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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.**	**Cause No. P1300CR20081339** **Division 6** **STATE'S RESPONSE TO DEFENDANT'S POSITION ON HARTFORD EVIDENCE AND POSSIBLE STIPULATION** **FILED UNDER SEAL**

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby submits its Response to Defendant's Position on Hartford Evidence and Possible Stipulation. The State's position is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1. The State was diligent in obtaining the Hartford documents.

It is undisputed that the State had no idea that the life insurance policies had been paid out until after Sears's June 3, 2010 opening statement. It is also undisputed that YCSO made inquiry of Hartford as late as April 2010 to ascertain whether or not Defendant disclaimed any interest in the policies. As it turned out, the YSCO Detective did not ask the Hartford representative the "right" question, and was never informed that the $500,000 and

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$250,000 policies had both been paid out in 2009. In fact, without Sears's statements, the State would still not know that the life insurance proceeds had in fact been paid and that $700,000 of the proceeds was filtered through several bank accounts for the benefit of the Defendant. Defendant's argument that the State's lack of knowledge of the payout was due to lack of due diligence is completely without merit.

Furthermore, Defendant made no pretrial disclosure to the State that he intended to show that he had disclaimed all right, title and interest to the policies. He did not list the disclaimers on his list of exhibits which would have alerted the State that he had in fact disclaimed any right to the policies. The evidence from the insurance company was that, despite Defendant's suggestion of disclaimer in September of 2008, they were continuing to deny payment until the pending homicide investigation in which Defendant was a suspect was no longer open. Defendant failed to disclose any evidence relating to the Hartford documents, which were previously in his control. The State should be permitted to admit the evidence which was previously known to the defense and discovered very shortly after its receipt by the State.

2. <u>Defendant's use of the proceeds on the victim's life is relevant to motive and should not be excluded under the Arizona Rules of Evidence</u>.

In his opening statement, defense counsel told the jury that the monetary dispute between Defendant and the victim arose over $4,500. Reporter's Partial Transcript of Proceedings, Opening Statement by Mr. Sears, June 3, 2010 1:31 p.m. at p. 30; see also p. 36: "This little squabble over the $4,500 was not a problem, not something that was going to be impossible to resolve." He stated that this dispute is the State's theory of the case, "the entire motive, **except for the life insurance policies**." Id. at 30. Defense counsel informed

the jury that Defendant persuaded Hartford that he would disclaim the money [from the life insurance proceeds]. Id. Defense counsel then added:

> You will hear from Katie and Charlotte that their father told them from the beginning, this is your money from your mother. This isn't mine. He disclaimed, he signed over any interest to the girls, and the money was paid out to the girls. That is what happened in this case. So the idea dangling after the State's opening that Mr. DeMocker killed her for the insurance money, has to be measured against what the evidence really would be.

Id. at 31-32.

Defense counsel, on cross-examination, failed to ask Katie or Charlotte any questions regarding the life insurance proceeds during their testimony. The subject was carefully avoided by defense counsel, while it was completely unknown to the State.

Up until defense counsel's opening argument, the State's theory regarding the life insurance proceeds was that shortly before her murder, Defendant made up the late payments on the policies and, shortly after the murder, attempted to obtain the proceeds. It has always been the State's position from the onset that the life insurance proceeds were part of the pecuniary gain motive for the murder. If Defendant did not become a suspect in the murder investigation, he would have been able to gain access to the proceeds in the same way that he eventually did obtain access--by intimidating his children into giving the money to him, because he owned the policies and paid the premiums. Since he was arrested for the murder, however, Defendant insisted that the proceeds had to be used for "bond first, defense second." Jail call with Katie 3-17-2009 1039 hours at p. 2, attached.

Defendant exerted an enormous amount of pressure on Katie in order to control how the insurance proceeds were to be used for his benefit. The attachment is a partial transcript of a phone conversation between Defendant and his daughter dated March 17, 2009, which is

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just days after he executed the disclaimers mentioned in defense counsel's opening statement. To fully grasp Defendant's intent, the Court is asked to read the attachment from front to back. The Court will note after reading this partial transcript that the words "life insurance" do not appear anywhere in the conversation. After this conversation, it is obvious Defendant overcame Katie's will and controlled how the proceeds were to be spent.

This evidence is offered to prove motive and relates back to a time before the homicide took place. The file that was in the possession of the State at the outset of the trial demonstrated that the Defendant continued to exercise dominion and control over the Hartford Life Insurance policies because he was the owner of the policies as well as the beneficiary. He made up the late payments on the policies and he changed the broker of record on the policies to reflect his continuing control over the policies. At the time of the murder of Carol Kennedy, there was a dispute over Defendant's 401K, which Defendant believed was in the amount of $197,000, but which was actually paid to victim Carol Kennedy in the amount of $186,000. Defendant was also one day late on his $6,000 per month alimony payment. He planned to meet the victim that evening because they "owed each other a pile of money" and they would "exchange checks".

The issue of the insurance policies has been argued by the State continuously since the beginning of this case as one of Defendant's primary pecuniary gain motives in killing Carol Kennedy. At no time has the Defendant in all of the approximately 300 motions filed in this case ever challenged the State's use of the Hartford Insurance policies as evidence. The Court is urged to scrutinize carefully the entire record and it will be very clear that the aforementioned statement is true and accurate. The only reason this issue has arisen at this

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time is because the defense raised it in their opening statement and the jury has a right to know the truth.

3. The evidence that the insurance proceeds benefited the Defendant is not unduly prejudicial.

The insurance evidence is admissible under Rule 403, Ariz. R. Evid. as well. There is no danger of unfair prejudice. It is just additional evidence which supports the State's theory that Defendant always planned to obtain the life insurance proceeds for himself. The evidence obviously is strong evidence that Defendant killed Carol for pecuniary gain. Although the evidence certainly is detrimental to Defendant, it does not "ha[ve] an undue tendency to suggest [a] decision on an improper basis, such as emotion, sympathy or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997); *cf Onujiogu v. United States*, 817 F.2d 3, 6 (1st Cir. 1987) (all evidence against defendant meant to be prejudicial; Rule 403 Fed. R. Evid. designed to prevent only unfair prejudice).

Defense counsel complains that some of the jurors are already "discussing the high cost of [Defendant's] bike and other issues related to his relative income level" and that the press and bloggers are smearing Defendant "as a profligate man of wealth--as if his financial profile were proof guilt." Defendant's Position on Hartford Evidence and Possible Stipulation filed 7/15/10 at p. 2, lines 21-25. This comprises his sole claim that the Hartford body of evidence would somehow be unduly prejudicial under Rule 403, Ariz. R. Evid. However, during his opening statement, Sears frequently brought up Defendant's wealth.

> . . . Over here you can see this is a golf course. This is the Hassayampa Golf Course. This is a gated -- a very fancy area, and these are large four-unit condominiums. Steve lived in one at 1716 Alpine Meadows. ... Very pretty place. He lived right on the golf course. These were very elegant townhomes, a gated private area. Steve really loved living here. He played golf.

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...

> This is a fitness center. This is the Hassayampa subdivision, a very fancy area.

TR 6/3/10 at pp. 33.

Once again defense counsel opened the door to evidence of Defendant's supposed wealth, implying that Defendant had so much money that he had no motive to kill Carol. To now imply that this supposedly wealthy man benefited to the tune of $700,000 will now prejudice him due to previous juror question(s) and blogs is preposterous.

Evidence in this case will demonstrate that Defendant did lead a very opulent lifestyle. Unfortunately, Defendant's income was not commensurate with the life he was leading. As was previously demonstrated before Judge Lindberg, Defendant's compensation had diminished while his already significant debt was increasing. The dissolution of the professional relationship with Ms. O'non would cause further reduction in Defendant's compensation due to Ms. O'non's insistence that the "split" of their accounts be more in her favor. His divorce from Carol had become a full blown battle over money, specifically how the community debts would be paid. The primary liquid asset in the community property was Defendant's sizable 401K. After the divorce, neither Defendant nor Carol had anything of value to show for their 20+ years of marriage or Defendant's success as a financial advisor and both still had significant debt. According to the probate file, there was no equity in the Bridle Path residence. Nevertheless, defense counsel insisted on portraying Defendant as a wealthy man, and such assertions should not be allowed to go unchecked by the State.

4. <u>Defendant's "conditional stipulation" is insufficient</u>.

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Defendant's "conditional stipulation" as suggested on page 6 of his Position is completely unrealistic. The jury must be informed that $700,000 of the approximate $750,000 due to the children was controlled to the very end by the Defendant and used for his benefit. It is a fact. The fact does not go away simply because there are other questionable issues relating to defense counsel's involvement in the transactions. The Court has already determined that those ancillary issues may not be brought up in trial. The fact of the payment in no way confuses any issue. Defendant killed his ex-wife for pecuniary gain. A large part of those insurance proceeds and pecuniary gain went to Defendant's benefit. If a defendant stole a credit card, would the State be prevented from introducing evidence that the defendant paid an outstanding bill with it? Would this information so inflame the jury that it should be excluded? What is the difference in this case? Defense counsel is the person who referred to the insurance proceeds as "blood money", not counsel for the State. The bottom line is, Defendant controlled and benefited from the proceeds of Carol's life insurance. It is not unduly prejudicial. It is fact and no sanitization is appropriate.

CONCLUSION:

The evidence of $700,000 in life insurance proceeds going to the benefit of Defendant is part of motive evidence in this case. It is timely, relevant, not unfairly prejudicial and should not be excluded. Defendant's Motion should be denied.

RESPECTFULLY SUBMITTED this 20th day of July, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Joseph C. Butner
Deputy County Attorney

COPIES of the foregoing delivered this 20th day of July, 2010 to:

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Steve: Hey pumpkin

Katie: Hey how are ya?

Steve: I'm okay, sorry it sounds like I woke you up.

Katie: No, no it's fine.

Steve: Okay. Uhm I just got off the phone with John and uh would it be okay if you and I did a little uh we just have to have a talk, some kind of business slash financial something we need to just be clear on before he proceeds with something and it doesn't have to be right now if you're off to class or anything.

Katie: Uhm I guess.

Steve: Okay uhm uh he said its okay to talk in general terms uhm it's about what you talked with him about and then the other morning before you left what you talked with Codkey about.

Katie: (Inaudible)

Steve: Uhm when John talked to you he had the feeling that we were all on the same page, that these are resources that uhm you know for reasons you understand need to be set aside under your control for now but that this is, these are resources I have to be pretty sure I you know I'm in, that I am gonna make the decisions about how they're deployed. Uhm on behalf of me and the family and he thought we were all square on that but then he

Katie: That's absolutely not what happened; he was like do we understand that this is completely your decision, that you know of course we want you to make the right decision that you know (Inaudible)

Steve: Right, okay, I need to be certain, I need to be certain that you'll take my guidance on this and not uhm he, he had said something, I don't know whether it was a comment you'd made to him or a comment you'd made to Codkey about uh Charlotte's college education or any of that. I'm going to take care of that.

Katie: But you have to understand that from my perspective if absolutely, let's just say worst, worst case scenario here and you don't have that option, I need to be sure that I can make sure that Charlotte goes to college.

Steve: This will all

Katie: I know (Inaudible)

Steve: I understand your concern but that, that is, that is unfortunately at this point, that has to be down the scale of priorities below bond first, defense second and

Katie: The amount of money that I was, am planning on setting aside for Charlotte is not going to significantly impede upon any of that.

Steve: Sweetie, let me be as direct as I can and I don't want to get into a fight but I want to make sure we're clear with each other. The only reason that it is even coming under, we need to be certain that there is nothing you know, the worst case scenario wouldn't occur until after uh that money is spent and we, we may need, we may need very little of it if things go the way we're trying to make them go here. But we may need every penny of it for defense and I need to make certain that you understand that there will be no impediment to that if that's what we need.

Katie: And I need to make sure you understand that I'm trying to take care of my little sister.

Steve: I understand that you're trying to do that but we're going to get an acquittal here and if we don't

Katie: You don't know that. I'm really sorry to be that harsh okay, but like I am of course that is the most likely outcome and of course there's 99% sure that that's gonna happen and that's what we all want and that's what it is we will spend every little bit that we can doing and time and energy and resources, whatever. Of course that's what we all want but you cannot say beyond a shadow of a doubt that that is what is going to happen.

Steve: No that's absolutely right, let me correct myself. It may be that we spent every dime, everything we can borrow from family, everything that we have at our disposal on defense. It's always possible, it's very unlikely, but it's always possible that if we go to trial we would not get the outcome we wanted, we'd have to proceed to appeal. But the fact is sweetie we have to be clear before, before I'm willing to do this.

Katie: Before you're willing to do what?

Steve: Before I'm willing to do what I do that even

Katie: And your alternative is?

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Steve: Sweetie, is it, are you telling me that you would hold aside a significant chunk of money and refuse

Katie: It doesn't seem that significant to me. I mean like it's significant but it would be enough to take care of her college education and that's it. I'm not taking money to take care of Charlotte

Steve: Are you

Katie: and I, I'm not taking money for our general well being

Steve: I know, I know

Katie: for clothes

Steve: calm down,

Katie: for anything, okay.

Steve: calm down

Katie: So you need to understand this is not unreasonable

Steve: I am understanding. Sweetie you can't, you can't hold aside anything. If it all needs to be used for defense, it all has to go to defense. My life is in the balance and it's more important that Charlotte's college. We'll find some other way if we have to to pay for Charlotte's college but the idea that you would hold back

Katie: By we, you mean me

Steve: the idea that you would presume

Katie: I'm not holding anything; I'm setting aside money that I'm not just gonna hand over.

Steve: Then, then we have to do something different. I, I, sweetie, I'm crushed. I can't believe that you would hold in reserve, that you would do anything other right now than say the same thing that my parents have, whatever is available goes to the first two priorities right now even if it exhausts everything and then we pick up the pieces after that. But if you're telling me that you would hold aside anything, anything, a dime

Katie: I'm not saying that if it came down to it we wouldn't have access to it; I'm saying that I will definitely hold that money aside.

Steve: How, what are you talking about doing?

Katie: Maybe you should get your lawyer to explain it to you a little better.

Steve: Hey

Katie: Instead of criticizing me in my decision

Steve: I'm not, no one's criticizing you

Katie: Yeah you are.

Steve: Sweetie the only reason those resources will come under your control will be if I give them up

Katie: Okay and, and you're gonna get them otherwise? If you can do that, go for it. Then I don't have to deal with it.

Steve: But then

Katie: If you can take them yourself, go for it.

Steve: Sweetheart

Katie: I don't see you having another option so don't make this about you being so nice to me.

Steve: I'm not being nice, sweetheart. This is, these are resources that otherwise wouldn't come until after this is all over and we need them now for the defense and so this is a completely legal and appropriate way that the attorneys have constructed but we need your cooperation and if you're going to exert control here

Katie: And I'm pretty much cooperating but there are some things that I know a little bit about now

Steve: Why are you being like this?

Katie: Okay? I have my own advice on things; I have all kinds of things going on

Steve: Why are you doing this?

Katie: and you are obviously my first, no, no, you know what?

Steve: Why are you doing this?

Katie: Charlotte is my first priority.

Steve: Really?

Katie: And you are really, really, really a close, yes making sure that Charlotte is okay, you have no idea what it feels like

Steve: Yes I do. Are you telling me that Charlotte's going to college is a higher priority than defending my life?

Katie: No I'm saying, No dad!

Steve: Then I need you to tell me, I need you to tell me that you understand and that you trust that I and if not me the family will make certain, it is not your responsibility you don't need to set aside resources that we need right now for my defense for anything.

Katie: You don't know that. And I'm not saying

Steve: Sweetheart I'm asking you simply to step aside and don't exert this sort of

Katie: I'm not gonna do that

Steve: Oh pumpkin, oh pumpkin, I'm counting on you. My life is in the balance

Katie: Dad stop saying that!

Steve: It's the truth.

Katie: It's not true okay. I'm

Steve: You're the one

Katie: not telling you that I'm taking all of it and holding it somewhere and being unwilling to give it out to you.

Steve: I need to, sweetheart, you're the one who just drilled me with the fact that you don't know that dad, there's no guarantees. So if that's the level we're playing on here, let's be clear.

Katie: Go for it, be clear, what do you want to say?

Steve: This is a capital murder case and we need every possible dime available to defend me – I need to know that you're not going to be in the way because you value Charlotte's college education above my defense at this point. There is no other way to interpret what you're saying. I don't get it, why would you even step into the middle of this other than to do, other than to do what I ask you to do? Whatever that is? Why, I don't understand why you're doing this.

Katie: Cause I have to take care of her.

Steve: Sweetheart I know, I know that's how it feels.

Katie: No you don't know how it feels.

Steve: Yes I do God damit.

Katie: I'm sure you have a lot of other feelings that I don't understand either but you don't know how it feels to be me right now so stop saying that.

Steve: I didn't say I did. Here's what I know. I know damn well as well or better than you do what it feels like to be responsible for someone's well being and be unsure how or whether I can even do it. I have never been in this position in my life and I need your help.

Katie: Well that's what I'm doing and you need to trust that I will do whatever I can to help you but I'm not just gonna fork everything over right away without trying to preserve something for Charlotte.

Steve: That's different.

Katie: That's not different so maybe before you call with these kinds of conversations you should try and clarify what the fuck is going on.

Steve: I did exactly all, everything I was supposed to do. I checked with John, he said here's my understanding; you need to check this with Katie.

Katie: John's also telling people that I have some letter of agreement and I have nothing (Inaudible)

Steve: I don't know what you're talking about

Katie: No, I'm not doing this with you right now

Steve: Sweetheart

Katie: I'm done

Steve: Don't fold on me here

Katie: I'm not gonna tell you over the phone that everything is just perfect

Steve: I'm not asking you to tell me

Katie: (Inaudible) everything that you say. I have some decisions to make now and you can't always play the daddy card

Steve: Sweetie I will make certain, first of all 99% probability here is if we can get me out and get me back to work whether or not there's a civil suit against the county that succeeds, as long as I'm acquitted and back to work, I will take care of both of you as I always have and if for some reason I am not able to, my family will. But the resources we have at our disposal right now have to go to this without any interference and I need to know that from you. If you want to set up an account for now that's fine. As long as we're clear that if we need it it comes to the defense, it comes to my defense or my bond. I have to be out and I have to be acquitted. The two go hand in hand; I need to get out so I can raise money so that I can help with my defense.

Katie: You think I don't understand that we want you to get out?

Steve: Of course I do, that's why I don't understand why you're, what I thought you were saying is no, I'm holding some aside for Charlotte

Katie: That is what I'm saying

Steve: Pardon me?

Katie: That is what I'm saying, you just said it was fine to do that and now you're saying it's not

Steve: Temporarily if it makes you feel better but the other problem for me is say we don't even go to trial, this is money that is being conveyed to you now because we need it now rather than simply waiting for an acquittal

Katie: And (Inaudible)

Steve: Excuse me, let me finish. And having it do what the family's plan always was that it would come to me to take care of you.

Katie: (Inaudible)

Steve: Pardon me? I'll call you back, hang on we're gonna run out of time.