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.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

ROBERT H. FARLEY, JR.
1155 S. Washington Street
Naperville, Illinois 60540
Phone: 630-369-0103
Fax: 630-369-0195
farleylaw@aol.com

THOMAS G. MORRISSEY.
10249 S. Western Avenue
Chicago, Illinois 60643
Phone: 773-233-7900
Fax: 773-239-0387

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

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REPLY BRIEF

I. Facts

A. Lockdown Search Of Division III and Division IV.

Division III and Division IV are separate and distinct housing units for women at the Cook County Department of Corrections ("Jail"). The divisions are located approximately four blocks apart and each division has its own correctional staff. The superintendent of each division determines when a lockdown weekend will occur and the searches of the tiers are conducted by the staff from that division.

Defendant mistakenly infers that Division III and IV conduct weekend lockdowns at the same time each month and that the searches of the combined 22 tiers takes up to 15 to 22 hours. (Def. Brief at 6, 16, 19, 24) Division III has only six tiers and it can be searched in approximately 3 hours and Division IV with sixteen tiers can be searched in approximately 8 hours. The facts as alleged in the Second Amended Complaint state that it takes correctional officers anywhere from 20 to 40 minutes to search a tier. (Plts. Brief at p. 6; Doc. 14-A-par. 17) These facts are consistent with the Defendant's Division IV Shakedown / Search log reviewed by Shelia Vaughn, a correctional expert who found that these documents reflect that it takes approximately 30 minutes for five to six officers to perform a search of a typical wing. (Plts. App. at 51) Sheila Vaughn concluded that a search of Division III should take approximately 3 hours and the search of Division IV would take approximately 8 hours. (Plts. App. at 52)[1] Moreover, Charles Fasano, the Director of the John Howard Association, who is the court

[1]Ms. Vaughan noted that if an additional 5 or 6 officers were assigned to the lockdown search, the time to search each division could be cut in half. (Plts. App. at 54)

appointed monitor at the Jail, stated that it would be possible to conduct a routine shakedown of Division III in approximately 3-4 hours. (Plts. Brief at p. 9, par. 6; Doc. 17 at page 5-6)

B. Completion Of Lockdown Search Of Division III.

Division III 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. (Plts. App. at page 5, par. 3) The practice in Division III is to search a majority of the 6 tiers at the start of a lockdown on Friday afternoons and to continue the lockdown after the completion of the searches until Sunday evening. (Plts. App. at page 6, par. 6) For example, on Friday, December 20, 2002, Division III went on lockdown at 1:30 p.m. and the first and second floors of the Division were searched that afternoon, however, those inmates remained on lockdown until Sunday, December 22, 2002 until 5:30 p.m. (Plts. App. at page 15, par. 26; Ptls. App. 29-50; Doc. 38 - 3rd Amend Comp)

Division III has one of the highest ratios of correctional officers to inmates at the Jail and according to Director Fasano has more than sufficient staff to complete a search of the tiers in Division Three in under four hours. (Plt. App. 13-14 at par. 22) Fasano testified that a 48 hour weekend lockdown in Division III is clearly excessive and the continuation of a lockdown after the tiers are searched is in conflict with good principals of correctional operation. Furthermore, Director Fasano stated that prolonged lockdowns cause inmates to suffer from mental distress and inmates to injure cellmates.. (Plts. Brief at p. 9; Doc 17 at page 5-6 plus attachments of deposition testimony) Director Fasano is personally aware of one person suffering a heart attack and one person delivering a baby during a weekend lockdown. (Plts. App. at p. 14, par. 30; Doc. 38 - 3rd Amend Compl. at par. 30)

II. Injunctive Relief

The defendants do not challenge the District Court's finding that plaintiff Kos has standing to challenge the Sheriff's weekend lockdown practice and to seek injunctive relief. Ms. Kos is the only plaintiff in this case who was a pretrial detainee at the time the case was filed. The District Court properly found that she has exhausted all administrative remedies available before filing suit. *Hart v. Sheahan,* 2003 U.S. Dist. LEXIS 22867 *3, *7 (N.D. Ill. 2003).

Although the defendants erroneously questions the plaintiffs' entitlement to money damages (Def. Brief at 30-31), it is clear that the Prison Litigation Reform Act (PLRA) also does not present a bar to injunctive relief. *Mitchell v. Horn,* 318 F. 3d 523, 533 (7th Cir. 2003). Plaintiff Kos claims that during extended weekend lockdowns, she has been injured by fellow inmates and denied needed medical attention because the Sheriff has shirked his responsibility to provide medical care and protection during these prolonged lockdowns. (Doc. 14-attachment at par. 41). Plaintiff Kos further alleges that she experienced labor pains during one of the weekend lockdowns and during another lockdown she helped in the delivery of her cellmate's baby because the guards did not respond to calls for medical assistance. (Plt. App. 11-12 at par. 14)

In *DeShaney v. Winnebago County Dept. Of Social Servs.,* 489 U. S. 189, 200 (1986), the Court stated that:

> When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs---e.g. food, clothing, shelter, medical care, and reasonable safety---it transgresses the substantive limits on state action set by the Eight Amendment and the Due Process Clause.

The District Court erred when it dismissed Plaintiff's Koss claim for injunctive relief because the

Sheriff has a constitutional duty to protect inmates from violence inflicted by other inmates and to provide medical care to inmate under *Farmer v. Brennan*, 511 U.S. 825 (1994).

III. Plaintiffs Stated A Cause of Action

A. Sheriff's General Practice Of Conducting Prolonged Weekend Lockdowns Serves No Legitimate Purposes and Amounts To Punishment Of PreTrial Detainees.

The plaintiffs maintain that the Sheriff's general practice of extended weekend lockdowns which continue after housing tiers are searched, serves no legitimate governmental interest and it amounts to punishment of the pre-trial detainees under the Due Process Clause. In *Tesch v. County of Green Lake,* 157 F. 3d 465, 473 (7th Cir. 1998), this Court discussed the two lines of cases for determining the state of mind required of a defendant under claims brought by pretrial detainees. The first test[2] under *Bell v. Wolfish* should be used:

> When the State imposes a general practice, rule, or restriction of pretrial confinement, it manifests its intent to subject all pretrial detainees to that practice, rule, or restriction. Similarly, even in situations in which the State does not mean to deny basic human necessities, we infer the State's intent when the restriction and its effect on pretrial detainees are known and the State imposes the restriction on pretrial detainees anyway.
> *Id.* at 475.

Under the second line of cases arising out of the denial of basic human necessities to pretrial detainee, this Court held that the deliberate indifference standard applies. *Id.* at 474. The District Court properly found that the present case should be consider under *Bell.* "Since the Plaintiffs' allege that the general practice of weekend lockdown searches amounts to punishment,

[2] Under *Bell,* if a 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 qua detainees. *Id.* at 539.

I find that the *Bell* standard applies." *Hart* at 14. Defendants agree that the *Bell* test governs in this case. (Def. Brief at 14)

The defendants concur with the District Court's opinion that since the parties agree that there is a legitimate reason for conducting lockdowns to maintain security at the Jail, the inquiry was over under *Bell* and the District Court properly deferred to the presumed expertise of the Jail administrators in regards to the duration of the lockdown and the need to continue the lockdown after the tiers were searched. (Def. Brief at 16-19). In response to the plaintiffs' claim that the actual practice for conducting these weekend lockdowns in Division III and IV is excessive, arbitrary or purposeless, defendant offers only two defenses. First, the defendant argues that all movement in a division must be restricted until all the tiers in a division are searched and secondly, that there would be an additional cost if more guards were assigned to conduct the searches in a shorter period of time. (Def. Brief at 18, 19) In regards to the issue of constricting movement, the Sheriff states:

> Unless the divisions are locked down and detainees' movements are restricted during the shakedown or search of all tiers (as well as common areas and other rooms within a division of the jail), **it is reasonable to assume**, as the Court assumed in *Block,* that detainees could enlist the help of others to hid contraband or weapons from the guards somewhere outside of a particular area of the division. (emphasis added) (Def. Brief at 18) (See also, Def. Brief at 26)

As an initial matter, the tiers are self contained units within a division and it is impossible to enter or leave a tier without first passing through a set of interlock doors. (Doc. 14-A-par. 14) Therefore, the physical structure of the housing divisions prevents the movement of pretrial detainees outside their tier during a lockdown and the passing of contraband to inmates in other tiers when a lockdown is not extended over several days. Furthermore, the Sheriff's assumption

that security at the Jail is enhanced by delaying the timing of the searches of all the tiers in a division over a 50 hour period is wrong. Logically, if all the tiers in a division are searched in a prompt manner, the inmates have less an opportunity to dispose of contraband and/or pass contraband to other tiers. Sheila Vaughan a correctional expert stated in her report the following:

> [W]hen the search extends over two days it is impossible to prevent inmates from other wings from coming into contact with each other. Meals are delivered to the wing/tiers and distributed to the cells by inmate workers, garbage is removed from the cells and wing/tires, and inmates are sent to visits or clinic thereby affording inmates from different wings an opportunity to commingle.
>
> For searches to be effective they should be frequent and unannounced, a policy also reflected in the Cook County Corrections Department General Order 9.7. Once a weekend lockdown is initiated, the surprise element of the search is gone. Any inmate in possession of contraband would know to 'use it or lose it' once the lockdown commenced. Without the element of surprise, the ability to discover contraband is greatly reduced. (Plt. App. at p. 53)

Defendants assumption that the Sheriff's practice of delaying the searches of all the tiers in a division over a 50 hour period lessen the possible that detainees will enlist the help of other inmates is false and there is no evidence to support this argument for justifying continuing to lock women down after their tiers have been searched.

The defendants' second argument that it would be more costly to conduct the searches over a shorter period because "more personnel over the weekend would be needed to search all 22 tiers in a shorter time" is without merit. (Def. Brief at 19) As a factual matter, this statement is misleading because Division III and IV do not jointly conduct lockdowns over the same weekend and the same guards are not used to conduct the tier searches. Additionally, Ms. Vaughan concluded after reviewing the Defendants' shakedown/search logs, that Division III which has only 6 tiers can be searched in three hours using the same level of staffing which is

currently used by the Sheriff. (Plt. App. 51-52) The search of Division IV, which has 16 tiers, would take approximately 8 hours using the same number of guards according to Ms. Vaughan and Mr. Fasano. (Plt. App. 51-52) Therefore there would be no additional cost to the Sheriff if the lockdown searches were done in a reasonable manner. In *Turner v. Safley,* 482 U.S. 78, 90-91 (1987), the Court stated that:

> [T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable. But is an "exaggerated response" to prison concerns. This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider evidence that the regulation does not satisfy the reasonable relationship standard.

The District Court erred when it failed to even consider the statement of Mr. Fasano in the Second Amendment Complaint, that the existing lockdown practice serves no legitimate penological interest (Doc. 14-A-par. 27, 30) and instead gave complete deference to the Sheriff. The finding by the District Court was premature and prevented the plaintiffs from presenting evidence to support their allegations that the prolonged weekend lockdown practice was unreasonable, excessive, abusive, inflicted punishment on pretrial detainees and served no legitimate penological interest.

B. Abusive Lockdowns Are Unconstitional.

The Defendant fails to understand the nature of Plaintiffs claims under the Due Process Clause of the Fourteenth Amendment. The Plaintiffs claim that lockdowns conducted in an abusive manner are unconstitutional and the entire lockdown procedure must be viewed in its

totality.[3] During the abusive and prolonged lockdowns, the Sheriff fails to protect pretrial inmates from harm from other inmates and fails to provide medical treatment. (Plt. Brief at 14) The Sheriff incorrectly attempts to frame the issue by claiming that the Plaintiffs are only objecting to the length of the lockdown and nothing more. (Def. Brief at 16-17) The totality of the lockdown must be viewed in its entirety. Just as certain conditions at a Jail are not per se Eighth Amendment violations such as double-celling or overcrowded conditions, however if these conditions of confinement lead to "deprivations of . . . medical care" or when they cause an "increase [in] violence among inmates or create other conditions intolerable for prison confinement," then these conditions are Eighth Amendment violations. *Rhodes v. Chapman,* 452 U.S. 337, 348 (1981) Likewise, when lockdowns are conducted in a manner at the Jail which are abusive, punitive and cause injury among the inmates, then such procedures violate the rights of the Plaintiffs pretrial detainees.

C. District Court's Incorrectly Deferred To Defendant' s Jail Arguments and Ignored Factual Allegations.

The Defendant argues that it was proper for the District Court to accept their arguments advanced in their motion to dismiss that only the Sheriff should decide "[h]ow to maintain security and conduct a division-wide search at CCDOC." (Def. Brief at 37) This argument was rejected by this Circuit Court in *May v. Sheahan,* 226 F.3d 876, 884 (7th Cir. 2000) as the Sheriff argued that shackling hospital detainees is likewise rational related to legitimate security interest.

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[3] Just as reasonable force may be permitted to make an arrest, the use of "excessive force" is unconstitutional. (See *Payne v. Pauley,* 337, F.3d 767, 778 (7th Cir. 2003)*,* "A police officer's use of force is unconstitutional if, 'judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest.' *Lester v. City of Chicago,* 830 F.2d 706, 713 (7th Cir. 1987)." Likewise, lockdowns are permissible, but an excessive or abusive lockdown is unconstitutional.

This Circuit stated that May's allegations were more than adequate to survive a motion to dismiss.

The Defendant's attempt to distinguish *May* by arguing that shackling a pretrial detainee is different than locking down a pretrial detainee is without merit. (Def. Brief at 24) This Court stated in *May* that "it is hard to see how shackling an AIDS patient to his or her bed around the clock, despite the presence of a guard, is an appropriate policy for carrying out this purpose. Such a purpose is plainly excessive in the absence of any indication that the detainee poses a security risk." *Id.,* at 884. Likewise, it is hard to see how locking down a pretrial detainee for up to 50 hours in their cell after their tier has already been searched is an appropriate policy for carrying out the purpose of searching for contraband. Moreover, In *May,* the pretrial detainees shackled were hospital patients. In the instant case, in Division III, the Jail houses women with special medical needs, such as women with severe mental illness; women in need of prenatal care; women in need of medical care; and women being treated for substance abuse. (Plts. App. 5 at par. 3)[4] Additionally, Ms. Vaughan, a correctional expert stated, "During a lock down weekend inmates could be restricted to their wings or tiers, but not locked inside their cells. . . The Administration would have the same ability to control contraband as currently exists. (Plts. App. 54)

As in *May,* this Court has not accepted at face value the claim by correctional officials that security concerns override any consideration of whether less restrictive measures can be used by the correctional facility. In *DeMallory v. Cullen,* 855 F.2d 442, 448 (7th Cir. 1988), this Court

[4] Also, Division III has one of the highest ratios of correctional officers to inmates at the Jail and according to Director Fasano has more than sufficient staff to complete a search of the tiers in Division Three in under four hours. (Plt. App. 13-14 at par. 22)

stated:

> The defendants justify the restrictions on DeMallory's access to legal assistance on the grounds that he and other inmates in the Adjustment Center are security risks. Generalized security concerns, however, are insufficient to support such a ban. Instead, prison officials must come forward with evidence that the specific contact at issue threatens security and must show that less restrictive measures, such as precounseling searches are not possible. (citations omitted) WCI officials have done neither. Moreover, several genuine issues of material fact remain relating to less-restrictive measures, which precludes awarding summary judgment for the defendants at this stage.
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> * * *
>
> The State argues that direct contact between inmates and [inmate] paralegals would overtax prison resources because of the security risk involved in permitting paralegals into the segregated Adjustment Center. Yet the record reflects that, at least in some other limited circumstances, general population inmates were allowed into the Adjustment Center under the supervision of prison officials. *Id.,* at 448.

In the instant case, the Defendant argues "[u]nless the divisions are locked down and detainees's movements are restricted during the shakedown or search of all tiers (as well as the common areas and other rooms within a division of the jail)" then the lockdown would be compromised. (Def. Brief at 18) However, the divisions are not completely locked down as the inmate workers deliver meals to the tiers; garbage is removed from the tiers by inmate workers; and inmates are sent to visits or clinics, which permits inmates with an opportunity to commingle with areas under lockdown and which have not been searched. (Plt App. at 53) Accordingly, the current lockdown procedures are compromised by the Jail's existing policy of permitting commingling among the inmates.

. The Defendants are wrong in claiming that no weight should be given to the opinion of

Charles Fasona by incorrectly characterizing the opinions and findings of Charles Fasano as "legal conclusions." (Def. Brief at 33) The Plaintiffs have alleged that Charles Fasano, a former administrator at the Cook County Jail, and the current Director of the John Howard Association, has opinioned that the current practices and procedures followed for weekend lockdowns in Division Three and Four serve no legitimate penological objective and place inmates at risk to be injured and in fact. Director Fasano is aware of inmates having been injured during the lockdowns and the risk is not generalized as the Plaintiffs have been injured physically and/or emotionally by the current weekend lockdown procedures. (Plts. Brief at 6-9, 15)

Moreover, in the instant case, another person knowledgeable about correctional operations, Sheila Vaughn, rendered an opinion that there are no legitimate penelogical interests being served by the current weekend lock down procedures at the Jail. (Plts. App. 9-10 at. par 19; App. 20; App. 51-54)

In *Gary v. Sheahan,* 1999 U.S. Dist. LEXIS 17305 (N.D. Ill. 1999), the Court entered a permanent injunction against the Sheriff from strip searching female inmate court returns who had been judicially discharged from the Jail. The District Court rejected the Sheriff's argument which was "argued throughout this case that the potential security threats of not strip searching inmates when they return to the Jail outweighs any harm caused to the individual plaintiffs by the search." as the facts demonstrated that the "potential security threat could not be that overwhelming since the defendant does not strip search returning male inmates on a regular basis." *Id.,* at 8. Likewise, the Plaintiffs in the instant case, should be permitted to challenge the Defendant's arguments and assumptions and develop a factual record to clearly demonstrate that

the lockdowns are conducted in an abusive unconstitutional manner.

D. Cook County Jail Administrators Lack Expertise.

The Defendant argues that "[h]ow to maintain security and conduct a division-wide search at CCDOC is a decision 'peculiarly within the province and professional expertise of correctional officials.'" (Def. Brief at p. 37) The Defendant further argues that "judicial deference must be accorded to prison administrators because they have the expertise in prison administration. (Def. Brief at p. 17) In reply to the Defendant's argument, the 'professional expertise' of the Cook County Department of Corrections has recently been seriously challenged by a "Report of the Extended March 2003 Cook County, Illinois Grand Jury August 30, 2004," which released its report on September 16, 2004.[5]

The Grand Jury was assigned by the Honorable Paul Biebel., Jr., Presiding Judge of the Criminal Division to investigate several incidents of alleged physical abuse at the Jail, as well as the overall conditions and operations at the Jail and to prepare a report. The Grand Jury which was assisted by Thomas A. Hett, a retired Cook County Circuit Court Judge. The Grand Jury in the section titled, "Standards and Criteria for Employment," found the following:

> [The Sheriff] has filled a number of positions of importance, directly impacting the operations of the jail, with people who appear to have no background in corrections -- Zelda Whittler, the Undersheriff, James Ryan, the Director of Operations, and Richard Remus, Superintendent of the SORT unit at the time of the 1999 incident .
>
> Even the Executive Director, Callie Baird, has no experience in corrections (Exhibit 71). She is a lawyer, familiar with the jail as a Public Defender and

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[5] The Cook County Grand Jury Report is reported at www.chicagotribune.com. To view the report, under the section "News/Home page," click on "special reports." Under special reports, click on the section "Tribune special report - justice derailed," and then click on Chapter 8 - "Cook County Jail Beatings."

> heard the gripes of her clients. . .
>
> *   *   *
>
> James Ryan, a cousin of Sheriff Sheahan, also testified before the Grand Jury (Exhibit 21), and aside from the fact that the Grand Jury generally found him to be not credible, he offered no background in either management or corrections to justify his position. . .
>
> Another example of employment that adversely affected the operation of the jail was the appointment of Richard Remus as Superintendent of the SORT unit . . . Remus never attended the Sheriff's Training Academy and his personnel file does not indicate any prior experience in corrections. . . Richard Remus, before and after his employment with the Sheriff's Office has practiced the trade of plumber. He lives in the 19th Ward of the City of Chicago, the same area where the Sheriff resides. . . The employment of Richard Remus , a 19th Ward neighbor and James Ryan a relative, both of whom, in the eyes of the Grand Jurors, are unqualified to participate in, supervise, and direct operations of the Department of Corrections, raises the specter of cronyism in the selection of the higher ranks of the Office. (Cook County Grand Jury Report at p. 105-109)

The factual findings that the top administrators at the Jail appear to have no background in corrections by the Grand Jury Report are findings which are admissible against the Defendant under Federal Rule of Evidence 803(8)(c). Under Rule 803(8)(c), the factual findings resulting from an investigation made pursuant to authority granted by law are removed from the rule against hearsay unless circumstances indicate untrustworthiness. Because of this presumption, that report is not to be excluded under the hearsay rule and the party opposing the admission of the report must prove the report's untrustworthiness. Even assuming the factual findings by the Grand Jury Report are not admissaible, the Plaintiffs could still present evidence through witnesses that the Jail administrators lack the training and expertise to run the institution and lack the expertise to conduct "weekend" lockdowns in a manner which satisfies legitimate penological interests to rebut any arguments by the Defendant that the Court should defer to the

expertise of the Jail officials.

E. PLRA Is Not Applicable To Those Plaintiffs Who Had Been Released At The Time Of The Filing Of The Lawsuit.

The Sheriff incorrectly argues that the Plaintiff Gelco "failed to allege anything more than *de minimis* physical injuries" and is "precluded from seeking monetary damages for emotional distress. (Def. Brief at 31) First, the Plaintiff Gelco was not an inmate at the Cook County Jail at the time of the filing of the lawsuit. (Doc. 14-A-par. 36) The PLRA is not applicable to ex-prisoners. *Kerr v. Puckett,* 138 F.3d 321, 323 (7th Cir. 1998). Secondly, the physical injuries to the Plaintiff Gelco were not *de minimis* as she was struck in the jaw and injured in the process. (Doc. 14-A-par. 39)

As to Plaintiff Koss, although she was a detainee inmate at the time of the filing of the lawsuit, her physical injuries are not *de minimis* as argued by the Defendants. (Def. Brief at 31) Helen Koss "was attacked by her cell made and was struck numerous times which caused bruises and she had clumps of her hair pulled out of her head." (Doc. 14-A-par. 41) Even if Koss suffered no physical injuries, the PLRA is not a bar for a prisoner seeking "injunctive relief" or "claims for nominal and punitive damages." *Calhoun v. DeTella*, 319 F.3d 936, 940, 941 (7th Cir. 2003). In *Calhoun,* the Circuit Court stated, "[w]e have long ago decided that, at a minimum, a plaintiff who proves a constitutional violation is entitled to nominal damages." *Id.,* at 941. "Although Calhoun does not specifically request nominal damages. . .his amended complaint contains a prayer for 'such other relief as it may appear plaintiff is entitled.'" *Id.,*at 943. Likewise, in the instant case, the Plaintiffs have a prayer for relief to "[grant Plaintiffs any and all other relief as law and justice demand." (Def. App. 57; Plts. App. 27-28)

F. Deliberate Indifference.

Although the Defendant argues that the "proper inquiry" of whether the conditions of the lockdown amount to punishment (Def. Brief at p. 15), the Defendant also argues separately that the "the general risks faced by inmates [during weekend lockdowns] does not suffice to establish a deliberate indifference due process claim." (Def. Brief at 32) "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer v. Brennan,* 511 U.S. 825, 842 (1994).

The Plaintiffs have not only sufficiently pled a claim of punishment, the Plaintiffs have also pled a claim of deliberate indifference. The Plaintiff Koss was physically and emotionally injured during the weekend lockdown in April, 2002; the Plaintiff Gelso was physically and emotionally injured during the weekend lockdown of May, 2002; Director Fasano based on his knowledge and experience at the Jail knew that prolong lockdowns caused mental and physical injuries to inmates and greater requests for medical services; Antoinatte Davis became severely depressed during the weekend lockdown of January 24, 2003 and attempted to commit suicide after her calls for assistance from the guards went unanswered; Joyce Owens during the weekend lockdown of July 14, 2002 threatened to kill herself if not released from lockdown and on the next day, cut her wrist. (Plts. Brief at 6-7, 9, 11-12) Plaintiffs have sufficiently pled to satisfy *Farmer* as the Court stated, "if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was 'longstanding, persuasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official

being sued had been exposed to information concerning the risk and thus 'must have know' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.' *Id.,* at 842-843.

IV. Leave To Amend Complaint

The Plaintiffs sought "to file a Third Amended Complaint to set forth additional facts in support of their allegations that the Sheriff's policy and practice related to weekend lockdowns is excessive and serves no legitimate penological interest." (Plts. App. 1; Doc 38) The Defendant faults the Plaintiffs for not including the "new" allegations relating to the additional penological opinions of Charles Fasano, the Director of the John Howard Association and the penological opinions of Sheila Vaughn, a correctional expert prior to filing the Second Amended Complaint and prior to the Court ruling on the motion to dismiss. (Def. Brief at 38-40).

The reason for the delay in including the "new" allegations set forth in the Third Amended Complaint is twofold. First, the Plaintiffs believed that they had set forth sufficient facts contained in the Second Amended Complaint to survive a motion to dismiss and therefore the Plaintiffs did not include the new allegations. Secondly, based on serious settlement discussions with the District Court and the Defendants, the Plaintiffs believed that this case would settle due to the belief that the Plaintiffs had stated a viable cause of action against the Defendants and delayed including the "new" allegations. Settlement discussions were held with the District Court and the Defendant on April 22, 2003 and June 27, 2003 in chambers.

Although as a general rule, evidence of promises, offers, and acceptance of compromise or attempts to compromise a disputed claim, either as to validity or amount, is inadmissable, evidence related to compromise need not be excluded when the evidence is offered for another

purpose, such as “negativing a contention of undue delay.” Fed.R.Evid. 408. Evidence of settlement discussions is admissible when the Defendant raises the issue of delay in amending the 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,

____
One of the Plaintiffs Attorneys

Thomas G. Morrissey
Thomas G. Morrissey, Ltd.
10249 S. Western Ave.
Chicago, Il. 60643
(773)-233-7900

Robert H. Farley, Jr.
Robert H. Farley, Jr., Ltd.
1155 S. Washington
Naperville, Il. 60540
(630)-369-0103

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 reply 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 reply brief is 5,241 words.

Dated: September 30, 2004

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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.

Dated: September 30, 2004.

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Robert H. Farley, Jr.

PROOF OF SERVICE

The undersigned, counsel for the Plaintiffs-Appellants, hereby certifies that on September 30, 2004, two copies of the Reply Brief as well as a digital version containing the brief, were sent via federal express to counsel for the Defendants-Appellees.

Dated: September 30, 2004

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Robert H. Farley, Jr.