

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 10-942

IN RE: ERIE COUNTY

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

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RESPONSE OF THE UNITED STATES TO PETITIONERS' MOTION TO  
EXPEDITE REVIEW OF PETITION FOR WRIT OF MANDAMUS

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**INTRODUCTION**

Petitioners seek expedited review of their previously-filed request for mandamus relief. They argue that this Court should resolve the underlying discovery dispute before the United States again visits County facilities or speaks to County employees. But the request for mandamus no longer presents a live controversy. The request sought review of an expedited discovery order that granted the United States authority to tour the Erie County Holding Center on March 22 and 23, 2010. The United States conducted that tour on the scheduled days, without any harm to petitioners' attorney-client relationships. Petitioners assert that the district court may in the future issue similar discovery orders authorizing additional tours of the facility. They further assert that, *unlike* in the

March 22-23 tour, those tours will threaten the attorney-client privilege. But that assertion is speculative and provides no basis for exercising this Court's extraordinary mandamus authority now.

In any event, for the reasons stated in our opposition to the mandamus petition and accompanying stay motion, the petition is without merit; petitioners' attempt to draw this Court into a discovery dispute that has been thoroughly reviewed and correctly resolved by the district court is an unnecessary distraction from the resolution of important issues in the district court. And contrary to petitioners' assertions, the district court's discovery order simply held that the initiation of litigation does not require the noticing of depositions before speaking to inmates, nor does it require the noticing of depositions for consultants to question staff. That holding was clearly within the district court's discretion in managing discovery. Accordingly, the United States does not object to prompt resolution of this matter. The Court should expedite its consideration and deny the writ.

### **BACKGROUND**

The United States began investigating conditions at two of petitioners' facilities – the Erie County Holding Center (EHC) and Erie County Correctional Facility – in November 2007. March 6 Order 2 (attached hereto as Exhibit A).

Following an investigation, the United States issued a Findings Letter indicating that conditions at County facilities violated the constitutional rights of inmates.

*Ibid.* Unable to resolve the relevant issues, the United States filed suit in September 2009 against Erie County and some of its officials under the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. 1997 *et seq.* *Id.* at 2-3.

Of particular concern to the government is the high suicide rate among inmates at ECHC. As noted by the district court, “[t]here have been three reported suicides and two attempted suicides at the ECHC in the last three months, with the most recent suicide occurring [in early March].” March 19 Order 3 (attached hereto as Exhibit B). Overall, the rate of suicides at the ECHC is almost five times the national average for local jails. Hayes Decl. ¶ 8 (attached hereto as Exhibit C).

At issue are a series of discovery orders. On March 6, 2010, the district court granted the United States’ request for expedited discovery, finding that the United States demonstrated “good cause,” and that its request was “both warranted and necessary.” March 6 Order 2.<sup>1</sup> Indeed, citing the recent suicides, the court “ha[d] little difficulty finding that the [United States] ha[d] demonstrated that

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<sup>1</sup> In the same order, the district court said that it will deny petitioners’ motion to dismiss the complaint, for reasons that will be explained in an order that will be issued in the future.

expedited discovery is warranted.” *Id.* at 8. The court concluded that (1) “the increasing frequency of suicides and suicide attempts at the ECHC, coupled with the historical allegations in the complaint, constitutes good cause for ordering expedited discovery,” *ibid.*; (2) the United States’ “discovery requests are narrowly tailored and reasonable,” *ibid.*; (3) the United States’ “access to the ECHC is not unduly burdensome as County lawyers and representatives may accompany the Justice Department and will be present when County employees are questioned,” *ibid.*; (4) the County’s concerns regarding “run[ning] afoul of confidentiality laws” were not persuasive, *id.* at 8-9; and (5) “the balance of prejudice weighs in the [United States’] favor,” *id.* at 9-10.

On March 17, 2010, the district court issued an order concluding that the United States’ “request to enter and inspect the ECHC is proper under Rule 34(a)(2) of the Federal Rules of Civil Procedure.” March 17 Order 3, 4-6 (attached hereto as Exhibit D).

On March 19, 2010 – one business day before the United States’ visit was scheduled to begin<sup>2</sup> – the district court denied petitioners’ request to stay its March 17 Order. In so doing, the court rejected petitioners’ assertion that they

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<sup>2</sup> March 19, 2010, was a Friday, and the United States’ visit was scheduled for the following Monday and Tuesday, March 22 and 23.

faced irreparable harm due to their alleged inability to prepare County employees prior to questioning. March 19 Order 2. The court noted that (1) its “previous orders provide ample guidance for the interviews,” *ibid.*; and (2) petitioners “have been on notice that expedited discovery is on the issues of suicide prevention and mental health protocols at the ECHC,” *ibid.* The court therefore “fail[ed] to see how [petitioners] lack the opportunity to identify and prepare their employees for questioning on these two topics.” *Id.* at 2-3.

As relevant here, the district court also rejected petitioners’ claim “that they will be harmed because they cannot object to questions or protect against disclosure of privileged or confidential information.” March 19 Order 3. It concluded that “[t]hese arguments largely ignore that County attorneys will be present and able to instruct employees during the interviews, thus giving them the opportunity to protect against improper disclosures.” *Ibid.*

That same day (March 19), petitioners filed a petition for a writ of mandamus and an accompanying motion for stay with this Court. The United States responded, and this Court – per Judge Hall – issued an order that evening denying the motion for stay. Accordingly, the United States’ inspections went forward as scheduled on March 22 and 23. Nowhere in the motion for expedited review or the accompanying declaration do petitioners identify a single instance in

which those inspections compromised attorney-client privilege.

## ARGUMENT

### I

#### MANDAMUS IS NOT APPROPRIATE

##### A. *Standard Of Review*

“On its own or a party’s motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of [the Federal Rules of Appellate Procedure] in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” Fed. R. App. P. 2.

With regard to the underlying petition, “[t]he writ of mandamus is ‘meant to be used only in the exceptional case.’” *In re Security & Exchange Comm’n*, 374 F.3d 184, 187 (2d Cir. 2004) (quoting *In re von Bulow*, 828 F.2d 94, 96 (2d Cir. 1987)). “Pretrial discovery orders like the one issued by the district court in this case generally are not reviewable on direct appeal, and ‘[this Court] ha[s] expressed reluctance to circumvent this salutary rule by use of mandamus.’” *Ibid.* (quoting *United States v. Coppa*, 267 F.3d 132, 137 (2d Cir. 2001)).

“Nevertheless, mandamus may be available where ‘a discovery question is of extraordinary significance or there is extreme need for reversal of the district court’s mandate before the case goes to judgment.’” *Ibid.* (quoting *von Bulow*,

828 F.2d at 97). Accordingly, this Court “will entertain a petition for a writ of mandamus . . . to cure a defective pretrial discovery order if the petitioner demonstrates ‘(1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.’” *Ibid.* (quoting *Coppa*, 267 F.3d at 137-138).

*B. Petitioners’ Assertions Regarding The Propriety Of Mandamus Relief Are Incorrect*

As a preliminary matter, the dire predictions petitioners made in their mandamus petition were not borne out by the facts when the United States conducted its visits to the ECHC on March 22 and 23. The government spoke to approximately 21 County employees during those two days. Petitioners, however, cite no examples of discovery violations, irregularities, or even problematic questions that occurred during these visits. Contrary to petitioners’ fears, there were no inadvertent disclosures of privileged information, see *Pet. for Writ of Mandamus* 11-12; no inability to properly prepare witnesses, see *id.* at 15; no inability to preserve an objection or instruct an employee not to answer, see *ibid.*; and no disruption to the operation of the facility, see *ibid.*

In now seeking expedited consideration of their mandamus request,

petitioners rely heavily on their fears that privileged information may be revealed during future interviews. See Mot. to Expedite 6-7, 9-10. To be sure, this Court has, as petitioners contend, granted mandamus in cases where privileged information truly is at risk. See Mot. to Expedite 10 (citing *von Bulow*, 828 F.2d at 98). But this Court “ha[s] also recognized that the existence of a claim of attorney-client privilege will not routinely permit review of discovery orders via mandamus.” *In re W.R. Grace & Co.*, 984 F.2d 587, 589 (2d Cir. 1993). See also *In re Dep’t of Investigation of the City of New York*, 851 F.2d 65, 68 (2d Cir. 1988) (“It suffices to say that *von Bulow* did not discard this Circuit’s well-settled rule that ‘an extreme need for reversal’ must be shown to justify the mandamus remedy.”) (quoting *In re Weisman*, 835 F.2d 23, 27 (2d Cir. 1987)). And there are specific factors to consider when a claim of privilege is made in this situation: a petition for a writ of mandamus

is appropriate to review discovery orders that involve privilege where (i) the petition raises an issue of importance and of first impression; (ii) the petitioner’s privilege will be lost if review must await final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.

*In re Sims*, 534 F.3d 117, 128-129 (2d Cir. 2008) (quoting *In re Long Island*



*Lighting Co.*, 129 F.3d 268, 270 (2d Cir. 1997)).<sup>3</sup>

Petitioners satisfy none of these requirements. For one thing, the district court has not authorized any additional tours of the facility; there is no live controversy over the rules that should apply to future tours that the district judge might or might not authorize. Moreover, petitioners' claim that privileged materials may inadvertently be divulged during future interviews is wholly speculative and unproven. As petitioners concede, "the United States' team toured the facility for nearly seven hours" on March 22, "and its experts questioned countless ECHC employees during the tours." Mot. to Expedite 4. Although no formal transcript was created, interviews of ECHC employees were tape-recorded, and counsel for the employees was present. See *ibid.*

As noted above, petitioners fail to cite a single instance in which potentially-privileged material was actually – or even nearly – divulged. Nor do they explain how or why they believe potentially-privileged information may be revealed inadvertently during the interviews. Their counsel is present and can object to questions and instruct employees not to answer. The United States has

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<sup>3</sup> The cited cases apply this standard to situations in which a litigant is ordered to produce allegedly privileged documents, but the United States respectfully submits that it should apply with equal force to petitioners' claim that its employees may inadvertently reveal privileged information during interviews.

no authority to force an answer over the reasonable objection of petitioners' counsel and will not attempt to do so. And, because the interviews are tape-recorded, any disputes regarding the content of questions, answers, or objections may be resolved at a later time.

Simply put, in light of the protections the district court put in place and the experience provided by the March 22 and 23 visits, it is extremely unlikely privileged information will be divulged in future interviews, should the district court again authorize such interviews in the future. The district court has adequately addressed the manner in which these visits to the facilities will be conducted and there is no basis for this Court to use its extraordinary mandamus power. Petitioners' effort to use the issue of attorney-client privilege as a hook to draw this Court into a discovery dispute therefore should be rejected.

Finally, the United States also takes issue with the notion that mandamus is appropriate because the district court granted expedited discovery despite the fact that the United States has not yet sought or been awarded preliminary injunctive or other similar relief, and that its allegations therefore are "untested." Mot. to Expedite 8-9. As the district court observed – and petitioners well know – one of the purposes for expediting discovery in this case is to determine whether the United States *should* seek a preliminary injunction. See March 6 Order 5. The

information gathered during discovery also will assist the United States in determining what sort of injunction is necessary. And it goes without saying that the issue of an ongoing problem of *suicides* is not one that cautions delay.

More broadly, the purpose of litigation – of which discovery is an essential part – is to test the allegations made in a plaintiff’s complaint. Accordingly, the idea that discovery should be denied or circumscribed because a plaintiff has yet to assert a claim for specific relief is nonsensical. At any rate, the United States’ allegations are considerably less “untested” than those of a typical plaintiff in a civil action. As noted by the district court, the United States engaged in a lengthy pre-filing investigation that resulted in a 49-page, detailed findings letter that described a number of serious problems at County facilities. See March 6 Order 2-4.

**CONCLUSION**

For the reasons stated above, the United States does not object to expedited consideration of the pending mandamus petition. The petition should be denied.

Respectfully submitted,

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# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

**DECISION AND ORDER**  
09-CV-849S

ERIE COUNTY, NY,

CHRIS COLLINS,

*County Executive,*

ANTHONY BILLITTIER, IV, MD

*County Health Commissioner,*

TIMOTHY B. HOWARD,

*Erie County Sheriff,*

RICHARD T. DONOVAN,

*Erie County Undersheriff,*

ROBERT KOCH,

*Superintendent Administrative Services Division,*

*Jail Management Division,*

BARBARA LEARY,

*First Deputy Superintendent,*

*Erie County Holding Center,*

DONALD LIVINGSTON,

*First Deputy Superintendent,*

*Erie County Correctional Facility,*

Defendants.

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**I. INTRODUCTION**

Presently before this Court is the Justice Department's Motion for Expedited Discovery pursuant to Rule 26(d)(1) of the Federal Rules of Civil Procedure.<sup>1</sup> The Justice Department seeks limited, expedited discovery to determine whether changes can be made at the Erie County Holding Center ("ECHC") that would decrease the likelihood of

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<sup>1</sup>Also pending is the Justice Department's March 4, 2010 Motion for Leave to File a Supplemental Declaration in further support of its Motion for Expedited Discovery. (Docket No. 41.) That motion, which includes a declaration advising this Court of the most recent suicide at the ECHC on March 3, 2010, will be granted. (Lopez Supplemental Declaration, Docket No. 41-2, ¶ 3.)

preventable suicides and suicide attempts. Briefing on the motion concluded on March 1, 2010. (Docket Nos. 27-30, 32-34, 36-40.)

Due to the Justice Department's demonstration of good cause and the recurring incidents of suicide and attempted suicide at the ECHC, this Court finds that the requested expedited discovery is both warranted and necessary. The request for expedited discovery will therefore be granted, and the defendants will be ordered to respond to the proffered discovery requests within **14 days** of service rather than within the 30 days sought by the Justice Department. The defendants will also be ordered to permit the Justice Department access to the ECHC on March 22 and 23, 2010.

## II. BACKGROUND

In November 2007, the Civil Rights Division of the U.S. Department of Justice began investigating conditions at the ECHC and the Erie County Correctional Facility (collectively, "the facilities").

At the end of the two-year investigation, the Justice Department notified Erie County through a "Findings Letter" that, in its view, conditions of confinement at the facilities violated the federal constitutional rights of inmates incarcerated there. In particular, the Justice Department expressed its opinion that certain practices — including the failure to provide adequate suicide prevention, medical and mental health care, protection from harm, and safe and sanitary environmental conditions — resulted in Erie County failing to protect inmates from serious harm or the risk of serious harm.

Efforts at resolving the Justice Department's concerns short of litigation failed.

Consequently, on September 30, 2009, the Justice Department filed suit against Erie County and various county officials (collectively, “the County”) pursuant to the Civil Rights of Institutionalized Persons Act of 1980 (“CRIPA”), 42 U.S.C. § 1997, et seq.<sup>2</sup> The Justice Department seeks an Order enjoining the County from depriving incarcerated individuals of their constitutional rights, privileges, and immunities.

The County moved to dismiss the complaint. Briefing and oral argument on that motion is complete. For reasons that will be fully explained in a Decision and Order to follow forthwith, the County’s Motion to Dismiss will be denied. In short, this Court finds that the complaint adequately states a claim under the CRIPA and that the CRIPA is not unconstitutional as applied to the defendants.

In its complaint, the Justice Department alleges that the County repeatedly fails to provide adequate mental health and medical treatment to inmates with known or obvious mental health or medical needs. (Complaint, Docket No. 1, ¶ 23.) As it relates to this

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<sup>2</sup>Forty-two U.S.C. § 1997a (a) provides as follows:

Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to an institution as defined in section 1997(1)(B)(ii) of this title only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.



motion, the Justice Department alleges that the County has inadequate suicide prevention methods, which have resulted in multiple suicides and attempted suicides between 2007 and 2008. (Complaint, ¶ 23(a).) For example, the County allegedly places inmates with known or obvious mental health needs, including suicidal inmates, in cells that contain multiple means for committing suicide. (Complaint, ¶ 23(a).) These allegations are further explained in the Findings Letter attached to the Complaint. (Complaint, Exhibit B.)

In the Justice Department's view, the ECHC's suicide prevention policies themselves appear sound. (Findings Letter, Docket No. 1, Exhibit B, p. 9.) But the investigation found that there are "serious problems" with how those policies are implemented and followed, and it concluded that the ECHC's suicide prevention practices do not comport with generally accepted standards of correctional mental health care. (Findings Letter, p. 9.) It also found that the cells at the ECHC are unsafe and present multiple means for inmates to commit or attempt suicide, including having steel beds, missing wall plates, accessible grab bars, and bars on the windows. (Findings Letter, p.10.) Finally, the Justice Department alleges that the County does not refer inmates who attempt suicide or demonstrate suicidal thoughts or ideation for mental health assessments or further suicide screening. (Findings Letter, p. 11.)

These conclusions are supported by episodic examples: between 2003 and 2009, at least 23 inmates either committed, or attempted to commit, suicide. (Findings Letter, p. 10.) In just one year (2007-2008), there were three suicides and at least ten attempted suicides. (Findings Letter, p. 10.) These incidents involved inmates hanging themselves with bed sheets from air vents, ingesting other inmates' medications, and jumping from a 15-foot railing in a common area. (Findings Letter, pp. 10-11.) According to the Justice

Department's expert witness, Lindsay M. Hayes, ECHC's suicide rate is nearly five times the national average as determined by U.S. Bureau of Justice Statistics.<sup>3</sup> (Hayes Declaration, ¶ 8.)

The Justice Department alleges that these and similar incidents occur because the County is unable to supervise inmates, identify inmates at risk for suicide, correct deficiencies in cells that facilitate suicide, and prevent likely suicide attempts. (Findings Letter, p. 10.) Supporting this conclusion are allegations that some inmates make multiple suicide attempts, that at least one individual was able to commit suicide despite his family warning the ECHC that he could be suicidal, and that suicide attempts are made by inmates who are supposed to be under constant observation.<sup>4</sup> (Findings Letter, p. 11.)

And just three days ago, on March 3, 2010, an inmate at the ECHC hanged himself with a bed sheet. (Lopez Supplemental Declaration, Docket No. 41-2, ¶ 3.) This individual reportedly exhibited suicidal tendencies, and the staff of the ECHC was allegedly advised of his past attempts at self-harm and suicide. (Lopez Supplemental Declaration, ¶ 4.)

In the present motion, the Justice Department seeks limited, expedited discovery related to suicide prevention at the ECHC to assess whether it should apply for a preliminary injunction. Specifically, the Justice Department seeks information concerning whether changes to the ECHC's policies, procedures, or practices would decrease the likelihood of preventable suicides and suicide attempts occurring at the ECHC. The

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<sup>3</sup>Although the defendants and the County's attorneys disagree with the manner in which this statistic was arrived at, they have not submitted any contrary expert testimony.

<sup>4</sup>In November 2007, an inmate at the ECHC allegedly attempted suicide while under constant observation. (Findings Letter, p. 11.) Yet despite this attempt, ECHC officials allegedly released the inmate into the general population, where he again attempted suicide six days later. (Findings Letter, p. 11.)

request is prompted by there having been three reported suicides by hanging at the ECHC since oral argument on the County's Motion to Dismiss, with the most recent occurring on March 3, 2010, as described above. (Lopez Supplemental Declaration, ¶¶ 3, 5, 6, and Exhibits A – D.)

As more fully explained in the Declaration of Aaron S. Fleisher (Docket No. 27), the Justice Department seeks an Order requiring the defendants to respond within 30 days to the following discovery requests:

- (1) Interrogatories seeking information from January 2009 to present relating to suicide prevention staff, inmates who have attempted suicide or are deemed suicide risks, recent suicide policy and practice changes, suicide-safe cells, and suicide screening procedures;
- (2) Document requests that seek documents related to suicide prevention policy, mental health and suicide screening, suicide prevention training, suicide and suicide attempt investigations and other categories of documents related to suicides at the ECHC;
- (3) Request for Entry and Inspection pursuant to Rule 34 of the Federal Rules of Civil Procedure to allow mental health and suicide prevention consultants access to the ECHC on March 22 and 23, 2010, to (a) tour the relevant portions of the facility accompanied by ECHC staff, (b) inspect the records identified in the Document Requests, and (3) interview inmates outside the presence of ECHC staff.

The County opposes the Justice Department's motion on the basis that it seeks discovery and access to individuals that is not authorized by the Federal Rules of Civil Procedure or permitted under confidentiality laws. In addition, the County argues that there is no cause for expedited discovery and the Justice Department's requests are over-broad and unduly burdensome.

### III. DISCUSSION

Parties are barred from seeking discovery in the absence of a Rule 26(f) conference, unless discovery is otherwise authorized by a federal rule, a stipulation between the parties, or a court order. See Fed. R. Civ. P. 26(d)(1); Local Rule 26(c) (“[A] party may not seek discovery, absent agreement of the parties or court order, from any source before the parties have met and conferred as required by Federal Rule of Civil Procedure 26(f).”).

In this circuit, leave to conduct expedited discovery is granted upon a finding of good cause and reasonableness.<sup>5</sup> See Stern v. Cosby, 246 F.R.D. 453, 457 (S.D.N.Y. 2007); Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326 (S.D.N.Y. 2005). Courts generally assess “the potential prejudice which will be suffered by the defendant if discovery is permitted, and that which will be experienced by the plaintiff if denied the opportunity for discovery at this stage.” OMG Fidelity, Inc. v. Sirius TechTechs., Inc., 239 F.R.D. 300, 305 (N.D.N.Y. 2006). Within that inquiry, the burden of responding to the discovery requests and the likelihood that the proffered discovery will eventually take place must be considered. See OMG Fidelity, 239 F.R.D. at 304-05. Several courts have further found that where an expedited discovery request is made in contemplation of the filing of a motion for preliminary injunction, the denial of that request prejudices the moving party. See Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc., No. 07 Civ. 2014, 2007

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<sup>5</sup>Defendants’ reliance on Notaro v. Koch for the proposition that the Justice Department must demonstrate irreparable harm to obtain expedited discovery is not persuasive. 95 F.R.D. 403, 405 (S.D.N.Y. 1982). The weight of authority in this circuit rejects the Notaro analysis in favor of the reasonableness or good cause standard, which provides more flexibility for the court to order expedited discovery. See, e.g., Stern, 246 F.R.D. at 457; OMG Fidelity, 239 F.R.D. at 303; Ayyash, 233 F.R.D. at 326-27.

WL 1121734, at \*1 (S.D.N.Y. Apr. 11, 2007); OMG Fidelity, 239 F.R.D. at 305.

Given the circumstances of this case, this Court has little difficulty finding that the Justice Department has demonstrated that expedited discovery is warranted.

First, this Court finds that the increasing frequency of suicides and suicide attempts at the EHC, coupled with the historical allegations in the complaint, constitutes good cause for ordering expedited discovery.

Second, this Court finds that the Justice Department's discovery requests are narrowly tailored and reasonable. This Court is unpersuaded by the County's arguments that the discovery demands are over-broad or unduly burdensome. The discovery requested is directed at a limited issue — EHC's suicide policies, procedures, and practices — and encompasses just five categories of documents. And even then, the request is limited to only the discovery necessary for the Justice Department to determine whether it should seek a preliminary injunction to impose immediate remedial measures to decrease the number of preventable suicides. (Fleisher Declaration, ¶ 5.) Responding to these demands is not unduly burdensome and is something that the County will have to do shortly in this litigation in any event. Similarly, the Justice Department's access to the EHC is not unduly burdensome as County lawyers and representatives may accompany the Justice Department and will be present when County employees are questioned.

Moreover, this Court is unpersuaded by the County's contention that complying with the Justice Department's demands would run afoul of confidentiality laws, particularly New York Mental Hygiene Law 3313 and 3316 and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). These provisions do not preclude discovery. The

Justice Department's request fits the HIPAA exception allowing third-party disclosure set forth in 45 C.F.R. § 164.512(d) and the Justice Department's CRIPA claims preempt state confidentiality laws. See, e.g., United States v. Illinois, 148 F.R.D. 587, 591 (N.D. Ill. 1993) (state law preempted); United States v. County of Los Angeles, 635 F. Supp. 588, 594 (C.D. Cal. 1986) (similar).

Third, this Court finds that the balance of prejudice weighs in the Justice Department's favor. The potential prejudice to the County of having to engage in expedited discovery is low. This Court's impending denial of the County's Motion to Dismiss makes discovery in this case certain. Undoubtedly, the proffered discovery demands would be served later in the discovery process anyway, making the County's eventual obligation to respond to these demands unavoidable. This Court of course recognizes that responding to discovery demands on an expedited basis may require extra manpower and resources, but that is not uncommon when proceedings are expedited. To ease the burden on the defendants, the Justice Department has expressed its willingness to examine voluminous documents on site, and it will not seek materials in the course of discovery that have already been provided on an expedited basis, thereby eliminating any claimed prejudice from duplication. (Fleisher Declaration, ¶¶ 8, 9.)

On the other hand, the prejudice to the Justice Department if expedited discovery is not permitted is palpable and significant. Without this discovery, the Justice Department is unable to adequately assess whether changes can be made at the ECHC that would warrant a request for preliminary injunctive relief to implement those changes in an effort to decrease the likelihood of preventable suicides and suicide attempts. And given the results of the Justice Department's investigation and the recent and continuing incidents

of suicide and attempted suicide at the ECHC, there is a good faith basis for the Justice Department's contemplation of a motion for preliminary injunction. To deny the requested discovery at this stage would deny the Justice Department the benefit of early evidence to develop its motion for injunctive relief. This prejudice outweighs any prejudice the County may experience in having to produce the requested documents on an expedited basis.

#### IV. CONCLUSION

For the foregoing reasons, the Justice Department's Motion for Expedited Discovery will be granted.

#### V. ORDERS

IT HEREBY IS ORDERED, that the Justice Department's Motion for Expedited Discovery (Docket No. 29) is GRANTED.

FURTHER, that the defendants shall respond to the First Set of Interrogatories (Docket No. 27-2) within **14 days** of service.

FURTHER, that the defendants shall respond to the First Request for Production of Documents (Docket No. 27-3) within **14 days** of service.

FURTHER, that the defendants shall respond to the First Request for Entry and Inspection (Docket No. 27-4) within **14 days** of service.

FURTHER, that the defendants shall permit the Justice Department's attorneys and consultants to enter and inspect the ECHC on March 22 and 23, 2010, for the purposes stated in the First Request for Entry and Inspection (Docket No. 27-4).

FURTHER, that the Justice Department's Motion to File a Supplemental Declaration (Docket No. 41) is GRANTED.

SO ORDERED.

Dated: March 6, 2010  
Buffalo, New York

/s/William M. Skretny  
WILLIAM M. SKRETNY  
Chief Judge  
United States District Court



# **EXHIBIT B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

**DECISION AND ORDER**  
09-CV-849S

ERIE COUNTY, NY,

CHRIS COLLINS,

*County Executive,*

ANTHONY BILLITTIER, IV, M.D.,

*County Health Commissioner,*

TIMOTHY B. HOWARD,

*Erie County Sheriff,*

RICHARD T. DONOVAN,

*Erie County Undersheriff,*

ROBERT KOCH,

*Superintendent Administrative Services Division,*

*Jail Management Division,*

BARBARA LEARY,

*First Deputy Superintendent,*

*Erie County Holding Center,*

DONALD LIVINGSTON,

*First Deputy Superintendent,*

*Erie County Correctional Facility,*

Defendants.

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On March 6, 2010, this Court granted the Justice Department's request for expedited discovery related to suicide prevention and mental health treatment protocols at the Erie County Holding Center ("ECHC"). (Docket No. 42.) Each side then filed discovery-related motions concerning the scope of the authorized discovery, which this Court resolved on March 17, 2010. (Docket No. 54.) Familiarity with both decisions is presumed.

Defendants now move to stay that portion of this Court's March 17, 2010 Decision and Order permitting the Justice Department's consultants to interview inmates and County employees during the site inspection. Defendants argue that they will be irreparably harmed if the interviews are not conducted according to the strictures of the Federal Rules of Civil Procedure. According to Defendants, a stay is necessary to allow them to file an application for Writ of Mandamus with the United States Court of Appeals for the Second Circuit.

Defendants' motion is denied.

Under Rule 8 of the Federal Rules of Appellate Procedure, motions to stay a district court's order pending appeal must ordinarily be made to the district court in the first instance. See Fed. R. App. P. 8(a)(1)(A). Determining whether to stay an order falls within the court's discretion and requires consideration of (1) whether the moving party will be irreparably injured absent a stay, (2) whether the non-moving party will be substantially injured if a stay is issued, (3) whether the moving party has demonstrated "substantial possibility, although less than a likelihood of success" on appeal, and (4) the public interests that may be affected. Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (quoting Dubose v. Pierce, 761 F.2d 913, 920 (2d Cir. 1985)); Plummer v. Quinn, No. 07 Civ. 6154, 2008 WL 383507, at \*1 (S.D.N.Y. Feb. 12, 2008).

On the first factor, Defendants claim irreparable harm because they cannot prepare County employees for questioning, specific employees have not been identified, and the scope of questioning is unclear. But this Court's previous orders provide ample guidance for the interviews. Defendants have been on notice that expedited discovery is on the issues of suicide prevention and mental health protocols at the ECHC. This Court fails to

see how Defendants lack the opportunity to identify and prepare their employees for questioning on these two topics.

Defendants also maintain that they will be harmed because they cannot object to questions or protect against disclosure of privileged or confidential information. These arguments largely ignore that County attorneys will be present and able to instruct employees during the interviews, thus giving them the opportunity to protect against improper disclosures.

Finally, Defendants argue that lawyers may become fact witnesses and information gathered in the interviews may appear in subsequent expert reports. This concern is premature. Statements made to the consultants will likely be memorialized in an expert report, related witness depositions will likely be noticed and taken, and witness testimony will also likely be given at related court proceedings. At such times, Defendants will have the opportunity to challenge whichever statements they deem necessary.

On the second factor, Defendants implicitly recognize that further delay harms the Justice Department's efforts to inspect the ECHC, but they argue that the need to resolve whether depositions are required "far outweighs" the delay in completing the inspection. This argument is wholly unpersuasive. There have been three reported suicides and two attempted suicides at the ECHC in the last three months, with the most recent suicide occurring just 16 days ago. Further delay prevents the Justice Department's assessment of whether a preliminary injunction imposing certain changes at the ECHC could reduce this suicide rate. Moreover, additional delay allows Defendants more opportunity to change conditions at the ECHC, which may be beneficial to inmates and staff, but may also prevent the Justice Department from accurately assessing the true conditions at the

facility. See Matthew Spina, Holding Center Gets Cleaning for Federal Visit, The Buffalo News, March 16, 2010 (reporting that County crews are working overtime to scrub, paint and repair the ECHC).

On the third factor, Defendants argue that there is at least a substantial possibility that their application for Writ of Mandamus will be successful because their application will present novel issues of law that have not yet been addressed in this circuit. But from what this Court can gather, Defendants' application will assert that this Court misapplied Rule 34. A direct appeal of this ruling is unavailable and the circuit court is reluctant to reach non-appealable discovery orders by use of mandamus. See In re W.R. Grace & Co., 984 F.2d 587, 589 (2d Cir. 1993). Moreover, this is not an exceptional case presenting an "extreme need for reversal." In re von Bulow, 828 F.2d 94, 97 (2d Cir. 1987) (quoting Am. Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 282 (2d Cir. 1967)). Accordingly, this Court finds that Defendants have not established a substantial possibility that their application for Writ of Mandamus will be successful.

On the fourth factor, Defendants argue that the public interest in maintaining the integrity of the discovery process weighs in favor of a stay. This concern — which is overstated in light of this Court's ruling that the interviews fit within the discovery process authorized by Rule 34<sup>1</sup> — is additionally unpersuasive considering that the counterweight is the possibility of preventing suicides and suicide attempts. Although Defendants plainly disagree with this Court's construction of Rule 34, the public interest is undoubtedly best served by denying the request for a stay and permitting the expedited inspections of the

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<sup>1</sup> See Coleman v. Schwarzenegger, No. CIV S-90-0520, 2007 WL 3231706 (E.D.Cal. Oct. 30, 2007).

ECHC to go forward as ordered.

For all of the above reasons, Defendants' motion is denied.

IT HEREBY IS ORDERED, that Defendants' Motion to Stay (Docket No. 56) is DENIED.

SO ORDERED.

Dated: March 19, 2010  
Buffalo, New York

/s/William M. Skretny  
WILLIAM M. SKRETNY  
Chief Judge  
United States District Court

# **EXHIBIT C**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA; )  
 )  
 PLAINTIFF, )  
 )  
 v. )  
 )  
 ERIE COUNTY, NEW YORK; )  
 CHRIS COLLINS, COUNTY EXECUTIVE; )  
 ANTHONY BILLITTIER, IV, MD, COUNTY )  
 HEALTH COMMISSIONER; )  
 TIMOTHY B. HOWARD, ERIE COUNTY )  
 SHERIFF; RICHARD T. DONOVAN, )  
 ERIE COUNTY UNDERSHERIFF; )  
 ROBERT KOCH, SUPERINTENDENT, )  
 ADMINISTRATIVE SERVICES DIVISION, )  
 JAIL MANAGEMENT DIVISION; )  
 BARBARA LEARY, FIRST DEPUTY )  
 SUPERINTENDENT FOR ERIE COUNTY )  
 HOLDING CENTER; DONALD LIVINGSTON, )  
 FIRST DEPUTY SUPERINTENDENT FOR )  
 ERIE COUNTY CORRECTIONAL FACILITY, )  
 )  
 DEFENDANTS. )  
 \_\_\_\_\_ )

Civil No. 09-cv-0849

DECLARATION OF LINDSAY M. HAYES

I, Lindsay M. Hayes, declare under penalty of perjury that:

1. I was retained as an expert witness by the United States in the matter of United States v. Erie County, et al. I was specifically asked to assess issues related to suicide prevention practices at the Erie County Holding Center ("ECHC") in Buffalo, New York.

2. I am a Project Director of the National Center on Institutions and Alternatives, with an office in Mansfield, Massachusetts. I earned my Bachelor of Arts in Sociology in 1977 from Ithaca College, New York, and my Master of Science in Administration of Justice in 1978 from The American University, Washington, D.C.



3. I have thirty-two years of experience related to suicide prevention within jails, prisons and juvenile facilities and am nationally recognized as an expert in the field. My qualifications, outlined in more detail in my Curriculum Vitae (attached as Exhibit A) include the following:

a. I conducted the only five national studies of jail, prison, and juvenile suicide: *And Darkness Closes In... National Study of Jail Suicides* (1981), *National Study of Jail Suicides: Seven Years Later* (1988), *Prison Suicide: An Overview and Guide to Prevention* (1995), *Juvenile Suicide in Confinement: A National Survey* (2004), and *National Study of Jail Suicide: 20 Years Later* (2009);

b. I serve as editor/project director of the *Jail Suicide/Mental Health Update*, a quarterly newsletter devoted to research, training, prevention, and litigation that is funded by National Institute of Corrections (NIC); consulting editor and editorial board member of *Suicide and Life-Threatening Behavior*, the official scientific journal of the American Association of Suicidology; and editorial board member of *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, the official scientific journal of the International Association of Suicide Prevention;

c. I have authored over 50 publications in the area of suicide prevention within jail, prison and juvenile facilities, including model training curricula on both adult inmate and juvenile suicide prevention;

d. I have reviewed and/or examined over 3,000 cases of suicide in jail, prison, and juvenile facilities throughout the country during the past 29 years;

e. In 2001, I was presented with the National Commission on Correctional Health Care's Award of Excellence for outstanding contribution in the field of suicide prevention in correctional facilities;

f. My work has been cited in the suicide prevention sections of various state and national correctional health care standards, as well as numerous suicide prevention training curricula and I serve as a technical assistance consultant/expert by conducting training seminars and assessing inmate and juvenile suicide prevention practices in various state and local jurisdictions throughout the country; and

g. I have been appointed as a Federal Court Monitor and expert to special masters/monitors in the monitoring of suicide prevention practices in several adult and juvenile correctional systems under court jurisdiction.

4. I have reviewed a multitude of documents produced by Erie County (the "County"), the New York State Commission of Correction ("NYSCC"), and private counsel of former ECHC

inmates. A list of the documents I reviewed is appended to this declaration. See Document List, attached as Exhibit B.

5. Based on my review of the documents identified in Exhibit B, I have concluded that the suicide rate at ECHC substantially exceeds the national suicide rate for Jails as determined by the United States Bureau of Justice Statistics ("BJS"). Although I was able to make this deduction based on my review of the documents produced during a period of cooperation between the United States and the County, I am unable to provide a complete assessment of ECHC's suicide prevention and management practices because I lack access to critical documents necessary to identify the deficient practices that, if fixed immediately, would reduce the risks of self-harming behaviors by inmates, and to also offer minimum corrective measures.

6. BJS collects, analyzes, publishes, and disseminates statistical analysis regarding criminal justice and corrections practices. BJS' statistical analysis on correctional practices is a generally accepted measure for correctional oversight and for facility management to identify how a facility compares nationally with other similar facilities. Relying on the average daily population rates ("ADP") of each facility surveyed, BJS calculated that the average annual suicide rate for the period 2000-2006 was 43 deaths per 100,000 local jail inmates. See Bureau of Justice Statistics, Death in Custody Statistical Table, Local Jail Deaths, 2000-2006, <http://bjs.ojp.usdoj.gov/content/dcrp/tables/dcst06lj3.cfm>.

7. The generally accepted standard method for calculating the suicide rate at a jail or prison relies on the facility's ADP. In calculating the rate, a facility must first identify the total number of suicides at a facility for a given period. Then, the facility will divide that number by the product of a facility's ADP multiplied by the number of years within the identified period. The facility will then multiply the quotient by 100,000. The product is the suicide rate for the given facility.

8. Applying the generally accepted method for analyzing suicide rates at a jail or prison I find the suicide rate at ECHC over an eight year period is almost five times the national average for local jails or 202 deaths per 100,000 inmates.

- a. Upon information and belief, from 2002 to 2009, ECHC has had eleven suicides over the course of eight years.
- b. Upon information and belief, the suicides occurred at ECHC and not Erie County Correctional Facility ("ECCF").
- c. Upon information and belief, ECHC has an ADP of 680 inmates. For the purposes of this calculation the figures relied on are those of ECHC only and not ECCF.
- d. Applying the equation:  $(11 \text{ suicides} / 680 \times 8) (100,000) = 202$ .

9. Upon information and belief, the National Commission on Correctional Health Care ("NCCHC") informed the County and ECHC of apparent physical plant deficiencies that provide ready access to inmates who are determined to commit suicide. Indeed, according to the NCCHC's 2008 report, "[t]he cells used to house suicidal inmates were not 'suicide-proof.' There were multiple ways to facilitate committing suicide, including using the steel beds, wall plates that are lifted from the wall, handicapped bars, bars on windows, etc." See National Commission on Correctional Health Care, Health Services Study: Erie County Correctional Facilities, at 10 (Jan. 10, 2008, revised, Feb. 11, 2008). After the County received this report, upon information and belief, three additional inmates committed suicide by hanging, two in 2008 within months after the NCCHC report and another in 2009, within months of the County's receipt of the Department of Justice's July 15, 2009 Findings Letter.

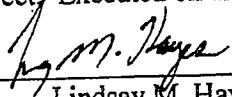
10. While, based on the documents reviewed, I have been able to identify historical trends at ECHC as to types of suicides and potential risk factors, additional information is needed to (1) identify the deficient practices that continue to place inmates in harm's way and (2) articulate the minimum corrective measures necessary to reduce the risks of self-harming behaviors by inmates. Specifically:

- a. I have a substantial number of concerns regarding ECHC's suicide prevention practices. Without discovery, including access to the facility and firsthand information regarding the inmate intake process, identification and classification of inmates identified for suicide watch, and the observation or care of inmates identified as suicidal, it is not possible to determine what practices are deficient.
- b. Similarly questionable are ECHC's opiate detoxification practices. Without discovery, including access to the facility and firsthand information regarding the inmate intake process, identification and classification of inmates identified for suicide watch, and the identification and classification of inmates suffering from opiate withdrawals, it is not possible to determine what practices are deficient.
- c. Given the number of suicides by hanging that utilized air ventilation grates, including the December 19, 2009, suicide of ECHC inmate Adam Murr, I need access to the Holding Center and, in particular, the cells where inmates identified with mental illness or on suicide watch are held.
- d. I have substantial concerns regarding the safety and management of inmates on suicide precautions. Given the January 18, 2010, suicide attempt by ECHC inmate Marcia Mitchell, reportedly while held in constant observation, I need access to the Holding Center to analyze the viability of ECHC's constant observation program.
- e. ECHC may be employing mental health technicians who are not licensed to provide mental health and suicide risk assessments. These individuals appear to

have provided assessments in some of the suicides reviewed, thus discovery is needed regarding mental health staff and oversight.

- f. ECHC's mental health referral system is deficient. The NYSCC has cited ECHC on multiple occasions for inadequate mental health referrals. Additional information is needed to assess ECHC's mental health referral system and practices.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on the 3rd day of February, 2010, in MANSFIELD, MA.

  
\_\_\_\_\_  
Lindsay M. Hayes

**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2010, I electronically filed the foregoing with the Clerk of the District Court, Western District of New York, using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

Kristin Klein Wheaton [kristin@erie.gov](mailto:kristin@erie.gov)

Cheryl A. Green [cheryl.green@erie.gov](mailto:cheryl.green@erie.gov)

And, I hereby certify that I caused the foregoing to be mailed, by the United States Postal Service, first class mail, to the following non-CM/ECF participants:

NONE

/s/Aaron S. Fleisher  
AARON S. FLEISHER  
ZAZY I. LÓPEZ  
ALYSSA C. LAREAU  
CHARLES W. HART  
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## VITAE

### LINDSAY M. HAYES

#### PERSONAL INFORMATION

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E-Mail: [Lhayesta@msn.com](mailto:Lhayesta@msn.com)  
Website: [www.ncianet.org/suicideprevention](http://www.ncianet.org/suicideprevention)

**Date of Birth:** June 5, 1955

**Marital Status:** Married, four children

#### ACADEMIC BACKGROUND

Master of Science -- Administration of Justice (1978); The American University,  
Washington, D.C.

Bachelor of Arts -- Sociology (1977); Ithaca College, New York

#### SUMMARY

Lindsay M. Hayes is a Project Director of the National Center on Institutions and Alternatives, with an office in Mansfield, Massachusetts. He is nationally recognized as an expert in the field of suicide prevention within jails, prisons and juvenile facilities. Mr. Hayes has been appointed as a Federal Court Monitor (and expert to special masters/monitors) in the monitoring of suicide prevention practices in several adult and juvenile correctional systems under court jurisdiction. He is also a suicide prevention consultant to the U.S. Justice Department's Civil Rights Division (Special Litigation Section) in its investigations of conditions of confinement in both adult and juvenile correctional facilities throughout the country. He also serves as an expert witness/consultant in inmate suicide litigation cases. Mr. Hayes also serves as a technical assistance consultant/expert by conducting training seminars and assessing inmate and juvenile suicide prevention practices in various state and local jurisdictions throughout the country.

Mr. Hayes has conducted the only five national studies of jail, prison, and juvenile suicide (*And Darkness Closes In...National Study of Jail Suicides* in 1981, *National Study of Jail Suicides: Seven Years Later* in 1988, *Prison Suicide: An Overview and Guide to Prevention* in 1995, *Juvenile Suicide in Confinement: A National Survey* in 2004, and *National Study of Jail Suicide: 20 Years Later* in 2009). The jail and prison suicide studies were conducted through contracts with the National Institute of Corrections (NIC), U.S. Justice Department; whereas the first national study of juvenile suicide in confinement was conducted through a contract with the Office of Juvenile Justice and Delinquency Prevention, U.S. Justice Department.

Mr. Hayes serves as editor/project director of the *Jail Suicide/Mental Health Update*, a quarterly newsletter devoted to research, training, prevention, and litigation that is funded by NIC; and is a consulting editor and editorial board member of *Suicide and Life-Threatening Behavior*, the official scientific journal of the American Association of

Suicidology, as well as editorial board member of *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, the official scientific journal of the International Association of Suicide Prevention. Mr. Hayes has authored over 50 publications in the area of suicide prevention within jail, prison and juvenile facilities, including model training curricula on both adult inmate and juvenile suicide prevention.

As a result of research, technical assistance, and expert witness consultant work in the area of suicide prevention in correctional facilities, Mr. Hayes has reviewed and/or examined over 3,000 cases of suicide in jail, prison, and juvenile facilities throughout the country during the past 29 years. In 2001, Mr. Hayes was presented with the National Commission on Correctional Health Care's Award of Excellence for outstanding contribution in the field of suicide prevention in correctional facilities. His work has been cited in the suicide prevention sections of various state and national correctional health care standards, as well as numerous suicide prevention training curricula..



## POSITIONS HELD

**National Center on Institutions and Alternatives (NCIA), Alexandria, Virginia, (January 1978 to Present).**

- **Federal Court Monitor for Suicide Prevention** (September 2004 to Present) in *United States v. King County (WA) et al* (CV-9-0059), monitoring use of force, suicide prevention, and medical care practices in the King County Correctional Facility from January 2009 to Present; *United States v. State of Mississippi* (3:03-CV-1354-HTW-JCS), monitoring suicide prevention practices in the state Division of Youth Services' facilities from February 2008 to Present; in *United States v. State of Hawaii*, serve as expert to Court Monitor in monitoring suicide prevention practices in the Hawaii Youth Correctional Facility from September 2006 to Present; in *United States v. State of Hawaii*, serve as expert to Court Monitor in monitoring suicide prevention practices in the Oahu Community Correctional Center from July 2009 to Present; in *United States v. State of Arizona* (CV-04-1926-PHX-EHC), monitoring suicide prevention practices in the state Department of Juvenile Corrections' facilities from September 2004 thru September 2007.
- **Technical Assistance Consultant/Expert Witness** (January 1983 to Present) providing specialized staff training and facility needs-assessment to jails, prisons, and juvenile facilities in suicide prevention. **Expert Witness** consultation and testimony provided in litigation concerning jail, prison, and juvenile suicide. Qualified as an expert in both state and federal court.
- **Project Director/Principal Investigator** (September 2006 to Present) of the U.S. Justice Department (National Institute of Corrections) contract to conduct an updated national study of inmate suicides occurring in county and city jails, as well as police department lockup facilities. Responsible for collection and analysis of suicide data, as well as development of recommendations to impact current practices and policies regarding programmatic intervention for identification of potential suicide victims. This contract encompasses a follow-up national study to that performed in both 1980 and 1986.
- **Technical Assistance Consultant** (June 1993 to Present) to the Special Litigation Section of the U.S. Justice Department's Civil Rights Division in its investigation of suicides and general conditions of confinement within jails, prisons, and juvenile facilities throughout the country.
- **Technical Assistance Consultant** (June 1984 to Present) to the National Institute of Corrections (NIC), U.S. Department of Justice for jail and prison suicide prevention. Also member of NIC's National Jail Suicide Prevention Task Force (1984-1985), an advisory board created to design strategies for reducing jail suicides nationwide.
- **Project Director/Editor** (May 1989 to Present) of the *Jail Suicide/Mental Health Update*. This U.S. Justice Department (National Institute of Corrections) contract publishes a quarterly newsletter focused on two areas: 1) current research, litigation, training, and model programs in the field of jail suicide prevention; and 2) promoting information and technology transfer between local jurisdictions that desire to implement or enhance jail-based mental health services. This project is a continuation of prior U.S. Justice Department grants (1986-1988).
- **Project Director/Principal Investigator** (August 1999 to December 2003) of a U.S. Justice Department, Office of Juvenile Justice and Delinquency Prevention contract to conduct the first national survey of juvenile suicide in confinement. During the contract period, the project determined the extent and distribution of juvenile suicides throughout the country, as well as developed a report (*Juvenile Suicide in Confinement: A National Survey*) for use by juvenile justice practitioners in expanding their knowledge base and in creating/revising policies and training curricula on suicide prevention.



- **Technical Assistance Manager** (September 1987 to September 1997) of NCIA's services to state and local government officials in identifying policies and programs to alleviate overcrowded prisons and jails. Systemic assessments provided counties in the following states: Alabama, Delaware, Georgia, Idaho, Maine, Maryland, Pennsylvania and Rhode Island. In addition, served as a consultant to U.S. Justice Department (National Institute of Corrections) in providing needs-assessment to jurisdictions which experience jail overcrowding. Qualified as an expert in federal court.
- **Project Director/Principal Investigator** (April 1993 to August 1994) of a U.S. Justice Department (National Institute of Corrections) contract to develop a monograph on prison suicide. The monograph (*Prison Suicide: An Overview and Guide to Prevention*) included an extensive literature review, examination of state and national standards for prison suicide prevention, analysis of prison suicide rates, case studies of effective prevention programs, and review of liability issues.
- **Project Director** (September 1990 to February 1991) of an NCIA research project to evaluate the effectiveness of the Intensive Parole Supervision Project, a joint venture of the U.S. Parole Commission and the U.S. Probation Office for the District of Maryland. The purpose of this five-month evaluation project was to assess the performance and goal achievement of the program during a two-year period, while providing Parole Commission officials with information useful to decision-making regarding program continuation, expansion and/or refinement, and allocation of resources.
- **Project Director/Principal Investigator** (September 1986 to February 1988) for the National Coordination of the Jail Suicide Prevention Information Task Force. This U.S. Justice Department (National Institute of Corrections) contract: 1) Conducted regional seminars on jail suicide prevention throughout the country; 2) Gathered information from each state on the incidence of jail suicide and related issues, including replication of NCIA's 1981 National Study of Jail Suicides; 3) Provided technical assistance to individual jails and others regarding jail suicide prevention while disseminating a quarterly newsletter (*Jail Suicide Update*) concerning timely developments in jail suicide prevention, litigation, training and special issues; and 4) Developed a model training manual on jail suicide prevention.
- **Project Director/Principal Investigator** (July 1980 to November 1981) for the National Study of Jail Suicides, the first effort to determine nationally the extent and distribution of suicides within jails and lockups. Responsible for collection and analysis of suicide data, as well as development of recommendations to impact current practices and policies regarding programmatic intervention for identification of potential suicide victims.

**Research Assistant/Juvenile Decarceration Project -- Joint Effort of NCIA and The American University, Washington, D.C.** (January 1978 to December 1978).

- A one-year project for the study of policy implementation regarding deinstitutionalization services for delinquent youth (a four state study). Responsible for compiling research for the monograph -- *The Politics of Decarceration*.

**Administrative Assistant/Bergen County Courthouse, Hackensack, New Jersey** (June 1977 to August 1977).

- Worked as an administrative assistant to the county court administrator and was responsible for conducting municipal court inspections. The purpose of these inspections was to correct any inadequacies in each of the (72) municipal courts, and to coordinate each court into a consistently run municipal court system.

**Youth Counselor/South Lansing Center, Lansing, New York** (January 1977 to May 1977).

- The South Lansing Center was a New York State Division for Youth Title II Residential Treatment Facility. Worked as a full-time intern in conjunction with Ithaca College. Involved gaining knowledge of the treatment program as a whole and working with youth on a one-on-one basis.

**Administrative Assistant/Bergen County Jail Annex, Hackensack, New Jersey (June 1976 to August 1976).**

- Worked as an administrative assistant to the jail psychologist and assisted in interviewing, counseling and screening individuals for the county's work-release program.

**SELECTED (STATE and NATIONAL) CONFERENCE PRESENTATIONS**

- Council of Juvenile Correctional Administrators, 2<sup>nd</sup> Annual Leadership Conference, Chicago, IL, October 2009;
- Academy of Correctional Professionals, Managing the Mentally Ill Through the Correctional System, Luncheon Speaker, Fairfax, VA - May 2009, Farmington, CT - June 2009, and Austin, TX - July 2009;
- Council of Juvenile Correctional Administrators, Seminar for New Directors, Tampa, FL, January 2009;
- American Correctional Association, 138<sup>th</sup> Congress of Correction, Health Care Professional Luncheon Speaker, New Orleans, LA, August 2008;
- Missouri Institute of Mental Health, Suicide in Jails and Prisons Conference, Keynote Address, Chesterfield, MO, August 2008;
- National Commission on Correctional Health Care, Mental Health in Corrections, Las Vegas, NV, July 2008.
- Florida Sheriffs Association, Annual Jail Conference, Sandestin, FL, December 2007.
- International Association of Suicide Prevention, Preventing Suicide Across the Life Span: Dreams and Realities Conference, Correctional Settings-Symposium, Killarney, Ireland, August 2007.
- Colorado Division of Youth Corrections, 4<sup>th</sup> Annual DYC Provider Training Conference, Breckenridge, CO, May 2007.
- OJJDP/ACA's National Juvenile Corrections and Detention Administrator's Forum, Pittsburgh, PA, May 2006.
- National Disability Rights Network, Annual Skills Building Conference, San Diego, CA, January 2006.
- Texas Juvenile Probation Commission, Behind Closed Doors: Liabilities, Issues and Trends in Juvenile Justice Facilities, Austin, TX, September 2005.
- National Center for Mental Health and Juvenile Justice, National Policy Academy on Improving Services for Youth with Mental Health and Co-Occurring Substance Abuse Disorders within the Juvenile Justice System, Bethesda, MD, September 2005.
- National Commission on Correctional Health Care, Mental Health in Corrections, Chicago, IL, July 2005.
- Connecticut Youth Suicide Advisory Board and Connecticut Clearinghouse, Suicide Prevention Promises and Practices: Focus on Youth, Rocky Hill, CT, May 2005.
- Corrections Corporation of America, 2005 Health Services Conference, Scottsdale, AZ, April 2005.
- Wisconsin Department of Justice and Wisconsin Department of Corrections, Suicide Prevention in Jails, Wisconsin Dells, WI, April 2005.
- National Commission on Correctional Health Care, 28<sup>th</sup> National Conference on Correctional Health Care, New Orleans, LA, November 2004.

- National Commission on Correctional Health Care, Mental Health in Corrections, Las Vegas, NV, July 2004.
- Massachusetts Department of Public Health, Suicide Prevention Across the Lifespan, 3<sup>rd</sup> Annual Suicide Prevention Conference, Worcester, MA, May 2004.
- Suicide Prevention Resource Center, Preventing Suicide in Regions VII and VIII: Communities Working Together to Implement the National Strategy for Suicide Prevention in the Prairies and Mountain West, Westminster, CO, October 2003.
- North Dakota Office of Management and Budget, Risk Management Division, Suicide Prevention in Correctional Facilities Workshop, Bismarck, ND, May 2003.
- Maine Department of Behavioral and Developmental Services, 2003 Crisis Clinician Conference, Keynote Address. Augusta, ME, March, 2003.
- Texas Juvenile Probation Commission, Symposium on Juvenile Suicide Prevention and Intervention: Putting Children First, Austin, TX, March 2003.
- American Correctional Association, Winter Conference, Charlotte, NC, January 2003.
- Council of Juvenile Correctional Administrators, Mid-Winter Meeting, Charlotte, NC, January 2003.
- New York State Commission of Correction and Office of Mental Health, 2002 Correctional Medical and Mental Health Care Symposium, Sarasota Springs, NY, October 2002.
- University of Connecticut Health Center/Correctional Mental Health Conference, Suicide Prevention: Assessment and Management in a Correctional Environment, Farmington, CT, September 2002.
- American Correctional Health Services Association, Multidisciplinary Training Conference, Portland, OR, March 2002.
- Wisconsin Department of Corrections, Executive Planning Meeting, Kohler, WI, January 2002.
- MCP Hahnemann University, Behavioral Healthcare Education, 9<sup>th</sup> Annual Forensic Rights and Treatment Conference, Grantville, PA, November 2001.
- National Commission on Correctional Health Care, 25<sup>th</sup> National Conference on Correctional Health Care, Albuquerque, NM, November 2001.
- Maryland Governor's Interagency Workgroup on Youth Suicide Prevention, 13<sup>th</sup> Annual Suicide Prevention Conference, Baltimore, MD, October 2001.
- Florida Department of Corrections, 4<sup>th</sup> Annual Female Offender Focused Symposium, Orlando, FL, September 2001.
- National Institute of Corrections, U.S. Department of Justice, Prison Health Care: Suicide Prevention Workshop, Longmont, CO, June 2001.
- New York State Office of Mental Health, Best Practices Conference, Brooklyn, NY, June 2001.
- Office of Juvenile Justice and Delinquency Prevention (OJJDP) National Conference, Justice for Children: A Vision for the 21<sup>st</sup> Century, Washington, DC, December 2000.

- National Commission on Correctional Health Care, 24<sup>th</sup> National Conference on Correctional Health Care, St. Louis, MO, September 2000.
- Indiana Sheriffs' Association and Indiana Department of Corrections, Jail Suicide Prevention Workshop, Indianapolis, IN, July 2000.
- OJJDP/ACA's 15<sup>th</sup> Annual National Juvenile Corrections and Detention Forum, Albuquerque, NM, May 2000.
- Governor's Summit - Correctional Health to Community Health: A Continuum of Prevention and Care for the Criminal Offender, Las Vegas, NV, April 2000.
- Ohio Community Forensic Association, Suicide and the Criminal Justice Population, Columbus, OH, March 2000.
- Hawaii Criminal Justice Association, 3<sup>rd</sup> Annual Conference, Keynote Address, Honolulu, HI, March 2000.
- National Commission on Correctional Health Care, 23<sup>rd</sup> National Conference on Correctional Health Care, Fort Lauderdale, FL, November 1999.
- Council of Juvenile Correctional Administrators, Western Regional Meeting, Tucson, AZ, November 1999.
- Florida Senate and House of Representatives, Committees on Corrections, Presentation on Suicide in Florida Prisons, Tallahassee, FL, January 1999.
- Open Society Institute, 1<sup>st</sup> National Conference on Death and Dying in Prisons and Jails, New York, NY, November 1998.
- Ohio Department of Mental Health, Office of Forensic Services, Unlocking the Barriers: Mental Health Services in Jails and Working with Law Enforcement Agencies, Cuyahoga Falls, OH, August 1998.
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- Wood County Juvenile Detention Center, 1998 Ohio Regional Juvenile Suicide Awareness Seminar, Bowling Green, OH, March 1998.
- Netherlands Institute for the Study of Criminology and Law Enforcement, Leiden University, Leiden, The Netherlands, July 1997.
- Institute for the Study and Treatment of Delinquency, 3rd International Conference on Deaths in Custody, Uxbridge, England, July 1997.
- National Juvenile Detention Association, 9<sup>th</sup> Annual National Juvenile Services Training Institute, Indianapolis, IN, June 1997.
- National Commission on Correctional Health Care, 20<sup>th</sup> National Conference on Correctional Health Care, Certified Correctional Health Care Program, Nashville, TN, October 1996.

- Sam Houston State University, Criminal Justice Center, 27<sup>th</sup> Annual Jail Management Conference, Huntsville, TX, October 1996.
- Oregon Jail Managers' Association, Bend, OR, August 1996.
- Ohio Department of Rehabilitation and Correction, Correctional Health Care Conference, Columbus, OH, May 1996.
- U.S. Department of the Army, U.S. Army Military Police Support Agency, Army Corrections Conference, Fort Belvoir, VA, December 1995.
- National Commission on Correctional Health Care, 19<sup>th</sup> National Conference on Correctional Health Care, Washington, DC, November 1995.
- Centers for Disease Control and Prevention, National Violence Prevention Conference, Des Moines, IA, October 1995.
- National Commission on Correctional Health Care, National Conference on Legal Issues in Correctional Health Care, Chicago, IL, June 1995.
- Louisiana State University, School of Social Work, Office of Correctional Studies, Prison Suicide Prevention Workshop, Baton Rouge, LA, September 1994.
- Wisconsin Department of Corrections, Suicide Prevention in Detention Facilities Seminar, Wisconsin Dells, WI, September 1994.
- University of Virginia, Institute of Law, Psychiatry and Public Policy, 26<sup>th</sup> Semi-Annual Forensic Symposium: Jails and Mental Health Services, Charlottesville, VA, May 1994.
- American Association of Suicidology, 27<sup>th</sup> Annual Conference, New York, NY, April 1994.
- Institute for the Study and Treatment of Delinquency, 2<sup>nd</sup> International Conference on Deaths in Custody, Cambridge, England, April 1994.
- National Association of State Mental Health Program Directors' Conference, St. Louis, MO, September 1993.
- Pennsylvania Prison Warden's Association, Jail Suicide Prevention Seminar, Bethlehem, PA, November 1992.
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- American Jail Association, 7<sup>th</sup> Annual Training Conference, Los Angeles, CA, April 1988.

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- American Correctional Association, Winter Conference, Phoenix, AZ, January 1988.
- American Association of Correctional Training Personnel and the Juvenile Justice Trainers Association, 3<sup>rd</sup> Annual National Correctional Trainers Conference, Pittsburgh, PA, October 1987.
- Police Foundation, Police Litigation Prevention Seminar, Chicago, IL, May 1987.
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- Centers for Disease Control, 1987 Conference on Injury in America, Atlanta, GA, February 1987.
- Southeastern Psychological Association, 29th Annual Meeting, Atlanta, GA, March 1983.
- American Association of Suicidology, 16th Annual Conference, Dallas, TX, April 1983.

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  - “Custodial Suicide: Yet Another Look,” (Editor), 15 (1), Summer 2006.
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## **OTHER SELECTED TECHNICAL ASSISTANCE/RESEARCH PROJECT REPORTS**

- *Technical Assistance Report on Suicide Prevention Practices Within the Massachusetts Department of Correction* January 2007.
- *An Assessment of Suicide Prevention Practices at the MacLaren Youth Correctional Facility*, September 2004.
- *Report on Suicide Prevention Practices Within the Arizona Department of Juvenile Corrections*, July 2003.
- *An Evaluation of Bridgewater State Hospital's Suicide Prevention Policies and Practices*, June 2000.
- *An Assessment of Suicide Prevention Practices at the Hillcrest Youth Correctional Facility*, April 1998.
- *Suicide Prevention in the Central Detention Facility: An Assessment and Corrective Action Plan*, July 1994.
- *Suicide Prevention in YSA Facilities: A Status Report and Corrective Action Plan*, September 1992.

## **OTHER SIGNIFICANT DATA**

- Testimony before the Joint Committee on Mental Health and Substance Abuse and the Joint Committee on Public Safety and Homeland Security regarding *Suicide Prevention Practices Within the Massachusetts Department of Corrections*, State House, Boston, MA, May 1, 2007.
- Consulting Editor and Editorial Board Member of *Suicide and Life-Threatening Behavior*, the official scientific journal of the American Association of Suicidology, 2004 to Present.
- Editorial Board Member of *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, the official scientific journal of the International Association of Suicide Prevention, 2004 to Present.
- Recipient of the National Commission on Correctional Health Care's B. Jaye Anno Award of Excellence in Communication for an outstanding contribution to the field of suicide prevention in correctional facilities, November 2001.
- Recipient of a Governor's Citation by the Governor of the State of Maryland for assistance in the implementation of revised suicide prevention policies in the state's juvenile institutions, October, 2001.
- Principal Investigator, *Evaluation of Suicide Prevention Policies and Practices at Bridgewater State Hospital*, Massachusetts, 2000.
- Testimony before the House of Representatives Committee on Corrections regarding *Suicides in Florida Prisons*, State Capitol, Tallahassee, FL., January 9, 1999.
- Testimony before the House Interim Committee on Judiciary and the Senate Judiciary Crime and Civil Subcommittee regarding *Suicide Prevention Practices at the Hillcrest Youth Correctional Facility*, State Capitol, Salem, OR, March 10, 1998.
- Suicide Prevention Consultant to the Council of Juvenile Correctional Administrators, 1998 to Present.
- Jail Suicide Prevention Expert to Special Master in *Campbell v. McGruder, et al* (District of Columbia), 1994 to 1997.

- Juvenile Suicide Prevention Expert to Special Master in *Jerry M. v. District of Columbia, et al*, 1989 to Present.
- Special Editor for series devoted to international perspective of jail suicides in *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, 18 (4), 1997.
- Columnist/Reviewer to *Crisis: The Journal of Crisis Intervention and Suicide Prevention*, 1992 to 2005.
- Invited Lecturer, School of Justice, The American University, Washington, D.C., January 1985 to April 1990.
- Outstanding Alumnus, School of Justice, The American University, Washington, D.C., Spring 1985.

**SUICIDE PREVENTION SERVICES (staff training, program assessment/development and litigation consultation) PROVIDED TO HUNDREDS OF LOCAL AND STATE JURISDICTIONS IN THE FOLLOWING STATES:** Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington (State), West Virginia, Wisconsin, and Wyoming.

**Listings of training, technical assistance, and litigation consultation in suicide prevention furnished upon request.**

September 2009



## **Exhibit B**

### **List of Documents Reviewed by Lindsay M. Hayes**

1. New York State Commission on Corrections, Apr. 30, 2007 Corrective Action Evaluation
2. New York State Commission on Corrections, Aug. 6, 2007 Corrective Action Evaluation
3. New York State Commission of Corrections Findings regarding the Death of Inmate CJ, Aug. 20, 1998
4. New York State Commission of Corrections Findings regarding the Death of Inmate EF, July 5, 2002
5. New York State Commission of Corrections Findings regarding the Death of Inmate MB, Sept. 14, 2002
6. New York State Commission of Corrections Findings regarding the Death of Inmate EB, Aug. 28, 2003
7. New York State Commission of Corrections Findings regarding the Death of Inmate JM, Apr. 29, 2003
8. New York State Commission of Corrections Findings regarding the Death of Inmate MS, Sept. 22, 2004
9. New York State Commission of Corrections Findings regarding the Death of Inmate JA, Apr. 20, 2005
10. New York State Commission of Corrections Findings regarding the Death of Inmate CT, May 14, 2005
11. New York State Commission of Corrections Report Regarding the Death of Inmate MR, Jan. 23, 2007
12. New York State Commission of Corrections Report Regarding the Death of Inmate JJ, Mar. 31, 2008
13. New York State Commission of Corrections Report Regarding the Death of Inmate JR, Apr. 30, 2008
14. Incident Reports:
  - a. IR 07-005

- b. IR 07-007
- c. IR 07-019
- d. IR 07-026
- e. IR 07-039
- f. IR 07-046
- g. IR 07-054
- h. IR 07-069
- i. IR 07-078
- j. IR 07-084
- k. IR 07-130
- l. IR 07-132
- m. IR 07-150
- n. IR 07-153
- o. IR 07-157
- p. IR 07-195
- q. IR 07-203
- r. IR 07-214
- s. IR 08-010
- t. IR 08-028

15. Additional Information Regarding Suicides Between 2000-2005, Received from David Elibol, Esq., Aug. 14, 2008.

- a. JM, Apr. 29, 2003
- b. MS, Sept. 22, 2004
- c. PC, Sept. 11, 2004
- d. JA, Apr. 20, 2005
- e. CT, May 14, 2005

16. Pathological Examination of JJ, ME 631-08

17. Sample Forms: ECHC

- a. Forensic Referral
- b. Suicide Prevention Screening Guidelines
- c. Suspected Suicidal Inmate Notification Form
- d. Forensic Referrals Log
- e. Suspected Suicidal Inmate Referral Form (JMD-227)

18. National Commission on Correctional Health Care Health Services Study, Jan. 10, 2008, revised Feb. 11, 2008

19. Relevant Articles:

- a. Stephen Watson, "Jail Death Attributed to Suicide," Buffalo News Aug. 30, 2003
- b. Dianne McQuillen, "Prisoner's Death Makes No Sense," Buffalo News, Feb. 6, 2004

- c. "2 Recent Hanging Deaths at Jail Prompt Review," Buffalo News, Sept. 24, 2004
  - d. "Heroin Suspect Found Hanged in County Jail," Buffalo News, May 19, 2005
  - e. Vanessa Thomas, "Suicide, Attempt in Holding Center Probed," Buffalo News, Feb. 14, 2007
  - f. "Alden Man Hangs Himself After Being Sentenced," May 1, 2008 (EC\_POST10062-63)
  - g. Matthew Spina, "Collins Bars Investigation Into Deaths in County Jails," Buffalo News, Aug. 10, 2008
  - h. "Jail Employees Thwart Inmate's Attempted Suicide," Buffalo News, Dec. 3, 2008
  - i. "Holding Center Inmate, 21, Saved From Suicide Attempt," Buffalo News, May 12, 2009
  - j. "Deputies Say Inmate, 17, Tried to Hang Himself," Buffalo News, May 31, 2009
  - k. "Deputies Rescue Inmate After Suicide Attempt," Buffalo News, Jun. 6, 2009
  - l. "Inmate Injured in Jump in Holding Center," Buffalo News, Jun. 25, 2009
  - m. Matthew Spina and Gene Warner, "Suicide Try Made in Holding Center - County Said Officers Did All They Could," Buffalo News, Dec. 19, 2009
  - n. Patrick Lakamp, "Inmate who Tried to Kill Self in Cell Dies," Buffalo News, Dec. 21, 2009
  - o. Matthew Spina, "Another Holding Center Inmate Attempts Suicide," Buffalo News, Jan. 18, 2010.
20. July 15, 2009 Erie County Holding Center and Erie County Correctional Facility investigation Findings Letter
21. September 10, 2009 Erie County response to USDOJ Findings Letter
22. Erie County Sheriff's Office Jail Management Division Policy and Procedure Manual, # JMD 13.00.00 Suicide Prevention
23. Suicide Prevention & Crisis Intervention in County Jails & Police Lockups Officer's Handbook
24. Suicide Prevention & Crisis Intervention in County Jails & Police Lockups Refresher Program Trainer's Manual
25. Suicide Training & Refresher

# **EXHIBIT D**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

v.

**DECISION AND ORDER**  
09-CV-849S

ERIE COUNTY, NY,

CHRIS COLLINS,

*County Executive,*

ANTHONY BILLITTIER, IV, MD

*County Health Commissioner,*

TIMOTHY B. HOWARD,

*Erie County Sheriff,*

RICHARD T. DONOVAN,

*Erie County Undersheriff,*

ROBERT KOCH,

*Superintendent Administrative Services Division,*

*Jail Management Division,*

BARBARA LEARY,

*First Deputy Superintendent,*

*Erie County Holding Center,*

DONALD LIVINGSTON,

*First Deputy Superintendent,*

*Erie County Correctional Facility,*

Defendants.

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**I. INTRODUCTION**

Presently pending are the parties' discovery-related motions filed in response to this Court's March 6, 2010 Decision and Order granting the Justice Department's Motion for Expedited Discovery. The Justice Department filed a Motion to Compel Defendants' compliance on March 11, 2010. Defendants filed a Motion for Protective Order on March 12, 2010. Both sides seek expedited treatment of their motions. Briefing concluded yesterday, March 16, 2010.

For the reasons that follow, expedited treatment is granted and the motions are granted in part and denied in part.

## II. BACKGROUND

On March 6, 2010, this Court granted the Justice Department's request for expedited discovery concerning whether changes can be made at the Erie County Holding Center ("ECHC") to decrease incidents of preventable suicides and suicide attempts. (Docket No. 42.) The discovery sought included information related to suicide prevention and mental health treatment, as well as entry and inspection of the ECHC to allow suicide prevention and mental health consultants to examine the facility, inspect relevant records, and interview inmates. (Fleisher Declaration; Docket No. 27, ¶ 5; United States' First Request for Entry and Inspection, Docket No. 27-4.) In granting the Justice Department's motion, this Court rejected Defendants' arguments that the Justice Department lacked good cause for expedited discovery, that the requested discovery was over-broad and unduly burdensome, and that the requests ran afoul of state and federal confidentiality laws.

This Court granted limited expedited discovery and directed Defendants to respond to the Justice Department's three sets of discovery requests within 14 days of service. The approved discovery requests included Requests for Interrogatories, Requests for Production of Documents, and a Request for Entry and Inspection. (Docket Nos. 27-2, 27-3, 27-4.)

At issue is the scope of the Justice Department's Request for Entry and Inspection.

In pertinent part, the request seeks the following:

- entry and inspection of the ECHC by Justice Department attorneys and consultants;
- review of requested documents;
- examination of the premises for conditions related to mental health treatment and suicide prevention at the facility;
- access to ECHC staff who are able to answer questions about the premises and processes viewed during the facility inspection;
- interviewing of inmates, outside the presence of ECHC staff or defendants' counsel, on issues of mental health treatment and suicide prevention at the facility.

(Docket No. 27-4.)

Although Defendants will permit the Justice Department entry to the ECHC and are in the process of producing records, they seek a Protective Order barring any interviewing of County employees or inmates that does not comport with the Federal Rules of Civil Procedure. The Justice Department, on the other hand, seeks an order compelling Defendants to comply with this Court's March 6, 2010 Decision and Order and the discovery requests as written.

### **III. DISCUSSION**

The Justice Department's request to enter and inspect the ECHC is proper under Rule 34(a)(2) of the Federal Rules of Civil Procedure. Defendants argue, however, that the Justice Department's additional requests to informally interview County employees and inmates are not authorized by Rule 34 and are barred by Rule 30, which governs depositions. Defendants also seek clarification as to several logistical concerns related to

the inspection of the ECHC.

**A. County Employees**

This Court ordered that Defendants allow the Justice Department access to the ECHC on March 22 and 23, 2010, finding that “access to the ECHC is not unduly burdensome as County lawyers and representatives may accompany the Justice Department and will be present when County employees are questioned.” (Docket No. 42.) Access is necessary for the Justice Department’s consultants to examine mental health treatment and suicide prevention conditions at the ECHC, and for them to gain an understanding of related practices and policies. To this end, the Justice Department requests the opportunity to interview inmates and have access to ECHC staff who are able to provide information about the premises and processes viewed during the inspection.

Defendants maintain that informal interviewing of County employees, even with County lawyers present, violates the federal rules because County employees are essentially represented parties in this lawsuit. As such, statements from County employees may be taken only by noticed deposition, in compliance with Rule 30. Defendants also note that the Justice Department has not identified any specific individuals or categories of individuals that it would like to question, beyond the broad request for “staff who are able to answer questions about the premises and processes viewed during the facility inspection.” (Docket No. 27-4.)

Rule 34(a)(2) of the Federal Rules of Civil Procedure authorizes service of a request “to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.”



Rule 34, like all federal discovery rules, is to be liberally construed. In this Court's view, permitting consultants entry to the ECHC to examine the suicide and mental health protocols falls within an inspection of an "operation" on property. See Rule 34(a)(2). In Coleman v. Schwarzenegger, for example, the plaintiffs requested site inspections of ten prisons by their experts, including a request that their experts be permitted to interview prison staff. No. CIV S-90-0520, 2007 WL 3231706 (E.D.Cal. Oct. 30, 2007). The defendants objected on the same basis that Defendants do here — that only Rule 30 permits a party to take the testimony of another person. Id. at \*1. The court rejected the defendants' argument and instead held under Rule 34 that "questions by experts directed to prison employees . . . concerning those matters identified in plaintiffs' inspection requests [which included access to medical and mental health care] are properly included as part of an inspection of "any operation" on the prison facilities to be inspected." Id. at 2.

This Court agrees with the Coleman court's construction of Rule 34(a)(2), particularly as it relates to the scope of inspection afforded a consultant or expert to inspect an "operation" on the property. Defendants argue that Coleman is distinguishable because the decision came in the compliance phase of that litigation. This argument is unpersuasive, however, because the phase of the litigation is not material to the court's construction of what Rule 34 allows. Accordingly, the Justice Department's consultants shall be permitted to interview or question ECHC and other County employees as necessary during the course of the site inspection on the issues of suicide prevention and mental health processes and procedures. Reasonable access to employees is necessary for the consultants to form an understanding and opinion about the suicide practices and

protocols at the ECHC. Moreover, there is no danger of prejudice or element of surprise to Defendants because their attorneys are permitted to accompany the consultants and advise County employees as they see fit.

But interviews of County employees by Justice Department attorneys are different. This Court previously held that County attorneys may be present during the Justice Department's questioning of County employees. But this Court did not consider the precise parameters of the Justice Department's questioning. The investigative work of lawyers is different from that of consultants or experts. Because County employees are represented by the County Attorney's office and are arguably defendants in this lawsuit, this Court agrees with Defendants that questioning of County employees by Justice Department lawyers, if any, should be governed by Rule 30 and the other discovery rules.

Consequently, the Justice Department must notice the depositions of individuals or classifications of individuals that it wishes its lawyers to speak with during the inspection period. Depositions may be taken on two days notice before, during, or up to 14 days after the inspection concludes. To eliminate any security concerns stemming from employees being pulled from their posts for depositions, Defendants shall make every effort to have the individuals who are scheduled for deposition available and not working on the date and time their deposition is noticed. Defendants shall also have appropriate accommodations and a stenographer available at the ECHC on March 22 and 23, 2010, at 9:00 a.m., unless no depositions are noticed during that time.

**B. Inmates**

Defendants also argue that the Justice Department's interviews of inmates should comply with the federal rules and be accomplished by deposition. But the same concern

that holds true for County employees does not hold true for inmates: they are not County employees nor are they represented by the County Attorney's office. Rather, inmates are non-party witnesses, and as such, although the Justice Department could depose them under Rule 30, there is no requirement that it do so. An inmate, like any other non-party witness or potential witness, can be informally interviewed (if willing) by either party. Moreover, requiring that inmates be deposed (or interviewed) in the presence of County attorneys or employees would likely chill their willingness to speak to investigators or to speak candidly. This, of course, defeats the whole purpose of speaking to inmates in the first place.

Defendants further argue that permitting interviews of inmates presents a security concern and will deny the inmates access to their attorneys. But inmates are not entitled to counsel in this context nor are they required to speak to the Justice Department if they would prefer to have their attorneys present. Moreover, to alleviate any security concerns, Defendants are hereby ordered to make appropriate security arrangements for Justice Department personnel to tour, examine, and inspect the ECHC, as well as to interview inmates in an appropriate room with reasonable accommodations where the participants can be seen, but not heard, and without County lawyers or employees present. If additional staff and security are required on March 22 and 23 to accommodate the inspection and interview process, Defendants are ordered to provide it.

**C. Rule 16 Conference**

Defendants request a Rule 16 conference to discuss logistical issues related to the inspection of the ECHC, such as the extent of the document production, the mechanics of the facility inspection, the sharing of information gathered during the inspection, the

number of people allowed into the facility during the inspection, and reasonable measures relating to inmate security and safety. The Justice Department does not oppose this request.

Given the expedited time frame, this Court strongly encourages counsel to work together to resolve any further logistical concerns without the need for a Rule 16 conference. Efforts are better spent preparing for the upcoming inspection than preparing for a conference with the Court. Counsel are therefore directed to work in good faith to reach agreement on any remaining issues. If disagreements persist, however, the parties may appear before the Honorable Jeremiah J. McCarthy, United States Magistrate Judge, on March 19, 2010, at 1:00 p.m. for a Rule 16 conference. Judge McCarthy will also be available by telephone on March 22 and 23 should any issues arise during the site inspection that require judicial intervention.

#### **IV. CONCLUSION**

For the foregoing reasons, the parties' Motions to Expedite are granted, the Justice Department's Motion to Compel is granted in part and denied in part, and Defendants' Motion for a Protective Order is granted in part and denied in part. Defendants are ordered to have the ECHC available for the Justice Department's inspection beginning at 9:00 a.m. on March 22, 2010.

#### **V. ORDERS**

IT HEREBY IS ORDERED, that the parties' Motions to Expedite (Docket Nos. 45, 49) are GRANTED.

FURTHER, that the Justice Department's Motion to Compel (Docket No. 43) is

GRANTED in part and DENIED in part, consistent with the foregoing decision.

FURTHER, that the Defendants' Motion for Protective Order (Docket No. 46) is GRANTED in part and DENIED in part, consistent with the foregoing decision.

SO ORDERED.

Dated: March 17, 2010  
Buffalo, New York

/s/William M. Skretny  
WILLIAM M. SKRETNY  
Chief Judge  
United States District Court

## CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2010, I electronically filed the foregoing RESPONSE OF THE UNITED STATES TO PETITIONERS' MOTION TO EXPEDITE REVIEW OF PETITION FOR WRIT OF MANDAMUS with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

Counsel for the Petitioners is a registered CM/ECF user, and service will be accomplished by the appellate CM/ECF system.

*/s/ Dirk C. Phillips*

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DIRK C. PHILLIPS

Attorney