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)

REPLY BRIEF OF THE APPELLANT

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August 30, 2018

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel, in compliance with Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1-1(a)(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
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I. THE DISTRICT COURT CLEARLY ERRED WHEN IT MISAPPLIED THIS COURT'S BRIGHT-LINE RULE THAT DISCOVERY MATERIAL IS NOT A JUDICIAL RECORD UNLESS IT ACCOMPANIES A FILING IN A CASE.

The press concede that Alabama's lethal-injection protocol was never filed in the district court. (Appellee's Br. 36.) Thus, under this Court's straightforward precedent, the press's request to access the protocol should end there, as the protocol was not a judicial record here. In their attempt to justify the district court's ruling, the press seek to replace this Court's easy-to-apply rule with a convoluted, hard-to-follow rule that would require district courts to label unfiled discovery material as a judicial record based on how much it relied on a document in resolving a case. But neither the district court's ruling, nor the press's unworkable arguments find support under this Court's precedent.

A. THE PRESS'S ARGUMENTS DEFENDING THE DISTRICT COURT'S ERRONEOUS RULING CONFLICT WITH THIS COURT'S STRAIGHTFORWARD PRECEDENT.

The press maintain that the protocol is a judicial record here by repeating the same points raised by the district court; namely, that the State provided the district court with a courtesy copy of the protocol before a hearing in Doyle Hamm's case, the protocol was "discussed at hearings[in that case,] and [it was] relied upon in resolving the merits of Hamm's claims." (Appellee's Br. 20.) But the press's

position is not the law in this circuit, nor does it justify the district court's erroneous legal conclusion.

This Court has explained that materials provided in discovery are not judicial records unless they are "*filed* in connection with pretrial motions that require judicial resolution of the merits[.]" *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001) (per curiam) (emphasis added). This has been true in this circuit for over thirty years. *See In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (recognizing that a common-law right of access exists for those documents that are "duly filed," but it does not exist for discovery material). This "simple rule to apply" does not turn on whether the district court relies on a document in deciding a motion to dismiss; rather, it turns on whether the document accompanied a *filing* in a case that requires judicial resolution of the merits. *F.T.C. v. AbbVie Prod. LLC*, 713 F.3d 54, 64 (11th Cir. 2013) ("[W]e determine whether a document is a judicial record depending on the type of *filing* it accompanied.") (emphasis added). In short, "material *filed* with discovery motions is not subject to the common-law right of access, whereas discovery material *filed* in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right[.]" *Chicago Tribune Co.*, 263 F.3d at 1312 (emphasis added).

The press devote significant time in their brief detailing the uncontroverted point that the common-law right of access applies broadly to judicial records that

were *filed* in conjunction with a document in a case, such as a complaint, the trial court record, and documents attached to summary judgment motions. (Appellee's Br. 20-25.) It is well-settled that a complaint, a dispositive motion, a transcript of a proceeding, and any exhibit attached to those filings are clearly judicial records because they were *filed* and "are integral to the 'judicial resolution of the merits' of any action.'"[1] *AbbVie Prod. LLC*, 713 F.3d at 64 (quoting *Chicago Tribune Co.*, 263 F.3d at 1312). It is equally settled that any discovery material 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.* Thus, the district court clearly erred in finding that the protocol was a judicial record when it discounted this Circuit's rule that discovery material is not a judicial record until it is filed with the court.

This Court is not alone in recognizing that it is the *filing* of discovery material that transforms it into a judicial record, subjecting it to the common-law right of access. The Third Circuit recognized as much in *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161–162 (3d Cir. 1993):

> Numerous other courts have also recognized the principle that *the filing of a document* gives rise to a presumptive right of public access. *See,*

1. As explained in the State's principal brief, because the press's request to unseal transcripts of two closed hearings and their request to unseal Hamm's motion to amend his complaint clearly fall within the class of documents that are subject to the common-law right of access, the State does not argue that the district court erred when it gave the press access to those documents. The State's only argument concerning those documents is that the press were not entitled to them because the press should not have been allowed to intervene in Hamm's case.

> *e.g.*, *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 460–61 (10th Cir. 1980) (right of access attaches to docketing statement, joint appendix and briefs filed in court of appeals); *Pratt & Whitney Canada, Inc. v. United States*, 14 Cl. Ct. 268, 273 (1988) (right of access attaches to "pleadings, orders, notices, exhibits and transcripts filed"); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983) (right of access attaches to documents filed with the district court); *In re Johnson*, 232 Ill. App. 3d 1068, 174 Ill. Dec. 209, 598 N.E.2d 406, 410 (Ill. App. Ct. 1992) ("Once documents are filed with the court, they lose their private nature and become part of the court file and 'public components' of the judicial proceeding to which the right of access attaches." (citation omitted)).

(Emphasis added).

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." (Appellant's App. Tab 13; Doc. 122 at 11.) This is so because the State provided Hamm with the protocol only as discovery material, and at no point did either Hamm or the district court append the protocol to any *filing* in Hamm's case that required judicial resolution on the merits. Nor did Hamm or the district court ever make the protocol an exhibit at any hearing in Hamm's case.[2] In

2. In their brief, the press claim, just as the district court did, that the reason why the protocol was not filed here was due to "oversight in failing to file it with the clerk." (Appellee's Br. 36.) The State disagrees that any oversight occurred here, nor is there anything in the record to support the district court's contention that an oversight occurred or that any party desired to make the protocol a part of the record. Regardless, the press do not cite any authority holding that oversight can

other words, no one in Hamm's case took any steps to transform the protocol from *unfiled* discovery material into a *filed* judicial record. Thus, the protocol is not a judicial record that is subject to the common-law right of access.

B. THE PRESS MISAPPREHEND *NEWMAN V. GRADDICK*, CLAIMING THAT IT HOLDS THAT UNFILED DOCUMENTS ARE JUDICIAL RECORDS SUBJECT TO THE COMMON-LAW RIGHT OF ACCESS.

To overcome the problem that the protocol was never filed here, the press look for help in this Court's decision in *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983), and two non-binding criminal district court cases that rely on that decision. According to the press, *Newman* holds "that documents submitted in connection with a substantive, litigated dispute are judicial records subject to the public's right of access whether or not they are formally filed." (Appellee's Br. 29.) But their reliance on *Newman* is misplaced for three reasons.

First, *Newman* did not address the question at issue here. Rather, that case was about whether the district court properly balanced the interests of the parties when the press requested access to the lists of prisoners that the district court ordered the State to provide to it under a consent decree. *Newman*, 696 F.2d at 803. Unlike here, in that case, the State did not argue that the lists of prisoners that it was ordered to

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transform an unfiled document into a filed one. Essentially, the press seek to force the State to turn over a document that was never made a part of the record in Hamm's case simply because neither Hamm, nor the district court chose to make it a part of the record. The State should not be punished in this way.

provide to the court were not judicial records, nor was this Court asked to decide that question. Moreover, that case concerned documents that the district court required the State to provide to the court under a consent decree. Not so here. This case concerns a different class of documents altogether—*unfiled* discovery material that was never appended to any pleading or motion, nor was it ever made part of the record in any other way.

Second, *Newman* does not hold what the press want it to hold. In their brief, the press claim that "this Court made clear in *Newman* that documents submitted in connection with a substantive, litigated dispute are judicial records subject to the public's right of access *whether or not they are formally filed*." (Appellee's Br. 29 (emphasis added).) Yet this Court made no such statement in *Newman*. To divine this holding, the press latch on to one sentence in *Newman*: "As 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." 696 F.2d at 803. The press assume from this single sentence that the prisoner lists at issue in *Newman* were never "formally filed" with the district court "and do not appear on the district court docket." (Appellee's Br. 25.) Because this Court did not discuss whether those lists were "formally filed" and because "formal filing" was not at issue in *Newman*, the press's assumption here is on shaky ground, at best. This assumption is especially perilous given that, while the press equate the word "submitted" with "not filing," this Court has used the

words "submitted" and "filed" interchangeably. *See, e.g.*, *Chicago Tribune Co.*, 263 F.3d at 1312 ("The Firestone documents were produced during discovery, but all of them were also *filed* with the court, under seal, in connection with pre-trial motions. Some of the documents were *submitted* to support motions to compel discovery; others were *submitted* to support summary judgment motions.") (emphasis added).

Moreover, the press read *Newman* in a way that renders thirty years of cases that follow it meaningless and unnecessary. If it were true that this Court held in *Newman* that filing a document with the district court has no bearing on whether that document is a judicial record, then there was no need for this Court to hold in *AbbVie* that "we determine whether a document is a judicial record depending on the type of *filing* it accompanied." 713 F.3d at 64 (emphasis added). Likewise, there was no need for this Court to hold in *Grant* that, "while the [press] may enjoy the right of access to 'pleadings, docket entries, orders, affidavits or depositions *duly filed*,'" there is no common-law right of access to discovery material. 820 F.2d at 355. And there was no need for this Court in *Chicago Tribune Co.* to hold "that material *filed* with discovery motions is not subject to the common-law right of access, whereas discovery material *filed* in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right[.]" 263 F.3d at 1312 (emphasis added). What is more, because the press's reading of *Newman* puts it at odds with *AbbVie*, *Grant*, and *Chicago Tribune Co.*, and because those three cases

were decided *after Newman*, this case is controlled by *AbbVie*, *Grant*, and *Chicago Tribune Co.*, not *Newman*.

Third, even reading *Newman* in the same way as the press, the protocol is still not a judicial record here. Again, in *Newman* this Court found that prisoner lists that were "submitted to the court and became part of the court proceedings" were subject to the common-law right of access. 696 F.2d at 803. While the press read *Newman* as holding that documents that play some discernible role in the outcome of a case are judicial records, whether or not they are filed with the district court, even if this were accurate, the press do not meet their own test. In fact, they fail it in two ways.

To start with, the protocol never became part of the court proceeding in Hamm's case. The district court found as much, noting in its April 3 order 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." (Appellant's App. Tab 10; Doc. 113 at 2 (emphasis added).) Then later doubling down on that finding, the district court explained 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." (Appellant's App. Tab 13; Doc. 122 at 11.)

The press also fail their test because, despite their claims to the contrary, the protocol did not play a dispositive role in Hamm's as-applied challenge to Alabama's method of execution. Instead, Hamm's as-applied claim hinged on the

condition of *his* veins, and nothing in the protocol could answer the question of whether Hamm's veins were of suitable condition to execute him. Once again, the district court explained as much when it told the parties that its independent medical expert ("IME") had concluded that peripheral venous access could be established through Hamm's lower extremities, and thus "the medical evidence negated any need to delve further into Alabama's lethal injection protocol." (Appellant's App. Tab 4; Doc. 58-2 at 4.)

At bottom, the press want this Court to affirm the district court and hold that unfiled discovery materials that are mentioned in the resolution of a case are judicial records subject to the common-law right of access. (Appellee's Br. 20–35.) But doing so would give a stamp-of-approval to the very *ad hoc* standard this Court rejected in *AbbVie*, upend thirty years of caselaw, and undermine this Court's policy on conducting discovery in civil litigation.

In the end, this case is simple. The protocol was provided to Hamm as discovery material that was never filed in connection with any motion in Hamm's case and appears nowhere in the record. While the press make much of the fact that the State provided the district court with a courtesy copy of the protocol before the January 31 hearing to show that the protocol was "submitted to" the district court, providing a court a courtesy copy of a document is not the functional equivalent of *filing* that document in connection with any motion. *See* FED. R. CIV. P. 5(d)(2)

(providing that a document is filed when one of two conditions is met: (1) it is delivered to the clerk, or (2) it is delivered "to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk"). And this Court has held that discovery material is not subject to the common-law right of access until it is "*filed* in connection with pretrial motions that require judicial resolution of the merits[.]" *Chicago Tribune Co.*, 263 F.3d at 1312.

Because the court found that the protocol was never *duly filed* in Hamm's case, the protocol cannot be a document that was "filed in connection with" any motion or pleading. Thus, the protocol is not a judicial record and there is no common-law right of access to it. This Court must reverse the district court's holding to the contrary.

II. EVEN IF UNFILED DISCOVERY MATERIAL WERE SUBJECT TO THE COMMON-LAW RIGHT OF ACCESS, THE DISTRICT COURT ERRED WHEN IT HELD THAT THE PRESS WERE ENTITLED TO THE PROTOCOL WHERE THE BALANCING OF INTERESTS HERE SHOWS OTHERWISE.

While the only other circuit court to have addressed a common-law-right-of-access claim to a state's confidential lethal injection protocol rejected it, *see Flynt v. Lombardi*, 885 F.3d 508, 511 (8th Cir. 2018) (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"), the press stand on

the district court's erroneous conclusion that the State's interests in keeping the protocol confidential "do not overcome the public's common-law right of access to the protocol, except with respect to certain security measures and identity of personnel." (Appellee's Br. 36.) But the press's assessment of the balancing of interests do not validate the district court's action; rather, they prove that the district court's decision was erroneous.

When balancing the competing interests of the parties, 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 v. U.S. Atty. Gen.*, 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*, 696 F.2d at 803.

Starting with the substantial-access factor, the press claim that this factor weighs in their favor because they have never been given "substantial access to the protocol" itself and the State "will keep the lethal injection protocol secret from the public unless the [district] court unseals it." (Appellee's Br. 40–41 (quotation omitted).) But this factor does not turn on whether the press have been given substantial access to the protocol itself; rather, the question here is whether the press have been given "substantial access to the *contents*" of the protocol. *Newman*, 696

F.2d at 803 (emphasis added). The press have already been given substantial access to the *contents* of the protocol.

Here, the only portion of the protocol that was at issue in Hamm's case (IV placement and how the State obtains venous access) was known to the press when they asked the district court to unseal the protocol. In fact, on February 6 the district court issued a publicly available order, detailing the protocol at length and 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.

(Appellant's App. Tab 3; Doc. 30 at 7–8.) The district court further detailed what was not included in the protocol:

> [T]he protocol does not describe how long the IV team may attempt to obtain peripheral access, how many times the team may attempt peripheral venous access, how the team determines if peripheral access is unobtainable, or what sort of medical equipment or medical specialist is available in the event the team must attempt to obtain a central line.

Id. at 8.

Despite the fact that the district court provided the public with a detailed list of the portions of the protocol at issue in Hamm's case, the press repeat the district court's claim that the district court was "deliberately vague" when it described the protocol in its February 6 order. (Appellee's Br. 40.) Yet they forget that *their* motion to intervene and unseal characterized the Court's order as having "summarized the State's protocol at length." (Appellant's App. Tab 8; Doc. 108 at 4.) In any event, it is clear that the district court gave the public (and the press) substantial access to the *contents* of the protocol by spelling out what is (and what is not) in the protocol as it concerns IV placement and venous access. Thus, the district court gave the press more than substantial access to the contents of the protocol, and the court clearly erred when it weighed this factor in the press's favor.

Further proof of this point is that the press concede that they are not entitled to the entire protocol and, instead, are content with having access to only the heavily redacted version of the protocol that the district court ordered the State to submit to

it. (Appellee's Br. 36.) Here, after it issued an order granting the press's motion to intervene and unseal, the district court issued another order instructing the State to file, under seal, a redacted copy of the protocol so it could release the protocol to the press. (Appellant's App. Tab 15; Doc. 124.) According to the district court, the press "seek information more directly related to the process of execution than the activities in the 24-hour window of time leading up to the execution, and they themselves suggest redacting information that could reveal the identities of 'low-level prison officials involved in the execution.'" *Id.* Thus, the district court explained, that the State had to submit to it "a copy of the lethal injection protocol that redacts *only* security information and information that could be used to identify individuals involved in executions[,]" leaving only the sections of the protocol that concern how a lethal-injection execution is carried out, what drugs are administered during a lethal-injection execution, and in what dosages those drugs are administered. *Id.* In other words, the district court ordered the State to provide the press what it already knows. Thus, they have already been given substantial access to the contents of the protocol and are not entitled to it.

Turning to the historical-understanding factor, the press claim that this factor weighs in their favor because they say having access to the protocol will help them shed light on what happened during the aborted Hamm execution. But the press do not explain how having access to the protocol would help them, in any way,

understand what happened during Hamm's aborted execution beyond what they already know and have already reported on. This is especially true given the fact that the press "seek information more directly related to the process of execution" and nothing else, and the district court detailed that process for them in its February 6 order.

What is more, the press's brief demonstrates that they have already reported on the process and what they think happened during Hamm's aborted execution:

> On February 22, Alabama attempted to execute Mr. Hamm. According to the expert report of the doctor who examined Mr. Hamm pursuant to the district court's order, Mr. Hamm suffered through a prolonged, painful and bloody process as Alabama unsuccessfully sought to implement the execution protocol. Two men first spent about thirty minutes inserting needles into Mr. Hamm's lower extremities, including ten minutes of "extremely painful" probing of his right calf during which Mr. Hamm could feel the men "rolling and mashing" the tissue in his leg and his right shinbone reached by a needle. Notice of Submission of Expert Report of Dr. Mark Heath, ECF No. 93, Appendix A at 2. When those attempts at IV access failed, the focus moved to Mr. Hamm's groin region and he felt multiple needle insertions "penetrating deep into his groin and pelvis." *Id.* Mr. Hamm began to hope the doctor "could 'get it over with' because he preferred to die rather than to continue to experience the ongoing severe pain." *Id.* After "a large amount of blood" accumulated in Mr. Hamm's groin region the execution was called off. *Id.* Guards had to support Mr. Hamm by his arms to return him to his cell because he was in too much pain to support himself. *Id.* at 2-3. The doctor who subsequently examined Mr. Hamm noted 11 puncture wounds and observed that the bleeding from his groin region was "consistent with arterial puncture." *Id.* at 4.
>
> The failed attempt to execute Mr. Hamm received national media coverage. For example, NBC reported "a frantic scene in the death chamber" and published pictures of Mr. Hamm's lower legs and feet

> showing discoloration and puncture wounds. A debate played out in the press between Mr. Hamm's attorney, who described the effort to implement the protocol as a "botched and bloody" process, and Alabama officials who disputed that characterization and contended that the problem had been "more of a time issue."

(Appellee's Br. 9–10 (footnotes omitted).)

While the State disagrees with Hamm's assessment, the fact remains that the press have already reported on the mechanics of Hamm's execution attempt, what Hamm's counsel and expert witness think happened, and the State of Alabama's comment in response. Having access to the protocol would add nothing to what the press have already reported on and would not aid them in promoting a public understanding of Hamm's aborted execution. Thus, this factor weighs against the press.

In sum, 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, and the press provide this Court with nothing to hold otherwise. Thus, this Court should reverse the district court's decision to unseal the protocol.

III. REGARDLESS, THE PRESS SHOULD NOT HAVE BEEN ALLOWED TO INTERVENE IN HAMM'S CASE IN THE FIRST PLACE.

Finally, the press claim that this Court should affirm the district court's decision that they could both intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure and could permissively intervene under Rule 24(b) of the Federal Rules of Civil Procedure. But neither rule works here.

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).

Starting with intervention as of right under Rule 24(a), the press offer nothing to explain why their decision to wait 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 is a "timely" intervention. The press also offer nothing to explain how they are actually prejudiced if they are not able to intervene in Hamm's case. Instead, they claim that they "have suffered harm, and will continue to suffer harm if they must wait for a hypothetical future case to litigate their present-day claims." (Appellee's Br. 53.) But the press do not address the fact that they did not need to wait for a hypothetical case to arise. In fact, 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 case, the press chose to intervene in Hamm's closed case. And, because the press could seek the protocol elsewhere, they cannot show that they have an interest here that would be impaired by the disposition of the Hamm case. To put it another way, because the press have other opportunities to attempt to gain access to the protocol 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.

Turning to permissive intervention under Rule 24(b), the press concede that to permissively intervene in a case they must share "*a question of law or fact in common* [with the main action.]" *Georgia v. United States Army Corps of Eng'rs*, 302 F.3d 1242, 1250 (11th Cir. 2002). To establish this nexus, the press point to "the district court's protective order preventing disclosure of the protocol" as the "common question of law and fact" between Hamm's as-applied claim and their motion to intervene. But Hamm's case 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*.").

Because the press's motion to intervene was untimely, because they suffer no prejudice by not being allowed to intervene, and because they share no common question of law and fact with Hamm, the district court erred when it allowed the press to intervene in Hamm's case.

CONCLUSION

For the reasons set out in the State's principal brief and in its reply brief, this Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this reply brief complies with the type-volume limitations set forth in FED. R. APP. P. 32(a)(7)(B)(ii), as it contains only 5,190 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under FED. R. APP. P. 32(a)(7)(B)(iii).

2. In addition, this reply 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 August 30, 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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