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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2008 DEC 22 PM 3:45
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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| STATE OF ARIZONA<br><br>Plaintiff,<br><br>vs.<br><br>STEVEN CARROLL DEMOCKER,<br><br>Defendant. | No. CR 2008-1339<br><br>Division 6<br><br>MEMORANDUM RE: SIMPSON HEARING |

Pursuant to Article 2, Sections 4 and 22 of the Arizona Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, Rule 7.2 of the Arizona Rules of Criminal Procedure and A.R.S. §§ 13-3961 and 3962, Defendant Steven DeMocker requests that this Court find that State has not met its burden of proving the exception to granting bail and release him pending trial.

**MEMORANDUM OF POINTS AND AUTHORITIES**

The Arizona Constitution provides that all persons accused of a capital offense shall be bailable unless the proof is evident or the presumption great that they committed the offense. *See* Arizona Constitution, Section 2, Article 22. Likewise,

Arizona law provides that where the proof is not evident or the presumption not great that an accused is guilty of the offense, the accused shall be admitted to bail. A.R.S. § 13-3962. A defendant is constitutionally and statutorily entitled to both the presumption of innocence at every stage of a criminal proceeding and a presumption that bail will be granted. *See Simpson v. Owens*, 207 Ariz. 261, 269 85 P.3d 478, 486 (2004). In order to overcome the latter presumption, the State bears the burden of proving that "the proof is evident or presumption great" that the accused, in this case, Mr. DeMocker, committed capital murder. A.R.S. § 13-3961 (A). The State cannot meet this burden and the Court should release Mr. DeMocker on reasonable bail pending trial.

## I. The State Has Failed to Meet Its Burden of Proof Evident or Presumption Great.

A court's consideration of bail must begin with the principle that defendants are presumed innocent. *See Simpson*, 207 Ariz. at 269, citing *Stack v. Boyle*, 342 U.S. 1, 4 (1951). "Ultimately, though, the criminal jurisprudence of the United States and any discussion of bail is founded on a presumption of individual innocence." *Id.* With this presumption as a starting point, the United States Supreme Court has held that bail can only be denied in limited, carefully considered circumstances. *See United States v. Salerno*, 481 U.S. 739 (1987). "[L]iberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Id.* The Arizona Court of Appeals has adopted the reasoning of *Salerno*, noting that the Supreme Court was declaring in *Salerno* that "what is necessary for due process in the determination of bail, a principle applicable not only to the federal government." *Simpson*, 207 Ariz., at 266, fn 5. Due process requires procedural and substantive protections when courts are considering whether to take the exceptional step of denying an accused bail. *Id.* at 267. The burden of proving an exception to granting bail lies with the State. *Id.* at 270.

The State has asserted that Mr. DeMocker broke into Ms. Kennedy's home when she was not there, secreted himself in the laundry room, and then proceeded to attack her with a golf club while she was on the phone with her mother. He apparently did this without leaving a trace of physical evidence. His motive, as alleged by the State, was to avoid paying her precisely the amount of money he offered in settlement during divorce proceedings, which was far less than the sums he had been providing for her living expenses for the prior five years. He also is alleged to have done this out of the blue, with absolutely no prior history of violence toward Ms. Kennedy or anyone else. This theory, based entirely on assumptions, speculation, and innuendo, does not rise to the level required for proof evident or presumption great and the State has therefore failed to meet its heavy burden. Mr. DeMocker should be released pending trial.

## II. Proof Evident or Presumption Great Requires Evidence that is Clear to the Understanding or Judgment, Obvious, Plain, Indubitable, Certain and Conclusive.

The State must prove that "the proof is evident or the presumption great" in order to meet its burden. The Arizona Court of Appeals has clarified this historic legal standard "proof is evident or presumption great" by requiring some variant of the clear and convincing burden of proof or the clear and strong evidence standard. *Id.*, at 271. The *Simpson* court also referred to Rhode Island's statute for clarification which requires "clear and strong evidence" that "leads to a well-guarded and dispassionate judgment that the accused is guilty and probably would be punished capitally." *Id.* citing *Fountaine v. Mullen*, 117 R.I. 262, 366 A.2d 1138 (1976). Additional clarification comes from the *Simpson* court's citation to *In Re Haigler,* where the Arizona Supreme Court explained that the standard requires that the evidence "makes it clear to the understanding and satisfactory to the judgment that the crime committed is murder in the first degree and the presumption is great that the accused is guilty.

*Simpson*, 207 Ariz. 271, citing *In re Haigler*, 15 Ariz. 150, 153, 548 P.2d 1198, 1199 (1976).

In further defining the "proof is evident or the presumption great" burden of proof that the State is required to meet, the *Simpson* court noted that it is appropriate for the trial court to consult a dictionary. *Simpson*, 207 Ariz. at 273, citing *State v. Mahaney*, 193 Ariz. 566, 568, 975 P.2d 156, 158 (App. 1999). The Court cited the Oxford English Dictionary as defining "evident" to mean "[c]lear to the understanding or judgement [sic]; obvious, plain" and "[i]ndubitable, certain, conclusive." *Simpson*, 207 Ariz. at 273 fn. 19. The *Simpson* Court went on to cite Webster's New Universal Unabridged Dictionary defining evident as "visible, clear, out and plain; easy to see or perceive; apparent." *Id.* The Court also noted that synonyms for evident are "plain, visible, conspicuous, manifest, obvious, clear, palpable, apparent, discernable." *Id.*

Finally, the *Simpson* Court concluded that if the State is to establish the exceptional case, the standard of "proof is evident, or presumption great" is met only where the evidence is "*plain* and *clear* to the understanding" and "*satisfactory* and *apparent* to the well-guarded, dispassionate judgment" that the accused committed an enumerated offense. *Simpson*, 207 Ariz. at 274 (emphasis added). The proof must be substantial. *Id.* Without such a showing by the State, no exception to the presumption that bail will be granted can be made, and an accused must be granted bail. A.R.S. § 13-3962.

## III. The Government's Purely Circumstantial Case is Based on Innuendo, Inference and Gossip and Not Actual Evidence and Does Not Rise to the Level of Proof Evident and Presumption Great.

The State does not have, and has not offered, evidence that rises to the level of proof evident and presumption great and cannot therefore meet its burden under the law. After two months of investigating the case, Detective Brown, the lead detective on the

case, candidly admitted in a sworn September 4, 2008 Affidavit in Support of a Search Warrant that the State did not have any evidence tying Mr. DeMocker to the crime scene. "At this time, **we have not been able to locate** the murder weapon, the shoes that created the tracks and **specific evidence tying DeMocker directly to the house**." (Bates No. 001726, emphasis supplied). Detective Brown made this same admission a month later on October 22, 2008, after over three and a half months of investigation, again in a sworn search warrant Affidavit. (Bates No. 001762). Nonetheless, Mr. DeMocker was arrested the very next day, and charged with capital murder.

Based on what has been provided in the State's disclosures to date, the status of the evidence, or the lack thereof with respect to Mr. DeMocker, has not changed since Detective Brown's statement of October 22. And yet, the State has proceeded to charge Mr. DeMocker with capital murder on the basis of circumstantial gossip, inferences and innuendo. Use of such information, as opposed to actual evidence of a crime, does not rise to the level of evidence that is "*plain* and *clear* to the understanding" and "*satisfactory* and *apparent* to the well-guarded, dispassionate judgment" that Mr. DeMocker committed this offense. *Simpson*, 207 Ariz. at 274 (emphasis added). The law requires that the proof be substantial. *Id.* Here the "proof" is non-existent, and Detective Brown has admitted as much, when he said that "we have not been able to locate ... specific evidence tying DeMocker directly to the [crime scene]." The State has failed to meet its burden. As a result, no exception to the presumption that bail will be granted can be made in this case.

For these reasons Mr. DeMocker respectfully requests that the Court find that the State has not met its burden of proof evident or presumption great and release him on bail pending trial. Denying him reasonable bail would, under the circumstances and facts of this case, violate his rights under the Arizona and United States constitutions to bail and to due process of law.

DATED this 22d day of December, 2008.

By: _____

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ORIGINAL of the foregoing filed
this 22d day of December, 2008, with:

Jeanne Hicks,
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COPIES of the foregoing hand delivered
this 22d day of December, 2008 to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
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