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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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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. P1300CR20081339 Div. 6 **REPLY IN SUPPORT OF MOTION TO PRECLUDE TESTIMONY OF EXPERTS PURSUANT TO ARIZONA RULE OF EVIDENCE 702** (Oral Argument Requested)

In its response, the State fails to respond to the most important elements of Steven DeMocker's motion to preclude the testimony of experts pursuant to Arizona Rule of Evidence 702. Not only does the State completely ignore all case law cited in the motion, the State does not address the NAS Report at even a superficial level. Accordingly, Mr. DeMocker requests that the Court: (1) exclude any shoe print

identification testimony from Sergeant D. Winslow, Detective T. Kennedy, and Commander S. Mascher; (2) preclude Sergeant D. Winslow, Detective T. Kennedy, and Commander S. Mascher from offering any opinion based upon photographs rather than recollection; and (3) exclude the tire track and shoe print testimony of Statedesignated experts John B. Hoang and Eric Gilkerson unless the State can prove that impression evidence is sufficiently grounded in science. This Reply is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Modification of motion based on recent court rulings

Since this motion was filed, the Court has issued rulings affecting the testimony of Winslow and Mascher. During the April 13, 2010 hearing, the Court precluded Mascher from making any statement regarding the similarity of the shoe prints found to the soles of the La Sportiva shoe. (April 13, 2010 Hearing on Pretrial Motions; April 13, 2010 minute entry) The Court also precluded Winslow from testifying as to the pattern of the shoe unless he had a recollection of the pattern without relying on photographs to refresh his memory. (*Id.*) In addition, because Winslow cannot testify as an expert, the Court precluded Winslow "from testifying about what particular shoe made the imprint." (*Id.*)

Based on the same reasoning, Mr. DeMocker requests that the Court similarly preclude testimony from Mascher and Kennedy unless they have a recollection of the shoe print pattern without relying on photographs. In addition, Mr. DeMocker requests that the Court preclude testimony from Winslow and Kennedy regarding the similarity of any shoe prints to the soles of the La Sportiva shoe. The Court's reasoning applies with equal force to all non-expert witnesses. As the Court recognized, a witness must be a shoe print expert in order to "testify as to a pattern of what he saw or similarity to a La Sportiva shoe that was found." (April 13, 2010 hearing) The Court found at the

hearing on April 13, 2010 that neither Winslow nor Mascher are qualified as shoe print experts because none of these witnesses has sufficient training. Because they cannot qualify as experts, the Court must limit Winslow and Mascher to testifying only as to their recollection; they cannot be permitted to offer opinions based upon photographs. Because Kennedy is similarly deficient in expertise regarding shoe prints, Mr. DeMocker requests that the Court similarly restrict her testimony regarding the similarity of shoe prints as well as any opinions based upon photographs.

II. Expert opinion on impression evidence

The State has confirmed in its response that it intends to offer the following expert testimony on impression evidence: (1) the testimony of Hoang that similar tire tread patterns exist between the tire tracks depicted in photographs taken behind of the victims house and those made by the tires of Mr. DeMocker's bicycle; (2) the testimony of Gilkerson that the shoe impressions at the scene are most comparable with the soles found on three models of La Sportiva shoes; and (3) the testimony of Mascher regarding the bicycle tracks and shoe impressions found behind the Bridal Path residence.

Although the State's brief is purportedly a response to Mr. DeMocker's motion, it fails to address the most crucial argument made in the motion. Mr. DeMocker's motion to preclude testimony is premised in large part upon the groundbreaking National Academy of Sciences exhaustive and fully documented report entitled "Strengthening Forensic Science in the United States: A Path Forward." National Research Council, Strengthening Forensic Science in the United States (The National Academies Press 2009) (hereafter the "NAS Report") (hereafter the "NAS Report"). The motion documents the dramatic reaction of both courts and academics to the Report

in calling for a more stringent evaluation of the science admitted in courtrooms. Yet, the State's response makes no mention of the NAS report.[1]

The State may choose to ignore the serious implications the NAS Report has on the field of forensic impression evidence, but that will not diminish the Report's impact in any way. The NAS Report has revolutionized the approach that all courts must take in evaluating forensic evidence and this court is no exception. While Mr. DeMocker's motion recognizes that Arizona courts have heretofore held that expert comparison of shoe prints to a defendant's shoes does not involve scientific methods or tools and, therefore, does not require any analysis under *Frye,*[2] the motion nevertheless argues that this assumption is incorrect and must be reevaluated because the NAS Report, written by the nation's leading experts in forensic sciences, treats impression evidence as a distinct discipline of forensic science and analyzes it as such. The issue of whether the forensic discipline of impression evidence should receive blanket admission into courtrooms is an issue that this Court must tackle head on. The call for reform is gaining momentum and this responsibility will not go away.

The Court must independently evaluate whether impression evidence merits any longer the deference it has historically received. Mr. DeMocker argues that it does not. Impression evidence is no longer generally accepted by the scientific community. The NAS Report demonstrates that impression evidence suffers from a widely varying level of education among "experts" as well as the difficulty inherent in the fact that identification is a highly subjective process. NAS Report at 146. There is no defined threshold that must be surpassed in order to register an expert in identification, nor are there any studies that associate the number of matching characteristics with the

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[1] The state does cite a pre-NAS Report case for the proposition that impression evidence is reliable. Response at 3-4. Clearly this does little to advance the discourse on whether the serious doubt cast by the NAS Report onto the forensic sciences requires a reevaluation of impression evidence.

[2] *See State v. Murray*, 184 Ariz. 9, 29 (Ariz. 1995) (en banc); *State v. Dixon*, 153 Ariz. 151, 155 (Ariz. 1987) (en banc); *State v. Richards*, 166 Ariz. 576, 578 (Ariz. App. 1991).

probability that the impressions were made by a common source. *Id.* at 147. In addition, although the IAI has a certification program, the course of study does not require an understanding of the scientific basis of the examinations, nor does it recommend the use of the scientific method. *Id.* at 148. Furthermore, the IAI does not recommend proficiency testing or continuing education. *Id.*

The State's generic recitations of the testimony its experts will present coupled with cases that predate the release of the NAS Report add nothing to this Court's analysis. The NAS Report has irrevocably altered the landscape of forensic science. We have asked this Court to recognize a special obligation in this death penalty case to ensure that the evidence the Court permits the jury to hear is sound science. Until the State has demonstrated that the fields of shoe print and tire track analysis are subjected to rigorous scientific study and uniform educational requirements, the Court should exclude the testimony of John B. Hoang and Eric Gilkerson on these issues or, in the alternative, conduct a hearing to ascertain the reliability of their testimony.

By now the Court is undoubtedly aware that "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). As a result, the United States Constitution requires that "'extraordinary measures [be taken] to insure that the [accused] is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell v. Mississippi,* 472 U.S. 320, 329 n.2 (1985) (*quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J.,

concurring in part and dissenting in part)). *See also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.") (*quoting Burger v. Kemp*, 483 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

CONCLUSION

Defendant Steven DeMocker, by and through counsel, hereby requests that this Court: (1) exclude any shoe print identification testimony from Sergeant D. Winslow, Detective T. Kennedy, and Commander S. Mascher; (2) preclude Sergeant D. Winslow, Detective T. Kennedy, and Commander S. Mascher from offering any opinion based upon photographs rather than recollection; and (3) exclude the tire track and shoe print testimony of experts John B. Hoang and Eric Gilkerson unless the State can prove that impression evidence is sufficiently grounded in science.

DATED this 23 day of April, 2010.

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COPIES of the foregoing hand delivered this this 23 day of April, 2010, to:

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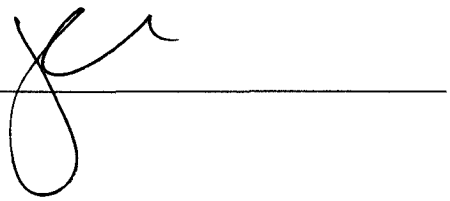

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