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

FAVIAN BUSBY, ET AL.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No.: 2:20-CV-02359-SHL**
	)	
FLOYD BONNER, JR., ET AL.,	)	
	)	
Defendants.	)	

RESPONDENTS-DEFENDANTS' RESPONSE IN OPPOSITION TO PETITIONERS-PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

Respondents-Defendants, Floyd Bonner, Jr., Shelby County Sheriff and the Shelby County Sheriff's Office ("Respondents-Defendants") respond in opposition to Petitioners-Plaintiffs' Motion for Expedited Discovery. [ECF No. 57.]

ARGUMENT

A. Petitioners-Plaintiffs are not automatically entitled to discovery, much less expedited discovery.

Unlike a normal civil plaintiff, a habeas petitioner is not entitled to discovery as a matter of course, but only upon a fact-specific showing of good cause and in the Court's exercise of discretion. USCS Sec. 2254 Cases R 6; *Bracy v. Gramley*, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997).[1] Before determining whether discovery is warranted, the Court must first identify the essential elements of the claim on which discovery is sought. *Id*. (citing *United States v. Armstrong*, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)). The burden of demonstrating

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[1] Pursuant to Rule 1(b) of the Rules Governing § 2254 Cases, federal courts apply the Habeas Rules to § 2241 proceedings. *See White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989) (applying Habeas Rules to a § 2241 petition); *Settle v. Parris*, 2020 U.S. Dist. LEXIS 104922 (W.D. Tenn. June 16, 2020) (applying Habeas Rules to a § 2241 petition); *Williams v. Holloway*, 2016 U.S. Dist. LEXIS 32264, at *12 n.2 (W.D. Tenn. Mar. 14, 2016) ("The Habeas Rules apply to petitions brought under § 2241 challenging a prisoner's detention").

the materiality of the information requested is on the moving party. *Stanford v. Parker*, 266 F.3d 442 (6th Cir. 2001) (citing *Murphy v. Johnson*, 205 F.3d 809, 813-15 (5th Cir. 2000)).

Under Rule 6(b), "a party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any documents." USCS Sec. 2254 Cases R 6(b). While the Court may afford a habeas petitioner the right to conduct discovery, the Court may limit the extent of the discovery. USCS Sec. 2254 Cases R 6(a). When addressing a motion for discovery, "a habeas court must identify the 'essential elements' of the petitioner's substantive claim . . . [and] evaluate whether '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.'" *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004) (quoting *Bracy*, 520 U.S. at 904 & 908-09). A petitioner's factual allegations may not be speculative or conclusory, and "Rule 6 does not authorize fishing expeditions." *Murphy v. Johnson*, 205 F.3d 809, 814 (5th Cir. 2000).

Here, Petitioners-Plaintiffs assume that they are entitled to discovery; however, they have failed to undergo the process as set forth by Rule 6 by providing specific reasons for their requests so that the Court may set the parameters of the discovery sought. Before the Court allows four (4) days of written discovery, depositions, and an on-site inspection by Petitioners-Plaintiffs, the Petitioners-Plaintiffs must provide reasons for their specific requests, and the Court must be given the opportunity to determine the parameters of what, if any, discovery will be allowed in the case as a whole. Because Petitioners-Plaintiffs have disregarded Rule 6, their motion for expedited discovery should be denied.

B. Petitioners-Plaintiffs have failed to show "good cause" for expedited discovery under the Federal Rules of Civil Procedure.

To the extent the Federal Rules of Civil Procedure apply to Petitioners-Plaintiffs' expedited discovery request, Petitioners-Plaintiffs have failed to show the requisite "good cause" necessary to support their motion. Expedited discovery is not the norm. *Branch Banking & Trust Co. v. Jones*, 2018 U.S. Dist. LEXIS 204659, at *20 (E.D. Kent. Dec. 4, 2018); *In re Paradise Valley Holdings, Inc*., 2005 Bankr. LEXIS 2951, at *4 (E.D. Tenn. Bankr. Dec. 29, 2005). Generally, "[e]xcept in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E), or when authorized under these rules or by order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)." *In re Paradise Valley Holdings, Inc.*, 2005 Bankr. LEXIS 2951 at *4. Expedited discovery can only be appropriate, if at all, to the extent the discovery is necessary to support a plaintiff's request for an injunction. *See Degeeter v. McNeill*, 2007 U.S. Dist. LEXIS 105812, *7-8 (W.D. Tenn. Sept. 21, 2007). Even then, expedited discovery is appropriate only where discovery of certain facts is "unusually difficult or impossible." *Nellson v. Barnhart*, 2020 U.S. Dist. LEXIS 98112, at *9 (D. Colo. June 4, 2020) (*quoting Pod-Ners, LLC v. N. Feed & Bean of Lucerne Ltd. Liability Co*., 204 F.R.D. 675, 676 (D. Colo. 2002)). "Courts should not grant leave without some showing of the necessity for expedited discovery. The court must protect defendants from unfairly expedited discovery." *Waggin' Train LLC v. Normerica, Inc*., 2009 U.S. Dist. LEXIS 110564, *3 (W.D. Tenn. Aug. 18, 2009) (*citing Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982)). As such, litigants are entitled to expedited discovery only "upon a showing of good cause." *North Atlantic Operating Co. v. Huang*, 194 F. Supp. 3d 634, 637 (E.D. Mich. 2016).

"Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Fabreeka Int'l*

Holdings, Inc. v. Haley, 2015 U.S. Dist. LEXIS 116007, at *12 (E.D. Mich. Dept. 1, 2015). In considering whether good case exists, courts examine multiple factors including "[1] the danger that the nonmovant will not preserve the information sought, [2] whether expedited discovery will substantially contribute to moving the case forward, and [3] the narrow scope of the information sought." *Branch Banking & Trust Co.,* 2018 U.S. Dist. LEXIS 204659, at *21 (E.D. Ky. Dec. 4, 2018). Notably, the party requesting expedited discovery bears the burden of demonstrating good cause to abandon the usual discovery process. *Id.*

i. There is no danger that Respondents-Defendants will not preserve the information sought.

Regarding the first factor—the danger of destruction of the evidence— it was not addressed by Petitioners-Plaintiffs. There is, therefore, no allegation or basis to conclude that any relevant information in Respondents-Defendants' possession will not be preserved.

ii. Expedited discovery will not substantially contribute to the case moving forward.

Expedited discovery will not substantially contribute to this case moving forward. The hearing scheduled for July 1, 2020, is a continuation of the previously conducted hearing on Petitioners-Plaintiffs' motion for a temporary restraining order and it is the Petitioners' burden to show they are entitled to relief. The discovery Petitioners-Plaintiffs seek prior to the hearing is largely irrelevant. Petitioners-Plaintiffs brought a petition for habeas corpus, not a 42 U.S.C. § 1983 claim. To be a petition for habeas corpus, their claims must challenge the fact of their confinement, not the past conditions of their confinement. *See e.g., Nelson v. Campbell,* 541 U.S. 637, 643 (2004). The relief they seek is release, not damages, nor modifications to the Shelby County Jail's response to COVID-19. [*See* ECF No. 50.] Indeed, this Court has already determined that Petitioners "do not challenge, or seek alteration of, jail conditions." [ECF No. 38, PageID 678.] Instead, Petitioners-Plaintiffs' "challenge is to the fact that they are being confined in a

community facility such as the Jail….and [s]o long as they are confined at the Jail during the pandemic, Plaintiffs contend that their confinement is unconstitutional." [ECF No. 38, PageID 679.] As Petitioners-Plaintiffs' counsel explained at the hearing:

> We are certainly not asking you, Your Honor, to go in and make changes to the [jail] conditions. But the reason why we're not asking for that is because the challenge that we are presenting is to the validity of the confinement . . . . [T]here are no conditions at the jail under which Petitioners and the class members who are medically vulnerable or at otherwise at high risk of severe infections or death from COVID-19 can be safe.

[ECF No. 36, PageID 582.] Thus, Petitioners-Plaintiffs do not believe *any* remedy is available to protect their constitutional rights *other than* release. *See also*, *Wilkinson v. Dotson*, 544 U.S. 74, 79, 125 S. Ct. 1242, 161 L. Ed. 2d 253 (2005) (explaining that the purpose of a writ of habeas corpus is to obtain release from "unlawful confinement").

Despite Petitioners-Plaintiffs' contention that their claims concern the current fact of their confinement, they demand broad, expedited discovery concerning, not only the current conditions of the Shelby County Jail, but also its previous responses to the COVID-19 pandemic. For example, Petitioners seek a copy of "[a]ll written policies adopted or implemented…since March 12, 2020 regarding management of the COVID-19 pandemic as it relates to the Jail, Detainees, or Staff," all "[d]ocuments reflecting or relating to communications, projections, estimates, studies, graphs, charts, spreadsheets, memos, reports, models, or calculations concerning the actual or potential impact of COVID-19," and "Documents sufficient to show a daily count of the Detainee population from March 12, 2020 to the date of Your response to these requests." [ECF No. 57-2.] Based upon these requests, it is also likely that during the depositions they propose to conduct, Petitioners-Plaintiffs would question deponents concerning the four-month history of the Shelby County Jail's response to COVID-19. While such information could relate to a § 1983 conditions

of confinement claim, it does not relate to the current fact of Petitioners-Plaintiffs' confinement. Accordingly, such discovery would not contribute to *this* case moving forward.[2]

Petitioners-Plaintiffs' proposed expert inspection is likewise well-beyond what is relevant for this matter and would not substantially contribute to the case moving forward. Petitioners-Plaintiffs seek permission for their expert to "inspect physical spaces for cleanliness….and to assess other issues relevant to the reduction of risk of contracting COVID-19." [ECF No. 57-6, PageID 893.] Additionally, they propose their expert be allowed to "assess the adequacy and accessibility of cleaning and hygiene supplies…[and] observe and assess the degree to which staff implement the Jail's policies regarding COVID-19." [ECF No. 57-6, PageID 893.] Unexplainably, Petitioners-Plaintiffs desire to seek whether the jail is "clean," whether cleaning supplies are supplied, and whether the Jail is following CDC guidelines, when in their own view, the answers to those questions are not determinative or relevant to whether their constitutional rights are being violated. Again, Petitioners-Plaintiffs brought a *habeas* petition – not a § 1983 claim. Their theory is that in light of COVID-19, *no conditions* in the Jail can satisfy constitutional standards. They fail to explain why they now wish to conduct discovery almost solely about the conditions of the Jail or how such information in any way advances this case.

Even if conditions of confinement are relevant to this matter, this case is akin to *Nellson v. Barnhart*, where the District Court of Colorado denied the plaintiffs' motion for expedited discovery. In *Nellson*, the plaintiff, purportedly representing a class of similarly situated inmates, alleged that the defendants were not "(1) not screening inmates or staff members for COVID-19,

[2] Notably, during the pendency of this case, Petitioners-Plaintiffs have publicly threatened a separate 42 U.S.C. § 1983 lawsuit against Respondents-Defendants. *See* https://dailymemphian.com/section/metro/article/14717/aclu-threatens-second-lawsuit-against-shelby. Petitioners-Plaintiffs should not be allowed to conduct irrelevant discovery in this matter, on an expedited basis, in an attempt to learn information they actually intend to utilize for a future suit.

(2) not testing prisoners for COVID-19, (3) not isolating prisoners who test positive for COVID-19, and (4) not preventing infected staff members from working" under the Eighth Amendment. *Nellson,* 2020 U.S. Dist. LEXIS 98112, at *1-2. The plaintiff filed a motion for temporary restraining order and preliminary injunction, requesting the defendants institute screening and testing of inmates and staff. *Id.* at *2. Subsequently, the plaintiff moved the court for expedited discovery, seeking, among other requests, communications "between state, regional, and national BOP officials on the BOP's response to COVID-19 at [the defendant prison]." *Id.* at *10-11. The court denied this request, noting that "[w]hile the facts underlying the[] various requests may be 'unusually difficult or impossible' to obtain without discovery, they are also irrelevant to the preliminary matter before the Court….What decisions the BOP could have taken is irrelevant to whether defendants should be required to screen, test, and isolate staff and inmates, or whether defendants are already implementing those measures." *Id.* at *11. Here, like in *Nellson*, Petitioners-Plaintiffs' proposed discovery concerning what steps the Shelby County Jail should or could have taken in response to COVID-19 is irrelevant to the question before the Court – whether the "fact" of Petitioners-Plaintiffs' confinement is constitutional.[3]

Furthermore, to the extent that Petitioners-Plaintiffs seek discovery concerning the current "fact" of their confinement or other issues the Court deems relevant to the "fact" of their confinement, they have likewise failed to show that expedited discovery will substantially contribute to this case moving forward. Learning such information would be duplicative in light of the Court already appointing Michael Brady to "render an expert opinion on the current health and safety of medically vulnerable Plaintiff-detainees at the Shelby County Jail. . . in light of the

[3] Petitioners-Plaintiffs' basis for their contention is that social distancing cannot occur in the Shelby County Jail. Thus, even if the Shelby County Jail fully complied with applicable CDC and other applicable guidelines and standards, Petitioners-Plaintiffs' position is that their constitutional rights would still be violated if social distancing could not occur.

COVID-19 pandemic[.]" [ECF No. 56.] Mr. Brady will be granted "unrestricted access to the Facility unannounced, and may bring with him laptops or other similar equipment with internet access, cameras, cell phones, writing implements, and any other equipment required to conduct his site visit/s." [ECF No. 56, PageID 844.] He will be permitted to "inspect areas of the facilities without limitation…[and will] be permitted to review all pertinent Facility and detainee records and documents including medical and mental health records, electronic or otherwise, and video footage in connection with his investigation." [ECF No. 56, PageID 844-45.] He will further be allowed to interview "all supervisors and staff…immediately and without undue delay." [ECF 56, 845.] After his inspection, Mr. Brady will prepare a written report and testify before the Court concerning his findings at the upcoming July 1, 2020 hearing. [ECF No. 56, PageID 845.]

"Courts should not grant leave without some showing of the necessity for expedited discovery [as] [t]he court must protect defendants from unfairly expedited discovery." *Waggin' Train LLC v. Normerica, Inc.*, 2009 U.S. Dist. LEXIS 110564, *3 (W.D. Tenn. Aug. 18, 2009) (*citing Notaro v. Koch*, 95 F.R.D. 403, 405 (S.D.N.Y. 1982)). Here, Petitioners-Plaintiffs fail to explain why expedited discovery is necessary when this Court has already appointed Mr. Brady to provide the Court an opinion on the Jail's current response to COVID-19. Notably, they fail to identify even a single relevant fact they believe they can discover that Mr. Brady cannot. They seek documents, but Mr. Brady will *already* be allowed access to all relevant documents. They seek written interrogatory responses and deposition testimony, but Mr. Brady will *already* be allowed to interview Jail supervisors and staff. They seek to inspect the Jail, but Mr. Brady will *already* be allowed to do so.

Petitioners-Plaintiffs have failed to meet their burden to show that expedited discovery is necessary to move the case forward even one iota, much less that it is necessary for the case to *substantially* move forward. Accordingly, their request for expedited discovery must be denied.

iii. The discovery sought by Petitioners-Plaintiffs is overly broad, unduly burdensome, and prejudicial to Respondents-Defendants.

Contrary to Petitioners-Plaintiffs' assertion, their requests are *not* narrowly-tailored, and it would in reality be *impossible* for Respondents-Defendants to fully respond to their requests within the time proposed. In Petitioners-Plaintiffs' requests for production, Petitioners-Plaintiffs seek countless documents generated since March 12, 2020, concerning Respondents-Defendants response to the COVID-19 pandemic. [ECF No. 57-2.] For example, Petitioners-Plaintiffs seek "[d]ocuments sufficient to show all efforts, measures, or other steps You or the Jail have taken or are taking specifically on behalf of Detainees who are 'high-risk for severe illness from COVID-19' as defined by the CDC." [ECF No. 57-2, Req. No. 4.] Petitioners-Plaintiffs define "documents" broadly and seek not only hardcopy records, but also "electronic copies of electronic mail [and] text messages…." [ECF No. 57-2, PageID 57-2.] It would be impossible for Respondents-Defendants to perform an electronically stored information ("ESI") search of all Shelby County Jail custodians' email accounts and cell phones, identify any potentially responsive documents, review all potentially responsive documents, determine which, if any of said documents would be privileged, prepare any needed privilege log, and then produce to Petitioners-Plaintiffs all of said responsive documents within the proposed *two-day* time frame.[4] To the contrary, such an undertaking would likely take several weeks, if not longer.

Forcing Respondents-Defendants to participate in a four-day discovery marathon would

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[4] Petitioners-Plaintiffs propose Respondents-Defendants respond to their proposed written discovery by 5:30 p.m. on Wednesday, June 24, 2020. [ECF No. 57-1, PageID 861; 57-2, PageID 871.]

likewise be unduly burdensome on Respondents-Defendants. As addressed at the previous hearing, the Shelby County Jail has two days of extensive COVID-19 testing scheduled during the week of June 22, 2020. During those two days, in addition to safely operating the Jail, jail staff will devote much of their time to ensuring detainees can be safely and efficiently tested. Additionally, depending upon the volume of documents Mr. Brady will request from Respondents-Defendants and upon the number of interviews that he wishes to conduct, jail staff will also be devoted to accommodating Mr. Brady's requests. Forcing jail staff to additionally participate in written and/or oral discovery would cause undue burden on the Jail's ability safely and efficiently operate the facility, provide the scheduled COVID-19 testing, and timely respond to Mr. Brady's inquiries. Moreover, allowing such discovery could likewise interfere with Mr. Brady's unannounced inspection. For example, if Petitioners-Plaintiffs are allowed to conduct depositions, it is likely they would be deposing a witness who at the exact same time Mr. Brady might wish to interview on-site during his inspection.

Similarly, allowing Petitioners-Plaintiffs' own expert to conduct his or her own inspection of the Jail during the same week that Respondents-Defendants are conducting extensive COVID-19 testing and making accommodations for Mr. Brady's inspection causes an undue burden on Respondents-Defendants. In light of COVID-19, jail staff are already taking numerous additional steps to safely and efficiently operate the jail as well as protect the health of inmates. Being forced to accommodate two separate inspections at the same time that jail staff are already undertaking additional obligations due to COVID-19 would jeopardize jail staff's ability to efficiently operate the facility. Additionally, because Mr. Brady's inspection will be unannounced, allowing Petitioners-Plaintiffs access to the Jail via their own expert could result in their expert being present during and interfering with Mr. Brady's inspection.

Forcing Respondents-Defendants to arrange for three depositions in addition to preparing the other discovery sought by Petitioners-Plaintiffs would cause an undue burden on Respondents-Defendants in other ways. For example, two of the three proposed deponents, Chief Kirk Fields and Dr. Donna Randolph, are intricately involved, not only in the day-to-day operations and medical care provided at the Jail, but also in its response to COVID-19.[5] Forcing them into depositions with just a few days' notice creates an undue hardship on Respondents-Defendants to ensure appropriate staff members are available in their absence. The third proposed deponent, Dr. Bruce Randolph, is Shelby County's Health Officer. Among other many duties, Dr. Randolph oversees Shelby County, Tennessee's response to COVID-19. As part of his duties, Dr. Randolph participates in regular COVID-19 briefings and advises numerous Shelby County entities on a daily basis. With almost no advanced notice, Petitioners-Plaintiffs seek to depose Dr. Randolph without regard to his numerous obligations in protecting the health and safety of the citizens of Shelby County. [*See* ECF No. 27-5, PageID 476.]

If allowed, Petitioners-Plaintiffs' discovery will unduly burden Respondents-Defendants and will cause them prejudice by affecting Respondents-Defendants' ability to be fully responsive and accommodating to Mr. Brady. Accordingly, Petitioners-Plaintiffs' motion must be denied.

iv. Other factors support denying Petitioners-Plaintiffs' request for expedited discovery.

Petitioners-Plaintiffs additionally cite "how far in advance of the typical discovery process the request was made" as a factor for the Court to consider. [ECF No. 57, PageID 853.] While Petitioners-Plaintiffs gloss over said factor, it likewise supports denying their motion. This case has been pending since May 20, 2020. [ECF 1.] When they initially filed their suit, Petitioner-

[5] Dr. Donna Randolph is not an employee of Shelby County, Tennessee, and therefore, counsel cannot confirm her current ability to even attend the deposition sought by Petitioners-Plaintiffs.

Plaintiffs made no request for expedited discovery. On June 12, 2020, the Court initially set the case for another hearing on Petitioners-Plaintiffs' motion for temporary restraining order. [ECF No. 45.] Unexplainably, Petitioners-Plaintiffs made no request for expedited discovery until a *full week* later. Obviously, in light of the swiftly moving nature of the case, the obligations that have been imposed on the Respondents, and the continuing obligations on the Respondents and their counsel, a full week is considerable. Had Petitioners-Plaintiffs truly believed that expedited discovery was necessary, there is no reason they should have waited until Friday, June 19, 2020, to file their motion. The effect of such a delay only serves to further burden Respondents-Defendants by forcing them to respond to discovery in a much tighter window of time during which they must also be fully available to accommodate Mr. Brady.[6] In light of said delay, Petitioners-Plaintiffs cannot support their contention that they are "entitled to expedited discovery now," and they should not be allowed to force Respondents-Defendants to engage in a four-day expedited discovery process.

CONCLUSION

Based upon the above and upon the record as a whole, the Court should deny Petitioners-Plaintiffs' motion for expedited discovery.

[6] It is also notable that Petitioners-Plaintiffs did not seek such relief until *after* they learned counsel, James I. Pentecost, had a family vacation planned beginning on June 24, 2020, the same day they now propose to begin conducting depositions and *after* they learned counsel, Nathan D. Tilly, had a vacation planned beginning on June 26, 2020, the last day of their proposed depositions. [ECF 47-1; 47-2.] Additionally, Petitioners-Plaintiffs make their request without regard to defense counsel's professional schedules and defense counsel have other matters scheduled this week in other cases. For example, Mr. Tilly previously scheduled three depositions in another case this week and Mr. Pentecost as well as Mr. Stokes previously scheduled a mediation in another case this week.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served via ECF filing system, upon the following:

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