

DECLARATION OF DEBORAH L. WESTBROOK

1. I am an attorney licensed to practice law in the State of Nevada; I am the deputy public defender assigned to represent Jose Azucena in this appeal; I am familiar with the procedural history of this case.

2. To fully develop the facts and issues in this case, it was necessary to write an Opening Brief in excess of 14,000 words and 1,300 lines of text. The Opening Brief contains 17,150 words and 1,742 lines of text which exceeds the limitations set forth in NRAP 32(a)(7).

3. A lengthy Opening Brief was necessary because Mr. Azucena's case is *extremely complex*. Mr. Azucena was charged with 39 crimes against 6 different children who lived in his apartment complex. Following a 12-day jury trial, Mr. Azucena was convicted of 30 of those crimes: 12 counts of lewdness with a child under 14, 4 counts of attempt lewdness with a child under 14, 5 counts of indecent exposure, 7 counts of child abuse neglect or endangerment, 1 count of sexual assault, and 1 count of first degree kidnapping. The complexity of the case substantially increased the word count in Appellant's Opening Brief.

3. Pursuant to ADKT 411, Nevada Indigent Defense Standards of Performance, Appellate and Post-Conviction Representation, Standard 2(a)-(f), I was required to raise all potentially meritorious issues in the Opening

Brief “that are supported by facts of record that will benefit the defendant if successful” and “not hesitate to assert claims that may be complex, unique, or controversial in nature”.

4. After reviewing the record, I identified multiple potentially meritorious issues, including issues of first impression, issues of constitutional magnitude, and issues that were “complex, unique or controversial in nature.” These issues included:

(a) An issue of first impression involving whether it is structural error for a judge to yell and swear at a potential juror for disclosing her bias against the defendant during voir dire, where that judge subsequently refused the defendant’s request to replace the venire. The presentation of this issue required that all of the judge’s interactions with the juror be set forth in the Opening Brief, along with the judge’s explanation as to why he refused to replace the venire. It also required a detailed analysis of structural error doctrine as it pertained to jury selection. The argument on this issue is approximately 2,166 words.

(b) An issue of first impression involving whether it is unduly coercive for a judge to issue an ostensibly “approved” form of Allen charge to the jury in response to a jury note asking the judge “talk to” the lone holdout juror who believes “not guilty”. Because jury coercion must be

evaluated based on the “totality of the circumstances”, see Lowenfield v. Phelps, 484 U.S. 231, 237 (1988), adequate briefing on this issue required a lengthy discussion of the facts and circumstances surrounding the Allen charge that was given, including a complete recitation of the court’s statement to the jury. The argument on this issue is approximately 2,024 words.

(c) Several significant issues that directly affect the length of Mr. Azucena’s minimum sentence, including: (1) that Mr. Azucena was improperly convicted of a count of lewdness with a child and a count of sexual assault where those two counts were pled alternatively to one another, and, as a result of the error, he received an additional, *consecutive* sentence of 10-life which must be stricken; and (2) the State failed to prove essential elements of the crimes of lewdness and child abuse, which (if he prevails) will result in a further reduction of Mr. Azucena’s minimum sentence by 13 years. Briefing on these issues required approximately 1,932 words.

(d) A highly complicated issue regarding the admissibility of child hearsay pursuant to **NRS 51.385**, including sub-issues of first impression as to the scope of this hearsay exception, the procedures by which such testimony may be deemed admissible, and the cumulative effect of admitting such testimony via five different witnesses prior to any of the

children being called to testify. Due to the complexity of this issue, which has multiple sub-parts, the argument is approximately 3,497 words.

(e) Two, extremely fact-intensive issues involving prosecutorial misconduct and judicial misconduct which required a lengthy recitation of the statements made by both the State and the court and an analysis of the statements' impact upon the jury. Briefing on these issues required 3,528 words.

(f) Other miscellaneous issues include the propriety of a flight instruction and cumulative error. Appellate counsel is aware that this Court may not consider a cumulative error argument unless the three-part cumulative error test is stated and applied. As such, the argument on these issues totals approximately 1,459 words.

5. Mr. Azucena is an elderly man in his sixties who is currently serving 85 years to life in prison. Effective representation pursuant to ADKT 411 and the Sixth Amendment required briefing in excess of that otherwise allowed by NRAP 32(a)(7).

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6. Accordingly, I am requesting that this Honorable Court grant Mr. Azucena leave to submit the Opening Brief in excess of 14,000 words and 1,300 lines of text.

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

EXECUTED on the 10th day of April, 2018.

/s/ Deborah L. Westbrook
DEBORAH L. WESTBROOK

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 10 day of April, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JOSE AZUCENA
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BY /s/ Carrie M. Connolly
Employee, Clark County Public
Defender's Office