Sheila Polk
Yavapai County Attorney
Firm No. 00048700
Jack H. Fields, SBN 012470
Deputy County Attorney

Attorneys for STATE OF ARIZONA

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2009 FEB -4 AM 10: 44
JEANNE HICKS, CLERK
BY: S Smisko

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	CAUSE NO. CR2008-1339 AMENDED MOTION FOR HEARING AND RULING ON PUBLIC RECORDS REQUEST AND FOR *IN CAMERA* REVIEW OF RECORDS Div. 6 Honorable Thomas B. Lindberg

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby move this court for an order authorizing or denying the release of certain public records related to the prosecution of defendant STEVEN CARROLL DEMOCKER and held by the Yavapai County Attorney. The reasons the court should grant this motion are explained in the Memorandum of Points and Authorities attached in support of this motion.

WHEREFORE, the Yavapai County Attorney prays that this court:

1. Inspect the public and unprivileged records held by the Yavapai County Attorney's Office and determine which items are appropriate for immediate public disclosure;

2. For such other relief the court deems fair and just.

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Office of the Yavapai County Attorney
255 E. Gurley Street, Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

RESPECTFULLY SUBMITTED this 4th day of February, 2009.

Sheila Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Jack H. Fields
Deputy County Attorney

COPY of the foregoing mailed
this 4th day of February, 2009, to:

Larry A. Hammond
Anne M. Chapman
Osborn Maledon, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, AZ 85012-2793

And

John M. Sears
107 N. Cortez Street, Suite 104
Prescott, AZ 86301

Attorneys for Defendant

David J. Bodney
Steptoe & Johnson
201 E. Washington Street
Suite 1600
Phoenix, AZ 85004-2382

Attorneys for American Broadcasting Companies, Inc.

Dane Cohen
524 W. 57th Street
New York City, New York 10019

CBS News

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

This case originated as a criminal prosecution of defendant STEVEN CARROLL DEMOCKER (DeMocker) by the Yavapai County Attorney's Office ("YCAO"). DeMocker has been charged primarily with first-degree murder of his former wife Carol Kennedy. Due to the circumstances of Ms. Kennedy's death and the positions of Ms. Kennedy and Mr. DeMocker in the Prescott area community, the prosecution has produced significant interest in the local news media, and some interest from national media.

On January 5, 2009, YCAO received a request from ABC for records contained in YCAO's files regarding the prosecution of Mr. DeMocker. On January 6, 2009 ABC clarified their request to include:

> "All records, reports or documents in any medium (including but not limited to printed, electronic, video, audio, photographic) including Sheriff's investigative reports, crime scene photos or video, video or audio recordings of the suspect, Steven DeMocker, and witnesses, including Katie DeMocker and her boyfriend; other video or photographs created in the course of the investigation; search warrants, charging documents, affidavits, witness statements, autopsy findings and any other reports from the medical examiner, Ruth Kennedy's 911 call recording and any police or emergency dispatch radio traffic recordings related to the murder of Carol Kennedy on July 2, 2008."[1]

[1] See Exhibit "A" (January 6, 2009 letter from Andrew Paparella of ABC News to Penny Cramer of YCAO).

ABC's request was made pursuant to Arizona's Public Records Law, A.R.S. §39-121.01, which requires YCAO to produce, upon request, all public records of which they are custodian, for viewing and copying. While the general rule is that public records must be produced, there are exceptions to this rule, notably for reasons of personal privacy or state necessity.

On January 5, 2009 YCAO received a similar request from the Columbia Broadcasting Company (CBS News), although the CBS request was a general request to "inspect the files."[2]

On January 6, 2009, YCAO filed a "Motion for Hearing and Ruling on Public Records Request and Request for *In Camera* Review of the Document."[3] In their motion, YCAO pointed out that many of the records requested by ABC and CBS News contained graphic images of the deceased victim, and that release of these images might well violate the constitutional rights of the victims in this case. YCAO asked the Court for an *In Camera* inspection of the records. YCAO served Mr. DeMocker, ABC, and CBS News with copies of the motion and a notice of hearing.

On January 9, 2009, the Court considered YCAO's Motion for *In Camera* review. Defendant STEVEN CARROLL DEMOCKER was present with counsel. David Bodney, Esq., appeared on behalf of ABC. Jack H. Fields, Esq., appeared for YCAO. CBS News made no appearance. At the hearing, YCAO provided the Court, ABC's counsel, and the Defendant's counsel with an informal chart entitled "Summary of Public Records with Objections" ("Summary"), which listed the various kinds of documents and other material contained in the records that had been requested by ABC and CBS, an indication as to whether or not YCAO intended to produce the document or material, and if they were declining to do so, the basis for

[2] See Exhibit "B" (January 5, 2009 fax from Dane Cohen of CBS to YCAO.
[3] See Exhibit "C" (January 6, 2009 Motion for Hearing and Ruling on Public Records Request and Request for *In Camera* Review of the Documents).

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the declination.[4] After a very short discussion, all counsel and the Court agreed to continue argument on YCAO's public records motion until a later time. That hearing is currently scheduled for February 10, 2009 at 2:00 PM.

On January 28, 2009, YCAO provided a copy of the Summary to Dane Cohen of CBS News.[5] CBS News continues to remain unrepresented in this matter, and has yet to make an appearance before the Court.

On January 28, 2009, YCAO and ABC reached a verbal agreement on the release of public records. YCAO and ABC agreed that the terms of the Summary would serve as a basis for the release of records in this case; that items to be withheld at this time would include the autopsy photographs, any other photographs (including crime scene photographs) that contained images of the victim in a deceased state, and taped or transcribed interviews of witnesses. No physical evidence will be released. The parties also agreed that material to be released would be redacted of private or sensitive information. YCAO would prepare the material for release within a reasonable time. The parties also agreed that YCAO would notify counsel for Mr. DeMocker of the release at least five (5) business days in advance of the release, to allow Mr. DeMocker's counsel an opportunity to object to release. Finally, the parties agreed that this agreement did not permanently protect material withheld from release, and that ABC would be able to renew its request for release of items currently withheld as future events warranted. While not in full agreement with YCAO's position on the release of records, ABC agreed to stipulate with YCAO on these issues based on judicial economy and the costs of litigation.

The basic terms of the agreement were communicated to Mr. DeMocker's counsel. In response to news of the agreement between YCAO and ABC, on January 30, 2009 DeMocker's

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[4] See Exhibit "D" (Summary of Public Records Request with objections).

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counsel filed a "Position on Public Records Requests."[6] Based on DeMocker's response to the YCAO/ABC agreement, ABC has indicated they will likely seek more disclosure than that outlined in the YCAO/ABC agreement.

STATE'S POSITION ON RELEASE OF RECORDS

As noted in our Summary, YCAO's position is that most of the material held by YCAO is a public record, and disclosure upon request of material redacted of private information is appropriate because it will not seriously impinge upon the rights of the defendant or the victims in this case, and will not be seriously detrimental to the State's interest. *A.R.S. §39-121.01.* Material that would not be released at this time would include autopsy and crime scene photos that contained images of the deceased victim, based on the Arizona Victims' Bill of Rights, *Article 2, §2.1, Arizona Constitution*; physical evidence, based on the serious threat of prejudice to the State's prosecution, *Phoenix Newspapers, Inc. v. Keegan,* 201 Ariz. 344, 348, 35 P.3d 105, 109 (App. 2001); and copies of witness interviews or transcripts of interviews, based on the serious threat of prejudice to the State's prosecution, *Id.*

DEFENDANTS OBJECTION TO RELEASE

While Defendant's "Position" does not formally move the court for relief, it is clearly constitutes an objection by DeMocker to the release of YCAO records, and should be treated as such. Defendant first argues that the release of **<u>any</u>** record in the custody of YCAO will result in a violation of Mr. DeMocker's Fifth, Sixth, and Eight Amendment rights under the U.S. Constitution, as well as a violation of Article 2, §§ 4 and 24 of the Arizona Constitution.[7] DeMocker acknowledges that YCAO and ABC had agreed to withhold certain items and release

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[5] See Exhibit "E" (Fax to Dane Cohen with cover sheet).
[6] See Exhibit "F" (Defendant's Position on Public Records Requests).
[7] See Exhibit "F" page 3 line 17 to page 4 line 22.

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others. DeMocker states that "the release of this information [under the agreement] will violate his [DeMocker's] due process and fundamental fairness rights to a fail trial by an impartial jury under the United States and Arizona Constitutions . . .,"[8] and that release will "only exacerbate the on-going violation of DeMocker's rights."[9] In claiming that his due process rights would be violated by a records release DeMocker makes no distinction between records that were to be withheld pursuant to the YCAO/ABC agreement, and those that were to be released under that agreement. DeMocker thus asserts the release of **any** record would be a violation of DeMocker's constitutional rights.

Despite the lack of the word "objection" or a prayer for relief in their "Position," DeMocker is asserting, in response to a prosecution motion, that a proposed action by the prosecutor will result in violation of fundamental rights of the Defendant. DeMocker's "Position" is obviously an ***objection*** to the release of any YCAO records. DeMocker's "Position" has raised a serious issue that may affect the outcome of this prosecution if not addressed now. The Court should treat DeMocker's pleading as an objection to the release of any of YCAO's records, conduct an *in camera* review of those records, and rule appropriately.

DeMocker next argues that release of certain records will constitute a violation of his privacy, and that of his daughters, because the homicide victim was his ex-wife and the mother of his daughters. DeMocker argues that the accused in a homicide case has a right to prevent the public disclosure of the evidence against him on privacy grounds. DeMocker's apparent argument that he is entitled to have a private (rather than public) trial for 1st degree murder is a bit far-fetched. DeMocker makes a more colorable argument to protect the daughters of the deceased victim from inappropriate disclosure based on their rights as victims under the Arizona Victims'

[8] See Exhibit "F" page 3 lines 10-12

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Bill of Rights as well as privacy concerns. See, *A.H. Belo Corp v. Mesa Police Department*, 202 Ariz. 184, 42 P.3d 615 (App. 2002). Again, the proper course of action would be for the Court to review copies of YCAO's material, determine if they constitute public records, and to the extent they do, balance the presumption against disclosure against the rights of Mr. DeMocker to a fair trial, the rights of the victims in this case under the Arizona Victims' Bill of Rights, and the State's legitimate public interest in preserving witness testimony.

CONCLUSION

This Court should consider the "Position" filed by DeMocker as a formal objection to release of any and all material held by YCAO in this matter. This Court should review all disputed material *in camera* and determine what is a public record, and what is subject to disclosure under A.R.S. §39-121.01. YCAO suggests the Court follow the release terms outlined in the Summary.[10] Finally, this motion addresses only the requests of ABC and CBS News for records under A.R.S. §39-121.01. Nothing in this motion, the "Position" or any order resulting from this court should restrain the State from releasing such information to such persons as they deem appropriate in pursuit of their official duties.

[9] See Exhibit "F" page 4 line 17.
[10] See Exhibit "D"

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ATTENTION: PENNY CRAMER

January 6th, 2008

Penny Cramer
Administrative Assistant
Yavapai County Attorney's Office
Via Fax: 928-771-3110.

Dear Penny:

I have filled out a records request form it is the 2nd page of this fax.

Please note ABC News is requesting all records related to the DeMocker case, including but not limited to:

All records, reports, or documents in any medium (including but not limited to printed, electronic, video, audio, photographic) including Sheriff's investigative reports, crime scene photos or video, video or audio recordings of the suspect, Steven DeMocker, and witnesses, including Katie DeMocker and her boyfriend; other video or photographs created in the course of the investigation; search warrants, charging documents, affidavits, witness statements, autopsy findings and any other reports from the medical examiner. Ruth Kennedy's 911 call recording and any police or emergency dispatch radio traffic recordings related to the murder of Carol Kennedy on July 2, 2008.

This request should serve as notice that we also request any documents that fall under the scope of the Arizona Public Records Law (A.R.S. 39-121-125) related to this case that are created in the future.

Please also note, we have asked that the fee of .25 per copy be waived for this request. This request is for a non-commercial use. If this waiver request cannot be accommodated, ABC requests some more reasonable fee be negotiated.

If written documents exist in digital form, we ask that you save paper and provide the documents in digital form, via email or some other agreed upon means.

Please feel free to contact me with any questions about this request at 212-456-5968 or Andrew.Paparella@ABC.com

Best Regards,

Andrew Paparella
Producer, ABC News 20/20

147 Columbus Avenue New York, NY 10023-6298 (212) 456-7777 Fax (212) 456-7644

Yavapai County Attorney

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SHEILA POLK
Yavapai County Attorney

REQUEST FOR ACCESS TO PUBLIC RECORD

Pursuant to A.R.S. §§ 39-121 and 39-121.01:

I am herewith requesting access to the following-described public record in the possession of the Yavapai County Attorney's Office:

Request Date: 1.6.2009 Date of Violation: 7.2.2008

Agency: Sheriff DR#: 08-029129

Suspect: STEVEN DeMocker Adult ✓ Juvenile ____

Victim: CAROL Kennedy

Location of Occurrence/Precinct: PRESCOTT

Additional Comments/Information PLEASE CONTACT me to discuss options for delivery. CAN YOU email DIGITAL COPIES? OR FTP them?

In accordance with A.R.S. § 39-121.03, I certify that these records are not being requested for a commercial purpose.

Name: ANDREW PAPARELLA ABC NEWS
Address: 147 COLUMBUS AVE.
NEW YORK, NY 10023
Phone: 212.456.5968

Signature:

***Please note: Records will be supplied within a reasonable amount of time – usually within 7-10 working days. There is a charge of $0.25 per page.** PLEASE WAIVE FE

OFFICE USE ONLY

Date received: ____ Attorney reviewing: ____
Secretary: ____ CA File No.: ____
Comments:

Yavapai County Attorney

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(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

F EQUEST FOR ACCESS TO PUBLIC RECORD

Pursuant to A. .S. §§ 39-121 and 39-121.01:

I am herewith equesting access to the following-described public record in the possession of the Yavapai Cour Attorney's Office:

Request Date: 1/5/08 Date of Violation: Death: July 2, 2008 Arrest: Oct 23, 2008

Agency: _____ DR#: _____

Suspect: S even Democker Adult ✓ Juvenile _____

Victim: C rol Kennedy

Location of C currence/Precinct: Prescott

Additional Cc nments/Information _____

In accordance with A.R.S. § 39-121.03, I certify that these records are not being requested for a commercial p pose.

Name: Dane Cohen (48 Hours)
Address: 524 W 57th Street
NY, NY 10019
Phone: 212-975-6813
Signature: Dane Cohen

***Please note Records will be supplied within a reasonable amount of time – usually within 7-10 working days. There is a charge of $0.25 per page.**

OFFICE USE ONLY

Date receive _____ Attorney reviewing: _____
Secretary: _____ CA File No.: _____
Comments:

Rec'd 1-5-09

(Revised 5/03) 2008

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IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DeMOCKER,** **Defendant.**	**CR 2008-1339** **Division 6** **MOTION FOR HEARING AND RULING ON PUBLIC RECORDS REQUEST AND REQUEST FOR *IN CAMERA* REVIEW OF THE DOCUMENTS**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby move this Court for an *in camera* review of certain photographs of the crime scene, autopsy and skull reconstruction to determine whether they are subject to release pursuant to the Arizona Public Records Law. The State has received two requests for all records associated with this case from major media sources and anticipates many more in the days ahead. It is the State's position that public release of many of the photographs and documents will violate the victims' rights as guaranteed by the Arizona Constitution.

"Paragraphs one through nine of the VBR not only create rights, but create rights unique and peculiar to crime victims." *State ex rel. Napolitano v. Brown,* 194 Ariz. 340, 343, 982 P.2d 815, 818 (1999). The portions of the Victims' Bill of Rights at issue here, Ariz. Const. Art. II, §§ 2.1(A)(1) and (12)(C) , provide:

(A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

. . .

(1) To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

(12)(C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative ...

Many photographs contain graphic and sometimes gruesome depictions of the procedures followed during the autopsy and reconstruction processes. Public release of these items will violate the victims' right to be treated with respect and dignity and may result in additional trauma and emotional injury to Ms. Kennedy's family, specifically Carol's elderly mother and her daughters. Additionally, a review of case law on this issue suggests that Defendant has a right to object and be heard prior to public disclosure.

Accordingly, the State respectfully requests that the assigned court set an expedited hearing on the public records request.

Respectfully submitted this 6 day of January, 2009.

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

By _____
Mark K. Ainley
Deputy County Attorney

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///

///

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Copy of the foregoing delivered/mailed
this 6 day January, 2009 to:

Honorable Thomas B. Lindberg
Division 6
Yavapai County Courthouse

John Sears
107 North Cortez Street
Prescott, Arizona 86301
and
Larry Hammond
Anne Chapman
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Phoenix, AZ 85012-2794

Attorneys for Defendant

Dane Cohen
CBS/48 Hours
523 West 57th Street
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Andrew Paparella
ABC News
147 Columbus Avenue
New York, NY 10023-6298

By: _____

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, v. STEVEN CARROLL DeMOCKER, Defendant.	Case No. CR 2008-1338 ORDER FOR EXPEDITED HEARING ON PUBLIC RECORDS REQUEST Assigned to Division 6

This Court, having considered the State's motion for in camera review of records and expedited hearing on public records request and good cause appearing therefor,

IT IS HEREBY ORDERED that a hearing on the public records request in this matter is set for the _____ day of _____, 2009, at _____ ___.m.

DATED: _____

_____
Judge of the Superior Court

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Phone: (928) 771-3344 Facsimile: (928) 771-3110

STATE V. STEVEN CARROLL DEMOCKER
CR 2008-1339
Summary of Public Records Request

Description	Summary of Content	State's Position on Public Release	Object to Release	Court Ruling
Investigative Reports	Primary investigation reports resulting in charges against the defendant	Will be released when redacted of private information.		
Crime scene photographs and other non-autopsy photographs	Photographs of the crime scene and other investigative photographs, excluding photographs taken during the autopsy of the victim.	Will be released when redacted of private information.		
Search warrants, officer affidavits, charging documents	Documents used to gain authority for investigative searches, and documents prepared for charging.	Will be released when redacted of private information.		
Autopsy report	Report of the forensic autopsy of the victim prepared by the Medical Examiner(s)	Will be released when redacted of private information.		
Defendant statements	Audio, written or transcribed statements of the defendant	Will be released when redacted of private information.		
Documentary evidence	Financial records of defendant and victim, other documentary evidence gathered in the course of investigation	Will be released when redacted of private information.		
911 recording	Recording of the 911 telephone call of Ruth Kennedy	Will be released.		
Autopsy Photographs	Graphic photographs of the forensic autopsy of the deceased victim	Requested by ABC News (20/20) and CBS News (48 hours). Autopsy photographs are public records. However they are not subject to release because release would violate constitutional provisions of the Victims'	State	

		Bill of Rights. *Article 2, §2.1, Arizona Constitution.* Under the Victims' Bill of Rights, victims in this case include the deceased victim, and the elderly mother and children of the deceased victim. *Id at §2.1 (C).* Release of photographs would result in the widespread public circulation of images of the deceased victim in an extremely undignified state. Release of the Autopsy Photographs would be a disrespectful and abusive act to the deceased victim, as well as the elderly mother and daughters of the deceased. *Id at §2.1 (A) (1); A.H. Belo Corp. v. Mesa Police Dept., 202 Ariz. 184, 188, 42 P.3d 615, 619 (App. 2002).*		
Physical Evidence	Various physical evidence gathered by the State during investigation	Requested by CBS News (48 hours). Physical evidence is not a public record. *A.R.S. §41-1350.* However, physical evidence is not subject to release because release of physical evidence would be extremely prejudicial to the State's case. Distribution to others would ruin the chain of custody necessary to prove the reliability of the evidence, rendering the evidence useless. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	
Witness interviews and statements	Recorded interviews of witnesses that may be called at trial conducted in the course of the criminal investigation.	Requested by ABC News (20/20) and CBS News (48 hours). The witness interviews are public records. However, they are not subject to release at this time as release would be detrimental to the integrity of witness testimony at trial. Release would allow witnesses to compare their versions of events, which will damage the reliability of the testimony of witnesses at trial. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	

YAVAPAI COUNTY ATTORNEY'S OFFICE

SHEILA POLK, COUNTY ATTORNEY
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(928) 567-7717 (Verde Criminal Division) - Facsimile (928) 567-7745
(928) 771-3338 (Civil Division) - Facsimile (928 771-3375)
(928) 771-3485 (VictimWitness Division)
(928) 771-3490 (Bad Check Division)

FACSIMILE TRANSMITTAL SHEET

TO: Dane Cohen	FROM: Jack H. Fields
COMPANY	DATE: 1/28/09
FAX NUMBER: (212) 975-5000	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER:	SENDER'S REFERENCE NUMBER.
RE: State v. Steven Democker Summary of Public Records Request	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS.

The information contained in this transmission may contain privileged and confidential information. It is intended only for the use of the person(s) named above. If you are not the intended recipient you are hereby notified that any review, dissemination, distribution or duplication of this communication is strictly prohibited.

If you are not the intended recipient, please contact Kathy by telephone or mail and destroy all copies of the original message.

To reply to the sender directly, please call (928) 777-7132 – Kathy Williamson, Legal Secretary.

Prescott Office: 255 E. Gurley Street, Suite 300, Prescott, AZ 86301
Verde Valley Office: 3505 W. Hwy 260, Suite 107, Camp Verde, AZ 86322

********** -IND. XMT JOURNAL- ********** DATE JAN-28-2009 ***** TIME 13:09 ********

DATE/TIME	= JAN-28-2009 13:07
JOURNAL No.	= 03
COMM. RESULT	= OK
PAGE(S)	= 003
DURATION	= 00:00:40
FILE No.	= 658
MODE	= TRANSMISSION
DESTINATION	= 912129755000--311578
RECEIVED ID	=
RESOLUTION	= STD

-YAV CTY ATTY -

********** - - ***** - 520 567 7745- *********

STATE V. STEVEN CARROLL DEMOCKER
CR 2008-1339
Summary of Public Records Request

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		Bill of Rights. *Article 2, §2.1, Arizona Constitution.* Under the Victims' Bill of Rights, victims in this case include the deceased victim, and the elderly mother and children of the deceased victim. *Id at §2.1 (C).* Release of photographs would result in the widespread public circulation of images of the deceased victim in an extremely undignified state. Release of the Autopsy Photographs would be a disrespectful and abusive act to the deceased victim, as well as the elderly mother and daughters of the deceased. *Id at §2.1 (A) (1); A.H. Belo Corp. v. Mesa Police Dept., 202 Ariz. 184, 188, 42 P.3d 615, 619 (App. 2002).*		
Physical Evidence	Various physical evidence gathered by the State during investigation	Requested by CBS News (48 hours). Physical evidence is not a public record. *A.R.S. §41-1350.* However, physical evidence is not subject to release because release of physical evidence would be extremely prejudicial to the State's case. Distribution to others would ruin the chain of custody necessary to prove the reliability of the evidence, rendering the evidence useless. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	
Witness interviews and statements	Recorded interviews of witnesses that may be called at trial conducted in the course of the criminal investigation.	Requested by ABC News (20/20) and CBS News (48 hours). The witness interviews are public records. However, they are not subject to release at this time as release would be detrimental to the integrity of witness testimony at trial. Release would allow witnesses to compare their versions of events, which will damage the reliability of the testimony of witnesses at trial. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	

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Attorneys for Defendant

COPY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. CR 2008-1339 Division 6 DEFENDANT'S POSITION ON PUBLIC RECORDS REQUESTS Honorable Thomas B. Lindberg

Defendant Steven C. DeMocker, by and through counsel, hereby provides the Court with his position with respect to the public records requests of ABC and CBS and the agreement between ABC and the Yavapai County Attorney's Office regarding ABC's request.

BACKGROUND

On January 8, 2009, producers from ABC's 20/20 and CBS's 48 Hours Mystery television programs made separate requests for access to public records from the Yavapai County Attorney, seeking records "in the possession of the Yavapai County

Attorney's Office" pursuant to Arizona Public Records Law, A.R.S. §39-121 *et seq.* ABC indicated it was seeking:

> All records, reports, or documents in any medium (including but not limited to printed, electronic, video, audio, photographic) including Sheriff's investigative reports, crime scene photos or video, video or audio recordings of the suspect, Steven DeMocker, and witnesses, including Katie DeMocker (sic) and her boyfriend; other video or photographs created in the course of the investigation; search warrants, charging documents, affidavits, witness statements, autopsy findings and any other reports from the medical examiner. Ruth Kennedy's 911 call recording and any police or other emergency dispatch radio traffic recordings related to the murder of Carol Kennedy on July 2, 2008.

(See Exhibit A). On January 23, 2009, ABC amended its request to exclude autopsy photos, crime scene photos showing the victim, Ms. Kennedy, or skull x-rays. (See Exhibit B).

CBS did not specify any particular records. (See Exhibit C). Both ABC and CBS submitted request forms certifying that the requests were not for commercial purposes pursuant to A.R.S. § 39-121.03.

On January 8, 2009 the Yavapai County Attorney's Office moved for an *in camera* review of certain photographs of the crime scene, the autopsy and items regarding skull reconstruction to determine whether they are subject to release pursuant to the Arizona Public Records Law. The County objected to release of these materials on the grounds that their release would violate victim's rights. This Court set a hearing on February 6, 2009 to address the issues raised by the request. ABC's counsel, Mr. Bodney requested and was granted an unopposed continuance to February 10, 2009.

On January 28, 2009, Jack Fields of the Yavapai County Attorney's Office notified counsel that he and ABC had reached an agreement in principle and forwarded a chart outlining the agreement. (See Exhibit D). Essentially, the agreement is that no witness statements in the form of audio, video or written transcript, other than Mr.

DeMocker's, will be released and no photographs or video that include the body of Ms. Kennedy will be released. However, the other requested items, including photographs and video of the bloody scene, will be released. Other items to be released pursuant to the agreement include autopsy findings and any other reports from the medical examiner, the recording of the 911 call of Ruth Kennedy, and police and emergency dispatch radio traffic recordings. The County has indicated that it intends to withdraw its motion as a result of this agreement.

Mr. DeMocker hereby states his position with respect to these public records requests and the agreement between ABC and the Yavapai County Attorney's Office. Mr. DeMocker is concerned that release of this information will violate his due process and fundamental fairness rights to a fair trial by an impartial jury under the United States and Arizona Constitutions and that release of photographs and audio and video recordings would violate his privacy rights and the privacy rights of his minor children.

ARGUMENT

I. Release Will Violate Mr. DeMocker's Fifth, Sixth and Eighth Amendment Rights.

Release of the requested and agreed upon information will violate Mr. DeMocker's Fifth, Sixth and Eighth Amendment rights and his rights under the Arizona Constitution, article II, Section 4 and 24. Pursuant to due process and fundamental fairness, Mr. DeMocker is entitled to a fair trial by an impartial jury under both the Arizona and United States Constitutions. Ariz. Const. art. II, § 4, 24; U.S. Const. Amend. V, VI, XIV. Pretrial publicity violates this right when it pervades the court proceedings to the extent that prejudice can be presumed or when there is actual prejudice by invasion of the objectivity of the jurors. *See State v. Cruz*, 219 Ariz. 149, 156, 181 P.3d 196, 203 (2008) (internal quotations omitted). When pretrial publicity rises to this level, it renders a fair trial by an impartial jury virtually impossible. *See e.g.*

Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985) (overwhelming publicity in county with population of 7000 led to finding that prejudice from pretrial publicity was presumed); *see also State v. Bible,* 175 Ariz. 549, 858 P.2d 1152 (1993) (citing *Coleman*). Equally important, in this case, all decisions must be considered in light of the fact that the death penalty "is a punishment different from all other sanctions in kind rather than degree." *Woodson v. North Carolina*, 428 U.S. 2890, 303-304 (1976). The Supreme Court has held consistently that because death is uniquely severe and irreversible, "the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed." *Herrera v. Collins*, 506 U.S. 390, 405 (1993).

A "google" search for the terms "Steven DeMocker" and "arrested" generates 797 results as of January 26, 2009. A number of the written comments from the Prescott community have been removed by news organizations as they violate terms of use policies because of their venomous attacks on Mr. DeMocker. Prescott is a small community with a population of just under 34,000 people. Media saturation at such an early stage of the proceedings already seriously threatens Mr. DeMocker's rights under the Fifth, Sixth and Eighth Amendments to the United States Constitution and his attendant rights under the Arizona Constitution. Release of the requested information would only exacerbate the on-going violation of DeMocker's rights. Further media coverage, replete with bloody crime scene photos and video, and recordings of Ms. Kennedy's 911 call, radio dispatch traffic and Mr. DeMocker's recorded statements will only serve to overwhelm the Prescott community, making it impossible for Mr. DeMocker to receive the fair trial by an impartial jury to which he is entitled by law.

II. Release of Documents, Photographs, and Audio and Video Recordings Will Violate Mr. DeMocker and his Daughter's Privacy Rights.

Release of the requested and agreed documents, photographs and audio and video recordings will violate the privacy rights of Mr. DeMocker and his young daughters, Charlotte and Katie DeMocker. Specifically, both Mr. DeMocker and his two children, Katie and Charlotte DeMocker (who is a minor), have a cognizable and protectable privacy interest in preventing the public release of crime scene photos or videos; video or audio recordings of Mr. DeMocker; other videos or photographs created in the course of the investigation; autopsy findings and any other reports from the medical examiner and the forensic anthropologist employed to reconstruct the victim's skull; and Ruth Kennedy's 911 call recording and any police or other emergency dispatch radio traffic recordings related to the murder of Carol Kennedy on July 2, 2008. These documents, photos and audio and video recordings, including those that do not include the victim, include many bloody, gruesome images and descriptions that are deeply disturbing.

The DeMockers' privacy interests should outweigh any general public interest in disclosure. Where privacy interests do outweigh the general public interest in disclosure, an officer or custodian may rightfully refuse inspection. *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984). *See e.g. A.H. Belo Corp. v. Mesa Police Department*, 202 Ariz. 184, 42 P.3d 615 (App. Div. 1 2002). In *Belo* the court held that a family's privacy interest in the audio recording of a 911 call outweighed the presumption favoring disclosure. *Id.* The family in *Belo* explained that disclosure should be prohibited because the 911 call would be difficult to hear, would remind them of the painful day when

their child was injured and would interfere with the family's healing. *Belo,* 202 Ariz. at 187, 42 P.3d at 618. The court found that the family's privacy interest trumped the presumptive public interest in disclosure. *Belo,* 202 Ariz. at 188, 42 P.3d at 619. "Indeed, we cannot imagine a more fundamental concern or one more directly associated with the intimate aspects of identity and family autonomy than the desire to withhold from public display the recorded suffering of one's child." *Id.* The court found that release of the transcript of the call was sufficient, while acknowledging it was not what the requestor wanted and did not have the dramatic properties of an audio tape. *Id.* The court noted that the public interest in receiving access to public records "decreases when alternative means of receiving the information are available." *Id.* (citing *Scottsdale Unified Sch. Dist. V. KPNX,* 191 Ariz. 297, 303, 955 P.2d 534, 540 (1998) (internal quotations omitted)).

Here the DeMockers' have privacy interests similar to the family in *Belo* and alternative means of receiving the information are likewise available. Katie and Charlotte DeMocker have lost their mother and Steven DeMocker has lost the woman he was married to for over twenty years and the mother of his children. From their perspective, the crime remains unsolved and is still very fresh, raw and painful. Photographs or videos of the bloody scene, even without Ms. Kennedy in the them; autopsy or forensic examination reports; their grandmother's 911 call describing their mother's last words; radio dispatches of police discussing the scene of their mother's death; and video or audio recordings of Mr. DeMocker, regarding the death of their mother would be extremely difficult to hear, would remind them of that very painful day and would make it impossible for them to continue with their healing. The court should conclude, as in *Belo,* that privacy interests here outweigh the general presumption of

disclosure. Additionally, transcripts of some of this information can be made available and should be sufficient to meet the public interest in receiving access to the public record, as in *Belo*.

Lastly, the County Attorney's Office and ABC have agreed that witness interviews, other than Mr. DeMocker's, will not be released because release "would allow witnesses to compare their versions of events, which will damage the reliability of the testimony of witnesses at trial" citing *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App. 2001). The same is true with respect to release of Mr. DeMocker's interview. At this point, the state has been ordered to return to the grand jury to seek a true bill against Mr. DeMocker. Mr. DeMocker's interview should be treated similarly to all other witnesses unless and until he is re-indicted.

DATED this 30th day of January, 2009.

By _____
John Sears

OSBORN MALEDON, P.A.

Larry A. Hammond
Anne M. Chapman
2929 N. Central Avenue, Suite 2100
Phoenix, Arizona 85012-2793
Attorneys for Defendant

ORIGINAL of the foregoing filed
this 30th day of January, 2009, with:

Jeanne Hicks,
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 30th day of January, 2009 to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Mark K. Ainley, Esq.
Office of the Yavapai County Attorney
255 E. Gurley
Prescott, AZ 86301-3868

Jack Fields, Esq.
Office of the Yavapai County Attorney
255 E. Gurley
Prescott, AZ 86301-3868

COPIES of the foregoing mailed by U.S.Mail
this 30th day of January, 2009 to:

David Bodney
Steptoe & Johnson
Collier Center
201 East Washington Street, 16th Floor
Phoenix AZ 85004

2356429v1

ATTENTION: PENNY CRAMER

January 8th, 2008

Penny Cramer
Administrative Assistant
Yavapai County Attorney's Office
Via Fax: 928-771-3110.

Dear Penny:

I have filled out a records request form it is the 2nd page of this fax.

Please note ABC News is requesting all records related to the DeMocker case, including but not limited to:

All records, reports, or documents in any medium (including but not limited to printed, electronic, video, audio, photographic) including Sheriff's investigative reports, crime scene photos or video, video or audio recordings of the suspect, Steven DeMocker, and witnesses, including Katie DeMocker and her boyfriend; other video or photographs created in the course of the investigation; search warrants, charging documents, affidavits, witness statements, autopsy findings and any other reports from the medical examiner. Ruth Kennedy's 911 call recording and any police or emergency dispatch radio traffic recordings related to the murder of Carol Kennedy on July 2, 2008.

This request should serve as notice that we also request any documents that fall under the scope of the Arizona Public Records Law (A.R.S. 39-121-125) related to this case that are created in the future.

Please also note, we have asked that the fee of .25 per copy be waived for this request. This request is for a non-commercial use. If this waiver request cannot be accommodated, ABC requests some more reasonable fee be negotiated.

If written documents exist in digital form, we ask that you save paper and provide the documents in digital form, via email or some other agreed upon means.

Please feel free to contact me with any questions about this request at 212-456-5968 or Andrew Paparella@ABC.com

Best Regards,

Andrew Paparella
Producer, ABC News 20/20

147 Columbus Avenue New York, NY 10023-6298 (212) 456-7777 Fax (212) 456-7644

Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

REQUEST FOR ACCESS TO PUBLIC RECORD

Pursuant to A.R.S. §§ 39-121 and 39-121.01:

I am herewith requesting access to the following-described public record in the possession of the Yavapai County Attorney's Office:

Request Date: 1·6·2009 Date of Violation: 7·2·2008

Agency: Sheriff DR#: 08-029129

Suspect: STEVEN DeMocker Adult ✓ Juvenile ____

Victim: CAROL [redacted] Kennedy

Location of Occurrence/Precinct: PRESCOTT

Additional Comments/Information: PLEASE CONTACT me to DISCUSS OPTIONS for delivery. CAN YOU email DIGITAL COPIES? OR FTP them?

In accordance with A.R.S. § 39-121.03, I certify that these records are not being requested for a commercial purpose.

Name: ANDREW PAPARELLA ABC NEWS
Address: 147 COLUMBUS AVE.
NEW YORK, NY 10023
Phone: 212.456.5968

Signature: [signature]

*Please note: Records will be supplied within a reasonable amount of time – usually within 7-10 working days. There is a charge of $0.25 per page. PLEASE WAIVE fee!

OFFICE USE ONLY

Date received: ____ Attorney reviewing: ____
Secretary: ____ CA File No.: ____
Comments:

(Revised 5/02)

ATTENTION: PENNY CRAMER

January 23rd, 2008

Penny Cramer
Administrative Assistant
Yavapai County Attorney's Office
Via Fax: 928-771-3110.

Dear Penny:

Please consider this official notification that ABC News 20/20 would like to amend its original records request under Arizona Public Records Law (A.R.S. 39-121-125) in the DeMocker case as follows:

We do not want crime scene photos showing the victim, or autopsy photos, or skull x-rays.

Please feel free to contact me with any questions about this request at 212-456-5968 or Andrew.Paparella@ABC.com

Best Regards,

Andrew Paparella
Producer, ABC News 20/20

48 HOURS MYSTERY

CBS NEWS 524 W. 57th St. New York, NY 10019 Tel: 212-975-4848 Fax: 212-975-5797

DATE: 1/5/08

TO: Penny Cramer

FAX #: 928-771-3110

FROM: Jane Cohen

RE: State of Arizona v. Stephen Democker

COMMENTS:

Thanks for your help Penny.
Please let me know if you need any additional information.

PHONE # OF SENDER: 212-975-6813

PAGES (INCL. COVER SHEET): 2

TOTAL P.05

Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

F EQUEST FOR ACCESS TO PUBLIC RECORD

Pursuant to A. .S. §§ 39-121 and 39-121.01:

I am herewith equesting access to the following-described public record in the possession of the Yavapai Cour · Attorney's Office:

Request Date: 1/5/08 Date of Violation: Death: July 2, 2008 Arrest: Oct 23, 2008

Agency: _____ DR#: _____

Suspect: S even Democker Adult ✓ Juvenile _____

Victim: C ro l Kennedy

Location of C urrence/Precinct: Prescott

Additional Co ments/Information _____

In accordanc vith A.R.S. § 39-121.03, I certify that these records are not being requested for a commercial p pose.

Name: Dane Cohen (48 Hours)
Address: 524 W 57th Street
NY, NY 10019
Phone: 212-975-6813
Signature: Dane Cohen

*Please note **Records will be supplied within a reasonable amount of time – usually within 7-10 working days. There is a charge of $0.25 per page.**

OFFICE USE ONLY

Date receive _____ Attorney reviewing: _____
Secretary: _____ CA File No.: _____
Comments:

Rec'd 1-8-09 @ 1:00pm

(Revised 3/03)

STATE V. STEVEN CARROLL DEMOCKER
CR 2008-1339
Summary of Public Records Request

Description	Summary of Content	State's Position on Public Release	Object to Release	Court Ruling
Investigative Reports	Primary investigation reports resulting in charges against the defendant	Will be released when redacted of private information.		
Crime scene photographs and other non-autopsy photographs	Photographs of the crime scene and other investigative photographs, excluding photographs taken during the autopsy of the victim.	Will be released when redacted of private information.		
Search warrants, officer affidavits, charging documents	Documents used to gain authority for investigative searches, and documents prepared for charging.	Will be released when redacted of private information.		
Autopsy report	Report of the forensic autopsy of the victim prepared by the Medical Examiner(s)	Will be released when redacted of private information.		
Defendant statements	Audio, written or transcribed statements of the defendant	Will be released when redacted of private information.		
Documentary evidence	Financial records of defendant and victim, other documentary evidence gathered in the course of investigation	Will be released when redacted of private information.		
911 recording	Recording of the 911 telephone call of Ruth Kennedy	Will be released.		
Autopsy Photographs	Graphic photographs of the forensic autopsy of the deceased victim	Requested by ABC News (20/20) and CBS News (48 hours). Autopsy photographs are public records. However they are not subject to release because release would violate constitutional provisions of the Victims'	State	

		Bill of Rights. *Article 2, §2.1, Arizona Constitution.* Under the Victims' Bill of Rights, victims in this case include the deceased victim, and the elderly mother and children of the deceased victim. *Id at §2.1 (C).* Release of photographs would result in the widespread public circulation of images of the deceased victim in an extremely undignified state. Release of the Autopsy Photographs would be a disrespectful and abusive act to the deceased victim, as well as the elderly mother and daughters of the deceased. *Id at §2.1 (A) (1); A.H. Belo Corp. v. Mesa Police Dept., 202 Ariz. 184, 188, 42 P.3d 615, 619 (App. 2002).*		
Physical Evidence	Various physical evidence gathered by the State during investigation	Requested by CBS News (48 hours). Physical evidence is not a public record. *A.R.S. §41-1350.* However, physical evidence is not subject to release because release of physical evidence would be extremely prejudicial to the State's case. Distribution to others would ruin the chain of custody necessary to prove the reliability of the evidence, rendering the evidence useless. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	
Witness interviews and statements	Recorded interviews of witnesses that may be called at trial conducted in the course of the criminal investigation.	Requested by ABC News (20/20) and CBS News (48 hours). The witness interviews are public records. However, they are not subject to release at this time as release would be detrimental to the integrity of witness testimony at trial. Release would allow witnesses to compare their versions of events, which will damage the reliability of the testimony of witnesses at trial. *Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 348, 35 P.3d 105, 109 (App 2001).*	State	