IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03399-WJM-KMT

RYAN DECOTEAU, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

RICK RAEMISCH, in his official capacity, *et al.*,

Defendants.

PLAINTIFFS' MOTION TO MODIFY CLASS DEFINITION

Plaintiffs Ryan Decoteau, Anthony Gomez, and Dominic Duran, by and through their attorneys, hereby move this Court to modify the definition of the class certified by this Court's order of July 10, 2014, ECF 37 ("Class Cert. Order"), in light of recent amendments to relevant Colorado Department of Corrections ("CDOC") regulations. Plaintiffs' Motion for Class Certification, ECF 12, requested -- and this Court approved -- a class definition that used the term "administrative segregation." Since the time Plaintiffs filed their motion, Defendants have issued amended regulations that no longer use that term. Plaintiffs respectfully submit that it would be appropriate to modify the class definition to avoid the use of terminology not currently used in CDOC Administrative Regulations. The class as defined in the proposed modified definition would still satisfy Rule 23.

Certification Pursuant to D.C. Colo. LCivR 7.1(a)

The undersigned certifies that counsel for Plaintiffs wrote to counsel for Defendants on August 29, 2014, explaining the need to modify the class definition in light of the revised

regulations and requesting Defendants' position on such a motion. On September 17, 2014, counsel for Defendants responded that they opposed the motion, but did not propose an alternative approach to address the CDOC's change in terminology.

Original and Proposed Class Definitions

This Court certified a class defined as follows:

> All inmates who are now or will in the future be housed in administrative segregation at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise.

Class Cert. Order at 13. Plaintiffs propose that the definition be modified by deleting the phrase "in administrative segregation" so that it would read:

> All inmates who are now or will in the future be housed at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise.

Background and New Regulations

On May 15, 2012, the CDOC issued Administrative Regulation ("AR") 650-03 governing administrative segregation. Decl. of Amy F. Robertson, ECF 12-1, Ex. 2. At the time Plaintiffs moved to certify a class of inmates in administrative segregation housed at the Colorado State Penitentiary ("CSP"), 588 inmates had that status. *Id.* Ex. 1 at 2 (Monthly Population and Capacity Report, Nov. 30, 2013). At the time, those were the only inmates at CSP other than a small group in medium security who worked at the facility. *Id.*

On June 30, 2014, the CDOC issued a revision to AR 650-03 as well as to AR 600-09 (governing "close custody" inmates). The former, among other things, eliminated the term "administrative segregation." Decl. of Amy Robertson in Support of Motion to Modify Class Definition ("Second Robertson Decl.," filed simultaneously with this motion), Ex. 1. In lieu of

the administrative segregation classification in the old version of AR 650-03, the revised version establishes a new status called "Restrictive Housing Maximum Security Status" ("Max"). *Id*. at 2, ¶ III(J). Revised AR 600-09 added the new statuses of "Close Custody Transition Unit" ("CCTU") and "Management Control Unit" ("MCU"). Second Robertson Decl. Ex. 2 at 1-2, ¶¶ III(B) - (F). All three of these statuses – Max, CCTU, and MCU – are now housed at CSP.

There are several sources of data concerning inmates now designated as Max, MCU, and CCTU and the time they have spent in administrative segregation generally and at CSP specifically. Not all of these data sources agree, but all support the conclusion that there are large numbers of inmates in each such status, the numbers are ever shifting, and many people in each status have spent significant periods of time in what used to be called "administrative segregation" before being assigned a new status. As noted below, even inmates newly-referred to one of these statuses are at risk of harm and are therefore proper class members.

One source of data concerning Max inmates is the "Monthly Population and Capacity Report" that CDOC makes available on its website. Second Robertson Decl. Ex. 3. Second, last spring, Plaintiffs requested that Defendants identify -- and produce "move sheets" for -- (1) all inmates in administrative segregation at CSP since 2011 and (2) all inmates housed in administrative segregation in any CDOC facility. Second Robertson Decl. ¶¶ 8-10 & Ex. 14. "Move sheets" record where an inmate was housed at any given time from the time he began his sentence through the date the sheet was printed. *See* Dep. of Paul Hollenbeck in *Oakley v. Clements*, 10-cv-CMA-MJW (D. Colo.), 7:1-10.[1] The move sheets produced in response in early

[1] Excerpts from the Deposition of Paul Hollenbeck in the *Oakley* case are attached as Exhibit 11 to the Second Robertson Declaration.

May, 2014 ("Move Sheets"), are attached as Exhibit 14 to the Second Robertson Declaration. Third, after the June 30, 2014, amendments to ARs 600-09 and 650-03, Plaintiffs requested data on, among other things, inmates currently housed at CSP who had at one time or another been in administrative segregation, the length of time they had been in administrative segregation, and their current status under the new ARs. On August 13, 2014, Defendants produced in response the spreadsheet attached as Exhibit 4 to the Second Robertson Declaration ("August 13 Data").

1. Restrictive Housing Maximum Security Status

Steve Hager, CDOC's Director of Prison Operations and its Rule 30(b)(6) designee on the new regulation, testified that the "primary difference between administrative segregation and restrictive housing is not the conditions of confinement but the process for getting into and out of that status" and "the length of time." Dep. of Steve Hager ("Hager Dep."), 24:15-22.[2] Max inmates are only housed at CSP. *Id.* 26:5-24.

According to revised AR 650-03, inmates placed in Max are only supposed to be in that status for up to six or twelve months, depending on the severity of the offense. AR 650-03 at 4; *see also* Hager Dep. 31:14 - 33:13. Extensions beyond the twelve-month period are permitted for "exigent circumstances." AR 650-03 at 14, ¶ IV(K); Hager Dep. 73:6-9, 76:22 - 77:1. Inmates in Max at CSP exercise only in the interior exercise rooms depicted on page three of Plaintiffs' Motion for Class Certification, that is, the same indoor exercise rooms in which Administrative Segregation inmates exercised under the old regulation. Hager Dep. 58:15 - 59:10 & Ex. 16.

[2] Excerpts from the Deposition of Steve Hager are attached as Exhibit 10 to the Second Robertson Declaration.

Although Mr. Hager testified that, starting early this year, the CDOC began reviewing inmates formerly classified as Administrative Segregation, starting with inmates who had been in that status the longest, Hager Dep. 54:15 - 55:3, the August 13 Data indicate that there were still 276 inmates at CSP with the status "Administrative Segregation/Maximum Security."[3] Second Robertson Decl. ¶ 13. The Monthly Population and Capacity Report for August 31, 2014, shows 208 inmates with Max status at CSP. *Id.* Ex. 3; *see also* Dep. of Paul Hollenbeck ("Hollenbeck Dep.") 36:6 (testifying that there were 223 inmates with the status Max as of early September).[4] As noted above, these inmates are limited to the interior exercise rooms; they are not permitted to exercise outdoors.

Based on the August 13 Data, at least 53 Max inmates had been in administrative segregation for more than nine months cumulatively. Based on the Move Sheets, at least 48 Max inmates in the August 13 Data had been in administrative segregation at CSP for more than nine months cumulatively, and at least 17 had been in administrative segregation at CSP for more than nine months continuously. Second Robertson Decl. ¶ 13.

Mr. Hager testified that, since June 30, 2014, only two of the thirty inmates who had been referred to Max were sent there for a time period of twelve months. Hager Dep. 34:11-24. A chart produced by CDOC on September 24, 2014, confirmed that Mr. Hager's testimony was accurate as of August 19. Second Robertson Decl. Ex. 6 at CDOC/Decoteau 009206. Between

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[3] Although the status "Administrative Segregation" was supposed to have been eliminated by the revision to AR 650-03, August 13 Data continued to use the abbreviation "A" which Defendants defined as "Administrative Segregation/Maximum Security." Second Robertson Decl. Exs. 4 & 5.

[4] Excerpts from the Deposition of Paul Hollenbeck in the present case are attached as Exhibit 12 to the Second Robertson Declaration.

Mr. Hager's August 19 deposition and CDOC's September 24 document production, however, eleven more inmates were sent to Max for periods of twelve months. *Id*. at CDOC/Decoteau 009206-207.

Finally, while Paul Hollenbeck, Defendants' Rule 30(b)(6) designee on the subject of classification, testified on September 11, 2014 that CDOC had "cleaned out" all but one of the inmates who had been in administrative segregation for more than a year prior to the new regulations, Hollenbeck Dep. 77:20 - 78:8, Defendants' September 24 chart listing inmates recently referred to Max includes 12 inmates who had in fact already been in Administrative Segregation at CSP for periods ranging from 11 to 75 months according to the Move Sheets. Second Robertson Decl. ¶ 19 and Ex. 7.

2. Close Custody Transition Unit.

There are two other sets of inmates at CSP who Plaintiffs allege are also being denied outdoor exercise and are therefore part of the class:[5] those who are designated CCTU; and those designated MCU. These inmates are permitted to exercise in two areas. Like other close custody inmates at CSP, they exercise in the small indoor exercise rooms attached to their living units. Starting very recently, CCTU inmates have been permitted exercise in a fully-enclosed, mesh-covered courtyard for one hour per week in addition to the time they are permitted in indoor exercise rooms. Hager Dep. 81:17 - 82:1, 93:3-15 and Exs. 19 & 20. Plaintiffs assert that both the courtyard and the limited amount of time permitted there are not sufficient to satisfy the Eighth Amendment, and further assert that these inmates are proper class members because there

[5] CSP also houses certain medium security inmates who are apparently provided regular outdoor exercise, *see* Hager Dep. 83:3 - 84:1 & Ex. 17, and are therefore not part of the class.

is no assurance that they will continue to be permitted even this inadequate exercise. Indeed, the newly-revised AR governing CCTU inmates states that their "[o]ut of cell time include 3 hours of indoor or outside recreation per week," Second Robertson Decl. Ex. 2 at 11, ¶ IV(G)(4)(c), so access to even the mesh-covered courtyard -- which CDOC considers "outside" but Plaintiffs do not -- could be revoked consisted with the new regulation.

Defendants' August 13 Data indicate that there were 136 "Transition" inmates at CSP. Second Robertson Decl. ¶ 13; *see also* Hollenbeck Dep. 36:7 ("100-and-change in CCTU"). Although Mr. Hager testified that this is a short-term status of less than six months, Hager Dep. 81:1-5, the Move Sheets show that at least 98 inmates marked as "Transition" in the August 13 Data had been in administrative segregation at CSP for cumulatively more than nine months, 93 for more than nine months consecutively. Second Robertson Decl. ¶ 13. Thus it appears that while any given stay in CCTU at CSP may technically be limited to six months, there is nothing preventing the assignment of that status to inmates who have already been deprived of outdoor exercise for far longer periods.

3. Management Control Unit.

Mr. Hager testified that MCU inmates would be housed at Sterling Correctional Facility, with only "a couple of overflow offenders" at CSP. Hager Dep. 94:8-20, *see also id.* 80:17 - 81:12. However, Defendants' data show that there are 105 inmates at CSP with a designation of MCU or the related MCU designations of "Management Control-High Risk" ("MCH") or "Management Control-Protective Custody" ("MCP"). Second Robertson Decl. ¶ 13; *see also* Hollenbeck Dep. 36:7-8 ("a little over 100 MCU" inmates). The Move Sheets show that 89 of the inmates listed as MCU, MCH, or MCP in the August 13 Data had been at CSP cumulatively

for more than nine months, 78 for more than nine months consecutively. Second Robertson Decl. ¶. 13. Plaintiffs do not know whether MCU inmates exercise in the mesh-covered courtyard area or in the exercise rooms in their pod. They do not exercise outdoors, as the only outdoor recreation yard at CSP is limited to medium security inmates. Hager Dep. 83:3 - 84:1 & Ex. 17. They are thus proper class members.

In sum, Defendants' data show that there are currently 517 inmates at CSP who do not receive adequate outdoor exercise, 188 of whom have been in Administrative Segregation for over nine months consecutively.

ARGUMENT

For the second time in just over two years, in the words of CDOC officials, "radical" and "dramatic" change has come to the conditions of confinement for high-risk inmates in the Department's custody. While the Department's change in terminology requires a change in class definition, the class remains properly certified.

1. This Court Has Discretion to Modify the Class Definition.

"An order that grants . . . class certification may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). "Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *see also In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1261 (10th Cir. 2004) (same); *Davoll v. Webb*, 194 F.3d 1116, 1146 (10th Cir. 1999) (holding that court has discretion to modify class definition).

2. The Class As Modified Would Continue to Satisfy Rule 23.

a. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

The class, defined as modified, would continue to satisfy Rule 23(a)(1): it is both sufficiently numerous and even more fluid than before the regulatory revisions.

As noted above, there are currently 517 inmates at CSP who do not receive adequate outdoor exercise, 188 of whom have been in Administrative Segregation at CSP for more than nine months consecutively. This Court held, in its Class Cert. Order, that cases with as few as 13 class members had been found sufficient to satisfy Rule 23(a)(1). *Id.* at 4 (citing *Dale Elec., Inc. v. R.C.L. Elecs., Inc.*, 53 F.R.D. 531, 534-36 (D.N.H. 1971); *see also id*. (citing *Wilcox Dev. Co. v. First Interstate Bank*, 97 F.R.D. 440, 443 (D. Ore. 1983) (class of 40 is sufficient to satisfy numerosity requirement)). The class -- defined as proposed here -- would continue to be sufficiently numerous to satisfy Rule 23(a)(1).

The Court also held that "the fact that the Class definition is fluid -- in that it calls for the addition of new inmates when they are transferred to CSP -- further supports a finding that joinder is impracticable." Class Cert. Order at 4; *see also Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) ("Moreover, the fluid nature of a plaintiff class -- as in the prison-litigation context -- counsels in favor of certification of all present and future members."). This remains the case under the new regulations, as the new policies call for inmates to be referred into and progressed out of Max, MCU and CCTU. In addition, move sheets show the frequency with which many inmates are moved into and out of CSP. Second Robertson Decl. Ex. 14.

In addition, prior ARs and Operational Memoranda show the frequency with which CDOC regulations and philosophies change. As recently as 2009, administrative segregation

was governed by AR 600-02 and a series of Operational Memoranda promulgated by the warden of CSP. *See, e.g.*, Second Robertson Decl. Exs. 8 & 9. On May 12, 2012, the administrative segregation operational memoranda were codified into a new AR 650-03. ECF 12-1, Ex. 2; *see also* Testimony of Susan Jones, former warden of CSP, *Anderson v. Colorado*, No. 10-cv-01005-RBJ-KMT (D. Colo.), Trial Tr. (May 4, 2012) at 159:24 - 160:9.[6] Warden Jones testified with respect to the mid-2012 changes, that "[t]he administrative-segregation policy is pretty radically different from the former version." *Id*. Trial Tr. (May 3, 2012) at 67:9-15; *see also id.* (May 4, 2012) at 158:13 - 159:1 (characterizing the 2012 changes as "dramatic" and explaining that they were in response to an external review and the change of executive director). The program described by Warden Jones as a radical and dramatic change was scrapped just over two years later for the current regime. Mr. Hollenbeck recently testified that the newly-revised ARs continue to be under review and that he anticipates further revisions. Hollenbeck Dep. 13:14 - 14:9, 15:16-24, 43:5-10.

Given this frequent flux in both CSP's population and the rules governing high-risk inmates, it is predictable that these inmates will face future changes in their conditions of confinement. There are thus far more than the several hundred inmates in Defendants' recent data who face a risk of the harm that flows from denial of outdoor exercise.

b. There Are Questions Of Law Or Fact Common To The Class.

As before, the class satisfies Rule 23(a)(2) commonality because it "consists of inmates that are all subjected to the same policy," one that "denies access to outdoor exercise for all

[6] Excerpts from Warden Jones's testimony in the *Anderson* trial are attached as Exhibit 13 to the Second Robertson Declaration.

prisoners housed" in Max, MCU, or CCTU at CSP. *See* Class Cert. Order at 7. Defendants' primary challenge to commonality was that, while there was a common policy, the amount of time inmates spent in Administrative Segregation differed. This Court observed that the then-operative level system required nine months to progress out of Administrative Segregation, so that "based on Defendants' current administrative segregation policies, each inmate placed in administrative segregation at CSP will be denied access to outdoor exercise for at least nine months." Class Cert. Order at 8.

Those policies have since been amended; however, inmates in Max can be referred there for 12 months, or longer under "exigent circumstances." AR 650-03 at 14. Although Mr. Hager testified that reviews of inmates in Administrative Segregation at CSP have been underway since the first of the year, Hager Dep. 54:15 - 55:3, there are still at least 188 inmates in Max, MCU or CCTU at CSP who have been there for more than nine months consecutively, Second Robertson Decl. ¶ 13. Indeed, during the month between August 12 and September 12, 2014 alone, twelve inmates were referred to Max who had already been in administrative segregation at CSP for 11 to 75 consecutive months. *Id*. Ex. 7. As this Court noted in the Class Cert. Order, "[a]lthough there is no bright line rule for when denial of outdoor exercise becomes cruel and unusual punishment, the Tenth Circuit has held than an inmate who was denied outdoor exercise for nine months stated a claim for an Eighth Amendment violation." Class Cert Order at 8 (citing *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 805 (10th Cir. 1999)).

Finally, an inmate can establish a violation of the Eighth Amendment by demonstrating either actual harm or a risk of future harm. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 833-34 (1994) (holding that relevant question is whether there is a "substantial risk of serious harm.").

Under the current policies, inmates may stay in Max for a year or more and many inmates with Max, MCU and CCTU status have -- eight months into the review process -- already been there for far longer. Under these circumstances, a large number of inmates share the common legal question whether the CDOC is violating their rights under the Eighth Amendment.

c. The Claims Or Defenses Of The Representative Parties Are Typical Of The Claims Or Defenses Of The Class.

This Court held that the class satisfied Rule 23(a)(3) because the named Plaintiffs were "three inmates currently imprisoned in administrative segregation at CSP and who are being denied access to outdoor exercise." Class Cert. Order at 9. Since Plaintiffs' original motion, however, CDOC has transferred all three Named Plaintiffs out of CSP. This does not undermine these individuals' roles as representative plaintiffs with claims typical of the class.

First, their claims are not moot. In a case that is essentially a companion case to the present the individual plaintiff, Jacob Oakley, alleges that his Eighth Amendment rights were violated by the lack of outdoor exercise while he was in Administrative Segregation at CSP. After that case was filed, CDOC transferred Mr. Oakley out of CSP and moved to dismiss for mootness. Judge Watanabe recommended and Judge Arguello affirmed that his claim was not moot. *Oakley v. Estate of Tom Clements ex rel. Clements*, 2013 WL 4229490, at *7 (D. Colo. Aug. 15, 2013). That court held that the "voluntary cessation" exception to mootness applied, and noted that "'[t]he rule that 'voluntary cessation of a challenged practice rarely moots a federal case . . . traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior."'" *Id.* at 85 (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) and *Unified Sch. Dist. No. 259, Sedgwick County, Kan. v. Disability Rights Center of Kansas*, 491

F.3d 1143, 1149 (10th Cir. 2007)); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (holding that the defendant had the "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again."); *cf. Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

Here, Named Plaintiffs' history shows that they are often moved from one facility to another. Mr. Decoteau, for example, has been moved 17 times since he was first incarcerated in the custody of the CDOC in 2004. Decl. of Lauren Fontana ¶¶ 6-7 & Ex. 1. Mr. Duran has been moved three times, and Mr. Gomez, seven, including two different stays at CSP. *Id.* ¶¶ 8-10 & Exs. 2 & 3. Given this, and in light of the decision in *Oakley*, Named Plaintiffs' claims are not moot.

Furthermore, even if Named Plaintiffs' claims were moot, this would not moot the claims of the properly certified class. The Supreme Court has "developed the broad rule that once an order granting or denying class certification has issued, a class action will not be mooted if the class representative's claim becomes moot -- so long as a live controversy remains between the defendant and the represented class." William B. Rubenstein, *Newberg on Class Actions*, § 2:10 (5th ed. 2013). In *Sosna v. Iowa*, the Supreme Court held that after a class is certified, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by" the named plaintiffs which "significantly affects the mootness determination." 419 U.S. 393, 399 (1975). Since *Sosna*, numerous courts have held that the fact that a named plaintiff's claims may be mooted after the class is certified does not moot the

claims of the class. *See, e.g.*, *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1245 (10th Cir. 2011) ("Once a class has been certified the expiration of a plaintiff's claim will not moot the action on appeal."); *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1138 (10th Cir. 2009) ("because a certified class becomes an independent juridical entity capable of satisfying the standing requirements of Article III, the mooting of a named plaintiff's claims *after* class certification does not moot the claims of the class," citing *Sosna*, 419 U.S. at 399, and *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 755–56 (1976)).

Named Plaintiffs continue to have claims for injunctive relief to remedy the lack of outdoor exercise at CSP, and as such have claims typical of the class.

d. Named Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

This Court held that the class satisfied Rule 23(a)(4) because "Plaintiffs' counsel has significant experience litigating civil rights actions, including the filing of two separate lawsuits for individual prisoners on this precise issue . . . [and] [t]here is no known or alleged conflict between counsel or the named Plaintiffs and the proposed Class." Class Cert. Order at 10. Ultimately, Defendants did not dispute this requirement. *Id.*

e. The Class Remains Properly Certified Under Rule 23(b)(2).

Certification is proper under Rule 23(b)(2) where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As before, the entire class is subject to the policy of being denied adequate outdoor exercise at CSP, and the injunctive relief -- providing such outdoor exercise -- is appropriate with respect to the class as a whole. As this Court noted, while class members may have gone varying lengths of time without

outdoor exercise, this can be reflected in the Court's ultimate injunction: "the Court can draw whatever lines are necessary when fashioning the ultimate relief on the merits, and any injunction entered can still apply to the Class as a whole." Class Cert. Order at 12. Certification remains proper under Rule 23(b)(2).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court modify the class definition to: "All inmates who are now or will in the future be housed at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise."

Respectfully Submitted,

s/ Amy F. Robertson

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DATED: September 29, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2014, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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s/ Sophie Breene
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