



This Motion is based upon the following Memorandum and all papers and pleadings on file herein.

DATED this 10th day of April, 2018.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook

DEBORAH L. WESTBROOK, #9285  
Deputy Public Defender  
309 So. Third Street, Suite #226  
Las Vegas, Nevada 89155-2610  
(702) 455-4685

## MEMORANDUM OF POINTS AND AUTHORITIES

**Rule 30(d)** of the Nevada Rules of Appellate Procedure allows an appellant to include copies of relevant and necessary exhibits in the appendix. However, if an exhibit is not able to be reproduced,

the parties may file a motion requesting the court to direct the district court clerk to transmit the original exhibits. The court will not permit the transmittal of original exhibits except upon a showing that the exhibits are relevant to the issues raised on appeal, and that the court's review of the original exhibits is necessary to the determination of the issues.

### **NRAP 30 (d).**

On April 9, 2018, the district court entered an order directing that “that the JAVS from the pretrial hearings on March 23, 2017 and April 11, 2017 and from the entirety of the 12-day trial (beginning April 24, 2017 and ending on May 10, 2017) be made a part of the official court record in this case and be lodged as Court’s Exhibits in the Evidence Vault.” See Exhibit A. Those JAVS have subsequently been lodged as Court’s Exhibits in the Evidence Vault. See Exhibit B, Exhibit List.

Appellant asks that this Court direct the District Court Clerk’s office to transmit **Court Exhibits 3, 4, 5, 6, 12 and 14** (containing the JAVS for 4/25/17, 4/27/17, 4/28/17, 5/1/17, 5/9/17 and 3/23/17, respectively). Appellant is unable to copy these JAVS for inclusion in Appellant’s

Appendix. See **NRAP 10(b)(2)**. The contents of the JAVS are relevant to several arguments on appeal.

The contents of **Court Exhibit 3**, JAVS 4/25/17, are relevant to Issue I on appeal, that “Mr. Azucena’s constitutional rights were violated when the judge verbally abused a juror during voir dire and then refused to replace the venire.” In order for this Court to properly evaluate the chilling effect that the judge’s outburst had on the jury, it is necessary to view the JAVS. As explained in Mr. Azucena’s Opening Brief:

While the naked transcript does not reflect the judge’s tone of voice or demeanor during the encounter, the JAVS shows that he was exceptionally angry at the juror, that he repeatedly cut the juror off before she could explain herself, and that he even *threw a book at the wall behind him* when he accused her “completely throw[ing] out our entire justice system because you don’t want to be fair and impartial.”

See Opening Brief at pp. 13-14.

The contents of **Court Exhibit 12**, JAVS 5/9/17, are relevant to Issue II on appeal, that “Mr. Azucena’s constitutional rights were violated when the district court singled out the lone hold-out juror and directed an Allen charge to him.” Because the video recording shows the judge’s tone of voice, inflection and demeanor during his reading of the Allen charge, it is part of the “totality of the circumstances” that this Court must consider when determining the coercive effect of that charge. See, e.g., Lowenfield v.

Phelps, 484 U.S. 231, 237 (1988) (“[o]ur review of petitioner’s contention that the jury was improperly coerced requires that we consider the supplemental charge given by the trial court “in its context and under all the circumstances”) (citation omitted).

Finally, the contents of **Court Exhibits 4, 5, 6 and 14** (JAVS 4/27/17, 4/28/17, 5/1/17 and 3/23/17, respectively) are relevant to Issue VIII on appeal, that “Judicial misconduct violated Mr. Azucena’s constitutional rights.” In Kinna v. State, 84 Nev. 642, 647 (1968), this Court held that a trial court “may not hamper or embarrass counsel in the conduct of the case by remarks or rulings which prevent counsel from presenting his case effectively or from obtaining full and fair consideration from the jury.” On appeal, Mr. Azucena contends that the court openly displayed animosity toward defense counsel as early as the discovery phase and that hostility continued throughout trial. Mr. Azucena relies on the JAVS from 3/23/17, 4/27/17, 4/28/17 and 5/1/17 to support this argument on appeal.

Because Appellant relies on and refers to the aforementioned JAVS at numerous points in his Opening Brief, it is necessary for this Court to review the original exhibits on appeal. Appellant therefore requests that this Honorable Court direct the Eighth Judicial District Court Clerk to transmit **Court Exhibits 3, 4, 5, 6, 12 and 14**, lodged in the Evidence Vault on April

9, 2018 (containing the JAVS for 4/25/17, 4/27/17, 4/28/17, 5/1/17, 5/9/17 and 3/23/17, respectively) for this Court's review.

DATED this 10 day of April, 2018.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

By /s/ Deborah L. Westbrook  
DEBORAH L. WESTBROOK, #9285  
Deputy Public Defender

**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  
NDOC No. 1183653  
c/o High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89018

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

# **EXHIBIT A**

*Steven D. Grierson*

SAO  
PHILIP J. KOHN, PUBLIC DEFENDER  
NEVADA BAR NO. 0556  
309 South Third Street, Suite #226  
Las Vegas, Nevada 89155  
(702) 455-4685  
Attorney for Defendant

DISTRICT COURT  
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,  
Plaintiff,

v.

JOSE AZUCENA,  
Defendant,

CASE NO. C-17-321044-1

DEPT. NO. 18

STIPULATION AND ORDER TO RECONSTRUCT THE RECORD

*P. David Westbrook*  
P. David Westbrook

Based on the stipulation and agreement by and between Deputy Public Defender, *Deborah L. Westbrook* and Chief Deputy District Attorney, Stacy L. Kollins, it is hereby agreed as follows:

Pursuant to NRAP 10(c), in order to facilitate appellate review in this case, the parties stipulate that the JAVS from the pretrial hearings on March 23, 2017 and April 11, 2017 and from the entirety of the 12-day trial (beginning April 24, 2017 and ending on May 10, 2017) be made a part of the official court record in this case and be lodged as Court's Exhibits in the Evidence Vault.

PHILIP J. KOHN  
CLARK COUNTY PUBLIC DEFENDER

STEVE WOLFSON  
CLARK COUNTY DISTRICT ATTORNEY

By *P. David Westbrook*  
P. DAVID WESTBROOK, #9278  
Chief Deputy Public Defender

By *Stacy L. Kollins*  
STACY L. KOLLINS, #5394  
Chief Deputy District Attorney

IT IS SO ORDERED.

DATED *8th* day of *March*, 2018.

*[Signature]*  
DISTRICT COURT JUDGE



# **EXHIBIT B**

# EXHIBIT(S) LIST

Case No.: C-17-321044-1

Hearing Date: \_\_\_\_\_

Dept. No.: 2

Judge: \_\_\_\_\_

Court Clerk: \_\_\_\_\_

Plaintiff: THE STATE OF NEVADA

Recorder: \_\_\_\_\_

Counsel for Plaintiff: \_\_\_\_\_

vs.

Defendant: JOSE AZUCENA

Counsel for Defendant: \_\_\_\_\_

## HEARING BEFORE THE COURT

### COURT'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	Stipulation and Order to reconstruct the record	4/9/18	/	4/9/18
2	CD(2) Jaws Recording- trial Day 1			
3	CD(2) Jaws Recording- trial Day 2			
4	CD(2) Jaws Recording- trial Day 3			
5	CD(3) Jaws Recording- trial Day 4			
6	CD(2) Jaws Recording- trial Day 5			
7	CD(1) Jaws Recording- trial Day 6			
8	CD(1) Jaws Recording- trial Day 7			
9	CD(1) Jaws Recording- trial Day 8			
10	CD(2) Jaws Recording- trial Day 9			
11	CD(2) Jaws Recording- trial Day 10			
12	CD(1) Jaws Recording- trial Day 11			
13	CD(1) Jaws Recording- trial Day 12			
14	CD(1) "Def. Motion to Compel 3/23/17"			
15	CD(1) "Def. MIL'S 4/11/17"			
16	CD(2) "NRS 51.305 Hearing 4/26/17"			