

IN THE SUPREME COURT OF THE STATE OF NEVADA

Henry Aparicio, Appellant	)	Supreme Court Case No.: 80072
	)	
	)	Electronically Filed
vs.	)	Apr 10 2020 10:26 a.m.
	)	Elizabeth A. Brown
	)	Clerk of Supreme Court
The State of Nevada, Respondent,	)	APPELLANT'S APPENDIX INDEX
	)	Vol. I
	)	Pages 001-175
	)	

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Appendix Index (Chronological)

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# Register of Actions

Case No. 18F0022X

State of Nevada vs. APARICIO, HENRY

§  
§  
§  
§  
§

Case Type: Felony  
 Subtype: DUI Case  
 Date Filed: 05/21/2018  
 Location: JC Department 13

## Party Information

Defendant: APARICIO, HENRY

Lead Attorneys  
 Damian Sheets  
 Retained  
 702.598.1299(W)

State of Nevada

## Charge Information

Charges: APARICIO, HENRY	Statute	Level	Date
1. DUI of alcohol and/or controlled or prohibited substance, resulting in death [53908]	484C.430	Felony	05/16/2018
2. DUI of alcohol and/or controlled or prohibited substance, resulting in death [53908]	484C.430	Felony	05/16/2018
3. Reckless driving r/DoSBH [53896]	484B.653.6	Felony	05/16/2018
4. Reckless driving r/DoSBH [53896]	484B.653.6	Felony	05/16/2018
5. Reckless driving r/DoSBH [53896]	484B.653.6	Felony	05/16/2018
6. DUI of alcohol and/or controlled or prohibited substance, result in substantial bodily harm [53906]	484C.430	Felony	05/16/2018

## Events & Orders of the Court

**DISPOSITIONS**

06/04/2018 Disposition (Judicial Officer: Baucum, Suzan)  
 1. DUI of alcohol and/or controlled or prohibited substance, resulting in death [53908]  
     Bound Over to District Court as Charged (PC Found)  
 2. DUI of alcohol and/or controlled or prohibited substance, resulting in death [53908]  
     Bound Over to District Court as Charged (PC Found)  
 6. DUI of alcohol and/or controlled or prohibited substance, result in substantial bodily harm [53906]  
     Bound Over to District Court as Charged (PC Found)  
 3. Reckless driving r/DoSBH [53896]  
     Bound Over to District Court as Charged (PC Found)  
 4. Reckless driving r/DoSBH [53896]  
     Bound Over to District Court as Charged (PC Found)  
 5. Reckless driving r/DoSBH [53896]  
     Bound Over to District Court as Charged (PC Found)

**OTHER EVENTS AND HEARINGS**

05/16/2018 Bail Set - No Bail  
     C1: \$0 Cash/\$0 Surety Set in Court

05/16/2018 CIRACK Back Assignment JC11

05/16/2018 Bail Set - No Bail  
     C2: \$0 Cash/\$0 Surety Set in Court

05/16/2018 Bail Set - No Bail  
     C3: \$0 Cash/\$0 Surety Set in Court

05/16/2018 Standard Bail Set  
     C4: \$5000 Cash/\$5000 Surety

05/16/2018 Standard Bail Set  
     C5: \$5000 Cash/\$5000 Surety

05/16/2018 Standard Bail Set  
     C6: \$5000 Cash/\$5000 Surety

05/16/2018 Nevada Risk Assessment Tool

05/16/2018 Not Released NPR

05/16/2018 Arrest Report

05/16/2018 CIRACK Case Modified  
     Judge/BAS;

05/16/2018 CIRACK Case Modified  
     Jurisdiction/DA;

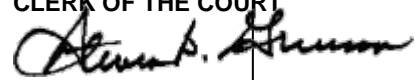
05/17/2018 Initial Appearance Justice Court (PC Review) (9:00AM) (Judicial Officer: Baucum, Suzan)  
     05/17/2018 Reset by Court to 05/17/2018  
     Result: Signing Completed

05/17/2018 Probable Cause Review Packet - Initial Appearance Court

05/17/2018 Media Request for Electronic Coverage  
     of Court proceedings received and filed

05/17/2018 Order Regarding Media Request for Electronic Coverage Filed  
 Kristen DeSilva of FOX5 KWU  
 05/17/2018 Probable Cause Found  
 05/17/2018 Bail Reset - Cash or Surety  
 Counts: 001; 002; 003; 004; 005; 006 - \$000\$000/Total Bail  
 05/17/2018 Minute Order - Department 13  
 05/18/2018 72 Hour Hearing (7:30AM) (Judicial Officer:Baucum, Suzan)  
 In Custody  
 Result: Matter Heard  
 05/18/2018 72 Hour Hearing Completed  
 05/18/2018 Counsel Confirms as Attorney of Record  
 D. Sheets, Esq.  
 05/18/2018 Motion to Continue - State  
 for 5 days - Objection by Defense - Motion Granted  
 05/18/2018 Motion by Defense for an OR Release  
 Objection by State - Motion Denied  
 05/18/2018 Oral Motion  
 by State for \$500,000 / \$500,000/Total Bail with House Arrest and Alcohol Monitoring - Objection by Defense - Motion Granted  
 05/18/2018 Bail Reset - Cash or Surety  
 Counts: 001; 002; 003; 004; 005; 006 - \$500,000.00/\$500,000.00/Total Bail  
 05/18/2018 Release Order - Court Ordered Bail AND House Arrest  
 Counts: 001; 002; 003; 004; 005; 006  
 05/18/2018 Bail Condition - SCRAM  
 Defendant to be released to Bail and House Arrest and SCRAM  
 05/18/2018 Defendant Identified as a Veteran  
 05/18/2018 Side Bar Conference Held  
 05/18/2018 Continued for Status Check on filing of Criminal Complaint  
 05/18/2018 Minute Order - Department 13  
 05/21/2018 CANCELED Status Check on Filing of Criminal Complaint (7:30AM) (Judicial Officer:Baucum, Suzan)  
 Criminal Complaint Filed  
 In Custody  
 05/21/2018 Initial Appearance (7:30AM) (Judicial Officer:Baucum, Suzan)  
 In Custody  
 Result: Matter Heard  
 05/21/2018 Criminal Complaint  
 Filed in open Court  
 05/21/2018 Initial Appearance Completed  
 Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint  
 05/21/2018 Discovery Given to Counsel in Open Court  
 05/21/2018 Plea of Not Guilty Entered  
 05/21/2018 Oral Motion  
 by Defense to Reduce Bail - Objection by State - Motion Denied  
 05/21/2018 Bail Stands - Cash or Surety  
 Counts: 001; 002; 003; 004; 005; 006 - \$500,000.00/\$500,000.00/Total Bail  
 05/21/2018 Release Order - Court Ordered Bail AND House Arrest  
 Counts: 001; 002; 003; 004; 005; 006  
 05/21/2018 Bail Condition - SCRAM  
 Defendant to be released to Bail and House Arrest and SCRAM  
 05/21/2018 Minute Order - Department 13  
 05/23/2018 Media Request for Electronic Coverage  
 of Court proceedings received and filed  
 05/23/2018 Order Regarding Media Request for Electronic Coverage Filed  
 05/24/2018 CANCELED Status Check on Filing of Criminal Complaint (7:30AM) (Judicial Officer:Baucum, Suzan)  
 Vacated  
 In Custody  
 05/24/2018 Motion for Disclosure of Non Public Information  
 FOX5 KWU  
 05/24/2018 Motion for Disclosure of Non Public Information  
 Las Vegas Review Journal  
 05/24/2018 Motion for Disclosure of Non Public Information  
 KINV  
 05/24/2018 Motion for Disclosure of Non Public Information  
 Las Vegas Sun  
 05/24/2018 Motion for Disclosure of Non Public Information  
 KLAS-TV  
 05/24/2018 Redacted paperwork approved by Judge  
 05/24/2018 Miscellaneous Filing  
 Legal Review Form  
 05/25/2018 Motion for Disclosure of Non Public Information  
 KSNV  
 05/29/2018 Media Request for Electronic Coverage  
 of Court proceedings received and filed  
 05/29/2018 Order Regarding Media Request for Electronic Coverage Filed  
 Lany Ish of KINV  
 06/04/2018 Preliminary Hearing (8:00AM) (Judicial Officer:Baucum, Suzan)  
 In Custody  
 Result: Matter Heard  
 06/04/2018 Preliminary Hearing Held  
 Motion to Exclude Witnesses by Defense - Motion Granted  
 State Witnesses: 1. Brandon MacAuley - Identifies Defendant 2. Keith Richard Sonetti - Identifies Defendant 3. Jeisel Antonio Morales 4. Kaitlynn Garduno 5. Matthew Ware - Identifies Defendant 6. Corey Staheli 7. Khadija Dellei 8. Edward Aaron Contreras, Jr. 9. Kenneth Salisbury 10. Kael Atkinson  
 State Rests. Defendant Advised of His Statutory Right to call witnesses, present evidence and/or to testify on his own behalf. Defendant understands his rights and following the advice of his defense counsel, waives his rights at preliminary hearing. Defense Rests. Motion to Dismiss by Defense - Argument Against Said Motion by State - Motion Denied  
 06/04/2018 Bound Over to District Court as Charged

0604/2018 District Court Appearance Date Set  
Jun 6 2018 10:00AM In Custody  
0604/2018 Bail Stands - Cash or Surety  
Counts: 001; 002; 003; 004; 005; 006- \$500,000.00/\$500,000.00/Total Bail  
0604/2018 Release Order- Court Ordered Bail AND House Arrest  
Counts: 001; 002; 003; 004; 005; 006  
0604/2018 Bail Condition- SCRAM  
Defendant to be released to Bail and House Arrest and SCRAM  
0604/2018 Case Closed - Bound Over  
0604/2018 Minute Order - Department 13  
0604/2018 Certificate, Bindover and Order to Appear  
0606/2018 Bind Over Receipt



1 MOT  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

14 EIGHTH JUDICIAL DISTRICT COURT  
15 CLARK COUNTY, NEVADA

16 State of Nevada, ) Case No.: C-18-332496-1  
17 Plaintiff ) Dept. No: VIII  
18 )  
19 vs. ) DEFENDANT'S MOTION IN LIMINE TO  
20 ) EXCLUDE EVIDENCE OF RETROGRADE  
21 Henry Aparicio, ) EXTRAPOLATION  
22 Defendant )  
23 )  
24 )

25 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
26 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this  
27 Defendant's Motion in Limine to Exclude Evidence of Retrograde Extrapolation.

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1 NOTICE OF HEARING

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: DEPUTY DISTRICT ATTORNEY:

4 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the  
5 above and foregoing motion on for hearing on the **16th** day of **July**, 2018, at  
6 the hour of **8am**, before the above-entitled Court, or as soon thereafter as counsel can be  
7 heard.

8  
9 DATED this 5 day of July, 2018.

10  
11 MAYFIELD GRUBER & SHEETS  
12 Respectfully Submitted By:

13 /s/ Damian Sheets  
14 DAMIAN SHEETS, ESQ.  
15 Attorney for Defendant  
16  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 Defendant Henry Aparicio is charged with Driving Under the Influence of Alcohol  
4 Resulting in Death, as well as a litany of similar lesser included offenses. He pled Not Guilty  
5 to the charges on or about June 6, 2018 and invoked his right to a speedy trial. Calendar  
6 Call is currently scheduled for August 8, 2018, with trial on August 13, 2018.  
7

8 On or about June 27, 2018 the State filed a Supplemental Notice of Witness and/or  
9 Expert Witness List, and added Mr. Raymond C. Kelly as an expert to testify on many topics,  
10 including retrograde extrapolation. As part of its discovery disclosures, the State also  
11 provided a report by Dr. Kelly that attempts to use retrograde extrapolation to establish  
12 Mr. Aparicio's blood alcohol content at the time of the accident (two blood samples were  
13 taken, however they are both outside of two hours).  
14

15 The law is clear that retrograde extrapolation is not appropriate in this case. The  
16 landmark Nevada case on point, *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 936, 267 P.3d  
17 777, 783 (2011), held that retrograde extrapolation is not admissible unless the calculation  
18 takes into account the following factors:  
19

20 We agree that achieving a reliable retrograde extrapolation calculation  
21 requires consideration of a variety of factors. The following factors are  
22 relevant to achieving a sufficiently reliable retrograde extrapolation  
23 calculation: (1) gender, (2) weight, (3) age, (4) height, (5) mental state,  
24 (6) the type and amount of food in the stomach, (7) type and amount of  
25 alcohol consumed, (8) when the last alcoholic drink was consumed, (9)  
26 drinking pattern at the relevant time, (10) elapsed time between the  
27 first and last drink consumed, (11) time elapsed between the last drink  
28 consumed and the blood draw, (12) the number of samples taken, (13)  
the length of time between the offense and the blood draws, (14) the  
average alcohol absorption rate, and (15) the average elimination rate.  
We observe, as the *Mata* court did, that not every personal fact about

1 the defendant must be known to construct a reliable extrapolation, 46  
2 S.W.3d at 916-17, but rather those factors must be balanced. *Id.*

3 In this case, the State's "expert" in retrograde extrapolation relied on "Mr. Aparicio's  
4 body weight and gender" plus his two BAC test results taken outside of two hours. The  
5 result took into consideration only two of the fifteen factors articulated by the Nevada  
6 Supreme Court. Even presumably fixed values, such as "the average elimination rate"  
7 (factor number 15) was not used, as the report uses an improper linear elimination rate  
8 from guidelines published in 1994 for use in extrapolation from single-sample cases;<sup>1</sup> not  
9 only are virtually none of the individual factors taken into consideration, which is  
10 "required" per *Armstrong*, but even the known variables are derived from extremely  
11 outdated sources.  
12

13  
14 Furthermore, it does not take an expert to realize the serious flaw in Dr. Kelly's  
15 ultimate result. In addition to using an improper linear elimination model, the rate of  
16 dissipation was calculated not by using fixed and known values, but actually Mr. Aparicio's  
17 two existing BAC measurements;<sup>2</sup> Dr. Kelly simply took the two existing inadmissible BAC  
18 results, calculated the difference between those two values, and used *that* to extrapolate  
19 into a BAC value which purportedly reflects Mr. Aparicio's BAC at the time of the accident.  
20 This is, from a scientific perspective, nonsensical.  
21  
22  
23

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24  
25 <sup>1</sup> Gullberg, RG, and Jones, AW, "Guidelines for estimating the amount of alcohol consumed from a single  
26 measurement of blood alcohol concentration: re-evaluation of Widmark's equation," *Forensic Sci. Int'l*, 69:  
27 119-130, 1994.

28 <sup>2</sup> In his report, Mr. Kelly writes, "In making the calculation, I utilized the alcohol metabolic rate derived from  
the difference between his two measured BAC values obtained one hour apart." He then concedes that the  
difference between these two values, which formed the basis for his extrapolated result, is actually almost  
double the "mean value for males in the population" that would typically be used.

1 Mr. Aparicio's two BAC results, which reflect a specific dissipation rate for that hour  
2 only, cannot be used as a basis for linear extrapolation of the entire period of alcoholic  
3 consumption. For example, if Mr. Aparicio had two different drinks with varying alcohol  
4 contents or drank more than exactly one drink per hour, a linear regression model  
5 (without taking into account any of the factors articulated in *Armstrong*) is fundamentally  
6 unreliable.  
7

8 Not only is it unreliable, it is *precisely why* the *Armstrong* case exists – a linear  
9 regression model does not work because of the sheer number of variables, fifteen at a  
10 minimum, that would affect the ultimate result. Of those fifteen listed by the Supreme  
11 Court, only Mr. Aparicio's body weight and gender were taken into consideration. That is  
12 insufficient as a matter of law, and therefore the Defense respectfully requests this Court  
13 preclude any reference to or results of retrograde extrapolation in this case.  
14  
15

16 DATED this 5 day of July, 2018.

17 By:  
18 MAYFIELD GRUBER & SHEETS

19 By:  /s/ Damian Sheets  
20 Damian Sheets, Esq.  
21 Nevada Bar No. 10755  
22 726 S. Casino Center Blvd.  
23 Las Vegas, Nevada 89101  
24  
25  
26  
27  
28

1 CERTIFICATE OF SERVICE

2

3 I HEREBY CERTIFY that on the 5 day of July, 2018 I served a true and correct copy of

4 the foregoing Defendant's Motion in Limine, upon each of the parties by electronic service

5 through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to

6 N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the United States

7 mail, Postage Pre-Paid, addressed as follows:

8 Clark County District Attorney's Office

9 200 Lewis Ave., 3rd Floor

10 Las Vegas, NV 89155

11 motions@clarkcountyda.com

12 pdmotions@clarkcountyda.com

13 /s/ Kelsey Bernstein

14 An Employee of Mayfield Gruber & Sheets

15

16

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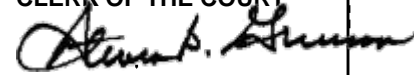
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1 **RSPN**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CHARLES MARTINOVSKY  
6 Chief Deputy District Attorney  
7 Nevada Bar #007439  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-18-332496-1

12 HENRY APARICIO, aka,  
13 Henry Biderman Aparicio, #6069038

DEPT NO: VIII

14 Defendant.

15 **STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE EVIDENCE OF**  
16 **RETROGRADE EXTRAPOLATION**

17 DATE OF HEARING: JULY 16, 2018  
18 TIME OF HEARING: 8:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
20 District Attorney, through CHARLES MARTINOVSKY, Chief Deputy District Attorney, and  
21 hereby submits the attached Points and Authorities in Response to Defendant's Motion to  
22 Exclude Evidence of Retrograde Extrapolation.

23 This Response is made and based upon all the papers and pleadings on file herein, the  
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
25 deemed necessary by this Honorable Court.

26 ///

27 ///

28 ///

1 FACTS.

2 On May 15, 2018, the Defendant and his girlfriend, Morgan Hurley, entered Dave and  
3 Buster's restaurant at about 5:30 P.M. Video evidence shows the two drinking inside the bar.  
4 Receipts from the tab indicate that the TWO (2) ordered the first drink at 5:37 P.M. The video  
5 shows that Morgan was drinking a Caribbean Lit, and the Defendant was drinking shots of  
6 Patron Silver. The bar tab indicates that by 7:21 P.M., the pair had ordered TEN (10) shots of  
7 Patron Silver, THREE (3) Caribbean Lit Drinks, and they had not ordered any food. Video  
8 evidence shows the pair then entering Casa Del Matador, also located in Downtown  
9 Summerlin, shortly after they had left Dave and Buster's. The Defendant worked at this  
10 establishment at the time. The tab from Casa Del Matador indicates that the pair consumed  
11 SIX (6) more shots of Tequila. The pair also ordered Goat Cheese Jalapeno, but they did not  
12 order any other food. The tab closed at 8:52 P.M., and video evidence shows the Defendant  
13 and Morgan stumbling out of the Casa Del Matador shortly after paying the tab. The video  
14 evidence also shows a bar tender helping the Defendant out of the bar and then returning to  
15 the bar. Shortly after this, the same bartender left the bar to speak with the Defendant as he  
16 entered the driver's side of the red Mercedes involved in the collision.

17 At about 9:08 P.M., the Defendant crashed into the back of the victims' car when they were  
18 stopped facing East at a red light on Sahara and Hualapai. The speedometer on the Defendant's  
19 car was stuck at 100 mph. The collision accelerated the victim's car from zero to over 50 mph.  
20 The collision killed both occupants. Body camera evidence from Officer Sonetti from shortly  
21 after the collision shows the Defendant sitting on the curb just outside the red Mercedes, crying  
22 and pleading with the officer to save the passenger of the red Mercedes. The body camera  
23 also shows that Morgan Hurley was unconscious in the passenger seat of the red Mercedes  
24 which had just crashed into the victims' car.

25 Police obtained a search warrant, and got one blood sample from the Defendant at 1:47 and  
26 another at 2:47. Chemical analysis indicates the Defendant's BAC was .204 at the first draw,  
27 and .178 at the second.

28 Dr. Ray Kelly reviewed the reports and evidence from the case. He calculated that the

1 Defendant's BAC was over .32 at the time of driving. Dr. Kelly based his conclusions on the  
2 Defendant's height and weight, as well as the other evidence in the case such as the driving  
3 pattern, the consumption pattern at the bar, and the Defendant's behavior at the scene and his  
4 performance on the HGN.

5  
6 **ARGUMENT.**

7 State v. Dist. Ct (Armstrong), 127 Nev. 927 (2011) does not support the Defendant's  
8 argument. First of all, the court did not establish a rule of law that all courts must exclude  
9 retrograde evidence whenever the blood draw or draws occur beyond TWO (2) hours from the  
10 time of driving. On the contrary, the Supreme Court merely held that the District Court did not  
11 abuse its discretion when it excluded the evidence of retrograde extrapolation. The court  
12 stated, "Under the circumstances presented, we cannot say that the District Court manifestly  
13 abused or arbitrarily or capriciously exercised its discretion, that is, applied a clearly erroneous  
14 interpretation of the law or one not based on reason or contrary to the evidence or established  
15 rules of law." Armstrong, at 937. Hence, this court has its own discretion to admit evidence of  
16 retrograde extrapolation as it sees fit.

17 Second, the facts of this case present sufficient evidence upon which to base a retrograde  
18 extrapolation. In Armstrong, the State's expert knew only that the Defendant consumed TWO  
19 (2) beers between 5 P.M. and 10 P.M. and weighed 212 pounds. Crucially, in Armstrong police  
20 obtained only one blood sample. The court stated, "Here, significant personal characteristics,  
21 such as the amount of food, if any, in Armstrong's stomach – a factor Armstrong's expert  
22 testified was the most important and the State's expert acknowledged significantly affects  
23 alcohol absorption – were unknown. And the single blood draw makes it difficult to determine  
24 whether Armstrong was absorbing or eliminating alcohol at the time of the blood draw. The  
25 admission of retrograde extrapolation evidence when a single blood draw was taken more than  
26 two (2) hours after the accident and the extrapolation calculation is insufficiently tethered to  
27 individual factors necessary to achieve a reliable calculation potentially invites the jury to  
28 determine Armstrong's guilt based on emotion or an improper ground – that the Defendant

1 had a high blood alcohol level several hours later – rather than a meaningful evaluation of the  
2 evidence.” Armstrong, at 937.

3 In contrast to the facts of Armstrong, the State possesses lots of information upon which to  
4 base the retrograde extrapolation. First and foremost, the state has TWO (2) blood draws taken  
5 ONE (1) hour apart which clearly demonstrate that the Defendant was eliminating alcohol at  
6 the time of the draw. Second, the state knows the Defendant height and weight and age. Third,  
7 the State possesses video and receipts from the bars where the Defendant was drinking which  
8 indicate how much he drank and ate from 5:37 PM until 8:52 PM, TWENTY (20) minutes  
9 before the collision. See Exhibits 1 and 2. Fourth, the state has body camera evidence which  
10 indicates the Defendant’s demeanor right after the collision.

11 Furthermore, Anderson v. State, 109 Nev. 1129 (1994), clearly holds that evidence of  
12 retrograde extrapolation is clearly admissible if the State possesses TWO (2) blood draws  
13 without more. In that case, the state charged the Defendant with DUI Death. The State  
14 presented retrograde extrapolation evidence to the jury. Dan Berkabile testified that he relied  
15 upon a standard metabolic rate of .02 per hour, and TWO (2) blood samples to estimate that  
16 the Defendant’s BAC was over the legal limit at the time he was driving. Anderson, at 1132.

17 After the jury convicted the Defendant, he challenged the verdict claiming the evidence  
18 presented did not support the result. The Court rejected this claim. The court stated,  
19 “Furthermore, Dan Berkabile, a forensic chemist, testified that after testing the blood samples  
20 taken on the night in question, he extrapolated backwards to estimate Anderson’s blood  
21 alcohol level at the time of the accident; he estimate Anderson’s blood alcohol level to have  
22 been 0.128.” Anderson, 1138.

### 23 CONCLUSION

24 The Court should reject the Defendant’s arguments. Armstrong does not support the  
25 Defendant’s position. At best the Court holds that the District Court did not abuse its discretion  
26 when it excluded evidence of retrograde extrapolation. This is hardly a ringing endorsement  
27 of the holding nor does it establish a rule of law which all courts must follow. Second, the  
28 State knows with great precision how much the Defendant ate and drank from 5:37 PM until



1 8:52 PM, TWENTY (20) minutes before he killed the victims. The State obtained TWO (2)  
2 blood draws, ONE (1) hour apart, and knows the Defendant's height and weight. Also,  
3 Anderson v. State, 109 Nev. 1129 (1994), basically holds that the state can admit retrograde  
4 extrapolation based on a standard metabolic rate so long as the State has two blood draws one  
5 hour apart.

6 DATED this 11<sup>th</sup> day of July, 2018.

7 Respectfully submitted,

8 STEVEN B. WOLFSON  
9 Clark County District Attorney  
Nevada Bar #001565

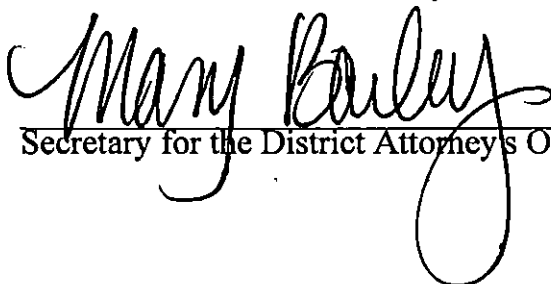
10 BY 

11 CHARLES MARTINOVSKY  
12 Chief Deputy District Attorney  
13 Nevada Bar #007439

14 CERTIFICATE OF ELECTRONIC FILING

15 I hereby certify that service of State's Response to Defendant's Motion to Exclude the  
16 Evidence of Retrograde Extrapolation was made this day of July, 2018, by Electronic Filing  
17 to:

18 DAMIEN SHEETS, ESQ.  
19 EMAIL: dsheets@defendingnevada.com

20   
21 Secretary for the District Attorney's Office  
22  
23  
24  
25  
26  
27

28 17F05727X/CM/mlb/vcu

Casa Del Matador  
1770 Festival Plaza Dr  
Suite 109  
702-228-2766

180515-4422

Server: Asa 05/15/2018  
8/1 8:52 PM  
Guests: 1  
#20096

Reprint #: 3

2 Casamigos Reposado (@12.00)	24.00
Don Julio 1942	22.00
Dos Artes Extra Anejo	23.00
Goat Cheese Jalapeno	11.00

Top Shelf Tuesday	-6.00
Top Shelf Tuesday	-6.00
Top Shelf Tuesday	-22.50

Subtotal	45.50
Tax	3.75

Total 49.25

Visa #XXXXXXXXXXXX4991 37.35

Tip 10.00

Total 47.35

Auth:000328

Cash 11.90

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[@matador\\_restaurants](http://www.thanx.com/thematador)

--- Check Closed ---

**EXHIBIT "1"**

Bates 015



180515-4422

May 24, 2018

Detective Atkinson

Las Vegas Metropolitan Police Department  
Traffic Bureau/Fatal Detail  
5880 Cameron Street  
Las Vegas, NV 89118

Detective Atkinson:

Please find the enclosed guest checks and flash drive pertaining to the activities of identified suspects in your investigation. The flash drive contains video of the front entry from the time entered until the time they left. The bar camera contains all interactions with the bartender and the Winner's Circle camera shows the redemption of coupons for the ball you see them leave with. If you have any questions, you may contact me at 469-323-5982 or 214-904-2225.

Sincerely,

*James H. Brussow*  
James H. Brussow  
Director of Security  
Dave & Buster's Inc.

Check Detail

Check	Table	Check Opened	Minutes	Guests	Reference Info	Location	Employee
9127		5/15/2018 5:30 PM	1.83	0		Summerlin	Emilymarie Javelosa
		5/15 5:31 PM	1		RCH \$20 PCARD	20.00	Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:31 PM	1		SUPER CHARGE 20	3.00	Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:31 PM	1		eTicket Selected		Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:31 PM	1		RCH \$20 PCARD	20.00	Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:31 PM	1		SUPER CHARGE 20	3.00	Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:31 PM	1		eTicket Selected		Front Desk
		5/15 5:31 PM			191598704		Front Desk
		5/15 5:32 PM			G105-05_20FOR20/94	(20.00)	Front Desk
		5/15 5:32 PM			Visa	26.00	Front Desk
		5/15 5:32 PM			*****7962		Front Desk
					Sub Total	26.00	
					Tax	0.00	
					Service Charge	0.00	
					Check Total	26.00	

Check Detail

Check	Table	Check Opened	Minutes	Guests	Reference Info.	Location	Employee
5828	811	5/15/2018 5:37 PM	6.98	0		Summerlin	John Raniola
		5/15 6:37 PM	1		CARIBBEAN LIT	5.00 Viewpoint Bar	John Raniola
		5/15 6:37 PM	1		PATRON SILVER	5.00 Viewpoint Bar	John Raniola
		5/15 6:37 PM	1		dub soda	Viewpoint Bar	John Raniola
		5/15 5:40 PM	1		PATRON SILVER	5.00 Viewpoint Bar	John Raniola
		5/15 6:40 PM	1		dub soda	Viewpoint Bar	John Raniola
		5/15 5:43 PM			Visa	26.24 Viewpoint Bar	John Raniola
		5/15 5:43 PM			\$ Charged Tip	10.00 Viewpoint Bar	John Raniola
		5/15 5:43 PM			*****7982	Viewpoint Bar	John Raniola
					Sub Total	15.00	
					Tax	1.24	
					Service Charge	10.00	
					Check Total	26.24	

**Check Detail**

Check	Table	Check Opened	Minutes	Guests	Reference Info	Location	Employee
5835	810	5/15/2018 6:08 PM	43.73	0	morgan hurley	Summerlin	John Raniola
		5/15 6:08 PM	1	PATRON SILVER	5.00	Viewpoint Bar	John Raniola
		5/15 6:08 PM	1	club soda		Viewpoint Bar	John Raniola
		5/15 6:08 PM	1	CARIBEAN LIT	5.00	Viewpoint Bar	John Raniola
		5/15 6:12 PM	1	PATRON SILVER	5.00	Viewpoint Bar	John Raniola
		5/15 6:12 PM	1	club soda		Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	CARIBEAN LIT	5.00	Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	PATRON SILVER	5.00	Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	club soda		Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	PATRON SILVER	5.00	Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	up		Viewpoint Bar	John Raniola
		5/15 6:50 PM	1	PATRON SILVER	5.00	Viewpoint Bar	John Raniola
		5/15 8:50 PM	1	up		Viewpoint Bar	John Raniola
		5/15 6:51 PM		Visa	37.89	Viewpoint Bar	John Raniola
		5/15 6:51 PM		*****7982		Viewpoint Bar	John Raniola
				Sub Total	35.00		
				Tax	2.89		
				Service Charge	0.00		
				Check Total	37.89		

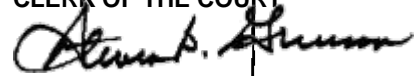
### Check Detail

Check	Table	Check Opened	Minutes	Guests	Reference:Info	Location	Employee
4630		5/15/2018 6:38 PM	0.02	1		Summerlin	Kiosk 01
		5/15 6:38 PM	1		KIOSK RCH \$25 PC	25.00 Kiosk	Kiosk 01
		5/15 6:38 PM			191598704	Kiosk	Kiosk 01
		5/15 6:38 PM	1		KIOSK SUPER 25	4.00 Kiosk	Kiosk 01
		5/15 6:38 PM			191598704	Kiosk	Kiosk 01
		5/15 6:38 PM			Visa	29.00 Kiosk	Kiosk 01
		5/15 6:38 PM			*****4991	Kiosk	Kiosk 01
		5/15 6:38 PM			191598704	Kiosk	Kiosk 01
					Sub Total	29.00	
					Tax	0.00	
					Service Charge	0.00	
					Check Total	29.00	

### Check Detail

Check	Table	Check Opened	Minutes	Guests	Reference Info	Location	Employee
6647	816	5/15/2018 7:14 PM	6.60	0		Summerlin	John Raniola
		5/15 7:15 PM	1	PATRON SILVER	9.99	Viewpoint Bar	John Raniola
		5/15 7:15 PM	1	club soda		Viewpoint Bar	John Raniola
		5/15 7:15 PM	1	PATRON SILVER	9.99	Viewpoint Bar	John Raniola
		5/15 7:16 PM	1	up		Viewpoint Bar	John Raniola
		5/15 7:15 PM	1	PATRON SILVER	9.99	Viewpoint Bar	John Raniola
		5/15 7:15 PM	1	up		Viewpoint Bar	John Raniola
		5/15 7:21 PM		Visa	40.44	Viewpoint Bar	John Raniola
		5/15 7:21 PM		\$ Charged Tip	8.00	Viewpoint Bar	John Raniola
		5/15 7:21 PM		*****4991		Viewpoint Bar	John Raniola
				Sub Total	29.97		
				Tax	2.47		
				Service Charge	8.00		
				Check Total	40.44		





1 PET  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant-Petitioner  
13 Henry Aparicio

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

11 The State of Nevada, ) Case No.: C-18-332496-1  
12 Plaintiff-Respondent, ) Dept. No: VIII  
13 vs. )  
14 Henry Aparicio, ) **DEFENDANT'S PETITION FOR WRIT OF**  
15 Defendant-Petitioner. ) **HABEAS CORPUS (PRE-TRIAL)**  
16 )  
17 )

18 COMES NOW, Petitioner Henry Aparicio, by and through his attorney of record,  
19 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this  
20 Defendant's Pre-Trial Petition for Writ of Habeas Corpus.

21 This Petition is made and based upon all the papers and pleadings on file herein, the  
22 attached points and authorities in support hereof, and oral argument at the time of hearing,  
23 if deemed necessary by this Honorable Court.

24 ///

25 ///

1 **NOTICE OF MOTION**

2  
3 TO: STATE OF NEVADA, Plaintiff,  
4 TO: CLARK COUNTY DISTRICT ATTORNEY

5  
6 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will  
7 bring the forgoing Petition on for hearing before this court on the 6th day of  
8 August 2018, at the hour of 8:00 a. m, or as soon thereafter as counsel may  
9 be heard.

10 DATED this 20 day of July, 2018.

11 MAYFIELD GRUBER & SHEETS

12 Respectfully Submitted By:

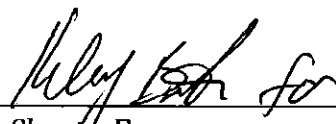
13 /s/ Damian Sheets  
14 DAMIAN SHEETS, ESQ.  
15 Attorney for Defendant  
16  
17  
18  
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26  
27  
28

1 **PETITION FOR WRIT OF HABEAS CORPUS**

2  
3 The Petition of Henry Aparicio (hereinafter "Petitioner") submitted by Damian  
4 Sheets, Esq., retained counsel and attorney of record for the above-captioned Petitioner,  
5 respectfully shows:

- 6 1. That Counsel for Petitioner is a duly qualified, practicing and licensed  
7 attorney in the State of Nevada;  
8  
9 2. That Petitioner's restrained of his liberty via custodial restraint within the  
10 state of Nevada as a result of the instant criminal charges;  
11  
12 3. That the restraint of said Petitioner is unlawful and violates Petitioner's  
13 rights in the Nevada and United States Constitutions for lack of probable  
14 cause;  
15  
16 4. That Counsel for Petitioner is personally authorized by the Petitioner to  
17 commence this action;  
18  
19 5. Petitioner hereby waives his right under Nevada law to a trial within 60  
20 days; and  
21  
22 6. That this is a first Petition for Writ of Habeas Corpus heretofore filed on  
23 behalf of the Petitioner in this particular case.

24 DATED this 20 day of July, 2018.

25 By:   
26 Damian Sheets, Esq.  
27 Nevada Bar No. 10755  
28 726 S. Casino Center Blvd.  
Las Vegas, Nevada 89101

**DECLARATION OF COUNSEL**

1. I am an attorney duly-licensed to practice law in the State of Nevada;
2. I have been retained by the Petitioner to represent him, in the instant matter;
3. I am familiar with the facts and circumstances of this case;
4. I am the attorney of record for the Petitioner in the above matter;
5. I have read the foregoing Petition, know the contents thereof, and that the same is true of my own knowledge, except for those matters therein stated on information and belief, and, as to those matters, I believe them to be true;
6. Petitioner, Henry Aparicio, personally authorized me to commence this action for a Petition for Writ of Habeas Corpus; and
7. I declare under penalty of perjury pursuant to Nevada Statute that the foregoing is true and correct to the best of my knowledge.

DATED this 20 day of July, 2018.

  
DAMIAN SHEETS, ESQ.

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**TABLE OF AUTHORITIES**

**CASES**

*Anderson v. State*, 109 Nev. 1129, 865 P.2d 318 (1993).....20

*Eureka Cty. Bank Habeas Corpus Cases*, 35 Nev. 80 (1912).....9

*Goldsmith v. Sheriff of Lyon Cty.*, 85 Nev. 295, 454 P.2d 86 (1969).....21

*Grace v. Eighth Jud. Dist. Ct.*, 132 Nev. Adv. Op. 51, 375 P.3d 1017 (2016).....21, 22

*Patterson v. State*, 298 P.3d 433 (Nev. 2013).....22

*Pellegrini v. State*, 117 Nev. 860, 34 P.3d 519 (2001).....9

*Rogers v. State*, 105 Nev. 230, 773 P.2d 1226 (1989).....11

*Sheriff v. Burcham*, 124 Nev. 1247, 198 P.3d 326 (2008).....20, 21

*State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 267 P.3d 777 (2011) .....18, 19, 20, 21

**OTHER SOURCES**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. Statement of the Case**

4 Defendant Henry Aparicio is charged with Driving Under the Influence of Alcohol  
5 Resulting in Death, as well as a litany of similar lesser included offenses, as a result of a  
6 fatal automobile collision. He pled Not Guilty to the charges on or about June 6, 2018 and  
7 invoked his right to a speedy trial. Calendar Call is currently scheduled for August 8, 2018,  
8 with trial on August 13, 2018.  
9

10 Transcripts of the preliminary hearing were filed on July 9, 2018. The instant  
11 Petition follows, averring that Petitioner is being held without probable cause in violation  
12 of the Nevada Constitution, and therefore the case must be dismissed as a matter of law.  
13

14 **II. Statement of the Facts**

15  
16 This Writ is comprised of only two issues: one is the introduction of non-  
17 extrapolated blood alcohol results that were taken outside of two hours; and the other is  
18 the distinct lack of evidence presented that could place Mr. Aparicio in actual physical  
19 control of the vehicle. Notably, *not a single testifying witness, including those who directly*  
20 *witnessed the crash, could place Mr. Aparicio behind the wheel. Without even a scintilla of*  
21 *evidence to establish that Mr. Aparicio was ever in actual physical control of a vehicle, it*  
22 *was error as a matter of law to find sufficient probable cause to bind the case over to*  
23 *District Court.*  
24

25  
26 While the standard in a preliminary hearing is only slight or marginal evidence, by  
27 necessity that includes slight or marginal evidence of each element necessary to establish a  
28

1 criminal act. In this case, the record during the preliminary hearing was entirely devoid of  
2 any evidence to establish that Mr. Aparicio was in actual physical control of a vehicle, a  
3 well-known predicate requirement to all claims of Driving Under the Influence.  
4 Additionally, the State was permitted to introduce the results of a blood draw taken over  
5 four hours after the accident, which was similarly erroneous under controlling Nevada law.  
6

7 In the instant case, a two-car collision with a red Mercedes Benz and a white Toyota  
8 Prius occurred on May 15, 2018 around 9:00pm (Preliminary Hearing Transcript, 7).  
9 Several people witnessed the collision; Mr. Aparicio is alleged to have driven the red  
10 vehicle, and the two occupants in the white vehicle were found to be deceased before  
11 emergency personnel arrived (73). However, according to the preliminary hearing  
12 testimony, nobody could identify Mr. Aparicio as the driver, and significantly, Mr. Aparicio  
13 was found *outside* the vehicle on the back *passenger* side, sitting on the curb (32). A female  
14 occupant of the red vehicle was found hunched over on the floor of the passenger seat (31).  
15 Both the female and Mr. Aparicio were transported to University Medical Center, at which  
16 time an officer from the Las Vegas Metropolitan Police Department conducted the  
17 horizontal gaze nystagmus test while Mr. Aparicio was strapped to the hospital bed in a  
18 trauma ward waiting area (60).  
19  
20  
21

22 When Mr. Aparicio was released from UMC, he was transported to the Clark County  
23 Detention Center. Two blood draws occurred one hour apart, with the first being at  
24 1:47a.m., roughly 4 hours and 39 minutes after the collision (45; 122).  
25  
26  
27  
28



1       **III.     Standard of Writ of Habeas Corpus**

2  
3       “The right to seek the remedy of habeas corpus is protected by the Nevada  
4 Constitution.” *Pellegrini v. State*, 117 Nev. 860, 870, 34 P.3d 519, 526 (2001). An individual  
5 may petition a court of competent jurisdiction to challenge the legality of their custody or  
6 incarceration via a Petition for Writ of Habeas Corpus. “The judge before whom a writ of  
7 habeas corpus is returned shall proceed to hear and examine the return, and in a summary  
8 way to hear such allegation and proof as may be produced against such imprisonment or  
9 detention or in favor of the same and to dispose of such party as the justice of the case may  
10 require.” *Eureka Cty. Bank Habeas Corpus Cases*, 35 Nev. 80, 100 (1912).

11  
12       Pursuant to NRS 34.360, “Every person unlawfully committed, detained, confined  
13 or restrained of his or her liberty, under any pretense whatever, may prosecute a writ of  
14 habeas corpus to inquire into the cause of such imprisonment or restraint.” Additionally,  
15 NRS 34.530 states that “Any person who is imprisoned or detained in custody on any  
16 criminal charge before conviction for want of bail may file a petition for a writ of habeas  
17 corpus for the purpose of giving bail, upon averring that fact in the person’s petition,  
18 without alleging that the person is illegally confined.”  
19  
20

21       Pre-trial Petitions are permitted within 21 days of the Defendant’s first appearance  
22 in District Court or 21 days after the filing of the transcript of the defendant’s preliminary  
23 hearing; this time may be extended by the Court upon a showing of good cause. *See* NRS  
24 34.700. The express purpose of a pre-trial Petition is to challenge a defendant’s detention  
25 “based on alleged lack of probable cause or otherwise challenging the court’s right or  
26 jurisdiction to proceed to the trial of a criminal charge.” *Id.* A court should grant a Petition if  
27  
28

1 it appears the petitioner "has been committed or indicted on a criminal charge, including a  
2 misdemeanor... or any ordinance adopted by a city or county to regulate traffic, without  
3 reasonable or probable cause." NRS 34.500(8).  
4

5  
6 **ARGUMENT**

7  
8 **I. MR. APARICIO WAS NOT SHOWN BY SLIGHT OR MARGINAL EVIDENCE TO  
9 HAVE BEEN DRIVING OR IN ACTUAL PHYSICAL CONTROL OF A VEHICLE**

10 As stated above, one of the two issues raised here is that Mr. Aparicio was never  
11 shown, even by slight or marginal evidence, to have ever been in actual physical control of  
12 the vehicle involved in the subject collision. Two vehicles were involved, which for ease of  
13 reference throughout the preliminary hearing were referred to as the "red car" (which Mr.  
14 Aparicio is alleged to have driven) and the "white car." There can be no question that being  
15 in actual physical control of a vehicle is a necessary element of a DUI charge:  
16

- 17  
18 1. It is unlawful for any person who:  
19 (a) Is under the influence of intoxicating liquor;  
20 (b) Has a concentration of alcohol of 0.08 or more in his or her  
21 blood or breath; or  
22 (c) Is found by measurement within 2 hours after driving or being  
in actual physical control of a vehicle to have a concentration of alcohol  
of 0.08 or more in his or her blood or breath,

23 **to drive or be in actual physical control of a vehicle** on a highway or  
24 on premises to which the public has access. NRS 484C.110 (emphasis  
added).

25 If there is no evidence presented that a defendant was ever driving or in actual  
26 physical control of a vehicle, by law there cannot be probable cause that he committed a  
27  
28

1 DUI offense because a material element of the charge cannot be established. *Rogers v. State*,  
2 105 Nev. 230, 232, 773 P.2d 1226, 1227 (1989). By definition, the complete absence of  
3 evidence would preclude a proper finding of slight or marginal evidence required in order  
4 to bind over a defendant answer the charges in District Court. If the State did not present  
5 slight or marginal evidence to support a material element of the charges, then matter  
6 should have been dismissed.  
7

8 Although it is difficult to fully articulate the absence or omission of a particular  
9 point, in this case each witness who testified at Mr. Aparicio's preliminary hearing also  
10 stated under oath that they could not identify the driver of the vehicle. The salient facts and  
11 admissions for each witness are as follows:  
12

13  
14 Witness 1: Brandon McCauley

- 15 • Lay witness, stopped at a red light when accident occurred directly in front of him  
16 (Preliminary Hearing Transcripts, hereinafter "PHT," 11: 18);  
17 • Was not able to turn around to return to the scene until 10 minutes after collision  
18 (PHT 15: 3);  
19 • "Q: Okay. And when you that car drove past you, you didn't see who was behind the  
20 wheel of the car - and I'm referring to the red car - isn't that correct?  
21 A: That is correct.  
22 Q: And you didn't see who was operating the vehicle?  
23 A: That's correct.  
24 Q: Okay. And when you returned you didn't see anybody behind the wheel of that  
25 vehicle; isn't that correct?  
26 A: That's correct" (PHT 21: 17).

27 Witness 2: Keith Richard Sonetti

- 28 • Police Officer with Las Vegas Metropolitan Police Department, en route to an  
unrelated call when he came across the accident scene (PHT 25: 1);  
• When he approached the red vehicle, Mr. Aparicio was on the back passenger side  
sitting on the curb (PHT 28: 23);

- 1 • "Q: Officer, you have no personal knowledge of who was operating that motor  
2 vehicle; isn't that right?

3 A: No, sir.

4 Q: Is that incorrect or is that correct?

5 A: That's correct, sir" (PHT 34: 15).

6 Witness 3: Jeisel Morales

- 7 • Emergency medical technician, directly witnessed the collision occur (PHT 37: 19);  
8 • "Q: Is it fair to say that your attention was really solely focused on that white car;  
9 isn't that correct?

10 A: Yes.

11 Q: Okay. So you didn't actually see who was behind the wheel of that red car prior to  
12 the collision; isn't that correct?

13 A: Like I said, it initially -

14 Q: Isn't that correct?

15 A: Yes" (PHT 39: 18).

16 Witness 4: Katlynn Garduno

- 17 • Medical technician at the Clark County Detention Center (PHT 41: 25);  
18 • Conducted Mr. Aparicio's blood draw at CCDC after he was released from the  
19 hospital (PHT 43: 23);  
20 • "Q: Okay. And did you hear the officer talking to him about anything that night?

21 A: The only thing that I heard was that he had stated to the officer - okay. I'm sorry.  
22 He'd state to the officer that he was not driving multiple different times and then  
23 turn around and ask the officer did I run the red light. That's the only conversation  
24 he really had that I can remember.

25 Q: Okay. And you don't know what the officers had told him prior to taking him in,  
26 correct?

27 A: No.

28 Q: So you don't know if the officers had said, hey, you were driving the vehicle; isn't  
that right?

A: I have no idea.

...

Q: Okay. And was that one officer or more than one officer?

A: It was two officers.

1 Q: Okay. And they specifically told you that they were trying to prove that he was  
2 operating the vehicle, correct?

3 A: Correct" (PHT 48: 3; 50: 15).

4 Witness 5: Matthew Ware

5 • Police Officer with Las Vegas Metropolitan Police Department, first made contact  
6 with Mr. Aparicio in a waiting room at UMC Trauma (PHT 52: 6).

7 • "Q [Direct Examination]: Did he make any spontaneous statements about what  
8 happened?

9 A: He did.

10 Q: What did he say?

11 A: He stated that I killed two people, kind of like it was a question. He kind of said it  
12 like he was asking a question.

13 MR. MARTINOVSKY: All right. No further questions.

14 Q: [Cross Examination]: Sir, he actually asked did I really kill two people; is that  
15 correct?

16 A: I don't exactly remember the verbiage.

17 Q: But you remember them as a question, correct?

18 A: Correct.

19 Q: It wasn't the statement that I killed two people?

20 A: As far as I can recall, yes.

21 ...

22 Q: And you've seen a lot of vehicular collisions, correct?

23 A: Yes.

24 Q: You've seen head trauma, correct?

25 A: Yes.

26 Q: That's going to affect people's memory; isn't that correct?

27 A: Possibly.

28 Q: Okay. So if somebody doesn't remember and is told something happened, they  
might ask a question like that; isn't that correct?

A: Could be.

Q: You don't actually know if my client was driving the motor vehicle; isn't that  
correct?

A: I don't know.

Q: Okay. Because my client never actually admitted to you that he was driving the  
motor vehicle, correct?

A: That's correct" (PHT 56: 1; 57: 20).

1  
2 Witness 6: Corey Staheli

- 3 • Police Officer with Las Vegas Metropolitan Police Department, first made contact  
4 with Mr. Aparicio at UMC Trauma (PHT 59: 17);  
5 • Conducted only one field sobriety test, the HGN, while Mr. Aparicio was immobilized  
6 strapped in a hospital bed (PHT 60: 5);  
7 • “Q: And NHTSA says you’re supposed to take into account all physical circumstances  
8 prior to assessing someone’s nystagmus; isn’t that correct?  
9 A: Yes.  
10 Q: Like if somebody’s been involved in a car accident, correct?  
11 A: Yes.  
12 Q: If someone’s sustained an injury; isn’t that correct?  
13 A: Yes.  
14 ...  
15 Q: And there was an allegation that my client had been injured in that accident; isn’t  
16 that correct?  
17 A: Yes.  
18 Q: Okay. And you’re aware through your training per the National Highway Safety  
19 Administration that injuries to the head, accidents, whiplash cause natural  
20 nystagmus. Isn’t that correct?  
21 A: At times.  
22 Q: Okay. And you didn’t conduct any other field sobriety test, correct?  
23 A: Correct” (PHT 65: 12; 69: 25).

24 Witness 7: Khadija Bilali-Azzat

- 25 • Lay witness who discovered accident on his way home from work and stopped to  
26 assist (PHT 72: 16);  
27 • Approached the white car only (PHT 73: 3).

28 Witness 8: Edward Aaron Contreras

- Police Officer with Las Vegas Metropolitan Police Department, dispatched to  
accident location and later made contact with Mr. Aparicio at the Clark County  
Detention Center (PHT 79: 17);  
• Obtained Mr. Aparicio’s consent for blood draw (PHT 79: 21);  
• “Q: Okay. My client never made any admissions to you?

1 A: No" (PHT 81: 18).

2 Witness 9: Kenneth Salisbury

- 3
- 4 • Police Officer with the Las Vegas Metropolitan Police Department Fatal Detail assigned to investigate the collision (PHT 82: 20);
  - 5 • "Q: Let me ask you this, sir: How many bodies did you see in the vehicle?

6 A: In which vehicle?

7 Q: The red one.

8 A: None.

9 Q: Okay. Now you don't know who was in the vehicle at this time; isn't that correct?

10 A: Definitely? No.

11 Q: Okay. Because you've been told by other officers who was in that vehicle; isn't that correct?

12 A: Correct" (PHT 94: 23).

13 Witness 10: Karl Atkinson

- 14 • Police Officer with the Las Vegas Metropolitan Police Department Fatal Detective assigned to investigate the collision (PHT 100: 13);
- 15 • "Q: What did you observe when you arrived?

16 A: I arrived just before 10:00pm. We were notified around 9:15pm that there was a two-person fatal collision at that intersection. Upon my arrival, I parked on the south side of the intersection facing northbound on Hualapai so I wouldn't disturb any of the debris that was left in the intersection. From where I parked, I couldn't actually see the vehicles or if there were occupants at the time because there was a county fire rescue unit - an engine blocking my view of the [white] Prius" (PHT 101: 7).

17 Of the ten witnesses presented by the State, *not a single one* could place Mr. Aparicio behind the wheel of the car. Even the purportedly circumstantial evidence does not support this finding by slight or marginal evidence; the State will likely argue that three excerpts of testimony allow them to meet this burden. The first is that the female occupant of the vehicle was found on the floorboard of the passenger side of the vehicle. However, the data and crash reconstruction expert was unable to tell if anyone was wearing their seatbelts

1 during the collision, and without this data even the State's witness conceded it is probable  
2 that bodies will shift position following a major impact.

3           Second is the blood trail out of the driver's side of the red vehicle. However, no test  
4 results were provided that indicate whose blood it actually is; furthermore, there appears  
5 to be a substantial blood trail leading out of the vehicle, and yet Mr. Aparicio's external  
6 injuries are limited to bruising and a busted lip. Third is Mr. Aparicio's questions to the  
7 Officers, asking if he ran the red light or if he killed anyone. However, the cross-  
8 examination during the preliminary hearing makes it quite clear that these were *questions*,  
9 not statements, and thus likely the result of him being subsequently told of his alleged  
10 involvement by police, rather than from personal knowledge. This is further supported by  
11 the testimony of the medical technicians, who both stated that at that point the police  
12 officers had deliberately set out to prove that he was the driver of the vehicle. However,  
13 and perhaps most importantly, when the Officers asked Mr. Aparicio if he was driving that  
14 night multiple times, on each occasion he said *no*.

15           The State's conclusory speculations that would tie Mr. Aparicio as the driver of the  
16 vehicle are not evidence at all, but just that - a tower of speculations, theories and  
17 assumptions. The only evidence that was offered by the testifying witnesses did *nothing* to  
18 place Mr. Aparicio behind the wheel of the car. Because the State provided no evidence of  
19 actual physical control, as a matter of law they cannot have sufficient slight or marginal  
20 evidence to bind him over for DUI. Therefore, Mr. Aparicio respectfully requests this case  
21 against him be dismissed.



1           **II.     THE JUSTICE COURT ERRONEOUSLY ADMITTED BLOOD ALCOHOL TEST**  
2           **RESULTS, WITHOUT EXTRAPOLATION, TAKEN OUTSIDE OF TWO HOURS**

3  
4           Given that the admitted blood alcohol test results played a significant part in the  
5 finding of probable cause, erroneous admission of those results likewise casts doubt on the  
6 legitimacy and validity of the ultimate probable cause finding. When the State sought to  
7 admit the original two blood alcohol test results (each taken outside of two hours), Defense  
8 Counsel strenuously objected; the following colloquy ensued:

9  
10           MR. SHEETS: ... Pursuant to State versus District Court Armstrong case  
11 the Nevada Supreme Court makes it very clear that unextrapolated  
12 results are not proper and, in fact, extrapolated results are only proper  
13 when there are 15 factors that are considered. We have heard zero  
14 testimony as to that occurring. In fact, the only testimony that we have  
15 heard today is that a blood draw occurs 4 hours and 39 minutes after a  
16 supposed collision, Your Honor. So we have a very real issue.

17           I do have that briefed. I'd ask Your Honor if you're not inclined to grant  
18 that today to allow me to submit that brief to you this afternoon. But I  
19 think the law is clear in Armstrong. It prohibits the admission of  
20 unextrapolated data. There is no statute that allows him to present that.  
21 There is no basis for establishing relevancy because they haven't  
22 provided any testimony that establishes the results outside the per se  
23 period of two hours have any connection to this matter whatsoever.

24           ...  
25           MR. MARTINOVSKY: Actually, Armstrong is not very clear on this. The  
26 holding of Armstrong is simply that we are not going to overturn Judge  
27 Miley's ruling because it was not arbitrary and capricious. That's what  
28 the case says. That's number one.

          Number two - so any District Court judge who wants to make their own  
determination as to whether or not the alcohol content of a driver is  
relevant in a DUI case can make their own determination. And I quite  
frankly can't think of anything which would be more relevant for a DUI  
case than the blood alcohol. That's number two. So first thing is all they  
said was that she had did not abuse her discretion.

          Number three, Anderson specifically says that the retrograde  
extrapolation is admissible.

1  
2 Number four, we're all talking about a trial. This is a prelim. And there's  
3 a case specifically on point, Sheriff versus Burcham, 124 Nevada 1247  
4 2009, specifically says that at a hearing where the issue is slight to  
5 marginal evidence such as this one the State doesn't need to call a  
6 retrograde expert. It only needs to present two blood draws one hour  
7 apart and that the trier of fact when the burden is slight or marginal  
8 evidence does need to call (PHT 122: 7).

9 Defense is grateful to the State for itemizing their arguments in favor of submission,  
10 as that makes it significantly easier to evaluate and analyze each reason proffered. The  
11 State's first ground in support of admission holds: "Armstrong is not very clear on this. The  
12 holding of Armstrong is simply that we are not going to overturn Judge Miley's ruling  
13 because it was not arbitrary and capricious" (PHT 123: 9). To the contrary, the law is  
14 astoundingly clear. While it is true that the ultimate holding in *Armstrong* was that Judge  
15 Miley did not abuse her discretion – which is correct, considering that abuse of discretion is  
16 the standard of review for evidentiary rulings on appeal – that does not entitle the State to  
17 simply disregard the Supreme Court's basis for that ruling. Otherwise, *no* evidentiary ruling  
18 would hold precedential value.

19 Simply because the Supreme Court held that Judge Miley was not arbitrary and  
20 capricious (based on the reasoning provided by the Supreme Court) does not create a free-  
21 for-all for every District Court Judge to consider the issue *de novo*, which is precisely what  
22 the State argues. As stated, the law in *Armstrong* is clear as day:

23  
24 We agree that **achieving a reliable retrograde extrapolation**  
25 **calculation requires consideration of a variety of factors.** The  
26 following factors are relevant to achieving a sufficiently reliable  
27 retrograde extrapolation calculation: (1) gender, (2) weight, (3) age, (4)  
28 height, (5) mental state, (6) the type and amount of food in the  
stomach, (7) type and amount of alcohol consumed, (8) when the last

1 alcoholic drink was consumed, (9) drinking pattern at the relevant  
2 time, (10) elapsed time between the first and last drink consumed, (11)  
3 time elapsed between the last drink consumed and the blood draw,  
4 (12) the number of samples taken, (13) the length of time between the  
5 offense and the blood draws, (14) the average alcohol absorption rate,  
6 and (15) the average elimination rate. *State v. Dist. Ct. (Armstrong)*,  
7 127 Nev. 927, 936, 267 P.3d 777, 783 (2011) (emphasis added).

8 The State is not permitted to ignore the Supreme Court's mandate at their whim.  
9 The *Armstrong* case set forth a very clear and **mandatory** rule of law, and that rule of law is  
10 applicable in all cases relying on retrograde extrapolation, including this one. Therefore,  
11 the State's argument that *Armstrong* is somehow unclear on the issue is patently without  
12 merit.

13 As their second basis for admission, the State claims that the judge can make their  
14 own determination of whether the blood alcohol content is relevant. This is true, as Judges  
15 at all levels are entitled to make evidentiary rulings in cases he or she presides over; such is  
16 an inherent aspect of the judicial function. However, the law does *not* permit the Judge to  
17 stand in the place of a retrograde extrapolation expert to find that the results are  
18 sufficiently reliable without considering any of the factors articulated in *Armstrong*. That is  
19 precisely what occurred here.

20 The State introduced two bare BAC results, with nothing more. These results are  
21 themselves inadmissible per statute (outside of two hours) and relevant only for  
22 extrapolation purposes; by introducing these results, the State is asking the Court to act as  
23 a retrograde expert and themselves determine if the extrapolated result both demonstrates  
24 that the defendant was above .08 at the time of driving and that the result is sufficiently  
25 reliable to be admitted in a court of law. These two determinations are necessary in order  
26  
27  
28

1 for the results to be lawfully admitted. However, these conclusions, which require expert  
2 testimony by default, are beyond the expertise of the Justice Court to decide. A Justice of the  
3 Peace is not a retrograde extrapolation expert, and has no legal authority to conclude from  
4 the two inadmissible BAC tests alone what the extrapolated result would be, or that this  
5 result is scientifically reliable to admit; to this end, the Nevada Supreme Court's ruling in  
6 *Armstrong* is controlling and dispositive. This reasoning applies whether admission is  
7 sought at a preliminary hearing or trial.  
8

9  
10 This leads into the State's third and fourth grounds for admission. Ground three is  
11 simply that "Anderson specifically says that the retrograde extrapolation is admissible."  
12 Clearly, this is inaccurate as a blanket conclusion because *Armstrong* specifically held that it  
13 was *not* admissible without considering the listed 15 factors. Presumably, the State is  
14 referring to *Anderson v. State*, 109 Nev. 1129, 865 P.2d 318 (1993). To the extent *Anderson*  
15 discussed admissibility of retrograde extrapolation, it was explicitly superseded by  
16 *Armstrong*. In fact, even *Armstrong* incorporated and referred to *Anderson*, but only as part  
17 of a string citation discussing *relevance*, not admissibility.<sup>1</sup> The State's universal conclusion  
18 on admissibility of extrapolation results is simply no longer good law post-*Armstrong*.  
19

20 Lastly, the fourth ground for relief draws a distinction between admission at a  
21 preliminary hearing versus admission at a trial, citing to *Sheriff v. Burcham*, 124 Nev. 1247,  
22

---

23  
24 <sup>1</sup> "Although we have not addressed the admissibility of retrograde extrapolation as a matter of law, we have  
25 alluded to its relevance in prosecutions for driving under the influence. See, e.g., *Sheriff v. Burcham*, 124 Nev.  
26 1247, 1261, 198 P.3d 326, 335 (2008) (holding that State was not required to present retrograde  
27 extrapolation evidence to obtain grand jury indictment where grand jury could reasonably infer from two  
28 blood alcohol tests taken within reasonable time after driving that defendant's blood alcohol concentration  
was .08 or higher when he was driving); *Anderson v. State*, 109 Nev. 1129, 1135, 865 P.2d 318, 321 (1993)  
(pointing to retrograde extrapolation evidence in concluding that State presented sufficient evidence to  
support conviction)." *Armstrong*, 127 Nev. 927, 933, 267 P.3d 777, 780-81 (2011)

1 198 P.3d 326 (2008). Ironically enough, the very same string citation dealing exclusively  
2 with relevance listed not only *Anderson*, but *Burcham* as well. Once again, the State's  
3 argument was explicitly superseded by *Armstrong*.

4  
5 *Armstrong* succinctly states, "achieving a reliable retrograde extrapolation  
6 calculation requires consideration of a variety of factors." It does not state that  
7 admissibility *at trial* is dependent on these factors. It does not state that consideration of  
8 these factors is discretionary. It states that consideration of the fifteen factors is *required* in  
9 order to achieve a *reliable* extrapolation result. Therefore, if the listed factors are not  
10 considered, per the Supreme Court in *Armstrong*, the result is deemed unreliable.

11  
12 Furthermore, on its face this legal mandate is a **universal statement** and not  
13 limited to specific stages of criminal proceedings, such as a preliminary hearing versus a  
14 trial. In essence, the State argued that reliable evidence is a privilege limited to trial only,  
15 and the State is free and clear to admit unreliable results simply because the hearing is not  
16 a trial. This violates the universal holding in *Armstrong*, violates the Defendant's rights to  
17 Due Process under the Constitution, and violates basic precepts of justice and fundamental  
18 fairness. The need for reliable evidence is not a concept limited solely to trial, nor should it  
19 be.  
20

21  
22 Nevada law has explicitly recognized time and again that constitutional mandates do  
23 not disappear simply because it is a preliminary hearing. *Goldsmith v. Sheriff of Lyon Cty.*, 85  
24 Nev. 295, 303, 454 P.2d 86, 91 (1969) (holding that the evidence presented a preliminary  
25 hearing "must consist of legal, competent evidence"); *Grace v. Eighth Jud. Dist. Ct.*, 132 Nev.  
26 Adv. Op. 51, 375 P.3d 1017, 1020 (2016) (permitting Justice Courts to suppress unlawful  
27  
28

1 evidence introduced at preliminary hearing); *Patterson v. State*, 298 P.3d 433, 435 (Nev.  
2 2013) (recognizing preliminary hearing as “critical stage” in criminal proceedings).  
3 Additionally, given that the *Armstrong* case was an appeal from an evidentiary ruling based  
4 on unfair prejudice, there can be little argument that admissibility of retrograde  
5 extrapolation results is evidentiary in nature. Its admission is governed by the rules of  
6 evidence, whether admission is sought at a preliminary hearing or a trial.  
7

8         On this point, the Nevada Supreme Court has held that unless otherwise exempted,  
9 Nevada rules of evidence do apply at preliminary hearings. *Grace v. Eighth Jud. Dist. Ct.*, 132  
10 Nev. Adv. Op. 51, 375 P.3d 1017, 1020 (2016) (“First, the rules of evidence apply at  
11 preliminary hearings.”). Certain types of inadmissible evidence have been statutorily  
12 exempted for purposes of preliminary hearing, but unless the law has been updated very  
13 recently, retrograde extrapolation is not one of them. Therefore, the rules of evidence  
14 applicable to retrograde extrapolation as set forth in *Armstrong* apply with equal force at  
15 both a preliminary hearing and a trial.  
16  
17

18         Significantly, the State in Mr. Aparicio’s hearing *did not even admit the extrapolation*  
19 *result* – they only admitted the inadmissible test results outside of two hours, and asked the  
20 Court to infer and speculate as to their admissibility for extrapolation without even  
21 knowing the actual extrapolated BAC number. As stated above, the Justice Court is not an  
22 expert in extrapolation and so lacks the legal authority to determine how these two  
23 baseline tests interact to create a final extrapolation at the time of the accident.  
24

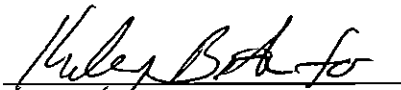
25         In summation, by admitting nothing but two otherwise inadmissible test results, the  
26 State asked the Justice Court to 1) use these two values to independently formulate an  
27  
28

1 opinion as to the BAC at the time of the accident (which itself requires an expert  
2 calculation); and 2) formulate a subsequent opinion as to the reliability of that result  
3 (sufficient to warrant admissibility) without any consideration of the *Armstrong* factors.  
4 With nothing more, admitting the BAC results for the Justice Court's substantive  
5 consideration was erroneous as a matter of law.  
6

7  
8 **CONCLUSION**  
9

10 For these reasons and those stated above, Mr. Aparicio respectfully request this  
11 Court dismiss this case for lack of probable cause and/or remand for a new preliminary  
12 hearing based on the erroneous admission of inadmissible blood alcohol results for the  
13 purposes of extrapolation.  
14

15  
16 Dated this 20 day of July, 2018.  
17

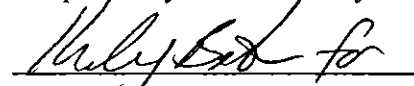
18   
19 Damian Sheets, Esq.  
20 Nevada Bar No. 10755  
21 726 S. Casino Center Blvd., Ste. 211  
22 Las Vegas, Nevada 89101  
23  
24  
25  
26  
27  
28

**VERIFICATION OF DAMIAN SHEETS, ESQ.**

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Petitioner.
3. The factual contentions contained within the above Petition are true and correct to the best of my knowledge.

Dated this 20 day of July, 2018.

Respectfully Submitted By:

  
DAMIAN SHEETS, ESQ.  
Attorney for Petitioner



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 20 day of July, 2018 I served a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS, upon each of the parties by electronic service through Wiznet, the Eighth Judicial District Court's e-filing/e-service system, pursuant to N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the United States mail, Postage Pre-Paid, addressed as follows:

Clark County District Attorney's Office  
200 Lewis Ave., 3rd Floor  
Las Vegas, NV 89155  
motions@clarkcountyda.com  
pdmotions@clarkcountyda.com

/s/ Kelsey Bernstein  
An Employee of Mayfield Gruber & Sheets

DISTRICT COURT  
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

July 23, 2018

C-18-332496-1      State of Nevada  
vs  
Henry Aparicio

July 23, 2018

8:00 AM

Deft.'s Motion in Limine to Exclude Evidence of  
Retrograde Extrapolation

HEARD BY: Smith, Douglas E.

COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Trisha Garcia

REPORTER:

PARTIES

PRESENT:

JOURNAL ENTRIES

- Charles Martinovsky, Chf Dep DA, present on behalf of the State and Damian Sheets, Esq., present on behalf of Deft. Aparicio, who is also present.

This is the time set for hearing on Deft.'s Motion in Limine to Exclude Evidence of Retrograde Extrapolation. Upon Court's inquiry, Mr. Sheets advised that he would submit on his Motion; he believes retrograde extrapolation is not appropriate in this case. The State's expert in this case relied on the Deft.'s body weight and gender plus his two (2) BAC test results and did not take into consideration the many other factors listed in State v. District Court (Armstrong). Mr. Martinovsky submitted the matter.

Court noted that retrograde extrapolation is admissible in this case pursuant to State v. District Court (Armstrong). The State has evidence that confirms what the Deft. drank between 5:37 p.m. and 8:52 p.m., when he was at Dave and Buster's restaurant. After leaving Dave and Buster's, the Deft. went to Casa Del Matador, where he worked. The Deft. had more to drink and he also ordered Goat Cheese Jalapeno. At 8:52 p.m., the bartender helped the Deft. out of the bar and then later returned to talk to him as he was getting into his car because he was too intoxicated. At 9:08 p.m. the Deft. crashed into

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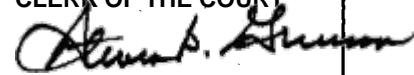
Page 1 of 2

Minutes Date: July 23, 2018

the back of the victims' car, which was stopped at a red light on Sahara and Hualapai. The Deft.'s BAC was extremely high. The State, however, knew exactly how much the Deft. drank and ate between the hours of 5:37 p.m. and 8:52 p.m. and obtained two (2) blood draws one (1) hour apart. State v. District Court (Armstrong) holds that retrograde extrapolation can also be based on standard metabolic rate and is extremely appropriate in this particular case. Therefore, COURT ORDERED, the Deft.'s Motion is DENIED. The State shall prepare Findings of Fact and Conclusions of Law consistent with their Opposition and this Court's decision.

Mr. Sheets advised that he file a Petition for Writ of Habeas Corpus and, therefore, the Deft. will be WAIVING his speedy trial right; the trial date currently set for August 13, 2018, will need to be continued. The Writ is set for hearing on August 6, 2018; colloquy. COURT ORDERED, the hearing date on the Writ will STAND; Court directed Mr. Marlinovsky to file the State's Return so Mr. Sheets can file his Reply, if necessary. A new trial date will be set after argument on the Writ.

CLSTODY



1 **RSPN**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CHARLES MARTINOVSKY  
6 Chief Deputy District Attorney  
7 Nevada Bar #007439  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7  
8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

CASE NO: C-18-332496-1

12 HENRY APARICIO, aka,  
13 Henry Biderman Aparicio, #6069038

DEPT NO: VIII

14 Defendant.

15  
16 STATE'S RETURN TO DEFENDANT'S PETITION FOR  
17 WRIT OF HABEAS CORPUS

18 DATE OF HEARING: JULY 16, 2018  
19 TIME OF HEARING: 8:00 AM

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
21 District Attorney, through CHARLES MARTINOVSKY, Chief Deputy District Attorney, and  
22 hereby submits the attached Points and Authorities in Response to Defendant's Petition for  
23 Writ of Habeas Corpus.

24 This Response is made and based upon all the papers and pleadings on file herein, the  
25 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
26 deemed necessary by this Honorable Court.

27 ///

28 ///

1 FACTS.

2 On May 15, 2018, the Defendant and his girlfriend, Morgan Hurley, entered Dave and  
3 Buster's restaurant at about 5:30 P.M. Video evidence shows the two drinking inside the bar.  
4 Receipts from the tab indicate that the two ordered their first drinks at 5:37 P.M. The video  
5 shows that Morgan was drinking a Caribbean Lit, and the Defendant was drinking shots of  
6 Patron Silver. The bar tab indicates that by 7:21P.M., they pair had ordered 10 shots of Patron  
7 Silver, 3 Caribbean Lit Drinks, and they had not ordered any food. Video evidence shows the  
8 pair then entering Casa Del Matador, also located in downtown Summerlin, shortly after they  
9 had left Dave and Buster's. The Defendant worked at this establishment at the time. The tab  
10 from Casa Del Matador indicates that the pair consumed 6 more shots of Tequila. The pair  
11 also ordered Goat Cheese Jalapeno, but they did not order any other food. The tab closed at  
12 8:52 P.M., and video evidence shows the Defendant and Morgan stumbling out of the Casa  
13 Del Matador shortly after paying the tab. The video also shows a bar tender helping the  
14 Defendant out of the bar. That same bar tender then returns to the bar. Shortly after this, the  
15 same bar tender leaves the bar to speak with the Defendant as he entered the driver's side of  
16 the red Mercedes which shortly thereafter caused the collision which killed the victims.

17 At about 9:08 P.M., the Defendant crashed into the back of the victims' car when they  
18 were stopped facing East at a red light on Sahara and Hualapai. The speedometer on the  
19 Defendant's car was stuck at 100 mph. The collision accelerated the victim's car from zero to  
20 over 50 mph. The collision killed both occupants.

21 Brandon McCauley testified that he left Downtown Summerlin at around 8:30 P.M. He  
22 witnessed a red vehicle pass him and exceeding the speed limit as he was driving East on  
23 Sahara. Mr. McCauley testified that the red car did not stop at the red light at the intersection  
24 of Sahara and Hualapai but slammed into the back of a white car which was stopped for the  
25 red light at the intersection. PHT, p. 9-11. Shortly after the collision, Mr. McCauley went to  
26 the red car which had caused the collision. Mr. McCauley saw a group of people holding the  
27 Defendant down near the red vehicle. PHT, p. 12 – 13.

28 ///

1 Mr. McCauley reiterated on cross examination that the group of people where  
2 'apprehending' the Defendant. Mr. McCauley testified that 'Because I—well, initially after I  
3 saw the accident, like when the civilians were apprehending the guy next to you, he looked  
4 intoxicated. He just looked out of it. And he was being apprehended over the red car, so I just  
5 assumed that he was the driver.' PHT, p 22 line 23-25 – PHT p. 23 lines 1-2.

6 Officer Sonetti testified to two very important pieces of information. First, when he  
7 arrived on scene, Morgan Hurley was slumped down in the passenger seat of the red vehicle.  
8 PHT, p. 26-line 23- p. 27 line 3. Second, the Defendant was sitting on the curb crying, and  
9 asking Officer Sonetti to save the passenger. PHT, p. 28 lines 14-25.

10 Katlynn Garduno drew the Defendant's blood. She remembered performing the blood  
11 draw on the Defendant. Katlynn testified that she heard the Defendant asking one of the  
12 officers if he had run the red light. Katlynn testified as follows:

13 "Q: Did the Defendant make any statements to you about the collision?

14 A: He (the Defendant) didn't make it directly to me, but he did ask the officer if he had ran the  
15 red light." PHT, p. 46, lines 19-22.

16 Officer Ware also testified that the Defendant asked if he had killed two people. Officer  
17 Ware conducted the blood draws with Katlynn Garduno. Officer Ware testified that "He (the  
18 Defendant) stated that I killed two people, kind of like it was a question. He kind of said it  
19 like he was asking a question." PHT, p. 56 lines 1-10. On cross, Officer Ware again reiterated  
20 that the Defendant asked if he had killed two people. PHT, p. 56, lines 14-25.

21 Officer Staheli testified that the Defendant had dried blood on his lip and his nose. PHT,  
22 p. 62, Lines 12-16. State's exhibit #2 showed the injuries on the Defendant's face.

23 Detective Ken Salisbury testified that the ACM data indicated that the collision accelerated  
24 the victims' car from zero MPH to 58.4 MPH. PHT, p. 86 lines 1-6.

25 Detective Atkinson testified to several key pieces of information. First, Detective  
26 Atkinson found a woman's purse on the floorboard of the red Mercedes. The purse contained  
27 numerous pieces of identification for Morgan Hurley. PHT, P. 103. Detective Atkinson also  
28 testified that his speed analysis indicated that the Defendant was driving over 100 miles per

1 hour when he ran into the back of the victims' car while it was stopped for the red light at the  
2 intersection of Hualapai and Sahara. PHT, p. 115, line 7. Detective Atkinson testified that  
3 he found blood on the driver's side door, blood on the exterior of the driver's side of the vehicle  
4 proceeding along the outside of the vehicle and leading towards the passenger side of the  
5 vehicle. Detective Atkinson also found blood on the outside of the passenger door. PHT, p.  
6 105 p.12-19. Detective Atkinson testified that he found a bloody rag on the driver's seat and  
7 blood on the driver's side airbag. PHT, p. 108 lines 3-12. Detective Atkinson testified that  
8 the backs of the front seats did not have any blood or marks on them. PHT, p. 107 lines 7-12.  
9 Detective Atkinson testified that his inspection of the vehicle indicated that the rear seats of  
10 the vehicle were unoccupied. He drew this conclusion from the following. First, the collision  
11 threw glass all over the inside of the Defendant's car. The glass evenly coated the back seats.  
12 Second, rear seat belts were locked and not extended, indicating that they had not been used.  
13 PHT, p. 106 p. 20-25.

14 Police obtained a search warrant, and got one blood sample from the Defendant at 147  
15 A.M. and another at 2:47 A.M. Chemical analysis indicates the Defendant's BAC was .204 at  
16 the first draw, and .178 at the second.

17 Dr. Ray Kelly reviewed the reports and evidence from the case. He calculated that the  
18 Defendant's BAC was over .32 at the time of driving. Dr. Kelly based his conclusions on the  
19 Defendant's height and weight, as well as the other evidence in the case such as the driving  
20 pattern, the consumption pattern at the bar, and the Defendant's behavior at the scene and his  
21 performance on the HGN.

#### 22 ARGUMENT.

##### 23 I.RELEVANT LAW.

24 "Probable cause to support a criminal charge 'may be based on slight, even 'marginal'  
25 evidence,...because it does not involve a determination of the guilt of an accused.'" Sheriff  
26 Washoe County v. Steward, 109 Nev. 831, 835 (1993), citing Sheriff v. Hodes, 96 Nev. 184,  
27 186 (1980). The state may even establish probable cause to hold a Defendant for trial when  
28 the evidence conflicts with itself: "The fact that this testimony is in direct conflict with that of

1 another witness is of no import at this stage of the proceedings. The magistrate could, and did,  
2 determine that the evidence supported an inference of criminal conduct by the accused, thereby  
3 leaving the ultimate question of credibility to the trier of fact.” State v. Badillo, 95 Nev. 593  
4 (1979). To commit an accused for trial, the State is not required to negate all inferences which  
5 might explain his conduct, but only to present enough evidence to support a reasonable  
6 inference that the accused committed the offense. Kinsey v. Sheriff, Washoe County, 87 Nev.  
7 361 (1971).

8 II. THE STATE DEMONSTRATED BY SLIGHT TO MARGINAL EVIDENCE THAT  
9 THE DEFENDANT WAS DRIVING THE VEHICLE.

10 All the evidence established sufficient facts for the trier of fact to draw the reasonable  
11 inference that the Defendant was driving the car. First, the evidence regarding the how the car  
12 was occupied allows the court infer reasonably that the Defendant was driving the red vehicle.  
13 The Defendant was clearly involved in the collision: he had cuts to his face, he was at the  
14 scene, and he was expressing concern for the passenger, Morgan Hurley. The fact that he was  
15 distraught and expressing concern for the passenger clearly indicates that he was in the vehicle.  
16 Yet, the Defendant was not sitting in the passenger seat because Morgan Hurley was slumped  
17 over in the passenger seat. Morgan’s purse was also stowed neatly under the front passenger  
18 area indicating that the force of the collision did not propel her into the front seat from some  
19 other part of the vehicle. Further, the Defendant was not sitting in the back seat. Detective  
20 Atkinson testified that the evidence suggested that no one was sitting in the back seat: the  
21 broken glass from the collision was evenly distributed on the rear seats, the rear seat belts had  
22 not been used, and the back of the front seats did not have any blood on them. Had someone  
23 been sitting in the back seat, unrestrained, they severity of the collision means they would have  
24 hit the back seats with great force and left blood or marks on them. Had someone been sitting  
25 in the rear seats, the glass broken in the collision would not have been evenly distributed over  
26 the rear seats. But backs of the front seats did not have blood or impact marks on them, and  
27 the glass was evenly distributed on the back seats. Hence, the only reasonable inference is that  
28 the Defendant was driving the red Mercedes at the time of the collision.



1 Equally important, two witnesses (Katlynn Garduno and Officer Ware) testified that  
2 the Defendant asked if he had killed two people. The fact that the Defendant asked such a  
3 question allows one to reasonably infer that it constitutes slight to marginal evidence that the  
4 Defendant confessed. For, had the Defendant not been driving, he wouldn't have asked the  
5 question.

6 Third, the injuries on the Defendant's face are consistent with the conclusion that he  
7 was driving the vehicle. The Defendant had fresh cuts on his nose and lips. Detective  
8 Atkinson found a bloody rag in the driver's seat and blood on the driver's air bag and a trail  
9 of blood leading from the driver's side around the back of the car to the passenger side. Since  
10 the passenger was slumped over in the passenger seat, she did not leave the bloody rag or trail  
11 of blood. The cuts on the Defendant's face, when combined with the trail of blood leading  
12 from the driver's side of the vehicle to the passenger side of the vehicle indicate that he was  
13 driving but exited to check on the passenger immediately after the collision. The fact that he  
14 implored Officer Sonetti to save the passenger corroborates this inference.

15 Finally, Brandon McCauley testified that a group of people were apprehending the  
16 Defendant and holding him at the scene shortly after the collision. In fact, Brandon testified  
17 that he thought the Defendant was the driver, and was intoxicated. This testimony indicates  
18 that the Defendant attempted to flee the scene, which indicates consciousness of guilt.  
19 Consciousness of guilt indicates that the Defendant was driving.

20 All the aforementioned evidence certainly establishes a slight to marginal inference that  
21 the Defendant was driving at the time he crashed into the back of the victims' car.

22 **II. THE COURT PROPERLY ADMITTED AND RELIED UPON TWO BLOOD**  
23 **SAMPLES AT THE PRELIM.**

24 Sheriff v. Burcham, 124 Nev. 1247 (2009) is exactly on point. The case specifically  
25 holds that the state can present two blood samples taken one hour apart, and nothing more, at  
26 a hearing when the standard of proof requires slight to marginal evidence to establish the  
27 Defendant was greater than .08 when driving. The facts of the case are as follows. Burcham  
28 was driving his car between 6:15AM and 6:30 AM when he rear ended the victim's car. The

1 collision killed the victim, a certain Dylan Whisman. Police obtained one blood sample at  
2 7:15 A.M., and another at 8:22A.M. The results were a .07 and a point .04, respectively. The  
3 state indicted Burcham. At the Grand Jury, the state presented both blood samples, but did not  
4 call an expert to testify about the BAC at the time of driving. Burcham convinced the District  
5 Court that the state should have called an expert to the grand jury to testify about the retrograde  
6 extrapolation. Burcham relied upon Mata v. State, 46 S.W.3d 902 (Tex.Crim.App.2001).  
7 Mata had held that the complexity of performing a retrograde extrapolation at trial meant that  
8 state needed to call an expert to the grand jury to testify about retrograde extrapolation. The  
9 State appealed the District Court's ruling.

10 The Supreme Court held that the state did not need to call an expert to the grand jury  
11 to testify about a retrograde extrapolation. The Supreme Court held that so long as the state  
12 presented two samples, taken one hour apart, and the second one was lower, the state did not  
13 need to call an expert to testify about a retrograde extrapolation. The court held, "Similarly,  
14 in this case, the two BAC tests suggested that Burcham's BAC was dropping and that it court  
15 have therefore been 0.08 when he was driving. We conclude that because the State's burden  
16 at a grand jury proceeding is to present slight or marginal evidence to support an inference  
17 that the accused committed the crime charged, specific scientific evidence and expert  
18 testimony concerning retrograde extrapolation are not required. Such a requirement would  
19 place a tremendous burden on the State to produce, during grand jury proceedings, evidence  
20 addressing the man factors involved with retrograde extrapolation, as discussed above."

21 Burcham, at 1261.

22 Furthermore, Burcham specifically approves of retrograde extrapolation at trial. The  
23 court stated that "In Anderson v. State, this court recognized the use of retrograde  
24 extrapolation to estimate a Defendant's BAC at the time of an accident. In that case, a  
25 forensic chemist testified that the standard metabolism rate of alcohol is approximately 0.02  
26 percent per hour, and he extrapolated backwards to estimate that the Defendant's BAC was  
27 0.128 when he was driving." Burcham, at 1258.

28 ///

1 Finally, Burcham expressly stated that it was considering whether the state must present  
2 expert testimony regarding retrograde extrapolation at a grand jury and not at trial. The court  
3 stated, “We conclude that Mata is unpersuasive here because the Mata court addressed whether  
4 expert testimony on retrograde extrapolation was reliable in a jury trial, not whether expert  
5 testimony should be required when the State relies on retrograde extrapolation in grand jury  
6 proceedings.” Burcham, at 1259.

7 State v. Dist. Ct (Armstrong), 127 Nev. 927 (2011) does not support the Defendant’s  
8 argument. This case holds that the District Court had discretion to admit evidence as it sees  
9 fit. Armstrong stated the holding as follows: “Under the circumstances presented, we cannot  
10 say that the district court manifestly abused or arbitrarily or capriciously exercised its  
11 discretion, that is, applied a clearly erroneous interpretation of the law or one not based on  
12 reason or contrary to the evidence or established rules of law.” Armstrong, at 937. Later,  
13 Armstrong expressly stated the narrow scope of its holding in the case at bar. The court stated  
14 expressly that each district court must determine, when the state only has one blood draw, the  
15 admissibility of retrograde evidence on a case by case basis. The Court stated, “There may be  
16 circumstances consistent with this opinion in which a calculation based on the results of a  
17 single blood sample is reliable and whose relevance is not substantially outweighed by the  
18 danger of unfair prejudice; that is up to the district court to determine on a case – by – case  
19 basis.” Armstrong, at 937. The Supreme Court merely held that the Court did not abuse its  
20 discretion when it excluded the retrograde extrapolation.

21 These block quotations reveal three more important points regarding the holding of  
22 Armstrong. First, the holding specifically concerns only single blood draw extrapolation, not  
23 those based upon 2 blood draws. Since there are two blood draws in the case at bar, Armstrong  
24 does not even apply. Second, the court specifically stated the state may actually admit  
25 retrograde evidence even when it only has one blood draw so long as it possesses enough  
26 information. Finally, Armstrong address the admissibility of retrograde extrapolation at trial,  
27 not a preliminary hearing or a grand jury. Since the issue in this Petition concerns the  
28 admissibility of two blood draws at a prelim, Armstrong does not apply.

1 CONCLUSION

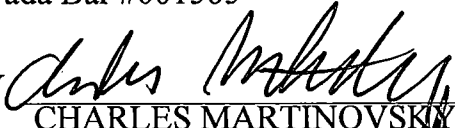
2 The court should reject the Defendant's arguments. First, the state presented sufficient  
3 evidence at the prelim to allow the court to draw the reasonable inference that slight to  
4 marginal evidence indicated the Defendant was driving the red Mercedes. Second, the state  
5 properly admitted two blood samples taken one hour apart to allow the court to hold the  
6 Defendant to answer for all theories of liability. Sheriff v. Burcham, 124 Nev. 1247 (2009) is  
7 exactly on point and basically constitutes black letter law that the state does not need to present  
8 an expert to testify regarding retrograde extrapolation at a prelim so long as it has two blood  
9 samples taken one hour apart and the second one is lower than the first.

10 Finally, Armstrong does not support the Defendant's position. At best the court holds  
11 that the District Court did not abuse its discretion when it excluded evidence of retrograde  
12 extrapolation. This is hardly a ringing endorsement of the holding nor does it establish a rule  
13 of law which all courts must follow. On the contrary, Armstrong specifically indicates that,  
14 when a court is considering whether to admit retrograde evidence when the state only has one  
15 blood draw, each court must address the issue on a case by case basis. Furthermore, Armstrong  
16 specifically discusses the admissibility of retrograde extrapolation testimony at trial when the  
17 state only has one blood sample. Neither of those conditions obtain here: the state had two  
18 blood samples, and admitted them at the prelim.

19 DATED this 24th day of July, 2018.

20 Respectfully submitted,

21 STEVEN B. WOLFSON  
22 Clark County District Attorney  
23 Nevada Bar #001565

24 BY   
25 CHARLES MARTINOVSKI  
26 Chief Deputy District Attorney  
27 Nevada Bar #007439

28 ///

///

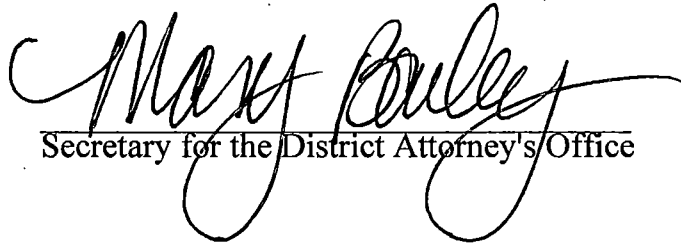
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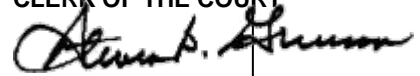
CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Return To Defendant's Petition For Writ Of Habeas Corpus was made this day of July, 2018, by Electronic Filing to:

Damien Sheets  
EMAIL: dsheets@defendingnv.com

  
Secretary for the District Attorney's Office

18F09022X/CM/mlb/vcu



1 MOT  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

14 EIGHTH JUDICIAL DISTRICT COURT  
15 CLARK COUNTY, NEVADA

16 State of Nevada, ) Case No.: C-18-332496-1  
17 Plaintiff ) Dept. No: VIII  
18 )  
19 vs. ) MOTION FOR DISQUALIFICATION AND  
20 ) AFFIDAVIT IN SUPPORT  
21 Henry Aparicio, )  
22 Defendant )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

29 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
30 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Motion  
31 for Disqualification and Affidavit in Support.

32 Pursuant to NRS 1.235(5)(a), upon the filing of the instant Motion and Affidavit,  
33 Defendant respectfully requests this Court "immediately transfer the case to another  
34 department of the court, if there is more than one department of the court in the district, or  
35 request the judge of another district court to preside at the trial or hearing of the matter."

36 ///

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF THE CASE

3 Following a full and contested preliminary hearing in the Las Vegas Justice Court,  
4 Defendant Henry Aparicio was bound over to the Eighth Judicial District Court, Department  
5 8, to answer for the charges of Driving Under the Influence Resulting in Death (and other  
6 lesser included offenses). The Information was filed on June 5, 2018.

7  
8 On July 5, 2018, Defense filed a Motion in Limine to Exclude Evidence of Retrograde  
9 Extrapolation. In this case, Mr. Aparicio's blood draw occurred outside of two hours, and  
10 the State provided, through discovery, an expert retrograde extrapolation report. The  
11 Motion to Exclude this report argued that the State's expert improperly used a linear  
12 retrogression model, taking into account only "Mr. Aparicio's body weight and gender" to  
13 reach its conclusion, i.e. the extrapolated blood alcohol content measurement. Defense  
14 argued this conclusion was reached in direct violation of the Nevada Supreme Court's  
15 holding in *State v. Dist. Ct. (Armstrong)*, 127 Nev. 927, 936, 267 P.3d 777, 783 (2011), which  
16 articulated no less than fifteen distinct factors to consider before an extrapolation can be  
17 scientifically and legally reliable. In response, the State argued that *Armstrong* is not  
18 applicable to this case because more than one blood draw was obtained. The State also  
19 presented additional information regarding what Mr. Aparicio ate and drank, but this  
20 information was only recently disclosed and not used by the expert in reaching the  
21 extrapolation result. The Court denied the Motion, ruling that it was "perfectly reasonable"  
22 to conduct a retrograde extrapolation using the information presented. Additionally, in  
23 reaching its conclusion, the Court made several statements that were immediately  
24  
25  
26  
27  
28

1 concerning. Specifically, the Court stated "And he was doing over a 100 miles an hour,  
2 killed two people."

3  
4         Shortly thereafter, on July 20, 2018, Defense filed a Petition for Writ of Habeas  
5 Corpus challenging the probable cause at the preliminary hearing. Specifically, although  
6 approximately 15-20 people witnessed the auto collision, not a single person could identify  
7 Mr. Aparicio as the driver. Another female was also present in the vehicle; she was found  
8 unconscious on the passenger seat, but testimony during the preliminary hearing revealed  
9 that she was not wearing a seatbelt and there was also damage to the windshield. The  
10 Court denied the Petition, claiming that Mr. Aparicio's presence on the curb outside of the  
11 vehicle following the accident was sufficient probable cause that he was the driver of the  
12 vehicle; notably, the State conceded immediately after this ruling that Mr. Aparicio's mere  
13 presence alone would actually *not* be sufficient probable cause.  
14

15  
16         Given that the Court had previously ruled the State's expert report on retrograde  
17 extrapolation was permissible despite relying on only two of the fifteen required  
18 *Armstrong* factors, Defense thereafter submitted an ex parte request for investigative fees  
19 for the Defense to hire a rebuttal expert or investigator, attaching financial disclosures to  
20 support a finding of indigency. The Court summarily denied the request in chambers.  
21

22 Specifically, the Order states:

23  
24                 THE COURT HEREBY FINDS, pursuant to the Ex Parte Motion, that  
25                 Defendant provided a total monthly income in the amount of \$1,084,  
26                 total monthly debts in the amount of \$1,515, and total assets in the  
27                 amount of \$400,  
28



1 THE COURT HEREBY ORDERS Defendant's Ex Parte Motion for  
2 Authorization of Employment of Investigator and Payment of Fees is  
3 DENIED for an insufficient showing of indigency.

4 Without the availability to funds to hire an investigator or expert witnesses, Defense  
5 Counsel ran into extreme difficulty finding experts willing to participate with such limited  
6 available funding. Therefore, the Defense was forced to file a Motion to Continue the Trial  
7 Date. The Motion was granted, and Calendar Call is currently set in this matter on July 31,  
8 2019; jury trial is scheduled to begin on August 5, 2019.

9  
10 II. PROCEDURE FOR DISQUALIFICATION

11  
12 The grounds to request disqualification of a judge other than a Supreme Court  
13 Justice or Judge on the Court of Appeals is set forth in NRS 1.230-.235; NRS 1.230(1) states:  
14 "A judge shall not act in such an action or proceeding when the judge entertains actual bias  
15 or prejudice for or against one of the parties to the action." It is on this basis that the instant  
16 Motion for Disqualification is sought.

17  
18 Procedurally, the party seeking disqualification must file an Affidavit specifying the  
19 facts upon which disqualification is sought and serve the documents upon the judge sought  
20 to be disqualified. Pursuant to NRS 1.235(1)(a), the request must be filed not less than 20  
21 days before the date set for trial or hearing of the case. Trial in this matter is set for August  
22 5, 2019, and therefore the instant Motion is timely.

1 III. STANDARD FOR DISQUALIFICATION  
2

3 "Quite simply and quite universally, recusal was required whenever impartiality  
4 might reasonably be questioned." *Liteky v. United States*, 510 U.S. 540, 548, 114 S. Ct. 1147,  
5 1154 (1994). "[A defendant] is entitled to a neutral and detached judge in the first  
6 instance." *Matter of Ross*, 99 Nev. 1, 13, 656 P.2d 832, 839 (1983); see also, *Ward v. Vill. Of*  
7 *Monroeville, Ohio*, 409 U.S. 57, 59, 93 S.Ct. 80, 82 (1972). The concept of a neutral and  
8 unbiased decisionmaker has been a cornerstone of American law since its inception.  
9

10 Comments made by the Court which show bias, prejudice or any similar concept of  
11 pre-disposition which call into question the neutrality of a trial may be grounds for  
12 reversal. *Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 963 P.2d 459 (1998). In *Rudin v.*  
13 *State*, 120 Nev. 121, 86 P.3d 572 (2004), the Nevada Supreme Court also held that  
14 comments which "reflect any animus" towards one party are problematic. *See also, Leonard*  
15 *v. State*, 114 Nev. 1196, 1211, 969 P.2d 288, 298 (1998) ("While the court may have  
16 displayed some irritation with defense counsel, the clear intent of its remarks was to save  
17 time; it was not directing animus towards defense counsel").  
18  
19

20 Statements which "express an opinion as to the merits or the outcome of any  
21 ongoing proceedings" is similarly problematic. *Goldman v. Bryan*, 104 Nev. 644, 651, 764  
22 P.2d 1296, 1300 (1988). "Remarks of a judge made in the context of a court proceeding are  
23 not considered indicative of improper bias or prejudice unless they show that the judge has  
24 closed his or her mind to the presentation of all the evidence." *Cameron v. State*, 114 Nev.  
25 1281, 1282, 968 P.2d 1169, 1170 (1998). A judge must remain "open-minded enough to  
26  
27  
28

1 refrain from finally deciding a case until all of the evidence has been presented" in order to  
2 remain impartial. *Id.* at 1283.

3 To support disqualification, the moving party must point to facts in the record "to  
4 suggest that the district court's decision was colored by bias or a lack of impartiality."  
5 *Rudin*, 120 Nev. at 142. Particular attention will be paid when improvident conduct by the  
6 district court judge would prejudice the litigant's rights to a fair trial. *Parodi v. Washoe Med*  
7 *Ctr., Inc.*, 111 Nev. 365, 366, 892 P.2d 588, 589 (1995). In *Parodi*, the Nevada Supreme  
8 Court found error because "the totality of the conduct may have a prejudicial effect on the  
9 jury's view" of the case. *Id.* at 369. See also, *Leonard v. State*, 114 Nev. 1196, 1213 (1998).

12 IV. GROUNDS FOR DISQUALIFICATION IN THIS CASE

13  
14 With all due respect, Defense believes there are sufficient grounds on the record in  
15 this case to question the impartiality of the District Court, and therefore Defense requests  
16 reassignment to a new department. The grounds will be presented chronologically, and  
17 represent both a combination of the formal rulings made as well as the statements by the  
18 Court, while on the record, in Mr. Aparicio's matter.

19  
20  
21 1. *Motion in Limine to Exclude Retrograde Extrapolation*

22  
23 On this issue, the Court ignored Nevada Supreme Court precedent to allow the  
24 admission of an expert conclusion based on information, disclosed after the fact, that was  
25 not known to or considered by the expert when performing the retrograde extrapolation.  
26  
27  
28

1 Summarily, the expert's extrapolation result was ruled admissible based on information  
2 that the expert did not ever have access to when calculating that result.

3  
4 Generally speaking, retrograde extrapolation is a mathematical process that uses  
5 blood alcohol results taken outside of two hours to "guess" or "extrapolate" what the blood  
6 alcohol results would have been had they been taken within the two hour window.  
7 However, the process for reverse engineering a person's blood alcohol content for a  
8 criminal matter is not a simple task, as the results depend on the person's gender, height,  
9 weight, age, what they drank, when they drank, what they ate, when they ate, how much  
10 time had elapsed, etc.  
11

12 This basic premise is reflected in the Nevada Supreme Court's holding in *State v.*  
13 *Dist. Ct. (Armstrong)*, 127 Nev. 927, 936, 267 P.3d 777, 783 (2011), wherein the Court held  
14 that retrograde extrapolation is not admissible unless the calculation takes into account  
15 the following factors:  
16

17 We agree that achieving a reliable retrograde extrapolation calculation  
18 requires consideration of a variety of factors. The following factors are  
19 relevant to achieving a sufficiently reliable retrograde extrapolation  
20 calculation: (1) gender, (2) weight, (3) age, (4) height, (5) mental state,  
21 (6) the type and amount of food in the stomach, (7) type and amount of  
22 alcohol consumed, (8) when the last alcoholic drink was consumed, (9)  
23 drinking pattern at the relevant time, (10) elapsed time between the  
24 first and last drink consumed, (11) time elapsed between the last drink  
25 consumed and the blood draw, (12) the number of samples taken, (13)  
26 the length of time between the offense and the blood draws, (14) the  
27 average alcohol absorption rate, and (15) the average elimination rate.  
28 We observe, as the *Mata* court did, that not every personal fact about  
the defendant must be known to construct a reliable extrapolation, 46  
S.W.3d at 916-17, but rather those factors must be balanced. *Id.*

26 In this case, the extrapolation result reached by the State's expert only took into  
27 account Mr. Aparicio's body weight and gender, using a linear model which actually  
28

1 *excluded* consideration of all of the above-listed factors. In fact, per the State's report, the  
2 expert used a linear rate that was published over 25 years ago to reach its conclusion.

3  
4 In response to the Defense Motion, the State argued that it was *now* in possession of  
5 receipts which purportedly showed what Mr. Aparicio ate and drank the night of the  
6 accident. However, this information gathered *after* the expert reached the extrapolation  
7 result utilizes multiple assumptions – for example, assuming that Mr. Aparicio drank the  
8 purchased beverages instead of his partner, and assuming that he consumed the entirety of  
9 menu items purchased instead of partial portions. Additionally, this information is entirely  
10 irrelevant to the reliability of the underlying extrapolation result because *the expert did not*  
11 *have this information when calculating the extrapolated blood alcohol result.* The Court ruled  
12 that information now possessed by the State, yet was never provided to the expert,  
13 somehow makes the expert's conclusion more reliable as a matter of law. It is the Defense's  
14 position that it is arbitrary and capricious to rule that the expert's conclusion, which by  
15 itself failed to abide by the requirements in *Armstrong*, is more reliable based on  
16 subsequent information that was not provided to that expert.  
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19 In conjunction with the Court's ruling, statements made on the record are also  
20 gravely concerning to the Defense with respect to Mr. Aparicio's ability to receive a fair  
21 trial. Specifically, *the Court stated on the record that Mr. Aparicio killed two people.* The crux  
22 of this entire case is identity – Mr. Aparicio never said he was the driver, none of the 15+  
23 witnesses could place him behind the wheel, and another individual was also present in the  
24 vehicle during the collision. The Court's statement that Mr. Aparicio was not only driving  
25 but had killed two people is a clear pre-disposition before the close of evidence in this case.  
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1 After making this statement, the Court held that it was going to deny the Motion to  
2 Exclude because "retrograde extrapolation is extremely reasonable in this particular case."  
3 The Court failed to articulate how the extrapolation survives analysis under *Armstrong* and  
4 failed to address the Defense arguments entirely before making its ruling. After the fact,  
5 Defense tried to create a record as to the basis for the denial, and the Court continually cut  
6 off Counsel's arguments:  
7

8  
9 MR. SHEETS: ...just so the record is clear, I think our position was that  
10 the report didn't indicate that he had used any of the facts that we're  
11 talking about [the receipts], the time he had drank, what he had eaten. I  
12 don't think the expert's report -

13 THE COURT: Thank you.

14 MR. SHEETS: And that was kind of our biggest thing and it didn't -

15 THE COURT: All right (Transcripts, July 23, 2018, 4: 1).

16 2. *Petition for Writ of Habeas Corpus*

17 Defense would also strongly encourage this Court to view the JAVs recordings for  
18 July 23, 2018 and August 8, 2018. The general demeanor, tone and facial expressions of the  
19 District Court during these hearings is also significant in this case. For example, this Court  
20 should review the hearing on July 23, 2018 to see firsthand the District Court's demeanor  
21 when the Court stated that Mr. Aparicio killed two people, and then also when the Court  
22 learned that Defense had filed a Petition for Writ of Habeas Corpus to challenge the  
23 probable cause finding at Mr. Aparicio's preliminary hearing. Specifically, the Court audibly  
24 scoffed at the notion that the Defense would file a Writ, creating a direct insinuation that  
25 the Court believed a writ would have no merit prior to one ever being filed.  
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1 On that note, the Petition for Writ of Habeas Corpus presented only one issue –  
2 there was no evidence presented whatsoever, let alone slight or marginal, that Mr. Aparicio  
3 was the driver of the vehicle. Prior to the hearing on the matter, however, the Court was  
4 notably disdainful towards Defense Counsel:  
5

6 MR. SHEETS: Your Honor, I can tell Your Honor that for some reason I  
7 didn't receive a copy of the State's response. I did download it when I  
8 got on Odyssey on Monday.

9 THE COURT: You must have had time because you didn't show up for  
10 court.

11 MR. SHEETS: I had five separate district courts on that day so-

12 THE COURT: I don't care.

13 MR. SHEETS: So, I mean, I can argue it orally or if you want my Reply  
14 Your Honor, or if you want –

15 THE COURT: You can argue it (Transcripts, August 8, 2012, 2: 16).

16 In their response to the Habeas Petition, the State argued that *Armstrong* did not  
17 apply to this case at all because the holding was limited to single-blood draw cases only.  
18 Defense responded that this is an improper limitation of the *Armstrong* holding, but the  
19 Court did not consider the argument. Instead, the Court found that Mr. Aparicio's presence  
20 on the curb outside of the vehicle following the accident was sufficient probable cause that  
21 he was the one driving the vehicle.  
22

23 MR. SHEETS: She [the other occupant] was in the passenger seat but  
24 there was also –

25 THE COURT: Oh.

26 MR. SHEETS: - a discussion about how she wasn't a seat – how she  
27 wasn't wearing a seatbelt, Your Honor, and there was damage to the  
28 windshield.

1 THE COURT: Please.

2  
3 MR. SHEETS: So there's no evidence that would have suggested that she  
4 couldn't have been ejected from that driver's seat and into the  
5 passenger seat.

6 THE COURT: Slight even marginal evidence is all that has to be shown  
7 at a preliminary hearing.

8 MR. SHEETS: Right. But there has to be slight or marginal evidence -

9 THE COURT: There was.

10 MR. SHEETS: - sitting next to a car I don't believe creates the -

11 THE COURT: Well -

12 MR. SHEETS: - slight or marginal evidence -

13 THE COURT: - I think you're wrong (Transcripts, August 8, 2018, 6: 14;  
14 8: 11).<sup>1</sup>

15 Additionally, Defense Counsel reiterated that, at the previous hearing on the Motion  
16 to Exclude the Retrograde Extrapolation, "Your Honor had mentioned at the last hearing  
17 that I was present at, that my client killed two people, I think for purposes of preliminary  
18 hearing we have to look at what was presented to that particular court. And Your Honor  
19 was referencing things that were not part of the preliminary hearing at that prior hearing."  
20 (Transcripts, August 8, 2018, 5: 1). The Court declined to clarify or provide context to its  
21

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25 <sup>1</sup> Defense Counsel will note that the State provided supplemental argument regarding probable cause *after*  
26 the District Court had made this ruling; however, since the instant Motion for Disqualification does not seek  
27 to readdress the merits of the District Court's ruling except as it relates to disqualification, for purposes of  
28 this Motion it should be noted that the Court made this ruling prior to the State's additional argument, and  
therefore did not take the subsequent argument into consideration. However, it is noteworthy that the State  
also conceded during their argument that mere presence alone would not be sufficient probable  
cause, which directly contradicts the District Court's finding (9: 8).



1 earlier statement that would suggest it was anything other than a pre-disposition as to Mr.  
2 Aparicio's guilt.

3  
4 *3. Order Denying Investigative Fees*

5  
6 This is perhaps the most egregious and concerning action by the District Court to  
7 warrant disqualification. Following the District Court's decision to allow the State's  
8 retrograde extrapolation expert, Defense Counsel filed an Ex Parte Motion for  
9 Authorization of Employment of Investigator and Payment of Fees. This investigation was  
10 necessary both for the general needs of the defense, as well as to rebut the State's expert  
11 conclusion which the District Court had just permitted.  
12

13 Mr. Aparicio provided financial disclosures that listed income in the amount of  
14 \$1,084 per month, debts in the amount of \$1,515 per month, and assets in the amount of  
15 \$400. Therefore, Mr. Aparicio presented a *negative* debt to income ratio, which on its face is  
16 sufficient to qualify for government assistance. Despite these disclosures, which were  
17 recognized by the Court, the Court nonetheless still denied the request for investigative  
18 fees based on "an insufficient showing of indigency." Not only did the District Court just  
19 permit an expert opinion that was contrary to controlling precedent, but the same Court  
20 then excluded the Defense from employing an investigator to rebut that opinion based on a  
21 lack of indigency when the Court also recognized Mr. Aparicio's negative debt to income  
22 ratio.  
23  
24

25 The District Court's ruling to deny investigative fees marked the culmination of a  
26 series of rulings and statements which demonstrate an arbitrary and capricious handling of  
27  
28

1 the case. The District Court's statements on the record, especially when viewed through  
2 JAVs video, facially indicate a bias and animus against the Defendant in this case. In fact, the  
3 Court stated on the record that Mr. Aparicio killed two people; there are fewer ways to  
4 express a pre-disposition of guilt prior to the presentation of evidence. The District Court  
5 was also very disrespectful towards Defense Counsel, often cutting him off when trying to  
6 make a record of the Court's ruling.  
7

8         The District Court's demeanor, coupled with rulings that are both contrary to law  
9 and without legal foundation, have served to deprive Mr. Aparicio of a fair trial before the  
10 trial has even commenced. The lack of impartiality, as noted on the record through the  
11 transcripts and Order attached, is sufficient to warrant disqualification. The Court's  
12 decision to deny the request for investigative fees directly inhibits the ability for Mr.  
13 Apricio to pursue a complete defense to his case, in part because Mr. Aparicio now cannot  
14 rebut the State's expert which the Court had ruled was admissible.  
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1           Therefore, under the law governing disqualification as set forth by both the United  
2 States Supreme Court and the Nevada Supreme Court, Defense respectfully requests this  
3 matter be reassigned to a new department. Additionally, Defense would request an  
4 opportunity to renew the Motions filed in this case before a new judge, as the rulings made  
5 by the District Court have a direct impact on the evidence which can be presented at trial.

6  
7 DATED this 4 day of February, 2019.

8 By:  
9 MAYFIELD GRUBER & SHEETS

10 By:     /s/ Damian Sheets      
11 Damian Sheets, Esq.  
12 Nevada Bar No. 10755  
13 726 S. Casino Center Blvd.  
14 Las Vegas, Nevada 89101

1 AFFIDAVIT IN SUPPORT OF DISQUALIFICATION

2 STATE OF NEVADA )

3 )ss.

4 COUNTY OF CLARK )

5 DAMIAN R. SHEETS, being first duly sworn, deposes and says:

- 6 1. That I am a duly licensed attorney in good standing able to practice law in the State  
7 of Nevada.  
8 2. That I represent Henry Aparicio, the named defendant in the Eighth Judicial District  
9 Court, case no. C-18-332496-1.  
10 3. That Mr. Aparicio's case was assigned to Department 8 of the Eighth Judicial District  
11 Court following a contested preliminary hearing.  
12 4. That on numerous occasions, the District Court has displayed an animosity and pre-  
13 disposition towards both myself and Mr. Aparicio in this matter, to wit:  
14 a. By arbitrarily and capriciously ruling that the State's expert opinion was  
15 legally reliable based on information subsequently disclosed that was not  
16 used to formulate that opinion;  
17 b. By prohibiting me from creating a record as to the Court's ruling;  
18 c. By stating on the record that my client killed two people, thereby creating  
19 a pre-disposition of guilt;  
20 d. By making numerous statements, facial expressions, and intonations that  
21 strongly imply an animosity towards myself and Mr. Aparicio;  
22 e. By concluding that slight or marginal evidence existed that Mr. Aparicio  
23 was driving the vehicle only due to his presence outside the vehicle after  
24 the accident, although the State later conceded that "mere presence alone  
25 is not enough" at the same hearing;  
26 f. By allowing the State's expert to testify as to retrograde extrapolation and  
27 thereafter denying the Defense request for investigative fees to rebut this  
28 expert;  
29 g. By finding "an insufficient showing of indigency" when Mr. Aparicio has a  
30 negative debt to income ratio by approximately -\$400/month;  
31 h. By making rulings and decisions which directly inhibit Mr. Aparicio's  
32 ability to pursue a full and complete defense, and thereby prejudicing his  
33 trial;  
34 i. By any and all grounds as provided above in the instant Motion.  
35 5. That I respectfully request this matter be reassigned to a new department in the  
36 Eighth Judicial District Court.

37 ///

38 ///

1 6. That I have read the above Motion for Disqualification, and I affirm the facts and  
2 information presented to be true to the best of my recollection.

3  
4 I declare under penalty of perjury that the foregoing is true and correct.

5  
6 Executed on 2/11/19  
(Date)

(Signature)

7 Kim Garcia

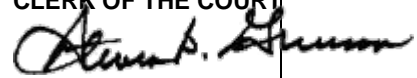
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10 State of Nevada

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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

HENRY APARICIO,  
AKA HENRY BIDERMAN APARICIO,

Defendant.

CASE#: C-18-332496-1

DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE  
WEDNESDAY, JUNE 13, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:  
STATUS CHECK: TRIAL SETTING**

APPEARANCES:

For the State:

CHARLES S. MARTINOVSKY, ESQ.  
Chief Deputy District Attorney

For the Defendant:

DANIEL F. LIPPMANN, ESQ.

RECORDED BY: GINA VILLANI, COURT RECORDER

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Las Vegas, Nevada, Wednesday, June 13, 2018

[Hearing began at 9:13 a.m.]

THE COURT: C332496, Henry Aparicio.

THE MARSHAL: I called the attorney's office. I called both attorneys, left messages, the office was going to try to get ahold of them.

THE COURT: Do we have -- I have an updated sheet but. What's his name?

THE MARSHAL: I called Lippmann and I called Sheets.

THE COURT: Lippmann, do we have Lippmann's cell?

THE MARSHAL: Yeah.

[Colloquy between the Court and the Marshal]

[The Court makes telephone call]

[Hearing trailed at 9:15 a.m.]

[Hearing recalled at 9:25 a.m.]

THE COURT: C332496, Henry Aparicio.

MR. LIPPMANN: Aparicio.

THE COURT: Aparicio. How was that, better?

MR. LIPPMANN: Better.

THE COURT: All right. Let me get to page 10.

This is a status check on a trial setting. He is in custody. I don't know what his bail status is. I would like to know what his bail status is because this is driving under the influence with death.

MR. MARTINOVSKY: It's a half a million dollars.

THE COURT: Pardon?



1 MR. MARTINOVSKY: Half-million.

2 THE COURT: All right.

3 MR. MARTINOVSKY: It's alleged two deaths and a  
4 substantial.

5 THE COURT: So why is it a status check on a trial setting?

6 MR. MARTINOVSKY: We went last Wednesday down on the  
7 lower lever, after the prelim, and he invoked but they said he was going  
8 to have to waive. I guess your first trial setting was August 30<sup>th</sup>. So then  
9 Damian asked -- Mr. Sheets asked to come up here.

10 THE CLERK: August 13<sup>th</sup>.

11 MR. MARTINOVSKY: August 13<sup>th</sup> was the first trial setting.

12 THE COURT: All right.

13 MR. MARTINOVSKY: He didn't wanna. I don't know.

14 THE COURT: Well, you know what, that's the sad part of it is,  
15 we have civil and we have criminal. And we're going to have to waive it,  
16 whether he waives it or not. I guess you could be ready in a week. I can  
17 try the case in a week.

18 MR. LIPPMANN: Given the nature of the case, given that  
19 there is still outstanding discovery, I'm sure Mr. Sheets would request it  
20 not be set in a week.

21 THE COURT: All right.

22 MR. LIPPMANN: But by August 13<sup>th</sup> waiving by one week --

23 THE CLERK: Three days.

24 THE COURT: Three days.

25 MR. LIPPMANN: Three days, Your Honor.

1 THE COURT: All right.

2 MR. LIPPMANN: I don't see an issue with that.

3 [Colloquy between the Court and the Clerk]

4 THE CLERK: So then he'd have to wait 10 days. If he -- if it --  
5 from the date of arraignment.

6 MR. LIPPMANN: Regardless, the Court can't accommodate  
7 within the 60. So waiving by 10 is what's needed.

8 THE COURT: All right. You don't want to waive by 10 but we  
9 have civil that we can't set. So unless you go in two weeks, you've got  
10 to have it set in August.

11 Do you understand?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Okay.

14 THE CLERK: So that's August 8<sup>th</sup> for calendar call; August  
15 13<sup>th</sup> for jury trial.

16 THE COURT: Thank you.

17 MR. LIPPMANN: Thank you.

18 MR. MARTINOVSKY: I'm sorry, Madam Clerk, what time is  
19 the jury trial?

20 THE CLERK: 8 o'clock for calendar call; 9:30 for trial.

21 MR. MARTINOVSKY: Thank you.

22 THE COURT: And give defense all *Brady* and statutory,  
23 *Giglio* discovery.

24 MR. MARTINOVSKY: Yes, Your Honor.

25 Just for the record, we are -- I've spoken to the lab they're

1 testing DNA from the vehicle. I do have -- I just spoke to Mr. Lippmann.  
2 I have a video from Dave and Buster's, but I have to -- I just got it last  
3 night. So I'm going to make a copy.

4 I also have the coroner's reports. Those are being copied  
5 today. I'll get those today.

6 And I have a stack of receipts from Casa Del Matador and  
7 also from Dave and Buster's. And a bunch of handwritten statements  
8 that we had gotten after the preliminary hearing, because people -- this  
9 was one of the rare cases that went within two weeks of the actual  
10 event.

11 So I told him I didn't want to give him all this today since I just  
12 got the video and the coroner's reports. So I'll bring that over Thursday or  
13 Friday.

14 THE COURT: Okay.

15 MR. LIPPMANN: That's fine, Your Honor.

16 MR. MARTINOVSKY: Thank you.

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And the DNA as soon as it's available.

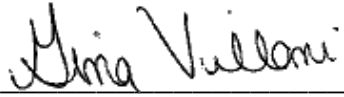
THE COURT: All right.

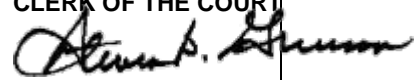
MR. MARTINOVSKY: Thank you.

[Hearing concluded at 9:29 a.m.]

\* \* \* \* \*

**ATTEST:** I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Gina Villani  
Court Recorder/Transcriber



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DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

CASE#: C-18-332496-1  
DEPT. VIII

vs.

HENRY APARICIO,  
AKA HENRY BIDERMAN  
APARICIO,  
Defendant.

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE  
MONDAY, JULY 16, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:  
DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF  
RETROGRADE EXTRAPOLATION**

APPEARANCES:

For the State: KELSEY EINHORN, ESQ.  
Deputy District Attorney

For the Defendant: DAMIAN R. SHEETS, ESQ.

RECORDED BY: GINA VILLANI, COURT RECORDER

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Las Vegas, Nevada, Monday, July 16, 2018

[Hearing began at 9:13 a.m.]

THE COURT: C332496, Henry Ar -- Aparicio.

MR. SHEETS: Aparicio.

THE COURT: Aparicio.

It's your motion.

MR. SHEETS: Yes. Good morning, Your Honor.

With the Court's permission, I didn't get the -- the State's response until late week, if we could move this one week for me to do a reply.

THE COURT: Yeah, I haven't -- I haven't seen the State's response so.

MS. EINHORN: I'll make sure both parties receive that, Your Honor.

THE COURT: I've got a copy.

MS. EINHORN: Oh, okay.

THE COURT: I just hadn't had a chance to read it.

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MS. EINHORN: What was the date again?

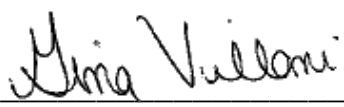
THE CLERK: July 21<sup>st</sup>.

MR. SHEETS: Thank you very much, Your Honor.

[Hearing concluded at 9:13 a.m.]

\* \* \* \* \*

**ATTEST:** I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Gina Villani  
Court Recorder/Transcriber





1 Las Vegas, Nevada, Monday, July 23, 2018

2  
3 [Hearing began at 9:07 a.m.]

4 THE COURT: C332496, Henry Aparicio.

5 All right. It's your motion, Counsel.

6 MR. SHEETS: Yes, Your Honor.

7 THE CLERK: Can we have appearances.

8 MR. SHEETS: Damian Sheets on behalf of Mr. Aparicio  
9 who's present in custody.

10 MR. MARTINOVSKY: Charles Martinovsky for the State,  
11 7439.

12 MR. SHEETS: Your Honor, we filed our motion, the State filed  
13 the opposition. I won't belabor you. I think we laid it all out in the  
14 motion, the opposition.

15 THE COURT: Yeah, the motions are well written. I reviewed  
16 the cases that were cited to.

17 Does the State want to say anything? They're not going to --  
18 do you want to submit it?

19 MR. MARTINOVSKY: Yes, Your Honor.

20 THE COURT: One of the things in the case, I believe it was  
21 *Armstrong* 127 Nevada 927 in 2011, that talked about retrograde  
22 extrapolation. Not only did they take in the identifiers for this Defendant  
23 but they took into account -- I mean they have -- they know from 5:30 to  
24 8:30 what he drank and what he ate because he was at Dave and  
25 Buster's. And I believe it was at that point that Dave -- that the

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1 bartender at Dave and Buster's walked him out to his car because he  
2 was too intoxicated and put him behind the wheel.

3 So they know how much he had to drink and eat then.  
4 Nothing to eat and lots to drink. Then he went to the restaurant, I  
5 believe he was the manager of, and they know that he bought six shots  
6 of tequila and he finished that at about, as I recall, five -- I can't find my  
7 notes right now -- but it was five minutes to 9:00. By 9:08 he had run  
8 into the back of that Prius. His blood alcohol content was extremely high  
9 in retrograde but they knew exactly what he drank, when he drank, and  
10 how much food. And at that restaurant, I think he ordered jalapeno  
11 poppers. And if he ate all of them, he had not much in his body.

12 But he hit that Prius, and I read the police reports on that, and  
13 it knocked that Prius from zero to 50 miles an hour. It was stopped at a  
14 light at Sahara and Hualapai. And I believe the car -- and it'll have -- it  
15 was a newer Mercedes, the red Mercedes, that the black box in the  
16 newer cars can tell you to the second how fast you were driving when  
17 that airbag deployed. And he was doing over a 100 miles an hour, killed  
18 two people.

19 Extrapolation, retrograde extrapolation is extremely  
20 reasonable in this particular case. The Defendant's motion to -- in limine  
21 to exclude evidence of retrograde extrapolation is denied. The State will  
22 prepare a findings of fact, conclusions of law consistent with their  
23 opposition and this Court's decision today.

24 Thank you.

25 MR. SHEETS: And if I could -- and I'm not trying to get Your

1 Honor to change your mind -- just so the record is clear, I think our  
2 position was that the report didn't indicate that he had used any of those  
3 factors that we're talking about, the time he had drank, what he had  
4 eaten. I don't think the expert's report --

5 THE COURT: Thank you.

6 MR. SHEETS: -- and that was kind of our biggest thing and it  
7 didn't --

8 THE COURT: All right.

9 MR. SHEETS: A couple of housekeeping issues though,  
10 since I've got the State here, we did file our petition for a writ, Your  
11 Honor, consistent with that. We're obviously waiving our right to a  
12 speedy trial. I was gonna ask if maybe we can go ahead and continue  
13 the trial now. And I know Mr. Martinovsky would like to set a specific  
14 schedule for responding to the writ because he's gonna be out of the  
15 jurisdiction as well. So I wonder if we could just kind of clean that up  
16 while we're here. I don't know if Your Honor's --

17 THE COURT: You filed the writ?

18 MR. SHEETS: We did. It was filed late --

19 THE COURT: Challenging what?

20 MR. SHEETS: The probable cause from the preliminary  
21 hearing.

22 MR. MARTINOVSKY: It was filed on Friday.

23 Mr. SHEETS: Yes.

24 THE COURT: It was filed on Friday?

25 MR. MARTINOVSKY: Yes.

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THE COURT: How much time do you need to respond?

MR. MARTINOVSKY: I already -- I mean, I don't need much time. I just -- I'm not gonna be here next week because I'll be in Disney. So if we could just set -- I don't know how you want -- and his didn't have a date on it. His motion didn't have a -- it hadn't been calendared yet as far as I could see.

MR. SHEETS: I don't -- I don't know. I was out of the jurisdiction on Friday.

THE COURT: I haven't see that so.

MR. SHEETS: I'm fine with whatever schedule the State wants to be on.

THE CLERK: It's scheduled for hearing on August 6<sup>th</sup>.

THE COURT: All right.

MR. MARTINOVSKY: Oh, that's fine.

THE COURT: All right. We're gonna argue August 6. You file a response by then, you file a reply by then, we're going to have the argument. We don't -- and we can deal with resetting the trial at that time.

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MR. MARTINOVSKY: Thank you, Your Honor.

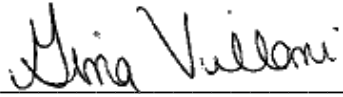
MR. SHEETS: Thank you, Your Honor.

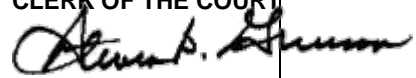
THE COURT: Thanks.

[Hearing concluded at 9:12 a.m.]

\* \* \* \* \*

**ATTEST:** I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Gina Villani  
Court Recorder/Transcriber



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RTRAN

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

HENRY APARICIO,  
AKA HENRY BIDERMAN APARICIO,

Defendant.

CASE#: C-18-332496-1

DEPT. VIII

BEFORE THE HONORABLE DOUGLAS E. SMITH, DISTRICT COURT JUDGE  
WEDNESDAY, AUGUST 8, 2018

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:  
PETITION FOR WRIT OF HABEAS CORPUS  
CALENDAR CALL**

APPEARANCES:

For the State:

CHARLES S. MARTINOVSKY, ESQ.  
Chief Deputy District Attorney

For the Defendant:

DAMIAN R. SHEETS, ESQ.

RECORDED BY: GINA VILLANI, COURT RECORDER

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Las Vegas, Nevada, Wednesday, August 8, 2018

[Hearing began at 8:47 a.m.]

THE COURT: C332496, Henry Aparicio.

Are you ready to go to trial?

MR. SHEETS: This is argument for writ today, Your Honor.

THE COURT: No, that was -- you didn't show up for the argument on the writ.

MR. SHEETS: So did Your Honor summarily deny the writ then at that point?

THE COURT: No, I don't -- I don't remember if it's on --

[Colloquy between the Court and the Clerk]

THE COURT: All right. Argue your writ.

MR. SHEETS: I had it on for argument and resetting of the trial date.

Your Honor, I can tell Your Honor that for some reason I didn't receive a copy of the State's response. I did download it when I got on Odyssey on Monday.

THE COURT: You must had time because you didn't show up for court.

MR. SHEETS: I had five separate district courts on that day so.

THE COURT: I don't care.

MR. SHEET: So, I mean, I can argue it orally if you want my reply Your Honor, or if you want --

1 THE COURT: You can argue it.

2 MR SHEETS: Okay. So after having read the State's  
3 response, Your Honor, I do have a couple of brief points that I kind of  
4 want to address.

5 First of all, I think that the State's response doesn't properly  
6 apply *Armstrong* and it doesn't properly interpret *Armstrong*. And with all  
7 due respect to Mr. Martinovsky, who I think is a very fine attorney; I just  
8 think that the picture that he's painting regarding *Armstrong* and how it  
9 applies almost kind of improperly narrows the scope of what *Armstrong*  
10 is about.

11 If you would believe the State's response, *Armstrong* should  
12 only apply two cases where there are -- there's only one blood draw.  
13 And I don't think that *Armstrong* at all lays out that proposition. I think, in  
14 fact, the crux or the underlying meat of the *Armstrong* ruling is  
15 specifically addressing whether or not the physical factors exist that can  
16 be used to properly extrapolate blood when they don't have a three  
17 blood draw extrapolation. And I think that's where we're looking at it  
18 differently.

19 The State would have you think that, oh, because there's two  
20 all of a sudden an extrapolation can be done. That's not what *Armstrong*  
21 is addressing. *Armstrong* was addressing the fact that extrapolation is a  
22 medical science that requires medical, physical data when turning  
23 around and calculating that extrapolation. And absent that concrete  
24 medical data, you do not have what you need for that extrapolation to be  
25 legally admissible because there are questions as to its reliability and



1 questions as to its authenticity.

2           And in this case I think that's exactly what applies. The State  
3 would have the Court believe that the evaluator factored all these things  
4 in; however, the report that Your Honor has does not factor those things  
5 in.

6           The State would also have you believe that simply because  
7 there's a receipt that says drinks were bought that that's evidence that  
8 there were receipts -- that was evidence that my client specifically  
9 engaged in drinks. But what we're doing is we're creating a whole lot of  
10 assumption.

11           So in this particular circumstance as it was presented for the  
12 preliminary hearing, we have a situation where I believe there's been an  
13 improper use of *Armstrong*. There's an improper reliance on *Armstrong*.  
14 And in this particular matter, the State's trying to completely remove  
15 *Armstrong* because they know that *Armstrong* has a direct negative  
16 impact on their case. And so if they can try to improperly restrict  
17 *Armstrong* to only single blood draw situations, they're ignoring the  
18 complete discussion that underlies that entire case talking about the  
19 physical information that needs to be asked for, that needs to be  
20 obtained, and needs to be used in the calculation of this extrapolation.

21           And in this particular case, he's talking about using a simple  
22 linear extrapolation, that's what his report says. And it doesn't factor in  
23 any of that physical information. That is exactly why *Armstrong* applies.  
24 Because when this is not done, that is not a proper extrapolation.

25           Additionally, with regards to the actual physical control, there

1 has -- while Your Honor has heard argument and Your Honor had  
2 mentioned at the last hearing that I was present at, that my client killed  
3 two people, I think that for the purposes of preliminary hearing we have  
4 to look at what was presented to that particular court. And Your Honor  
5 was referencing things that were not part of the preliminary hearing at  
6 that prior hearing. This writ deals specifically with that. And what we  
7 had was every single witness say that they did not see or know who was  
8 operating the motor vehicle.

9 Now, the State, you know, says, oh, he was there; he must  
10 have been operating the motor vehicle. Well, they had a witness testify  
11 who was there. So how do we know he wasn't operating the motor  
12 vehicle? They had a girl that was there. For the purposes of preliminary  
13 hearing, there was no evidence. In fact, when asked there was no  
14 statement by any of the witnesses that the person who was in the  
15 passenger seat of the car couldn't have been the person in the driver  
16 seat of that car.

17 THE COURT: Except she was unconscious --

18 MR. SHEETS: Well, of course she was --

19 THE COURT: -- when the police got there.

20 MR. SHEETS: That -- that's --

21 THE COURT: He was out on the curb crying.

22 MR. SHEETS: He was out on the curb, correct, Your Honor.  
23 He was being massaged.

24 But that doesn't mean that he was operating that motor  
25 vehicle. That's --

1 THE COURT: All right.

2 MR. SHEETS: -- that's the problem. When -- even by the  
3 testimony of the witnesses when officer's arrived there were -- there  
4 were a -- quite a -- quite a few people. There were a ton of people there.  
5 And, in fact, even the independent witness that comes out says that  
6 there were a -- quite a few people here.

7 Now, the State tried to illicit the term that the witness was  
8 implying that my client was a suspect, I objected, and that was then  
9 removed, that qualifier. So what you have is a guy who responds to the  
10 scene -- or a lay person who's on the scene who says, listen, there's a  
11 whole bunch of people around, there's one guy that's being held by a  
12 bunch of other people, but he wasn't in the car and can't use the term  
13 suspect, and there were all these other people there and then there was  
14 a girl in the car. The girl was unconscious in the car but there was also  
15 damage to the windshield. And when specifically --

16 THE COURT: Where was she sitting in the car?

17 MR. SHEETS: She was in the passenger seat but there was  
18 also --

19 THE COURT: Oh.

20 MR. SHEETS: -- a discussion about how she wasn't a seat --  
21 how she wasn't wearing a seatbelt, Your Honor, and there was damage  
22 to the windshield.

23 THE COURT: Please.

24 MR. SHEETS: So there's no evidence that would have  
25 suggested that she couldn't have been ejected from that driver's seat

1 and in the passenger seat.

2           The fact of the matter is there was a single person within that  
3 motor vehicle. Not one, not one of the officers testified that my client  
4 admitted to being the operator of the motor vehicle. Not one of the  
5 witnesses testified that they saw my client inside that motor vehicle. So  
6 what we have is we have to have evidence. There has to be cognizable  
7 evidence that my client is in that driver's seat. And at that preliminary  
8 hearing there was no evidence whatsoever presented that puts my client  
9 in that seat. The only assumption that we're making is because he's  
10 sitting in proximity to the car he must, he must have been the one that  
11 was operating or in actual physical control of the motor vehicle.

12           The case law is very clear. You cannot operate on a hunch  
13 and that's exactly what they're doing. I suspect that he was in the car  
14 because he was sitting -- because he's sitting next to the car. And that's  
15 just not enough. The case law is very clear and the evidence presented  
16 at the preliminary hearing is what Your Honor has to base your opinion  
17 on when --

18           THE COURT: Sure.

19           MR. SHEETS: -- when having this particular ruling. And there  
20 is just not sufficient evidence to do that. Not one of the witnesses asked  
21 to directly on cross. They supposedly, according to one of the  
22 witnesses, there are these 20 people, 15 to 20 people that are around  
23 this car, not one of them comes to testify at the preliminary hearing say I  
24 saw this guy behind the wheel. In fact, the one guy who gets there  
25 right -- pretty much right after the accident doesn't see him behind the

1 wheel either.

2 At the preliminary hearing they don't have any blood on the  
3 car, they don't have, you know, they don't have any DNA on the car,  
4 they don't have any DNA on the airbag. They have none of that  
5 information.

6 THE COURT: All of your argument is really addressed at a  
7 jury question.

8 MR. SHEETS: Quite frankly, Your Honor, that's not a jury  
9 question, that's a preliminary hearing question whether sufficient to the  
10 evidence was provided.

11 THE COURT: Slight even marginal evidence is all that has to  
12 be shown at a preliminary hearing.

13 MR. SHEETS: Right. But there has to be slight or marginal  
14 evidence --

15 THE COURT: There was.

16 MR. SHEETS: -- sitting next to a car I don't believe creates  
17 the --

18 THE COURT: Well --

19 MR. SHEETS: -- slight or marginal evidence.

20 THE COURT: -- I think you're wrong.

21 MR. SHEETS: Well, you know, because if we base our  
22 standard on that, Your Honor, then any of the other 10 to 15 people  
23 there around the car could have also have been charged with the same  
24 thing based on that standard, Your Honor.

25 Based on that, I'd submit.

1 THE COURT: All right. Mr. Martinovsky?

2 MR. MARTINOVSKY: Well, Your Honor, as to the *Armstrong*  
3 issue, there's a case right on point, *Burcham*, which basically says that  
4 at prelim because the standard is so low the State can admit two  
5 different blood samples taken an hour apart without calling an expert to  
6 testify. That's black letter law.

7 And then as to the identification of the Defendant as the driver,  
8 obviously it's slight to marginal. Mere presence is alone is not enough  
9 but we have two witnesses testify that he said, did I kill two people?

10 We have a detective who testified that we have a girl in the  
11 passenger seat but she wasn't just there, her purse was tucked  
12 underneath the passenger seat with all her identification. And the  
13 detective testified no one was in the backseat because of the distribution  
14 of the glass, the Defendant had injuries on his face consistent with  
15 having been in a collision. There was blood on the steering wheel and  
16 he was expressing concern for the passenger saying, go save her, go  
17 save her.

18 As well as the fact that Brandon McCauley said that he saw a  
19 crowd of people, and his words from Mr. Sheets' question, and  
20 McCauley's words were there were a crowd of people apprehending  
21 him.

22 THE COURT: All right.

23 MR. MARTINOVSKY: So I think that because of the evidence  
24 it's slight to marginal and we did present more than just mere presence.

25 THE COURT: Thanks.

1           Based on pleadings and argument, it's clear, crystal clear to  
2 the Court that there was slight even marginal evidence that was  
3 presented at the justice court. It was crystal clear that the testing of the  
4 blood was -- would satisfy *Armstrong*. Absolutely crystal clear.

5           The writ is denied. The State will prepare a findings of fact,  
6 conclusions of law consistent with their opposition.

7           Now what about the trial date?

8           MR. SHEETS: Your Honor, we're waiving speedy. So if we  
9 can set it in the ordinary course, I'd be looking for something after the  
10 first of the year, please.

11           THE COURT: Is that what you want to do after -- under the  
12 circumstances and after discussing the matter fully with your attorney,  
13 Mr. Aparicio?

14           THE DEFENDANT: Yes, Your Honor.

15           THE COURT: All right. You're satisfied that's in your best  
16 interest?

17           THE DEFENDANT: Yes Your Honor.

18           THE COURT: All right. Speedy trials waived, we'll set it in  
19 January.

20           THE CLERK: Is it a week?

21           MR. MARTINOVSKY: It's a week.

22           THE CLERK: Okay. So January 23<sup>rd</sup> calendar call; January  
23 28<sup>th</sup>.

24           MR. MARTINOVSKY: Thank you.

25           MR. SHEETS: And, Madam Clerk, what are the times on

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those?

THE CLERK: 8 o'clock and 9:30.

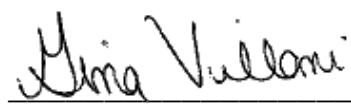
MR. SHEETS: Thank you very much, Your Honor.

MR. MARTINOVSKY: Thank you.

[Hearing concluded at 8:58 a.m.]

\* \* \* \* \*

**ATTEST:** I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



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Gina Villani  
Court Recorder/Transcriber



1 ORD  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

11 **EIGHTH JUDICIAL DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

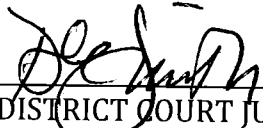
13 The State of Nevada ) Case No. C-18-332496-1  
14 Plaintiff, )  
15 vs. ) Dept. No. VIII  
16 Henry Aparicio, ) **ORDER DENYING EX PARTE MOTION FOR**  
17 Defendant. ) **AUTHORIZATION OF EMPLOYMENT OF**  
 ) **INVESTIGATOR AND PAYMENT OF FEES**

18  
19 This matter having been filed before the Court, Defendant having submitted an Ex  
20 Parte Application for Authorization of Employment of Investigator and Payment of Fees,  
21 the Court has considered the pleadings, papers and documents on file herein and, by  
22 summary disposition and without oral argument, hereby finds and orders,  
23

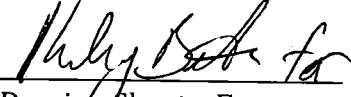
24 THE COURT HEREBY FINDS, pursuant to the Ex Parte Motion, that Defendant  
25 provided a total monthly income in the amount of \$1,084, total monthly debts in the  
26 amount of \$1,515, and total assets in the amount of \$400,  
27  
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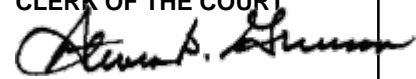
1 THE COURT HEREBY ORDERS Defendant's Ex Parte Motion for Authorization of  
2 Employment of Investigator and Payment of Fees is **DENIED** for an insufficient showing of  
3 indigency;  
4

5  
6 DATED this 2 day of August, 2018.  
7

8  
9   
DISTRICT COURT JUDGE  
ndp

10 Respectfully Submitted By:

11   
12 Damian Sheets, Esq.  
13 Attorney for Defendant  
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1 **OPPS**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CHARLES MARTINOVSKY  
6 Deputy District Attorney  
7 Nevada Bar #007439  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

CASE NO: C-18-332496-1

12 HENRY APPARICIO, aka,  
13 Henry Biderman Aparicio, #6069038,

DEPT NO: XXX

14 Defendant.

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION TO DISQUALIFY JUDGE**  
16 **SMITH.**

17 DATE OF HEARING: MARCH 19, 2019  
18 TIME OF HEARING: 9:00 A.M.

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
20 District Attorney, through CHARLES MARTINOVSKY, Deputy District Attorney, and  
21 hereby submits the attached Points and Authorities in Opposition to Defendant's Motion to  
22 Disqualify Judge Smith.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the  
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
25 deemed necessary by this Honorable Court.

26 ///

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1 FACTS.

2 On May 15, 2018, the defendant and his girlfriend, Morgan Hurley, entered Dave and  
3 Buster's restaurant at about 5:30 P.M. Video evidence shows the two drinking inside the bar.  
4 Receipts from the tab indicate that the two ordered their first drinks at 5:37 P.M. The video  
5 shows that Morgan was drinking a Caribbean Lit, and the defendant was drinking shots of  
6 Patron Silver. The bar tab indicates that by 7:21P.M., they pair had ordered 10 shots of Patron  
7 Silver, 3 Caribbean Lit Drinks, and they had not ordered any food. Video evidence shows the  
8 pair then entering Casa Del Matador, also located in downtown Summerlin, shortly after they  
9 had left Dave and Buster's. The defendant worked at this establishment at the time. The tab  
10 from Casa Del Matador indicates that the pair consumed 6 more shots of Tequila. The pair  
11 also ordered Goat Cheese Jalapeno, but they did not order any other food. The tab closed at  
12 8:52 P.M., and video evidence shows the defendant and Morgan stumbling out of the Casa  
13 Del Matador shortly after paying the tab. The video also shows a bar tender helping the  
14 defendant out of the bar. That same bar tender then returns to the bar. Shortly after this, the  
15 same bar tender leaves the bar to speak with the defendant as he entered the driver's side of  
16 the red Mercedes which shortly thereafter caused the collision which killed the victims.

17 At about 9:08 P.M., the defendant crashed into the back of the victims' car when they were  
18 stopped facing East at a red light on Sahara and Hualapai. The speedometer on the defendant's  
19 car was stuck at 100 mph. The collision accelerated the victim's car from zero to over 50 mph.  
20 The collision killed both occupants.

21 Brandon McCauley testified that he left Downtown Summerlin at around 8:30 P.M. He  
22 witnessed a red vehicle pass him and exceeding the speed limit as he was driving East on  
23 Sahara. Mr. McCauley testified that the red car did not stop at the red light at the intersection  
24 of Sahara and Hualapai but slammed into the back of a white car which was stopped for the  
25 red light at the intersection. PHT, p. 9-11. Shortly after the collision, Mr. McCauley went to  
26 the red car which had caused the collision. Mr. McCauley saw a group of people holding the  
27 defendant down near the red vehicle. PHT, p. 12 – 13.

1 Mr. McCauley reiterated on cross examination that the group of people where  
2 'apprehending' the defendant. Mr. McCauley testified that 'Because I—well, initially after I  
3 saw the accident, like when the civilians were apprehending the guy next to you, he looked  
4 intoxicated. He just looked out of it. And he was being apprehended over the red car, so I just  
5 assumed that he was the driver.' PHT, p 22 line 23-25 – PHT p. 23 lines 1-2.

6 Officer Sonetti testified to two very important pieces of information. First, when he  
7 arrived on scene, Morgan Hurley was slumped down in the passenger seat of the red vehicle.  
8 PHT, p. 26-line 23- p. 27 line 3. Second, the defendant was sitting on the curb crying, and  
9 asking Officer Sonetti to save the passenger. PHT, p. 28 lines 14-25.

10 Katlynn Garduno drew the defendant's blood. She remembered performing the blood  
11 draw on the defendant. Katlynn testified that she heard the defendant asking one of the officers  
12 if he had run the red light. Katlynn testified as follows:

13 "Q: Did the defendant make any statements to you about the collision?

14 A: He (the defendant) didn't make it directly to me, but he did ask the officer if he had  
15 ran the red light." PHT, p. 46, lines 19-22.

16 Officer Ware also testified that the defendant asked if he had killed two people. Officer  
17 Ware conducted the blood draws with Katlynn Garduno. Officer Ware testified that "He (the  
18 defendant) stated that I killed two people, kind of like it was a question. He kind of said it like  
19 he was asking a question." PHT, p. 56 lines 1-10. On cross, Officer Ware again reiterated that  
20 the defendant asked if he had killed two people. PHT, p. 56, lines 14-25.

21 Officer Staheli testified that the defendant had dried blood on his lip and his nose. PHT,  
22 p. 62, Lines 12-16. State's exhibit #2 showed the injuries on the defendant's face.

23 Detective Ken Salisbury testified that the ACM data indicated that the collision  
24 accelerated the victims' car from zero MPH to 58.4 MPH. PHT, p. 86 lines 1-6.

25 Detective Atkinson testified to several key pieces of information. First, Detective  
26 Atkinson found a woman's purse on the floorboard of the red Mercedes. The purse contained  
27 numerous pieces of identification for Morgan Hurley. PHT, P. 103. Detective Atkinson also  
28 testified that his speed analysis indicated that the defendant was driving over 100 miles per

1 hour when he ran into the back of the victims' car while it was stopped for the red light at the  
2 intersection of Hualapai and Sahara. PHT, p. 115, line 7. Detective Atkinson testified that  
3 he found blood on the driver's side door, blood on the exterior of the driver's side of the vehicle  
4 proceeding along the outside of the vehicle and leading towards the passenger side of the  
5 vehicle. Detective Atkinson also found blood on the outside of the passenger door. PHT, p.  
6 105 p.12-19. Detective Atkinson testified that he found a bloody rag on the driver's seat and  
7 blood on the driver's side airbag. PHT, p. 108 lines 3-12. Detective Atkinson testified that  
8 the backs of the front seats did not have any blood or marks on them. PHT, p. 107 lines 7-12.  
9 Detective Atkinson testified that his inspection of the vehicle indicated that the rear seats of  
10 the vehicle were unoccupied. He drew this conclusion from the following. First, the collision  
11 threw glass all over the inside of the defendant's car. The glass evenly coated the back seats.  
12 Second, rear seat belts were locked and not extended, indicating that they had not been used.  
13 PHT, p. 106 p. 20-25.

14 Police obtained a search warrant, and got one blood sample from the defendant at 147  
15 A.M. and another at 2:47 A.M. Chemical analysis indicates the defendant's BAC was .204 at  
16 the first draw, and .178 at the second.

17 Dr. Ray Kelly reviewed the reports and evidence from the case. He calculated that the  
18 defendant's BAC was over .32 at the time of driving. Dr. Kelly based his conclusions on the  
19 defendant's height and weight, as well as the other evidence in the case such as the driving  
20 pattern, the consumption pattern at the bar, and the defendant's behavior at the scene and his  
21 performance on the HGN.

## 22 POINTS AND AUTHORITIES

23 Cameron v. State, 114 Nevada 1281 defines the relevant law on this issue. Cameraon  
24 holds that Canon 3B5 and NRS 1.230 prohibit improper judicial bias. The court in Cameron  
25 clearly states that said statutes prohibit bias against a class or party. A judge may hold a  
26 specific general opinion regarding a legal or social matter that relates to the case before him.  
27 Having such an attitude does not establish in that judge improper bias or prejudice. "Neiher  
28 bias nor prejudice refers to the attitude that a judge may hold about the subject matter of a

1 lawsuit. That a judge has a general opinion about a legal or social matter that relates to the  
2 case before him or her does not disqualify the judge from presiding over the case.” Cameron,  
3 1283. Further, comments made by a judge do not indicate improper bias or prejudice unless  
4 they show that the judge has closed his or her mind to the presentation of all the evidence.  
5 Cameron, at 1283.

6 The defendant has not presented any evidence that Judge Smith is impartial or biased  
7 to any class of persons or party. Judge Smith denied the defendant’s motion to exclude  
8 retrograde extrapolation. The defendant argues that since case law clearly excludes all  
9 retrograde extrapolation, Judge Smith must harbor bias against his client. The court should  
10 reject this claim, because it is patently false. Contrary to the defendant’s argument, State v.  
11 Dist. Ct (Armstrong), 127 Nev. 927 (2011) does not support the defendant’s argument. The  
12 court did not establish a rule of law that all courts must exclude retrograde evidence whenever  
13 the blood draw or draws occur beyond 2 hours from the time of driving. The Supreme Court  
14 merely held that the District Court did not abuse its discretion when it excluded the evidence  
15 of retrograde extrapolation. The court stated, “Under the circumstances presented, we cannot  
16 say that the district court manifestly abused or arbitrarily or capriciously exercised its  
17 discretion, that is, applied a clearly erroneous interpretation of the law or one not based on  
18 reason or contrary to the evidence or established rules of law.” Armstrong, at 937. Hence,  
19 every court has its own discretion to admit evidence of retrograde extrapolation as it sees fit.

20 Second, the facts of this case present sufficient evidence upon which to base a  
21 retrograde extrapolation. In Armstrong, the state’s expert knew only that the defendant  
22 consumed 2 beers between 5 pm and 10 pm and weighed 212 pounds. Crucially, in Armstrong  
23 police obtained only one blood sample. The court stated, “Here, significant personal  
24 characteristics, such as the amount of food, if any, in Armstrong’s stomach – a factor  
25 Armstrong’s expert testified was the most important and the State’s expert acknowledged  
26 significantly affects alcohol absorption – were unknown. And the single blood draw makes it  
27 difficult to determine whether Armstrong was absorbing or eliminating alcohol at the time of  
28 the blood draw. The admission of retrograde extrapolation evidence when a single blood draw

1 was taken more than two hours after the accident and the extrapolation calculation is  
2 insufficiently tethered to individual factors necessary to achieve a reliable calculation  
3 potentially invites the jury to determine Armstrong's guilt based on emotion or an improper  
4 ground – that the defendant had a high blood alcohol level several hours later – rather than a  
5 meaningful evaluation of the evidence.” Armstrong, at 937.

6 In contrast to the facts of Armstrong, the state possesses lots of information upon which  
7 to base the retrograde extrapolation. First and foremost, the state has two blood draws taken  
8 one hour apart which clearly demonstrate that the defendant was eliminating alcohol at the  
9 time of the draw. Second, the state knows the defendant height and weight and age. Third,  
10 the state possesses video and receipts from the bars where the defendant was drinking which  
11 indicate how much he drank and ate from 537 pm until 852 pm, 20 minutes before the  
12 collision. See Exhibits 1 and 2. Fourth, the state has body camera evidence which indicates  
13 the defendant's demeanor right after the collision.

14 Furthermore, Anderson v. State, 109 Nev. 1129 (1994), clearly holds that evidence of  
15 retrograde extrapolation is clearly admissible if the state possesses 2 blood draws without  
16 more. In that case, the state charged the defendant with dui death. The state presented  
17 retrograde extrapolation evidence to the jury. Dan Berkabile testified that he relied upon a  
18 standard metabolic rate of .02 per hour, and two blood samples to estimate that the defendant's  
19 BAC was over the legal limit at the time he was driving. Anderson, at 1132.

20 After the jury convicted the defendant, he challenged the verdict claiming the evidence  
21 presented did not support the result. The court rejected this claim. The court stated,  
22 “Furthermore, Dan Berkabile, a forensic chemist, testified that after testing the blood samples  
23 taken on the night in question, he extrapolated backwards to estimate Anderson's blood  
24 alcohol level at the time of the accident; he estimate Anderson's blood alcohol level to have  
25 been 0.128.” Anderson, 1138.

26 Second, the defendant claims that the court denied the defendant's petition for writ of  
27 habeas corpus without any legal justification. Hence, the defendant argues that Judge Smith  
28 harbors bias against the defendant. This claim is false. The state clearly presented slight to



1 marginal evidence that the defendant drove the vehicle which killed the victims. All the  
2 evidence established sufficient facts for the trier of fact to draw the reasonable inference that  
3 the defendant was driving the car. First, the evidence regarding the how the car was occupied  
4 allows the court infer reasonably that the defendant was driving the red vehicle. The defendant  
5 was clearly involved in the collision: he had cuts to his face, he was at the scene, and he was  
6 expressing concern for the passenger, Morgan Hurley. The fact that he was distraught and  
7 expressing concern for the passenger clearly indicates that he was in the vehicle. Yet, the  
8 defendant was not sitting in the passenger seat because Morgan Hurley was slumped over in  
9 the passenger seat. Morgan's purse was also stowed neatly under the front passenger area  
10 indicating that the force of the collision did not propel her into the front seat from some other  
11 part of the vehicle. Further, the defendant was not sitting in the back seat. Detective Atkinson  
12 testified that the evidence suggested that no one was sitting in the back seat: the broken glass  
13 from the collision was evenly distributed on the rear seats, the rear seat belts had not been  
14 used, and the back of the front seats did not have any blood on them. Had someone been  
15 sitting in the back seat, unrestrained, the severity of the collision means they would have hit  
16 the back seats with great force and left blood or marks on them. Had someone been sitting in  
17 the rear seats, the glass broken in the collision would not have been evenly distributed over  
18 the rear seats. But backs of the front seats did not have blood or impact marks on them, and  
19 the glass was evenly distributed on the back seats. Hence, the only reasonable inference is  
20 that the defendant was driving the red Mercedes at the time of the collision.

21 Equally important, two witnesses (Katlynn Garduno and Officer Ware) testified that  
22 the defendant asked if he had killed two people. The fact that the defendant asked such a  
23 question allows one to reasonably infer that it constitutes slight to marginal evidence that the  
24 defendant confessed. For, had the defendant not been driving, he wouldn't have asked the  
25 question.

26 Third, the injuries on the defendant's face are consistent with the conclusion that he was  
27 driving the vehicle. The defendant had fresh cuts on his nose and lips. Detective Atkinson  
28 found a bloody rag in the driver's seat and blood on the driver's air bag and a trail of blood

1 leading from the driver's side around the back of the car to the passenger side. Since the  
2 passenger was slumped over in the passenger seat, she did not leave the bloody rag or trail of  
3 blood. The cuts on the defendant's face, when combined with the trail of blood leading from  
4 the driver's side of the vehicle to the passenger side of the vehicle indicate that he was driving  
5 but exited to check on the passenger immediately after the collision. The fact that he implored  
6 Officer Sonetti to save the passenger corroborates this inference.

7 Finally, Brandon McCauley testified that a group of people were apprehending the  
8 defendant and holding him at the scene shortly after the collision. In fact, Brandon testified  
9 that he thought the defendant was the driver, and was intoxicated. This testimony indicates  
10 that the defendant attempted to flee the scene, which indicates consciousness of guilt.  
11 Consciousness of guilt indicates that the defendant was driving.

12 All the aforementioned evidence certainly establishes a slight to marginal inference that  
13 the defendant was driving at the time he crashed into the back of the victims' car.

14 The state was not involved in any way with the denial of the defendant's motion for  
15 investigator fees so it cannot respond on that issue.

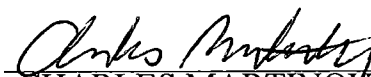
16 **CONCLUSION**

17 For the foregoing reasons, the court should deny the defendant's claim that Judge Smith  
18 harbors bias against his client. Strong legal and factual bases supported Judge Smith's rulings.  
19 The defendant has not presented any evidence that Judge Smith harbors bias against him.

20 DATED this 26th day of February, 2019.

21 Respectfully submitted,

22 STEVEN B. WOLFSON  
23 Clark County District Attorney  
24 Nevada Bar #001565

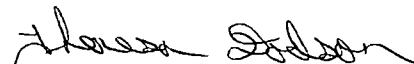
25 BY   
26 CHARLES MARTINOVSKY  
27 Deputy District Attorney  
28 Nevada Bar #007439

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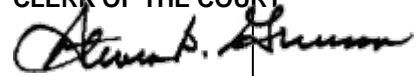
CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that service of the above and foregoing State's Opposition to Defendant's Motion to Disqualify Judge Smith was made this 26<sup>th</sup> day of February, 2019, by facsimile transmission to:

DAMIAN SHEETS, ESQ.  
FAX: (702) 598-1266

BY:   
Theresa Dodson  
Secretary for the District Attorney's Office

CM/td/vcu



1 REQ  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

11	State of Nevada,	)	Case No.: C-18-332496-1
12	Plaintiff	)	Dept. No: VIII
13	vs.	)	
14	Henry Aparicio,	)	REQUEST TO STRIKE AFFIDAVIT IN
15	Defendant	)	RESPONSE TO DISQUALIFICATION
16		)	and
		)	REQUEST TO STRIKE STATE'S
		)	OPPOSITION TO MOTION FOR
		)	DISQUALIFICATION

17  
18 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
19 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Request  
20 to Strike Affidavit in Response to Disqualification and Request to Strike State's Opposition  
21 to Motion for Disqualification.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 On or about February 6, 2019, Defendant Henry Aparicio filed a Motion for  
4 Disqualification and Affidavit of Support pursuant to NRS 1.235. The statute sets forth a  
5 clear procedure for how cases are handled subsequent to filing for disqualification. NRS  
6 1.235 states, in pertinent part:

7  
8 5. Except as otherwise provided in subsection 6, the judge against  
9 whom an affidavit alleging bias or prejudice is filed shall proceed no  
10 further with the matter and shall:

11 (a) If the judge is a district judge, immediately transfer the case to  
12 another department of the court, if there is more than one department  
13 of the court in the district, or request the judge of another district court  
14 to preside at the trial or hearing of the matter;

15 (b) If the judge is a justice of the peace, immediately arrange for  
16 another justice of the peace to preside at the trial or hearing of the  
17 matter as provided pursuant to NRS 4.032, 4.340 or 4.345, as  
18 applicable; or

19 (c) If the judge is a municipal judge, immediately arrange for  
20 another municipal judge to preside at the trial or hearing of the matter  
21 as provided pursuant to NRS 5.023 or 5.024, as applicable.

22 6. A judge may challenge an affidavit alleging bias or prejudice by  
23 filing a written answer with the clerk of the court within 5 judicial  
24 days after the affidavit is filed, admitting or denying any or all of the  
25 allegations contained in the affidavit and setting forth any additional  
26 facts which bear on the question of the judge's disqualification. The  
27 question of the judge's disqualification must thereupon be heard and  
28 determined by another judge agreed upon by the parties or, if they are  
unable to agree, by a judge appointed:

(a) If the judge is a district judge, by the presiding judge of the  
judicial district in judicial districts having more than one judge, or  
if the presiding judge of the judicial district is sought to be disqualified,  
by the judge having the greatest number of years of service (emphasis  
added)

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1           A. Request to Strike Answer to Affidavit in Support of Disqualification

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3           Pursuant to statute, the challenged judge had 5 judicial days after the affidavit is  
4 filed to submit a written answer to said affidavit. In the instant matter, the challenged  
5 judge did not file his answer until February 21, 2019, over two weeks after the Motion and  
6 supporting Affidavit were filed. Therefore, the answer submitted by Judge Smith on  
7 February 21, 2019 must be stricken as untimely.  
8

9           No entities, including the courts, are above the requirements of statutory  
10 compliance to which all other parties are held. “[W]here the language of an enactment is  
11 clear and unambiguous, the statute must be held to mean what it clearly expresses, and no  
12 room is left for construction. There is no safer or better settled canon of interpretation.”  
13 *Hand v. Cook*, 29 Nev. 518, 528, 92 P. 3, 4 (1907). With regards to statutory time  
14 constraints, the law under the Nevada Supreme Court requires strict compliance.  
15

16           Unless a statute setting forth a clear time constraint allows a caveat that would  
17 accept substantial compliance, such as the one year time limit on a petition for writ of  
18 habeas corpus which may be extended for good cause shown, statutory time and manner  
19 restrictions are strictly construed. “Although statutes allowing for a “reasonable time” to  
20 act are subject to interpretation for substantial compliance, those with set time limitations  
21 are not. Our interpretation of the statute's timing requirements and our conclusion that  
22 those requirements must be complied with strictly is consistent with the general tenet that  
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1 "time and manner" requirements are strictly construed..." *Leven v. Frey*, 123 Nev. 399, 407-  
2 08, 168 P.3d 712, 718 (2007).<sup>1</sup>

3 In the alternative, were Judge Smith's Answer to be considered on the merits, the  
4 Defense would respond briefly as follows (the substantive response to Mr. Aparicio's  
5 Motion to Disqualify can be found in paragraphs 6-9 of the Answering Affidavit):

6 Paragraph 6 states the purported legal basis on the Motion in Limine; as Defense  
7 went into thorough detail on the legal analysis in its original Motion, the same  
8 points will not be belabored here.

9 Paragraph 7 states that the Petition for Writ of Habeas Corpus was denied because  
10 "Defendant raised the same argument unsuccessfully raised in his Motion in  
11 Limine." This is factually incorrect. Defendant's Motion in Limine to Exclude  
12 Retrograde Extrapolation was based on the expert extrapolation report  
13  
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16 <sup>1</sup> The Nevada Supreme Court case *Leven v. Frey* also sets forth numerous cases from other jurisdictions as  
17 support for the position that clear time constraints in statutes require strict compliance:

18 *Daugherty v. Dearborn County*, 827 N.E.2d 34, 36 (Ind. Ct. App. 2005) (explaining that a statute with a built-in  
19 180-day time limit for serving notice of a tort claim was subject to strict compliance, even though other  
20 aspects of the statutory scheme were subject to review for substantial compliance); *Schooler v. Iowa Dept. of*  
21 *Transp.*, 576 N.W.2d 604, 607-08 (Iowa 1998) (concluding that failing to serve notice within a statute's thirty-  
22 day time limitation precluded condemnees from appealing an award made in a condemnation proceeding and  
23 the condemnees' argument that they substantially complied with the notice requirement was unavailing since  
24 it would require the court to ignore the clear language of the statute); *Kirkpatrick v. City of Glendale*, 99  
25 S.W.3d 57, 60 (Mo. Ct. App. 2003) (indicating that giving notice of a tort claim within ninety days, as set forth  
26 by statute, was a condition precedent to maintaining a tort action, which condition must be complied with  
27 strictly, while the statute's other requirements, governing the form of notice, were subject to review for  
28 substantial compliance); *Regency Investments v. Inlander Ltd.*, 2004 PA Super 274, 855 A.2d 75, 79 (Pa. Super.  
Ct. 2004) (concluding that the doctrine of substantial compliance does not apply when the timeliness of  
serving notice is at issue, and thus, the trial court properly struck a mechanics' lien claim since notice of the  
claim was not served until one month after the statutory time period allowed for service); *American Standard*  
*Homes Corp. v. Reinecke*, 245 Va. 113, 425 S.E.2d 515, 518, 9 Va. Law Rep. 776 (Va. 1993) (indicating that,  
unless a lien is perfected within the time outlined by statute, it is lost); *Marsh-McLennan Bldg., Inc. v. Clapp*, 96  
Wn. App. 636, 980 P.2d 311, 313 n.1 (Wash. Ct. App. 1999) (explaining that an unlawful detainer statute's  
time requirements for filing a notice must be complied with strictly, while substantial compliance with the  
statute's requirements regarding the form and content of the notice was sufficient).

1 subsequently provided to the Defense after the State filed its Notice of Expert  
2 Witness; the Motion alleged that the extrapolation report did not comply with the  
3 requirements of *Armstrong*. The Writ Petition, on the other hand, challenged the  
4 Justice Court's introduction of the raw blood results, taken outside of two hours, at  
5 the preliminary hearing (as the blood was used as a basis for a finding of probable  
6 cause). The two challenges are distinct, as one relates to the improper introduction  
7 of blood results outside of two hours without extrapolation, and the other  
8 challenges the subsequent extrapolation results which are improperly calculated.  
9 The Court's Answer further cites to unspecified slight or marginal evidence as  
10 grounds in support of its ruling; however, the Court relied on the same basis the  
11 State subsequently conceded was insufficient (that Mr. Aparicio was found outside  
12 the vehicle as slight or marginal evidence that he was driving). While the State made  
13 subsequent arguments in support of their position, it is the Court's decision *at the*  
14 *time it was made* that is the source of Mr. Aparicio's instant challenge. The  
15 Answering Affidavit further fails to state what slight or marginal evidence was relied  
16 upon in rendering the decision to deny relief.  
17

18 Paragraph 8 states that Mr. Aparicio's request for investigative fees was denied  
19 "based on the totality of the circumstances." The circumstances are relatively  
20 minimal: the State's retrograde extrapolation expert was allowed (over Defense  
21 objection), Mr. Aparicio sought a rebuttal expert, Mr. Aparicio provided detailed  
22 financial affidavits of his inability to independently retain an expert (which the  
23 Court accepted), Mr. Aparicio had a *negative* monthly debt-to-income ratio, and the  
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1 Court denied him investigative fees due to an "insufficient showing of indigency."  
2 There are no other circumstances which exist to create a "totality" that would justify  
3 the Court's ruling.

4 Paragraph 9 claims that the Court's statements that Mr. Aparicio killed two people  
5 (among others) do not show bias because they "were not made before jurors, were  
6 not made to establish judicially noticed facts or laws of the case, and are not  
7 dispositive of the outcome in this case." However, this is also incorrect; the Court's  
8 statements were dispositive of the outcome in this case because they were given as  
9 *the basis* for its ruling to deny relief *on a retrograde extrapolation issue*. The  
10 statements were not made in a probable cause challenge hearing, or under other  
11 circumstances which permit the Court to accept them as true for the purpose of  
12 granting or denying relief. Instead, the Court took these factual statements as true to  
13 form a basis to permit retrograde extrapolation evidence. These statements  
14 communicated the Court's basis to deny relief on an issue that was completely  
15 unrelated to the underlying facts of the case (whether or not the retrograde  
16 extrapolation satisfied *Armstrong*). Therefore, as the Court's statements were used  
17 as the basis to deny relief on an issue independent of the facts of the case, it most  
18 certainly was dispositive of the outcome and has a very significant effect on the  
19 remainder of Mr. Aparicio's criminal proceedings.

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1        B. Request to Strike State's Opposition to Motion for Disqualification

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3            There is no authority which grants the State standing to oppose a disqualification  
4 request. The statute, as cited above, is unambiguous that the *challenged judge* may file an  
5 answer, not the State of Nevada (or any party to the underlying proceedings). As the statute  
6 is clear as to who may file a response, it may not be expanded to permit another entity such  
7 a right that does not exist. "This court has, for more than a century, recognized that the  
8 Legislature's 'mention of one thing or person is in law an exclusion of all other things or  
9 persons.'" *Butler v. State*, 120 Nev. 879, 902, 102 P.3d 71, 87 (2004) (citing *V. & T. R.R. Co. v.*  
10 *Elliott*, 5 Nev. 358, 364 (1870)).  
11

12            Additionally, the State's Opposition would only exacerbate the most natural  
13 consequence of the filing: although the State and the Court are separate entities, for the  
14 State to defend the Court's conduct defies the required impartiality between them. A  
15 request for disqualification is a procedural mechanism exclusively between the moving  
16 party and the challenged judge; the State has no standing to defend the challenged judge, or  
17 else it creates a substantial appearance of impropriety. The State's Opposition creates a  
18 situation where the State of Nevada is acting as the representative of the tribunal, without  
19 any entitlement to do so, and thereby also creates a conflict of interest. The Court is capable  
20 of representing itself though whatever means it avails when challenged for bias, and the  
21 State is not a party to these proceedings.  
22

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1 Therefore, because the State of Nevada is not a party to disqualification proceedings  
2 between the moving party and the challenged judge, the Defense requests the State's  
3 Opposition be treated as a fugitive document and stricken from the record.  
4

5 DATED this 27 day of February, 2019.

6 By:  
7 MAYFIELD GRUBER & SHEETS

8 By: /s/ Damian Sheets  
9 Damian Sheets, Esq.  
10 Nevada Bar No. 10755  
11 726 S. Casino Center Blvd.  
12 Las Vegas, Nevada 89101

13 CERTIFICATE OF SERVICE

14  
15 I HEREBY CERTIFY that on the 27 day of February, 2019 I served a true and correct  
16 copy of the foregoing Request to Strike, upon the following, by serving them personally or  
17 by leaving it at chambers with a person of suitable age and discretion employed therein.

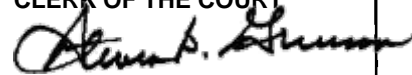
18 Eighth Judicial District Court, Department 8, Hon. Judge Smith

19 Eighth Judicial District Court, Department 7, Hon. Judge Bell

20 Eighth Judicial District Court, Department 30, Hon. Judge Wiese

21  
22 /s/ Kelsey Bernstein  
23 An Employee of Mayfield Gruber & Sheets





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**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

STATE OF NEVADA,

Plaintiff,

Case No. C-18-332496-1

vs.

Dept. No. VIII

HENRY APARICIO,

Defendant.

**DECISION AND ORDER**

Henry Aparicio filed a Motion to Disqualify Judge Douglas Smith based on comments Judge Smith made during a hearing and Judge Smith's denial of Mr. Aparicio's ex parte request for investigative fees. Mr. Aparicio also argues that the State does not have standing to make any arguments and that I should strike Judge Smith's affidavit for untimeliness. Mr. Aparicio's Motion is denied because it is moot.

**I. Factual and Procedural Background**

On June 5, 2018, Mr. Aparicio was charged with Driving Under the Influence Resulting in Death along with other lesser included offenses in district court by way of information. On July 23, 2018, during a Motion in Limine to Exclude Evidence of Retrograde Extrapolation, Judge Smith stated on the record that Mr. Aparicio "was doing over 100 miles an hour, and killed two people."

Mr. Aparicio then filed an ex parte request for investigative fees for the Defense to hire a rebuttal expert. Judge Smith denied this request.

On February 6, 2019, Mr. Aparicio filed a Motion for Disqualification and Affidavit in Support. On February 21, 2019, Judge Smith filed an Affidavit in Response to Mr. Aparicio's Request to Disqualify him. On February 26, 2019, the State of Nevada filed an Opposition to Defendant's Motion to Disqualify Judge Smith. On February 27, 2019, Mr. Aparicio filed a Request to Strike Affidavit in response to Disqualification and Request to Strike State's Opposition to Motion for Disqualification.

RECEIVED  
LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII  
APR - 2 2019  
CLERK OF THE COURT

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## II. Discussion

NRS 1.230 provides the statutory grounds for disqualifying district Court judges. The statute in pertinent part provides:

1. A judge shall not act in an action or proceeding when the judge entertains actual bias or prejudice for or against one of the parties to the action.
2. A judge shall not act as such in an action or proceeding when implied bias exists in any of the following respects:
  - (a) When the judge is a party to or interested in the action or proceeding.
  - (b) When the judge is related to either party by consanguinity or affinity within the third degree.
  - (c) When the judge has been attorney or counsel for either of the parties in the particular action or proceeding before the court.
  - (d) When the judge is related to an attorney or counselor for either of the parties by consanguinity or affinity within the third degree. This paragraph does not apply to the presentation of ex parte or contested matters, except in fixing fees for an attorney so related to the judge.

The Revised Nevada Code of Judicial Conduct provides substantive grounds for judicial disqualification. Pursuant to NCJC 2.11(A):

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned. Ybarra v. State, 127 Nev. 47, 50-51 (2011). The test for whether a judge's impartiality might be reasonably questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality. Id. at 51.

The burden is on the party asserting the challenge to establish sufficient factual and legal grounds warranting disqualification. Las Vegas Downtown Redevelopment Agency v. District Court, 116 Nev. 640, 643 (2000). A judge has a duty to preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or compelling reason otherwise. Id. at 643. A judge is presumed to be unbiased. Millen v. District Court, 122 Nev. 1245, 1254 (2006). A

1 judge is presumed to be impartial, and the burden is on the party asserting the challenge to establish  
2 sufficient factual grounds warranting disqualification. Yabarra, 127 Nev. at 51.

3 The Nevada Supreme Court has stated “rulings and actions of a judge during the course of  
4 official judicial proceedings do not establish legally cognizable grounds for disqualifications.” In re  
5 Pet. To recall Dunleavy, 104 Nev. 784, 789 (1988). The personal bias necessary to disqualify must  
6 ‘stem from an extrajudicial source and result in an opinion on the merits on some basis other than  
7 what the judge learned from participation in the case.” Id. at 790 “To permit an allegation of bias,  
8 partially founded upon a justice’s performance of his [or her] constitutionally mandated  
9 responsibilities, to disqualify that justice from discharging those duties would nullify the court’s  
10 authority and permit manipulation of justice, as well as the court.” Id.

11 The Nevada Supreme Court has noted that while the general rule is that what a judge learns  
12 in his or her official capacity does not result in disqualification, “an opinion formed by a judge on  
13 the basis of facts introduced or events occurring in the course of the current proceedings, or of prior  
14 proceedings, constitutes a basis for a bias or partiality motion where the opinion displays ‘a deep-  
15 seated favoritism or antagonism that would make fair judgment impossible.” Cameron v. State, 114  
16 Nev. 1281, 1283 (1998). However, “remarks of a judge made in the context of a court proceeding  
17 are not considered indicative of improper bias or prejudice unless they show that the judge has  
18 closed his or her mind to the presentation of all the Evidence.” Id.

19 **A. Judge Smith’s Affidavit will not be stricken due to public policy concerns.**

20 Mr. Aparicio bases his request to strike Judge Smith’s Affidavit based on NRS 1.235(6).  
21 NRS 1.235(6) states:

22 “A judge may challenge an affidavit alleging bias or prejudice by filing a written  
23 answer with the clerk of the court within 5 judicial days after the affidavit is filed,  
24 admitting or denying any or all of the allegations contained in the affidavit and setting  
forth any additional facts which bear on the question of the judge’s disqualification.”

25 Mr. Aparicio argues that NRS 1.235(6), read literally and plainly, states that a judge must challenge  
26 an affidavit within five days. Taken with NRS 1.235(5), which states that a judge must immediately  
27 transfer the matter should a party file a motion for disqualification, this would suggest that if a judge  
28 fails to file an affidavit within five days, the proper remedy is reassignment.

1 Taken in a vacuum, Mr. Aparicio’s argument holds some merit. However, a judge has a duty  
2 to sit. Las Vegas Downtown Redevelopment Agency v. District Court, 116 Nev. 640, 643 (2000).  
3 The decision to take a judge off a case cannot be done lightly. Interpreting NRS 1.235(6) as  
4 mandating reassignment when a judge fails to file an appropriate affidavit within the time limit  
5 would directly conflict with the duty to sit, as a judge might be forced to recuse as a result of  
6 excusable neglect, a heavy calendar, or seeking advice.

7 In addition, NRS 1.235(6) does not contain mandatory language. NRS 1.235(6) states that a  
8 judge “may challenge an affidavit alleging bias” by filing a response within five days. Compare this  
9 language with NRS 1.235(5) which states that a judge “against whom an affidavit alleging bias or  
10 prejudice is filed shall proceed no further with the matter.” Using permissive language in NRS  
11 1.235(6) is intentional, especially considering the mandatory language in NRS 1.235(5). Thus, an  
12 appropriate interpretation of the issue when taking both the duty to sit and lack of mandatory  
13 language into consideration is that there may be some delay in challenging an affidavit so long as it  
14 is reasonable and in substantial compliance with the statute.

15 In this case, the Motion to Disqualify was filed February 6, 2019. Using the rules for  
16 counting calendar days there were in place at that time, NRS 1.235 dictated that Judge Smith could  
17 file a response by February 13, 2019. Judge Smith waited until February 21, 2019 to do so, which  
18 constitutes a little over a week delay. This is not unreasonable, and does not warrant striking Judge  
19 Smith’s affidavit as he was in substantial compliance.

20 **B. The State’s Opposition will not be stricken as they have standing.**

21 Mr. Aparicio argues that the State lacks standing to challenge the request to disqualify. Mr.  
22 Aparicio argues that NRS 1.235 does not have any provision for a non-judge to challenge a  
23 disqualification. Mr. Aparicio also argues that allowing the State to file Oppositions in these  
24 proceedings automatically creates an appearance of impropriety.

25 While NRS 1.235 does not have any provision for a non-judge to challenge disqualification,  
26 it also does not bar any other party from filing relevant pleadings. As the State would be directly  
27 affected by a reassignment, the State naturally has standing as it has a stake in which judge hears the  
28 case, just as Mr. Aparicio does. In addition, the State could have theoretically moved to disqualify



1 Judge Smith. If a party has standing for moving to disqualify a judge, it is logical that party also  
2 would have the ability to oppose such a motion.

3 The State opposing Motions to Disqualify does not create an appearance of impropriety.  
4 Defending or criticizing a judge's actions or rulings during a proceeding is routine. Such defenses or  
5 criticisms are found in Motions for Reconsideration, Writs of Habeas Corpus, or at various points  
6 during the proceedings where a party is attempting to make a record for an appeal. As these  
7 instances of defenses are common and routine in most cases, and judges are presumed unbiased,  
8 then a judge is presumed unbiased even where a party defends the judge's actions because they are  
9 found in a large number of cases. Millen v. District Court, 122 Nev. 1245, 1254 (2006). As the State  
10 has standing and it would not create an appearance of impropriety, I am not striking its response.

11 **C. Judge Smith's imminent retirement renders this Motion moot.**

12 Judge Smith announced that he will retired on April 12, 2019. There are no hearings  
13 scheduled before April 12, 2019. Thus, this Motion is moot because Mr. Aparicio will have a  
14 different judge for the next hearing.

15 **III. Conclusion**

16 Judge Smith's imminent retirement renders Mr. Aparicio's request moot. As such, it si  
17 denied.

18  
19 DATED this day of March 29, 2019.

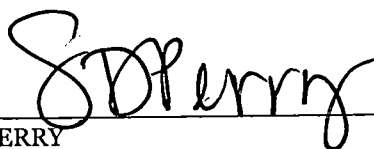
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21   
22 \_\_\_\_\_  
LINDA MARIE BELL  
DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
DA's Office	Counsel for State
Damian R. Sheets, Esq. 726 S. Casino Center BLVD STE 211 Las Vegas, NV 89101	Counsel for Defendant
The Honorable Judge Douglas Smith	Judge

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII



SYLVIA PERRY  
JUDICIAL EXECUTIVE ASSISTANT, DEPARTMENT VII

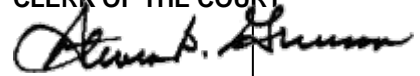
**AFFIRMATION**

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number C332496 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell  
District Court Judge

Date: 03/21/2019



1 MOT  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

11 State of Nevada, ) Case No.: C-18-332496-1  
12 Plaintiff ) Dept. No: VIII  
13 vs. )  
14 Henry Aparicio, ) MOTION TO RECONSIDER DECISION AND  
15 Defendant ) ORDER FILED APRIL 5, 2019  
16 )

17 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
18 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Motion to  
19 Reconsider Decision and Order filed April 5, 2019.  
20

21 ///

22  
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24  
25  
26 ///

1 NOTICE OF HEARING

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: DEPUTY DISTRICT ATTORNEY:

4 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the  
5 above and foregoing motion on for hearing on the \_\_\_\_ day of \_\_\_\_\_, 2019, at  
6 the hour of \_\_\_\_\_, before the above-entitled Court, or as soon thereafter as counsel can be  
7 heard.

8  
9 DATED this 5 day of April, 2019.

10  
11 MAYFIELD GRUBER & SHEETS  
12 Respectfully Submitted By:

13 /s/ Damian Sheets  
14 DAMIAN SHEETS, ESQ.  
15 Attorney for Defendant  
16  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 Defendant Henry Aparicio is charged with Driving Under the Influence of Alcohol  
4 Resulting in Death, as well as a litany of similar lesser included offenses. He pled Not Guilty  
5 to the charges on or about June 6, 2018 and invoked his right to a speedy trial. Calendar  
6 Call is currently scheduled for August 8, 2018, with trial on August 13, 2018.  
7

8 Mr. Aparicio filed a Motion to Disqualify Judge Douglas Smith based on bias  
9 exhibited on the record and in pleadings. Subsequent to filing the Motion, Judge Smith  
10 announced an early retirement date of April 12, 2019. Based on this announcement, the  
11 Decision and Order filed on April 5, 2019 regarding the Motion to Disqualify was denied as  
12 moot because Mr. Aparicio will have a different judge for the next hearing.  
13

14 However, the issue of bias in the pleadings still needs to be addressed, as Mr.  
15 Aparicio alleged that bias by Judge Smith manifested in several adverse rulings that worked  
16 to Mr. Aparicio's extreme detriment. Such rulings include Motions in Limine, a pre-trial  
17 Petition for Writ of Habeas Corpus, and a request for investigative fees, all of which were  
18 alleged to have been tainted with bias. Each of these rulings also has a substantial impact  
19 on the direction, outcome and strategy of this case. Therefore, a formal decision on bias is  
20 necessary to the extent that Mr. Aparicio would be entitled to have his pleadings re-heard  
21 before a neutral magistrate.  
22

23 ///

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1 For these reasons, Mr. Aparicio respectfully requests the Chief Judge reconsider the  
2 Decision and Order that denies the Motion as moot only insofar as it bears on Mr. Aparicio's  
3 ability to have his pleadings fully and fairly litigated before a new judge.  
4

5 DATED this 5 day of April, 2019.

6 By:  
7 MAYFIELD GRUBER & SHEETS

8 By: /s/ Damian Sheets  
9 Damian Sheets, Esq.  
10 Nevada Bar No. 10755  
11 726 S. Casino Center Blvd.  
12 Las Vegas, Nevada 89101

13 CERTIFICATE OF SERVICE

14 I HEREBY CERTIFY that on the 5 day of April, 2019 I served a true and correct copy  
15 of the foregoing Defendant's Motion to Reconsider, upon each of the parties by electronic  
16 service through Wiznet, the Eighth Judicial District Court's e-filing/e-service system,  
17 pursuant to N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the  
18 United States mail, Postage Pre-Paid, addressed as follows:

19 Clark County District Attorney's Office  
20 200 Lewis Ave., 3rd Floor  
21 Las Vegas, NV 89155  
22 motions@clarkcountyda.com  
23 pdmotions@clarkcountyda.com

24 Eighth Judicial District Court, Department 8, Hon. Judge Smith  
25 Eighth Judicial District Court, Department 7, Hon. Judge Bell

26 /s/ Kelsey Bernstein  
27 An Employee of Mayfield Gruber & Sheets

DISTRICT COURT  
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

April 15, 2019

C-18-332496-1      State of Nevada  
vs  
Henry Aparicio

April 15, 2019      8:00 AM      Defendant's Motion to Reconsider Decision and  
Order filed April 5, 2019

HEARD BY: Barker, David      COURTROOM: RJC Courtroom 11B

COURT CLERK: Carol Donahoo

RECORDER: Rubina Fedra

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

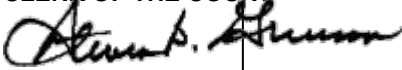
- Dena Rinetti, Chf Dep DA, present on behalf of the State and Damian Sheets, Esq., present on behalf of Deft. Aparicio, who is also present.

This is the time set for hearing on Deft's Motion to Reconsider Decision and Order Filed April 5, 2019. Court noted that Judge Bell filed a Decision and Order on April 5, 2019, to the Deft's Motion to Disqualify Judge Smith, which was DENIED. Later that same day, Mr. Sheets filed a Motion to Reconsider Decision and Order filed April 5, 2019; this Court will not entertain the substance of said motion at this time.

Mr. Sheets advised that this matter is assigned to Charles Martinovsky, Chf Dep DA, but he is out of the jurisdiction so he is present to make representations; he believes this Motion should be heard by Judge Bell. Court noted that since Judge Bell issued the original Order on Mr. Sheet's challenge to Disqualify Judge Smith, this Motion should be transferred to her for consideration. Therefore, COURT ORDERED, the Motion is TRANSFERRED to Department VII for further proceedings.

CUSTODY

CONTINUED TO: 04/23/19 9:00 AM (DEPARTMENT VII)



1 MOT  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

11 State of Nevada, ) Case No.: C-18-332496-1  
12 Plaintiff ) Dept. No: VIII  
13 vs. ) MOTION TO CONTINUE TRIAL  
14 Henry Aparicio, ) Hearing Requested  
15 Defendant )  
16 \_\_\_\_\_ )

17 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
18 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this  
19 Defendant's Motion to Continue Trial.

21 This Motion is made and based upon the Points and Authorities attached hereto and  
22 any arguments deemed necessary by this Honorable Court, and further is brought in good  
23 faith and not for the purpose of delay.

24 ///

27 ///



1 NOTICE OF MOTION

2  
3 TO: State of Nevada, Plaintiff;

4 TO: Clark County District, Attorney for Plaintiff.

5  
6 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the  
7 foregoing Motion on for hearing before this court, on the \_\_\_\_ day of \_\_\_\_\_,  
8 2019, at the hour of \_\_\_\_:\_\_\_\_ \_\_.m., or as soon thereafter as counsel may be heard.

9 DATED this 24 day of July, 2019

10 MAYFIELD, GRUBER & SHEETS

11  
12 BY \_\_\_\_/s/ Damian Sheets  
13 DAMIAN R. SHEETS, ESQ.  
14 Nevada Bar No. 10755  
15 726 S. Casino Center Blvd., Suite 211  
16 Las Vegas, Nevada 89101  
17 (702) 598-1299  
18 *Attorney for Defendant*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 The Defendant in this matter, Henry Aparicio, is charged with Driving Under the  
4 Influence Resulting in Death and other similar lesser-included offenses. Calendar call is  
5 currently scheduled for July 31, 2019 with jury trial set to begin on August 5, 2019.

6 Previous requests to continue this matter have been filed to permit Mr. Aparicio to  
7 secure a rebuttal expert to the State's disclosed retrograde extrapolation expert; however,  
8 given his custody status and the Court's prior denial of his request for investigative fees,  
9 neither Mr. Aparicio nor his family have the financial ability to secure an expert witness. As  
10 a result, his Counsel's ability to defend him in this case has been directly impaired by Judge  
11 Smith's ruling denying him said fees, compounded by Chief Judge Bell's ruling that the issue  
12 of bias was moot after Judge Smith announced his retirement. Under the circumstances,  
13 Counsel's desire and ability to properly represent Mr. Aparicio has been rendered  
14 ineffective.  
15  
16

17 The unfortunate circumstances surrounding this case have prompted Mr. Aparicio  
18 to file a Motion with this Court requesting an opportunity to readdress the previous rulings  
19 by Judge Smith in this case under its overarching constitutional authority. Specifically, the  
20 Motion requests the matters be readdressed to comport with fundamental Due Process  
21 considerations which Mr. Aparicio has, to this point in time, been entirely denied.  
22

23 Additionally, in the most recent Notice of Witness list filed by the State, the State  
24 lists no less than *fifty-five* individual witnesses; given Judge Smith's decision to deny Mr.  
25 Aparicio any financial assistance with his case whatsoever, Mr. Aparicio has similarly been  
26 unable to secure an investigator to thoroughly interview and/or assess the anticipated  
27  
28

1 testimony of the numerous witnesses contained in the State's list. Furthermore, given that  
2 roughly ten lay witnesses testified in the preliminary hearing, and yet *not a single one* could  
3 put Mr. Aparicio behind the wheel of a vehicle, the ability to anticipate and prepare an  
4 adequate defense to these witness's testimony, including for purposes of impeachment,  
5 becomes vital. In this manner, Judge Smith's ruling has also directly impacted and limited  
6 Counsel's ability to properly represent him or prepare a defensive strategy to this case.  
7

8         These issues are precisely why Mr. Aparicio has filed the request to readdress the  
9 prior rulings made by Judge Smith. If that request is denied, further emergency relief will  
10 likely be sought with the appellate courts. The simple fact is that, if the trial were to  
11 proceed, Mr. Aparicio would be forced to go to trial with a very limited and arguably  
12 judicially-created ineffective defense, with his hands proverbially tied behind his back.  
13

14         This Motion to Continue Trial is made pursuant to the Court's authority to grant a  
15 continuance for good cause as set forth in *Benson v. Benson*, 66 Nev. 94, 99, 204 P.2d 316,  
16 318-19 (1949) and *Higgs v. State*, 126 Nev. 1, 9, 222 P.3d 648, 653 (2010).  
17

18 DATED this 24 day of July, 2019.  
19

20 By:  
21 MAYFIELD GRUBER & SHEETS

22 By: /s/ Damian Sheets  
23 Damian Sheets, Esq.  
24 Nevada Bar No. 10755  
25 726 S. Casino Center Blvd.  
26 Las Vegas, Nevada 89101  
27  
28

AFFIDAVIT OF DAMIAN SHEETS, ESQ. IN SUPPORT OF MOTION  
TO CONTINUE TRIAL DATE

STATE OF NEVADA )

) ss:

COUNTY OF CLARK )

I, Damian Sheets, Esq., being first duly sworn, depose and say:

1. That your affiant is an attorney duly licensed to practice law in the State of Nevada with offices located at 726 S. Casino Center Blvd., Las Vegas, Nevada;
2. That I am the attorney of record for the Defendant in the above-referenced matter and have personal knowledge of the facts contained herein;
3. That this Motion is brought in good faith and not for the purposes of delay;
4. That Counsel needs additional time to prepare an adequate defense in this case;
5. That Counsel needs additional time to conduct further investigation in this case, including the employment and preparation of expert witnesses and private investigators;
6. That Counsel needs additional time to pursue relief to find the Defendant is indigent and is entitled to financial assistance in preparation of his defense;
7. That the Defendant has previously waived his statutory right to a speedy trial within 60 days;
8. That the Defendant has been made aware of Counsel's intent to continue the trial date in the instant case.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 24th day of July, 2019

BY:       /s/ Damian Sheets        
Damian Sheets, Esq.  
Nevada Bar No. 10755  
726 S. Casino Center Blvd.  
Las Vegas, Nevada 89101

1 CERTIFICATE OF SERVICE

2

3 I HEREBY CERTIFY that on the 24 day of July, 2019 I served a true and correct copy

4 of the foregoing Defendant's Motion to Continue Trial, upon each of the parties by

5 electronic service through Wiznet, the Eighth Judicial District Court's e-filing/e-service

6 system, pursuant to N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope

7 in the United States mail, Postage Pre-Paid, addressed as follows:

8 Clark County District Attorney's Office

9 200 Lewis Ave., 3rd Floor

10 Las Vegas, NV 89155

11 motions@clarkcountyda.com

12 pdmotions@clarkcountyda.com

13 /s/ Kelsey Bernstein

14 An Employee of Mayfield Gruber & Sheets

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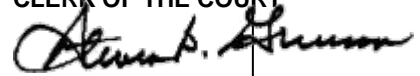
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1 MOT  
2 MAYFIELD GRUBER & SHEETS  
3 Damian Sheets, Esq.  
4 Nevada Bar No. 10755  
5 Kelsey Bernstein, Esq.  
6 Nevada Bar No. 13825  
7 726 S. Casino Center Blvd.  
8 Las Vegas, Nevada 89101  
9 Telephone: (702) 598-1299  
10 Facsimile: (702) 598-1266  
11 dsheets@defendingnevada.com  
12 Attorney for Defendant  
13 Henry Aparicio

EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA

11 State of Nevada, ) Case No.: C-18-332496-1  
12 Plaintiff ) Dept. No: VIII  
13 vs. )  
14 Henry Aparicio, ) MOTION TO REHEAR MOTION IN LIMINE  
15 Defendant ) AND REQUEST FOR INVESTIGATIVE FEES  
16 ) Hearing Requested  
17 )

17 COMES NOW, Defendant Henry Aparicio, by and through his attorney of record,  
18 DAMIAN SHEETS, ESQ. of the firm Mayfield Gruber & Sheets, hereby submits this Motion to  
19 Rehear and Reconsider Motions in Limine and Request for Investigative Fees.  
20

21 ///

22 ///

23 ///

1 NOTICE OF HEARING

2 TO: THE STATE OF NEVADA, Plaintiff; and

3 TO: DEPUTY DISTRICT ATTORNEY:

4 YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the  
5 above and foregoing motion on for hearing on the \_\_\_\_ day of \_\_\_\_\_, 2019, at  
6 the hour of \_\_\_\_\_, before the above-entitled Court, or as soon thereafter as counsel can be  
7 heard.

8  
9 DATED this 24 day of July, 2019.

10  
11 MAYFIELD GRUBER & SHEETS  
12 Respectfully Submitted By:

13 /s/ Damian Sheets  
14 DAMIAN SHEETS, ESQ.  
15 Attorney for Defendant  
16  
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18  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 Defendant Henry Aparicio is charged with Driving Under the Influence of Alcohol  
4 Resulting in Death, along with similar lesser included offenses. Calendar Call is currently  
5 scheduled for July 31, 2019, with trial on August 5, 2019. A Motion to Continue is being  
6 filed concurrently herewith.

7  
8 Mr. Aparicio filed a Motion to Disqualify Judge Douglas Smith based on bias  
9 exhibited on the record and in pleadings. Oral argument on the Motion was heard before  
10 the Honorable Chief Judge Bell, but Judge Bell withheld decision on the matter until after  
11 Judge Smith announced an early retirement date of April 12, 2019. Based on this  
12 announcement, Judge Bell declared the Motion was moot in a Decision and Order filed on  
13 April 5, 2019. The Court found the bias issue was moot because Mr. Aparicio will have a  
14 different judge for the next hearing.

15  
16 Counsel for Mr. Aparicio filed a Motion to Reconsider the Decision because the bias,  
17 if it did exist, would have infected the entirety of the proceedings, including numerous  
18 evidentiary rulings that have a substantial bearing on the direction and strategy of this  
19 case. For example, Judge Smith granted, without limitation, the State's ability to introduce  
20 blood alcohol content taken outside of the two hours that arguably does not comply with  
21 Nevada case law and is based on a purported retrograde extrapolation formula used in the  
22 1990s. When Mr. Aparicio requested financial assistance to obtain a rebuttal expert,  
23 despite showing a negative income to debt ratio, Judge Smith denied Mr. Aparicio's request  
24 based on "an insufficient showing of indigency." Judge Smith effectively permitted the State  
25  
26  
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28



1 to admit evidence *carte blanche*, and then subsequently prevented Mr. Aparicio from  
2 rebutting that evidence in any meaningful way.

3  
4 However, at the hearing on the Motion to Reconsider filed before Judge Bell, she  
5 declined to alter the ruling that the issue of bias was moot, and further ruled that she  
6 lacked jurisdiction to order the rehearing or reconsideration of previously ruled upon  
7 motions. While the Chief Judge believes she may not have the jurisdiction to order the  
8 Court to rehear the previously filed Motions, as the trial Court, this Court can grant such  
9 relief under its overarching constitutional authority.

10  
11 The right to a neutral and fair magistrate is rooted in the Due Process Clause of the  
12 Fourteenth Amendment. "[A defendant] is entitled to a neutral and detached judge in the  
13 first instance." *Matter of Ross*, 99 Nev. 1, 13, 656 P.2d 832, 839 (1983); see also, *Ward v. Vill.*  
14 *Of Monroeville, Ohio*, 409 U.S. 57, 59, 93 S.Ct. 80, 82 (1972). "It is axiomatic that [a] fair trial  
15 in a fair tribunal is a basic requirement of due process." *Caperton v. A. T. Massey Coal Co.*,  
16 556 U.S. 868, 876, 129 S. Ct. 2252, 2259 (2009). "A fair trial in a fair tribunal is a basic  
17 requirement of due process. Fairness of course requires an absence of actual bias in the trial  
18 of cases." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625 (1955).

19  
20 Additionally, the Court has the inherent power to correct errors of constitutional  
21 magnitude. "The power of this court to address plain error or issues of constitutional  
22 dimension sua sponte is well established." *Pellegrini v. State*, 117 Nev. 860, 882, 34 P.3d  
23 519, 533-34 (2001); *Emmons v. State*, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991); see  
24 also *Edwards v. State*, 107 Nev. 150, 153 n.4, 808 P.2d 528, 530 n.4 (1991). "When  
25 the constitution commands how a right may be exercised, it prohibits the exercise of that  
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1 right in some other way. If exercised at all it must be exercised as commanded by  
2 the constitution. 'A state constitution is also binding on the courts of the state, and on every  
3 officer and every citizen. Any attempt to do that which is prescribed in any other manner  
4 than that prescribed, or to do that which is prohibited, is repugnant to that supreme and  
5 paramount law, and invalid.'" *Porch v. Patterson*, 39 Nev. 251, 269, 156 P. 439, 445 (1916).  
6

7         Given the constitutional magnitude of the issues presented, the Trial Court has the  
8 inherent jurisdiction to correct any such constitutional flaw. Although the Chief Judge  
9 declined to rule one way or the other with regards to bias, there is little doubt that *this*  
10 Court has the power to rehear motions if the prior rulings do not comply with the  
11 requirements of Due Process. In this case, there is at least one major, glaring example of  
12 how the prior Judge denied Mr. Aparicio Due Process: After permitting the State to  
13 introduce expert testimony of retrograde extrapolation, the Judge denied Mr. Aparicio's  
14 request for financial assistance to obtain a rebuttal expert despite the Judge's  
15 *acknowledgement* of Mr. Aparicio's negative debt-to-income ratio. Mr. Aparicio has been  
16 denied any ability to rebut evidence presented by the State which, at face value, is wholly  
17 rebuttable and central to the State's case. There is little question that Mr. Aparicio's  
18 financial inability to secure a rebuttal expert will have a significant impact on the  
19 proceedings and outcome of this trial; Mr. Aparicio should not have to endure an inherently  
20 unconstitutional trial or conviction in order to raise the matter on appeal when this Court  
21 has the inherent power to correct the errors that are present immediately before it.  
22  
23  
24  
25  
26  
27  
28

1           Therefore, as part of its constitutional authority and obligation, Mr. Aparicio  
2 respectfully requests this Court rehear the previously filed Motion in Limine and Request  
3 for Investigative Fees anew.  
4

5 DATED this 24 day of July, 2019.

6 By:  
7 MAYFIELD GRUBER & SHEETS

8 By: /s/ Damian Sheets  
9 Damian Sheets, Esq.  
10 Nevada Bar No. 10755  
11 726 S. Casino Center Blvd.  
12 Las Vegas, Nevada 89101

13 CERTIFICATE OF SERVICE

14 I HEREBY CERTIFY that on the 24 day of July, 2019 I served a true and correct copy  
15 of the foregoing Defendant's Motion to Reconsider, upon each of the parties by electronic  
16 service through Wiznet, the Eighth Judicial District Court's e-filing/e-service system,  
17 pursuant to N.E.F.C.R.9; and by depositing a copy of the same in a sealed envelope in the  
18 United States mail, Postage Pre-Paid, addressed as follows:

19 Clark County District Attorney's Office  
20 200 Lewis Ave., 3rd Floor  
21 Las Vegas, NV 89155  
22 motions@clarkcountyda.com  
23 pdmotions@clarkcountyda.com

24 /s/ Kelsey Bernstein  
25 An Employee of Mayfield Gruber & Sheets  
26  
27  
28



FILED IN OPEN COURT  
STEVEN D. GRIERSON  
CLERK OF THE COURT

AUG 01 2019

BY: *Louisa Garcia*  
LOUISA GARCIA, DEPUTY

1 **GPA**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CHARLES MARTINOVSKY  
6 Chief Deputy District Attorney  
7 Nevada Bar #007439  
8 200 Lewis Avenue  
9 Las Vegas, NV 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

C-18-332496-1  
GPA  
Guilty Plea Agreement  
4863026



9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 HENRY APARICIO, aka,  
13 Henry Biderman Aparicio, #6069038,  
14 Defendant.

CASE NO: C-18-332496-1

DEPT NO: IX

15 GUILTY PLEA AGREEMENT

16 I hereby agree to plead guilty to: **COUNT 1 - DRIVING UNDER THE INFLUENCE**  
17 **RESULTING IN DEATH (Category B Felony - NRS 484C.110, 484C.430, 484C.105 -**  
18 **NOC 53908); COUNT 2 - DRIVING UNDER THE INFLUENCE RESULTING IN**  
19 **DEATH (Category B Felony - NRS 484C.110, 484C.430, 484C.105 - NOC 53908) and**  
20 **COUNT 3 - RECKLESS DRIVING (Category B Felony - NRS 484B.653 - NOC 53896),**  
21 as more fully alleged in the charging document attached hereto as Exhibit "1".

22 My decision to plead guilty is based upon the plea agreement in this case which is as  
23 follows:

24 The State will retain the right to argue as to Counts 1 and 2; but no opposition to  
25 concurrent service of time between the Reckless Driving count and the two (2) counts of  
26 Driving Under The Influence Resulting In Death.

27 I agree to the forfeiture of any and all weapons or any interest in any weapons seized  
28 and/or impounded in connection with the instant case and/or any other case negotiated in

1 whole or in part in conjunction with this plea agreement.

2 I understand and agree that, if I fail to interview with the Department of Parole and  
3 Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate,  
4 by affidavit review, confirms probable cause against me for new criminal charges including  
5 reckless driving or DUI, but excluding minor traffic violations, the State will have the  
6 unqualified right to argue for any legal sentence and term of confinement allowable for the  
7 crime to which I am pleading guilty, including the use of any prior convictions I may have to  
8 increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without the  
9 possibility of parole, life with the possibility of parole after ten (10) years, or a definite twenty-  
10 five (25) year term with the possibility of parole after ten (10) years.

11 Otherwise I am entitled to receive the benefits of these negotiations as stated in this  
12 plea agreement.

13 CONSEQUENCES OF THE PLEA

14 I understand that by pleading guilty I admit the facts which support all the elements of  
15 the offense to which I now plead as set forth in Exhibit "1".

16 **As to Count 1**, I understand that as a consequence of my plea of guilty, the Court must  
17 sentence me to imprisonment in the Nevada Department of Corrections for a minimum term  
18 of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years.  
19 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum  
20 term of imprisonment. I understand I will be fined a minimum of \$2,000.00 and a maximum  
21 of \$5,000.00.

22 **As to Count 2**, I understand that as a consequence of my plea of guilty, the Court must  
23 sentence me to imprisonment in the Nevada Department of Corrections for a minimum term  
24 of not less than TWO (2) years and a maximum term of not more than TWENTY (20) years.  
25 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum  
26 term of imprisonment. I understand I will be fined a minimum of \$2,000.00 and a maximum  
27 of \$5,000.00.

28 **As to Count 3**, I understand that as a consequence of my plea of guilty, the Court must

1 sentence me to imprisonment in the Nevada Department of Corrections for a minimum term  
2 of not less than ONE (1) years and a maximum term of not more than SIX (6) years. The  
3 minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of  
4 imprisonment. I understand I will be fined a minimum of \$2,000.00 and a maximum of  
5 \$5,000.00.

6 Further, pursuant to NRS 484C.460 I understand the Court must order the installation  
7 of a breath ignition interlock device at my own expense in any vehicle I own or operate, as a  
8 condition to the reinstatement of my driving privileges, for not less than twelve (12) months  
9 and not more than thirty-six (36) months upon my release from prison, residential confinement,  
10 confinement in a treatment facility, or from parole or probation.

11 I understand that as a consequence of my plea in the instant case, that if I should be  
12 convicted of any subsequent Driving Under the Influence offense, regardless of when that  
13 offense takes place, that conviction shall be a felony punishable by imprisonment in the  
14 Nevada Department of Corrections for a minimum of two (2) years and a maximum of fifteen  
15 (15) years, and a fine of not less than \$2,000.00 and not more than \$5,000.00. I further  
16 understand that such imprisonment will not be suspended nor will that fine be excused. In  
17 addition, the Department of Motor Vehicles will revoke or suspend my license for at least three  
18 (3) years and impose a \$35 civil penalty. I understand the Department of Motor Vehicles may  
19 also suspend the registration on any vehicles I own or operate.

20 I understand that if I am convicted of three (3) Driving Under the Influence offenses  
21 during my lifetime, including the offense to which I am pleading guilty today, and I  
22 proximately cause the death of another person while driving under the influence of alcohol,  
23 liquor, a controlled substance, and/or a prohibited substance, then I can be prosecuted for  
24 Vehicular Homicide. I understand that I would then be subject to imprisonment in the Nevada  
25 Department of Corrections for: (a) life with the possibility of parole after a minimum of ten  
26 (10) years has been served; or (b) a definite term of twenty-five (25) years with the possibility  
27 of parole after a minimum of ten (10) years has been served.

28 I further understand and agree, that as a consequence of accepting the negotiations in

1 the instant case, I will not ask for nor receive treatment under NRS 458.300 et seq.

2 I understand that the law requires me to pay an Administrative Assessment Fee and a  
3 \$60.00 Chemical Analysis Fee.

4 I understand that, if appropriate, I will be ordered to make restitution to the victim of  
5 the offense to which I am pleading guilty and to the victim of any related offense which is  
6 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to  
7 reimburse the State of Nevada for any expenses related to my extradition, if any.

8 **As to Count 1**, I understand that I am not eligible for probation for the offense(s) to  
9 which I am pleading guilty.

10 **As to Count 2**, I understand that I am not eligible for probation for the offense(s) to  
11 which I am pleading guilty.

12 **As to Count 3**, I understand that I am eligible for probation for the offense to which I  
13 am pleading guilty. I understand that, except as otherwise provided by statute, the question of  
14 whether I receive probation is in the discretion of the sentencing judge.

15 I understand that I must submit to blood and/or saliva tests under the Direction of the  
16 Division of Parole and Probation to determine genetic markers and/or secretor status.

17 I understand that if more than one sentence of imprisonment is imposed and I am  
18 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order  
19 the sentences served concurrently or consecutively.

20 I understand that information regarding charges not filed, dismissed charges, or charges  
21 to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

22 I have not been promised or guaranteed any particular sentence by anyone. I know that  
23 my sentence is to be determined by the Court within the limits prescribed by statute.

24 I understand that if my attorney or the State of Nevada or both recommend any specific  
25 punishment to the Court, the Court is not obligated to accept the recommendation.

26 I understand that if the offense to which I am pleading guilty was committed while I  
27 was incarcerated on another charge or while I was on probation or parole that I am not eligible  
28 for credit for time served toward the instant offense.



1 I understand that if I am not a United States citizen, any criminal conviction will likely  
2 result in serious negative immigration consequences including but not limited to:

- 3 1. The removal from the United States through deportation;
- 4 2. An inability to reenter the United States;
- 5 3. The inability to gain United States citizenship or legal residency;
- 6 4. An inability to renew and/or retain any legal residency status; and/or
- 7 5. An indeterminate term of confinement, with the United States Federal  
8 Government based on my conviction and immigration status.

9 Regardless of what I have been told by any attorney, no one can promise me that this  
10 conviction will not result in negative immigration consequences and/or impact my ability to  
11 become a United States citizen and/or a legal resident.

12 I understand that the Division of Parole and Probation will prepare a report for the  
13 sentencing judge prior to sentencing. This report will include matters relevant to the issue of  
14 sentencing, including my criminal history. This report may contain hearsay information  
15 regarding my background and criminal history. My attorney and I will each have the  
16 opportunity to comment on the information contained in the report at the time of sentencing.  
17 Unless the District Attorney has specifically agreed otherwise, the District Attorney may also  
18 comment on this report.

#### 19 WAIVER OF RIGHTS

20 By entering my plea of guilty, I understand that I am waiving and forever giving up the  
21 following rights and privileges:

- 22 1. The constitutional privilege against self-incrimination, including the right  
23 to refuse to testify at trial, in which event the prosecution would not be  
allowed to comment to the jury about my refusal to testify.
- 24 2. The constitutional right to a speedy and public trial by an impartial jury,  
25 free of excessive pretrial publicity prejudicial to the defense, at which  
26 trial I would be entitled to the assistance of an attorney, either appointed  
or retained. At trial the State would bear the burden of proving beyond  
a reasonable doubt each element of the offense(s) charged.
- 27 3. The constitutional right to confront and cross-examine any witnesses who  
28 would testify against me.



1 My attorney has answered all my questions regarding this guilty plea agreement and its  
2 consequences to my satisfaction and I am satisfied with the services provided by my attorney.

3 DATED this 1 day of ~~July~~, 2019.

4 *Asst*

5 *Henry Aparicio*  
6 HENRY APARICIO, aka.  
7 Henry Biderman Aparicio  
8 Defendant

8 AGREED TO BY:

9 *Charles Martinovskiy*

10 CHARLES MARTINOVSKY  
11 Chief Deputy District Attorney  
12 Nevada Bar #007439

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court  
3 hereby certify that:

- 4 1. I have fully explained to the Defendant the allegations contained in the  
5 charge(s) to which guilty pleas are being entered.  
6 2. I have advised the Defendant of the penalties for each charge and the restitution  
7 that the Defendant may be ordered to pay.  
8 3. I have inquired of Defendant facts concerning Defendant's immigration status  
9 and explained to Defendant that if Defendant is not a United States citizen any  
10 criminal conviction will most likely result in serious negative immigration  
11 consequences including but not limited to:  
12 a. The removal from the United States through deportation;  
13 b. An inability to reenter the United States;  
14 c. The inability to gain United States citizenship or legal residency;  
15 d. An inability to renew and/or retain any legal residency status; and/or  
16 e. An indeterminate term of confinement, by with United States Federal  
17 Government based on the conviction and immigration status.

18 Moreover, I have explained that regardless of what Defendant may have been  
19 told by any attorney, no one can promise Defendant that this conviction will not  
20 result in negative immigration consequences and/or impact Defendant's ability  
21 to become a United States citizen and/or legal resident.

- 22 4. All pleas of guilty offered by the Defendant pursuant to this agreement are  
23 consistent with the facts known to me and are made with my advice to the  
24 Defendant.  
25 5. To the best of my knowledge and belief, the Defendant:  
26 a. Is competent and understands the charges and the consequences of  
27 pleading guilty as provided in this agreement,  
28 b. Executed this agreement and will enter all guilty pleas pursuant hereto  
voluntarily, and  
c. Was not under the influence of intoxicating liquor, a controlled  
substance or other drug at the time I consulted with the Defendant as  
certified in paragraphs 1 and 2 above.

Dated: This 1 day of ~~July~~, 2019.

August

  
DAMIAN SHEETS, ESQ.

ld/vcu

1 **AINF**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 CHARLES MARTINOVSKY  
6 Chief Deputy District Attorney  
7 Nevada Bar #007439  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Plaintiff

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,  
11 -vs-  
12 HENRY APARICIO, aka,  
13 Henry Biderman Aparicio, #6069038,  
14 Defendant.

CASE NO. C-18-332496-1  
DEPT NO. IX

AMENDED  
INFORMATION

15 STATE OF NEVADA }  
16 COUNTY OF CLARK } ss:

17 STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State  
18 of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That HENRY APARICIO, aka, Henry Biderman Aparicio, the Defendant(s) above  
20 named, having committed the crimes of **DRIVING UNDER THE INFLUENCE**  
21 **RESULTING IN DEATH** (Category B Felony - NRS 484C.110, 484C.430, 484C.105 -  
22 **NOC 53908**) and **RECKLESS DRIVING** (Category B Felony - NRS 484B.653 - **NOC**  
23 **53896**), on or about the 15th day of May, 2018, within the County of Clark, State of Nevada,  
24 contrary to the form, force and effect of statutes in such cases made and provided, and against  
25 the peace and dignity of the State of Nevada,

26 COUNT 1 - DRIVING UNDER THE INFLUENCE RESULTING IN DEATH

27 did then and there willfully and unlawfully drive and/or be in actual physical control of  
28 a vehicle on or off a highway at West Sahara Avenue and South Hualapai Way, Las Vegas,

**EXHIBIT "1"**

Bates 154

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1 Clark County, Nevada, Defendant being responsible in one or more of the following ways  
2 and/or under one or more of the following theories, to wit: 1) while under the influence of  
3 intoxicating liquor to any degree, however slight, which rendered him incapable of safely  
4 driving and/or exercising actual physical control of a vehicle, 2) while he had a concentration  
5 of alcohol of .08 or more in his blood, and/or 3) when he was found by measurement within  
6 two (2) hours after driving and/or being in actual physical control of a vehicle to have a  
7 concentration of alcohol of .08 or more in his blood, Defendant, while driving and/or in actual  
8 physical control of a vehicle, failing to pay full time and attention to his driving, failing to  
9 exercise due care, and/or failing to drive in a careful and prudent manner, which acts, or  
10 neglect of duties, proximately caused the vehicle Defendant was driving and/or in actual  
11 physical control of, to strike and collide with a vehicle being driven or occupied by DAMASO  
12 PUENTE, said collision proximately causing death to DAMASO PUENTE.

13 COUNT 2 - DRIVING UNDER THE INFLUENCE RESULTING IN DEATH

14 did then and there willfully and unlawfully drive and/or be in actual physical control of  
15 a vehicle on or off a highway at West Sahara Avenue and South Hualapai Way, Las Vegas,  
16 Clark County, Nevada, Defendant being responsible in one or more of the following ways  
17 and/or under one or more of the following theories, to wit: 1) while under the influence of  
18 intoxicating liquor to any degree, however slight, which rendered him incapable of safely  
19 driving and/or exercising actual physical control of a vehicle, 2) while he had a concentration  
20 of alcohol of .08 or more in his blood, and/or 3) when he was found by measurement within  
21 two (2) hours after driving and/or being in actual physical control of a vehicle to have a  
22 concentration of alcohol of .08 or more in his blood, Defendant, while driving and/or in actual  
23 physical control of a vehicle, failing to pay full time and attention to his driving, failing to  
24 exercise due care, and/or failing to drive in a careful and prudent manner, which acts, or  
25 neglect of duties, proximately caused the vehicle Defendant was driving and/or in actual  
26 physical control of, to strike and collide with a vehicle being driven or occupied by CHRISTA  
27 PUENTE, said collision proximately causing death to CHRISTA PUENTE.

28 ///

1 COUNT 3 - RECKLESS DRIVING

2 did then and there willfully, unlawfully, and feloniously drive a motor vehicle at West  
3 Sahara Avenue and South Hualapai Way, Las Vegas, Clark County, Nevada, with willful or  
4 wanton disregard for the safety of persons or property, by driving said vehicle without paying  
5 full time and attention to his driving, and/or failing to exercise due care, and/or failing to drive  
6 in a careful and prudent manner, and/or by traveling at a high rate of speed and/or failing to  
7 slow down for traffic, thereafter crashing into and/or rear-ending a vehicle in which DAMASO  
8 PUENTE was seated, which acts, or neglect of duties, proximately causing the death of  
9 DAMASO PUENTE and/or CHRISTA PUENTE.

10 STEVEN B. WOLFSON  
11 Clark County District Attorney  
12 Nevada Bar #001565

13 BY *Charles Martinovsky*  
14 CHARLES MARTINOVSKY  
15 Chief Deputy District Attorney  
16 Nevada Bar #007439

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27 DA#18F09022X/td/vcu  
28 LVMPD EV#1805154422  
(TK11)

September 30, 2019

Victim Impact Statement for fatal victims

Dámaso and Christa Puente

Sentencing of Henry Aparicio #C-18-332496-1

To Your Honor, Judge Cristina Silva

My name is Ian Malone and I'm one of Christa's older brothers. I'm writing to you today in an attempt to share some of the experiences and feelings that my family and I have gone through since the crash on May 15, 2018. What words I put on paper won't come close to telling the whole story, but I'll do my best to express the pain and misery that we've all felt for the past year and a half, and I'll try to convey the goodness that was taken out of the world that night.

Christa was born when I was 3 years old. I don't have any memories that far back so when I think of our family it was always my older brother, myself, and my two little sisters. It took getting older for me to realize how lucky we were growing up. We had parents that gave us their time and love, and we had siblings that cared about and loved each other. Christa was the baby of the family and was truly the best of all of us. It's no surprise that she grew up to be an oncology nurse, and that she spent her adult life bettering the lives of those in pain. The kindest and brightest person anyone could ever hope to meet, always laughing from my earliest memories of her to my last.

I also had an older sister that I never got a chance to know because she was taken away from us in a car accident before I was born. I never met Christine, but I know the effect that her death had on my mother. She was hit by a car near her home in California nearly 40 years ago and that's been a pain that my mother has carried with her for all that time. That sadness has never gone away, and the loss of her first child will never be less painful. I have a child of my own now, and though I understand the sense of loss and pain that my mother has lived through



twice, and now my father with her, I pray I never have to experience what it's really like to lose a child. My father said to me a few times over the years, before the accident, that a parent should never have to bury their child. It's the worst nightmare of any family and living through it is far worse than I could have possibly imagined.

When I think of my brother-in-law Dámaso, the first thing that always comes to mind is how funny he was. His sense of humor was pervasive and constant. I don't have a single sad, or even serious, memory of him before the accident. Anyone lucky enough to know him will speak to how incredible a person he was to be around. But more importantly to me, he was a perfect husband to my little sister. It's a common thing between Dom and Christa's friends and family to refer to them as Romeo and Juliet because none of us has seen a couple so truly devoted and crazy about each other. I don't remember how long ago I met Dámaso, it must be 17 or 18 years now, but from the start it was clear that we could trust him with the baby of our family. They remain the most perfect couple I've known, or seen in a movie, or read about in a fairy tale. After 7 years of dating and 9 years of marriage the new feeling of love and joy never wore off for them. They remained a perfect love story until the last moment. As painful as their deaths have been, it's made worse by the knowledge that they were finally ready to start having children. We can only guess about what bright, beautiful, and loving children they would have raised. The world not only lost two perfect souls on the night of the accident, but all their future children and grandchildren. They would have been so good at parenthood, but they were robbed of the chance to raise children. My parents were robbed of the chance to see those grandchildren grow up. My siblings and I were robbed of our future nieces and nephews.

I wish I could have another year or month or day to spend with them. I didn't get enough time over the last 10 years. As it sometimes happens in adult life we moved to different parts of the country. We could talk on the phone and no matter the time apart or the distance we would pick up right where we left off as if we had just seen each other yesterday. But there's no substitute for being in the same room with them. Now I regret every time I left town and didn't go to see them. Every vacation, every weekend off work, every trip I took could have been a chance to spend time with them. Now that the chances have forever run

out, I feel those lost opportunities like a weight on my chest. I wish I had a chance to thank Christa for being the perfect baby sister and I wish I had a chance to thank Dámaso for being so, so good to her.

The morning of May 16, 2018 I received a voicemail from the Las Vegas coroner's office asking me to return a call to them about a case involving Christa Puente. That was all the message said but a terrible, surreal feeling came over me. Logically I knew that there was only one reason I'd be getting a message like that, but like anyone would I was hoping for another explanation. Since my sister was a nurse, I was holding out hope that it was something to do with that. I called the number they left me and while I was being transferred to the person dealing with the case, my phone died. Since I was in a store at the time, I went to buy a portable charger to turn my phone back on, my mind spinning the whole time, hoping and dreading. When I was able to call back and get transferred back to the correct person I was walking to my car. They asked me if I knew Christa Puente and when I told them that she was my sister they informed me that she and her husband had been in a car accident in Las Vegas the evening before and had been killed on impact. With that the hope died and the misery began.

I wasn't able to drive my car because I was crying so I had to ride in the passenger seat while my girlfriend drove me home. I knew I was the first to find out about the accident, so I had to tell my family. I consider these the most painful moments of my life. I tried calling my parents, then my sister, then my brother, none of whom answered. For the time I was alone with a terrible secret that I didn't want to share and that I didn't want to be true. When my father did call me back, he was with my mother. I told him about the accident and he dropped the phone and just repeated "No, No, No" over and over. I could hear my mother asking him what was wrong, but he wasn't able to answer her, so she picked up the phone and I repeated the heart-wrenching news to her. I was in a daze at the time and I don't remember what I was doing. I know I was in my car, listening to my mother scream "Another one, another one", and I don't know anything else about the next few hours. When I was able to drive, I went to my parents and got them on a flight to Las Vegas so that they could go identify the body of their youngest child.

In the past year and a half since the accident I've never told the full story of that morning to anyone. The telling is still too painful. I'm putting it into this letter because its something I hope will influence the sentencing of Henry Aparicio. I should have written an impact statement before now but every time I sat down to work on it, I stopped immediately. I never got a single word on the paper. I put it off so long that now I'm perversely writing a statement about the impact of my sister's death on her 35<sup>th</sup> birthday. My son shares her September 30<sup>th</sup> birthday and what once was a great day in our family will always be tinged with a sadness in knowing what we're missing and what we were cheated out of that night.

My immediate family has gotten together several times since the funeral that saw my sister and her soulmate buried. It still doesn't feel real that that's all of us now. There's such a huge, glaring hole that used to be filled by the warmth, laughter, and humor of Dom and Christa. I will never get used to them not being there, and while its possible for me to think fondly about the wonderful people they were, it will always be in a past tense. In the present, I still hurts every time I think about it. In the present my mother still cries herself to sleep every night, and cries herself awake every morning, because she gave birth to three beautiful daughters and now she has one. In the present, my father will never see his youngest child again. I've only touched on my family's heartache in this letter, but Damaso and Christa had so many dear friends, co-workers, and patients that were also crushed by Mr. Aparicio's actions that night.

I am hoping, Your Honor, that you will sentence Henry Aparicio to the maximum sentence for each count with which he is charged and that those sentences will run consecutively. This is not just because of the personal pain and misery that he has caused me, but because he is a dangerous person. If it wasn't my sister and her husband that died that night, it surely would have been someone else's son/daughter/mother/father/sister/brother. It is a very serious thing that he chose to drive after drinking so heavily, but more than that, he turned his vehicle into a deadly weapon and guaranteed that he would kill someone when he accelerated to over 100 mph on Sahara Ave. It was not just the alcohol that murdered my sister and her husband. Henry Aparicio was not just another drunk driver. He would have killed someone that night if he had been completely sober driving at those speeds. What he showed was a complete

lack of regard and disrespect for life to everyone around him. A person like that belongs in prison for the maximum amount of time because he is a danger to all of those around him. I would never wish the pain and heartache that he has caused my family on any other.

I wish that I could express my thoughts better than I have because as I read them over the words on the page do no justice to the pain and outrage of the experience. I just don't know any better way to tell it. But I want to thank you Judge Silva for taking the time to read this letter and consider my thoughts and feelings in this grave matter.

Respectfully,

Ian Malone

Sentencing of Henry Aparicio #C-18-332496-1

Fatal Victims: Damaso and Christa Puente

Judge: Cristina D. Silva

September 20, 2019

To: The Honorable Judge Cristina D. Silva

My name is Dan Wilson and I am the oldest brother of Christa Malone Puente. I have held off writing this Victim's Impact Statement as long as I could have, I guess to reserve myself the extra pain it will no doubt bring by writing it.

Christa was the youngest of our family, my mom's baby girl. I am 10 and a half years older than Christa so there was quite an age difference between us. I think that difference in age allowed me to see clearer what an amazing person she was and how she had grown to be a person that one could only sit back and admire. Her smile could calm you and brighten your day. She was surely a ray of light in the dark world in which we live. Christa was extremely caring for others and a very unselfish person. I think creating joy and happiness in others is what truly made her happy.

My sister had also found her soulmate in Damaso Puente. Those two together lived a real-life Romeo and Juliet love story. They were two hearts that had become one, a beautiful sight to behold just watching them together. They were, together, so full of life and love, a bond most can just dream of. Hanging out with the two of them was such a privilege. They could both make you laugh all day long and completely forget anything that might be troubling you. Just their faces they would make back and forth to each other, I'll just miss that so much.

On the morning of May 16, 2018 I was working in St. Louis which is where I live. My cell phone starting ringing and the caller ID said Dan Malone, my step-dad. I answered the call and all he said was my name. My heart dropped in my chest and a lump formed in my throat, I knew there was something very wrong. My first thought was is my mom okay, because surely she would be calling if it was something else. My dad said to me that there had been a terrible accident and that Christa and Dom had been killed the night before in Las Vegas. I knew then why my mom had not been the one to contact me. I'm sure at that point she would not have been able to say those words to me. Shock, disbelief, pain and tears came instantly at the same exact moment. I could not complete my duties on the job, I knew

that for certain. I called my boss for a replacement and did the best I could do to drive home, trying to see straight through the tears and crying.

The moment that I was told of the deaths of my baby sister and her incredible husband I felt cheated. Cheated of time, cheated of being able to see them again and cheated out of goodbyes. I will never again be able to be comforted by my sisters smile, completely lose myself in the laughter they both would induce upon me and never again be astonished by experiencing the deep, deep love they showed for each other and the ones around them.

All that I feel now is heartache and utter loss. Still I wake up each morning and try to convince myself this heinous crime did not happen, that Christa and Dom can't possibly be gone. But on my drive to work I realize it is real, they were both taken from us. I hate driving now, especially alone. For me, it is the time I think of them most with no one there to talk of something else, anything else. It is there in the truck, thinking of them, that I hurt most. There are other times as well that I think of them, but for sure those two hours of the day five and six times a week. Reliving this crime of Christa and Dom being stolen from us physically hurts my chest so bad that it actually hurts my back. Lumps in the throat and random tears fall without warning.

Sometimes I feel that I'm being selfish by feeling sorry for myself that I'll never see Christa and Dom again. I feel as if I shouldn't have the right to mourn for them so much because of the impact that it has had on my mom and dad. I think to myself that if it hurts me this bad, what must it be like for them. I never want to know their pain. I have three children of my own and I don't know that I would be strong enough to continue on with the loss of one of my children. And for my sweet mother, it is the second child that has been taken from her. We lost my older sister, Christine in 1978. She was killed in California by a hit and run driver while riding her bike in a quiet neighborhood. I was only four years old and too young to fully understand what had happened, but I do remember the effect on my mother. Every night, which seemed like for years, she would cry, cry from deep in her heart. I remember it waking me up and I would go into her room and try and comfort her. And now it has happened again. Another child, another sweet, innocent girl taken from her. This time we know for sure it was preventable.

When Henry Aparicio decided to drive completely and utterly intoxicated on the night of May 15, 2018, he also made the decision to take the lives of Christa and Dom. Sure, he didn't know them, but he did indeed murder them. If it hadn't been them, it would surely have been another family mourning the loss of a loved one. I look at it like this. There's not much of

a difference between driving intoxicated at speeds of 100 mph and shooting bullets into a crowd. The chances of someone getting seriously hurt or killed is extremely high in both cases. So when Mr. Aparicio got into that car in his condition and drove that recklessly he accomplished the results that were so likely to happen. He killed my sister and he killed Damaso. He took away my mom and dad's baby girl. He stole my brother and sister's best friend. He ended the beautiful love story between Christa and Dom. He never let me see or visit them again. He destroyed my kids' relationship with their Aunt and Uncle. He brought darkness by taking our ray of sunshine.

Personally, I don't feel as if Mr. Aparicio deserves to ever get out of prison for the two acts of murder he committed. Dear Judge I ask you to please sentence Mr. Aparicio to the maximum penalty for each count he is charged and that the sentencing for each count run consecutively. Mr. Aparicio has taken from this world two of the most beautiful souls most of us have ever or will ever be lucky enough to know. I hope he stays in prison long enough to feel a fraction of the pain that he has induced upon us. That will take quite some time.

Thank you, your honor, for taking the time to listen to my thoughts and concerns. I wish that I had the ability to convert the feelings in my heart to paper more clearly but this seems to be the best I can do to share my feelings and emotions with you.

Respectfully,  
Dan Wilson  
(loving brother of Christa Malone Puente)

August 29, 2019

Sentencing of Henry Aparicio #C-18-332496-1

Fatal victims: Damaso and Christa Puente

Honorable Judge Cristina Silva,

My name is Makenzey Wilson. Christa is my aunt, and ever since I have been able to remember, Damaso has been my uncle. Even before the two of them were married, I thought of him as family. I do not remember a time when the two of them were not together and I would not have it any other way. Although I have not gotten to see them as often in recent years, some of my greatest childhood memories are from the time I spent visiting them in Vegas. When I found out the two of them had passed away on May 15, 2018, I was in shock. I heard the news from my mother and I was not able to have an emotional response other than shock for a whole day, but when I did, I thought about the fact that I would never get to spend times like that with them ever again.

There is never really a day I do not think about the fact that my aunt and uncle are both gone from my life. I will never get to longboard around parking lots with Damaso like my sister and I did when we were kids. I will never get to see Christa's smile, which lit up every room and made everyone a little happier. It will not feel the same when my dad, Christa's brother, tells me how much I remind him of her, because I am clumsy and messy just like she was when she was younger. It hurts me to think about those things, and it makes me wish I could have spent every minute with them while they were here. Due to living multiple states away, I had not seen them in a few years, though I thought about it frequently. Now, the opportunity to change that has



been taken away from me. In addition to mourning their death, I am also mourning the memories I will not get to make with them in the future.

Thoughts like those play in my head on a loop, and they make me cry as I type them out because somehow it makes them feel more real. Those thoughts are not the only new experience I have had since they passed. Driving and being in cars has always made me on edge, but since the passing of Christa and Damaso, it has been made even harder. I cannot stop thinking about the worst possible scenarios that could take place. It is so easy for someone to make a careless decision such as the one made in this case before getting behind the wheel of a car. I think about that constantly, as well as all the other possibilities of what could go wrong while on the road. I have grown more and more anxious every time I close the door after getting into a car. Anytime a car gets a little too close, my heart starts beating at a rapid rate and I suddenly feel a lump in my throat as these thoughts go through my mind. I feel extreme stress the second anyone goes over the speed limit. This has even stopped me from getting a driver's license of my own up until this point. The fact that I am too anxious to drive on my own puts more stress on me because it limits what I can do since I live in an area where driving places is the only way to get almost anywhere.

In addition to my own struggles, I have had to watch the rest of my family struggle through this loss as well. My father is not one to talk about his emotions very often, but I can tell he has been different since the incident. Something like losing a sibling is not something you ever get over, and it changes who you are as a person for your entire life. My siblings are also affected, although my brother in a different way. He is younger than my sister and I are and he never got the same opportunities and chances to get to know his own aunt and uncle the way that we did, and now he never will.

Due to the actions of the defendant, my family, myself, and all of the people who were touched by the lives of Christa and Damaso are forced to mourn the loss of their lives. Due to the impact of his actions, I ask that the defendant, Henry Aparicio, be sentenced to the maximum penalty for each of his crimes, and that his sentences run consecutively. Although this cannot bring back the lives of Christa or Damaso, it can assure that he is not able to cause this kind of devastation to anyone else for many years to come.

Judge Silva, I thank you for taking the time to allow me to express my feelings, thoughts and concerns.

Respectfully,

Makenzey Wilson

Sentencing of Henry Aparicio #C-18-332496-1

Fatal victims: Damaso and Chrisa Puente

Judge: Cristina Silva

September 22, 2019

Your Honor,

My name is Peggy Buell. I am Christa Puente's Grandmother. I am 87 years old and this is my second granddaughter whose life has been cut short dying in an automobile wreck.

I was living with my daughter Diane Malone, her husband, Dan and my granddaughter Christa and her husband Damaso Puente when the horrific death of my beloved granddaughter occurred. When my daughter received the news she was overcome with such devastation I have no words that can even express the emotional and physical trauma she has sustained. For the next several weeks to months there was so much chaos and grief that the entire household seemed surreal. I seemed to be the one that helped to support my daughter and tried to comfort her but it was impossible! There was nothing that could take the nightmare away. I hardly slept and cried most of the time along with my daughter Diane.

I eventually had to move in with my granddaughter for a while then moved to Fenton Missouri to be close to my son. My entire life was turned upside down and the stress has caused me to become more and more forgetful. Now I am becoming unable to sometimes remember the death and each time someone talks about Christa I have to be reminded again and experience the nightmare over and over like it just happened. The stress is unbearable for this old person.

I pray that Your Honor finds the maximum penalty of 8-20 years be given for each count to run consecutively. Henry Aparicio has ripped out a piece of my soul and left my family in ruins.

Thank you Judge Silva for taking the time to consider my thoughts and concerns.

Sincerely,

Peggy Buell, Christa's Grandmother

Sentencing of Henry Aparicio #C-18-332496-1

Fatal victims: Damaso and Chrisa Puente

Judge: Cristina Silva

September 20, 2019

Your Honor Cristina Silva,

My name is Elaine Babor and I am Christa Puente's Aunt, Diane Malone's only sister.

I was at home when my mother called me to tell me that Christa and Damaso were dead. I was in total disbelief as to how this could possibly be true. My sister has already lost a daughter to an automobile accident and now this. It just couldn't be, I must be hearing it wrong but I'm not. I was told a drunk driver rear ended them while they were innocently sitting at a traffic light.

Christa was the light of the family, the most gentle loving soul and oh that smile of her's melted my heart. I never heard a cross word or a negative thought about anyone or anything from her in her life. As a little girl she was always the kindest and most gentle when playing with her cousins. They lived just up the street from me and I always loved seeing her happiness. It would just light up my day.

Christa was always wanting to help others and her dream of becoming a nurse and doing what she did best, helping others with her love, kindness and caring nature became reality. She spent many years going to school and finally got her nursing degree only to have her passion for others cut so short. No one will ever know the true impact she might have made on many others with her skills and love.

Christa's mother, Diane is my younger sister and I now am watching her deal with a death of her second daughter and I do not believe she will ever be able to live with this tragedy. Up until this point in time she has been on a mission to bring justice for her daughter and son-in-law and when the sentencing is over I fear for

her very life. When I talk with her she is a shell of a person and cries every day and has no thoughts except for Christa. She is in a nightmare day in and day out and cannot cope with anything except thinking of Christa's death which is consuming her.

Diane now lives in the home Christa and Damaso had shared for so many years and finds no direction to her life. In the past year and a half she meanders through the house and finds only empty memories of the happy home that once was. Diane is unable to cope with daily living and she feels dead inside. She has placed pictures, plants and many loving things given by so many from the funeral to the family in remembrance of Christa and Damaso all over the house and you can't go into any room without feeling their presence and their death. She is unable to move even a step forward in doing anything to pick up the pieces left by Christa.

I pray for my sister Diane daily for her peace and comfort but I know there is none. It is a life sentence and I feel in my heart that my sister will never recover from this horrible tragedy that Henry Aparicio caused. I fear for my sister's life as I know she is so desperate to join Christa in heaven and be with her again.

With his decision to drink and drive he has destroyed the lives of many innocent people not limited to the two he killed. There is no future for my sister to love grandchildren and enjoy large family gatherings for the holidays and special events. Christa's brothers Dan and Ian, and sister Anna will never know nieces and nephews that could have been. Christa's death has left a huge hole in the middle of a loving family.

Christa's father, Dan is a quiet man but now that quiet man is mostly silent. Hardly speaking even one word ever.

I now only see the devastation that Henry Aparicio has caused to each and every member of our small family. Because Henry Aparicio chose to drive drunk that night two wonderful people are dead. Not only did he choose to drive drunk at many times the legal limit he denied being the driver and lied over and over again about driving the car and murdering my niece and her husband. He has shown no remorse at all and has not accepted responsibility for their deaths.

I know he has agreed to a plea only to try to save himself. He is an evil person with no regard for the families he has destroyed.

I hope this impact letter helps you to understand the depth of pain and suffering and loss this family feels every hour of every day for the rest of our lives. Henry Aparicio will never understand the true impact he has made on so many lives and how he has forever destroyed so many more lives than just the two lives he took that night. He lives and they are dead.

Your Honor, I respectfully ask you to sentence Mr. Aparicio to the maximum sentence of 8 to 20 years for each count, to run consecutively to help keep him from the possibility of destroying any more lives and the families left behind. He chose to drive drunk and should pay the maximum penalty for that choice.

Thank you for your time to consider my thoughts about the impact this has made on my family.

Respectfully,

Elaine Babor, Aunt to Christa Puente

Sentencing of Henry Aparicio #C-18-332496-1

Fatal victims: Damaso and Chrisa Puente

Judge: Cristina Silva

September 20, 2019

Your Honor Cristina Silva,

My name is Michelle Kujath. I am Christa's cousin.

Christa was a very beautiful person. I remember when I was fourteen, I had gone to stay with my Aunt Diane and my Uncle Dan for the summer to babysit for them. Ian, Anna, and Christa. I had a great time with them all! Christa was the baby and the most work, but she was always so bubbly and adorable with those great, big, beautiful eyes and her big smile.

Our family will never be the same!

Every time I saw her after that summer, she was always happy and so sweet.

I will miss her very much. I will always miss her and Damaso together and how happy they always were together.

I strongly request the maximum penalty of 8-20 years be given for each count to run consecutively!!!!!!

Thank you for your time.

Respectfully,

Michelle Kujath

Sentencing of Henry Aparicio #C-18-332496-1

Fatal Victims: Damaso and Christa Puente

Judge: Cristina Silva

Your Honor,

My name is Patricia Hussey and Christa Puente is my cousin. I'm not sure exactly how to write this letter but it needs to be written. The devastation Christa and Damaso's murder has had on this family is hard to put in words.

I was an older cousin of Christa's. I didn't really have the fortune to grow up with Christa as little children but fortunately, I had a job that sent me to Las Vegas twice a year when we were adults. While out there, I stayed with Aunt Diane each time and got to know Christa very well. She was one of the most selfless people I have ever had the pleasure to know. She was genuine and beautiful and had such a contagious smile. It felt so good to finally know my little cousin. They flew to Missouri to be part of my wedding. Damaso did the videography because that was his passion. It was wonderful to share that special day with them.

Through family, I always stayed up on what those two were up to. I had just found out they were going to inquire about adopting a child. I always wished all the best for them, as they deserved a great LIFE. Two such loving, selfless, giving, caring souls should have.

There has not been 1 day since their horrible murders, that I have not thought about them and their parents. I pray every night to God to please give them strength to get through this tragedy. As I can not fathom the pain they feel. I pray every day for Christa's Mom, my Aunt Diane, that she will make it through. This is the second child that I have had to see my Aunt lose. Her oldest and now her youngest. I worry that the pain will consume her and be too much for her to bear.

This is a constant thought in my brain, every day, caused by the selfish, murderous act that Mr. Aparicio committed. He CHOSE to drink way too much at the restaurant, he CHOSE to get in the car behind the wheel, HE CHOSE TO MURDER MY COUSIN AND HER HUSBAND!

Christa and Damaso did not have a choice!!

Please, your Honor, I am asking that you give Mr. Henry Aparicio the maximum penalty of 8-20 years to be given for each count to run consecutively.

I would like to thank you, your Honor, for taking your time to consider my thoughts and concerns.

Respectfully,

Patricia Hussey

Christa's Cousin



Sentencing of Henry Aparicio #C-18-332496-1

Fatal victims: Damaso and Chrisa Puente

Judge: Cristina Silva

September 20, 2019

Your Honor Cristina Silva,

My name is Nancy Metts. I am Christa's first cousin, and Diane and Dan's niece.

From the time she was born, Christa was always smiling. Just being around her, your day would become so much better.

I remember when I went home my parents were sitting on the porch and my mom was crying. She began to tell me that Christa and Damaso were in a car accident and they were dead! Devastated!! This couldn't be real, maybe they have mixed something up because there is no way that two people like Christa and Damaso could be dead! I just started sobbing! Our family will NEVER be the same again! Their lives were stolen from us!

I have watched my Aunt go down a hole that no one wants to endure. Her baby was just taken from her! My Aunt doesn't sleep. She is in constant reminder of this horrible nightmare that she cannot wake up from. My Grandmother watches her daughter go thru the most horrific thing, and she can't do anything to fix it. Everyday is a struggle to overcome!

Christa and Damaso's life were a gift that most people inspire to be. I will never get to see that smile of hers again! My family will forever be altered by this!

I request the MAXIMUM PENALTY of 8-20 years be given for each count to run consecutively!

Thank you very much for taking the time to consider my thoughts.

Respectfully,

Nancy Metts

Sentencing of Henry Aparicio #C-18-332396-1

Fatal victims: Damaso and Christa Puente

Judge: Cristina Silva

Dear Judge Silva,

My name is Jessica Henry and I am first cousin to Christa Puente. I was devastated when my mother called me and told me that Christa and Damaso had been killed by a drunk driver.

This tragic disaster has impacted my life and will forever. My little cousin Christa was a sweet, loving, self-less soul. A very important piece of our family puzzle that will be lost forever and our family will never be whole again.

I have watched my Aunt Diane, Christa's mother lose a part of herself that will never heal. Losing a child is a mother's worst nightmare that you never awaken from and losing my cousin is a forever nightmare for me as well. The smallest of things triggers the horror of it over and over again. I think of my little cousin so happy as a little girl then grow into such a loving soul so happy in life. I grieve for losing her and I see the sorrow in her mother's face and how it overwhelms her constantly and I know it will never go away. My Grandmother has to watch her own daughter go through this daily along with the hurt it bestowed on her own heart as well.

For me it's not just losing my cousin but also losing a part of my Aunt, my Grandmother and every member of our small family. I watch the grief affect every member of my family and the lose just grows.

This will forever affect each member of Christa's family forever. It will not just go away. It's a life sentence of sorrow.

Please consider the maximum penalty for each count to run consecutively for Henry Aparicio as it's a life sentence for Christa and Damaso's families.

Thank you for considering my thoughts.

Respectfully,

Jessica Henry