

Rule 35, Ariz. R. Crim. P.

STATE'S RESPONSE TO DEFENDANT'S MOTION TO SEAL THE RECORD

Court records are presumptively open to the public. The party seeking to seal public records bears the burden of overcoming the presumption of disclosure by showing the probability that specific, material harm will result from disclosure.

The State of Arizona, by and through undersigned counsel, opposes the defendant's Motion to Seal the Record, for the reasons stated in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL FACTS:

The defendant was convicted of forgery on September 13, 2000. He has asked this Court to seal the records concerning his case, including the presentence report prepared pursuant to Rule 26.4, Ariz. R. Crim. P.

II. Law and Argument

A. This Court should deny the motion because it fails to meet the requirements of Rule 35.1(a), Ariz. R. Crim. P.

Pursuant to Rule 35.1, Ariz. R. Crim. P., all motions "shall contain a short, concise statement of the precise nature of the relief requested" and must be "accompanied by a brief memorandum stating the specific factual grounds therefore and indicating the precise legal points, statutes, and authorities relied upon." Here, the defendant's motion is not accompanied by a memorandum of law, nor does the body of the motion cite any authority upon which his motion is based. Therefore, the motion is procedurally defective and this Court should not consider the motion. Nevertheless, if this Court chooses to consider the merits of this motion, the State asks this Court to deny it for the reasons set forth in

subsection B of this Response.

B. The burden is on the party seeking to block disclosure of public records to overcome the presumption in favor of disclosure. The defendant here has failed to meet this burden.

Rule 26.6(e), Ariz. R. Crim. P., states that presentence reports and other reports prepared under Rule 26 “are matters of public record unless otherwise provided by the court or made confidential by law.” A.R.S. § 39-121 provides:

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.

Arizona imposes a presumption in favor of disclosure of public records. *A.H. Belo Corp. v. Mesa Police Dept.*, 202 Ariz. 184, 186, ¶ 5, 42 P.3d 615, 617 (App. 2002); see also *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 81, 927 P.2d 340, 347 (App. 1996) [it is well-settled that Arizona evinces a general “open access” policy toward public records]. The public naturally has an interest in public records, regardless of whether the member of the public seeking them has any need for those records. *Bolm v. Custodian of Records, Tucson Police Department*, 193 Ariz. 35, 39, ¶ 10, 969 P.2d 200, 204 (App. 1998).

In *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984), the Arizona Supreme Court recognized the statutory policy favoring disclosure, but also stated that “where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection,” a public official or custodian could refuse to allow public inspection of particular records. To overcome the presumption of disclosure, the party that seeks nondisclosure of public records bears the burden of showing “the probability that specific, material harm will result from disclosure.” *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984). See also *Scottsdale Unified*

School District v. KPNX Broadcasting Co., 191 Ariz. 297, 300, ¶ 9, 955 P.2d 534, 537 (1998).¹

Here, the defendant has not met his burden of showing “the probability that specific, material harm will result from disclosure.” *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984). Indeed, he has not even alleged why he believes the records in his case should not be disclosed. Thus, he has not met his burden and he is not entitled to have the records in his case sealed.

III. Conclusion:

The defendant’s motion did not meet the requirements of Rule 35.1, Ariz. R. Crim. P. Even if his motion had been procedurally proper, his motion failed to meet his burden of showing the probability that he would suffer specific, material harm if the records were not sealed. Therefore, the State asks the Court to deny the defendant’s Motion to Seal the Record.

¹In *Phoenix Newspapers, Inc. v. United States District Court*, 156 F.3d 940, 949 (9th Cir. 1998), the Ninth Circuit held that criminal proceedings and documents may not be closed to the public without violating the First Amendment unless three substantive requirements are met: “(1) closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest.” *Id.* at 949, quoting *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462, 1464 (9th Cir. 1990). Furthermore, the court ordering closure must “make specific factual findings,” rather than “bas[ing] its decision on conclusory assertions alone.” *Id.* at 949, quoting *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462, 1464 (9th Cir. 1990).