United States District Court
District of Connecticut

Justin Mustafa,
Plaintiff

v.

Christopher Byars,
Defendant

No. 19-cv-1780

December 16, 2024

Emergency Motion to Intervene for Immediate Disclosure of Judicial Documents

On November 14, the ACLU of Connecticut requested, from the clerk's office, copies of video exhibits in this matter. The videos were played in open court during trial and never sealed—and as a result, they retain the strongest common law and First Amendment presumptions of access. Yet, the Court has still not made the videos available, and recently offered the parties to the underlying litigation a month in which to weigh in on the ACLU's request. Because the ACLU (and any member of the public) has rights to the immediate inspection or copying of the videos, and because no restriction of those rights has been ordered by the Court, the ACLU now moves on an expedited basis to intervene and obtain the records.

1. Facts

1.1. The parties' decisions to enter video exhibits at trial without limitation.

In this 42 U.S.C. § 1983 litigation, plaintiff Justin Mustafa contends that defendant Christopher Byars—a prison guard at the Garner Correctional Institution—injured him in contravention of the Eighth Amendment proscription against cruel or unusual punishment. In mid-September 2024, two weeks before the jury trial was to

start, the parties submitted a joint pretrial memorandum including their respective exhibit lists and objections thereto. Mr. Mustafa set out that he planned to introduce a video, and Byars consented:

> *Plaintiff's*
>
> 1) Video, 5/25/19
>
> Full Exhibit by Agreement.

Parties' Proposed Ex. List [ECF # 88-1] 2. Mr. Byars informed the Court that he planned to introduce four such videos, and Mustafa consented:

> H. Video recording: handheld video camera recording, 5-25-19 starting at or around 5:47 pm. Video of plaintiff's escort from F Unit to Medical and then to UConn transport.
>
> Full Exhibit by Agreement.
>
> I. Video Recording: handheld video camera recording, 5-25-19 starting at or around 11:31pm. Video of plaintiff's escort to F Unit after being transported back from UConn.
>
> Full Exhibit by Agreement.
>
> J. Video recording: C038 from F Unit, 5-25-19, 3:39 pm – 5:39pm. Stationary camera footage.
>
> Full Exhibit by Agreement.
>
> K. Video recording: C037 from F Unit, 5-25-19, 3:39 pm – 5:39pm. Stationary camera footage.
>
> Full Exhibit by Agreement.

Id. 8-9. No party moved *in limine* to exclude or limit use of the videos. No party moved to seal the video exhibits ahead of trial. And no party moved to close any portion of the trial to the public.

Trial proceeded without any closure to the public, and the videos were admitted into evidence. Mr. Mustafa's videos were numbered Plaintiff's Ex. 1 and 1-a:

EXHIBIT	DESCRIPTION	RLS	IDENTIFIED	ADMITTED
Pla-1	Video Unit F.LVC	Yes	9/30/2024 10:17 AM	9/30/2024 10:17 AM
Pla-1-a	Video Unit F	Yes	9/30/2024 10:17 AM	9/30/2024 10:17 AM

And Mr. Byars's videos were designated as Defendants' Ex. H, I, J, and K:

Def-H	Video, Handheld - 5-25-19 5.47 pm (Mustafa Escort).mp4	Yes	9/30/2024 1:41 PM	9/30/2024 1:41 PM
Def-I	Video, Handheld - 5-25-19 11.31 pm (Mustafa back from UCONN - going to RHU).mp4	Yes	9/30/2024 10:02 AM	9/30/2024 10:02 AM
Def-J	Video, Stationary C038 2019-05-060 - (C038 Housing Unit F - 5-25-19 - 3.39 pm - 5.39 pm).avi	Yes	9/30/2024 10:02 AM	9/30/2024 10:02 AM
Def-K	Video, Stationary C037 2019-05-060 - (C037 Housing Unit F - 5-25-19 - 3.39 pm - 5.39 pm).avi	Yes	9/30/2024 10:02 AM	9/30/2024 10:02 AM

Exhibit Log [ECF # 114] 1. The jury returned a $1.35 million verdict for Mr. Mustafa on October 3, 2024 [ECF # 111], and the Court entered judgment accordingly on October 21st. ECF # 117. Mr. Byars's motion for a new trial [ECF # 120] is pending, and the parties have a settlement conference before Judge Spector on January 2, 2025. ECF # 133. No party has, at any time, moved to seal any of the videos, and the Court has not done so.

1.2. The ACLU, and its request to copy the trial exhibits.

The ACLU of Connecticut is a statewide non-profit organization that has, since 1948, advocated for the protection and extension of civil rights and civil liberties. Among other activities, it uses public education and policy advocacy in Connecticut's legislative and executive branches to change the law and restore democratic oversight and control over the state's prison system. The ACLU of Connecticut believes that

incarcerated people should not suffer injury in prison at the hands of the government, and that such occurrences are serious matters meriting public examination and debate.

On November 14, 2024, the ACLU—through counsel—made a telephonic request to the clerk's office for copies of the six video exhibits played at trial.[1] Over the course of a few telephone calls, the clerk's office determined to look into whether the Court still possessed the trial exhibits. On a telephone call on November 18th, a clerk's office supervisor stated that she needed to verify that the Court still possessed the exhibits, citing D. Conn. L. R. 83.6's provision for the Court to return trial exhibits to the parties.[2]

Having not heard back, on November 22nd the ACLU's counsel telephoned the supervisor again to inquire about the status of the ACLU's request, and left a voicemail.[3] That same day—while the ACLU's records request was pending—the clerk's office returned all trial exhibits to Mr. Byars's counsel. ECF ## 126, 127. Before the end of the same day, Byars moved for a protective order [ECF # 128] restricting how the parties could handle the videos, but did not ask that the public's right to them be curtailed. The Court so-ordered the motion without further briefing. ECF # 129. The ACLU has heard nothing further about its request.[4]

On December 4th, the ACLU wrote to Chief Judge Shea to appeal the constructive denial of its request. On December 9th, the Court docketed the ACLU's appeal letter and ordered the parties to "file responses outlining their respective positions" on the letter by January 10, 2025. ECF # 135.

[1] Decl. of Dan Barrett (attached here as Ex. 1) ¶ 2.
[2] *Id.* ¶ 3-5.
[3] *Id.* ¶ 6-7.
[4] *Id.* ¶ 8.

Because the ACLU (and the public) has undisputed First Amendment and common law rights of contemporaneous access to the trial exhibits, it now moves to intervene for the limited purpose of immediately obtaining them.

2. The ACLU has common law and First Amendment rights to the trial exhibits it seeks, and those rights will be lost without immediate intervention and disclosure of the documents.

2.1. Having been presented in open court, the trial exhibits are judicial documents to which the strongest presumptions of public access attach.

The ACLU has twin rights of access to the trial exhibits it has requested, provided by the First Amendment and the common law. Both apply to "judicial documents," that is, materials submitted to a court that are "relevant to the performance of the judicial function and useful in the judicial process." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Videos played in open court at trial and pre-trial proceedings are judicial documents, *Mirlis v. Greer*, 952 F.3d 51, 60 (2d Cir. 2020); *In re Nat'l Broadcasting Co.*, 635 F.2d 945, 952 (2d Cir. 1980), whether admitted into evidence or not. *United States v. Graham*, 257 F.3d 143, 152 (2d Cir. 2001).

While all judicial documents enjoy a presumption of access, the weight of the presumption depends upon the role of the document at issue. As the First Amendment goes, the presumption is heaviest as to "evidence introduced at trial or in connection with summary judgment," *Brown v. Maxwell*, 929 F.3d 41, 49 (2d Cir. 2019), because those materials request that the Court use its power to adjudicate parties' rights. *See also*, *e.g.*, *United States v. Akhavan*, 532 F. Supp. 3d 181, 187 (S.D.N.Y. 2021) (holding

that the First Amendment right of access to after-the-fact copies of trial evidence is "especially strong").

The common law similarly holds trial exhibits at the apex of public access. The weight of the common law access presumption derives "from the role those documents played in determining litigants' substantive rights—conduct at the heart of Article III—and from the need for public monitoring of that conduct." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995). Trial evidence is the paradigmatic example of information used to adjudicate rights, and so garners the strongest presumption of public access. *In re NBC*, 635 F.2d at 952. For purposes of the common law, "[o]nce the evidence has become known to the members of the public . . . through their attendance at a public session of court, *it would take the most extraordinary circumstances to justify restrictions* on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction." *Id.* (emphasis added). *See also In re CBS, Inc.*, 828 F.2d 958, 960 (2d Cir. 1987) (extending common law rule to videotaped deposition played in open court, and reversing denial of public access to copy the tape).

The exhibits at issue here were played in open court, and are therefore judicial documents to which the public has the strongest right of access. Any restriction upon their release, including by delay, implicates the ACLU's rights of access to them.

2.2. The ACLU's interest in vindicating its contemporaneous right of access to the videos necessitates its limited intervention.

Intervention has two forms: mandatory and permissive. It is mandatory via Fed. R. Civ. P. 24(a)(2), in relevant part, where the putative intervenor (1) through a

timely motion, shows (2) an interest in the litigation, (3) that "may be impaired by the disposition of the action," (4) which interest is "not adequately protected by the parties to the action." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000). Alternatively, this Court may grant permissive intervention where the would-be intervenor "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b).

As a court records-seeker, the ACLU easily meets both standards. Its request to intervene comes about a week after the Court put its access rights on hold; it has important common law and First Amendment rights to contemporaneous information access as detailed below; those rights are denied each day that the ACLU is denied the trial exhibits; and no existing party to the litigation shares its interest in prompt disclosure. And, intervention would cause no delay to the parties, who have already had a judgment rendered and are briefing the defendant's motion for a new trial. Nothing in granting intervention or the immediate production of the trial exhibits would delay the parties' march towards a final resolution. *See In re Telegraph Media Group Ltd.*, 23-mc-215, 2023 WL 5770115, at *2 (S.D.N.Y. Sep. 6, 2023) (explaining that in practical terms, permissive intervention requires the district court to consider "whether the proposed intervention will unduly delay or prejudice the adjudication of the parties' rights.").

In either event, whether viewed as mandatory or permissive, records-seeker intervention "should be granted absent some compelling justification for a contrary result." *In re Pineapple Antitrust Litig.*, No. 04-md-1628, 2015 WL 5439090, at *1 (S.D.N.Y. Aug. 10, 2015) (granting intervention to challenge sealing orders). *See also Trooper 1 v. New York State Police*, 22-cv-893, 2024 WL 1345516, at *3 (E.D.N.Y. Mar.

29, 2024) (granting motion to intervene for contesting sealing where no risk that intervention would interfere with the merits of the case and the request to gain access to documents would not cause delay or prejudice to the parties); *Coleman v. Suffolk County*, 174 F. Supp. 3d 747, 754 (E.D.N.Y. 2016) (granting permissive intervention, and explaining that "courts in this Circuit have demonstrated a willingness to allow the press to intervene in situations such as this where the public's access to court documents is at stake"). This Court should therefore grant the ACLU leave to intervene for the limited purpose of obtaining the six trial exhibits it seeks.

3. The heavy First Amendment and common law presumptions for public access to the trial exhibits are unimpeded and undiminished here, so the Court must release the exhibits.

The mine-run court records access case features a party trying to seal a filing, or a member of the public trying to unseal one. The ACLU's records request is different. Here, no Court order has curtailed the public's rights to the records sought, and no party has sought to curtail those rights. The sole purpose of the ACLU's intervention and motion for production is to vindicate its undiminished rights to the trial videos. The situation that the ACLU now finds itself in is the same one that a person walking into the clerk's office and asking to see a motion for summary judgment would if they were made to first wait a month, and then a further month while the Court took briefing on the subject from the parties in the underlying litigation. Because production of records is the default, and because the parties' views on the public's right of access are irrelevant, the Court must order the immediate production of the trial exhibits.

Both the common law and First Amendment rights may be overcome by a strict scrutiny-equivalent showing that the public's access should be narrowly limited in

consideration of compelling circumstances.[5] Whether that showing was—or could be—met is irrelevant to the ACLU's request here, because the trial evidence it seeks has never been restricted in any way. The Court has not sealed the exhibits in whole or part, and no party has so much as *asked* the Court to do so. In the absence of a sufficient order having been issued, immediate access is the default. *United States v. All Funds at Wells Fargo Bank in San Francisco in Acct. No. 7986104185*, 643 F. Supp. 2d 577, 585 (S.D.N.Y. 2009) (holding that district courts are "*required* to order disclosure" unless the public's right has been overcome) (emphasis added).

Moreover, the views of the parties who showed the trial exhibits in open court are irrelevant to the public's strong right of access. The right of access belongs to the public, not to them, and it vested the moment the parties showed the videos in open court. At any rate, the parties conclusively demonstrated their views of the matter by playing the videos at trial without objection or limitation, and by not once moving to seal the videos before or after the trial. It is a continued diminution of the public's rights for the Court to delay access for a further month while the parties consider whether they now prefer to try retroactively making secret that which they voluntarily revealed at trial.

4. The public's contemporaneous or immediate right to inspect the videos requires the Court to quickly release them.

Lastly, the Court should not only release the records, but do so quickly. The ACLU's right to the trial exhibits is a contemporaneous or immediate one that continues to be denied each day that its request for access is delayed.

[5] *See, e.g.*, *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987); D. Conn. Local R. 7(e)(1)(A) (spelling out standards).

Because the rights of access to judicial documents rest in part on the vital function of public oversight, *e.g.*, *Amodeo*, 71 F.3d at 1049, those rights are to "*contemporaneous* public access," as "the passage of time erodes to some extent the vindication of the public access right." *NBC*, 635 F.2d at 952, 954 (emphasis added). Closure of court proceedings or records protected by the First Amendment creates irreparable harms, such that "each passing day may constitute a separate and cognizable infringement." *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (describing a four-week delay in public access to a court proceeding as "exceed[ing] tolerable limits"). *See also*, *e.g.*, *Courthouse News Serv. v. Gabel*, No. 21-cv-132, 2021 WL 5416650, at *15 (D. Vt. Nov. 19, 2021) (collecting contemporaneous access cases, and granting injunction barring state court system from withholding civil complaints from inspection during a clerk's office review procedure that "often takes several days").

And so, our Circuit has expressly directed district courts to avoid impeding requests, declining to decide motions to intervene, or holding unsealing motions in abeyance. Our circuit's landmark judicial documents case, *Lugosch*, was itself a collateral appeal from a decision to hold a media outlet's motion to intervene in abeyance until after a summary judgment decision. The Second Circuit held that the delay in deciding the intervention motion conclusively determined the public's right of immediate access, 435 F.3d at 118, and reversed in relevant part because the "district court erred . . . in failing to act expeditiously" on the access request. *Id.* at 126. *Accord New York Times*, 828 F.2d at 113 (holding that delayed decision in newspaper's motion for disclosure of sealed materials was immediately appealable as "effectively deny[ing] appellants much of the relief they seek, namely, prompt public disclosure").

Respectfully, the Court's actions and inactions to date have done just that, and the briefing schedule it set for the parties stands to compound the injury. The Court should accordingly order the immediate release of the six trial exhibits sought.

5. Conclusion

Because it has plain common law and First Amendment rights of access to the trial exhibits it seeks, and because delay in furnishing that access violates those rights, the ACLU should be granted leave to intervene and the Court should immediately make the requested records available to the ACLU.

/s/ Dan Barrett
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