FILED
2:40 O'Clock P.M.
JUN 10 2011
SANDRA R. MARKHAM, Clerk
By:

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

DIVISION PRO TEM B

HON. WARREN R. DARROW

By: Diane Troxell, Judicial Assistant

CASE NO: P1300CR201001325/20081339 (dismissed)

Date: June 10, 2011

TITLE:	COUNSEL:
STATE OF ARIZONA	Jeffrey Paupore, Esq. Steven A. Young, Esq. Deputy Yavapai County Attorneys
(Plaintiff)	(For Plaintiff)
vs.	
STEVEN CARROLL DEMOCKER	Craig Williams, Esq. DeRienzo & Williams 3681 N. Robert Rd. Prescott Valley, AZ 86314 Greg Parzych, Esq. 2340 W. Ray Road, Suite One Chandler, AZ 85224
(Defendant)	(For Defendant)

INITIAL RULING ON UNSEALING/UNRESTRICTING DOCUMENTS

Rule 123(c)(1) of the Rules of the Supreme Court of Arizona (*Open Records Policy*) provides as follows:

> Historically, this state has always favored open government and an informed citizenry. In th[at] tradition, the records in all courts and administrative offices of the Judicial Department of the State of 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. However, in view of the possible countervailing interests of confidentiality, privacy or the best interests of the state public access to some court records may be restricted or expanded in accordance with the provision of this rule, or other provisions of law.

This Court was assigned to this matter after Judge Lindberg was stricken with a fatal illness during trial. Fundamentally, it was determined that it was in the best interests of the Defendant and the State to attempt to complete the already lengthy and expensive trial process. It was the intention of the Court to promote this compelling interest by avoiding

possible contamination of the non-sequestered jury through dissemination of unusual and potentially prejudicial information. It was anticipated that the trial would be completed during the fall of 2010 and that the bulk of the records and proceedings would be unsealed or unrestricted shortly thereafter. In fact, to this Court's knowledge the first suggestion that a formal request for sealed records would be asserted was presented in Western News&Info, Inc.'s October 5, 2010, application to intervene in P1300CR20081339. Because a mistrial has been declared and trial reset, however, concern with the state's interest in ensuring a fair trial is still present to some degree.

In addition to records and proceedings sealed or restricted during the trial, some orders to seal involved ex parte Rule 15.9 proceedings that occurred over many months preceding trial. Other records and proceedings involve matters implicating recognized privacy interests of jurors and attorneys and recognized interests in protecting attorney-client privilege. Furthermore, the unsealing and unrestricting of documents of all categories have been complicated by a number of factors including the large volume of records and proceedings involved, technical problems, and litigation over judicial assignments.

In general, matters in the State v. DeMocker cases have been held in abeyance in order to give the appointed attorneys sufficient time to review the extensive materials and present the Defendant's position on the issue of sealed documents and other matters. The Court has now considered the Defendant's and other parties' positions to the extent presented to date and has reviewed a large number of the records in question. This Court fully recognizes, of course, the intervenors' and public's interest in unsealing and unrestricting records and proceedings to the fullest extent permitted by law. This order is intended to promote that vital interest in a manner consistent with other protected interests.

The Defense Memorandum Re: Application of Western News & Info, Inc. for Leave to Intervene filed in P1300CR20081339 on April 11, 2011, lists four categories of records and proceedings which have been sealed or restricted. The Court will use this list to organize this initial ruling and will address each category separately below. The Court notes that the appropriate procedure for gaining access to the Court records is specified in Rule 123(f) and (g).

1. Indigency and Rule 15.9 Applications.

As noted by counsel for Intervenor Western News & Info., Inc. at the April 11, 2011, conference, the public has a strong interest in the expenditure of public funds. The Defense argues that disclosure of the amounts paid to potential defense experts and witnesses would reveal the extent of the investigation and should remain sealed. The Court concludes that the defense has not shown a specific harm or compelling interest that would justify continued non-disclosure of the expenditure of public funds. Thus, records showing the amounts ordered to be paid pursuant to Rule 15.9 will be unsealed. As is noted below, however, redaction of these records may be necessary.

The Court has not read the Rule 15.9 sealed, ex parte records and transcripts of proceedings. Although the Court concludes that the issue concerning sealed records can be addressed without finally resolving, at this time, the question of the appropriateness or

scope of ex parte proceedings, which are contemplated by Rule 15.9, some discussion of this question is appropriate in the present context.[1]

In contrast to the expanded disclosure required of the prosecution under Rule 15.1(b)(4), Rule 15.2(c)(2) requires the defense to disclose only expert witnesses who will testify at trial; the defense need not disclose the identity of expert witnesses who are consulted but are not ultimately listed as trial witnesses. Consequently, when there is no issue of public funding, no member of the general public – in fact, not even the prosecution – has any recognized interest in knowing the identity of expert witnesses consulted by the defense. Thus, the Court must balance an indigent defendant's constitutional rights and his protections under the Rules of Criminal Procedure as against the public's right to be informed of the use of public funds.

In his pending motion to dismiss or disqualify filed in P1300CR201001325, the Defendant has revealed the identity of at least some of the witnesses who were the subject of the Rule 15.9 ex parte proceedings. The Court therefore concludes that it is appropriate to unseal and make public orders for payments pursuant to Rule 15.9. The names and the specialties or assignments of experts and investigators not listed as witnesses will be redacted. However, the Court also concludes that there is no compelling State interest for continued sealing of records relating to witnesses who have been disclosed or relating to investigators, paralegals, and other assistants whose identities have been revealed during the course of litigation. Except as discussed above, the ex parte Rule 15.9 motions and the transcripts of proceedings will remain sealed at this time. The Court will consider unsealing the motions and transcripts after completion of the case, the Court finding that the Defendant's interests as noted above warrant continued sealing, at least until that time.

Because of the nature of the case, the records and transcripts relating to the proceeding for determination of indigency will also remain sealed at this time.

2. Juror Issues.

The specific reference to juror records in Rule 123 of the Supreme Court Rules is under the heading "Access to Administrative Records" and provides as follows:

> The home and work telephone numbers and addresses of jurors, and all other information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master list, are confidential, unless disclosed in open court or otherwise opened by order of the court.

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1 In *Morehart v Barton*, 226 Ariz. 510, 250 P.3d 1139 (2011) the Arizona Supreme Court recently vacated the Court of Appeals' opinion (225 Ariz. 269, 236 P.3d 1216), which had based its determination of a Rule 15.9-ex parte question on an interpretation of victims' rights law. This Court acknowledges, however, the State's concern over the appropriate scope of ex parte communications whose purpose is to obtain funding for defense consultants or potential witnesses. A mere avowal of counsel as to the need for the expert or investigator seemingly would not implicate ethical concerns or the substantive issues underlying those concerns relating to ex parte communications. A more detailed discussion relating to the specific reasons for the requested expert and funding, however, could be a completely different matter, and, perhaps, such proceedings should be conducted by a judge who is not presiding over the case.

Rule 123(e)(10), Rules of the Supreme Court. This rule is consistent with the provisions of A.R.S. § 21-312 and Rule 18.3 of the Arizona Rules of Criminal Procedure. Any unsealed jury records and transcripts of proceedings will therefore be redacted to conform to the requirements of the statute and rules.

In addition to maintaining confidentiality of "the list of juror names and other information," "the jurors' home and business telephone numbers and addresses," and all other information that "personally identifies jurors summoned for service, except the names of jurors on the master jury list, . . . unless disclosed in open court," the juror number in any released record will also be redacted. Release of juror number could defeat the compelling state interest in juror confidentiality that is embodied in the statute and rules cited above.

The Court concludes that records and proceedings involving juror issues such as compliance with the admonition, scheduling, and juror questions should be released after the necessary redactions are made. As discussed at the conference on April 11, 2011, juror records and proceedings relating to health concerns will remain closed.

3. Grand Jury Proceedings.

A.R.S. §§ 13-2812 and 28-411 express the compelling state interest in the secrecy and confidentiality of grand jury proceedings. There has been no explanation given to this Court as to how the presumption favoring open records would form a basis for the Court's determination that disclosure would be in furtherance of justice. The Court concludes that these records should remain closed.

4. "Miscellaneous" Items.

This category was addressed by the Defendant in a 4-page, supplemental memorandum which, with the approval of the Court, was filed under seal on May 2, 2011. As the Court has determined that some of the items discussed in the memorandum are to remain sealed due to the "countervailing interests of confidentiality, privacy or the best interests of the state," this initial ruling will not reveal detailed information that would negate the compelling interests that justify continued sealing of the records. However, the court has determined that providing general descriptions of the various sub-categories does not harm the interests in privacy and confidentiality and is necessary to the presentation of a meaningful initial ruling in this matter.

(A)(i) Any document (or copy thereof) submitted to a professional organization or association will remain closed as required by law.

(A)(ii) Statements directed at counsel.

The Court notes at the outset that some of this information has already been publicized.

Although the Court fully recognizes the strong countervailing interests in privacy and confidentiality that must be considered in connection with this sub-category of material, the Court cannot find that these legitimate concerns constitute a compelling state interest in the

permanent sealing or restricting of this information. The statements were made in the course of litigating this homicide case; they were made in the context of legal arguments relating to disclosure, discovery and the admissibility of evidence and became the subject of a motion to dismiss. Transparency in the trial process is a necessary component of "open government and informed citizenry." Therefore, subject to orders for redacting, sealing or restricting stated in this order, the Court concludes that this information is to be unsealed and unrestricted.

The Court also concludes, however, that there is a compelling state interest in delaying disclosure of this information until after the juror questionnaires containing the Court's admonition to prospective jurors are received by the panel summoned for trial (or retrial) of this matter. This case has received extensive coverage in local media. Even without a possible surge in media coverage, this Court estimates that it is necessary to send questionnaires to approximately 800 prospective jurors. Given the obvious expense involved, the Court concludes that it is appropriate to maintain the restricted status of this information until no sooner than July 15, 2011.

(B) Attorney-Client Privilege.

With approval of both parties, two ex parte conferences were conducted between the Court and the defense, one conference with Judge Brutinel and one with this Court. Minute entries, transcripts, and any other record relating to these ex parte conferences will remain sealed as they involve matters of attorney-client privilege, and it is in the best interests of the state to continue to recognize and protect this privilege.

(C) Account Numbers and Private Information.

The Court concludes that it is appropriate to redact this information in accordance with Rule 123.

(D) Ethical Issues.

The Court notes that it has not yet been provided with specific law that pertains to this issue, which involves the attorney-client privilege.

In this Court's experience, attorneys are routinely allowed to withdraw from representation of a defendant after an appropriate avowal. Because of the stage of the case at which the issue arose in the present matter, however, the Court engaged in a much more extensive procedure, with the Arizona Supreme Court ultimately deciding that the original defense attorneys should be permitted to withdraw. As noted above, the Court concludes that there is a compelling state interest in recognizing basic principles of attorney-client privilege and in not publicizing restricted or sealed information that relates solely to the discussion of ethical concerns. (The Court believes, however, that the Arizona Supreme Court order that mentions the pertinent ethical rule is a matter of public record.)

However, to the extent this information was presented to the Court in the context of motions relating to evidentiary or other substantive issues, it should be unsealed and unrestricted. Furthermore, the Court notes that, subject to its ruling on the pending motion to dismiss, it is likely that much of this information would be raised or discussed in future pretrial motions and, potentially, trial. Disclosure of the information in this sub-category

involves the same concerns discussed in the last paragraph under 4(A)(ii) above such that release will not occur sooner than July 15, 2011.

(E) Additional Items.

Counsel for the Defendant stated in the supplemental memorandum that counsel was not able to locate five minute entries relating to sealed hearings. These minute entries would have been recorded in Volumes 15 and 16. These minute entries should be unsealed unless they would be subject to sealing or other restriction pursuant to the foregoing provisions of this ruling. However, these records will not be released until specifically examined by the Court.

IT IS ORDERED that records are to be unsealed, unrestricted, and redacted in accordance with the foregoing provisions of this ruling. The status of any record will not be changed sooner than July 15, 2011.

IT IS FURTHER ORDERED setting a hearing/status conference regarding this initial ruling and on the unsealing and unrestricting of records on the 16th day of June, 2011, at 8:00 a.m. Telephonic appearances will be permitted if requested at least one business day in advance.

DATED this 10th day of June, 2011.

Warren R. Darrow
Superior Court Judge

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