

UNITED STATES OF AMERICA PLAINTIFF
VERSUS CIVIL ACTION NO. 3:16-CV-00622-CWR-FKB
STATE OF MISSISSIPPI DEFENDANT

(Appearances noted herein.)

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APPEARANCES VIA VIDEOCONFERENCE:

FOR THE PLAINTIFF, THE UNITED STATES OF AMERICA:

DEENA FOX, ESQ.

MITZI DEASE PAIGE, ESQ

PATRICK HOLKINS, ESQ.

REGAN RUSH, ESQ.

FOR THE DEFENDANT, THE STATE OF MISSISSIPPI:

JAMES SHELSON, ESQ.

MARY JO WOODS, ESQ.

DOUGLAS T. MIRACLE, ESQ.

ALSO PRESENT:

DR. MICHAEL F. HOGAN, SPECIAL MASTER

KEITHFER ROBINSON

WENDY BAILEY

TWANA SUMMERS

1 **PROCEEDINGS VIA VIDEOCONFERENCE, FEBRUARY 22, 2021**

2
3 THE COURT: Good afternoon.

4 MS. PAIGE: Good afternoon, Your Honor.

5 THE COURT: Who do I have on for -- who do I have on
6 for the government?

7 MS. FOX: Your Honor, this is Deena Fox for the United
8 States, with me also are Regan Rush, Patrick Holkins, and
9 Mitzi Dease Paige.

10 THE COURT: Okay. And who's on for the state?

11 MR. SHELSON: Your Honor, you have Jim Shelson as well
12 as Doug Miracle and Mary Jo Woods with the Mississippi
13 Attorney General's Office.

14 THE COURT: Okay. And I see Mr. Hogan is on as the
15 monitor in this matter; is that correct?

16 SPECIAL MASTER HOGAN: Yes. Thank you, Your Honor.

17 THE COURT: All right. Can everybody hear me fine?

18 I appreciate you for accommodating us with doing this
19 by Zoom. It is open to the public. I don't know if the
20 public -- I assume the line is open for the public. And there
21 may be interested parties or parties or persons who are
22 interested in this litigation, so they may be on listening.

23 This is our status conference to follow up on where
24 we -- to follow up from where we -- to find out where we are.
25 I guess it's been a little bit more than a year since the

1 Court entered its initial order. The parties, we've met a
2 couple of times since then, or at least I think most recently
3 back in the summer, I think. And we're still sort of
4 operating from a point of view where we're trying to avoid
5 having persons in the courtroom as much as possible.

6 The court reporter is present and is taking a
7 transcript of this hearing. So I guess -- I guess what I want
8 to know, then, is where we are, and I guess the -- I'll start
9 with the master and allow him to tell us, from his
10 perspective, where we are. And then, of course, I will give
11 the parties an opportunity to tell me where they think we are.

12 I know at the last hearing, I know there were some
13 things going on with the state as far as the state appointing
14 an individual pursuant to the -- I guess legislation that was
15 passed in the legislature last year I think, so I'm interested
16 in hearing from the state with respect to what is and is not
17 being done now that the legislature is in session this year.
18 What efforts are being made to try to appropriate or finance
19 any of the things that the parties might be talking about?

20 So, Dr. Hogan, I'll start with you. Tell me where we
21 are.

22 SPECIAL MASTER HOGAN: Well, thank you, Your Honor.
23 I'll just pick up where you've left off in a sense and say
24 that since we were before you virtually last, there's a new
25 director at the Department of Mental Health, Wendy Bailey, who

1 has been there for quite a while but is new in that leadership
2 role. So she's been participating in the conversations.

3 I would say vis-a'-vis your charge to us that the
4 parties have been working diligently and collaboratively and
5 are almost there, but not quite. And I used this analogy
6 before, but it's a little bit like climbing a mountain. A lot
7 of times when you get near the top, it gets the steepest. And
8 we are very near the top, and it's gotten a little steep. But
9 the parties will tell you a little bit more about that.

10 Without going into too much detail, I will say that the
11 parties have reached substantial agreement on those services
12 that would be added by the state and in the state to respond
13 to issues identified at trial. So the capacity of the needed
14 services and a timeline for putting those in place that are
15 still -- would still be required. The parties have also
16 reached substantial agreement on how those services would be
17 overseen and how quality problems would be addressed along the
18 way toward full compliance.

19 There are some issues that were noted at trial that go
20 beyond new services to be added, things like steps to be taken
21 to avoid unnecessary hospitalization and --

22 THE COURT: Mr. Hogan --

23 SPECIAL MASTER HOGAN: Yes.

24 THE COURT: Mr. Hogan, let me interrupt you for a
25 second, and I apologize. I want to ask anyone who's not

1 speaking at any given time, which will also include me, to put
2 our mikes on mute, so maybe that might reduce some feedback, a
3 little feedback that I'm hearing. So I'm going to put myself
4 on mute as well, so if --

5 SPECIAL MASTER HOGAN: Yep. Yep. So thank you, Your
6 Honor.

7 So the -- as I was saying in addition to the services
8 to be added, the parties have come to agreement on issues like
9 discharge planning from the hospital and the steps to be taken
10 to avoid unnecessary admission to one of the state hospitals,
11 technical assistance that would be provided to local
12 providers, and data collection, so that's the good news.

13 The part that has been the hardest to reach agreement
14 on with parties -- in fact, they started very far apart -- had
15 to do with what might be seen as the two final elements of an
16 agreement. One, under what circumstances would the parties
17 propose to dismiss the lawsuit? How would it be terminated?

18 And, two, closely related to that, how would progress
19 be monitored on an interim basis until the agreed conditions
20 have all been -- have all been met?

21 As I said, the parties started very far apart on that
22 issue and remain apart, but remain in dialogue. And there is
23 not, unless things happened over the weekend, agreement yet on
24 that point. But my impression is that we will know within
25 days to weeks if it's possible to reach agreement on those

1 matters, and with that, on the -- on an agreement overall.

2 And I think I'll stop with that, Your Honor, and the
3 parties may wish to describe any of that in more detail.

4 THE COURT: Okay. And for the record, I don't see
5 Ms. Wendy Bailey, but I understand she's on the line at least.
6 And I presume she's representing -- she's the new director,
7 and she's here as the party representative, I presume, for the
8 state.

9 Is that correct, Mr. Shelson?

10 MR. SHELSON: Well, Your Honor, I'd put it I'm here on
11 behalf of the state, and Ms. Bailey is on the call as the
12 executive director of DMH.

13 THE COURT: Okay. She's on as the client, basically?

14 MR. SHELSON: Yes, Your Honor.

15 THE COURT: Okay. All right. Thank you.

16 So let me hear from the parties starting with the
17 United States. Mr. Hogan has said that basically there has
18 been much agreement to many of the things, many of the terms
19 and conditions. He said you-all made it up to the mountain
20 top, a little steeper to go, and he indicated on the back end
21 what those two points are that remain the sticking points or
22 somewhat outstanding.

23 But before we get to those points, to the United
24 States, do you feel like you indeed have reached agreement on
25 the salient issues that are discussed in the Court's order

1 that has been put forth in the proposals by the United States?
2 And I'll ask -- I'm going to ask the same question to the
3 state of Mississippi as well.

4 But what is your view on how the negotiations are
5 proceeding?

6 MS. FOX: Thank you, Your Honor. This is Deena Fox for
7 the United States.

8 I did want to flag before continuing that we've heard
9 from our outreach specialist that she's had trouble getting
10 access to the public line, and she's been on hold. So I'm not
11 sure if the line has opened up since she first attempted to
12 access it, but if we can double check on that while we
13 proceed, that would be helpful.

14 THE COURT: Who is your outreach specialist?

15 MS. FOX: That's Sarah Louise Malgus (phonetically).

16 THE COURT: Could you e-mail -- send an e-mail to my
17 chambers with her phone number, and we'll see if we can find
18 out what might be the issue?

19 MS. FOX: Absolutely. Mr. Holkins will right now.

20 So as far as the progress toward agreement, I would
21 agree with Dr. Hogan's summary. I think frankly I've been
22 impressively surprised with the progress that we've made so
23 far on the substantive issues, and I do believe that as far as
24 the substance, we have essentially reached agreement. There
25 are a few I's to dot and T's to cross, but the primary

1 outstanding issues, as Dr. Hogan mentioned, are really
2 relating to termination and monitoring of the agreement. And
3 we have worked to try and address the state's concerns on
4 those fronts and hope that (AUDIO GAP) and so that we will
5 hopefully get an answer within, as Dr. Hogan said, days or
6 weeks about whether we can resolve those final issues. I
7 think both parties have --

8 THE COURT: Ms. Fox, I'm sorry to interrupt you. Let's
9 take about a ten-minute break. And I apologize to you-all,
10 but I've gotten word that maybe some others are having
11 difficulty accessing the information, and because this is a
12 public hearing, I do want to make every effort to make it
13 available to people since we are not in the courthouse.

14 So let's take a ten-minute break while we try to figure
15 out what technological issues are interfering with our ability
16 to make this accessible. Stay on -- stay on the line, but
17 just take a ten-minute recess.

18 (A brief recess was taken.)

19 THE COURT: Thank you. Now, I ask you don't give
20 feedback now. We heard from the special master and all. So I
21 want to hear from a representative of the government. How
22 does the Government believe that negotiations in the status of
23 the case is going?

24 MS. FOX: Thank you, Your Honor. We do agree with
25 Dr. Hogan's assessment that the parties have neared the very

1 top of the mountain as far as the negotiations process, and
2 that we have all but dotted our I's and crossed our T's on the
3 substantive components of the Court's remedial order under
4 consideration.

5 We, the parties, have stalled, as Dr. Hogan mentioned,
6 on the key question of determining the monitoring and
7 termination provision. And as we've said before, we of course
8 think that Your Honor would need an opportunity and sufficient
9 information on which to assess whether the state has, in fact,
10 implemented and complied with orders that you ultimately
11 issued.

12 So we are hopeful that with the proposal that's now
13 with the state that we can finally close that gap, and we need
14 to show an opportunity to assess, as the conversation moves
15 forward, whether the state has, in fact, met its obligation it
16 has been negotiating for the last year.

17 And we do very much appreciate the work of Dr. Hogan to
18 bring the parties to this point, and also the state's
19 creativity during the conversations that we've had this year
20 to work together and identify solutions that might work well
21 to bring us into compliance with the ADA and also meet the
22 needs of the state.

23 So we are looking forward to hopefully have, as
24 Dr. Hogan said, having a decision on whether we can propose
25 something jointly to you in the next few days to few weeks.

1 Which if we are not able to do so, we do believe that we will
2 have reached a conclusion of the useful mediation process, and
3 so we would ask that you, at this point, enter a timeline for
4 the parties to propose orders to you.

5 Hopefully, and as we've always said, it is our first
6 priority to have an agreed upon order to present, but if we
7 are unable to do so in the next few weeks, we think it's high
8 time for the parties to present their own proposals to the
9 Court. And we are ready to propose a schedule today of a
10 three-week schedule beginning now in which the state would
11 offer (AUDIO GAP) results followed by the United States
12 offering a proposal. Each proposal would be submitted, along
13 with basing, if the parties preferred, in order to provide a
14 basis for the proposal on the record. And then the special
15 master would have the opportunity to comment and make
16 recommendations to you before you make an ultimate decision
17 about the appropriate (AUDIO GAP) order.

18 So, again, we would ask that you issue that schedule in
19 hopes that we don't need it, in hopes that we come to
20 agreement before this with a joint proposal. But if we don't,
21 we think we need to move forward and (AUDIO GAP).

22 THE COURT: Thank you, Ms. Fox.

23 MR. SHELSON: Your Honor, I'll start by recognizing
24 DOJ's and Dr. Hogan's efforts to move this process along. The
25 progress, as it may, DOJ and Dr. Hogan get a lot of credit for

1 that. I think it's important to clarify one thing, though,
2 that some negotiations have been conducted. (AUDIO GAP) will
3 help that we've negotiated exceptions. We started with the
4 court services and negotiated each service separately. We all
5 recognize that we can't negotiate everything at once, so we
6 have (AUDIO GAP) and we would do so on an articulate point and
7 move on. But everyone -- (AUDIO GAP)

8 (Whereupon, the court reporter lost connection.)

9 MR. SHELSON: The primary negotiators on this are not
10 the final deciders. So both sides have recognized that when
11 we've negotiated as far as we can, depending on where we are,
12 we -- I have to go back to the state, DOJ has to go back
13 internally, and we have to see where we are with the ultimate
14 decision-makers.

15 With that said, if we're not able to reach an
16 agreement, we are not opposed to a timeline. We think three
17 weeks is a bit ambitious, and that realistically the parties
18 need a little bit more time than that.

19 As far as Ms. Fox's proposal that the state go first
20 and then the United States submit a proposed order, we think
21 that is backwards. The United States is the plaintiff. I
22 don't know of anything that has relieved them of their burden
23 on the remedy, so, if anything, we think that the United
24 States should go first.

25 Failing that, we would submit that the proposals be

1 simultaneously submitted. And -- but we do not agree that the
2 state should go first.

3 And, finally, Your Honor, as far as the special master
4 making comments or recommendations, we have to think about
5 that some. You know, Dr. Hogan has done a marvelous job, but
6 he's heard a lot of Rule 408 things along the way. So -- so
7 that presents a bit of a difficulty there that we just have to
8 work through.

9 THE COURT: Okay. Let's assume -- let's assume that
10 the state submits something that the parties have almost
11 agreed to with respect to court services, for example. It
12 sounds like the parties are close to an agreement, at least on
13 some of them. I guess my question would be: Will the state,
14 in talking about the court services that the state would agree
15 to provide, is the state prepared to -- will the state be
16 prepared to implement any portion of this without an order
17 from the Court or without an agreement from the parties?

18 If, for example, the court services would mean that
19 there would be more facilities placed up in a certain -- more
20 PACT units, for example, in a particular area. The state
21 says, yeah, we agree to their more PACT units. These are the
22 ones that we might be able to provide. This is the place
23 where they will be. Is the state prepared to proceed with
24 opening up those additional PACT units without an order from
25 the Court or without full agreement from the parties?

1 And if the state is willing to do that, does the state
2 have the monies to do it? Or, you know, a lot of this is
3 going to depend on what the Department of Rehab or what the
4 state of Mississippi can do from a financial or economical
5 point of view. Do we have ample funds set aside or
6 appropriated to fulfill whatever it is that the state says
7 that it can do? Will the state be able to do it immediately,
8 or will we have to wait until the legislature appropriate
9 money for it for it to come into effect sometime in the
10 future? Is that something that the parties have discussed,
11 Mr. Shelson?

12 MR. SHELSON: Indirectly, Your Honor, by virtue of
13 negotiating for about a year. That's -- that's complicated,
14 Your Honor. I don't mean to dodge your question, but that has
15 several moving parts so let me address it the best I can.

16 So in fiscal year '21, the state increased expenditures
17 on community-based services by \$4 million. So Dr. Hogan
18 mentioned that one of the sections of the draft we're
19 negotiating is capacity, and there's a capacity section for
20 each of the court services. So, you know, we're going to do
21 this with PACT teams, we're going to do this with housing, and
22 so forth.

23 So, Your Honor, some of what's in the capacity sections
24 of the draft has already been done or it is in the process of
25 being done, and some is to be done in the future. And I can

1 give you an example of housing. The draft, as stated,
2 contemplates the state increasing the numbers of housing
3 vouchers for a period of years going forward, so obviously
4 things like that are not done.

5 But as far as funding, Your Honor, we obviously have to
6 have a final agreement to know what that looks like, and we
7 are right now in the budgetary process for fiscal year 2022.
8 But the request to fund what's in the draft has been made in
9 DMH's budget for fiscal year 2022, so has -- the legislature
10 has not adopted its 2022 budget yet, so, no, it has not been
11 approved as of this time.

12 I hope I honored your -- I hope I answered Your Honor's
13 question. If I didn't, I'll be happy to answer any additional
14 questions Your Honor has about that.

15 THE COURT: No. Thank you. That's helpful. Now, with
16 respect -- you did indicate, Mr. Shelson, that obviously the
17 parties who have been working, apparently rather -- you've
18 been working together rather good obviously are not the
19 persons who will have to seal the deal; that it's going to
20 take approvals on both ends up the chain of command at DOJ as
21 well as the state of Mississippi.

22 With that approval process for the state of
23 Mississippi, will it require anyone other than the persons at
24 MDHS or will it require the agreement of the attorney general
25 or the agreement of the governor or the -- and I guess when I

1 say -- well, or the person whose name I'm not -- I've been
2 told before. I don't remember his name, but there is a person
3 now who has been appointed by the governor in the Department
4 of Finance and Administration, right, who's -- who was given
5 the authority in the last legislature. I think they said they
6 were going to appoint someone to sort of shepherd this work
7 here. Do you need that person's approval, and does it go any
8 higher than that person, I guess, is my question?

9 MR. SHELSON: So, Your Honor, that person is Bill
10 Rosamond, and he's the coordinator of mental health
11 accessibility. And so anything I'm about to say now is not
12 intended to diminish his position in any way, because it's an
13 important position. But I do not understand Mr. Rosamond's
14 role as to shepherd this negotiation process. That's not --
15 he's certainly welcome to offer input, but he's not -- he's
16 not the lead negotiator.

17 Ultimately, Your Honor, this decision is the
18 Mississippi Attorney General's, as the chief legal officer for
19 the state. I can't speak directly for sure, but I'm sure
20 there's others with the state government and other senior
21 leadership of the state she'll consult with. But, ultimately,
22 we report to the attorney general, and we receive our
23 direction from the Attorney General's Office.

24 THE COURT: Okay. Thank you. And I guess one final
25 question. The government, the United States that is, has

1 suggested that it's probably time to start seeking to start
2 moving on getting this thing finalized. With respect to
3 timetables, if the United States is told to go first,
4 Mr. Shelson, or if the parties are told to produce something
5 simultaneously, what type of schedule would you recommend?

6 MR. SHELSON: Sixty days, Your Honor.

7 THE COURT: Now, shifting -- oh, and let me ask you
8 this. You indicated you sort of believe that -- and please
9 correct me if I'm wrong -- but the Court might not require the
10 special master to formally vet the proposals that the parties
11 put forth on a formal basis. Is that -- or maybe on any
12 basis.

13 I understand you indicated that the special master --
14 it's the state's view that the special master has heard some
15 stuff that might be subject to 408 and probably ought not be
16 allowed to weigh in. Is that -- have I understood your --

17 MR. SHELSON: Well, I think Your Honor --

18 THE COURT: Is that a correct articulation of what you
19 said?

20 MR. SHELSON: I think we need to think that through on
21 our end, because I don't want to state categorically no right
22 now. Because, again, the special master has been more than
23 fair I think to both sides and has a lot to add to this. And
24 so, you know, there's certainly value in the special master's
25 point of view. I just want to make sure that -- I just have

1 to make sure that we can -- that the state is comfortable with
2 him doing that while safeguarding the Rule 408 constraints
3 that have been placed on this process.

4 THE COURT: Okay. I opened up this matter hearing from
5 the special master, and it does sound like at least that the
6 parties are at least in the same neighborhood on many of the
7 things. But he did note that there's a couple of issues that
8 you-all may not be in the same neighborhood on, may not even
9 be in same city. And that is, specifically, I believe, if the
10 Court would set up something which required -- well, when will
11 this litigation, I guess, be terminated?

12 And if there are goal posts that the parties agree
13 should be met, how do you monitor -- how do you monitor how
14 the parties -- in particular how do you monitor whether
15 Mississippi is in compliance, substantial compliance, or some
16 other goal post that the parties would agree would be
17 necessary?

18 It seems to me that the master says that those are
19 points -- at least points of contention. And, you know, this
20 may be set out in either party's proposal, but I'll start with
21 the United States on this issue. How long do you foresee the
22 Court being involved in the oversight, if you will, of this
23 litigation after the parties have met -- I guess after the
24 parties agree or whatever that there has been compliance?

25 I know of cases that I've been involved in, or that I'm

1 still involved in, where there's still oversight either
2 because the parties -- because the state or county defendant
3 has not met the terms that the parties have agreed to, and
4 therefore it is required that the Court stay involved. And it
5 can be a never-ending process, but typically, to the United
6 States, how long do you anticipate after the parties have
7 agreed?

8 What type of timetable do you believe -- or what is the
9 practice of how long a case remains open for supervision by
10 the Court?

11 I know that was a -- that was a multidimensional,
12 compound all kinds of questions just -- I'm not a lawyer
13 anymore, so I don't have to stick to that. Please help me
14 out.

15 MS. FOX: Absolutely, Your Honor, and I would like to
16 address a couple of points that Mr. Shelson made after I
17 answer your question if that's all right.

18 So as to our -- the length of any kind of order that
19 would be in place, we understand that that has been a
20 long-standing concern on the part of the state, and none of us
21 want to see never-ending litigation or court oversight over
22 this issue. It's a resource strain on the United States as
23 well as on the state if that continues, and of course on the
24 Court.

25 So we have in the draft agreement that the parties are

1 working toward, we have set quite rapid timelines for reaching
2 full compliance, and the state believes that those are
3 feasible. And our goal would be for the state to reach them
4 on time. And then to conclude, we have a plan for -- in
5 general, we -- our approach in our work across the country is
6 to have a one-year period of substantial compliance that is
7 maintained for a year after achieving that period. And so the
8 point is not to retain court supervision forever, but rather
9 to achieve it, and then to show that it is durable in some
10 way, and that would be through one year of additional
11 reporting once that has been achieved.

12 And we have seen this work, and work efficiently in
13 other cases. We have a similar matter that concluded in
14 Delaware just a few years ago that covered similar issues in
15 that state, and the state did achieve compliance with the
16 terms that the parties had agreed and exited that court order
17 in a timely way with -- with success and real changes to the
18 ability of people within the state to avoid unnecessary
19 institutionalization. That is our hope, and that is the way
20 that the current provisions the parties have been working on
21 is drafted.

22 We also in some cases include language that enables
23 parties to exit portions of court oversight when they've
24 achieved compliance with the -- that portion and maintained
25 compliance of that portion for a year, again, to limit the

1 burden on the Court and on the parties to engage in ongoing
2 oversight.

3 I'm not sure if I've answered that question. If I
4 have, I can address the other issues, but I'll give you a
5 chance to see if I've met your concern.

6 THE COURT: I think you have, but I was distracted for
7 a second. Are you saying that one year from the date that the
8 Court accepts the -- whatever it is, the agreement, one year
9 from the date the Court entered its order saying this is how
10 the case will be, or one year from the date that the parties
11 have come into compliance?

12 Are you talking about the one year from the date --
13 which date are you talking about the one year from? I'm
14 sorry.

15 MS. FOX: Yes, I can certainly clarify that. So in
16 these agreements, typically because there's an expansion of
17 services and it's difficult to do that all at once and
18 certainly difficult to do that all at once and do it well. So
19 the language anticipates a few year ramp-up period to get to
20 the full capacity that is anticipated, and I think that the
21 parties here have conceived of a pretty aggressive timetable
22 to get to implementation and to the full implementation
23 quickly in hopes of then ending the oversight, again, quickly.

24 So the point would be, say, approximately three years
25 of ramp up of the services, hopefully at that point, the state

1 would be in substantial compliance with all the provisions.
2 And then it would be one more year after reaching that
3 substantial compliance, so that the Court could assess that
4 the changes, in fact, are durable and sustainable.

5 THE COURT: And you indicated that at least that's sort
6 of what you-all have done in Delaware -- I mean, the parties
7 in the Delaware litigation.

8 MS. FOX: Correct. Correct, Your Honor.

9 THE COURT: Okay. And if I understood you correctly,
10 there will be an opportunity to do it somewhat piecemeal if
11 the state has gotten everything done with respect in their
12 three-year period or one-year period or a 90-day period have
13 gotten something done that they could fulfill, and that's
14 done, then that hopefully would not be a ball of contention
15 for why it ought to be expanded at a time from that point
16 forward.

17 Unless they fall back, I understand; but as long as
18 they've done what the parties have agreed to be done, then we
19 might move on to the next issue, or you might use up that time
20 that would be used on that issue to seek compliance with
21 everything else.

22 MS. FOX: Yes, Your Honor, and that works in a few
23 different ways. One thing that happens is that as the parties
24 reach -- as the state reaches compliance on a particular area,
25 then obviously less attention by the parties and the Court

1 would be focused on that area once everyone was sure that, in
2 fact, compliance had been reached; because it wouldn't be a
3 good use of everyone's time in continuing that assessment.

4 And the other aspect that I was mentioning is, in some
5 of our agreements and court orders, we have provisions that
6 enable the state to seek to terminate a portion of the court
7 order when the state has reached compliance with that, you
8 know, broad section, and then has maintained it for a year.
9 So that it would -- not only would the parties not be focusing
10 as much attention on it, but it would, in fact, no longer
11 technically be part of the court order under supervision.

12 THE COURT: Okay. Now, you may move on to your other
13 thing that you wanted to tell the Court.

14 MS. FOX: Thank you. I wanted to address the order of
15 submission of proposals. As I mentioned earlier, the United
16 States proposes that the state would go first, and the reason
17 that we make that proposal is that it's consistent with the
18 approach that's been taken by courts in other *Olmstead* and
19 other constitutional matters.

20 Given that the state is going to be implementing the
21 order and the remedy in this case, they are the ones in the
22 best position to propose how they prefer to remedy the
23 violations that the Court (AUDIO GAP). This is consistent
24 with the court's action in *Disability Advocates, Inc., New*
25 *York, Olmstead* case, and it's also consistent with Medicaid

1 civil rights matters and with decisions in civil rights
2 matters relating to school desegregation. In all of those
3 types of cases, the preference is for the state to have the
4 autonomy to propose what it feels would be most appropriate to
5 resolve its own violations.

6 If the Court and the state doesn't prefer to have that
7 opportunity to go first, and the Court doesn't choose to place
8 to give them that first opportunity, then we think that a
9 simultaneous proposal process would make the most sense with
10 the opportunity for each party to respond to the other party.

11 As to the timeline, as you know the parties began our
12 negotiations nearly a year ago and exchanged proposals at that
13 time about what each party thought would be the appropriate
14 remedy to resolve the issues at hand. And for that reason and
15 given the length of the time that has been spent already on
16 these negotiations and the familiarity of both parties with
17 the issues, at this point we think that a 60-day timeline is
18 excessive for initial filings.

19 And as to the involvement of the special master, we
20 would note that the original order from the Court on the role
21 of the special master indicated that the special master would
22 be himself proposing the plan to remedy the ADA violations.
23 At this point, we think that the parties have each invested
24 significant time, energy, and thought in developing proposals,
25 and we think it is appropriate for the parties to submit the

1 proposals themselves. But the value to the Court of having
2 the special master engaged in this process, certainly there's
3 already been significant value in the progress the parties
4 have made toward a resolution, but we think that it would be
5 valuable to have the special master weigh in and provide
6 support to enable the Court to reach a conclusion about what
7 proposal ultimately, or what components of each proposal might
8 be best to remedy the violations of law.

9 THE COURT: Okay. Thank you, Ms. Fox.

10 All right. Well, I'm going to ask the special master;
11 obviously, I think his voice can be and should be heard on any
12 of these issues if he wants to add anything based on his
13 experience, his practice, what he knows of his involvement in
14 other cases, or whatever. And, you know, I'm taking all of
15 this into consideration to try to be fair to everyone, all the
16 parties.

17 Mr. Hogan, do you have anything you wish to say?

18 SPECIAL MASTER HOGAN: Well, Your Honor, thank you.
19 Very briefly, I substantially agree with what Ms. Fox just
20 said, and I also note the concerns that Mr. Shelson raised
21 before; to wit, the parties have come a very long way and
22 really are in substantial agreement on the substance of what
23 has to be done. So I guess I could say thank God. I don't
24 envision having to write a whole plan here, so I don't believe
25 that's necessary.

1 Number two, there might be areas that the parties have
2 each made recommendations where a tie breaker or a synthesis
3 might be useful to the parties and eventually to the Court.
4 You know, I note that, you know, as a nonlawyer, the
5 challenges of doing that in a way that's consistent with the
6 federal rules of evidence are substantial, but I think there's
7 a way to skate around those. So if I can be a little bit
8 helpful, that would be -- that would be great. It might be
9 useful, and as I said before, thank God I don't anticipate
10 having to do more than that.

11 THE COURT: Okay. Well, thank you. Well, I don't
12 think at this point it would be fair to anybody to give them
13 less than 30 days. There's a lot going on around here with
14 respect to COVID and weather, and Mr. Shelson is the only
15 someone who's been involved in that side of the case
16 100 percent of the time. There may be some people in the
17 background who are doing some stuff, but I know Mr. Shelson
18 has been the engineer on this matter. And I certainly would
19 want to give the state as much as necessary to come up with a
20 plan that they think is remedial.

21 I think as Ms. Fox said, the state probably should come
22 forward with how they believe, how it believes it could come
23 into compliance; this is what we could do, and this is what we
24 can assure you of. And I guess the United States could say if
25 that's all they can do, that's not enough. This is what they

1 would have to do to comply with the statute or with court
2 decisions in other places.

3 There are still many moving -- well, there's still some
4 moving parts, probably not many. But I would expect if the
5 state was given a reasonable opportunity at the time that it
6 is drafting or preparing what it would file with the Court,
7 will be getting input from those in authority who will have to
8 sign off on the deal at the end of the day. And that's going
9 to take a minute or two, I would imagine.

10 But I would expect that although Mr. Shelson has,
11 again, been the engineer and actually the workhorse on this
12 matter for as long as it's been around, I think, I would
13 imagine that there will be input on the front end from those
14 in authority who will have to ultimately make the decision.

15 I would not expect Mr. Shelson to say that we could do
16 82 PACT units, one per county, and the state -- and then he
17 goes back to the state, and they say, oh, no, no, no, that's
18 not possible; we could only do X-amount.

19 So I know it's going to take some coordination. I'm
20 going to think about all of these things, but I'll tell you
21 what I'm inclined to do. I'm inclined to give you the
22 60 days, Mr. Shelson, at least 60 days, but I'd have to think
23 about it some more. But I do -- if it's 60 days from
24 March 1st, for example, that puts us around May 1st. For
25 example, if that is the case, and, again, I'm talking off the

1 top of my head. Look here, I have not consulted with my
2 lawyers. I have lawyers, too, that I have to consult with.

3 It may be reasonable to give the government 30 or
4 60 days from that point to submit something. If it's 30 days,
5 that puts us at June 1st. If it's more than that, that puts
6 us at July 1st.

7 And in all likelihood, I am inclined to give the
8 special master the opportunity to weigh in to advise me,
9 because ultimately I'm going to need his expert view. Because
10 I do want to make what is the best decision from a legal point
11 of view, but also a practical point of view for the state of
12 Mississippi and the parties.

13 And, again, when I say "the state of Mississippi and
14 the parties," I know we have the state of Mississippi, but we
15 also have these people out there who are in dire need of the
16 services that the state has to provide. And, again, that is
17 an ongoing consideration, because I've found already that the
18 services have not met, you know, the constitutional
19 requirements, and I want to make sure that people are getting
20 the services they need.

21 So, you know, with those sort of dates and timeframe,
22 again, if I give the government 30 or 60 days, I'm going to
23 give the special master some opportunity, if I choose to go
24 that route, probably at least a 30-day period to weigh in.
25 And, you know, that puts us into August, maybe even September,

1 and then, you know, you have some sort of overall decision, if
2 there is one at least to be made. It may be that, you know,
3 we're signing off on somebody's plan, and that's about it.
4 And then we will enter something after we have all had a
5 chance to study everybody's reports. And I did not mention
6 any sort of rebuttal-type thing, but, you know, that may or
7 may not be on the table.

8 So -- but I appreciate the parties. First of all, I
9 appreciate everything that I've heard today. I appreciate the
10 way the parties have really, really worked hard to reach
11 agreement on most of the terms, and I appreciate your inputs.

12 What I failed to do, though, before I jumped in and
13 said how I think it may go forward, I did hear from the
14 government, Mr. Shelson, about the -- you know, what I
15 perceived to be the two significant hurdles right now that
16 Mr. Hogan alluded to. I didn't give you an opportunity to
17 respond at all on the government's belief that, number one,
18 you can reach full agreement on certain parts. But it's
19 likely that the Government will be advancing a position that
20 the Court ought to state indicates for at least three years to
21 give the state the breathing room and the opportunity to
22 comply and how the parties might define or address the
23 particular goal posts in the interim.

24 But, you know, you can weigh in now, Mr. Shelson, if
25 you wish, or this may be part of your submission. But does

1 the state have a view on how -- is a three-year period longer
2 than what the state believes is necessary?

3 MR. SHELSON: Well, Your Honor, to answer that last
4 part correctly, that's probably a realistic timeframe given
5 the terms of the preliminary draft that we have. You know, I
6 agree that Dr. Hogan correctly identified the two hurdles, and
7 they're big hurdles.

8 I appreciate the opportunity the Court has given me to
9 address Ms. Fox's comments, but I'm concerned that the more
10 the lawyers for the parties talk on this call, the further
11 apart we get. So I will -- I will refrain from further
12 comment, if that pleases the Court.

13 THE COURT: Okay. Mr. Shelson, thank you. I just
14 didn't want to feel like you were neglected at all, that I was
15 mistreating the state in any way.

16 But, again, I appreciate the parties for working like
17 you have. What I will do is get back with you in writing with
18 respect to a timetable on -- because it sounds like the
19 parties agree that some sort of timeline ought to be entered.
20 I know that's one theory the government advanced, and I didn't
21 hear the state say otherwise. So I'll work on a timeline that
22 I think would be beneficial for the parties as well as the
23 Court, and we will go from there.

24 And in that timeline, I will set forth a schedule as to
25 who submits what and when. I may decide -- although it sounds

1 like I'm suggesting that maybe the state go first, I could
2 decide that you do things simultaneously, so just wait until
3 you receive the order. You know, I'm known for tipping my
4 hat, so I think I'm going to give the state an opportunity to
5 put forth its best foot, you know, the things that they can do
6 best first, and then hear from the Government I think. I
7 think that's what I might do. Just, you know, again, tipping
8 my hat, tipping my hands, and if you see something otherwise,
9 you might be shocked.

10 MR. MIRACLE: Your Honor, this is Mr. Miracle. At the
11 risk of stepping on what Mr. Shelson said by complicating
12 anything, and I'm one of the players who came into this case
13 late. But on behalf of the Attorney General's Office, I did
14 want to raise one really just question, and maybe it doesn't
15 have to be resolved.

16 But as the Court is preparing this submission about
17 timelines, obviously we are, you know, one year further down
18 the road than we were when these negotiations started. Is it
19 the Court's anticipation that if submissions take place on the
20 Court's timeline, that that submission by the state will
21 reflect, you know, what progress the state has made since, A,
22 either the close of evidence at trial, or, I guess, B, since
23 the parties started negotiating?

24 I don't know that we've touched on that today, and I
25 just -- this may be the last time we're all together on a

1 call; it may not be. But just so there's some clarity on to
2 the extent that the state feels the Court needs to be apprised
3 of, you know, the current status of different services, and
4 that may require the introduction of some type of proof,
5 whatever that may look like, that we didn't neglect to at
6 least raise that and bring that to the Court's attention to
7 think about how the Court may wish to proceed on that.

8 THE COURT: Thank you. Good question, Mr. Miracle. I
9 was -- well, again, on a going-forward basis, I would like
10 to -- I would like to know I guess, you know, what the state
11 has done since the Court's order. If it believes that what
12 they -- what it has done was to, you know, plug any of the
13 deficiencies that the Court already found, I will hear from
14 the United States.

15 I realize the evidence in this matter closed a long
16 time ago, but I think it's only fair to know where we are
17 today and where we will be at the time that the Court sort of,
18 you know, puts in a framework for -- I assume what the parties
19 have been talking about, you know, an agreement that sort of
20 identifies how the state could be in full compliance with the
21 ADA, because I think what we've heard is that the -- there
22 will be opportunities where the state may meet full compliance
23 on one issue and substantial compliance or full compliance
24 might be down the road on another issue, even if the parties
25 were to agree today.

1 So let me hear from the United States. I mean, I think
2 it might be helpful to know what progress has been made since
3 the Court entered its order back in 2019. I think it was
4 September 2019, and I think it's only fair to know what the
5 state has done to remedy what the Court thought was wrong.
6 And -- but let me hear from the Government on that point.

7 MS. FOX: Your Honor, I think the point that you just
8 made about the time since the Court's order was issued brings
9 me back to generally the timeline for reaching a final order
10 in this case, which is the problems, the violation of law that
11 have been -- that was identified in the Court's decision is
12 serious and critical, and we need to reach a final order as
13 quickly as possible.

14 There's already been delay, and we very much would like
15 to move this process along to get to the implementation as
16 quickly as we can. So that's the reason that we proposed a
17 short timeline, and we still believe that that one is
18 appropriate given that players within the state have been kept
19 abreast of the negotiations and the needs here throughout the
20 process and are well aware of what is being discussed.

21 As far as whether additional updating of the record is
22 necessary, the Court determined in the order issuing or
23 putting into place the special master that we do not need
24 additional discovery or consultants to elaborate on the facts;
25 that the facts are known, and we believe they are, in fact,

1 known at this time and sufficient basis for the judge -- for
2 the Court to issue a remedial order without further discovery.

3 We think that to the extent the state has moved the
4 ball forward in the time since the Court's order issued, that
5 will be reflected in the speed with which they reach
6 compliance with certain provisions and sections of the order.
7 And, in fact, they may be able to move to exit the order even
8 earlier than anticipated in the timelines that we've set
9 forth, and that would be wonderful if that were the case.

10 But we do not believe that there should be additional
11 delay, and that the state should be able to put in additional
12 evidence at this time. If the judge were -- you know, if you
13 were considering opening the door to additional facts from the
14 state, we would consider a joint stipulation to facts, such as
15 the facts that were stipulated by the parties.

16 But if the state was seeking to put in its own facts or
17 update things beyond agreed stipulations of the parties, then
18 we would seek to reopen discovery. There would be
19 depositions, document production. I don't think that either
20 party is looking to go down that road, nor do we think that
21 it's necessary or appropriate at this point in the case.

22 All parties have agreed and stated on various occasions
23 in this matter that the record was closed, and we were now
24 ready to move forward to a remedial order. We don't think
25 it's necessary or appropriate for the judge to be looking at

1 additional facts now, nor do we think it would change what is
2 ultimately ordered.

3 THE COURT: Okay. I guess, again, I'm looking at this
4 sort of -- no, no, there would not be any new discovery. Not
5 only do the parties not want that, the Court does not want all
6 of that either.

7 But if, for example, I think in the order, the Court
8 found that there were not enough PACT units I think. I think
9 that's in the order. You know, that they're not -- I think
10 that's one critical finding that the Court made. I have not
11 gone back and read the order.

12 But if, in fact, the Court did say that there were not
13 enough PACT units back in September of 2019, could the parties
14 reach an agreement on how many PACT units have been
15 established since that -- since the order, how many have been
16 established, and where they are?

17 Because that would help on any sort of remedial plan,
18 right? I mean, I'm just asking, Ms. Fox?

19 MS. FOX: Yes, Your Honor, I think that there are
20 certain updated stipulations as I mentioned facts that the
21 parties could agree are the case, and they would inform, you
22 know, again how -- how much growth the state needs beyond
23 where it is today. That still might require in the order
24 language requiring maintenance of the growth that has occurred
25 in the time since the trial concluded, but we do agree that

1 updating key stipulated facts would be a feasible approach if
2 the parties could agree on those.

3 THE COURT: Okay.

4 MS. FOX: And I apologize, but that would also require
5 in some cases background or supporting documents from the
6 state that the United States could review to the extent that
7 we don't have those already.

8 THE COURT: In other words, you're not going to accept
9 their word for it? That's fine.

10 MS. FOX: We love to trust, but verify.

11 THE COURT: I understand. Okay. I'll think about how
12 to assure that the record remains complete, or closed if you
13 will, for one purpose, but making sure that it's sort of open
14 for some other type of reason. And, again, I'm thinking out
15 loud and off the top of my head right now.

16 But, Mr. Miracle, I do thank you for raising that
17 issue, and I'll think about it. I know it's one that
18 Mr. Shelson has been saying for quite some time I think. So,
19 you know, because I suspect -- I hope and I pray that the
20 state Department of Mental Health does not look like what it
21 looked like as of September 2019. I know Ms. Mikula is no
22 longer the executive director, and I'm not suggesting at all
23 that she was the subject of all the problems. I'm not
24 suggesting that.

25 But I know that that is a change that is made. She has

1 retired, and now we have Ms. Wendy Bailey there. But I hope
2 the department has looked at the order that the Court entered
3 and has taken steps to address the concerns that the Court
4 raised, irrespective of whether the agency has made a final
5 decision on whether ultimately they will -- might mount an
6 appeal, I just hope that there have been some differences
7 about the way that they have done business.

8 We do know that the hiring of Mr. Rosamond was sort of
9 responsive to what the Court I think entered, and I guess
10 there are other things that have been done I presume. And it
11 might help the Court to know exactly what has been done, and I
12 don't think it would take discovery to make those points. The
13 parties ought to be able to stipulate what has been done.
14 They should be, yeah.

15 Is there anything else that we need to cover?

16 SPECIAL MASTER HOGAN: Your Honor, if I might?

17 THE COURT: Oh, Mr. Hogan, I'm sorry.

18 SPECIAL MASTER HOGAN: Well, this -- I may have missed
19 something, or I may just be ignorant of -- of the legal
20 matters here. But to circle back to the beginning of our
21 conversation, as I understand it the state is still
22 considering a final proposal that the Department of Justice
23 has made vis-a'-vis these issues of that monitoring
24 termination. And that it's a -- I don't know if that's going
25 to be acceptable to the state, but it's a robust proposal.

1 And so before Your Honor goes to all the work of the
2 order, it seems to me that a little bit of time for the state
3 to make a final determination and possibly for a few more
4 conversations might be in order. So I don't know if I missed
5 something, but that's my understanding of the status of
6 things. And if the state and the government could come to
7 agreement on that, it would sure save a lot of time.

8 MS. FOX: Your Honor, I think the United States would
9 agree that perhaps a status conference in a few weeks to --
10 unless we were able to agree and submit something before then,
11 would enable the Court -- us to provide the Court with an
12 update on whether we, in fact, are submitting a joint
13 proposal.

14 I don't think that that should necessarily delay
15 issuance of an order with timelines, because as we mentioned,
16 it may take the parties time to prepare submissions. But it
17 might be useful to maintain -- as we all know, deadlines work
18 miracles, so it could be nice for the parties to have another
19 appearance briefly with you to update you on our ability to
20 reach agreement, which we hope will be the resolution here.

21 THE COURT: Mr. Shelson, I'll hear from you.

22 MR. SHELSON: Thank you, Your Honor. The reason why I
23 said 60 days is because we're in agreement with what Dr. Hogan
24 said a minute ago. To factor in what, if any, further
25 progress can be made in an agreement, plus writing a proposal,

1 realistically in this environment -- and by that I mean COVID
2 and weather and things that just happened -- 60 days is an
3 ambitious timeline for the state. It may seem like a long
4 time, but that's an ambitious timeline.

5 THE COURT: Would the 60 days allow you to do what
6 Mr. Hogan thought was necessary, or are we talking --

7 MR. SHELSON: Yes, sir.

8 THE COURT: -- about an additional 30 days? I'm just
9 asking.

10 MR. SHELSON: We would need, Your Honor, at least
11 60 days to do what Dr. Hogan talked about and just submit a
12 proposal, whether we go first or simultaneously.

13 THE COURT: Okay. All right.

14 Okay. Well, Ms. Fox, did you have -- I saw you lurch.

15 MS. FOX: Yes, Your Honor. I was -- my proposal was
16 not -- I mean, I've already stated my position about the
17 length of time that I think is appropriate overall. But
18 assuming 60 days for submissions, the United States still
19 would seek a status conference sooner to help make an
20 assessment of whether, in fact, we are concluding with a joint
21 proposal and submitting that to the Court or going forward
22 with these separate proposals.

23 We think that it is useful to have another brief
24 opportunity to come together and provide a bit of a deadline
25 for the parties to make it up or down on how we're proceeding.

1 THE COURT: If the Court were to put in sometime in the
2 next week or so that 60 days is the timeframe for the state of
3 Mississippi to submit its proposal and/or the parties submit a
4 joint proposal, doesn't that accomplish what you might need?

5 Because that would give you 30 days or so to decide
6 whether or not you're going to submit it jointly, or if y'all
7 decide to go about your separate ways. If the Court just
8 simply says 60 days from the date of this order, whatever
9 order that is, the state of Mississippi is to submit its plan,
10 or the parties may submit something joint, wouldn't that cover
11 it?

12 MS. FOX: Yes, Your Honor. I think we were looking for
13 some more pressure on the parties, but I think you're right.
14 Ultimately we can --

15 THE COURT: No, I'm not right just because I'm the
16 judge. I'm really trying to figure this out. I mean, if you
17 don't think that's right, please, please, please -- I've been
18 pushed back before, so I welcome it right, Mr. Miracle?

19 MS. FOX: I have often pushed for the same thing
20 multiple times in the same hearing with you, so I know that
21 you know I'm not afraid to push back.

22 I think the main concern that we have is we are very
23 close, I think, to an up or down, and we want to make that
24 decision as expeditiously as possible. And 60 days may lead
25 to some creep in decision by the parties. But -- and so

1 that's why we were proposing a -- some kind of a check-in or a
2 midpoint to press for a decision. But ultimately we will need
3 to -- the parties will eventually need to come to that even
4 within a 60-day timeline.

5 THE COURT: Okay. Well, I'll take that under
6 consideration on my timeline that I'll submit after this
7 hearing. I'll give everybody a head's up on what I think
8 might be appropriate.

9 As Mr. Shelson said, like the rest of the country, we
10 have COVID issues. Unlike the rest of the country, we're just
11 getting out of a real inclement sort of weather cycle, and
12 believe it or not, it's February or March, it's tornado
13 season. I'm not predicting that anything might happen, but
14 the way things have been happening, you know, it's just we
15 might have some further weather conditions that -- and,
16 please, I hope nothing happens, because y'all will say the
17 judge ordered tornados to come to Mississippi. I'm not doing
18 that at all. I hope they stay wherever they are over the
19 water, the Pacific Ocean or somewhere, not hurting anybody.

20 But I thank you so very much for your attention today
21 and putting up with the Court on trying to make sure that we
22 could have this hearing. I appreciate, again, the parties
23 continuing to work together, and hopefully you'll get some
24 order within the next week. You'll get something from me that
25 will set forth a schedule that will sort of deal with what we

1 talked about today.

2 So, again, I thank you so very much for your attention.
3 Thank you, Mr. Hogan, for your service. I believe the parties
4 and certainly the Court appreciate it.

5 Now, is there anything else from the United States?

6 MS. FOX: No, Your Honor.

7 THE COURT: All right. Thank you.

8 Anything further from the state of Mississippi?

9 MR. SHELSON: No, Your Honor.

10 THE COURT: All right. Thank you all so much. Court
11 is now adjourned.

12 Oh, Mr. Hogan, anything else -- Mr. Hogan?

13 SPECIAL MASTER HOGAN: No, Your Honor.

14 THE COURT: Okay. Thank you. Court is now adjourned.
15 Thank you so much.

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COURT REPORTER'S CERTIFICATE

I, Candice S. Crane, Official Court Reporter for the United States District Court for the Southern District of Mississippi, do hereby certify that the above and foregoing pages contain a full, true, and correct transcript of the proceedings had in the forenamed case at the time and place indicated, which proceedings were stenographically recorded by me to the best of my skill and ability.

I further certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

THIS, the 15th day of March 2021.

/s/ Candice S. Crane, RPR CCR

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