IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

RYAN DECOTEAU,
ANTHONY GOMEZ, and
DOMINIC DURAN,
on behalf of themselves and others similarly situated,

Plaintiffs,
v.

RICK RAEMISCH, in his official capacity as the Executive Director of the Colorado Department of Corrections, and

TRAVIS TRANI, in his official capacity as the Warden of the Colorado State Penitentiary and the Centennial Correctional Facility.

Defendants.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, by and through their counsel, respectfully submit this Motion for Partial Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

INTRODUCTION

Defendants have refused and continue to refuse to provide outdoor exercise to all inmates, including Ryan Decoteau, Anthony Gomez, and Dominic Duran ("Named Plaintiffs"), housed in solitary confinement at Colorado State Penitentiary ("CSP"). The undisputed facts in this case establish that the Colorado Department of Corrections ("CDOC") has deprived Mr. Decoteau, Mr. Gomez, and Mr. Duran, as well as all inmates who are now or in the future will be housed in solitary confinement at CSP, of a basic human need: access to outdoor exercise.

CDOC has completely denied outdoor exercise to all inmates held in solitary confinement at CSP – including the named Plaintiffs – from CSP's construction in 1993 to the present. Further, CDOC has no plans to provide outdoor exercise to inmates in solitary confinement at CSP in the future. While CDOC has recently implemented a new policy governing inmates housed in solitary confinement at CSP and has proposed a "Facility Program Plan" ("FPP") to address the lack of outdoor exercise for *some* inmates at CSP, it remains undisputed that neither the new policy nor the FPP allows inmates housed in solitary confinement at CSP access to outdoor exercise. Thus, CDOC has subjected the Named Plaintiffs and the class they represent to a serious deprivation of their rights in violation of the Eighth Amendment.

The undisputed facts further demonstrate that Defendants know and have known for years that CSP is out of compliance with correctional standards and well-established case law. It has been the law in the Tenth Circuit for more than 25 years that "regular outdoor exercise is extremely important to the psychological and physical wellbeing of inmates." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987). More than two years ago, another court in this district held that the CDOC violated the Eighth Amendment rights of an inmate it held at CSP without access to outdoor exercise. *Anderson v. Colorado Dep't of Corr*., 887 F.Supp.2d 1133, 1142 (D. Colo. 2012). Like Mr. Anderson, inmates in solitary confinement at CSP have either suffered a long-term denial of a basic human need or are currently at substantial risk of serious harm because CDOC intends to continue depriving them of outdoor exercise. The Defendants knew of, disregarded, and continue to disregard that risk of harm. That total disregard of the risk is evidenced by the fact that Defendants continue to deny any opportunity for outdoor exercise to inmates housed in solitary confinement at CSP, putting all inmates who are likely to be housed in

solitary confinement at CSP in the future at substantial risk of serious harm. The undisputed facts in this case establish that Plaintiffs are entitled to summary judgment on their claim that CDOC fails to provide outdoor exercise to inmates in solitary confinement at CSP, in violation of the Eighth Amendment.

BACKGROUND

In 2010, Troy Anderson sued the CDOC, arguing, among other things, that the CDOC violated his Eighth Amendment right to be free from cruel and unusual punishment by denying him access to outdoor exercise. *Anderson*, 887 F.Supp.2d at 1138. Judge Jackson agreed with Mr. Anderson on this claim and held that the CDOC was violating the Eighth Amendment. *Id*. at 1142. In response to this judgment, rather than providing outdoor exercise at CSP, the CDOC transferred Mr. Anderson to Sterling Correctional Facility. *Anderson*, ECF 118 "Defendants' Notice of Compliance with Final Order and Judgment," 10/23/12.

In 2013, because the CDOC continued to deny outdoor exercise to inmates in solitary confinement at CSP, Plaintiffs filed a class action lawsuit challenging the practice. The class was certified on July 10, 2014, with the 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.

ECF 37 ("Class Cert. Order").

Prior to June 30, 2014, the CDOC referred to solitary confinement as "administrative segregation." On June 30, 2014, the CDOC issued a revision to Administrative Regulation ("AR") 650-03, which, among other things, eliminated the term "administrative segregation." Statement of Undisputed Material Facts, *infra*, at ¶ 7. 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*. 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" that individuals stay there. *Id*. at ¶ 8. Because the new status did not change the conditions of confinement challenged by the class action claim but eliminated a term used in the class definition, Plaintiffs filed a Motion to Modify Class Definition on September 29, 2014. The proposed modification eliminated the term "administrative segregation" and thus reads as follows:

> 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.

ECF 41, Motion to Amend Class Definition. Defendants' response to that motion is due on November 21, 2014. ECF 45.

On June 30, 2014, the CDOC also issued a revision to AR 600-09, which added the new statuses of "Close Custody Transition Unit" ("CCTU") and "Management Control Unit" ("MCU"). Statement of Undisputed Material Facts, *infra*, at ¶ 50. Inmates with all three of these statuses – Max, CCTU, and MCU – are now housed at CSP. *Id*. at ¶ 51. Plaintiffs move for Partial Summary Judgment only with respect to the inmates who are now or in the future will be housed in Max at CSP.[1]

[1] Defendants have indicated that they may propose their own modified class definition, to include only inmates in Max who have been refused outdoor exercise for more than nine continuous months. *See* Email from N. Gellar to counsel for Plaintiffs, Oct. 23, 2014, Ex. 3 to Decl. of Amy F. Robertson in Opp'n to Mot. to Modify Scheduling Order (ECF 49-1). Given that the instant Motion is limited to inmates in Max, it would apply equally to such a class as well.

STATEMENT OF UNDISPUTED MATERIAL FACTS ("SUMF")

CDOC Does Not Provide Outdoor Exercise to Inmates in Max at CSP

1. CDOC began construction on CSP in 1990 and opened the facility in 1993. Ex. 1, CDOC website; Ex. 2, Dep. of Larry Reid ("Reid Dep.") in *Oakley v. Clements*, 10-cv-CMA-MJW (D. Colo.), 42:20 - 43:9.

2. CSP houses some inmates in conditions of solitary confinement. Ex. 3, AR 650-03 at CDOC/Decoteau 8897-8902.

3. Until June 30, 2014, CDOC referred to solitary confinement as "administrative segregation." Ex. 4, Dep. of Steve Hager ("Hager Dep."), 18:23 - 26:4; Ex. 3, AR 650-03 at CDOC/Decoteau 8892-8913.

4. CDOC did not provide outdoor exercise to inmates housed in administrative segregation at CSP. Ex. 2, Reid Dep. 23:10 – 23:13; Ex. 5, Dep. of Richard Weems ("Weems Dep."), 53:25 - 54:13; Ex. 6, 2008 ACA Report at DOC-OAKLEY-02675-76; Ex. 7, 2011 ACA Report at DOC-OAKLEY-02768.

5. In 2012, a district court in Colorado found that the lack of outdoor exercise in administrative segregation at CSP subjected Troy Anderson to cruel and unusual punishment in violation of the Eighth Amendment. *Anderson*, 887 F.Supp.2d at 1142.

6. The present lawsuit was filed on December 17, 2013. ECF 1, Class Action Complaint.

7. On June 30, 2014, CDOC issued a revision to AR 650-03 that eliminated the term "Administrative Segregation" and established a new status called "Restrictive Housing Maximum Security Status" ("Max"). Ex. 3 AR 650-03 at CDOC/Decoteau 8892–8913.

8. 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" that individuals stay there. Ex. 4, Hager Dep. 24:13-22.

9. Inmates held in Max at CSP are held in conditions that include being alone in a cell 23 hours a day and out of cell a maximum one hour a day for five days a week. Ex. 3, AR 650-03 at CDOC/Decoteau 8892-8913.

10. CDOC does not permit inmates in Max at CSP to exercise outside. Ex. 5, Weems Dep. 16:7 - 17:6; Ex. 4, Hager Dep. 57:22 - 59:10; Ex. 8, CDOC Facility Program Plan at CDOC/Decoteau 8942-8974.

11. The only out-of-cell exercise that CDOC permits for inmates in Max occurs in an indoor recreation cell. Ex. 5, Weems Dep. 20:16 - 23:22; Ex. 2, Reid Dep. 24:23 - 25:2; Ex. 4, Hager Dep. 58:15 - 59:6; 91:6 - 10.

12. The recreation cell is a completely indoor room, enclosed by a floor, ceiling, and walls. Ex. 9, Wide Angle Photo of Recreation Cell; Ex. 10, Diagram of Day Hall.

13. The recreation cell measures approximately 90 square feet. Ex. 9, Wide Angle Photo of Recreation Cell; Ex. 10, Diagram of Day Hall.

14. The recreation cell's exterior wall contains two narrow windows, which are covered by metal grates. Ex. 11, Narrow Angle Photo of Recreation Cell.

15. The only access to the outside elements in the recreation cell is through the holes in the metal grating covering the windows. Ex. 9, Wide Angle Photo of Recreation Cell; Ex. 12, Photo of Metal Grates.

CDOC Data Shows That a Significant Number of Inmates Are Subjected to The Blanket Denial of Outdoor Exercise

16. The Monthly Population and Capacity Report (available on CDOC's website) for August 31, 2014, shows 208 inmates with Max status at CSP. Declaration of Amy Robertson filed with Motion to Modify Class Definition ("Second Robertson Decl.") (ECF 41-2) ¶ 13;[2] Ex. 13, Dep. of Paul Hollenbeck ("Hollenbeck Dep.") 36:6 (testifying that there were 223 inmates with the status Max as of early September).

17. After the recent 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. Second Robertson Declaration (ECF 41-2) ¶ 6.

18. On August 13, 2014, Defendants produced in response the spreadsheet attached as Exhibit 4 to the Second Robertson Declaration (ECF 41-2) ("August 13 Data"). The August 13 Data indicate that there were 276 inmates at CSP with the status "Administrative Segregation/Maximum Security." Of these, 53 inmates had had that status for more than nine months cumulatively. Second Robertson Decl. (ECF 41-2) ¶ 13.

19. "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. Ex. 14, Dep. of Paul Hollenbeck in *Oakley v. Clements*, 10-cv-CMA-MJW (D. Colo.), 7:1-10.

[2] Plaintiffs analyzed the data Defendant produced regarding movement of inmates in and out of CSP and Administrative Segregation/Max in their Motion to Modify Class Definition (ECF 41). Because the documents attached to that Motion were voluminous, in the interest of judicial efficiency, Plaintiffs refer to the documents already filed by reference rather than attaching them again to this Motion.

20. 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. (ECF 41-2) ¶¶ 8-10 & Ex. 14.

21. Based on the Move Sheets produced by the Defendants, at least 17 Max inmates in the August 13 Data had been in administrative segregation at CSP for more than nine months continuously. *Id*. at ¶ 13.

22. Defendants' September 24, 2014, 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. *Id*. at ¶ 19 and Ex. 7.

CDOC Denied Outdoor Exercise to Named Plaintiffs

23. Mr. Decoteau had been incarcerated at CSP for three years and two months as of the date of this filing. Ex. 15, Declaration of Ryan Decoteau ("Decoteau Decl.") ¶¶ 3-4.

24. In April 2014, after the start of this litigation, CDOC transferred Mr. Decoteau from CSP to Crowley County Correctional Facility. *Id*. at ¶ 4.

25. CDOC has transferred Mr. Decoteau 17 times since he was first incarcerated in the custody of CDOC in 2004. Declaration of Lauren Fontana filed with Motion to Amend Class Definition ("Fontana Declaration") (ECF 41-1) ¶¶ 6-7 & Ex. 1.

26. Mr. Gomez had been incarcerated at CSP for a total of four years and seven months as of the date of this filing. Ex. 16, Declaration of Anthony Gomez ("Gomez Decl.") ¶¶ 3-5.

27. CDOC has transferred Mr. Gomez to CSP on two different occasions during the course of his incarceration. *Id*. at ¶¶ 3-4.

28. In September 2014, after the start of this litigation, CDOC transferred Mr. Gomez from CSP to Buena Vista Correctional Facility. *Id*. at ¶ 6.

29. CDOC has transferred Mr. Gomez seven times since he has been incarcerated. Fontana Declaration (ECF 41-1) ¶¶ 10-11 & Ex. 3.

30. Mr. Duran had been incarcerated at CSP for one year and five months as of the date of this filing. Ex. 17, Declaration of Dominic Duran ("Duran Decl.") ¶¶ 3-4.

31. In July 2014, after the start of this litigation, CDOC transferred Mr. Duran from CSP to Arkansas Valley Correctional Facility. *Id*. at ¶ 4.

32. CDOC has transferred Mr. Duran three times since he has been incarcerated. Fontana Declaration (ECF 41-1) ¶¶ 8-9 & Ex. 2.

33. Mr. Decoteau filed grievances – which CDOC denied – asking for outdoor exercise while at CSP, stating that "since I've been [in] Ad-Seg I have not been given the opportunity to outdoor rec [sic], which is to include being able to feel the rain, snow, sun, wind on my body." Ex. 18, Grievances of Ryan Decoteau.

34. A CDOC official denied Mr. Decoteau's grievance and responded, in part, by saying, "CSP's recreational procedure does allow out of cell recreation in day hall exercise rooms. You are allowed a minimum of one hour per day outside of your cell, five days a week, which does meet the recreational requirements. Progression through the CSP level system would allow you to progress to a less secure environment and eventually to a facility with outdoor yard privileges." Ex. 19, Response to Decoteau Grievance.

35. Mr. Gomez filed grievances – which CDOC denied – asking for outdoor exercise while at CSP, stating that, "It is unethical, inhumane, and cruel and unusual punishment for me to be

deprived of outdoor recreation." Ex. 20, Grievance of Anthony Gomez.

36. A CDOC official denied Mr. Gomez's grievance and responded, in part, by stating, "If you want to go outside as per your remedy request, I suggest working your way through the privilege level system." *Id*.

37. Mr. Duran filed grievances – which CDOC denied – asking for outdoor exercise while at CSP, stating that, "The so called day hall is considered 'outside.' It is no where [sic] near out side [sic]. Its [sic] a room with a window at most." Ex. 21, Grievance of Dominic Duran at ORCA.

38. A CDOC official denied Mr. Duran's grievance and stated in its response that "in review of this matter it is my finding that the CSP's recreational procedure does not allow for outdoor recreation." Ex. 22 -- Response to Duran Grievance.

CDOC Has Long Been Aware that Its Failure to Provide Outdoor Exercise to Inmates in Solitary Confinement at CSP is Unconstitutional

39. The American Correctional Association (ACA) Standards recommend outdoor exercise for inmates in segregation units. Ex. 6, 2008 ACA Report at DOC-OAKLEY-02684; Ex. 7, 2011 ACA Report at DOC-OAKLEY-02775.

40. In 2008 and 2011, ACA Accreditation Reports on CSP found that CSP was non-compliant with respect to the provision of outdoor exercise, stating that administrative segregation "exercise areas are all interior areas," Ex. 6, 2008 ACA Report at DOC-OAKLEY-02684, and that "exercise units don't have outside space available." Ex. 7, 2011 ACA Report at DOC-OAKLEY-02775.

41. In 2010, the American Bar Association (ABA) adopted standards for the treatment of

prisoners. *Anderson*, 887 F.Supp.2d at 1141.

42. ABA Standard 23-3.6(b) says that "[e]ach prisoner, including those in segregated housing, should be offered the opportunity for at least one hour per day of exercise, in the open air if weather permits." *Id*.

43. In 2011, Defendants commissioned the National Institute of Corrections (NIC), an agency within the U.S. Department of Justice, to undertake a study of CDOC's offender classification system and administrative segregation policies. Ex. 23, CDOC Administrative Segregation and Classification Review ("Austin-Sparkman Report") at ORCA 000142.

44. The Austin-Sparkman Report found that CDOC failed to provide outdoor recreation to inmates in administrative segregation at CSP, specifically stating that "access to outdoor recreation is deficient at all of the [administrative segregation] units except for" three facilities other than CSP. *Id*. at ORCA 000158.

45. On November 1, 2012, Defendants filed a Budget Report with the Colorado State Legislature for the 2013-2014 term, which stated, "Colorado State Penitentiary, constructed in 1993, does not have an outdoor exercise area." Ex. 24, CDOC Budget for 2013-2014 at ORCA-000059.

46. As of late 2014, the CDOC continues to deny outdoor exercise to inmates in Max at CSP. Ex. 5, Weems Dep. 16:7 - 17:6; Ex. 4, Hager Dep. 57:22 - 59:10.

47. The CDOC has no plan to provide outdoor exercise to inmates in Max at CSP. Ex. 8, CDOC Facility Program Plan at CDOC/Decoteau 8942-8974; Ex.4, Hager Dep. 91:6-20.

The Facility Program Plan and Administrative Regulations Include No Change in Conditions of Confinement for Inmates in Max at CSP

48. According to revised AR 650-03, inmates placed in Max are presumed to be in that status for up to six or twelve months, depending on the severity of the act committed while incarcerated or the circumstances of the inmate. Ex. 3, AR 650-03 at CDOC/Decoteau 8895; Ex. 4, Hager Dep. 31:14 - 33:13.

49. Extensions beyond the twelve-month period are permitted for "exigent circumstances." Ex. 3, AR 650-03 at CDOC/Decoteau 8905; Ex. 4, Hager Dep. 73:6-9, 76:22 - 77:1.

50. On June 30, 2014, the CDOC also issued a revision to AR 600-09, which added the new statuses of "Close Custody Transition Unit" ("CCTU") and "Management Control Unit" ("MCU"). Ex. 25, AR 600-09 at CDOC/Decoteau 8875-8876.

51. People with all three of these statuses – Max, CCTU, and MCU – are now housed at CSP. Ex. 8, Facility Program Plan at CDOC\Decoteau 8945-8946.

52. On July 25, 2014, CDOC released a Facility Program Plan. *Id.* at 8942-8983.

53. The Facility Program Plan outlines the requirements for design and construction to provide group outdoor exercise space for inmates in CCTU and MCU at CSP. *Id* at 8944.

54. The construction described in the Facility Program Plan "is in part intended to satisfy the directives issued in the Anderson case as well as to negate future litigation." *Id*. at 8947.

55. The CDOC created the Facility Program Plan in anticipation of "the potential for future legal proceedings on similar grounds, especially with regard to reasonable access to the out-of-doors and outdoor exercise opportunities for offenders housed at CSP." *Id*.

56. CDOC will present the Facility Program Plan in a budget request to the Colorado

legislature in 2015. *Id*. at 8942-8974. Even if funded as requested, the Facility Program Plan states a projected completion date of December 2016. *Id.* at 8974.

57. The Facility Program Plan states, "Regarding the minimum standards for outdoor exercise, the existing spaces at CSP do not meet certain American Correctional Association (ACA) physical standards for outdoor recreation areas, and do not satisfy certain court-decreed minimum legal standards for an outdoor exercise area." *Id.* at 8947.

58. Operationally, inmates with Max designation will be housed in a similar manner as "they were in former Administrative Segregation but generally for a shorter period of time." *Id*. at 8945.

59. The Facility Program Plan does not address outdoor exercise for inmates in Max. Ex. 5, Weems Dep. 15:23 - 16:1; 17:2-17:6.

60. Inmates in Max status will continue to exercise in the existing indoor exercise rooms, and CDOC has "no plan to modify these rooms in this project." Ex. 8, CDOC Facility Program Plan at CDOC/Decoteau 8945.

61. Inmates in Max at CSP exercise in the same indoor exercise rooms formerly provided to inmates in administrative segregation, Ex. 4, Hager Dep. 59:3 - 10, that is, the same rooms in which Troy Anderson exercised and which were held to be deficient in his case. *Anderson*, 887 F.Supp.2d at 1142.

62. The CDOC plans to construct and utilize outdoor space for inmates in Max at CSP only if the CDOC decides it would be beneficial, or if the CDOC is required to do so in the future. Ex. 8, CDOC Facility Program Plan at CDOC/Decoteau 8951.

STANDARD OF REVIEW

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court may grant summary judgment when the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Farthing v. City of Shawnee*, 39 F.3d 1131, 1134-35 (10th Cir. 1994). A fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. The moving party bears the initial responsibility of providing to the Court the factual basis for its motion and identifying "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which "reveal that there are no genuine issues as to any material fact[s], [and that] the party is entitled to summary judgment as a matter of law. *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 921 (10th Cir. 2001) (internal quotation marks omitted).

ARGUMENT

Defendants violated and continue to violate the Eighth Amendment rights of the Class through the policy and practice of denial of outdoor exercise to inmates in Max at CSP. In order to satisfy the requirements necessary to show an Eighth Amendment violation, Plaintiffs must prove a two-prong test. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

The first prong of this test is objective, in that Plaintiffs must show that the treatment they experienced constitutes a sufficiently serious deprivation of the minimal civilized measure of life's necessities. *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S.Ct. 2321, 2324 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399 (1981)). An inmate is denied the

"the minimal civilized measure of life's necessities" if the prison deprives him of a basic human need. *Rhodes*, 452 U.S. at 347. The objective prong is likewise satisfied if an inmate establishes that he is at substantial risk of serious harm in the future. *Helling v. Mckinney*, 509 U.S. 25, 34 (1993) ("[T]he Eighth Amendment protects against future harm to inmates.").

The second prong is subjective; Plaintiffs must show that the Defendants had a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834. In cases involving prison conditions, this culpable state of mind must be one of "deliberate indifference" to inmate health or safety. *Id*. In this case, Defendants deprived, and continue to deprive, the Class of a basic human need and acted with deliberate indifference in doing so, as the undisputed facts show. Therefore, the undisputed facts support both prongs of the Eighth Amendment test, and Plaintiffs' Motion for Partial Summary Judgment should be granted.

I. Defendants' Denial of Outdoor Exercise Constitutes a Sufficiently Serious Deprivation of the Basic Human Needs of the Class.

Courts have consistently recognized that a long-term denial of outdoor exercise satisfies the objective prong of the Eighth Amendment analysis. In 2012, a district court in Colorado held that CDOC's denial of outdoor exercise to inmates in administrative segregation at CSP constituted a sufficiently serious deprivation of a basic human need. SUMF, ¶ 5. Analogous to the facts in *Anderson*, the undisputed facts in this case show that members of the Class have been and remain at risk of being deprived of their basic human need for outdoor exercise. Plaintiffs, therefore, satisfy the objective prong of the Eighth Amendment analysis.

A. Outdoor Exercise is a Basic Human Need

The objective prong requires that Plaintiffs show that the treatment they received was a sufficiently serious deprivation of their constitutional rights. *Farmer*, 511 U.S. at 834; *see also*

Anderson, 887 F.Supp.2d at 1139. A prison condition is sufficiently serious if it denies the inmate "the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347. In *Wilson*, the Supreme Court held that exercise is a basic human need. 501 U.S. at 304. In addition, the Tenth Circuit has recognized that "regular outdoor exercise is extremely important to the psychological and physical well-being of inmates." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987).

Two years ago, a Colorado district court determined that CSP's recreation cell was inadequate to provide outdoor exercise in compliance with the Eighth Amendment. SUMF, ¶ 5. The *Anderson* court found that every "CDOC professional who was asked [at trial] about outdoor exercise agreed" that it was important to the mental health of inmates. *Id*. at 1139. The court further stated that, in combination with the other conditions in administrative segregation at CSP, the long-term deprivation of outdoor exercise for the inmate was a "paradigm of inhumane treatment." *Anderson*, 887 F.Supp.2d at 1140. While Mr. Anderson had been in administrative segregation without outdoor exercise for 12 years, as explained below, periods far shorter have been held to violate the Eighth Amendment as well.

Defendants' continued denial of outdoor exercise to inmates in Max at CSP is, therefore, a deprivation of a basic human need.

B. The Class Has Been Harmed by Defendants' Denial of Outdoor Exercise.

Defendants violated, and continue to violate, the Class members' Eighth Amendment right to be free from cruel and unusual punishment by denying them outdoor exercise. Inmates housed in Max at CSP are housed in conditions of confinement whereby inmates are alone in their cells for 23 hours a day and only allowed outside their cells for one hour a day for a

maximum of five days a week. SUMF at ¶¶ 2, 3, 7, 9. It is the blanket policy of CDOC to deny outdoor exercise to inmates housed in Max at CSP. *Id*. at ¶ 10.

The only exercise the CDOC provides to inmates in Max at CSP occurs in an indoor recreation cell. *Id*. at ¶ 11. This cell is completely indoors and is enclosed by a floor, ceiling, and walls. *Id*. at ¶ 12. The indoor cell measures approximately 90 square feet. *Id*. at ¶ 13. It contains only two narrow windows covered by metal grates. *Id*. at ¶ 14. The only access to outside elements occurs through the holes in the metal grating covering these narrow windows. *Id*. at ¶ 15. Under no honest analysis of the term "outdoors" does this recreation cell provide outdoor exercise. The Defendants recognize this, and have admitted they do not provide outdoor exercise throughout the course of this case. *Id.* at ¶ 57. The Named Plaintiffs were denied outdoor exercise for the entire time they were housed in solitary confinement at CSP, and other members of the Class have been and continue to be denied outdoor exercise in Max at CSP.

Multiple circuits considering the denial of outdoor exercise, including the Tenth Circuit, have held that a denial of outdoor exercise for periods less than and similar to those experienced by the Class is a serious deprivation of an inmate's constitutional rights. In *Perkins v. Kansas*, 165 F.3d. 803, 810 (10th Cir. 1999), the Tenth Circuit held that a prisoner who was denied outdoor exercise for nine months satisfied the objective prong of the Eighth Amendment analysis. *See also Fogle v. Pierson*, 435 F.3d. 1252, 1259-60 (10th Cir. 2006) (holding a three-year deprivation of outdoor exercise sufficient to bring an Eighth Amendment claim); *Kettering v. Chaves*, No. 07-cv-1575, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008) (holding that a three-month denial of outdoor exercise satisfied the objective prong of the Eighth Amendment analysis); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (holding that a-four year denial

of outdoor exercise constituted an Eighth Amendment violation).

Inmates in Max at CSP are denied access to outdoor exercise for extensive periods of time. According to the newly revised AR 650-03, the length of time presumptively spent in Max at CSP is up to 6 months for some violations and up to 12 months for a number of other violations. *Id.* at ¶ 48. In addition, inmates may be housed in Max for even longer than 12 months for "exigent circumstances." *Id.* at ¶ 49. The Named Plaintiffs were all housed in administrative segregation at CSP for more than one year. *Id.* at ¶¶ 23, 26, 30. Moreover, the undisputed facts show that a number of inmates continue to be held in Max at CSP for more than 9 months or even 12 months when their current period of confinement in Max status is combined with the amount of time spent in administrative segregation before it was changed to Max. *Id.* at ¶ 17-22. Such periods of time are all much longer than the three-month period found to satisfy the objective prong of the Eighth Amendment in *Kettering,* 2008 WL 4877005, at *12, and just as long if not longer than the nine-month period in *Perkins*, 165 F.3d at 810.

C. The Class remains at risk of harm because of CDOC's failure to provide outdoor exercise to inmates in Max at CSP.

Many of the members of the Class who are currently inmates in Max at CSP continue to suffer harm because they have been in solitary conditions without outdoor exercise for extensive periods of time. Other members of the Class—including the Named Plaintiffs—not only suffered a deprivation of a basic human need while at CSP, but remain at risk of being returned to Max at CSP and to the total deprivation of outdoor exercise therein. This risk is established by CDOC's history of frequent transfer of inmates and the recent increase in referrals to Max in August and September SUMF at ¶¶16, 22, 25, 29, 32. For example, Mr. Gomez was transferred in and out of CSP two times. *Id.* at ¶ 27. After Plaintiffs filed this lawsuit, Defendants transferred each Named

Plaintiff (Mr. Gomez, Mr. Decoteau, and Mr. Duran), to another facility. *Id.* at ¶¶ 24, 28, 31. The 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. *Id.* at ¶ 25. Mr. Duran has been moved three times, and Mr. Gomez, seven, including two different stays at CSP. *Id.* at ¶¶ 29, 32.

Importantly, the conditions for inmates in solitary confinement at CSP have not changed. *Id*. at ¶ 8, 58-61. As of late 2014, inmates in Max are still not receiving any access to outdoor exercise. *Id*. at ¶ 46. The new revisions to ARs 650-03 and 600-09 merely eliminated the term, "administrative segregation," relabeling it "Maximum Security Status," and added additional status designations to the CSP facility, namely CCTU and MCU. *Id.* at ¶¶ 7, 50, 51. CDOC's Facility Program Plan, which began in response to the court's ruling in *Anderson* and is meant to respond to this litigation, *Id.* at ¶¶ 54-55, provides no guarantee of outdoor exercise to inmates in Max at CSP, nor can the possibility of an approved budget request be construed as a true cure to the harm and risk of future harm to Plaintiffs. *Id.* at ¶¶ 6, 59-61. All members of the class thus remain at risk of being deprived of their right to outdoor exercise at CSP. Therefore, in addition to the fact that some members of the Class, including the Named Plaintiffs, have already suffered a deprivation of basic human rights, the undisputed facts also satisfy the equally powerful component of the Eighth Amendment objective prong that recognizes the risk of future harm as deserving of constitutional protection.

Because Plaintiffs can establish that some members of the Class, including the Named Plaintiffs, suffered harm from the denial of outdoor exercise at CSP, that the Class remains at a substantial risk of serious harm from the denial of outdoor exercise for inmates in Max at CSP,

and that other members of the class are still suffering harm from that denial, they satisfy the objective prong of the Eighth Amendment analysis.

II. Defendants have acted and continue to act with deliberate indifference by denying the Plaintiffs outdoor exercise.

In order to establish an Eighth Amendment claim, a second prong—a subjective prong—also must be satisfied. Plaintiffs must prove that Defendants acted with a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834. In cases involving prison conditions, this means that the Defendants acted with "deliberate indifference" to inmate health or safety. *Id*. The undisputed facts show that Defendants have been aware in the past and remain currently aware of the risk of harm involved in not offering outdoor exercise to the Plaintiffs and continue to deliberately disregard those risks.

A. Defendants have long known that CSP does not offer outdoor exercise and that it posed a substantial risk of serious harm.

From CSP's creation in 1993 to the present day, Defendants have received ample notice that conditions in solitary confinement at CSP are in violation of the Eighth Amendment. At a minimum, the *Anderson* decision and the CDOC's own Austin-Sparkman report put the CDOC on direct notice that long term denial of outdoor exercise posed a substantial risk of serious harm to inmates in Max at CSP. In 2011, the CDOC commissioned a study of its inmate classification system and administrative segregation policies. *Id.* at ¶ 43. The study, known as the Austin-Sparkman report, concluded that CSP failed to provide outdoor recreation to inmates in administrative segregation, and found that CSP's access to outdoor recreation is "deficient." *Id.* at ¶ 44. In 2012, Judge Jackson issued his *Anderson* opinion, which explicitly stated that CSP's indoor recreation cell did not offer outdoor exercise to inmates in administrative segregation and

finding that deprivation unconstitutional as it applied to Mr. Anderson. *Anderson*, 887 F.Supp.2d at 1140.

1. CDOC was put on direct notice of its failure to comply with the Eighth Amendment in the *Anderson* decision in 2012 and the court's condemnation of CSP's indoor exercise room for inmates in solitary confinement.

It is undisputed that Defendants were aware of the court's decision in *Anderson*. *See generally Anderson*, 887 F.Supp.2d at 1138-39. In *Anderson*, Defendants were made directly aware that the lack of outdoor exercise at CSP was causing harm to inmates. *Id.* The court found that CSP's denial of outdoor exercise, coupled with other conditions, was "a paradigm of inhumane treatment." *Id*. at 1140. As to deliberate indifference, the court stated:

> CDOC officials know that the CSP is out of step with the rest of the nation. They have been told by the experts whom they hired that access to outdoor recreation at the CSP is deficient. However, so far as the evidence in this case shows, nothing has been done to provide any form of outdoor exercise to Mr. Anderson or to other inmates who have been held in administrative segregation at the CSP for long periods. The Court concludes that defendants have been deliberately indifferent to Mr. Anderson's mental and his physical health.

Id. at 1142. In *Anderson*, the court ultimately held that CDOC was violating the Eighth Amendment by denying outdoor exercise. *Id*. In addition, in CDOC's Facility Program Plan, Defendants acknowledge that the project's conception was due to the court's decision in *Anderson*. *Id*. at ¶ 54.

2. CDOC officials acknowledge that CSP does not provide outdoor exercise to inmates in Max.

It is undisputed that Defendants have repeatedly admitted that inmates housed in Max at CSP are not provided outdoor exercise. SUMF, at ¶¶ 10, 38, 45, 57. On November 2, 2012, after the *Anderson* ruling, Defendants filed a Budget Report to the Colorado State Legislature that, in

pertinent part, stated: "Colorado State Penitentiary . . . does not have an outdoor exercise area." *Id.* at ¶ 45. Further, Defendants responded to Named Plaintiff Dominic Duran's grievance concerning the lack of outdoor exercise at CSP by stating, "CSP's recreational procedure does not allow for outdoor recreation." *Id.* at ¶ 38.

In 2014, CDOC released its Facility Program Plan, which states, "Regarding the minimum standards for outdoor exercise, the existing spaces at CSP do not meet certain American Correctional Association (ACA) physical standards for outdoor recreation areas, and do not satisfy certain court-decreed minimum legal standards for an outdoor exercise area…" *Id.* at ¶ 57. Given these undisputed facts, CDOC has been very much aware, and indeed has on more than one occasion admitted, that it does not provide outdoor exercise to inmates in Max at CSP in violation of court-ordered standards.

3. Defendants knew that the Named Plaintiffs were not receiving outdoor exercise at CSP.

It is undisputed that Defendants were aware that the Named Plaintiffs were being denied outdoor exercise because the undisputed facts show that the Named Plaintiffs filed grievances related to the lack of outdoor exercise at CSP.

The Tenth Circuit has held that prisoner grievances can show that prison officials both knew of a substantial risk of harm to plaintiff's well being and disregarded that harm. *Perkins,* 165 F.3d at 810. All of the Named Plaintiffs have filed grievances regarding the lack of outdoor exercise at CSP. *Id.* at ¶ 33, 35, 37. Named Plaintiff Ryan Decoteau filed a grievance that stated he has not had the opportunity to exercise outside and has not been "able to feel the rain, snow, sun, [or] wind on my body." *Id.* at ¶ 33. Defendants' response to Mr. Decoteau's grievance was that "CSP's recreational procedure does allow out of cell recreation in day hall exercise

rooms. . . Progression through the CSP level system would allow you to progress to a less secure environment and eventually to a facility with outdoor yard privileges." *Id.* at ¶ 34.

Named Plaintiff Anthony Gomez filed his grievance that stated, "[i]t is unethical, inhumane, and cruel and unusual punishment for me to be deprived of outdoor recreation." *Id.* at ¶ 35. Defendants' response to Mr. Gomez was, "[i]f you want to go outside as per your remedy request, I suggest working your way through the privilege level system." *Id.* at ¶ 36.

Mr. Duran filed a grievance asking for outdoor exercise while at CSP, stating that, "The so called day hall is considered 'outside.' It is no where near out side [sic]. Its [sic] a room with a window at most." *Id.* at ¶ 37. Defendants' response to Mr. Duran's grievances was, "in review of this matter it is my finding that CSP's recreational procedure does not allow for outdoor recreation." *Id.* at ¶ 38. The grievances filed by the inmates to the CDOC made them aware of the lack of outdoor exercise provided to the Named Plaintiffs; therefore, Defendants knew that inmates in solitary confinement were being deprived of a basic human need that they repeatedly requested: the ability to exercise outside.

4. Defendants are aware that correctional standards and well-established case law require outdoor exercise

The undisputed facts show that through decisions handed down by courts in Colorado, the ACA and ABA standards, and their own internal studies and reports, Defendants are fully aware that they are out of step with the rest of the nation's prisons. CSP has been out of step with the rest of the nation from the year it opened in 1993 to the present day. *Id.* at ¶ 1, 4, 39-46.

CDOC began construction of CSP three years after the Tenth Circuit's ruling in *Bailey*, which stated, "regular outdoor exercise is extremely important to the psychological and physical well-being of inmates," *Bailey*, 828 F.2d at 653, and eleven years after the Ninth Circuit held that

depriving inmates outdoor exercise for more than four years constituted cruel and unusual punishment. *Spain*, 600 F.2d at 200. Judge Jackson noted in his *Anderson* opinion that, in February 2010, the ABA adopted standards for treatment of prisoners that included Standard 23-3.6(b), which states, "[e]ach prisoner, including those in segregated housing, should be offered the opportunity for at least one hour per day of exercise, in the open air if weather permits." SUMF at ¶¶ 41-42. Although not binding on the CDOC, Standard 23-3.6(b) is further proof that CDOC is out of step with the rest of the nation, and Judge Jackson's reference to the standard put Defendants on notice of their lack of compliance. Defendants are also aware that they are not in compliance with the ACA Standards for outdoor exercise. *Id.* at ¶¶ 39-40. The ACA Standards require outdoor exercise for inmates in solitary confinement units. *Id*. at ¶ 39. In their Accreditation Report on CSP, the ACA found that access to outdoor exercise at CSP was non-compliant. *Id*. at ¶ 40. Further, the ACA found that all exercise areas were indoors, and that those indoor exercise units do not have available outside space." *Id*.

Courts in this and other circuits have consistently found that denial of outdoor exercise is unconstitutional. *Anderson*, 887 F.Supp.2d at 1142; *Fogle*, 435 F.3d at 1259-60; *Perkins*, 165 F.3d at 810 ("[A]s this and other courts have recognized, 'some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates.'"); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) ("[D]eprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation."); *Allen v. Sakai*, 48 F.3d 1082, 1088 (9th Cir. 1994) (holding that a long-term deprivation of exercise is a denial of a basic human need in violation of the Eighth Amendment, because, "[a]fter *Spain* and *Toussaint* [*v. Yockey*, 722 F.2d 1490, 1493 (9th Cir. 1984)], defendants cannot legitimately claim

that their duty to provide regular outdoor exercise to Smith was not clearly established"); *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993) ("[T]he lack of outdoor exercise for extended periods is a sufficiently serious deprivation and thus meets the requisite harm necessary" to satisfy the Eighth Amendment test); *Bailey*, 828 F.2d at 653; *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("Courts have frequently stated that confinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment."); *Spain*, 600 F.2d at 199 ("[T]here is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates.").

Given the case law, especially *Anderson*, the grievances filed by inmates, the ABA inmate treatment standards, the ACA Accreditation Report, and CDOC's own Austin-Sparkman Report, and Facility Program Plan, the undisputed facts show that Defendants knew that there was no outdoor exercise offered by CSP and that this poses a substantial risk of serious harm to the Class.

B. Defendants deliberately disregarded the risk of denying outdoor exercise to the Class.

The undisputed facts of this case demonstrate that Defendants were aware and continue to be aware that CSP does not provide outdoor exercise to inmates in Max. Defendants in this case are deliberately indifferent because they have repeatedly failed to act reasonably in response to a serious condition. *See Perkins*, 165 F.3d at 809-10. It is clear that Defendants' response to this serious condition was to do nothing, and to continue to do nothing, despite having both general and specific knowledge of the substantial harm they are causing. Although the new ARs and the Facility Program Plan may change the conditions for other subsets of inmates, SUMF

¶ 53, or at least promise improvements to do so,[3] the conditions of confinement for inmates in Max at CSP are, and will remain, the same. SUMF at ¶¶ 4, 7, 8, 10, 46, 47. As of late 2014, Defendants still have yet to fix the problem of the lack of outdoor exercise at CSP. *Id*. at ¶¶ 46-47.

CSP has been on notice that the failure to provide outdoor exercise violates the Eighth Amendment since before its construction in 1993. *Spain*, 600 F.2d at 200; *Toussaint v. Yockey*, 722 F.2d 1490, 1493 (9th Cir. 1984); *Ruiz*, 679 F.2d at 1152. Numerous cases have held that failing to provide inmates in solitary confinement the opportunity to exercise outdoors violates the Eighth Amendment. *Anderson*, 887 F.Supp.2d at 1138-39; *Fogle*, 435 F.3d. at 1259-60; *Spain*, 600 F.2d at 200. Reports and studies conducted on CDOC's facilities have determined CSP not to be in compliance with contemporary standards for outdoor exercise. SUMF at ¶¶ 39-44. Finally, a Colorado district court decision found that CSP's lack of outdoor exercise for inmates in administrative segregation violated the Eighth Amendment. *Anderson*, 887 F.Supp.2d at 1142. Still, Defendants have done nothing to stop the violation of the Eighth Amendment rights of the Class members who now or in the future will be housed in Max at CSP. SUMF, ¶ 62. The undisputed facts demonstrate that Defendants denying such inmates access to outdoor exercise at CSP poses a substantial risk of harm and Defendants have deliberately disregarded that risk.

[3] The Colorado legislature will not act on CDOC's funding request until sometime in 2015. SUMF, ¶ 56. Even if the legislature grants the funding request, the Facility Program Plan states a projected completion date of December 2016.

CONCLUSION

The undisputed facts demonstrate that Defendants violated and continue to violate the Class's Eighth Amendment right to be free from cruel and unusual punishment by denying the Class access to outdoor exercise while in Max at CSP. Consequently, Plaintiffs' Partial Motion for Summary Judgment should be granted.

DATED: October 24, 2014

Respectfully submitted,

STUDENT LAW OFFICE

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 24th day of October, 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 address:

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