

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

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

DEFENDANTS’ MOTION FOR A STAY PENDING APPEAL

On May 30, 2018, this Honorable Court issued a memorandum opinion setting out its reasons for denying Defendants’ motion to reconsider allowing Intervenors to step into this already-disposed-of case and its reasons for granting Intervenors’ motion to unseal Alabama’s lethal injection protocol and other related documents. (Doc. 122.) That same day, this Court issued two orders stemming from its memorandum opinion. The first order set out the four items this Court decided to make public, namely

1. Alabama’s lethal injection protocol.
2. The sealed transcript of the *in camera* hearing held on January 31, 2018.
3. The sealed transcript of the closed hearing held on February 16, 2018.

4. Doyle Lee Hamm's motion for leave to supplement his first amended complaint.

(Doc. 123.) The second order required Defendants to submit to this Court, under seal, a redacted copy of the protocol by June 7, 2018. (Doc. 124.) In sum, this Court's memorandum opinion and orders expose to the public Alabama's lethal injection protocol. No other court has done this.

Because this Court's decision implicates a serious issue that deserves the review of a higher court before it becomes effective, Defendants ask this Court to stay its decision until the Eleventh Circuit has had an opportunity to weigh in. So, pursuant to Rule 62 of the Federal Rules of Civil Procedure and other applicable law, Defendants respectfully move this Court to stay its Memorandum Opinion (Doc. 122), its Order granting Intervenors' motion to unseal certain documents (Doc. 123), and its Order requiring Defendants to submit to it, under seal, a redacted copy of the protocol. (Doc. 124.)

REASONS FOR GRANTING THE STAY

Whether a stay pending an appeal is appropriate depends on "the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal citation and quotation omitted). When deciding whether a stay should issue in a given case, courts must consider four factors: (1) the likelihood of prevailing on the merits on appeal; (2) irreparable harm to the movant if no stay is granted; (3) harm to the adverse party if a stay is granted; and (4) the public interest. *Id.* at 434

(citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); see also *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Each factor weighs in favor of granting a stay here.

Turning to the first factor, Defendants are likely to prevail on the merits of their appeal. This is so for four reasons. First, as this Court recognized in its April 3rd order (Doc. 113) and again in its memorandum opinion, Alabama’s lethal injection protocol “does not appear anywhere in the electronic docket,” as “no party ever attached the protocol to a pleading or filing in this case[.]” (Doc. 122 at 11.) In other words, the protocol appears nowhere in this Court’s record.

Second, Defendants provided the protocol to Hamm only as discovery material and did so under the protection of an agreed confidentiality order. The Eleventh Circuit has made it clear that while the public and 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) (citations and quotations omitted) (some emphasis added). See also *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) (recognizing that discovery materials “are neither public documents nor judicial records”) (citing *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989)). Because no party “duly filed” the

protocol in this case, but was, instead, provided only as discovery material, the protocol is not subject to the common-law right of access and cannot be unsealed.

Third, even if the protocol were a judicial record here, the balancing of the competing interests weighs in Defendants' favor. *See Chi. Tribune Co.*, 263 F.3d at 1311. These competing interests include: whether the records are sought for such illegitimate purposes as to promote public scandal; whether access is likely to promote public understanding of historically significant events; and whether the press has already been permitted substantial access to the contents of the records. Here, Intervenors seek access to Alabama's lethal injection protocol to report on what occurred during Hamm's aborted execution. But, because Intervenors have already reported on what happened during the Hamm execution,¹ access to the protocol could neither further any legitimate purpose, nor could it aid in promoting any historical understanding of what happened during that aborted execution. Moreover, the parts of the protocol this Court ordered unsealed are already largely known to Intervenors and has been widely reported by them.

1. *See* Kim Chandler, *Federal Judge: Alabama must reveal lethal injection details*, THE ASSOCIATED PRESS (May 31, 2018), <https://apnews.com/7c57c38e27ed4ecbb7f5833b4e359ead> (“Alabama halted Hamm’s execution in February when the execution team could not connect an intravenous line to Hamm, who had damaged veins because of lymphoma, hepatitis and past drug use.”).

Fourth, this Intervenor's request to step into this already-disposed-of case should have been denied, as Intervenor cannot establish the requirements for intervention as of right, nor can they show the requirements for a permissive intervention. *See* FED. R. CIV. P. 24. Thus, the first factor weighs in favor of granting a stay pending appeal.

Turning to the second factor, Defendants will undoubtedly suffer irreparable harm if no stay is granted. This is so for two reasons. First, as this Court explains in its memorandum opinion, "Defendants have always sought to keep the lethal injection protocol confidential" and have always zealously guarded the information contained in the protocol. (Doc. 122 at 18.) Once this Court exposes that information to the public, it cannot return the protocol to its confidential status if Defendants prevail on appeal. Second, this Court's order requiring Defendants to file, under seal, a redacted copy of the protocol irreparably harms Defendants if that order is not stayed because it requires Defendants to do something that has not yet been done in this case: *duly file* a copy of the protocol in the electronic record. Requiring Defendants to comply with this order before giving them an opportunity to ask the Eleventh Circuit to weigh in arguably makes the protocol a judicial record, possibly subjects it to the common-law right of access, and certainly undercuts Defendants' claim that the protocol has never been duly filed in this case. Thus, the second factor weighs in favor of granting a stay pending appeal.

Turning to the third factor, Intervenors will suffer no harm if this Court grants a stay pending appeal. The only reason Intervenors have given this Court to have access to the protocol is to explain to the public what happened during Hamm's aborted execution. Although gaining access to the protocol will not give them the answers they seek, Hamm's aborted execution occurred more than 100 days ago and, if this matter is as great a public concern as Intervenors' suggest, nothing will be lost if this Court stays its memorandum opinion and orders while Defendants appeal this Court's decision.

What is more, Intervenors' own actions in this case show that granting a stay pending appeal would cause them no harm. Indeed, at no point in this case have Intervenors acted with any sense of urgency. As this Court pointed out in its memorandum opinion, one of the Intervenors had a reporter present at the January 31 hearing at which the protocol was discussed, yet Intervenors waited almost two months later (and after the case had been disposed of) to seek intervention. Because Intervenors have not acted with any sense of urgency in this case, they will not suffer any harm if they are made to wait to get the information they seek. Thus, the third factor weighs in favor of granting a stay pending appeal.

Finally, concerning the fourth factor, while this Court found that there exists a public interest in understanding how Alabama carries out its lethal-injection procedure (Doc. 122 at 15), there is a greater public interest at stake here: The State's

ability to carry out its lawful functions. There is no doubt that there is great public interest in ensuring that the State can carry out its duly enacted laws. Alabama's death-penalty statutes are constitutional and enforceable and anything that hinders the State's ability to enforce that statute (even minimally) is of great public interest and, thus, weighs in favor of granting a stay pending appeal.

CONCLUSION

Based on these reasons, Defendants ask this Court to enter an order staying its Memorandum Opinion (Doc. 122), its Order granting Intervenors' motion to unseal certain documents (Doc. 123), and its Order requiring Defendants to submit to it, under seal, a redacted copy of the protocol by June 7, 2018. (Doc. 124.)

Respectfully submitted,

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BY—

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CERTIFICATE OF SERVICE

I certify that on June 6, 2018, I electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notification of such filing to the following: **John G. Thomson, Gabriella E. Alonso, and John Langford.**

/s/ Stephen M. Frisby
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