

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

**MOVANT ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC.’S
REPLY REGARDING ITS MOTION
TO INTERVENE AND RESCIND PROTECTIVE ORDER**

Comes now Movant Association of American Physicians & Surgeons, Inc., (“AAPS”), on behalf of itself and its members, by counsel Andrew Schlafly, *pro hac vice*, and by W. Bevis Schock, and hereby submits its Reply Regarding its Motion for Leave to Intervene and to Rescind the Protective Order Concerning the Videotapes.

Movant AAPS assumes the reader is familiar with their original Motion.

The government’s Memorandum in Opposition to Movant AAPS’s Motion rests primarily on procedural grounds. The government argues that Movant AAPS’s Motion is improper because it is brought under the Federal Rules of Civil Procedure but these are criminal cases.

Movant AAPS has two arguments in response.

First, the government’s position must be wrong. Because there is no Criminal Rule which addresses intervention, if the government were right then there would be no way for a non-party ever to intervene in a criminal case. That would be absurd.

Second, and more significantly, the federal courts do not support the government's position.

In the well known Susan McDougal criminal matter, an Eighth Circuit case, the press and the President were disputing access to a videotape of a deposition. The court addressed the merits and wasted no time on procedural concerns over the press's right to intervene. *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)).

In *ABC v. Stewart*, 360 F.3d 90, 97 (2nd Cir. 2004) the court simply ignored the issue:

By hearing the Media Coalition's motion, the district court in effect allowed the Media Coalition to intervene in the pending criminal proceeding for the limited purpose of challenging the January 15 [Protective] Order... We have observed that where, as here, the “[a]ppellants’ claims could have been treated by the district court as a new civil case, as opposed to an intervention in the pending criminal case, and the orders would have been final in that case[,] [n]o jurisdictional significance should attach simply because the district court chose to treat appellants as intervenors in the criminal proceeding.” *In re New York Times Co.*, 828 F.2d 110, 113 (2nd Cir. 1987); *accord United States v. Suarez*, 880 F.2d 626, 628-29 (2nd Cir. 1989).

At a minimum the *ABC* case guides the court to a solution to the government's concern: that is, to simply treat Movant AAPS's filing as a new civil case.

The government's second argument is that FOIA offers Movant AAPS an alternative remedy. The Post Dispatch and Carolyn Tuft have addressed that argument in detail in their Reply, noting that they made a FOIA request without result.

Movant AAPS incorporates those arguments by reference.

Movant AAPS notes to the court the obvious fact that the government has ignored the substance of Movant's Motion.

PRAYER

For the foregoing reasons, and for the reasons stated its prior pleadings, Movant Association of American Physicians & Surgeons, Inc. respectfully prays 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.

Respectfully Submitted,

/s/ W. Bevis Schock
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2004 the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following:

Lee T. Lawless
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Barry A. Short
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