

**No. 83346**

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**IN THE NEVADA SUPREME COURT**

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Elizabeth A. Brown  
Clerk of Supreme Court

**Eric Abasta**  
Appellant,  
vs.  
**State of Nevada**  
Respondent.

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Direct Appeal From a Judgment of Conviction (Plea of Guilty)  
Eighth Judicial District Court  
The Honorable Michael Villani, District Court Judge;  
Honorable David Barker, District Court Judge;  
Honorable Christina Silva, District Court Judge  
District Court Case No. C-20-349045-1

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**APPELLANT'S OPENING BRIEF**

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## **I. JURISDICTIONAL STATEMENT**

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea after a settlement conference, to one count of first degree murder, four counts of assault with a deadly weapon and two counts of robbery. AA3, pg. 526-36. This Court has jurisdiction over this appeal pursuant to NRS 177.015.

## **II. ROUTING STATEMENT**

This is an appeal from a judgment of conviction based on a guilty plea and is therefore presumptively assigned to the Court of Appeals under NRAP 17(b)(1).

## **III. STATEMENT OF THE ISSUES**

The district court erred in sentencing Mr. Abasta by ordering him to pay an indigent defense civil assessment fee without considering his ability to pay.

## **IV. STATEMENT OF THE CASE**

On June 18, 2020, a grand jury was initially convened to address allegations against Eric Abasta, Mason Arney and James Arney. AA1, pg. 1. The grand jury re-convened on June 25, 2020, and a true bill was returned. AA2, pg. 307-08. An indictment was filed on June 26, 2020,

charging Mr. Abasta with five counts of assault with a deadly weapon, three counts of ownership or possession of a firearm by a prohibited person, one count of carrying a concealed firearm or other deadly weapon, one count of attempt robbery with use of a deadly weapon, one count of murder with use of a deadly weapon, three counts of conspiracy to commit robbery, three counts of robbery with use of a deadly weapon, one count of grand larceny auto, one count of attempt robbery, one count of attempt murder with use of a deadly weapon, and one count of battery with use of a deadly weapon resulting in substantial bodily harm. AA2, 346-57. Mr. Abasta was initially held without bail. AA2, pg. 360-66.

The Arraignment took place on July 2, 2020 and July 7, 2020, and Mr. Abasta entered a plea of not guilty and invoked his right to a speedy trial. AA2, pg. 367-82. Jury trial was initially scheduled for September 8, 2020. AA2, pg. 386. Because the court was not conducting trials on September 8, 2020, the trial date was vacated and re-scheduled to November 30, 2020. AA2, pg. 391-92. On November 25, 2020, the district court again continued the trial because of the court's inability to go forward as well as outstanding discovery issues. AA2, pg. 394-97. Trial was continued to January 19, 2021, with Mr. Abasta still in invoked

status. AA2, pg. 396-98. On January 13, 2021, however, trial was once again vacated due to the governor's order regarding COVID and the case was sent to central trial readiness. AA2, pg. 399-400.

On January 27, 2021, at central trial readiness, discovery issues were still outstanding so trial was re-scheduled for February 22, 2021. AA2, pg. 401-03. Thereafter, on February 10, 2021, the State moved to amend the indictment to add a theory of felony murder to the charge of murder. AA2, pg. 404-20. Mr. Abasta opposed the motion on February 17, 2021. AA2, pg. 421-24. At the calendar call on February 17, 2021, discovery issues were still being addressed, an offer was outstanding and the parties agreed to again continue the trial while allowing Mr. Abasta to remain in invoked status. AA2, pg. 425-28. Trial was set for March 29, 2021. AA2, pg. 428.

The State's motion to amend the indictment was heard on February 23, 2021<sup>1</sup>, and taken under advisement. AA2, pg. 429-36; 437-42. Before

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<sup>1</sup>There are two transcripts in the Appellant's Appendix for the February 23, 2021 hearing on the State's motion to amend the indictment. Since both transcripts are for the same hearing but the information contained therein is different from each other, both are contained in the Appellant's Appendix. AA2, pg. 429-36 and AA2 pg. 437-42.

the district court made a decision, however, Mr. Abasta moved to dismiss the indictment due to the violation of his speedy trial rights on March 12, 2021. AA3, pg. 443-56. Thereafter, on March 15, 2021, the district court entered its order granting the State's motion to amend the indictment. AA3, pg. 457-59. The amended indictment was filed the same day. AA3, pg. 460-69. On March 19, 2021, the State opposed Mr. Abasta's motion to dismiss and the district court subsequently denied the motion. AA3, pg. 470-87.

At calendar call on March 24, 2021, trial was again continued, this time at Mr. Abasta's Counsel's request, due to the late disclosure of additional discovery and the complexity of the case. AA3, pg. 488-94. At this hearing, the State suggested that a settlement conference be held, Mr. Abasta agreed, and it was scheduled for May 3, 2021. AA3, pg. 491-94.

The settlement conference acknowledgment was filed on April 6, 2021. AA3, pg. 495-98. As a result of this conference, a second amended indictment was filed charging Mr. Abasta with one count of murder (first degree), four counts of assault with a deadly weapon and two counts of robbery. AA3, pg. 499-502. Thereafter, on May 11, 2021, Mr. Abasta

entered a plea of guilty to those counts and the parties stipulated to an aggregate total sentence of twenty-four (24) to sixty-five (65) years in the Nevada Department of Corrections. AA3, pg. 505-06; 526-36. In addition, the State agreed to dismiss the criminal charges pending in North Las Vegas justice court against Mr. Abasta's mother. AA3, pg. 505-06.

Sentencing was held on June 25, 2021. AA3, pg. 537. After hearing the arguments of the parties and the statements of the victims, the district court sentenced Mr. Abasta in accordance with his negotiated agreement. AA3, pg. 537-73. The judgment of conviction was issued on July 9, 2021. AA3, pg. 574-76. Mr. Abasta filed his notice of appeal on August 6, 2021. AA3 pg. 577-79.

## **V. STATEMENT OF THE FACTS**

The State alleged that between October, 2019 and January, 2020, Eric Abasta illegally purchased a Glock-17 gun. AA1, pg. 157-59. When he purchased that gun, co-defendant James Arney was present. AA2, pg. 246. Thereafter, between January 5, 2020 and April 20, 2020, Eric Abasta, James Waylon Arney and Mason Arney, along with other individuals, engaged in several crimes including an assault with a deadly weapon on January 5, 2020, (AA2, pg. 211-19), a murder on January 14,



2020, (AA 1, pg. 131-74; AA2, pg. 248-57), a grand larceny auto on January 26, 2020, (AA1, pg. 8-27; 95-100), an assault with a deadly weapon involving Mr. Abasta's grandfather on February 2, 2020, (AA1, pg. 54-61), an attempted robbery on March 15, 2020, (AA1, pg. 87-90), an attempted murder on March 23, 2020, (AA1, pg. 30-41) and an assault with a deadly weapon on March 24, 2020, (AA1, pg. 74-79). Forensic testing established that the gun used in the murder, a Glock-17, was discovered approximately 300 yards from Mr. Abasta's grandfather's home. AA1, pg. 143-45.

On March 24, 2020, police were called to the home of Mason Arney's grandmother with regard to the suspects in these crimes. AA2, pg 262. Eric Abasta was present at that residence. AA2, pg. 262-63. A show up was done with the alleged victims of the most recent crime and they were able to identify Eric Abasta as one of the individuals involved. AA1, pg. 80-84.

Mason Arney subsequently admitted to police that he shot the victim in the March 23, 2020, incident when the two were struggling over a rifle. AA2, pg. 267-68. Mason Arney also admitted that he was the individual in the back seat who pointed a rifle out the car window at the victims on

March 24, 2020. AA2, pg. 268. Mason indicated he was with “Junior” (Eric Abasta) on both days. AA2, pg. 268. James Arney testified against Mr. Abasta at the grand jury, implicating him in the murder. AA2, 248-57.

On April 20, 2020, police executed a search warrant at Mr. Abasta’s mother’s address. AA1, pg. 145-46. During that search, a handwritten note was found containing email accounts, passwords and instructions to Mr. Abasta’s mother to delete all locations history and to change all the passwords. AA2, pg. 271-72. A search of the emails revealed that the location data had, in fact, been deleted. AA2, pg. 294-95. This resulted charges against Mr. Abasta’s mother for destruction of evidence. AA2, pg. 294-95; AA3, pg. 505-06.

Mr. Abasta was arrested and charged with five counts of assault with a deadly weapon, three counts of ownership or possession of a firearm by a prohibited person, one count of carrying a concealed firearm or other deadly weapon, one count of attempt robbery with use of a deadly weapon, one count of murder with use of a deadly weapon, three counts of conspiracy to commit robbery, three counts of robbery with use of a deadly weapon, one count of grand larceny auto, one count of attempt robbery, one count of attempt murder with use of a deadly weapon, and one count

of battery with use of a deadly weapon resulting in substantial bodily harm. AA2, 346-57. He entered a plea, pursuant to settlement conference negotiations, to one count of murder (first degree), four counts of assault with a deadly weapon and two counts of robbery. AA3, pg. 499-502.

The parties stipulated to an aggregate total sentence of twenty-four (24) to sixty-five (65) years in the Nevada Department of Corrections. AA3, pg. 505-06; 526-36. In addition, the State agreed to dismiss the criminal charges pending in North Las Vegas justice court against Mr. Abasta's mother. AA3, pg. 505-06.

Mr. Abasta's Presentence Investigation Report was filed with the district court and noted his social history. PSI<sup>2</sup> pg. 2. Relevant facts before the district court included that Mr. Abasta had been unemployed since 2019. PSI pg. 2. While he had previously held a job as a delivery driver for Domino's Pizza for five months, had been employed by his family occasionally and had obtained experience in food service and cleaning services, this was the extent of his job history. *Id.* He only had

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<sup>2</sup>Prior to the filling of this brief, a motion to transmit the PSI under seal was filed with this Court. Any references to the PSI in this brief will, therefore, refer to the page of the PSI rather than the Appendix.

a high school education, no military service and, given his young age (23), had a relatively substantial history of drug and alcohol use. PSI pg. 2-3. Mr. Abasta, despite repeatedly invoking his speedy trial rights, had been incarcerated for 458 days prior to sentencing. PSI pg. 8; AA2, pg. 367-82, 396-98, 425-28; AA3, pg. 443-56, 470-87.

Mr. Abasta was sentenced in accordance with his negotiation, however, in announcing the sentence, the district court assessed a court appointed counsel fee of two hundred fifty dollars (\$250.00) for having the public defender represent him. AA3, pg. 568. There was no assessment of the ability to pay this fee, however, in discussing restitution, the State admitted that, because Mr. Abasta was going to be spending a substantial portion of his life in prison, the restitution was unlikely to be paid by him. AA3, pg. 572. As a result, the district court ordered that restitution would be paid jointly and severally by Mr. Abasta as well as his co-defendants. AA3, pg. 572.

Mr. Abasta timely filed his Notice of Appeal. AA3, pg. 577-79. He herein files his Opening Brief.

## **VI. SUMMARY OF THE ARGUMENT**

Eric Abasta is indigent. He was appointed counsel because he was

unable to afford to pay an attorney to represent him. The evidence before the district court indicated that he only had a high school diploma, had been working as a pizza delivery driver for only five months prior to his arrest, that he had worked for his family previously but his grandfather was one of his victims, and that he was entering a plea to crimes with a stipulated aggregate sentence of twenty-four (24) to sixty-five (65) years.

While NRS 178.3975 allows the district court to order a defendant to pay part of the expenses incurred by the county in providing him with an attorney, the court must take into account his ability to pay. Here, the district court erred in ordering Mr. Abasta to pay two hundred fifty dollars (\$250.00) for an indigent defense civil assessment without assessing his ability to pay such fine. Accordingly, the above entitled matter must be reversed and remanded for re-sentencing.

## **VII. ARGUMENT**

### **A. The district court erred in sentencing Mr. Abasta by ordering him to pay an indigent defense civil assessment fee without considering his ability to pay**

Mr. Abasta's state and federal constitutional rights to due process and assistance of counsel were violated because the District Court assessed a fee to pay for the appointment of the public defender to

represent him without establishing ability to pay. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 8, Art. IV, Sec. 21.

### **1. Standard of Review**

A “. . . 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).

### **2. Whether a defendant can be ordered to pay for the services of the public defender must be based upon his ability to pay**

Pursuant to NRS 171.188, an indigent defendant may request the appointment of an attorney to represent him. It is the public defender’s office who is charged with the representation of indigent criminal defendants, which representation must be “without charge”. NRS 260.030; NRS 260.050. The district court *must* appoint the public

defender to represent indigent criminal defendants unless they are disqualified. NRS 7.115. When the public defender is disqualified, the court is permitted to appoint another attorney to represent the defendant as long as such appointment complies with the county plan for the provision of indigent defense services. *Id.*

Here, there were multiple defendants in the case. AA2, pg. 346. Without a waiver from each defendant as to any conflict of interest, the public defender could not have represented all defendants. As a result, according to Clark County Nevada's plan for the provision of indigent defense services, the Special Public Defender accepted appointment to represent Eric Abasta in the above entitled matter, without charge. AA3, pg. 581.

An initial determination that a defendant is indigent, however, 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. As indicated in NRS 7.165:

If at any time after the appointment of an attorney or attorneys the magistrate or the district court finds that money is available for payment from or on behalf of the defendant so that the defendant is financially able to obtain private counsel

or to make partial payment for such representation, the magistrate or the district court may:

...  
Direct that such money be paid to:

...  
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 the state public defender, if such compensation and expenses were paid partly from moneys appropriated to the office of the state public defender and the money received exceeds the amount of compensation and expenses paid from the county treasury.

The district court has the responsibility to continually assess a defendant's ability to pay for his attorney. And, while the district court has the discretion to order a defendant to pay all or part of the attorney's fees, the district court may do so only after assessing a defendant's ability to pay. Specifically, NRS 178.3975 states, in pertinent part, that:

The court may order a defendant to pay all or any part of the expenses incurred by the county, city or state in providing the defendant with an attorney which are not recovered pursuant to NRS 178.398. The order may be made at the time of or after the appointment of an attorney and may direct the defendant to pay the expenses in installments.

The court shall not order a defendant to make such payment unless the defendant is or will be able to do so. 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.

While NRS 178.3975 gave the district court the discretion to require the partial repayment of funds expended by the county for attorney's fees, the statute mandated that the defendant's financial resources be assessed first. As this Court indicated in *Taylor v State*, 111 Nev. 1253, 1259, 903 P.2d 805, 809 (1995) *overruled on other grounds by Gamma v. State*, 112 Nev. 833, 920 P.2d 1010 (1996):

*“[O]nly those who actually become capable of repaying the State will ever be obliged to do so. Those who remain indigent or for whom repayment would work “manifest hardship” are forever exempt from any obligation to pay.” Fuller, 417 U.S. at 52-53 (Emphasis added). Taylor’s contention that recoupment must be conditioned on ability to pay is therefore correct, but the statutory safeguards written into Oregon’s recoupment statute are likewise present in NRS 178.3975.*

*quoting Fuller v. Oregon, 417 U.S. 40, 52-53 (1974) (emphasis in original).*

Here, the district court was required to take into account Mr. Abasta's financial resources and ability to pay before assessing him a fee of two hundred fifty dollars (\$250.00) for attorney's fees. This, the district court failed to do. The district court, therefore, abused its discretion in assessing such fees to Mr. Abasta.

The evidence indicates that Mr. Abasta was found indigent and

counsel was appointed for him. AA3, pg. 581. His PSI revealed that his employment history was very limited – only five months as a pizza delivery driver. PSI pg. 2. Although Mr. Abasta had worked in the family interior design business “off and on”, his grandfather was a victim of his criminal activity so it is unlikely that he would have family support. PSI pg. 2; AA1, pg. 51-61. He only had a high school diploma, no history of military service and a substantial drug problem, given his young age of twenty-three. PSI pg. 2-3.

Further, Mr. Abasta spent well over a year in the Clark County Detention Center awaiting trial. PSI pg. 8. This delay was not Mr. Abasta’s fault as he repeatedly invoked his right to a speedy trial. AA2, pg. 367-82, 396-98, 425-28; AA3, pg. 443-56, 470-87. Accordingly, during his lengthy pretrial incarceration, he had no opportunity to earn money nor did he have any ability to pay for an attorney.

Most importantly, however, Mr. Abasta received a sentence of twenty-four (24) to sixty-five (65) years in prison. AA3, pg. 574-76. This was a substantial sentence that the State acknowledged may result in Mr. Abasta “spending the better part of his life, if not his whole life, in prison.” AA3, pg. 572. The State never asked for attorney’s fees to be assessed and

agreed that the restitution should be reduced in accordance with defense Counsel's calculations because ". . . it is very unlikely to be paid by him." AA3, pg. 572. Given these facts, the district court abused its discretion in assessing attorney's fees to Mr. Abasta as part of his sentence. As a result, Mr. Abasta's sentence must be reversed and remanded for re-sentencing.

### **VIII. CONCLUSION**

Mr. Eric Abasta is indigent and, having been appointed counsel as a result of his indigent status, the district court was obligated to assess his ability to pay before sentencing him to pay two hundred fifty dollars (\$250.00) for attorney's fees. Mr. Abasta's status as indigent never changed throughout the case and, accordingly, the district court abused its discretion in assessing attorney's fees. Mr. Abasta's sentence must be reversed and remanded for re-sentencing.

DATED this 7th day of March, 2022.

Respectfully submitted,

/s/ MELINDA E. SIMPKINS

By:\_\_\_\_\_

MELINDA E. SIMPKINS

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## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify this brief does comply with the formatting requirements of NRAP 32(a)(4).
2. I hereby certify that this brief does comply with 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 Word Perfect Office 11 in 14 point font of the Century Schoolbook style.
3. I hereby certify that this brief does comply with the word limitation requirement of NRAP 32(a)(7)(A)(ii). The relevant portions of the brief are 3,376 words.
4. 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 of the transcript or appendix where the matter relied on is to be found. I understand that I

may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of March, 2022.

*/s/ MELINDA E. SIMPKINS*

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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on the 7th day of March, 2022, a copy of the foregoing Opening Brief (and Appendix) was served as follows:

**BY ELECTRONIC FILING TO**

District Attorney's Office  
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*/s/ MELINDA SIMPKINS*

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