IN THE CIRCUIT COURT FOR THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO.: 482008-CF-0015606-O
Judge Perry

vs.

CASEY MARIE ANTHONY,
Defendant.
______________________________/

MOTION IN LIMINE REGARDING TESTIMONY OF NEIGHBOR BRIAN BURNER IN REFERENCE TO SHOVEL

COMES NOW THE Defendant, CASEY MARIE ANTHONY, by and through her attorneys J. CHENEY MASON and JOSE BAEZ and, pursuant to Rules 401 and 403, Florida Rules of Evidence, and the United States and Florida Constitutions, moves this Court in Limine to prohibit the introduction into evidence in the trial of this cause of any testimony by one Mr. Brian Burner, a neighbor of the Defendant's, as it relates to allegations of the Defendant borrowing a shovel.

The shovel has not been linked by witness or any forensic evidence whatsoever to any aspect of this case and, accordingly, is irrelevant and immaterial.

MEMORANDUM OF LAW IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE CERTAIN TESTIMONY OF MR. BRIAN BURNER

A motion in limine is used to shorten trial, simplify issues, and reduce the potential for mistrial, thereby moving the case toward a conclusion on the merits. *Rosa v. Fl. Power & Light Co.*, 636 So. 2d 60 (Fla. 2d DCA 1994); *See also* § 90.403, Fla. Stat. (2009) ("Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair

prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."). Further, "[a] motion in limine ... is generally used to prevent the introduction of improper evidence, the mere mention of which at trial would be prejudicial." *Dailey v. Multicon Development, Inc.*, 417 So. 2d 1106 (Fla. 4th DCA 1982); *Adkins v. Seaboard Coast Line R. Co.*, 351 So. 2d 1088 (Fla. 2d DCA 1977).

Additionally, Florida Statute § 90.105 provides, "[t]he court shall determine preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence." Also, § 90.104(2) provides "[i]n cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means." Based upon due process, a fair trial, an impartial jury, and effective assistance of counsel, Ms. Anthony is entitled to a hearing and ruling on the following issue before the selection of a jury.

STATEMENT OF THE FACTS

Based on Discovery Materials provided by the State, Mr. Brian Burner engaged in a Taped Interview conducted by Detective Appling Wells on July 17, 2008 (hereinafter Interview 1). Based on the transcript of the interview, Mr. Burner stated that, during the week of June 16, 2008: "...Casey approached me and said that she couldn't find the key to their shed and want (sp.) to know if I had a shovel she could borough (sp.) to dig up...um...a bamboo root that she's been tripping over...and I agree I said yea I have a shovel that you can use." (Interview 1 Tran. P. 3; 21-24). Further, Mr. Burner stated, "I gave her the shovel." (Interview 1, P. 4; 7). Subsequently, two more interviews were conducted, which reiterated this point. (Taped Transcript of Brian Burner Interview Conducted by Corporal Edwards, July 30, 2008; Transcript of Brian Burner Conducted by Det. Appling Wells, August 12, 2008). Mr. Burner also stated that

Ms. Anthony returned the shovel that same day. (Interview 1, P. 6;17). Further, he stated that he noticed nothing unusual about the shovel or Ms. Anthony's demeanor. (Interview 1; p. 10, 10-14).

ARGUMENT

Mr. Brian Burner's testimony related to the shovel, as well as any related reference to such testimony, must be precluded from trial in order to protect Ms. Anthony's right to a fair trial. First, the testimony regarding the shovel is utterly irrelevant to the case at hand. Second, any alleged probative value is substantially outweighed by its potential prejudicial effect on the jury.

I. MR. BURNER'S STATEMENTS THAT MS. ANTHONY BORROWED A SHOVEL FROM HIM ARE UTTERLY IRRELEVANT AND HAVE NO TENDENCY TO PROVE OR DISPROVE A MATERIAL FACT AT ISSUE.

The test of admissibility is relevancy. *Reddish v. State*, 167 So. 2d 858, 861 (Fla. 1964); FLA. STAT. § 90.401 (2009). Relevant evidence is evidence that has "any logical tendency to prove or disprove a fact" in issue. *State v. Taylor*, 648 So. 2d 701, 704 (Fla. 1995). Although evidence tending to prove or disprove one material element of an offense is relevant, whether Ms. Anthony borrowed a shovel is irrelevant and has no tendency to prove or disprove a material fact at issue in this capital criminal prosecution. Specifically, Ms. Anthony has been charged with Capital First Degree Murder, Aggravated Child Abuse, and four counts of Providing False Information to a Law Enforcement Officer. (Indictment). Evidence that Ms. Anthony borrowed a shovel from her neighbor does not tend to prove any element of the offenses for which she is charged and, thus, is inadmissible as irrelevant.

Shennett v. State, 937 So. 2d 287 (Fla. 4th DCA 2006) is instructive. In *Shennett*, the defendant was charged with burglary and possession of burglary tools based on allegations that he broke into a Dodge Caravan by shattering a window with a spark plug. When the Defendant was subsequently stopped by Law Enforcement, a search of his vehicle produced a Ziploc baggie which contained a screwdriver and pieces of porcelain from a spark plug. Evidence of the screwdriver and the porcelain pieces were admitted at trial and the defendant was convicted on both burglary and possession of burglary tools. *Id.* On appeal, the Court found that the trial court had abused its discretion by admitting the screwdriver and the porcelain pieces into evidence. Specifically, the Court stated:

> The screw driver was irrelevant to the issues at trial because it did not 'tend to prove or disprove a material fact' in the case. § 90.401, Fla. Stat. (2005). The burglary tool which Schennett was charged with possessing was "porcelain pieces." There was no evidence that he used the screwdriver in any way to burglarize Brown's minivan. The screwdriver had no connection with either charged offense. *See Rigdon v. State*, 621 So. 2d 475, 478 (Fla. 4th DCA 1993).

Id. at 292-93.

Similarly, whether or not Ms. Anthony borrowed a shovel from Mr. Burner does not in any way make the charged offenses more or less probable. There is no evidence that Ms. Anthony used or intended to use the borrowed shovel to facilitate the commission of any of the charged crimes, nor is there any assertion of such. *LaVallee v. State*, 958 So. 2d 509, 511 (Fla. 4th DCA 2007) (stating where a defendant possessed a screwdriver and gloves shortly after a burglary and even during a burglary was irrelevant, as there was "simply no connection shown between appellant's possession of the items and the crime charged"); (Contrast *Rebjebian v. State*, 44 So. 2d 81 (Fla. 1949) where the defendant was caught in the commission of a burglary,

had gained entry to a locked dwelling, and was found to possess a screwdriver while in the dwelling, the screwdriver was admissible).

Further, in an analogous case, the Fifth DCA found that an ineffective assistance of counsel claim had merit where the defendant's attorney failed to object to the admissibility of firearms found in the defendant's home when the firearms were not linked to the charged crime of Attempted First Degree Murder. *Moore v. State*, 1 So. 3d 1177 (Fla. 5th DCA 2009). In coming to this conclusion, the Court stated:

> Of course, if there was no evidence linking any of these firearms to the charged crime, evidence of the firearms would be irrelevant, and should have been excluded upon proper objection. *See, e.g., Sosa v. State*, 639 So. 2d 173 (Fla. 3d DCA 1994) (holding that it was error to admit into evidence .380 cartridges found in the defendant's car where there was no link established between the cartridges and the crime charges); *Huhn v. State*, 511 So. 2d 583 (Fla. 4th DCA 1987) (holding that it was error to admit into evidence a gun purchased by the defendant which was not connected with the charged crimes); *Rigdon v. State*, 621 So. 2d 475 (Fla. 4th DCA 1993) (reversing a conviction for aggravated assault with a firearm where the trial court admitted into evidence a semi-automatic weapon on the defendant's bed because there had been no connection between the weapon and the crime.)

Id. at 1178-79.

Similarly, in the present case, there is no evidence which links the shovel to the commission of the any of the charges. And while the above case cites a string of authority related directly to the inadmissibility of firearms, rather than the shovel at issue in the present case, the proposition still stands that the admission of irrelevant evidence creates a danger that the jury will base a conviction on information that is not related to the charges at hand. *Rosa v. Fl. Power & Light Co.*, 636 So. 2d 60 (Fla. 2d DCA 1994) (stating a motion in limine helps to shorten

trials, simplify issues, and reduce the potential for mistrial, thereby moving the case toward a conclusion on the actual merits).

Where a shovel has been mentioned (often fleetingly) in a published opinion as presumably relevant, admissible evidence in a capital first degree premeditated murder trial, the shovel was directly related to the charge. *Twilegar v. State*, 42 So. 3d 177, 186 (Fla. 2010) (mentioned shovel in appeal where a shovel was found at the burial site and the victim had been buried while, likely, still breathing); *Cole v. State*, 36 So. 3d 597, 600 (Fla. 2010) (mentioning shovels where the shovels were used to dig a grave and bury the victims alive); *Rodgers v. State*, 934 So. 2d 1207, 1224 (Fla. 2006) (mentioning a list created by the defendant, one of the items on which was a shovel, where the list was made by the defendant which included items "needed to effectuate the plan"). The present case presents no such scenario, in that the shovel at issue was clearly not used in the commission of any of the charged crimes. As such, admitting the shovel would be in violation of Fla. Stat. § 90.104(2), which requires "[i]n cases tried by a jury, a court shall conduct proceedings, to the maximum extent practicable, in such a manner as to prevent inadmissible evidence from being suggested to the jury by any means."

II. ANY ALLEGED PROBABTIVE VALUE OF MR. BURNER'S STATEMENTS ARE SUBSTAINTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE TO MS. ANTHONY.

As stated above, the shovel is irrelevant to the charges in the present case. However, if this Honorable Court does deem testimony regarding the shovel somewhat relevant, such testimony must still be excluded. FLA. STAT. § 90.403 (2009) (Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury or needless presentation of cumulative evidence). In *Huhn v. State*,

511 So. 2d 583, 588 (Fla. 4th DCA 1987), the Court found that evidence related to the purchase of a firearm was unfairly prejudicial, where the firearm was not linked to the commission of the charged offense. The Court stated "evidence concerning the gun and the AFT records of his purchase of this and other guns was inadmissible. He says that because the particular gun was not linked to the offenses charged, it served the purpose only of conveying to the jury that Huhn's having guns tended to support the testimony that he had a gun when engaged in the charged crimes. We agree." *Id.*

In the present case, any purported probative value is even more tenuous, and thereby more worthy of exclusion. There are no allegations that a shovel was used to commit the charged offenses. Further, there is no assertion that the victim was buried. In *Huhn*, the fact that the defendant bought a gun and a gun (albeit a different one) was used in the commission of the crime apparently created some relevancy issue at the trial level. Here, not even such an insufficient nexus exists. *Blair v. State*, 667 So. 2d 834 (Fla. 4th DCA 1996) (stating that in a burglary conviction, among other charges, the introduction of a briefcase and its contents was improper "because the state failed to show a nexus between the briefcase and its contents to the crimes charged in this case, the prejudicial effect of the items outweighed any probative value," although because defense counsel did not preserve an objection, the court found that the issue was not properly preserved) (citing *Huhn*, 511 So. 2d 583; *Barrett v. State*, 605 So. 2d 560 (Fla. 4th DCA 1992). Because any purported relevancy of testimony related to the shovel would create a danger of unfair prejudice, as there is no sufficient nexus between the shovel and the crimes charged, failing to preclude any related testimony to the shovel would seriously and irreparably undermine Ms. Anthony's right to a fair trial.

CONCLUSION

Therefore, in the interests of Casey Marie Anthony's constitutional rights, the Defense respectfully asks this Honorable Court to:

a. Order the Prosecution to file a response motion and memorandum of law within thirty days of the filing of this motion and accompanying memorandum of law;

b. Allow the defense ten business days from the Prosecution's filing of its responsive motion and memorandum of law to file a reply motion and memorandum of law;

c. Set a hearing date, at which time this Honorable Court may hear arguments relating to the motions; and

d. Grant her Motion in Limine to Preclude Certain Testimony of Mr. Brian Burner;

e. If this Honorable Court denies the instant Motion in Limine, Ms. Anthony reserves the right to renew this motion at trial.

Respectfully Submitted,

J. CHENEY MASON, attorney for
CASEY MARIE ANTHONY.

JOSE A. BAEZ, attorney for
CASEY MARIE ANTHONY.

Dated: 12/21, 2010

J. CHENEY MASON, ESQUIRE
Florida Bar No.: 131982
390 North Orange Avenue
Suite 2100
Orlando, Florida 32801-1967
Telephone (407) 843-5785
Facsimile (407) 422-6858