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

3 EVARISTO JONATHAN GARCIA,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.  
8  
9

Supreme Court Case No.: 64221

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11 **APPELLANT'S APPENDIX**

12 **VOLUME 11 OF 11**

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1           THE COURT: We'll make that, the old one,  
2 a Court's exhibit, to solidify what we talked about,  
3 and we will exchange this one which I made my, while  
4 we were waiting for you guys to come, we just added  
5 weapon.

6           MS. PANDUKHT: Okay.

7           THE COURT: And if that's okay with both  
8 sides, we'll switch them out and send it back.  
9 That's all they wanted to let us know.

10          MS. PANDUKHT: Okay. No problem. No  
11 objection.

12          THE COURT: Okay, great. Thanks. We'll  
13 go back off the record.

14          MS. PANDUKHT: Okay.

15                (Whereupon, a recess was had while the  
16 jury deliberated.)

17          THE COURT: Good afternoon, ladies and  
18 gentlemen. We're on the record on State of Nevada  
19 versus Evaristo Garcia. Case No. C262966.

20                Let the record reflect the  
21 defendant's present with his attorneys, Mr. Goodman  
22 and Mr. Figler. And for the State, Ms. Pandukht is  
23 present.

24                We're in the presence of the jurors,  
25 and it's my understanding that the jury has reached

1 a verdict. Is that correct, whoever the foreperson  
2 is?

3 FOREMAN ARCANA: That's correct.

4 THE COURT: And can you state your name?  
5 And you're Juror No. 3 for the record.

6 FOREMAN ARCANA: That's right, yes. My  
7 name is Michael Arcana.

8 THE COURT: Okay.

9 FOREMAN ARCANA: Juror No. 3.

10 THE COURT: All right. Can you hand it  
11 to the marshal and we will record the verdict? All  
12 right. I'm gonna ask the defendant to please stand  
13 and my clerk will now read the verdict out loud.

14 THE CLERK: In the District Court, Clark  
15 County, Nevada, the State of Nevada, plaintiff,  
16 versus Evaristo Jonathan Garcia, defendant. Case  
17 C262966. Department 15, verdict.

18 We the jury in the above-entitled  
19 case find the defendant Evaristo Jonathan Garcia as  
20 follows:

21 Count I, conspiracy to commit  
22 murder, not guilty.

23 Count II, murder with use of a  
24 deadly weapon, guilty of second-degree murder with  
25 use of a deadly weapon.

1 Signed and dated the 15th day of  
2 July 2013. Signed by jury foreperson Michael  
3 Arcana.

4 Ladies and gentlemen, are these your  
5 verdicts as read so say you one so say you all?

6 THE JURY: Yes.

7 THE COURT: All right. Does either of  
8 the parties desire to have the jury polled?

9 MS. PANDUKHT: Not the State, Your Honor.

10 MR. FIGLER: Yes, Your Honor.

11 THE COURT: All right. Defense would  
12 like the jury polled.

13 THE CLERK: Lisa Griffis, are these your  
14 verdicts as read?

15 JUROR GRIFFIS: Yes, they are.

16 THE CLERK: Namit Bhatnagar, are these  
17 your verdicts as read?

18 JUROR BHATNAGAR: Yes.

19 THE CLERK: Michael Arcana, are these  
20 your verdicts as read?

21 JUROR ARCANA: Yes, they are.

22 THE CLERK: Pamela Olson, are these your  
23 verdicts as read?

24 JUROR OLSON: Yes, they are.

25 THE CLERK: Jackie Wiese, are these your

1 verdicts as read?

2 JUROR WIESE: Yes.

3 THE CLERK: Angelica Numez-Morarrez, are  
4 these your verdicts as read?

5 JUROR NUMEZ-MORARREZ: Yes.

6 THE COURT: Keith Trombetta, are these  
7 your verdicts as read?

8 JUROR TROMBETTA: Yes.

9 THE CLERK: Christina Beber, are these  
10 your verdicts as read?

11 JUROR BEBER: Yes.

12 THE CLERK: Erica Villanueva, are these  
13 your verdicts as read?

14 JUROR VILLANUEVA: Yes.

15 THE CLERK: Joseph Catello, are these  
16 your verdicts as read?

17 JUROR CATELLO: Yes.

18 THE CLERK: David McCallum, are these  
19 your verdicts as read?

20 JUROR MCCALLUM: Yes.

21 THE CLERK: Elizabeth Uhrle, are these  
22 your verdicts as read?

23 JUROR UHRLE: Yes.

24 THE COURT: All right. The clerk is now  
25 gonna record the verdict in the minutes of the



1 court.

2 Ladies and gentlemen, as you know,  
3 the right to a trial by a jury is one of our basic  
4 and fundamental constitutional rights. So on behalf  
5 of counsel, the parties in the Eighth Judicial  
6 District Court, I want to thank you for your careful  
7 deliberation which you gave to this case.

8 The question may arise as to whether  
9 you may now talk to other persons regarding this  
10 matter. I advise you that you may, if you wish,  
11 talk to other persons and discuss your deliberation  
12 which you gave to this case, but you are not  
13 required to do so.

14 If anybody pesters you or you don't  
15 want to and you're being, you know, harassed, you  
16 just let the Court know and we'll take care of that,  
17 but you may speak to whoever you want to as well  
18 about this case now that you're gonna be excused.

19 So again, on behalf of the State of  
20 Nevada, I want to thank you again and you're excused  
21 as jurors. I'd ask you to follow Marshal Ellis to  
22 the conference room.

23 (Whereupon, the jury exited the  
24 courtroom.)

25 THE COURT: All right. We're outside the

1 presence of the jury. I just want to make sure that  
2 stipulation had been filed for purposes of making a  
3 record.

4 Has that stipulation on punishment  
5 on the first been filed?

6 MR. FIGLER: We didn't get that filed.  
7 I'm sorry, Your Honor. It doesn't matter now.

8 THE COURT: It's not gonna matter now. I  
9 think it's moot.

10 MS. PANDUKHT: I agree.

11 THE COURT: And, you know, we've made  
12 continual records. So I just don't think it matters  
13 at this point.

14 Would both parties agree with me?

15 MR. FIGLER: I would, Your Honor. And it  
16 was only in relation to first-degree murder. The  
17 jury did not come back with first-degree murder.

18 THE COURT: Correct.

19 MS. PANDUKHT: Yes.

20 THE COURT: So at this time sentencing  
21 will be up to the Court.

22 MS. PANDUKHT: Yes.

23 THE COURT: And what I'm gonna do is  
24 remanding the defendant, no bail at this point. His  
25 sentencing date will be two months.

1                   Here's the next court date.

2                   THE CLERK:   September 12th at 9 a.m.

3                   MR. FIGLER:   Thank you, Your Honor.

4                   THE COURT:   Thank you very much.   We'll  
5 go off the record.

6

7   ATTEST:       FULL, TRUE AND ACCURATE TRANSCRIPT OF THE  
8                   PROCEEDINGS.

8

9                               /s/ JoAnn Melendez

10                              JO ANN MELENDEZ  
11                              CCR NO. 370

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by Jennifer Kimmel  
JENNIFER KIMMEL, DEPUTY

THE STATE OF NEVADA,

Plaintiff,

-vs-

Case No. C262966

Dept No. XV

EVARISTO JONATHAN GARCIA,

Defendant.

VERDICT

We, the jury in the above entitled case, find the Defendant EVARISTO JONATHAN GARCIA, as follows:

COUNT 1 - CONSPIRACY TO COMMIT MURDER

(please check the appropriate box, select only one)

☐ Guilty of Conspiracy to Commit Murder

☒ Not Guilty

APP 002017

1 COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON

2 *(please check the appropriate box, select only one)*

- 3 ☐ Guilty of First Degree Murder with Use of a Deadly Weapon
- 4 ☐ Guilty of First Degree Murder
- 5 ☒ Guilty of Second Degree Murder with Use of a Deadly Weapon
- 6 ☐ Guilty of Second Degree Murder
- 7 ☐ Guilty of Voluntary Manslaughter with Use of a Deadly Weapon
- 8 ☐ Guilty of Voluntary Manslaughter
- 9 ☐ Not Guilty

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11 DATED this 15 day of July, 2013

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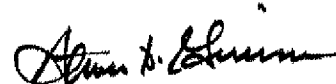
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11 EVARISTO J. GARCIA

8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

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10 STATE OF NEVADA,	)	CASE NO. 10C262966-1
	)	DEPT. NO. XV
11 Plaintiff,	)	
	)	
12 vs.	)	<b>MOTION FOR ACQUITTAL OR IN THE</b>
	)	<b>ALTERNATIVE, MOTION FOR NEW</b>
13 EVARISTO J. GARCIA,	)	<b>TRIAL</b>
	)	
14 Defendant,	)	
	)	
15	)	
16	)	

17 COMES NOW the Defendant, EVARISTO J. GARCIA, by and through his attorneys,  
18 DAYVID J. FIGLER, ESQ. and ROSS C. GOODMAN, ESQ., and submits this Motion for  
19 Acquittal or in the Alternative, Motion for New Trial pursuant to NRS 175.381 and NRS  
20 176.515. This motion is supported by the attached points and authorities, and hereby  
21 incorporates by reference all prior pleadings in this matter as well as any argument deemed  
22 necessary by this Court.

23 DATED this 22nd day of July, 2013.

24 Respectfully Submitted by:

25 /s./ Dayvid J. Figler, Esq.  
26 DAYVID J. FIGLER, ESQ.  
27 Nevada Bar No. 004264  
28 615 S. 6th Street  
Las Vegas, NV 89101  
Attorneys for Defendant,  
EVARISTO J. GARCIA

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YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the foregoing motion of for setting before the above entitled Court, in Department XV, thereof, on the 1<sup>st</sup> day of August, 2013, at the hour of 9.00 o'clock A.M. or as soon thereafter as counsel may be heard.

Respectfully Submitted by:  
/s./ Dayvid J. Figler, Esq.  
DAYVID J. FIGLER, ESQ  
Nevada Bar No. 004264  
615 S. 6th Street  
Las Vegas, NV 89101  
Attorneys for Defendant,  
EVARISTO J. GARCIA

1. POINTS AND AUTHORITIES

2. STATEMENT OF FACTS AND CASE

3. Evaristo Garcia, 16, was accused of shooting and killing Victor Gamboa, 15, as the  
4. ostensible outgrowth of a schoolyard brawl, though there was no evidence that the boys knew  
5. each other or ever engaged in any conflict or actual fight even up to the seconds before the  
6. shooting. Indeed, of the dozen or so available witnesses who indicated they were in or an  
7. observer to the brawl, none (with the exception of Jonathan Harper) were able to identify  
8. Evaristo Garcia out of a line-up as even being at the school, let alone being the shooter. No  
9. physical evidence placed Evaristo Garcia at the scene of the shooting, or the prior fight, or the  
10. car, which allegedly transported Evaristo Garcia to the school, or the gray hoodie the shooter was  
11. agreed upon by almost every witness to have worn. In fact, no reliable evidence even placed the  
12. Defendant in Sal Garcia's apartment where the parties who went to the school were located when  
13. the call came in to go to the school.

14. Indeed, one of the State's key witnesses, Betty Graves, testified that she stared directly  
15. into the face of the boy she attributed as the shooter, and yet there was no evidence that she was  
16. able to identify Evaristo Garcia as being that boy at any time.

17. The State had originally alleged that this was an outgrowth of gang violence and that  
18. Evaristo Garcia was both a member of the gang, and that the shooting was an act done in  
19. furtherance of the gang. Halfway through the trial it became abundantly clear that the State  
20. could not meet the burden for showing that the group of kids charged in the conspiracy were a  
21. "gang" under the legal definition, let alone that this random shooting was an act done in  
22. furtherance for the benefit of this non-existing gang. The Defense made an oral motion for  
23. mistrial based (1) on the bad faith of bringing gang charges when there was no sufficient basis  
24. and (2) the prejudice to the Defendant having to endure voir dire, opening statements, and the  
25. first half of the trial under the specter of being in a gang. The State was allowed to make a  
26. written memo in support of why the gang theory was pursued and the Court denied the Defense  
27. motion without prejudice to readdress the issues contained therein if warranted.



1       Once the gang enhancements were gone, the State ultimately abandoned the “challenge to  
2 fight” theory of first-degree murder under NRS 200.450 prior to submission to the jury.

3       The trial proceeded with some significant surprises along the way that operated to the  
4 prejudice of the defendant.

5       First, Melissa Gamboa (the sister of the decedent) was expected to identify the Defendant  
6 in Court as she had done so at the preliminary hearing. Prior to trial, however, the Defendant  
7 had moved this Court to exclude and suppress Ms. Gamboa’s prior in-court identification as  
8 being overly suggestive. It is undisputed that Ms. Gamboa did not pick the Defendant out of a  
9 photo line-up prior to the preliminary hearing (there was contradicting evidence as to whether or  
10 not she was shown a line-up). The Court denied the Defendant’s Motion to Suppress. At trial,  
11 Ms. Gamboa was unable to identify the Defendant as the person who shot her brother, thus  
12 bolstering the Defendant’s concern about the prior identification coming into evidence and  
13 prejudicing him. The State, over objection, was allowed to bring a photo of the Defendant taken  
14 around two months prior to the preliminary hearing and asked Ms. Gamboa if that was the  
15 person who shot her brother. This was an improper back-door method of presenting an already  
16 tainted identification that no amount of cross-examination could correct. What should have been  
17 the end of any testimony on the subject (failure to identify the Defendant at trial) turned into a  
18 better scenario for the State wherein the State urged the jury to excuse the failure to identify as  
19 the outgrowth of the Defendant aging. Most of the other witnesses who observed the Defendant  
20 at the time of the preliminary hearing had no difficulty identifying him Court.

21       Second, to the surprise of the Defendant, the State called Edshel Calvillo while  
22 ensconced in chains under a so-called “material witness” warrant. There were a number of  
23 reasons why the Defendant was shocked that Edshel Calvillo was called to the stand. Beyond  
24 not telling the Defense despite a veneer of cooperation, Edshel Calvillo had once before testified  
25 in an ancillary proceeding (the shooting of Jonathan Harper) in a manner that the same counsel in  
26 the present matter had labeled very succinctly as “lies” in her closing statement. As such, the  
27 State placed on the stand an individual who they already had encountered as a perjurer.

1 Next, it was clear from a reading of Calvillo's statement to the police that his testimony  
2 was so utterly unbelievable from its internal inconsistencies and external contradictions<sup>1</sup> that it  
3 would be a farce to present him as a credible State's witness. Finally, and most troubling, there  
4 has yet been any exploration why Calvillo was brought into the courtroom in chains and how it  
5 was determined that he was in need of a "material witness warrant." It is the Defendant's  
6 position that bringing the known perjurer, Calvillo, unexpectedly into the courtroom in chains  
7 was a charade designed to garner credibility to the otherwise non-credible witness.

8 Indeed, this maneuver was done so suddenly at the second day of trial and without any  
9 discourse before the Court that this Court should take great pause. When the subject was  
10 discussed, the State indicated that while served properly, Calvillo "did not show up" to the  
11 optional pre-trial conferences or "as expected on Monday." Monday was jury selection and there  
12 were no witnesses observed by the Defense as having showed up at the courtroom that day at  
13 noon. According to the Court record, the ex parte application for a material witness warrant was  
14 submitted and signed by 2:00 P.M. that same day. It should be of special note that in the State's  
15 ex parte application it was averred that Calvillo would have information about the gang  
16 enhancement (which was dropped) and admitted that Calvillo was part of "an orchestrated  
17 attempt by members of the Puros Locos gang to secure the acquittal of Salvador Garcia." Yet, at  
18 the sudden and without warning the now "sympathetic" Calvillo was brought in front of the jury  
19 to testify that the Defendant had admitted the offense to him, though all parties, and especially  
20 the State knew it was unreliable testimony at best.

21 Third, and to no surprise of the Defendant, Detective Ken Hardy testified that he had  
22 concerns that the gun at issue had not been properly tested for DNA. To corroborate this, the  
23 Defense had produced what was later marked as Defense Exhibit A showing that it was a belt  
24 buckle of the decedent, and not the gun slide that was tested. The Defense and State went around  
25

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26  
27 <sup>1</sup> For starters, Calvillo told police that he voluntarily was giving the statement to tell the truth and  
28 then proceeded to lie that he received a phone call from the Defendant. When the police  
debunked that, he claimed the Defendant picked him up in a non-existent white car and drove  
him to a park to confess. When the police debunked that, Calvillo couldn't even remember the

1 this issue for a short while through witness, but ultimately (after Motion to Dismiss was denied),  
2 the State convinced this Court that the swabbing of the slide was in fact the one that was tested,  
3 yet curiously the State never was able to fulfill its offer of proof necessary to even have that  
4 swab (State's proposed Exhibit 109) admitted into evidence. There was an incomplete chain of  
5 custody and the actual record now belies any suggestion that the correct swabbing was done.  
6 The person who allegedly took the proper swab was never called to testify and the exhibit was  
7 not admitted. The Defendant's motion to dismiss was therefore proper and should have been  
8 granted. Moreover, the State admitted that no other efforts were made to preserve any DNA on  
9 the weapon. It most also be noted that no DNA linked the gun to the Defendant.

10 Finally, Jonathan Harper testified. The Court ruled that he was an uncharged accomplice  
11 and therefore his testimony was required to be corroborated. Jonathan Harper, despite having  
12 lost 23 percent of his brain tissue, testified in the way expected by the Defense as a result of  
13 efficient pre-trialing by the State. If one were, however, to look at Jonathan Harper's prior  
14 testimony both at the preliminary hearing and grand jury in this matter, it is clear that Jonathan  
15 Harper was testifying either as a result of (1) confabulation or (2) falsehood. One cannot look at  
16 Jonathan Harper's trial testimony as the truth since it so vastly differs from his prior testimony.  
17 Notably, his prior testimony was repeatedly rehabilitated through prior inconsistent statements  
18 from his original statement; he either claimed different knowledge or no memory when he  
19 testified. Now, and several years later, Jonathan Harper was able to flawlessly go through the  
20 events of the day without a single need by the State to rehabilitate with prior statements as they  
21 had been required to do dozens of times at the earlier proceedings.

22 Additionally, Jonathan Harper testified that he in close enough proximity to the shooting  
23 to actually hear Giovanni Garcia encourage the Defendant to shoot Victor Gamboa. No other  
24 witness (not Melissa Gamboa, Principal Dan or any other State's witnesses) heard such an  
25 exchange. Moreover, every State witness indicated there was either one or two boys pursuing  
26 Gamboa, no one mentioned a third in close proximity (Jonathan Harper). If nothing else, this

27  
28 Defendant's name when asked who the parties were who returned from the school shooting --  
Calvillo tellingly first uttered... Sal (the alleged leader of the group of kids).

1 either proves that Harper was (a) lying or (b) was one of the two boys pursuing Gamboa and  
2 may, himself, have been the shooter. Likewise, Harper testified that the shooter unloaded his  
3 clip into the body of Gamboa, which was contradicted by the Coroner.

4 In a word, Jonathan Harper's testimony was a farce, and that's why the Defense objected  
5 to his testimony without a Court-order direct examination by Dr. Roitman to psychologically get  
6 to the core of this issue. The Court, without the benefit of seeing the discrepancy it witnessed at  
7 trial, denied the Defense motion. And while Dr. Roitman was able to testify as to general  
8 characteristics, his lack of actual examination of Jonathan Harper (which is hindsight would have  
9 been legally proper) was exploited by the State. More importantly, only Calvillo corroborated  
10 Harper and then only ambiguously since Calvillo adamantly denied he was at the school (though  
11 he did finally admit contrary to his statement to the police that he never left Sal's apartment).

12 Thus, the State proceeded on a very weak case. The only actual evidence that linked the  
13 Defendant to the offense was that two of his fingerprints (out of three of value and countless  
14 more that were not of testing quality) appeared on the gun, and two years later he was located in  
15 Mexico. Regarding the former, the Defense more than adequately elicited testimony that the  
16 Defendant's fingerprints on the gun meant nothing more than at some time and place the  
17 Defendant had held the gun – a point not disputed by the Defense – but that does not rise to the  
18 level of reasonable doubt necessary to establish he was the shooter. Regarding the latter, the  
19 State did not establish when the Defendant went to Mexico or under what circumstances. The  
20 State was unable to show that the Defendant went to Mexico after the arrest warrant was issued  
21 (June, 2006), or if he had, that he hadn't gone down to Mexico years after the shooting. In sum,  
22 there was NO evidence as to when the Defendant first left Las Vegas. Even together with other  
23 evidence adduced, there was insufficient evidence to meet the high burden of reasonable doubt.

24 The jury was presented with a two-count Indictment alleging conspiracy to commit  
25 murder and murder (which included as an alternate theory – conspiracy). The Defendant was  
26 acquitted of conspiracy and found guilty of second-degree murder with use of a deadly weapon.  
27 The instant motion follows.

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**A. MOTION FOR ACQUITTAL**

NRS 175.381 (2) and (3) provides:

NRS 175.381 (2) and (3) provides:

(2) The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.

Defendant avers that as a matter of law, the State did not produce even the minimum legally sufficient evidence to support a conviction of Evaristo Garcia was guilty of the alternate theories of liability presented. Indeed, the jury specifically rejected the conspiracy theory and as such, must have found (though unsupported) that the defendant was the shooter (albeit one lacking in premeditation or deliberation despite having fired a shot in the back after a chase). And while the State arguably proved beyond a reasonable doubt that the young man in the gray hoodie was the shooter, there was scant

1 evidence (let alone that beyond reasonable doubt) that Evaristo Garcia was the boy in the gray  
2 hoodie. In fact, the Court ruled that as a matter of law Jonathan Harper needed to be  
3 corroborated and as a matter of law, the record is devoid of legally allowable corroboration as  
4 would support a conviction. As such, this Court has the authority on the record as it stands to  
5 grant an acquittal.

6 **B. MOTION FOR NEW TRIAL**

7 In the alternative, the Defense would submit that the State's manipulation of the facts  
8 (not borne out at trial) in pre-trial motions warrants the granting of a new trial. Specifically, if  
9 the Court knew at the pre-trial motion hearings, what it ultimately learned at trial, there would  
10 have been a very different outcome.

11 NRS 176.515 provides that:

- 12 1. The court may grant a new trial to a defendant if required as a  
13 matter of law or on the ground of newly discovered evidence.
- 14 2. If trial was by the court without a jury, the court may vacate the  
15 judgment if entered, take additional testimony and direct the entry  
16 of a new judgment.
- 17 3. Except as otherwise provided in NRS 176.0918, a motion for a  
18 new trial based on the ground of newly discovered evidence may  
19 be made only within 2 years after the verdict or finding of guilt.
- 20 4. A motion for a new trial based on any other grounds must be  
21 made within 7 days after the verdict or finding of guilt or within  
22 such further time as the court may fix during the 7-day period.

21 The record is replete with support for a new trial.

22 For instance, the State should not have been able to refer in any way to Melissa  
23 Gamboa's faulty in-court identification of the Defendant, let alone bolster it by showing her a  
24 picture of the Defendant from 2008. In fact, showing the picture was a greater violation of an  
25 overly suggestive identification than what was being initially challenged. The Defense objected  
26 strenuously, but the State was able to benefit even greater from a legally insufficient  
27 identification.  
28

1 Likewise, Jonathan Harper should not have been able to testify without being fully  
2 subjected to a psychological analysis to determine his competence as a witness. While giving a  
3 fluid and damning account of events at trial seven years after his brain had been blown out by Sal  
4 Garcia (and possibly in orchestration with Edshel Calvillo), the Court must now see after review  
5 of the earlier testimony and the testimony of Dr. Roitman that this Jonathan Harper was not a  
6 competent witness in that his testimony could NOT have been truthful, or capable of  
7 truthfulness. Indeed, the fluid, almost flawless testimony of Harper at trial is a red flag of  
8 unreliability given his prior testimony and the context. If anything, it had to be so polished and  
9 rehearsed that it was error to even be presented; and the defense despite pre-trial motions  
10 designed to uncover this charade were stymied. In a new trial, the Defense would renew its  
11 effort to examine Jonathan Harper and/or exclude his testimony as is proper.

12 Further, Edshel Calvillo should not have had a material witness warrant issued against  
13 him and the discussion of whether or not he be presented in chains should have been discussed  
14 before he was paraded out in front of the jury. Clearly, the jury's view of Mr. Calvillo in this  
15 setting was designed to bolster his credibility (i.e. "forcing" him at great personal suffering to  
16 testify in chains against his "friend"). Further, there can be certain circumstances where the  
17 coercive environment is so overwhelming that it is akin to securing a witness to testify in a  
18 particular fashion. "Government misconduct that amounts to substantial interference with a  
19 witness' free and unhampered determination to testify may be deemed a violation of due  
20 process." United States v. Foster, 128 F.3d 949, 953 (6th Cir.1997). In considering "prosecutorial  
21 misconduct," the U.S. Supreme Court has stated that prosecutors must "refrain from improper  
22 methods calculated to produce a wrongful conviction." Berger v. United States, 295 U.S. 78, 88,  
23 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The Supreme Court has also held that the appropriate  
24 standard of review for prosecutorial misconduct is "the narrow one of due process," because a  
25 defendant's due process rights are violated when a prosecutor's misconduct renders a trial  
26 "fundamentally unfair." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d  
27 144 (1986). See also Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987);  
28 Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). As such,

1 the State's tactics here were designed either to make sure Calvillo testified in a certain way  
2 favorable to the State and/or presented him in a way in chains to bolster credibility – either way,  
3 it was a violation of the Defendant's due process rights to have this evidence received in such a  
4 fashion.

5 Also, while the Defense was aware of Calvillo's earlier statement, it was so far-fetched  
6 that Calvillo, a person known to the State to be a perjurer, would be called to testify and so the  
7 Defense to some degree was caught at unawares. More significantly, however, is that the  
8 Defense learned new information on the stand that Calvillo did not reveal to the police in the  
9 earlier statement, to wit, that he did in fact embark upon a journey to the school to engage in a  
10 fight. (He told police he didn't). As such, the Defense faced with this new evidence could now  
11 do an investigation into Calvillo as an alternate suspect. Certainly, he fits the general description  
12 of the shooter, and his denial that he did not make it all the way to the school should be treated  
13 with the same reliability as when he told the police he did not leave the apartment. In other  
14 words, Calvillo's admission that he and Sal actually got in a car and headed to the school is a  
15 game changer, in and of itself, warranting a Motion for a New Trial.

16 Next, it was error for the State to rehabilitate the "swab" as being properly gathered and  
17 tested when the evidence that was admitted suggested it wasn't, and the offer of proof the State  
18 presented was never fulfilled. Specifically, the State, contrary to its promise, never completed the  
19 chain of custody regarding the swab of the gun slide, and never admitted the swab into evidence.  
20 As such, the suggestion that the proper swab was taken and submitted for testing is,  
21 cumulatively, additional grounds for a new trial.

22 Finally, it was absolute prejudice for the State to proceed through this trial with a gang  
23 enhancement theory. Their unfounded pursuit of this theory tainted jury selection and opening  
24 statements as well as other witnesses cross-examination. And while the State did a yeoman's job  
25 in explaining to the Court through its Memo that they expected witnesses to testify that the  
26 Defendant was "in their gang" – they made no legitimate representation that the State could ever  
27 prove that LEGALLY this was a gang. The Defense had objected by writ, and during trial, and  
28 yet the State proceeded. Nothing in the memo changes that there was a bad faith effort to sully



1 the Defendant and the proceedings with gang references when in fact they could NEVER have  
2 PROVEN that this a gang per statute with **felonious activities as their commonality**. The State  
3 knew there were never sufficient felony convictions to establish a gang, and yet proceeded  
4 anyhow in violation of statute and their obligation to seek justice under the law. Jimenez v. State,  
5 112 Nev. 610, 618, 918 P.2d 687, 692 (1996) (“The prosecutor represents the state and has a  
6 duty to see that justice is done in a criminal prosecution.”); ABA Standards for Criminal Justice,  
7 Prosecution Function Standard 3–1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek  
8 justice, not merely to convict.”); Id. cmt. (“[I]t is fundamental that the prosecutor’s obligation is  
9 to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well  
10 as to enforce the rights of the public”). See also, Berger v. United States, 295 U.S. 78, 88, 55  
11 S.Ct. 629, 79 L.Ed. 1314 (1935), Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91  
12 L.Ed.2d 144 (1986), Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987);  
13 Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). The  
14 motion for mistrial is still ripe.

15 In the present case, the State attempted to corroborate an accomplice who in all  
16 likelihood was incompetent to testify with a known perjurer (specifically one who “orchestrated  
17 testimony” in this prosecutor’s words in another one of her related cases) who was brought into  
18 court in chains without benefit or time for a pre-trial discussion. The State also created out of  
19 whole cloth a second ID of the defendant from a picture shown to Melissa Gamboa when the  
20 State knew that the prior in-court ID was already tenuous and subject to suppression. Finally, the  
21 State discarded all the witnesses (basically everyone else) who did not identify Garcia as the  
22 shooter and was able (because of their misguided effort to convict when the evidence did not  
23 support) conflate the gray-hoodied individual with the Defendant. A careful reading of the  
24 record will reveal that every witness who had close contact with the shooter in the gray hoodie  
25 (i.e. Principal Dan, Betty Graves, Joseph Harris, Crystal Perez, Bryan Marquez, etc.) DID NOT  
26 identify Evaristo Garcia as the boy in the hoodie.

27 “Historically, Nevada has empowered the trial court in a criminal case where the  
28 evidence of guilt is conflicting, to independently evaluate the evidence and order another trial if

1 it does not agree with the jury's conclusion that the defendant has been proven guilty beyond a  
2 reasonable doubt." State v. Purcell, 110 Nev. 1389, 887 P.2d 276 (1994) citing Washington v.  
3 State, 98 Nev. 601, 604, 655 P.2d 531, 532 (1982) (quoting State v. Busscher, 81 Nev. 587, 589,  
4 407 P.2d 715, 716 (1965)). Further, in State v. Walker, 109 Nev. 683, 685-86, 857 P.2d 1, 2  
5 (1993), the Nevada Supreme Court stated: "[A] conflict of evidence occurs where there is  
6 sufficient evidence presented at trial which, if believed, would sustain a conviction, but this  
7 evidence is contested and the district judge, in resolving the conflicting evidence differently from  
8 the jury, believes the totality of evidence fails to prove the defendant guilty beyond a reasonable  
9 doubt." See also State v. Purcell, 110 Nev. 1389, 887 P.2d 276 (1994).

10 In the present case, the Court saw the Defense eviscerate the credibility of Edshel  
11 Calvillo and prove how he provided no basis for the necessary corroboration of Jonathan Harper.  
12 Further, the Court heard all about the prior testimony under oath of Jonathan Harper, as well as  
13 the circumstances of his original statement, and how he conflicted with himself, as well as other  
14 witnesses. Finally, the Court was able to survey the totality of circumstances including the vast  
15 amount of conflicting evidence (and lack of evidence) resulting in the State relying in essence on  
16 two things: (1) the happenstance of the Defendant's fingerprints on a gun admitted uncontestedly  
17 handled by numerous parties (including Edshel Garcia, Sal Garcia, Manuel Lopez and Jonathan  
18 Harper) and (2) Defendant's presence in Mexico during an unknown duration. These two facts,  
19 given the totality of the circumstances, are insufficient to support a conviction for murder.

20 Likewise, the Court heard how the parties involved were at Sal Garcia's house, that  
21 Manuel Lopez got the call, how Manuel Lopez owned the gun, how Manuel Lopez owned and  
22 drove the car, and how Manuel Lopez had prior connection to the site of the gun retrieval after  
23 the fact, and in fact, himself tried to retrieve it. Manuel Lopez was able to plead to a voluntary  
24 manslaughter conviction.

25 There was no similarly convincing evidence against Evaristo Garcia warranting  
26 conviction. A new trial is required.

27 Moreover, because of the tortured due process concerns from the onset of this case in the  
28 District Court, the Defense suggests that pursuant to his Constitutional rights. "Cumulative error

1 applies where, although no single trial error examined in isolation is sufficiently prejudicial to  
2 warrant reversal, the cumulative effect of multiple errors has still prejudiced a defendant.”  
3 Whelchel v. Washington, 232 F.3d 1197, 1212 (9th Cir.2000) (internal quotation marks and  
4 alterations omitted). The touchstone inquiry is whether the aggregated errors “ ‘so infected the  
5 trial with unfairness as to make the resulting conviction a denial of due process.’ ” Parle v.  
6 Runnels, 387 F.3d 1030, 1045 (9th Cir.2004) (quoting Donnelly v. DeChristoforo, 416 U.S. 637,  
7 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)). Defendant suggests that given the nature and  
8 circumstances of this case, it cannot be said that because of the machinations both pre-trial and at  
9 trial, he ultimately received the protections of due process.

10 DATED this 22nd day of July, 2013.

11 Respectfully Submitted by:

12 /s./ Dayvid J. Figler, Esq.  
13 DAYVID J. FIGLER, ESQ.  
14 Nevada Bar No. 004264  
15 615 S. 6th Street  
16 Las Vegas, NV 89101  
17 Attorneys for Defendant,  
18 EVARISTO J. GARCIA  
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1 CERTIFICATE OF SERVICE

2 I, the undersigned, hereby certify that on the 22nd day of July, 2013, a true copy of  
3 MOTION FOR ACQUITTAL OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL was  
4 served upon the opposing parties by way of facsimile transmission as follows:

5  
6 NOREEN C. DEMONTE, ESQ.  
7 Chief Deputy District Attorney  
8 Nevada Bar No. 008213  
9 **FAX: 702-477-2998**

10 TALEEN R. PANDUKHT, ESQ.  
11 Chief Deputy District Attorney  
12 Nevada Bar No. 005734  
13 **FAX: 702-477-2959**

14 Attorneys for Plaintiff

15 I further certify that a copy of the same will also be served upon opposing counsel via  
16 electronic mail (e-mail) through the Eighth Judicial District Court's electronic filing system,  
17 Odyssey File & Serve, to counsel's corresponding e-mail address as follows:

18 NOREEN C. DEMONTE, ESQ.  
19 E-mail: noreen.demonte@clarkcountyda.com

20 SCOTT L. BINDRUP, ESQ.  
21 E-mail: taleen.pandukht@clarkcountyda.com

22 /s/: Dayvid Figler  
Dayvid Figler, Esq.

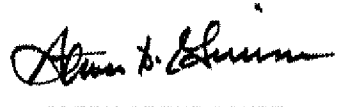
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CASE NO. C262966

DEPT NO. XV

DISTRICT COURT

  
CLERK OF THE COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, )

Plaintiff, )

vs. )

EVARISTO JONATHAN GARCIA, )

Defendant. )

REPORTER'S TRANSCRIPT  
OF  
PROCEEDINGS

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

AUGUST 1, 2013

9:00 A.M.

APPEARANCES:

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

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

Reported by: JoAnn Melendez, CCR No. 370

1 LAS VEGAS, CLARK COUNTY, NV, AUG 1, 2013

2 9:00 A.M.

3 -oOo-

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

5  
6 THE COURT: So the last case on calendar  
7 is Evaristo Garcia. Case No. C262966. He's present  
8 in custody with his counsel Mr. Figler, Mr. Goodman.  
9 For the State, Ms. Demonte and Ms. Pandukht.

10 Okay. So I read the points and  
11 authorities. I'm happy to hear any further  
12 argument.

13 I am embarrassed that the State used  
14 like two quotes of mine. Something about a babbling  
15 baby and -- I don't think I'm gonna -- you know, I  
16 just talk.

17 MR. FIGLER: Right.

18 THE COURT: And I got the babbling baby  
19 right back in my face. So that's great for the  
20 supreme court.

21 MR. FIGLER: I won't belabor it, judge.  
22 You said --

23 THE COURT: Very judicious, very  
24 judicious when I talk about competency and a  
25 babbling baby. So you know I read it.

1 MR. FIGLER: Right.

2 THE COURT: Go ahead and tell me more.

3 MR. FIGLER: Right. And, and we didn't  
4 file a reply brief because we know that you read all  
5 the stuff and we know that you lived through the,  
6 the proceeding.

7 I mean, basically we were looking at  
8 it this way: That the State had two facts that were  
9 undeniable, which was that he was found in Mexico  
10 and that his fingerprints were on the gun.  
11 Everything else was in play.

12 And it's, it's our position that  
13 based on the points that were raised in the, the  
14 brief, the conflicting evidence that was remarkable,  
15 the lack of corroboration of Jonathan Harper and the  
16 issues with Jonathan Harper, the issues surrounding  
17 the prior identification all together led for  
18 ultimately lack of faith in the ultimate verdict  
19 that was received based on the state of the  
20 evidence.

21 And we felt that despite the fact  
22 that they had acquitted him on the conspiracy to  
23 commit murder obviously came to some manner of  
24 interesting compromise for giving him a lesser  
25 included on the main charge that the verdict still

1 cannot withstand a sufficiency of the, of the  
2 evidence. That would amount to an acquittal from  
3 the Court. However, if the Court merely found that  
4 there was conflicting evidence that was significant  
5 enough to not support the verdict, then Your Honor  
6 could order a new trial.

7                   Based on all that, that we presented  
8 in the brief, we would say that that would be --  
9 either one of those would be an appropriate analysis  
10 of the case.

11                   So of course we would ask for it to  
12 be an acquittal, but we understand that it's a  
13 higher standard, that a new trial would be  
14 appropriate as well.

15                   THE COURT: Okay. The only thing I  
16 wanted to mention is that when I read the statement  
17 of facts, the State was correct in their version  
18 that Melissa Gamboa did not identify him at prelim  
19 and they did not question her regarding that booking  
20 photo.

21                   So I agree with the State's  
22 rendition because I remember specifically thinking  
23 in my mind gee, how come they didn't go back and get  
24 like the booking photo of him three years ago.

25                   Now, the next witness that took the



1 stand, they did that.

2 MR. FIGLER: Right.

3 THE COURT: And I think that was Jonathan  
4 Harper. But the rendition that you put in your  
5 moving papers because I want this record to reflect  
6 I was there and I heard the evidence, and I thought  
7 it very odd after Melissa Gamboa did not identify  
8 him at trial why no other I guess stab at it, I  
9 guess I'll say that in my transcript, why the State  
10 didn't put another stab at it through trying to get  
11 identification a different way.

12 And then I read in the pleadings on  
13 their opposition that they didn't have the booking  
14 photo until the next morning.

15 MR. FIGLER: Right.

16 THE COURT: So they weren't able to  
17 rehabilitate that witness at all with the booking  
18 photo. So they didn't ask him about a booking  
19 photo.

20 Now, did they say did you identify  
21 him at a prelim, yeah. But, I mean --

22 MR. FIGLER: And this is what he looked  
23 like. And, you know, we objected to the use of that  
24 photo in any regard because then what's the  
25 relevance if they didn't tie it back up to Melissa

1 Gamboa. So I appreciate --

2 THE COURT: And at --

3 MR. FIGLER: I misspoke.

4 THE COURT: And at the end of the day,  
5 she testified that it was a blonde haired person  
6 that looked to be 19 and -- you know, I mean, they  
7 listened to her testimony.

8 MR. FIGLER: But they tried to clean it  
9 up by saying light was light hair instead of blonde  
10 hair, et cetera.

11 See, this was our, our concern with  
12 the way that the State proceeded in, in doing these  
13 kind of ancillary things that bolstered the  
14 otherwise weak circumstantial case.

15 So the problem that we had was -- so  
16 for instance, with this photograph, okay, I'm not  
17 surprised that I mis, misrepresented those  
18 particular facts by accident because the whole point  
19 of the State was to not have her say no, that wasn't  
20 the guy, but after she had testified to then kind of  
21 suggest to the jury, see, this is what he looked  
22 like back then.

23 Of course she didn't identify him  
24 here today which is sort of a backdoor way of  
25 getting an in-court identification in when we heard

1 from all the detectives or bailiff that he didn't  
2 really change so much in appearance that he wasn't  
3 recognizable. I mean, certainly Mogg and Hardy and  
4 all those guys said yeah, that's the same guy from  
5 back then. They were able to do in court  
6 identifications, and they said that they saw him in  
7 '08, that was the last time that they saw him.

8 So that was our problem with  
9 everything that kind of happened.

10 You know, bringing up all that gang  
11 stuff, bringing up all these photos, because we  
12 objected to that photo a hundred times. And you,  
13 Your Honor remembers, when they brought out that  
14 booking photo, we objected to its use, we objected  
15 to its admissibility, we objected to it being  
16 published to the jury, we objected to any sort of  
17 argument that would stem from it.

18 So in essence what we felt that  
19 happened was was a back door walk around of her  
20 failure to identify our client in court.

21 And, of course, she was in the best  
22 position to be able to identify and she didn't  
23 identify our client which goes to the lack of  
24 substantial evidence for his conviction.

25 She didn't identify him, Betty

1 Graves who saw the person face to face didn't  
2 identify Evaristo Garcia. Principal Dan didn't  
3 identify him.

4 THE COURT: He never did though.

5 MR. FIGLER: Right.

6 THE COURT: And she's the only one that  
7 had before, and now you're talking a period of seven  
8 or eight years.

9 MR. FIGLER: Oh, right, but I'm talking  
10 about at the time.

11 THE COURT: In court she said she  
12 couldn't make that identification after this many  
13 years.

14 MR. FIGLER: Right. But what I'm  
15 saying --

16 THE COURT: And the jury listens to that.

17 MR. FIGLER: Right. And I hear that.  
18 But also, you know, there was a big -- and I hope  
19 that the jury heard it because I know the Court  
20 heard it, that there were --

21 THE COURT: Clearly the Court heard it  
22 because that was my memory.

23 MR. FIGLER: Right.

24 THE COURT: She did not show her a  
25 booking photo.

1           MR. FIGLER: Right. But I think that the  
2 Court also heard that all the witnesses who were in  
3 the best place to identify the shooter, Betty Graves  
4 who looked into the shooter's face straight on for a  
5 minute never identified Evaristo Garcia at the time  
6 or later.

7           The guy who was on the bike, I  
8 just -- John -- that was the, the other witness who  
9 saw the guy run right by him didn't ever identify  
10 Evaristo Garcia.

11           I mean, all the witnesses who  
12 verifiably were in a place to observe and, and be  
13 able to identify Evaristo Garcia didn't in this  
14 case. I mean, it's just not fair. And that's,  
15 that's part of our sufficiency argument.

16           So, so the whole thing that  
17 happened, happened with the photo, whether she was  
18 shown it or not, the implication was very clear is  
19 that she identified him at the preliminary hearing,  
20 here's what he looked like at the preliminary  
21 hearing, oh, look, he's changed so much even though  
22 he really hadn't.

23           MR. GOODMAN: One of the point -- and a  
24 point, Your Honor, just real quickly, is that  
25 Melissa Gamboa testified at the preliminary hearing

1 that her description of the shooter at the time of  
2 the incident was, was wrong, it was incorrect, that  
3 she misidentified -- that her description of the  
4 shooter did not match Mr. Garcia who was sitting in  
5 court at the preliminary hearing.

6 And that was the basis of my motion  
7 to exclude it in the first place.

8 THE COURT: Thank you. All right. I'll  
9 hear from the State.

10 MS. DEMONTE: Your Honor, I won't belabor  
11 it. Our response I believe was somewhere around 33  
12 pages.

13 THE COURT: I was really surprised how  
14 well written both sides were. Right after that  
15 trial, I thought to myself -- honestly I thought to  
16 myself if you guys were civil attorneys, do you know  
17 how much money you would make based on how good both  
18 sides were.

19 MS. DEMONTE: Thank you.

20 MR. FIGLER: I appreciate that.

21 THE COURT: Honestly, that's what went  
22 through my head as I read it, like wow, I've got to  
23 say my hats off to both sides. Really, really good  
24 lawyering on both sides. Really, really well  
25 written and so fast after the trial.

1 MR. FIGLER: Well, you know, we have  
2 seven days to --

3 THE COURT: I know that. Well, I know  
4 you have seven days, but I mean, that's what's so  
5 amazing is it was -- and they, they came up with a  
6 reply very quick, too.

7 And to put everything that you put  
8 in it, I was honestly just floored at how well  
9 written both sides -- I mean, I just don't see that  
10 good of lawyering criminally that often.

11 MS. DEMONTE: Thank you, Your Honor.

12 THE COURT: Civilly we do and that was as  
13 good as anything I've ever seen. So I really have  
14 to tell you, you guys both did a really good job.  
15 Both sides.

16 MS. DEMONTE: Thank you, Your Honor.

17 THE COURT: Besides coordination.

18 MS. DEMONTE: Yes. I was just -- I did  
19 quote you back to you that I would be --

20 THE COURT: You didn't like my rulings  
21 during trial, but now you do, don't you, with that  
22 verdict?

23 MS. DEMONTE: Thank you, Your Honor. I'm  
24 not gonna belabor it. The jury heard all of the  
25 nuances of Melissa Gamboa's testimony, they heard

1 about all of these inconsistencies. They reached  
2 their decision as triers of fact and the State does  
3 not believe their decision should be overturned in  
4 any way.

5 And with that, we'll submit it.

6 THE COURT: Is there anything in  
7 response?

8 MR. FIGLER: No, Your Honor.

9 THE COURT: All right. You know, the  
10 Court's read the points and authorities. I've  
11 actually, I've actually granted an acquittal before.  
12 Shockingly. It's something I never thought I would  
13 do. So I have done it and I got affirmed on appeal  
14 by the supreme court as well.

15 This is a case where the jury had  
16 every opportunity to sit and listen to every single  
17 witness and make a determination of whether or not  
18 this defendant did it or he don't it.

19 And at the end of the day, they  
20 clearly believed the two witnesses that identified  
21 him and were friends with him. And that is Jonathan  
22 Harper and Edshat -- I can't even say his name.  
23 Edshatel or whatever.

24 MR. FIGLER: Edshel Calvillo.

25 THE COURT: And, you know, they listened



1 to it, these two witnesses talked about what had  
2 happened before, during the commission of the crime.  
3 And then what was really damning to the defense was  
4 what he was telling them after the crime which the  
5 jury heard.

6 I believe one of the witnesses that  
7 Shateal (phonetic) said that -- did I just make him  
8 Jewish? Shateal. I think I made him Jewish, but  
9 they heard him say that he was laughing about it and  
10 that he shot the kid.

11 Now, they have every opportunity to  
12 believe him or disbelieve him, but the testimony of  
13 him was quite damning, Mr. Shateal.

14 And quite frankly, Harper --

15 MR. FIGLER: Calvillo. Calvillo.

16 THE COURT: Well, hold on, I'm talking.

17 MR. FIGLER: No, Calvillo. I was just  
18 giving you his name.

19 THE COURT: Calvillo.

20 MS. FIGLER: Sure.

21 THE COURT: I thought you were gonna  
22 interrupt me.

23 MR. FIGLER: No, no.

24 THE COURT: And quite frankly, Harper was  
25 not a babbling baby once I saw him. He was toe to

1 toe with both defense counsel. You know, with --  
2 I'm trying to think was it -- I think it was Mr.  
3 Goodman that crossed him.

4 And, and it -- the State picked up  
5 on it in their opposition, at some point said well,  
6 you know, isn't everybody under stress, you know, in  
7 stressful situations.

8 He had very -- he came back with  
9 some things that I would not have expected, you  
10 know. When you read the pleadings ahead of time and  
11 you see somebody's been shot in the head and, you  
12 know, the State brought up that I had brought up  
13 from a prior murder case, I had somebody shot in the  
14 head two times and she was the best witness in the  
15 case, when you see him, he's certainly not what, in  
16 the Court's opinion because I sat and listened to  
17 it, what the defense is claiming, like oh, his  
18 brains are blown out.

19 Did he have problems? He had  
20 problems walking up there, but he was able to  
21 definitely relate back whatever happened.

22 Now, whether they believe him or not  
23 based on his going, you know, flipping like a fish,  
24 whether they -- you know, you have damning evidence  
25 against -- per cross-examination that he's sick and

1 tired of what the prosecutors are telling him. And  
2 you argued all of that to the jury. They heard it  
3 all and they have the determination at the end of  
4 the day to determine that.

5 I just don't think that based on the  
6 statute this Court could touch that jury's verdict.

7 If the supreme court disagrees, you  
8 know, they'll reverse based on what they see in the  
9 record.

10 But they listened to the evidence,  
11 there was certainly enough evidence to convict him,  
12 albeit, you know, obviously not the strongest case  
13 that we see in the criminal justice system.

14 They certainly had the opportunity  
15 to either disbelieve it and take the defense  
16 position that it was not the defendant, or at the  
17 end of the day say it was the defendant, in which  
18 case they come back with a murder two.

19 And that was their choice. 12  
20 people unanimously heard all the same evidence and  
21 they chose to believe those witnesses.

22 And so that's really, you know, how  
23 the State -- or how the State. How the Court looks  
24 at it as far as making a determination. Hard  
25 pressed to overturn any kind of verdict based on

1 that.

2 So respectfully, the Court is going  
3 to, based on all of the reasons set forth  
4 methodically in the State's opposition, and I'd ask  
5 the State to prepare an order denying the motion for  
6 the reasons set forth in that opposition and list  
7 them how you did. You had like six points.

8 MS. DEMONTE: I will, Your Honor.

9 THE COURT: And it was well written. I'm  
10 not gonna redo it. I just ask that you send it in  
11 to me. Send it into him first and I'll sign off on  
12 it.

13 MS. DEMONTE: Absolutely.

14 THE COURT: So based on that, we'll see  
15 everybody at sentencing.

16 Oh, by the way, did you want me to  
17 do it sooner? And if you do, I would get both sides  
18 together on it because I'm sure both families will  
19 want to speak.

20 MR. GOODMAN: There's a PSI already, Your  
21 Honor. I'm not sure. I mean, I guess it --

22 THE COURT: Well, I guess --

23 MR. GOODMAN: -- if the family does want  
24 to speak.

25 THE COURT: Right. What happened is

1 after we left, it dawned on me there's a PSI because  
2 I let him withdraw a guilty plea.

3 MS. PANDUKHT: Right.

4 THE COURT: So there is a PSI. I can  
5 sentence him at any time. My question is what I  
6 would do is get both sides together, find the time  
7 amenable in the next -- you know, I can do it  
8 sooner.

9 MS. DEMONTE: Sure.

10 THE COURT: And, you know --

11 MR. FIGLER: We'd like to do it earlier  
12 than later --

13 THE COURT: Sure.

14 MR. FIGLER: -- at the convenience of  
15 the, the --

16 THE COURT: Right.

17 MR. FIGLER: -- victim's family. That,  
18 that would be appropriate.

19 THE COURT: Yeah. They can come in, you  
20 know, next week, but I don't know. Do you want  
21 to --

22 MS. PANDUKHT: Yeah. As long as we have  
23 two weeks. I think if we had two weeks, that would  
24 be sufficient.

25 THE COURT: Here's what I would do: I'm

1 gonna make it for two weeks. If there's any  
2 problem, teleconference my chambers and I'll do a  
3 minute order changing the date for everybody, so  
4 they don't have to come back and then do another  
5 date. Teleconference me -- like say somebody's out  
6 on vacation, you know, the mother or something,  
7 then, you know, that's not right, I just set it  
8 during a vacation.

9 MS. DEMONTE: Yeah. The only problem we  
10 anticipate is potentially Melissa Gamboa's baby  
11 being born. Because she was --

12 MS. PANDUKHT: She was about to give  
13 birth.

14 THE COURT: Right. Okay. Well, I heard  
15 her testimony, too, so I know she might want to  
16 speak but.

17 MS. DEMONTE: Yeah.

18 THE COURT: But it's up to you if you  
19 want to hold up the sentencing based on that. I  
20 mean --

21 MS. DEMONTE: Right. We can, we can  
22 always --

23 THE COURT: She may not --

24 MS. DEMONTE: -- something from her in  
25 writing.

1 THE COURT: -- to be holding her child --

2 MS. DEMONTE: Yeah.

3 THE COURT: -- getting all upset either.

4 MS. DEMONTE: Yeah.

5 THE COURT: So if we could just set it  
6 for two weeks, let's do that. If there's any  
7 problem on either side, again, teleconference, both  
8 sides call me, we'll change that date, make it  
9 amenable to everybody else.

10 MS. DEMONTE: Absolutely. Okay.

11 THE COURT: Give me like three days and  
12 I'll -- I just thought it was stupid we need a --  
13 just if you want a sentence, I heard the whole  
14 thing, we can just sentence.

15 MS. DEMONTE: Okay.

16 MR. GOODMAN: Very good. Thank you, Your  
17 Honor.

18 THE CLERK: Judge, your book's really  
19 heavy on -- in two weeks because the Tuesday you're  
20 not here.

21 THE COURT: Oh.

22 THE CLERK: So it would be -- it's gonna  
23 be compounded with a lot of other sentencings. I'm  
24 gonna suggest August 22nd.

25 THE COURT: The only thing is I don't

1 have any trials. So why don't I just say 10:30.

2 THE CLERK: Okay.

3 THE COURT: So if I have a big calendar,  
4 you guys just come in after your calendars at 10:30.

5 MR. FIGLER: What date?

6 THE CLERK: So we're gonna do August 15th  
7 at 10:30 then?

8 THE COURT: Yeah.

9 MR. GOODMAN: Thank you.

10 THE COURT: And we'll figure it will take  
11 until about noon. We'll take that morning at 10:30.

12 MS. DEMONTE: Okay.

13 MR. FIGLER: Thanks. It's three days  
14 before my birthday.

15 THE COURT: Oh, happy birthday.

16 MR. FIGLER: Thanks. Appreciate it.

17 THE COURT: I'll try to remember that,  
18 too.

19 MR. FIGLER: Okay, great.

20 MS. DEMONTE: 29?

21 THE COURT: You're much younger than me.

22 MR. FIGLER: 39.

23 MS. DEMONTE: 39.

24 MR. FIGLER: That's not true.

25 MS. DEMONTE: Thank you, Your Honor.



1 THE COURT: All right. Thank you.

2 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF THE  
3 PROCEEDINGS.

4 /s/ JoAnn Melendez

5 JO ANN MELENDEZ

6 CCR NO. 370  
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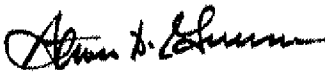
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CLERK OF THE COURT

ROSS C. GOODMAN, ESQ.  
Nevada Bar No. 7722  
DAYVID J. FIGLER, ESQ.  
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DISTRICT COURT  
CLARK COUNTY, NEVADA

\*\*\*

STATE OF NEVADA,	)	
	)	CASE NO: 10-C-262966-1
Plaintiff,	)	DEPT NO: 15
vs.	)	
	)	SENTENCING MEMO
EVARISTO J. GARCIA,	)	
	)	
Defendant.	)	

COMES NOW, the Defendant, EVARISTO J. GARCIA, by and through his attorneys, DAYVID J. FIGLER, ESQ. and ROSS C. GOODMAN, ESQ. and submits this Memorandum in Support of a Term of Years for the Single Count of Second Degree Murder with Use of A Deadly Weapon found by jury verdict. This memorandum is supported by the attached points and authorities, and hereby incorporates by reference all prior pleadings in this matter as well as any argument deemed necessary by this Court.

DATED this 13th day of August, 2013.

DAYVID J. FIGLER, ESQ  
/s./ Dayvid J. Figler, Esq.  
Nevada Bar No. 4264  
615 S. 6th Street  
Las Vegas, Nevada 89101  
Attorneys for Defendant

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF FACTS AND CASE**

3 Evaristo Garcia, 16, was found guilty of shooting and killing Victor Gamboa, 15, as the  
4 ostensible outgrowth of a schoolyard brawl, despite no evidence that the boys knew each other or  
5 ever engaged in any conflict or actual fight even up to the seconds before the shooting. Indeed,  
6 of the dozen or so available witnesses who indicated they were in or an observer to the brawl,  
7 none (with the exception of Jonathan Harper) were able to identify Evaristo Garcia out of a line-  
8 up as even being at the school, let alone being the shooter. No physical evidence placed Evaristo  
9 Garcia at the scene of the shooting, or the prior fight, or the car, which allegedly transported  
10 Evaristo Garcia to the school, or the gray hoodie the shooter was agreed upon by almost every  
11 witness to have worn. In fact, no reliable evidence even placed the Defendant in Sal Garcia's  
12 apartment where the parties who went to the school were located when the call came in.

13 Likewise, there was insufficient evidence that at the time of the shooting, Evaristo was  
14 affiliated with a gang. Furthermore, there was insufficient evidence that the gang referred to by  
15 any witnesses was legally or technically a gang under the definition as given by the law. As such,  
16 any references to "gang" or Evaristo's membership in a gang, especially Puros Locos – should be  
17 stricken.

18 Further, the jury also acquitted Evaristo of any conspiracy and therefore found that while  
19 he was the shooter, his conduct must have been devoid of premeditation or deliberation.

20 Finally, the District Attorney and the Defense made oral record at trial that in the event  
21 that Evaristo was found guilty of FIRST DEGREE murder by the jury, the State was comfortable  
22 with a term of years instead a life tail as an appropriate punishment.

23 Thus, and in essence, the jury found the 16-year old Evaristo to have acted rashly, and  
24 though with malice, that he did not deliberate upon or really plan his decisions before engaging  
25 in the act for which he was found guilty. The State has assessed that even if the premediation  
26 and deliberation were present, that a term of years is appropriate. There is no sufficient basis, or  
27 new information that the State has from the time of that stipulation to the date of sentencing. As  
28

1 such, they have no legitimate reason to change position simply because the jury found Evaristo  
2 guilty of a lesser-related offense than that which the State asked for during closing arguments.

### 3 **MITIGATING FACTORS**

#### 4 **1. LACK OF PRIOR CRIMINAL HISTORY**

5 The existence (or lack thereof) of a prior criminal record is a major factor to consider in  
6 determining whether to impose a greater or lesser sentence. Indeed, the ONLY enumerated  
7 reason for granting a Motion for New Sentencing is the situation where the Court misperceived  
8 or received wrong information regarding prior criminal conduct. See Edwards v. State, 112 Nev.  
9 704, 708, 918 P.2d 321, 324 (1996) citing Passanisi v. State, 108 Nev. 318, 831 P.2d 1371  
10 (1992); Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 (1948).

11 Furthermore, "no significant history of prior criminal activity" is a specifically  
12 enumerated mitigating circumstance to first degree murder, and it follows that it would equally  
13 apply to second degree murder. NRS 200.035.

14 In the present case, the conviction for second-degree murder is his only offense. He was  
15 free from any criminal activity as a juvenile. As such, this inures to his benefit and supports a  
16 term of years for his offense.

#### 17 **2. YOUNG AGE**

18 But for the nature of the offense and automatic certification pursuant to NRS 62B.330(3),  
19 Evaristo would have been under the jurisdiction of the juvenile court. There, a number of  
20 assessments would have been conducted pursuant to statute most notably a determination of  
21 whether or not the child has substance abuse or emotional or behavioral problems and the  
22 substance abuse or emotional or behavioral problems may be appropriately treated through the  
23 jurisdiction of the juvenile court. NRS 62B.390. In any event, he would certainly not be facing a  
24 life consequence as a minor, but for the offense.

25 That said, the youth of an offender is always considered a mitigating circumstance, and  
26 additionally is a specifically enumerating mitigating factor for first-degree murder, and equally  
27 applies to second degree murder. NRS 200.035(6). Evaristo was 16 at the time of the offense. It  
28



1 is undisputed that 16 is very young. As such, this inures to his benefit and supports a term of  
2 years for his offense.

### 3 **3. MENTAL INFIRMITY**

4 The defense had previously attempted to introduce evidence of the mental infirmity and  
5 low IQ of Evaristo Garcia during the trial phase and as such introduced the findings of Dr.  
6 Paglini and indeed found it to be proper penalty information. (See Reporter's Transcript,  
7 September 21, 2010 hearing). As such, the Defendant hereby incorporates by reference the prior  
8 Motion to Admit Evidence of Defendant's low IQ and all attached exhibits.

9 A defendant's mental capacity is an important factor in determining mitigation of  
10 sentence. See Evans v. Lewis, 855 F.2d 631 (9<sup>th</sup> Cir. 1988). As such, and because of his low IQ,  
11 this is yet another factor that inures to Evaristo's benefit and supports a term of years for his  
12 offense.

### 13 **4. GREATER EXPOSURE TO WEAPON ENHANCEMENT**

14 After the crime at issue occurred in 2006, the Nevada legislature has subsequently revised  
15 the exposure any defendant has to a weapon enhancement to a maximum of 20 years in a murder  
16 case. See NRS 193.165 (enacted July 1, 2007). Thus, while Evaristo who was convicted in 2013  
17 faces a possibility of life in prison as an enhancement for use of a deadly weapon, a person  
18 exactly situated who committed a murder in Nevada one year later could only face a maximum  
19 of 8-20 years – and then only if the Court determined it to be appropriate after considering  
20 enumerated information including the lack of criminal history of the defendant. Id.

21 Plainly stated, and while the Nevada Supreme Court has specifically indicated that the  
22 new, more favorable statute is not retroactive, this Court is not precluded from considering as a  
23 matter of proportionate sentencing whether the new enlightened sentencing range for use of a  
24 deadly weapon should inform its decision in whether to give Evaristo a term of years. Certainly,  
25 it makes sense that if an adult cannot today be sentenced to more than 8-20 years for the use of a  
26 deadly weapon, that the Court can properly exercise its discretion in giving Evaristo the  
27 minimum sentence for the enhancement of 10-25 years. As such, the Court would still be giving  
28 Evaristo an additional 2 years on the bottom and 5 years on the top for the mere circumstance of

1 the year in which the offense was committed. Such an analysis comports with the notions of  
2 fairness and equity in sentence. See generally, State v. Second Judicial Dist. Court ex rel.  
3 County of Washoe, 124 Nev. 564, 188 P.3d 1079 (2008).

4 This does not mean, however, that the Defendant is abandoning a challenge pursuant to  
5 the Due Process and Equal Protection clauses of the United States Constitution as well as the  
6 Fifth, Sixth and Eighth Amendments, that he should under law receive the benefit of the new  
7 sentencing structure under NRS 193.165, especially in light of the fact that as a juvenile, he will  
8 as a matter of law be receiving a disproportionate sentence to adults who lack even the most  
9 remote of mitigating factors that he possesses. Both at law and at equity, it is truly a denial of  
10 fundamental fairness and justice that a juvenile be forced to served a minimum of 20 to 50 years  
11 in prison, when but for the enlightenment of the legislature a mere year after the offense was  
12 committed that maximum range of punishment for ANY offender who were to receive a term of  
13 years is 18 to 45 years. Further, that the minimum sentence for a similarly situated defendant  
14 could be as low as 11 to 27.5 years. As such, the Defendant moves to be sentenced under the  
15 new statute, but understands the precedent of the Nevada Supreme Court.

#### 16 CONCLUSION

17 The State has already stipulated on the record that it was amenable to a term of years for  
18 Evaristo should the jury have found first-degree murder. This was unrelated to any plea  
19 agreement but was forged out of fairness and the State's assessment of Evaristo as of the date of  
20 the verdict. Nothing has changed. There is ample mitigation and support for the giving of a term  
21 of years for this youthful offender, and the Court is humbly requested to impose this sentence.

23 DATED this 13<sup>th</sup> day of August, 2013.

24 RESPECTFULLY SUBMITTED:

25 By: /s./ Dayvid J. Figler  
26 DAYVID J. FIGLER, ESQ.  
27 Nevada State Bar No. 4264  
28 615 S. 6<sup>th</sup> Street  
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02/18/2014 11:25:05 AM

1 CASE NO. C262966

2 DEPT NO. XV

3 DISTRICT COURT

  
CLERK OF THE COURT

4 CLARK COUNTY, NEVADA

5  
6 THE STATE OF NEVADA, )

7 Plaintiff, )

8 vs. )

9 EVARISTO JONATHAN GARCIA, )

10 Defendant. )

REPORTER'S TRANSCRIPT  
OF  
SENTENCING

11  
12 BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

13 AUGUST 29, 2013

14 9:00 A.M.

15  
16 APPEARANCES:

17 For the Plaintiff: Noreen Demonte, Esq.  
18 Deputy District Attorney

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

21  
22  
23  
24  
25 Reported by: JoAnn Melendez, CCR No. 370

1 LAS VEGAS, CLARK COUNTY, NV, AUG. 29, 2013

2 9:00 A.M.

3 -oOo-

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

5  
6 THE COURT: We're now gonna move on to  
7 State versus Evaristo Garcia. Case No. -- what page  
8 is he on?

9 THE CLERK: 13.

10 THE COURT: C262966. Let the record  
11 reflect that he is present in custody with his  
12 attorneys Mr. Goodman and Mr. Figler. And for the  
13 State, Ms. Demonte.

14 And it's now the time set for  
15 sentencing. Is there any legal cause or reason why  
16 judgment should not be pronounced?

17 MR. GOODMAN: No, there's not, Your  
18 Honor.

19 THE COURT: All right, sir. By virtue of  
20 jury verdict, you're hereby adjudicated guilty on  
21 Count II, second-degree murder with use of a deadly  
22 weapon.

23 State.

24 MS. DEMONTE: Thank you, Your Honor.  
25 Your Honor, the presentence investigation report in

1 this case recommends the life tail. We are under  
2 the old law which would be 10 years to life, plus an  
3 equal and consecutive 10 years to life which is what  
4 P & P's recommendation would be. The State concurs  
5 with that recommendation.

6 I will point out first that yes, the  
7 State was willing, had we gotten a verdict of  
8 first-degree murder, to stipulate to a term of  
9 years. But under the sentencing structure for  
10 first-degree murder, that would have amounted to 100  
11 years on the top end which is essentially a life  
12 sentence which explained why the State was willing  
13 to do that and is now asking for a life sentence  
14 here today.

15 Your Honor, you've heard the trial.  
16 I'm not gonna belabor the facts of the trial. He  
17 shot a kid in the back while he was running away, he  
18 fled to Mexico and had to be extradited back.

19 Your Honor, the defendant's pre -- I  
20 mean, the defendant's presentence -- I mean, the  
21 defendant's sentencing memorandum references an IQ  
22 of 79. That comes from a report generated by Dr.  
23 Paglini prepared pretrial a couple of years back.

24 And that score actually, according  
25 to Dr. Paglini, is an underestimate of his true

1 cognitive abilities. Because he scored so low on  
2 the verbal sections, it weighted down the rest of  
3 his. His learning disabilities are partly in his  
4 own making. By his own admission, he -- when he was  
5 in school was truant three times a week up to four  
6 times a week. Spent nine weeks in a behavioral  
7 school until he believes he was expelled from school  
8 in December of 2005. So he probably would have done  
9 better had he actually shown up to school.

10                   Additionally, since he's been in  
11 custody, he's been quite the behavioral problem  
12 within the Clark County Detention Center. He had,  
13 in February and March of 2009, been placed in  
14 disciplinary housing for gang-related politics.

15                   In both of those, he actually denied  
16 being a member, but in one incident referred to  
17 himself as I'm a soldier. And it was noted that he  
18 does have 'East Side' tattooed on his arms.

19                   In the other incident, he had stated  
20 that he actually denied being a member of the  
21 Sereno's but stated that he would consider himself  
22 to be a South Sider.

23                   Additionally, in an instance on  
24 March 25th of 2010, while coming to court and being  
25 transported with Manuel Lopez, he called him a

1   snitch and the two of them got into a physical  
2   altercation.

3                   This is not somebody who's been a  
4   model citizen by any stretch of the imagination  
5   while he's been here awaiting trial. The State  
6   certainly expects that to continue.

7                   There are two victim speakers.

8                   So we are asking for a term of 10 to  
9   life, plus the equal and consecutive 10 to life.  
10   Thank you.

11                  THE COURT: All right. Defense, I have  
12   read the sentencing memorandum, but I'm happy to  
13   hear any further argument at this time.

14                  MR. FIGLER: Thank Your Honor. Yeah, I  
15   would like to do everything step by step about the  
16   defendant's age, his mental infirmity, the  
17   circumstance surrounding everything else with regard  
18   to the term.

19                  With regard to his time in custody,  
20   sometimes a person has a target on their back. And  
21   certainly I think Mr. Bindrup previously had brought  
22   up the Manuel Lopez situation and that it did appear  
23   as though Mr. Garcia was actually the target of Mr.  
24   Lopez.

25                  That said, Your Honor, that



1 shouldn't sway the Court in determining whether or  
2 not to give a term to life. Either way, it's really  
3 just an unfair, just a couple of months later and he  
4 would have been looking at significantly less of a  
5 sentencing if Your Honor were to max him out. There  
6 is a manner of equity that should play into the  
7 court.

8                   And while legally the Court can't go  
9 back retroactively, even though we raised that  
10 issue, certainly the Court can be cognizant of the  
11 disparity, so that the equal portionality at  
12 sentencing of people who just happened to be  
13 differing offenses within two or three months.

14                   I think that's really it as far as  
15 Mr. Garcia goes. I mean, certainly he maintained  
16 his innocence and he shouldn't be punished for that,  
17 but he will have a significant term either way.

18                   And again, since he does have two  
19 terms that he's gonna go under, he has to either be  
20 paroled or expired from the first one before the  
21 second one even starts.

22                   So whatever Your Honor does today,  
23 it will be guaranteeing that Mr. Garcia has a very  
24 lengthy period of time in custody far more than  
25 anyone who would commit that crime today under the

1 same exact circumstances.

2                   Additionally, giving him the life  
3 sentence, just the only thing that is really  
4 different from practical standpoint is, is different  
5 housing, different opportunities for him while he's  
6 in prison to try to better himself. And then also  
7 has an additional burden upon the State because it  
8 would be a direct full appeal as opposed to the fast  
9 track appeal, et cetera.

10                   I think this case actually merits a  
11 fast track treatment, not the full blown treatment  
12 that -- in other words, if it's not a life tail,  
13 then it goes to the fast track. It's more expedient  
14 with regard to the amount of time and effort and  
15 energy that have to be put into the appeal and  
16 certainly the cost from the difference between doing  
17 a fast track and doing a full blown appeal.

18                   Just all these various concerns I  
19 think ultimately is the conclusion that the best  
20 sentence and, and appropriate sentence for Mr.  
21 Garcia would be the term of years, which is still  
22 pretty harsh at 20 to 50 year sentence.

23                   And I don't think anyone's gonna  
24 think that someone got off lightly on the second  
25 degree murder because he got 20 to 50 years,

1 especially concerning what that would bring today.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Figler. Sir,  
4 do you have anything to say in mitigation of  
5 punishment at this time?

6 THE DEFENDANT: Yes, I do. You know, I  
7 would like to apologize to the victim's family on  
8 behalf of me and Giovanny and Manuel Lopez and the  
9 pain we caused you guys for the, you know, for the  
10 victim.

11 You know, Your Honor, as you know,  
12 I've been here for five years and a half. I've been  
13 incarcerated since I was 18.

14 You know, I would like to get a  
15 chance to actually live, to, you know, to become a  
16 man out there in society, not in here.

17 I mean, I ask you to look at this  
18 case, you know, as I know you got to carry out the  
19 rightful sentence on which you believe, but, you  
20 know, dating back to 2006, we were all teenagers, we  
21 were all 16, 17. Nobody, you know, was an adult  
22 then.

23 I could say nobody that was there  
24 was anything of anything. You know what I'm saying?  
25 Everybody was there for, you know, for a reason.

1                   It escalated to something that it  
2 shouldn't have, but, you know, I would actually like  
3 to have the chance to become a -- to know what life  
4 is, not life behind a door. You know what I'm  
5 saying?

6                   You've got -- you have two families  
7 here today. I know you've got to consider the  
8 victim's family, but then again, I haven't been with  
9 my family for seven years. I would like to be there  
10 for Thanksgiving dinner or, you know, for Christmas,  
11 you know. I would like to get that opportunity, you  
12 know. I mean, I can't do it behind, behind the  
13 fence.

14                  I ask you not to look at me as the  
15 man I've become now as the DA said. You know, back  
16 in the day, I wasn't gang affiliated, even though  
17 now they have records of me denying saying I'm a  
18 South Sider or, or my prison gang affiliation. That  
19 pretty much has -- to me has nothing do with 2006  
20 when this murder occurred, you know.

21                  On my behavior status in County,  
22 well, you know, we're not surrounded by model  
23 citizens. That's why everybody's in here for a  
24 reason.

25                  With that, I would just like to

1 apologize once again to the victim's family. And  
2 that's pretty much about it. Thank you.

3 THE COURT: Thank you, Mr. Garcia.

4 All right. We'll hear from your  
5 victim speakers. If you could just have them come  
6 up by you, Mrs. Demonte.

7 MS. DEMONTE: Absolutely.

8 THE COURT: And they can stand next to  
9 you or sit next to you.

10 MS. DEMONTE: Your Honor, one of them  
11 requires the interpreter so we'll call her first.

12 THE COURT: We have the Spanish speaking  
13 interpreter.

14 Can I get the interpreter's name for  
15 this proceeding?

16 MR. PICO: Ricardo Pico, Spanish  
17 interpreter.

18 THE COURT: I need the first one to come  
19 on up here. Come on up here, ma'am, around here.  
20 Go ahead and stand by Ms. Demonte.

21 All right. Go ahead and raise your  
22 right hand.

23 (Whereupon, Maria Oyervidez was duly  
24 sworn to tell the truth, the whole truth  
25 and nothing but the truth.)

1 THE COURT: Please state your full name  
2 and spell it for the record.

3 VICTIM SPEAKER OYERVIDEZ: Maria  
4 Oyervidez. O-y-e-r, V as in Victor, i-d-e-z.

5 THE COURT: Yes, ma'am. If there's  
6 cellular phones on, please turn them off. Hold on.  
7 I hear something. Thank you. Yes, ma'am.

8 VICTIM SPEAKER OYERVIDEZ: How I feel. I  
9 feel empty. I'm desperate. I wish I could see my  
10 son. I wish I could forgive him, but I can't, I  
11 can't be a hypocrite. I know there's nothing he can  
12 do to give me my son back and I don't believe that  
13 he's remorseful.

14 No one knows how I feel. It's not  
15 just me when I, when I go to the graveyard to visit  
16 my son. I take my grandchildren. They see me  
17 crying, but the youngest ones tells me mom, let's go  
18 see Hugo (phonetic) and let's bring him back. I  
19 wish I could. But no.

20 I wish there was someone that could  
21 tell me how to ease this pain. I'm always asking  
22 God to give me strength, you know, for my other  
23 children.

24 I don't know how to explain to you  
25 so you can understand the pain that I feel. I know

1 that only someone that -- I only know that someone  
2 who has gone through what I've gone through can  
3 understand. No one else.

4 I don't know what to say. Only I  
5 know how I feel. Like I said, I can't explain it.  
6 I don't know.

7 THE COURT: Thank you very much, ma'am,  
8 for coming in and addressing the court. Thank you.

9 MS. DEMONTE: And Melissa Gamboa is next,  
10 Your Honor.

11 THE COURT: Can you please raise your  
12 right hand and spell your name for the record?

13 (Whereupon, Melissa Gamboa was duly sworn  
14 to tell the truth, the whole truth, and  
15 nothing but the truth.)

16 THE CLERK: Please lower your hand and  
17 state your full name for the record.

18 VICTIM WITNESS GAMBOA: Melissa Maria  
19 Gamboa. M-e-l-i-s-s-a. M-a-r-i-a. Gamboa,  
20 G-a-m-b-o-a.

21 THE COURT: Yes, ma'am.

22 VICTIM WITNESS GAMBOA: Pretty much you  
23 saw my mom here. I think it's hard enough for all  
24 of us seeing my mom suffer. I've seen the big  
25 changes for my mom. It's hard for us, for everybody

1 to see that.

2 On February 6th, I saw my brother  
3 got shot. And I don't think I could never forget  
4 that or get that off my mind. It's hard enough to  
5 know that I can't do anything about it.

6 Every day I feel guilty, just  
7 wishing I can go back. I was just trying to do good  
8 for myself and get an education for me and my son.  
9 And I truly regret going back to school.

10 I think my family's been going  
11 through so much. Even though it's seven years, I  
12 still see it like it was that same day. Just the  
13 fact that we can't see him here, it's hard just  
14 knowing that we can't see him, speak to him. It  
15 hurts a lot.

16 Even though it's passed seven years,  
17 I pray to God every time that just to give me a sign  
18 for him, to talk to him, to see him, anything, and  
19 we can't bring him back.

20 I don't think it's harsh enough for  
21 him to get 20. I think he should get life. I don't  
22 think it's fair enough that my family doesn't get to  
23 see my brother no more. His family at least gets to  
24 talk to him, see him, visit him. We can't speak to  
25 my brother, nothing. It's so hard for us.



1                   And I know from the bottom of my  
2 heart you are not sorry.

3                   My brother was only 15 years old. I  
4 remember him telling me he wanted to be in the Army,  
5 do a lot of things; buy my mom a house, everything.  
6 And we don't have him here no more.

7                   I just really hope you get life.  
8 Really. We don't get to do no more holidays for us  
9 either. I know you want to spend time with your  
10 family.

11                  And trust me, we want to see our  
12 brother, but you took his life away. You didn't  
13 give him no chance so I don't think it's fair for  
14 you to get a chance either.

15                  Nothing's the same. Our holidays,  
16 nothing's the same. We don't even spend holidays  
17 together, nothing. I just really, really hope you  
18 don't get out at all.

19                  The good thing you have is your  
20 parents get to see you, visit you. You get to talk  
21 to them.

22                  You don't know how bad I wish for  
23 God, I pray to God that I can talk to my brother,  
24 for him to tell me anything. I really wish I had  
25 him here. That's all.

1           THE COURT: Thank you for addressing the  
2 court, ma'am. All right. It's now submitted to the  
3 Court. The Court did preside over the trial and  
4 heard all the facts from all the sides and has taken  
5 also the sentencing into -- the sentencing into  
6 consideration.

7           One thing the defendant said today  
8 gave the Court pause. And that was that you said I  
9 didn't -- it was interesting that the defendant said  
10 that -- or inferred that somehow the victim wasn't  
11 innocent in this case of anything. And it was in  
12 the context of, you know, everybody that was there  
13 was not innocent of anything. And so it's  
14 interesting that you would actually have said that  
15 because I picked up on it when you said it.

16           I listened to the whole trial. I  
17 didn't hear anything about the victim doing really  
18 anything. Was everybody involved in a fight? Yeah.  
19 But it's interesting that you picked those words to  
20 say today or infer that somehow the victim wasn't,  
21 wasn't innocent while he was there. It gives the  
22 Court some pause. It's interesting that you have  
23 those words.

24           And it doesn't change what I was  
25 gonna do. I just think I find it interesting that

1 you would choose those words.

2                   The Court doesn't disagree that  
3 you're probably somewhat different than when you  
4 were a teenager. Both families are different.  
5 There's been a lot of time that's gone by.

6                   At the end of the day, both families  
7 have been just destroyed on what is a completely  
8 selfish, stupid, immature -- I could go on and on  
9 for just this, this decision that you made to bring  
10 a gun to a fight. And not only to bring a gun but  
11 to use the gun. Such a senseless murder that was  
12 committed.

13                   And again, it's just destroyed --  
14 you know, the Court feels bad for both families.  
15 The victim's family has suffered tremendously. And  
16 to a large extent the defendant's family sits here,  
17 they suffer as well. Both sides. Nobody wins in  
18 this case.

19                   And no matter what the Court does,  
20 the Court can't bring back this woman's son or this  
21 other woman's brother. So the Court can't make  
22 anybody whole. It's just a tragic, tragic event and  
23 a tragic loss.

24                   In addition to the \$25 assessment  
25 fee, the \$150 DNA fee and submit to genetic testing,

1 \$38,000 in restitution, you're hereby sentenced on  
2 murder in the second degree to a life with parole  
3 eligibility beginning after a minimum of 10 years  
4 has been served.

5 For the deadly weapon enhancement,  
6 an equal and consecutive term of life.

7 Your credit for time served -- can I  
8 get credit as of today?

9 MS. DEMONTE: 1,959, Your Honor.

10 THE COURT: 1,900 and what --

11 MS. DEMONTE: 59.

12 THE COURT: -- 59 days will be the credit  
13 for time served. And that will close this case out.  
14 Thank you.

15 MS. DEMONTE: Thank you.

16 MR. FIGLER: Your Honor, may we approach?

17 THE COURT: Approach, sure.

18 (Whereupon, the following proceedings  
19 were had in open court at the bench and  
20 outside the presence of those present in  
21 the courtroom.)

22 MR. FIGLER: Your Honor, we have an order  
23 for appeal to appoint Mr. Goodman. If you can sign  
24 that.

25 THE COURT: Oh, yeah, yeah. Sorry. Yes,

1 I'll do that.

2 MR. FIGLER: Thanks.

3 THE COURT: Thank you.

4 THE COURT: All right. Thank you.

5 (Whereupon, the bench conference ended.)

6 THE COURT: I have just signed an order  
7 for the defense, for Mr. Goodman's appointment on  
8 appeal. That's just been signed and you can file  
9 that today.

10 Then this will now conclude the  
11 proceedings. Thank you.

12 MS. DEMONTE: Thank Your Honor.

13

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

16 /s/ JoAnn Melendez

17 JO ANN MELENDEZ

18 CCR NO. 370

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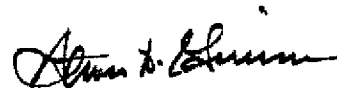
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CLERK OF THE COURT

JOC

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA  
#2685822

Defendant.

CASE NO. C262966-1

DEPT. NO. XV

JUDGMENT OF CONVICTION  
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 - CONSPIRACY TO COMMIT MURDER (Category B Felony), in violation of NRS 200.010, 200.030, 199.480; and COUNT 2 - MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crime of COUNT 2 - SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON (Category A Felony), in violation of NRS 200.010, 200.030, 193.165; thereafter, on the 29<sup>TH</sup> day of August, 2013, the Defendant was present in court for sentencing with his counsels, ROSS GOODMAN, ESQ. and, DAYVID FIGLER, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said crime as set forth in

1 the jury's verdict and, in addition to the \$25.00 Administrative Assessment Fee,  
2 \$150.00 DNA Analysis Fee including testing to determine genetic markers, and to PAY  
3 \$38,000.00 RESTITUTION, the Defendant is SENTENCED to the Nevada Department  
4 of Corrections (NDC) as follows: COUNT 2 - LIFE with a MINIMUM Parole Eligibility of  
5 TEN (10) YEARS plus an EQUAL and CONSECUTIVE term of LIFE with TEN (10)  
6 YEARS MINIMUM for Use of a Deadly Weapon; with ONE THOUSAND NINE  
7 HUNDRED FIFTY-NINE (1,959) DAYS Credit for Time Served. Defendant found NOT  
8 GUILTY as to COUNT 1.  
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12 DATED this 9 day of September, 2013

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16 ABBI SILVER  
17 DISTRICT JUDGE  
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CLERK OF THE COURT

**NOTC**

Ross C. Goodman, Esq.  
Nevada Bar No. 7722

**GOODMAN LAW GROUP**

A Professional Corporation  
520 S. Fourth Street, Second Floor  
Las Vegas, Nevada 89101  
Telephone: (702) 383-5088  
Facsimile: (702) 385-5088

*Attorneys for Defendant  
Evaristo Jonathan Garcia*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

vs.

EVARISTO JONATHAN GARCIA,

Defendant.

Case No: C262966

Dept. No.: XV

**NOTICE OF APPEAL**

NOTICE is hereby given that Defendant EVARISTO JONATHAN GARCIA, hereby appeals to the Supreme Court of the State of Nevada from his sentence on August 15, 2013. The Judgment of Conviction having been entered on September 11, 2013.

Dated this 11<sup>th</sup> day of October, 2013.

GOODMAN LAW GROUP,  
A PROFESSIONAL CORPORATION

/s/: Ross C. Goodman, Esq.

Ross C. Goodman, Esq.

Nevada Bar No. 7722

*Attorney for Defendant Evaristo Garcia*

CERTIFICATE OF SERVICE

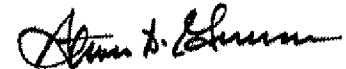
I hereby certify that I am an employee of the GOODMAN LAW GROUP, P.C. and that on the 11<sup>th</sup> day of October, 2013, I served a true and correct copy of the following **NOTICE OF APPEAL** by:

- ☒ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below.
- ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☐ Courtesy copy by facsimile on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.
- ☐ Federal Express or other overnight delivery

Steven B. Wolfson, Esq.  
Clark County District Attorney  
Office of the District Attorney  
200 Lewis Avenue, 3rd Floor  
Las Vegas, Nevada 89101

Evaristo Garcia  
#1108072  
High Desert State Prison  
P.O. Box 650  
Indian Springs, Nevada 89070

/s/ Tiffanie Johannes  
Employee of Goodman Law Group,  
A Professional Corporation



CLERK OF THE COURT

**CASA**  
Ross C. Goodman, Esq.  
Nevada Bar No. 7722  
**GOODMAN LAW GROUP**  
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Las Vegas, Nevada 89101  
Telephone: (702) 383-5088  
Facsimile: (702) 385-5088

*Attorneys for Defendant*  
*Evaristo Jonathan Garcia*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,  
  
Plaintiff,

vs.

EVARISTO JONATHAN GARCIA,  
  
Defendant.

Case No: C262966

Dept. No.: XV

**CASE APPEAL STATEMENT**

**CASE APPEAL STATEMENT**

- |                              |   |  |
|------------------------------|---|--|
| 1. Appellant                 | : | Evaristo Jonathan Garcia   |
| 2. Judge                     | : | Honorable Abbi Silver  |
| 3. Parties in District Court | : | <u>State of Nevada v. Evaristo Jonathan Garcia</u>   |
| 4. Parties in Appeal         | : | <u>Evaristo Jonathan Garcia v. State of Nevada</u>   |
| 5. Counsel on Appeal         | : | Ross C. Goodman, Esq.<br>520 S. Fourth Street, 2nd Floor<br>Las Vegas, Nevada 89101<br>(702) 383-5088<br><br>Steven B. Wolfson, Esq.<br>District Attorney<br>200 Lewis Avenue<br>Las Vegas, Nevada 89101 |

- 1 6. Appellant was represented by Ross C. Goodman, Esq. and Dayvid Figler, Esq. in the
- 2 District Court.
- 3 7. Appellant is currently represented by Ross C. Goodman, Esq. on appeal.
- 4
- 5 8. On August 15, 2013, Defendant Evaristo Jonathan Garcia was sentenced by Honorable
- 6 Abby Silver. The Judgment of Conviction was entered on September 11, 2013.
- 7 Dated this 11<sup>th</sup> day of October, 2013.
- 8

9 GOODMAN LAW GROUP,  
10 A PROFESSIONAL CORPORATION

11 /s/: *Ross C. Goodman, Esq.*  
12 Ross C. Goodman, Esq.  
13 Nevada Bar No. 7722  
14 *Attorney for Defendant Evaristo Garcia*  
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the GOODMAN LAW GROUP, A Professional Corporation and that on the 11<sup>th</sup> day of October, 2013, I served a true and correct copy of the following **CASE APPEAL STATEMENT** by:

- ☒ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below.
- ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
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