

1 Larry A. Hammond, 004049  
2 Anne M. Chapman, 025965  
3 OSBORN MALEDON, P.A.  
4 2929 N. Central Avenue, 21st Floor  
5 Phoenix, Arizona 85012-2793  
6 (602) 640-9000  
7 lhammond@omlaw.com  
8 achapman@omlaw.com

9 John M. Sears, 005617  
10 P.O. Box 4080  
11 Prescott, Arizona 86302  
12 (928) 778-5208  
13 John.Sears@azbar.org

14 Attorneys for Defendant

15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA, ) No. P1300CR20081339  
18 )  
19 Plaintiff, ) Div. 6  
20 )  
21 vs. ) **MOTION TO COMPEL**  
22 ) **INTERVIEW**  
23 STEVEN CARROLL DEMOCKER, )  
24 )  
25 Defendant. )  
26 )  
27 )  
28 )

29 Steven DeMocker, by and through counsel, hereby respectfully requests that this  
30 Court order that Ruth Kennedy be compelled to submit to an pretrial interview by the  
31 defense. This Motion is supported by the Due Process and Confrontation clauses as well  
32 as the Eighth Amendment of the United States Constitution and counterparts in the

ORIGINAL FILED PMS  
DAY OF 3/23/10  
JEANNE HICKS  
Clerk Superior Court  
By RENE BRANER  
Deputy



1 Arizona Constitution, Arizona Rules of Evidence, Arizona Rules of Criminal Procedure  
2 and the following Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Ruth Kennedy is a key fact witness in this case. She is the last known person to  
5 have contact with Carol Kennedy before she was killed. Ruth Kennedy was on the phone  
6 with Carol Kennedy when Carol Kennedy was attacked. Ruth Kennedy made a 911 call  
7 some time shortly after her contact with Carol Kennedy wherein she described that Carol  
8 Kennedy screamed "oh no" before the telephone connection ended. Later, Ruth Kennedy  
9 said that Carol had not screamed and had simply stated "oh no." Ruth Kennedy is the last  
10 known person to have any contact with Carol Kennedy and was in contact with her when  
11 she is believed to have been confronted by her attacker. When asked by the 911 operator  
12 if she thought it could be Carol's ex husband, Ruth Kennedy immediately responded "I  
13 don't think so." "No. I don't think its that kind of a thing, you know."

14 Furthermore, Ruth Kennedy is the grandmother to Carol Kennedy and Steven  
15 DeMocker's two daughters, Katie and Charlotte DeMocker. The State disclosed an  
16 interview of Ruth Kennedy wherein she discussed her views on the death penalty. Ms.  
17 Kennedy's side of the interview was apparently not recorded so the defense has no way  
18 of knowing what Ms. Kennedy's views on the appropriateness of the death penalty are in  
19 this case.

20 Arizona statutes prohibit direct defense contact with a victim, as defined by  
21 statute. See A.R.S. 13-4401 *et seq.* On October 27, 2009, the defense filed a Motion to  
22 Declare A.R.S. §§ 13-4431 and 4433(b)-(e) and Arizona Rule of Criminal Procedure  
23 39(b)11 Unconstitutional in an attempt to have direct contact with Ruth Kennedy. The  
24 Court denied that motion. As a result, on January 12, 2010 the defense provided a letter  
25 addressed to Ruth Kennedy via Assistant Yavapai County Attorney Joe Butner. On  
26 January 22, 2010, Mr. Butner advised the Court that the letter would be mailed that day.

1 Mr. Butner orally advised John Sears sometime later that Ms. Kennedy did not wish to be  
2 interviewed. Mr. Sears requested that Mr. Butner provide this information in writing. No  
3 written confirmation or response to the January 12, 2010 letter has been received by the  
4 defense.

5 **1. Mr. DeMocker has a Constitutional Right to a Pretrial Interview of Ruth**  
6 **Kennedy**

7 Mr. DeMocker's Sixth Amendment and due process rights require that counsel  
8 fully investigate his case and have unadulterated access to witnesses so that he may  
9 prepare and present a defense. A defendant has a due process right, under the federal and  
10 Arizona constitutions, to present a defense. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.  
11 Ct. 1038, 35 L.Ed.2d 297 (1973). To determine what is required to prepare and present a  
12 defense in a capital case, counsel are required under Rule 6.8 of the Arizona Rule of  
13 Criminal Procedure to "be familiar with and guided by" the American Bar Association  
14 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty  
15 Cases ("ABA Guidelines"). The ABA Guidelines have been acknowledged by the  
16 Supreme Court "as 'guides to determining what is reasonable'" in the representation of  
17 capital defendants. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466  
18 U.S. at 688); see also *Williams v. Taylor*, 529 U.S. 362, 396 (2000). See *ABA Revised*  
19 *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty*  
20 *Cases*, in 31 Hofstra L. Rev. 913 (2003).

21 The ABA Guidelines provide that counsel have an obligation to interview  
22 witnesses to the crime. See American Bar Association, *Guidelines for the Appointment*  
23 *and Performance of Defense Counsel in Death Penalty Cases* (2003) (Commentaries to  
24 Guidelines 10.7 & 10.11). The ABA Guidelines provide that "defense counsel must  
25 independently investigate the circumstances of the crime, and all evidence ... purporting  
26 to inculcate the client." See ABA Guidelines, Commentary, Introduction. This duty  
27 includes interviewing "witnesses having purported knowledge of events surrounding the  
28

1 alleged offense itself.” ABA Guidelines, 10.7(2)(a)(1). Counsel is also required to seek  
2 out and interview members of the victim’s family under the ABA Guidelines, barring  
3 exceptional circumstances. See ABA Guidelines, Guideline 10.7, Commentary 2(a)(4).

4 Ruth Kennedy is a key witness. She was on the phone with Carol Kennedy when  
5 she was attacked. She can potentially describe Carol Kennedy’s reaction to her attacker.  
6 And she has not been consistent in her description. Ruth Kennedy is potentially a witness  
7 at both the guilt-innocence and sentencing phases of the trial, thus contact is an essential  
8 part of investigating this death penalty case. The Arizona Court of Appeals has held that  
9 “except in the most unusual circumstances, it offends basic notions of minimal  
10 competence of representation for defense counsel to fail to interview any state witnesses  
11 prior to a major felony trial.” *State v. Radjenovich*, 138 Ariz. 210, 274, 674 P.2d 333,  
12 227 (1983). The Arizona Supreme Court agrees. See e.g. *State v. Schultz*, 140 Ariz. 222,  
13 224, 681 P.2d 374, 377 (1984).

14 The Confrontation Clause’s also provides Mr. DeMocker a right to an interview of  
15 Ms. Kennedy. The Confrontation Clause’s primary goal is to,

16  
17 ensure reliability of evidence, but it is a procedural rather than a substantive  
18 guarantee. It commands, not that evidence be reliable, but that reliability be  
19 assessed in a particular manner: by testing in the crucible of cross-examination.  
20 *Crawford v. Washington*, 541 U.S. 36, 61 (2004). As *Crawford* reiterated, limiting a  
21 defendant’s access to pretrial preparation violates the Confrontation Clause:

22 [R]estriction on the ability to engage in cross-examination does not suggest,  
23 however, that the Confrontation Clause prohibits only such limitations. A crucial  
24 avenue of cross-examination also may be foreclosed by the denial of access to  
25 material that would serve as the basis for this examination.

26 *Id.* 480 U.S. at 67, 107 S.Ct. at 1006.

1           Given that Ms. Kennedy's version of events about what happened immediately  
2 before Carol Kennedy was attacked has changed over time, it is crucial that Mr.  
3 DeMocker be permitted to interview her in preparation for her trial testimony. Mr.  
4 DeMocker also needs to know what Ms. Kennedy's position in with respect to the death  
5 penalty is in this case. Because of the State's faulty recording system, the interview  
6 where Ms. Kennedy discusses her views on the issue was improperly recorded and Mr.  
7 DeMocker does not know whether Ms. Kennedy is in favor of or opposes the death  
8 penalty in this case.<sup>1</sup>

9       **2. To the Extent the Victim's Bill of Rights or A.R.S. §§ 13-4431 et seq. Prohibits**  
10       **Mr. DeMocker's Interview with Ruth Kennedy, It Must Yield**

11           Victim's rights under the Arizona Constitution are not absolute because "the search  
12 for truth implicates the right to due process of law." *State v. Superior Court In and For*  
13 *County of Maricopa*, 186 Ariz. 363, 366, 922 P.2d 927, 930 (Ariz.App. Div. 1, 1996)  
14 (citing *State ex rel. Romley v. Superior Court In and For County of Maricopa*, 172 Ariz.  
15 232, 236, 836 P.2d 445, 449 (Ariz.App. Div. 1, 1992) (Lankford, J., concurring)). Thus a  
16 defendant's due process right to prepare for trial trumps the victim's rights:

17           Under certain circumstances, a defendant's right to gather exculpatory information  
18 can take precedence over the victim's constitutional right to be left alone.

19           Moreover, "the due process clauses of the Fifth and Fourteenth Amendments give a  
20 defendant the right of access to any evidence favorable to the defense and material to  
21 either guilt or punishment." *Romley v. Superior Court*, 172 Ariz. at 239 (noting that any  
22 limitation of discovery is subject to the *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194,  
23 (1963)). "[N]othing in the Victims' Bill of Rights or section 13-4433 supports the  
24 argument that victims have a blanket right to be shielded from all contact with defendants  
25

26 \_\_\_\_\_  
27 <sup>1</sup> This interview was conducted in October 2009 and not disclosed to the defense until December 2009 after repeated  
28 requests. No written report regarding this portion of this interview has been disclosed to the defense.

1 or their attorneys until the time of trial.” See *Champlin v. Sargeant, In and For County of*  
2 *Maricopa*, 192 Ariz. 371, 374-75, 965 P.2d 763, 766-67 (1998) (citing *State ex rel. Dean*  
3 *v. City Court*, 173 Ariz. 515, 516-17, 844 P.2d 1165, 1166-67 (App.1992) (holding that  
4 alleged victim may be compelled to testify at pretrial hearing)). For example, despite the  
5 Victim’s Bill of Rights, a trial court in certain circumstances can order a victim’s pretrial  
6 deposition. *Day v. Superior Court In and For County of Maricopa*, 170 Ariz. 215, 823  
7 P.2d 82 (App. Div. 1 1991).

8           Regarding a defendant’s right to confront, the Arizona Supreme Court holds that  
9 even under the Arizona Victim's Bill of Rights, “[t]he defendant also has a concomitant  
10 right to effective cross-examination of a witness at trial.” *State ex rel. Romley*, 172 Ariz.  
11 at 236, 836 P.2d at 449. Indeed, the scope of the defendant’s right goes well beyond the  
12 trial:

13           The right to confront witnesses means more than simply being able to physically  
14 confront witnesses in the courtroom; confrontation also includes as its “main and  
15 essential purpose” the ability to effectively cross-examine witnesses.

16 *State ex rel. Romley*, 172 Ariz. at 240, 836 P.2d at 453. Therefore, “any restrictions on  
17 defendant’s access to information essential to preparation for effective, reasonable cross-  
18 examination or impeachment of the victim in this case imposed pursuant to the Victim’s  
19 Bill of Rights ***must be proportionate to the interest of protecting the victim as balanced***  
20 ***against the defendant’s due process right to a fundamentally fair trial.*** *Id.*(added  
21 emphasis). Thus, a defendant’s rights to due process trumps even a direct provision of  
22 the Victims Bill of Rights:

23           [W]hen the defendant’s constitutional right to due process conflicts with the  
24 Victims’ Bill of Rights in a direct manner . . . then due process is the superior right.

25 *State ex rel. Romley*, 172 Ariz. at 236, 836 P.2d at 449. “[W]hen the information is both  
26 essential to the defense and requires pretrial disclosure to have value to the defense, then  
27 due process requires that defendant be allowed to obtain it.” *State ex rel. Romley*, 172

1 Ariz. at 241, 836 P.2d at 453. . A.R.S. § 13-3344 (B)-(E) effectively denies a defendant  
2 his full right to prepare for cross examination and constitutes a “denial of access to a  
3 witness’ prior statements.” The key is not a person’s status as “victim” but rather his  
4 status as *witness*. When an alleged victim has the potential to become a witness it  
5 implicates not only the Confrontation Clause but all the rights to prepare for the  
6 confrontation.

7 Here, the State’s main witness, though a victim, is still subject to cross  
8 examination at trial and thus the defendant must have the right to fully prepare for the  
9 cross examination.

10 **3. Ruth Kennedy is Not a Victim of the Burglary and May be Interviewed as a**  
11 **Witness to that Offense**

12 The Arizona Supreme Court has held that a victim’s right to refuse an interview  
13 pursuant to the Victim’s Bill of Rights is not triggered when a defendant seeks to obtain  
14 witness testimony relating to facts unrelated to his or her victimization. *See Champlin v.*  
15 *Sargeant, In and For County of Maricopa*, 192 Ariz. 371, 374-75, 965 P.2d 763, 766-67  
16 (1998). In *Champlin* the Court held that a child molestation defendant was entitled,  
17 despite the Victim’s Bill of Rights, to a pretrial interview of child witnesses to the  
18 defendant’s alleged criminal conduct, as long as the witnesses, who were victims of other  
19 behavior by the same defendant on separate occasions, were not interviewed with regard  
20 to their own victimization). Ruth Kennedy qualifies is a victim under 13-4401(19) as a  
21 result of Carol Kennedy’s murder. However, Mr. DeMocker is also charged with  
22 burglary. Under the 13-4401 *et seq.*, Ruth Kennedy is not a victim of the burglary,  
23 although she is a witness to the burglary. Thus, Ruth Kennedy is not entitled, under  
24 *Champlin*, to refuse an interview under the Victim’s Bill of Rights, with respect to the  
25 burglary offense.

26 **4. Death is Different**

1 The United States Constitution requires that "extraordinary measures [be taken] to  
2 insure that the [Accused] is afforded process that will guarantee, as much as is humanly  
3 possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or  
4 mistake." *Caldwell v. Mississippi*, 472 U.S. 320, 352 n.2 (1985) (quoting *Eddings v.*  
5 *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)). Indeed, "[t]ime and  
6 again the [Supreme] Court has condemned procedures in capital cases that might be  
7 completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994)  
8 (quoting *Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J.,  
9 concurring in part and dissenting in part)). See also *Kyles v. Whitley*, 514 U.S. 419, 422  
10 (1995) (noting that the Court's "duty to search for constitutional error with painstaking  
11 care is never more exacting than it is in a capital case.") (quoting *Burger v. Kemp*, 483  
12 U.S. 776, 785 (1987)). This elevated level of due process applies both to the guilt and  
13 penalty phases of the case. *Beck v. Alabama*, 447 U.S. 625, 638 (1980).

#### 14 CONCLUSION

15 Defendant Steven DeMocker, by and through counsel, hereby requests that this  
16 Court compel Ruth Kennedy to be interviewed by the defense.

17  
18 DATED this 19<sup>th</sup> day of March, 2010.

19  
20 By:

*Larry A. Hammond*  
John M. Sears *for EMS*  
P.O. Box 4080  
Prescott, Arizona 86302

21  
22  
23 OSBORN MALEDON, P.A.  
24 Larry A. Hammond  
25 Anne M. Chapman  
26 2929 N. Central Avenue, Suite 2100  
27 Phoenix, Arizona 85012-2793

28 Attorneys for Defendant



1  
2 **ORIGINAL** of the foregoing mailed for  
3 filing this 19<sup>th</sup> day of March, 2010, with:

4 Jeanne Hicks  
5 Clerk of the Court  
6 Yavapai County Superior Court  
7 120 S. Cortez  
8 Prescott, AZ 86303

9 **COPIES** of the foregoing mailed this  
10 this 19<sup>th</sup> day of March, 2010, to:

11 The Hon. Thomas B. Lindberg  
12 Judge of the Superior Court  
13 Division Six  
14 120 S. Cortez  
15 Prescott, AZ 86303

16 Joseph C. Butner, Esq.  
17 Yavapai County Attorney  
18 2830 North Commonwealth Drive, #106  
19 Camp Verde, AZ 86322

20  
21  
22  
23  
24  
25  
26  
27  
28



---