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

STATE OF ARIZONA,

Plaintiff,

vs.

JOHN CHARLES MCCLUSKEY,

Defendant.

Case No.: CR-2010-00823

**MOTION FOR JUROR SELECTION
PROCESS**

John McCluskey through undersigned counsel, respectfully requests this Court enter the following orders and engage in the following procedures with respect to the selection of jurors:

1. Order that the Court distribute to the prospective jurors the Juror Questionnaire submitted by the defense.
2. Order that the questionnaire be completed by the prospective jurors in the office of the jury commissioner that same day, that the completed questionnaire be distributed to the attorneys for the State and Defense no later then 4:00 PM on the same day.
3. Order that the voir dire begin the following morning at 8:30 AM by first having the attorneys and the Court meet to excuse by stipulation those prospective jurors who

1 demonstrated by their questionnaire answers that they cannot be fair and unbiased
2 jurors.

3 4. That the Court make no reference at any time to the prospective jurors that the
4 defendant is represented by a Public Defender or the Public Defender's Office. All
5 references must reflect to the defendant's attorneys as local attorneys with offices in
6 Kingman, AZ.

7 5. Order that each attorney conducting the voir dire be permitted the widest latitude in
8 the inquiry of the prospective jurors as a basis for challenge for cause or to obtain
9 information to enable the attorney to exercise intelligently the allowed peremptory
10 challenges.

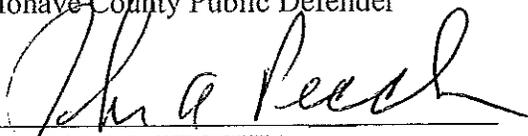
11 6. That when a juror requests questioning in private, the Court accommodate that
12 request.

13 This Motion is made pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to
14 the United States Constitution Article 2, Sections 3, 4, 11, 15, 23, 24, 32 and 33 of the Arizona
15 Constitution; and is supported by the attached Memorandum of Points and Authorities.

16 DATED THIS 19th DAY OF MAY, 2011.

17
18
19 Respectfully Submitted,

20 John A. Pecchia
21 Mohave County Public Defender

22 
23 By: JOHN A. PECCHIA
24 Public Defender
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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: ew

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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

**MEMORANDUM OF POINTS AND
AUTHORITIES**

14 **INTRODUCTION**

15 Court and Counsel are engaging in the process of selecting jurors in a high profile,
16 high media attention case.

17 **I. ATTORNEYS MUST CONDUCT QUESTIONING OF THE PROSPECTIVE**
18 **JURORS TO ENABLE COURT AND ATTORNEYS TO EXCUSE THOSE**
19 **PROSPECTIVE JURORS WHO DEMONSTRATE THEIR INABILITY TO**
SIT FAIRLY ON THIS CASE.

20 The rules relating to *voir dire* are set forth in Arizona Rules of Criminal Procedure
21 18.5 (d) and (e):

22 d. The court shall conduct a thorough oral examination of prospective jurors.
Upon the request of any party, the court shall permit that party a reasonable
23 time to conduct a further examination of the prospective jurors. The court may
impose reasonable limitations with respect to questions allowed during a
24 party's examination of the prospective jurors, giving due regard to the purpose
of such examination. In addition, the court may terminate or limit *voir dire* on
25 grounds of abuse. Nothing in this Rule shall preclude the use of written
questionnaires to be completed by the prospective jurors, in addition to oral
26 examination.

1 e. The examination of prospective jurors shall be limited to inquiries directed
2 to bases for challenges for cause or to information to enable the parties to
exercise intelligently their peremptory challenges.

3 Generally, if a juror understands from the Court's leading questions what he or she is
4 expected to say, the juror will obediently mouth the answer indicated by the question. The
5 juror will not have become any fairer or less constitutionally impaired, but will have satisfied
6 the "wink and nod" function and fulfilled his or her natural human desire to "fit in" with the
7 moral and ethical framework created by the Judge. The Judge is a person whom the average
juror respects as an exalted personage with the highest of moral qualities.

8 What is at issue and of the utmost importance in the selection of fair and unbiased
9 jurors is that the Judge not hint to jurors what answers he expects to hear, but rather creates an
10 atmosphere in which the prospective juror feels as comfortable as possible about articulating
his own moral and ethical principles.

11 **A. Attorney-conducted oral *voir dire* of the panel is required upon request.**

12 Rule 18.5(d) of the Arizona Rules of Criminal Procedure grants trial counsel the right,
13 upon request, to conduct oral *voir dire* of prospective jurors. The Arizona Supreme Court has
14 recognized that "[s]uch questioning often helps to elicit more detailed and candid responses."
State v. Blakeley, 204 Ariz. 429, 435, 65 P.3d 77, 83 (2003).

15 While the right to oral *voir dire* exists, counsel recognizes that the right has
16 limitations. This court has discretion to "impose reasonable limitations with respect to
17 questions" so long as "due regard" is given to the purpose of the examination. Further, this
18 court may "terminate or limit *voir dire* on grounds of abuse." Rule 18.5(d), Ariz. R. Crim. P.

19 In the instant case, all questions that counsel contemplates asking will be directed "to
20 bases for challenge for cause or to information to enable counsel to exercise intelligently the
peremptory challenges." Rule 18.5(e), Ariz. R. Crim. P.

21 **B. Sufficient time for *voir dire* questioning must be given.**

22 Rule 18.5(d) of the Arizona Rules of Criminal Procedure states that Judges have
23 discretion to limit *voir dire* to a "reasonable time." The "reasonable time" provision of this
24 rule is not designed as a mechanism to foreclose questioning during *voir dire*. To the
25 contrary, the Arizona Supreme Court has recognized that the "intent" of the rule is that "each
26 party be given [an] opportunity and reasonable time to question prospective jurors to discover

1 information relevant to challenges and to possibly rehabilitate [prospective jurors].” *State v.*
2 *Anderson*, 197 Ariz. 314, 321, 4 P.3d 369, 376 (2000). Moreover, a reasonable time
3 “necessarily includes” time to question the panel on key issues and subjects.

4 In *Morgan v. Illinois*, 504, U.S. 719, 112 S.Ct. 2222 (1992), the Supreme Court
5 commented on the importance of conducting adequate *voir dire*.

6 *Voir dire* plays a critical function in assuring the criminal defendant
7 that his constitutional right to an impartial jury will be honored.
8 Without an adequate *voir dire* the trial Judge’s responsibility to
9 remove prospective jurors who will not be able impartially to follow
10 the court’s instructions and evaluate the evidence cannot be fulfilled.

11 *Id.* at 729-30, 112 S.Ct. at 2230, citations omitted.

12 Also relevant to determining how much time should be allotted for *voir dire* is the
13 need to consider the scope of *voir dire*. Rule 18.5(e), Ariz. R. Crim. P., governs the scope of
14 *voir dire* and states that inquiries of prospective jurors be directed “to bases for challenge for
15 cause or to information to enable the parties to exercise intelligently their peremptory
16 challenges.”

17 Consequently, the “reasonable time” provision set forth in Rule 18.5(d), Ariz.R. Crim.
18 P., contemplates that the court will allot sufficient, reasonable time for both parties to question
19 prospective jurors on key issues and subjects, to discover information relevant to challenges,
20 and to engage in rehabilitation as necessary. “Part of the guarantee of a defendant’s right to
21 an impartial jury is an *adequate voir dire* to identify unqualified jurors.” *Morgan v. Illinois*,
22 504 U.S. at 730 112 S.Ct. at 2230, emphasis added.

23 **II. JUROR SELECTION WILL PROCEED EFFICIENTLY AND**
24 **EFFECTIVELY IF BOTH SIDES ARE PERMITTED LEEWAY TO**
25 **INDIVIDUALLY QUESTION PROSPECTIVE JURORS ABOUT**
26 **THEIR FEELINGS AND OPINIONS ABOUT THIS TYPE OF CASE.**

27 In most criminal cases, this Court conducts the majority of *voir dire* and the attorneys
28 then proceed, if need be, with limited follow-up questions. For *voir dire* questions to be
29 effective in this case, however, the questions must provide jurors with sufficient information
30 about the material issues so that complete responses to questions will be forthcoming.
31 Questions that merely inquire about a juror’s subjective evaluation of his/her ability to be
32 “fair” or “follow the law” do not elicit sufficient information. Such questions encourage
33 jurors to give socially desirable responses and courts have held that such questions form an

1 inadequate basis upon which to assess juror qualifications. *See, e.g., Murphy v. Florida*, 421
2 U.S. 794, 800, 95 S.Ct. 2031, 2036 (1975).

3 It is requested that the court give counsel for both parties leeway to asked open-ended
4 questions of individual prospective jurors. Those questions are designed to inquire into
5 feelings, opinions, and knowledge. Many times during *voir dire*, questions are put to jurors in
6 this vein: "The law requires that you follow the instructions of the court without regard to
7 your personal feelings or beliefs. Is there anyone among you who cannot follow the law and
8 set aside personal feelings or beliefs?" In this situation, a juror who harbors a disqualifying
9 bias is placed in the position of admitting to an authority figure as well as to all present in the
10 courtroom that he cannot be fair and impartial; that he is, in effect, a lawbreaker. Answers
11 elicited by such questions are predictable and meaningless.

12 To conduct a proper *voir dire* that protects the rights of the accused as well as the
13 rights of the State, both sides should be able to fully develop each prospective juror's feelings
14 about this type of case. It is only through a penetrating *voir dire* that a juror's feelings,
15 beliefs, views, attitudes, and convictions about this type of case may be adequately explored.

16 The United States Supreme Court and other jurisdictions recognize that wide latitude
17 in *voir dire* questioning is necessary to select constitutionally unimpaired jurors. *See, e.g.,*
18 *Morgan et. al., supra; United States v. Johnson*, 366 F. supp. 2D 822 (N.D Iowa 2005);
19 *United States v. Fell*, 372 F.Supp.2d 766 (D.Vt. 2005); *State v. Garcia*, 224 Ariz. 1 (2010)
20 (citing approvingly to *U.S. v. Johnson* and *U.S. v. Fell, supra*); *State v. Jones*, 223 S.W. 3d
21 379 (Tex.Crim.App., 2007); *State v. Samuel*, 243 S.W. 3d 592 (Tenn.Crim.App.,2007); *State*
22 *v. Ezell*, 233 S.W. 3d 251 (Mo. App. W.D., 2007); *People v. Vieira*, 35 Cal.4th 264 (2005);
23 *People v. Cash*, 28 Cal. 4th 703, 50 P. 3d 332 (Cal., 2002); *State v. Clark*, 981 S.W. 2d 143
24 (Mo.1998); *People v. Mapp*, 283 Ill.App.3d 979 (1996); *State v. Biegenwald*, 126 N.J. 1, 594
25 A. 2d 172 (N.J., 1991). This latitude allows appropriate questions that inquire into juror
26 feelings about specifics that may arise in the case while avoiding a promise or commitment
from the juror as to how he or she would vote in this particular case.

CONCLUSION

None of the parties wants the juror selection process to become a never-ending
marathon. It is hoped that all parties will work together to ensure that the juror selection
process is efficient, effective, and fair to all. The constitutional rights of the parties will be

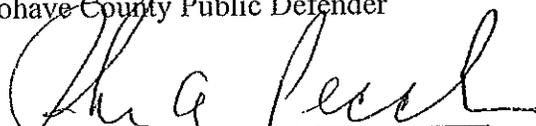
1 respected and a fair and impartial jury will be impaneled without any unnecessary waste of
2 time and resources.

3 What is being requested is the very minimum necessary for the defense to intelligently
4 exercise challenges for cause and peremptory challenges, and to empanel a fair and impartial
5 jury. Counsel is merely seeking impartial and unbiased jurors who can assess the propriety of
6 the State's case within the parameter of the constitutions, statutes, and cases that govern a
7 criminal trial. To accomplish this goal, we request that the Court order these requested
8 procedures.

9 DATED THIS 19th DAY OF MAY, 2011.

10 Respectfully Submitted,

11 John A. Pecchia
12 Mohave County Public Defender

13 
14 By: JOHN A. PECCHIA
15 Public Defender

16 Jason Steffen
17 Deputy Public Defender

18 
19 By: JASON STEFFEN
20 Deputy Public Defender

21 A copy of the foregoing sent
22 this ____ day of May, 2011 to:

23 Victoria Stazio
24 Mohave County Attorney's Office
25 John Charles McCluskey, Defendant
26 Honorable Steven F. Conn

By: _____

THE HONORABLE STEVEN F. CONN
SUPERIOR COURT DIVISION III
MOHAVE COUNTY

STATE OF ARIZONA V. JOHN CHARLES MCCLUSKEY

JUROR QUESTIONNAIRE

This questionnaire has been approved by the Court and is to be filled out by each prospective juror in this case. The questionnaire is designed to obtain information regarding your qualifications to sit as a juror in a pending criminal case.

This information is designed solely to save time and assist the Court and the parties in selecting jurors for the trial. By use of the questionnaire, the process of jury selection will be substantially shortened. It is not our intention to embarrass anyone. Your responses to the questionnaire will eliminate the need to ask these questions in open court. You are given more privacy by answering them in this questionnaire. This questionnaire will be returned by the parties to the Court Clerk after the completion of jury selection.

YOU ARE UNDER OATH AND ARE REQUIRED TO ANSWER THE QUESTIONS TRUTHFULLY. YOU ARE EXPECTED TO SIGN THE QUESTIONNAIRE AND YOUR ANSWERS WILL HAVE THE EFFECT OF A STATEMENT GIVEN UNDER OATH TO THE COURT.

In order to ensure that your answers are not influenced by the opinions of others, you should fill out the questionnaire by yourself without consulting or talking to any other person.

You must print or handwrite your answers in **blue or black pen**. Please print or write legibly. If your answers are illegible, you may be requested to re-copy your answers.

Please read each question carefully and answer each question as completely and accurately as you can. Your complete answers will save a great deal of time for the Court, the parties and you. There are no right or wrong answers to the questions.

If you cannot answer a question because you do not understand it, write "Do not understand" in the space after the question. If you cannot answer the question because you do not know the answer, write "Do not know" in the space after the question. If you need extra space to answer any question, please use the extra blank sheet of paper included at the end of the questionnaire. Be sure to indicate on the blank page the number of the question you are answering. **If any question calls for a response that is so personal and private that you want to discuss it with the judge and the attorneys in the judge's chambers, please write "I need to speak in private" and give a brief description of the information. If any follow-up is required, a private hearing with the judge and the attorneys can be conducted to discuss the response.**

Until you are excused as a potential juror, **you are ORDERED** to not discuss anything connected with this case, including the questions asked in this questionnaire, your answers or any other aspect of this case with anyone, including your family and close friends. **You are also ORDERED to avoid reading or listening to any news coverage of this matter or to discuss this matter with any other person.** Do not allow anyone to discuss these subjects with you.

The purpose of this questionnaire is to encourage your full expression and honesty so that all parties will have a meaningful opportunity to select a fair and impartial jury.

THANK YOU FOR YOUR PATIENCE AND COOPERATION

Date

The Honorable Steven F. Conn

JUROR QUESTIONNAIRE

The information on this questionnaire is for the judge and attorneys involved in this case. Please answer all of the questions as **completely** and **honestly** as you can. Remember that you are **under oath**. Please keep in mind that there are no "right" or "wrong" answers. Just read each question carefully and give an honest answer. You **must not** discuss your answers with any of the other jurors. If you need help, ask one of the clerks for assistance. Thank you for your cooperation.

Name: _____ Age: _____ Sex: Male Female

1. What town do you live in or closest to?

2. Where did you grow up? _____

3. How long have you lived at your present address? _____

4. How long have you lived in Mohave County? _____

5. Do you currently: ~ Own ~ Rent ~ Live with other homeowners

6. Are you currently:

~ Employed full-time

~ Retired

~ Employed part-time

~ Unemployed

~ Employed at more than one job

~ Full-time homemaker

List your current occupation and employer: _____

Briefly describe your occupational duties: _____

7. List your last four jobs and briefly describe your duties:

Dates	Employer	Position	Duties

Dates	Employer	Position	Duties

8. Where and what years did you attend high school? _____

Did you: ~ graduate ~ get a GED not graduate

9. Please list any training or schooling past high school:

Dates	Name of School	Area of Study	Degrees/Certificates

10. What is your marital status?

~ Married for __ years ~ Widowed for __ years ~ Single
 ~ Remarried for __ years ~ Separated/Divorced for __ years ~ Partner

If **married, living with partner, or separated/divorced**, list spouse's or partner's employer and occupation. If **widowed**, list spouse's last occupation.

His/Her occupation and employer: _____

11. What are the ages, genders, and occupations of your children, if you have any?

Age	Male or Female	Occupation	Schools Attended and When

Age	Male or Female	Occupation	Schools Attended and When

12. What are the ages, genders, and occupations of your grandchildren, if you have any?

Age	Male or Female	Occupation	Schools Attended and When

13. List the occupation and educational background of any other adults in your household and their relationship to you:

14. List any organizations you have belonged to and in which you participate. This could include veterans groups, service clubs, social clubs, unions, professional, volunteer, church, neighborhood, educational, or political groups:

15. Have you ever served in the military? ____ Yes No ____

IF YES, please explain, including what branch, when, rank, type of discharge, and where served. Include any service in the reserve or national guard:

16. Were you ever involved in any way with military law enforcement, court martial, or investigations? ____ Yes No ____

IF YES, please explain: _____

17. What is or was the occupation and education of your:

Mother: _____

Father: _____

18. Have you or anyone close to you ever:

	No	Person	What Happened?
been a victim of a crime	—	~ Self ~ Spouse ~ Family ~ Friend	
witnessed a crime	—	~ Self ~ Spouse ~ Family ~ Friend	
been interviewed or questioned by the police	—	~ Self ~ Spouse ~ Family ~ Friend	
been interviewed or questioned by an investigator or attorney	—	~ Self ~ Spouse ~ Family ~ Friend	
been charged with a crime	—	~ Self ~ Spouse ~ Family ~ Friend	
been convicted of a crime	—	~ Self ~ Spouse ~ Family ~ Friend	
made a charge against someone	—	~ Self ~ Spouse ~ Family ~ Friend	
been a witness in court	—	~ Self ~ Spouse ~ Family ~ Friend	

	No	Person	What Happened?
sued someone or been sued	—	~ Self ~ Spouse ~ Family ~ Friend	
been involved in a lawsuit or legal proceeding	—	~ Self ~ Spouse ~ Family ~ Friend	

19. What type of books do you like to read? _____

20. What television programs do you watch? _____

21. Do you watch any television programs dealing with crime, the law, or police, such as *48 Hours*, *CSI*, *Cops*, *America's Most Wanted*, *Law and Order*? ____ Yes No ____

22. Do you have any relatives or friends who are lawyers, judges, or employed in the legal system or court system? ____ Yes No ____

IF YES, please explain: _____

23. Have you or anyone you know ever taken any courses or training in or worked in the field of law enforcement or criminology, such as for the police, highway patrol, FBI, sheriff, corrections, state crime bureau, security, bureau of compliance, etc.? ____ Yes No ____

IF YES, is this: ~ Yourself ~ Spouse ~ Child ~ Family ~ Friend

Please explain, including courses or job held and dates of employment:

24. Have any of your jobs included supervisory duties? If so, what were those duties?

25. Have you or anyone close to you ever had any contact or experience with any school liaison officers, truant officers, or child custody officers? ____ Yes No ____

IF YES, is this: ~ Yourself ~ Spouse ~ Child ~ Family ~ Friend

Was this experience: ~ Positive ~ Negative ~ Mixed

Please explain: _____

26. Do you have any other contact with any kind of law enforcement, through your job, volunteer work, or any other source? ____ Yes No ____

IF YES, please describe: _____

27. What are your general feelings about police officers?

~ Positive ~ Negative ~ Mixed

Please explain your answer: _____

28. You will be hearing testimony from several law enforcement officers in this case. Do you think you would give them more credibility, less credibility, or the same amount of credibility as other witnesses who were not law enforcement officers?

~ More credibility ~ Less credibility ~ Same credibility

Please explain your answer: _____

29. Have you ever taken any courses or training in law ? ____ Yes No ____

IF YES, please explain: _____

30. Have you ever served on a jury or grand jury? ____ Yes No ____

Year	Civil or Criminal	What Court?	Kind of Case	What was the Verdict?
	~ Civil ~ Criminal	~ State ~ Federal		
	~ Civil ~ Criminal	~ State ~ Federal		
	~ Civil ~ Criminal	~ State ~ Federal		

Was your jury experience: ~ Positive ~ Negative ~ Mixed

Did you ever serve as the jury foreperson? ____ Yes No ____

31. How often do you read the newspaper?

~ Never ~ Rarely ~ Several times a week ~ Daily

Which sections of the newspaper do you usually read? _____

32. This case has received and continues to receive extensive media coverage.

Have you heard anything about this case or the other people involved, or did you see or hear any news reports about it? ____ Yes No ____

IF YES, please check all your sources of news about this situation:

~ Newspaper ~ Television ~ Radio ~ People talking ~ Internet

What have you heard or read about this case and situation?

What stands out in your mind about what you have read or heard about this case or the people involved?

33. Is there anything you have read or heard about John McCluskey that would make it difficult for you to presume that he is innocent of the charges against him? ____ Yes No ____

IF YES, please explain: _____

34. Do you know anyone else who is connected to this situation or the people involved in any way? ____ Yes No ____

IF YES, please explain: _____

35. Is there any reason why you think you might have difficulty being completely impartial in this case or any other reason why you feel you couldn't or shouldn't sit as a juror in this case? ____ Yes No ____

IF YES, please explain: _____

36. Is there anything else the judge and attorneys should know about you in relation to serving on this jury? ____ Yes No ____

IF YES, please explain: _____

37. Do you or anyone you are close to know or do business or have any other kind of social or personal connection with any of the following people, attorneys, or offices? Please check the appropriate category below:

IF YES, which medications? _____

39. Do you have any limitations on your vision or hearing? _____ Yes No _____
40. There will be routine breaks during the trial. However, you may be required to sit for a couple hours at a time, would this cause you any significant discomfort?
41. Do you have any other special medical needs such as diabetes, food allergies or medication that you must take periodically?
42. Do you have any difficulty reading?
43. Are there any pressing family or business matters that would distract you or prevent you from giving the case your complete and undivided attention? _____ Yes No _____

Please Explain: _____

44. Is there any subject covered in this questionnaire that you would **not** want to discuss in front of the other jurors in open court? _____ Yes No _____
- What question or questions are those? _____

45. I affirm, under penalty of perjury, that I have given complete and honest answers to all of the questions above, to the best of my knowledge.

Signature

Date