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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ANTHONY MAYS, Individually and on behalf of a class of similarly situated persons, et al.,	Case No. 20 CV 2134
Plaintiffs,	Chicago, Illinois April 15, 2020 3:16 p.m.
-vs-	
COOK COUNTY SHERIFF DART J. THOMAS, Sheriff of Cook County,	
Defendant.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MATTHEW F. KENNELLY

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(Proceedings heard in open court:)

THE COURT: Okay. This is Judge Kennelly.

Claire Newman, if you're on, you can go ahead and call the case.

04:48:41 CLERK NEWMAN: 20 C 2134, Anthony Mays versus Cook County Sheriff Thomas Dart.

THE COURT: Okay. This is Judge Kennelly. Just so you know, other than Mr. Bruton, there's one other person in the courtroom who I assume to be a reporter.

04:48:41 Can the lawyers who are on for the plaintiffs give your names, please?

MS. VAN BRUNT: Good afternoon, Your Honor. Alexa Van Brunt for the plaintiffs.

MR. BOWMAN: Locke Bowman, also for plaintiffs.

04:49:13 MR. WEIL: Good afternoon, Judge.

MS. GRADY: Sarah --

MR. WEIL: Steve Weil for plaintiffs.

MS. GRADY: Sarah Grady for plaintiffs.

MR. GERSTEIN: Charles Gerstein for the plaintiffs.

04:49:30 MR. KARAKATSANIS: Alec Karakatsanis for the plaintiffs.

THE COURT: Is that everybody for the plaintiffs' side?

Okay. And can defense counsel give your names,

04:49:44 please?

MR. SHANNON: Certainly, Your Honor. Robert Shannon on behalf of defendant Dart.

MR. LYDON: Jim Lydon on behalf of the Sheriff.

INDISCERNIBLE VOICE: (Indiscernible) on behalf of Sheriff Dart.

04:50:15 THE COURT: Okay. So the last person we need. The person before that was kind of garbled, but I know that was James Lydon. The person after Mr. Lydon, can you say it again?

04:50:31 Yeah, you've got a bad connection. We're not hearing you. Let's skip on to the next person while that person tries to readjust.

[Inaudible].

THE COURT: Okay. All right. So stop. Everybody

04:50:55 stop. Stop. Stop.

I have Shannon. I have Lydon. There was a female voice that I couldn't get the name, and there were two male voices talking at the same time. So let's go with the female voice next.

04:51:10 MS. SPERRY: Gretchen Sperry.

THE COURT: Thank you.

Now keep going.

MR. VAUGHT: Adam Vaught for the defendant.

MS. DIERKS: Lari Dierks for defendant Dart.

04:51:35 MR. SCOUFFAS: And Nick Scouffas from the Cook County

Sheriff's Office.

THE COURT: All right. Is that everybody on the defense side?

All right, is there --

04:52:01 MR. HENRETTY: (Inaudible) This is also Lyle Henretty, Your Honor --

THE COURT: Mr. Henretty.

MR. HENRETTY: -- on behalf of the County.

MR. HENRETTY: Yes.

04:52:28 THE COURT: So is there anybody on that hasn't given your name other than people who are court staff?

All right. So we're going to talk about two things, and then I may have a question or two for the plaintiffs on another point or two. And the sequence in which we're going

04:52:47 to talk about this is the expedited discovery motion first, the PLRA issues second, and I'll figure out when to ask the other thing or two that I need to ask of the plaintiffs.

So on the expedited discovery, I have some questions for the plaintiffs. So who's going to be answering those?

04:53:18 MS. VAN BRUNT: Your Honor, this is Alexa Van Brunt. I'll be doing my best to answer.

THE COURT: Okay. So on the question of depositions of Miller and Menella, M-E-N-E-L-L-A, what are you hoping to get from those that's not covered in their affidavits?

04:53:40 MS. VAN BRUNT: Your Honor, for Mr. Miller, we find

(inaudible) it's very important on the issue of social distancing.

THE COURT: So pause.

MS. VAN BRUNT: And --

04:54:08 THE COURT: Pause.

Okay. It's not a great connection, so you're going to have to speak slower.

MS. VAN BRUNT: Apologies.

Mr. Miller is particularly important as to the issue

04:54:20 of social distancing in the jail and capacity on the tiers. That was a major point of the Sheriff's response brief was that that effort was ongoing, that they were working towards 50 percent capacity.

Mr. Miller's exhibits to his declaration made clear

04:54:40 they were not at 50 percent capacity in many dorms and were, in fact, at 70 to 100 percent capacity in many dorms, making social distancing impossible.

Mr. Miller obviously has a lot of information about the operations on the ground in the jail, and so what we want

04:54:59 to know from being in a short deposition is about what that social distancing looks like now because, as you can see from our pleadings, social distancing is a major part of our request for relief in the next proceedings.

THE COURT: So in terms of how many people are on

04:55:19 what tiers and what the capacity of the tiers are and how

that's changed or not changed over the past number of weeks, I mean, he's not going to have that information committed -- he's not going to know that information off the top of his head. He's going to be getting it from documents, and I'm
04:55:39 just trying to get a handle on -- unless I'm missing something.

I mean, unless this is like some sort of Encyclopedia Brown here who basically carries around all information in his head.

04:55:57 What -- doesn't it make more sense just to ask for whatever the documentation is that is of a particular date?

MS. VAN BRUNT: I -- I understand that point, Your Honor. If we're able to exhaust all efforts that the Sheriff is undertaking through a documentary process, an evidentiary
04:56:17 process, because the issue is it's just not entirely clear what is being done entirely.

The Sheriff says they're making efforts, and they say that several times, and we need to understand the extent of those efforts. And definitions are a really useful language
04:56:46 that is it just the 50 percent capacity?

What else is being done in what tiers, in what division as to the quarantine population, as to the PUI population, as to the non-quarantine population? It's just we need specificity on that and --

04:57:08 THE COURT: So I'm now going to ask you about

Dr. Menella. So what is it you're hoping to get from Dr. Menella if you get to take a deposition of her?

MS. VAN BRUNT: Sure. And, Judge, if I can beg your patience and turn that over to Mr. Bowman who has this down pat.

04:57:34

MR. BOWMAN: Judge, with respect to Dr. Menella, the defendants have proffered her affidavit on multiple occasions with respect to the ability of Cermak to respond medically to the crisis in the jail, and our expectation is that Dr. Menella will be in a position to respond to questions about the extent to which Cermak is currently at or above its capacity to respond to the crisis and about the circumstances that -- that might unfold and how that would interact with Cermak's ability to respond.

04:58:09

04:58:37

So that's -- that's essentially yet the issue of the medical capacity within the jail, the expectations of further spread, further overwhelming of Cermak, and how that would look.

THE COURT: So I guess, again, a similar question to what I asked Ms. Van Brunt. So to the extent that what you're talking about is, you know, numbers of beds, where they are, how many are occupied, other types of equipment that's available, et cetera, et cetera, again, it's not likely that -- maybe she will know that off the top of her head, but presumably she's going to have to consult records.

04:58:59

04:59:17

So why doesn't it make more sense just to get the records on those?

MR. BOWMAN: I -- I think the records are important and -- and would inform their limited questions that we would ask, but the records often are not completely clear.

04:59:54

And from the affidavits or the declarations that Dr. Menella has submitted, I think there is an unanswered question about the monitoring on the tiers, the way that looks, the extent to which it's possible, the extent to which staff is stressed and unable to do it, the extent to which the -- the degree of monitoring that should occur in compliance with accepted medical practice and then how things would look with respect to the number of beds, when a bed has to be used, and what the drill is where individuals have to be moved to Stroger or elsewhere, and, you know, at least the documents that are on the table so far are not sufficient to answer those questions.

05:00:27

05:01:04

THE COURT: Well, you haven't gotten any, so -- because there haven't been -- there hasn't been any discovery done.

05:01:19

MR. BOWMAN: Right. I mean, there's been an extensive proffer of documentary evidence, but that's -- that's true, and -- that is true.

THE COURT: Okay. So general question on both of those, and I'm just anticipating, you know, something that

05:01:37

Mr. Shannon or one of his colleagues, I think it was Mr. Shannon brought up the other day having to do with, you know, we're talking about people here who have not just very significant but very urgent and important responsibilities
05:01:54 that they're dealing with, you know, on an hourly, daily basis, and a deposition is a very cumbersome thing that requires a lot of, you know, time and effort, not just the however long you're taking the deposition but the time before it and after it.

05:02:13 So my other question then is assuming that I think you need this information, why doesn't it make more sense to have you to say, okay, let's -- let's -- let's submit some really focused and targeted and limited interrogatories that are directed to this stuff, which, you know, the Sheriff will
05:02:36 have to answer under oath, consulting, you know, whoever he consults, whether that's Mr. Miller or Dr. Menella or whoever, and do it that way.

So -- and obviously they'd still have to be involved in some way, but it would probably require less of a
05:02:50 commitment of time than a deposition and all the preparation for that. So is -- is there some reason to think that that's not an adequate alternative, assuming I think you're entitled to do this discovery? And if it's not, tell me why not.

MR. BOWMAN: Your Honor, there's no reason specific
05:03:10 to this case. The general concern that we have with respect

to that approach just has to do with the issue of follow-up questions and the reality that in some circumstances, the deposition can be a lot less cumbersome in terms of being able to frame a second question in response to the answer that's given to clarify --

05:03:40

THE COURT: Okay.

MR. BOWMAN: -- an answer and move forward --

THE COURT: I get your point on that. So I'm going to ask a question that really goes to a broader issue, and there's maybe some overlap with other things I want to ask here.

05:03:48

So hearing what you're saying, it sounds like what you are trying to ascertain are -- is information regarding whether and the extent to which it is, A, possible for the jail to do more social distancing, and, B, whether they're actually doing it.

05:04:08

Am I hearing you right?

MR. BOWMAN: I think that's a fair summary, yes, sir.

THE COURT: Okay. So does that mean that it is not your position, the plaintiffs' position right now, that it's not possible for the jail to do something that would adequately, you know, consistent with Fourteenth Amendment rights, protect people within the jail?

05:04:26

MS. VAN BRUNT: Your Honor, this is Alexa Van Brunt.

We believe that's dependent on the Sheriff's position

05:04:51

here, and that's not exactly -- it's not exactly clear what that is as our remedies requests have made clear --

THE COURT: I don't understand what you mean when you say it's dependent on the Sheriff's position. Explain that to me.

05:05:11

MS. VAN BRUNT: Well, for instance, one of the remedies we sought was transfer, and we believe --

THE COURT: No, I understand that, but, I mean, that's -- that involves taking somebody out of the confines of the jail and putting them in some other type of confinement or detention or whatever.

05:05:29

If -- if you -- if your view is that there's -- that that's required now because it's not possible for the Sheriff to confine everyone who's currently in the jail in the jail in a way that would be consistent with what you contend are his constitutional obligations, then you don't need the discovery.

05:05:49

And so conversely, the fact that you've told me that you need the discovery in order to find out those things suggests to me that your position is not that the Sheriff is not capable of complying with his constitutional obligations within the confines of the jail. Otherwise, you wouldn't need the discovery.

05:06:11

MS. VAN BRUNT: Correct, Your Honor --

MR. BOWMAN: Your Honor --

THE COURT: One person gets to answer that --

05:06:21

MS. VAN BRUNT: Sorry, this --

THE COURT: No. Stop. One person is going to get to answer that question. So do rock paper scissors and figure out who it is before somebody starts talking.

05:06:40 MS. VAN BRUNT: Could I --

MR. BOWMAN: That would be Ms. Van Brunt.

THE COURT: Okay.

MS. VAN BRUNT: Sorry.

The first steps, you're right, Your Honor, the reason

05:06:52 we're seeking the discovery is to find out whether it is possible to do social distancing in the actual jail facility at 26th and California, that is correct, and that's an essential first step, and it is not clear yet on the record we have.

05:07:09 THE COURT: Okay. So then it's not your position that at this moment in time, that you're not taking the position that it's not possible for the Sheriff to comply with the requirements of the Fourteenth Amendment within the confines of the jail, correct? That's not your position.

05:07:33 MS. VAN BRUNT: Based on the evidence we have now, that is not our position. It is up to the Sheriff, it's our position, as to whether that is possible, and we need records to verify that.

THE COURT: Okay. So I -- I want to take the -- I

05:07:53 want to take the directly responsive part out of that, the

directly responsive part of that, repeat it to you and make sure I'm understanding it right.

What I heard you just to tell me that based on the state of the record as it currently exists right now at this moment, it is not the plaintiffs' position that the Sheriff cannot possibly comply with the requirements of the Fourteenth Amendment within the confines of the jail.

Am I correct?

MS. VAN BRUNT: At this moment on the record we have, that is correct, Your Honor.

THE COURT: All right. Good. Thanks.

All right. So I have one other question about the document requests, and it really -- it's the first one, which is the one that asks for basically identification of folks that have, you know, various types of medical conditions, and I guess it struck me just on its face that it's a -- it's a pretty large undertaking.

You may know more than I do, at least from your perspective, and I can certainly ask the Sheriff's counsel this, but do you have some reason to think that this is the type of thing that can be easily, in a relatively non-burdensome way, pulled up out of, you know, whatever records the Sheriff and the jail might have about detainees currently? I mean, you're basically --

MS. VAN BRUNT: Yes, there's --

THE COURT: -- asking, there's essentially a list of, you know, maybe a dozen or so conditions, and you want to know anybody who has any of those conditions or who is over 65. The 65 part my guess is you can do that with a computer search.

05:09:44

Is the rest of it, to your way of understanding, readily accessible?

MS. VAN BRUNT: Yes. Your Honor, it is our understanding, based on talking to people who have actually worked inside the jail, including our expert who submitted a declaration, Dr. Puisis, that there is a system by which detainees are tagged with specific health conditions in the system, and that they can then be pulled up by those health conditions.

05:09:54

And there is, as our discovery makes clear, there is a health alert put on detainees that is transmitted between Cermak and the Sheriff's Office.

05:10:19

THE COURT: Okay.

MS. VAN BRUNT: I will say one more thing, which is also our position that the Sheriff should already have a list of this medically vulnerable group for purposes of protecting them under the Constitution. So whether or not they have a list is relevant due to the underlying claim also.

05:10:34

THE COURT: All right. Thanks.

Okay. So I want to give defense counsel a chance to

05:10:55

talk about the request for expedited discovery, and, I mean, you may have various points on that, Mr. Shannon and Mr. Shannon's colleagues, but I'll let you do them in whatever sequence you want to, and then I'll just come back at the end
05:11:19 and pick up whatever questions I have.

So go ahead.

MR. SHANNON: Okay. Thank you, Your Honor.

I was wondering if it would make sense to start, but I'll take Your Honor's direction on this, with some updated
05:11:34 information on numbers and statistics coming out of the jail because I know that is something that Your Honor --

THE COURT: That would be terrific.

MR. SHANNON: Okay. And I will tell Your Honor that we are working on a more comprehensive and formal report along
05:11:50 these lines, but I do want to make it on the record, and please know I've done my best.

I have to qualify what I'm about to say with only in the respect that I've done my best investigation to verify these numbers, and I do want to provide them to you, but we
05:12:13 will get you a more formal presentation as part of one of our more recent -- or upcoming filings, rather.

So according to the numbers that we are looking at and how we are tracking, Your Honor, it does appear that the situation at the jail spiked approximately a week and a half
05:12:35 ago. And, for example, the number of detainees testing

positive is decreasing. We had gone from a high of 289 positive tests, and we currently today are at 167 positive tests.

THE COURT: Okay. I have to ask you a question about that.

05:13:02

So unless -- so I may be missing something fairly obvious here, but a detainee is a detainee and if you have -- the number wouldn't go down unless people are either being sent out or not being counted for some other reason or they've passed away.

05:13:19

MR. SHANNON: Well, not the latter. Exactly, and if I could add, Your Honor, what you are picking up on is that we currently have approximately 149 detainees in the convalescent tier, all right? These are detainees that are at various stages along in their recovery.

05:13:49

THE COURT: Got it.

MR. SHANNON: So that 149 is not included in the 167 figure that I provided.

THE COURT: Understood. Okay. Now I get it.

05:14:01

MR. SHANNON: Okay. Walking through my list, Judge, the number of those detainees pending test results also appears to be going down, and that number currently stands at 15.

THE COURT: So those are people who have been tested --

05:14:26

MR. SHANNON: The numbers --

THE COURT: Those are people who have been tested, and you're waiting for the results?

MR. SHANNON: I believe that is correct.

05:14:35 THE COURT: Okay. Go ahead.

MR. SHANNON: The number of negative test results is going up, so these are, you know, numbers that we want to go up. And that number currently stands at 56.

THE COURT: Okay.

05:14:56 MR. SHANNON: The number of daily bookings, I have those figures, too, if you would like, Your Honor.

THE COURT: Okay. That would be great, yeah.

MR. SHANNON: And I believe Mr. Scouffas can add to this, if he can. I believe I just have release figures, Your

05:15:14 Honor, and --

THE COURT: Fair enough.

MR. SHANNON: I had provided aggregate population numbers at the last hearing. 84 detainees were released yesterday. 34 were released to electronic monitoring. And,

05:15:38 Your Honor, I'm sorry, I should know whether that 34 is included in the 84 or not, and I'll have to find that out for you.

THE COURT: I get it. That's okay. No worries.

MR. SHANNON: Okay. And then should I move on?

05:15:55 THE COURT: Yes, you should. Thanks.

MR. SHANNON: So we have spent a lot of time, Your Honor, trying to digest and appreciate the plaintiffs' brief and their filing. Frankly, some of the comments that we've heard today are impacting that analysis, so that is ongoing.

05:16:18 We did pick up on the fact that what they appear to be focused on happens to be two aspects that were covered as part of our emergency proceedings and importantly a subject of your TRO order, which is still in effect, at least as it relates to the emergency nature of things and the timing of

05:16:48 what we'll be dealing with.

I suppose what I would start with, Judge, is to make sure that before we get into the contours and the allowance of discovery, we are having what we believe to be a very important discussion about some threshold legal issues, which

05:17:11 at the very least we believe should affect the scope of discovery and allowable discovery.

So, for example, and frankly, Your Honor, I'm going to have to process this with my colleagues with the benefit of Ms. Van Brunt's comments here today. One very important

05:17:30 threshold legal issue that -- that we think that plaintiff appears to be suggesting is that they could prove a reasonable likelihood of success on the merits even where we are in compliance with not only the Court's emergency order, but with the CDC guidelines, and whether they -- whether they, as a

05:18:02 legal matter, could establish that the Sheriff is acting

unreasonably -- objectively unreasonably in following the CDC guidelines for correctional detention facilities.

THE COURT: Let me just interject.

MR. SHANNON: And --

05:18:17 THE COURT: Mr. Shannon, let me just interject.

MR. SHANNON: Okay.

THE COURT: I read the plaintiffs' written materials the same way. There was a short discussion in there about whether compliance with, you know, rules, regulations, advice

05:18:37 from authoritative sources is sufficient to comply with the Constitution.

The argument was made that it -- it isn't necessarily, and that was then part of a discussion, if I'm recalling right, that one of the things that the CDC

05:18:58 guidelines do that the plaintiffs, I think, were contending is not constitutionally acceptable in the context of correctional or jail -- correctional facilities or jails is the CDC guidelines, as was pointed out, allow leeway for, for want of a better word, feasibility, and the plaintiffs are saying,

05:19:25 maybe not quite in this way, but saying that's really constitutionally not a concern or not an issue.

So I read it the same way you did that the plaintiffs were contending that even if they've -- even if you comply, the Sheriff complies with CDC guidelines, that is not the end

05:19:43 of the story.

MR. SHANNON: And we think that that's an important legal threshold issue, Your Honor. And stated another way, it did not appear to us, at least on the papers, that plaintiff is suggesting that we -- that we are out of compliance with
05:20:00 CDC guidelines or Your Honor's temporary restraining order.

I suppose they would prefer to have, you know, more assurances in that respect, but that -- that, I think, is an important legal threshold issue and potentially dispositive on whether we should be getting into discovery.

05:20:21 The plaintiffs' brief also but relatedly appears to really take an overly narrow, and this is certainly not to understate the importance of social distancing, but an erroneously narrow view of the methods and tools available to a detention facility to guard against the spread of the virus,
05:20:51 and there's no accounting, for example, for the distribution of masks.

There is an important legal threshold issue, Your Honor, on class certification that has not been dealt with here. So I -- before we get to the suggestion of written
05:21:11 interrogatories, our position really is that as a matter of efficiency and as a matter of staging and structure, there are important threshold legal issues that we think could be dealt with that would likely eliminate the need for any discovery or at least limit it in a way that is much more workable than
05:21:36 suggested.

THE COURT: So let me ask you --

MR. SHANNON: For example --

THE COURT: Let me ask this question back to you, and that would be -- so, I mean, I assumed honestly that part of
05:21:49 your argument on discovery was going to be we don't need it because there are legal barriers to the case, and that's kind of what you're saying.

So what -- do you have a proposal as to how to get those out on the table, get them -- and get them decided by
05:22:03 me?

MR. SHANNON: It would be -- it would be certainly very quick briefing.

THE COURT: So are you talking about you -- I want to get real specific on this.

05:22:18 Are you talking about you filing some sort of a -- I don't know what it would be. I don't know if it's necessarily a motion to dismiss or whether it's a -- whether it's a response to the preliminary injunction motion that basically says that -- argues that it's legally -- that even if it's --
05:22:34 that it's legally deficient in some way. I mean, I'm not sure if you've gotten far enough into it to have a sense of what it is exactly you want to file.

So that's the first question. And then the second question is when are you proposing to file it?

05:22:49 MR. SHANNON: Right. So, Your Honor, to be frank

with you, we have been round tabling it out whether or not we need to ask for, and I think we need to reserve the right at least to ask for an opportunity to respond to the filing of last night in writing, but we knew that we were going to --

05:23:07 THE COURT: Sure.

MR. SHANNON: -- our insistence upon that was going to be dependent upon what we talked about here today.

And to answer your question, I think it would really be focused on addressing the threshold substantive issue,

05:23:28 which appears to be one of social distance because in our minds, if -- pending resolution of that issue, you would not even get to the PLRA or habeas or release or transfer issue, if I'm understanding the plaintiffs' view of things, that we would deal with that issue first and that we would -- we

05:23:52 would, on the arguments on papers already filed, raise what we believe to be threshold issues to establish that the discovery that they are seeking is not appropriate or necessary at this point and -- because they can't prevail on a reasonable likelihood of success on the merits.

05:24:15 THE COURT: Okay. So that was question 1. So do you have an answer to question 2, question 2 being when?

MR. SHANNON: Could I -- could I consult with my co-counsel as we answer that question, Your Honor?

THE COURT: So, you know, yeah. I mean, honestly I

05:24:33 would have thought you'd know an answer to that, but that's

fine.

I mean, if you all want to -- everybody wants to group text everybody back and forth, because I assume you're not in the same spot, go for it.

05:24:49 MR. SHANNON: I'm going to hand it over to Ms. Sperry, if I could, to speak to that.

THE COURT: Okay. So Ms. Sperry, you've now been put --

MR. SHANNON: Gretchen, are you there?

05:25:10 MS. SPERRY: I'm sorry. I was on mute.

MR. SHANNON: Oh, sorry.

MS. SPERRY: Sorry about that.

My problem this time was that I was on mute. I apologize.

05:25:29 THE COURT: Go ahead.

MS. SPERRY: I think the number of issues that we would be addressing are -- are lengthy. They're substantive. They're dispositive.

THE COURT: Just give me the bottom line, okay?

05:25:41 Honestly, there's not enough hours in the day for me to go through all of this, so just give me the bottom line. I just want an answer to my question: When?

When is somebody going to be, on the defense side, going to be in a position to file whatever it is you want to

05:26:02 file that basically explains to me why there shouldn't be any

discovery because there's these basic infirmities in the plaintiffs' case? Just give me a date. What's the date? And we'll talk about it.

MS. SPERRY: Friday night. Friday night.

05:26:20 THE COURT: Friday night? You mean as in the day after tomorrow?

MS. SPERRY: Correct.

THE COURT: Okay.

Okay. And just to be clear, what you'd be filing,

05:26:37 and I gave kind of a summary of my own there a second ago, you'd be filing some sort of a -- maybe not a complete response, but at least a partial response to the motion for preliminary injunction and the motion for expedited discovery that basically says here's these basic problems with the

05:26:58 plaintiffs' case. And when I said PI and discovery, it could also include the class cert. issue obviously because that's embedded in there.

There's these basic problems in the plaintiffs' case that ought to cause you to either carve it way back, eliminate

05:27:14 it entirely or, at a minimum, you know, eliminate, carve back or whatever the discovery.

Is that a reasonably-close-enough-for-government-work summary?

MS. SPERRY: That's exactly right, Your Honor.

05:27:30 THE COURT: Okay. All right.

All right. So let's just -- let's just pause right there for a second, and I want to switch over to another issue because, I mean, obviously this is a very significant case, but I've got other cases, too, including people who are -- at
05:27:49 the same time I'm dealing with this, I'm essentially acting in the same capacity as those judges who are hearing the bond motions that the public defender is filing, and I've got one of those that I've already moved back during this phone call a little bit and I'm going to have to deal with at some point.

05:28:05 So I wanted to ask a couple of questions about the -- about the PLRA issue, and starting off with -- so, look, guys, these are going to be very specific questions. I want very direct and specific answers. If you start hemming around, I'm just going to cut you off.

05:28:26 So on the PLRA three-judge court issue, my understanding of the plaintiffs' position when you filed the previous round of briefs, in other words, the ones that were on file before the TRO hearing, was that you were asking -- you were asking -- you were suggesting that the creation of a
05:28:47 three-judge court be put into the works, in other words, get the ball rolling so that it's ready because we think we're going to need it, and you weren't specifically asking for it at that point.

I -- I think that I'm reading the paper, the document
05:29:03 that you filed last night, as saying, okay, it's time to

create a three-judge court. So first question is am I reading that right?

MS. GRADY: Your Honor, this is Sarah Grady. I --

THE COURT: It's -- I just -- I'm sorry, Ms. Grady, I
05:29:23 just need a one-word answer, and then I'm going ask the follow-ups.

So the answer is yes, and so the question I then have is what is it, how is it that you think the trigger for doing that has been met in light of what was said to me by Ms. Van
05:29:43 Brunt that it isn't the plaintiffs' position right now that it's not possible for the Sheriff to comply with the Fourteenth Amendment within the confines of the jail?

MS. GRADY: Our position is that the three-judge panel should be convened unless the Sheriff takes the position
05:30:06 that social distancing is possible. If the Sheriff is -- believes that remedy is available, then it is our position that that's a remedy that should be pursued first.

If the Sheriff agrees that social distancing is impossible, it is our position that three-judge panel should
05:30:36 begin.

THE COURT: Yeah, I'm just -- I'm trying to process that here for a second.

Okay. I mean, honestly, and with great respect, I regard that as a bit of a dodge. Ms. Van Brunt said to me,
05:30:59 and I asked her not once but twice and she said it twice, it's

not the plaintiffs' position at this point that the record reflects that the Sheriff can't comply.

There's such a thing as a burden of proof here, and, I mean, I understand why strategically, tactically or whatever

05:31:20 you want to throw this back into the defendant's lap and say, well, let's hear what they have to say about it, and I can maybe require them to include that in the document that they want to file on Friday; but there has -- the trigger has to be met in some way. Something has to happen in order for the

05:32:07 trigger under 3626(a)(3)(A) to be met, and I'm -- I just need to know what it is. What's -- has the trigger been pulled yet, and what is it that's pulled the trigger?

MS. GRADY: Well, 3626(a)(3)(A)(1) requires a previous order for less intrusive relief. I believe that the

05:32:49 order on improving conditions would satisfy that, but I -- I agree that the record as it stands does not currently support a finding that social distancing is impossible.

I mean, quite frankly, our concern is one of timing. So if defendants are taking days to respond and put their

05:33:19 position out there, then we've lost several days. I mean, that's just parked on the table why --

THE COURT: I get that .

MS. GRADY: -- we are taking the position we are.

THE COURT: I get that. Okay.

05:33:40 MS. GRADY: So -- so the way the record stands as it

stands right now, we don't have evidence in the record sufficient for Your Honor to make a finding that social distancing is impossible, and -- and so that may need to be a predicate.

05:33:54 I do believe that at the very least, the Sheriff should either today or part of their brief go on record as to the possibility of that, and it may be that we need to have that predicate order before a three-judge panel is convened.

The reason I would like to have that answered today

05:34:22 is obviously in the interests of time and the safety of our clients.

THE COURT: Okay. I will -- I do want to say one thing, and I don't think I'm talking out of school by saying this, that I -- I on -- what's today? Today -- whatever date

05:34:39 that I issued the order. I'm blanking on what date that was.

CLERK BRUTON: Friday.

THE COURT: Friday. On Friday, I notified Chief Judge Wood of the pendency of the case and of the possibility that at some point in the future there might be a request made

05:35:01 to appoint a three-judge court, and so the Chief Judge of the Circuit is aware of it.

And as I understand it, the PLRA reverts over to 28 U.S.C. I think it's 2283, or something like that, which gives it to the Chief Judge of the Circuit to appoint it. But I

05:35:24 just wanted -- I did that to either alert her, give her

a heads up, so to speak, so she was aware the issue is out there. So that much has been done, so it's not going to come as a great shock if we get to that point.

So -- okay. I think I've got -- I think that's -- I
05:35:53 think I've got the answer that I needed to the question. So here's what I -- here's what I think -- let me -- well, actually, let me ask Mr. Shannon another question, and you did speak to this a little bit yesterday when we were talking just hypothetically about the anticipated motion for expedited
05:36:13 discovery.

Can you -- do you want to talk at all about -- and if Mr. Scouffas wants to chime in because I know Mr. Scouffas has a really good sense, as good as anybody, about the nature of records and how accessible they are and so on. I mean, I've
05:36:34 dealt with Mr. Scouffas in quite a lot of cases, and he knows this stuff.

So do you want to talk at all about the question of burdensomeness, No. 1, on the records request that the plaintiffs have proposed to make and, No. 2, the question of
05:36:51 burdensomeness on the possibility of depositions of the two individuals that they've asked for?

MR. SHANNON: Yes, Your Honor. I'll start, if it's all right, and then I'll let Mr. Scouffas weigh in.

One, and I don't mean to be dramatic about it, but to
05:37:42 follow up on my prior comments, the burden now is different

than the burden than the other time, and everything --

THE COURT: Understood.

MR. SHANNON: -- we do that details these people is burdensome.

05:38:02 I -- as it relates to deposition discovery, that would be extraordinarily burdensome because there's preparation that's involved, there's time that's involved. I will tell Your Honor frankly that one of the real concerns that we have in terms of how this would have to be structured

05:38:27 before we would be, we believe, able to get into any sort of a meaningful discovery process, and this has been part why we think our threshold legal issues are important, is we think all things being equal, plaintiff has already apparently had an opportunity to consult with experts and has had the benefit

05:38:47 of their thoughts and input, and we don't -- I think we would not agree, and we think it's cumulative, but we have not.

And the notion and idea of retaining an infectious disease consulting expert at this point would be a very, very difficult undertaking, and I think before --

05:39:18 THE COURT: I think they're all probably pretty occupied at the moment, so --

MR. SHANNON: And before we would get into oral discovery speaking about the issues and speaking about what plaintiffs' experts say, we think we should have the right to

05:39:34 that. That would be very burdensome.

On the records, Your Honor, I can say this. I'm not sure, in terms of the burden and the scope, that I'm tracking why these medical records and why these medical alerts are relevant to what I think we've all agreed upon is the threshold substantive issue, which is social distancing. And then beyond that, Mr. Scouffas, can you -- or maybe Lyle for that matter --

05:39:55

THE COURT: So I can -- I don't want to speak for the plaintiffs on this, but -- and there may be more than one reason why they're asking for those records, but so -- but a couple that I guess I've gleaned from what I've read and what I've heard would be, No. 1, having a sense of the number of detainees at the jail who are either older or suffer from significant medical conditions that would put them in a high-risk category if they contract coronavirus disease would be significant in determining the, you know, any number of issues relating to the preliminary injunction. Maybe starting at the end would be, you know, a question of the potential for irreparable injury and balance of harms.

05:40:11

05:40:42

On the front end, it might have a bearing on, you know, the question of reasonableness of the Sheriff's actions or inactions, reasonableness being something that's based on a, you know, usually a large number of factors.

05:41:11

So that would be one thing. And then another thing would be, and this was alluded to, I think, by Ms. Van Brunt

05:41:28

in a comment that she made earlier, just to know whether the Sheriff has a -- by getting the discovery, it would give some indication of whether the Sheriff has a current sense of who the higher-risk people are, which, again, sort of feeds back
05:41:51 into the question of readiness and reasonableness and so on.

So that's -- I mean, that may not be everything, but that's some of it. I mean, you know, one can take the position on the defense side is that, hey, Judge, we concede that there's, you know, a large number, in the hundreds at
05:42:13 least, of people in the jail, detainees in the jail who are either -- who are either over 65 and/or have, you know, one or more medical conditions on the list that the plaintiff provides, and that would, I guess, deal with a -- if nothing else, a numerosity question on the question of class
05:42:37 certification.

It might also deal, depending upon -- you know, the depth to which you conceded the point might deal with some of the other issues, but I think that's what I described before is my understanding of at least part of why they want it.

05:42:53 So anyway, that's just my thought.

You were about to hand it off to Mr. Scouffas, I think.

MR. SHANNON: Yes. Nick, and perhaps if any of it relates to Cermak, I would invite Mr. Henretty to weigh in as
05:43:16 well.

MR. SCOUFFAS: This is Nick Scouffas.

Looking at the requests for production that they sent to us. No. 1, besides age, you're correct that age would be pretty relatively easy to ascertain for our detained population.

05:43:45

In terms of medical vulnerability besides age, the Sheriff's Office does not have, you know, possession of and understand exactly people's certain conditions, but information was kept by Cermak Health Services.

05:44:03

We receive certain medical information through alerts, and this alert system which would -- these would be alerts that are used to impact operationally how we're going to make decisions, housing decisions, dietary decisions, allow them to possess things that would otherwise be contraband, such as, for example, an inhaler for asthma.

05:44:53

THE COURT: Right.

MR. SCOUFFAS: We would have that information, and we could pull alert information relatively easy, but that would not tell you if someone has a moderate to severe asthma problem.

05:45:12

THE COURT: Fair enough. Okay.

MR. SCOUFFAS: I don't believe we would be able --

THE COURT: Can I just -- Mr. Scouffas, can I just make sure I'm understanding what you said? I'm just going to try to translate it a little bit.

05:45:30

So it sounds like to me that what you're saying is if what somebody was asking is give us a list of all of the people who have medical alerts, we can do that. What that's not going to tell you is specifically what the nature and level of the severity of the condition is for any particular person.

05:45:47

Am I hearing that right, or did I read too much into what you said?

MR. SCOUFFAS: No, I think that's exactly right.

05:45:58

THE COURT: Okay.

Okay. So in other words, you would be able to, because it's a flag or a tag or whatever within the database, you'd be able to run a report of, okay, here's the inmates who have medical alerts; but in order to figure out whether it's asthma or whether they have an inhaler or they have chronic bronchitis or whether they have diabetes or whatever, that is not something that's flagged on the medical alert itself. You'd have to drill down more in order to get that. Am I --

05:46:14

MR. SCOUFFAS: Right.

05:46:31

THE COURT: -- getting that right?

MR. SCOUFFAS: Yes, that's correct. Especially when you look at the list of things we're actually talking about.

THE COURT: Right.

MR. SCOUFFAS: You know, like an epilepsy, we would not know epilepsy. He would have a lower bunk alert so that

05:46:51

we didn't put him in a top bunk --

THE COURT: Got it.

MR. SCOUFFAS: -- something along those lines.

THE COURT: Right.

05:47:06 MR. SCOUFFAS: It's things like that.

THE COURT: Okay. All right. Okay.

MR. SCOUFFAS: And then moving on, I think in No. 2, you know, burdensome-wise, I don't think those would be huge pulls that we couldn't get, you know, once every once in a

05:47:37 while. That would just be -- that would be just running a data query, I believe.

Those people are very busy. I wouldn't want to have to do that daily, but it is something we could do in a reasonably short amount of time.

05:48:00 No. 3, which is asking about the number of people reporting to work --

THE COURT: That's basically asking for --

MR. SCOUFFAS: -- I don't --

THE COURT: That's basically asking for how many

05:48:07 call-offs you have, I'm assuming, or at least the flip side of that maybe.

MR. SCOUFFAS: That -- that could be. I don't know.

MS. VAN BRUNT: This is Alexa Van Brunt.

This is correct, Your Honor.

05:48:29 THE COURT: Yeah.

MR. SCOUFFAS: That would be a little bit more difficult on a daily basis shift by shift. I believe that we'd have to go in there and work that data out. I don't believe we have like a "this number of people showed up totally compound wide." I think it's more based -- drilled down by division, so I'd have to get back to you on exactly if we're able to do that.

THE COURT: All right.

MR. SCOUFFAS: But there's probably a way to do it.

05:49:12 THE COURT: All right. Thanks.

Okay. So I think I have -- I think I have a bit of a plan in mind here, and I just want to say that, you know, that -- that -- I mean, I understand on the one side there's -- on the plaintiffs' side there's a concern that, you know, we're dealing with a fast-moving situation, the case needs to move fast, too, and I understand that on the defense side -- and I'm not trying on either side to encapsulate the entirety of your concerns by the very brief comment that I just made and what I'm about to make -- but on the defense side, there's a concern that, hey, Judge, we're working with both hands and both feet already; don't put more burdens on us. And I completely get all of that.

You know, it's an important -- you know, everybody's got important things that they're doing, and it's a lot of work, and I appreciate that not just the lawyers involved but

more -- perhaps more importantly the clients involved on both sides have a lot that they're dealing with and concerned about.

I'm just little ol' me dealing with a lawsuit here, 05:51:15 okay, and trying to -- trying to deal with that in a way that, as best as I can, accommodates the concerns on both sides but also has to keep in mind that, you know, there are safety issues, and those do not necessarily all run one direction.

So this is what I think the plan is here. I just 05:51:44 want to think about this for a second.

Okay. So I'm going to give the defense until -- so I'm going to ask -- remind me of the name of the person who was talking to me about Friday night?

MS. SPERRY: This is Gretchen Sperry.

05:52:07 MR. SHANNON: Gretchen Sperry.

THE COURT: Okay. So here's my question for you: Do you want until 8:00, or would you rather me put an earlier deadline on you?

MS. SPERRY: Well, we'll take the extra time, Judge, 05:52:29 if you can accommodate.

THE COURT: You're just going to say to everybody you guys, you know, that's the wrong way to go about that. You want the earlier deadline so you can be done with it.

Don't say that in a joking way to minimize it.

05:52:52 That's fine. Okay. So the defendants are going to

file -- so we're just going to call it a -- you can call it a response to the preliminary injunction motion, you can call it an initial response, you can call it whatever you want, but what you're going to put in there is the stuff that you told me about plus one thing that I'm going to add on.

05:53:08

The stuff you told me about is basically what you consider to be the threshold issues, whether they're legal issues, factual issues or mixed legal and factual issues that you contend really ought to lead me to, for want of a better word, stop the lawsuit in its tracks or at least slow it way down or not allow discovery or deny the request for preliminary injunction or whatever.

05:53:34

The one thing -- there's one thing I'm going to direct you to add to it, and then there's one thing I'm going to give you an opportunity to add to it if you want to.

05:53:49

So the thing I'm going to direct you to add to it is I do think I want to get the Sheriff's position on -- I'm going to state this and you're going to say, boy, that's a really ambiguous question, Judge, so I'm going to try to define it after I state it -- the Sheriff's position on whether it is possible to, for want of a better word, rearrange people within the jail to accomplish social distancing, okay? I want you to give me your position on that.

05:54:09

Now, that may end up being an affidavit from

05:54:36

somebody. It may end up being something other than that, but I think I need to have the Sheriff's position on that because it's pertinent to a number of issues.

So when I say social distancing, so if your question
05:54:53 back to me is what the heck do you mean by that, Judge, and I'd like to be able to give you an answer to that, but I think what we can reasonably use as a marker of it, so to speak, is if you take the CDC guidelines without the safety valve, for want of a better word, for feasibility. Follow what I'm
05:55:19 saying?

In other words, I quoted them in the -- and referred to them in the opinion on the TRO the guidelines, the CDC guidelines for correctional facilities, or whatever it's called, basically says social distancing, but we recognize
05:55:35 that this might not be feasible given the nature of the facility.

So my question basically is if you take the feasibility thing off of it, is it accomplishable within the confines of the jail?

05:55:48 MS. SPERRY: Understood.

THE COURT: Yeah. Okay, good. I'm glad you got it.

The thing that you can't -- obviously, you can put anything in a brief that you want to. If you want to say anything about any of these PLRA issues, the three-judge court
05:56:08 thing most specifically, you can put that in there, too.

And don't -- don't be concerned about -- I mean, obviously, I want you to keep the thing as to the point and succinct as possible, but don't be, you know, freaking out at 7:00, oh, my God, we've got X pages, is the judge going to let us file that?

05:56:31

So don't be freaking out about that. I'll take care of that.

MS. SPERRY: Thank you.

THE COURT: So then what that's going to mean is that honestly, I'm going to need to get something from the plaintiffs. If you want to file a reply to whatever they file, you're going to have it do it over the weekend.

05:56:43

So I will again let you figure out who it is that you want to have answer this question, but -- so what, if you get their thing at 8:00 on Friday night, what's the -- when do you want to file whatever you're going to file in the reply?

05:56:58

MS. VAN BRUNT: Your Honor, this is Alexa Van Brunt.

We will, in fact, file something over the weekend. Just kind of set the time, I think Sunday morning would be --

THE COURT: Okay. So just give me a time so I can put a time in there and everybody will know when they don't have to be waiting for it and when they do.

05:57:25

MS. VAN BRUNT: Okay. How about actually --

THE COURT: How about noon?

MS. VAN BRUNT: -- Sunday at noon?

05:57:41

THE COURT: There you go. That's perfect.

Okay.

MS. VAN BRUNT: Your Honor, may I make one point about discovery just to mitigate some further --

05:57:54 THE COURT: Yes, you may make one point about discovery.

MS. VAN BRUNT: Okay. If the Sheriff says on Friday in his brief that social distancing is not possible, that would negate the need for some of our discovery, which would

05:58:08 make it less burdensome also.

THE COURT: I get that. I get that. Okay.

All right. So I'm going to decide sometime between now and the end of the day on Sunday when we're going to talk again. So my next -- yeah, my next weekday up in the queue

05:58:31 isn't for a while, so I'd probably be having to -- if I conclude that we need to do some more talking, it's probably going to end up being as early in the morning on some day in the early part of next week.

By early in the morning, I mean something like 8:30

05:58:48 or, you know, somewhere in there so that I can get on and off before whoever the assigned judge is for that day has to kind of take over the equipment, okay?

All right. So we're going to go into recess, and so basically the order is going to say, yeah, 8:00 Friday and

05:59:07 noon on Sunday.

And so one other thing I wanted to say about that is so -- and I know there was some filing issues with the defendants' stuff last weekend, I actually think that --

(Recording ended abruptly.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the digital recording of proceedings in the above-entitled matter to the best of my ability, given the limitations of using a digital-recording system.

/s/Kathleen M. Fennell — *April 15, 2020*

Kathleen M. Fennell — Date
Official Court Reporter