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

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

DOYLE LEE HAMM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:17-cv-02083-KOB (JDB)
	)	
JEFFERSON S. DUNN, et al.,	)	
	)	
Defendant.	)	
	)	

PRESS MOVANTS' REPLY REGARDING THE PROPRIETY OF THIS COURT'S ORDER GRANTING THEIR MOTION TO INTERVENE

This Court correctly held that Press Movants are entitled to intervene in order to vindicate the public's right of access to judicial records. *See* Order Granting Mot. to Intervene, ECF No. 111. For the reasons laid out below, the public may intervene as of right to assert the constitutional right of access to the records of a proceeding that is subject to the access right, and in any event Press Movants plainly satisfy Federal Rule of Civil Procedure 24's requirements in this case.

I. PRESS MOVANTS ARE ENTITLED TO INTERVENE TO UNSEAL COURT RECORDS SUBJECT TO THE PUBLIC ACCESS RIGHT

The public's constitutional right of access to the records of certain judicial proceedings allows Press Movants to intervene as of right to protect that right. As the Supreme Court has instructed, the "press and general public *must* be given an

opportunity to be heard on the question of their exclusion." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (emphasis added); *see also Newman v. Graddick*, 696 F.2d 796, 802 (11th Cir. 1983) (same). Where the public is denied access to judicial records in a proceeding subject to the constitutional access right, the Eleventh Circuit has made clear that members of the public are entitled to intervene and file a motion *in that proceeding* to protect their right of access to the records, regardless of Rule 24's considerations of timeliness and prejudice. *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015–16 (11th Cir. 1992).

In *Brown*, the defendant agreed to settle the case in exchange for the plaintiff's agreement that the record be sealed. *Id*. The district court sealed the record and dismissed the case. *Id.* Over six months later, a third-party filed a motion to intervene and unseal the defendant's summary judgment motion and other related documents. *Id.* at 1014–15. For much the same reasons advanced by the defendants here, the district court in *Brown* denied the motion as untimely under Rule 24(b) and further reasoned that permitting a third-party to intervene would prejudice the defendant by stripping it of "a crucial benefit of the settlement"—had intervention come earlier it might have factored into the defendant's settlement decision. *Id.* at 1015.

The Eleventh Circuit reversed and ordered the records unsealed. *Id.* at 1015–16. The post-settlement timing did not bar the unsealing motion because it asserted "the rights of the public, an absent third party." *Id.* at 1016. In this context, the Court of Appeals explained, "any member of the public" may subsequently "move the court to unseal the court file in the event the record has been improperly sealed." *Id.* Nor did reliance on a stipulated sealing order overcome the constitutional access right:

> It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.

Id.

In *Brown*, the Eleventh Circuit treated the third-party's motion to intervene "as a motion to unseal the file," and, "find[ing] nothing in the record to support the sealing of the court file," ordered the records unsealed. *Id.* This same approach has been followed consistently in each of the Eleventh Circuit's First Amendment right of access rulings following a motion to intervene by a news organization. None weigh the propriety of intervention under Rule 24, but instead provide that the press has "standing to intervene for purposes of challenging its denial of access to the underlying litigation, even though it is otherwise not a party," and proceed directly to the merits of the right of access motion. *United States v. Valenti*, 987

F.2d 708, 711 (11th Cir. 1993); *see In re Subpoena to Testify Before Grand Jury Directed to Custodian of Records*, 864 F.2d 1559, 1561 (11th Cir. 1989); *In re Petition of Tribune Co. v. United States*, 784 F.2d 1518, 1521 (11th Cir. 1986); *Newman*, 696 F.2d at 800; *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001) (proceeding directly to the merits).

As this consistent precedent makes clear, Press Movants in this case are entitled to intervene as of right for the limited purpose of moving this Court to unseal judicial records from a proceeding that itself is subject to the right of access. *See* Mem. in Supp. of Mot. by Press Movants for Leave to Intervene and Unseal Judicial Records at 8–12, ECF No. 108.

II. PRESS MOVANTS NONETHELESS SATISFY RULE 24

In any event, Press Movants satisfy Rule 24's requirements for intervention. Under Rule 24(a)(2), a party is entitled to intervene as a matter of right if (1) their motion is timely; (2) they have an interest relating to the property or transaction which is the subject of the action; (3) they are so situated that disposition of the action may impede or impair their ability to protect that interest; and (4) their interest is inadequately represented by the existing parties to the suit. *See Tech. Training Assocs., Inc. v. Buccaneers Ltd.*, 874 F.3d 692, 695–96 (11th Cir. 2017). Similarly, a party seeking permissive intervention under Rule 24(b)(1)(B) must demonstrate (1) its application to intervene is timely, and (2) its claim or defense

and the main action have a question of law or fact in common. *Cox Cable Commc'ns, Inc. v. United States*, 992 F.2d 1178, 1180 (11th Cir. 1993). Both standards are satisfied here.[1]

As this Court found, and defendants do not contest, Press Movants' interest in this case is sufficiently related to the litigation and not adequately represented by the parties. *See* Ord. Granting Mot. to Intervene at 2, ECF No. 111; Defs.' Resp. Br. at 10, ECF No. 119. Contrary to defendants' assertions, Press Movants' motion is also timely and their interest will be impaired, if intervention is denied.

A. Press Movants' Motion Is Timely

When considering whether a motion for intervention as of right or by permission is timely, a court considers four factors: (1) the length of time during which the would-be intervenor knew or reasonably should have known of her interest in the case before she 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 she knew or reasonably should have known of her interest; (3) the extent of prejudice to the would-be intervenor if her petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *See Salvors, Inc. v. Unidentified Wrecked &*

[1] Because defendants only contest timeliness and prejudice, the Rule 24 analysis here is not impacted by whether Press Movants' motion to intervene is framed as seeking intervention as of right or seeking permissive intervention.

Abandoned Vessel, 861 F.3d 1278, 1294 (11th Cir. 2017); *Angel Flight of Georgia, Inc. v. Angel Flight Am., Inc.*, 272 F. App'x 817, 818 n.1 (11th Cir. 2008) (timeliness analysis is the same under Rule 24(a) and (b)). These considerations reinforce this Court's finding that "Press Movants' motion is timely." *See* Order Granting Mot. to Intervene 2, ECF No. 111.

i. The time between closure and intervention was reasonable.

The determination of timeliness is "largely committed to the discretion of the district court." *Stallworth v. Monsanto*, 558 F.2d 257, 263 (5th Cir. 1977). For the purposes of Rule 24, timeliness "is not a word of exactitude or of precisely measurable dimensions." *Id.* Courts, including the Eleventh Circuit, have permitted intervention for the purpose of unsealing judicial records following long periods of delay. *See Brown*, 960 F.2d 1013 (over six months); *see, e.g.*, *Carlson v. United States*, 837 F.3d 753, 756–57 (7th Cir. 2016) (granting a journalist's motion to intervene and adjudicating request to unseal 70-year-old grand jury records). So, too, outside the right-of-access context, where "[n]umerous courts have allowed third parties to intervene in cases . . . involving delays [by the third parties] measured in years rather than weeks." *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 785 (1st Cir. 1988) (collecting cases).

As this Court already has found, the length of time between closure and intervention here was short and reasonable. *See* Order Granting Mot. to Intervene,

ECF No. 111. Press Movants used the time between the January 31 hearing and March 28 to assess their potential legal rights and claims, conduct research, draft a memorandum of law, and coordinate with legal counsel.[2]

Defendants' argument that the Press Movants have "known for years that Defendants have opposed requests to make public Alabama's lethal injection protocol" is completely beside the point. Press Movants seek to vindicate the public's right to judicial records in *this* case, not a freestanding right to every past, present or future execution protocol. Defendants' refusal to disclose the execution protocol to the public in other contexts over the course of many years has no bearing whatsoever on the timeliness of Press Movants' motion to require disclosure of the judicial records in this case.

ii. Intervention does not prejudice the parties.

Defendants claim they would be prejudiced by intervention in two ways: they "would not have . . . turned over the Protocol to Hamm" and "could have taken a different approach to the . . . settlement agreement," which they claim would leave them "no way to . . . correct or explain . . . their interpretation of [the

[2] The former Fifth Circuit has already rejected the rule defendants assert, which would require intervention nearly as soon as would-be intervenors have knowledge of the pendency of litigation. *See Stallworth v. Monsanto*, 558 F.2d 257, 265 (5th Cir. 1977). Such a rule would "encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high." *Id.*

Protocol].” Defs.’ Resp. Br. 17–18, ECF No. 119. Neither claim withstands scrutiny, as a matter of law or fact.

Neither asserted prejudice is the type of prejudice Rule 24’s timeliness requirement protects against. “[T]he prejudice to the original parties to the litigation that is relevant to the question of timeliness is only that prejudice which would result from the would-be-intervenors’ failure to request intervention as soon as he knew or reasonably should have known about his interest in the action.” *Stallworth*, 558 F.2d at 265. Defendants instead focus on the prejudice that would result from a successful motion to unseal, which is neither here nor there.

More fundamentally, defendants cannot be prejudiced by vindication of the public’s constitutional right to access judicial records. “Once a matter is brought before a court for resolution, it is no longer solely the parties’ case, but also the public’s case.” *Brown*, 960 F.2d at 1015–16. Defendants cannot foreclose public access to court records by invoking prejudice under Rule 24.

Moreover, defendants’ assertion that they would be prejudiced because they would not have voluntarily disclosed the protocol to Hamm had Press Movants intervened earlier doesn’t square with the facts of this proceeding. By defendants’ own argument, Press Movants “knew or reasonably should have known” about their interest in this action as of the January 31, 2018, hearing. *See* Defs.’ Resp. Br. 11, ECF No. 119. But this Court ordered defendants to disclose the protocol to

Hamm prior to the January 31, 2018, evidentiary hearing, *see* Redacted Resp. Br. 35, *Hamm v. Dunn*, No. 18-10473 (11th Cir. Feb. 13, 2018), and the protocol was submitted to the Court under a stipulated sealing order the day before the hearing, on January 30, 2018, *see* Joint Mot. for Protective Order, ECF No. 26; Agreed Confidentiality Order, ECF No. 28. Defendants had already produced the protocol under court order by the time they claim Press Movants should have intervened.

iii. Press Movants would be prejudiced by denial of their motion to intervene.

Conversely, Press Movants would be significantly prejudiced by denial of their motion to intervene. When information to which the public is entitled is sealed, "each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J., Circuit Justice). Accordingly, it is critical that the press and public have an efficient means "to be heard in a manner that gives full protection of the asserted right [of access]." *Jessup v. Luther*, 227 F.3d 993, 998 (7th Cir. 2000). That includes the ability to obtain "immediate and contemporaneous" relief. *In re Associated Press* 162 F.2d 503, 507 (7th Cir. 1998).

Requiring Press Movants to raise and litigate the ongoing First Amendment violations in this case elsewhere would run afoul of these principles. Press Movants—and the public—would suffer irreparable harm in the form of further delay, if forced to press their claim through another, less efficient avenue, such as in a freestanding action before a different judge without familiarity with the sealing orders and without the ability to offer "immediate and contemporaneous" relief "once access is found to be appropriate." *Id.* at 506.

B. Continued Closure Impairs Press Movants' Interest in Access

Defendants claim that Press Movants "have no interest that would be impaired" by denial of intervention because "Intervenors have numerous other opportunities to seek access to Alabama's lethal injection protocol." Defs.' Resp. Br. 14, ECF No. 119. As before, defendants misapprehend Press Movants' claims and the rights at issue here. Continued closure plainly impairs Press Movants' ability to access judicial records in this case.

CONCLUSION

For the foregoing reasons, Press Movants respectfully ask the Court to deny defendants' request to reconsider the order granting Press Movants' motion to intervene.

Dated: April 23, 2018

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[3] This motion has been prepared in part by a clinic associated with the Abrams Institute for Freedom of Expression and the Information Society Project at Yale Law School but does not purport to present the school's institutional views, if any.

CERTIFICATE OF SERVICE

I certify that on April 23, 2018, I electronically filed the foregoing memorandum using the Court's CM/ECF system.

/s/ John Langford
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