

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	No. 4:98 CR 177 DJS (TIA)
v.)	No. 4:97 CR 290 DJS (TIA)
)	
CHARLES THOMAS SELL,)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND TO
RESCIND THE PROTECTIVE ORDER CONCERNING THE VIDEOTAPES BY
MOVANT THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC.**

Movant the Association of American Physicians & Surgeons, Inc. (“AAPS”), on behalf of itself and its members, hereby submits its Memorandum in Support of its Motion for Leave to Intervene and to Rescind the Protective Order Concerning the Videotapes.

Movant AAPS seeks leave to intervene pursuant to Federal Rule of Civil Procedure 24(a), (b) & (c) for the limited purpose of challenging this Court’s Stipulated Protective Order filed June 10, 2004 governing the videotaped treatment of defendant Dr. Charles Thomas Sell, Docket Number 358 (hereinafter, the “Protective Order”). Movant respectfully requests that this Court rescind the Protective Order with respect to the videotapes and allow copying and publicizing of them. The Protective Order infringes on the right of AAPS to report on the treatment of patients at federal psychiatric detention facilities and deprives the medical community of information illustrating the allegedly abusive treatment of patients confined there.

BACKGROUND

AAPS is a non-profit organization that has a membership of thousands of physicians in all practices and specialties, including members in Missouri. AAPS was established in 1943 to preserve the practice of private medicine, and is dedicated to upholding the integrity of the medical profession. AAPS is incorporated in the State of Indiana and qualifies under Section 501(c)(6) of the Internal Revenue Code. AAPS reports and speaks out on issues important to the medical profession through its publications the *AAPS News* and the *Journal of American Physicians & Surgeons*, which publishes some articles of general interest addressing matters similar to the treatment of Dr. Sell. AAPS brings its motion here in three capacities: (1) on behalf of its physician members, (2) on behalf of itself as a publisher of medical news, and (3) on behalf of patients likely to be affected by the controversial treatment of patient and inmate defendant Dr. Sell.

AAPS has a direct and substantial interest in promoting and preserving the rights of its members to be informed about the subject matter of this action. Those rights have not been and will not be adequately represented by existing parties to this cause. *See, e.g., Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *National Motor Freight Ass'n v. U. S.*, 372 U.S. 246 (1963); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

As a publisher of information of general interest to the medical profession, AAPS has a direct and substantial interest in promoting and preserving its rights to report on this case, and these rights have not been and will not be adequately represented by existing parties to this cause. *See, e.g., Wiggins v. Burge*, 173 F.R.D. 226 (N.D. Ill. 1997), *appeal dismissed*, 150 F.3d 671 (7th Cir. 1998) (granting motion to obtain access to discovery by third-party intervenors); *Pansy v.*

Borough of Stroudsburg, 23 F.3d 772, 777 (3d Cir. 1994) (“We have routinely found, as have other courts, that third parties have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings.”) (citing numerous precedents, footnote omitted).

ARGUMENT

AAPS has a right to intervene under Fed. R. Civ. P. 24(a)(2). This application to intervene is timely and AAPS has a substantial interest in obtaining information about the treatment of patients in federal psychiatric detention facilities. AAPS’s members are practicing physicians, many of whom treat psychiatric patients at prison facilities. The Protective Order directly impairs the ability of AAPS to inform its members and thereby serve their patients, and the original parties cannot adequately represent this interest. It is well-established that publishers like AAPS satisfy the requirements of Fed. R. Civ. P. 24 in challenging protective orders, and practicing physicians who belong to AAPS have a right and need to review the information contained on the videotapes.

Judicial discretion to enter protective orders is limited by Fed. R. Civ. P. 26 and “is circumscribed by a long-established legal tradition” which places high value on public access to court proceedings. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Rule 26(c) allows the sealing of court records, such as the videotapes at issue here, only “for good cause shown” to the court that the records justify court-imposed secrecy. No such showing has been made here, where defendant Dr. Sell himself wants public scrutiny of the treatment captured by the videotapes. The Protective Order accomplishes nothing more than covering up government wrongdoing. That is a clear violation of

Rule 26(c) and the precedent established in *Brown & Williamson*. See also *P & G v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

The Protective Order infringes on the right of AAPS to report on the treatment of patients at federal psychiatric detention centers. In the absence of this extraordinary Order, AAPS would be able to view the videotapes with the consent of Dr. Sell and report to physicians nationwide what is depicted on the videotapes. Dissemination of information contained on the videotapes would facilitate reform of federal psychiatric detention facilities and prevention of the recurrence of abuse. Yet the Protective Order “severely impede[s] the news agencies’ ability to discover newsworthy information.” *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 927 (5th Cir. 1996). AAPS has standing to challenge the unjustified Protective Order, which should be overturned.

The Protective Order prohibits circulation of information about the videotapes illustrating the allegedly abusive treatment of Dr. Sell as he has been confined in a federal facility. The effect of this Order is simply this: government wrongdoing in the treatment of Dr. Sell is withheld from the public. The Order has no other plausible justification. Dr. Sell himself has been cited in the *St. Louis Post-Dispatch* as seeking the public release of the videotapes. “Sell, 54, says he hopes their release might help other patients at the federal prison hospital in Springfield, Mo., prove abuse at the hands of the guards. Sell alleges that guards have abused many inmates, even using some for gladiator-style fights, and handcuffing them to bunks for 30 days straight.” Carolyn Tuft, “Dentist Wins Round; Judge Orders Tapes of Alleged Abuse by Guards,” *St. Louis Post-Dispatch*, May 20, 2004, at C1. The Protective Order is not serving any interest of the defendant featured on the videotapes. Rather, it can only be withholding from the public important evidence of abuse

inflicted by government agents.

Defendant Dr. Sell has shown to a reporter a 7-inch-long, 4-inch-wide lump extending from his belly that he says is a rupture or hernia caused by being beaten by the guards. *See id.* He has described being attacked several times by guards, noting that two of the episodes are captured on the videotapes being concealed by the Protective Order. *See id.* Specifically, news reports have stated that the videotapes may show:

On Nov. 9, 1999 ... guards stormed into his cell after he broke a plastic food tray, stripped him naked and took him to another room. There, they shackled Sell to a concrete block so he could not move and left him there for 19 1/2 hours straight.

On Feb. 19, 2000, after Sell complained about being too cold in his unheated cell ... a guard stripped him naked and handcuffed him behind his back. Then, the guard allegedly took Sell to a shower and sprayed him with scalding hot water for 10 minutes in front of a female nurse. He alleges that after the guard repeated that about six times, the guard slammed the still-naked Sell face-first to the floor and dragged him to his cell.

Id.

The federal government has not denied that the videotapes show this abuse, but internally documented a weak statement of denial that Sell received “not inhumane treatment.” *Id.* The government should not be able to hide behind a Protective Order to deny the truth. The public has a compelling interest to learn if the government is telling it the truth about the treatment of Dr. Sell.

It is well-established that there is a First Amendment right of the public access to court proceedings and records. *See, e.g., In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989). There the Eighth Circuits emphasized that “we are persuaded that the First Amendment right of public access does extend to the documents filed in support of search warrant applications.” *Id.* at 573. More

recently in *Hartford Courant Co. v. Pellegrino*, 2004 U.S. App. LEXIS 11206 (2d Cir. June 8, 2004), the Second Circuit overturned a practice in the State of Connecticut to seal its docket sheets from public scrutiny. The court held in favor of “the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. We agree that a qualified First Amendment right of access extends to such documents.” *Id.* at *26 (quoting *In re The New York Times*, 828 F.2d 110, 114 (2d Cir. 1987)). *See also A.M.P. v. Hubbard Broad. Inc.*, 216 F. Supp. 2d 933, 935 (D. Minn. 2001) (“Plaintiffs have not met that burden [of secrecy] in this case. At a minimum, the ‘evil that would result from the reportage’ is far from certain.”).

Access to videotapes used in judicial proceedings has only been denied when there is a substantial justification for the secrecy – a justification wholly lacking here. “[W]here access to audiotapes was sought by the press on grounds that they were public information, the press’s First Amendment right was adequately protected because members of the public, including the press, were (1) permitted to listen to the audiotapes as they were played to the jury in the courtroom and (2) furnished with copies of the written transcript.” *United States v. McDougal*, 103 F.3d 651, 659 (8th Cir. 1996), *cert. denied*, 522 U.S. 809 (1997) (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978)). If the public already had access to the videotape through a public trial, and had the benefit of a detailed and objective written documentation of the contents of the videotape, then there might be a plausible argument for sealing the tapes. But, quite the contrary, neither AAPS nor any other member of the press has had *any* access to the videotapes at issue here. They should be released to the public immediately.

The federal government lacks a legitimate interest in covering up wrongdoing at federal facilities. The Eighth Circuit emphasized that third parties have standing to intervene when the governmental entity does not represent the public interest adequately. *See Chiglo v. City of Preston*, 104 F.3d 185, 187-88 (8th Cir. 1997) (“When one of the parties is an arm or agency of the government, acting in a matter of sovereign interest, the governmental entity is presumed to represent the interests of its citizens However, the government only represents the citizen to the extent his interests coincide with the public interest. If the citizen stands to gain or lose from the litigation in a way different from the public at large, the [government] would not be expected to represent him.”). The federal government is plainly not acting in the interest of the public in concealing the contents of the videotapes of Dr. Sell here. AAPS, in contrast, is acting in the interest of citizens in seeking independent access to the videotapes.

AAPS also has a permissive right under Fed. R. Civ. P. 24(b) to intervene here to challenge the Protective Order. “We agree with other courts that have held that the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.” *Pansy*, 23 F.3d at 778. *See also E.E.O.C. v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1045 (1998) (“[E]very circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders.”) (citations omitted); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 162 (6th Cir. 1987) (recognizing Rule 24(b) intervention as the proper method for nonparty to seek protected materials); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979) (intervention under Rule 24(b) is the proper method for third party challenges to a protective

order); *In re Beef Industry Antitrust Litig.*, 589 F.2d 786, 789 (5th Cir. 1979) (same).

“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.” *Pansy*, 23 F.3d at 785. The Protective Order here is entirely contrary to the right of citizens to see what their government is up to. *United States Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 772-73 (1989) (“[A] democracy cannot function unless the people are permitted to know what their government is up to.”). The Protective Order was entered by this Court without any notice or opportunity to be heard by AAPS, physicians, the media, or the public. “[P]ublic interest far outweighs any harm to the [defendants] and thus[] there is no good cause to keep the documents confidential.” *Wiggins*, 173 F.R.D. at 230.

In sum, there is simply no justification for this Protective Order. The videotapes contain no national secrets nor any information that might prejudice a jury pool against defendant Dr. Sell. The federal government has no legitimate interest in keeping evidence of its own wrongdoing from the public, and the videotaped treatment of Dr. Sell by federal agents should be exposed for citizens to see. A goal of covering up government misconduct cannot justify maintenance of the Protective Order. “[T]here is an important public interest at stake -- the health and welfare of the general public and the integrity of the [government]. The public has a right to know” *Id.*

“Absent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue.” *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 485 (3rd Cir. 1995). Hiding wrongdoing by officers - the only possible rationale in this action - cannot possibly be an acceptable justification for a protective order. “General allegations of injury to reputation

and client relationships or embarrassment that may result from dissemination of privileged documents is insufficient to justify judicial endorsement of an umbrella confidentiality agreement.”

Id. at 484.

Because the Protective Order implicitly restricts the litigants from speaking out about misconduct in this case, the Order operates as a gag on speech and interferes with the public’s right to obtain information. Such restraints can only be justified in cases of serious and imminent harm to the administration of justice, which is certainly not the case here. *See Hubbard Broad. Inc.*, quoted *supra*. The Protective Order cannot continue in order to conceal wrongdoing and frustrate much-needed reforms.

CONCLUSION

For the foregoing reasons, Movant respectfully requests that this Court (a) grant it leave to intervene in this proceeding for the purpose of challenging the Protective Order, (b) rescind the Protective Order with respect to the videotapes and (c) allow copying of the videotapes for interested citizens to view.

Dated: July 9, 2004
St. Louis, Missouri

Respectfully Submitted,

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