U.S. Department of Justice

United States Attorney
Eastern District of New York

271 Cadman Plaza East
Brooklyn, New York 11201

April 10, 2020

By ECF (w/ enclosure)

Honorable Rachel P. Kovner
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Chunn, et al. v. Warden Derek Edge*, Civil Action No. 20-cv-1590 (Kovner, J.)

Dear Judge Kovner:

Following the denial of Petitioners' motion for a temporary restraining order (TRO),[1] and pursuant to the Court's April 8, 2020 Order, Respondent Warden Derek Edge respectfully submits his position on the course of this litigation and the parties' proposed discovery plan.

On April 8, 2020, the Court denied Petitioners' TRO motion. Dkt. Entry dated April 8, 2020. Petitioners then requested permission to engage in expedited discovery in connection with their anticipated motion for a preliminary injunction. The Court ordered the parties to meet and confer regarding a proposed discovery plan. Dkt. Entry dated April 8, 2020. To date, Petitioners have not moved for a preliminary injunction, nor moved for class certification.

Counsel for all parties have met and conferred in good faith in an effort to agree on the terms of a proposed discovery plan. Unfortunately, the parties have been unable to reach an agreement on all terms of the plan. The parties' proposed case management plan with the parties' respective position on discovery is annexed hereto.

Respondent respectfully submits his position regarding discovery below.

I. Petitioners Have Failed To Show Good Cause For Discovery

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). As discussed below, Petitioners have not shown good cause for discovery in this matter.

[1] Two of the Petitioners, Chunn and McBride, have received the injunctive relief they sought via the grant of their motions for compassionate release and, therefore, are not in a position to pursue injunctive relief here.

A. Habeas Actions Typically Do Not Require Discovery

There is no significant history of discovery in habeas cases prior to 1969, and there has never been a suggestion that the Constitution requires discovery in such proceedings. *See Harris v. Nelson*, 394 U.S. 286, 293 (1969) (in concluding that Federal Rules of Civil Procedure on discovery do *not* apply to habeas proceedings, explaining that "prior to [the promulgation of the federal rules in] 1938" there was no showing made that "discovery was actually being used in habeas proceedings"). In fact, it was "not until many years later" that factual questions were even considered in federal habeas cases, making it inconceivable that discovery would be an essential component of the writ. *Id*. at 295.

Thus, in the instant constitutionally-based habeas proceeding (Petition ¶¶ 119-20) (Dkt. No. 1), there can be no question that the relevant settled habeas practice—not only in 1789, but for almost two centuries thereafter—would preclude discovery. *See Harris*, 394 U.S. at 295. That habeas practice of 1789 did not contemplate discovery or fact-finding by the habeas petitioner is clear. Indeed, "[o]ne of the maxims of eighteenth-century habeas corpus practice had been that the petitioner could not controvert the facts stated in the return." Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 COLUM. L. REV. 961, 986 n.131 (1998) (citing, *inter alia*, R.J. Sharpe, The Law of Habeas Corpus 61-68 (1976)). The facts alleged by the Executive to continue to hold an individual "were to be taken as true, and the court was to determine whether the justification was legally sufficient." *Id.* Even in executive detention cases, courts traditionally conducted only limited factual review. *See INS v. St. Cyr*, 533 U.S. 289, 306 (2001) ("some evidence" review). While courts from the period permitted the prisoner to "allege additional facts consistent with the return that might rebut the appearance of justification," Neuman, 98 COLUM. L. REV. at 986 n. 131, that was not a constitutional requirement and certainly did not suggest that discovery was ever appropriate.

The Supreme Court has thus held, for example, that in view of the history of the writ and the intended scope of the Federal Rules of Civil Procedure a petitioner does not have the right to serve interrogatories on his custodian (although the Federal Rules would otherwise allow for broad discovery in civil suits). *Harris*, 394 U.S. at 292-98. Significantly, in 1938, when the federal rules were initially adopted, the expansion of statutory habeas corpus practice to its present scope was only in its primordial stages. *Mooney v. Holohan*, 294 U.S. 103, 113 (1935); *Johnson v. Zerbst*, 304 U.S. 458, 459 (1938); *Waley v. Johnston*, 316 U.S. 101, 102 (1942). And it was not until many years later that the federal courts considering a habeas corpus petition even began to make an independent determination of the factual basis of claims that state convictions had violated the petitioner's federal constitutional rights. *See Brown v. Allen*, 344 U.S. 443, 447-48 (1953).

That the Constitution did not require such innovations to the habeas practice of 1789 is demonstrated by the need for subsequent legislation to expand fact-finding authority of federal courts, which did not occur until after the Civil War. *See* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (stating that a "petitioner may deny any of the material facts set forth in the return, or may allege any fact to show that the detention is in contravention of the constitution or laws of the United States," and requiring the federal court to "proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested"). And it was in 1890 that the Supreme Court, citing the Civil War era statute, held that the federal courts could

have a proper role in determining certain non-jurisdictional facts. *See Cunningham v. Neagle*, 135 U.S. 1, 70-75 (1890). The statutory expansion of the fact-finding role only proves the point that such functions are never constitutionally required. So too here. While Petitioners may provide their *own* evidence and version of events for this Court's consideration, any discovery they may be granted from the Government is a matter of Executive discretion rather than a constitutional entitlement.

Modern developments in statutory habeas procedure cannot alter this constitutional ceiling. Thus, it is of no moment that in *Harris* the Court interpreted the All Writs Act, 28 U.S.C. § 1651, to authorize limited discovery in statutory habeas cases at the discretion of the court. Indeed, the fact that discovery, even in modern statutory habeas cases, is *entirely discretionary*, *see Harris*, 394 U.S. at 300, Habeas Rule 6(a), provides a complete answer to the question whether it is constitutionally required. Moreover, recent developments in habeas practice cannot alter the fact that there was no constitutional requirement for discovery in habeas cases. The Suspension Clause of the Constitution cannot operate as a "one-way ratchet that enshrines in the Constitution every grant of habeas jurisdiction" conferred by statute or judge-made common law, *see St. Cyr*, 533 U.S. at 341-42 (Scalia, J., dissenting), for if it did, then the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which limited state prisoners' access to the writ, would be unconstitutional, a proposition the Supreme Court rejected in *Felker v. Turpin*, 518 U.S. 651, 662-64 (1996) ("judgments about the proper scope of the writ are 'normally for Congress to make'") (citation omitted). Thus, there is significant support for the historical approach to habeas as providing the constitutional ceiling. *See Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring in part and concurring in the judgment); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 47 U. CHI. L. REV. 142, 170 (1970). Congress's repeal of habeas jurisdiction, in conjunction with the fact that constitutionally derived habeas corpus does not require discovery, is therefore fatal to the claim that discovery is appropriate in these proceedings.

B. Petitioners Fail to Show Good Cause Here

"Discovery is available only if the judge in the exercise of his discretion and for good cause shown grants leave." *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996) (citations omitted); *see also Drake v. Portuondo*, 321 F.3d 338, 346 (2d Cir. 2003) (petitioners are generally "not entitled to discovery as a matter of ordinary course . . . [unless there has been] a showing of good cause.") (citations omitted). "In order to show good cause, a petitioner must set forth specific allegations that provide reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Cobb v. Unger*, No. 1:09-CV-0491, 2013 WL 821179, at *2 (W.D.N.Y. Mar. 5, 2013) (internal quotation marks omitted); *see also Horton v. Recktenwald*, No. 15-CV-843, 2017 WL 2964726, at *3 (W.D.N.Y. Feb. 6, 2017) (finding that the petitioner failed to establish good cause for discovery because he did "not specifically allege[] that the requested discovery would help him demonstrate his entitlement to habeas relief").

Here, Petitioners have not shown "good cause" to obtain any discovery in the litigation. In denying Petitioners' TRO motion, the Court expressly ruled that Petitioners have not "demonstrate[d] irreparable harm and either (1) a likelihood of success on the merits or (2) sufficiently serious questions on the merits to make them a fair ground for litigation and a balance

of hardships tipping decidedly in the moving party's favor." *Towers Financial Corp. v. Dun & Bradstreet, Inc.*, 803 F. Supp. 820, 822 (S.D.N.Y. 1992) (citing *Local 1814 Int'l Longshoremen's Assoc. AFL-CIO v. New York Shipping Assoc., Inc.*, 965 F.2d 1224, 1228 (2d Cir. 1992)); *Perez v. U.S.*, No. 14 Civ. 846 (NRB), 04 Cr. 937-1 (NRB), 2015 WL 3413596, at *5 (S.D.N.Y. May 8, 2015) (denying motion for discovery in habeas case where the petitioner failed to show good cause because petitioner's argument was clearly legally insufficient). Thus, Petitioners are not entitled to discovery, and certainly not expedited discovery, because they cannot show (1) irreparable injury; (2) some probability of success on the merits; (3) some connection between the expedited discovery and avoidance of irreparable injury; and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury defendant will suffer if the expedited discovery is allowed. *See Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 402 (S.D.N.Y. 2011) (holding that expedited discovery was not warranted in shareholder's putative class action against corporation, seeking temporary restraining order and preliminary injunction because shareholder had not demonstrated injury or probability of success on merits, shareholder's discovery requests had been unreasonable, and shareholder had not offered concrete basis justifying expedited discovery); *see also Irish Lesbian & Gay Org. v. Giuliani*, 918 F. Supp. 728, 731 (S.D.N.Y. 1996) (denying plaintiff's expedited discovery request as "a broadside not reasonably tailored to the time constraints under which both parties must proceed or to the specific issues that will have to be determined at the preliminary injunction hearing").

The standard for obtaining a preliminary injunction is the same as the standard for obtaining a temporary restraining order. *See, e.g., EricMany Ltd. v. Agu*, No. 16-CV-2777, 2016 WL 8711361, at *2 (E.D.N.Y. June 3, 2016); *Oliva v. Brookwood Coram I, LLC*, No. 14-CV-2513, 2015 WL 3637010, at *1 (E.D.N.Y. Apr. 30, 2015); *Von Grabe v. Ziff Davis Publishing*, No. 91 Civ. 6275, 1994 WL 719697, at *1 (S.D.N.Y. Dec. 29, 1994). The Court has already denied Petitioners' motion for a TRO and they have failed to demonstrate any additional factors, not already raised in this action, that would entitle them to expedited discovery, let alone to preliminary injunctive relief.

Petitioners have not articulated why BOP's current submissions to the Court, pursuant to Administrative Order No. 2020-14, are insufficient. *See Garafola v. United States*, 909 F. Supp. 2d 313, 335 (S.D.N.Y. 2012) (denying discovery in a habeas proceeding where petitioner failed to "articulate sufficient reasons as to why [the court] should permit the requested discovery," and rather, the petitioner's request for broad discovery "constituted a fishing-expedition.") (internal quotations omitted); *see also Levitis v. Petrucci*, No. 19-CV-918 (JPO), 2019 WL 3531565, at *4 (S.D.N.Y. Aug. 2, 2019) (finding that the habeas petitioner has "not shown good cause for the discovery he requests."). Respondent is already providing, pursuant to Administrative Order No. 2020-14, detailed information to the Court regarding conditions at the MDC; protocols for screening and testing inmates, staff and others entering or leaving each facility; the number of inmates tested and the number of positive inmate tests; the number of staff and/or others testing positive; and all efforts undertaken to mitigate the spread of COVID-19 both generally and in response to any symptomatic inmate(s) and/or positive test(s).

Indeed, Petitioners' claims are based entirely on "speculation and conjecture." *Rodriguez v. Griffin*, No. 9:16-CV-1037, 2018 WL 6505808, at *28 (N.D.N.Y. Dec. 11, 2018) (finding that the petitioner failed to establish good cause to permit discovery in a habeas action). "Generalized

statements about the possible existence of discovery material are insufficient to establish the requisite 'good cause.'" *Caswell v. Racetti*, 11-CV-00153A (F), 2012 WL 162611, at *3 (W.D.N.Y. Jan. 17, 2012) (quoting *Green v. Artuz*, 990 F. Supp. 267, 271 (S.D.N.Y. 1998)). The court also noted that "the [c]ourt may, in its discretion, deny discovery where the petitioner provides no specific evidence that the requested discovery would support his habeas corpus petition." *Id.* (quoting *Hirschfeld v. Comm'r of the Div. of Parole*, 215 F.R.D. 464, 465 (S.D.N.Y. 2003) (internal alterations omitted)).

Accordingly, Petitioners have not shown good cause for discovery here.

II. The Court Should Stay Any Discovery Because Respondent Anticipates Moving To Dismiss The Habeas Petition

As noted *supra*, Petitioners have represented that they intend to file a motion for a preliminary injunction, notwithstanding the Court's decision denying their TRO. In their proposed schedule, Petitioners intend to file the motion within 12 days (by April 22). Respondent will oppose any motion for a preliminary injunction, but also intends to move to dismiss the habeas petition on the grounds that it is deficient as a matter of law. We respectfully request the following briefing schedule: Respondent's motion to dismiss due by April 24, 2020; Petitioners' response due by May 8, 2020; and Respondent's reply due by May 15, 2020.

Petitioners are of the view that discovery is needed here and is needed at the very outset of the case. That is hardly so on a motion to dismiss that will address the straightforward question of the sufficiency of Petitioners' claim of constitutional violations at the MDC. Whether the habeas petition is deficient as a matter of law is not an inquiry that discovery would advance. The Court should therefore stay discovery based on Respondent's anticipated dispositive motion. *See Spencer Trask Software & Info. Servs., LLC v. RPost Int'l Ltd.*, 206 F.R.D. 367, 368 (S.D.N.Y. 2002) (granting stay of discovery pending disposition of the motion to dismiss).

III. Petitioners' Proposed Discovery Plan Is Unreasonable

In the event the Court were to order the parties to commence limited discovery, notwithstanding Respondent's objection to conducting any discovery at this stage of the litigation, the parties do agree on the following items: (1) the parties agree on a period for written and oral discovery; (2) the parties agree on a procedure for resolution of discovery disputes before the Court; and (3) the parties agree on a period for expert discovery.

The parties, however, have not been able to reach agreement, in particular, on the scope and time period for discovery.

Petitioners have not demonstrated any need for expedited discovery particularly in light of the Court's decision to deny Petitioners' emergency motion for a temporary restraining order finding no irreparable harm in the absence of their immediate release. In fact, two of the Petitioners, Chunn and McBride, have already obtained release. To the extent the two remaining Petitioners, Rodriguez and Rabadi, seek immediate relief, they already have filed motions with their sentencing judges for release pursuant to 18 U.S.C. § 3582(c)(1)(A), and have argued for

release, in part, based on the same allegedly unconstitutional conditions of confinement that they assert in this case. If those sentencing judges deny Petitioners' request for early release notwithstanding the allegedly unconstitutional conditions of confinement that Petitioners have argued before those sentencing judges, there would be no need for any discovery at all, much less expedited discovery, based on the findings of those sentencing judges.

Respondents are unable to agree at this time to Petitioners' unreasonable request for expedited discovery because Petitioners have failed to describe with any specificity the scope and nature of the discovery that they anticipate seeking and whether Petitioners' proposed expedited timeline is reasonable, practical or even feasible.

For example, Petitioners' discovery schedule provides Respondent only three business days to respond to requests for documents, a Fed. R. Civ. P. 30(b)(6) Notice, and Notice of Inspection (*i.e.*, from late in the afternoon on Friday, April 10, 2020, when Petitioners served their Notice of Inspection and Document Demands, and Sunday, April 12, 2020 (Easter) when they intend to serve their 30(b)(6) notice of deposition, until April 15, 2020). Petitioners then provide only one day to meet and confer regarding any objections, before seeking Court intervention (from April 15 to April 16). The Federal Rules contemplate and encourage the parties to meet and confer in good faith prior to seeking the Court's intervention to address any discovery disputes. One day to resolve those disputes is hardly sufficient to give the parties an opportunity to resolve those disputes without prematurely burdening the Court with matters that the parties could resolve on their own. Petitioners ultimately seek to complete discovery within eight business days or twelve calendar days (from April 10 to April 22).

In the parties' proposed case management plan, Petitioners ostensibly seek only "three documents" but, as their description of those documents make clear, they actually seek a myriad of documents relating to hundreds of inmates' private medical files and internal BOP records. Indeed, it appears that Petitioners request, among other things, three "types" of documents, as well as an onsite inspection, expert discovery, and depositions. Further, while Petitioners state that they seek only one 30(b)(6) witness, without having seen Petitioners' 30(b)(6) notice, Respondent cannot ascertain at this time whether only one witness would be sufficient to respond to the areas of inquiry identified in any forthcoming 30(b)(6) notice. It is also unclear if Petitioners will be seeking any document discovery in connection with their requested Fed. R. Civ. P. 30(b)(6) witness.

The Court should be mindful that BOP staff, who are working around the clock at the MDC, to safeguard the inmates under their care and supervision, would have the added responsibility of collecting information and responding to Petitioners' discovery demands, all while performing their normal duties. To put it simply, it is impossible for Respondent to comply with Petitioners' proposed discovery schedule. Petitioners' schedule would force MDC officials to turn away from their essential job duties—including their continued work ensuring the safety of inmates and staff members alike during a global pandemic—and instead spend their limited time sifting through paper discovery and responding to overly burdensome requests. Specifically, Petitioners' schedule would require, at an absolute minimum, the following, all within 48 hours of obtaining the requests: (1) the identification of custodians likely to possess responsive records; (2) the retrieval (in a forensically sound manner) of potentially responsive records; (3) the processing

of those records on an electronic-review platform; (4) document-by-document, line-by-line review of individual records for responsiveness; (5) the identification of any applicable privileges (including, where applicable, coordination with other agencies to ascertain whether and under what circumstances privilege should be asserted); (6) creation of a privilege log consistent with this Court's Local Rules; and (7) an agreement on confidentiality or protective order regarding any sensitive materials.

The President of the United States[2] and the Governor of New York State[3] have both called the current pandemic a "war." BOP officials must not be wrested "from the battlefield to answer compelled deposition and other discovery inquiries." *In re Iraq & Afghanistan Detainees Litig.*, 479 F. Supp. 2d 85, 105 (D.D.C. 2007), *aff'd sub nom. Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011). The Court should not order Respondent to attempt to produce discovery on such an impossible schedule. *See Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 166 (D.C. Cir. 2017) (ordering the impossible is an abuse of discretion).

Respondent simply cannot agree to the aggressive, expedited and wholly unwarranted discovery plan Petitioners propose.

IV. To The Extent Petitioners Seek Class Discovery, Respondent Objects To Any Class Discovery At This Time And Requests That Discovery Should be Limited to Petitioners Only

With respect to class certification, during the meet and confer, when asked whether Petitioners anticipated seeking discovery at this time relating to class certification, Petitioners could not confirm either way. Instead, Petitioners' counsel responded that they will be seeking discovery as it relates to all inmates at the MDC, including putative class members. In Petitioners' proposed discovery plan, they fail to provide any deadlines as it relates to class certification and, presumably, do not intend to seek discovery relating to class certification at this time.

However, without a commitment from Petitioners that they will not seek class discovery at this time, Respondent still does not know the full scope of Petitioners' anticipated discovery. If Petitioners were to seek class discovery at this time, Respondent would object to any such discovery.

At this stage in the litigation, where Petitioners have not even formally moved for class certification, Petitioners are not entitled to unfettered, class-wide discovery on the merits of the class claims. Indeed, Petitioners currently have standing only to pursue the remaining individual claims and to seek to have the proposed class certified. At the pre-class certification stage, discovery in a putative class action is generally limited to issues surrounding certification, such as the number of class members, the existence of common questions, the typicality of claims, and the

[2] Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (Mar. 19, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-6/

[3] Joanna Walters, "This is a war:" Cuomo warns coronavirus could overwhelm New York healthcare, Guardian (Mar. 19, 2020), https://www.theguardian.com/world/2020/mar/19/coronavirus-new-york-cuomo-healthcare-overwhelmed-please

representative's ability to represent the class. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 n.13 (1978). Utilizing putative class discovery "is within the discretion of the court, but it should not be used 'when it only will confuse the absentees, some class members can demonstrate that it will prejudice their rights, it will be employed prematurely or administered in an inappropriate fashion, or it will serve only to reduce the efficiencies of the class action.'" *Hapka v. Carecentrix, Inc.*, No. 16-2372-CM-KGG, 2017 WL 3386253, at *1 (D. Kan. Aug. 7, 2017) (citation omitted). Such confusion for absentee class members will definitely occur here, as many members of Petitioners' putative class are already seeking relief through other means before their sentencing judges in courts in this District, the Southern District of New York, and likely elsewhere.

Moreover, Petitioners have not articulated why class discovery is necessary when they have not even taken the steps necessary to move to certify a class. Indeed, providing civil discovery to Petitioners' putative class—which, as defined in the Petition, would include pre-trial detainees—would only circumvent the limitations placed on discovery in criminal matters. Allowing liberal civil discovery to proceed would subvert the restrictions placed on the discovery available to criminal defendants. *See Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1010 (E.D.N.Y. 1992) ("Allowing civil discovery to proceed—including the deposition of defendant Redzinski—may afford defendants an opportunity to gain evidence to which they are not entitled under the governing criminal discovery rules."). Importantly, in criminal proceedings, the Government's constitutional discovery obligation (as distinct from obligations under Rule 16 of the Federal Rules of Criminal Procedure) is defined by *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and related precedents (together, "*Brady*"). Thus, beyond the required production of material exculpatory evidence under *Brady*, "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). Accordingly, in the criminal context, it is well established that the Due Process Clause requires no open-ended discovery beyond the prosecution's *Brady* obligations. *Id.*; *see Gray* v. *Netherland*, 518 U.S. 152, 167-68 (1996); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) ("[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the [Government's] files"); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice)"); Fed. R. Crim. P. 16, 1975 Advisory Committee Notes ("the defendant has no constitutional right to discover any of the prosecution's evidence (unless it is exculpatory within the meaning of *Brady*)"). Requiring discovery here, in the civil habeas/class context, is therefore inappropriate.

The named Petitioners bear the burden of proof in moving for class certification: they must demonstrate that the case meets all of the requirements of Rule 23(a), fits into one of the categories of Rule 23(b) and that counsel meets the requirements of Rule 23(g). If facts are contested with regard to any of these issues, the Petitioners are entitled to develop those facts through the formal discovery process. Correlatively, the Respondent is entitled to utilize those same discovery devices to demonstrate that the facts cut against certification. The Supreme Court continues to caution that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are

satisfied." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013).

The Court has already acknowledged that the proposed class includes hundreds of individualized concerns relating to whether the class member's release would pose risks to the community for dangerousness or flight. The Court has acknowledged that the Eighth Amendment analysis for the class—which Petitioners now assert consists of the 537 inmates classified as vulnerable by the MDC Warden—as detailed by Petitioners' counsel, would not allow any Special Master appointed to consider that class member's dangerousness or risk of flight. *See* April 1, 2020 Transcript ("Tr.") 81:1-7; 70:4-10 (Petitioners argue that for the four named petitioners the only relevant inquiry regarding release is whether they are "at risk"); 77:4-5, 19-20 (Petitioners stating only that dangerousness or risk of flight "could be relevant" and "maybe those considerations would come into play"). The Court also noted that the Special Master, as proposed by Petitioners, "would be very quickly addressing claims on the merits of a very large class of individuals at MDC" Tr. 112:23-25, causing the Court to question whether this action is "an appropriate class action when there are … individual issues that would go to release, individual issues that could go to the medical circumstances [for an Eighth Amendment analysis]." Tr. 113:3-6. Accordingly, given the concerns already raised by the Court vis-à-vis the propriety of a class action to make 537 separate determinations relating to release of these inmates, any discovery requested by Petitioners in connection with their class allegations should be denied as premature.

Because Petitioners set forth no schedule for pre-certification discovery, the Court should not permit any discovery relating to class certification or discovery relating to any inmate other than the two remaining Petitioners at this time.

V. If The Court Were To Permit Some Discovery, The Court Should So Order Respondent's Reasonable Discovery Plan

In the event that the Court permits limited discovery here, Respondent's proposed discovery plan provides for a reasoned and principled approach to discovery that balances the need for expedited discovery, while recognizing that discovery must be proportional to the needs of the case and not overly burdensome. Respondent's proposed discovery plan provides for the parties to complete expedited discovery -- with time limits shorter than those set forth in the Federal Rules -- within less than two months.

Respondent thanks the Court for its consideration of this matter.

Respectfully submitted,

RICHARD P. DONOGHUE
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Enclosure

cc: The Honorable Roanne L. Mann, U.S. Magistrate Judge
All Counsel of Record (by ECF)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI by his Next Friend Migdaliz Quinones; and JUSTIN RODRIGUEZ by his Next Friend Jacklyn Romanoff, individually and on behalf of all others similarly situated,

Civil Action No.
20-CV-1590 (Kovner, J.)

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

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[PROPOSED] CASE MANAGEMENT PLAN

The parties in the above-referenced matter submit the following proposed case management plan pursuant to the Court's April 8, 2020 Order, as follows:

A. **As set forth in Respondent's separate letter-motion, dated April 10, 2020, Respondent objects to any discovery at this stage of the litigation because Petitioners have failed to demonstrate good cause for discovery**. In habeas cases, Petitioners are required to demonstrate good cause for conducting discovery.

Petitioners' position. As will be set forth in greater detail in response to Respondents' letter-motion, Petitioners can demonstrate good cause for the limited expedited discovery they seek in support of the imminent filing of their motion for a preliminary injunction. Petitioners request leave to respond to Respondents' letter-motion for a stay of discovery by 5 p.m. on Saturday April 11, 2020.

B. **Respondent's request for a stay of discovery**. As set forth in Respondent's separate letter-motion, dated April 10, 2020, Respondent anticipates moving to dismiss Petitioners' habeas petition. Respondent requests a stay of discovery pending motion practice on Respondent's anticipated motion to dismiss.

Respondent proposes the following schedule with respect to his anticipated motion to dismiss:

- Respondent's motion to dismiss due by April 24, 2020;

- Petitioner's response due by May 8, 2020; and

- Respondent's reply due by May 15, 2020.

Petitioners' position. Petitioners intend to oppose Respondents' request for a stay of discovery pending motion practice on Respondent's anticipated motion to dismiss. Petitioners request that Respondents be directed to file their motion by Thursday, April 16, 2020 in accordance with the statutory maximum timeframe provided for response to a habeas petition pursuant to 28 U.S.C. § 2243.

C. **Proposed discovery schedule**.

Respondent's position. As set forth in Respondent's separate letter-motion, dated April 10, 2020, Respondent objects to any discovery at this time.

Petitioners' position. As will be set forth in Petitioners' separate opposition to Respondent's letter-motion, Petitioner seeks to pursue limited expedited discovery at this time in support of their contemplated motion for a preliminary injunction. Specifically, Petitioners seek to conduct one 30(b)(6) deposition, and request that Respondent produce three documents: (1) Testing protocols for Covid-19 in effect at the MDC from February 1, 2020 to date; (2) Documents sufficient to show how much soap was received at the MDC from February 1, 2020 to date and (3) All sick call requests for medical care made by people incarcerated at MDC from March 13, 2020, in redacted form to omit the person's name and DIN number. Petitioners also seek to have their correctional health expert Dr. Homer Venters conduct an inspection of the MDC pursuant to a Notice of Entry on Land served on Respondent on April 10, 2020.

In the event the Court orders discovery, Respondent objects to Petitioners' request for expedited discovery, and sets forth his proposed deadlines below. By proposing these alternative dates, Respondent does not waive any objections or concede in any way that the discovery sought is appropriate, or should be permitted including, but not limited to, an inspection of the Metropolitan Detention Center, Brooklyn, and reserves his right to raise any applicable objections. Respondent further reserves the right to serve supplemental discovery requests.

Description	**Petitioners' Proposed Deadline**	**Respondent's Proposed Deadline**
Petitioners serve 30(b)(6) Notice of Deposition	Sunday, April 12, 2020 by 5 p.m.	No objection to Petitioners' proposed deadline.
Respondent shall serve Discovery Requests including notices of deposition. Respondent anticipates scheduling depositions of the Petitioners for a date and time mutually convenient for all parties.	Monday, April 13, 2020 by 5 p.m.	Wednesday, April 15, 2020

Respondent Provides Responsive Documents or Objections To Petitioner's Discovery Demands and Responses or Objections to the Notice of Inspection	Wednesday, April 15, 2020 by COB	Friday, May 1, 2020
Petitioners Provide Responsive Documents or Objections to Respondent's discovery requests	Wednesday, April 15, 2020	Friday, May 1, 2020
Parties Submit Letters to Court regarding any disputes on scope of discovery	Thursday, April 16, 2020 by COB	Friday, May 8, 2020
30(b)(6) deposition	Monday, April 20, 2020 at 10 a.m.	Without waiving any objections, Respondent proposes the week of May 4, 2020 for the 30(b)(6) deposition(s) on a date and time mutually convenient for all parties.
Plaintiff's Expert's Inspection of MDC	Tuesday, April 21, 2020 at 10 a.m.	On the afternoon of April 10, 2020, Respondent received Petitioners' Inspection Notice. Respondent needs an opportunity to review the Notice. Without waiving any objections, Respondent cannot agree to a date at this time.
Petitioners' expert disclosures due. Parties to schedule deposition of Petitioners' expert for a date after the submission of Petitioners' expert report and disclosures.	Petitioners do not believe that expert depositions and reports are appropriate for an expedited proceeding.	Friday, May 15, 2020
Respondent's rebuttal expert disclosures due	N/A	Friday, June 5, 2020

Petitioners' briefing in support of motion for preliminary injunction including any supplemental expert report	Wednesday, April 22, 2020 by COB	Friday, June 5, 2020
Respondent's Response to Petitioner's preliminary injunction motion	Friday, April 24, 2020 by COB	Friday, June 19, 2020
Petitioners' reply in further support	Saturday, April 25, 2020 by COB	Monday, June 22, 2020
Preliminary Injunction Hearing	Monday, April 27, 2020	Week of June 22, 2020

Dated: New York, New York
April 10, 2020

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