No. 80255

IN THE NEVADA SUPREME COURT

Evaristo Jonathan Garcia,

Petitioner-Appellant,

v.

James Dzurenda, et al.

Respondents-Appellees.

On Appeal from the Order Denying Petition
for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District, Clark County (A-19-791171-W)
Honorable David M. Jones, District Court Judge

Petitioner-Appellant's Appendix in Support of Brief
Volume 7 of 10

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Federal Public Defender,
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Dated May 3, 2021.

Respectfully submitted,

Rene L. Valladares
Federal Public Defender

/s/ Emma L. Smith
Emma L. Smith
Amelia L. Bizzaro
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the foregoing with the Clerk of the Nevada Supreme Court by using the appellate electronic filing system.

Participants in the case who are registered users in the appellate electronic filing system will be served by the system and include: Alexander Chen.

/s/ Jessica Pillsbury
An Employee of the
Federal Public Defender

@3:45 pm
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUL 15 2013
BY, JENNIFER KIMMEL, DEPUTY

INST

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA,
#2685822

Defendant.

Case No. C262966

Dept No. XV

10C262966-1
INST
Instructions to the Jury
2712976

INSTRUCTIONS TO THE JURY (INSTRUCTION NO. I)

MEMBERS OF THE JURY:

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

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

INSTRUCTION NO. 12

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

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

INSTRUCTION NO. 3

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

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

COUNT 1 - CONSPIRACY TO COMMIT MURDER

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

COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON

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

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

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

Each charge and the evidence pertaining to it should be considered separately. The fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other offense charged.

INSTRUCTION NO. 4

A conspiracy is an agreement between two or more persons for an unlawful purpose. A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator.

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

Even if you find that a conspiracy existed for some unlawful purpose, a person may not be found criminally liable for Murder committed by another conspirator unless you find beyond a reasonable doubt that he, too, possessed the specific intent to commit Murder.

INSTRUCTION NO. 5

In order for a person to be held accountable for the specific intent crime of another (such as Murder) under an aiding or abetting theory of principal liability, the State must prove beyond a reasonable doubt that the aider or abettor knowingly aided the other person with the intent that the other person commit the charged crime of Murder.

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

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

Proof that the defendant knew that some crime would be committed is not enough.

INSTRUCTION NO. 16

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

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

INSTRUCTION NO. 7

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

INSTRUCTION NO. 9

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

INSTRUCTION NO. 9

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

INSTRUCTION NO. 10

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

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

INSTRUCTION NO. 11

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

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

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

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

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

Premeditation need not be for a day, an hour, or even a minute. It may be as instantaneous as successive thoughts of the mind. For if the jury believes from the evidence that the act constituting the killing has been preceded by and has been the result of premeditation, no matter how rapidly the act follows the premeditation, it is premeditated.

INSTRUCTION NO. 12

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

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

INSTRUCTION NO. 13

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

INSTRUCTION NO. 14

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

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

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

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

INSTRUCTION NO. 15

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

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

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

INSTRUCTION NO. 16

The heat of passion which will reduce a homicide to Voluntary Manslaughter must be such an irresistible passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances. A defendant is not permitted to set up his own standard of conduct and to justify or excuse himself because his passions were aroused unless the circumstances in which he was placed and the facts that confronted him were such as also would have aroused the irresistible passion of the ordinarily reasonable man if likewise situated. The basic inquiry is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection and from such passion rather than from judgment.

INSTRUCTION NO. 17

When a person kills another after an attempt by the person killed to commit a serious personal injury on the person killing that does not rise to the level of self-defense or justifiable homicide, it is not murder, but the offense of Voluntary Manslaughter.

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

INSTRUCTION NO. 18

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

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

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

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

INSTRUCTION NO. 19

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

You are instructed that a firearm is a deadly weapon.

INSTRUCTION NO. 20

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

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

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

INSTRUCTION NO. 21

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

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

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

INSTRUCTION NO. 22

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

INSTRUCTION NO. 23

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

INSTRUCTION NO. 24

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

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

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

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

INSTRUCTION NO. 25

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

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

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

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

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

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

INSTRUCTION NO. 26

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

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

INSTRUCTION NO. 27

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

INSTRUCTION NO. 28

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

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

You are instructed that Jonathan Harper, while not charged is an accomplice under the law given the prosecution's theory of criminal culpability.

INSTRUCTION NO. 29

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation is an expert witness. An expert witness may give his opinion as to any matter in which he is skilled.

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

INSTRUCTION NO. 30

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

INSTRUCTION NO. 31

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

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

INSTRUCTION NO. 32

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

INSTRUCTION NO. 33

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

Read backs of testimony are time-consuming and are not encouraged unless you deem it a necessity. Should you require a read back, you must carefully describe the testimony to be played back so that the court ~~recorder~~ Reporter can arrange his/her notes. Remember, the court is not at liberty to supplement the evidence. AS

INSTRUCTION NO. 34

When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberation and will be your spokesperson here in court.

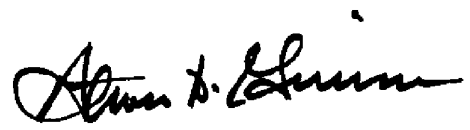
During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience.

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

INSTRUCTION NO. 35

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

GIVEN: Abbi Silver
DISTRICT JUDGE July 15, 2013



CASE NO. C262966-1

DEPT. NO. XV

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

vs.

EVARISTO GARCIA,
Defendant.

Reporter's Transcript
of
Jury Trial

BEFORE THE HON. ABBI SILVER, DISTRICT COURT JUDGE

MONDAY, JULY 15, 2013

9:00 A.M.

APPEARANCES:

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

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

Reported by: JoAnn Melendez, CCR No. 370

I N D E X

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

9:00 A.M.

-oOo-

P R O C E E D I N G S

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

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

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

MS. DEMONTE: That's fine.

MS. PANDUKHT: That's fine.

MR. FIGLER: Yes.

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

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

It's now set for the jury

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

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

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

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

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

THE COURT: Sure.

MR. FIGLER: Thanks.

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

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

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

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

THE COURT: That was really nice of you.

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

THE COURT: Not really.

MR. FIGLER: You said it could come in.

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

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

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

MR. FIGLER: I think --

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

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

didn't want to jump and object to her.

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

MR. FIGLER: Thank you.

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

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

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

THE COURT: Okay, thank you.

(Whereupon, the bench conference ended.)

THE COURT: Is it ready or not?

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

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

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

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

number we are, okay?

(Whereupon, the Instructions were read to the jury panel but not reported per stipulation of the attornies.)

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

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

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

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

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

MS. DEMONTE: Thank Your Honor.

THE COURT: Ms. Demonte.

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

We're asking you today to return

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

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

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

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

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

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

And so we approach every single charge with those.

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

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

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

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

To aid and abet is to aid, promote,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This case is not voluntary manslaughter, ladies and gentlemen.

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

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

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

But I'm starting with Jonathan

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

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

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

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

house with Manuel Lopez and Evaristo Garcia.

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

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

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

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

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

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

And then over on Park Hurst. And

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

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

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

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

past her with a gun and heard shots.

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

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

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

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

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

a gray hoody shoot her brother.

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

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

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

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

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

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

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

Betty Graves told you that the male

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

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

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

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

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

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

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

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

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

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

They took Giovanny to the homicide office because they knew he was part of it and he was photographed wearing the same clothing. He was wearing all black.

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

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

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

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

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

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

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

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

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

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

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

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

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

call. And you bet it sure did.

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

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

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

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

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

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

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

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

THE COURT: Do you want me to take a

break before I go into yours?

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

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

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

MR. GOODMAN: Thank you, Your Honor.

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The independent witnesses is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

You heard a whole bunch of evidence

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

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

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

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

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

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

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

We don't know, you don't know

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

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

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

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

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

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

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

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

Jonathan Harper never mentioned a

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

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

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

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

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

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

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

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

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

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

emptied the gun all six shots.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How come he's sick and tired?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What was the next material lie he

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

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

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

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

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

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

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

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

tinted windows, there was a phone call.

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

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

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

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

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

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

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

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

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

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

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

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

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

gun.

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

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

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

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

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

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

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

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

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

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

Garcia is a shooter.

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

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

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

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

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

Look at Instruction No. 11. When

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

So according to, according to Detective Mogg, Edshel Calvillo, Jonathan Harper, Manuel Lopez, Sal Lopez, they all went to this park to fight to help Giovanny out. It wasn't to murder somebody, it wasn't to kill somebody, it was to fight.

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

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

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

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

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

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

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

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

manslaughter, you must find for voluntary manslaughter.

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

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

The State did not meet their burden.

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

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

Because the law instructs you in

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

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

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

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

culpability.

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

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

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

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

What evidence do you have? The fact

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

MR. FIGLER: No.

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

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

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

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

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

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

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

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

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

No independent witness identified

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

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

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

THE COURT: All right.

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

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

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

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

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

(Whereupon, the jury exited the courtroom.)

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

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

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

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

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

THE COURT: I have a copy.

MS. PANDUKHT: Okay.

THE CLERK: I had to give her one.

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

MR. FIGLER: Okay.

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

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

THE COURT: Sure.

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

THE COURT: Sounds good. All right.

MR. FIGLER: Thank you, Your Honor.

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

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

THE COURT: Do a written stipulation on that.

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

THE COURT: I think, yeah.

MR. FIGLER: Or --

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

MR. FIGLER: Before verdicts, yes.

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

Is there anything else before we break?

MS. PANDUKHT: No.

THE COURT: Nothing else.

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

prevent that as long as both of us --

THE COURT: That's fine.

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

THE COURT: That's fine.

MR. FIGLER: That Your Honor.

THE COURT: Anything else?

MR. FIGLER: No, that's it.

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

(Whereupon, a recess was had.)

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

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

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

MS. PANDUKHT: Thank you, Your Honor.

THE COURT: Ms. Pandukht.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

actually over seven years since the date of this murder.

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

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

THE COURT: Sustained.

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

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

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

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

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

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

what the evidence was.

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

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

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

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

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

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

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

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

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

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

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

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

Each detective, Mogg and Hardy, said

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

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

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

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

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

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

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

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

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

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

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

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

evidence that that was in any way true.

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

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

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

Now, the defense stated that Harper

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PANDUKHT: Thank you, Your Honor.

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

are not evidence.

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

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

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

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

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

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

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

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

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

Now, with regard to the police

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. PANDUKHT: That was her testimony.

THE COURT: Overruled.

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

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

back in 2006.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This was willful, premeditated and deliberate.

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

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

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

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

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

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

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

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

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

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

MR. FIGLER: No, Your Honor.

MS. DEMONTE: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. This is the verdict form.

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

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

MS. PANDUKHT: I got you.

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

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

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

MS. PANDUKHT: Okay.

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

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

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

MS. PANDUKHT: Okay.

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

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

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

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

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

FOREMAN ARCANA: That's correct.

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

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

THE COURT: Okay.

FOREMAN ARCANA: Juror No. 3.

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

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

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

Count I, conspiracy to commit murder, not guilty.

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

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

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

THE JURY: Yes.

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

MS. PANDUKHT: Not the State, Your Honor.

MR. FIGLER: Yes, Your Honor.

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

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

JUROR GRIFFIS: Yes, they are.

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

JUROR BHATNAGAR: Yes.

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

JUROR ARCANA: Yes, they are.

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

JUROR OLSON: Yes, they are.

THE CLERK: Jackie Wiese, are these your

verdicts as read?

JUROR WIESE: Yes.

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

JUROR NUMEZ-MORARREZ: Yes.

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

JUROR TROMBETTA: Yes.

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

JUROR BEBER: Yes.

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

JUROR VILLANUEVA: Yes.

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

JUROR CATELLO: Yes.

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

JUROR McCALLUM: Yes.

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

JUROR UHRLE: Yes.

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

court.

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

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

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

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

(Whereupon, the jury exited the courtroom.)

THE COURT: All right. We're outside the

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

Has that stipulation on punishment on the first been filed?

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

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

MS. PANDUKHT: I agree.

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

Would both parties agree with me?

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

THE COURT: Correct.

MS. PANDUKHT: Yes.

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

MS. PANDUKHT: Yes.

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

Here's the next court date.

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

MR. FIGLER: Thank you, Your Honor.

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

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

/s/ JoAnn Melendez
JO ANN MELENDEZ
CCR NO. 370

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3:45 P.M.
FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUL 15 2013
BY Jennifer Kimmel
JENNIFER KIMMEL, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

EVARISTO JONATHAN GARCIA,

Defendant.

Case No. C262966

Dept No. XV

10C262966-1
VER
Verdict
2712901

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

COUNT 2 – MURDER WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

- ☐ Guilty of First Degree Murder with Use of a Deadly Weapon
- ☐ Guilty of First Degree Murder
- ☑ Guilty of Second Degree Murder with Use of a Deadly Weapon
- ☐ Guilty of Second Degree Murder
- ☐ Guilty of Voluntary Manslaughter with Use of a Deadly Weapon
- ☐ Guilty of Voluntary Manslaughter
- ☐ Not Guilty

DATED this 15 day of July, 2013

Michael Arcaro
FOREPERSON

Electronically Filed
09/11/2013 08:12:26 AM

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 29TH 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

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

DATED this 9 day of September, 2013

ABBI SILVER
DISTRICT JUDGE

NOTC
Ross C. Goodman, Esq.
Nevada Bar No. 7722
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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 11th 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 11th day of October, 2013, I served a true and correct copy of the following **NOTICE OF APPEAL** by:

[X] 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,
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IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 64221

APPEAL

(Direct Appeal from Judgment of Conviction – Jury Verdict)

APPELLANT'S OPENING BRIEF

ROSS C. GOODMAN, ESQ.
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ATTORNEYS FOR APPELLANT

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendant / Appellant is Evaristo Jonathan Garcia.

The following firms have appeared as counsel for Defendant/Appellant Evaristo Jonathan Garcia in this matter:

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/s/ Ross C. Goodman, Esq.
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APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

(A) This is an appeal from the Judgment of Conviction by Jury Verdict from the District Court.

(B) Judgment of Conviction was filed on September 11, 2013 by the District Court. (AA, 2088-2089) A Notice of Appeal was timely filed on October 11, 2013. (AA, 2090-2091).

(C) This appeal is from the Judgment of Conviction filed by the District Court and under this Court's jurisdiction pursuant to N.R.A.P. 4(b) and N.R.S. 177.015.

STATEMENT OF THE ISSUES

I. **WAS THERE AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER?**

II. **DID THE DISTRICT COURT ERR ALLOWING PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY DEFENDANT AT TRIAL?**

III. **DID THE DISTRICT COURT ERR BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY?**

IV. **DID THE DISTRICT COURT ERR IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING A SYMPATHY FOR A STATE'S WITNESS?**

V. **WAS IT PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL?**

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STATEMENT OF THE CASE

The Original Indictment was filed on or about March 19, 2010. (1 AA 1-6).

Plea negotiations had been entered on or about March 17, 2011, however, they were defective and a Motion to Withdraw Guilty Plea was allowed on February 21, 2012. This was the initial reason for an Amended Indictment and the subsequent Second and Third Amended Indictments. (1 AA 43-44; 2 AA 294-96; 5 AA 973-975). In the Third Amended Indictment which was in place as the jury trial commenced, Evaristo Garcia (hereinafter "Garcia") was charged with Conspiracy to Commit Murder and Murder with Use of A Deadly Weapon With the Intent to Promote, Further or Assist a Criminal Gang. (5 AA 973-975).

Garcia, before trial, filed two significant Motions at issue herein. The first was a Motion to Suppress In-Court Identification on September 25, 2012. (1 AA 51-67). The State filed an Opposition on October 4, 2012. (1 AA 155-179). A Reply brief was filed on October 8, 2013. (1 AA 180-82). The second was a Motion for an Evidentiary Hearing to Determine the Competency of the State's Key Witness (Jonathan Harper) on September 27. 2012. (1 AA 68-154). The State filed an Opposition on October 23, 2012. (2 AA 183-243). At hearing on the Motions on October 30. 2012, the trial

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court denied the Motion to Suppress, and ultimately found the witness competent to testify without ordering a mental or psychological evaluation. (2 AA 244-291).

A seven (7) day trial commenced on July 8, 2013. (2 AA 297). During trial, Garcia challenged the gang enhancement as being utterly insufficient as a matter of fact and law, and as a result of numerous trial court rulings, the gang enhancement was dropped by the State and a Fourth (and final) Indictment was filed reflecting that change. (10 AA 1850-1851). During the trial, the jury noted some concern with being in the public hallways which was the subject of a lengthy court canvass. (8 AA 1526-1584).

At its conclusion on July 16, 2013, the Jury acquitted Garcia of Count I- Conspiracy to Commit Murder, and returned a guilty verdict only on Count II – but as the lesser-included charge of Second Degree Murder with Use of a Deadly Weapon. (11 AA 2017-2018). Garcia had filed a compelling Sentencing Memorandum requesting sentencing under the new guidelines or a term of years in the alternative. (14 AA 2059-2064). However, on August 29, 2013, Garcia was sentenced to life with the possibility of parole after ten years for Second Degree Murder and an equal and consecutive life with the possibility of parole after ten years for the

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weapon enhancement with 1,959 days credit for time served. (14 AA 2224-2246). Garcia filed his timely Notice of Appeal on October 11, 2013. (14 AA 2249-2250). The instant appeal follows.

STATEMENT OF FACTS

Evaristo Garcia, 16, was accused of shooting and killing Victor Gamboa (herinafter "Gamboa"), 15, as the ostensible outgrowth of a schoolyard melee. There was no evidence, however, that the boys EVER knew each other or EVER engaged in any conflict or actual fight even up to the seconds before the shooting. Indeed, of the dozen or so available, independent witnesses who indicated they were in or an observer to the melee, none (with the exception of purported gang members and unindicted accomplices, Jonathan Harper and Edshel Cavillo) were able to identify Evaristo Garcia out of a line-up as even being at the school, let alone being the shooter. (9 AA 1654-1660).

The State's theory was essentially that as a result of the brewing schoolyard conflict between an individual named Crystal Perez and an individual named Giovanny Garcia (who did not testify), a tense, but non-physical confrontation between another individual named Jesus Alonzo (who did not testify) and Giovanny Garcia occurred. (5 AA 822-835). Jesus Alonzo dated Melissa Gamboa. (5 AA 824). According to the State's

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theory, as a result of this tension between Jesus Alonzo and Giovanny Garcia, a second (also non-physical) confrontation occurred between Crystal Perez and Giovanny Garcia on a different day. (5 AA 836-837).

There was testimony as to two different telephone calls that were made after this second non-physical confrontation between Giovanny Garcia and Crystal Perez. Jena Marquez testified that she saw Giovanny Garcia make a phone call which upset her. (The Giovanny call is described in more detail, *infra*).

This caused Jena and her friend Melissa Gamboa to leave school and call her brother Bryan Marquez. (5 AA 839-840). As a result of Jena's call, Bryan Marquez and Victor Gamboa (the brother of Melissa Gamboa) arrived at the school. (5 AA 841). Once arrived, this of group of young people went back to the school to meet up with Jesus Alonzo. (5 AA 841). The melee where many, many young people started fighting was described to have begun when Giovanny Garcia struck Bryan Marquez. (5 AA 844).

This melee was observed by various school personnel. (6 AA 1072, 1098).

There was no evidence that Evaristo Garcia had any direct contact whatsoever on the day in question with Crystal Perez, Jesus Alonzo, Bryan Marquez, Jena Marquez or Melissa Gamboa.

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The State argued that a call was placed by Giovanny Garcia to encourage people to come down to the schoolyard for an impending conflict. (5 AA 837). In order to establish who was on the other end of this phone call, the State (still operating under a theory that this was underlying gang activity) called supposed gang members Edshel Calvillo and Jonathan Harper. Calvillo did not receive that call but allegedly heard the gist of the conversation second-hand. (5 AA 870-871). Calvillo initially testified that when the call from Giovanny Garcia came into Sal Garcia's apartment the following people were present: himself, Sal Garcia, Jonathan Harper, an individual named Padre, an individual named Periso and numerous girlfriends. (5 AA 871-874). Evaristo Garcia was NOT among those originally listed by Calvillo to be present when that call came. (5 AA 871, lines 18-20). Nonetheless, Calvillo then testified that as a result of the phone call from Giovanny Garcia (which he did not hear), Evaristo Garcia got into a car with Jonathan Harper and a man named Puppet in Puppet's El Camino. (5 AA 876). Calvillo claims he was in a different car with Sal Garcia and others which never made it to the school (5 AA 876-77). Calvillo could not remember the model of car he was in. (5 AA 877). Calvillo also admitting lying to the police. (6 AAA 998). Jonathan Harper testified to similar facts. (7 AA 1277-1283).

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There was testimony that the murder weapon belonged to an individual named Puppet and that many people had handled that weapon. (5 AA 878, 6 AA 1024, 7 AA 1282). There was also evidence adduced that Puppet (aka Manuel Lopez) was identified as previously working at the site where the murder weapon was found. (9 AA 1652-1654). Puppet also admitted to owning the murder weapon. (9 AA 1652). There was also evidence adduced that Giovanny Garcia had a gun at the melee. (9 AA 1648-1649).

In truth, however, no reliable evidence was offered that even placed Garcia in Sal Garcia's apartment when the call came in. Furthermore, no physical evidence placed Garcia at the scene of the shooting, or the melee prior to the shooting, or any car that allegedly transported people to the school, or the gray hoodie (6 AA 1059, 1089, 1100) the shooter was agreed upon by almost every witness to have worn. (9 AA 1654-1660). At best, and in the light most favorable to the State, they were able to show that Garcia at one point held the murder weapon although many people had touched the murder weapon; and also that Garcia went to Mexico (9 AA 1600-1602) at a time after the melee.

The rest of the case depended primarily on contested and contradicted testimony of Jonathan Harper, and to a lesser extent grossly unreliable

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testimony of Edshel Calvillo and evidence of a prior in-court identification given over objection by Melissa Gamboa.

Indeed, one of the State's key witnesses, an independent school official, Betty Graves, testified that she stared directly into the face of the boy she attributed as the shooter, and yet she did not identify Evaristo Garcia as being that boy. (6 AA 1095-1098). Moreover, there were MANY State witnesses, as well, who saw the shooter but could only identify a hoodie the shooter was wearing; NO ONE ELSE identified Evaristo Garcia at the time of the offense.

Melissa Gamboa (the sister of the decedent) was expected to identify the Defendant in court as she had done at the preliminary hearing which occurred years after the event. Prior to trial, however, Garcia moved to exclude and suppress Ms. Gamboa's prior in-court identification as being overly suggestive. (1 AA 51-67). It is undisputed that Ms. Gamboa did not pick Garcia out of a photo line-up prior to the preliminary hearing (there was contradicting evidence as to whether or not she was shown a line-up). (7 AA 1212). The trial court denied the Motion to Suppress. (1 AA 7-42). At trial, Ms. Gamboa was unable to identify Garcia as the person who shot her brother, thus bolstering the concern about the prior identification coming into evidence and ensuing prejudicing. (6 AA 1161-1189; 7 AA 1190-

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1214). The State, over objection, was allowed asked Ms. Gamboa if she was able to identify the shooter at the preliminary hearing and she indicated "yes." (6 AA 203). Melissa Gamboa admitted that her preliminary hearing identification of Garcia did not match her description of the shooter from her original statement to the police. (7 AA 1195).

Additionally, the State called Edshel Calvillo while ensconced in chains under a so-called "material witness" warrant. (5 AA 899). This was the same Edshel Calvillo had once before testified in an ancillary proceeding (the shooting of witness Jonathan Harper) in a manner (and maintained at trial) that was inconsistent with the State's position that it was an attempt murder versus a self-inflicted injury. (6 AA 1034; 5 AA 931-32). As such, the State placed on the stand an individual who they already had encountered as a perjurer. It was clear from the cross-examination of Calvillo, that his statement to the police about the incident at issue was so utterly unbelievable from its internal inconsistencies and external contradictions that it was a farce to present him as a credible State's witness. (5 AA 978-988; 6 AA 989-1047).

There was no discussion on the record as to the specifics as to why a "material witness warrant" was required.

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Finally, Jonathan Harper testified. The Court ruled that he was an uncharged accomplice and therefore his testimony was required to be corroborated. (10 AA 1803-1806). Jonathan Harper, who had lost 23 percent of his brain tissue due to a bullet being placed in his head at Sal Garcia's apartment, was able to have seemingly flawless recall of events, unlike prior proceedings where he admitted having serious memory problems (7 AA 1313-21). A reading of the record reveals Jonathan Harper testified without hesitation or need for much refreshing of recollection. Dr. Norton Roitman testified that based on his observation of the medical records and testimony, Jonathan Harper's testimony could be a product of confabulation. (9 AA 1760-1766). The State was able to point out that Dr. Roitman did not personally interview Jonathan Harper (inasmuch as it was disallowed by the trial court). (9 AA 1768).

Jonathan Harper's testimony was largely uncorroborated as it related to witnessing the shooting itself, to wit: (1) he testified that he in close enough proximity to the shooting to actually hear Giovanny Garcia encourage the Defendant to shoot Victor Gamboa. (7 AA 1287). (2) No other witness who was close enough to observe (i.e. Melissa Gamboa and Joseph Harris) heard such an exchange. Moreover, every State witness indicated there was either one or two boys pursuing Gamboa, no one

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mentioned a third in close proximity whereas Jonathan Harper stated he was there with Giovanny Garcia and Evaristo Garcia (7 AA 1287). (3) Jonathan Harper also testified that the shooter unloaded his entire clip of bullets into the body of Gamboa (7 AA 1287), which was contradicted by the Coroner. (7 AA 1374).

Finally, and despite all the references to a criminal gang, and that enhancement in the Indictment, the trial court having heard ALL the State's evidence ruled there was an insufficient basis to have the State's expert testify that he could conclude that Evaristo Garcia was in a criminal gang or that the group described by all the witness was a criminal gang. (7 AA 1359).

SUMMARY OF THE ARGUMENT

This case is about the State proceeding on a very weak case seeking first degree murder. The only actual evidence that linked the Defendant to the offense was that two of his fingerprints (out of three of value and countless more that were not of testing quality) appeared on the gun, and two years later he was located in Mexico. Regarding the former, the Defense more than adequately elicited testimony that the Defendant's fingerprints on the gun meant nothing more than at some time and place the Defendant had held the gun – a point not disputed by the Defense – but that

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does not rise to the level of reasonable doubt necessary to establish he was the shooter. Regarding the latter, the State did not establish when the Defendant went to Mexico or under what circumstances. The State was unable to show that the Defendant went to Mexico after the arrest warrant was issued (June, 2006), or if he had, that he hadn't gone done to Mexico years after the shooting. In sum, there was NO evidence as to when the Defendant first left Las Vegas. Even together with other evidence adduced, there was insufficient evidence to meet the high burden of reasonable doubt.

The jury was presented with a two-count Indictment alleging conspiracy to commit murder and murder (which included as an alternate theory – conspiracy). The Defendant was acquitted of conspiracy and found guilty of only second-degree murder with use of a deadly weapon (which fit NO theory of the case). The jury was clearly swayed by inappropriate-by-law gang evidence that was received early in the proceedings.

LEGAL ARGUMENT

I. THERE WAS AN INSUFFICIENCY OF EVIDENCE TO SUSTAIN A VERDICT OF GUILT FOR SECOND DEGREE MURDER.

Appellant submits that the evidence adduced at trial was insufficient to support his convictions of Murder in the Second Degree with the Use of a Deadly Weapon.

The recognized standard of proof, in support of conviction, is whether

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the evidence is of such certainty that a rational trier of fact will be convinced of the guilt of the accused beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979) (see *Virginia v. Black*, 538 U.S. 343 (2003); *Mejia v. State*, 122 Nev. 487, 134, P.3d 722 (2006); *Thompson v. State*, 221 P.3d 708 Nev. (2009)). Furthermore, this Court has held that a conviction cannot be upheld where it is based on evidence from which only uncertain references can be drawn. *Woodall v. State*, 97 Nev. 235, 236, 627 P.2d 402 (1981). Further, in evaluating the evidence of an accomplice, corroboration is paramount. NRS 175.291; *Ramirez-Garza v. State*, 108 Nev. 376, 379, 832 P.2d 392, 393 (1992).

Even in the light most favorable to the State, without the benefit of the testimony of accomplices Edshel Cavillo and Jonathan Harper, the conviction is devoid of the necessary quantum of proof.

The State was able to offer evidence that Evaristo Garcia's fingerprints were found on the weapon used in this case, but has to concede that many people touched that weapon. (6 AA 1024). Apart from that fact, there was not a single clean, untainted identification of Evaristo Garcia as the shooter. There was no evidence adduced that Evaristo Garcia knew the victim Victor Gamboa or why Victor Gamboa would have been singled out in the melee by a person who (according to the State's theory) had just

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arrived at the scene. While Evaristo Garcia did go to Mexico at some undetermined time, it must be noted that Jonathan Harper stuck around in Las Vegas and was shot in the head at Sal Garcia's house. Evaristo Garcia did not give a statement or admission to the police. There is no other evidence that links Evaristo Garcia to the offense.

As a result, the State needed to rely heavily on a prior in-court identification by Melissa Gamboa, and the testimony of two admitted "Puros Locos" members – Jonathan Harper and Edshel Cavillo, neither of whom were corroborated by independent evidence. (see more detailed accounts of the errors raised by the testimony of these three individuals, *infra*).

Moreover, even with the enhanced but improper testimony of Melissa Gamboa and the two accomplices (Jonathan Harper rode in the vehicle and engaged in the fight; Edshel Cavillo in response to the telephone call to come to the scene, got in a car and headed to the school to fight), it is clear that there is insufficient evidence upon a reading of the actual record.

Melissa Gamboa admitted that her identification of Evaristo Garcia at the preliminary hearing as the shooter contradicted her depiction of the shooter at the time of offense. (7 AA 1195).

Edshel Cavillo told police he did not travel to the scene (6 AA 1005), but contradicted his own statement at trial by testifying that he did attempt to

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go to the school, but never made it that far (5 AA 879-881). Edshel Cavillo also claimed that Evaristo Garcia confessed to him, but that was not independently verified and the circumstances surrounding that so-called confession are impossible to have occurred in a manner described by Edshel Cavillo given his testimony. (6 AA 1009-1024). Edshel Cavillo also admitted he did NOT see the shooting. (5 AA 881). Jonathan Harper's main testimony supposedly incriminating Evaristo Garcia was actually contradicted (not corroborated) by independent and scientific evidence. (7 AA 1287; 1374).

In sum, there was insufficient evidence to support a conviction that showed that Evaristo Garcia shot into the body of Victor Gamboa and killing him in a manner consistent with Second Degree Murder.

II. THE DISTRICT COURT ERRED IN ALLOWING A PRIOR SUGGESTIVE IN-COURT IDENTIFICATION WHEN THE WITNESS FAILED TO IDENTIFY THE DEFENDANT AT TRIAL.

Melissa Gamboa was never given a photo line-up to identify the alleged shooter of her brother Victor, but she did give a statement describing the shooter to the police. At the preliminary hearing in this matter, Melissa Gamboa identified Evaristo Garcia, who was the only person in custody at the defense table. She also admitted that the person she described close in time to the incident did not match the appearance of the person she identified

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at preliminary hearing. At trial, she did not identify anyone as being the shooter.

Evidentiary rules disallow in-court identification when the circumstances surrounding pre-trial identifications are unduly prejudicial. See *Simmons v. U.S.*, 390 U.S. 377, 88 S.Ct. 967 (1968). Initial misidentification "reduces the trustworthiness" of subsequent lineup or courtroom identification. *Id.*

The standard regarding undue suggestiveness comes originally from *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); (see also, *Baker v. State*, 88 Nev. 369, 498 P.2d 1310 (1972)). The test is whether "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that (the defendant is) denied due process of law." *Stovall v. Denno*, 388 U.S. at 301-302, 87 S.Ct. at 1972. This determination is to be made after a review of the "totality of the circumstances." 388 U.S. at 302, 87 S.Ct. 1967.

In *United States v. Wade*, 388 U.S. 218, 233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), the U.S. Supreme Court gave further examples of impermissibly suggestive lineup procedures, such as presenting a lineup in which all participants except the suspect are known to the witness, or are grossly dissimilar in appearance or clothing, or in which the suspect is

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pointed out before or during the lineup. The United States Supreme Court has held that "reliability is the linchpin." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). The factors which must be considered are "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself." *Id.* at 114, 97 S.Ct. at 2253.

In the present case, Garcia's Motion to Suppress an In-Court Identification should have been granted, and it was error to allow the State to present evidence of a prior, tainted identification where every single factor making an identification suspect and prejudicial was present. Melissa Gamboa did not know Evaristo Garcia, had only the quickest opportunity to observe him in the most stressful situation imaginable where there were other distracting factors (a gun, a melee, dozens of kids fighting). The shooter was identified as having worn a hoodie and while she testified it may have come off, for the most part the identity by the nature of that article of clothing was obscured. She wasn't presented with an array of people to choose from (line-up or photo spread), but was confronted with a single

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person, in court, sitting at the defense table. There was no level of certitude discerned and it contradicted a closer in time description of the shooter.

Without Melissa Gamboa's identification of Evaristo Garcia as the shooter, only one other witness claimed to see the shooting – an accomplice who gave an account that contradicts the testimonial and physical evidence. With this one piece of key evidence removed, there is no basis to sustain the conviction and the conviction must be reversed.

III. THE DISTRICT COURT ERRED BY ALLOWING AN INCOMPETENT WITNESS TO TESTIFY.

Jonathan Harper had 23 percent of his brain blown out from a shooting at the hands of Sal Garcia subsequent to the event at issue. The reason for that attempt murder or the impact it must have had upon the witness both in terms of mental ability to recall events and fears in testifying in ways that upset the group of people including Edshel Cavillo who insisted he shot himself is self-evident, or at least worthy of exploration *vis a vis* an examination by an expert. That is why Garcia moved to compel a psychological examination of Jonathan Harper. (1 AA 68-154). It was error to deny that Motion.

In his Motion, Garcia set forth in great detail the statements of Jonathan Harper that indicated that he was having great difficulty with his memory. (1 AA 72-77). In that recitation, it is clear that both the

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prosecution and defense efforts to get Jonathan Harper to provide relevant information were severely hampered by his brain injury and that fundamental facts, such as what clothing Evaristo Garcia was alleged wearing on the day in question were unattainable from him. And while the Defense was given many medical records which allowed Defense Expert Dr. Norton Roitman to conclude that there was a great likelihood of confabulation, it was necessary for an actual examination of Jonathan Harper. It was only a few questions into the cross-examination where the State exploited the fact that Dr. Roitman did not personal meet or examine Jonathan Harper – disingenuous since they opposed such an examination (2 AA 183-243), but effective in discrediting the expert's basis for conclusion.

When the competency of any witness has been questioned, it is within the trial court's discretion to consider facts relative to qualification and to determine if such a person is competent to testify. NRS 175.221(2); Fox v. State, 87 Nev. 567 (1971). Further, there do sometimes arise circumstances where a person's mental or emotional state affects their veracity. Generally, there is a compelling reason for a psychiatric examination where there is little or no corroboration of allegations and the defense has questioned the effect of the witness' emotional or mental condition upon veracity. Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980). And

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while a great number of cases deal with this issue in the context of child sexual abuse victims, the logic remains the same, to wit: the court has a need to deal with witnesses who because of an obvious emotion or mental condition are not competent to testify.

Here, Jonathan Harper suffered a devastating, verifiable injury that unquestionable affected his ability to recall events and thereby his ability to testify truthfully. His testimony was contradicted by other witnesses and miraculously, his testimony got more clear and concise by the time he got to trial which was a highly unlikely scenario given his injury as described by Dr. Norton Roitman. Indeed, it was necessary for Dr. Roitman (or frankly some other expert – the Defense would not have been limited had the Motion been properly granted) to examine Jonathan Harper prior to his testimony to better gage the limits of his incompetence to testify and the degree of his confabulation. As it happened, Jonathan Harper was able to testify in a way that clearly was unfounded in veracity, and utterly lacked proper corroboration, but prejudicially was allowed to be offered.

It was error to disallow a mental examination of Jonathan Harper given the facts and circumstances of his brain injury, his inability to recall events and his lack of corroboration and contradiction to independent evidence. The conviction should be reversed.

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IV. THE DISTRICT COURT ERRED IN ALLOWING A MATERIAL WITNESS WARRANT TO ISSUE ENGENDERING SYMPATHY AND/OR CREDIBILITY FOR A STATE'S WITNESS.

Edshel Calvillo should not have had a material witness warrant issued against him and the discussion of whether or not he be presented in chains should have been discussed before he was paraded out in front of the jury. Clearly, the jury's view of Mr. Calvillo in this setting was designed to bolster his credibility (i.e. "forcing" him at great personal suffering to testify in chains against his "friend"). Further, there can be certain circumstances where the coercive environment is so overwhelming that it is akin to securing a witness to testify in a particular fashion.

NRS 178.494 provides in relevant part, that:

> 1. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure the person's presence by subpoena, the magistrate may require bail for the person's appearance as a witness, in an amount fixed by the magistrate. If the person fails to give bail the magistrate may: (a) Commit the person to the custody of a peace officer pending final disposition of the proceeding in which the testimony is needed

In the present case, there was no justifiable cause why a material witness warrant was issued for Edshel Cavillo, nor was there any basis for why he had to appear in shackles in front of the jury.

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"Government misconduct that amounts to substantial interference with a witness's free and unhampered determination to testify may be deemed a violation of due process." *United States v. Foster*, 128 F.3d 949, 953 (6th Cir.1997). In considering "prosecutorial misconduct," the U.S. Supreme Court has stated that prosecutors must "refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The Supreme Court has also held that the appropriate standard of review for prosecutorial misconduct is "the narrow one of due process," because a defendant's due process rights are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). See also *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

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

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Also, while the Defense was aware of Calvillo's earlier statement, it was so far-fetched that Calvillo, a person known to the State to be a perjurer, would be called to testify and so the Defense to some degree was caught at unawares. More significantly, however, is that the Defense learned new information on the stand that Calvillo did not reveal to the police in the earlier statement, to wit, that he did in fact embark upon a journey to the school to engage in a fight. (He told police he didn't). As such, Calvillo clearly established himself as an accomplice and given his lack of corroboration and the circumstances of his appearance, his testimony cannot be relied upon as supportive of a finding beyond reasonable doubt as to the guilt of Garcia.

There was no basis for a material witness warrant for Edshel Calvillo. He should not have appeared in chains or been coerced by the governments conduct in arresting him to testify. The whole charade of Edshel Calvillo's testimony is grounds for reversal of the conviction.

V. IT WAS PROSECUTORIAL MISCONDUCT TO PROCEED WITH A PREJUDICIAL GANG ENHANCEMENT ONLY TO DROP IT MIDTRIAL.

It was absolute prejudice for the State to proceed through this trial with a gang enhancement theory only to realize it was unsupportable. Their unfounded pursuit of this theory tainted jury selection and opening

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statements as well as other witness' examination. (4 AA 705-06, 716; 5 AA 859). The record is devoid of any legitimate representation that the State could ever prove that LEGALLY this was a gang.

The Defense had objected prior to trial, and during trial, and yet the State proceeded. There was, therefore, a bad faith effort to sully the Defendant and the proceedings with gang references when in fact they could NEVER have PROVEN that this a gang per statute with felonious activities as their commonality.

The State knew there were never sufficient felony convictions to establish a gang, and yet proceeded anyhow in violation of statute and their obligation to seek justice under the law. *Jimenez v. State*, 112 Nev. 610, 618, 918 P.2d 687, 692 (1996) ("The prosecutor represents the state and has a duty to see that justice is done in a criminal prosecution."); ABA Standards for Criminal Justice, Prosecution Function Standard 3–1.2(c) (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *Id.* cmt. ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public"). See also, *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

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Greer v. Miller, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Arguably, the State might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial. See generally, *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971), and *United States v. Lovasco*, 431 U.S. 783, 795, n. 17, 97 S.Ct. 2044, 2051 n. 17, 52 L.Ed.2d 752 (1977).

The Nevada Rules of Professional Conduct 3.4(e) provides that a lawyer shall not: "In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused." A prosecutor may not argue facts or inferences not supported by the evidence. *Collier v. State*, 101 Nev. 473, 705 P.2d 1126 (1985).

This Court has also taken special umbrage with the grave prejudicial impact of unfounded gang insinuations at all stages. See, *Norwood v. State,*

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112 Nev. 438, 440, 915 P.2d 277, 278 (1996); also, generally, *Butler v. State*, 120 Nev. 879, 102 P.3d 71 (2004). Indeed, in *Butler*, the Court favored that before gang-type evidence be admitted that there be some manner of *Petrocelii* hearing to determine at least clear and convincing evidence. *Id.* Here, there was no common felonious activity in existence at all (thus making a criminal gang's existence impossible), and at trial there was no reliable testimony that Evaristo Garcia was a member of this purported gang or any other gang. Once the canard was exposed, the Defendant's request for a mistrial (or the subsequent motion for new trial/ acquittal) should have been granted. It is worth noting that at some point in the middle of trial, the jury became on some level "upset and afraid" but could not reasonably articulate their concern even after a canvass and were thereafter kept in the back hallways. (8 AA 1526-1584).

Framing this case as a gang matter and proceeding in such a fashion before the jury when it was patently clear that it could not be supported was error of such a prejudicial magnitude that reversal is required.

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CONCLUSION

As a result of the error at the trial admixed with prosecutorial misconduct, the convictions must be reversed.

Dated this 13th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of 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 Times New Roman type style; or

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)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains no more than 14,000 words, and does not exceed 30 pages, in fact it is 7100 words.

3. Finally, I hereby certify that I have read this appellate brief, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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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 13th day of June, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 19th day of June, 2014, the above and foregoing ***Appellant's Opening Brief*** was served upon the appropriate parties hereto via the Supreme Court's notification system in accordance to the Master Service List.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 64221

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

EVARISTO JONATHAN GARCIA, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 64221

RESPONDENT'S ANSWERING BRIEF

Appeal from Judgment of Conviction
Eighth Judicial District Court, Clark County

STATEMENT OF THE ISSUE(S)

1. Whether there was sufficient evidence to support the jury's guilty verdict.

2. Whether the district court properly denied Garcia's pre-trial motion to suppress.

3. Whether the district court properly allowed Jonathan Harper to testify.

4. Whether Appellant was not prejudiced by the material witness warrant.

5. Whether it was not prosecutorial misconduct for the State to proceed to trial on the gang enhancement.

6. Whether any alleged error was harmless

STATEMENT OF THE CASE

On June 19, 2006, Evaristo Jonathan Garcia ("Appellant") was charged by way of Criminal Complaint with Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). Respondent Appendix ("RA") 55-56. On November 26, 2008, Appellant was charged by way of Amended Criminal Complaint with Murder with Use of a Deadly Weapon with the Intent to Promote, Further or Assist a Criminal Gang (Felony – NRS 193.168, 193.169, 200.010, 200.030, 193.165). RA 53-54. The preliminary hearing was held on December 18, 2008, and Appellant was bound-over to district court. RA 1-31.[1]

On December 29, 2008, Appellant was charged by way of Information with Murder with Use of a Deadly Weapon with the Intent to Promote, Further or Assist a Criminal Gang in Case No. 06C226218-2. RA 74-75. On March 19, 2010, Appellant was charged by way of Indictment with Conspiracy to Commit Murder with the Intent to Promote, Further or Assist a Criminal Gang (Felony – NRS 200.010, 200.030, 199.480, 193.168, 193.169) and Murder with Use of a Deadly Weapon with Intent to Promote, Further or Assist a Criminal Gang in Case No. 10C262966-1. Appellant Appendix ("AA") 1-6. On May 25, 2010, the State

[1] While pages 1-4 and 65-100 of the preliminary hearing transcript is included in the Appellant's Appendix, Respondent has included the entirety of the transcript in the Respondent's Appendix.

voluntarily moved to dismiss Case 06C226218-2 to proceed in Case 10C262966-1. RA 102.

On March 17, 2011, pursuant to negotiations, the State filed an Amended Indictment and charged Appellant with Second Degree Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). I AA 43-44. That same day, Appellant entered a plea of guilty to the count charged in the Amended Indictment, pursuant to the North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), but on May 12, 2011, the district court granted Appellant's pre-sentence Motion to Withdraw Guilty Plea. I AA 45-46.

On September 25, 2012, Appellant filed a Motion to Suppress In-Court Identification Pursuant to NRS 174.152(1). I AA 51-67. On October 4, 2012, the State filed an Opposition to the Motion to Suppress. I AA 155-179. On October 8, 2012, Appellant filed a Reply to the State's Opposition. I AA 180-81. On October 30, 2012, the district court denied the motion. II AA 253-54.

On September 27, 2012, Appellant filed a Motion for Evidentiary Hearing to Determine Competency of State's Primary Witness and Order Compelling Production of Medical Records and Psychological Examination and Testing to Determine Extent of Memory Loss. I AA 68-154. On October 23, 2012, the State filed an Opposition. II AA 183-243. On October 30, 2012, the district court denied the motion. II AA 276.

On July 8, 2013, the State filed a Second Amended Indictment charging Appellant with the same crimes as the March 19, 2010, Indictment. II AA 294-96. Trial commenced that day. II AA 297. On July 9, 2013, the State filed a Third Amended Indictment correcting a clerical error but charging Appellant with the same crimes. X AA 973-75. On the fourth day of trial, July 11, 2013, the court granted Appellant's motion to preclude the state's gang expert from testifying. VII AA 1355-57. However, the court also found that the State had brought the gang enhancement in good faith. VII AA 1357. In response to the court's ruling, the State filed a Fourth Amended Indictment on July 12, 2013, dropping the gang enhancements. X AA 1850-52. On July 15, 2013, the jury returned a verdict of guilty of Second-Degree Murder with Use of a Deadly Weapon and not guilty of Conspiracy to Commit Murder. XI AA 1995.

On July 22, 2013, Appellant filed a Motion for Acquittal or in the alternative, Motion for New Trial. XI AA 2019-33. On July 29, 2013, the State filed an Opposition. RA 115-48. On August 1, 2013, the district court denied the Motion. XI AA 2049.

On August 29, 2013, Appellant was sentenced to life with the possibility of parole after ten (10) years for second-degree murder, plus an equal and consecutive term of life with the possibility of parole after ten (10) years for the deadly weapon enhancement. XI AA 2081. Appellant received one thousand nine hundred fifty-nine

(1,959) days credit for time served. XI AA 2081. On September 11, 2013, the Judgment of Conviction was filed. XI AA 2088-89. On October 11, 2013, Appellant filed a Notice of Appeal. XI AA 2090-91.

STATEMENT OF THE FACTS

Crystal Perez (Perez) was attending Morris Sunset East High School in February of 2006. VI AA 1140. Among her classmates were Giovanny Garcia aka "Little One" (Garcia), Gena Marquez (Marquez), and Melissa Gamboa (Gamboa). VI AA 1137-36, 1140. Perez was friends with Gamboas's boyfriend, Jesus Alonso (Alonso), an active member of Brown Pride who went by the moniker Diablo. VI AA 1139-40, 1164. Perez was aware of Garcia's membership in the Puros Locos gang. VI AA 1144-45. The week prior to February 6, 2006, Perez had gotten into a confrontation with Garcia over a book. VI AA 1141. Following this confrontation, Alonso approached Garcia and revealed his gang membership. VI AA 1143. Perez then observed Garcia make the Puros Locos hand signal to Alonso. VI AA 1147.

On February 6, 2006, Perez observed Garcia talking on his cell phone and heard him say "bring Stacy." VI AA 1149-50. Following this call, Perez and Marquez left school early, fearing an altercation would take place. VI AA 1150. Perez and Marquez went to Marquez's house to get help from Marquez's brother Bryan Marquez. VI AA 1150. Bryan Marquez was with Gamboa's younger brother Victor Gamboa (Victor or victim). VI AA 1150.

Perez, Marquez, Bryan Marquez, and Victor returned to the school. VI AA 1152. Bryan Marquez approached Garcia and hit him. IV AA 842, 844, VI AA 1153. From there, a large group of students began fighting. IV AA 844, VI AA 1153.

Perez got knocked to the ground but observed a person run past her with a gun. VI AA 1155. Perez then heard shots. VI AA 1156. Perez admitted she initially lied to the police and said that Garcia was the shooter because she believed he caused the fight which lead to Victor's death. VI AA 1157. She "wanted it to be him." VI AA 1157.

Gamboa saw Victor outside of the school, but did not see him fighting. V AA 1172-73. During the fight, she observed a gray El Camino carrying two males and one female park at the school. VI AA 1169-71. One of the occupants got out of the car and proceeded to the fight. VI AA 1171. One of the males was wearing a gray hooded sweatshirt. VI AA 1174. The fight broke up and everyone fled. VI AA 1173. Gamboa was running behind Victor when she saw the male in the gray hoodie with a gun in his right hand and watched as he shot her brother. VI AA 1174, 1176. Gamboa could not identify the shooter at trial, over seven (7) years later, but she had previously identified Appellant as the shooter at the Preliminary Hearing on December 18, 2008. VII AA 1203.

During the fight, Campus Monitor Betty Graves observed a Hispanic male with black hair in a gray hooded sweatshirt holding his right hand in his pocket as

he attempted to throw punches with his left hand. VI AA 1100-01, 1098-99. Graves stated to her co-worked, "that boy's got a gun." VI AA 1099. Graves called Principal Dan Eichelberger. VI AA 1070.

Principal Eichelbeger came out of the school and observed "total mayhem." VI AA 1070-71. Principal Eichelberger yelled loudly for the fighting to stop and many participants ran to cars and left. VI AA 1072. He then began escorting the others off school property when he saw a smaller kid running away from a taller male in a gray hoodie. VI AA 1073-74. The male in the hoodie pulled the hoodie over his head and "fired away." VI AA 1074-75.

Joseph Harris (Harris) was at the school to pick up his girlfriend. VI AA 1086. As he was waiting, he observed a young male running across the street. VI AA 1087. A male in a gray hoodie pointed a gun at the boy as he ran away, holding the gun in his right hand. VI AA 1088-89. Harris heard five to six shots, and saw the victim fall against a wall face-first, before sliding down to the ground. VI AA 1091-92.

Vanessa Grajeda (Grajeda) had been watching the fight and observed a male in a gray hoodie. VI AA 1056, 1059. She noticed something black in his pocket, and watched him as he ran to the middle of the street, pulled out a gun, and shot the gun. VI AA 1060.

Daniel Proietto, a Crime Scene Analyst with the Las Vegas Metropolitain Police Department (LVMPD), responded to the school to document the crime scene

and collect evidence. IV AA 733-34. On Washington, Proietto located four bullets and six expended cartridge cases. IV AA 746-48, 750. All six of the cartridge cases were headstamped Wolf 9mm caliber Makarov. IV AA 749, 752. On the North side of Washington, across from the school, Proietto located four bullet strikes on the wall adjacent to the sidewalk and one bullet embedded in the wall. IV AA 752-54.

Officer Richard Moreno began walking in the direction the shooter had been seen fleeing, and located an Imez 9mm Makarov pistol hidden upside down in a toilet tank that had been left curbside outside 865 Parkhurst. IV AA 808. [2] Proietto collected and impounded the firearm. IV AA 756-58.

Dinnah Angel Moses examined the firearm, bullets, and cartridge cases recovered at the crime scene. VIII AA 1460-61. Moses testified that all of the cartridge cases were consistent with the impounded firearm, and was able to identify two of the recovered bullets as being fired by the Imez pistol. VIII AA 1464-67. The remaining two bullets were too damaged to identify, but bore similar characteristics to the other bullets. VIII AA 1465.

Detective Mogg interviewed Garcia. IX AA 1616. Garcia was photographed wearing the same all black clothing he was wearing during the school day. IX AA 1618. Detective Mogg collected Garcia's cellular telephone and discovered that just

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[2] Russell Carr, the owner of the home where the toilets were outside, testified that the gun found in the toilet by Officer Moreno had never been inside his house and he did not know how it got there. VII AA 1219-1220.

prior to the shooting, Garcia placed twenty calls to Manuel Lopez (Lopez), a fellow member of Puros Locos who went by the moniker Puppet, and twelve calls to Melinda Lopez, the girlfriend of Salvador Garcia, another member of Puros Locos. XI AA 1617, 1621-22.

In late March of 2006, Detective Mogg received a call from Detective Ed Ericcson with the LVMPD's Gang Unit. IX AA 1623. Detective Ericcson was investigating a shooting of Puros Locos member Jonathan Harper (Harper) that had occurred on February 18, 2006 at the home of Salvador Garcia. IX AA 1623-24. Detective Ericcson believed that Harper might have information regarding the homicide at Morris Sunset East High School. IX AA 1624.

Detectives Mogg and Hardy interviewed Harper on April 1, 2006. VIII AA 1401. Harper provided the moniker of the shooter in the gray hoodie, which led the LVMPD to Evaristo. VIII AA 1396-97.

Harper testified at trial that in February of 2006, he was a member of Puros Locos for a short time, and went by the moniker Silent. VII AA 1273, 1276. On the day of the murder, he was at Salvador Garcia's apartment with Lopez, Edshell Calvillo (Calvillo) (who went by the moniker Danger, V AA 857) and Evaristo (who he called "E"). Harper identified Appellant as E. VII AA 1278, 1280; IX AA 1629-30. Harper stated Appellant was wearing a gray hoodie. VII AA 1284. While at Salvador's apartment, Garcia called. VII AA 1280-81. Salvador told them they had

to go to the school. VII AA 1280-81. Before leaving, Harper noticed that Lopez had his "nine" in his waistband and that he gave it to Appellant. VII AA 1282. Harper, Lopez, Appellant, and Lopez's girlfriend Stacy got into Lopez's El Camino. VII AA 1281.

Once they arrived, Harper saw a big brawl in front of the school. VII AA 1284. A kid ran from the fight. IV AA 1286. Garcia and Appellant chased the kid and were fighting over the gun. VII AA 1287. They were yelling loud enough that Harper could hear it. VII AA 1287, 1307. Harper heard Appellant say, "I got it." VII AA 1287. Then Appellant shot the victim, and "dumped . . . the whole clip in the kid." VII AA 1288. Harper testified that later Appellant told him, "I got him." VII AA 1289. Harper overheard several people at Salvador's apartment talking about the gun being hidden. VII AA 1289.

In May of 2006, Detective Mogg received an anonymous tip via "Crime Stoppers." IX AA 1627. The tip led him to the 4900 block of Pearl Street. IX AA 1628. Detective Mogg began investigating residents for any connection to a person named Evaristo, and located Maria Garcia and Victor Tapia. IX AA 1628. Maria Garcia worked at the Stratosphere, and listed Appellant, her son, as an emergency contact with her employer. IX AA 1628.

On July 26, 2006, Calvillo came forward because the fact that a young boy had been killed "weighed heavy on his conscience." VI AA 991. Calvillo testified

that on February 6, 2006, he was at Salvador Garcia's apartment with Lopez, Harper and Appellant. V AA 871. They received a call from Garcia to "back him up" at the school. V AA 871, 877. Calvillo testified that Lopez gave the gun to Appellant. V AA 878-79. Harper, Appellant, Lopez, and "Puppet's girl" left in Lopez's El Camino. V AA 876. Calvillo got into another car with Sal, and followed Lopez's car. V AA 877. Sal's car got stuck at a light and by the time they got to the school everyone was running and they heard shots. V AA 879-80. After the shooting, he spoke with Appellant. V AA 884. Appellant admitted he shot a boy and laughed. V AA 888. Appellant also told Calvillo that he hid the gun in a toilet. V AA 894. Calvillo stated Harper told him he saw the whole thing. V AA 885.

An arrest warrant was issued on October 10, 2006. VIII AA 1590-91. FBI Special Agent T. Scott Hendricks, of the Criminal Apprehension Team (CAT), a joint task force of the FBI and local law enforcement, was granted pen register warrants for the cellular telephones of Appellant's parents. VIII AA 1591, IX AA 1590-92, 1594. On April 23, 2007, Detective Mogg spoke to Appellant's parents. IX AA 1595-97. Shortly after that conversation, Appellant's parents placed a call to Vera Cruz, Mexico. IX AA 1597-98. Appellant was arrested on April 23, 2008, and was extradited to the United States on October 16, 2008. IX AA 1599, 1601, 1603.

Alice Maceo, a Latent Print Examiner and the Lab Manager of the Latent Prints Section of the LVMPD, examined the firearm. IX AA 1682, IX AA 1699.

Maceo was able to lift three (3) latent prints from the upper grip below the slide (L1), the back strap (L2) and the grip (L3). IX AA 1709. The print from the grip (L3) was not of sufficient quality to make any identification. IX AA 1709-10. Maceo was able to exclude Giovanny Garcia and Manuel Lopez as to the remaining two prints. IX AA 1707, 1710. After Appellant was taken into custody, Maceo was then able to compare his prints to L1 and L2. IX AA 1711. Maceo identified Appellant's right ring finger on the upper left side of the grip (L1). IX AA 1719. She also identified Appellant's right palm print, the webbing between the thumb and the index finger, on the back strap of the gun just above the grip (L2). IX AA 1717-19. Maceo demonstrated at trial that the print on the back strap is consistent with holding the firearm in a firing position, and the location of the print on the upper grip could be consistent with placing the gun in the toilet in the position in which it was found. IX AA 1736-37.

SUMMARY OF THE ARGUMENT

There is overwhelming forensic evidence, eye witness accounts, and accomplice testimony supporting the jury's verdict. Gamboa's pre-trial identification of Appellant was not unduly prejudicial because she identified Appellant while he was sitting in the jury box with other defendants. Harper was competent to testify despite a head injury because he was able to go "toe to toe" with defense counsel and his memory could be refreshed. The district court's decision

not to compel a psychiatric examination is supported by Appellant's failure to present a compelling reason for such an intrusion. The court did not err in granting the State a material witness warrant for Calvillo, as he admitted under oath that he did not want to testify and failed to appear for court despite a subpoena. The State did not commit prosecutorial misconduct because Calvillo's appearance in custody was pursuant to a valid material witness warrant. There was also no prosecutorial misconduct regarding the State's decision to bring a gang enhancement since it was supported by the facts and was correctly withdrawn after an adverse ruling. Any alleged error was harmless due to the overwhelming evidence against Appellant.

ARGUMENT

I.

THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT

This Court should decline Appellant's invitation to second-guess the credibility determinations of the jury. Appellant's conviction of Second Degree Murder is supported by overwhelming evidence, including eyewitness testimony, his confessions to his associates and the presence of his fingerprints on the gun.

In reviewing a claim of insufficient evidence, the relevant inquiry is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). "Where there is substantial evidence to support the jury's verdict, it will not be disturbed on appeal." Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). "It is for the jury to determine the degree of weight, credibility and credence to give to testimony and other trial evidence, and this Court will not overturn such findings absent a showing that no rational juror could have found the existence of the charged offenses beyond a reasonable doubt." Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994), holding modified, Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006). "Circumstantial evidence alone may support a judgment of conviction." Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000) (citing Deveroux v. State, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980)).

Multiple witnesses saw a male in a gray hoodie running from the scene of the murder. Gamboa saw a male run by her in a gray hooded sweatshirt with a gun in his right hand following her brother. VI AA 1174, 1176. Campus Monitor Graves saw a Hispanic male in a gray hooded sweatshirt run by her with what she believed was a gun in his right pocket. VI AA 1100-01, 1098-99. Principal Eichelberger also saw a smaller boy running away from a taller male in a gray hoodie. VI AA 1073-74. He also watched as the male in the hoodie "fired away." VI AA 1074-75. Grajeda had been watching the fight and observed a male in a gray hoodie run down the street, pull out a gun, and shoot the gun. VI AA 1056, 1059, 1060. Harris saw a man

in a gray hoodie point a gun at a young male, fire six shots, and watched as the victim fell against a wall. VI AA 1087-93.

Harper was present in the car when Lopez gave the gun to Appellant. VII AA 1280-82. He observed Appellant wearing a gray hoodie when traveling to the school. VII AA 1284. Harper saw Garcia and Appellant fighting over the gun as Victor ran away. VII AA 1286-87, 1307. Harper saw Appellant shoot Victor. VII AA 1288. Appellant told Harper that "[he] got him." VII AA 1289. Harper watched Appellant run toward the neighborhood where the gun was found. VII AA 1288. Gamboa identified Appellant as shooting the victim. VII AA 1070, 1288. Appellant told Calvillo that he shot a boy and laughed. V AA 884-94. Appellant also said he hid the gun in the toilet. V AA 894.

Forensic evidence also support's the jury's verdict. Four bullets and six expended cartridges were found at the murder scene. IV AA 746-48. The gun found in the toilet was the gun that fired the bullets found at the scene, and Appellant's fingerprints were found on that gun. IX AA 1717-19.

II.
THE COURT PROPERLY DENIED APPELLANT'S MOTION TO SUPPRESS

Appellant's fundamental error is the belief that a judge must rest control over credibility questions from jurors. Appellant's contentions about Gamboa's identification of him as the shooter do not flow from inappropriately suggestive

police conduct but rather the court process itself and Gamboa's memory. These concerns do not warrant judicial invasion of the province of the jury.

When reviewing a district court's decision regarding a motion to suppress, this Court reviews findings of fact for clear error, but the legal consequences of these facts de novo. State v. Beckman, 120 Nev. __, __, 305 P.3d 912, 916 (2013).

That the recollection of a witness is allegedly impaired does not warrant removing the question of credibility from the jury:

> The right to confront and cross-exam witnesses, however, does not mean that the testimony of a witness must be excluded when the witness is unable to recall the underlying basis for the testimony that is introduced. In Delaware v. Fensterer, the Supreme Court upheld the admission of the prosecution's expert testimony even though the witness was unable to recall the theory upon which his opinion was based. In United States v. Owens, the victim's out-of-court identification of the defendant was admitted into evidence even though the victim testified at trial that he could not remember seeing his assailant. In both cases, rules of the Confrontation Clause were met by allowing cross-examination of the witnesses. *Because the deficiencies in the reliability of the testimony could be addressed in this manner, admitting the testimony was not fundamentally unfair and did not violate the Due Process Clause.*

2 Modern Constitutional Law § 30:67 (3rd. ed. 2011) (italics and underlining added, footnotes omitted).

There is no due process violation if a defendant is afforded the opportunity to challenge the credibility of a witness through the traditional truth finding tools of the courtroom. The United States Supreme Court recently endorsed this principle:

> In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safe-guards apart, admission of evidence in state trials is ordinarily governed by state law, and *the reliability of relevant testimony typically falls within the province of the jury to determine.*

Perry v. New Hampshire, ___ U.S. ___, ___, 132 S.Ct. 716, 720 (2012) (emphasis added).

Perry resolved a division of opinion over whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of a suggestive eyewitness identification not arranged by the police. Perry arose out of a defendant's desire to suppress an identification as a violation of due process because factually the witness identification "amounted to a one-person showup in … [a] parking lot." Id. at ___, 132 S.Ct. at 722. According to the defendant, due process was violated because it was "all but guaranteed that … [the witness] would identify him as the culprit." Id. The Supreme Court began its analysis by noting:

> The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safe-guards available to defendants to counter the State's evidence include the Sixth Amendment right to counsel, … compulsory process … and confrontation plus cross-examination of witnesses ... Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and *juries are assigned the task of determining the reliability of the evidence presented at trial.*

Perry, ___ U.S. at ___, 132 S.Ct. at 723 (emphasis added, citations omitted).[3]

Perry held that due process does not require a preliminary judicial inquiry into potentially suggestive eyewitness identifications that are not arranged by law enforcement. Id. at ___, 132 S.Ct. at 730. In reaching this conclusion the Court noted that "[w]e have concluded in other contexts … that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair." Id. at ___, 132 S.Ct. at 728. The Court went on to explain that:

> Our unwillingness to enlarge the domain of due process … rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. … We also take account of other safeguards built into our adversarial system that caution juries against placing undue weight on … testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. ... Another is the defendant's right to the effect assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. … [and] jury instructions[.] … The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes conviction based on dubious identification evidence.

Perry, ___ U.S. at ___, 132 S.Ct. at 728-29.

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[3] The only instance where the Supreme Court has found a due process violation premised upon the reliability of testimony is where the State knowingly allows an important witness in a criminal prosecution to testify falsely regarding consideration for his testimony. Napue v. People of the State of Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959).

The real danger inherent in Appellant's argument is that it would push the criminal justice system away from its traditional reliance upon the jury as the ultimate decision maker. Appellant assumes that the jury could not be trusted to evaluate Gamboa's testimony; however, this lack of faith in the jury system is directly counter to the Supreme Court's wise "unwillingness to enlarge the domain of due process … [because] the jury, not the judge, traditionally determines the reliability of evidence." Perry, ___ U.S. at ___, 132 S.Ct. at 28.

The precedents of this Court and the Ninth Circuit are in accord with the holding of Perry. In Baker v. State, 88 Nev. 369, 370, 498 P.2d 1310 (1972), the defendant complained that the preliminary hearing examination deprived him of due process in violation of the Fourteenth Amendment by exposing him to identification in a prejudicially suggestive grouping, contrary to Stovall. This Court rejected his argument. Baker, 88 Nev. at 371, 498 P.2d at 1311.

Baker then took his case to the federal courts. In Baker v. Hocker, 496 F.2d 615 (9th Cir. 1974), the Court of Appeals for the Ninth Circuit, found that the defendant failed "to clear even the first hurdle" of a Stovall violation. Id. at 617. In Baker, the defendant had not been identified in an earlier physical lineup, but was identified at the preliminary hearing, where he was seated between the two co-defendants who had been identified in that physical lineup. Id. The court held that the risk of a mistaken identification at preliminary hearing becoming "fixed" and

tainting trial identification "is far less present in the court proceeding because, as here, the identification can be immediately challenged by cross-examination." Id.

The Ninth Circuit reaffirmed Baker, in Johnson v. Sublett, 63 F.3d 926 (9th Cir. 1995), cert. denied, 516 U.S. 1017, 116 S.Ct. 582):

> While conceding that courtroom procedures are undoubtedly suggestive, we stress that only "unnecessary" or "impermissible" suggestion violates due process. We balanced the state's strong interest in conducting the court procedure against the dangers of misidentification, which were already mitigated by cross-examination, and held that the suggestive character of courtroom logistics was not unnecessarily suggestive.

63 F.3d at 929.

As early as 1969, this Court held, in Craig v. State, 85 Nev. 130, 451 P.2d 365 (1969), that a defendant's claim that he was prejudiced by being identified at a preliminary hearing without having had a lineup was without merit. This Court noted that the nature of the alleged prejudice was not clear. Id.

The circumstances of Gamboa's identification of Appellant were not so suggestive as to require judicial trespass into the role of the jury. The court found that the preliminary hearing identification was not unduly suggestive because Gamboa first recognized Appellant while he was sitting in the jury box with other in-custody defendants, nobody talked to her about who he was, and there was a reliable basis for the identification based on her statement to police that she saw him, could identify him, and described what he was wearing. II AA 253.

Moreover, Appellant had the opportunity to cross-examine Gamboa at the preliminary hearing about inconsistencies in her statements, and her identification of him as "the person seated at counsel table." I AA 64-66. She was also subjected to extensive cross examination at trial. VI AA 1184-VII AA 1205.

III.
THE COURT PROPERLY ALLOWED JONATHAN HARPER TO TESTIFY

It was not error to allow Harper to testify and to deny the Motion for Evidentiary Hearing since he was able to communicate his observations, his recollection could be refreshed and he was subject to cross examination.

A trial court's finding of competence will not be reversed on appeal absent a clear abuse of discretion. Lanoue v. State, 99 Nev. 305, 307, 661 P.2d 874, 874 (1983). NRS 50.015 states that "[e]very person is competent to be a witness except as otherwise provided in this title." Nowhere in the remaining sections are persons who express an inability to recall events perfectly or who provide inconsistent statements over a span of several years precluded from testifying.

This Court, in finding an eight-year-old competent, reiterated that the standard of competence is "that the child must have the capacity to receive just impressions and possess the ability to relate them truthfully." Wilson v. State, 96 Nev. 422, 423-24, 610 P.2d 184, 185 (1980). This Court reiterated that inconsistencies in testimony go to the weight to be given the evidence by the jury rather than to the question of competence. Id.

In Fox v. State, 87 Nev. 657, 569-72, 491 P.2d 35, 36-37 (1971), this Court found that a district court did not abuse its discretion in refusing to order a physical examination of the witness and allowing the witness, who admitted to consuming drugs the night before he testified, to testify. In Fox, the district court found that the witness did not appear to be under the influence of narcotics and he handled himself well on cross-examination even though counsel tried to "cross him up" and "throw rapid-fire questions" at him. Id. This is similar to the case at hand where the court found that Harper went "toe to toe" with defense counsel and that he was definitely able to relate what had happened. XI AA 2046-67.

Authority in Nevada for compelling a witness to undergo a psychiatric evaluation is centered mostly on child victims of sexual abuse. The same analysis applies here. In Abbott v. State, 122 Nev. 15, 138 P.3d 462 (2006), this Court overruled prior precedent and returned to factors set forth in Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000), reasserting that a trial judge should order an independent psychological or psychiatric examination of a witness only if there is a compelling reason for such an examination.

Appellant's reliance on Washington v. State, 96 Nev. 305, 307, 608 P.2d 1101, 1102 (1980) is misplaced. In Washington, this Court found that defense must present "compelling reasons" to require a psychiatric examination even when the victim admits to lying to the police and to committing perjury. Id. Harper never

admitted to perjury and the district court found that jurors heard all of his statements, including inconsistent ones, and should make their own decision regarding his credibility. XI AA 2047-48.

The district court, in denying Appellant's request for an evidentiary hearing, found that a witness can suffer a head injury and still be competent. II AA 276. The court found that there was no need for a psychiatric examination and the fact that Harper gave contradictory statements was a cross-examination issue. II AA 277-78. Harper was subjected to extensive cross examination. VII AA 1293-1321. Importantly, over the State's objection, the district court instructed the jury that Harper's testimony needed to be corroborated. X AA 1803, 1884.

IV.
APPELLANT WAS NOT PREJUDICED BY THE MATERIAL WITNESS WARRANT

A. The State Properly Obtained a Material Witness Warrant

Calvillo was properly the subject of a material witness warrant because he failed to appear for court despite being subpoenaed.

Appellant did not preserve this issue for appeal. Appellant objected to relevance and was concerned about Calvillo being informed of his Fifth Amendment Rights, but did not object to the material witness warrant. V AA 854-56. Failure to object during trial generally precludes appellate consideration of an issue. Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997). Despite such failure, this court

has the discretion to address an error if it was plain and affected the defendant's substantial rights. Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 23 P.3d 227, 239 (2001).

Under NRS 178.494:

> "1. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure the person's presence by subpoena, the magistrate may require bail for the person's appearance as a witness, in an amount fixed by the magistrate. If the person fails to give bail the magistrate may:
> (a) Commit the person to the custody of a peace officer pending final disposition of the proceeding in which the testimony is needed; . . ."

In Globensky v. State, 96 Nev. 113, 188, 605 P.2d 215, 219 (1980), this Court entertained a claim that holding a witness until trial on a material witness warrant placed the witness "under such pressure … that she was forced to testify against her husband." This Court rejected the contention because "our statute authorizes courts to set bail for material witnesses and allow for these witnesses to be taken into custody if bail cannot be posted[.]" Id.

The record does not present error of any degree of Calvillo testified that while he promised to appear for court, he did not, despite being subpoenaed. V AA 852.

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B. It Was not Prosecutorial Misconduct to Present Calvillo in Custody

When this Court considers a claim of prosecutorial misconduct, it engages in a two-step analysis. Valdez v. State, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008). First, the Court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id. The second prong is dependent on what type of error it was and whether or not it was preserved. Id. at 1189-90, 196 P.3d at 476-77. When an error is not preserved, this Court employs a plain-error review and asks whether the defendant demonstrated that the error "affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Id. at 1190, 196 P.3d at 477, (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). Appellant did not object to the material arrest warrant or that Calvillo was in shackles. V AA 854-56. There was no objection regarding alleged prosecutorial misconduct during Calvillo's testimony. V AA 851-896. Therefore this Court should review the second prong using a plain error analysis.

Appellant did not demonstrate that the shackles were improper, or that any misconduct occurred. The State was concerned that any attempt to obscure Calvillo's custody status could be seen as improper vouching, particularly considering Calvillo's involvement and confession. See, Lisle v. State, 113 Nev. 540, 553, 937 P.2d 473, 481 (1997). Appellant's contention that the State attempted to either make

sure Calvillo testified in a way favorable to the state or presented him in a way to bolster his credibility is belied by the record and nonsensical. Calvillo admitted that he did not want to testify. V AA 852-53. No promises or threats had been made regarding his testimony. V AA 928. He was brought to court in shackles because he was in custody, and pursuant to NRS 178.494 he was in custody until the completion of his testimony, regardless of how he testified.

Appellant's contention that the material witness warrant somehow prevented defense counsel from adequately preparing makes no sense and is belied by the record. Calvillo was noticed as a witness by the State in the Indictment filed on March 19, 2010. I AA 5. When Appellant complained to the district court that he had not had an opportunity to interview Calvillo, counsel was given the opportunity to interview him before cross-examination began. V AA 898-99, 935-37. Further, the prosecution suffered the same handicap due to Calvillo's failure to appear since only one interview had been conducted by the prosecutor that very day. V AA 926-27.

Defendant failed to object on the grounds that Calvillo was an accomplice. Defendant inquired as to what Calvillo would testify to and if he needed an attorney. V AA 854-56. Calvillo had not participated in the fight or the shooting, and the State indicated it had no intention of prosecuting him for any crimes. V AA 854-56. Calvillo was not an accomplice, and could not be prosecuted as such as the court

found the statute of limitations had run. V AA 905-07. Defense never requested a jury instruction regarding corroboration of accomplice testimony as they did with Harper. X 1803-07, 1884.

V.
IT WAS NOT PROSECUTORIAL MISCONDUCT TO PROCEED TO TRIAL WITH THE GANG ENHANCEMENT

There was no prosecutorial misconduct in proceeding to trial with a gang enhancement.

When this Court considers a claim of prosecutorial misconduct, it engages in a two-step analysis. Valdez, 124 Nev. at 1189, 196 P.3d at 476. First, the Court determines whether the prosecutor's conduct was improper, and second, if the conduct was improper, the court determines whether it warrants reversal. Id.

The prosecutor's conduct was not improper. Under the original Case No. (C226218), Appellant filed a Petition for Writ of Habeas Corpus challenging the gang enhancement on February 17, 2009. RA 77-82. The court denied this Writ on March 3, 2009 pursuant to a hearing, stating that the bar at a preliminary is slight, and authorizing the State to move forward with the gang enhancement. RA 83. Following the grand jury presentment, Defendant filed a second Petition for Writ of Habeas Corpus challenging the gang enhancement, which was denied on May 25, 2010, again authorizing the State to move forward with the gang enhancement. RA 84-100, 102. On June 4, 2010, Manuel Lopez, who was charged in connection to the

same incident, filed a Petition for Writ of Habeas Corpus challenging the gang enhancement. RA 103-12. On June 22, 2010, pursuant to a hearing, the Court denied the writ as untimely, but also ruled that the State had presented adequate evidence to move forward with the gang enhancement as the State had shown: 1) that Appellant knew he was going to get into a fight with a rival gang; 2) Puros Locos could enhance its reputation by fighting Brown Pride; 3) Appellant's fellow gang member, Garcia, requested Appellant's assistance to fight; and 4) Appellant has a large tattoo on his chest of Puros Locos. RA 114. Furthermore, the Court found that the trier of fact determines if the gang enhancement should be applied. RA 114. [4]

The gang enhancement was a viable charge until Appellant successfully argued that the State should be precluded from calling a gang expert to testify. VII AA 1361. Without the gang expert, the State could not proceed with the gang enhancement Origel-Candido v. State, 114 Nev. 378, 956 P.2d 1378 (1998) (finding that evidence the defendant was in a gang but no evidence regarding felonious activity as a common act does not constitute sufficient evidence for a gang enhancement). However, the district court found that the State had proceeded in good faith and that the loss of the enhancement was due to changes in the testimony

[4] The transcripts of the hearings regarding all three of Appellant's Petitions for Writs of Habeas Corpus are not part of the record, and thus it is presumed that the transcripts support the findings of the district court. Sasser v. State, 130 Nev. __, __, 324 P.3d 1221, 1225, footnote 8 (2014).

of witnesses and new information not available to the State when the case was charged. VII AA 1353-57.

NRS 193.168(1) states that "a criminal gang enhancement may be added for "any person who is convicted of a felony committed knowingly for the benefit of, at the direction of, or in affiliation with, a criminal gang, with the specific intent to promote, further or assist the criminal gang." Based on discovery, the State had reason to believe that Appellant shot Victor as a result of a gang dispute between Brown Pride and Puros Locos. Statements from Harper led the State to believe that Calvillo, Appellant, Lopez, Garcia, and Salvador Garcia were in Puros Locos. RA 69. At the preliminary hearing Harper testified that they were going to fight Brown Pride. RA 7. In a recorded statement on March 30, 2006, Lopez also stated that Appellant ran with Puros Locos and was a member of a gang. RA 68.

Appellant argues that because no one in the gang had actual felony convictions, that there was not a gang. However, NRS 193.168(8) defines a criminal gang as:

> As used in this section, "criminal gang" means any combination of persons, organized formally or informally, so constructed that the organization will continue its operation even if individual members enter or leave the organizations, which:
> (a) Has a common name or identifying symbol;
> (b) Has particular conduct, status and customs indicative of it; and

(c) Has as one of its common activities engaging in criminal activity punishable as a felony, other than the conduct which constitutes the primary offense.

There is no requirement that the felonious conduct must be proven by way of actual convictions, as opposed to other forms of evidence. In Origel-Candido, 114 Nev. at 383, 956 P.23 at 1381, this Court discussed the sufficiency of testimony by a gang expert regarding whether the activities the gang engaged in were felonious activities of the gang as a whole. This Court did not require that the State prove prior felony convictions in order to establish the requisite felonious activity. Id.

The prosecution brought the gang enhancement in reliance on NRS 193.168(7), which permits the admissibility of expert testimony to show "the types of crimes that are likely to be committed by a particular criminal gang . . . ." Furthermore, the prosecution had been told by the Court, not once, but twice, through the denial of Appellant's pre-trial Writ of Habeas Corpus that there was sufficient evidence to move forward with the gang enhancement. But when the court ruled that the State could not present the gang expert, the State no longer had the ability to prove the gang enhancement and thus did not proceed. VII AA 1361-62.

VI.
ANY ALLEGED ERROR WAS HARMLESS

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would

have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

Any potential error was harmless. The State presented ample evidence that Appellant committed the crimes with which he was charged. See Supra I.

CONCLUSION

Based on the foregoing, the State respectfully request that this Court affirm the Judgment of Conviction.

Dated this 7th day of October, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of 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 2003 in 14 point font of the Times New Roman style.
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)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,550 words.
3. **Finally, I hereby certify** that I have read this appellate brief, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 7th day of October, 2014.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 7th day of October, 2014. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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