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2011 MAY 23 AM 10:32

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REDACTED

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

9 STATE OF ARIZONA,

10 Plaintiff,

11 vs.

12 JOHN CHARLES MCCLUSKEY,

13 Defendant.

Case No.: CR-2010-00823

MOTION TO SUPPRESS OUT OF
COURT AND ANY IN COURT
IDENTIFICATION OF THE
DEFENDANT

HEARING REQUESTED

14 Comes the Defendant, JOHN CHARLES MCCLUSKEY, by and through counsel
15 undersigned, and pursuant to the due process clause of the Arizona and United States
16 Constitution moves this Court to suppress any out of court or subsequent in court
17 identification of the defendant as the police procedures utilized were unduly suggestive. As
18 further grounds for this motion, the Defendant attaches the following Memorandum of Law.

19 STATEMENT OF THE FACTS

20 [REDACTED] and [REDACTED] alleged victims in this
21 case, were interviewed by the Flagstaff Police Department and ultimately shown photo line-
22 ups. [REDACTED] spoke English, but [REDACTED]'s English skills were so limited that he required a Hindi
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1 translator. Detective Conway used [REDACTED] translate for [REDACTED]. Therefore, [REDACTED] and

2 [REDACTED] were not separated during Detective Conway's questioning.

3 [REDACTED] told the Detective it was dark in the cab of the truck. He described the driver
4 as white, 6'1" - 6'2", strong with short hair and tattoos on his arms. He could not describe
5 the tattoos. The driver was wearing orange pants, tank top and shoes. [REDACTED] described the
6 other male as missing front teeth, tattoos and wearing a tank top. He described the woman as
7 wearing camouflage shirt and pants and white shoes.

8 [REDACTED] through [REDACTED] as the interpreter, described the driver as white, 5'7"-5'8",
9 short gray hair, muscular with tattoos on his arm. He believed driver had a large cross on his
10 right arm.

11 Detective Conway prepared three photo line-up packets with six photos in each.
12 McCluskey was in first packet, Welch in the second and Province in the third. The Detective
13 gave [REDACTED] a Photo Line-Up Cover Sheet to read before viewing the photo packs. [REDACTED]
14 remained in the small interrogation room while [REDACTED] viewed the photo packs and made his
15 selections. After [REDACTED] selections were made, Detective Conway used [REDACTED] to translate
16 the Photo Line-Up Cover Sheet for [REDACTED]. [REDACTED] viewed the photo packets in the presence of
17 [REDACTED] and picked the same photos.

18 LEGAL ANALYSIS

19 The Arizona Supreme Court long ago recognized that due process and the right to a
20 fair trial afforded protection from unduly suggestive pretrial identification procedures by the
21 police. *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969). *Dessureault* held that if an
22 in-court identification is challenged by pre-trial motion, a two step process is involved. First,
23 the trial court must "immediately hold a hearing" and "determine from clear and convincing
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1 evidence whether it contained unduly suggestive circumstances.” *Id.* at 384. The burden at
2 such a hearing is on the state “to establish from all the circumstances surrounding the pretrial
3 identification that it was not such as to be unduly suggestive.” *Id.* Second, if the Court
4 concludes that the State has failed to meet this burden, the prosecution has the further burden
5 to establish “from clear and convincing evidence that the proposed in-court identification is
6 not tainted by the prior identification.” *Id.*¹

7 Several standard factors may impact the reliability of witness identification. Factors
8 that impact the likelihood of misidentification include: (1) the witness's opportunity to
9 observe the criminal at the time of the crime; (2) the degree of attention of the witness; (3) the
10 accuracy of a witness's prior description of the criminal; (4) the witness's level of certainty at
11 the confrontation; and (5) the amount of time that passed between the crime and the
12 confrontation. *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, (1972). The *Biggers*
13 factors can not be considered as all inclusive but only serve to provide an example of the most
14 common facts that may taint identification procedures. The Court must look at the totality of
15 the circumstances surrounding the identification to determine its reliability. *State v. Chapple*,
16 135 Ariz. 281, 660 P.2d 1208 (1983).

17 Both were only able to give approximate height, weight and possible ethnic origin of
18 the three persons as well as the type of clothing they wore. Neither observed any
19 distinguishing features, tattoos or marks upon the person they observed. These facts establish
20 that at least 3 of the factors listed by *Biggers* weigh in the favor of the Defendant.

21 Similarly, it was highly impermissible for the Detective to allow the witnesses to view
22 the photographs together. Each witness could hear and sense what the other witness believed

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24 ¹ If the State fails to meet its burden in the first stage but succeeds at the second stage a *Dessureault* Instruction
25 may be required.
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1 to be the correct picture. Each witness was allowed be influenced by the level of certainty
2 that the other had in the selection. By presenting the photographs to the two witnesses in the
3 presence of each other, the police encouraged each witness to influence the other in their
4 selections.

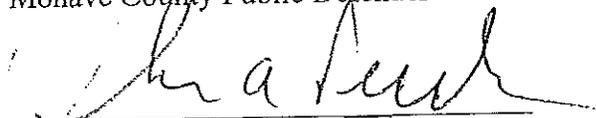
5 The United States Supreme Court long ago remarked, "[re]gardless of how the initial
6 misidentification comes about, the witness thereafter is apt to retain in his memory the image
7 of the photograph rather than of the person actually seen, reducing the trustworthiness of
8 subsequent lineup or courtroom identification. *Simmons v. United States*, 390 U.S. 377, 383-
9 384, 88 S.Ct. 967, 971, (1968). The manner in which the photographs were shown to [REDACTED]
10 and [REDACTED] combined with the presence of both [REDACTED] and [REDACTED] in the same room during the
11 photo line-up procedure combined with [REDACTED] translating for [REDACTED] created the situation
12 warned of by *Simmons*. Under these circumstances, both the out of court and any possible in
13 court identification must be suppressed.

14 WHEREFORE, the Defendant respectfully requests that this matter be scheduled for a
15 hearing to determine if the police procedures unduly tainted the any pretrial identification and,
16 if so, if any proposed in-court identification is impermissibly tainted.

17 DATED THIS 23rd DAY OF MAY, 2011.

18 Respectfully Submitted,

19 John A. Pecchia
Mohave County Public Defender

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21 By: JOHN A. PECCHIA
22 Public Defender

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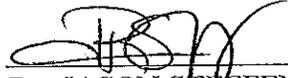
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Jason Steffen
Deputy Public Defender


By: JASON STEFFEN
Deputy Public Defender

A copy of the foregoing sent
this 23 day of May, 2011 to:

Victoria Stazio
Mohave County Attorney's Office

John Charles McCluskey, Defendant

Honorable Steven F. Conn

By: lu