IN SUPERIOR COURT
YAVAPAI COUNTY
STATE OF ARIZONA

State of Arizona,

Plaintiff,

vs.

Michael L. Ham,

Defendant.

case no. P1300CR2019 01558

APPLICATION OF WILLIAM E. WILLIAMS, JOURNALIST, FOR LEAVE TO INTERVENE FOR LIMITED PURPOSE OF MOVING TO UNSEAL COURT RECORDS AND PROCEEDINGS, EXPEDITED ORAL ARGUMENT REQUESTED

Pursuant to the First Amendment, and the Arizona Constitution, article 2, and Ariz R Sup Ct 123, William E. (Bill) Williams, a journalist whose partial credentials are listed under his signature line below, respectfully applies for leave to intervene for the limited purpose of moving to unseal numerous court records and proceedings that have been closed to the public in this criminal case. This Application is supported by the following facts, argument and memorandum of law:

This Petitioner/News Reporter has been prevented from reporting on the case at bar because Court staff will not make copies of court filings/records and claims there is some sort of seal on them.

This is a case of wide reaching public importance. The Prescott Courier Newspaper, Prescott Enews, KNAU Radio, AZFamily, AZCentral, Peoria Times, Daily Independent, Fountain Hills Times, FOX 10, and Western News Service have reported on this investigation.

Under the First Amendment the public has a strong right of access to the Court's records. See Press Enterprise Co. v Superior Court, 478 US 1, 106 S. Ct. 2735 (1986) [there are two Press-Enterprise case cited herein]. The Arizona Constitution commands "justice in all cases shall be administered openly," Ariz Const art. II; and the Arizona Supreme Court have declared that court filings are presumed to be open to any member of the public for inspection." Ariz R Sup Ct 123 c(1).

If this Petitioner continues to be denied copies, the Court Clerk actions could be deemed violative of substantive and procedural requirements that must be met before any portion of a case file be sealed from public view.

The law requires the Court provide public notice and make on-the-record findings before closure demonstrating closure serves a compelling interest, the compelling interest would be harmed in the absence of closure and less restrictive alternatives are unavailable. See Phoenix Newspapers Inc v District Court, 156 F 3rd 940 (9th Cir 1998). Arizona law requires the Court make similar findings demonstrating why a particular record should be sealed. See Ariz. R Sup Ct 123 c(1) and 123(d).

The courts have recognized the news media's special role in gathering information for dissemination to the public, and the United States Supreme Court has acknowledged that "news gathering is not without its First Amendment protections" because "without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 707, 681 (1972). This Petitioner has been hampered in his news gathering efforts for a third article on this case because of the Yavapai County Court's Records Department denial of access to public records. Some of the records this Petition seeks pertain to proceedings and what was discussed or what was ruled upon as a result of those proceedings, but blocking Petitioner's access to those by this Courthouse interferes with Petitioner's rights as a news reporter. The press has a virtually absolute right to report all events that transpire in the courtroom. Neb. Press Ass'n v. Stuart, 427 U.S. 539 (1976).

In addition, this Petitioner seeks a Court Order allowing him to attend all future hearings and the trial in this case or make specific findings of an overriding interest in closing the courtroom; see "access to court" in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980); the United States Supreme Court recognized a First Amendment right of the press and public to attend criminal trials. See also Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984) ("Press-Enterprise I"), the United States Supreme Court significantly enhanced the First Amendment right of access.

The Ninth Circuit has opined on both issues... opening records for a reporter's inspection, and allowing the reporter to attend a trial. The Ninth Circuit has held that to abrogate the right of access, three tests must be satisfied. First, "there must be a substantial probability that irreparable damage to a defendant's fair-trial will result if the proceeding is not closed. Second, "there must be no less drastic alternative available." Third, "there must be a 'substantial probability that closure will be effective in protecting against the perceived harm." Associated Press v. U.S. Dist. Court, 705 F.2d 1143, 1146 (9th Cir. 1983), cited with approval in Seattle Times, 845 F.2d at 1513. Moreover, once the danger of prejudice has passed, transcripts of properly closed proceedings must be released. See Phoenix Newspapers, Inc. v. U.S. Dist. Court, 156 F.3d 940, 947-48 (9th Cir. 1998). See also See Phoenix Newspapers Inc. v. Jennings, 107 Ariz. 557, 490 P.2d 563 (1971) (defendant charged with multiple homicides not entitled to have reporters and public excluded from preliminary hearing)

Harm to this Petitioner. On 03/19/2021 this Petitioner/News Reporter was denied copies of several Dr. Michael Ham case files/documents during an in-person conversation with the Records Clerk and her supervisor who she summoned for an opinion on the matter. But this violates an Arizona Rule and Statute. Rule 123 sets out the limits to access in both case files and court administrative records. Rule 123 also addresses how to obtain access to paper and electronic records. If a court custodian of the record denies access to a case file or an administrative record, you may request that the presiding judge of that court review the denial of your request, therefore this Petitioner seeks review and opinion by the judge assigned to the Ham Case.

Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986): under the first amendment the public has a strong right of access to court records; and court filings are open to members of the public and if not, the court has to make findings according to Ariz. R. Sup. Ct. 123(c)(1) and 123(d); the First Amendment requires such on-the-record findings before closure, citing Phoenix Newspapers, Inc. v. District Court, 156 F.3d 940 (9th Cir. 1998). Arizona law defines "public records" broadly and creates a presumption requiring the disclosure of public documents. *See* Ariz. Rev. Stat. § 39-121.

It is well settled law in Arizona that the state must demonstrate that a "harmful effect" would result from the release. The Arizona Attorney General has made clear that "doubts should be resolved in favor of disclosure." 1975-76 Ariz. Att'y Gen. Op. R75-781, at 145.

Four cases decided by the Arizona Supreme Court between 1984 and 1993 clarified the proper interpretation of the Arizona Public Records Law and all four work in this Petitioner's favor: Carlson v. Pima County, 141 Ariz. 487, 687 P.2d 1242 (1984); Mitchell v. Superior Court, 142 Ariz. 332, 690 P.2d 51 (1984); Arizona Board of Regents v. Phoenix Newspapers, Inc., 167 Ariz. 254, 806 P.2d 348 (1991) and Cox Ariz. Publications, Inc. v. Collins, 175 Ariz. 11, 852 P.2d 1194 (1993)

It is true that the law says grand jury proceedings are confidential but nowhere in the law does it say that transcribed testimony may not be provided to a news reporter. In fact, a redaction is reasonable to guard against some information being made public. This Petitioner prevailed in the State v. DeMocker homicide trial Yavapai County P1300 CR20081339 and P1300CR20101325 where this Petitioner was appointed Intervenor by the judge for two purposes: arguing for the public's right to know and freedom of the press. Petitioner prevailed in that case and he got all the records he wanted.

And this Petitioner again claims grand jury transcriptions must be provided to him because of the public's right to know and freedom of the press issues. As a journalist of 50 years, this Petitioner/News Reporter has a moral responsibility to provide audiences with information based on their need to know; an unrestricted public right to know is the foundation of press freedom. Petitioner is a conduit of important information but cannot serve these roles without unfettered access to court documents. The public deserves to know what investigators and prosecutors are saying about the very people who may have worked on their eyes, their eyesight or their eye surgeries and likewise the public at large deserves to know what investigators allege; or, the Court or those opposed to release of said documents must come up with a very persuasive opinion on why not. If they don't want them released, the bare minimum accepted by this Petitioner would be the inspection of all of the documents he requests.

The horse is already out of the barn, partially.

Numerous portions of grand jury transcripts or testimony have been attached to various filings by various litigants in the Dr. Michael Ham case and this Petitioner has referred to them in his second news article on the investigation/trial. Some portions were redacted and this Petitioner is willing to accept some redactions but the Court has to release the grand jury transcripts or opine on a reason not to. This Petitioner has combed through the case file and paid for copies containing approximately 1,000 words of grand jury testimony that were incorporated into various court filings that are open and viewable by the public (and news reporters). So the horse is out of the barn from about his muzzle to his loins, but that's not good enough; this Petitioner wants from the forelock to the hocks. In other words, this Petitioner prevailed as Intervenor requesting the record in the DeMocker homicide case; that's precedent. And certainly this Court wouldn't presume that obtaining the file of a homicide case is any more or less worthy than a fraud and conspiracy case file.

This Court has already ruled on whether or not the Prosecution or the Defense should get complete transcripts of the Grand Jury testimony and argument (See Orders in the case file) and both sides admit they have them. Yet the most important people in the County do not have access to them – the citizens who may or may not have been harmed by actions described in those transcripts. The public

deserves access to the transcripts and this Petitioner/News Reporter is but a conduit in the process; in other words: the Petitioner plans to present the content to those deserving residents in the form of his investigative reports; for a Court or a lawyer to prevent that upends the public's right to know and interferes with the freedom of the press. Judge Darrow, in State v. DeMocker appointed this Petitioner, and an attorney from Steptoe and Johnson, as Intervenors in the case and limited the Petitioner to raising issues of the Public's Right to Know and Freedom of the Press and this Petitioner took advantage of that and filed Motions and spoke twice in Court Hearings. Petitioner cited London v. Broderick, 206 Ariz. 490 (2003) as but one of numerous cases cited, explaining Ariz. Sup. Ct. R. 123: "... the court's open records provision, recognizes the public's significant interest in access to information regarding the courts and honors the presumption that court records be open and available to the public." And Petitioner incorporates the *London* court decision herein in full. Later, Presiding Judge Mackey was assigned to the DeMocker trial and further aided this Petitioner in obtaining all documents this Petitioner requested. Judge Mackey Ordered an additional 13 documents (beyond what the first Judge ordered) be provided. They were scanned to disk and mailed to this Petitioner at County expense.

Judge Mackey and the previous Judge, Darrow, also placed Petitioner on a permanent mailing list for all newly filed documents and hearing notices and this Petitioner requests the same treatment here.

In DeMocker, a former assistant county attorney was tasked with providing all documents to this Petitioner. They came in phases to this Petitioner (The Intervenor) including Grand Jury Transcripts, sometimes printed out, sometimes on a DVD, and normally without a charge for them. This Petitioner requests and expects the same in this case.

This Petitioner (The Intervenor) utilized the content of all DeMocker documents to write 6 free-lance articles he wrote about the case. When the process of releasing and providing was complete, Petitioner ended up with thousands of pages of materials, testimony, information, reports and crime scene photographs from the DeMocker Trial.

In this case, the Petitioner/News Reporter does not seek to publish personal details of Defendants' lives or victims' lives and said as much in his recent article on Prescott ENews. That's not good journalism. This Petitioner seeks to inform the public about the wide ranging investigation and describe the significance to Arizona residents. If the lawyers or the judge want to re-label some persons named in case files as "Witness 1" or "Victim X" because identification would jeopardize private information or hold someone up for scorn, then Petitioner understands that and can work with that. But denying entire transcripts or other case files could warrant a special action.

The series of reports this Petitioner seeks to publish are to be based on the totality of the Dr. Michael L. Ham case file and will be and have been designed to inform the public on the basic nuts and bolts of a fraud and conspiracy investigation, absent any opinion or comment regarding specific personal harm or guilt or innocence. And when Uranga v. Federated Publ'ns, Inc., 67 P.3d 29 (Idaho 2003) came to bat for a newspaper reporter, the court pointed out "the circumstances surrounding the publication... certainly evoke sympathy"). In this case, this Petitioner's style of reporting would invoke empathy – for the thousands of Yavapai County residents affected by lack of eye health care by Michael L. Ham and his 47 staffers, and other impacts the charges and investigation have on society.

Case precedent has been set. In State v. DeMocker.

Attending the trial. This Petitioner seeks a Court Ruling on whether he can attend the trial or hearings leading up to the trial and uses as his shield and spear KPNX Broadcasting Co. v. Superior Court, 139 Ariz. 246 (Ariz. 1984) where the court noted that the media's First Amendment interest in gathering news "means precisely the right to attend the trial and report on what transpires" Id. at 256, 678 P.2d at 441.

Our public records law assumes that documents such as police reports and even on-body camera footage are presumed public unless prosecutors can present specific reasons why they should be sealed.

Whether a document is a public record under Arizona's public records law presents a question of law, which we review de novo. *See Cox Ariz. Publ'ns, Inc. v. Collins*, 175 Ariz. 11, 14, 852 P.2d 1194, 1198 (1993).

The public records law requires all public officials to make and maintain records reasonably necessary to provide knowledge of all activities they undertake in the furtherance of their duties. *See Carlson*, 141 Ariz. at 490, 687 P.2d at 1245 and *Griffis v. Pinal County*, 215 Ariz. 1, 4 (Ariz. 2007)

Most public records cases require only an interest-balancing step because the documents at issue are clearly public records. *See, e.g., Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 955 P.2d 534 (1998); *Cox Ariz. Publ'ns*, 175 Ariz. 11, 852 P.2d 1194; *Carlson*, 141 Ariz. 487, 687 P.2d 1242.

Griffis v. Pinal County, is instructive here. A court decides whether a document is subject to inspection by making a two-step assessment. The court must initially determine whether the requested document is a "public record." *Griffis v. Pinal Cnty.*, 215 Ariz. 1, 5, ¶ 13, 156 P.3d 418, 422 (2007). Assuming the court finds that the document constitutes a public record, a strong presumption favoring disclosure applies and, "when necessary, the court can perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure." *Id.* at ¶ 13. The government has the burden of overcoming the presumption of disclosure. *Scottsdale Unified Sch. Dist.*, 191 Ariz. at 300, ¶ 9, 955 P.2d at 537.

In this case, Petitioner wants the whole record and the Court has to opine on it.

Lake v. City of Phoenix, 220 Ariz. 472, 486 (Ariz. Ct. App. 2009) clarifies that Arizona's public records law requires that the requestor be allowed to review a copy of the "real record."

It would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information. 220 Ariz. at 486 ¶ 48, 207 P.3d at 739.

For purposes of inspection and access, all records required to be made and maintained by ARS § 39-121.01(B) and preserved by (C) are to be available for inspection under § 39-121 and copying under § 39- 121.01(D), subject to the official's discretion to deny or restrict access where recognition of the interests of privacy, confidentiality, or the best interest of the state in carrying out its legitimate activities outweigh the general policy of open access.

Arizona law provides that "public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." See Ariz. Rev. Stat. (A.R.S.) § 39-121

(2001). But the County has denied a public records request by this Petitioner in this case; and this Petitioner says, "redact but don't withhold."

Furthermore, Arizona's public records law serves to "open government activity to public scrutiny." Griffis v. Pinal County, 215 Ariz. 1, 4 ¶ 11, 156 P.3d 418, 421 (2007); see also Phoenix Newspapers, Inc. v. Keegan, 201 Ariz. 344, 351 ¶ 33, 35 P.3d 105, 112 (App. 2001) ("The core purpose of the public records law is to allow the public access to official records and other government information so that the public may monitor the performance of government officials and their employees.") (citation omitted). A document's status as a public record is a question of law, which we review de novo. Griffis, 215 Ariz. at 3 ¶ 7, 156 P.3d at 420. ¶ 8 Consistent with the goal of openness in government, "Arizona law defines 'public records' broadly and creates a presumption requiring the disclosure of public documents." Id. at 4 ¶ 8, 156 P.3d at 421.

Petitioner is not unreasonable; he admits there are privacy, confidentiality, or the 'best interests of the state' issues involved herein. But it's up to the Judge to opine.

Mathews v. Pyle, 75 Ariz. 76 (1952), 251 P.2d 893, defined a public record as: (1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; (2) a record that the law requires to be kept, or "necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done"; or (3) "a written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such," whether required by law or not. 75 Ariz. at 78-79, 251 P.2d at 895.

Accordingly, Petitioner Williams respectfully requests the Court unseal all closed case filings, or what the Records Clerk claims "cannot be printed off," or make specific findings that would justify their closure. If the Court finds the continued closure of any record warranted, Petitioner asks that only those portions of the records that are truly confidential be redacted and the remainder be disclosed as required by law.

Currently, there is no explanation for a denial of public access in this case.

This fraud and conspiracy case is of substantial public interest and concern. Forty-eight members of the community are charged or are being investigated. A business has closed own. Hundreds or thousands of eye surgery patients are involved, along with impact to the families and local businesses affected by the 48. Local commerce is impacted.

FURTHER FACTS/ARGUMENT:

News organizations are routinely permitted to intervene in court proceedings to challenge the restriction of public access to criminal records and proceedings. Press Enterprise v Superior Court 464 US 501 (1984) (press allowed to object to closure); Globe Newspaper Co v Superior Court, 457 US 596 (1982) (upholding newspaper's right to challenge); KPNX Broadcasting v Superior Court, 139 Ariz 246 (1984) (unconstitutional prior restraint); Phoenix Newspapers v Superior Court, 140 Ariz 30 (Ct App 1983) (newspaper permitted to intervene). Given this Petitioner's abiding interest in reporting news to the public and protecting constitutional rights, intervention should be allowed.

THE LAW BARS SEALING CRIMINAL RECORDS AND CLOSING THE COURTROOM ABSENT SPECIFIC FACTUAL FINDINGS AND THAT CLOSURE IS ESSENTIAL TO PROTECTING A COMPELLING INTEREST, NARROWLY TAILORED TO SERVE THAT INTEREST IN THE LEAST RESTRTICTIVE ALTERNATIVE.

"Consistent with the presumed right of access to court proceedings and documents under the First Amendment as articulated in Press-Enterprise I, the party seeking access is entitled to a presumption of entitlement to disclosure." Oregonian Publishing v District Court, 920 F2nd 1462 (9th Cir 1990).

1. Sealing is permissible only if the Court finds that Closure serves a compelling interest, there is a substantial probability that in the absence of closure this compelling interest would be harmed, and there are no alternatives to closure that would adequately protect the compelling interest. Phoenix Newspapers, Inc 156 F.3d at 949. Procedurally the Court must provide notice to the public and press to afford them the opportunity to object or offer alternatives...if objections are made, a hearing on the objections must be held. *Id.* And those findings must satisfy all three requirements. *Id.* At 950.
2. The Court must not base its decision on conclusory assertions alone, but must make specific factual findings. Oregonian Publishing, 920 F.2d at 1466.
3. The US Supreme Court has recognized public scrutiny of criminal cases enhances their quality and safeguards the fact finding process, with benefits to both the defendant and to society as a whole... fosters an appearance of fairness, thereby heightening public respect for the judicial process and permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government." Globe Newspaper, 457 US at 606. For these reasons the substantive and procedural requirements of the First Amendment are not mere punctilios, to be observed when convenient." Phoenix Newspapers, 156, F.3d at 951. Providing public notice and opportunity to be heard ensures the trial court will have a true opportunity to weigh concerns of those affected... and an entry of findings allows fair assessment of the trial judge's reasoning...
4. Arizona law provides a broad right of inspection to the public and evinces a clear policy favoring disclosure of public records such as the judicial records of concerns here See Carlson v Pima County, 141 Ariz 487 (1984) construing ARS 39-121 et seq. (the Arizona Public Records Law). A party seeking to overcome the presumption in favor of access has the burden of specifically demonstrating how disclosure of each record would harm interests of privacy, confidentiality or best interests of the state. Ariz R Sup Ct 123c(1).
5. The Open Records Law says the proponent of closure has the heavy burden of proving the probability that harm will result. See Mitchell v Superior Court, 142 Ariz 332, 690 P.2d 51 (1984) (emphasis added). This burden cannot be met by speculating harm that might result,

such as the ad nausem "sorry it will jeopardize the investigation" rationale. In this case at bar, the investigation is complete; the parties are working toward trial. *See* Cox Arizona Publications v Collins, 175 Ariz 11, 852 P.2d 1194 (1993) for more on "burden."
In this case, Petitioner requests all documents be open to scrutiny and that the public be allowed to order copies of any filing in this case, be it a motion or grand jury testimony transcripts. How can thousands of eye patients know what their care giver stands accused of unless access is granted to the investigators' testimony/reports/comments? The closure Proponent must identify specific harms by the release of the document. Star Publishing v Pima County Attorney's Office, 181 Ariz 432, P.2d 899 (Ct App 1993) (public records are presumed open to the public for inspection unless the public official can demonstrate a factual basis why a record ought to be disclosed)(emphasis added). Upon closure, or seal of a document, the Court shall state the reason. Ariz R Sup Ct 123(d).

Redact if necessary. Ariz R Sup Ct 123(f)(4)(B)(i). This Court is obligated to examine the record. If a threat of harm is relied upon, prove it, and then release the other documents. If redactions are in play, then redactions must be lifted as soon as the necessity no longer exists. Phoenix Newspapers, 156 F.3d at 947-48. The importance of *Phoenix Newspapers* is that this Petitioner/Reporter will come back again.

Conclusion

For the foregoing reasons Petitioner Williams' application should be granted; he should be allowed to make these claims and arguments in a hearing; and closed records, transcripts and proceedings in this matter should be unsealed and sent to the Petitioner on disc at no charge, as was done in the DeMocker trial. Expedited oral argument is requested. And Petitioner requests the Court allow him to Efile.

RESPECTFULLY SUBMITTED this 26th day of March, 2021.

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