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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF MOHAVE**

9 STATE OF ARIZONA,  
10 Plaintiff,

No. CR-2010-0823

11 vs.

**RESPONSE TO MOTION TO  
SEVER**

12 **JOHN CHARLES MCCLUSKEY,**  
13 Defendant.

14 The State of Arizona, by and through the undersigned deputy county attorney,  
15 hereby responds to the defendant's motion to sever Count 1, and opposes both  
16 requests for the reasons stated in the accompanying memorandum.

17 **MEMORANDUM OF POINTS AND AUTHORITIES**

18 **I. FACTUAL BACKGROUND**

19 On 7/30/10, three inmates at the Arizona State Prison, Tracy Province, John  
20 McCluskey, and Daniel Renwick, escaped from the prison facility. During the  
21 investigation, it was learned that McCluskey's girlfriend, Casslyn Welch, assisted. After  
22 escaping from the facility, Renwick took off in a vehicle that was provided by Welch.  
23 The other three were left on their own. Trackers from the Mohave county Sherriff's  
24 Office found that the suspects headed from the prison towards Interstate 40. In the  
25 same area, two truck drivers, had pulled over to conduct a vehicle inspection on their  
semi-truck. At that time, a white male wearing an orange prison jumpsuit was pointing a



1 gun at them. He was accompanied by another male and a female wearing camouflage.  
2 The victims were told that the attackers had just escaped from prison and didn't want to  
3 kill anyone else as long as the victims were cooperative. They were pushed into the  
4 bag of the truck, still at gun point. At one point in the ride, Defendant and his  
5 accomplices talked about what they were going to do with the victims, ultimately telling  
6 the victims it was their lucky day because the majority ruled in favor of not killing them.

## 7 II. JOINDER IS APPROPRIATE UNDER ARIZONA LAW.

8 Joinder of offenses is authorized under three circumstances listed in Rule  
9 13.3(a), Ariz. Rules of Crim. Procedure. Same or similar character of the offenses is the  
10 basis least likely to survive a motion for severance; in fact, Rule 13.4(b) expressly  
11 provides for severance as a matter of right if that is the only basis, unless evidence of  
12 one would be admissible at trial on the other under applicable rules of evidence.

13 In this case, the State relies upon Rule 13.3(a) (2) and (3) as the bases for  
14 joinder. Under Rule 13.3a(2), the escape and the other charged offenses are otherwise  
15 connected together in their commission. The Defendant and his co-defendants had an  
16 overall arching plan, not just to escape from the MTC prison facility, but to get away  
17 from the entire area itself. To do that, they had to have transportation. This is why the  
18 victims were held at gunpoint and were taken along with their semi-truck. The offenses  
19 involving the victims stem from and are a continuation of the escape plan.

20 Also, joinder is appropriate under Rule 13.3(a) (3), where proof of the escape  
21 tends to prove or establish essential elements of the victim offenses. Since the victims  
22 did not know their attackers personally, outside corroboration is necessary to support  
23 any in court identification of the Defendant, or establish identity if there is an inability to  
24 make an in court identification. For example, in the escape offense there is evidence of  
25 three male inmates who escaped with the aid of a civilian female. The evidence shows

1 that part of the escape party left the immediate area in a truck, leaving the others to find  
2 transportation on their own. Tracking of the vicinity shows that prints lead to or stop in  
3 an area off of I-40. This same area is where the victims were held at gunpoint. These  
4 facts provide outside corroboration for identifying the Defendant as one of the three  
5 people who attacked the victims and providing motive for the offenses. These facts also  
6 establish motive for the kidnapping and aggravated assault offenses.

7 **II. THE DEFENDANT WILL NOT BE UNFAIRLY PREJUDICED IF COUNTS ARE**  
8 **NOT SEVERED**

9 Joinder cannot be avoided simply because proof of guilt on one charge will make  
10 the jury more likely to find guilt on another charge. *Anderson v. State*, 155 Ariz. 289,  
11 290, 746 P.2d 30, 31 (App. 1987). There will be no unfair prejudice when jurors are  
12 instructed to consider each offense separately, are instructed on the elements of each,  
13 and are given limiting instructions regarding consideration of the gang membership  
14 evidence. *State v. Comer*, 165 Ariz. 413, 799 P.2d 333 (1990); *State v. Martinez-*  
15 *Villareal*, 145 Ariz. 441, 446, 702 P.2d 670, 675 (1985), *cert. denied*, 474 U.S. 975  
16 (1985).

17 For example, the murder of a child and attempted murder of a spouse were  
18 properly joined because the charges arose from a single domestic dispute, both shots  
19 were fired from the same gun, and were proved by overlapping testimony by the same  
20 witness, the surviving spouse. *State v. Prince*, 204 Ariz. 156, 160 ¶17, 61 P.3d 450  
21 (2003). The most significant aspect of the *Prince* decision is that the defendant  
22 admitted shooting his wife during his testimony at trial, and only contested the murder of  
23 the child. Under that circumstance, one might think that the Court would have found  
24 that a Rule 403 analysis would have required separate trials, especially for a fair  
25 determination of the child murder offense. However, the Court found joinder proper.

1 RESPECTFULLY SUBMITTED THIS 31ST DAY OF MAY, 2011.

2 MOHAVE COUNTY ATTORNEY  
3 MATTHEW J. SMITH

4 By   
5 DEPUTY COUNTY ATTORNEY  
6 VICTORIA STAZIO

7 A copy of the foregoing  
8 sent this same day to:

9 HONORABLE STEVEN F. CONN  
10 SUPERIOR COURT JUDGE

11 JOHN A. PECCHIA & JASON STEFFEN  
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16 By VS