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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)
21) **REPLY IN SUPPORT OF**
22) **APPLICATION OF PHOENIX**
23) **NEWSPAPERS, INC. AND DENNIS**
24) **WAGNER TO INTERVENE FOR**
25) **THE LIMITED PURPOSE OF**
26) **UNSEALING LETTERS TO THE**
27) **COURT**
28) (Assigned to Hon. Monica L. Stauffer)
[Oral Argument: December 23, 2009,
3:00 p.m.]

Preliminary Statement

21 PNI filed its Application to Intervene to ask the Court to unseal the letters
22 from relatives of the victims (the "Letters") that Judge Roca cited in support of his
23 rejection of the parties' disposition agreement at the October 22, 2009 hearing – a
24 decision that prompted both sides to seek his removal from the case (the "Hearing").
25 [Oct. 22, 2009 Hr'g Tr. at 4-5] Neither the juvenile, his mother nor his guardian *ad*
26 *litem* has filed any opposition to PNI's Application. For its part, the State does not
27 contest that the Letters – having been reviewed by the Court and formed part of the basis
28 of the Court's decision-making – are presumptively public judicial records. Rather, the

1 State asserts that PNI should not be permitted to intervene and that release of the Letters
2 may “potential[ly] harm” the victims and their relatives. [State’s Resp. at 1]

3 As shown below, the State’s objections lack merit for two fundamental
4 reasons. First, the press and the public are routinely permitted to intervene to seek access
5 to judicial records, and PNI is entitled to intervene here. Second, the State’s Response
6 fails to offer any *proof* of an overriding interest that supersedes the strong presumption of
7 public access, or that sealing is narrowly tailored to advance any such interest.
8 Accordingly, the Court should unseal the Letters promptly.

9 Argument

10 I. PNI SHOULD BE PERMITTED TO INTERVENE TO SEEK
11 RECONSIDERATION OF THE COURT’S SEALING OF THE LETTERS.

12 Contrary to the State’s assertions, PNI’s intervention request is appropriate
13 and should be granted. PNI was informed that the Court (presumably, then-sitting Judge
14 Roca) had ordered or directed that the Letters be sealed, and that the only way it could
15 secure access to the Letters was by obtaining an order from the Court. [PNI’s Appl. at 3-
16 4] At a minimum, PNI is entitled to seek leave to intervene to learn the reasons for, and
17 seek reconsideration of, the Judge’s sealing order or directive.

18 The State’s assertion that Ariz. Sup. Ct. R. 123 provides the *only* avenue for
19 challenging the sealing order is erroneous – and contrary to the First Amendment. PNI’s
20 Application is based on multiple authorities, including the public’s right of access to court
21 records under the First Amendment, the Arizona Constitution and the common law. [*Id.*
22 at 1, 4-9] The First Amendment alone requires that the Court hold a prompt hearing on
23 objections to a sealing order, and that judicial records must be released unless specific, on-
24 the-record findings are made, after a hearing, showing that (1) closure serves a compelling
25 interest, (2) there is a substantial probability that this compelling interest would be harmed
26 without closure, and (3) no alternatives to closure would adequately protect that interest.
27 [*Id.* at 5-6 (citing cases)] The First Amendment trumps contrary state laws and rules.
28 *E.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

1 Moreover, this is not a case in which a custodian denied access pursuant to
2 Rule 123. The remedy that the State discusses applies only where an “applicant is denied
3 the right to inspect, receive copies or access any record *pursuant to the authority of this*
4 *rule....*” Ariz. Sup. Ct. R. 123(f)(5)(A) (emphasis added). Here, the Court Administrator
5 did not cite Rule 123, but informed PNI that the Judge had directed or ordered sealing.
6 [PNI’s Appl. at 3-4] Where – as here – records are sealed at the behest of a judge sitting
7 on a specific case, courts routinely allow members of the press and the public to intervene.
8 [*Id.* (citing cases)] See, e.g., *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501 (1984)
9 (press allowed to intervene to seek *voir dire* transcripts closed by the court); *Phoenix*
10 *Newspapers, Inc. v. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998) (transcripts of closed
11 hearings); *United States v. Schlette*, 842 F.2d 1574, 1583 (9th. Cir. 1988) (presentence
12 report); *Phoenix Newspapers, Inc. v. Super. Ct.*, 140 Ariz. 30, 32, 680 P.2d 166, 168 (Ct.
13 App. 1983) (sentencing proceedings and transcripts).

14 *Arpaio v. Davis*, 221 Ariz. 116, 210 P.2ds 1287 (2009), is not the contrary.
15 [State’s Resp. at 2 n.2] In that case, a judge presiding over a particular case had *not*
16 ordered the sealing of specific records. Rather, a custodian denied Sheriff Arpaio’s
17 burdensome and random requests for more than 16,000 emails to and from court staff.
18 Moreover, unlike PNI’s Application, the Sheriff’s request did *not* arise under multiple
19 sources of authority apart from Rule 123. In the circumstances of this case, Rule 123 does
20 not prescribe the sole, exclusive or even best means for moving the Court to unseal
21 documents that the then-sitting Judge directed be sealed.

22 Even if the Court finds that Rule 123(f)(5)(A) provides the exclusive means
23 for unsealing the Letters, PNI’s Application should be construed as an appropriate request
24 for administrative review under the Rule. PNI’s Application cites Rule 123 and was
25 submitted to the Apache County Court Clerk and its Presiding Judge within 10 days of the
26 denial. [See Appl. at 11 (showing service on Presiding Judge Donna Grimsley); see also
27 Ex. A (Nov. 6, 2009 letter to Apache County Superior Court) and Ex. B (Nov. 9, 2009
28 filing date)] In brief, the State’s procedural objection should be overruled.

1 II. THE STATE'S RESPONSE FAILS TO OVERCOME THE STRONG
2 PRESUMPTION IN FAVOR OF PUBLIC ACCESS.

3 The State does *not* challenge the Letters' status as public judicial records
4 that are subject to a strong presumption in favor of public access and disclosure. [See
5 PNI's Appl. at 2-3, 4-5; State's Resp. at 1-3] For several reasons, the Response fails to
6 meet the State's heavy burden of proving that significant harm to compelling interests will
7 result if the Letters are unsealed. [PNI's Appl. at 5-7]

8 First, the Response is based on nothing more than the State's unsupported
9 assertions concerning the victims' families and the juvenile. Generalized assertions of
10 harm, unsupported by concrete facts, cannot overcome the public's right of access. [*Id.* at
11 5-7] Second, the State's assertion that the victims' families submitted the Letters "with
12 the understanding" that the Letters would be private is both factually unsupported and
13 legally insufficient. [State's Resp. at 3] It is unclear whether the State believes that any
14 promise of confidentiality or privacy had been extended to the Letter writers, and, if so, by
15 whom. Absent evidence that such promises were made, the State cannot even begin to
16 meet the tests for closure recognized by the First Amendment and Arizona law.
17 Moreover, assurances of confidentiality are not enough to justify permanent sealing of
18 documents submitted to public judicial officers for their consideration in making
19 sentencing or disposition determinations. If the law were otherwise, then court officers
20 could routinely override the public's right of access by simply promising to keep certain
21 records private or confidential. That is not, and cannot be, the law. *Cf. Phoenix*
22 *Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 273, 159 P.3d 578, 583 (Ct. App. 2007)
23 (claimant's unilateral request that a Notice of Claim be held in confidence cannot trump
24 the public's right of access to public records); *Moorehead v. Arnold*, 130 Ariz. 503, 505,
25 637 P.2d 305, 307 (Ct. App. 1981) (a public official's "promise of confidentiality standing
26 alone is not sufficient to preclude disclosure" under the Arizona Public Records Law).

27 Third, the notion that the victims' families had a reasonable expectation of
28 privacy in the Letters is inconsistent with Arizona law. Rather, the Rules of Juvenile
Procedure expressly contemplate that the Letters may be released publicly. If the Letters

1 are part of the “case file” under Rule 19.A, they “shall be open to public inspection”
2 unless otherwise ordered; if part of the “social file,” the Court may order their release.
3 Rule 19.A.2. In view of Rule 19, the families could not have had a reasonable expectation
4 that the letters were private – or could be sealed indefinitely.

5 Fourth, the State’s assertions concerning the effect of unsealing the Letters
6 on the juvenile are unavailing because the parties best suited to raise the juvenile’s rights –
7 Romero, his guardian *ad litem* and his mother – do *not* oppose PNI’s Application.
8 Romero’s case has already been the subject of extensive press coverage – his confession
9 has been aired around the world, and the details of his plea agreement have been reported
10 widely. [See, e.g., Appl. Ex. A] If release of the Letters would subject to Romero to
11 “heightened prejudice and condemnation,” Romero’s representatives would surely have
12 joined the State’s opposition. Their non-opposition undercuts the State’s position.

13 Fifth, the public has an abiding interest in access to the Letters. The
14 victims’ families submitted the Letters to the Court for the purpose of providing input into
15 the Court’s decision-making process regarding Romero’s sentencing and disposition, and
16 Judge Roca explicitly relied upon them in rejecting the parties’ disposition agreement.
17 [Appl. at 8-9] The acute public interest in opening judicial proceedings and understanding
18 the judicial process – as embodied in the First Amendment, the Arizona Constitution and
19 Rule 123 – strongly supports disclosure here. See, e.g., *Schlette*, 842 F.2d at 1583
20 (releasing presentence report in murder case of strong public interest).

21 Because the State has provided no factual or legal basis for keeping the
22 Letters under seal, the Letters should be released forthwith. Alternatively, the Court
23 should review the Letters *in camera* and either release the Letters in their entirety, or
24 narrowly redact the Letters to remove only those portions that, if disclosed, would likely
25 cause specific, material harm to a compelling interest. [See PNI’s Appl. at 6-7]

26 Conclusion

27 For the foregoing reasons, PNI’s Application should be granted, the Letters
28 should be unsealed and true and correct copies should be made available to PNI.

1 RESPECTFULLY SUBMITTED this 21st day of December, 2009.

2 STEPTOE & JOHNSON LLP

3
4 By 

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14 ORIGINAL of the foregoing sent via
15 Federal Express Priority Overnight Service
16 this 21st day of December, 2009, for filing, to:

17 Clerk of the Apache County Superior Court
18 Attention: Civil Filing Counter
19 P. O. Box 365
20 70 West 3rd South
21 Saint Johns, Arizona 85936

22 COPY of the foregoing served via
23 facsimile and US Postal Service
24 this 21st day of December, 2009, to:

25 Hon. Monica L. Stauffer, Presiding Judge
26 Greenlee County Superior Court
27 P.O. Box 1027
28 Clifton, Arizona 85533
Fax: (928) 865-5358

Hon. Donna J. Grimsley, Presiding Judge
Apache County Superior Court
P. O. Box 365
70 West 3rd South
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Exhibit A

Exhibit A

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November 6, 2009

VIA FEDERAL EXPRESS

Clerk, Apache County Superior Court
P. O. Box 365
70 West 3rd South
Saint Johns, Arizona 85936

Re: *In re the Matter of: Romero, Christian Ryan, No. JV2008065*
Filing

Dear Clerk:

Enclosed for filing in the above-captioned case are the original and one copy of each of the following papers:

1. Notice of Appearance; and
2. Application of Phoenix Newspapers, Inc. and Dennis Wagner to Intervene for the Limited Purpose of Unsealing Letters to the Court (and Proposed Order).

Please file the originals, and please conform the copies and return them to me in the enclosed self-addressed stamped envelope.

If you have any questions, please feel free to call.

Respectfully submitted,


Peter S. Kozinets

Enclosures

591355

Exhibit B

Exhibit B

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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.

) No. JV2008065

) **APPLICATION OF PHOENIX
NEWSPAPERS, INC. AND DENNIS
WAGNER TO INTERVENE FOR
THE LIMITED PURPOSE OF
UNSEALING LETTERS TO THE
COURT**

) (Assigned to the Honorable Michael P.
Roca)

) [*Expedited* Oral Argument Requested]

19
20 Pursuant to the First Amendment to the United States Constitution, Art. II,
21 § 11 of the Arizona Constitution and Ariz. R. Sup. Ct. 123, Phoenix Newspapers, Inc.,
22 which publishes *The Arizona Republic*, and *Republic* senior investigative reporter
23 Dennis Wagner (collectively, "PNI"), apply for leave to intervene in this matter for the
24 limited purpose of unsealing certain letters submitted to the Court by relatives of the
25 victims (the "Letters"). The Court specifically referred to these Letters at the October
26 22, 2009 hearing in this case (the "Hearing"). This Application is supported by the
27 following Memorandum of Points and Authorities.
28