No. 18-12402-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCE LOCAL MEDIA, LLC, et al,

Appellee,

v.

COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, et al,
Appellant.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division (No. 2:17-cv-02083-KOB)

BRIEF OF THE APPELLANT

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July 17, 2018

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel, in compliance with Federal Rule of Appellate Procedure 26.1, certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Advance Local Media LLC, an Intervenor in this case, which does business as the Alabama Media Group, which is a subsidiary of Advance Publications, Inc., a media company incorporated and headquartered in New York;

2. Allen, Richard, former Commissioner of the Alabama Department of Corrections;

3. Alonso, Gabriella E., counsel for Intervenors in this case;

4. Armstrong, Jeremy, former Assistant Attorney General during the postconviction proceedings;

5. Bolling, Leon, Warden of Donaldson Correctional Facility and Defendant in this action;

6. Bowdre, Karon Owen, federal district court judge;

7. Brasher, Andrew, Solicitor General of the State of Alabama;

8. Cunningham, Patrick, victim;

9. Dobbs-Ramey, Kimberly J., counsel for Hamm during the postconviction appeal;

10. Dunn, Jefferson S., Commissioner of the Alabama Department of Corrections;

11. Folsom, Fred C., trial judge;

12. Forrester, Nathan, former Solicitor General for the State of Alabama during the postconviction appeal;

13. Frisby, Stephen M., counsel for Defendants in this case;

14. Govan, Jr., Thomas R., counsel for Defendants in this case;

15. Hamm, Doyle Lee, plaintiff;

16. Harcourt, Bernard, counsel for Hamm in postconviction proceedings, in federal habeas proceedings, and in this Court;

17. Hardeman, Don L., postconviction judge;

18. Harris, Hugh, trial and direct appeal counsel for Hamm;

19. Hughes, Beth Jackson, counsel for the State in postconviction proceedings, in federal habeas proceedings, and in this Court;

20. King, Troy, former Alabama Attorney General during the federal habeas proceedings;

21. Langford, John, counsel for Intervenors in this case;

22. Little, William D., Assistant Attorney General during the direct appeal;

23. Marshall, Steve, Alabama Attorney General;

24. Martinez, Catherine, law student intern for Intervenors in this case;

25. Morin, Robert, counsel for Hamm on appeal to the United States Supreme Court on direct appeal;

26. Morse, Michael, law student intern for Intervenors in this case;

27. Nail, Pamela, counsel for Hamm in postconviction proceedings;

28. Newsome, Kevin C., former Solicitor General of the State of Alabama during postconviction proceedings;

29. Nunnelley, Kenneth, former Assistant Attorney General during the postconviction proceedings;

30. Pryor, William H., former Alabama Attorney General during the postconviction proceedings;

31. Roden, Douglas, co-defendant;

32. Roden, Regina, co-defendant;

33. Schulz, David A., counsel for Intervenors in this case;

34. Seidell, Charlie, law student intern for Intervenors in this case;

35. Siegleman, Don, former Alabama Attorney General during the direct appeal;

36. Simpson, Lauren A., counsel for Defendants in this case;

37. Stewart, Cynthia, Warden Holman Correctional Facility and Defendant in this action;

38. Stewart, Sandra J., former Assistant Attorney General during the direct appeal;

39. Strange, Luther, former Alabama Attorney General;

40. The Associated Press, an Intervenor in this case;

41. *The Montgomery Advertiser*, an Intervenor in this case, which is a part of the USA Today Network, whose parent corporation is Gannett Co., Inc., which is a media company incorporated in Delaware and headquartered in Virginia, a publicly traded company with no affiliates or subsidiaries that are publicly owned. BlackRock, Inc., a publicly traded company, owns ten percent or more of Gannett's stock;

42. Thomas, Kim, former Commissioner of the Alabama Department of Corrections;

43. Thompson, John G., counsel for Intervenors in this case;

44. Tran, Delbert, law student intern for Intervenors in this case; and

45. Williams, Martha E., trial and direct appeal counsel for Hamm.

/s/ Stephen M. Frisby
Stephen M. Frisby
Assistant Alabama Attorney General

STATEMENT REGARDING ORAL ARGUMENT

The district court's order misapplied and contorted this Court's caselaw in such a way that it created a mechanism for the press to obtain documents that are not part of the record in a civil case. While the district court's error here is clear, the State requests oral argument to highlight how the district court's decision jeopardizes the ability of parties in civil cases to disclose sensitive documents in the course of discovery and upends this Court's policy that parties pass information freely to keep discovery and litigation moving.

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INTRODUCTION

This case involves a fundamental misapprehension about the type of documents to which the press has a common-law right of access and to which documents they do not. The district court erroneously granted the *Montgomery Advertiser*, Alabama Media Group, and the Associated Press ("the press") access to a confidential document in this case by incorrectly labeling the document a judicial record, even though the court admitted that the document had never been filed and "does not appear on the court's electronic docket." (Doc. 113 at 2.) This Court has clearly held that the common-law right of access extends only to judicial records, which does not include documents that are never filed in a case. The district court's misapplication of this bright-line rule is made obvious by the fact that the court ordered the State to submit a redacted copy of the document to the court to turn over to the press precisely because the document itself appears nowhere in the record.

Not only does the district court's order prejudice the State here, but it will also have ramifications in other settings by muddying this Court's clear rule for determining what constitutes a judicial record and chilling the free flow of information in discovery by creating a mechanism for the press to obtain documents that are not part of the record in a civil case. Thus, the district court's order must be reversed.

STATEMENT OF JURISDICTION

This is an appeal from the district court's order denying the State's motion to reconsider allowing the press to intervene in Doyle Lee Hamm's already disposed-of case and granting their motion to unseal Alabama's lethal injection protocol in that case. This Court has jurisdiction over this case in one of two ways.

First, the district court's order granting the press's motion to intervene and unseal is final, giving this Court jurisdiction under 28 U.S.C. § 1291. Second, even if the district court's order were not final, this Court would have jurisdiction under the collateral-order doctrine, *see Choen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because the district court's order (1) conclusively determined whether the press were entitled to have access to the protocol, (2) that question was separate from the underlying case, and (3) that question would be "effectively unreviewable on appeal from a final judgment." *Sell v. United States*, 539 U.S. 166, 176 (2003).

ISSUES PRESENTED FOR REVIEW

The district court allowed the press to intervene in Doyle Lee Hamm's case, although they watched the case unfold from the beginning, yet did not move to intervene until after the case had settled. The court also found that the press had a common-law right of access to Alabama's lethal injection protocol, concluding that (1) the protocol was a judicial record, even though it neither accompanied any filing in Hamm's case nor was ever admitted as evidence in that case, and (2) in balancing the competing interests of the parties, the scales tipped in the press's favor. But because the protocol does not appear anywhere in the record in Hamm's case, the district court issued a second order requiring the State to file, under seal, a copy of the protocol with the district court so that the court could make the protocol available to the press. This appeal raises three issues:

1. Did the district court err when it did not follow this Court's bright-line rule that "whether a document is a judicial record depend[s] on the type of filing it accompanied" in holding that the protocol was a judicial record here?

2. Did the district court err when it found that the press had a common-law right of access to the protocol?

3. Did the district court err when it denied the State's motion to reconsider allowing the press to intervene in Hamm's case when they had no discernable right to intervene?

STATEMENT OF THE CASE

For years, death-row inmates, death-penalty abolitionists, and the press have tried to make public Alabama's lethal-injection protocol.[1] Until now, none of them have been successful. But the press's success in this case should be short-lived. This is so because, in unsealing the protocol, the district court misapplied this Court's simple, bright-line rule when it labeled the protocol a judicial record, its decision conflicts with other long-standing cases from this Court about unsealing judicial records, and it should never have allowed the press to intervene in Hamm's case in the first place.

Ultimately, the district court's error does not turn on either an analysis of Alabama's lethal-injection protocol or the facts of Hamm's case. Rather, it turns on the court's fundamental misapprehension of this Court's clear-cut precedent. Nevertheless, while this Court is aware of what happened in Hamm's case, *see Hamm v. Comm'r, Ala. Dep't of Corrs.*, 725 F. App'x 836 (11th Cir. 2018), a brief discussion of that case and the events that followed are relevant to understanding how the district court erred here.

1. Trying to unearth confidential execution protocols is not something that is unique to Alabama. Recently, the Eight Circuit rejected a similar attempt to unseal Missouri's protocol. *See Flynt v. Lombardi*, 885 F.3d 508 (8th Cir. 2018).

I. THE HAMM CASE

In early December 2017, Hamm filed a complaint raising only an as-applied challenge to Alabama's method of execution; he 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.) He 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 requesting that the State be barred from carrying out his execution. (Doc. 15.)

On January 30, after filing dispositive motions (Docs. 12, 16, 18), the State, through discovery, provided Hamm with a redacted copy of the protocol. (Doc. 52 at 21.) But the State did so only after the parties jointly moved for a protective order to keep the protocol confidential (Doc. 26 ¶ 3) and after the district court entered the agreed order. (Doc. 28.)

The next day, the district court conducted a public hearing on the State's dispositive motions and Hamm's request for injunctive relief. While a brief portion of that hearing was handled in camera, the parties' arguments, the expert-witness

testimony, the district court's rulings on the pending motions, and the district court's decision to sua sponte grant Hamm a stay of execution were handled before a public audience. Importantly, while the State provided the district court with a paper courtesy copy of the protocol at the outset of that hearing, at no point did anyone move to admit the protocol into evidence, nor did anyone attach it as an exhibit to any substantive motion or pleading.

On February 6, the district court issued a publicly available order detailing Hamm's as-applied claims, his specific medical conditions, and how those medical conditions affected both peripheral venous access and central line placement, and summarized the protocol at length and discussed what it perceived to be gaps in the protocol. (Doc. 30 at 1–11.) That same day, the court issued another publicly available order explaining why it had concluded a stay was necessary. (Doc. 31.) In that order, the court explained 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." *Id.* at 2. The State appealed. (Doc. 32.)

On appeal, this Court vacated the district court's stay and directed it "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. *Hamm v. Comm'r, Ala. Dep't of Corrs.*, No. 18-10473, 2018 WL 2171185, at *4 (11th Cir. Feb. 13, 2018). The district 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." *Id.* at 3. The IME concluded that there would be no issue obtaining peripheral venous access, and thus, "cannulation of the central veins will not be necessary to obtain venous access." *Id*. at 5.

On February 16, the district court conducted a closed hearing to discuss the IME's findings with the parties. Originally, the court scheduled that hearing so that the State could present testimony about the protocol. *Id*. at 4. But because the IME's findings "negated any need to delve further into Alabama's lethal injection protocol," the court abandoned that plan and only asked the State to stipulate that it would not attempt peripheral venous access through Hamm's upper extremities. *Id.* The State agreed. *Id.*

While the February 16 hearing was closed to the public, the district court issued a publicly available order on February 20, in which it summarized that hearing, detailed the IME's findings, and explained why a stay of Hamm's scheduled

execution was no longer necessary. (Doc. 58.) This Court affirmed that decision, and further detailed Hamm's claims and why it was appropriate to deny him a stay of execution. *Hamm*, 725 F. App'x at 844.

On the day of his execution, Hamm launched a last-minute, last-ditch effort to stop it. *Hamm v. Dunn*, 138 S. Ct. 828 (2008) (mem). That effort, although ultimately unsuccessful, left the State with only a few hours to carry out Hamm's execution. A little after 11:00 PM, the State called off Hamm's execution before it started because "medical personnel had advised officials that there wasn't enough time to ensure that the execution could be conducted in a humane manner" before the midnight deadline on the execution warrant. Lawrence Specker, *Execution of Alabama inmate Doyle Lee Hamm called off*, AL.COM (Feb. 22, 2018, updated Feb. 26, 2018), goo.gl/Numkuh. Immediately thereafter, the ADOC Commissioner made himself available to the press to answer their questions. *Id.*

On March 5, Hamm moved to amend his complaint (Doc. 94), which the State did not oppose. (Doc. 100.) Hamm filed his second amended complaint on March 26 (Doc. 103), but that same day, the parties jointly stipulated to dismiss Hamm's claims. (Doc. 104.) The district court dismissed Hamm's case on March 28. (Doc. 105.)

II. THE PRESS MOVE TO INTERVENE IN HAMM'S ALREADY-DISMISSED CASE

While Hamm's case bounced among the district court, this Court, and the Supreme Court, the press sat back, watched, and reported on the events as they unfolded. The press were well aware of Hamm's case,[2] and at least one of their reporters was present at the January 31 hearing.[3] But they did nothing to insert themselves in Hamm's case while public interest was at its peak. Instead, they waited until fifty-six days after the January 31 hearing, thirty-four days after Hamm's execution was called off, two days after the parties filed their joint stipulation of dismissal, and hours after the district court disposed of Hamm's case to try to intervene and gain access to the protocol and other related documents. (Docs. 107, 108.)

In their motion, the press argued that they had both a constitutional and a common-law right of access to the protocol, stressing that the protocol is "clearly a judicial record" because (1) "the protocol was introduced into the record," and (2) the district court relied "extensively" on the protocol to make a decision. (Doc. 108 at 12, 18–19.)

2. Ivana Hrynkiw, *Execution drug may have been named in court filings from Alabama AG's Office*, AL.COM (Jan. 18, 2018), goo.gl/fdd4XE.
3. Ivana Hrynkiw, *Attorneys for Alabama AG's Office, death row inmate argue in federal court*, AL.COM (Jan. 31, 2018), goo.gl/QVXmqZ.

Despite the press's decision to wait until Hamm's case was disposed of to file their motion, the district court, without giving the parties an opportunity to respond, issued an order finding that the press satisfied the requirements for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. But the court reserved ruling on their request for access to the protocol and other related documents. (Doc. 111.) A few days later, the court ordered the State to respond to the press's request for access to the protocol and other related documents. (Doc. 113.) In that order, the court clarified the press's mistaken belief about the status of the protocol as a record in Hamm's case, explaining that the protocol "does not appear on the court's electronic docket" because "[t]he parties *never filed* an electronic version of the lethal injection protocol." *Id*. at 2 (emphasis added).

On April 17, 2018, the State filed a response to the press's motion, requesting that the court reconsider its decision to allow the press to intervene because intervention as a matter of right was inappropriate here. The State also argued that, in any event, the press could not have access to a document that appears nowhere in the record and, even so, the press had no common-law right of access to the protocol. (Doc. 119.)

III. THE DISTRICT COURT'S MEMORANDUM OPINION ALLOWS THE PRESS TO INTERVENE IN HAMM'S CASE AND GRANTS THEM ACCESS TO THE PROTOCOL

On May 30, the district court issued a memorandum opinion that (1) denied the State's request to reconsider allowing the press to intervene in Hamm's case and (2) granted the press's motion to unseal the protocol and other related records. (Doc. 122.) In granting the press's motion to unseal, the court conceded that "no party ever attached the protocol to a pleading or filing in [Hamm's] case; indeed, the protocol does not appear anywhere in the electronic docket." *Id*. at 11. But the court concluded that "the failure to formally file the protocol does not make it a non-judicial record" because Hamm's case was "rushed" and the "parties and the court did not cross all Ts or dot all Is to have the protocol filed of record[,]" "the court needed and relied upon the protocol to resolve [the State's] motion for summary judgment and Mr. Hamm's request for injunctive relief[,]" and other judicial records referred to the protocol. *Id*. at 11–12. Thus, the court held that the protocol was a judicial record. *Id*. at 14. After making this finding, the court balanced the competing interests of the parties and determined that the press had a common-law right of access to the protocol. *Id.* at 14–18.

Immediately after issuing its memorandum, the district court issued two orders. In the first, the court clarified precisely what documents it was unsealing, including (1) the protocol, (2) the sealed transcript of the January 31 in camera

hearing, (3) the sealed transcript of the closed hearing on February 16, and (4) Hamm's motion for leave to supplement his first amended complaint. (Doc. 123.) In the second, the court instructed the State to file, under seal, a redacted copy of the protocol for the court to review before releasing it. (Doc. 124.)

At that point, the State moved the district court to stay its memorandum opinion and orders pending an appeal to this Court, pointing out that the order "requires [the State] to do something that has not yet been done in this case: *duly file* a copy of the protocol in the electronic record." (Doc. 126 at 5.) The district court granted the State's motion (Doc. 127), and the State filed a timely notice of appeal. (Doc. 125.)

STANDARD OF REVIEW

This Court reviews the district court's decision to unseal the protocol for an abuse of discretion. *See, e.g.*, *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 61 (11th Cir. 2013). This Court applies the same standard of review to the district court's finding that permissive intervention is appropriate here. *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1249 (11th Cir. 2002). This Court has explained that a district court can abuse its discretion in two ways: (1) when it "'applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous,'" *id.* (quoting *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 814, 821 (11th Cir. 2010)), or (2) "'when it misconstrues its proper role, ignores or misunderstands the relevant evidence, and bases its decision upon considerations having little factual support,'" *id.* (quoting *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1546 (11th Cir. 1996)).

This Court reviews de novo the district court's decision to find that the press could intervene as a matter of right. *U.S. Army Corps of Eng'rs*, 302 F.3d at 1249.

SUMMARY OF THE ARGUMENT

The district court abused its discretion by ignoring this Court's well-established precedent that makes it clear that the common-law right of access extends only to documents that are filed and made a part of the record in a case. The district court's order misapplied this Court's clear-cut rule and turned that rule on its head by purporting to grant the press's motion to "unseal" the protocol, even though the court previously admitted that the protocol had never been filed in the case and did not appear on the court's electronic docket. (Doc. 113 at 2.) Thus, the protocol was not a judicial record here. What is more, the court had no authority to order the State to unseal and submit to the press a document that was never filed, and the order requiring such unprecedented action is clearly erroneous.

And the district court compounded this error when it improperly labeled the protocol a judicial record because, in its mislabeling, it failed to recognize that the protocol was provided only as unfiled discovery material in Hamm's case. This Court has long-held that discovery material is not subject to the common-law right of access. But, even if unfiled discovery material were subject to the common-law right of access, the court still erred because it did not properly balance the competing interests of the parties.

Finally, there was no need for the district court to misapply any of this Court's cases because it should never have allowed the press to intervene anyway. For any of these reasons, this Court should reverse.

ARGUMENT

Both the press and the public have long enjoyed a common-law right of access to civil proceedings, which includes "a general right to inspect and copy *public* records and documents, including judicial records and documents." *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978) (emphasis added). But that right is far from absolute, *id.* at 598, and is subject to several well-defined limitations. For example, "'[w]hen applying the common-law right of access[,] federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not; the . . . public presumptively ha[s] access to the former, but not to the latter.'" *AbbVie Prod. LLC*, 713 F.3d at 62 (quoting *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001)). Included in those items that are not judicial records are documents that never accompanied a filing in a case, *see id.* at 64, and documents provided only in discovery, *see Chi. Tribune Co.*, 263 F.3d at 1312. If a document falls into either of these two categories, then there is no right of access to them.

Even if a document is a judicial record, there is still no absolute right to inspect and copy it because "'a judge's exercise of discretion in deciding whether to release [a] judicial record[] should be informed by a sensitive appreciation of the circumstances that led to the production of the particular document in question,'" which "'requires a balancing of competing interests.'" *AbbVie Prod. LLC*, 713 F.3d

at 62 (quoting *Chi. Tribune Co.*, 263 F.3d at 1311) (internal quotation marks, alterations, and citation omitted in *AbbVie*). There are several factors courts consider when balancing the competing interests, 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 v. United States*, 717 F.3d 1224, 1235–36 (11th Cir. 2013) (quotations omitted), and whether "the press has already been permitted substantial access to the contents of the records." *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983).

Here, in their motion to intervene and unseal, the press claimed that they had a common-law right of access to Alabama's lethal-injection protocol. (Docs. 107, 108.) The district court agreed.[4] (Doc. 122 at 9.) But in so doing, the district court misapplied this Court's bright-line rule for determining when a document becomes a judicial record and ignored this Court's other longstanding rules about judicial records.[5]

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4. Because the district court found that the press had a common-law right of access to the protocol, it did not address the press's claim that they had a constitutional right of access as well.
5. To be clear, while the State contends that the district court erred when it found that the protocol was a judicial record in Hamm's case and unsealed it, the State does not contend that the court erred on that basis when it unsealed the transcripts of the closed hearings or Hamm's motion to amend his complaint. Those documents are clearly judicial records, *see AbbVie Prod. LLC*, 713 F.3d at 63. That being said, if this Court finds that the district court erred when it allowed

This Court should reverse the district court for any of the following four reasons:

- First, the district court misapplied this Court's simple, bright-line rule that courts "determine whether a document is a judicial record depending on the type of filing it accompanied" and not "whether it played a discernable role in the resolution of the case," *AbbVie Prod. LLC*, 713 F.3d at 64, when it held that the protocol never accompanied any filing in Hamm's case but was nonetheless a judicial record.

- Second, the district court ignored this Court's longstanding rule that while 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 352, 355 (11th Cir. 1987) (emphasis added, citations and quotations omitted).

- Third, even if discovery material were subject to the common-law right of access, the State's interest in keeping the protocol confidential outweighs the press's interest in accessing it. *See Chi. Tribune Co.*, 263 F.3d at 1311. The district court's finding otherwise is clearly erroneous.

- Fourth, the district court should never have allowed the press to intervene in Hamm's case, as they did not show that they satisfied the requirements to intervene as of right and they cannot, as a matter of law, permissively intervene.

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the press to intervene in Hamm's case, then this Court must reverse the district court's decision to release the protocol, the hearing transcripts, and Hamm's motion.

I. THE DISTRICT COURT MISAPPLIED THIS COURT'S CASELAW WHEN IT FOUND THAT THE PROTOCOL WAS A JUDICIAL RECORD.

Under this Court's case law, a document is not a judicial record if it has never been made part of the record in a judicial proceeding. In *AbbVie Prod. LLC*, this Court created a "simple rule to apply" for determining whether a document is a judicial record. 713 F.3d at 64. This simple rule "does not involve locating the [document] on a continuum by determining the actual role the document played—by, for instance, counting the number of times the district court cited it while deciding a motion to dismiss"; rather, it involves looking only at "the type of filing [the document] accompanied." *Id.* Thus, while a complaint, a dispositive motion, a transcript of a proceeding, and any exhibit attached to those filings are clearly judicial records, any document that is *not filed* with the court is not a judicial record even if "it played a discernable role in the resolution of the case." *Id.*

Here, the district court found that "no party ever attached the protocol to a pleading or filing in [Hamm's] case" and that "the protocol does not appear anywhere in the electronic docket." (Doc. 122 at 11.) But the court still concluded that the protocol was a judicial record because it "needed and relied upon" the protocol to decide Hamm's case. *Id*. at 12. This reasoning misapplies this Court's simple, bright-line rule that courts "determine whether a document is a judicial record depending on the type of filing it accompanied" and *not* "whether it played a

discernable role in the resolution of the case." *AbbVie Prods. LLC*, 713 F.3d at 64. For this reason alone, this Court should reverse the district court.

While the district court recognized *AbbVie*, it tried to work around that case in three unavailing ways.

First, the court attempted to distinguish *AbbVie* by claiming that the facts in that case "are the inverse of the facts in this case." (Doc. 122 at 14.) This is so, the court posited, because in that case, "the plaintiff filed the document with the court, but the court did not rely on it," while "[i]n this case, no party formally filed the document with the court, but the court *did* rely on it." (*Id.*) Thus, the court concluded that the protocol was a judicial record here. But this position turns *AbbVie* on its head, creating a harder-to-apply rule that a document becomes a judicial record if it plays some discernable role in the resolution of a case, even though it never accompanied any filing. This Court put this approach to rest in *AbbVie*.

AbbVie is clear: a document's status as a judicial record has nothing to do with a court's reliance on the document in reaching a decision, and has everything to do with whether the document accompanied a filing in a case. In other words, the court's attempt here to distinguish *AbbVie* by pointing to the fact that the court in *AbbVie* did not rely on the document at issue to reach a decision is not a distinction that matters when determining whether a document is a judicial record. What made the document at issue in *AbbVie* a judicial record (it was *attached* as an exhibit to a

complaint) is precisely what makes the protocol a non-judicial record here (it was attached to nothing).

Second, the district court invented a fast-moving-case exception to *AbbVie* when no such exception exists. Here, while the court recognized the protocol's absence from the record, it attributed the absence to the "rush to address Mr. Hamm's as-applied claim before his scheduled execution date." (Doc. 122 at 11.) According to the court, this "rush" prevented the "parties and the court [from] cross[ing] all Ts or dot[ting] all Is to have the protocol filed of record." *Id.* But while Hamm put the court in a difficult position by bringing his as-applied claim after his execution date had been set, the speed at which Hamm's case moved (which is commonplace in last-minute death-penalty litigation) does not co-opt a document that was never filed into a part of the record. In short, the speed at which a case moves is not an exception to this Court's simple rule that a document becomes a judicial record when it accompanies a filing in a case.

Finally, the district court attempted to create yet another exception to *AbbVie* that does not exist, claiming that the protocol was a judicial record because "other judicial records referred to and incorporated the lethal injection protocol itself." (Doc. 122 at 13.) While other judicial records in Hamm's case do mention and quote portions of the protocol, that fact alone does not append the actual protocol to a

filing. The district court made it clear that the protocol appears nowhere in the record, *id*. at 11, and as such, the protocol cannot be a judicial record.

Nothing highlights this glaring problem more than the district court ordering the State to file, under seal, a redacted copy of the protocol so it could release the protocol to the press. (Doc. 124.) In other words, the court could not actually enforce its order unsealing the protocol unless and until the State provided a copy of the protocol to the court after the fact. Allowing district courts to require parties to provide documents after a case has been closed so they can be unsealed is dangerous for two reasons.

First, the district court's rule will make it impossible for parties in civil cases to disclose sensitive documents in the course of discovery. Imagine, for example, a patent-infringement suit between The Coca-Cola Company and PepsiCo in which The Coca-Cola Company is asked to disclose in discovery its formula for Coca-Cola Classic. Lawyers for the parties negotiate a confidentiality agreement and the court enters a protective order, and Coca-Cola discloses the document. Then, without any party ever filing a copy of this closely-guarded formula with the court, the case is dismissed by a settlement. Imagine then that the press gets wind of the fact that The Coca-Cola Company provided its secret formula in discovery and moves to intervene in that case and unseal the formula because the public has an interest in knowing what ingredients go into a Coca-Cola Classic. Under the district court's

approach here, The Coca-Cola Company would be required to provide a copy of its secret formula to the district court so it could release the formula to the press. This would be so even though the Coca-Cola Company only disclosed the document in reliance on a protective order and confidentiality agreement.

Second, and equally as dangerous, is the fact that under the district court's approach, a document is transformed into a judicial record if there is any reference to it in a filing and that document is in a party's possession. So, for example, if counsel mentions that he or she corresponded by letter with opposing counsel on a motion to continue, then that letter is a judicial record subject to the right of access. While that may seem mundane, this Court has stressed the importance of the free flow of information between parties to keep discovery and litigation moving. *See, e.g.*, *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) (If "discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge."). If counsel must always be aware of the fact that any information he or she provides opposing counsel is subject to disclosure under the right of access, then

counsel will necessarily be less open with opposing counsel, thwarting this Court's policy.

In sum, because the district court found that the protocol was never filed, it is not a public or judicial record to which the press has a right of access. Further, the district court's attempts to side-step *AbbVie* are unavailing. This Court should reverse the district court's decision to unseal the protocol.

II. THE DISTRICT COURT FURTHER ERRED BECAUSE, AT BEST, THE PROTOCOL APPEARED IN HAMM'S CASE AS DISCOVERY MATERIAL, AND THIS COURT HAS LONG HELD THAT THE COMMON-LAW RIGHT OF ACCESS DOES NOT APPLY TO DISCOVERY MATERIAL.

While no party ever filed the protocol in Hamm's case, the protocol was provided to Hamm in discovery. This Court has long held that 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 v. Barnett Bank of Polk Cty.*, 876 F.2d 89, 91 (11th Cir. 1989)).

Here, the district court recognized this Court's long-standing precedent (Doc. 122 at 10) but ignored it, explaining that the protocol was a judicial record in

Hamm's case because "documents '*filed* in connection with pretrial motions that require judicial resolution of the merits [are] subject to the common-law right [of access].'" (*Id.* (quoting *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007)) (alterations in the district court's order, emphasis added).) The court's holding is contradicted by its fact-finding.

Again, the district court found that "no party ever attached the protocol to a pleading or filing in [Hamm's] case" and that "the protocol does not appear anywhere in the electronic docket." (Doc. 122 at 11.) Because the court found that the protocol was never *duly filed*, the protocol cannot be a document that was "filed in connection with" any motion or pleading. Thus, there is no common-law right of access to the protocol here, and this Court must reverse the district court's holding to the contrary. *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").

III. EVEN IF UNFILED DISCOVERY MATERIAL WERE SUBJECT TO THE COMMON-LAW RIGHT OF ACCESS, THE STATE'S INTEREST IN KEEPING THE PROTOCOL CONFIDENTIAL OUTWEIGHS THE PRESS'S INTEREST IN ACCESSING IT.

Even if unfiled discovery material were subject to the common-law right of access, the State's interest in keeping the protocol confidential outweighs the press's interest in accessing it, and the district court erred when it found otherwise. This is so for two reasons.

First, the only other court to evaluate a claim for common-law access to a lethal injection protocol has rejected it.[6] In that case, the Eighth Circuit concluded that because the State has a substantial, compelling interest in maintaining the safety and security of a correctional facility, and because it also has a substantial, compelling interest in being able carry out executions, there is no common-law right of access to the protocol. *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

6. This Court and other circuits have rejected inmates' claims that due process mandates that they have a right of access to a state's execution protocol. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089, 1109 (8th Cir. 2015); *Sepulvado v. Jindal*, 729 F.3d 413, 419–20 (5th Cir. 2013); and *Wellons v. Comm'r, Ga. Dep't of Corrs.*, 754 F.3d 1260, 1267 (11th Cir. 2014). The Sixth and Eighth Circuits have also rejected First Amendment right of access claims. *See, e.g.*, *Flynt*, 885 F.3d at 512–13; *Phillips v. DeWine*, 841 F.3d 405, 417–20 (6th Cir. 2016). And, while the Ninth Circuit stayed an inmate's execution until the state provided to him "the name and provenance of the drugs to be used in the execution" and "the qualifications of the medical personnel," *Wood v. Ryan*, 759 F.3d 1076, 1088 (9th Cir. 2014), the Supreme Court summarily vacated that decision, *see Ryan v. Wood*, 135 S. Ct. 21 (2014) (Mem).

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"). This Court should find likewise here.

Second, the district court improperly balanced the competing interests of the parties, and ignored several key facts and improperly discounted the State's interest in weighing whether the protocol should be disclosed.

At times, the common-law right of access demands heightened scrutiny to seal records from public view, but 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 v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985); citing *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1015–16 (11th Cir. 1992)). But when, as is the case here, a court seals only a *portion* of the record 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. While the district court balanced these factors in the press's favor, it erred in doing so.

As an initial matter, the district court clearly erred when it found that the press did not already have substantial access to the protocol. The only portion of the protocol that was at issue in Hamm's case (IV placement and how the State obtains venous access) was already known to the press. They conceded as much in their motion to unseal, noting that the district court's February 6 order "summarized the State's protocol at length." (Doc. 108 at 4.) While the district court downplayed the breadth of its February 6 order in its memorandum opinion, claiming that it "kept its summary of the protocol deliberately vague, highlighting what the protocol does *not* contain instead of what it *does* provide" (Doc. 122 at 16), even a cursory review of the order shows that not to be the case. (*See* Doc. 30 at 7–8.)

In fact, that order details the protocol at length, explaining (1) when an inmate's veins are assessed before an execution and who makes that assessment, (2) that an IV team makes a second assessment of the inmate's veins on the day of his execution, (3) who is included in the IV team, (4) that on the day of execution, two IV lines are placed into an inmate's veins, (5) that if the IV team cannot obtain peripheral venous access, then medical personnel will use a central line to obtain

intravenous access, (6) that after the IV lines are checked, one IV team member stays in the execution chamber and signals to the Warden that it is okay to proceed with the execution, (7) that the Warden administers the lethal-injection solution from another room, (8) what is included in that solution, and (9) that the IV team member who remains in the execution chamber administers a consciousness check. (Doc. 30 at 7–8.)

The district court claims that this "vague summary of the portions of the protocol and its gaps cannot truly substitute for the document itself." (Doc. 122 at 17.) But it is clear that the court spelled out what is and is not in the protocol as it concerns IV placement and venous access. Thus, the district court not only gave the press substantial access to the contents of the protocol, but it also gave them *more information* than the contents of the protocol. Because the court gave the press more than substantial access to the contents of the protocol, the court clearly erred when it weighed this factor in the press's favor.

The district court also erred when it found that the protocol would help the public gain a historical understanding of what happened with Hamm's execution. The press already knew what happened during Hamm's execution and have reported on it,[7] and having access to the protocol would add nothing to what they already

7. *See* Ivana Hrynkiw, *"It was a botched execution": Doyle Hamm's lawyer on Thursday's execution attempt*, AL.COM (Feb. 26, 2018), goo.gl/Sb9KWK.

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, the district court's IME determined that Hamm had accessible veins in his lower extremities, the court asked the State to stipulate to only accessing Hamm's veins through his lower extremities, and the State agreed. While the State ended up calling off Hamm's execution before administering any lethal-injection drugs, it 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." Specker, *supra*. Nearly immediately after the called-off execution, Hamm's counsel spoke to the media and published a report from Hamm's expert witness about 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), goo.gl/ZCXfdX; Bernard Harcourt, *Dr. Mark Heath Submits Medical Report Documenting Execution*, UPDATE: DOYLE LEE HAMM V. ALABAMA (Mar. 5, 2018), goo.gl/yxGKXB.

In its memorandum opinion, the district court dismissed all this because it said that access to the protocol "may help the public to understand the context of the State's efforts to execute [Hamm]" and "may also help the public to understand how

the same scenario might be repeated or avoided under the protocol as it currently stands." (Doc. 122 at 16.) The court's reasons for finding that this factor weighs in the press's favor is flawed in two ways. First, as explained above, the court already detailed in its February 6 order what efforts the State would undertake to execute Hamm,[8] and Hamm's counsel explained to the press (with pictures) exactly what those efforts entailed. Second, the court overlooks the fact that Hamm presented an as-applied claim concerning the viability of *his* veins and that no other death-row inmate has a similar claim; it is therefore unclear how the court reasoned that the press having access to the protocol might explain how the Hamm scenario might be either repeated or avoided in the future. Thus, the court erred when it weighed this factor in the press's favor.

The district court also erred when it found that the press would not use the protocol to promote public scandal. While the court found that the press's "anti-capital punishment bias is not the type of 'scandal' the Supreme Court referred to when it suggested that courts consider the purpose for which someone seeks to unseal records" (Doc. 122 at 17), the press's anti-death penalty bias and their desire to publish both the protocol and the details of Hamm's called-off execution to

8. The district court also did not consider the fact that both its February 20 order (Doc. 58) and this Court's opinion following that order further detailed what efforts the State would undertake to execute Hamm. *See Hamm*, 725 F. App'x at 841–44.

attempt to cast Alabama's death-penalty practice in a negative light is precisely the type of "scandal" the Supreme Court envisioned when it told courts to consider the "purpose" the press has for gaining access to a judicial record.

In fact, this Court need look no further than those entities to which the press are linked in order to see their purpose here. As the State explained below, the press are closely tied to a staunchly anti-death penalty blog, The Marshall Project. In fact, 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), goo.gl/FsWwBQ, 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), goo.gl/xY7rfe. The Marshall Project's website shows that they have only one purpose: to create public scandal about the death penalty. *See, e.g.*, Maurice Chammah, *Was This Man Sentenced to Death Because He's Gay?*, THE MARSHALL PROJECT (June 11, 2018), goo.gl/qctaMd (positing that Charles Rhines was sentenced to death because of his sexual orientation). The press here are inextricably intertwined with The Marshall Project and their purpose.

Further, the district court overlooked how the press has used its platform in the past to derail other states' abilities to carry out executions. As the State pointed out below, for years, Missouri has closely guarded its protocol and zealously fought

to keep it 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), goo.gl/QjFdsr. Missouri's concerns were proved valid, as the day after the story ran, 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), goo.gl/CtVwCk.

In short, the district court clearly erred when it balanced the State's interest in keeping the protocol confidential and the press's interest in unsealing it. Thus, this Court should reverse the district court's decision to unseal the protocol.

IV. IN THE ALTERNATIVE, THE DISTRICT COURT SHOULD NEVER HAVE ALLOWED THE PRESS TO INTERVENE IN HAMM'S CASE.

In their motion, the press sought permission to intervene under Rule 24 of the Federal Rules of Civil Procedure. (Doc. 107.) They did not identify whether they wanted to intervene as a matter of right or permissively, but the district court interpreted their request as seeking intervention as a matter of right under Rule 24(a)(2) and concluded that they had standing to intervene and satisfied the requirements to intervene as a matter of right. (Docs. 111, 122.) The court also concluded, in passing and without explanation, that the press could permissively "intervene under Rule 24(b)." (Doc. 122 at 5.)

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 given case does not mean that they are always entitled to do so. *See Davis v. Butts*, 290 F.3d 1297, 1299 (11th Cir. 2002). The district court erred when if found that the press could both intervene as of right under Rule 24(a) and could permissively intervene under Rule 24(b), as neither rule works here.

A. THE PRESS DID NOT SHOW THAT THEY SATISFY THE REQUIREMENTS FOR INTERVENTION AS OF RIGHT.

Intervention as a matter of right is appropriate only if the intervening party shows 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 the district court held that intervention as a matter of right is proper here (Doc. 111), the press did not satisfy either the first or third requirement for intervention as a matter of right.

1. THE PRESS'S MOTION TO INTERVENE WAS UNTIMELY.

When assessing the timeliness of a motion brought under Rule 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 F. App'x 817, 819 (11th Cir. 2008) (citing *United States v. Jefferson Cty.*, 720 F.2d 1511, 1516 (11th Cir. 1983)). The district court's holding that the press's motion was timely is incorrect for three reasons.

First, the press knew that they had an interest in Hamm's case from nearly the start of that litigation, yet they decided to wait until after the case was disposed of to intervene. In fact, the press have known for years that the State has opposed requests to make the protocol public.[9] While the district court only imputed knowledge to the press of their interest in this case as of the January 31 hearing (Doc. 122 at 6), it is clear that the press knew that Hamm's case involved the protocol as early as January 18, 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." Hrynkiw, *Execution drug may have been named in court filings from Alabama AG's Office*, *supra*.

But while Hamm's case remained open and while public interest was at its apex, the press showed no interest or intention to intervene in this case to gain access

9. *See* Brian Lyman, *Alabama adopts new death penalty protocol*, MONTGOMERY ADVERTISER (Sept. 12, 2014), goo.gl/3X498A (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").

to the protocol. Instead, the press sat on their hands from January 18 until March 28, waiting so long that the parties settled and the district court dismissed the case before acting. Because the press had reason to know from nearly the outset of Hamm's case that the protocol was being discussed out of public view and that they would not be given access to it, and because they have historically lamented the fact that they have never been given access to it, they have no reason for having waited so long to try to assert themselves into Hamm's case.

Second, the press's decision to wait to intervene in Hamm's case until after its dismissal severely prejudices the State in two ways. First, had Defendants known that the press would seek to intervene and gain access to the protocol, the State would not have voluntarily turned over the protocol to Hamm. While the district court dismissed this claim as "unpersuasive" because it would have "ordered [the State] to produce it" anyway, the court misses the point. If the press had moved to intervene on January 18 (the day they started reporting on Hamm's case and *before* the State provided Hamm the protocol in discovery), then the State would not have voluntarily turned over the protocol in discovery and would have challenged any decision requiring them to do so. Because Hamm's as-applied challenge to Alabama's method of execution turned on the condition of his veins and because, as the district court found, once it was clear Hamm's veins were acceptable for IV access there was no need "to delve further into Alabama's lethal injection protocol," (Doc. 58 at

4), the State likely would have prevailed in not disclosing the protocol to Hamm. *See, e.g.*, *Grayson v. Allen*, 491 F.3d 1318, 1323–24 (11th Cir. 2007) (explaining that Alabama's decision to keep its protocol confidential does not impede an inmate's ability to raise a method-of-execution challenge to the protocol). In other words, if the press had timely intervened in Hamm's case and requested access to the protocol, the State would have had an opportunity to challenge any decision requiring it to disclose the protocol to anyone. The press's late intervention here deprived the State of this right; thus, their untimely motion prejudiced the State.

The press's untimely motion also prejudices the State in another way. If the press had sought intervention *before* Hamm's case settled, then the State could have taken a different approach to the joint dismissal of this case and the finalized settlement agreement with Hamm. The district court finds this argument "unpersuasive" because neither party to the settlement could have reached "any agreement about what any member of the public would do about seeking to unseal records." (Doc. 122 at 7.) Again, the court misses the point. The State did not argue below that it could have reached an agreement with Hamm to keep the protocol out of the press's hands. Rather, the State argued that it could have altered what *is* included in the settlement agreement and what *is* within the control of the parties had the press timely intervened. As it stands, that agreement and its terms are final,

and had the press had timely intervened in Hamm's case, the State could have altered its negotiations with Hamm with the press's intervention in mind.

Finally, contrary to the district court's findings (Doc. 122 at 8), the press will suffer no prejudice if they are not allowed to intervene, as they have not forever lost the opportunity to attempt to gain access to the protocol. In fact, there are several ways for the press to attempt to access the protocol outside the Hamm case. For example, AL.com and the Associated Press were involved in an ongoing facial challenge to Alabama's method of execution *before* they moved to intervene in the already disposed-of Hamm case. *See* Motions to Quash Nonparty Witness Subpoenas, *In re: Alabama Lethal Injection Protocol Litigation*, No. 2:12-cv-0316-WKW, Docs. 372, 374. But instead of moving to intervene in that ongoing case, the press chose to intervene in Hamm's closed case. Additionally, while the district court dismissed the State's claim that the press could seek intervention in any of the other ubiquitous § 1983 method-of-execution cases because "the statute of limitations will bar an inmate's facial challenge to Alabama's method of execution" (Doc. 122 at 8), this position ignores the fact that Alabama state courts are still imposing the death penalty and that every new case in which the death penalty is imposed gives that inmate a two-year window to file a § 1983 claim. In other words, the press have many more chances to intervene in cases involving the protocol. Because the press have no shortage of opportunities to assert themselves into an *open* proceeding to

attempt to gain access, they necessarily could not be prejudiced by denying them the chance to intervene in Hamm's case.

In sum, because the press knew from nearly the outset of Hamm's case that they should intervene but waited until it was dismissed to do so, because the State is prejudiced by the press's late intervention attempt, and because the press would suffer no prejudice if the district court had denied their motion to intervene, the district court erred when it found that the press's motion was timely.

2. THE PRESS'S STATED INTEREST IN HAVING ACCESS TO THE PROTOCOL IS IN NO WAY AFFECTED BY THE DISMISSAL OF HAMM'S CASE.

Even if their motion were timely, more problematic for the press here is that intervention as of right is unwarranted when the press, as a practical matter, have no interest that would be impaired upon disposition of the case. *See Davis*, 290 F.3d at 1300. The only discernable interest the press asserted in the district court to gain access the protocol was to 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.) This interest is not impaired by the disposition of Hamm's case. As set out above, the press have numerous other opportunities to seek access to the protocol. And because they have other opportunities to do so regardless of what happened with Hamm's case, it follows that the disposition of Hamm's case can

have no impact on the press's interest in the protocol. Thus, the district court erred when it found that the press could intervene as a matter of right.

B. THE PRESS HAVE NO QUESTION OF LAW OR FACT IN COMMON WITH HAMM; THUS, PERMISSIVE INTERVENTION IS INAPPROPRIATE.

"Permissive intervention . . . is appropriate where a party's claim or defense and the main action *have a question of law or fact in common* and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties." *United States Army Corps of Eng'rs*, 302 F.3d at 1250. While the district court provided no explanation for its finding that permissive intervention is appropriate here (Doc. 122 at 5), the press did not show that they have a claim or defense that has either a "question of law or fact in common" with Hamm's case. As explained above, Hamm's action concerned one question of law—whether Alabama's method of execution was unconstitutional as applied to him—and one question of fact—the condition of Hamm's veins. The press moved to intervene to gain access to the protocol, a claim that is wholly ancillary to the questions at issue in Hamm's case. As the press and Hamm share no common question of law or fact, the district court erred when it found that permissive intervention is appropriate. *See, e.g.*, *Cunningham v. Rolfe*, 131 F.R.D. 587, 590 (D. Kan. 1990) ("The court finds that applicants have not shown that their attempt to intervene is contemplated by the rule allowing permissive intervention since applicants attempt to intervene solely for the purpose of modifying or vacating the Final Protective Order entered in

Cunningham. This purpose is, as the court has previously stated, collateral to the merits of the substantive claims and defenses raised in *Cunningham*.").

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in FED. R. APP. P. 32(a)(7)(B). This brief contains 9,863 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under FED. R. APP. P. 32(f).

2. In addition, this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on July 17, 2018, I served a copy of the foregoing brief upon counsel for the Appellee via the United States mail, first class postage prepaid and addressed as follows:

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