

curc
p8

FILED
12

BY: _____
2011 MAY 31 PM 3:50

VIRLYNN TIRNELL
SUPERIOR COURT CLERK

1 JOHN A. PECCHIA
Mohave County Public Defender
State Bar No. 027654

2 JASON R STEFFEN
3 Deputy Public Defender
State Bar No. 025776

4 Attorneys for Defendant
318 N. Fifth Street
5 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,

Case No.: CR-2010-00823

MOTIONS IN LIMINE

12 vs.

13 JOHN CHARLES MCCLUSKEY,
14 Defendant.

15 The Defendant, through counsel undersigned, moves this Court to exclude the
16 following evidence from trial:

- 17
18 1. Defendant's Prior Crimes. The State has disclosed a list of the Defendant's
19 alleged prior convictions. These convictions could conceivably be used as
20 impeachment material per Rule 609. Their use by the State during its case-in-
21 chief, however, would be highly prejudicial: the prior offenses involve violence,
22 while several of the current charges are alleged to be dangerous. "When prior
23 convictions are similar to the charged offense, the potential for prejudice is
24



1 particularly strong.” State v. Bolton, 182 Ariz. 290, 303 (1995). A mere mention
2 of these prior offenses could easily mislead the jury into convicting the Defendant
3 for an improper reason—namely, that the crimes he is alleged to have committed
4 in this case bears some semblance to crimes he has committed in the past.

5 This evidence should therefore be excluded from the State’s case-in-chief
6 pursuant to Rules 403 and 404(b).

7
8 2. Defendant’s Subsequent Crimes. Likewise, the State must be precluded from
9 eliciting testimony from witnesses that, subsequent to the events in this case, the
10 Defendant allegedly committed other offenses, either in this State or other
11 jurisdictions.

12 “[S]ubsequent bad acts . . . are analyzed exactly as are prior bad acts.” State v.
13 Moreno, 153 Ariz. 67, 68 (App. 1986). As with prior bad acts, testimony about
14 defendant’s subsequent acts are likely to unfairly prejudice the jury against the
15 defendant, particularly where they are of a serious nature. In addition, there are
16 clear indicia of trustworthiness related to prior *convictions*, whereas subsequent
17 bad acts are mere *accusations* by law enforcement until proven otherwise. The
18 State must not be allowed to present testimony about these alleged offenses, as
19 such testimony would be irrelevant and highly prejudicial. See, e.g., State v.
20 Martinez, 127 Ariz. 444, 447 (1980) (trial judge properly excluded mention of
21 robbery defendant’s alleged subsequent robbery, though defendant later opened
22 door to admission of that evidence).

1 3. Codefendant's Statements. The disclosed evidence in this case indicates one or
2 more co-defendants has made statements detrimental to Mr. McCluskey. The
3 State has not indicated an intent to call any co-defendants at trial. Therefore, these
4 statements are hearsay, precluded by Rule 802. Furthermore, if these statements
5 were admitted at trial against Mr. McCluskey, he would have no recourse to
6 confront his co-defendants about them, as they are currently facing other charges
7 and are represented by counsel. The State must therefore be precluded from
8 presenting evidence of any statements the co-defendants may have made
9 implicating Mr. McCluskey in this matter, pursuant to the Sixth Amendment of the
10 United States Constitution, Crawford v. Washington, 541 U.S. 36 (2004), and
11 Davis v. Washington, 547 U.S. 813 (2006).

12
13 4. Untested Evidence

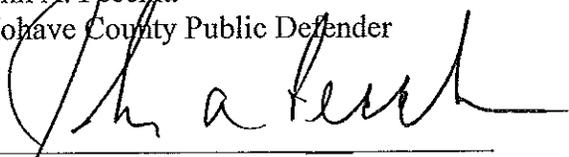
14 The police reports disclosed in this matter indicate that the State may seek to
15 elicit testimony that investigators took samples of various types of physical evidence,
16 such as blood swabs. No lab tests have been disclosed revealing DNA or other
17 analyses were performed on these samples.

18 Under Arizona Rules of Evidence, Rule 104(b), "When the relevancy of
19 evidence depends upon the fulfillment of a condition of fact, the court shall admit it
20 upon, or may admit it subject to, the introduction of evidence sufficient to support a
21 finding of the fulfillment of the condition." In this case, evidence regarding the
22 various items allegedly found in this case is relevant only if the State can prove that
23 these objects contained the Defendant's DNA, or some other relevant testing links
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

them to the Defendant. The State should not be permitted to introduce this evidence unless the State can first prove that these items are what the State claims. Permitting them to be introduced without this prerequisite evidence would be highly prejudicial and should therefore be precluded by Rules 104(b), 401, 402, and 403.

DATED THIS 30TH DAY OF MAY, 2011.

John A. Pecchia
Mohave County Public Defender

By: JOHN A. PECCHIA
Public Defender


By: JASON R STEFFEN
Deputy Public Defender

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

Victoria Stazio, Deputy
Mohave County Attorney's Office

John Charles McCluskey, Defendant

Honorable Steven F. Conn

By: _____