

EVARISTO GARCIA,  
  
Appellant,  
  
vs.  
  
STATE OF NEVADA,  
  
Respondent.

VS. )  
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STATE OF NEVADA, )  
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Respondent. )  
\_\_\_\_\_ )

COMES NOW Appellant, EVARISTO GARCIA, by and through his undersigned counsel, ROSS GOODMAN, ESQ., and petitions this Honorable Court to rehear the matter based on the Court overlooking and/or misapprehending points of fact, material questions of law and/or controlling authority pursuant to NRAP (40).

Respectfully submitted,  
GOODMAN LAW GROUP

Docket 64221 Document 2015-17274

## **PROCEDURAL HISTORY**

After trial, Appellant filed a Notice of Appeal on the jury's finding of second-degree murder that resulted in a matter which was submitted to the jury as first degree murder. Briefing was completed in the matter on or about December 9, 2014. The case was submitted for decision without oral argument. The Order of Affirmance was filed on May 18, 2015, making this Petition for Rehearing timely filed on June 5, 2014.

The Appellant had raised numerous issues in his Opening Brief, and the Court in its Order of Affirmance considered the matters but may have misapprehended the main issue as it relates to the significance of the trial court allowing a prior, rogue identification of the Defendant into the trial as a fact.

For the purpose of this Petition for Rehearing, the Appellant will focus on solely on the misapprehension of specific points of fact and law related to the circumstances surrounding this rogue identification and why its allowance directly impacted the verdict and, therefore, why relief pursuant to NRAP (40) is warranted.

## **ARGUMENT**

From the onset, it appears that the Court has given great significance to the uncorroborated testimony of the two uncharged accomplices, JH and EC. Indeed, the entirety of the Court's factual predicate in support of the finding that there was

1 sufficient evidence to find guilt beyond a reasonable doubt for this second degree  
2 murder case relates to testimony and supposed observations of these two  
3 uncharged accomplices. Specifically, the Court gives great weight to JH's  
4 eyewitness account that the Appellant pointed out in great detail was contradicted  
5 by every other single witness, and the supposed admissions made to EC after EC  
6 was shown to have a bias to protect another individual and who clearly perjured  
7 himself with self-contradictory testimony. Be that as it may, and understanding  
8 this Court's reliance on *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439  
9 (1975) ("[I]t is the function of the jury, not the appellate court, to weigh the  
10 evidence and pass upon the credibility of the witness."), there is great significance  
11 to the fact that the prime support for a conviction in this Court's mind comes from  
12 these two sources.  
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18 Inasmuch as the Appellant is not attempting to reargue the insufficiency  
19 claim, but only provide context for the one area of misapprehension raised, it must  
20 also be noted that the other facts relied upon (i.e. Appellant matched the general  
21 description, his fingerprints were found on a gun that many of the witnesses  
22 including JH and EC handled, and that it was found in a toilet as EC claims  
23 Appellant told him), are extraordinarily weak in both the context of a second-  
24 degree conviction AND the great weight of independent testimony from people  
25 who did not have a motive to cover their own accomplice liability.  
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1 That said, the ENTIRETY of the case came down to the existence of any  
2 independent identification of the Appellant as the shooter. As such -- and this may  
3 have been misapprehended by this Court – the central argument of the Appeal is  
4 that but for the rogue and otherwise inadmissible identification of Melissa Gamboa  
5 of the Appellant at his preliminary hearing – there would have been no conviction,  
6 let alone the clearly compromise conviction of second degree murder<sup>1</sup>.  
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9 In his opening brief and again in the reply brief, the Appellant extensively  
10 addressed and/or went through the specific reasons why the preliminary hearing  
11 identification was improper both at the time and for any future usage. (Opening  
12 Brief, pp. 15-18; Reply Brief, pp. 1-4; 7-9. Also, I AA 60-66). The Appellant cited  
13 to the Court, and it has NEVER been disputed by any record citation of the State,  
14 that the preliminary hearing identification was unduly suggestive because (1) it did  
15 not match up with the witnesses contemporaneous description of the shooter and  
16 (2) the Appellant was the only person in the courtroom in custody. Period. No  
17 record has ever been made that there was every anyone else besides the Appellant  
18 in the courtroom when Ms. Gamboa first saw him.  
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23 The confusion may arise whereupon the District Court erroneously assumed  
24 there were other people in the Court, and the State in its Answering Brief  
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26 <sup>1</sup> It must also be noted that no theory of either the prosecution or the defense  
27 provided for a pathway to a second degree murder conviction. Indeed, neither  
28 party argued that this would be an appropriate verdict, either.

1 misrepresented the record that there were other people in the courtroom at the time  
2 of first observation. (See Answering Brief, Page 20).

3 As the Court may recall, the State attempted to but failed to convince this  
4 Court to take Judicial Notice that there were other people in the courtroom when  
5 Appellant was first observed at his preliminary hearing. (See State's Motion for  
6 Judicial Notice or Limited Remand, filed December 11, 2014; denied December  
7  
8 26, 2014).

9  
10 Appreciating the fact that there was indeed no in-court identification at trial  
11 by Melissa Gamboa, the Appellant would suggest (unlike the inference of this  
12 Court's Order of Affirmance that it renders further analysis moot) that had the  
13 record ended there that there would have been no independent, credible testimony  
14 that suggested Appellant was the shooter.

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16 The State recognized this, and thereafter solicited over objection that in a  
17 prior proceeding Ms. Gamboa had identified the Appellant. Whatever the jury  
18 attributed to the change of position (fear of the witness, the Appellant growing  
19 older and therefore looking older, etc.), it was inappropriate for the jury to even  
20 consider this prior identification BECAUSE it was inappropriate and legally  
21 insufficient from the start. However, because the jury did hear that a prior  
22 identification did occur, they were able to utilize this information for whatever  
23 weight they thought appropriate to the ultimate prejudice of the Appellant and the  
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1 return of the compromise verdict. In other words, but for the prior, rogue  
2 identification; the jury would not have come back with a guilty verdict.

3 In its Order of Affirmance, this Court held that since the preliminary hearing  
4 identification of the Appellant was “subject to immediate and thorough cross-  
5 examination” and since she did not identify him at trial, there was no due process  
6 violation. (Order of Affirmance, page 2).  
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9 The Appellant would suggest that the Court utilized the correct precedent in  
10 citing *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *Baker v. Hocker*, 496 F.2d  
11 615, 617 (9<sup>th</sup> Cir. 1974); and *United States v. Domina*, 784 F.2d 1361, 1368 (9th  
12 Cir. 1986), but because there was a different factual scenario, may have misapplied  
13 these cases because it should have led to the requested outcome of error.  
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16 To elaborate, all these cases are concerned that for lack of a better word, a  
17 bad pretrial identification is problematic and a due process violation because it can  
18 lead to a bad trial identification.  
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20 It’s likely, that since there was no bad trial identification that the Court felt  
21 these cases did not apply, but that would be a misapplication of the case law.  
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23 First, the fact that the preliminary hearing identification was subject to  
24 immediate and thorough cross-examination is not dispositive of the case when that  
25 cross-examination, as in the current case, revealed that it was a bad, inadmissible  
26 and suggestive identification. It should at this point be undisputed that because of  
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1 the cross-examination it was revealed that the identification was not fit for  
2 introduction in any court of law and certainly not to a lay trier of fact.

3 Secondly, and more importantly, if one were to follow this Court's logic in  
4 the Order of Affirmance, there would be a due process violation if Monica  
5 Gamboa DID identify the Appellant and likely a reversal. But since she didn't, no  
6 further analysis is warranted.  
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9 This, however, belies the fact that the jury was left to its own conclusions  
10 and allowed to apply weight to a suggestive identification that violates due process.  
11 All Monica Gamboa's failure to in-court ID did was to eliminate the middle-man.  
12 The toxic identification was still delivered to the jury and it is of no moment that  
13 the prior bad identification was immediately and thoroughly cross-examined  
14 because the jury isn't charged with considering admissibility – the District Court is  
15 and the District Court ruled erroneously.  
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19 Indeed, and unaddressed by this Court in its Order was the finding by the  
20 trial court upon the initial motion to suppress the bad identification from the  
21 preliminary hearing that the trial court erroneous found that the identification was  
22 not suggestive because there were other inmates in the courtroom when the record  
23 clearly did not establish that. (See II AA 253).  
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26 In sum, the great weight of case law finds overly suggestive in-court  
27 identifications problematic and violative of due process. Certainly, one of the ills is  
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1 that it may taint a later identification at trial, but clearly, this Court must see that it  
2 is not the only ill. The other obvious and related issue is that it may be misused by  
3 the State in a prosecution and here in a weak case, it was used to the ultimate  
4 prejudice of the Appellant – a conviction that cannot otherwise be supported by  
5 independent evidence.  
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8 The record is clear that the State relied HEAVILY on this rogue and  
9 otherwise inadmissible identification and emphasized it in their closing arguments,  
10 despite the strenuous objection by the defense. (See 10 AA 1898-99).  
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12 The State used the bad identification in its Power Point presentation. (10 AA  
13 1898). The State then used the bad identification in its closing argument, to wit:  
14 “And at that preliminary hearing in 2008, she *identified the defendant* as being the  
15 one that that she saw shoot her brother. She *identified the defendant* as wearing the  
16 gray hoody.” (10 AA 1913)(emphasis added).  
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19 “And since Melissa Gamboa has testified at preliminary hearing, it’s been  
20 five years since that time. So she *identified the defendant* two years after she saw  
21 him and today actually over seven years from the date of the murder.” (AA 10A  
22 1970-71)(emphasis added).  
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25 In sum, the Appellant on this Petition for Rehearing fears the Court  
26 identified the correct standards and law, but misapplied the facts because of the  
27 mere fact that there was prior cross-examination and no in-court identification.  
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1 While these facts may be true, the taint of an otherwise inadmissible  
2 identification was presented by the State to the jury as a fact to consider and weigh  
3 and as a result the State was able to secure a conviction.  
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5 A bad identification is a bad identification and nothing that happened  
6 subsequently can possibly be said to have cured that. The jury should never have  
7 been informed that there was a factual identification of the Appellant by an  
8 independent source because that identification was irrefutably and forever tainted  
9 and met no standard for admissibility either at the preliminary hearing or any other  
10 time. For these reasons, Appellant requests rehearing on the matter in that the  
11 Court may have not fully contextualized some of the factual allegations and not  
12 realized the full objection by the Defense as to why the prior, inadmissible  
13 identification was a due process violation despite there being no at-trial  
14 identification. Rehearing and possibly oral argument would be appropriate.  
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19 DATED this 5th day of June, 2015.

20 Respectfully submitted,  
21 THE GOODMAN LAW GROUP

22 By /s/ ROSS GOODMAN, Esq.

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28

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 40(b)(4) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point New Times Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately space, has typeface of 14 points or more and contains no more than 4,667 words, and in fact contains 2349 words.

3. Finally I hereby certify that I have read this petition for rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of June, 2014.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the 5th day of June, 2015, a copy of completed APPELLANT'S PETITION FOR REHEARING herein was electronically served upon the appropriate parties hereto in accord with the Nevada Supreme Court's electronic filing master service list for the instant case.

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