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U.S. DISTRICT COURT
N.D. OF ALABAMA

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

DOYLE HAMM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:17-CV-02083-KOB
	)	
JEFFERSON S. DUNN, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PRESS MOVANTS' MOTION TO INTEREVENE AND UNSEAL JUDICIAL RECORDS

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INTRODUCTION

Death row inmates, death penalty abolitionists, and the media have all tried to make public Alabama's confidential lethal injection protocol. None of them have been successful. Now the *Montgomery Advertiser*, Alabama Media Group, and the Associated Press ("Intervenors") are trying a new way to unearth it—intervening in this already-disposed-of case and requesting that this Court unseal both Alabama's lethal injection protocol and the transcripts of the hearings that discuss it. But their arguments are unavailing and this Court should deny their request.

RELEVANT PROCEDURAL BACKGROUND

In early December 2017, Doyle Lee Hamm filed his initial § 1983 complaint, raising only an as-applied challenge to Alabama's method of execution. In his complaint, Hamm claimed that, because he "has severely compromised veins, it will be exceedingly difficult, if not impossible, for prison personnel to establish reliable peripheral intravenous access during the lethal injection procedure." (Doc. 1 ¶ 6.) Hamm also claimed that he expected the Alabama Department of Corrections ("ADOC") to "attempt to establish percutaneous central venous access," which he said "present[ed] specific problems for [him], given his unique medical condition." (Doc. 1 ¶ 7.) In January 2018, Hamm filed his first amended complaint adding a claim that

the ADOC's treatment of him while incarcerated violated the Eighth Amendment and adding a request for injunctive relief, barring Defendants from carrying out his scheduled execution. (Doc. 15.)

On January 30, 2018, after Defendants filed dispositive motions (Docs. 12, 16, and 18), Defendants, through the discovery process, provided Hamm with only a redacted copy of Alabama's confidential lethal injection protocol. But Defendants did so only after both parties jointly moved for a protective order to keep the protocol confidential (Doc. 26 ¶ 3), and after this Court entered the agreed confidentiality order. (Doc. 28.)

The next day, this Court conducted an open, public hearing on Defendants' dispositive motions and Hamm's request for injunctive relief. While a brief portion of that hearing was handled *in camera*, the parties' arguments, expert-witness testimony, this Court's rulings on the pending motions, and this Court's decision to *sua sponte* grant Hamm a stay of execution were handled before a public audience. Importantly, while Defendants provided this Court a copy of Alabama's lethal injection protocol at the outset of the hearing, at no point did either party move to admit the lethal injection protocol into evidence, nor had either party attached it as an exhibit to any substantive motion or pleading.

On February 6, 2018, this Court issued a publicly available order, in which it detailed the January 31 hearing. (Doc. 30.) In that order, this Court detailed Hamm's as-applied claims, his specific medical conditions, how those medical conditions affected both peripheral venous access and central line placement, and generally summarized the portion of Alabama's lethal injection protocol touching on Hamm's as-applied claims. (Doc. 30 at 1–11.) This Court also revealed what the lethal injection protocol does not describe concerning peripheral venous access and central line placement. (Doc. 30 at 8.) That same day, this Court issued another publicly available order explaining why it had concluded a stay was necessary, noting that it needed to obtain "an independent medical examination and opinion concerning the current state of Mr. Hamm's lymphoma, the number and quality of peripheral venous access, and whether any lymphandenopathy would affect efforts at obtaining central line access." (Doc. 31 at 2.)

Defendants appealed this Court's decision to stay Hamm's execution to the Eleventh Circuit. (Doc. 32.) Ultimately, the Eleventh Circuit vacated the stay and directed this Court "to immediately appoint an independent medical examiner and schedule an independent medical examination, and to thereafter make any concomitant factual findings—pursuant to a hearing or otherwise" no later than February 20, 2018. (Doc. 38 at 11–12.) This Court did so, and its

independent medical examiner ("IME") concluded that, while "[t]here are no veins" in Hamm's upper extremities that "would be readily accessible for venous access without difficulty," Hamm had accessible and usable veins in his lower extremities. (Doc. 58 at 5.) The IME further found that, contrary to Hamm's assertions, Hamm has "zero lymphadenopathy." (Doc. 58 at 3.) The IME concluded that there would be no issue obtaining peripheral venous access; thus, "cannulation of the central veins will not be necessary to obtain venous access." (Doc. 58 at 5.)

On February 16, 2018, this Court conducted a closed hearing to discuss the IME's findings with the parties. Originally, that hearing was scheduled so Defendants could present testimony concerning Alabama's lethal injection protocol. (Doc. 58 at 4.) But, because the IME's findings "negated any need to delve further into Alabama's lethal injection protocol," this Court only asked Defendants to stipulate that they would not attempt peripheral venous access through Hamm's upper extremities. (*Id.*) Defendants agreed. (*Id.*)

While the February 16 hearing was closed to the public, this Court issued a publicly available order on February 20, 2018, in which this Court summarized the substance of that hearing, detailed the IME's findings, and explained why a stay of Hamm's scheduled execution was no longer necessary. (Doc. 58.) The Eleventh Circuit affirmed this Court's decision after

Defendants submitted an affidavit to that court explaining that they would only attempt peripheral venous access through Hamm's lower extremities, that they were capable of administering an IV line through Hamm's lower extremities, and that they would have both ultrasound technology and a physician present during Hamm's execution. *Hamm v. Comm'r, Alabama Dep't of Corr.*, No. 18-10636, 2018 WL 1020051, *3 (11th Cir. Feb. 22, 2018). In that decision, the Eleventh Circuit detailed Hamm's claims and why it was appropriate to deny him a stay of execution. *Id.*

Then, on February 22, 2018, Hamm launched a last-minute, last-ditch effort to stop his execution. *Hamm v. Dunn*, 138 S. Ct. 828 (2008) (Mem). That effort, although ultimately unsuccessful, left the State of Alabama with only three hours to carry out Hamm's execution. Then, a little after 11:00 p.m. that night, Defendants called off Hamm's execution because "medical personnel had advised officials that there wasn't enough time to ensure that the execution could be conducted in a humane manner." Lawrence Specker, *Execution of Alabama inmate Doyle Lee Hamm called off*, AL.COM, (posted Feb. 22, 2018, updated Feb. 26, 2018) www.al.com/news/birmingham/index.ssf/2018/02/alabama_inmate_doyle_lee_hamm.html. Immediately after the ADOC postponed Hamm's execution,

the ADOC Commissioner made himself available to the press to answer their questions. *Id.*

Then, on March 5, 2018, Hamm moved to amend his complaint (Doc. 94), which Defendants did not oppose. (Doc. 100.) Hamm filed his second amended complaint on March 26, 2018. (Doc. 103.) But, that same day, the parties jointly stipulated to dismiss Hamm's claims (Doc. 104), which this Court granted on March 28, 2018. (Doc. 105.)

While Intervenors were well-aware of Hamm's as-applied challenge to Alabama's method of execution,[1] and while at least one of their reporters was present at the January 31, 2018, hearing,[2] they waited until fifty-six days after the January 31 hearing, thirty-four days after Hamm's execution date, two days after the parties filed their joint stipulation of dismissal, and hours after this Court disposed of this case to try to intervene and gain access to certain documents. (Docs. 107, 108.)

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1. Ivana Hrynkiw, *Execution drug may have been named in court filings from Alabama AG's Office*, AL.COM, (Jan. 18, 2018), http://www.al.com/news/index.ssf/2018/01/midazolam_in_alabama_execution.html.

2. Ivana Hrynkiw, *Attorneys for Alabama AG's Office, death row inmate argue in federal court*, AL.COM, (Jan. 31, 2018), http://www.al.com/news/birmingham/index.ssf/2018/01/attorneys_for_alabama_ags_offi.html.

Despite Intervenors' decision to wait until this case was disposed of to make these requests, this Court granted their motion in part, finding that they satisfied the requirements for intervention as of right under FED. R. CIV. P. 24(a)(2). But this Court reserved ruling on their request to gain access to certain documents. (Doc. 111.)

On April 3, 2018, this Court clarified Intervenors' misunderstanding about the status of Alabama's lethal injection protocol as a record in this case, noting that it had not been electronically filed with this Court. (Doc. 113.) This Court further explained that it would not unseal the transcripts of the February 7 and February 14 hearings. (*Id.*) Finally, this Court ordered Defendants to address Intervenors' remaining requests. (*Id.*)

DISCUSSION

In the memorandum supporting their motion, Intervenors make three arguments (1) that intervention is proper; (2) that they have a First Amendment right of access to Alabama's lethal injection protocol and Defendants "have not and cannot meet the heavy burden required to overcome the constitutional right of access"; and (3) that "the public has a common law right to disclosure of the protocol records." (Doc. 108 at 8, 9, 12, and 17.)

As set out above, Intervenors want to unearth several documents in this case, but this Court narrowed that list to three items (1) Alabama's

confidential lethal injection protocol; (2) the transcript of an *in camera* hearing held on January 31, 2018; and (3) the transcript of a closed hearing held on February 16, 2018.

Of these three items, Defendants oppose Intervenors' request to have access to Alabama's lethal injection protocol and oppose their request to have access to the hearing transcripts but only to the extent that those transcripts discuss the protocol.[3] This is so for four reasons:

- Intervenors did not timely ask this Court to intervene as of right and their stated interest will not actually be impaired or impeded as a result of the dismissal of this case.

- Alabama's lethal injection protocol is not a judicial record; thus, this Court cannot disclose it.

- There is no constitutional right of access to judicial records and, even so, there is no First Amendment right of access to Alabama's lethal injection protocol.

- There is no common-law right of access to Alabama's lethal injection protocol because it is only discovery material in this case, and, even so, Defendants' interests in maintaining confidentiality in its lethal injection protocol outweighs Intervenors' interest in accessing it.

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3. Defendants do not oppose giving Intervenors access to redacted transcripts of the hearings held on January 31 and February 16, removing from those transcripts any discussion of the lethal injection protocol. This Court recently made available the transcript of the February 16 hearing, but redacted from that transcript both the identity of the IME and information related to the lethal injection protocol. (Doc. 115). Defendants would not oppose a similar approach to the January 31 transcript of the *in camera* hearing.

I. INTERVENTION AS OF RIGHT IS INAPPROPRIATE HERE BECAUSE INTERVENORS DID NOT TIMELY ASK THIS COURT TO INTERVENE AND BECAUSE THEY HAVE NO INTEREST THAT WILL BE IMPAIRED AS A RESULT OF THE DISMISSAL OF THIS CASE.

In their motion, Intervenors asked this Court for permission to step into this case under Rule 24 of the FEDERAL RULES OF CIVIL PROCEDURE. (Doc. 107.) But they did not explain whether they sought intervention as a matter of right or whether they sought permissive intervention. This Court, however, interpreted their request as seeking intervention as of right under FED. R. CIV. P. 24(a)(2), and concluded that they had standing to intervene and that they satisfied the requirements to intervene.

But, while it is true that "[t]he press has standing to intervene in actions to which it is otherwise not a party in order to petition for access to court proceedings and records," *In re Petition of Tribune Co.*, 784 F.2d 1518, 1521 (11th Cir. 1986), and while it is true that a Rule 24 motion is the appropriate vehicle for the press to seek intervention for the purpose of obtaining judicial records, *see Flynt v. Lombardi*, 782 F. 3d 963, 966 (8th Cir. 2015), the fact that the press has standing to intervene and can move to intervene in a case does not mean that they are entitled to do so. *See Davis v. Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002).

In fact, they can do so only if they can show that (1) their motion to intervene is timely; (2) they have an interest relating to the property or transaction that is the subject of the action; (3) they are "so situated that disposition of the action, as a practical matter, may impede or impair [their] ability to protect that interest"; and (4) their interest is "represented inadequately by the existing parties to the suit." *Davis*, 290 F.3d at 1300 (internal quotations omitted).

While this Court concluded that intervention is proper here (Doc. 111), Defendants ask this Court to reconsider its decision because Intervenors cannot satisfy either the first or third intervention requirement.

a. INTERVENORS' MOTION IS UNTIMELY.

When assessing the timeliness of a motion brought under FED R. CIV. P. 24(a), courts must consider four factors: (1) "the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene"; (2) "the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest"; (3) "the extent of prejudice to the would-be intervenor if his petition is denied"; and (4) "the existence of unusual circumstances militating either for or against a determination that the application is timely." *Angel Flight of*

Georgia, Inc. v. Angel Flight Am., Inc., 272 Fed. App'x 817, 819 (11th Cir. 2008) (citing *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983)). Intervenors' motion is untimely for three reasons.

First, Intervenors have known for years that Defendants have opposed requests to make public Alabama's lethal injection protocol.[4] And they knew of this case as early as January 18, 2018, when they reported on filings in this case and complained that "Alabama has never released the makers of the drugs it uses in carrying out the death penalty" and that "[t]here has never been information publicly released on the exact protocol for executions, either." Ivana Hrynkiw, *Execution drug may have been named in court filings from Alabama AG's Office*, AL.COM, (Jan. 18, 2018), http://www.al.com/news/index.ssf/2018/01/midazolam_in_alabama_execution.html. What is more, at least one of the intervenors had a reporter present at the January 31 hearing, at which it was made clear that there would be brief *in camera* review because of the confidential nature of Alabama's lethal

4. *See* Brian Lyman, *Alabama adopts new death penalty protocol*, Montgomery Advertiser (Sept. 12, 2014), https://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2014/09/12/alabama-has-new-death-penalty-protocol-says-ag-office/15526777/ (explaining that "[t]he Advertiser . . . and the Associated Press last spring filed separate Freedom of Information Act requests with the Department of Corrections for information on drugs and death penalty procedures" but the ADOC "turned down the requests").

injection protocol. (Jan. 31 Hrg. Trans. at 22, 68, and 142.) But, while this case remained open and while public interest in Hamm's case was at its apogee, Intervenors showed no interest or intention to intervene in this case to gain access to documents. Instead, Intervenors sat on their hands from January 18 until March 28 before moving. In fact, they waited so long that the parties settled this case and this Court dismissed this case before Intervenors acted. Because Intervenors had reason to know from nearly the outset of this case that Alabama's lethal injection protocol was being discussed out of public view and that they would not be given access to it, and because Intervenors have historically lamented the fact that they have never been given access to it, Intervenors have no reason for having waited so long to try to assert themselves into this case.

Second, Intervenors' decision to wait to intervene in this case until after its dismissal severely prejudices Defendants in two ways. First, had Defendants known that a nonparty would seek to intervene in this case and attempt to gain access to Alabama's confidential lethal injection protocol, which was provided to Hamm only in the discovery process and under a confidentiality order, Defendants would not have voluntarily turned over the protocol to Hamm. Second, had Intervenors at least sought intervention *before* this case settled, Defendants could have taken a different approach to the joint

dismissal of this case and the finalized settlement agreement with Hamm. But, as it stands, the parties to this case entered into that agreement and are bound to follow it. As a result, if Intervenors are allowed to assert themselves in this case and are given access to the documents they seek, no party to this action will be able to make any statement to the press about the attempted execution of Hamm. In other words, the late intervention here would allow the press only to speculate about what happened during Hamm's execution leaving the parties in this case no way to either correct or explain the their interpretation of documents without breaching the finalized settlement agreement.

Finally, Intervenors will suffer no prejudice if this Court denies their motion to intervene here. As stated above, Intervenors have asserted themselves into this case to gain access to Alabama's lethal injection protocol. But, if they are not allowed to intervene here, they have not forever lost the opportunity to attempt to gain access to Alabama's lethal injection protocol. In fact, § 1983 method-of-execution claims are so ubiquitous Intervenors have no shortage of opportunities to assert themselves into an *open* proceeding to attempt to gain access to the lethal injection protocol. And, because Intervenors have other opportunities to unearth Alabama's lethal injection protocol, they necessarily cannot be prejudiced by denying them the chance to intervene here.

Because Intervenors knew from nearly the outset of this action that they should intervene but waited until this case was dismissed to do so, because Defendants are prejudiced by Intervenors' late intervention attempt, and because Intervenors would suffer no prejudice if this Court denied their motion to intervene, this Court should deny Intervenors' motion as untimely.

b. ADDITIONALLY, DISMISSAL OF THIS CASE WOULD NOT IMPEDE OR IMPAIR INTERVENORS' STATED INTEREST.

Even if their motion were timely, more problematic for Intervenors here is that intervention as of right is unwarranted when Intervenors, as a practical matter, have no interest that would be impaired upon disposition of the case. *See Davis*, 290 F.3d at 1300. Indeed, the only discernable interest Intervenors assert in their motion is the need to access Alabama's lethal injection protocol so they can help the public "to understand if the failure [to execute Hamm] was due to a problem inherent in the protocol, or to some other cause." (Doc. 108 at 22–23.) But this interest is not impaired by the disposition of this case. As set out above, Intervenors have numerous other opportunities to seek access to Alabama's lethal injection protocol. And, because they have other opportunities to do so regardless of what happens with this case, it follows that the disposition of this case can have no impact on Intervenors' interest in the lethal injection protocol. Thus, this Court should deny their motion to intervene.

II. REGARDLESS, THIS COURT CANNOT GIVE INTERVENORS ACCESS TO ALABAMA'S LETHAL INJECTION PROTOCOL BECAUSE IT IS NOT A JUDICIAL RECORD IN THIS CASE.

Intervenors raise both a constitutional right of access claim and a common-law right of access claim, seeking the disclosure of Alabama's lethal injection protocol and the portions of the transcripts that discuss it. But Alabama's lethal injection protocol is not a judicial record in this case. And, because it is not a judicial record in this case, this Court cannot disclose the protocol to them.

Of course, in raising their constitutional-right and common-law-right claims, Intervenors stress that Alabama's lethal injection protocol is "clearly a judicial record." (Doc. 108 at 12, 18.) In making this claim, Intervenors point to two things they say make the protocol a judicial record, subjecting it to disclosure: (1) "the protocol was introduced into the record" and (2) this Court relied "extensively" on the protocol to make a decision in this case. (Doc. 108 at 12, 18–19.) They are incorrect for two reasons.

First, Intervenors' claim that the lethal injection protocol was introduced into the record is simply wrong. Indeed, as this Court noted in its April 3, 2018, show cause order, Alabama's lethal injection protocol "does not appear on the court's electronic docket" because "[t]he parties *never filed* an electronic version of the lethal injection protocol." (Doc. 113 at 2

(emphasis added).) Additionally, no party ever attached Alabama's lethal injection protocol to any pleading or dispositive motion in this Court. And, although there was some discussion about the lethal injection protocol at the *in camera* hearing on January 31, no party ever admitted the lethal injection protocol as an exhibit in this case. So, contrary to Intervenors' claim, the lethal injection protocol was never "introduced into the record."

Second, the protocol did not play "a dispositive role" in resolving Hamm's as-applied challenge. Indeed, Hamm's claim did not "hinge[] on the protocol's content," as Intervenors claim. (Doc. 108 at 19.) Rather, Hamm's claim hinged on the condition of his veins. In fact, once this Court's IME concluded that peripheral venous access could be established through Hamm's lower extremities, this Court found it wholly unnecessary to delve into Alabama's lethal injection protocol to resolve Hamm's claim. (Doc. 58 at 4.) Of course, even if the protocol did play a dispositive role in this Court's decision, that fact does not make the lethal injection protocol a judicial record subject to disclosure. As the Eleventh Circuit has made clear, it has never "adopt[ed] an *ad hoc* standard that a document's status as a judicial record is dependent upon whether it played a discernible role in the resolution of the case." *Fed. Trade Comm'n v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013).

In sum, because Alabama's lethal injection protocol was never filed with this Court, was never admitted as an exhibit during any hearing, and did not play a dispositive role in disposing of Hamm's claims, it is not a public or judicial record to which the press has access. For this reason alone, this Court should deny Intervenors' request to have access to Alabama's lethal injection protocol and the portions of the transcripts that discuss it.

III. EVEN IF ALABAMA'S LETHAL INJECTION PROTOCOL WAS A JUDICIAL RECORD IN THIS CASE, THERE IS NO CONSTITUTIONAL RIGHT OF ACCESS TO JUDICIAL RECORDS AND, EVEN SO, THERE IS NO FIRST AMENDMENT RIGHT OF ACCESS TO ALABAMA'S LETHAL INJECTION PROTOCOL.

Intervenors claim that the First Amendment "grants the public a qualified right of access to court proceedings and records." (Doc. 108 at 9.) In so doing, Intervenors make two arguments (1) that the First Amendment right of access extends to Alabama's lethal injection protocol, and (2) Defendants have "not and cannot meet the heavy burden required to overcome the constitutional right of access." (Doc. 108 at 9, 12.) Intervenors' claims fail for three reasons.

First, there is no First Amendment right to copy and publish court exhibits and materials. *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 608–10 (1978). *See also Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426–27 (5th Cir. 1981) (finding that the United States Supreme Court has "squarely

rejected a claimed constitutional right of physical access to trial exhibits"); *Newman v. Graddick*, 696 F.2d 796, 801–803 (11th Cir. 1983) (recognizing that, while the press enjoyed a constitutional right to attend a civil proceeding, "[a]s to the prisoner lists, which were submitted to the court and became part of the court proceedings, *there may be no constitutional right to copy*") (emphasis added); and *In re Four Search Warrants*, 945 F. Supp. 1563, 1566 (N.D. Ga. 1996) (recognizing that there is no First Amendment right to copy and publish court exhibits and materials).[5] And, because there is no First Amendment right to copy and inspect court materials, there is no constitutional right to inspect Alabama's lethal injection protocol.

Second, even if there were such a right, Intervenors have not satisfied *their* burden of showing that a First Amendment right of access exists as to Alabama's lethal injection protocol. To do so, Intervenors must show that the "place and process have historically been open to the press and general public" and that "public access plays a significant positive role in the functioning of

5. The court in *In re Four Search Warrants* noted that two Eleventh Circuit decisions appear to conflict with prior, binding precedent—*Wilson v. Am. Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) and *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013 (11th Cir. 1992). *See In re Four Search Warrants*, 945 F. Supp. at 1566, n.4. In *Chi. Tribune Co.*, the Eleventh Circuit noted the suggestion of inconsistency, but declined to reach the issue because *Wilson* and *Brown* were inapplicable to that case. 263 F.3d at 1312, n.8.

the particular process in question." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8–9 (1986). They can show neither.

Indeed, there are no Eleventh Circuit opinions finding that there exists a First Amendment right of access to a state's execution protocol, and there are no Eleventh Circuit opinions holding that a state's execution protocol is the type of process that is historically open to the press and general public.[6] Moreover, there are no Eleventh Circuit opinions holding that the public plays a "significant positive role" in the function of a state's lethal injection protocol.[7] If anything, opinions from this circuit, as well as others, tend to suggest that there is no constitutional right to access a state's lethal injection protocol. *See, e.g.*, *Wellons v. Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1260, 1267 (11th Cir. 2014) (finding that the First Amendment does not "afford Wellons the broad right 'to know where, how, and by whom the lethal

6. While it is true that members of the press witness executions, *see* Ala. Code § 15-18-83(6) (1975), witnessing an execution is not the same as being allowed into the process of carrying out the execution protocol.

7. In Alabama, not only does the public not play a significant role in the lethal injection protocol, the Alabama legislature has expressly exempted the public from *any* role in the function of the lethal injection protocol. *See* ALA. CODE § 15-18-82.1(g) (1975) ("The policies and procedures of the Department of Corrections for execution of persons sentenced to death shall be exempt from the Alabama Administrative Procedure Act, Chapter 22 of Title 41.").

injection drugs will be manufactured,' as well as 'the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters'"); *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013) ("There is no violation of the Due Process Clause from the uncertainty that Louisiana has imposed on Sepulvado by withholding the details of its execution protocol."); *Williams v. Hobbs*, 658 F.3d 842, 852 (8th Cir. 2011) (holding that the prisoners, who argued that the Arkansas Method of Execution Act violated the due process clause because its secrecy denied them "an opportunity to litigate" their claim that the execution protocol violated the Eighth Amendment, failed to state a plausible due process access-to-the-courts claim). What is more, fifteen days before Intervenors moved to gain access to Alabama's lethal injection protocol, the Eighth Circuit rejected a nearly identical First Amendment claim from press intervenors seeking disclosure of Missouri's lethal injection protocol. *See Flynt v. Lombardi*, 885 F.3d 508, 512–13 (8th Cir. 2018).

Because they cannot satisfy their burden of establishing that there exists a First Amendment right of access to Alabama's lethal injection protocol, this Court should deny Intervenors' motion.

Third, even if they could make such a showing, Defendants need only show good cause for keeping the protocol confidential—not the "compelling

government interest" standard Intervenors suggest. As explained above, Defendants provided Hamm a redacted copy of Alabama's lethal injection protocol through the discovery process and under an agreed confidentiality order. As the Eleventh Circuit has explained, "[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001) (citing *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (footnote omitted). "Where discovery materials are concerned, the constitutional right of access standard is identical to that of Rule 26(c) of the Federal Rules of Civil Procedure." *Id.* (citing *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989)). So, when "a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access, like Rule 26, requires a showing of good cause by the party seeking protection." *Id.* Defendants can certainly show good cause for keeping Alabama's lethal injection protocol confidential and this Court's agreed confidentiality order intact.

Indeed, as the parties explained in their joint motion for a protective order, Defendants, ADOC, and the State of Alabama not only have good cause to keep the protocol confidential, they also have a "vital and compelling

interest in protecting the confidentiality of the procedures, the identities of persons who participate in the enforcement of death sentences, and all aspects of the manner of enforcing a death sentence in the State." (Doc. 26 ¶ 2.) Furthermore,

> [i]t is the ADOC's policy that all documents associated with the execution of death row inmates are confidential, to include the ADOC execution protocol. The ADOC has a strong interest in protecting the confidentiality of its execution protocol because the protocol contains security procedures relating not only to the execution itself, but procedures concerning the days leading up to a scheduled execution. The protocol specifies the location of ADOC correctional officers, their duty posts, and their movement within the facility prior to and after a scheduled execution date. Further, the protocol details specific times that correctional officers and a condemned inmate will be in specific locations within the correctional facility. The public dissemination of these security procedures would put correctional officers at risk, for example, by disclosing the number of officers deployed to certain areas of the correctional facility at certain times and would compromise the ADOC's security plan during the execution process. The public disclosure of this information could also compromise the ADOC's ability to ensure safety of other visitors to the facility, as well as other inmates, during an execution. Finally, the protocol references categories of correctional staff who participate as members of the execution team and the public disclosure of this information could provide a means to identify the identities of these personnel based on their titles.

(Attachment A, Affidavit of ADOC Commissioner, Jefferson S. Dunn, at ¶ 4.) The Eleventh Circuit has found good cause for reasons far less compelling than maintaining the safety and security of a correctional facility and to cover material far less important than a state's execution protocol. *See, e.g.*, *In re*

Alexander Grant & Co. Litig., 820 F.2d at 352 (finding good cause to defeat an access claim for "tax returns, trade secrets, or other sensitive material" when there was only "the fear of adverse publicity, intimidation or other outside forces that could interfere with the free flow of information"). Of course, even if Defendants had to show a "compelling government interest" in keeping Alabama's lethal injection protocol and the transcripts that discuss the protocol confidential, these reasons satisfy that standard.

In sum, because there is no constitutional right of access to judicial records, and because, even if there were, Intervenors have not met their burden of showing that there exists a First Amendment right of access to Alabama's lethal injection protocol, and because, even so, Defendants can show both good cause and a compelling government interest in keeping the lethal injection protocol confidential, this Court should deny Intervenors' motion.

IV. INTERVENORS ALSO HAVE NO COMMON-LAW RIGHT OF ACCESS TO ALABAMA'S LETHAL INJECTION PROTOCOL BECAUSE IT WAS PROVIDED ONLY AS DISCOVERY MATERIAL AND, EVEN SO, DEFENDANTS' INTERESTS IN KEEPING THE PROTOCOL CONFIDENTIAL OUTWEIGH INTERVENORS' INTEREST IN ACCESSING IT.

Intervenors also claim that the public "has a common law right to disclosure of the protocol records." (Doc. 108 at 17.) But they are incorrect for at least two reasons. First, Defendants provided Hamm a redacted copy of Alabama's lethal injection protocol as discovery material and under the

protection of a confidentiality order, and there is no common-law right of access to discovery materials. Second, even if the lethal injection protocol is not discovery material, Defendants' interests in keeping the protocol confidential outweigh Intervenors' interest in accessing it.

To be sure, both the press and the public enjoy a common-law right of access to civil proceedings, and that right includes "a general right to inspect and copy *public* records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597 (emphasis added). But that right is not absolute, and courts have "discretion to determine which portions of the record, if any, should remain under seal, and this discretion is 'to be exercised in light of the relevant facts and circumstances of the particular case.'" *Perez-Guerrero v. U.S. Att'y Gen.*, 717 F.3d 1224, 1235 (11th Cir. 2013) (quoting *Nixon*, 435 U.S. at 599). A court's discretion in this regard should be guided by "a 'sensitive appreciation of the circumstances that led to . . . [the] production [of the particular document in question].'" *Chi. Tribune Co.*, 263 F.3d at 1311 (quoting *Nixon*, 435 U.S. at 598). Furthermore, when exercising this discretion courts "traditionally distinguish between those items which may be properly considered public or judicial records and those that may not; the media and public presumptively have access to the former, but not to the latter." *Chi. Tribune Co.*, 263 F.3d at 1311.

Indeed, while the public and the press "may enjoy the right of access to pleadings, docket entries, orders, affidavits or depositions *duly filed*, [their] common-law right of access does not extend to information collected through discovery which is not a matter of public record." *In re Alexander Grant & Co. Litig.*, 820 F.2d at 355 (citations and quotations omitted). *See also Chi. Tribune Co.*, 263 F.3d at 1311 (recognizing that discovery materials "are neither public documents nor judicial records") (citing *McCarthy*, 876 F.2d at 91).

As discussed above, although Intervenors contend that Alabama's lethal injection protocol is "clearly a judicial record" because it "was entered into the record in the district court," (Doc. 108 at 18), they are incorrect. As this Court noted in its show cause order, Alabama's lethal injection protocol "does not appear on the court's electronic docket" because "[t]he parties *never filed* an electronic version of the lethal injection protocol." (Doc. 113 at 2 (emphasis added).) And, again, no party ever attached Alabama's lethal injection protocol to any pleading or dispositive motion in this Court. And, importantly, no party admitted Alabama's lethal injection protocol as an exhibit in this case.

Instead, Alabama's lethal injection protocol found its way into this case through the discovery process as Defendants provided a redacted copy of it to

Hamm as discovery material and under an agreed confidentiality order. Because Alabama's lethal injection protocol was never a "duly filed" record in this case and was provided only as a discovery document, there is no common-law right of access to Alabama's lethal injection protocol here, and Intervenors' common-law right of access claim should be denied. *See Chi. Tribune Co.*, 263 F.3d at 1312 (finding that "material filed with discovery motions is not subject to the common-law right of access").

Of course, even if Alabama's lethal injection protocol and the portions of the transcripts that discuss it are deemed judicial records that are subject to the common-law right of access, Intervenors still cannot access it because Defendants' interests in keeping their lethal injection protocol confidential outweigh Intervenors' interest in accessing it.

While at times the common-law right of access demands heightened scrutiny to seal records from public view, this heighted scrutiny applies only when a court seals the *entire* record of a case. *Chi. Tribune Co.*, 263 F.3d at 1311. When that happens, courts must show that doing so is "'necessitated by a compelling governmental interest, and is narrowly tailored to that interest.'" *Id.* (quoting *Wilson*, 759 F.2d at 1571; citing *Brown*, 960 F.2d at 1015–16). But, when, as is the case here, a court seals only a *portion* of the records from public view, the common-law right of access only "requires the court to

balance the competing interests of the parties." *Id.* (citing *Newman*, 696 F.2d at 803).

When balancing these competing interests, courts look to several relevant factors, "including whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, . . . whether access is likely to promote public understanding of historically significant events[,]" *Perez-Guerrero*, 717 F.3d at 1235–36 (quotations omitted), and whether "the press has already been permitted substantial access to the contents of the records." *Newman*, 696 F.2d at 803. None of these factors weigh in Intervenors' favor.

Indeed, history dictates that the media attempts to gin up public scandal concerning the death penalty and the procedures that surround it. For example, for years the State of Missouri has fought to keep its lethal injection protocol confidential out of fear that exposing the identities of their compounding pharmacies would subject those pharmacies to threats and harassment from groups seeking to frustrate the imposition of the death penalty. *See Flynt*, 885 F.3d at 511–12. Recently a media outlet exposed one of Missouri's compounding pharmacies, claiming that the "pharmacy [was] repeatedly found to engage in hazardous practices that could put patients—and convicts—at risk." Chris McDaniel, *The Secretive Company Behind*

Missouri's Lethal Injections: Missouri fought for years to hide where it got its execution drugs. Now we know what they were hiding, BUZZFEED NEWS, (Feb. 20, 2018) https://www.buzzfeed.com/chrismcdaniel/missouri-executed-17-men-with-drugs-from-a-high-risk?utm_term=.gn9Y4WeBlv#.keAjq7oEN8. Proving Missouri's concerns right, the day after the media exposed that pharmacy, the pharmacy issued a statement that it would "not provide any drugs for executions." *Centene-bought pharmacy won't give Missouri execution drugs*, THE ASSOCIATED PRESS, (Feb. 21, 2018) http://fox2now.com/2018/02/21/centene-bought-pharmacy-wont-give-missouri-execution-drugs/.

Particularly troubling with Intervenors' request here are the ties to a staunchly anti-death penalty blog, the Marshall Project. In fact, intervenor Alabama Media Group has joined the Marshal Project's "Next to Die" campaign, *see* Kent Faulk, *Al.com joins "Next to Die" project to track executions*, AL.COM (Sept. 14, 2015) http://www.al.com/news/birmingham/index.ssf/2015/09/alcom_joins_next_to_die_projec.html, and one of their reporters has been a featured writer for the Marshall Project. Kent Faulk, *In Alabama, You can be sentenced to death even if jurors don't agree*, THE MARSHALL PROJECT (Dec. 7, 2016) https://www.themarshallproject.org/2016/12/07/in-alabama-you-can-be-

sentenced-to-death-even-if-jurors-don-t-agree. In short, this factor weighs in favor of keeping Alabama's lethal injection protocol confidential.

Also, allowing Intervenors to have access to Alabama's lethal injection protocol here will not aid in any historical understanding of what happened with Hamm's execution. Indeed, Intervenors have already been apprised of what happened during Hamm's execution and access to the lethal injection protocol would add nothing to what they already know. As explained above, Hamm raised an as-applied challenge to Alabama's method of execution, claiming that his various medical conditions and past drug use rendered his veins inaccessible. Ultimately, this Court's IME determined that Hamm had accessible veins in his lower extremities, this Court asked Defendants to stipulate to only accessing Hamm's veins through his lower extremities, and Defendants agreed. While Defendants ended up aborting Hamm's execution, they did so because "Alabama Department of Corrections Commissioner Jeff Dunn said medical personnel had advised officials that there wasn't enough time to ensure that the execution could be conducted in a humane manner." Lawrence Specker, *Execution of Alabama inmate Doyle Lee Hamm called off*, AL.COM, (Feb. 22, 2018, updated: Feb. 26, 2018) http://www.al.com/news/birmingham/index.ssf/2018/02/alabama_inmate_doyle_lee_hamm.html. And, nearly immediately after the called-off execution,

Hamm's counsel spoke to the media and he published a report of Hamm's expert witness of how many times he thought the ADOC attempted to gain access to Hamm's veins, which included pictures of Hamm after the called-off execution. *See* Tracy Connor, *Lawyer describes aborted execution attempt for Doyle Lee Hamm as "torture"*, NBC NEWS (Feb. 25, 2018) https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006; and Bernard Harcourt, *Dr. Mark Heath Submits Medical Report Documenting Execution,* UPDATE | DOYLE LEE HAMM V. ALABAMA (Mar. 5, 2018) http://blogs.law.columbia.edu/update-hamm-v-alabama/2018/03/05/dr-mark-heath-submits-medical-report-documenting-execution/. As this Court is aware, having access to Alabama's lethal injection protocol would not aid intervenors in gaining any greater understanding of Hamm's execution. Thus, this factor weighs against disclosure of the protocol.

Furthermore, Intervenors have already been given substantial access to information from the only portion of Alabama's lethal injection protocol that was arguably at issue in Hamm's case and the discussions during the closed hearings on January 31 and February 16. In fact, Intervenors concede as much, noting that this Court's February 6 order "summarized the State's protocol at length." (Doc. 108 at 4.) Importantly, this Court's order not only detailed what

is included in the lethal injection protocol as it concerns IV placement, it also revealed what is not included in the protocol as it concerns IV placement. (Doc. 30 at 7–8.) Moreover, this Court's orders that followed both the January 31 and the February 16 hearings detailed what happened during those hearings, giving Intervenors substantial access to the contents of those records. Because Intervenors have already been given substantial access to the relevant information from the records sought, this factor also weighs in favor of nondisclosure.

Finally, as explained above, Defendants' have a substantial, compelling interest in not only maintaining the safety and security of a correctional facility, they also have a substantial, compelling interest in being able carry out executions. These interests alone are sufficient to overcome a common-law right of access claim. *See Flynt*, 885 F.3d at 511 (finding that "[t]he personal and professional safety of one or more members of the execution team, as well as the interest of the State in carrying out its executions, were sufficiently in jeopardy to overcome the common-law right of public access to the records").

CONCLUSION

For the reasons set forth above, Defendant's respectfully request that this Court deny Intervenors' Motion to Intervene and Unseal Judicial Records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2018, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to the following: **John G. Thompson, Gabriella E. Alonso, and John Langford.**

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