you that he was
7 at home with Victor when Crystal and Gina came to
8 get him, that they drove back to the school with
9 Victor, Crystal, Gina, that they parked over on
10 Virgil and went out to the school, that he was the
11 one that approached Giovanni and hit him first and
12 then that lots of guys started fighting him.

13 And remember what Brian Marquez told
14 you, back then he was 300 pounds. Brian Marquez was
15 the big, fat guy Jonathan started fighting with.
16 That's who that was.

17 Melissa Gamboa told you, she's
18 Victor's sister, that after school on February 6th
19 she saw a big fight and her brother was there. That
20 during this fight she sees a gray El Camino park and
21 that three males and one female are with that car.
22 And remember, Jonathan, Puppet, defendant and Stacy.
23 Three males and one female.

24 That when the fight broke up, she
25 was running behind her brother and she saw a guy in

1 a gray hoody shoot her brother.

2 And at that preliminary hearing in
3 2008, she identified the defendant as being the one
4 that that she saw shoot her brother. She identified
5 the defendant as wearing the gray hoody.

6 Vanessa Grajeda tells you that after
7 school there was a fight and she was watching it and
8 she saw a guy with a gray hoody with something black
9 in his pocket. And she kept watching him as he ran
10 to the middle of the street, pulled out the gun and
11 was shooting with his right hand.

12 Joseph Harris tells you that he went
13 to school to pick up his girlfriend and was waiting
14 at the bus stop and he sees a fight and then he sees
15 a young man running across the street in house shoes
16 and that a male in a hoody pulled out, pointed a gun
17 at him as he ran away and he heard five to six
18 shots. And he saw the victim fall and slide down
19 the wall as he was falling. Remember, how he -- he
20 demonstrated that to you how he went up against the
21 wall like this and slid down. (Indicating.)

22 Dr. Larry Sims told you that he
23 conducted the autopsy on Victor Gamboa, that there
24 was a gunshot wound that entered through the left
25 back, course through the aorta and exited through

1 the right abdomen. And he told you it was a shored
2 exit meaning that Victor Gamboa's body was up
3 against something such as a wall. And that he also
4 had abrasions to his face and his knee and he had --
5 if you see the picture, it appears to be some dirt
6 or an abrasion consistent with Joseph Harris telling
7 you how the victim slid down that wall.

8 Dany Eichelberer, the principal from
9 the school, said that just as school let out, he had
10 school police in his office on an unrelated matter
11 and Betty Graves called him very distressed, that he
12 went outside and saw total mayhem. Everyone was
13 fighting. That he yells and the crowd scatters.

14 Most of the people got in the cars and
15 started driving away, but there were, there were
16 some people that stayed behind. And he saw a
17 smaller kid is how he referred to him. A smaller
18 kid running from a taller male wearing a gray hoody.
19 And he saw that taller male in the gray hoody stop
20 in the middle of the street and pull that hoody over
21 his head before he fires away. And that was the
22 words that Dany Eichelberger used. He fired away as
23 the kid ran for his life and was pinned up against
24 the wall.

25 Betty Graves told you that the male

1 in the gray hoody was outside the school with a --
2 his hand in his right pocket and he was fighting
3 with his left hand. And Betty was very concerned
4 about the right hand in the pocket of that gray
5 hoody and looks over at her co-worker and says
6 Terrell, that boy's got a gun.

7 And that when the principal came up
8 and broke up the fight, she watched as the guy in
9 the hoody ran and stopped in the middle of the
10 street and then she saw gunshots -- and she heard
11 gunshots and saw smoke and fire.

12 She didn't actually see the firing
13 take place, but she knows that the person in the
14 gray hoody was the one firing from the middle of the
15 street by where she was seeing that smoke and fire.
16 She then saw what she referred to as a young baby by
17 the brick wall and his sister was crying. And she
18 said that shooter did not go to their school.

19 And you also heard from Edshel
20 Calvillo. He was at Sal's with Puppet, Jonathan and
21 someone he called Chucky. And he identified the
22 defendant as being Chucky and told you that he got
23 the name Chucky because he looked like a character
24 from Rugrats, and that the defendant was at Sal's
25 with them when they got the call from Little One.