

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

FAVIAN BUSBY and MICHAEL)	
EDGINGTON, on their own behalf and on)	
behalf of those similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	No. 20-cv-2359-SHL
)	
FLOYD BONNER, JR., in his official)	
capacity, and SHELBY COUNTY)	
SHERIFF'S OFFICE,)	
)	
Defendants.)	

**ORDER GRANTING IN PART AND LIMITING IN PART PLAINTIFFS' MOTION FOR
EXPEDITED DISCOVERY**

Before the Court are Plaintiffs' Motion for Expedited Discovery, (ECF No. 57), filed June 19, 2020, and Defendants' Response in Opposition, (ECF No. 64), filed June 22, 2020. Plaintiffs seek the Court's leave to conduct expedited discovery. For the following reasons, the Court **GRANTS IN PART** and **LIMITS IN PART** the Plaintiffs' Motion for Expedited Discovery.

BACKGROUND

On May 20, 2020, named Plaintiffs filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 and a Class Action Complaint for Declaratory Injunctive Relief. (ECF No. 1.) Plaintiffs seek "urgent habeas and injunctive relief to protect medically vulnerable people and people with disabilities detained" at the Shelby County Jail ("Jail"), located at 201 Poplar Avenue in Memphis, Tennessee, in light of the COVID-19 pandemic. (*Id.*) Specifically, Plaintiffs allege that their constitutional rights, under the Fourteenth Amendment, and their statutory rights, under the Americans with Disabilities Act and the Rehabilitation Act, are being

violated. (ECF No. 2 at PageID 53-59.) Concurrently, Plaintiffs filed a Motion for a Temporary Restraining Order (“TRO”). (Id.)

This Court certified the Class, (ECF No. 38), but reserved ruling on the TRO Motion, given the need for further fact-finding, (ECF No. 45). To that end, the Court appointed its own expert (“Independent Inspector”) to render an opinion to the Court on the current accommodations provided to the medically vulnerable inmates in the Jail but noted that the Inspection Order did not preclude “either party from hiring its own expert to conduct its own inspection.” (ECF No. 56.)

Here, Plaintiffs seek the answers to four interrogatories and documents responsive to eight requests for production of documents (“RFPs”). Additionally, Plaintiffs seek to depose three Shelby County health officials and conduct an inspection of the Jail. Plaintiffs request the Court’s leave to conduct this discovery on an expedited schedule. If the Plaintiffs’ expedited discovery schedule is adopted, the written discovery responses are due on June 24, with the Shelby County health officials deposed on June 25 and June 26. Plaintiffs do not provide a date as to its desired inspection of the Jail, but aver that it will be at a mutually agreed upon time.

Defendants oppose the Motion on three grounds: (1) Plaintiffs, as habeas petitioners, do not show that good cause exists for any discovery, (2) Plaintiffs do not show that good cause exists for expedited discovery and (3) the discovery sought is overly broad, unduly burdensome and prejudicial to Defendants.

ANALYSIS

The Court first turns to whether Plaintiffs meet their burden to conduct discovery as habeas petitioners and then to whether they meet their burden to conduct expedited discovery.

After finding that Plaintiffs largely meet these burdens, the Court limits the scope of certain overbroad discovery requests.

I. Discovery as Habeas Petitioners

Habeas petitioners are “entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so.” Rule 6(a), RULES GOVERNING SECTION 2254 CASES.¹ Good cause exists where specific allegations show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. See Harris v. Nelson, 394 U.S. 286, 300 (1969); Lynott v. Story, 929 F.2d 228, 232 (6th Cir. 1991). Petitioner need not show that the additional discovery would definitely lead to relief. See Payne v. Bell, 89 F. Supp. 2d 967, 970 (W.D. Tenn. 2000). Rather, he need only show good cause that the evidence sought would lead to relevant evidence regarding his petition. Id.

Here, Plaintiffs are entitled to discovery because the evidence sought is directly relevant to the essential elements of their Fourteenth Amendment and ADA claims. Plaintiffs allege that they are being confined in violation of the Constitution, and include affidavits with support for those allegations. (See, e.g., ECF Nos. 2-6, 2-7, 2-8, 2-9.) Plaintiffs’ discovery requests probe into the health and safety measures implemented at the Jail amid the COVID-19 pandemic. The specific information that Plaintiffs seek from Defendants—e.g., how inmates are tested, Jail policies regarding the COVID-19 pandemic, how inmates are housed—are material to how Defendants are addressing the potential spread of the virus within the facility. The Court has reason to believe that if Plaintiffs can uncover sufficient facts through its discovery requests that

¹ The Rules Governing Section 2254 cases may also be applied to habeas actions filed under § 2241. See Rule 1(b), RULES GOVERNING SECTION 2254 CASES.

Defendants' detention measures are "excessive" or that Defendants acted with "deliberate indifference" toward Plaintiffs, Plaintiffs may be entitled to relief. (ECF No. 2 at PageID 53-59.) See also Payne v. Bell, 89 F. Supp. 2d 967, 970 (2000).

Recall why the Court withheld ruling on Plaintiff's TRO Motion. Plaintiffs contend that Defendants are punishing pretrial inmates through confinement, that Defendants are deliberately indifferent to medically vulnerable inmates' health needs and that Defendants fail to provide reasonable accommodations to disabled inmates. Plaintiffs provided sworn affidavits and declarations attesting to these allegations. For instance, Plaintiffs' declarants stated that Jail staff are moving from pod-to-pod without masks, and without regard to the medically vulnerable inmates. (ECF Nos. 2-7, 2-9.) If some of their graver allegations are true, Plaintiffs may be entitled to habeas relief.

Yet, because Defendants attested to the exact opposite of Plaintiffs' allegations, i.e. that the Jail's health measures are aligned with those recommended by the Centers of Disease Control and Prevention, the Court reserved ruling on the TRO Motion until it could determine whose factual allegations are accurate. That the TRO Motion is pending due to an undeveloped factual record suggests that the Parties do their part, and speedily conduct discovery in the coming days and weeks. While the facts can never be developed enough for the Court to rule on such an emergency motion, Plaintiffs' proposed expedited discovery is a step in the right direction. This habeas petition is one where discovery is permitted, indeed is necessary.

II. Expedited Discovery

In some cases, "such as those involving requests for preliminary injunction," expedited discovery may be appropriate. See Fed. R. Civ. P. 26(d) 1993 Advisory Committee Notes. Courts look to whether circumstances show "good cause" for expedited discovery. See Fabreeka

Int'l Holdings, Inc. v. Haley, 2015 WL 5139606, at *5 (E.D. Mich. Sept. 1, 2015). Specifically, a party seeking discovery “must demonstrate the need to deviate from the normal timing of discovery.” Arab Am. Civil Rights League v. Trump, 2017 WL 5639928, at *2 (E.D. Mich. Mar. 31, 2017). Some factors courts consider under the good cause standard include whether a preliminary injunction is pending, the breadth of the discovery requests, the purpose for the request, the burden to comply and how far in advance of the typical discovery process the request was made. Id.

Plaintiffs show a sufficient need to conduct expedited discovery. Plaintiffs are pretrial inmates with an increased risk of significant health issues, even death, if they contract COVID-19. They allege constitutional violations that cannot be remedied if the worst occurs. Therefore, Plaintiffs have a pressing reason to conduct a speedy probe into what health and safety measures Defendants are implementing at the Jail, and more generally how the medically vulnerable are being confined.

Consider how some of the other factors under the good cause standard also favor expedited discovery. First, a Motion for Temporary Restraining Order is pending here. See Degeeter v. McNeill, 2007 U.S. Dist. LEXIS 105812, *8, 2007 WL 9706576 (noting that expedited discovery may be appropriate “to the extent the discovery is necessary to support plaintiff’s motion for preliminary injunction”). The sole reason it is pending is because of an undeveloped factual record. Second, the burden on Defendants to comply with the requests, with certain exceptions discussed below, is relatively low. Most of the written discovery Plaintiffs seek, such as testing information or Jail policies, should be readily available and easily produced. While expedited discovery will undoubtedly burden Jail officials, ultimately, that burden is greatly outweighed by a pressing need of further fact-finding. See Trump, 2017 WL 5639928, at

*2 (“An important inquiry in determining if good cause exists is whether the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.”).

Also, the breadth of Plaintiffs’ discovery requests is largely tailored to their immediate fact-finding needs. Interrogatories 1 and 2 relate to testing; the remaining two Interrogatories relate to how inmates exposed to, or infected with, COVID-19 are housed. RFPs 1, 3, 4, 5 and 7 relate to the policies and medical measures at the Jail, including those implemented for curbing the spread of COVID-19 in the facility; RFP 6 seeks a daily count of the Jail’s detainee population; RFP 8 seeks production of documents that are provided to the Independent Inspector.

Whether Defendants’ detention measures are “excessive”, or that they have been “deliberately indifferent” to pretrial inmates’ medical needs, as Plaintiffs allege, can likely be uncovered through these discovery requests. See J.H. v. Williamson County, Tennessee, 951 F.3d 709, 717, 720-23 (2020). Similarly, Plaintiffs’ proposed depositions and inspection of the Jail also relate directly, with certain exceptions discussed below, to these constitutional and statutory allegations.

That an Independent Inspector will also provide an expert opinion on the current situation in the Jail does not preclude Plaintiffs’ discovery. The Independent Inspector was appointed by the Court, and is the Court’s witness—not either Party’s. See Fed. R. Evid. 706 (governing the procedure for court-appointed expert witnesses, and noting that “this rule does not limit a party in calling its own experts”). It is with this in mind that the Court expressly stated that nothing “precludes either party from hiring its own expert to conduct its own inspection.” (ECF No. 56.) Given that Defendants have virtually full access to the Jail, with the opposite being true for

Plaintiffs, that Plaintiffs seek to inspect the Jail via its own expert should raise no eyebrows. See Nellson v. Barnhart, 2020 U.S. Dist. LEXIS 98112, *9 (D. Colo. June 4, 2020) (noting that expedited discovery may be appropriate “where discovery of certain facts is unusually difficult or impossible”).

Defendants argue that the discovery requests focus on the conditions of confinement but this petition is about the fact of confinement. While it is true that Plaintiffs do not seek to alter the conditions at the Jail, the Court must understand the Jail’s current conditions, as well as its responses to the COVID-19 pandemic, to assess whether the fact of confinement violates the Constitution or the ADA and Rehabilitation Act. Indeed, Plaintiffs must show that the conditions at the Jail are so constitutionally deplorable that “no set of conditions would be constitutionally sufficient.” Wilson v. Williams, 2020 U.S. App. LEXIS 14291, *4 (6th Cir. 2020). If Plaintiffs can prove their allegations through discovery, they may be entitled to release, the relief appropriate for such a fact of confinement suit.

III. Limitation of Certain Requests

Plaintiffs have good cause to conduct expedited discovery, with the exceptions outlined below. See Branch Banking & Trust Co. v. Jones, 2018 U.S. Dist. LEXIS 204659, *24, 2018 WL 6331684 (E.D. Ky. Dec. 4, 2018) (“Courts may limit the scope of overbroad discovery requests”). If Defendants have specific objections to certain written discovery requests, e.g., on medical privacy or attorney-client privilege grounds, the Parties must engage in good-faith consultation before asking the Court to resolve any objection. The Court hereby **LIMITS** the scope of the following discovery requests due to their overbroad nature:

- RFP 2’s scope is limited to the documents related to the Jail.

- Plaintiffs may retain an expert to inspect the Jail, but that expert may not be accompanied by counsel during the inspection, nor may the expert take videos or photos during the inspection. Defendant shall provide the same courtesies and support to this inspector as they have or will to the Independent Inspector.

Defendants shall immediately begin responding to the written discovery, in rolling-batches, until June 26, 2020. For those requests which Defendants are genuinely unable to respond to by June 26, they are to be responded to by June 29, 2020.

Plaintiffs' depositions and the proposed inspection will have to wait until after the July 1 hearing.

SCHEDULE

The Court recognizes the need to balance the Parties' interest in gathering the facts they need with the difficulties presented by the expedited nature of this case. In that light, the Court **ORDERS** the following deadlines:

- Defendants Produce Written Discovery: **June 24-29, 2020**
- Independent Inspector Hearing: (This hearing will only include the presentation of the independent inspector. No other proof may be offered.) **July 1, 2020**
- Depositions and Plaintiffs' Inspection: **July 2-8, 2020**
- TRO Hearing: **July 10, 2020 at 9:30 a.m.**

IT IS SO ORDERED, this 23rd day of June, 2020.

s/ Sheryl H. Lipman

SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE