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8 KPHO Broadcasting Corporation

9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 United States of America,
12 Plaintiff,
13 vs.
14 Abdul Malik Abdul Kareem, aka Decarus
Thomas,
15 Defendant.

No. CR-15-707-PHX-SRB (MHB)

**NEWS ORGANIZATIONS’
APPLICATION TO INTERVENE FOR
THE LIMITED PURPOSE OF
MOVING TO UNSEAL DOCUMENTS
RELATED TO PRETRIAL RELEASE
PROCEEDINGS**

[Expedited Oral Argument Requested]

17
18 KPNX-TV Channel 12, a division of Multimedia Holdings Corporation
19 (“KPNX”), which produces *12 News*; Scripps Media, Inc. dba KNXV-TV (“KNXV”),
20 which produces *ABC15 News*; Phoenix Newspapers, Inc. (“PNI”), which publishes *The*
21 *Arizona Republic*; and KPHO Broadcasting Corporation (“KPHO”), which produces *CBS*
22 *5 News* (collectively, the “News Organizations”), respectfully apply for leave to intervene
23 for the limited purpose of moving to unseal (a) all documents that have been filed under
24 seal in this matter, some of which, on information and belief, relate to pretrial release of
25 the Defendant, and (b) all entries on the Court’s docket index that are not public. This
26 Application is supported by the following memorandum of law. A proposed form of
27 Order is lodged herewith.
28

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MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Of the nineteen docket entries that have apparently been made in this case, nine are secret. *See* Docket (containing no entries for Docket numbers 3, 4, 5, 6, 8, 11, 12, 13, and 14). Each such entry could contain multiple supporting exhibits, affidavits, and other documents. Moreover, even the threshold procedural requirements for sealing documents do not appear to have been met for those documents that presumably have been filed under seal. There is no motion in the public docket to seal documents, there are no specific findings by the Court as to why documents should be sealed, and there is no evidence of notice to the public and the press before sealing court documents. *See, e.g., Phoenix Newspapers, Inc. v. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998) (outlining procedural requirements). This is so, even though the Ninth Circuit has squarely held that “the press and public have a right of access to pretrial release proceedings and documents filed therein” – the very types of documents that, on information and belief, have been sealed in this case and filed without even a public docket entry. *Seattle Times Co. v. Dist. Ct.*, 845 F.2d 1513 (9th Cir. 1998). To the News Organizations’ knowledge, neither the United States (the “Government”) nor the Defendant has met the constitutional requirement for sealing documents in this matter, and these documents and the related docket entries should be unsealed.

The News Organizations respectfully submit that the Court should order each of the parties to (a) review all documents that they *previously* filed under seal in this case, (b) file, in one week’s time, a motion to maintain under seal *only* those documents for which sealing can be justified under the First Amendment and common law, and (c) at the same time submit, for the Court’s *in camera* review, *only* those documents or portions thereof that either party believes should remain under seal. If the Court then determines that any continued sealing remains justified, the News Organizations request that they be given notice and an opportunity to be heard – as required by *United States v. Brooklier*, 685 F.2d 1162, 1168-69 (9th Cir. 1982), *Associated Press v. Dist. Ct.*, 705 F.2d 1143,

1 1147 (9th Cir. 1983), and *Phoenix Newspapers, Inc.*, 156 F.3d at 949 – before the Court
 2 issues an order that permits the continued sealing of any such documents. If a document
 3 now under seal is not the subject of a timely closure motion, the document should be
 4 unsealed immediately unless the Court *sua sponte* decides to conduct a *Brooklier* hearing
 5 with respect to that document.

6 The News Organizations further request that the Court unseal the docket entries
 7 that pertain to any documents that were previously filed under seal, or order the Clerk to
 8 identify the sealed filings on the public docket index by identifying the name of the filing
 9 party, the date of the filing and a general description of the nature of the document. For
 10 the reasons set forth below, the requested relief is compelled by the First Amendment and
 11 common law, and provides an appropriate mechanism for unsealing past court filings.

12 Factual and Procedural Background

13 The Government alleges that the Defendant had a role in planning an armed attack
 14 last month on a controversial Muhammad Art Exhibit and Contest in Garland, Texas.
 15 [Doc. 1.] The attack was carried out by two individuals, Elton Simpson and Nadir Soofi,
 16 who fired assault rifles at security personnel and law enforcement. [See Doc. 19 at 2]
 17 The attack ended with police fatally shooting Simpson and Soofi, but not before a
 18 security guard was injured from gunfire. Sean Holstege & Matthew Casey, *Judge:*
 19 *Suspected Conspirator in Texas Attack Remains in Custody*, The Arizona Republic (June
 20 17, 2015 12:18 A.M.), available at [http://www.azcentral.com/story/news/local/phoenix/
 21 2015/06/16/phoenix-suspect-helped-plan-attack-texas-rally-fed-say/28796081/](http://www.azcentral.com/story/news/local/phoenix/2015/06/16/phoenix-suspect-helped-plan-attack-texas-rally-fed-say/28796081/); *Abdul
 22 Malik Abdul Kareem: Phoenix Man Indicted for Role in Texas Cartoon Contest*,
 23 abc15.com (June 17, 2015 9:35 A.M.), available at [http://www.abc15.com/news/
 24 national/abdul-malik-abdul-kareem-man-indicted-for-role-in-texas-cartoon-contest](http://www.abc15.com/news/national/abdul-malik-abdul-kareem-man-indicted-for-role-in-texas-cartoon-contest).

25 These events, including their planning and any connection to a larger threat to public
 26 safety, are a topic of major public concern.

27 Defendant has been indicted on three felony counts: (1) conspiracy to transport
 28 firearms and ammunition in interstate commerce with the intent to commit certain crimes,

1 including murder; (2) transporting firearms and ammunition in interstate commerce with
 2 the intent to commit certain crimes, including murder and aggravated assault; and (3)
 3 willfully making false statements. [Doc. 19 at 2.] Defendant has pleaded not guilty to all
 4 counts.

5 At a pretrial hearing regarding the release of Defendant prior to trial, the
 6 Government contended that Defendant is “off the charts dangerous.” Holstege & Casey,
 7 *Judge: Suspected Conspirator, supra*. By contrast, Defendant contended that the
 8 Government’s case is “all smoke and mirrors” and hinges on a completely unreliable
 9 informant. *Id.* While some information was provided to the public during the pretrial
 10 hearing [See Doc. 19 at 2-3], on information and belief there was substantially more
 11 information that was filed with the Court, presumably under seal in one or more of the
 12 nonpublic docket entries (Docket numbers 3, 4, 5, 6, 8, 11, 12, 13, and 14).

13 KPNX produces *12 News*, KNXV produces *ABC15 News*, PNI publishes *The*
 14 *Arizona Republic*, and KPHO produces *CBS 5 News*, which provide information to the
 15 public about important issues, including law enforcement and the judicial system.
 16 Journalists from the News Organizations attended the pretrial detention hearing and
 17 requested copies of the documents filed with respect to that hearing. However, the
 18 reporters’ access was denied. Consequently, the News Organizations were compelled to
 19 seek this Court’s relief to inspect these judicial records.

20 Argument

21 I. THE NEWS ORGANIZATIONS SHOULD BE ALLOWED TO INTERVENE
 22 FOR THE LIMITED PURPOSE OF MOVING TO UNSEAL DOCUMENTS,
 23 TRANSCRIPTS, AND DOCKET ENTRIES.

24 News organizations are routinely permitted to intervene in court proceedings to
 25 challenge requests or orders to restrict public access to information of acute public
 26 interest and concern. *E.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986)
 27 (“*Press-Enterprise II*”) (press permitted to object to closure of transcripts of preliminary
 28 hearings in case involving alleged murder of 12 hospital patients); *Press-Enterprise Co.*
v. Superior Court, 464 U.S. 501 (1984) (“*Press-Enterprise I*”) (press allowed to object to

1 closure of *voir dire* examinations in criminal trial); *Globe Newspaper Co. v. Superior*
 2 *Court*, 457 U.S. 596 (1982) (upholding newspaper’s right to challenge order closing a
 3 criminal trial from the general public); *Associated Press*, 705 F.2d at 1145 (press allowed
 4 to challenge district court order that all filings in the DeLorean criminal case be
 5 automatically sealed for 48 hours). Given the strong and abiding interest of the News
 6 Organizations in reporting news to the public in general, and their demonstrable interest
 7 in reporting information about these events in particular, intervention should be allowed
 8 for the limited purposes set forth in this Application.

9 II. THE GOVERNMENT HAS NOT MET ITS BURDEN TO SEAL THE
 10 PRETRIAL RELEASE PROCEEDINGS AND DOCUMENT.

11 A. The Press and the Public Have Constitutional and Common Law Rights of
 12 Access to Court Filings in Criminal Matters, Including Filings Related to
Pretrial Release Proceedings.

13 The United States Supreme Court has long recognized a strong First Amendment
 14 right of public access to court proceedings and filings in criminal cases. *See, e.g.,*
 15 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (criminal trials); *Globe*
 16 *Newspaper*, 457 U.S. 596 (1982) (criminal trials); *Press-Enterprise I*, 464 U.S. 501
 17 (1984) (*voir dire*); *Press-Enterprise II*, 478 U.S. 1 (1986) (transcripts of preliminary
 18 hearings). The Ninth Circuit has similarly held that “the public and press have a first
 19 amendment right of access to pretrial documents in general.” *Associated Press*, 705 F.2d
 20 at 1145 (criminal case filings). *See also Oregonian Publ’g Co. v. Dist. Ct.*, 920 F.2d
 21 1462, 1465 (9th Cir. 1990) (recognizing that “[u]nder the first amendment, the press and
 22 the public have a presumed right of access to court proceedings and documents”). As the
 23 Supreme Court wrote in *Globe*, public scrutiny “enhances the quality and safeguards the
 24 integrity” of the proceedings, “heighten[s] public respect” and “permits the public to
 25 participate in and serve as a check upon the judicial process – an essential component in
 26 our structure of self-government.” 457 U.S. at 606.

27 The Ninth Circuit has addressed the right of access to the precise type of
 28 documents that, on information and belief, have been filed under seal in this case. In

1 *Seattle Publishing Co.*, the court held that “the press and the public have a right of access
2 to pretrial release proceedings and documents filed therein.” 845 F.2d at 1517. After
3 balancing the right to access with the defendant’s right to a fair trial, the court ordered
4 briefs filed by the government and the defendant on the issue of the defendant’s pretrial
5 detention to be unsealed. *Id.* at 1518.

6 The Ninth Circuit has also recognized “a strong presumption in favor of the
7 common law right to inspect and copy judicial records.” *Phoenix Newspapers*, 156 F.3d
8 at 946 (emphasis added). Under the common law, the Government and Defendant must
9 show that the need for secrecy outweighs the public’s right of access. *United States v.*
10 *Kaczynski*, 154 F.3d 930, 931 (9th Cir. 1998).

11 B. The Procedural and Substantive Requirements for Sealing Court Filings
12 Have Not Been Met in this Case.

13 The First Amendment imposes three separate, substantive requirements that the
14 party seeking closure must satisfy, with specific factual support, before criminal case
15 filings may be closed. Specifically, the proponent of closure must demonstrate that
16 “(1) closure serves a compelling interest; (2) there is a substantial probability that, in the
17 absence of closure, this compelling interest would be harmed; and (3) there are no
18 alternatives to closure that would adequately protect that interest.” *Phoenix Newspapers*,
19 156 F.3d at 949 (quoting *Oregonian*, 920 F.2d at 1466). *See also Brooklier*, 685 F.2d at
20 1168-69 (proponent of closure must also show a substantial probability that closure “will
21 be effective in protecting against the perceived harm”).

22 In addition to these substantive requirements, the First Amendment imposes two
23 critical procedural requirements that must be satisfied before any court documents may
24 be sealed. First, “[t]he court ordering closure must ‘make specific factual findings,’
25 rather than ‘bas[ing] its decision on conclusory assertions alone.’” *Phoenix Newspapers*,
26 156 F.3d at 949 (quoting *Oregonian*, 920 F.2d at 1466). Second, “if a court contemplates
27 sealing a document or transcript, it must provide sufficient notice to the public and press
28

1 to afford them the opportunity to object or offer alternatives. If objections are made, a
2 hearing on the objections must be held as soon as possible.” *Id.*

3 The need for a prompt hearing recognizes the temporal nature of First Amendment
4 rights. Indeed, as the Supreme Court has recognized, similar denials of First Amendment
5 rights – even for short periods – cause irreparable harm. *See, e.g., Elrod v. Burns*, 427
6 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods
7 of time, unquestionably constitutes irreparable injury.”) (citing *New York Times Co. v.*
8 *United States*, 403 U.S. 713 (1971)). *See also In re Charlotte Observer*, 882 F.2d 850,
9 856 (4th Cir. 1989) (holding that even “minimal delay” is fundamentally at odds with the
10 First Amendment right of access).

11 It bears mention that the public interest in this matter is acute. The allegations by
12 the Government include claims that Defendant was involved not only in the attack in
13 Garland, Texas, but also in planning other attacks, which apparently did not transpire.
14 Defendant also allegedly had “documents and videos on the computer and flash drive
15 advocated ideologically motivated violence against civilians.” [Doc. 19 at 3.] As such,
16 the records describe the Government’s investigation of Defendant’s alleged activities and
17 efforts to protect the public from acts of terrorism. *See, e.g., Godbehere v. Phoenix*
18 *Newspapers, Inc.*, 162 Ariz. 335, 343, 783 P.2d 781, 789 (1989) (“It is difficult to
19 conceive of an area of greater public interest than law enforcement. Certainly the public
20 has a legitimate interest in the manner in which law enforcement officers perform their
21 duties.”).

22 To enforce the First Amendment and common law rights of the public and the
23 press, the Court should require the parties to review any documents that they previously
24 filed under seal, provide prompt supplemental briefing regarding any such documents
25 that they believe may be sealed under the substantive and procedural tests set forth above,
26 and supply to the Court, for its *in camera* review, those documents or portions thereof
27 that they believe merit continued sealing. Any documents that are not the subject of a
28 timely motion to seal should be unsealed immediately. If the Court contemplates

1 continued secrecy of the previously-sealed documents, the Court should provide notice
2 and an opportunity to be heard to the public, including the News Organizations, as set
3 forth more fully on the proposed Order submitted herewith.

4 **III. THE CLOSED DOCKET ENTRIES SHOULD BE UNSEALED AND**
5 **RESTORED TO THE PUBLICLY-AVAILABLE DOCKET INDEX.**

6 In addition, the News Organizations request the Court to unseal any docket entries
7 that have been removed or obscured from the Court's open, public docket index. Dockets
8 have long been used to alert the public and press to judicial proceedings and filings –
9 historically, through the court clerk and notices posted at the courthouse, and more
10 recently, through online systems. By examining the docket, the public can learn the
11 status of cases and discover when particular hearings, arguments and other events will
12 occur. The docket also provides the public notice that a particular case or filing may be
13 sealed so that any interested parties may object and prevent cases or proceedings from
14 occurring in secret.

15 Federal courts have recognized that the docket enjoys a presumption of openness,
16 and that the public and press have a qualified First Amendment right to inspect it. *See,*
17 *e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (applying the
18 *Press Enterprise* “experience and logic” test to court docket sheets). Moreover, courts
19 have found that the use of a dual docket system – public and sealed – is an
20 unconstitutional infringement on the public's right of access. *E.g., United States v.*
21 *Valenti*, 987 F.2d 708, 715 (11th Cir. 1993); *see also CBS, Inc. v. Dist. Ct.*, 765 F.2d 823,
22 826 (9th Cir. 1985) (public confidence in court records “erodes if there is a two-tier
23 system, open and closed. If public records cannot be compared with the sealed ones, all
24 of the former are put in doubt.”).

25 Under First Amendment standards, closure is permissible only if the Court finds
26 that: (1) closure serves a compelling interest; (2) there is a substantial probability that in
27 the absence of closure the compelling interest would be harmed; and (3) there are no
28 alternatives to closure that would adequately protect that interest. *Phoenix Newspapers,*

1 156 F.3d at 949. Furthermore, a court contemplating sealing a record “must provide
2 sufficient notice to the public and press to afford them the opportunity to object or offer
3 alternatives. If objections are made, a hearing on the objections must be held as soon as
4 possible.” *Id.* The court then must “make specific factual findings supporting its closure
5 decision,” and those findings must “satisfy all three substantive requirements for
6 closure.” *Id.* at 950.

7 Accordingly, the News Organizations request that the Court direct the Clerk to
8 make publicly available a complete docket index that contains, at minimum, the docket
9 number, filing date, filing party and a general description of the nature of each document
10 filed in this case.

11 Conclusion

12 For the foregoing reasons, the News Organizations’ Application should be
13 granted, and the Court should enter the proposed Order submitted herewith.

14 RESPECTFULLY SUBMITTED this 24th day of June, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 24th day of June, 2015, I electronically transmitted a PDF version of this document to the Office of the Clerk of the Court, using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants listed for this matter.

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