

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE AZUCENA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
May 24 2019 11:34 a.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 74071

**UNOPPOSED¹ MOTION TO TRANSMIT
COURT EXHIBIT 3, DATED APRIL 9, 2018**

Comes Now Appellant JOSE AZUCENA, by and through Chief Deputy Public Defenders DEBORAH L. WESTBROOK and P. DAVID WESTBROOK, and moves for an order directing the District Court Clerk to transmit **Court Exhibit 3** lodged in the Evidence Vault on April 9, 2018 (containing JAVS for 4/25/17) to this Honorable Court pursuant to **NRAP 30(d)** and **10(b)(2)**.

On April 10, 2018, Appellant filed an original motion asking this Court to transmit **Court Exhibits 3** along with five other exhibits: **Court**

¹ This motion is unopposed, as Chief Deputy District Attorney Stacey Kollins was willing to stipulate to the transmission of **Court Exhibit 3** had such a stipulation been permitted by **NRAP 30(d)**. The parties stipulated to reconstruct the record to include **Court Exhibit 3** back in March of 2018.

Exhibits 4, 5, 6, 12 and 14 (containing the JAVS for 4/27/17, 4/28/17, 5/1/17, 5/9/17 and 3/23/17, respectively).

In its Order of April 26, 2018, this Court found that because “[t]ranscripts of the proceedings are included in appellant’s appendix, filed on April 10, 2018”, Appellant “failed to demonstrate why this court’s review of the [JAVS] is necessary to the determination of the issues.”

However, because the 4/25/17 trial transcript does not reflect the egregious nature of the court’s conduct on that date, Appellant renews his request that the Court transmit **Court Exhibit 3**. The most significant issue in this appeal involves the district court’s hostile communication with Juror #177 in front of the entire venire. It is essential that this Court have access to the JAVS when ruling on this key issue because the transcript does not reflect the court’s tone of voice, demeanor or his aggressive, physical actions while seated on the bench, **which included throwing a book at a wall and yelling at a prospective juror.**

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

DATED this 24 day of May, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER
By /s/ P. David Westbrook
DEBORAH L. WESTBROOK, #9285
P. DAVID WESTBROOK, #9278
Chief Deputy Public Defenders
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

MEMORANDUM OF POINTS AND AUTHORITIES

As the Appellant, Azucena has the “responsibility to provide the materials necessary for this court’s review.” **Jacobs v. State**, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975); accord **Thomas v. State**, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) (“Appellant has the ultimate responsibility to provide this court with ‘portions of the record essential to determination of issues raised in appellant's appeal.’”)

Pursuant to **NRAP 30(d)**, the required appendix should include “[c]opies of relevant and necessary exhibits,” or “[i]f the exhibits are too large or otherwise incapable of being reproduced in the appendix, the parties may file a motion requesting the Supreme Court to direct the district court clerk to transmit the original exhibits.”

On March 8, 2018, the parties jointly stipulated to reconstruct the record to include the JAVS as Court Exhibits. See Exhibit A. On March 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. On April 9, 2018, those JAVS were 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 Exhibit 3** which contains the JAVS for 4/25/17. Appellant is unable to copy this JAVS for inclusion in Appellant’s Appendix. See NRAP 10(b)(2). The State does not oppose Appellant’s request. Had it been possible for the parties to transmit **Court Exhibit 3** by stipulation, Chief Deputy District Attorney Stacey Kollins would have signed such a stipulation.

The contents of **Court Exhibit 3**, JAVS 4/25/17, are essential for this Court’s consideration of 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 depicting that outburst. 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 p. 12; see also Opening Brief at p. 14 (describing Juror 177 as "soft spoken" and referencing the Judge's "shouting", based on the JAVS) and at p. 17 (describing Judge's demeanor toward Juror 333 who came right after 177, also based on the JAVS).

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Because Appellant relies on and refers to the aforementioned JAVS throughout his Opening Brief, it is necessary for this Court to review the original exhibit on appeal. Appellant therefore requests that this Honorable Court direct the Eighth Judicial District Court Clerk to transmit **Court Exhibit 3** lodged in the Evidence Vault on April 9, 2018 (containing the JAVS for 4/25/17) for this Court's review.

DATED this 24 day of May, 2019.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By /s/ P. David Westbrook
DEBORAH L. WESTBROOK, #9285
P. DAVID WESTBROOK, #9278
Chief Deputy Public Defenders
309 So. Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 24 day of May, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
STEVEN S. OWENS

DEBORAH L. WESTBROOK
P. DAVID 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, #5391
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: _____

Plaintiff: THE STATE OF NEVADA

Court Clerk: _____

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 51.335 Hearing 4/26/17"			