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

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U.S. DISTRICT COURT

GENISE HART, CARMEN FELICIANO, ANN FRANCIS GELCO, HELEN KOSS, CAPRICE MORALES and MICHELLE GANDY, Individually and on behalf of a class,	)	No. 03 C 1768
Plaintiffs,	)	Judge James B. Zagel
v.	)	
MICHAEL SHEAHAN, SHERIFF OF COOK COUNTY, in his official capacity,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

Defendant, MICHAEL SHEAHAN, Sheriff of Cook County, by his attorney, Richard A. Devine, State's Attorney of Cook County, through E. Michael Kelly and Steven M. Puiszis of Hinshaw & Culbertson, as Special Assistant State's Attorneys, submits the following as his Memorandum of Law in support of his Motion to Dismiss Plaintiffs' Amended Complaint:

I. INTRODUCTION

Plaintiffs are current or former pretrial detainees at the Cook County Jail ("CCDOC"). Those plaintiffs who are currently in custody seek injunctive relief to prevent from being confined to their cells when periodic weekend lockdowns occur at CCDOC. Those who have been released from CCDOC seek monetary damages for the emotional distress and injuries which they claim to have suffered while being temporarily locked down.

As discussed below, plaintiffs have no basis to seek injunctive relief for several reasons. First, those plaintiffs who have been released from the jail lack standing to seek injunctive relief. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982); *Robinson v. City of Chicago*, 868 F.2d 959, 966 (7th Cir. 1989). Second, plaintiffs' designated class representative, HELEN KOSS, has failed to fully exhaust her administrative remedies as required under the Prison Litigation Reform Act.[1] KOSS

[1] Plaintiffs allege that plaintiff KOS will serve as the "representatives [sic] of a class seeking only injunctive relief . . ." related to the complained of weekend lock down policy. (Ex. A, ¶21).

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failed to follow the grievance process after the grievance she allegedly filed went unanswered.[2] Finally, the grievance that KOSS claims to have filed failed to place any jail official on notice of her claim. Accordingly, because KOSS lacks standing for herself, she cannot assert standing for any purported class.

Moreover, plaintiffs' cause of action runs headlong into Seventh Circuit precedent which holds that detainees of the county jail have no constitutional "liberty interest" in movement outside their cells. *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996). *Antonelli*, affirmed a Rule 12(b)(6) dismissal of a prisoner's complaint which, among other things, challenged "arbitrary and capricious" lockdowns that occurred at the same county jail. *Id.* If male residents of the CCDOC have no protectible interest in movement outside their jail cells under the Due Process Clause, neither do these plaintiffs.

The periodic weekend lockdown searches serve a legitimate penological purpose, they permit correctional officers to search for weapons and contraband. Where a jail regulation furthers a legitimate penological objective and/or serves a legitimate managerial purpose or function, it has been upheld against constitutional attack even though it has a less than salutary impact on the conditions of an inmate's confinement. As explained below, plaintiffs' Amended Complaint should be dismissed because it fails to state a claim upon which relief can be granted.

II. PLAINTIFFS' CLAIM MUST BE REVIEWED UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, NOT THE FOURTH AMENDMENT

Initially, it must be observed that because plaintiffs are or were pretrial detainees, their claims are governed by the Fourteenth rather than the Fourth Amendment which has no application to this matter. *See, e.g., Johnson v. Phelan*, 69 F.3d 144, 150 (7th Cir. 1995) ("[t]he Fourth Amendment does not protect privacy interests within prisons. Moving to other amendments does not change the outcome"); *Cavalieri v. Shepard*, 321 F.3d 616, 620 (7th Cir. 2003) (noting that the mother of a pretrial detainee properly amended her § 1983 action, alleging deliberate indifference, under Fourteenth Amendment, rather than basing the claim under the Fourth Amendment); *Paige v. Hudson*, 234 F.Supp.2d 893 (N.D. Ind. 2002) (holding that conditions of confinement claims brought by pretrial detainees at a county jail are evaluated under the Fourteenth Amendment, citing *Bell v. Wolfish*, 441 U.S. 520, 534-35 (1979)). Therefore, to

[2] Defendant has no record of the purported grievance having been filed by Ms. Koss, but recognizes for purposes of this motion only, the court is obligated to accept as true Ms. Koss' assertion that it was.

the extent that plaintiffs purport to bring their claims under the Fourth Amendment (Ex. A, ¶54), that aspect of their cause of action should be summarily dismissed.

The Seventh Circuit has also explained that there is "little practical difference between" a Fourteenth Amendment due process claim and an action brought under the standard of the Eighth Amendment. *Mayoral v. Sheahan*, 245 F. 934, 938 (7th Cir. 2001) (citing *Weiss v. Cooley*, 230 F.3d 1027 (7th Cir. 2000)). In fact, the Seventh Circuit has consistently reviewed claims brought by pretrial detainees under principles having their origin in the Eighth Amendment. *Washington v. LaPorte County Sheriff's Office*, 306 F.3d 515, 517 (7th Cir. 2002) ("The protections for pretrial detainees are 'at least as great as the Eighth Amendment protections available to a convicted prisoner,' and we frequently consider the standards to be analogous." (citation omitted)), *Henderson v. Sheahan*, 196 F.3d 839, 844 n.2 (7th Cir. 1999); *Frake v. City of Chicago*, 210 F.3d 779, 781-82 (7th Cir. 2000).

III. PLAINTIFF KOSS FAILED TO EXHAUST HER ADMINISTRATIVE GRIEVANCE

A. The Prison Litigation Reform Act

Section 1915A(c) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e, ("PLRA") defines the term "prisoner" to include any person detained in a facility who is accused of violating a criminal law. The PLRA applies to those plaintiffs who are "prisoners" at the time they file suit. *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998). Accordingly, the provisions of the PLRA apply to Ms. KOSS because she was a "prisoner" at the time suit was filed (Ex. A, ¶11).

The PLRA requires that available administrative remedies be exhausted and provides that "[n]o action should be brought with respect to prison conditions" until such administrative remedies are exhausted. 42 U.S.C. § 1997e(a). The PLRA's pre-filing exhaustion requirements apply to "all inmate suits whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999).

B. CCDOC's Grievance Mechanisms

There exists a detailed grievance mechanism at the Cook County Jail as a result of a federal consent decree entered into in *Duran v. Elrod*, No. 74 C 2949 (the "consent decree").[3] As set forth by Section III(B) of the decree entitled "Inmate Grievance Procedure," the grievance procedure at the jail encompasses complaints by inmates concerning "policies, practices,

[3] A copy if the Duran consent decree is attached as Exhibit B to defendant's Motion to Dismiss.

procedures, conditions, acts or omissions, under the jurisdiction" of the Cook County Department of Corrections (CCDOC) (see p. 2 of attachment D to the consent decree, Ex. B). Specifically, Section III(C)(1) states that grievances can be filed against "[p]olicies and rules promulgated to carry out policies" and identifies, *inter alia*, "inmate rights" and "security procedures" as proper topics of the grievance process (*Id.* at p. 3 of attachment D). Section III(C)(4) states that grievances can be filed involving "[f]acilities and living conditions" (*Id.*). Section III(C)(6) further states that grievances can be filed for "[a]ny inmate complaint not mentioned above concerning any matter within the jurisdiction of the Department" (*Id.*). Accordingly, under the grievance process at CCDOC, the weekend lockdowns which are the subject matter of this pending lawsuit were "fair game."

Under Section III(C) of the grievance policy, entitled "Fixed time limits," the "[e]xpiration of a time limit at any stage of the process without official action entitles the grievant to move to the next state of the grievance process" (*Id.* at p. 4). In other words, if jail officials fail to answer a grievance, the inmate is required "to move to the next state of the grievance process" rather than file a federal lawsuit. As discussed below, plaintiff KOSS did not follow up with any action after her grievance was allegedly "denied."

Section III(C)(2) states that jails officials "shall, within 5 days of the receipt of a grievance (excluding Saturdays and Sundays) . . . prepare a written decision supported by reasons, and initiate implementation of the decision" (*Id.*). Subsection C(3) also states that the Director of Human Services "shall, within 5 days of receipt of a written decision . . . review all decisions and where appropriate make written recommendations supported by reasons to the Executive Director" (*Id.* at p. 5). Subsection C(4) states that the Executive Director "shall, within 10 days of receipt of a recommendation . . . review the recommendation, make a written decision supported by reasons and initiate implementation." (*Id.*, *see also*, Section IV(A), Step 4(g)). Section IV, Step 5 states that "[i]f a grievant wishes to appeal the decision . . ., he may seek review directly to the Grievance Appeals Panel within 14 days of his/her receipt of the decision (*Id.* at p. 10).

C. Plaintiff KOSS Failed to Comply With the PLRA's Exhaustion Requirements

HELEN KOSS alleges that she filed a grievance about the purported lockdown policy in the fall of 2002 and that her grievance was never answered. (Ex. A, ¶¶ 11, 22). Contradicting the allegations of the Amended Complaint, plaintiffs' counsel has tendered a two sentence grievance allegedly authored and submitted by Ms. KOSS dated December 16, 2002 (attached as Ex. C),

which states "I would like to know what can be done about lockdown weekend. I feel it is unconstitutional and unfair." Ms. KOSS concludes her grievance by asking staff to "stop[] lockdowns."

Ms. KOSS alleges that her grievance was "denied by the defendant" (Ex. A, ¶32). Based on the purported "denial" of Ms. KOSS' alleged grievance, plaintiffs aver that there is no mechanism for detainees to grieve the Jail's weekend lockdown policy:

> There are no administrative procedures available to the plaintiffs at the Jail to challenge or change the formal policy of the Sheriff to conduct the weekend lockdowns. Under the existing grievance procedure, there is no authority for inmates to contest the weekend lockdowns as evidenced by the fact that the Jail failed to act on Helen Koss' grievance in the fall of 2002 concerning lockdowns. Inmates are permitted to initiate some grievances at the Jail by handing grievances to the social workers assigned to the Division. The practice and policy at the Jail is for the social worker to initially review the grievance and throw it away and not process those grievances which they deem unsuitable such as grievances which concern official policies at the Jail. (Ex. A, ¶22).

Plaintiffs do not cite any additional instance where a grievance related to a weekend lockdown was denied. That being the case, as a matter of law, no "policy" of denying similar grievances can be said to exist. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) ("considerably more proof than [a] single incident will be necessary . . . to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the unconstitutional deprivation."); *Estate of Novack v. County of Wood*, 226 F.3d 525, 531 (7th Cir. 2000) ("Even if we were to find that Novack's suicide itself was a result of unconstitutional conduct, a single instance of allegedly unconstitutional conduct does not demonstrate a municipality's deliberate indifference"); *Caldwell v. Cit of Elwood, Ind.*, 959 F.2d 670, 673 (7th Cir. 1992) ("drawing a reasonable inference that a municipal custom or policy exists when he has only pled one incident of alleged retaliation for speech on matters of public concern requires a leap in logic that we are unwilling to take.").

Notwithstanding plaintiffs' failure to properly establish a "policy" claim, plaintiff KOSS failed to fully exhaust her available administrative remedies. The Seventh Circuit has held that "exhaustion means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits). *Pozo v. McGaughtry*, 286 F.3d 1022,1024 (7th Cir. 2002) (emphasis in original). *Pozo* reversed a district court's decision which had held that a

prisoner was excused from exhausting administrative remedies where the prisoner had failed to timely file an appeal of the denial of his grievance. While the administrative rules in *Pozo* required the prisoner to file an appeal within 10 days, he waited a year to do so. *Id.* at 1024. His administrative appeal was denied. *Id.* Confronted with the prison officials' exhaustion defense, the inmate claimed that he had exhausted his remedies because a prison official "*could have* accepted [the untimely appeal] and addressed the merits . . . ." *Id.* (emphasis in original). The prisoner argued that "the *power* to [adjudicate] the untimely appeal is enough for exhaustion." *Id.* (emphasis in original). *Pozo* rejected this argument holding:

> [U]nless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to 'exhaust' state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison administration an opportunity to fix the problem – or to reduce the damage and perhaps shed light on factual disputes that may arise in litigation even if the prison's solution does not fully satisfy the prisoner.

Id. at 1023-24.

Pozo explained that a prisoner can fail to exhaust administrative remedies where he or she fails to appeal the denial of a grievance: "to exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Id.* at 1025. Following *Pozo*, the Seventh Circuit in *Dixon v. Page*, 291 F.3d 485, 488-91 (7th Cir. 2002) held that an inmate had failed to fully exhaust his grievance where he failed to appeal his grievances and where he also failed to make an immediate appeal to the Director of the Department of Corrections after a sustained grievance was not implemented.

To the extent that plaintiffs attempt to avert dismissal by relying on their conclusory assertion that there are "no administrative procedures available to plaintiffs at the Jail to challenge or change the formal policy of the Sheriff to conduct the weekend lock downs" because KOSS' grievance was allegedly left unanswered, their argument flies against several Seventh Circuit decisions which have rejected inmates' arguments that they need not follow applicable grievance procedures on the basis that the procedures are "futile." *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 534-36 (7th Cir. 1999) rejected an inmate's argument that it was futile to have file a grievance, calling the argument "guesswork" and holding that "[n]o one can know whether administrative requests will be futile; the only way to find out is to try." Similarly, *Massey v.*

Helman, 196 F.3d 727, 733 (7th Cir. 1999) opined that the "potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures." Rather, *Massey* noted that the issue is "whether the institution has an internal grievance procedure by which prisoners can lodge complaints about prison conditions." *Id.* at 734. As noted above, *Dixon v. Page*, 291 F.3d 490 held that a prisoner was first required to appeal to Director of IDOC before he could properly allege that lower level officials had frustrated or ignored his remedy. *See also, McCoy v. Gilbert*, 270 F.3d 503, 511 (7th Cir. 2002).

In light of the foregoing, it is clear Ms. KOSS failed to exhaust the grievance procedure because she failed to take her grievance to the next level of review after her initial grievance was allegedly unanswered. The CCDOC grievance policy clearly states that the "[e]xpiration of a time limit at any stage of the process without official action entitles the grievant to move to the next state of the grievance process" (*See* p. 4 of Ex. D to the Consent Decree (Ex. B)). Accordingly, because KOSS failed to take her grievance to the next level of review after it was allegedly not answered, she cannot claim that further review is "unavailable" to satisfy § 1997e(a)'s exhaustion requirement. *See, e.g., Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). *Jernigan*, held that a prisoner's failure to resubmit an unanswered grievance constitutes a failure to exhaust – "[a]n inmate who begins the grievance process but does not complete it is barred from pursuing a §1983 claim under PLRA for failure to exhaust his administrative remedies." In so concluding, *Jernigan* distinguished the Seventh Circuit's opinion in *Lewis*, holding that the inmate failed to exhaust his remedies because the grievance policy (in the court's words) "provides that if an inmate does not receive a response from the warden within thirty days after submission of the grievance, the inmate may send the grievance with evidence of its prior submission to an administrative review body." *Id.* at 1033.[4]

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[4] The Seventh Circuit in *Lewis v. Washington*, 300 F.3d 829 (7th Cir. 2002) discussed a limited exception to the exhaustion requirement set forth in *Pozo* and *Dixon*. Citing decisions from the Eighth and Fifth Circuits, *Lewis* held that where a prison official ignores an inmate's grievance, the inmate is required to "exhaust only those remedies that are *available* to him." 300 F.3d at 833 (emphasis supplied). Ultimately, *Lewis* held that the inmate had failed to exhaust his remedies because the prison officials had answered the second of his two grievances. *Id.* ("because Lewis received a response to his 'Staff Conduct' grievance, administrative remedies were available, for his failure to protect claims, and he was required to appeal the denial of his grievance within the time frame set by the prison."). *Lewis* does not control the disposition of this motion because plaintiff KOSS did not attempt to appeal the alleged lack of a response to her grievance. Defendant is aware that one published district court opinion and three unpublished opinions have held that the PLRA's "exhaustion" requirement was satisfied where it was alleged that

Accordingly, because KOSS did not resubmit her grievance that was allegedly ignored, she cannot claim that her grievance was denied. Rather, she must go through and complete the process. Similarly, the Sixth Circuit has also held that a prisoner must continue with the grievance process if he does not receive a response -- "[e]ven if plaintiff did file an initial grievance . . ., he was required to continue to the next step in the grievance process within the time frame set forth in the regulations if no response is received from prison officials." *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999).[5] *See also, Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir.1998) ("the courts cannot simply waive [the exhaustion] requirements where they determine they are futile or inadequate"). In summary, plaintiffs' claim for injunctive relief and any claim of damages which Ms. KOSS brings should be dismissed because she failed to properly appeal the alleged "denial" of her grievance.

D. Plaintiff KOSS Failed to Place the CCDOC on Notice of Her Claim(s)

Plaintiff KOSS' skeletal grievance fails to satisfy the PLRA because it would not have placed any jail official on notice of her claims. While the Seventh Circuit in *Strong v. David*, 297

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correctional officials failed to respond to an inmate grievances. See *Jones v. DeTella*, 12 F.Supp.2d 824, 826 (N.D. Ill. 1998); *Whitmore v. Hurley*, 2002 WL 2012469, *3 (N.D. Ill. 2002); *Bailey v. Sheahan*, 2002 1750929, *2 (N.D. Ill. 2002); *Goodman v. Carter*, 2001 WL 755137, *3 (N.D. Ill. 2001). Defendant submits those decisions are distinguishable because they did not have occasion to address the application of Section III(C) (or any similar procedure) which provides that inmates can move to the next level of the grievance process if no response is received. They are also distinguishable to the extent that they were decided before (or ignored) the Seventh Circuit's decisions in *Pozo* and *Dixon*.

[5] The following decisions have also held that a prisoner's failure to follow up on an allegedly ignored grievance does not constitute exhaustion under the PLRA. *Reyes v. Punzal*, 206 F.Supp.2d 431, 432-33 (W.D.N.Y. 2002) (inmate required to pursue appeal process despite alleging that facility failed to investigate his complaint – "even if plaintiff received no response to his grievance, he could have appealed it to the next level. By not doing so, plaintiff failed to exhaust his administrative remedies as required by the PLRA as a prerequisite to filing this lawsuit"); *Martinez v. Williams*, 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002) (holding that inmate who allegedly did not receive response to grievance "could have and should have appealed the grievance in accordance with grievance procedures"); *Flowers v. Grant*, 2003 WL 1565940, *2 (S.D.N.Y. 2003) (finding no exhaustion - "even if Plaintiff has filed an 'institutional grievance form' relating to his ETS claim, Plaintiff has not alleged that he followed any of the Department of Correction procedures for appellate review of his grievance."); *Kearsey v. Williams*, 2002 WL 1268014, *2-*3 (S.D.N.Y. 2002) (finding no exhaustion - "even if the IGRC at Rikers Island does not as a general practice investigate complaints against staff, the law requires that Plaintiff pursue his grievance with the superintendent and the CORC"); *Waters v. Schneider*, 2002 WL 727025, *2 (S.D.N.Y. 2002) (finding no exhaustion – and noting "[where] the committee fails to respond to the grievance, the inmate may appeal to the next level without awaiting administrative action"); *Mendoza v. Goord*, 2002 WL 31654855, *2 (S.D.N.Y. 2002) ("even accepting Mendoza's claim that he was never notified of the rejection of his grievance (or even had that rejection never occurred), the regulations clearly permit an appeal, and filing such an appeal is accordingly required by § 1997e(a) before a suit can be brought").

F.3d 646, 649-50 (7th Cir. 2002) acknowledged that "few courts have addressed what things an administrative grievance must contain," it found that that "[w]hen an administrative rulebook is silent, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought." The facts of *Strong* are readily distinguishable because KOSS' skeletal grievance stands light years away from the grievances addressed in *Strong*.

In *Strong*, the plaintiff filed two grievances, the first of which detailed an alleged sexual assault and the manner in which individuals from the prison's Internal Affairs and Adjustment Committee responded. *Id.* at 647. Specifically, the court noted that the plaintiff "asked to be released from segregation, that the 'matter not be overlooked', and that certain property and privilege be returned to him." *Id.* The grievance was denied. *Id.* The defendants conceded that the plaintiff had properly pursued all administrative remedies with regard to that initial grievance. *Id.* After being transferred to a new prison as a result of the underlying incident, the plaintiff filed a second grievance which tracked the factual allegations of the first and "sought additional relief, including a new polygraph examination, that 'all person involved be held liable for their action,' and compensation from pain and suffering." *Id.* at 648. The second grievance was also denied.

The defendants moved for summary judgment by arguing the plaintiff had failed to fully exhaust his administrative remedies on the basis that the two grievances were not detailed enough. *Id.* In addressing this argument, the Seventh Circuit noted that the district court failed to explain why the first grievance was not detailed enough. *Id.* The Seventh Circuit explained that "Strong's two grievances were comprehensible and contained everything that Illinois instructed him to include." *Id.* at 650.

Here, in contrast, KOSS' two sentence grievance that she allegedly filed in December of 2002 neglects to mention the alleged altercation with her cellmate which she claims took place in April of 2002. (Ex. A, ¶33). It also fails to set forth what aspect of a weekend lockdown she was grieving such as the alleged lack of phone calls, showers, visitation or that weekend lockdowns occur at all. That being the case, the submission of KOSS' grievance is like the one addressed in *Murray v. Artz*, 2002 WL 31906464, *4 (N.D. Ill. 2002) where Judge Kennelly dismissed an inmate's claim of inadequate medical care on the basis that "there is no hint in the grievance, so it does not suffice to "alert[] the prison to the nature of the wrong for which redress is sought." (quoting *Strong*, 297 F.3d at 650).

KOSS' failure to specifically grieve the alleged April incident and/or mention it in her alleged December grievance and her failure to put officials on notice as to what aspect of the weekend lockdown she was challenging runs contrary to the purpose of the PLRA which was to "reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 525 (2002). Among other things, the Supreme Court in *Porter* discussed that that when cases actually do reach federal court after the administrative remedies have been exhausted, the court's "adjudication could be facilitated by an administrative record that clarifies the contours of the controversy ." *Id,* quoting *Booth v. Churner*, 532 U.S. 731, 737 (2001). These specific policy goals were cited by the court in *English v. Redding*, 2003 WL 881000, *3-*4 (N.D. Ill. 2003) where the court held that the inmate had failed to place the defendants on notice that he required protection from another inmate. Here, Ms. KOSS has failed to set forth any basis in the administrative record that illuminates, much less clarifies her claims that the weekend lockdowns violated her constitutional rights. For this additional reason, the Amended Complaint should be dismissed.

IV. THE WEEKEND LOCKDOWN HAS A LEGITIMATE PENOLOGICAL OBJECTIVE – THE DISCOVERY OF WEAPONS AND CONTRABAND

Bell v. Wolfish, 441 U.S. 520, 547 (1979) explained that correctional officials should be afforded broad discretion in establishing appropriate security measures at a county jail:

> The problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Bell also recognized that there was no basis to conclude that "pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order." 441 U.S. at 546 n.28. Following *Bell*, Sheriff Sheahan can limit the rights of the detainees held in his custody where necessary to either maintain institutional security or to preserve order and discipline. *Id.* at 546; *Block v. Rutherford*, 468 U.S. 576 (1984) (upholding blanket prohibition of contact visits for pretrial detainees).

Where injunctive relief is sought in a correctional setting, the Seventh Circuit in *Godinez v. Lane*, 733 F.2d 1250, 1261 (7th Cir. 1984) also cautioned district courts to hesitate before treading into the management of prisons and jails and has instructed district courts to weigh the interests of

prison officials and to general public against the claims of inmates. In reversing the entry of a preliminary injunction the court in *Godinez* observed:

> [T]he undue burden that the district court's preliminary injunction would cause the Illinois Department of Corrections clearly disserves the public interest. "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody." Prison administrators are specially trained and duly compensated by the public to handle the daily operation and maintenance of maximum security prisons. Absent a clear constitutional violation, courts should be hesitant to impose their theories of prison reform. In contrast to the vast majority of Federal judges, prison administrators possess a wealth of penological expertise and experience that qualifies them to supervise, discipline, and rehabilitate inmates within an ever-changing, complex prison system. Judicial deference is accorded their decisions "not merely because the administrator will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive branches of our Government, not the Judicial."

Id. at 1261-62 (citations omitted).

Similarly, Judge Leinenweber held in *Buck v. Briley*, 2001 WL 619523, *2 (N.D. Ill. 2001) that the public interest "in the safe and orderly management of prisons" is of great concern "when a prisoner seeks a preliminary injunction against correctional officials." In this context, "federal courts must take cognizance of prisoners' valid constitutional claims, federal courts cannot manage prisons, and must give substantial deference to those who do." *Id.*

Against this backdrop, the Seventh Circuit has reiterated that the conditions of confinement for a pretrial detainee do not constitute an unconstitutional punishment where legitimate "managerial reasons" exist for their imposition. *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002). Higgs also held that a inmate "would not be entitled to notice and a hearing," "[a]s long as the purpose was indeed a preventive rather than a punitive one." *Id.*

Legitimate security concerns exist which justify the periodic weekend lockdowns. Plaintiffs acknowledge in paragraph 18 of their Complaint that the purpose of these weekend searches is to search for contraband. Given this concession and the obvious security risks that

exist at any large county jail, the weekend lockdowns serve a legitimate managerial purpose and do not violate plaintiffs' rights under the Fourteenth Amendment. Indeed, as *Bell* explained:

> For example, the Government must be able to take steps to maintain security and order at the institution and make certain no weapons or illicit drugs reach detainees. Restraints that are reasonably related to the institution's interest in maintaining jail security do not, without more constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.

Bell, 441 U.S. at 540. *See also, Washington v. Harper,* 494 U.S. 210, 225 (1990) ("There are few cases in which the State's interest in combating the danger posed by a person to himself and others is greater than in a prison environment, which, 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'"). Consequently, because they serve a legitimate peneological function, plaintiffs have no basis to challenge the constitutionality of the weekend lockdown searches at the jail.

V. THE RELIEF PLAINTIFFS SEEK WILL HARM THE "PUBLIC INTEREST"

As discussed above, the plaintiffs' claims for injunctive relief must be weighed against the "public interest." Here, the broad relief demanded by the plaintiffs will harm the "public interest" to the extent that CCDOC will be prevented from conducting appropriate searches for weapons and other contraband on a division-wide basis. Contrary to plaintiffs' sweeping conclusion, the practice of searching for weapons and contraband is not intended to punish detainees but is done in an effort to properly find and secure illegal weapons and contraband at the jail. In light of the risk to the public interest that would spring from precluding CCDOC from locking down the jail to search for weapons and contraband, this Court should dismiss plaintiffs' requests for injunctive relief. This is especially true since the weekend searches of an entire division are conducted to preclude the transfer of weapons or contraband from inmate-to-inmate between divisions or between tiers of the jail.

VI. PLAINTIFFS HAVE NO LIBERTY INTEREST IN MOVEMENT OUTSIDE THEIR CELLS

Plaintiffs claim that their constitutional rights have been violated because they are periodically confined to their cells when a weekend lockdown occurs. However, the scope of protection afforded under the Fourteenth Amendment was discussed in *Antonelli v. Sheahan,* 81 F.3d 1422, 1430 (7th Cir. 1996). *Antonelli* held that a pretrial detainee has "no general liberty

interest in movement outside of his cell guaranteed by the Due Process Clause." In *Antonelli*, plaintiff objected to lockdowns which impacted his freedom of movement and claimed those lockdowns were "arbitrary and capricious." *Id.* at 1430. Rejecting that claim, *Antonelli* held:

> A condition of confinement may be imposed on a pretrial confinee without violating the Due Process Clause if it is reasonably related to a legitimate and non-punitive governmental goal. It may not be arbitrary or purposeless. "Retribution and deterrence are not legitimate non-punitive governmental objectives." Therefore, the infliction may not derive from an intent to punish. "Such a course would improperly extend the legitimate reasons for which such persons are detained – to ensure their presence at trial." Also, there "is no doubt that preventing danger to the community is a legitimate regulatory goal," that may, "in appropriate circumstances, outweigh an individual's liberty interest." A prison official violates the constitutional rights of a pretrial detainee only when he acts with deliberate indifference. Conduct is deliberately indifferent when the defendant acts in an intentional or criminally reckless manner.

Id. at 1427-28 (citations omitted). *See also, Smith v. Shettle*, 946 F.2d 1250, 1252 (7th Cir. 1991) (no constitutionality based liberty claim to be housed in non-lockdown conditions or to mingle with others); *Maust v. Headley*, 959 F.2d 644, 746-48 (7th Cir. 1992) (holding criminal defendant found unfit to stand trial did not have a liberty interest in being confined in the "least restrictive environment"); *Caldwell v. Miller*, 790 F.2d 589, 604-05 (7th Cir. 1986) (even assuming lockdown restrictions were permanent, due process rights were not violated because the difference in pre and post-lockdown conditions is one of degree and not of kind). In light of the foregoing, plaintiffs' due process claim should be summarily dismissed.

Moreover, pretrial detainees do not enjoy a constitutional right against being subjected to intrusive searches. *Bell*, 441 U.S. at 557 ("even the most zealous advocate of prisoners' rights would not suggest that a warrant is required . . . Detainees' drawers, beds and personal items may be searched."); *Hudson v. Palmer*, 468 U.S. 517, 526-30 (1984) (holding that prisoners lack expectation of privacy in their belongings). It follows that pretrial detainees have no constitutional right which precludes the periodic weekend lockdown searches of the jail.

Accordingly, it is clear that institutional lockdowns over a weekend do not violate the Constitution. Searching for weapons and contraband at a jail is a "legitimate and non-punitive goal" that does not violate any constitutional right. *Atonelli*, 81 F3d. at 1428. Conspicuous by its absence in plaintiffs' Complaint is any assertion that the defendant intended to punish plaintiffs by

virtue of the periodic weekend lockdowns, which in and of itself warrants dismissal of the Complaint under *Antonelli*. Accordingly, since a pretrial detainee has "no general liberty interest in movement outside of his cell," plaintiffs cannot state a claim upon which relief can be granted.

VII. PLAINTIFFS FAIL TO ALLEGE THAT CONDITIONS DURING A WEEKEND LOCKDOWN IMPOSE AN "ATYPICAL AND SIGNIFICANT HARDSHIP"

In order to state a violation of the Fourteenth Amendment, plaintiffs must demonstrate that they have a "liberty interest" in the purported constitutional right they claim has been violated *and* that the deprivation they allegedly suffered "imposes atypical and significant hardship" in a constitutional sense. *Thielman v. Leen*, 282 F.3d 478, 482 (7th Cir. 2002). As discussed below, plaintiffs do not enjoy a "liberty interest" to not be subjected to the complained of conditions.

Thielman upheld the district court's determination that several provisions of the State of Wisconsin's Sexually Violent Persons Act (a civil commitment statute) did not violate a detainee's due process rights where plaintiff had alleged that the defendants had subjected him to overly restrictive security measures – characterized by the court as "full and double-locked restraints, chain-type-belt waist restraints with attached handcuffs, security Blackbox, and leg restraints'" during transport *without* an individualized determination that the security measures were necessary. *Id.* at 482.

In affirming the district court's dismissal of this claim, the Seventh Circuit analyzed the "predicate question" – "whether *Thielman* had a liberty interest in not being subjected to WRC's restraint policy." Accepting the argument that Wisconsin law provided the plaintiff with "a state-created right to the least restrictive conditions of confinement during transport," *Thielman* held that the Wisconsin statutes did "not provide [him with] a liberty interest cognizable under the Fourteenth Amendment." 282 F.3d at 482. Next, the court found that civil detainees could only have a protectible liberty interest under state law where the method of restraint "'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 484 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

Applying the of Supreme Court's rationale in *Sandin*, the Seventh Circuit held that the district court properly provided the officials with "'appropriate deference and flexibility.'" *Thielman*, 282 F.3d at 483 (quoting *Sandin*, 515 at 482-83). The Seventh Circuit recognized that "*Sandin* teaches that any person already confined may not nickel and dime his way into a federal claim by citing small, incremental deprivations of physical freedom." As support, *Thielman* found that "facilities dealing with those who have been involuntarily committed for sexual disorders are

'volatile' environments whose day-to-day operations cannot be managed from on high." *Id.* at 483. *Thielman* then concluded that the complained of methods of restraint ("a waist belt and leg chains") *did not* impose an "atypical and significant hardship in relation to the ordinary incidents of [plaintiff's] confinement." *Id.* at 484.

Under *Thielman*, in order to state a claim under the due process clause of the Fourteenth Amendment, plaintiffs must demonstrate that the random weekend lockdowns imposes an "atypical and significant hardship" on them which is significantly different from the ordinary incidence of life in the county jail. Because plaintiffs are already subjected to lockdowns at night and during shift changes they cannot establish any "atypical hardship" that is caused by the incremental lockdown period that occurs when a division of the jail is locked down to search for weapons on a weekend. For this reason as well, the Amended Complaint should be dismissed.

VIII. THE COMPLAINED OF CONDITIONS RESULTING FROM THE LOCKDOWNS DO NOT VIOLATE THE CONSTITUTION

Security measures that result in certain deprivations of cultural amenities or which restrict an inmate's desire to live as comfortably as possible do not necessarily violate the Constitution. As explained by the Supreme Court in *Lewis v. Casey,* 518 U.S. 343, 361-62 (1996), "[t]he district court made much of the fact that during lockdown, prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury." Here, none of the complained of conditions (the alleged lack of showers, exercise, telephone access and/or medical attention, (see Ex. A, ¶¶ 19-20) violate the Constitution.

A. THE ALLEGED LACK OF SHOWERS

The deprivation of "cultural amenities" does not violate the Constitution. *Henderson v. Lane*, 979 F.2d 466, 469 (7th Cir. 1992); *Bell*, 441 U.S. at 437 ("the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible with as little restraint as possible during confinement does not convert the conclusions or restrictions of detention into 'punishment'"). In *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988), the court determined that one shower per week was constitutionally sufficient. Here the alleged failure to provide plaintiffs with showers does not amount to a constitutional violation.

B. The Alleged Lack of Exercise

A claim for "lack of exercise" may only rise to the level of a constitutional violation where a plaintiff alleges that "movement is denied and muscles are allowed to atrophy [and] the health of the individual is threatened." "*Thomas v. Ramos*, 130 F.3d 754, (7th Cir. 1997), quoting *French v. Owens*, 777 F.2d 1250, 1255 (7th Cir. 1985). Under this standard, plaintiffs fail to allege that they have suffered any injury from their alleged lack weekend exercise during the lockdowns. Indeed, they do not even suggest that they cannot perform exercises in their cells.

C. The Alleged Lack of Access to Phones

Plaintiffs do not have the right to unlimited phone use. *Benzek v. Grammar*, 869 F.2d 1105, 1108 (8th Cir. 1989). Thus, the mere delay in access to the phone during the weekend lockdowns does not trigger a constitutional violation. Moreover, plaintiffs do not claim to have suffered any prejudice to pending or contemplated litigation as a result of the purported denial of the phone privileges. Consequently, these allegations fail to establish a constitutional violation. *Antonelli*, 81 F.3d at 1432 (affirming the dismissal of a similar claim where pretrial detainee failed to allege any detriment his access to court); *Carter v. O'Sullivan*, 924 F.Supp. 903, 909 (C.D. Ill. 1996) (denying TRO where it was alleged that new phone system resulted in delays of up to twenty days in making phone calls to an attorney).

D. The Alleged Lack of Medical Care

The Amended Complaint establishes that plaintiff GELCO's cellmate was removed from her cell for a psychological evaluation (Ex. A, ¶31). Accordingly, plaintiffs' allegations refute a claim of deliberate indifference. *Chapman v. Keltner*, 24 F.3d 842, 845 (7th Cir. 2001). Neither negligence nor even gross negligence will suffice to state a claim and, at best, that is all plaintiffs have possibly asserted. Liability is only triggered by conduct that is intentional or criminally reckless. *Id.* Additionally, no claim is stated unless an inmate asserts that the defendant knew of and failed to treat a serious injury or medical need. Moreover, plaintiffs must establish: (1) that they had an objectively serious injury or medical need; and (2) the official knew the risk of injury was substantial and failed to take measures to prevent it. *Id.*

Plaintiffs' assertions fall far short of these pleading thresholds. While they suggest that they should have been instantly removed from their cells and provided with medical care, the Constitution does not so require in the context of the lockdown procedure in question. The Constitution does not require the immediate administration of non-emergency medical care during

emotional distress. See, e.g., *Mitchell v. Horn*, 318 F.3d 523, 534-36 (3rd Cir. 2003) (citing *Oliver v. Keller*, 289 F.3d 623, 626-28 (9th Cir. 2002), *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999), *vacated and reh'g en banc granted*, 197 F.3d 1059, *reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000) (*en banc*), *cert. denied*, 532 U.S.1065 and *Siglar v. Hightower*, 112 F.3d 191, 193-94 (5th Cir. 1997); *Oliver v. Keller*, 289 F.3d 623, 629 (9th Cir. 2002) (holding that a detainee failed to allege more than a *de minimis* injury where he alleged, among other things, that he was assaulted by prisoner).

X. PLAINTIFFS ARE NOT ENTITLED TO DAMAGES BECAUSE THEY HAVE NOT PROPERLY ALLEGED A CLAIM AGAINST THE SHERIFF

It is axiomatic that the absence of a constitutional violation precludes a claim against the Sheriff in his official capacity. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Because the weekend lockdowns do not violate plaintiffs' constitutional rights, their claim against the Sheriff fails. It is also black letter law that Sheriff Sheahan cannot be held liable on the basis of *respondeat superior*. Ignoring this principle, plaintiffs KOSS and GELCO suggest that because they were allegedly injured during a weekend lockdown, their claims are cognizable. This is simply not the case. Rather, where a constitutionally based physical injury claim is premised upon a purported failure to train or to provide adequate staff (as it is alleged in paragraphs 40-42 of the Amended Complaint), a plaintiff must show that the defendant's "policy" was deliberately indifferent to the decedent's rights *and* that such indifference was the proximate cause of the plaintiff's injuries. *See, e.g., Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 407 (1997) ("a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights."); *City of Canton v. Harris*, 489 U.S. 378, 388 (1988); *Ineco v. City of Chicago*, 286 F.3d 994, 998 (2002); *Estate of Porter v. State of Illinois*, 36 F.3d 684, 688-89 (1994); *Benson v. Cady*, 761 F.2d 335, 341 (7th Cir.1985).

Here, none of the plaintiffs have alleged that any claimed physical injury was a proximate cause of any fault of the defendant in a constitutional sense. Accordingly, all claims brought against the Sheriff should be dismissed.

WHEREFORE, Sheriff Michael Sheahan prays that this Honorable Court grant his motion to dismiss.

Respectfully submitted,

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