

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC ABASTA,  
Appellant,  
v.  
THE STATE OF NEVADA,  
Respondent.

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Case No. 83346

**RESPONDENT'S ANSWERING BRIEF**

**Appeal From Judgment of Conviction (Plea of Guilty)  
Eighth Judicial District Court, Clark County**

MELINDA E. SIMPKINS  
Chief Deputy Special Public Defender  
Nevada Bar #007911  
330 South Third Street, #800  
Las Vegas, Nevada 89155  
(702) 455-6265

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
Regional Justice Center  
200 Lewis Avenue  
Post Office Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 671-2500  
State of Nevada

AARON D. FORD  
Nevada Attorney General  
Nevada Bar #007704  
100 North Carson Street  
Carson City, Nevada 89701-4717  
(775) 684-1265

Counsel for Appellant

Counsel for Respondent

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**ROUTING STATEMENT**

This appeal is appropriately retained by the Nevada Supreme Court pursuant to NRAP 17(b)(2)(A) because it is a direct appeal from a Judgment of Conviction involving a Category A felony.

**STATEMENT OF THE ISSUE(S)**

1. Whether the district court erred in ordering Abasta to pay an indigent defense civil assessment fee

**STATEMENT OF THE CASE**

On March 15, 2021, Eric Abasta (hereinafter “Abasta”) was charged by way of amended indictment with assault with a deadly weapon, ownership or possession of firearm by prohibited person, attempt robbery with use of a deadly weapon,

murder with use of a deadly weapon, conspiracy to commit robbery, robbery with use of a deadly weapon, grand larceny auto, attempt robbery, attempt murder with use of a deadly weapon, and battery with use of a deadly weapon resulting in substantial bodily harm. Appellant Appendix Volume 3 (“III AA”) at 000460-000469.

On May 11, 2021, the Abasta was canvassed and pled guilty to: one count of First-Degree Murder; four counts of Assault with a Deadly Weapon; and two counts of Robbery. Id. at 000526-000536. On July 9, 2021, the court adjudged Abasta guilty of one count of First-Degree Murder, four counts of Assault with a Deadly Weapon; and two counts of Robbery and sentenced him to a minimum of 24 years and a maximum of 65 years in the Nevada Department of Corrections. Id. at 000574-000576. Additionally, the court ordered Abasta to pay an Indigent Defense Civil Assessment Fee of \$250.00. Id. On August 6, 2021, Abasta filed a Notice of Appeal. Id. at 000577-000579.

On March 7, 2022, Abasta filed an Opening Brief (hereinafter “AOB”). The State responds as follows.

### **STATEMENT OF THE FACTS**

The Pre-Sentence Investigation Report sets forth the facts of the case:

On March 24, 2020, officers were dispatched to a location in reference to the report of an assault with a deadly weapon committed by the defendant, identified as Eric Abasta, aka Eric Absata, Jr. and co-defendants, Mason

Arney and James Waylon Arney, Jr. Upon arrival, officers interviewed victim #1 and victim #2. Prior to the instant offense, victim #1 was walking down the street with his girlfriend, victim #2 when they observed a vehicle drive past them with their headlights off. After passing the victims, the vehicle made a U-turn, approached the victims, and stopped the vehicle in front of them. The driver, later identified as Eric Abasta, rolled down the driver's side window and asked, "Do we have a problem?" It was at this time they observed the rear passenger, identified as Mr. Mason Arney, brandish a firearm and pointed it at both victims. After exchanging words, the suspect vehicle made another U-turn and fled the scene. Officers later learned that the altercation started because Mr. Mason Arney did not like the way the victims looked at him.

Officers requested for air support, who located a vehicle matching the description of the suspect vehicle parked at a residence. Officers responded to the residence, where they made contact with Mr. Abasta and two female passengers. Officers detained the vehicle occupants and conducted a show-up with the victims, who identified Mr. Abasta as the driver. During the investigation, officers developed information which identified Mr. Mason Arney as the rear passenger who pointed the firearm at the victims. Officers located Mr. Mason Arney inside of the residence and detained him.

Officers conducted a search of the suspect vehicle and discovered a .22 caliber casing with a headstamp on the rear passenger side floorboard. They also recovered a 9mm casing inside of the center console. Officers then obtained consent from the homeowner to search the residence where the vehicle was located. During the search, officers located drug paraphernalia with residue and ammunition inside Mr. Mason Arney's room. After further questioning, Mr. Mason Arney told officers where he hid the firearm.

Officers located the firearm under a dresser stored in the garage. During this time, Mr. Mason Arney admitted the firearm belonged to him. Officers noticed the firearm was loaded with the same .22 caliber headstamp as the casing discovered inside of the suspect vehicle. Officers learned that prior to their arrival, Mr. Mason Arney grabbed the firearm from the suspect vehicle and hid it inside of the residence.

During the course of the investigation, officers learned about a secondary incident that occurred. Mr. Mason Arney was involved in an altercation with victim #3 on March 23, 2020. During this incident, officers were dispatched to residential neighborhood in reference to a shooting. Officers arrived on scene and learned that victim #3 had sustained a gunshot wound to his chest and was laying in the driveway. The victim stated that two men, later identified as Mr. Mason Arney and Mr. Abasta, attempted to rob him of his bike. After the victim ignored them, the suspect vehicle pulled in front of the victim, blocking his path. Mr. Mason Arney and Mr. Abasta exited from the vehicle. Mr. Mason Arney told the victim, "Run your shit." The victim, thinking the gun was fake, refused to give up his bike and grabbed the barrel of the gun. After fighting over the gun, Mr. Mason Arney shot victim #3 once in the chest. The victim fell to the ground and began losing consciousness. The victim was later transported to a local hospital due to his injuries. The victim learned that his cellphone, debit card and an unknown amount of currency was missing.

Officers recovered a spend bullet casing in the driveway. The bullet casing was consistent with the same size caliber recovered from the suspect vehicle. Officers located residential surveillance cameras in the area. The surveillance video showed Mr. Abasta's vehicle pull up near victim #3. Mr. Mason Arney is seen exiting from the passenger side of the vehicle and approaches the victim. Shortly after, Mr. Mason Arney runs back to the suspect vehicle, which flees the scene.

Officers interviewed a witness, who stated she was walking to her room when she heard loud noises coming from outside. She looked outside and observed two males who appeared to be jumping a third male by punching him. As she turned to tell her boyfriend, she heard a loud bang noise. The two males attacking the victim then got into the suspect vehicle and drove away. The victim stumbled to a residence and began knocking on the door trying to get help, before collapsing in the driveway.

The .22 caliber casing located inside of the suspect vehicle was compared to the characteristics of the seized firearm. Microscopic comparison confirmed a match between the expended .22 caliber casing from Mr. Abasta's vehicle and a cartridge casing test fired from the seized firearm. The expended projectile recovered from the crime scene was consistent in size with the .22 caliber ammunition recovered. The .22 caliber casing from Mr. Abasta's vehicle was forensically analyzed. The .22 caliber headstamp from this event matched the .22 caliber headstamp discovered from the suspect vehicle. Mr. Mason Arney and Mr. Abasta were identified as the suspects in both incidents. The statements obtained from the victims' and the witness, corroborated the events seen in the surveillance video. Additionally, Mr. Mason Arney admitted that he used the same firearm in both incidents.

Officers learned of a third incident that occurred on January 26, 2020, in which victim #5 and victim #6 were carjacked at gunpoint by Mr. Mason Arney, Mr. James Arney, Jr., and Mr. Abasta. During this incident, the victims were in their vehicle parked at a local park when they were approached by Mr. Mason Arney, Mr. Abasta and Mr. James Arney, Jr. Mr. Mason Arney and Mr. Abasta then pointed their handguns at the victims demanding for them to exit the vehicle. In fear for their lives, the victims complied. After the victims complied, Mr. Mason Arney and Mr. Abasta took their identifications, cellphones, and money. The suspects then threatened the victims stating they knew where they lived



and instructed them not to report this to police. The suspects then jumped into the victim's vehicle and fled the scene.

Soon after the carjacking, officers located the stolen vehicle which resulted in a high-speed chase. The driver of the vehicle lost control and struck a center median. The vehicle occupants fled from the scene; however, Mr. Mason Arney, Mr. James Arney, Jr., and Mr. Abasta were subsequently arrested during this incident.

Mr. Mason Arney, Mr. Abasta and Mr. James Arney, Jr., were arrested, transported to the Clark County Detention Center, and booked accordingly.

Further, Mr. Abasta was found to be a suspect in three additional incidents as follows:

On February 2, 2020, officers were dispatched to a domestic disturbance involving Mr. Abasta and his grandfather, victim #7. The victim reported Mr. Abasta was arguing with his wife when a family member interjected himself in the argument. Mr. Abasta grabbed the victim and the other family member and all three collided with a wall. The victim went outside where he observed Mr. Abasta retrieve a semi-automatic handgun from inside his car, pull the slide back and walk towards him. The victim then went inside the residence to retrieve his handgun before Mr. Abasta got back into his vehicle and left the area.

On January 8, 2020, Mr. Abasta was identified as a subject involved in an assault with a deadly weapon. Victim #8 stated he was backing his vehicle out a parking spot when he was confronted by Mr. Abasta. The victim stated Mr. Abasta pulled a handgun from his rear waistband and pointed it at him. Then victim drove away and called police to report the incident.

Lastly on March 15, 2020, officers responded to a robbery call and made contact with victim #9 who was working maintenance at the time. He stated a male approached him and demanded the keys to his golf cart. The victim refused at which time the male began punching the victim numerous times and attempted to take his cellphone. The male then ran to a nearby vehicle where another male, later identified as Mr. Abasta, was sitting in the driver's seat. Mr. Abasta then drove towards the victim in an attempt to run him over with the vehicle. The victim dove out of the path of the vehicle to avoid being hit.

PSI, at 5-7.

### **SUMMARY OF THE ARGUMENT**

The district court did not abuse its discretion ordering Abasta to pay an indigent defense assessment fee because the court was provided evidence prior to Abasta's sentencing hearing that would lead a reasonable person to believe that Abasta had the ability to pay a \$250 fee. As such, this Court should uphold the district court's order and sentencing.

### **ARGUMENT**

#### **I. ABASTA WAIVED HIS RIGHT TO APPEAL**

Abasta filed an appeal from a judgment of conviction resulting from a guilty plea; however, the substance of his brief challenges the district court's order that he pay an indigent defense civil assessment fee of \$250. As evidenced by Abasta's executed Guilty Plea Agreement, Abasta waived his right to directly appeal his conviction:

By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges: . . . (6) The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4).

III AA 000530. Abasta makes no arguments regarding the underlying challenges to ineffective assistance of counsel or the voluntariness of the plea. Instead, his argument solely focuses on the district courts order to pay an indigent defense civil assessment fee. However, by pleading guilty Abasta effectively waived his right to such an appeal. Thus, as Abasta has waived his right to appeal his conviction, his claim is waived and should be denied.

## **II. ABASTA FAILED TO PRESERVE THE ISSUE BY FAILING TO OBJECT AT SENTENCING**

Abasta alleges that he is indigent and unable to pay a fee of \$250; however, failed to assert any objection to this fee during his sentencing. III AA 000568. As such, Abasta failed to preserve this issue by failing to object at sentencing. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”); see Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (observing

that it is an appellant's responsibility to present cogent arguments supported by salient authority), Sotelo v. Bouchard, 488 P.3d 581 (Nev. 2021). Thus, as Abasta failed to object to the indigent defense civil assessment fee during his sentencing hearing, his claim is waived and should be denied.

### **III. THE DISTRICT COURT DID NOT PLAINLY ERR OR ABUSE ITS DISCRETION BY ORDERING ABASTA TO PAY AN INDIGENT DEFENSE ASSESSMENT FEE**

Abasta claims the district court failed to assess his financial resources prior to ordering him to pay an indigent defense assessment fee.

Because Abasta did not object at sentencing, if this Court considers the asserted error at all, it is reviewed for plain error. See Valdez v. State, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). (“When an error has not been preserved, this court employs plain-error review.”) Under that standard, an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing “actual prejudice or a miscarriage of justice.” Id.; See also Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Ordering payment of a simple fine does not affect Abasta’s “substantial rights,” but even assuming it did the district court did not commit plain error.

As Abasta points out, “the sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion.” Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). See

also Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). Further, a district court has the discretion to order a defendant to pay expenses incurred by the county in providing indigent defense services. Taylor v. State, 111 Nev. 1253, 1258-59, 903 P.2d 805, 809 (1995), overruled on other grounds by Gamma v. State, 112 Nev. 833, 920 P.2d 1010 (1996).

An initial determination that a defendant is indigent is not “set in stone” and a defendant may be ordered to pay part or all of the attorney fees, if he becomes able, during the pendency of the action. Pursuant to NRS 7.165, a district court has the discretion to order an indigent defendant to make payments where the district court finds “money is available for payment from or on behalf of the defendant”. Specifically, the district court can direct money to be paid to:

(b) The clerk of the district court for deposit in the county treasury, if all of the compensation and expenses in connection with the representation of such defendant were paid from the county treasury, and remittance to the Office of State Public Defender, if such compensation and expenses were paid partly from moneys appropriated to the Office of State Public Defender and the money received exceeds the amount of compensation and expenses paid from the county treasury.

NRS 7.165(b).

Further, pursuant to NRS 178.3975, the district court has the discretion to order a defendant to pay all or part of their attorney’s fees. Specifically, NRS 178.3975 states, in pertinent part, that:

In determining the amount and method of payment, the court shall take account of the financial resources of the defendant and the nature of the burden that payment will impose.

Here, the district court was provided evidence prior to Abasta's sentencing hearing that would lead a reasonable person to believe that Abasta had the ability to pay a \$250 fee. First, as Abasta points out, he had an employment history outlined in his PSI which was provided to the court. AOB at 15. While this employment history was minimal, still lends to a finding that he may have financial resources available from the period of his employment.

Second, while Abasta alleges his family members may not be willing to support him, his family ties lends to a finding that Abasta has financial resources available to him. Lastly, Abasta agreed to pay fines of up to \$20,000 within his guilty plea agreement. III AA 000528.

As to Counts 2, 4, 5, and 7, I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than one (1) year and a maximum term of not more than six (6) years (EACH COUNT). The minimum term of imprisonment may not exceed forty percent (40%) of the maximum term of imprisonment. I understand that I may also be fined up to \$5,000.00 (EACH COUNT).

Id. The court was provided with this agreement prior to sentencing. A reasonable person would assume that if a defendant agreed to potentially pay \$20,000 in fines, he likely had sufficient financial resources to pay a fine of \$250. As such, Abasta

fails to establish his claim that the district court failed to “take into account Mr. Abasta’s financial resources and ability to pay before assessing him a fee”. AOB at 14.

Thus, as Abasta provides no proof that the district court failed to assess his financial resources and the record shows that the court was provided evidence that would support a finding that Abasta had sufficient financial resources to pay a \$250 fee, Abasta’s claim that the district court abused its discretion by ordering Abasta to pay an indigent defense civil assessment fee of \$250. Therefore, as the district court did not abuse its discretion, and certainly did not plainly err, by ordering Abasta to pay a defense fee, this Court should affirm Abasta’s Judgment of Conviction.

### **CONCLUSION**

Based on the foregoing, the State respectfully requests that this Court AFFIRM the Judgment of Conviction.

Dated this 5<sup>th</sup> day of April, 2022.

Respectfully submitted,

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

BY */s/ John T. Afshar*

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JOHN T. AFSHAR  
Deputy District Attorney  
Nevada Bar #14408  
Office of the Clark County District Attorney

## **CERTIFICATE OF COMPLIANCE**

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 3,006 words and 14 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 5<sup>th</sup> day of April, 2022.

Respectfully submitted

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

BY */s/ John T. Afshar*

---

JOHN T. AFSHAR  
Deputy District Attorney  
Nevada Bar #14408  
Office of the Clark County District Attorney  
Regional Justice Center  
200 Lewis Avenue  
Post Office Box 552212  
Las Vegas, Nevada 89155-2212  
(702) 671-2500



## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 5<sup>th</sup> day of April, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
Nevada Attorney General

MELINDA E. SIMPKINS  
Chief Deputy Special Public Defender

JOHN T. AFSHAR  
Deputy District Attorney

*/s/ J. Hall*

---

Employee, Clark County  
District Attorney's Office

JA/Elizabeth Turner/jh