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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 TO HOLD DEFENDANT IN THE MOHAVE COUNTY JAIL PENDING TRIAL**

The Defendant, through counsel undersigned, moves this Court to order that Mr. McCluskey's trial in the present matter be concluded prior to his removal to federal court. This motion is made pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, Article 2 § 24 of the Arizona Constitution, and supporting case law, as well as the following Memorandum and any pleadings, records, or arguments presented prior to and at the hearing on this motion presently scheduled for October 27, 2010, at 2:30 PM.

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MEMORANDUM

I. FACTS

Mr. McCluskey was indicted by a Mohave County grand jury on August 19, 2010; he was charged with one count of Escape, a Class 5 Felony; two counts of Kidnapping, Dangerous Class 2 Felonies; two counts of Armed Robbery, Dangerous Class 2 Felonies; two counts of Aggravated Assault, Dangerous Class 3 Felonies; and one count of Misconduct Involving Weapons, a Class 4 Felony. The Mohave County Public Defender's Office was appointed to represent him and entered a Notice of Appearance on or around August 23, 2010, the same date Mr. McCluskey was arraigned in Mohave County Superior Court.

Over the course of the past two months, Mr. McCluskey has made three appearances in court: a Case Management Hearing on September 13, 2010, a hearing on a Motion to Remand to the Grand Jury on October 15, 2010, and an Omnibus Hearing on October 25, 2010. In addition, Mr. McCluskey is scheduled to appear for oral arguments on a Motion for Complex Case Designation on November 2, 2010. In addition to these court appearances, counsel for Mr. McCluskey and their staff have logged over 60 hours working on preparing a defense in this case.

II. ARGUMENT

A federal court has issued a writ of habeas corpus ad prosequendum, proposing to remove Mr. McCluskey from the jurisdiction of this Court for an indefinite period of time in order to answer to federal criminal charges, despite the fact that this Court has had jurisdiction over the Defendant since mid-August of this year. Although the State has indicated no

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opposition to this proposed course of action, Mr. McCluskey has an interest, now that counsel have been working diligently on his case for over two months, to see the present case through to trial before being transported to a different jurisdiction to face new charges.

This Court is not required to acquiesce to the writ of habeas corpus ad prosequendum. Federal case law makes clear that this Court's consent is required to effectuate a transfer to federal custody pursuant to this writ. Thus, "[w]here a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is full performed and the jurisdiction invoked is exhausted; and this rule applied alike in both civil and criminal cases." Strand v. Schmittroth, 251 F.2d 590, 597 (9th Cir. 1957). For example:

> In United States ex rel. Moses v. Kipp, 7 Cir., 232 F.2d 147, 150, it was said, discussing a writ of habeas corpus ad prosequendum, that the 'United States District Court for the Northern District of Illinois could not have compelled the State of Michigan to surrender Moses after he had been incarcerated in that state for violation of a Michigan law. In spite of the terminology of the writ, the consent of the Michigan authorities was necessary to obtain the custody of Moses.' In Lunsford v. Hudspeth, 10 Cir., 126 F.2d 653, 657-658, Huxman, J., dissenting, pointed out that the 'most, then, that is required under the rule of comity is that the request be given respectful consideration' since the state had the right to 'deny the request in toto, on condition, or grant it absolutely.' Regarding such requests, a California court has said: 'The granting of the request is, of course, discretionary. * * * The federal authorities had a right to refuse the request with or without cause.' People v. South, 122 Cal.App. 505, 510, 10 P.2d 109, 112.

Id. at 611 n.14 (9th Cir. 1957). Similarly, "[i]n assessing the execution of state and federal criminal sentences, we have said that our federal system is one of 'dual sovereignty,' and not one in which the Supremacy Clause controls sentencing." Taylor v. Sawyer, 284 F.3d 1143, 1150 (9th Cir. 2002). Although this Court *may* choose to release Mr. McCluskey pursuant to the writ, "the federal government [can] not force state authorities to deliver a state prisoner to

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federal authorities for federal trial" without this Court's consent. U.S. v. Packer, 857 F.Supp. 726, 728 (C.D.Cal.,1994).

While this Court has the power to choose whether or not to allow the federal authorities to take custody of Mr. McCluskey pursuant to the writ of habeas corpus ad prosequendum, precedent argues in favor of this Court retaining jurisdiction until the present case is resolved. As the United States Supreme Court stated nearly a century ago in Ponzi v. Fessenden:

> The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject-matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose.

258 U.S. 254, 260, 42 S.Ct. 309, 310 (1922). This principle has been affirmed in more recent cases. See, e.g., Thomas v. Brewer, 923 F.2d 1361, 1365 (9th Cir. 1991) ("As a general rule, the first sovereign to arrest a defendant has priority of jurisdiction for trial, sentencing, and incarceration"). This "general rule" militates in favor of this Court retaining jurisdiction over Mr. McCluskey until the present charges can be properly and fully litigated.

More specifically, as in the present case, if "an accused is transferred pursuant to a writ of habeas corpus ad prosequendum[,] he is considered to be 'on loan' to the federal authorities so that the sending state's jurisdiction over the accused continues uninterruptedly." Crawford v. Jackson, 589 F.2d 693, 695, 191 U.S.App.D.C. 170, 172 (C.A.D.C., 1978). Arizona may technically retain jurisdiction over Mr. McCluskey while he is incarcerated in New Mexico facing federal charges. As a practical matter, however, the present case will not be making any progress toward trial if Mr. McCluskey is transferred out of state. This is especially evident in a situation where the State has indicated (despite its heretofore herculean

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efforts to bring this case to trial within a matter of weeks) its newfound willingness to acquiesce to the writ and halt the present proceedings indefinitely.

Furthermore, although Mr. McCluskey does not have standing to challenge the writ of habeas corpus ad prosequendum directly, he does have a constitutionally protected interest in due process at both the state and federal levels, which this Court is bound to recognize. Any delay in the federal case would not harm the federal government, as the Defendant is proposing being released to federal custody immediately following the termination of proceedings in the present case. On the other hand, a delay of months or years in this matter would deleteriously impact Mr. McCluskey's defense, especially where present counsel have made significant headway over the past two months in preparing his case for trial.

Finally, although Mr. McCluskey has an interest in resolving both his state and federal cases, continuing with the state case in order to effectuate his rights to due process and a speedy trial here will at the same time further his interest in preparing a defense to capital charges in federal court. Federal courts have recognized the rights of a defendant to prepare adequately in federal cases may trump considerations such as speedy trials. See, e.g., U.S. v. Kurt, 945 F.2d 248, 254 (9th Cir. 1991) (defendant's "return to Oregon and subsequent delay before trial occurred as a direct result of the court's concern for Kurt's access to a law library . . . [which] was crucial to his defense"). In any case, Mr. McCluskey is proposing to waive his speedy trial rights in the federal case in order to be able to stay in Arizona to complete his state case. See New York v. Hill, 528 U.S. 110, 114-15 (2000) (criminal defendants may waive rights including time limitations). Keeping Mr. McCluskey in Arizona will benefit all parties in the present case, and will do nothing to harm the federal government's case. Conversely, removing Mr. McCluskey to federal court for lengthy pretrial detention awaiting

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capital murder charges will do nothing to promote justice in the present case, and will offer no advantage to the federal government.

III. CONCLUSION

The State was actively seeking prosecution of Mr. McCluskey on multiple serious state felony charges when the federal government attempted to step in on the day of his Omnibus Hearing and take him into federal custody. It is not expected that Mr. McCluskey's federal capital case will be prepared for trial for a substantial period of time. In the meantime, Mr. McCluskey's ability to defend himself on the state charges will be eroded by the passage of time.

"[C]ourts should lean to avoiding conflicts with co-ordinate criminal jurisdictions." United States v. Tisnado, 412 F.2d 401 (9th Cir. 1969). Furthermore, "[i]n order to preserve comity between the sovereigns, a prisoner should not be removed from state custody for a longer period than may be reasonably necessary for the purpose of trial upon the federal charge." Crow v. United States, 323 F.2d 888, 891 (8th Cir. 1963). Here, because of the significant amount of time required to properly prepare and defend a federal capital case, it is in the interests of judicial economy and comity between the state and federal authorities that this Court retain jurisdiction over Mr. McCluskey for the relatively few months it will take to prepare the present case for trial. It makes little sense for Mr. McCluskey to sit in federal custody waiting for his attorneys to prepare to defend a capital case when his state case could likely result in a trial as soon as February or March of 2011.

WHEREFORE, the Defendant requests that this Court enter an order that the Defendant be held in the Mohave County Jail pending trial in this matter, after which time

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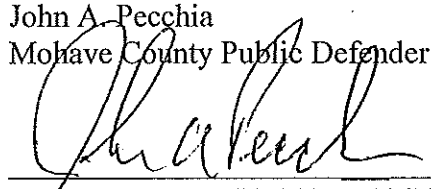
transfer to federal custody pursuant to the writ of habeas corpus ad prosequendum shall be accomplished.

DATED THIS 25TH DAY OF OCTOBER, 2010.

John A. Pecchia
Mohave County Public Defender



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

A copy of the foregoing sent
this ____ day of October 2010 to:

Victoria Stazio, Deputy
Mohave County Attorney's Office

John Charles McCluskey, Defendant

Honorable Steven F. Conn

By: _____

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