

1 MARK BRNOVICH  
2 Attorney General  
2 Firm State Bar No. 14000

3 Brett Harames  
4 Arizona State Bar #024701  
5 Assistant Attorney General  
5 Criminal Prosecutions Section  
6 2005 N. Central Ave.  
6 Phoenix, Arizona 85007-2926  
7 (602) 542-3881/Fax (602) 542-5997  
7 [crmhcfraud@azag.gov](mailto:crmhcfraud@azag.gov)

8  
9 Attorneys for Plaintiff

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12  
13 THE STATE OF ARIZONA,

14  
15 Plaintiff,

16 v.

17 MICHAEL LEE HAM,  
18 Defendant.

No. P1300 CR2019 01558

**STATE'S RESPONSE TO APPLICATION  
OF PETITIONER TO INTERVENE**

(Assigned to the Honorable Debra R. Phelan)

19  
20 Pursuant to the Court's Order directing the parties to respond to the *Application of William E.*  
21 *Williams for Leave to Intervene for Limited Purpose of Moving to Unseal Court Records and*  
22 *Proceedings, ...*, (hereinafter the "Application") filed March 26, 2021, undersigned counsel submits  
23 an objection to the application on procedural grounds. Specifically, the third-party movant's  
24 Application is silent with respect to whether other interested parties to the instant litigation – the  
25 codefendants in this case – have been provided adequate notice of the filed Application. Further, while  
26 the State is not opposed to appropriate, legally permissible media access to all court proceedings and

1 public records; to the extent the Application requests access to records which, under to Arizona  
2 Revised Statutes and controlling Arizona jurisprudence, are not public records, the current record is  
3 insufficient to grant the release of those *per se* non-public records to the third-party movant.

4 The State does not object to Petitioner attending each and every hearing before this Court as is  
5 the fundamental right of all members of the press in each and every criminal case pending in this  
6 Superior Court, and every Court, in Arizona.

7 This response is supported by the ensuing Memorandum of Points and Authorities.  
8

9 MEMORANDUM OF POINTS AND AUTHORITIES

10 The Application from third-party movant seeks absolute, unconstrained access to the  
11 transcripts of the Grand Jury Proceedings from which the instant case derived. This request necessarily  
12 compels an evaluation of whether the constitutional due process rights of all interested parties have  
13 been satisfied. Prior to a determination of the merits of the Application substantively, all parties with  
14 an interest in the ultimate disposition must be provided with an opportunity to respond to the  
15 Application, whether those parties elect to respond, or forego response.

16 **I. Procedural Due Process Requires All Interested Parties Be Provided Notice Of**  
17 **Petitioner’s Application and Allowed an Opportunity To Respond to Petitioner’s**  
18 **Application**

19 Appellate Courts in Arizona have repeatedly recognized a constitutional right to procedural  
20 due process afforded to interested parties.

21 “[D]ue process entitles parties to notice and a meaningful opportunity to be heard ....’. To protect this  
22 constitutional guarantee, procedural due process requires that a defendant be provided “an adequate  
23 opportunity to fully present factual and legal claims,” including the opportunity to respond to evidence  
24 submitted against him by the State. *Id.* at 549 ¶11, 390 P.3d at 789 (quoting *Kessen v. Stewart*, 195  
25 Ariz. 488, 492 ¶ 16, 990 P.2d 689, 693 (App. 1999)); *State v. Hampton*, 213 Ariz. 167, 179 ¶¶ 48–50,  
26 140 P.3d 950, 962 (2006) (to same effect).

1 *State v. Smith*, 250 Ariz. 69, 475 P.3d 558, 572 (2020), cert. denied, No. 20-6990, 2021 WL 1240961  
2 (U.S. Apr. 5, 2021).<sup>1</sup>

3 Defendant Michael Ham is not the only defendant party to this ongoing criminal case. In all,  
4 there were 47 co-defendants for whom the State Grand Jury returned an indictment. All defendants in  
5 the instant case were indicted on the basis of the same State Grand Jury proceedings. Of those persons  
6 indicted, 43 defendants are subject to active cases before the Yavapai Superior Court which have yet  
7 to be concluded.

8 Given the nature of the information sought by the Application - particularly, the request for  
9 disclosure of the comprehensive record of Grand Jury Proceedings – the codefendants maintain a  
10 constitutional due process right to notice of the Application, a reasonable time to respond to the  
11 request in the Application, and an opportunity to be heard with respect to the merits of the Application.  
12 As explained in more detail below, a large portion of the information sought by way of the Application  
13 is subject to laws mandating the secrecy of grand jury proceedings. Those laws, generally,  
14 acknowledge the sensitive nature of information provided to a grand jury; thus, the individuals to  
15 whom the information pertains, have standing *per se* to challenge the release of that information to any  
16 party other than the prosecution and the Defendant.

17 The State presumes the Application was not served on the codefendants in the case due to the  
18 lack of any information in the Application that any party besides undersigned counsel for the State and  
19 Attorneys for the Defendant were served with the Application. The final page of the Application only  
20 “certifies ... a copy of this pleading is being emailed, and mailed via USPS on this date of filing to:  
21 \_\_\_\_\_

22 <sup>1</sup> *see also*, *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ([p]rocedural due  
23 process means that a party had the opportunity to be heard “ ‘at a meaningful time and in a  
24 meaningful manner.’”); *Iphaar v. Industrial Comm'n*, 171 Ariz. 423, 426, 831 P.2d 422, 425 (App.1992)(“The  
25 elements of procedural due process are notice and an opportunity to be heard.”); *Mullane v. Central Hanover  
26 Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (Due process is not a static concept; it  
must account for “the practicalities and peculiarities of the case.”); *Comeau v. Arizona State Bd. of Dental  
Examiners*, 196 Ariz. 102, 106–07, 993 P.2d 1066, 1070–71 (Ct. App. 1999).

1 ...[undersigned Assistant Attorney General], and [Defense Attorneys for Michael Ham].” It appears  
2 none of the aforementioned codefendants, or their counsel, were apprised of this Application.

3 The fundamental right to procedural due process, guaranteed by the Arizona Constitution and  
4 the United States Constitution, requires the codefendants in this active and continuing case be afforded  
5 an opportunity to respond to the Application at issue. The State defers to the Court, opposing counsel,  
6 and the third party movant with respect to the amount of time required to satisfy the due process rights  
7 of the codefendants following service of the Application upon them.

8 **II. Petitioner’s Specific Request For Access To The Transcript Of Grand Jury**  
9 **Proceedings Is Governed By Those Arizona Revised Statutes, §§ 21-411 and 13-**  
10 **2812, Germane to the Secrecy of Grand Jury Proceedings**

11 To reiterate, the State recognizes the fundamental right of the press to attend public hearings  
12 and, thus, will not address the portions of the Application requesting to attend any and all Court  
13 proceedings in this case because the State agrees.

14 In support of the Application, Petitioner cites several Arizona, 9<sup>th</sup> Circuit, and U.S. Supreme  
15 Court decisions which, on the question of whether Petitioner is entitled to the Grand Jury Transcript of  
16 Proceedings, are inapposite because the cited decisions exclusively pertain to the release of statutorily  
17 defined public records for which there exists a substantial presumption in favor of disclosure. There  
18 exist Arizona Revised Statutes which specifically govern, and restrict, access to Grand Jury  
19 information.

20 The Arizona legislature, in expressly recognizing the need to maintain the secrecy of grand  
21 jury proceedings, has placed prohibitions on the release of a transcript of a grand jury proceeding. One  
22 of these enactments is A.R.S. § 21-411. This statute provides, in pertinent part:

23 A. ... The reporter's notes containing the proceedings from which an indictment is returned  
24 shall be transcribed and filed with the clerk of the court not later than 30 days following the  
25 return of said indictment, unless the court otherwise orders. Such transcripts shall be made  
26 available to the prosecuting officer and the defendant. Said transcript or a portion thereof may

1 be denied to a defendant by the court upon a showing of extraordinary circumstances by a  
2 prosecuting officer. The reporter's notes which are not transcribed as provided hereinabove  
3 shall be filed with the clerk of the superior court and impounded and shall be transcribed only  
when ordered by the presiding judge of the superior court.

4 B. The reporter and typist who transcribed the reporter's notes of the grand jury proceedings  
5 shall be sworn by the foreman or acting foreman, not to disclose any testimony or the name of  
any witness except to the county attorney or other prosecuting officer or when testifying in  
6 court.

6 *Id.*

7 Another statute which mandates secrecy with respect to information supplied to an Arizona  
8 Grand Jury is A.R.S. § 13-2812, which prohibits disclosure of the nature of substance of any grand  
9 jury testimony. A.R.S. § 13-2812 provides, in pertinent part:

10 A person commits unlawful grand jury disclosure if such person knowingly discloses to  
11 another the nature and substance of any grand jury testimony or any decision, result or other  
12 matter attending a grand jury proceeding which is required by law to be kept secret, except in  
the proper discharge of his official duties or when permitted by the court in furtherance of  
13 justice.

13 *Id.*

14 In light of these statutes, the only two exceptions to the general prohibition against disclosure  
15 of grand jury testimony or proceedings to any party other than the defendant or the prosecuting  
16 attorney are: (1) when the person making a disclosure is doing so in the proper discharge of official  
17 duties; or, (2) when the person making the disclosure is permitted by the court in furtherance of  
18 justice.

19 Undersigned counsel can find no specific authority of the Clerk of the Yavapai County  
20 Superior Court to disclose grand jury testimony or proceedings. In the absence of any specific  
21 authority granting the clerk the power to disclose grand jury proceedings without first obtaining a  
22 court order and in light of the fundamental principle of preserving secrecy of grand jury proceedings,  
23 we must conclude that the clerk of the superior court has no power to release the transcripts of grand  
24 jury proceedings unless that clerk has been ordered by a court of competent jurisdiction to do so.

1 Manifestly, the issue before the Court does not involve the discretionary disclosure of grand  
2 jury proceedings; but is, rather, whether it is permissible for this Court to authorize release of grand  
3 jury proceedings in the furtherance of justice.

4 The breadth of information covered by A.R.S. § 13-2812 is demonstrated by the Arizona  
5 Court of Appeals decision in *Samaritan Health System v. Superior Court*, 895 P.2d 131  
6 (Ariz.Ct.App.1994). In *Samaritan*, the Court recognized “that the proper functioning of our grand jury  
7 system depends upon the secrecy of grand jury proceedings.” *Id.* at 133; *citing Douglas Oil Co. v.*  
8 *Petrol Stops Northwest*, 441 U.S. 211, 218, 99 S.Ct. 1667, 1672, 60 L.Ed.2d 156 (1979). The Court  
9 then opined A.R.S. § 13-2812 extended to documents which were never reviewed by the grand jury.  
10 In *Samaritan*, the Arizona Court of Appeals granted Samaritan special action relief from the trial  
11 court's order that the documents be produced pursuant to a public records request from the media,  
12 holding:

13 We hold that the confidentiality of the documents is preserved by the grand jury secrecy  
14 statute. *See* A.R.S. § 13-2812....*By statute, documents, testimony and other matters connected*  
15 *with a grand jury proceeding cannot be disclosed....We reject the idea that these documents are*  
16 *unconnected to the grand jury proceeding because the grand jury never reviewed them....In*  
17 *summary, Samaritan's records are matters attending the grand jury proceeding and therefore are*  
18 *entitled to the confidentiality afforded by the legislature. For that reason, we granted relief*  
19 *from the superior court's order that these documents be disclosed (emphasis added).*

20 *Samaritan*, 895 P.2d at 132-133.

21 In this response the State does not assess, or advocate for a particular result regarding  
22 Petitioner’s request. However, whether, ultimately, the Court grants Petitioner’s request for access to  
23 the Transcript of Grand Jury Proceedings it should be done on the proper grounds: that such access is  
24 in the furtherance of justice, pursuant to A.R.S. § 13-2812. The State only wishes to articulate the  
25 appropriate standards applicable to the determination of whether to grant the Petitioner access. This is  
26 a determination for which there is an express statutory presumption against disclosure. This

1 presumption requires the party seeking disclosure or access to articulate compelling interest(s)  
2 sufficient to overcome the presumption against disclosure.

3 In sum, the State echoes the Response filed by opposing counsel for Defendant in that  
4 undersigned counsel is compelled to supply the appropriate legal standard to be applied by the Court  
5 in making the determination of whether to grant Petitioner's Application for disclosure of the Grand  
6 Jury Transcript of Proceedings.

7 CONCLUSION

8 Based on the aforementioned law and analysis, the State respectfully requests the Court  
9 provide notice to all codefendants, and their attorneys, as they are interested parties to this potential  
10 litigation; and, the Court apply the proper legal standard in the determination of whether to grant  
11 Petitioner's Application for access/disclosure of the Grand Jury Transcript of Proceedings.

12  
13 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of June, 2021.

14 MARK BRNOVICH  
15 ATTORNEY GENERAL

16  
17 By: /s/ Brett Harames  
18 BRETT HARAMES  
Assistant Attorney General  
Criminal Division

19 ORIGINAL of the foregoing efiled  
20 This 18<sup>th</sup> day of June, 2021, with:

21 Clerk of the Court  
22 Yavapai County Superior Court  
23 120 S. Cortez Street  
Prescott, Arizona 86303

1 COPY of the foregoing delivered  
2 this 18<sup>th</sup> day of June, 2021, to:

3 Hon. Debra R. Phelan  
4 Yavapai County Superior Court, Div. *Pro Tem* A  
5 120 S. Cortez Street  
6 Prescott, Arizona 86303

7 COPY of the foregoing emailed  
8 this 18<sup>th</sup> day of June, 2021, to:

9 James Belanger  
10 [jib@jbelanglerlaw.com](mailto:jib@jbelanglerlaw.com)

11 J. Andrew Jolley  
12 [andy@plgnaz.com](mailto:andy@plgnaz.com)

13 *Attorneys for MICHAEL LEE HAM*

14 William Williams  
15 *Petitioner*  
16 3655 N. Taylor Dr.  
17 Prescott Valley, AZ 86314  
18 [marketingbill@gmail.com](mailto:marketingbill@gmail.com)

19 By: P. Cox

20 #9596686