

JOSE AZUCENA,

VS.

THE STATE OF NEVADA,

Respondent.

**APPELLANT’S MOTION TO EXCEED OPENING BRIEF WORD
LIMIT BY 838 WORDS**

Comes Now Appellant, JOSE AZUCENA, by and through Deputy Public Defenders, P. DAVID WESTBROOK and DEBORAH L. WESTBROOK, and moves this Honorable Court for leave to file an Opening Brief in excess of type-volume limitations. This Motion is based upon the attached Declaration of Counsel.

DATED THIS 16 day of May, 2018.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ P. David Westbrook
P. DAVID WESTBROOK
Chief Deputy Public Defender

DECLARATION OF P. DAVID WESTBROOK

1. I am an attorney licensed to practice law in the State of Nevada. I am familiar with the procedural history of this case. Along with Carli Kierny, I served as trial counsel in this case and, along with Deborah Westbrook, I am the deputy public defender representing Jose Azucena on appeal.

2. Appellant Jose Azucena is requesting leave of the Court to exceed the 14,000-word limit for the Opening Brief by 838 words. I was trial counsel for Mr. Azucena, and I am writing the instant motion to share my perspective on the record made in this case with this Honorable Court.

3. As trial counsel, along with my co-counsel, Ms. Kierny, I worked extremely hard to make a detailed and comprehensive record of the errors committed in this very long and complex case. We invested hundreds of hours into this case and I believe very strongly in every single issue we preserved for appeal.

3. Ms. Kierny, Ms. Westbrook and I also believe very strongly in our client's constitutional rights to effective assistance of counsel and due process, as well as our ethical obligations to diligently represent him under the NRPC and ADKT 411. In fact, I personally took part in the initial study which led to the creation of ADKT 411, so I take my obligations under that

Order extremely seriously, particularly Standard 4-1: Role of Defense Counsel, which reads, in relevant part:

The paramount obligation of criminal defense counsel is to provide zealous and competent representation to their clients at all stages of the criminal proceeding...

ADKT 411 §4-1(a)(emphasis added).

4. The Opening Brief initially filed in this case contained 17,150 words, exceeding the NRAP 32(a)(7) word limit by 3,150 words. However, that was not the “original” draft of the Opening Brief. The original draft exceeded 20,000 words because it included an enormously fact-intensive issue concerning the State’s numerous discovery and Brady violations. The discovery/Brady issue was briefed and argued extensively, both before and during trial. And, as this Honorable Court knows, competently briefing discovery issues requires a lot of space.

Ultimately, trial and appellate counsel agreed, reluctantly, that the Court would not be inclined to accept a brief in excess of 20,000 words, so the discovery issue was cut. This was troubling, of course, because we all believe in the requirements of ADKT 411(b):

Counsel at every stage of the case has an obligation to take all steps that may be appropriate in the exercise of professional judgement in accordance with these standards to achieve an agreed upon disposition.

Id. However, given the Court's recent adverse rulings regarding motions to exceed the word count, in this and other cases, we felt that we had no choice but to cut the issue.

4. I was surprised when the Court declined appellate counsel's prior motion to exceed the word count by 3,150 words. This was a 12-day, six-victim trial with 39 felony counts, multiple life sentences, and a 3,000 page record. For appellate counsel to take that enormous record—nine complex issues—and effectively condense it into a mere 17,000 words was, in my estimation, remarkable. To have the motion to exceed denied, especially based on a perceived lack of *diligence*, was disappointing.

However, when this Honorable Court orders us to do something, we make every effort to comply to the best of our ability. With that in mind, both trial and appellate counsel completed multiple edits of the Opening Brief in an effort to get below 14,000 words without cutting meritorious issues. The submitted draft represents many hours of diligent work by two, seasoned attorneys. It is **14,838** words. The following is an explanation of why the Court allow this small excess:

5. First, in my professional opinion, this Opening Brief uses the minimum number of words necessary to preserve Appellant's right to effective assistance of counsel. Any further cuts to this brief would require

either, a) less complete and effective arguments on the nine legal issues presented, or b) the elimination of an issue. Either result would violate my client's rights to due process and effective assistance of counsel under the 5th, 6th and 14th Amendments to the United States Constitution. This brief has been prepared with great diligence and there is good cause to extend the word limit.

Second, the additional 838 words will not cost this Honorable Court time; they will save it. I was a clerk on the District of Columbia Court of Appeals, as was appellate counsel, Deborah Westbrook. As a clerk, I appreciated it when appellate counsel saved me time. Including a key section from the transcript in the body of the brief saved me time. Including a block quote from a key case, rather than just a few lines taken out of context, saved me time. Brevity may be the soul of wit, but clarity is the soul of legal writing. If a few extra words make a brief clearer, then those words don't waste time, they save it.

Cutting the following block quotes would bring the brief under 14,000 words, but would make the arguments less effective and reviewing the brief more arduous for the Court:

- p. 11-12 (300 words);
- p. 21-22 (369 words);

- p. 49 (74 words);
- p. 51 (44 words);
- p. 62 (57 words).

These quotes give context and clarity to the associated arguments and will prevent time-consuming dives into the record. The average person reads 300 words per minute¹, so while it takes less than three minutes to *read* 838 words, locating and returning to them, time and again, in the midst of a 3,000 page record, takes far longer. These extra 838 words will save the Court time.

6. If it pleases the Court, I would welcome an oral argument on this motion so that I can further expand, in person, on the complexity of the issues involved, the substantial efforts undertaken by counsel to comply with the Court's Order, the resources available to us, and the reasons why counsel has acted diligently and demonstrated good cause to grant the instant motion.

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¹ See FORBES MAGAZINE, Brett Nelson, *Do You Read Fast Enough To Be Successful?* (2012), <https://www.forbes.com/sites/brettnelson/2012/06/04/do-you-read-fast-enough-to-be-successful/#3397e166462e> (last checked 5/14/2018).

7. For the foregoing reasons, Appellant respectfully requests that his motion to exceed the word limit be granted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

EXECUTED on the 16 day of May, 2018.

/s/ P. David Westbrook
P. David Westbrook

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16 day of May, 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
P. DAVID WESTBROOK

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