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APACHE COUNTY SUPERIOR COURT

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11 ARIZONA SUPERIOR COURT

12 APACHE COUNTY

13 In re the Matter of:

14 ROMERO, CHRISTIAN RYAN,

15 Person under eighteen (18) years of age.

16) No. JV2008065

17) **APPLICATION OF KPNX
18 BROADCASTING CO. TO
19 INTERVENE FOR THE LIMITED
20 PURPOSE OF SECURING
21 RECONSIDERATION AND
22 MODIFICATION OF GAG ORDER**

23) (Assigned to the Honorable Michael P.
24 Roca)

25) [*Expedited* Oral Argument Requested]

26 Pursuant to the First Amendment to the United States Constitution, Art. II,
27 §§ 6 and 11 of the Arizona Constitution, A.R.S. § 39-121, Ariz. R. Sup. Ct. 42 and 123,
28 and Ariz. R. Crim. P. 35.3, KPNX Broadcasting Company ("KPNX"), which produces
"12 News," hereby applies for leave to intervene in this matter for the limited purpose of
securing reconsideration and modification of a gag order entered on November 10, 2008
in this matter (the "Order"). This Application is supported by the following
Memorandum of Points and Authorities and the attached proposed Order.

Preliminary Statement

The Court has entered a sweeping gag order that prohibits virtually anyone
"associated with this case" from providing any information to the public about a matter
of acute public interest: the prosecution of an 8-year-old boy for murder. As written, the

1 "Tests Sought for Boy Accused of Slaying Father, One Other," *The Arizona Republic*,
2 Nov. 11, 2008 at A1] KPNX has withheld the names of the boy and the father in its
3 reporting to avoid identifying the boy.

4 On November 10, the Court entered an Order addressing the media coverage
5 of the case. The Order provided as follows:

6
7 The Court and Counsel discuss the extent and nature of media
8 coverage of this case.

9 Good cause appearing:

10 IT IS ORDERED that Prosecution Agencies, Defense Agencies, all
11 Law Enforcement Organizations, DES, Probation Department,
12 Detention Staff, and The Attorney General's Office of any sort and
13 nature associated with this case cease immediately from
14 disseminating any information, views, predictions or commentary
15 regarding this case.

16
17 Argument

18 I. THE COURT SHOULD PERMIT KPNX TO INTERVENE TO PROTECT THE
19 RIGHTS OF THE MEDIA AND PUBLIC TO INFORMATION ABOUT THIS
20 CRIMINAL INVESTIGATION AND PROSECUTION.

21 News organizations are routinely permitted to intervene to object to orders
22 that burden First Amendment rights and restrict public access to court proceedings. *E.g.*,
23 *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*") (press
24 allowed to object to closure of *voir dire* examinations in criminal trial); *Globe Newspaper*
25 *Co. v. Superior Court*, 457 U.S. 596 (1982) (upholding newspaper's right to challenge
26 order closing a criminal trial from the general public); *KPNX*, 139 Ariz. at 254, 678 P.2d
27 at 439 (permitting news media to challenge gag order and prior restraint on publication of
28 juror sketches); *Phoenix Newspapers, Inc. v. Superior Court*, 140 Ariz. 30, 32, 680 P.2d
166, 168 (Ct. App. 1983) (newspaper permitted to intervene for limited purpose of
objecting to closure of criminal sentencing proceedings). Given KPNX's strong and
abiding interest in reporting news to the public in general, and its demonstrable interest in
reporting information about this case in particular, intervention should be allowed.

1 II. THE ORDER IS MUCH BROADER THAN NECESSARY TO PROTECT THE
2 DEFENDANT'S RIGHT TO A FAIR TRIAL.

3 As currently written, the Order prohibits virtually any government entity
4 from commenting or distributing information about the case. Specifically, the Order bars
5 prosecutors, defense attorneys, police, the Arizona Department of Economic Security,
6 probation and detention staff, the Arizona Attorney General's Office and all "Law
7 Enforcement Organizations . . . of any sort and nature associated with this case" from
8 "disseminating any information, views, predictions or commentary" about the case.

9 This ban on the dissemination of information burdens KPNX's First
10 Amendment right to gather news and the public's right to monitor these proceedings. *See,*
11 *e.g., Levine v. United States District Court*, 764 F.2d 590, 594 (9th Cir. 1985)
12 (recognizing gag order impairs media's ability to gather news). Because the Order
13 functions as a prior restraint on speech, it is valid only if "(1) the activity restrained poses
14 either a clear and present danger or a serious and imminent threat to a protected competing
15 interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not
16 available." *Id.* at 595 (citations omitted); *KPNX*, 139 Ariz. at 251, 678 P.2d at 436
17 (judging the validity of a prior restraint on reporting the events of a criminal trial by "(1)
18 the gravity of harm posed by media coverage; (2) whether other measures short of a prior
19 restraint would have adequately protected the fair-trial right; and (3) how effectively
20 the . . . order avoided the threat to a fair trial").

21 In addition to the First Amendment's prohibition of overbroad gag orders,
22 the Arizona Constitution affirmatively grants to every person the right to "freely speak,
23 write and publish on all subjects." Ariz. Const. Art. II, § 6. Arizona courts have
24 recognized that this protection may be even stronger than that afforded by the First
25 Amendment. *E.g., Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz.
26 350, 356, 773 P.2d 455, 461 (1989) (applying the "broader freedom of speech clause of
27 the Arizona Constitution").
28

1 In applying these federal and state constitutional safeguards in the Sketch-
2 Artist Case, the Arizona Supreme Court focused on the “purpose” and “effect” of speech
3 restrictions on trial participants. The Court upheld an order that (1) prohibited trial
4 participants in a mob-related, murder-for-hire trial from talking to the media after
5 completion of jury selection, and (2) appointed a media liaison to disseminate information
6 about the case to the public. *KPNX*, 139 Ariz. at 256, 678 P.2d at 441 (holding that
7 neither the purpose nor effect of the order was “primarily to deny the press or public
8 access to information” and determining that restrictions were reasonable and overrode
9 “incidental” effects on First Amendment rights) (citing *Globe*, 457 U.S. at 616). A careful
10 reading of the Sketch-Artist Case supports modification of the Order.

11 A. The Purpose and Effect of the Order Is to Deny the Media and Public
12 Access to Information at the Preliminary Stages of the Case.

13 The Order regulates not only the *speech* of trial participants and
14 investigators, but also access to *information* about the case. [See Order, at 1 (prohibiting
15 disclosure of “any information” regarding this case)] As such, it cuts off public access to
16 a broad category of public records. Access to these public records regarding this case,
17 such as police reports, is governed by A.R.S. § 39-121, which provides that public records
18 “shall be open to inspection by any person at all times” Similarly, Ariz. R. Sup. Ct.
19 123 controls the public’s right to inspect court records. Both the Arizona Public Records
20 Law and Rule 123 allow public bodies to withhold records when disclosure “would
21 violate rights of privacy or confidentiality” or harm the “best interests of the state.” *E.g.*,
22 *Cox Ariz. Publ’ns v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993); *Mitchell v.*
23 *Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984). Accordingly, public bodies
24 can withhold certain records related to this case in the absence of the Order. *Id.*

25 Records of ongoing law enforcement investigations, however, are *not*
26 exempt from disclosure. *Cox*, 175 Ariz. at 14, 852 P.2d at 1198. Indeed, in *Cox*, the
27 Arizona Supreme Court specifically rejected the Court of Appeals’ holding that
28 countervailing due process interests permitted the County Attorney to withhold police

1 reports in an active ongoing criminal investigation.” *Id.* Moreover, the trial judge in the
2 *Cox* case had entered a gag order, but specifically stated that the order was not intended to
3 prohibit the disclosure of public records. *Id.* at 13, 852 P.2d at 1197. Accordingly, even if
4 potential trial participants may be properly restrained from speaking publicly about this
5 case, any order restricting public comment should not extend to disclosure of investigative
6 records.

7 At the November 10, 2008 hearing, two reasons were given in support of the
8 Order: (1) the “inaccuracy” of recent media accounts, and (2) the potential for
9 “contaminating” dependency proceedings. As to the former, defense counsel complained
10 about the media “painting [his] client in a “fairly negative light.” As a matter of law,
11 concerns about “accuracy,” without more, are insufficient to justify a blanket gag order.
12 *E.g., Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 567 (1976). Indeed, restricting the
13 flow of legitimate information from trial participants and public records likely will have
14 the opposite effect: it will encourage speculation by the media and public and lead to the
15 spread of unreliable information about the case.

16 To the extent that the Court is concerned about the parallel dependency
17 proceeding, a new statute allows judges to close dependency proceedings when closure is
18 in the child’s best interests. A.R.S. § 8-525(E) (“The court may close an open proceeding
19 at any time for good cause shown and after considering the factors [outlined by the
20 statute].”). Closing the dependency proceeding – on a showing of good cause – would be
21 preferable to a blanket gag order on participants in the criminal hearings in this matter.
22 The public has a well-established First Amendment right to monitor criminal court
23 proceedings. *E.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).
24 Moreover, the public has strong interest in monitoring a criminal prosecution of a murder
25 case. *E.g., Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343, 783 P.2d 781,
26 789 (1989) (“It is difficult to conceive of an area of greater public interest than law
27 enforcement.”). That interest, however, is dramatically curtailed by the Order. *E.g.,*
28 *KPNX*, 139 Ariz. at 259, 678 P.2d at 444 (Feldman, J., concurring in part and dissenting in

1 part) (“If the government can be permitted to erect a wall of secrecy by forbidding those
2 with knowledge from talking with the press, then the right to attend and report what
3 transpires becomes illusory. . . .”).

4 B. The Sketch-Artist Case Supports Modifying the Order.

5 Arizona authority does not support the imposition of a gag order in this case.
6 First, the order upheld in *KPNX* was much more narrowly tailored than the Order here. In
7 *KPNX*, the gag order prohibited trial participants from speaking to the news media, and
8 appointed a court employee to serve as a “media liaison” to answer inquiries about the
9 proceedings. 139 Ariz. at 249, 678 P.2d at 434. Unlike the Order, however, the decree in
10 *KPNX* provided a means for the news media to obtain information from the court about
11 the proceedings, and it did *not* prohibit the police from speaking to the media or limit
12 disclosure of public records. *Id.* Indeed, the primary purpose of the Order in *KPNX* was
13 to provide information to the media.

14 Second, because it was entered *after jury selection*, the Sketch-Artist order
15 was much more limited in duration than the Order. Here, the Order prohibits disclosure of
16 any information by virtually anyone connected to the matter *at the outset of the case*.
17 Third, the Sketch-Artist order was more limited in scope: it prohibited counsel, court
18 personnel, jurors and other trial participants from contacting the media during the trial. *Id.*
19 at 248, 678 P.2d at 433. Here, the Order restrains everyone associated with the case,
20 including law enforcement and child welfare officials, from commenting or providing
21 information. Fourth, the Sketch-Artist order was supported by detailed findings of fact in
22 a case involving a mob slaying. *Id.* at 255, 678 P.2d at 439. To date, no such findings
23 have been entered in justification of the Order.¹ To the extent justification for the Order
24

25 ¹ It merits note that *KPNX* was decided *before* two landmark U.S. Supreme Court
26 cases involving public access to criminal proceedings. *See Press-Enterprise I*, 464 U.S.
27 501 (1984) (holding First Amendment right to attend criminal proceedings extends to *voir*
28 *dire*); *Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”) (First Amendment right to attend criminal trials extends to preliminary hearings). Both cases require courts to make specific, on-the-record findings that closure of a proceeding

1 centers on the defendant's fair trial rights, there has been no showing that the
2 circumstances of this case warrant a measure so extreme as imposition of the Order,
3 particularly at this early stage of the case. In any event, "pretrial publicity[,] even
4 pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press*,
5 427 U.S. at 555. At bottom, the Order does not meet constitutional safeguards against
6 prior restraints. *E.g.*, *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993) (holding
7 blanket prohibition extending to any statements that "have anything to do" with case was
8 unconstitutional prior restraint).

9 III. LESS-RESTRICTIVE ALTERNATIVES WOULD ADEQUATELY
10 SAFEGUARD THE PROCEEDINGS.

11 The Arizona Rules of Professional Responsibility set forth narrow
12 guidelines that should be sufficient to protect the integrity of the proceedings while
13 ensuring the public has access to information. Indeed, an admonition to counsel that they
14 may *not* make any statements that "have a substantial likelihood of materially prejudicing"
15 this proceeding is one such protection. Ariz. R. Sup. Ct. 42, ER 3.6(a); *see also Gentile v.*
16 *State Bar of Nevada*, 501 U.S. 1030, 1037 (1991) (order restraining parties' speech can be
17 entered only if speech sought to be restrained poses a "clear and present danger" or a
18 "serious and imminent threat to the fair administration of justice"); *Levine*, 764 F.2d at
19 599. So, too, is a requirement that the prosecutor adhere to ER 3.8(f). *E.g.*, *Levine*, 764
20 F.2d at 599 (recognizing Model Rule 3.6); *In re Application of New York Times Co.*, 878
21 F.2d 67, 68 (2d Cir. 1989) (approving of restrictions on counsel outlined local court rules).

22 For the Court's convenience, attached as Exhibit A is a Proposed Order that
23 KPNX believes strikes the proper balance between the public's right to monitor the
24 proceedings and the countervailing need to prevent dissemination of sensitive information
25 that "will have a substantial likelihood of materially prejudicing" the proceedings. Ariz.
26 R. Sup. Ct. 42, ER 3.6(a). The Order would (1) admonish counsel to observe ER 3.6; (2)

27 _____
28 is "essential to preserve higher values and is narrowly tailored to serve that interest."
Press Enterprise II, 478 U.S. at 13-14.

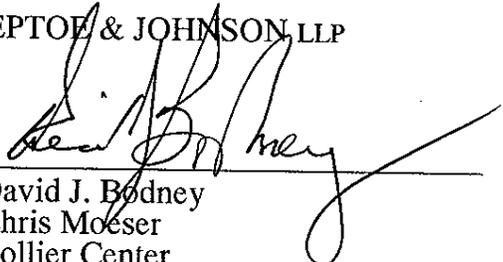
1 admonish prosecutors to comply with ER 3.8(f); and (3) reserve the right to take future
2 measures to balance the public's right to be informed with the defendant's right to fair
3 trial, including the imposition of sanctions.

4 Conclusion

5 For the foregoing reasons, KPNX requests that the Court grant this
6 Application to intervene, and modify the Order as outlined in Exhibit A.

7 RESPECTFULLY SUBMITTED this 11th day of November, 2008.

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1 ORIGINAL of the foregoing filed via
2 Federal Express Priority Overnight Service
3 this 1/14 day of November, 2008, to:

4 Clerk of the Apache County Superior Court
5 Attention: Civil Filing Counter
6 P. O. Box 365
70 West 3rd South
Saint Johns, Arizona 85936

7 COPY of the foregoing delivered via
8 Federal Express Priority Overnight Service
9 this 1/14 day of November, 2008, to:

10 Hon. Michael P. Roca
11 Judge Pro Tem
12 c/o Clerk of the Apache County Superior Court
13 P. O. Box 365
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Saint Johns, Arizona 85936

14 COPY of the foregoing served via
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