IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-01196-CMA-MEH

NATHAN JERARD DUNLAP

Plaintiff,

v.

ARISTEDES W. ZAVARAS, individually, and in his official capacity as Executive Director of the Colorado Department of Corrections,

Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Nathan Dunlap respectfully submits this Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

INTRODUCTION

For more than fourteen years, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and Tenth Circuit precedent, the Colorado Department of Corrections (CDOC) has denied Mr. Dunlap regular outdoor exercise.

Since Mr. Dunlap was sentenced to death in May 1996, the CDOC has incarcerated him in Colorado's "supermax" prison, the Colorado State Penitentiary (CSP), nearly continuously. For years at a time while Mr. Dunlap has been incarcerated at CSP—most recently, continuously for more than the past three years—the CDOC has not allowed him to exercise outside, instead limiting him to exercising in a "day hall

exercise room" within CSP. Inmates placed in the "day hall exercise room" are not outside.

For brief periods of time when the CDOC transferred Mr. Dunlap away from CSP, the CDOC allowed Mr. Dunlap to exercise outside on at least six occasions. During these occasions, Mr. Dunlap has been fully cooperative and compliant with CDOC staff, and he has engaged in such outdoor exercise without incident.

Defendant Aristedes W. Zavaras, the Executive Director of the Colorado Department of Corrections, is responsible for Mr. Dunlap's incarceration at CSP and has acted with deliberate indifference to the fact that the CDOC is denying Mr. Dunlap a basic human need—regular outdoor exercise. Defendant Zavaras and the CDOC knew and continue to know that they are consigning Mr. Dunlap to many years as a death-row inmate at CSP without being allowed to exercise outside, and they disregarded and continue to disregard the substantial risks that this long-term deprivation of outdoor exercise poses to Mr. Dunlap's health and well being.

Mr. Dunlap seeks injunctive and declaratory relief for this violation of his Eighth Amendment right to be free from cruel and unusual punishments. This Motion seeks summary judgment because the undisputed material facts demonstrate that under Tenth Circuit precedent, Mr. Dunlap is entitled to the relief requested as a matter of law.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343 over Plaintiff's cause of action arising under the U.S. Constitution and 42 U.S.C. §§ 1983 and 1988, and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff Nathan Jerard Dunlap is, and at all times relevant to this action has been, a death-row inmate incarcerated by the CDOC. (Third Amended Complaint (TAC), ¶ 3; Answer to Third Amended Complaint (Answer), ¶ 3.)

2. Defendant Zavaras operates the State of Colorado's correctional facilities where Mr. Dunlap is, and at all times relevant to this action has been, incarcerated. (TAC, ¶ 4; Answer, ¶ 4.)

3. As a matter of policy under the leadership of Defendant Zavaras, all death-row inmates, regardless of prison conduct, are housed at CSP. (TAC, ¶ 6; Answer, ¶ 6; Jones Dep., 96:14-21 (Declaration of Gail K. Johnson, Exhibit 1[1]).)

4. Pursuant to this policy, the CDOC sent Mr. Dunlap to CSP on May 22, 1996, with the expectation that Mr. Dunlap would remain at CSP as long as he was under a sentence of death. (TAC, ¶ 7; Answer, ¶ 7.)

5. Since February 12, 2004, with the exception of only a seven-day period of time in October 2006, an eight-day period of time in August 2007, and a seven-day period of time in September 2007, CDOC has incarcerated Plaintiff at CSP, where he has not been allowed outdoors. (Defendant's Responses to Plaintiff's Request for Admissions (Responses to RFAs), p. 2, Request 6 (Ex. 2).)

6. Since September 18, 2007, CDOC has continuously incarcerated Plaintiff at CSP, where he has not been allowed outdoors. (*Id.*, p. 2, Request 5 (Ex. 2).)

[1] All references hereafter to "Ex. __" are references to the Exhibits to the Declaration of Gail K. Johnson.

7. As the Executive Director of the CDOC, Defendant Zavaras is responsible for both the policy and the practice that has resulted in Mr. Dunlap being incarcerated at CSP without outdoor exercise for years at a time. All of Defendant Zavaras's acts and omissions alleged in the Third Amended Complaint have been and are being carried out under color of state law. (TAC, ¶ 4; Answer, ¶ 4.)

8. CSP primarily houses inmates who are unable to function at a less secure facility and aims to change inmate conduct through incentive-based behavior modification and cognitive programs. (Jones Dep., 92:10 – 93:8 (Ex. 3).)

9. CSP is a prison within the prison system of the CDOC. (Reid Dep., 37:17-20 (Ex. 4).)

10. The vast majority of CSP inmates are housed at CSP because they have engaged in some type of dangerous, violent, or disruptive behavior in a jail or prison setting. (Shoemaker Dep., 42:3 – 43:3 (Ex. 5).)

11. Due to Mr. Dunlap's death sentence, the CDOC will not allow him the opportunity to progress out of CSP, regardless of how good his behavior has been or for how long a period of time he has been behaving well. (Jones Dep., 96:14-21 (Ex. 1).)

12. Mr. Dunlap has not been charged with violating the CDOC's Code of Penal Discipline (COPD) since August 2002. (Responses to RFAs, p. 2, Response 11 (Ex. 2).)

13. CSP Warden Susan Jones believes that a disciplinary record of eight years free of any COPD charges—such as Mr. Dunlap's—is a pretty good record for an

administrative segregation inmate, and that there are only a few other CSP inmates whose disciplinary records are as good as that. (Jones Dep., 97:6-16 (Ex. 1).)

14. Former CSP Warden Larry Reid agrees that eight years at CSP without a COPD charge or conviction is a positive record for an inmate that shows that the inmate has demonstrated compliance with prison rules over an extended period of time. (Reid Dep., 104:6-14 (Ex. 6).)

15. CSP Warden Jones, who has served in that position since October 1, 2007, believes that Mr. Dunlap is not a disciplinary problem and that he is not a disruptive inmate. (Jones Dep., 99:5-17 (Ex. 1).)

16. During all times relevant to this action while Mr. Dunlap was incarcerated at CSP, he has been for the most part locked down in his cell 23 hours a day; the only opportunity for out-of-cell exercise that CDOC has provided Mr. Dunlap has been for up to one hour per day, five days a week, in a "day hall exercise room." (TAC, ¶ 14; Answer, ¶ 14; Reid Dep., 24:22 – 25:2 (Ex. 7).)

17. The "day hall exercise room" has a floor and a ceiling and is surrounded by walls on all sides. It has two rectangular, vertical recessed windows to the outside, each approximately 6 to 8 inches wide. There is also an opening below these vertical windows that is at least 20 inches wide and approximately 8-10 inches tall. The vertical windows and the opening are covered with a heavy-gauge metal screen but no glass. Mr. Dunlap has not been outside when he has been in the CSP "day hall exercise room." (TAC, ¶ 14; Answer, ¶ 14; Reid Dep., 18:7 – 21:15 (Ex. 8); Reid Dep. 157:9 – 158:3 (Ex. 9); Reid π's Exhibit 1 (Ex. 10).)

18. CSP is equipped with an outdoor exercise yard adjacent to the CSP gymnasium. (Jones Dep., 74:4-18 (Ex. 11).)

19. The outdoor exercise yard adjacent to the CSP gymnasium was originally designed to be used by prison inmates, and for a period of several years, some CSP inmates who had progressed to certain program levels with fewer restrictions were allowed to exercise in this outdoor exercise yard. (Reid Dep., 46:2 – 47:24 (Ex. 12).)

20. The CDOC has never allowed Mr. Dunlap to exercise in the outdoor exercise yard adjacent to the CSP gymnasium. (Jones Dep., 78:2-8 (Ex. 13).)

21. Since 2002 or 2003, the CDOC has not allowed any CSP inmates to exercise outside in the outdoor exercise yard adjacent to the CSP gymnasium. (Defendant Aristedes W. Zavaras's Responses to Plaintiff's First Set of Interrogatories (Responses to First Interrogatories), pp. 1-2, Interrogatory 1 (Ex. (14); Reid Dep., 58:19 – 59:13 (Ex. 15).)

22. Absent a change in CDOC policy or an injunction issued by this Court, Defendant will continue to incarcerate Mr. Dunlap at CSP, with exceptions only for brief trips to other detention facilities for medical or legal reasons, for as long as he remains on "death row," regardless of his prison conduct. (TAC, ¶ 18; Answer, ¶ 18.)

23. There is no CDOC policy stating that death-row inmates are not allowed to exercise outside; there is a policy that death-row inmates are to be housed at CSP, and the practice at CSP is not to allow its inmates to exercise outside. (Zavaras Dep., 7:7 - 20) (Ex. 16); Jones Dep., 174:22 – 175:17 (Ex. 17).)

24. Absent a change in CDOC practice or an injunction issued by this Court,

Defendant Zavaras will continue to prevent CSP inmates, including Mr. Dunlap, from exercising outside. (TAC, ¶ 19; Answer, ¶ 19.)

25. Defendant Zavaras is in charge of the CDOC and has the authority to change CDOC policy and practices, including the policy and practices that result in Mr. Dunlap not being allowed to exercise outside as long as he remains on death row. (Zavaras Dep., 13:20 – 17:14 (Ex. 18).)

26. Defendant Zavaras is aware that Mr. Dunlap has been on death row for more than ten years and that that tenure on death row is not atypical. (Zavaras Dep., 17:21 – 19:8 (Ex. 18).)

27. The only type of inmates who are housed at CSP by virtue of their sentence are inmates sentenced to death; all other CSP inmates are there because of their institutional behavior. (Zavaras Dep., 24:5-16 (Ex. 19).)

28. For the vast majority of CSP inmates, who are not on death row, there is an incentive-based system of behavior modification in place by which inmates are provided the opportunity to progress up through various levels of increasing privileges until they work their way back to a general population environment. (Zavaras Dep., 25:4 – 26:3 (Ex. 19).)

29. As a death-row inmate, Mr. Dunlap does not have the ability to earn his way out of CSP. (Zavaras Dep., 26:4-9 (Ex. 19).)

30. A group of five or six CDOC inmates sentenced to death and housed at CSP had their death sentences vacated for the legal reason that they had been sentenced by a three-judge panel instead of a jury; all five or six of these former death-

row inmates progressed up through the program levels at CSP and were then allowed to exercise outdoors at CSP. (Reid Dep., 75:3 -76:7 (Ex. 20).)

31. Defendant is aware that Plaintiff submitted written grievances to CDOC staff complaining about the long-term deprivation of outdoor exercise that he has been and is being subjected to at CSP and expressing his concerns that such deprivation is harmful to his mental health. (Responses to RFAs, p. 2, Request 7 (Ex. 2).)

32. Defendant Zavaras is aware that Mr. Dunlap submitted CDOC grievance forms requesting access to the outside exercise yard at CSP and stating in part:

> I'm not making this request to have an additional privilege; I'm making this request because if I'm going to live another five or more years in this environment, I'm going to need this remedy for my mental well-being and stability.

(Zavaras Dep., 32:21 – 37:13 (Ex. 21).)

33. Defendant is aware that CSP inmates other than Plaintiff have submitted written grievances complaining about the lack of outdoor exercise at CSP and expressing concerns about the risk of physical and psychological harms that may ensue from the limited exercise opportunities afforded to CSP inmates. (Responses to RFAs, p. 2, Request 8 (Ex. 2); Reid Dep., 141:13-19 (Ex. 22); Jacob Oakley grievance documents (Ex. 23) (Dunlap 001823-001830).

34. Defendant Zavaras and other CDOC officials were recently sued in a pro se prisoner complaint alleging physical and psychological harm, including depression, by inmates who alleged they were deprived of outdoor exercise for long periods of time. (Prisoner Complaint, Civil Action No. 1:10-cv-02725-BNB (Ex. 24).)

35. The CDOC's Administrative Regulation concerning "Offender Recreation" states:

> It is the policy of the Department of Corrections (DOC) to ensure all facilities provide a comprehensive recreational program that includes leisure-time activities, outdoor exercise, and recreation activities appropriate to the needs of the offenders and facility security designations. It is the intent of the DOC to encourage all offenders, including those with disabilities, to participate in activities that develop physical and mental well-being and constructive use of leisure time.

(AR 1000-01 (Dunlap 000027), p.1 (Ex. 25).)

36. The Standards For Adult Correctional Institutions promulgated by the American Correctional Association (ACA Standards) provide that segregation units should have outdoor exercise areas that meet certain minimum space requirements. (ACA Standards, Standard 4-4155 (4th ed., 2008 suppl.) (Ex. 26).)

37. Standard 4-4155 is a so-called "non-mandatory" ACA standard. In order to be accredited by the ACA, a correctional facility must comply with all of the "mandatory" standards and at least 90% of the so-called "non-mandatory" ACA standards. (Jones Dep., 182:2-8 (Ex. 27).)

38. CSP is not compliant with ACA Standard 4-4155, because CSP does not provide for outdoor exercise. (July 2010 CDOC "Self-Evaluation Report" prepared in connection with request for reaccreditation of CSP by the ACA, at p. 2 (Dunlap 000889) (Ex. 28); Shoemaker Dep., 67:1-18 (Ex. 29); Shoemaker Dep. 72:24 –73:25) (Ex. 30).

39. The ACA has explained that the CDOC sought "discretionary compliance" with ACA Standard 4-4155 due to "[a]n unwillingness to request funds from a parent agency or funding source" and "[a] preference to satisfy the standard/expected

practice's intent in an alternate fashion." (2008 ACA "Accreditation Report" for CSP, p. 16 (Dunlap 000827) (Ex. 31).)

40. The CDOC sought "discretionary compliance" with ACA Standard 4-4155 based in part on the following grounds:

> We are requesting discretionary compliance based on the lack of funding, lawsuits and grievances. Since CSP's opening in August of 1993, there has only been one lawsuit filed October 29, 1993 in which recreation was mentioned. The lawsuit was dismissed August 31, 1994. CSP has not had any other litigation concerning the recreation activities.

(*Id.*, p. 17 (Dunlap 000828).)

41. The American Correctional Association has also stated:

> Inmates in segregation should be provided with the opportunity to exercise in an area designated for that purpose, with opportunities to exercise outdoors, weather permitting, unless security or safety concerns dictate otherwise.

(ACA Standards, comment to Standard 4-4270 (4th ed. 2003) (Ex. 32).)

42. CSP is not in compliance with ACA Standard 4-4270 and the comment thereto. (Reid. Dep., 114:13 – 115:16 (Ex. 33).)

43. The ABA Criminal Justice Standards on the Treatment of Prisoners (adopted February 2010) (ABA Standards) provide in part:

> Each 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 the weather permits.

(ABA Standards, p. 14, Standard 23-3.6(b) (Ex. 34).)

44. The First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, adopted "Standard Minimum Rules for the Treatment of Prisoners" (UN Standard Minimum Rules), which were then approved

by the United Nations' Economic and Social Council by resolutions dated July 31, 1957 and May 13, 1977. (UN Standard Minimum Rules, p. 1 (Ex. 35).)

45. The UN Standard Minimum Rules states that these Rules "represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations." (UN Standard Minimum Rules (*Id.*, p. 1, ¶ 2.)

46. The UN Standard Minimum Rules provide:

> Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(*Id.*, p. 3, ¶ 21(1).)

47. There are no weather conditions in which the "day hall exercise room" is rendered inappropriate for use due to bad weather. (Reid Dep., 131:1-12, Ex. 36.)

48. On June 18, 2010, Defendant Zavaras stated, "Being accredited through the A.C.A. has precluded a lot of research into "The ABA Criminal Justice Standards on the Treatment of Prisoners" or "The Standard Minimum Rules for the Treatment of Prisoners." (Responses to Interrogatories, p. 4, Interrogatory 9 (Ex. 14).)

49. Human Rights and Prisons: Manual on Human Rights Training for Prison Officials, a publication of the Office of the United Nations High Commissioner for Human Rights (UN Human Rights Training Manual), states as an "Essential Principle" that:

> All prisoners shall have at least one hour's daily exercise in the open air if the weather permits.

(Ex. 37.)

50. The UN Human Rights Training Manual further states:

> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment believes that all prisoners, including those undergoing cellular confinement as punishment, should have at least one hour of exercise outside every day, where there is enough space to exert themselves physically.

(*Id.*)

51. Other than CSP, Defendant is not aware of any correctional facility anywhere in the United States that categorically denies its inmates the opportunity for outdoor exercise. (Responses to Interrogatories, p. 3, Interrogatory 8 (Ex. 14).)

52. Defendant asserts that there are two legitimate penological justifications for denying Mr. Dunlap the opportunity to exercise outside for years at a time while he is sentenced to death: (i) Defendant believes that Mr. Dunlap is "the highest escape risk" as a result of his having been sentenced to death; and (ii) Defendant believes that Mr. Dunlap "has the potential to be a safety risk." (Responses to Interrogatories, pp. 2-3, Interrogatory 5 (Ex. 14).)

53. The Bureau of Prisons' Administrative Maximum facility in Florence (ADX), federal "supermax," allows its inmates outside for regular outdoor exercise. (Reid Dep., 82:14-23 (Ex. 38); Martin Dep., 86:11-17 (Ex. 39); Martin Dep., 123:1-20 (Ex. 40).)

54. The CDOC allows inmates who are confined at CDOC facilities other than CSP and CSP II to regularly engage in outdoor exercise. Some CDOC inmates who are serving sentences for criminal convictions for one or more convictions for escape are confined in facilities that allow them to regularly engage in outdoor exercise. There are at least fifteen CDOC facilities confining CDOC inmates who are serving sentences

for one or more criminal convictions for escape that allow such inmates to regularly engage in outdoor exercise. (Responses to RFAs, p. 1, Requests 1, 2, & 3 (Ex. 2).)

55. Since May 1996, the CDOC has afforded the opportunity for regular outdoor exercise to more than 5,000 inmates who—unlike Mr. Dunlap—have been criminally convicted of escape or attempted escape. (Defendant Aristedes W. Zavaras Supplemental Responses to Plaintiff's First Set of Interrogatories, p. 2, Interrogatory 7 (referring to Dunlap 001012 – 001541) (Ex. 41).)

56. Since May 1996, the CDOC has afforded the opportunity for regular outdoor exercise to more than 2,000 inmates who—unlike Mr. Dunlap—have been convicted under the COPD for "escape with force," "escape without force," and other escape-related disciplinary offenses. (*Id.* (referring to Dunlap 000940 – 001011).)

57. On at least six occasions during August and September 2007, the CDOC allowed Mr. Dunlap to exercise outside at the Denver Reception and Diagnostic Center (DRDC) infirmary then temporarily located at the Denver Women's Correctional Center (Denver Women's) due to construction. (Fisher Dep., 65:9 – 66:21; 67:18 – 68:14; 70:4-23; 71:1-18; 71:19 – 72:6; 72:7 – 73:6 (Ex. 42).)

58. During these six occasions in August-September 2007 when the CDOC allowed Mr. Dunlap to exercise outside, Mr. Dunlap was fully cooperative and compliant with CDOC staff, and there were no incidents. (Fisher Dep., 62:4-13 (Ex. 42).)

59. Captain Joe Fisher was the shift commander at DRDC during the time period in August-September 2007 when Mr. Dunlap was allowed outdoor recreation. There was nothing about Mr. Dunlap's use of the outdoor recreation yard at Denver

Women's that caused Captain Fisher concerns about institutional safety. (Fisher Dep., 73:7-12 (Ex. 42).)

60. Former CSP Warden Larry Reid has no concerns about the fact that Mr. Dunlap was allowed to exercise outside at DRDC/Denver Women's, because he believes they could do that safely. (Reid Dep. 139:12-23 (Ex. 43).)

61. Defendant is unaware of any empirical research that would support the proposition that an inmate sentenced to death poses a greater risk of escape by reason of the inmate's death sentence than does either: (i) an inmate who is serving a sentence for one or more criminal convictions for escape and/or attempted escape; or (ii) an inmate who has been charged with and/or convicted of escape and/or attempted escape under the COPD. (Responses to RFAs, p. 4, Requests 21 & 22 (Ex. 2).)

62. The CDOC is capable of allowing an inmate who poses an "escape risk" to regularly exercise outdoors in an outside exercise yard while still preventing that inmate from escaping. (Responses to RFAs, pp. 4-5, Request 23 (Ex. 2).)

63. In the history of CSP, no inmate has ever escaped from the outdoor exercise yard at CSP, nor has any inmate ever climbed up over the walls of the outside exercise yard at CSP. (Responses to RFAs, p. 5, Request 25) (Ex. 2); Jones Dep., 78:13-16; 79:15-17 (Ex. 13); Reid Dep., 47:20 – 48:7 (Ex. 12).)

64. No CDOC inmate has ever escaped from a CDOC facility while under a sentence of death. (Reid Dep., 90:24 – 91:2 (Ex. 44).)

65. The CDOC allows regular outdoor exercise to hundreds of inmates who "have the potential to be a safety risk." (Responses to RFAs, p. 2, Request 10 (Ex. 2).)

66. The CDOC allows regular outdoor exercise to more than 20,000 inmates who "have the potential to be a safety risk." (Reid Dep., 149:16-20 (Ex. 45).)

67. There are at least dozens of inmates who have been criminally convicted of murder who are not housed at CSP and to whom the CDOC affords the opportunity for regular outdoor exercise. (Jones Dep., 100:16 – 101:15 (Ex. 1).)

68. The CDOC is capable of allowing an inmate who has "the potential to be a safety risk" to regularly exercise outdoors in an outside exercise yard while maintaining the safety of CDOC staff and inmates. (Responses to RFAs, p. 5, Request 24 (Ex. 2).)

69. Plaintiff's Expert Steve J. Martin has served as a corrections expert for, *inter alia*, the Civil Rights Division of the U.S. Department of Justice, federal courts, and state and local governmental entities. Mr. Martin is qualified to serve as a correctional expert on the types of correctional matters at issue in this case. (Declaration of Steve J. Martin (Martin Decl.), Report of Plaintiff's Expert Steve J. Martin (Martin Report), pp. 2-5; *Curriculum Vitae*; Reid Dep., 109:18-22.)

70. Mr. Martin has opined:

A. CDOC and CSP's policy and practice of denying outdoor exercise to the plaintiff for years at a time is unusual and represents a stark deviation from the standard practices as applied to condemned prisoners and supermax prisoners.

B. The blanket denial of outdoor exercise for years at a time during the plaintiff's incarceration, which constitutes a serious deprivation of a basic life necessity, is without identifiable penological justification.

(Martin Decl.; Martin Report, p. 7.)

71. Mr. Martin has also explained that he has inspected sixteen federal and state prison systems that house condemned inmates, including those in Texas,

California, Oklahoma, and Ohio, and "not one of them imposed a blanket prohibition on inmates for outdoor exercise." (Martin Decl., Martin Report, pp. 8-9.)

72. Mr. Martin has further opined that he has inspected no less than eight supermax prisons, including ADX, which "house inmates who often represent more immediately dangerous management risks than condemned prisoners." "Every one of them, at the time of my inspection, provided some limited outdoor exercise for inmates." (Martin Decl., Martin Report, p. 9.)

73. Mr. Martin's report concludes:

> In summary, the blanket denial of outdoor exercise for condemned prisoners at the CSP violates all correctional standards and practices with which I am familiar. Moreover, the fact that all the many death row and supermax facilities I have observed during my career provide regular outdoor exercise to their prisoners demonstrates that there is no valid penological basis for depriving prisoners of outdoor exercise for years at a time.

(Martin Decl., Martin Report, p. 9.)

74. Additionally, Mr. Martin has opined that "without question" it is possible for a correctional facility to violate an inmate's constitutional rights even though it is accredited by the ACA. (Martin Dep., 125:10-23 (Ex. 40).)

LEGAL ARGUMENT

Summary judgment is proper when the record before the Court "show[s] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if it could reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 248 (1986). A dispute is "genuine" if the outcome could be decided in favor of either party. *Farthing v. City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994).

"The Eighth Amendment, which applies to the States through the Due Process Clause of the Fourteenth Amendment, prohibits the infliction of 'cruel and unusual punishments' on those convicted of crimes." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (citation omitted). "Punishments incompatible with the evolving standards of decency that mark the progress of a maturing society or involv[ing] the unnecessary and wanton infliction of pain are repugnant to the Eighth Amendment." *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 809 (10th Cir. 1999). "Underlying the [E]ighth [A]mendment is a fundamental premise that prisoners are not to be treated as less than human beings." *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (citation omitted).

"An inmate making an Eight Amendment claim for constitutionally inadequate conditions of confinement must allege and prove an objective component and subjective component associated with the deficiency." *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001). "The objective component requires conditions sufficiently serious so as to 'deprive inmates of the minimal civilized measure of life's necessities.'" *Id.*, citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "Alternatively, a condition must be sufficiently serious so as [to] constitute a substantial risk of serious harm." *Shannon*, 257 F.3d at 1168. "The subjective component requires that a defendant prison official have a culpable state of mind, that he or she acts or fails to act with deliberate indifference to inmate health and safety." *Id.* In this regard, it is worth noting that an

official-capacity case against a government entity is "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The objective prong is easily met here, under either of two avenues. First, the resounding consensus among correctional standards demonstrates that regular outdoor exercise is a basic human need or life necessity—especially for inmates who are otherwise segregated and locked down in their cells 23 hours a day. (Plaintiff's Statement of Undisputed Material Facts (PSOF) ¶¶ 35-50); *Spain v. Procunier*, 600 F.2d at 199 ("Several factors combined to make outdoor exercise a necessity.") (relying on the fact that inmates were in "continuous segregation, spending virtually 24 hours every day in their cells with only meager out-of-cell movements and corridor exercise."); *Sinclair v. Henderson*, 331 F. Supp. 1123, 1130 (E.D. La. 1971) ("Confinement for long periods of time without the opportunity for regular outdoor exercise does, as a matter of law, constitute cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution."); *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y. 1974) (same). This is supported by the unrebutted opinions of corrections expert Steve J. Martin. (PSOF ¶¶ 69-74.) Indeed, Mr. Martin's experience and opinions demonstrate that the pain inflicted on Mr. Dunlap by depriving him of outdoor exercise is an unconstitutional punishment because it is wholly unnecessary, given that the federal supermax and death row as well as the much larger death rows of numerous states all afford outdoor exercise to their inmates. (PSOF ¶¶ 71-73); *Perkins*, 165 F.3d at 809. The deprivation of this basic human need in its entirety for more than three years, and nearly entirely for more than fourteen years, is an objectively serious deprivation. *Fogle*

v. Pierson, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (district court erred by dismissing Eighth Amendment claim alleging three-year deprivation of outdoor exercise).

Second, in the alternative, this Court may also rule that the objective prong is satisfied because the long-term and continuing deprivation of regular outdoor exercise shown here constitutes, as a matter of law under Circuit precedent, a sufficiently serious risk of harm to Mr. Dunlap's health and safety. The Tenth Circuit has repeatedly recognized that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates." *Perkins*, 165 F.3d at 810; *Fogle*, 435 F.3d at 1260; *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987); *see also Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) ("Deprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation."). Indeed, the Tenth Circuit has also repeatedly noted that "even a convicted murderer who had murdered another inmate and represented a major security risk was entitled to outdoor exercise." *Perkins*, 165 F.3d at 810 (district court erred in holding that allegations of extended deprivation of outdoor exercise showed no excessive risk to inmate's well-being); *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994); *Bailey*, 828 F.2d at 653. Here, it is undisputed that Defendant and the CDOC have deprived Mr. Dunlap of the outdoor exercise continuously for more than three years. (PSOF ¶ 6.) As this Court has held, an allegation of a 90-day denial of outdoor exercise states "a sufficiently serious objective deprivation." *Kettering v. Chaves*, No. 07-cv-01575-CMA-KLM, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008).

The subjective prong is also met here. CDOC officials have received grievances from CSP inmates complaining about the lack of outdoor exercise, and Defendant is aware of Mr. Dunlap's grievance explaining that if he is going to continue to be housed at CSP for a period of additional years, he needs outdoor exercise for his mental well being and stability. (PSOF ¶¶ 31-34); *see also Kettering*, 2008 WL 4877005, at *12 (subjective prong not met where no allegation that plaintiff complained to defendant or filed grievances putting defendant on notice regarding lack of outdoor exercise).

CONCLUSION

Mr. Dunlap respectfully asks this Court to grant this Motion for Summary Judgment and issue: (i) an injunction requiring Defendant to provide Mr. Dunlap with regular outdoor exercise; and (ii) a declaration that Defendant violated Mr. Dunlap's Eight Amendment right to be free from cruel and unusual punishments.

Respectfully submitted,

s/ Gail K. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of November, 2010, I served the foregoing **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** via the CM/ECF system, as indicated below:

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