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1 JOHN A. PECCHIA  
Mohave County Public Defender  
State Bar No. 027654  
2  
3 JASON R STEFFEN  
Deputy Public Defender  
State Bar No. 025776  
4  
5 Attorneys for Defendant  
318 N. Fifth Street  
PO Box 7000  
Kingman, AZ 86401  
6 Telephone: (928) 753-0734  
Fax No: (928) 753-0793  
7 john.pecchia@co.mohave.az.us

8 **IN THE SUPERIOR COURT, DIVISION III OF THE STATE OF ARIZONA**  
9 **IN AND FOR THE COUNTY OF MOHAVE**

10 STATE OF ARIZONA,  
11 Plaintiff,  
12 vs.  
13 JOHN CHARLES MCCLUSKEY,  
14 Defendant.

Case No.: CR-2010-00823  
**MOTION TO SEVER COUNT ONE**  
  
*Oral Argument Requested*

15 The Defendant, through counsel undersigned and pursuant to Rules 13.3 and 13.4,  
16 Arizona Rules of Criminal Procedure, moves this court to sever Count One from the  
17 remaining counts in the indictment, and submits the following Memorandum in support of  
18 this motion.

19  
20 **MEMORANDUM**

21 **I. FACTS**

22 On August 9, 2010, Mr. McCluskey was indicted, along with three other individuals,  
23 on the following counts:  
24



- 1 Count 1: ESCAPE IN THE SECOND DEGREE, CLASS 5 FELONY  
2 Count 2: KIDNAPPING, CLASS 2 FELONY  
3 Count 3: KIDNAPPING, CLASS 2 FELONY  
4 Count 4: ARMED ROBBERY, CLASS 2 FELONY  
5 Count 5: ARMED ROBBERY, CLASS 2 FELONY  
6 Count 6: AGGRAVATED ASSAULT, CLASS 3 FELONY  
7 Count 7: AGGRAVATED ASSAULT, CLASS 3 FELONY  
8 Count 8: MISCONDUCT INVOLVING WEAPONS, CLASS 4 FELONY

9 Two of the co-defendants (Ms. Welch and Mr. Province) pled guilty in this jurisdiction. The  
10 third co-defendant, Mr. Renwick, entered a plea in another jurisdiction which precludes him  
11 from being prosecuted here.

12 The State is alleging in Count 1 that Mr. McCluskey escaped from the Arizona State  
13 Prison facility in Golden Valley. Counts 2 through 8 contain allegations that Mr. McCluskey  
14 kidnapped two truck drivers, and that during the course of the kidnapping, he robbed and  
15 assaulted them, and that he used a gun while doing so.

## 16 II. LEGAL ARGUMENT

17 Rules 13.3 and 13.4 govern the joinder and severance of offenses and co-defendants.  
18 These rules "must be read together." State v. Henderson, 116 Ariz. 310, 316 (App. 1977).  
19 Furthermore, "[t]he rules on joinder and severance are intended to further not only liberal  
20 joinder but also liberal severance. Where there is any doubt, it must be resolved in favor of  
21 the defendant." State v. Roper, 140 Ariz. 459, 462 (App.Div. 1,1984), citations omitted.

### 22 A. Joinder of Escape Count Is Improper (Rule 13.3(a))

23 Joinder of counts is proper when the offenses:

- 24 (1) Are of the same or similar character; or

1 (2) Are based on the same conduct or are otherwise connected together in their  
2 commission; or

3 (3) Are alleged to have been part of a common scheme or plan.

4 Rule 13.3(a).

5 As to the first criterion (“same or similar character”), Count 1 is of a dissimilar  
6 character to the remainder of the counts. Escape is a non-violent, victimless offense. The  
7 remainder of the counts (except perhaps the Misconduct Involving Weapons charge) involve  
8 allegations that Mr. McCluskey committed a series of related offenses against two specific  
9 individuals; these offenses all involve violence generally and the use of a deadly weapon  
10 specifically.

11 As to the second criterion (“same conduct or otherwise connected together”), the State  
12 will presumably argue that the Escape offense was “connected” to the remaining offenses.  
13 There may be a temporal connection between these alleged offenses; however, “[t]he fact that  
14 the crimes were committed on the same day does not by itself connect them in their  
15 commission . . . [and] the fact that evidence of two crimes has come from one source is not  
16 sufficient under Rule 13.3(a) to justify their joinder.” State v. Curiel, 130 Ariz. 176, 184  
17 (App. 1981), citation omitted (holding severance should have been granted where police  
18 found both heroin and stolen gun in defendant’s vehicle, and defendant tried at same time for  
19 theft and gun charges). Escaping from prison is a completely separate type of criminal  
20 activity from kidnapping or assault. Furthermore, there is no allegation in this case that, for  
21 example, Mr. McCluskey kidnapped or assaulted a corrections officer or another inmate while  
22 making his escape. The allegation is that he escaped, then sometime later committed the

1 additional offenses. Count 1 is therefore not “connected together” with the other offenses in  
2 the way the statute requires.

3 Finally, the State will likely argue that the third criterion (“part of a common scheme  
4 or plan”) is met, since Counts 2 through 8 will be alleged to have been part of the escape  
5 “plan.” However, Arizona case law clarifies that “counts may be joined [under this criterion  
6 only] when they constitute a common scheme or plan as defined by the law of evidence. A  
7 common scheme or plan is said to exist, for evidentiary purposes, if the proof of one crime  
8 tends to prove or establish the other.” State v. Jones, 120 Ariz. 556, 558 (1978), citing State v.  
9 Downing, 109 Ariz. 456, 458 (1973).

10 For example, in State v. Garland, a defendant was accused of theft, kidnapping,  
11 robbery, and assault. 191 Ariz. 213 (App.Div. 1,1998). The State alleged that Garland had  
12 stolen a reporter’s camera around 11:30 PM, and then shot a motorist at around 1:00 AM.  
13 The trial court denied a motion to sever “because the incidents were of the same or similar  
14 character, and because the offenses were connected in their commission such that they could  
15 be considered part of a common scheme or plan.” Id. at 215. The Court of Appeals reversed,  
16 finding that the mere fact that a gun was used in both the theft and the assault incidents did  
17 not make them “of the same or similar character.” Id. at 216. The Court also found that there  
18 was “no evidence of any specific plan by Garland encompassing the two incidents.” Id. at  
19 217.

20 Moreover, evidence of one of the offenses would not have been admissible to prove  
21 the other:

22 Here the similarities—two incidents on the same night in the same general  
23 area, a baseball cap, a gun tucked into the front of the assailant's pants and then  
24 pulled out, and a black man named “Mike”—do not show how the crimes are

1 distinctly similar. Instead, they only show that the man or men who perpetrated  
2 the crimes were similar. The offenses were different.

3 Id. at 218. The fact that the defendant in the two incidents at issue in Garland may have been  
4 the same person is not relevant to determining whether the offenses were properly joined or  
5 not. Thus, “[i]n the prosecution of one accused of a particular offense, evidence showing or  
6 tending to show the commission by accused of another crime entirely distinct and independent  
7 of that for which he is on trial, even though it be a crime of the same class, is neither relevant  
8 nor admissible.” State v. Henderson, 116 Ariz. 310, 317 (Ariz.App. 1977), citing Dorsey v.  
9 State, 25 Ariz. 139, 143 (1923), quoted in State v. Moore, 108 Ariz. 215, 216-17 (1972).

10 Similarly, in the present case, it is not sufficient that the State has a theory of the case  
11 that involves a literal escape “scheme.” Joinder of Count 1 in this case is only proper where  
12 proof of the Escape count “tends to prove or establish” the remaining counts. Assuming that  
13 Mr. McCluskey did escape from prison, that fact alone does not make him any more or less  
14 likely to have committed the other charged offenses, which allegedly occurred after the  
15 escape offense had already been consummated.

16 **B. Severance of Escape Count is Necessary to Prevent Prejudice (Rule 13.4(a))**

17 Even if the original joinder of the counts is found to be proper, severance is mandated  
18 where “necessary to promote a fair determination of the guilty or innocence of any defendant  
19 of any offense . . . .” Rule 13.4(a). Specifically, “a trial court must grant a motion to sever  
20 “if necessary to promote a fair determination of guilt or innocence of any defendant, or if the  
21 court detects the presence or absence of unusual features of the crime or case that might  
22 prejudice the defendant.” State v. McCall, 139 Ariz. 147, 152 (1983), quoting State v. Cruz,

1 137 Ariz 541, 543 (1983). See also State v. Murray, 184 Ariz. 9, 25 (1995); State v. McGill,  
2 119 Ariz. 329 (1978).

3 This case presents a rather “unusual feature” relative to other criminal cases—namely,  
4 that the defendant is accused of committing crimes subsequent to escaping from a local prison  
5 facility. The risk of prejudice to Mr. McCluskey is significant. This Court is aware of the  
6 voluminous publicity this case has received, as discussed during a hearing on the Defendant’s  
7 previous Motion to Change Venue. The general outrage over the escape, both directed at Mr.  
8 McCluskey and at the prison facility, threatens to prejudice a jury against Mr. McCluskey and  
9 deny him a fair hearing on the remaining counts in this case.

10 In McCall, the defendant appealed a denial of a motion to sever two counts of theft  
11 from other, more serious counts, including first-degree murder; the Court held that “[i]n view  
12 of the other overwhelming evidence against appellant, it is unlikely that a jury would have  
13 been prejudiced or outraged by the two prior thefts.” 139 Ariz. at 153. In Mr. McCluskey’s  
14 case, however, there is a grave risk that the jury’s passions will be inflamed against him if  
15 they hear that he has escaped from the local prison facility. They may well choose to convict  
16 him on the remaining counts regardless of the strength of the State’s case, simply because of  
17 other crimes he is accused of committing.

18 A severance would diminish this risk. A jury hearing testimony about the alleged  
19 kidnapping and related charges would not necessarily know that the Defendant was the same  
20 one who had escaped from the local prison. Although it might inconvenience the Court and  
21 the State to conduct two jury trials instead of one, due process demands a severance in this  
22 instance.

1 **III. CONCLUSION**

2 The Escape charge in this case is improperly joined in the indictment to the other,  
3 unrelated charges. Even if joinder were proper, a severance would still be necessary in the  
4 interests of justice. Therefore, the court must sever Count 1 from the remainder of the  
5 indictment for purposes of trial.

6  
7 WHEREFORE, the Defendant requests that the Court sever Count 1 of the indictment  
8 from the remaining counts.

9  
10 DATED THIS 10TH DAY OF MAY, 2011.

11 John A. Pecchia  
12 Mohave County Public Defender

13 

14 By: JOHN A. PECCHIA & JASON R STEFFEN  
Attorneys for Defendant

15 A copy of the foregoing sent  
16 this 16 day of May 2011 to:

17 Victoria Stazio, Deputy  
Mohave County Attorney's Office

18 John Charles McCluskey, Defendant

19 Honorable Steven F. Conn

20 By: th

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