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IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 64221
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APPELLANT'S APPENDIX

VOLUME 10A OF 11

(BATES 1793-1993)

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1 And they were supposed to go back up Little One.
2 And remember, Little One is Giovanny. That before
3 they left to go back up Little One, Puppet gave the
4 gun to the defendant. That Jonathan, Puppet and
5 Puppet's girl and the defendant left in Puppet's El
6 Camino. And remember, that's the same thing
7 Jonathan said. And that he road with Salvador and
8 they followed behind.

9 Now, what Edshel tells you is that
10 Sal's car got stuck at a light and once they got to
11 the school, everyone was running and he heard shots.

12 Edshel told you that later on
13 defendant told him, I think I got him. Defendant
14 told him that he shot the kid because Little One had
15 told him to. He also told you that Jonathan told
16 him he saw everything. And he told you that he also
17 found out what happened from Giovanny and that he
18 heard that the gun was in the toilet.

19 Edshel also told you that he came
20 forward in July after arrest warrants had already
21 been issued because it weighed heavily on his
22 conscience that a young kid had been killed.

23 And now let's talk about the
24 investigation because this is what all the witnesses
25 have told you. And here's what the investigation

1 revealed: Detective Mogg and Hardy respond to the
2 scene on February 6th. The gun is recovered that
3 night in the toilet. And that all the witnesses,
4 save for one, Crystal Perez, described the shooter
5 as being a Hispanic male, late teens, dark hair,
6 wearing a gray hoody.

7 They took Giovanni to the homicide
8 office because they knew he was part of it and he
9 was photographed wearing the same clothing. He was
10 wearing all black.

11 But they also got his phone. And
12 what they got off Giovanni's phone were 20 calls to
13 Manuel Lopez between Giovanni's phone and Manuel
14 Lopez's phone and 12 calls to a phone belonging to
15 Melinda Lopez who's Sal's girlfriend.

16 They then interview Manuel Lopez.
17 Manuel Lopez admits to them that that was his gun.
18 He admits to them that he gave that gun to the
19 shooter and he admits to them that after the
20 shooting he went back to try to get the gun but the
21 cops had already gotten it.

22 Then on April 1st, Jonathan Harper
23 was located. And he was located because Detective
24 Ed Ericcson, who was investigating the shooting of
25 Jonathan, called up Detective Mogg and said this kid

1 might have information on your case. Mogg and Hardy
2 then interview Jonathan.

3 Now, before April 1st, they have all
4 of this information. They know the shooter was
5 wearing a gray hoody, they know that the shooter got
6 the gun from Manuel. They don't know the shooter's
7 name. That's all Jonathan gives them that they
8 didn't already know. He gave them the name
9 Evaristo. There was no last name to go with it
10 until Detective Mogg receives a tip from the Crime
11 Stoppers.

12 And remember, Crime Stoppers is the
13 secret witness line. It's an anonymous tip, but it
14 leaves him to the 4900 block of Pearl Street where
15 he starts investigating. He's checking license
16 plates, he's looking for anyone who might have a 16
17 year old son. Or a -- sorry. A teenage son that
18 matches the description of the shooter.

19 He then comes upon Maria Garcia who
20 works at the Stratosphere. And she lists in one of
21 her emergency contacts her 16 year old son Evaristo
22 Garcia. He then finds a driver's license photo for
23 Evaristo Garcia and puts together a photographic
24 lineup. He shows it to Manuel Lopez and Jonathan
25 Harper. Manuel Lopez identifies the defendant as

1 does Jonathan Harper. He then swears out arrest
2 warrants on June 21st of 2006.

3 And then a month later is when
4 Edshel Calvillo's interviewed. That's the time line
5 of the investigation.

6 After the arrest warrant is issued
7 in June of 2006, defendant can't be located. No one
8 knows where the defendant is.

9 In fact, when Detective Mogg was
10 investigating on Pearl Street he never saw the
11 defendant there. So he forwards the warrant to the
12 FBI.

13 And you heard from Scott Hendricks.
14 The defendant could not be located in the U.S. That
15 in October of 2006, Scott Hendricks gets a warrant
16 for unlawful flight to avoid prosecution from the
17 United States District Court, that he then gets a
18 subsequent warrant for a pen register to get the
19 phone records of the calls dialed from the
20 defendant's parents' phones. And that happens on s
21 April 20th, 2007.

22 Three days later, he told you he had
23 Detective Mogg go to the house to -- and he calls it
24 tickling the pen. Have Detective Mogg talk to the
25 defendant's parents and see if it's sparks a phone

1 call. And you bet it sure did.

2 After the conclusion of Detective
3 Mogg's interview with defendant's parents, there's a
4 call from the defendant's father's phone to Vera
5 Cruz, Mexico. Defendant was then located there and
6 finally arrested on a provisional warrant almost a
7 year later on April 23rd, 2008.

8 He was formally extradited back to
9 United States October 16th of 2008 and picked up at
10 the airport by Detectives Mogg and Hardy.

11 Once the defendant was arrested in
12 2008, he can finally be fingerprinted. And you
13 heard from Alice Maceo that they actually first got
14 this gun as soon as it had been recovered at the
15 scene in 2006 and she located and lifted three
16 prints, L1, L2, L3, off this gun in 2006. The first
17 one being this fingerprint up here just below this
18 line. The second one being L2 on the back strap and
19 the third one being here just above the grip. That
20 she had already compared those prints to Giovanni
21 Garcia and Manuel Lopez and they were not identified
22 to those two.

23 But once she had the defendant's
24 prints, she identified defendant's right palm right
25 here at L2. This part of the defendant's hand at

1 this part of the gun. (Indicating.) And you'll
2 have that gun. Put some gloves on. I'm sure
3 they'll send the gloves back with you. That is a
4 perfect place to leave your print if you're firing
5 that gun.

6 That she also identifies defendant's
7 right ring finger upside down right here.

8 (Indicating.) And Alice Maceo is on the stand and
9 counsel was asking her if the finger had to be
10 wrapped around. And we'll give it to you. That's a
11 really weird place for a fingerprint to be if you're
12 firing a weapon, but not a weird place at all if
13 you're stashing that gun upside down in the toilet.

14 Ladies and gentlemen, Ms. Pandukht
15 and I have proven to you that on February 6th of
16 2006, the defendant, Evaristo Garcia, shot Victor
17 Gamboa in the back and he was running away. And he
18 did so after gaining that gun from Manuel Lopez
19 prior to going to that fight and after Giovanny told
20 him to.

21 We ask you to find -- return
22 verdicts of guilty for conspiracy to commit murder
23 and first-degree murder with a deadly weapon. Thank
24 you.

25 THE COURT: Do you want me to take a

1 break before I go into yours?

2 MR. GOODMAN: I'm okay. Unless the jury
3 wants a break before I start. It's up to the jury,
4 Your Honor.

5 THE COURT: All right. It doesn't look
6 like they want a break right now. Let's -- it's
7 just a weird time. We'll definitely have a break
8 before the next one. There's one more argument by
9 the State and we'll have a break after that then,
10 okay.

11 All right. Then we'll hear from the
12 defense, Mr. Goodman.

13 MR. GOODMAN: Thank you, Your Honor.

14 THE COURT: Thank you.

15 MR. GOODMAN: What you heard in the last
16 week is that there's no independent witnesses.
17 Check your notes. There's no independent witnesses
18 that identify Evaristo Garcia as wearing a gray
19 hoody. There's no independent witnesses that
20 identify Evaristo Garcia as having a gun. There's
21 no independent witness to identify Evaristo Garcia
22 was at Sal's apartment in a car, much less at the
23 school.

24 You have two people. So what I told
25 at opening statement, their whole case, Metro's

1 entire investigation relied on Jonathan Harper and
2 we now know Edshel Calvillo. And we'll talk about
3 that in a second.

4 What do you know now? We know the
5 scene was dark. You know that everything happened
6 very fast. You know that nobody identified Evaristo
7 Garcia at the school except for Melissa Gamboa who
8 gave a description of who she thought was a shooter,
9 somebody wearing a gray hoody, 5 foot, 3.

10 Then you heard me ask her two years
11 later when she claims to identify the only person
12 at -- in the courtroom, and make no mistake, it's
13 the same set up, right, Melissa Gamboa is on the
14 witness stand, Evaristo Garcia was at counsel's
15 table, prosecutor says can you identify the shooter
16 and she points to only the defendant at the table.
17 That's the only thing that happened here.

18 And then at that hearing she was
19 asked did your description of the shooter the night
20 of the shooting match Evaristo Garcia. And what did
21 she tell you? No.

22 Nobody else identified Evaristo
23 Garcia as the shooter. She's the deceased's sister.
24 Nobody blames her. She's trying to hold somebody
25 accountable. But at the end of the day, she told

1 you from that witness stand that her description of
2 the shooter the night of the shooting did not match
3 Evaristo Garcia.

4 You heard about a photo lineup,
5 right? That's what you do. Okay. We don't know
6 who the shooter, let's go to all these witnesses
7 give them a photo lineup. You heard from Detective
8 Mogg what's a photo lineup. It's a six pack. You
9 have three people on top, three people on bottom,
10 they look the same or similar.

11 Did they go give that to Melissa
12 Gamboa, the person who claims to have saw the
13 shooter outside of the car come out of the El
14 Camino? She says she didn't. Detective Mogg said
15 that he thought he did give a photo lineup.

16 Either way, if he did give a photo
17 lineup it was negative because you could bet if she
18 identified Evaristo Garcia in a photo lineup then
19 you would have heard about it.

20 And so what happened was the one
21 thing that Detective Mogg told you shouldn't happen?
22 Would you ever, Detective Mogg, go to an eyewitness
23 and show them one photo? No. Of course not. Why
24 not? Because it's highly suggestive, it's
25 unreliable. How do you attach any weight to that?

1 Because a person's gonna think that must be the
2 suspect.

3 And guess what happened in this
4 case? The very thing that Detective Mogg warned
5 against is exactly what happened. A one photo
6 lineup, except it was worse, it was in person at
7 counsel's table. That's the only time that Melissa
8 Gamboa identifies Evaristo Garcia. It's completely
9 unreliable. And she came in here and she couldn't
10 identify Evaristo Garcia. Maybe she had a moment
11 of, you know what, maybe I can't do it.

12 But I would submit to each one of
13 you sitting on this jury that if you actually saw
14 the person that shot your friend, a family member,
15 and you saw his face, you would never forget that
16 face for the rest of your life. Whether it's two
17 years later, five years later or seven years later.

18 And if there's any doubt on whether
19 or not anybody could have identified the shooter at
20 that school in that park, all you have to do is look
21 at your notes and look at the independent witnesses
22 in this case. Principal Dan, Betty Graves, Joseph
23 Harris, the guy, the guy at the bus stop.

24 What did principal Dan say? I don't
25 think anybody's going to dispute his credibility.

1 What did he say? There was 20 to 30 people
2 fighting, the shooter was not a small guy, same,
3 same height. We asked him how, how tall are you,
4 Dan? He says 6'2". Can you tell us how tall, what
5 range the shooter was? He had one of the best looks
6 he said. Principal Dan said not shorter than 5'8"
7 and not taller than 6'1". Melissa Gamboa said the
8 shooter was 5'3".

9 What else did principal Dan say?
10 And I'm sure that you all wrote this down in your
11 notes. That the shooter was wearing a gray hoody,
12 quote, protecting his look. What do you mean?
13 Quote, it's like he wanted the hood to be down.

14 Nobody is gonna fault Melissa
15 Gamboa, but the reality is at 9 o'clock at night on
16 Washington with 30 to 40 people scattering around,
17 the people who have the best look could not identify
18 him. The guy in the gray hoody was trying to
19 protect his look.

20 Who else saw the shooter? Betty
21 Graves. Everybody remembers her. She was standing
22 right in front of them before the fight happened.
23 He had that, he was holding on to his pocket looked
24 like a gun. Standing right in front of him Betty
25 Graves couldn't identify that person. She said he

1 was about 19 to 20 years old, not 16 like Evaristo
2 was and he had a strange look. Quote, a strange
3 look. Couldn't identify.

4 Where's a photo lineup for Betty
5 Graves so we can have some objective evidence? Why
6 don't Detective Mogg or Hardy go and say here's a
7 six pack, Betty Graves. You stood right in front of
8 him for at least a minute, he had a strange look,
9 can you, can you identify who the shooter was.

10 Now that's competent evidence for
11 the jury. Where's that evidence?

12 Betty also said that she stands
13 about 5'6" tall and that the shooter was taller than
14 she was. Again, not the description that Melissa
15 Gamboa gave.

16 Who's the only other independent
17 witness that saw the shooter in a gray hoody run by?
18 Joseph Harris. The guy with the slippers at the bus
19 stop. Ran right by him. He couldn't identify him.

20 Do we even have any evidence? Did
21 Evaristo Garcia even have an opportunity to have the
22 detectives go to him and say can you pick somebody
23 out of this six pack? Somebody maybe other than
24 Evaristo Garcia.

25 The independent witnesses is

1 undisputed could not identify the shooter. The
2 shooter was protecting his face, he had the gray
3 hoody on and did not match the description from
4 Melissa Gamboa.

5 Now, Ms. Demonte stood up for you in
6 closing arguments and said well, I'm starting with
7 Jonathan Harper, but he's not the State's primary
8 witness. Not the State's primary witness? Who else
9 is her primary witness? The entire Metro
10 investigation relied on Jonathan Harper. There was
11 nobody else.

12 We talked in voir dire and opening
13 statement, you just got jury instructions right now,
14 about what reasonable doubt is. It's just based on
15 reason.

16 Let me give you four options on why
17 you can doubt Jonathan Harper's testimony. You
18 can't talk about Jonathan Harper without talking
19 about whether or not he confabulated that statement.
20 You just can't.

21 They can say whatever they want
22 about Dr. Roitman who's a board certified
23 psychiatrist, but what did he tell you? He reviewed
24 21 (sic) pages of medical records from Sunrise
25 Hospital and Healthsouth.

1 Ms. Demonte said well, you shouldn't
2 believe him because he couldn't read the images,
3 he's not a radiologist. He did a records review.
4 The CT scans were part of the 2100 pages that he
5 reviewed.

6 And he told you -- well, first he
7 described to you, so it makes sense, the severity of
8 Jonathan Harper's brain damage. Jonathan Harper
9 told you 23 percent of his brain was blown out. But
10 in medical terms, the CT scan showed a two inch
11 diameter hole in his skull, what Dr. Roitman said
12 was the equivalent of the size of a golf ball.
13 There was bullet and bone fragments in different
14 part of his brain and blood trapped in the inside of
15 his brain.

16 Medically what happened to Jonathan
17 Harper's brain? Dr. Roitman said it impacted the
18 frontal, temporal and parietal lobes. Almost all
19 his brain. Which create a swelling and bleeding.

20 Dr. Roitman told you an injury of
21 that severity, it's just like jello with the brain.
22 It impacts the whole brain and that is permanent
23 brain loss. That 23 percent of Jonathan Harper's
24 brain isn't growing back any time soon. It's dead
25 tissue.

1 And he gave an analogy, which I
2 thought, which I thought was very insightful on how
3 to look at Jonathan Harper's brain. He told you it
4 was like an air traffic controller. If a plane is
5 trying to come to Las Vegas and there's a delay in
6 Denver or there's a delay from, from Dallas, it
7 disrupts the timing of when that plane's gonna come
8 into Las Vegas. Just like the interference with
9 Jonathan Harper's brain tissue interferes, causes
10 interference with his entire brain.

11 Medically what is only evidence in
12 the record before this jury? The parietal lobe
13 damaged the left hemisphere of his lobe causes
14 problems with reasoning, understanding and logic.

15 And I asked him, Dr. Roitman, why's
16 logic important for the jury's consideration? And
17 he said logic is important for, for consistency,
18 otherwise you become inconsistent and illogical.

19 Dr. Roitman testified without logic
20 you can, you can contradict yourself and it doesn't
21 bother you.

22 Jonathan Harper doesn't know what
23 he -- it doesn't bother him that he doesn't know if
24 he gives a statement on April 2006, which is
25 different from a statement in December of '08 which

1 differs from a statement in March of 2008 -- 10,
2 which contradicts and is different from his
3 testimony this week.

4 The impact of his injury, Dr.
5 Roitman said, it wouldn't bother him, he can answer
6 one question one way and another the opposite way.

7 So what is confabulation? The whole
8 import of Jonathan Harper's medical injuries is that
9 it can lead somebody to confabulate a statement.
10 And he said confabulation is functional impairment.
11 A person with, a person with confabulation fills in
12 gaps, takes in suggestions and pieces together
13 stories. They can appear to have a fluid and
14 continuous memory.

15 Jonathan Harper can appear like he's
16 giving -- like he's giving testimony from his
17 personal knowledge when it's all pieced together
18 from other sources. That's a medical justification
19 on what happened.

20 That alone, if you look at the
21 reasonable doubt instruction, if you have any doubt
22 if it's, if it's based on reason, on that basis
23 alone, and the other jury instruction that you were
24 read, which I'll get to at the end of my closing, if
25 you don't believe any part of what a witness's

1 testimony is, if it's material, you can disregard
2 the entire testimony.

3 Let's look at the second option on
4 why Jonathan Harper would want to protect himself.
5 Everybody heard about the -- Sal's shooting. Sal
6 Garcia ended up shooting Jonathan Harper in his head
7 two weeks after this incident. February 18th, 2006.

8 It's not like Jonathan Harper came
9 in the night of the shooting or any time before that
10 shooting and said I know who it was.

11 What do we know? What is in your
12 notes? What evidence did you hear about Sal's
13 shooting? You heard that when he was recuperating
14 in the hospital, Detective Erickson came by and
15 started talking to Jonathan Harper in the hospital
16 in March of 2006 about what happened, what happened
17 with Sal's shooting.

18 Detective Ericcson didn't take a
19 recorded statement at that time. If you remember,
20 Detective Ericcson only took a recorded statement of
21 Sal's shooting of Jonathan Harper an hour after
22 Jonathan Harper gave a recorded statement in this
23 case on April 1st, 2006.

24 And I would suggest to you, ladies
25 and gentlemen of the jury, that there was a reason

1 for that. There was a quick -- quick quo pro. Why
2 else would you explain why Detective Ericsson, who
3 you didn't hear from, didn't record Jonathan
4 Harper's statement if they were out to get objective
5 evidence, the whole truth and nothing but the truth
6 and they were out to investigate the shooting of
7 Jonathan Harper, then why didn't Detective Ericsson
8 at any time while meeting with Jonathan Harper in
9 March take a recorded statement like Detective Mogg
10 says that they do?

11 They just go in, they turn on the
12 recorder and you tape the statements.

13 Because what I suggest to you is
14 that they said listen, we know there's an unsolved
15 shooting, we know that you were there, and unless
16 you tell us about what happened on the February 6th
17 shooting, we're not gonna prosecute. We have no
18 interest in prosecuting Salvador Garcia.

19 So Jonathan Harper was motivated in
20 every way to protect himself to prosecute the person
21 that shot him to confabulate or give a statement on
22 April 1st, 2006 against Evaristo Garcia.

23 Why name Evaristo Garcia? Why not
24 name Sal Garcia? Why not name Puppet Lopez?

25 You heard a whole bunch of evidence

1 which never came to fruition about this was done --
2 the very beginning the State stood up here and told
3 you this whole thing was done in furtherance of a
4 gang.

5 And you heard that every one of
6 these witnesses from Edshel to Jonathan Harper to
7 Manuel Lopez to Salvador Garcia, they were all part
8 of the gang.

9 Who's the one person that wasn't
10 part of the gang? Evaristo Garcia.

11 So if you're in a gang and if you're
12 trying to cover up a potential investigation of a
13 shooting of your gang, who are you gonna blame it
14 on?

15 You're not gonna blame it on the
16 leader of your gang, Sal Garcia.

17 You're not gonna blame it on Puppet,
18 the guy with the gun, who owns the gun, the guy who
19 had the gun in the waist band, the guy who worked at
20 the toilets, who knows where the toilets were
21 located, the guy that went back to go retrieve the
22 gun, you're not gonna blame it on him.

23 The only person you're gonna blame
24 it on is Evaristo Garcia.

25 We don't know, you don't know

1 whether or not Evaristo -- was Evaristo Garcia
2 anywhere around them. Was he just a friend? Was he
3 living in the neighbor? There's no evidence. The
4 State provided no evidence to you on why, on why
5 Evaristo Garcia would even be around them. Blame it
6 on Evaristo Garcia.

7 And guess what? They ended up
8 prosecuting Sal Garcia for that case. Now, you
9 can't talk about the confabulation, you can't talk
10 about the motive on why Evaristo Garcia gave that
11 statement without looking at the statement. The
12 April 1st, 2006 statement.

13 And everybody I'm sure wrote down
14 all the notes, all the inconsistencies, everything
15 that Evaristo Garcia -- of everything that Jonathan
16 Harper left out of that April 1st statement. But
17 let's go over it.

18 Well, before I do that, I just want
19 to give you the third option. The third option is
20 maybe John Harper is truthful, right. It's either
21 he confabulated because of his medical injuries,
22 he's doing it because, you know, they won't
23 prosecute Sal Garcia unless he gives some
24 information regarding the February 6th shooting, or
25 he's truthful. And, you know, maybe he's truthful.

1 Well, if he's truthful, despite his
2 23 percent brain injury that interferes with his
3 whole brain, then you have to believe what Jonathan
4 Harper said under oath at a grand jury hearing in
5 March of 2010 that Evaristo Garcia wasn't anywhere
6 near the park, he wasn't the shooter, he never saw
7 Evaristo Garcia with a gun.

8 Remember, every time I had to go
9 back up to the witness stand and show him his grand
10 jury testimony and then I came back and he would say
11 yes. He was being truthful I assume under oath
12 March of 2010 where he testified at grand jury
13 Evaristo Garcia didn't do anything.

14 And then you know what happened?
15 The prosecutors kept on trying to impeach him with
16 the April 1st statement of 2006 given five weeks
17 after, 23 percent -- that he suffered 23 percent
18 permanent brain damage.

19 So let's talk about the April 1st
20 statement because it, because it's very telling.
21 Who did he say was there? Giovanni, Edshel were at
22 Sal's house. Manuel and his girlfriend Stacy picked
23 them up. No mention of Evaristo Garcia on his April
24 1st, 2006 statement.

25 Jonathan Harper never mentioned a

1 second car. Never mentioned that Edshel jumped in
2 the car. There's no mention of Evaristo Garcia at
3 the house and there's no mention of a second car.
4 He told you in the April 1st, 2006 statement that
5 Manuel Lopez had the gun in his waist band before
6 they left. On the way to the park, on the way to
7 the school, he didn't see Lopez give the gun to
8 Evaristo Garcia. If you believe that Evaristo
9 Garcia went to the school.

10 Now, this is what he did say:
11 Giovanni and Evaristo Garcia ran across Washington
12 Street giving chase to Victor Gamboa. And that, as
13 the State told you in closing argument, you heard
14 about this banter back and forth, give me the gun, I
15 want to shoot, all that stuff. Where was the
16 evidence of all that but for Jonathan Harper?

17 Melissa Gamboa, what does she tell
18 you? The closest one to her brother turned around
19 when she saw the shooter coming. Nobody said
20 anything.

21 Which is it? Jonathan Harper tried
22 to minimize himself. I ran in the opposite
23 direction, I ran towards the baseball field. Well,
24 what distance were you? And I had my podium here
25 and he was standing right here. (Indicating.)

1 About the same distance that you were. And then he
2 said the shooter went up and emptied -- at close
3 range emptied the gun into Victor Gamboa.

4 What did Dr. Simms say? There was
5 one shot not at close range. Completely
6 contradicting John Harper's statement on April 1st
7 of 2006.

8 What did principal Dan and Betty
9 Graves tell you who had a clear shot at the
10 shooting? Both were standing out there on
11 Washington Street. There was only one person in a
12 gray hoody giving chase to Victor Gamboa.

13 Not two people like Jonathan Harper
14 claims. Again, confabulation, motivated for
15 whatever reason. Material facts contradicted.

16 Melissa Gamboa was closer than
17 anybody. She said there was only one person giving
18 chase and that shooter didn't say anything, Victor
19 Gamboa didn't say anything.

20 So how can you believe Jonathan
21 Harper who tells you there was two people giving
22 chase and there was all this conversation going on.
23 It's not believable. It's a lie. Thank God we have
24 objective evidence. He went up there, the shooter
25 went up there, Evaristo Garcia went up there and

1 emptied the gun all six shots.

2 You know from Dr. Simms that just
3 wasn't medically possible. And I asked what do you
4 mean by close range or he asked what's the
5 definition of close range. 24 inches? No. There
6 was one shot, it was beyond that. There was no
7 evidence, there was no objective evidence again on
8 what Jonathan Harper claims happened.

9 What is there to corroborate
10 Jonathan Harper's testimony? He told you under
11 oath -- well, he didn't tell you under oath, but he
12 told the grand jury under oath that the shooter was
13 in fact wearing black sleeves. Which is it?
14 Evaristo Garcia -- if you believe that he's giving
15 you truthful testimony and that that was truthful
16 testimony, then you have to believe what Jonathan
17 Harper said which is that Evaristo Garcia that night
18 was wearing long black sleeves. You can't just pick
19 and choose. There's reasonable doubt within
20 Jonathan Harper's own statement.

21 Here's another one if you're -- when
22 you go back there and consider whether or not to
23 believe Jonathan Harper. Jonathan Harper said that
24 he was picked up by Manuel Lopez to you and went
25 back to Sal's house.

1 What did he say at the grand jury
2 under oath? Who picked you up? Quote, a girl and
3 this guy in a truck who I didn't know. Did you ever
4 see Evaristo Garcia after the shooting? No, I
5 didn't. Why would you just make that up? Why would
6 you make up -- why would you come in here and
7 testify that Manuel Lopez picked him up but in front
8 of another jury under oath say a random girl and guy
9 picked him up in a truck, took him back to Sal's
10 house?

11 I'm gonna hit some jury
12 instructions, and I would ask you on behalf of my
13 client and myself for you to please write these jury
14 instructions down.

15 Because as you heard in voir dire
16 and in opening statement, the State gets the last
17 word. After I'm done, I have to go sit back down,
18 the prosecutors get rebuttal and I can't respond to
19 their rebuttal because they have the burden of
20 proof.

21 And so my closing's gonna be a
22 little bit longer because I can't come back up here.
23 But I want you -- next to Jonathan Harper, I want
24 you to tab Jury Instruction 28. The last paragraph
25 of that jury instruction instructs you: Quote

1 you're instructed that Jonathan Harper, while not
2 charged, is an accomplice under the prosecution's
3 theory of criminal liability. Or culpability.

4 The instruction goes on to say: You
5 need corroboration of Jonathan Harper. Something
6 needs to corroborate Jonathan Harper if you believe
7 Jonathan Harper at all.

8 And I would submit to you, ladies
9 and gentlemen of the jury, when you read the jury
10 instructions whether or not to consider if you have
11 an abiding conviction on whether or not you believe
12 you can believe anything Jonathan Harper said since
13 all four statements contradict each other, that you
14 ask yourself what corroborates Jonathan Harper.

15 Who did the State bring in? Edshel
16 Calvillo. Remember that, in handcuffs, his head was
17 hanging low, a known liar, an admitted liar. That's
18 who they want you to corroborate Jonathan Harper to
19 convict Evaristo Garcia.

20 The audacity. The audacity to use a
21 confessed liar knowing that during Sal Garcia's
22 trial Edshel Calvillo was a witness for Sal Garcia
23 with the same prosecutor who's here right now and
24 told the prosecutor Harper shot himself in the head.
25 Prosecutor knew he wasn't being truthful. He lied.

1 And yet that's who they want you to corroborate
2 Jonathan Harper with in order to convict Evaristo
3 Garcia.

4 Before I skip one part, if I can
5 back up for a second before I get to Edshel
6 Calvillo. And I really haven't heard this in a long
7 time.

8 Jonathan Harper testified to you,
9 testified under oath, reason -- he was promised
10 immunity. According to Jonathan Harper, if you
11 believe him, he was at Sal's house, he knew about
12 the gun, he got in the car, he went to the park, he
13 was the one that got into the fight, he went back to
14 Sal's house, do you think he could have been charged
15 here?

16 He was promised immunity on April
17 1st, 2006 to come up with some information to
18 protect him.

19 And what did he say which was so
20 telling in this trial? Isn't it true, Mr. Harper,
21 that you're sick and tired of the prosecutors
22 putting words in your mouth? Yes, I am.

23 Who gave that April 1st statement?
24 Was it Jonathan Harper or was it detectives, was it
25 prosecutors? What words did they put in his mouth?

1 How come he's sick and tired?

2 Do you think -- is that doubt based
3 on reason? Do you have reasonable doubt about that,
4 a witness telling you that they're sick and tired of
5 people putting words in his mouth?

6 Edshel Calvillo. He tells you he
7 never made it to the school, he didn't see anything,
8 he was in his second car that no other witness made
9 any mention of. Not principal Dan, not Betty
10 Graves, not Melissa Gamboa. Nobody. And his
11 explanation to this jury was he was stuck in
12 traffic. Who believes that really? Who believes
13 that explanation at 9 o'clock at night on Washington
14 Street that they're all at this house and they're
15 all gonna protect Giovanni?

16 Edshel Calvillo out of all people
17 who have the street name Danger because he's the
18 fighter of the group, he's the enforcer of the group
19 and he's not gonna make it to the park? You know he
20 got to that park. You know he got to that park with
21 Salvador Garcia. But he wants to tell you that he
22 was stuck at a traffic light. They all left
23 together.

24 Edshel Calvillo doesn't give a
25 statement like Giovanni does. He's not brought in

1 the night of the shooting, he's not brought in the
2 week of the shooting. They know about everybody in
3 Puros -- everybody in Puros Locos. They have
4 pictures. They showed you pictures of Manuel Lopez,
5 of Stacy his girlfriend, of Giovanny.

6 Who's the one picture that they
7 didn't show you? Edshel Calvillo. When did he give
8 his statement? Was it contemporaneous in time? He
9 gave it five and a half months later.

10 And you have to ask yourselves why
11 is there such a discrepancy. How could Edshel
12 Calvillo all of a sudden wakes up and comes down and
13 knocks on the police's door and say I want to give a
14 truthful statement? Does that make any sense?

15 That was about a month before Sal
16 Garcia's trial where he came in and testified on
17 behalf of Salvador Garcia. Where was his statement?
18 How come he wanted to come down at that point right
19 before Sal Garcia's trial to all of a sudden give
20 the whole truth and nothing but the truth? What is
21 going on here?

22 Edshel Calvillo was in the
23 apartment. How come Metro didn't go knock on his
24 door to interview him? How come they didn't do a
25 photo lineup of Edshel Calvillo when they're going

1 out to all these witnesses to see if they can
2 identify Edshel Calvillo as the shooter? The five
3 three guy, the athletic build that Melissa Gamboa
4 described? Where's that evidence? Who was he
5 tightest with? He told you his best friend in the
6 gang growing up is Sal Garcia, the leader of the
7 gang, and Jonathan Harper for -- since, since age
8 seven they were best friends.

9 Let's look in whether or not you
10 want to believe anything Edshel Calvillo says.

11 Let's talk about the fabricated
12 phone call. Like at his statement five-and-a-half
13 months later. Did he mention, did he mention
14 anything about Evaristo? Did he say when we
15 asked -- in his statement, Mr. Figler went up and
16 cross-examined him and he asked him, did you say --
17 did Evaristo mention anything about where the gun
18 was? Quote, nah, no. N-a-h, no, end quote.

19 When did you hear anything we got
20 all this information from Evaristo Garcia? It was
21 on a phone. Great. Well, give us the phone number.
22 I can't because it was a prepaid phone. I can't
23 give you that number.

24 We can't corroborate anything that
25 Edshel Calvillo's saying. Do you remember what the

1 number was? Nah. Well, well I don't really know.
2 Did he mention anything about that fabricated phone
3 call to you? This is a statement he gave to police
4 five-and-a-half months later. Did he testify here
5 about that he learned any of this information from
6 Evaristo Garcia in a phone call? No. It was a lie.

7 So when he went down voluntarily
8 five-and-a-half months after the shooting, knocked
9 on the police's door, I'm here, I'm here, I got a
10 clean conscience, I want to go to church every
11 Sunday, you know, I -- you know, you know, whatever
12 he said, by the way, let me lie to you, let's start
13 off by lying about this phone call. That's how I
14 got all that information. No mention about a phone
15 call in trial.

16 Please mark Jury Instruction 26.
17 And when you tab 26, the last paragraph says, quote,
18 if you believe that a witness has lied about any
19 material fact in the case, you may disregard the
20 entire testimony of that witness or any portion of
21 his testimony not proved by other evidence.

22 When we go down, I want you to keep
23 in mind Jury Instruction 26 for all of Edshel
24 Calvillo's testimony.

25 What was the next material lie he

1 told the police five-and-a-half months after the
2 shooting? Remember this white tinted car just made
3 up out of thin air? He told the police
4 five-and-a-half months later, okay, forget about the
5 phone call, I was wrong about that, Evaristo
6 actually picked me up in a white car with tinted
7 windows. And we went to a party in the car and
8 that's where he told me about what happened. The
9 police didn't even believe that.

10 And later Edshel Calvillo said yeah,
11 there wasn't a white car with tinted windows,
12 Evaristo never picked me up. Lied about the phone
13 call that never existed and lied about the white car
14 with tinted windows that never existed in his
15 statement five-and-a-half months after the shooting
16 where he wants to be truthful.

17 When you determine Edshel Calvillo's
18 credibility and veracity, you also have to consider
19 the testimony that came out about his testimony in
20 the Sal Garcia trial under oath.

21 What did he say in the Salvador
22 Garcia trial? Remember this guy named Casper, that
23 it was Casper? Who told him to make up this person
24 in thin air named Casper? Chavi told him to lie to
25 the cops to protect the gang. He even went so far

1 as to give a description about somebody who didn't
2 even exist to lie to the jury. I mean to lie to the
3 police. I don't -- I wasn't there. I can't tell
4 you if his head was also hung down like it was in
5 this trial, but I can bet you he was trying to sell
6 the police on whatever he thought he could at that
7 time. Much like he's trying to sell you on what he
8 claims happened at this point. Because no matter
9 how much details he gave the cops, the cops still
10 didn't -- the cops -- there was no Casper.

11 So this is a person who they want to
12 corroborate Jonathan Harper who fabricates out of
13 thin air of white car with tinted windows, a phone
14 call that didn't exist, and now a shooter other than
15 Sal Garcia which caused the gunshot injury to
16 Jonathan Harper.

17 I will submit to you, ladies and
18 gentlemen of the jury, that that's somebody you
19 can't believe objectively as evidence to convict
20 Evaristo Garcia of murder.

21 About the car when asked by the
22 police if he was being truthful, do you remember
23 what his response was? Quote, uhm, I'm being for
24 real, sir. He looked him straight in the eyes, I --
25 you can believe me, there was a car, white car with

1 tinted windows, there was a phone call.

2 Now, what I thought -- and it's up
3 to you, but what I wrote down what I thought was one
4 of the biggest slips and very telling about Edshel,
5 Edshel Calvillo, was when Mr. Figler asked him in
6 his statement, who went back to, to Sal's apartment.
7 Do you remember what he said in his statement, in
8 his statement to the police? Quote, Sal. I mean,
9 what's his name, Evaristo. Do you think that he,
10 Harper, Sal Garcia got together and planned on
11 pinning it on Evaristo Garcia? Who went back to the
12 apartment? Sal. I mean, what's his name, Evaristo.
13 The other kid basically, the non-gang member person
14 we don't care about, the only disposable, expendable
15 person out of their group.

16 So let's look at the investigation.
17 What do you have to corroborate anything against
18 Evaristo Garcia that supports anything Jonathan
19 Harper says, that supports anything Edshel Calvillo
20 says?

21 The -- Detective Mogg, Detective
22 Hardy conducted this investigation. There wasn't
23 one piece, we don't have one piece of physical
24 evidence connecting Evaristo Garcia to that El
25 Camino.

1 Not one piece of physical evidence
2 connecting Evaristo Garcia to that gray hoody
3 sweater.

4 Not one part, not one bit of
5 physical evidence to even put Evaristo Garcia at the
6 school the night of the shooting. No physical
7 evidence except for a fingerprint on the gun.

8 Now, if you want to know how
9 desperate this -- the prosecution case has become --
10 has begun, there was three prints, right? We know
11 that one in the webbing as far, as far up as you
12 can, against the high ridge of the gun.

13 Alice Maceo said is that
14 consistent -- I said, I said is that consistent with
15 somebody touching the gun or handling the gun? Yes,
16 it is. Does that mean somebody shot the gun? No,
17 it's not. It's not evidence of shooting the gun.

18 L1, the one at the top print, on the
19 high end of the left-hand side, which she said was
20 an unusual spot, she said that's not consistent with
21 somebody shooting the gun.

22 And the prosecutor was gracious
23 enough to say well, we'll just give that to them,
24 right, because it's not consistent with shooting the
25 gun.

1 So you remember what was telling
2 about my cross-examination of her? That's in the 2
3 o'clock position, it's pointing upwards, isn't it,
4 Ms. Maceo? No. And then she finally corrected
5 herself said yeah, I guess it's 2 o'clock. Well I
6 guess it's 2 o'clock is everything because now they
7 want to suggest to you that that print of this right
8 ring finger in the 2 o'clock position going up, not
9 down, going up was put there by the shooter putting
10 the gun upside down in the toilet, okay.

11 You saw the picture of how that gun
12 was, that gun was positioned in the toilet. The
13 only way that the shooter could put that gun in a
14 toilet tank is by the grip, okay. You can't put it
15 down any other way. If you wrap your hand under the
16 trigger guard, you get the barrel which try and do
17 that because the weight disparity, the finger's not
18 in a 2 o'clock position.

19 The one print that was in the
20 shooting position was not identifiable to Evaristo
21 Garcia. Was not identifiable to Evaristo Garcia.

22 So what, so what we have is the
23 State's evidence, Alice Maceo's evidence to you in
24 this record is that the print, L1 and L2 on the gun,
25 does not tell you when Evaristo Garcia touched the

1 gun.

2 You heard from Edshel Calvillo.
3 They all touched the guns, right? There was
4 multiple guns. They passed around the gun.

5 Much like I told you and explained
6 about this pen, I'm touching this pen right now, I
7 give it to Mr. Figler, he goes downstairs to another
8 courtroom, he leaves my pen downstairs in another
9 courtroom, that doesn't mean I was downstairs in
10 another courtroom.

11 You can't tell -- there's no
12 evidence on when Evaristo Garcia touched that gun.
13 And the State can't tell you any differently.

14 Ms. Maceo told you that somebody
15 could have held the gun, the shooter could have held
16 the gun in a shooting position and that would not
17 have obliterated that palm print, that L1 palm
18 print.

19 Somebody could have held the gun
20 in -- with a textured position of the grip while
21 doing the shooting and that would not have been
22 lifted off the print.

23 It was like that, that microphone.
24 The texture of the grip. And guess what? Even
25 though there's an L3 print consistent with somebody

1 shooting that wasn't identifiable to Garcia, what
2 don't we have? We don't have the benefit of DNA.
3 Even though Detective Mogg requested DNA swab of the
4 textured grip. Alice Maceo told you that's
5 important because it could have residue, it could
6 have skin cells, it could be a number of things that
7 could conclusively identify who was holding that
8 gun. But we don't have the opportunity of that DNA
9 evidence.

10 You can't speculate and you can't
11 guess. The State was not able to with any witness
12 to come in here, and they didn't follow up with
13 Edshel Calvillo, well, well everybody played with
14 the guns at Sal's apartment, everybody touched the
15 guns. Well, when was Evaristo Garcia at the
16 apartment? The day before? A week before? There's
17 no evidence except for the contradicting and
18 inconsistent evidence between Edshel Calvillo and
19 Jonathan Harper.

20 Let me get this instruction for you.
21 It's Instruction No. 9. And I have to go over these
22 jury instructions with you because I can't come back
23 up here.

24 We don't think the State has proved
25 their case beyond a reasonable doubt that Evaristo

1 Garcia is a shooter.

2 But I have to explain to you what
3 parts of the jury instructions you should take a
4 look at from the defense point of view.

5 And if you look at Instruction No.
6 9, one, two, three -- the fourth line down there,
7 there has to be evidence beyond a reasonable doubt
8 of malice aforethought may arise from anger, hatred,
9 revenge or from particular ill-will, spite or grudge
10 towards the person killed in order for you to find
11 malice sufficient for murder.

12 Was there any evidence that Evaristo
13 Garcia knew Victor Gamboa? Victor Gamboa was just
14 picked up by Brian Marquez to go to the fight.

15 Detective Mogg told you that
16 everybody went to the park to fight, it was a
17 misdemeanor. He couldn't effectuate an arrest out
18 of anybody. It was a misdemeanor. They went there
19 to fight, not to murder. That's from Detective
20 Mogg's own testimony.

21 There's no evidence that Evaristo
22 Garcia had any ill-will against Victor Gamboa.
23 Assuming that Evaristo Garcia was even in the park
24 on that night.

25 Look at Instruction No. 11. When

1 we're examining what evidence there is of
2 first-degree murder, fourth paragraph down where it
3 talks about deliberation in the last sentence, a
4 mere unconsidered and rash impulse is not
5 deliberate, even though it includes the intent to
6 care -- kill.

7 So according to, according to
8 Detective Mogg, Edshel Calvillo, Jonathan Harper,
9 Manuel Lopez, Sal Lopez, they all went to this park
10 to fight to help Giovanni out. It wasn't to murder
11 somebody, it wasn't to kill somebody, it was to
12 fight.

13 And so during a fight, people
14 scatter and then there was an impulse, the shooter
15 went after Victor Gamboa and shot him. That is a
16 mere unconsidered and rash impulse. That's not
17 deliberation, that's not premeditation for
18 first-degree murder.

19 Look at Instruction No. 17. The
20 State told you in closing arguments they just
21 dismissed you even considering voluntary
22 manslaughter.

23 What is voluntary manslaughter? It
24 also exists where there is -- the last sentence.
25 Unlawful killing of a human being without malice

1 upon heat of passion, or the operative language
2 here, a sudden quarrel.

3 What do we know if anything happened
4 here? A sudden quarrel. This was a result of a
5 fight at a school. The very definition of voluntary
6 manslaughter.

7 And then you have to read 17
8 together with 18. The very next one. This last
9 paragraph, you can put an asterisk next to it. If
10 you're satisfied beyond a reasonable doubt that the
11 killing was unlawful, but you have a reasonable
12 doubt whether the crime is murder or voluntary
13 manslaughter, you must give the defendant the
14 benefit of the doubt and return a verdict of
15 voluntary manslaughter whichever is appropriate
16 based on the facts of this case.

17 Well, the shooter in this case went
18 there with everybody else to get into a school fight
19 on behalf of Giovanni. The principal came out,
20 everybody scattered, there was a quarrel and there
21 was a shooting as a result of that quarrel. That
22 fits voluntary manslaughter and 17.

23 And if there's any doubt, the law
24 tells you, the law instructs you if you have any
25 doubt on whether or not it's murder or voluntary

1 manslaughter, you must find for voluntary
2 manslaughter.

3 No. 21 is a reasonable doubt
4 instruction. And just look at that first sentence
5 on the paragraph. A reasonable doubt is one based
6 on reason.

7 So when you go back and deliberate
8 and you look at your notes and you go down Jonathan
9 Harper's testimony, his inconsistencies, you go down
10 to Edshel Calvillo's testimony and his
11 inconsistencies and how they contradict each other,
12 if you have any doubt based on reason, that gives
13 you a reason to doubt any of their testimony, that's
14 reasonable doubt, ladies and gentlemen.

15 The State did not meet their burden.

16 And the last sentence, if you have a
17 reasonable doubt as to guilt of the defendant, he is
18 entitled to a verdict of not guilty. He's entitled
19 to a verdict of not guilty if you have any doubt
20 based on reason, based on the State's evidence.

21 And again, you have to read your
22 notes and talk about Jonathan Harper and Edshel
23 Calvillo's testimony with Instruction No. 26 right
24 next to it.

25 Because the law instructs you in

1 Instruction No. 26 in the last paragraph, put a big
2 asterisk there. If you believe that a witness has
3 lied about any material fact in the case, you may
4 disregard the entire testimony of that witness.

5 Well, I lost track in my notes of
6 the material facts that Jonathan Harper and Edshel
7 Calvillo lied about. That's not how it works in the
8 court of law. You can't pick and choose. Okay,
9 well, I think he's telling the truth today or I
10 think he's telling the truth about this but not
11 about the other thing, that's not how it works when
12 somebody's up here for murder.

13 This instruction is critical into
14 your consideration if you're gonna follow the law.
15 When you're reviewing your notes, you've got to have
16 Instruction No. 28 there. A conviction shall not be
17 had on the testimony of an accomplice unless the
18 accomplice is corroborated by other evidence. There
19 needs to be corroboration to prove their case beyond
20 a reasonable doubt. It's not enough to have
21 contradictory testimony by two witnesses in a gang.

22 You can look down the last line in
23 the instruction. You are instructed that Jonathan
24 Harper, while not charged, is an accomplice under
25 the law given the prosecution's theory of criminal

1 culpability.

2 So you need somebody other than
3 Jonathan Harper to corroborate Jonathan Harper's
4 testimony.

5 Let's look at Instruction 30. This
6 is what we call the flight instruction. And I
7 suspect that when I go sit down, because there is so
8 much contradiction and inconsistencies and the
9 fingerprints don't mean what the fingerprints are,
10 what they told you that that means that he's the
11 shooter just doesn't, that they're gonna tell you
12 well, you don't leave the country unless you're
13 guilty of something and therefore that's
14 corroboration.

15 Okay. If you look at this
16 instruction, it says the flight of a person
17 immediately after the commission of a crime or after
18 he is accused of the crime is not sufficient in
19 itself to establish his guilt, but is a fact which,
20 if proved, may be considered by you in light of all
21 the other proved facts in deciding the question of
22 his guilt or innocence.

23 Well, there's no evidence that it
24 was sufficient in itself to establish guilt, okay.

25 What evidence do you have? The fact

1 that in 2008 that they go down to Vera Cruz, Mexico,
2 they locate Jonathan Harper (sic), Jonathan Harper
3 (sic) says great --

4 MR. FIGLER: No.

5 MR. GOODMAN: -- I'm here. He didn't
6 fight extradition. He waived extradition. He
7 didn't say there's no consciousness of guilt. He
8 didn't say I'm gonna fight coming back here. He
9 waived extradition. He came back here under the
10 protection of law enforcement.

11 When you look at this instruction,
12 look what it says: The flight of a person
13 immediately after the commission of a crime. What
14 evidence do you have in the record to establish that
15 Evaristo Garcia went to Mexico immediately after the
16 commission of a crime? Doesn't exist.

17 You had an application for a search
18 of -- for an arrest warrant for Evaristo Garcia in
19 June of 2006 which -- and then they had to get the
20 provisional warrant and the warrant for Mexico.

21 The first -- the only evidence you
22 have that Evaristo Garcia knew about this, about
23 this case and about that he was being looked at is
24 when they came down to Mexico and they said we have
25 a warrant for your arrest.

1 Do you think that establishes a
2 conscious -- a consciousness of the guilt?

3 They didn't have anybody come in
4 here and say okay, this is what was said on these
5 phone calls, we talked to Mr. Garcia, Detective Mogg
6 went to Mr. Garcia's house and they -- you know,
7 Victor Garcia said well, you know, he left because,
8 you know, he didn't want to be arrested. Or did he
9 say he -- as soon as he heard about Jonathan Harper
10 got shot in the head, he was scared for his life and
11 he went to Mexico? Mexico doesn't corroborate
12 anything.

13 The instruction, if you follow the
14 instruction, there's no evidence in the record, it
15 doesn't allow you to imply consciousness of guilt.

16 The jury instructions that we just
17 went over told you a couple things, right? You have
18 to have corroboration. If you don't believe
19 somebody, if they lied about a material fact, you
20 have the right to disregard the entire testimony.

21 If you believe that you have any
22 reason based on reason, then that's reasonable doubt
23 and Evaristo Garcia is entitled to a verdict of not
24 guilty.

25 No independent witness identified

1 Evaristo Garcia in that gray hoody at the park, with
2 the gun on the night of the shooting.

3 What do they bring to try and prove
4 their case? Jonathan Harper, with all due respect
5 to Mr. Harper, was shot in the head, lost 23 percent
6 of his brain, had multiple reasons to blame it on
7 the only disposable person around them, a non-gang
8 member, promised immunity, he got his shooter
9 prosecuted in his case, and they bring in Edshel
10 Calvillo. Edshel Calvillo doesn't even corroborate
11 Edshel Calvillo.

12 I hope, ladies and gentlemen, once
13 you review the evidence in your notebooks and you
14 talk about this case that you will find the State
15 did not prove that Evaristo Garcia was the shooter
16 in the gray hoody at the park on February 6th of
17 2006. Thank you.

18 THE COURT: All right.

19 During this recess, you're
20 admonished not to talk or converse among yourselves
21 or with anyone else on any subject connected with
22 this trial.

23 Or read, watch or listen to any
24 report of or commentary on the trial or any person
25 connected with this trial by any medium of

1 information, including, without limitation,
2 newspapers, television, radio or internet.

3 Or form or express any opinion on
4 any subject connected with the trial until the case
5 is finally submitted to you.

6 We'll take a 10-minute break and
7 then we'll come back on the record for the State's
8 rebuttal arguments.

9 (Whereupon, the jury exited the
10 courtroom.)

11 THE COURT: Be seated. We're still on
12 the record, we're outside the presence of the jury.

13 I've received the State's opposition
14 on written record in response to defendant's oral
15 motion for a mistrial which I had previously orally
16 denied.

17 And for the reasons set forth in the
18 State's opposition, the Court will --

19 MR. FIGLER: We haven't seen it yet.

20 MS. PANDUKHT: I know. I was waiting for
21 it to get filed. And I -- is there just one copy
22 left?

23 THE COURT: I have a copy.

24 MS. PANDUKHT: Okay.

25 THE CLERK: I had to give her one.

1 THE COURT: You can certainly make any
2 record you want written and that's how -- what I
3 would ask. If you want to file anything in response
4 to it, you can.

5 MR. FIGLER: Okay.

6 THE COURT: But I'm gonna deny it
7 formally, a motion for mistrial at this time, based
8 on what I know to be the evidence and the opposition
9 and what -- you know, I believe that the State did
10 act in good faith based on a number of the
11 witnesses' testimony during discovery.

12 MR. FIGLER: I appreciate that, Your
13 Honor. And I'll take a closer look now, just being
14 handed the State's opposition.

15 THE COURT: Sure.

16 MR. FIGLER: And take a look at the
17 factual representations. Of course part of the
18 mistrial was also the prejudice of going as far as
19 we did with gang evidence and then it not being part
20 of the State's theory at the end, but we'll take a
21 look at it and we'll put everything in writing.

22 THE COURT: Sounds good. All right.

23 MR. FIGLER: Thank you, Your Honor.

24 THE COURT: Finally, did you file your
25 stipulation on punishment?

1 MR. FIGLER: No, we haven't, Your Honor.

2 THE COURT: Do a written stipulation on
3 that.

4 MR. FIGLER: We'll see if we can get that
5 done over the lunch break so that it comes to the
6 Court --

7 THE COURT: I think, yeah.

8 MR. FIGLER: Or --

9 THE COURT: Yeah, do it at the lunch
10 break. We're gonna have closing argument rebuttal
11 and then at the lunch break sign off on it before a
12 verdict comes in.

13 MR. FIGLER: Before verdicts, yes.

14 THE COURT: Yeah. So just do it at
15 lunch. I'll remind everybody once again at lunch
16 time then.

17 Is there anything else before we
18 break?

19 MS. PANDUKHT: No.

20 THE COURT: Nothing else.

21 MR. FIGLER: Nothing at this time. Oh,
22 one last thing, judge. Just as a matter of
23 procedure, I'm gonna be the one who's gonna be
24 vigilant for any objections during the rebuttal. I
25 don't think there's anything in the rules that

1 prevent that as long as both of us --

2 THE COURT: That's fine.

3 MR. FIGLER: -- aren't doing it. As long
4 as it's just one of us. Thank you.

5 THE COURT: That's fine.

6 MR. FIGLER: That Your Honor.

7 THE COURT: Anything else?

8 MR. FIGLER: No, that's it.

9 THE COURT: All right. We'll take a
10 break.

11 (Whereupon, a recess was had.)

12 THE COURT: All right. Please be seated.
13 We're on the record on State of Nevada versus
14 Evaristo Garcia. C262966.

15 Let the record reflect the defendant
16 is present with his attorneys Mr. Figler, Mr.
17 Goodman. And for the State, Ms. Pandukht and Ms.
18 Demonte. We're in the presence of the jurors.

19 And now is the time for the State's
20 final or rebuttal argument.

21 MS. PANDUKHT: Thank you, Your Honor.

22 THE COURT: Ms. Pandukht.

23 MS. PANDUKHT: Someone about to commit a
24 crime as serious as a murder doesn't want to get
25 caught, doesn't want to be identified and certainly

1 doesn't want to leave evidence behind that could
2 incriminate him.

3 That's why you wear something to
4 disguise your appearance like a hooded gray
5 sweatshirt while you pull that over your head so
6 people at the crime scene can't see your face.
7 That's why if you have a gun, that you ditch it
8 before you're caught by the police.

9 Criminals don't want to get caught.
10 It would make my job a lot easier if I could get all
11 kinds of incriminating evidence just left for me at
12 every single crime scene.

13 But we present the evidence to you
14 as we have it. We present the witnesses that we get
15 statements from and we present the evidence that is
16 found in this case. And that is what the State did
17 in this case.

18 And you heard from witnesses that
19 were at that scene who could not identify the
20 shooter, as Mr. Goodman stated, but they told you
21 about what they did see.

22 And what each and every one of those
23 independent witnesses saw is crucially important in
24 this case because it does corroborate Jonathan
25 Harper, it does corroborate Edshel Calvillo and it

1 does corroborate the fingerprint evidence in this
2 case that you heard presented by Alice Maceo, the
3 lab manager of the fingerprint detail at Metro.

4 You heard these witnesses talk to
5 you about the shooter wearing the gray hooded
6 sweatshirt, and you heard the witnesses at the crime
7 scene, several of them, talking about how they saw
8 the shooter pull the gun out and hold the gun in his
9 right hand. You never once heard anyone at this
10 trial testify that the shooter was shooting anything
11 but his right hand.

12 You heard about the object that
13 Betty Graves saw, that she saw, you know, the
14 shooter was swinging with his left hand which she
15 thought was weird because he kept his right hand in
16 his pocket.

17 You heard that -- several witnesses
18 said that he pulled out the gun with his right hand
19 and was shooting the gun with that hand.

20 And that is important because it is
21 only the defendant's right finger and palm prints
22 that are found on this weapon. His right ring
23 finger is found on the top of the grip and the
24 webbing between his right thumb and his right index
25 finger found in the position at the top of the grip

1 directly across from the trigger that you would pull
2 to fire the weapon which was done in this case.

3 So each and every one of those
4 witnesses had important testimony to provide to you.
5 In addition, they provided to you that the victim
6 was shot very close to the wall.

7 And you heard from CSA Dan Prioetto
8 that there were four bullet strikes in that blocked
9 wall. They told you that the shooter fired multiple
10 times, that it wasn't just one shot, that there
11 wasn't this huge interval between each shot. That
12 it was one after another, after another, after
13 another. It varied between four and seven or eight
14 and nine shots maybe, but nobody at that scene knew
15 what was gonna happen in this case. Nobody at that
16 scene knew that the defendant was gonna start
17 shooting at somebody.

18 So the only people that even knew
19 the defendant had that gun were the people that were
20 his friends that testified in this case.

21 So all of these independent
22 witnesses all of a sudden see a shooting. They see
23 a fight. They may think there's a fight, but all of
24 a sudden they see somebody run across Washington,
25 pull that gun out and start firing a gun. They

1 couldn't see his face. It was dark enough. Now
2 granted, there were streetlights in those
3 photographs, there were streetlights all up and down
4 both sides of that street. So it wasn't pitch dark,
5 but it was nighttime. And those witnesses described
6 to you what they could witness and what they could
7 remember seven years after this incident occurred.

8 Those witnesses gave statements as
9 close in time as they were identified to police.
10 Each witness was interviewed by police as close in
11 time as they were found out by the detectives.

12 Now, the defense talks about how
13 Melissa Gamboa described the gray hoody and she
14 identified him at the preliminary hearing.
15 Remember, that was in 2008. Melissa Gamboa
16 witnessed her brother murdered in 2006. She gave a
17 statement to police with a description of the gray
18 hoody and the short black hair.

19 That same description of the short
20 black hair was also testified to by several other
21 witnesses at this trial.

22 And since Melissa Gamboa has
23 testified at preliminary hearing, it's been five
24 years since that time. So she identified the
25 defendant two years after she saw him and today is

1 actually over seven years since the date of this
2 murder.

3 And the State admitted the
4 photograph of when the police came into contact with
5 the defendant. The police did not have a photograph
6 of the defendant until 2008.

7 MR. FIGLER: I'm gonna object, Your
8 Honor. It assumes facts not in evidence. They
9 didn't establish that.

10 THE COURT: Sustained.

11 MS. PANDUKHT: The police testified that
12 they arrested the defendant in October of 2008. And
13 that was the date of the photograph. You heard that
14 that was what he looked like in 2008, not even 2006.

15 So the police then have this
16 photograph and that is when they start doing photo
17 lineups was two years after the incident occurred.

18 MR. FIGLER: And I'm gonna to object that
19 that also --

20 MS. PANDUKHT: That came into evidence,
21 Your Honor.

22 MR. FIGLER: She said no photo lineups
23 were shown until 2008. That was not correct, Your
24 Honor.

25 THE COURT: It's sustained. It's not

1 what the evidence was.

2 MS. PANDUKHT: Now, you have heard
3 that -- I'll move on to the next argument which was
4 I want you to look at that photograph. And I want
5 you to look at the photograph that was admitted into
6 evidence and look at the defendant today and see
7 that his appearance has changed and look at the
8 difference between those photographs. Look at how
9 his head is shaved now and look at that photograph
10 for yourselves.

11 Defense talked about how there were
12 differences in descriptions of height. You would
13 note that the person that thought that the shooter
14 was actually the tallest was actually the tallest
15 witness to testify. The principal was by far the
16 tallest witness at 6'2" and varying descriptions
17 were given with regard to exactly how tall the
18 person was.

19 But again, I would submit to you
20 that witnesses are not out there on this incident
21 that is just happening, surprisingly all of a sudden
22 witnesses are not out there with a tape measure
23 making sure exactly how tall a particular person is.
24 It's something that they're trying to give their
25 best description of. So of course they would vary.

1 In closing argument, Mr. Goodman
2 actually stated the shooter was protecting his face.
3 And that is correct. He was protecting his face so
4 that he wouldn't be identified. And even the
5 defense admitted that.

6 With regard to Jonathan Harper, the
7 defense spoke at length about the testimony of Dr.
8 Norton Roitman. You will note that he has a medical
9 degree, but he is not a neurologist. And it's
10 important to really remember exactly what Dr.
11 Roitman testified to.

12 Dr. Roitman testified that he
13 reviewed all of Jonathan Harper's medical records.
14 Dr. Roitman stated that while he talked about
15 confabulation, please recall his testimony where Dr.
16 Roitman said he cannot say that Jonathan Harper was
17 actually confabulating or his memories were not
18 real. And I believe that was actually in response
19 to one of the juror questions in this case.

20 And so even Dr. Roitman admitted
21 that he cannot say that Jonathan Harper was in fact
22 confabulating or that he didn't actually remember
23 what he saw back in 2006.

24 He also testified that could he not
25 say it was within the bounds of scientific

1 certainty. And you'll recall that I asked experts
2 that question as well. So Mr. Roitman could not say
3 that it was within the bounds of scientific
4 certainty. I believe the best he said he could say
5 was probable.

6 You also saw Jonathan Harper in
7 court and you heard him testify that he did remember
8 this incident. And you heard him tell you about his
9 injuries and how it affected him in terms of how he
10 spoke at first and how he walks and that he still
11 walks with a limp.

12 And you also heard that Dr. Roitman
13 report said that the gunshot wound didn't affect
14 memory. In that letter he wrote to Mr. Goodman
15 regarding his findings, he stated that it didn't
16 affect memory and he even admitted on
17 cross-examination that that contradicted his
18 testimony in court.

19 Mr. Harper -- also it's important
20 that Mr. Harper didn't know what the other witnesses
21 had already said. You heard that the detectives
22 didn't give him any information and didn't tell him
23 about all the different little details that all the
24 other witnesses had spoken about during the case.

25 Each detective, Mogg and Hardy, said

1 they didn't give him any information and they asked
2 him questions about what happened. And so Harper
3 didn't know that the other witnesses had said
4 anything about a gray hoody or an El Camino, yet
5 Melissa Gamboa had described to police the same El
6 Camino. And recall, it's not just describing it.
7 Jonathan Harper picked out that El Camino in the
8 picture, Melissa Gamboa picked out that El Camino in
9 the picture, and that it was occupied by three males
10 and one female which Jonathan Harper also stated.
11 So that was corroborated.

12 And then also with regard to the, to
13 the gray hoody and also with regard to seeing the
14 defendant fire the gun because we had evidence --
15 see, Jonathan Harper stated that the gun was fired
16 multiple times. Well, we have six shell casings
17 that are found at the scene proving that that
18 firearm was fired at least six times on that night.

19 And you'll recall that two of the
20 bullets at that scene were conclusively identified
21 to the firearm that was found just around the
22 corner. I mean, that's why all these aerial maps
23 and the diagram were so important because that
24 firearm was found so close to where the shooting
25 occurred. It was just around the corner on that

1 very first street south on Park Hurst two houses
2 down at that second house was where that gun was
3 found.

4 With regard to Mr. Harper being
5 inconsistent, again, in addition to the detective
6 stating that they didn't give him any information,
7 they also testified, both Detective Mogg and Hardy,
8 that they didn't ask him leading questions. And if
9 you'll recall in Dr. Roitman's testimony, Dr.
10 Roitman said that he cannot tell us Harper was being
11 led. He admitted that on cross-examination. And
12 when asked about certain questions that were asked
13 during that interview on April 1st, 2006, Dr.
14 Roitman did not say those were leading questions.

15 And then Mr. Goodman states in his
16 closing argument that you can't talk about
17 confabulation without looking at Harper's April 1st,
18 2006 statement, yet isn't that exactly what Dr.
19 Roitman did. He didn't review that April 1st, 2006
20 statement given by Mr. Harper in this case.

21 Still with regard to Jonathan
22 Harper, the defense stated that Sal, who is Salvador
23 Garcia, shot Harper two weeks later.

24 You'll recall that Mr. Calvillo
25 testified that Jonathan Harper told him what

1 happened that night and Detective Ericcson at some
2 point interviewed Jonathan Harper about the shooting
3 that occurred.

4 Now, those cases were separate.
5 Detective Ericcson was the detective on the Sal
6 Garcia shooting of Jonathan Harper. Detective Mogg
7 and Hardy were the detectives in this particular
8 shooting.

9 Now, I understood that you heard a
10 lot of evidence about this case, but there was no
11 evidence in this case that according -- well, let me
12 just state this: According to Detectives Mogg and
13 Hardy, they stated that no promises were made to Mr.
14 Harper. But Mr. Harper was never prosecuted in this
15 case. He was never charged in this case.

16 And to suggest that Detective
17 Ericcson wouldn't prosecute the person who shot
18 Harper if he didn't solve this murder, I mean, I
19 think that's what Mr. Goodman was trying to say.
20 That it was kind of like well, we're not gonna
21 prosecute the person who shot you in the head if you
22 don't help us with this murder. And obviously why
23 would Detective Ericcson not prosecute somebody for
24 shooting somebody else in the head? And certainly
25 not only does it not make any sense, you heard no

1 evidence that that was in any way true.

2 But even if Jonathan was doing
3 something for Sal, you know, why not say it was Sal
4 that did this shooting. Why the defendant? I mean,
5 that doesn't make any sense at all. And if Sal shot
6 him in the head and why would that motivate the
7 defendant? I mean, why would that motivate Jonathan
8 Harper to blame the defendant? And that connection
9 is completely speculation.

10 With regard to the inconsistency
11 specifically mentioned by Mr. Goodman with regard to
12 his statement that Giovanni, Edshel, Manuel and
13 Stacy were there at the apartment and not the
14 defendant, remember during cross-examination the
15 defense showed one page, page five, the State showed
16 Jonathan Harper on page three where he did say that
17 the defendant was there at Sal's apartment just
18 prior to going over to the school.

19 Now, with regard to Giovanni and the
20 defendant running across Washington arguing over the
21 gun, again, the defendant told Edshel -- remember
22 when Edshel testified he said the defendant told him
23 that Giovanni told him to. So that's corroborated
24 as well between Edshel Calvillo and Jonathan Harper.

25 Now, the defense stated that Harper

1 said close range. Harper never said the term close
2 range. The only time you heard the term close range
3 was from Dr. Simms. And Dr. Simms testified that
4 for a shot to be fired at close range, it has to be
5 within 24 inches. And 24 inches is only two feet.
6 So Harper never said anything about close range.

7 With regard to Jonathan Harper
8 saying the defendant was wearing black that night at
9 the preliminary hearing, you also will recall that
10 the State directed right after that statement,
11 Jonathan Harper corrected himself to say the gray
12 hooded sweatshirt. Literary the very next question.

13 Again, with regard to Instruction
14 No. 28, regarding Harper being an accomplice and
15 requiring corroboration, there was corroboration of
16 Jonathan Harper. Not only Melissa Gamboa
17 corroborating with regard to the El Camino, but
18 Edshel Calvillo's testimony that the defendant
19 admitted to him right after this that he shot the
20 kid and that the defendant laughed. As well as
21 other statements incriminating the defendant.

22 Now, moving on to Edshel Calvillo,
23 the defense would like you to disregard all of
24 Edshel Calvillo's testimony because the defense
25 claims that he was lying in that trial in front of

1 Salvador Garcia where Salvador Garcia shot Jonathan
2 in the head. That was not in this particular case.
3 That was in another case.

4 And I would ask you to recall that
5 Edshel Calvillo did admit to making that stuff up
6 about that Casper thing, but he also testified that
7 he was very afraid of Salvador Garcia.

8 And I would ask that you remember
9 how both of these individuals came before you to
10 testify. The defense wants to make it look like
11 Jonathan Harper and Edshel Calvillo who are the
12 people who knew the defendant. I mean, that's how
13 they were able to know more about him is they were
14 friends of his. I mean, let's face it, they were
15 all friends at one point. And the defense wants you
16 to believe that Jonathan Harper and Edshel Calvillo
17 came up this big conspiracy to frame the defendant.

18 Well, that doesn't make any sense
19 for several reasons. First of all, if Edshel
20 Calvillo was trying to help Jonathan Harper, why
21 didn't he come to court on his own? Jonathan Harper
22 came in on his own to testify at this trial, but
23 Edshel Calvillo was only here because the State
24 arrested him. He did not come to court on his own.
25 And you heard that from his mouth, you heard and saw

1 him come in in chains as he came out of the holding
2 cell and went up to that witness stand.

3 So Edshel Calvillo, if he was in
4 some big conspiracy to help out Jonathan Harper, why
5 didn't he just come in on his own and try and
6 testify out of custody? But he spent the night in
7 jail because as he testified, he felt loyalty to the
8 defendant because he felt like they were his family.

9 MR. FIGLER: I'm gonna object, Your
10 Honor. That misstates the evidence. He said he
11 thought it was done.

12 MS. PANDUKHT: That was the evidence as I
13 remember it.

14 THE COURT: Well, he testified for a long
15 time. I'm just gonna allow the jury to use their
16 own memory as to which version they want to believe,
17 the State's or the Defense.

18 MS. PANDUKHT: Thank you, Your Honor.

19 And I would ask that you don't just
20 take my word for it, don't take Mr. Goodman's word
21 for it. If there was something Mr. Goodman or I
22 stated that you don't actually remember, it is your
23 memory of facts as they were presented in this case
24 that control everything in this case. Because as
25 the judge has instructed you, arguments of counsel

1 are not evidence.

2 Now, Mr. Calvillo came here and
3 talked about how he felt like them being family.
4 And I would ask that you remember his demeanor on
5 the stand and how difficult it seemed for him to be
6 here.

7 So there was no evidence that
8 Jonathan Harper and Edshel Calvillo were in some
9 conspiracy and decided to frame I guess the
10 defendant.

11 Also, if that were even true, if
12 they were in some sort of conspiracy, why didn't
13 Jonathan Harper and Edshel Calvillo go to the police
14 station together? Why didn't they decide that
15 they're gonna go and both tell Detectives Mogg and
16 Hardy what they saw? But their interviews were
17 months apart.

18 And you'll remember that Mr.
19 Calvillo testified that the only reason he came
20 forward is because it was weighing heavily on his
21 conscious that a young boy had been killed.

22 With regard to the statement by Mr.
23 Harper that he allegedly stated that he was sick of
24 prosecutors putting words in his mouth, there were
25 no district attorneys at that April 1st, 2006

1 statement. It was the detectives. And Jonathan --
2 and actually, the defendant hadn't even been charged
3 at that point because the arrest warrant was in June
4 and that interview was in April.

5 With regard to Edshel allegedly
6 lying because he said he was stuck in traffic,
7 that's not what he said. He said he got stuck at a
8 light.

9 Mr. Goodman said that the State
10 didn't show you Edshel's photo. Well, you got to
11 see Edshel testify. The photos that the State
12 showed you were people that you didn't see testify
13 in this case; Stacy, Giovanni, Manuel.

14 With regard to Edshel Calvillo not
15 saying initially that he heard these admissions from
16 a phone call at first, you know, I think at first he
17 said phone call, but he later clarified it was on
18 the phone and also in person that he heard these
19 admissions. And he didn't waiver -- even overnight
20 on the next day, he didn't waiver in saying that the
21 defendant made those admissions to him. Even on the
22 next morning after cross-examination, Edshel
23 Calvillo was adamant that the defendant made these
24 admissions to him that he shot the kid.

25 Now, with regard to the police

1 investigation in this case, the defense wants to
2 discount the fingerprints that were found on the
3 gun. Well, the fingerprints are important because
4 they're forensic evidence in this case and they're
5 evidence that incriminate the defendant.

6 You will recall the testimony of
7 Alice Maceo that she processed this gun in 2006
8 after it was recovered. And while there were three
9 prints on that gun, one of the prints wasn't even
10 identifiable. She gave a lot of testimony and
11 explained a lot about the science of latent prints
12 and about how much it, it has to be a certain level
13 of clarity and a certain size in order for her to be
14 able to make an identification and that various
15 things could interfere with the identifiability of a
16 latent print, such as not having enough moisture in
17 your hands, environmental factors, smudging or
18 smearing.

19 And you notice that when she was
20 testifying, she made a very, you know, distinct
21 impression every time she was showing with making a
22 fingerprint on an object up there. So prints are
23 fragile and she testified to that.

24 And she also testified to what was
25 called overlapping. She testified, and I believe

1 there were also jury questions about overlapping.
2 And that's very important. She testified that if
3 you had a print upon a gun and another print was
4 overlapped on it, it could have destroyed or caused
5 the print not to be identifiable.

6 So in this case, you have a clear
7 print on the back strap of that gun that was
8 identified to the defendant. And while you
9 cannot -- she doesn't know, she wasn't at the scene,
10 she can't testify that she saw him shooting and that
11 print had to be placed there, but I would remind you
12 that while Edshel Calvillo said that people were
13 touching that gun and playing with that gun, he
14 didn't say it was that night and he didn't say that
15 they were holding that gun in a firing position
16 either. And there was no testimony that anybody
17 else was firing that gun that night.

18 So that evidence is very important
19 that the defendant's fingerprint was identified on
20 that firearm in the exact position where you would
21 grip a firearm at the top of the grip across from
22 the pull of the trigger.

23 With regard to the right ring
24 fingerprint being on that, the defense argues that
25 that's not the way you would drop a gun into the

1 toilet tank. Well, we know the gun was dropped into
2 that toilet tank, we know the gun was upside down
3 because you have a picture of it. And you can see
4 that the top part of the gun, the top part of the
5 gun that you can see on top of the toilet tank is
6 the grip. And it is absolutely conceivable that you
7 could have grabbed the gun by the top of the grip
8 and that's where the fingerprint could have been
9 left.

10 But what would have been worse?
11 There's actually something that would have been
12 worse than having the defendant's fingerprint
13 identified on that gun. It's being caught with the
14 gun. That's the only evidence that would have been
15 even more damaging is if the defendant had been
16 caught in possession of that gun. And that's why he
17 had to get rid of that gun as fast as he could and
18 that's why he dropped it in that toilet tank. It
19 just happened to be sitting there out on the street.

20 With regard to the fact that no DNA
21 was done, DNA was done in the case. It was done on
22 what they thought was a biological stain that could
23 have been blood.

24 And you heard a lot of testimony,
25 especially on Friday, with regard to how they

1 processed the gun back in 2006. And you heard that
2 Alice Maceo saw this reddish stain that she thought
3 might have been something, a biological stain, so
4 she had it swabbed and that ultimately --

5 MR. FIGLER: I'm gonna object, Your
6 Honor, as to any evidence about a swab. There's no
7 swab in evidence.

8 MS. PANDUKHT: That was her testimony.

9 THE COURT: Overruled.

10 MS. PANDUKHT: Thank you. Her testimony,
11 and then the testimony of DNA expert, came in here
12 and said that it actually wasn't blood at all. So
13 they did a test and that stain wasn't blood. And
14 actually it wasn't even enough for DNA she testified
15 as well. But you heard back in 2006, which is when
16 it was important because this gun was processed back
17 in 2006, not today. So that's why the State
18 elicited testimony about the procedures and the
19 protocols used in 2006.

20 And you heard Alice Maceo testify as
21 to why the gun was processed for latent prints at
22 that time for possession. And they testified that
23 they didn't have touch DNA back then because now
24 they've got more developments and the machines are
25 more sensitive and they didn't have that capability

1 back in 2006.

2 Now, with regard to the defense
3 claiming that they went there to fight, he stated in
4 his closing argument they went there to fight. He
5 said Mogg said that. Well, Mogg only said that
6 regarding Harper. He only said Harper went there to
7 fight and that's why he wasn't charged.

8 The defendant didn't go there just
9 to fight. Because if you're gonna go there just to
10 fight, you don't take a semi-automatic weapon that's
11 fully loaded with you.

12 And the defendant went there with
13 the intent to commit murder which is evident by his
14 actions. And it is evident by the fact that he
15 didn't shoot that firearm right there in the middle
16 of the fight. Everyone was running away.

17 You heard the defense argue that
18 this should be voluntary manslaughter because it is
19 an impulse of a shooter, a rash impulse from a
20 sudden quarrel.

21 Well, when the principal came out to
22 break up that fight, everyone else, one, stopped
23 fighting. And then they started running away.
24 Almost everybody just ran away. Most people got
25 into their cars, but it was the shooter in this

1 case, the defendant, who ran across the street
2 chasing after the kid that was smaller, in the house
3 slippers, in those house shoes that you saw pictures
4 of, the defendant chase after Victor Gamboa who got
5 pinned up against that block wall across Washington
6 and he fired at him when Victor Gamboa's back was to
7 him.

8 You heard no evidence that Victor
9 Gamboa had a gun. You heard everyone say that the
10 back of Victor Gamboa was facing the shooter. So
11 the defendant fired not just once into Victor's
12 back. He fired at least six times in succession,
13 dumping the clip as Jonathan Harper testified.

14 So for defense to argue that this
15 was some irresistible passion, one, you have to use
16 a reasonable person standard. But let's not just
17 use a reasonable person standard. Because guess
18 what? You had all kinds of people at this fight.
19 You had all kinds of people who were fighting, who
20 were passionate, who were beaten up and bleeding and
21 injured. Brian Marquez said he was injured.

22 You had all kinds of people that
23 were at that fight who did not pull out a gun, chase
24 after somebody and shoot them in the back multiple
25 times. Only the defendant did that.

1 Lastly with regard to flight, the
2 defense would like you to believe because he waived
3 extradition that that's not evidence of flight. You
4 got the instruction in this case that that can be
5 something that you consider in terms of
6 consciousness of guilt. And I would remind you of
7 the testimony that he didn't waive extradition until
8 after two years after this crime and it's after we
9 found him in Mexico and after we arrested him in
10 Mexico. And there was several months before he
11 waived extradition.

12 But why would he go to Mexico? He's
13 a U.S. citizen. You have his birth certificate to
14 show you that. He's 16 years old. And his parents
15 live here in the United States. So why would he go
16 to Mexico unless it was to flee from this crime.

17 You have heard substantial evidence
18 in this case. Evidence beyond a reasonable doubt
19 not only that this defendant was the shooter in this
20 case, not only that it was not voluntary
21 manslaughter, but that it was premeditated,
22 deliberate murder.

23 The defendant made the choice to
24 bring a gun to that school. The defendant made a
25 choice to keep that gun hidden in his pocket. The

1 defendant made the choice to run across that street,
2 chase somebody across that street, pull out that gun
3 and he made that choice to pull the trigger of a
4 deadly weapon at another human being.

5 The defendant made that choice to
6 fire several times at an unarmed person in the back
7 until he fell against that wall and crumbled to the
8 floor.

9 This was willful, premeditated and
10 deliberate.

11 The defendant should be found guilty
12 of first-degree murder. Thank you.

13 THE COURT: Thank you very much. All
14 right. I'm gonna now swear the officers.

15 (Whereupon, the marshal was sworn to take
16 charge of the jury the marshal.)

17 THE COURT: All right. We're gonna have
18 the jury -- not the two alternates, but the jury's
19 gonna go with my marshal for deliberations.

20 I'm gonna have the alternates -- go
21 ahead and swear in Gail for the alternates.

22 (Whereupon, the Gail Reiger was sworn to
23 take charge of the alternates.)

24 THE COURT: All right. Please go with
25 your respective sworn officers.

1 (Whereupon, the jury exited the courtroom
2 to deliberate.)

3 THE COURT: Be seated. We're outside the
4 presence of the jurors.

5 Is there anything else we need to
6 take outside the presence of the jury?

7 MR. FIGLER: No, Your Honor.

8 MS. DEMONTE: No, Your Honor.

9 MR. FIGLER: We'll try to get that
10 stipulation done right now.

11 THE COURT: Okay. And then just have it
12 filed with my clerk while we're at ease or on break
13 or whatever. You can file it in open court before
14 the verdict.

15 All right. Have a good lunch.
16 We'll go off the record.

17 (Whereupon, a recess was had while the
18 jury deliberated.)

19 THE COURT: We're back on the record on
20 State of Nevada versus Evaristo Garcia. Case
21 C262966.

22 Let the record reflect the
23 defendant's not present. We're outside the presence
24 of the jury. And also we do have sides here, both
25 sides here. We have for the State, Ms. Pandukht;

1 for the defense, Mr. Goodman and Mr. Figler.

2 All the jury told my marshal is
3 there's a typo on the verdict form under second
4 degree.

5 And so when I looked, and you're
6 free to look at the actual verdict form, it is
7 missing the word weapon. So if you want to come up
8 here, we can make the old one a Court's exhibit and
9 Gail typed 'weapon' on the new one. And I'll make
10 that a Court's exhibit.

11 MS. PANDUKHT: Which is the -- okay. So
12 this would be the -- I didn't touch it.

13 THE COURT: Okay. This is the verdict
14 form.

15 MS. PANDUKHT: Oh, we left off the word
16 weapon.

17 THE COURT: Correct. So they didn't want
18 to do anything because they noticed a typo was on
19 it.

20 MS. PANDUKHT: I got you.

21 THE COURT: They're still deliberating,
22 they just noticed a typo and they wanted to bring it
23 to our attention.

24 MR. FIGLER: I have no objection to the
25 Court correcting it and sending a corrected --