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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,

12 vs.

13 JOHN CHARLES MCCLUSKEY,
14 Defendant.

Case No.: CR-2010-00823

**RESPONSE TO STATE'S MOTION
TO RECONSIDER DEFENDANT'S
MOTION TO PRECLUDE THE USE
OF RESTRAINING DEVICES ON
DEFENDANT DURING TRIAL**

15 Counsel for the Defendant submit the following Memorandum and urge the Court to
16 deny the State's Motion to Reconsider Defense Motion Restricting the Use of Restraints
17 (Specifically Electronic Security Devices) to be Placed on Defendant During Impending
18 Trial.¹

19 **MEMORANDUM**

20 It would appear from its recent Minute Order that the Court is well aware of the
21 background against which the State-qua-Special Counsel-to-the-Sheriff's-Office has filed its
22 Motion to Reconsider dated 6/8/11.

23 ¹ The title of the original Defense motion was "Motion To Preclude The Use Of Restraining Devices On
24 Defendant During Trial." The State apparently saw the need to alter and elongate this title in its motion, which
shall hereinafter be dubbed the "Motion to Reconsider" for brevity and convenience.



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1 Arizona follows the doctrine of the “law of the case,” which “describes the judicial
2 policy of refusing to reopen questions previously decided in the same case by the same court
3 or a higher appellate court.” Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II, 176
4 Ariz. 275, 278 (App.Div. 1,1993), citations omitted. This doctrine is codified in Rule16.1(d)
5 of the Arizona Rules of Criminal Procedure, which directs that, “[e]xcept for good cause, or
6 as otherwise provided by these rules, an issue previously determined by the court shall not be
7 reconsidered.”

8 “Good cause” is not defined in the Rules of Criminal Procedure. There is,
9 furthermore, a paucity of useful case law on this issue. Nevertheless, the trend in Arizona
10 seems to be that Rule 16.1(d) is successfully invoked only in limited circumstances. See, e.g.,
11 State v. Speers, 2010 WL 2176083, 16 (Ariz.App.Div. 1,2010) (“The superior court’s
12 determination it had mistakenly excluded otherwise admissible evidence based on a
13 misunderstanding of the facts constituted good cause for modifying its prior ruling”); State v.
14 Garcia, 224 Ariz. 1, 13 (2010) (second judge properly reconsidered first judge’s ruling where
15 first judge improperly applied the law); State v. Weeks, 2009 WL 189169, 7 (Ariz.App.Div.
16 2,2009) (court found good cause to reconsider the State’s motion due to no likelihood of
17 prejudice to defendant one year after original ruling and subsequent mistrial); State v. King,
18 180 Ariz. 268, 280 (Ariz.,1994) (new judge properly reconsidered motion where “his
19 predecessor left this question open for reconsideration”).

20 In its Motion to Reconsider, the State raises three points as ostensible “good cause”
21 grounds for reconsideration of the Court’s ruling. State’s Motion to Reconsider at 1. None
22 bear any semblance to the kinds of “good cause” found in the aforementioned cases.
23 Nevertheless, this Response shall address each in turn.

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(1) "The assigned state prosecutor was not familiar with the security measures needed to be employed by detention personnel in the transportation of pre-trial inmates."

The State elected not to present any evidence or make any argument on the issue in the original Defense motion at the hearing on 6/7/11. Such a decision is within the discretion of the assigned Deputy County Attorney. The State may, of course, decide which attorney(s) will prosecute a case or appear at a specific hearing. Permitting the State, however, to petition this Court to reconsider a prior ruling because of the choices of a particular assigned attorney is inadvisable. If the Court were to grant a rehearing on this basis, then the County Attorney's Office could conceivably file motions to reconsider every time, for example, the "officer of the day" failed to obtain as harsh a sentencing penalty as the originally assigned attorney desired, because the former failed to present some argument or evidence the latter would have proffered.

(2) "[T]he defendant failed to provide the Sheriff notice on this issue"

The Defense filed the original Motion well in advance of the hearing date scheduled by this Court to hear outstanding pretrial motions. Copies of all motions filed by the Public Defender's Office are, by default, sent to the County Attorney's Office. The State did not object to taking up this motion at the hearing on 6/7/11, nor did they indicate they had not received notice of the Defendant's motion. The Motion to Reconsider has been filed by a Deputy County Attorney in the Mohave County Attorney's Office. The State was represented at the 6/7/11 hearing by a Deputy County Attorney from the Mohave County Attorney's Office. The State clearly had ample notice; whether particular attorneys now feel left out of



1 the process is a matter for internal policymaking at the County Attorney's Office—it is not
2 grounds for reconsideration of this Court's ruling.

3 As to the alleged failure to notify the Sheriff's office, the State's Motion to Reconsider
4 cites no case law whatsoever indicating that the Defense in a criminal case has an obligation
5 to inform third parties about outstanding motions—nor is undersigned counsel aware of any
6 such rule.

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8 **(3) “[T]he motion was granted without proper arguments from the
9 Sheriff's counsel who will represent the facts and objections
10 supporting the use of this device.”**

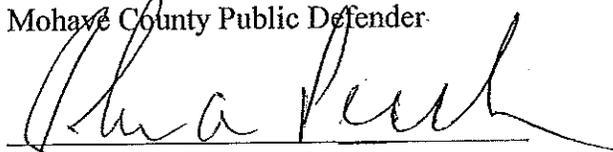
11 The Defendant's original motion established, and the Court in its ruling agreed, that
12 the burden of proof in this matter is on the State. If the State wished to contest the
13 Defendant's motion or present evidence from the Sheriff's Office on this matter, they had the
14 chance to do so at the hearing on 6/7/11. The State chose not to do so—nor, for that matter,
15 did the State request additional time to respond, or to prepare for a separate evidentiary
16 hearing. The State's post hoc compunction does not amount to “good cause” for purposes of
17 Rule 16.1(d).

18 WHEREFORE, the Defendant moves this Court to deny the State's Motion to
19 Reconsider Defense Motion Restricting the Use of Restraints (Specifically Electronic Security
20 Devices) to be Placed on Defendant During Impending Trial.

21 DATED THIS 10TH DAY OF JUNE, 2011.
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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 10 day of June 2011 to:

Victoria Stazio, Deputy
and/or LynnAnn Wilson, Deputy
Mohave County Attorney's Office

John Charles McCluskey, Defendant

Honorable Steven F. Conn

By: aw