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APACHE COUNTY SUPERIOR COURT

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14 ARIZONA SUPERIOR COURT

15 APACHE COUNTY

16 In re the Matter of:  
17 ROMERO, CHRISTIAN RYAN,  
18 Person under eighteen (18) years of age.

19 ) No. JV2008065

20 ) **APPLICATION OF PHOENIX**  
21 ) **NEWSPAPERS, INC. AND DENNIS**  
22 ) **WAGNER TO INTERVENE FOR**  
23 ) **THE LIMITED PURPOSE OF**  
24 ) **UNSEALING LETTERS TO THE**  
25 ) **COURT**

26 ) (Assigned to the Honorable Michael P.  
27 ) Roca)

28 ) [*Expedited* Oral Argument Requested]

29 Pursuant to the First Amendment to the United States Constitution, Art. II,  
30 § 11 of the Arizona Constitution and Ariz. R. Sup. Ct. 123, Phoenix Newspapers, Inc.,  
31 which publishes *The Arizona Republic*, and *Republic* senior investigative reporter  
32 Dennis Wagner (collectively, "PNI"), apply for leave to intervene in this matter for the  
33 limited purpose of unsealing certain letters submitted to the Court by relatives of the  
34 victims (the "Letters"). The Court specifically referred to these Letters at the October  
35 22, 2009 hearing in this case (the "Hearing"). This Application is supported by the  
36 following Memorandum of Points and Authorities.

1 Preliminary Statement

2 To provide the public with important and timely information about this  
3 murder prosecution, PNI respectfully asks that the Court unseal the Letters discussed by  
4 the Court at the Hearing, and order the release of true and correct copies to PNI. At the  
5 Hearing, the Court stated that “upon further review of ... the victims’ families’  
6 expressions in letters to the Court, copies of which have been made available to the  
7 parties,” the Court’s “inclination [is] to reject the disposition stipulations of the admission  
8 agreement that was previously entered.” [Oct. 22, 2009 Hr’g Tr. at 4-5] The Court’s  
9 statements – which potentially could upend the last seven months of proceedings in this  
10 case – were followed by the Defense’s petition for a change of judge. In an extraordinary  
11 turn of events, the State has evidently announced its intention to join the Defense’s  
12 request, and is taking the position that the events of the October 22 hearing require the  
13 reassignment of this case to a different judicial officer.

14 As demonstrated below, once the Letters were reviewed by the Court and  
15 formed part of the basis for the Court’s judicial decision-making, the Letters became  
16 presumptively *public* judicial records, and the law requires that they either be disclosed in  
17 their entirety forthwith, or redacted to exclude *only* that information which the Court  
18 specifically finds must be withheld to protect compelling countervailing interests in  
19 secrecy. If any redactions are permitted, they should be lifted as soon as the need for  
20 secrecy expires.

21 The public has a strong presumptive right of access to court records under  
22 the First Amendment. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14  
23 (1986) (“*Press-Enterprise II*”); *Oregonian Pub. Co. v. Dist. Ct.*, 920 F.2d 1462, 1466-67  
24 (9th Cir. 1990). The Arizona Constitution likewise commands that “[j]ustice in *all cases*  
25 *shall be administered openly*, and without unnecessary delay,” Ariz. Const., Art. II, § 11  
26 (emphasis added), and the Arizona Supreme Court has made clear that all documents filed  
27 with the court “are presumed to be open to any member of the public for inspection....”  
28 Ariz. Sup. Ct. R. 123(c)(1). Absent proof of an overriding interest that supersedes the

1 strong presumption of public access to court proceedings and documents, the Letters  
2 should be unsealed and released promptly.

3 Factual Background

4 This case arises from the November 5, 2008 arrest by St. Johns police of  
5 Christian Ryan Romero (“Romero”), then an 8-year-old boy, for shooting and killing his  
6 29-year-old father, Vince Romero, and a 39-year-old man who rented a room at the family  
7 home, Tim Romans. In February 2009, the Court accepted a plea agreement pursuant to  
8 which Romero admitted guilt in Romans’ shooting. In return, the State agreed to drop  
9 charges concerning the death of Romero’s father, and accept a sentence of intensive  
10 probation, counseling and other terms. [Dennis Wagner, “Boy’s lawyer: Judge in murder  
11 case is biased,” *The Arizona Republic*, B1, Nov. 5, 2009 (copy attached as Exhibit A)]

12 However, at the October 22, 2009 Disposition Hearing, this Court stated its  
13 inclination to reject the disposition stipulations that had been agreed to by the State and  
14 Romero, and suggested that the Court would require that Romero be turned over to the  
15 Arizona Department of Corrections. [Oct. 22, 2009 Hr’g Tr. at 5] In effect, the Court  
16 disapproved the terms of an agreement that would have brought closure to this murder  
17 case. The Court stated, on the record, that it based its decision upon further review of  
18 several documents, including “the victims’ families’ expressions in letters to the Court,  
19 copies of which have been made available to the parties....” [*Id.* at 4]

20 The Court’s rejection of the plea agreement prompted defense counsel to file  
21 a Notice of Change of Judge for Cause. On November 5, 2009, the *Republic* reported that  
22 Apache County Attorney Michael Whiting had said that he would support the Notice.  
23 [Exhibit A]

24 On November 4, 2009, Dennis Wagner sent an email to the Apache County  
25 Superior Court Administrator, asking if he could receive copies of the Letters referenced  
26 by the Court at the Hearing. On November 5, 2009, the Administrator informed Mr.  
27 Wagner, by email, that the Letters “are sealed and can’t be released except by order of the  
28 court.” [Attached as Exhibit B is a copy of Mr. Wagner’s email request and the

1 Administrator's reply.] On November 5, 2009, PNI, through undersigned counsel,  
2 telephoned the Administrator's Office to request a copy of the order sealing the Letters.  
3 On November 6, 2009, undersigned counsel was informed that the Court had directed that  
4 victim impact statements be sealed, but that a written order has not yet issued.

5 Argument

6 I. THE COURT SHOULD PERMIT PNI TO INTERVENE TO PROTECT THE  
7 RIGHTS OF THE PUBLIC AND THE PRESS TO IMPORTANT  
8 INFORMATION ABOUT THIS CASE, INCLUDING THE LETTERS UPON  
9 WHICH THE COURT RELIED IN REJECTING THE PARTIES' DISPOSITION  
10 AGREEMENT.

11 On November 18, 2008, this Court granted a similar request for limited  
12 intervention filed by PNI and KPNX Broadcasting Company. As PNI argued then, news  
13 organizations are routinely permitted to intervene to challenge requests or orders that  
14 burden First Amendment rights or restrict public access to judicial records and  
15 proceedings. *E.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (*Press-*  
16 *Enterprise I*) (press allowed to object to closure of *voir dire* examinations in criminal  
17 trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (upholding  
18 newspaper's right to challenge order closing a criminal trial from the general public);  
19 *KPNX Broadcasting Co. v. Superior Court*, 139 Ariz. 246, 254 (1984) (order requiring  
20 court approval of juror sketches challenged by the press and held unconstitutional);  
21 *Phoenix Newspapers, Inc. v. Superior Court*, 140 Ariz. 30, 32, 680 P.2d 166, 168 (Ct.  
22 App. 1983) (newspaper permitted to intervene for limited purpose of objecting to closure  
23 of criminal sentencing proceedings). Given PNI's strong and abiding interest in reporting  
24 news to the public in general, and its demonstrable interest in reporting information about  
25 the events described herein in particular, intervention should be allowed.

26 II. THE LETTERS TO THE COURT ARE PUBLIC JUDICIAL RECORDS, AND  
27 ARE SUBJECT TO A STRONG PRESUMPTION IN FAVOR OF ACCESS.

28 At the Hearing, the Court stated that it had reviewed, considered or relied  
upon the Letters in connection with its decision to reject the stipulated disposition terms.  
The Letters were provided to the Court and shared with the parties. Because the Letters

1 informed the Court's judicial decision-making, and because they formed part of the basis  
2 for judicial statements that have resulted in the parties seeking a change of judge, the  
3 Letters are subject to a *strong presumption* of public disclosure under the First  
4 Amendment. *See, e.g., Oregonian*, 920 F.2d at 1466-67 ("Consistent with the presumed  
5 right of access to court proceedings and documents under the first amendment as  
6 articulated in *Press-Enterprise I*, the party seeking access is entitled to a presumption of  
7 entitlement to disclosure.") (emphasis added). As Judge Posner has observed:

8           The general rule is that the record of a judicial proceeding is  
9           public. . . . Not only do such records often concern issues in  
10          which the public has an interest, in which event concealing the  
11          record disserves the values protected by the free-speech and  
            free-press clauses of the First Amendment, but also the public  
            cannot monitor judicial performance adequately if the records  
            of judicial proceedings are secret.

12 *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002). Indeed, the public's right of access is  
13 especially strong where, as here, a document "reflects input by a [ ] judge" or shapes  
14 judicial-decision making; such documents are presumptively public. *Id.* at 929-30. *See*  
15 *also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (the  
16 resolution of a dispute on the merits "is at the heart of the interest in ensuring the 'public's  
17 understanding of the judicial process and of significant public events'") (citation omitted).

### 18 III. THE LETTERS SHOULD BE DISCLOSED.

#### 19 A. The First Amendment Standards for Sealing Have Not Been Met.

20           Under the First Amendment, the public and the press are entitled to access to  
21 judicial hearings and records except where "specific, on the record findings are made  
22 demonstrating that 'closure is essential to preserve higher values and is narrowly tailored  
23 to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14 (citation omitted). *See also*  
24 *Oregonian*, 920 F.2d at 1466-67.

25           Under the First Amendment, **closure is permissible only if the Court finds**  
26 **that "(1) closure serves a compelling interest; (2) there is a substantial probability**  
27 **that, in the absence of closure, this compelling interest would be harmed; and (3)**  
28

1 **there are no alternatives to closure that would adequately protect the compelling**  
2 **interest.”** *Phoenix Newspapers, Inc. v. United States Dist. Ct.*, 156 F.3d 940, 949 (9th  
3 Cir. 1998).

4 Moreover, courts applying these requirements must follow certain  
5 constitutionally-mandated procedures. **First, if a court contemplates closing a hearing**  
6 **or sealing a judicial record, “it must provide sufficient notice to the public and press**  
7 **to afford them the opportunity to object or offer alternatives. If objections are made,**  
8 **a hearing on the objections must be held as soon as possible.”** *Phoenix Newspapers,*  
9 *Inc.*, 156 F.3d at 949. **Second, the court must “make specific factual findings**  
10 **supporting its closure decision,” and those findings must “satisfy all three**  
11 **substantive requirements for closure.”** *Id.* at 950.

12 PNI is not aware of whether any specific, on-the-record findings have been  
13 made to justify the Court’s sealing of the Letters. As explained above, PNI has not  
14 received a copy of a written order sealing these records. Even if such findings have been  
15 made, it seems unlikely that wholesale sealing is narrowly tailored to protect the interests  
16 that might favor secrecy, or that alternatives to such total closure not could adequately  
17 address those concerns – especially on the facts of this case. To further important public  
18 interests, the records should be released.

19 B. The Records Should Be Disclosed Under Arizona Law.

20 The Arizona Supreme Court has made clear that all papers filed with the  
21 courts of this state are presumptively public documents:

22 Historically, this state has always favored open government and an  
23 informed citizenry. In the tradition, *the records in all courts and*  
24 *administrative offices of the Judicial Department of the State of*  
25 *Arizona are presumed to be open to any member of the public for*  
*inspection or to obtain copies at all times during regular office hours*  
*at the office having custody of the records.*

26 Ariz. Sup. Ct. R. 123(c)(1) (emphasis added). To overcome the presumption, the party  
27 seeking closure has the burden of showing that “countervailing interests of confidentiality,  
28 privacy, or the best interests of the state” justify deviating from the usual rule of full

1 disclosure. *Id.*; *cf. Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984)  
2 (under the Arizona Public Records Law, an official seeking closure has the heavy burden  
3 of proving “the probability that *specific, material harm* will result from disclosure, thus  
4 *justifying an exception to the usual rule of full disclosure. . . .*”) (emphasis added).

5 In the analogous context of the Arizona Public Records Law, the Arizona  
6 Supreme Court has recognized that blanket, conclusory statements that disclosure *could*  
7 hamper an ongoing criminal investigation are insufficient to rebut the presumption of  
8 public access. *Cox Ariz. Publ’ns, Inc. v. Collins*, 175 Ariz. 11, 13-14, 852 P.2d 1194,  
9 1197-98 (1993) (rejecting as insufficient the County Attorney’s generalized concerns that  
10 disclosure “will hamper the ongoing investigation” and “might inhibit future witnesses  
11 from coming forward”). *See also Star Publ’g Co. v. Pima County Attorney’s Office*, 181  
12 Ariz. 432, 434, 891 P.2d 899, 901 (Ct. App. 1994) (granting request for public access  
13 where “[a]ll that is offered is *speculation*” that disclosure “might impede a pending  
14 criminal investigation”) (emphasis added).

15 If a specific threat of harm from disclosure exists, the Court must redact  
16 only as much information as necessary to advance the state’s interest in avoiding such  
17 harm, and release the remainder. *See Phoenix Newspapers*, 156 F.3d at 951 (“redaction of  
18 the juror’s names and addresses from the transcript – as was ultimately accomplished –  
19 would have sustained the protection of the juror’s security interests”). If any redactions  
20 are permitted, the law requires the Court to set forth specific, on-the-record factual  
21 findings that justify any closure order it might issue. *See Ariz. Sup. Ct. R. 123(d)* (“Upon  
22 closing any record the court shall state the reason for the action, including a reference to  
23 any statute, case, rule or administrative order relied upon.”). Moreover, the redactions  
24 must be lifted as soon as the necessity for closure no longer exists. *See Phoenix*  
25 *Newspapers*, 156 F.3d at 947-48 (information properly placed under seal “must be  
26 released when the danger of prejudice has passed”). Prompt disclosure of the Letters will  
27 further the strong policy of this State in favor of open judicial proceedings and records.

28

1 PNI recognizes that Rule 19.A.2 of the Rules of Procedure for the Juvenile  
2 Court allows for the placement of certain documents in the Juvenile Court's "Social File,"  
3 and that such documents "shall be confidential and withheld from public inspection except  
4 upon order of the court." Victim impact statements or letters to the court from victims or  
5 their families are not among the specifically-identified records listed in Rule 19.A.2 as  
6 being subject to confidentiality.

7 Nevertheless, PNI respectfully submits that if the Letters were placed in the  
8 Social File, they should be unsealed and released to the public for three reasons. First, as  
9 records considered and relied upon by the Court in rejecting the agreed-upon stipulations  
10 regarding Romero's disposition, the records will shed important light upon the Court's  
11 decision-making. *Jessup*, 277 F.3d at 928-30; *Kamakana*, 447 F.3d at 1179. The public  
12 interest in access to these documents is all the more acute because the Court's recent  
13 decision has led the Defense to seek a change of judge, and has evidently led the State to  
14 support the Defense's request in this case of great public interest. Because these records  
15 form an essential part of the Court's decision-making, they are presumptively subject to  
16 the public access as a matter of First Amendment law. To the extent that the First  
17 Amendment of the United States Constitution conflicts with Rule 19, the Court must  
18 follow the First Amendment. *See, e.g., Globe Newspapers*, 457 U.S. at 610-11  
19 (invalidating, under the First Amendment, a Massachusetts statute that required mandatory  
20 closure of trials involving minor victims of sexual assault).

21 Second, the acute public interest in opening judicial proceedings to public  
22 scrutiny and understanding the judicial process – as embodied in the First Amendment and  
23 Ariz. Sup. Ct. R. 123 – strongly supports disclosure of the Letters here. As the Ninth  
24 Circuit recognized in a case involving a newspaper's request for access to a pre-sentence  
25 report in murder case involving the shooting death of a prosecutor:

26 The newspaper has a legitimate interest in explaining to a  
27 concerned public the means by which sentencing decisions are  
28 made. Making the public aware of how the criminal justice  
system functions surely serves the ends of justice. Publishing  
sufficient information to allow the public to join in a dialogue

1 about the courts and the treatment of defendants can only have  
2 a positive impact on the public's perception of our judicial  
3 system. If the system has flaws, it is all the better that these  
4 flaws be exposed and subjected to public comment.

5 *United States v. Schlette*, 842 F.2d 1574, 1583 (9th. Cir. 1988). In *Schlette*, the court  
6 noted that even judicial records that may be afforded some form of confidentiality should  
7 be disclosed in cases of strong public interest and concern. *Id.* at 1583  
8 (“‘[C]onfidentiality’ is not some talismanic utterance that can justify a refusal to disclose  
9 the contents of a presentence report” in cases of acute public interest).

10 This case has been the subject of intense public interest and concern since its  
11 inception. The recent events of October 22 have caused both the Defense and the State to  
12 contend that the Court’s inclinations, if followed, would upend the last seven months of  
13 progress that the parties have made towards reaching a form of closure and finality. [See  
14 Exhibit A] Allowing access to the Letters will enable the public to understand more about  
15 the basis for the Court’s statements, and will further the fundamental values underlying  
16 public access to criminal court proceedings that have long been recognized. Indeed, as  
17 Justice Brennan wrote in *Globe Newspapers*:

18 [T]he right of access to criminal trials plays a particularly  
19 significant role in the functioning of the judicial process and  
20 the government as a whole. Public scrutiny of a criminal trial  
21 enhances the quality and safeguards the integrity of the  
22 factfinding process, with benefits to both the defendant and to  
23 society as a whole. Moreover, public access to the criminal  
24 trial fosters an appearance of fairness, thereby heightening  
25 public respect for the judicial process. And in the broadest  
26 terms, public access to criminal trials permits the public to  
27 participate in and serve as a check upon the judicial process-an  
28 essential component in our structure of self-government.

29 *Globe Newspapers*, 457 U.S. at 606. Given the tremendous importance of this case to the  
30 community, the State and beyond, and the significance of the Court’s statements and  
31 decisions at the October 22 hearing, the Court should release the Letters forthwith. *Cf.*  
32 *Mitchell*, 142 Ariz. at 334 n.3 (“the public’s ability to examine and evaluate the criminal  
33 justice system as it relates to the disposition of offenders is important and should not  
34 lightly be curtailed.”).

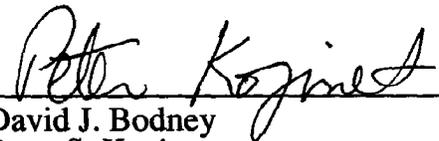
1 Third, the Letters should be disclosed because of the absence of any specific  
2 findings regarding any harms that might come to pass by disclosing them. There is no  
3 basis in the record here for keeping the Letters under seal. If any such basis exists, the  
4 Letters should be redacted as described above.

5 Conclusion

6 For the foregoing reasons, PNI requests that the Court grant this Application  
7 to Intervene and unseal the victims' families' letters to the Court referenced by Judge  
8 Roca at the October 22, 2009 hearing.

9 RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2009.

10 STEPTOE & JOHNSON LLP

11 By 

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13 Peter S. Kozinets  
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18 Phoenix, Arizona 85004-2382

19 Attorneys for Phoenix Newspapers, Inc.  
20 and Dennis Wagner

21 ORIGINAL of the foregoing filed via  
22 Federal Express Priority Overnight Service  
23 this 6<sup>th</sup> day of November, 2009, to:

24 Clerk of the Apache County Superior Court  
25 Attention: Civil Filing Counter  
26 P. O. Box 365  
27 70 West 3<sup>rd</sup> South  
28 Saint Johns, Arizona 85936

1 COPY of the foregoing served via  
2 facsimile and US Postal Service  
3 this 10<sup>th</sup> day of November, 2009, to:

4 Clerk of the Navajo County Superior Court  
5 Attention: Civil Filing Counter  
6 100 East Carter Drive  
7 South Highway 77  
8 P. O. Box 668  
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11 Hon. Michael P. Roca  
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\_\_\_\_\_

# **Exhibit A**

**Exhibit A**

## Boy's lawyer: Judge in murder case is biased

By Dennis Wagner

THE ARIZONA REPUBLIC

The attorney for a 9-year-old murder defendant in St. Johns is asking that the judge handling the case be removed because of alleged bias against the boy.

Christian Romero is accused in the Nov. 5, 2008, gunshot slayings of his father, Vince Romero, 29, and a family friend, Tim Romans, 39.

As part of a plea deal, the boy had admitted guilt in February in Romans' shooting. In return, prosecutors had agreed to drop charges in the death of Christian's father

See ST. JOHNS Page B3

## Judge is accused of bias in St. Johns murder case

ST. JOHNS

Continued from B1

and accept a sentence of intensive probation, counseling and possible juvenile detention.

Under the plea, which had been accepted by Apache County Superior Court Judge Michael Roca, the boy would not be imprisoned.

But Ronald Wood, the boy's lawyer, said in a petition filed last week that Roca intends to reject that deal and put Christian behind bars. Wood claimed the judge is acting on information from outside the court, rather than testimony or evidence.

During an Oct. 22 hearing, the judge announced that he could not support intensive probation because the St. Johns community would be "poison" for Christian.

Roca then declared the boy should be held by the Arizona Department of Corrections for an unspecified period of time, the motion said.

"No expert, no doctor and no one that has had any prolonged contact with the juvenile has suggested that this is an appropriate sentence," Wood wrote. "It appears that the court has succumbed to political pressure from some local 'citizens' to have the juvenile removed from the community."

Apache County Attorney Michael Whiting said he will support efforts to remove the judge because Roca reversed himself, potentially starting the case over seven months after accepting the plea.

"We need a new judge," he said. "Otherwise, we're almost back to Square 1."

Roca was unavailable for comment Wednesday. A hearing has not been scheduled.

# **Exhibit B**

**Exhibit B**

**From:** Smith, Betty [mailto:BSmith2@courts.az.gov]  
**Sent:** Thursday, November 05, 2009 7:51 AM  
**To:** Wagner, Dennis  
**Subject:** RE:

Mr. Wagner,

The victim impact statements are sealed and can't be released except by order of the court.

Betty

---

**From:** Wagner, Dennis [mailto:dennis.wagner@arizonarepublic.com]  
**Sent:** Wednesday, November 04, 2009 5:18 PM  
**To:** Smith, Betty  
**Subject:** RE:

Betty:

Thank you so much for these records.

According to transcripts from the Oct. 22 hearing, Judge Roca based his remarks in part on "victims' families' expressions in letters to the Court." If you have some or all of those letters in electronic form, can you email them to me? If the letters only exist as paper documents, can you tell me how I might receive them? I'd be glad to pay a reasonable fee if necessary.

My contact info is below. If you send a fax, please make sure my name is listed clearly on the cover page.

Thanks.

Dennis Wagner

The Arizona Republic/USA Today

O-(602) 444-8874

C-(602) 228-6805

Fax: (602) 444-8044.