IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No: 04-1443

GENISE HART, et. al.,

Plaintiffs-Appellants,

v.

MICHAEL SHEAHAN, et. al.,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
The Honorable **James Zagel**, Judge Presiding.

BRIEF OF PLAINTIFFS-APPELLANTS

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ATTORNEYS FOR PLAINTIFFS-APPELLANTS

DISCLOSURE STATEMENT

The undersigned, one of the counsels for Plaintiffs-Appellants, furnishes the following in compliance with Circuit Rule 26.1:

(1) The full name of the party represented by the undersigned counsels is Genis Hart, Carmen Feliciano, Ann Francis Gelco, Helen Koss, Caprice Morales and Michelle Gandy, individually and on behalf of a class.

(2) The names of all the attorneys who represent the Plaintiffs-Appellants are:

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(3) None of the Plaintiffs-Appellants are a corporation.

_____
One of the Attorneys for the Plaintiffs-Appellants

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JURISDICTIONAL STATEMENT

1. The jurisdiction of the District Court is based on 28 U.S.C. Sections 1331, 2201 and 42 U.S.C. Sections 1983 and 1988. Plaintiffs brought this action pursuant to 42 U.S.C. Section 1983 and 1988 to enforce their Federal and Constitutional rights. Plaintiffs brought this action as a class action pursuant to Rule 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The Plaintiffs sought injunctive relief and monetary relief to redress the Defendants violation of their Fourteenth Amendment Due Process Rights under the Federal Constitution.

2. The jurisdiction of the United States Court of Appeals for the Seventh Circuit is based on 28 U.S.C. Section 1291.

(i) On December 19, 2003, Final Judgment was docketed and the cause was dismissed pursuant to the Motion To Dismiss filed by the Defendant, Sheriff of Cook County.

(ii) On January 7, 2004, Plaintiffs filed a Motion To Alter or Amend the Judgment.

(iii) On January 29, 2004, the Order of the District Court was docketed denying the Plaintiffs Motion To Alter or Amend the Judgment.

(iv) On February 23, 2004, Plaintiffs filed a timely Notice of Appeal.

(v) On March 2, 2004 Plaintiffs filed a Jurisdictional Memorandum with United States Court of Appeals for the Seventh Circuit. On March 10, 2004 Plaintiffs filed a Supplemental Jurisdictional Memorandum with the United States Court of Appeals for the Seventh Circuit.

3. The Defendant, Michael Sheahan, Sheriff of Cook County is being sued in his official capacity. The current Sheriff of Cook County is Michael Sheahan.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing Plaintiffs claims that as pretrial detainees, the Defendant's prolonged and abusive non-emergency periodic weekend jail lockdowns violated their due process rights under the Fourteenth Amendment.

2. Whether the District Court erred and abused its discretion by failing to permit the Plaintiffs to file a Third Amended Complaint after granting the Defendant's Motion to Dismiss.

STATEMENT OF THE CASE

The Plaintiffs in this case are currently or have been pretrial detainees at the Cook County Department of Corrections ("Jail"). As pretrial detainees at the Jail, the Plaintiffs are subjected to weekend lockdowns which occur at least once a month. During these lockdowns, inmates are confined to their cells starting a 1:30 p.m. on Friday afternoon and are not released until late on Sunday afternoon. (Doc. 14-attachment at par. 1 - Second Amended Complaint)[1]

In the lawsuit, the Plaintiffs are not challenging the right of Jail officials to conduct random searches in the living quarters of the Jail and to impose lockdowns during emergencies. The Plaintiffs are challenging the reasonableness of regular, scheduled lockdowns which last up to fifty hours over the weekends and are imposed in a harsh and abusive manner by the Sheriff. These prolonged lock downs serve no justifiable administrative or penological purpose at the Jail and amount to punishment of the pre-trial detainees. During the prolonged lock downs, the Sheriff fails to protect pretrial inmates from harm from other inmates and fails to provide medical treatment. (Doc, 14-attachment at par 2, 19, 39, 41) Plaintiffs, as representatives of a class are seeking injunctive and monetary relief. (Doc. 14- attachment at par. 3) Plaintiffs filed a Motion for Class Certification. (Doc. 27)

Plaintiffs filed a motion for a temporary restraining order to enjoin the Defendant from conducting non emergency prolonged weekend lock downs of the Plaintiffs under conditions which are unreasonable and done in an untimely manner and under conditions which do not protect inmates from harm from other inmates and under conditions where medical treatment is denied. (Doc. 5)

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[1] References to the record: "Doc" refers to the civil docket; "Tr" refers to the transcript of proceedins before the District Court; "App" are documents set forth in the Separate Appendix.

The Defendant informed the District Court that the Sheriff would not engage in any non emergency weekend lockdowns without first giving prior notice to the Court. (Tr. - June 3, 2003 at pages 5-6) While this case was pending before the District Court, no weekend lockdowns occurred. (Tr. - December 3, 2003 at page 3) Upon information and belief, the Defendant resumed weekend lockdowns after the District Court dismissed Plaintiffs' claims.

On December 19, 2003, the District Court granted the Defendant's motion to dismiss the complaint pursuant to F.R.C.P. 12(b)(6) and denied all pending motions as moot. *Hart v. Sheahan, 2003 U.S. Dist. LEXIS 22867* (N.D. IL 2003). On January 7, 2004, Plaintiffs filed a motion to alter or amend the judgment (Doc. 39); a motion to clarify the record (Doc. 37); and a motion to file a third amended complaint. (App. 1-62, Doc. 38) On January 28, 2004, the District Court denied the motion to alter or amend. (Doc. 43) On February, 10, 2004, the District Court denied Plaintiffs motion to file a third amended complaint as moot. (Doc. 44)

On February 23, 2004, Plaintiffs filed a timely notice of appeal. (Doc. 46)

STATEMENT OF FACTS

1. The "Jail" Detention Facilities For Women.

At the time of the filing of the lawsuit, the Plaintiffs were either current or former female pretrial detainees at the Cook County Department of Corrections ("Jail"). (Doc. 14-attachment at par. 1)[2] Division Three and Division Four are the two buildings at the Jail where female pretrial detainees are housed. (Doc. 14-A-par. 14) Each housing division is divided into self contained units called tiers. The tiers consist of a large day room, a shower area and a hallway with cells on each side of the corridor. In the day rooms, female pretrial detainees receive their meals, have access to pay telephones and are allowed to watch television. (Doc. 14-A-par. 14-15)

At the entrance to each tier, there is an interlock area, which is staffed by a correctional officer and is the only means of entering and departing the tier. (Doc. 14-A-par. 14) There are only six tiers in Division Three and sixteen tiers in Division Four. (Doc. 14-A-par. 14) The correctional officer is able to observe from the interlock station, inmates in the day room to maintain security and protection for the inmates. (Doc. 14-A-par. 15) In Division Three and Four, the cells have solid steel doors with only a small opening. The correctional officer can not visual observe inmates from the interlock station after the inmates are locked in their cells. (Doc. 14-A-par. 16) When the female detainees are locked down in their cells, they are unable to communicate with the correctional officer stationed at the interlock when they are being physically attacked by their cell mates, and when they are in need of medical or psychological treatment. (Doc. 14-A-par. 19)

2. "Jail" Weekend Lockdowns.

The Jail has a practice and/or policy of locking pretrial females inmates down in their cells

[2] Plaintiffs will hereafter cite "Doc. 14-attachment at par. __" as Doc. 14-A-par.__"

once a month over a weekend starting at 1:30 p.m. on Friday and extending to late Sunday afternoon. (Doc. 14-A-par.18) Although it takes correctional officers anywhere from twenty minutes to forty minutes to search a tier, the female inmates still remain locked down in their cells after the search of their tier until late on Sunday afternoon despite the fact that there is no valid reason for this restriction. After the tier has been searched, they are still denied access to the day room where they normally receive their meals; denied access to the shower; and the pay phones. (Doc. 14-A-par. 3, 17, 18, 20)

As many as three female inmates are confined to a cell for over fifty hours during the lock downs under "dungeon like" conditions. (Doc. 14-A-par.19,38) The female detainees are left to fend for themselves during these weekend lock downs because the correctional guard assigned to the tier is either absent or is unable to see or hear an inmates cry for help from the interlock monitoring station. (Doc. 14-A-par. 19, 38, 39, 40, 52 (C)) Furthermore, during weekend lock downs, the Jail fails to provide access to medical and/or psychological treatment for female inmates to prevent serious medical injuries. (Doc. 14-A-par. 39, 41, 52(D), 52(E))

3. The Plaintiffs.

Plaintiff Gelso has been an inmate at the Jail on several occasions over the last two years and has been subjected to numerous weekend lockdowns while waiting trial. (Doc. 14-A-par. 10) During an incarceration in May, 2002, the Plaintiff Gelso was pregnant. On May 31, 2002, the lock down started at 1:30 p.m. (Friday), and she was confined with two other inmates to a cell, which had no lights until June 2, 2002 (Sunday). One of her cell mates was mentally ill, and during the course of the lock down, the cell mate became very violent towards Plaintiff Gelso and suicidal. The cell mate attempted to strangle herself and the Plaintiff Gelso and the other cell mate struggled to

restrain the women for a period of approximately 45 minutes before finally a correctional officer responded to their screams for assistance. During the course of this fight when the correctional guard was absent, Gelso was struck in the jaw by the suicidal cellmate and injured. (Doc. 14-A-par. 38-39)

Plaintiff Kos was an inmate at the time the complaint was filed. She had been incarcerated at the Jail since 2001 and had been subjected to numerous monthly prolonged weekend lock downs. (Doc. 14-A-par. 40) During a weekend lock down in April of 2002, the Plaintiff Koss was attacked by her cell mate and was struck numerous times which caused bruises and she had clumps of her hair pulled out of her head. During the entire period when she was being attacked, Ms. Koss yelled out for a correctional guard to help her, but the correctional guard was not at the interlock post. Finally after approximately ten minutes, an inmate worker located a correctional officer. When the officer finally arrived, the officer refused to take the Plaintiff Koss to receive medical treatment and told her to wash herself up. (Doc. 14-A-par. 41)

Helen Kos filed a written grievance on December 16, 2002, complaining about the weekend lock downs. Ms. Kos stated in her grievance, "I would like to know what can be done about lock down weekends. I feel it is unconstitutional and unfair." The written grievance requests the "stopping lock downs." There was no response by the defendant to the grievance filed by Ms. Kos. (Doc. 14-A-par. 26) Under the written administrative grievance procedures, detainees may take their grievance to The Grievance Appeal Panel if they do not receive a decision within five business days. Charles A. Fasano is the Director of the John Howard Association. The John Howard Association serves as the court appointed monitor of the grievance process at the Jail under the *Duran v. Elrod*, No. 74 C2949 consent decree. According to Charles Fasano, the appeals panel did

not exist in 2002. (Doc. 14-A-par. 27, 28)

The Plaintiffs Hart, Feliciano, Morales and Gandy as pretrial detainees at the Jail were also subjected to weekend lockdowns. (Doc. 14-A-par. 7-9, 12, 32-35, 42-43)

4. The Unreasonableness; Abusiveness and Punitive Conditions of Weekend Lockdowns.

During weekend lockdowns, the female inmates are confined to their cells for a time period greater than if they were being punished and placed in solitary confinement. During solitary confinement, the inmates are released from their cell for one hour during the day and allowed to shower and use the phone. (Doc. 14-A-par. 20) During weekend lock downs, inmates remain in their cells for in excess of 50 hours and are not permitted to shower, exercise outside their cell or have access to a pay phone to call their family or lawyer. (Doc. 14-A-par. 20).

During the prolonged lock downs, the Sheriff fails to protect pretrial inmates from harm from other inmates and fails to provide medical treatment. (Doc, 14-attachment at par 2, 19, 39, 41) The female detainees are left to fend for themselves during these weekend lock downs because the correctional guard assigned to the tier is either absent or is unable to see or hear an inmates cry for help from the interlock monitoring station. (Doc. 14-A-par. 19, 38, 39, 40)

Although it takes correctional officers anywhere from twenty minutes to forty minutes to search a tier, the female inmates still remain locked down in their cells after the search of their tier until late on Sunday afternoon. After their tier has been searched, they are still denied access to the day room where they normally receive their meals, and denied access to the shower and the pay phones. (Doc. 14-A-par. 3, 17, 18, 20)

According to the Director of the John Howard Association, Charles Fasano, the weekend

lockdown practice at the Jail serves no legitimate penological interest. (Doc. 14-A-par. 30). This conclusion by Mr. Fasano is supported by the brief filed by the Plaintiffs' in this case in Response to Defendant's Objection to the filing of the Second Amended Complaint, which contained excerpts from Mr. Fasano's deposition testimony. (Doc. 17) The following observations were made by Mr. Fasano, concerning the Jail's lockdown practice:

(1) In Division 3, the inmates are housed in six tiers with two tiers on each floor. Mr. Fasona testified that it would be impossible for an inmate in the day room in one tier to pass contraband to another inmate in the other day room tier on the same floor. (Fasona Dep. at p. 23-24)

(2) In Division 4, there are four single tiers on each floor. It would not be feasible for an inmate in the day room on a single tier to pass contraband to any inmate in another tier on the same floor. (Fasano Dep. at p. 28-29)

(3) After a tier has been searched and after the tier directly above and/or below has been searched, there is no legitimate penological reason to continue to confine the female inmates to their cells and restrict them from using the day room. Furthermore, Mr. Fasano stated that to continue the lockdown of the tier after it has been searched is in conflict with good principals of correctional operation. (Fasona Dep. at p. 62-63)

(4) During a lockdown, before a tier has been searched, "[t]here is no legitimate penological objective" to deny a certain number of inmates from being released from their cell at one time while the other inmates remain locked up in their tier to take showers and use the phone while they are being viewed by the correctional staff. (Fasona Dep. at p. 61)

(5) Prolonged lockdowns based on his knowledge and experience at times cause inmates to suffer from mental distress; cause inmates to injure their cellmates; and cause inmates to set fires in their cell. Following a lockdown of 48 hours, it would be typical for inmates to have a higher number of requests for medical services than if they had not been on lockdown for that same period. (Fasona Dep. at p. 64-65)

(6) A 48 hour weekend lockdown for Division 3 is clearly excessive. It would be possible to conduct a routine shakedown of Division 3 in approximately 3-4 hours. (Fasona Dep. at p. 69-71)

(Doc. 17 at page 5-6 plus attachments of deposition testimony)

5. Additional Facts Raised By Plaintiffs in the Third Amended Complaint Which Are Consistent with the Factual Allegations in the Second Amended Complaint.

Division Three of the Jail houses women with special medical needs, including but not limited to inmates with severe mental illnesses; women in need of prenatal care; women in need of medical care; and women being treated for substance abuse. (App. 5 at par. 3, Doc. 38 - 3rd Amend Compl. at par. 3). Division Three has one of the highest ratios of correctional officers to inmates at the Jail and according to Director Fasano[3] has more than sufficient staff to complete a search of the tiers in Division Three in under four hours. (App. 13-14 at par. 22, Doc. 38 - 3rd Amend Compl. par. 22). During weekend lockdowns in Division Three, a majority of the tiers are searched on Friday afternoons and the women remain on lockdowns until late on Sunday afternoon even though there is no legitimate penological reason for this practice. (App. 6, 15, 16, Doc 38 - 3rd Amend Compl. at par. 6, 26, 27 & Exhibit "A" attached to 3rd Amend Compl.).

Sheila Vaughan is a correctional expert , and the former Bureau Chief of the New York City Department of Correctional Facilities. Ms. Vaughan inspected the Jail on March 27, 2003 and prepared a report regarding the weekend lockdown practices at the Jail. She agrees with Director Fasaono position that Division Three can be searched in under four hours, and that the current practices for weekend lockdowns in Division Three and Four serve no legitimate penological purpose. (App. 9-10, 20, 51-53, Doc. 38 - 3rd Amend Compl at par. 19, 41 & Exhibit "B" attached to 3rd Amend Compl.).

During lockdown weekends, the Sheriff is deliberately indifferent to providing medical

[3] Charles Fasano is also a former administrator at the Cook County Jail. (App. 12, Doc. 38- 3rd Amend Compl at par.18).

and psychological care to female inmates with obvious medical and psychological needs. The Sheriff is also deliberately indifferent to providing protection to inmates from physical attacks by other inmates due to the fact that corrections officers do not monitor inmates while they are in lockdowns. (App. 5-6, Doc. 38 -3rd Amend Compl at par. 5). According to Director Fasano and Ms. Vaughan, there is a clear danger that inmates will be injured by a cell mate during a lockdown due to the fact that correctional officers can not see or hear inmates from their monitoring stations. (App. 11, Doc. 38 - 3rd Amend Compl at par. 24). Within the last two years, Director Fasano is personally aware of one person suffering a heart attack and one inmate delivering a baby during lockdowns. (App. 17, Doc. 38 - 3rd Amend Compl at par. 30). Furthermore, plaintiff Koss has assisted in the delivery of a cell mate's baby during a lockdown weekend due to the fact that no guards were on duty when her cell mate went into labor. (App. 8-9, Doc. 38 - 3rd Amend Compl at par. 14).

Plaintiffs Felciano and Gelso also allege that on occasions they did not receive their medication during lockdowns. Ms. Feliciano is on medication for a bipolar disorder, and has experienced periods of extreme anxiety and depression during lockdowns. (App. 10, Doc. 38 - 3rd Amend Compl at par.11). Plaintiff Gelso suffers from a long standing mental illness which is treated by medication. During a weekend lockdown in Division Three, Ms. Gelso was pregnant and she was not provided with prenatal care or her medication for her mental illness. This caused her to become depressed, anxious and gave rise to suicidal thoughts. (App. 11, Doc. 38 - 3rd Amend Compl at par. 13).

There have been frequent suicide attempts over lockdown weekends. During the weekend starting on January 24, 2003, Antoinatte Davis became severely depressed and attempted to commit

suicide after her calls for assistance from the guards went unanswered. On July 14, 2002, inmate Joyce Owens threatened to kill herself and on the next day cut her wrist. (App. 17, 59-62, Doc. 38 - 3rd Amend Compl at par. 31 & Exhibit C).

Since the filing of the Plaintiffs Motion for a Temporary Restraining Order on March 12, 2003, the Jail had not conducted a weekend lockdown in either Division Three or Four.[4] (App. 4, Doc. 38 - 3rd Amend Compl at par. 1)

[4] Upon information and belief, the Defendant resumed weekend lockdowns after the District Court dismissed Plaintiffs claims.

SUMMARY OF THE ARGUMENT

The District Court erroneously dismissed Plaintiffs claims against the Defendant, although the Plaintiffs, as pretrial detainees, sufficiently pled and stated a claim against the Sheriff that the regular, scheduled non-emergency weekend lockdowns which last up to fifty hours over the weekends, are unreasonable and are imposed in a harsh and abusive manner by the Sheriff. The Plaintiffs pled that the prolonged lock downs serve no justifiable administrative or penological purpose at the Jail and amount to punishment of the pre-trial detainees. During the prolonged lockdowns, the Sheriff fails to protect pretrial inmates from harm from other inmates and fails to provide medical treatment. The Plaintiffs pled that Charles Fasano, the Director of the John Howard Association, and a Court appointed monitor at the Jail, found that the current practices and procedures followed for weekend lock downs at the Jail serve no legitimate penological objective.

The District Court erroneously abused its discretion by not permitting the Plaintiffs to file a Third Amended Complaint after granting the Defendant's motion to dismiss. The District Court found that the Plaintiffs motion to file the Third Amended Complaint was moot and failed to provide any further explanation for denying Plaintiffs leave to file.

ARGUMENT

STANDARD OF REVIEW

Since the District Court granted the Defendants motion to dismiss the Plaintiffs claim under Rule 12(b)(6), the Circuit Court reviews the District Court's decision *de novo,* accepting the well pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the Plaintiff. *Travel All Over the World, Inc. v. Kingdom of Saudia Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996). A dismissal under Rule 12(b)(6) is proper only where the plaintiff can prove no set of facts that would entitle him to relief. *Id.* at 1429-30.

The Circuit Court reviews the District Court's denial of the Plaintiffs motion to file a Third Amended Complaint as to whether the District Court abused its discretion. *Perrian v. O'Grady,* 958 F.2d 192, 194 (7th Cir. 1992).

1. The District Court Erred In Dismissing Plaintiffs Claims That As Pretrial Detainees, The Defendant's Prolonged And Abusive Non-Emergency Periodic Weekend Jail Lockdowns Violated Their Due Process Rights Under The Fourteenth Amendment.

A. Unconstitutional Conditions Of Confinement.

The Plaintiffs, as pretrial detainees, sufficiently pled and stated a claim against the Sheriff that the regular, scheduled non-emergency weekend lockdowns which last up to fifty hours over the weekends, are unreasonable and are imposed in a harsh and abusive manner by the Sheriff. The prolonged lock downs serve no justifiable administrative or penological purpose at the Jail and amount to punishment of the pre-trial detainees. During the prolonged lockdowns, the Sheriff fails to protect pretrial inmates from harm from other inmates and fails to provide medical treatment.

(Doc. 14-A-par 2, 19, 39, 41)

In ruling on the Defendant's motion to dismiss, the District Court erroneously failed to accept as true all well-plead allegations and draw all reasonable inferences in favor to the Plaintiffs' that the prolonged weekend lockdowns serve no justifiable administrative or penological purpose.. A court may dismiss a complaint for failure to state a claim under Rule 12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hinson v. King & Spaulding,* 467 U.S. 69, 73 (1984). "Ambiguities in complaints in federal court should be interpreted in favor of plaintiffs; not defendants." *Early v. Bankers Life and Casualty Company,* 959 F.2d 75, 79 (7th Cir. 1992). The Court must accept as true all well-plead allegations and draw all reasonable inferences in favor to the plaintiff. *Perkins v. Silversein,* 939 F.2d 463, 466 (7th Cir. 1991).

The District Court erred when it failed to accept as true the statement by Charles Fasano, the Director of the John Howard Association, and a Court appointed monitor at the Jail[5], that the current practices and procedures followed for weekend lock downs in Division Three and Four at the Jail serve no legitimate penological objective. (Doc. 14-A-par. 27, 30) The Court also failed to accept as true, Plaintiffs' allegations that after a tier is searched, there is no valid reason to continue the lockdown of the females in that tier. The tiers are self contained units with a housing unit and it is impossible to enter or leave a tier without first passing through a set of interlock doors. (Doc. 14-A-par. 3, 18) Nevertheless, the District Court erroneously concluded:

> The CCDOC's administrators and officials argue that both random

[5] Charles Fasano is the Director of the John Howard Association, which is the court appointed monitor of the Cook County Jail in the *Duran v. Elrod*, No. 74 C 2949 consent decree. Mr. Fasano is also a former administrator at the Jail. (Doc. 14-A-par. 27).

> searches and weekend lockdown searches are necessary to decrease the risks posed by weapons and contraband. Since I do not wish to either second guess their judgment or try to tell them the best way to operate a prison, I find that, in light of the need to ensure security at the CCDOC, weekend searches are neither unreasonable nor excessive. The CCDOC's policy of conducting weekend lockdown searches is permissible under the *Bell* standard and does not violate the Plaintiffs' due process rights. *Hart* at 19.

The District Court erroneously gave complete deference to the Sheriff when he found that the Sheriff's practice and policy of locking down pretrial detainees in their cells for periods of up to 50 hours is "neither unreasonable nor excessive." This finding by the District Court was premature, and prevented the Plaintiffs from presenting evidence to support their allegations that the prolong weekend lockdown practice was unreasonable, excessive, abusive, inflicted punishment on pretrial detainees and served no legitimate penological objective. "[W]hen considering the justifications offered by the jail, we are to give the decisions of prison officials substantial (though not complete) deference." *Stanley v. Henson,* 337 G.3d 961, 966 (7th Cir. 2003). The deference accorded to the Sheriff by the District Court was in error because there was no evidence to support his finding, in contrast to *Stanley v. Henson,* where this Circuit Court applied the *Bell* standard only after the record was fully developed. In the present case, the District Court erroneously finds that 50 hour weekend lockdowns are neither unreasonable nor excessive in light of the security interest of the Jail. *Hart* at 19. The District Court ignored the Plaintiffs' well pled allegations that the lockdowns were unreasonable, abusive and punitive to pretrial detainees.

The District Court erroneously "[found]" the "weekend searches are neither unreasonable nor excessive." *Hart* at 19. At the motion to dismiss stage of the proceeding, there was no factual record for the District Court to make this finding that locking down pretrial inmates for a period in

excess of 50 hours, after their tiers have been searched, is reasonable and not excessive. No evidence was presented by the defendants justifying this extended lockdown practice, and rebutting the plaintiffs allegations that the Jail fails to provide protection to inmates from attacks from other inmates during lock downs and fails to provide access to medical treatment. Instead, the District Court limited his analysis to finding that "weekend lockdowns serve a legitimate purpose unrelated to punishment" without considering whether the policy is excessive and whether the legitimate purpose could be achieved in a less harsh manner. *Hart* at 16. "Since I do not wish to second guess their judgment or try to tell them the best way to operate a prison, I find that, in light of the need to ensure security at the CCDOC, weekend searches is neither unreasonable or excessive." *Hart* at 19.

The District Court committed error when it failed to consider whether the weekend lockdowns constituted punishment because the prolong lockdowns were excessive in relation to the limited purpose of searching the tiers for contraband. "If a particular restriction or condition is not reasonably related to a legitimate goal— if it is arbitrary or purposeless— a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Bell v. Wolfish,* 441 U.S. 520, 538 (1979). The weekend lockdowns which extend up to fifty hours and continue after the tiers are searched, are clearly excessive in light of the fact that Division Three has only six tiers and it takes at most forty minutes to search a tier for contraband. The Jail's practice of maintaining a division on lockdown after the tiers are searched is arbitrary and purposeless. The lock downs are conducted under abusive and unsafe conditions, and the Jail fails to protect inmates from each other and provide access to medical attention for the pretrial detainees . (Doc. 14-A-par. 19, 38, 39, 40) *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir.

1995). The prolong weekend lock down at the Jail is similar to the harsh conditions condemned by the Supreme Court in *Bell v. Wolfish,* 441 U.S. 539, n.20 where the Court stated:

> Loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

In *May v. Sheahan,* 226 F. 3d 876, 884 (7th Cir. 2000), the plaintiff, a pretrial detainee at Cook County Jail was transferred to Cook County Hospital for treatment for AIDS . While at the hospital the plaintiff was shackled to his bed, despite being guarded 24 hour a day, pursuant to the Sheriff's policy of shackling all hospital detainees. The plaintiff alleged under the due process clause of the Fourteenth Amendment that the restraints amounted to punishment of a pretrial detainee. In response to the Sheriff's argument that shackling hospital detainees is rationally related to legitimate security interest, the Circuit Circuit stated:

> Certainly, shackling all hospital detainees reduces the risk of a breach of security and thus furthers a legitimate non-punitive government purpose. But it is hard to see how shackling an AIDS patient to his or her bed around the clock, despite the continuous presence of a guard, is an appropriate policy for carrying out this purpose. Such a policy is plainly excessive in the absence of any indication that the detainee poses a security risk.
>
> * * *
>
> **Perhaps after some discovery Sheahan can produce evidence justifying both his shackling policy in general and his shackling of May in particular**, but May's allegations are more than adequate to survive a motion to dismiss. *Id.* at 884. (emphasis added)

In the instant case, the Plaintiffs have sufficiently pled that the Jail' practice of locking down pretrial detainees for up to 50 hours, and continuing the lockdowns after the tiers have been searched and secured, is excessive and unreasonable. Furthermore, such a policy is excessive, given that

during the lockdowns, the Plaintiffs can rarely be seen or heard by the correctional officials through the steel cell doors and the Plaintiffs health and safety are endangered. (Doc. 14-A at par. 16, 19)

The Plaintiffs allege that the conditions under which they are confined during lockdown weekends are much harsher and more severe than the conditions imposed on inmates that are placed in solitary confinement as a result of disciplinary segregation. For instance, pretrial detainees placed in disciplinary segregation are permitted each day to shower, to use the day room for one hour, to exercise and are provided access to the telephone. (Doc. 14-A-par. 20) During the weekend lockdowns, inmates remain in their cells for excess of 50 hours and are not permitted to use the day room, showers, or public phone. (Doc. 14-A-par. 2) The prolong weekend lockdown practice at the Jail is similar to the harsh, dungeon like conditions condemned by the Supreme Court in *Bell v. Wolfish,* 441 U.S. 539, n.20. The current prolonged weekend lockdown procedures at the Jail amounts to punishment of the pretrial detainees and violates their Fourteenth Amendment rights.

In *Zarnes v. Rhodes,* 64 F.3d 285, 291 (7th Cir. 1995), a case filed by an inmate under the Fourteenth Amendment, the Circuit Court stated:

> The government lawfully can incarcerate persons awaiting trial on criminal charges but cannot punish them, *Bell,* 441 U.S. at 534-35, so courts must determine whether the conditions of confinement are imposed with an intent to punish or only pursuant to a legitimate administrative purpose. *Id.* at 538. "If a restriction is not reasonably related to a legitimate goal- -if it is arbitrary or purposeless- -a court permissibly may infer that the purpose of the governmental action is punishment that may not be constitutionally inflicted upon detainees *qua* detainees." *Id.* at 539.

In the instant case, the Defendant's harsh and purposeless practice of confining all pretrial detainees in their cells from Friday afternoons through Sunday evenings, despite the fact that it takes at most forty minutes to search a tier and the pretrial detainees remain on lockdown after their tier

has been searched and secured, serves no legitimate administrative purpose and amounts to punishment of the pre-trial detainees. Even the court appointed monitor of the Jail, Mr. Fasano, acknowledged in his deposition that there are no legitimate penological interests being served by the current prolong weekend lock down procedures at the Jail. (Doc. 14-A-par. 30)

In response to the Defendant's objections to the filing of the Second Amended Complaint, the Plaintiffs argued to the District Court that prolong weekend lock downs serve no legitimate penological objective and amount to punishment. (Doc. 17 at page 4-7) The Plaintiffs referred the District Court to excerpts from Mr. Fasano's deposition testimony to show that there are facts within the scope of the Second Amended Complaint that if proven would entitle the Plaintiffs to judgment. (See Doc. 17 at page 5-6).

Charles Fasano made the following observations:

(1) In Division 3, the inmates are housed in six tiers with two tiers on each floor. Mr. Fasono testified that it would be impossible for an inmate in the day room in one tier to pass contraband to another inmate in the other day room tier on the same floor. (Fasono Dep. at p. 23-24)

(2) In Division 4, there are four single tiers on each floor. It would not be feasible for an inmate in the day room on a single tier to pass contraband to any inmate in another tier on the same floor. (Fasano Dep. at p. 28-29)

(3) After a tier has been searched and after the tier directly above and/or below has been searched, there is no legitimate penological reason to continue to confine the female inmates to their cells and restrict them from using the day room. Furthermore, Mr. Fasano stated that to continue the lockdown of the tier after it has been searched is in conflict with good principals of correctional operations. (Fasono Dep. at p. 62-63)

(4) During a lockdown, before a tier has been searched, "[t]here is no legitimate penological objective" to deny a certain number of inmates from being released from their cell at one time while the other inmates remain locked up in their tier to take showers and use the phone while they are being viewed by the correctional staff. (Fasono Dep. at p. 61)

(5) Prolonged lockdowns based on his knowledge and experience at times cause inmates to suffer from mental distress; cause inmates to injure their cellmates; and cause inmates to set fires in their cell. Following a lockdown of 48 hours, it would be typical for inmates to have a higher number of requests for medical services than if they had not been on lockdown for that same period. (Fasono Dep. at p. 64-65)

(6) A 48 hour weekend lockdown for Division 3 is clearly excessive. It would be possible to conduct a routine shakedown of Division 3 in approximately 3-4 hours. (Fasono Dep. at p. 69-71)
(Doc. 17 at page 5-6)

Although the reference to these six paragraphs from Mr. Fasono's depositions testimony do not appear in the Plaintiffs' Second Amended Complaint, "a plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint, in order to show that there is a state of facts within the scope of the complaint that if proved (a matter for trial) would entitle him to judgment." *Early v. Bankers Life and Casualty Company,* 959 F.2d 75, 79 (7th Cir. 1992).

Accepting the Plaintiffs factual allegations as true, for purposes of the motion to dismiss and drawing all reasonable inferences in favor thereof, the Plaintiffs have sufficiently alleged facts which could lead a fact finder to conclude that the periodic prolonged non-emergency weekend lockdowns were conducted in an abusive manner that could reasonably be said to be punishment. It was error for this Court to grant the Defendant's motion to dismiss.

B. Constitutional Duty To Protect Inmates From Violence And Provide Medical Care.

The Sheriff has a constitutional duty to protect inmates from violence inflicted by other inmates and to provide medical care. *Farmer v. Brennan,* 511 U.S. 825 (1994). In *Farmer,* the Supreme Court held that, "Having incarcerated 'persons [with] demonstrated proclivities for

antisocial criminal, and often violent, conduct,'. . . having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Id.* at 833. Moreover, prison officials have a duty, in light of the Eighth Amendment's prohibition against cruel and unusual punishment, to "ensure that inmates receive adequate food, clothing, shelter, and medical care." *Id.* at 834

The District Court properly found that plaintiff Kos has standing to seek injunctive relief from the defendant because she was a pretrial detainee at the time the lawsuit was filed, and she had exhausted all administrative remedies before filing suit. *Hart at 3, 7.* Plaintiff Kos and the putative class, have sufficiently pled that during the weekend lock downs, the Sheriff has a practice of failing to protect inmates from harm from other inmates, and failing to provide needed medical and/or psychological treatment to pretrial inmates.[6] (Doc. 14-A-par. 52 (C), 52 (D)). Plaintiff Koss was attacked by her cell mate during a lockdown and had clumps of her hair pulled out of her head. No correctional officer responded with a reasonable time for her cries of help as there were no officers at the interlock station. When the correctional officer finally arrived, the officer refused to take Koss to receive medical treatment. (Doc. 14-A-par. 41) In addition, Plaintiff Gelco was struck in the jaw and injured by a cellmate after the Plaintiff Gelco screamed for help and the correctional guards failed to timely respond during a lockdown.. (Doc. 14-A-par. 39)

The plaintiffs have alleged that as a result of the Sheriff practice of failing to protect inmates from harm from other inmates, and failing to provide needed medical and/or psychological

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[6] The District Court stated that if the Plaintiffs complaint survives the motion to dismiss, then it would be likely the Plaintiffs motion for class certification would be granted. (Tr. - October 7, 2003 at page 8) Moreover, the Defendants indicated that it may not oppose the motion for class certification. (Tr. - October 7, 2003 at page 8)

treatment to pretrial inmates, pretrial detainees are left to fend for themselves because the correctional guard assigned to the tier is either absent or is unable to hear or see the plaintiffs cry for help from the interlock monitoring station. (Doc. 14-A-par. 19, 39, 41) The Plaintiffs well pled allegations that the Sheriff shirks his constitutional duty to protect pretrial inmates from violence inflicted by other inmates and to provide medical care during prolong weekend lock downs, is sufficient to state a claim against the Sheriff for injunctive relief and damages.

II. The District Court Erred and Abused Its Discretion By Not Permitting The Plaintiffs To File A Third Amended Complaint After Granting The Defendants' Motion To Dismiss

Rule 15 (a) of the Federal Rules of Civil Procedure provides that leave to amend should be freely given when justice so requires. In *Foman v. Davis*, 371 U.S. 178,182 (1962), the Supreme Court stated that "of course , the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." The District Court found that the Plaintiffs motion to file the Third Amended Complaint was moot and failed to provide any further explanation for denying plaintiffs leave to file. (Doc. 44). There is nothing in the record to show that the failure to allow the amended complaint would cause undue delay or undue prejudice to the Defendant or that the failure to allow the amendment would be an exercise of futility.

The Plaintiffs contend that the Second Amended Complaint stated a claim that the Defendants custom, policy or practice was the proximate cause of the deprivation of Plaintiffs' constitutional rights under the notice pleading requirement of Rule 8 (a) of the Federal Rules of Civil Procedure. The Supreme Court has held that there are no heightened pleading standards for

prisoner civil rights. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). "A complaint that complies with the Federal Rules of Civil Procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts. The Federal Rules require (with relevant exceptions) only that the complaint state a claim, not that it plead the facts that if true would establish (subject to any defenses) that the claim was valid." *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002).

In granting the Defendant's Motion to Dismiss, the District Court erroneously made a factual finding that the Sheriff's practice of locking pretrial detainees in their cells for up to 50 hours over a weekend was "neither unreasonable or excessive." The factual finding was without any evidentiary support and the District Court abrogated his duty to accept Plaintiffs' allegations in the Second Amended Complaint as true and draw all reasonable inferences in favor to the Plaintiffs. *Travel All Over the World, Inc. v. Kingdom of Saudia Arabia,* 73 F.3d 1423, 1429 (7th Cir. 1996).

The Plaintiffs sought leave to file the Third Amended Complaint for the purpose of providing the District Court with additional facts, consistent with the Second Amended Complaint, in order to show that the complaint should not have been dismissed. *Early v. Bankers Life & Ca. Co.,* 959 F. 2d 75, 79 (7th Cir. 1992). When an appealant offers possible amendments that are consistent with the dismissed complaint, and which could possibly state a claim, the complaint should not be dismissed. *Orion Tire Corp. V. Goodyear Tire & Rubber Co.,* 268 F. 3d 1133 , 1137-38 (9th Cir. 2001); *Walker v. Thompson*, 288 F. 3d 1005, 1008 (7th Cir. 2002). In the Third Amended Complaint, the plaintiffs continue to allege that there is no legitimate penological purpose for the Sheriff's weekend lockdown practice and alleged the following additional facts which were not contained in the Second Amended Complaint : (App. 4-62, Doc. 38 - 3rd Amend Compl.)

a. Division Three of the Jail houses women with special medical needs, including but not limited to inmates with severe mental illnesses; women in need of prenatal care; women in need of medical care; and women being treated for substance abuse. (3rd Amend Compl. at par. 3)

b. The practice in Division Three is to search a majority of the tiers at the start of the lockdown on Friday afternoons. The inmates remain on lockdown until late on Sunday afternoon even though there is no legitimate penological reason for this practice. (3rd Amend Compl. at par. 6, 26, 27 & Exhibit "A" attached to 3rd Amend Compl.)

c. According to Director Fasano, Division Three has one of the highest ratios of correctional officers to inmates at the Cook County Jail, and has more than sufficient staff to complete searches in a prompt and efficient manner, in under four hours. Furthermore, Director Fasano stated that after the living units above and below a tier has been searched, there is no legitimate penological objective to continue a lockdown and the continuation of a lockdown is in conflict with correctional operations and is contrary to the standards in the correctional field. (3rd Amend Compl at par 22, 26)

d. Sheila Vaughan, a correctional expert , and the former Bureau Chief of the New Yourk City Department of Correctional Facilities , inspected the Jail on March 27, 2003 and it is her opinion that three hours is a sufficient time to search Division Three during a lockdown. It is Ms. Vaughan's opinion and Mr. Fasano's opinion that the current practices and procedures followed for weekend lockdowns in Division Three and Four serve no legitimate penological objective. (3rd Amend Compl at par. 9, 19, 41 & Exhibit "B" attached to 3rd Amend Compl.)

e. According to Director Charles Fasano, and Shelia Vaughan there is a clear danger that an inmate will be injured by a cellmate due to the fact correctional officers cannot see or hear inmates from their monitoring station if there is a lockdown. (3rd Amend Compl at par. 24)

f. According to Director Fasano and Ms. Vaughn, prolonged lockdowns cause inmates to suffer from mental distress; cause inmates to injure their cellmates; and cause inmates to set fires in their cell. Within the last two years, Director Fasano is aware of one person suffering a heart attack and one person delivering a baby during the lockdowns. (3rd Amend. Compl. at par. 30)

g. There have been frequent suicide attempts in Division Three and Four during lockdown weekends. During the weekend starting on January 24,

2003, Antoinatte Davis became severely depressed and attempted to commit suicide after her calls for assistance from the guards went unanswered. During a lockdown weekend on July 14, 2002, inmate Joyce Ownens threatened to kill herself and on the following day cut her wrist. (3rd Amended Compl. at par. 31, & Exhibit C).

h. Plaintiff Koss' has assisted in the delivery of a cellmate's baby during a lockdown weekend due to the fact that no guards on duty to call for assistance when her cellmate went into labor. (3rd Amend. Compl. at par. 14)

When the Jail's policy is to identify and segregate 'fragile' pretrial female detainees with special medical needs, including women with severe mental illnesses; women in need of prenatal care; women in need of medical care; and women being treated for substance abuse (App. 5, Doc. 38 - 3rd Amend Compl at par. 3) into one Division, namely Division Three, the jail has a duty to ensure that these inmates are protected from the other 'fragile' inmates and receive medical care to address their serious medical needs, which the Jail has identified. The Courts have found the failure to prevent harm and the failure to address serious medical needs to include the need for a mental illness to be treated, *Hudson v. McHugh,* 148 F.3d 859, 863 (7th Cir. 1998); to protect inmates from self-destructive tendencies - "suicide is a serious harm," *Estate of Cole by Pardue v. Fromm*, 94 F.3d 254, 21 (7th Cir. 1996); failure to provide medical assistance immediately preceding and during a birth, *Doe v. Gustavus,* 2003 U.S. Dist. LEXIS 21936 * 11 (N.D. Ill. 2003) The injuries suffered by the Plaintiffs and putative class members are not isolated instances but rather systematic occurrences which result from the weekend lockdown practices of the Sheriff during the weekend lockdowns. Director Charles Fasano of the John Howard Association acknowledge that based on his knowledge and experience, prolong lockdowns will cause inmates to injure their cellmates. (Doc 17, page 6, par.5)

The Plaintiffs, as pretrial detainees, have sufficiently stated a claim against the Sheriff that the weekend lockdowns are conducted in an abusive, unreasonable and excessive manner which endanger the health and safety of the pretrial detainees and are conducted in a manner which serves no legitimate penological purpose and which could be accomplished in alternative and less harsh methods. The District Court erred in dismissing the Plaintiffs' claims and erred in refusing to grant leave to file a Third Amended Complaint.

CONCLUSION

The Plaintiffs request that this Court reverse the order of the District Court which dismissed the Plaintiffs claims or in the alternative, reverse the District Court and permit the Plaintiffs to file a Third Amended Complaint.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undesigned, counsel of record for the Plaintiffs-Appellants, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 8,121 words.

Dated: April 29, 2004.

Robert H. Farley, Jr.

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undesigned, counsel of record for the Plaintiffs-Appellants, furnishes the following in compliance with Circuit Rule 31(e)(1):

The full contents of the brief, from the cover to the conclusion is provided in digital form. The appendix materials (short and separate) are not available on digital media.

Dated: April 29, 2004.

Robert H. Farley, Jr.

PROOF OF SERVICE

The undersigned, counsel for the Plaintiffs-Appellants, hereby certifies that on April 29, 2004, two copies of the Brief and Required Short Appendix of Appellants and one copy of the Separate Appendix as well as a digital version containing the brief, were sent via federal express to counsel for the Defendants-Appellees.

Dated: April 29, 2004

Robert H. Farley, Jr.

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) are contained in an appendix bound with the main brief as follows:

Appendix A contains the Minute Order of the District Court of February 10, 2004, denying Plaintiffs' Motion for leave to file Third Amended Complaint as Moot. District Court entered order of dismissal in favor of Defendants and against Plaintiffs.

Appendix B contains the Minute Order of the District Court of January 28, 2004, denying Plaintiffs' Motion to Alter or Amend the Judgment.

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Appendix C contains the Memorandum Opinion and Order decided December 18, 2003, granting the Defendant's Motion to Dismiss.

All materials required by Circuit Rule 30(b) are contained in the appendix of the appellants bound separately.

Dated: April 29, 2004

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Robert H. Farley, Jr.