

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

EVARISTO JONATHAN GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 64221

**RESPONSE TO MOTION FOR**

**JUDICIAL NOTICE OR**

**LIMITED REMAND &**

**MOTION FOR AFFIRMATIVE**

**RELIEF OF AN EXPANDED**

**REMAND IF GRANTED**

Electronically Filed  
Dec 18 2014 08:45 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

COMES NOW Appellant, EVARISTO GARCIA, by and through his attorney, ROSS GOODMAN, ESQ., pursuant to NRAP 27(a)(3), in response to the Respondent's Motion for Judicial Notice or Limited Remand. Counsel also moves for affirmative relief pursuant to NRAP 27(a)(3)(B) for expanded remand to include a determination of the exact composition of individuals in the jury box (if any). This response and motion are based upon the attached Points and Authorities, the declaration of counsel and all papers and pleadings on file herein.

DATED this 17<sup>th</sup> day of December, 2014.

Respectfully submitted,

By /s/ Ross C. Goodman, Esq.

ROSS C. GOODMAN, ESQ.

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*Attorneys for Appellant*

## **ARGUMENT**

The Respondent concedes that a factual reference made in its Answering Brief is unsupported by the record. (Motion for Judicial Notice, page 3). This, of course, is a violation of NRAP 28(e)(1). Once this was pointed out in the Appellant's Reply Brief, the Respondent now requests that this Court take judicial notice of a fact that would tend to support that there was a fair, non-suggestive *de facto* line-up when it asks this Court to take notice that a Justice Court jury box is “*always* filled with in-custody defendants.” (Motion for Judicial Notice, page 4, emphasis in the original). Such would be unprecedented.

As a matter of background, the Respondent needs the identification of Evaristo Garcia to be non-suggestive in order to support their legal position and possibly uphold the verdict. This is a very close case where apart from the testimony of accomplices, there is no evidence that places Mr. Garcia at the murder scene except, arguably, a preliminary hearing identification by Melissa Gamboa. This, despite the observation of the shooter by dozens of individuals. (Opening Brief, page 5).

Clearly, the Respondent is very concerned that the impropriety of the trial court in both failing to suppress the preliminary hearing identification as well as allowing it to be referenced for the jury after Ms. Gamboa failed to identify Evaristo Garcia at trial. The instant motion was not however filed as a concession

but an attempt to justify the fabrication of a material fact upon which the suppression issue is directly impacted. That attempt should fail.

It is undisputed that Melissa Gamboa's in-court identification of Evaristo Garcia at his preliminary hearing occurred three years after the event. Moreover, it is undisputed that her identification of Evaristo Garcia contradicted her prior identification at the time of the shooting. (7 AA 1195). The Appellant challenged the preliminary hearing identification through a pre-trial motion to suppress; and while denied, that ruling along with its improper admission at trial after the witness failed to identify the defendant, summarizes this issue on appeal. (1 AA 51-67).

In their Answering Brief, the Respondent attempted to bolster the propriety of admitting the prior in-court identification by stating without qualification or record support that Ms. Gamboa's identification was Constitutional because "...she identified Appellant while he was sitting in the jury box with other defendants." (Answering Brief, page 12).

It is of note that the Respondent did not aver in its Answering Brief with the words -- "it was likely that the jury box had other defendants in it." Neither did it make a contemporaneous record at the time to establish what it is now clearly *wished* for (i.e. "let the record reflect the jury box was filled with other defendants who matched the exact age, gender and ethnicity as the defendant removing any suggestiveness"). No, what the Respondent did was unequivocally cite to a record

that they knew did not exist.

Yet instead of conceding the error, the Respondent appears to be attempting to double-down on this misrepresentation by further making the outlandish claim that “...*anyone* who has practiced before Justice Court is well aware that the box is *always* filled with in-custody defendants.” (Respondent’s Motion, page 4 – emphasis in original). Such is not accurate to any degree, and certainly not to the extent of judicial notice. (See attached Declaration of Counsel).

Only facts not reasonably open to dispute should be judicially noticed. **Sheriff v. Kravetz**, 96 Nev. 919, 620 P.2d 868 (1980) citing **State ex rel. Blake v. County Commissioners**, 48 Nev. 299, 231 P. 384 (1924) (Sanders, J., concurring opinion); NRS 47.130.

Here, it can be stated without any hesitation that the jury box in Justice Court is a space in constant transition, the occupancy of which has no discernable consistency even within a single morning session. Some days the jury box is indeed filled with defendants of varying ethnicities, gender and age; other days there are relatively few occupants. On some days, the occupants could be all female, with one male; on other days, all African-American with one Latino (like the Appellant). Furthermore, in some Justice Court courtrooms, inmates are removed at different intervals depending on when their cases are concluded, leaving only the few (or solo) defendant(s) awaiting a preliminary hearing. This is

the reality of the Las Vegas Justice Court by most practitioners' experiences.

In the present case, the Respondent requests the Court to take Judicial Notice that the jury box prior to the Appellant's preliminary hearing was "filled." Based on the record in existence, that is not authorized by NRS 47.130. Furthermore, even if proven to be true (which it cannot be), the Respondent will still not have a fact that fully supports their legal position. In other words, the Respondent by its own theory must not only establish that the jury box was filled, but that the jury box was filled with people who disallow a suggestion of continued suggestiveness.

Moreover, if this Court is inclined to remand to the District Court, the record is in the same precarious position; it would have to determine the diversity (or lack of diversity) of the characteristics of the other individuals (if any) at the specific time that Ms. Gamboa allegedly saw Evaristo Garcia in the jury box. Such is the heart of questions concerning suggestive identifications. Mere presence of other individuals (if that's even true in this case) does not necessarily make the identification more reliable. See **United States v. Wade**, 388 U.S. 218, 233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)("A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.")

Inasmuch as the State is trying to bolster a pre-trial identification as lacking

suggestiveness and at the same time is suggesting that the “jury box” recognition of Evaristo Garcia is a *de facto* line-up (**done without notification to counsel or safeguards against suggestiveness**), the Constitutional import becomes evident.

**Id.**

In the event this Court is inclined to remand to the District Court, the Appellant would move that this Court also order in its remand the following record-making:

1. The exact time that Ms. Gamboa made her observation of the jury box and how long it lasted;
2. Who, if anyone, representing the State was with Ms. Gamboa at the exact time she made her alleged observation; and
3. How many people were in the jury box at the time of the alleged observation and their ethnicity, age and gender.

This information is vital to the State’s effort to bolster its only independent witness placing Evaristo Garcia at the scene of the crime, but it is paramount in the interest of justice.

Finally, the jury in the present case was given improper evidence after Ms. Gamboa was unable at trial to identify Evaristo Garcia as the shooter. The jury received prejudicial evidence of her prior, bad identification where no manner of cross-examination could sort out the now prejudicial information before the jury.

As such, the jury was left with a number of possibilities all of which were improper such as that the earlier identification was more accurate because it was closer in time, or that the witness was afraid given all the gang evidence that was wrongly introduced (and later withdrawn) in this case. The State should not be allowed to benefit now because they did not make the record clear when they were obligated to do so. The prejudice of the failure to suppress the preliminary hearing identification and to further allow it at trial after the witness failed to make a trial court identification is great and the State's effort to obscure that point with an unfounded request for Judicial Notice is misplaced.

DATED this 17th day of December 2014.

/s/: Ross Goodman  
ROSS GOODMAN, ESQ.  
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Las Vegas, NV 89101  
(702) 383-5088  
Attorney For the Appellant

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2  
3 **DECLARATION OF COUNSEL**

4 **ROSS C. GOODMAN, ESQ.**

5 STATE OF NEVADA                    )  
6    ) ss.  
7 COUNTY OF CLARK                    )

8           ROSS C. GOODMAN, ESQ., upon information and belief, declares  
9 and says:

10           1.     That Declarant is an attorney duly licensed to practice law in  
11 the State of Nevada and was trial counsel and is NRAP 3C(b)(2) appointed  
12 appellate counsel for EVARISTO GARCIA in the present case. Declarant  
13 was not counsel at the time of the Defendant's Preliminary Hearing.

14           2.     Declarant has been practicing law in the Las Vegas Justice  
15 Courts since 2001 and has been able to observe the character and occupancy  
16 of that setting literally hundreds of different times.

17           3.     That based on Declarant's observations, each day in Justice  
18 Court is different regarding the number and composition of inmates in the  
19 courtroom at any given time. On some days, the jury box is crowded, and  
20 on others it is relatively empty. I have been in court when my client was the  
21 only occupant of the jury box on many occasions. I have observed ethnically  
22 diverse populations in the jury box, and other times when my client was the  
23 only one of his ethnicity or age. Additionally, I observe the removal of  
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1 defendants from the jury box over the course of the morning sessions  
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3 depending on when their cases are completed when the justice court takes a  
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5 break and the closer the calendar gets to preliminary hearing time, the fewer  
6 and fewer defendants are in the jury box.

7 **FURTHER YOUR DECLARANT SAYETH NAUGHT.**

8 /s/ Ross C. Goodman, Esq.  
9 ROSS C. GOODMAN, ESQ.

10  
11 **CERTIFICATE OF SERVICE**

12 I hereby certify and affirm that this Response was filed electronically  
13  
14 with the Nevada Supreme Court on the 17<sup>th</sup> day of December, 2014.  
15 Electronic Service of the foregoing document shall be made in accordance  
16 with the Master Service List as follows:

17  
18 Steven Wolfson  
19 Jonathan Vanboskerck  
20 Clark County District Attorney

21 Catherine Cortez Masto  
22 Nevada Attorney General

23 /s/ Ross C. Goodman, Esq.  
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