

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

CRAIG WILSON, et al.	)	CASE NO.: 4:20CV794
	)	
	)	
Petitioners,	)	JUDGE JAMES S. GWIN
	)	
v.	)	
	)	
MARK WILLIAMS, Warden of Elkton	)	<u>RESPONDENTS' OPPOSITION TO</u>
Federal Correctional Institution, et al.,	)	<u>MOTION TO INTERVENE AS</u>
	)	<u>ADDITIONAL PLAINTIFF/AFFECTED</u>
Respondents.	)	<u>PARTY</u>
	)	
	)	
	)	

INTRODUCTION

Now come Respondents Mark Williams, Warden of Elkton Federal Correctional Institution and Michael Carvajal, Director of Federal Bureau of Prisons, in their official capacities (“Respondents”), pursuant to the Court’s June 16, 2020 non-document order, and hereby respectfully submit this response in opposition to the Emergency Motion to Intervene as Additional Plaintiff/Affected Party (ECF No. 121) filed by proposed intervenor Eric Henderson (“Movant”).

Movant claims that he should be a member of the medically-vulnerable subclass defined by the Court in its April 22, 2020 preliminary injunction order because he was “diagnosed with Keratoconus, he had eye surgery, and he has a prolonged use of...Prednisone.” (Mot. to Intervene, ECF No. 121 PageID # 1479.) For the reasons explained below, the motion should be denied.

LAW AND ARGUMENT

I. MOVANT’S REQUEST TO INTERVENE SHOULD BE DENIED

Intervention is governed by Federal Rule of Civil Procedure 24. Initially, Movant does not seek to intervene as a matter of right under Rule 24(a). Rather, he seeks “permissive intervention as an additional Plaintiff/Interested Party under Fed. R. Civ. P. 24(b)(1)(B).” (Mot. to Intervene, ECF No. 121 PageID # 1479.) Therefore, this Court need not consider whether Movant can intervene as a matter of right.

Regarding permissive intervention, Rule 24 provides that “[o]n timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B). Accordingly, the proposed intervenor must establish: (1) the motion is timely; and (2) the movant has a common claim or defense. *Id.*; *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005) (“To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact.”) If these two requirements have been established, the court must “balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court’s discretion, intervention should be allowed.” *United States v. Michigan*, 424 F.3d at 445; *see also*, Fed. R. Civ. P. 24(b)(3) (“In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”)

A. Movant’s Motion is Untimely

The Sixth Circuit has noted that Rule 24(b) provides no standard for timeliness. *FMC Corp. v. Keizer Equip. Co.*, 433 F.2d 654, 656 (6th Cir.1970). Rather, the Sixth Circuit reviews five factors for timeliness:

(1) the point to which the suit has progressed; (2) the purpose for which

intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir.1990) (discussing the factors of timeliness under Rule 24(a)); see also *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir.1981) (applying these timeliness factors to both Rules 24(a) and 24(b)). Importantly, “[t]he determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances.” *Jansen*, 904 F.2d at 340.

In the context of this highly expedited case, Movant’s request is untimely. The parties have litigated this case for many months in this court, the Sixth Circuit Court of Appeals, and the United States Supreme Court. During this time, Movant was pursuing his own administrative and legal remedies. (Mot. to Intervene, ECF No. 121, PageID # 1481.) He also completed the Court’s questionnaire and returned it to the ACLU, seeming to avail himself of the class process arranged by the Court and without identifying separate legal counsel. (Redacted Henderson Questionnaire attached as Ex. A.) He remained on the sidelines until he was denied compassionate release by another Court. (Mot. to Intervene, ECF No 12.1 PageID #1482.) Now, he seeks to have a second bite at the apple by intervening in this case after receiving an adverse decision in another court. However, such a request is untimely in the context of these proceedings and his attempts at individual relief.

B. Movant’s Alleged Claims are Highly Individualized

Movant’s request that he intervene so that he can seek compassionate release, home confinement, furlough, and/or transfer is a highly individualized evaluation that does not share

common questions of law or fact with the other inmates at Elkton. Movant does not attempt to argue that he has common claims with the other inmates at Elkton. Rather, he claims that because of his unique health conditions, Respondents should grant him home confinement, furlough or transfer. Because BOP has to consider, among other things, Movant's crime of conviction, sentence, disciplinary history, age, medical history, likelihood of recidivism, available housing, and the danger he poses to the community, Movant's situation is not in common with any of the Plaintiffs in this action or any other inmate at Elkton. Thus, intervention is inappropriate.

C. Intervention Would Cause Undue Delay and Prejudice

Allowing Movant to intervene at this stage would prejudice the parties by delaying and complicating these proceedings while providing no meaningful benefit to the Court, the existing parties, or the interests of justice. To allow such intervention would create a factual and procedural mess for the Court and the existing parties. Thus, intervention should be denied.

D. Other Factors Weigh against Intervention

Movant seeks to intervene because he claims that Respondents have disregarded and violated the Court's preliminary injunction order as it relates to him. (Mot. to Intervene, ECF No. 121 PageID #1480.) Movant's request fails to acknowledge that the United States Supreme Court has stayed enforcement of the preliminary injunction [ECF No. 111] and that, on June 9, 2020, the Sixth Circuit issued its ruling vacating the preliminary injunction. *Wilson v. Williams*, No. 20-3447, 2020 WL 3056217 (6th Cir. June 9, 2020). Accordingly, Movant's request to intervene for purposes of enforcing the preliminary injunction order should be denied.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that Mr. Henderson's Motion to Intervene as Additional Plaintiff/Affected Party should be denied.

Respectfully submitted,

JUSTIN E. HERDMAN
United States Attorney

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IN RESPONSE TO THE CORONAVIRUS (COVID-19) PANDEMIC,
A FEDERAL JUDGE HAS ORDERED THAT CERTAIN MEDICALLY
VULNERABLE PRISONERS BE TRANSFERRED OUT OF FCI ELKTON. WE
WANT TO KNOW IF YOU ARE PART OF THE GROUP THAT CAN GET
TRANSFERRED.

The ACLU of Ohio and the Ohio Justice & Policy Center want to learn who is covered by the Court's order as part of a class action lawsuit. Please fill out this letter only if:

1. You are **65 years old or older** OR
2. You have one or more **documented** medical conditions listed on the back of this page that puts you at high risk for getting very sick from COVID-19.

If you **are** in one of those 2 groups, please:

- Answer the questions on the back AND fill out the attached medical release form
- Put the letter AND the form in the envelope and return it.

If you **are not** in one of those 2 groups, please do not return this letter.

Name: Eric Henderson
BOP #: 457 49 424 Age: 41
Your Current Release Date: 7-30
Your Lawyer's Name: —
Your Lawyer's Phone or Email: —

Check this box only if you do NOT have a lawyer, and you cannot afford to pay for one: ☐

Have you asked the Warden for compassionate release? ☒ Yes ☐ No

If yes, when did you apply? 4-9-20

If yes, have you gotten a response? ☒ Yes ☐ No

What response did you get? NO

The ACLU of Ohio and the Ohio Justice & Policy Center are not your attorneys as an individual, though we do seek to represent the class of people seeking transfer, as a whole. If you think you might be eligible for compassionate release, you should contact your lawyer or ask for compassionate release in writing to the Warden.

TURN OVER

Your medically documented, pre-existing condition (circle all that apply):

[Redacted area]

Any details about your condition: _____

What treatment have you had for your condition? _____

Does FCI Elkton have access to medical records for your condition?

☒ Yes

☐ No

*If you believe you may have a condition that puts you at risk, it is your responsibility to provide all medical records to the prison so that you can be included. We recommend that you contact your attorney. **If you choose to provide information using this letter, we may share it with other attorneys, consultants, or attorneys for the Bureau of Prisons as part of our efforts to pursue relief for the class.***

You Can Choose to Stay at Elkton If You Want

The judge's order in the class action lawsuit applies to all prisoners age 65 or older OR with certain medical conditions that put them at higher risk from the coronavirus. These people may be eligible for home confinement, furlough, compassionate release, or transfer out of Elkton to a different prison.

It is possible that the Warden, the Bureau of Prisons, or the court may find that you are not eligible for home confinement, furlough, or release, and that your only choice is to move to a different prison or stay at Elkton. That other prison could be higher security than Elkton, but would be better than Elkton for social distancing. **IF THAT HAPPENS, YOU CAN DECIDE LATER TO STAY AT ELKTON.**

Even though you can decide later, would you like to decide to stay at Elkton now anyway? Checking "Yes" means you would **NOT** obtain any kind of release or transfer as a result of this lawsuit.

☐ Yes

☐ No

