IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

NATHAN JERARD DUNLAP

Plaintiff,

v.

TOM CLEMENTS, in his official capacity as Executive Director of the Colorado Department of Corrections,

Defendant.

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Nathan Dunlap respectfully submits this Reply in Support of Plaintiff's Motion for Summary Judgment (Doc. 75).

REPLY CONCERNING UNDISPUTED FACTS

2. At the time Plaintiff filed this official-capacity suit and when Plaintiff filed his Motion for Summary Judgment (Doc. 75), the Executive Director of the Colorado Department of Corrections (CDOC) was Aristedes W. Zavaras. Plaintiff does not dispute that Mr. Zavaras has been replaced by Tom Clements as the Executive Director of the CDOC. Indeed, Plaintiff noted in his Response to Defendant's Motion for Summary Judgment that Mr. Clements is automatically substituted in as the official-capacity Defendant in this action pursuant to Rule 25(d) of the Federal Rules of Civil Procedure. (Doc. 84 at p.1 n.1.)

3. Defendant explains that by means of a recent Executive Directive of then-Executive Director Zavaras, the CDOC implemented a policy change providing that male inmates who have received a death sentence will be assigned either to the Colorado State Penitentiary (CSP) **or** to Sterling Correctional Facility (SCF). (*See* Exhibit A to Response to Plaintiff's Motion for Summary Judgment (Doc. 83).) Plaintiff does not dispute the fact of this policy change. Plaintiff's counsel would simply note that although Exhibit A is dated January 15, 2011—more than two weeks before the parties were scheduled to file responses to the cross motions for summary judgment in this case—Defendant failed to provide a copy of Exhibit A to Plaintiff until Defendant filed its Response to Plaintiff's Motion for Summary Judgment (Doc. 83) with Exhibit A attached on February 2, 2011.

11. Defendant makes an aside comment that to the present time, Mr. Dunlap has been house at CSP "with the exception of two periods of time in which [Mr.] Dunlap was temporarily housed at a different facility." In fact, over a span of at least a decade from 1996 to 2006, the CDOC has housed Mr. Dunlap at a CDOC facility other than CSP for brief periods of time on at least ten occasions for medical or legal reasons; anytime Mr. Dunlap was at another CDOC facility for more than a couple of days, he was allowed to exercise outside, and he engaged in such outside exercise without incident. (*See* Declaration of Nathan Jerard Dunlap in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 84-1) at pp. 5-7, ¶¶ 11-27.)

Plaintiff's 69 / Defendant's 70.[1] At paragraph 70 of Defendant's Response to Plaintiff's Motion for Summary Judgment (Doc. 83), Defendant asserts (apparently in response to paragraph 69 of Plaintiff's Motion (Doc. 75)) that "Mr. Martin is not qualified as an expert nor is he qualified to testify as to what constitutes a deprivation of a basic life necessity." Plaintiff's Motion explains that it is undisputed that "Mr. Martin is qualified to serve as a correctional expert on the types of correctional matters at issue in this case." (Doc. 75 at p. 15, ¶ 69.) Defendant does not dispute that Mr. 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. (Doc. 75-2, pp. 2-5.) Nor does Defendant dispute that Defendant's own designated expert, Larry Reid (former warden of CSP), agrees that Mr. Martin's professional experience renders Mr. Martin qualified to offer expert opinions on the types of correctional issues involved in this case. (Declaration of Gail K. Johnson in support of Plaintiff's Motion for Summary Judgment (Doc. 75-1), Exhibit 46 (Reid Dep., 109:18-22.) In support of Defendant's apparent contention that Mr. Martin is not qualified to be a corrections expert in this case, Defendant points only to portions of the transcript of Mr. Martin's deposition in which Mr. Martin explains that he lacks *medical* training. (*See* Response to Plaintiff's Motion for Summary Judgment at p. 5, ¶ 70, and Exhibit B.) The matter of what are considered basic life necessities that must be provided to inmates in a correctional setting is, however, a subject that is appropriate for expert opinion by a *correctional* expert with substantial *correctional* experience, such as Mr. Martin.

[1] Defendant's paragraph numbering appears to mistakenly jump ahead one number.

ARGUMENT

A. Defendant's Argument That The Undisputed Facts Here Do Not Meet The Objective Prong Of The Eighth Amendment Ignores Circuit Precedent And Misconstrues And Overstates Other Case Law.

Defendant does not dispute that the objective component of an Eighth Amendment claim may be met by either of two avenues: (i) conditions sufficiently serious so as to 'deprive inmates of the minimal civilized measure of life's necessities.'" *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001), quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); or alternatively (ii) conditions "sufficiently serious so as [to] constitute a substantial risk of serious harm." *Shannon*, 257 F.3d at 1168.

(i) Deprivation of a Basic Life Necessity.

Plaintiff's Motion summarizes the resounding consensus within correctional standards and practices as well as among human rights and legal organizations that correctional institutions should provide inmates in administrative segregation or supermax conditions with regular exercise *outside*. Defendant admits the existence of all of these standards. Additionally, Defendant admits that the conditions under which Plaintiff has been incarcerated for years at a time violate these standards, because Plaintiff has not been allowed regular outdoor exercise. Relying upon two footnotes from Supreme Court opinions, Defendant argues only that "any alleged violation of correctional standards or his expert's opinion does not give rise to a cause of action under section 1983." (Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 8.) Defendant seriously misconstrues the Supreme Court jurisprudence in this area as it applies to Plaintiff's argument, however.

The Supreme Court has long recognized that the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (Eighth Amendment prohibits the death penalty for the crime of child rape). "Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule." *Id.* at 420 (concluding that there is "a national consensus against capital punishment for the crime of child rape").

As the Supreme Court held last year, a court's analysis of a claimed violation of the Eighth Amendment "begins with objective indicia of national consensus." *Graham v. Florida*, 130 S.Ct. 2011, 2023 (2010) (holding that the Eighth Amendment prohibits the imposition of a sentence of life without parole on a defendant who committed a non-homicide offense while a juvenile). To determine whether a national consensus exists, the *Graham* Court examined not only legislation but also "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute." *Id.* Here, Defendant admits that "[o]ther 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." (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 12, ¶ 51; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 5, ¶ 51.) Additionally, Defendant has not rebutted Mr. Martin's opinion, based on having personally toured numerous supermax and death row facilities, that Colorado's practice of denying Plaintiff outdoor exercise for years at a time "is unusual and represents a stark deviation from the standard practices as applied to condemned prisoners and

supermax prisoners." (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 15, ¶ 70.A.) The severe deprivation that Plaintiff challenges here, like the sentencing practice struck down by *Graham*, "is exceedingly rare." 130 S. Ct. at 2026. "And 'it is fair to say that a national consensus has developed against it.'" *Id.*, quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). Although such community consensus is not dispositive of whether an Eighth Amendment violation has occurred, it is "entitled to great weight." *Graham*, 130 S. Ct. at 2026, quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008).

The Supreme Court has also relied on international practices and norms in recent years to expand the scope of what is prohibited by the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.") (relying in part upon the United Nation Convention on the Rights of the Child). Again, Defendant admits that a number of international human rights documents provide that prisoners should be afforded at least one hour of outdoor exercise per day. (Plaintiff's Motion for Summary Judgment (Doc. 75) at pp. 10-12, ¶¶ 44-50; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at pp. 4-5, ¶¶ 44-51.) Similarly, in *Atkins*, the Supreme Court has support for its decision in the positions taken by mainstream professional organizations such as the American Psychological Association and the American Association of Mental Retardation. 536 U.S. at 316 n.21. Here, by analogy, it is entirely appropriate for this

Court to take into account the fact that the American Bar Association issued standards on the treatment of prisoners last year providing 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 the weather permits." (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 10, ¶ 43; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 4, ¶ 43.)

The Supreme Court also recently reiterated that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028. Here again, Mr. Martin's unrebutted opinion is highly relevant: "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." (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 15, ¶ 70.B.) The question of whether Mr. Martin's professional experience qualifies him to offer the expert opinions he has offered in this case is, of course, a legal determination to be made by the Court—not a disputed factual issue that could preclude a grant of summary judgment to Plaintiff.

The footnotes from two thirty-year old Supreme Court cases cited by Defendant do not contradict the weight of this recent authority. In the footnote from *Bell v. Wolfish*, the Court's primary ruling was that the lower court decisions and correctional standards relied on by plaintiff were factually distinguishable because they concerned facilities where inmates "were locked during most of the day," whereas the facility at issue in *Bell* was a short-term (60-day) detainee facility where inmates were free to move around a

common room except for the 7-8 hours when they were in their cells sleeping. 441 U.S. 520, 453 n.27. Indeed, the *Bell* Court expressly recognized that the recommendations of groups such as the American Correctional Association, although not sufficient in isolation to establish constitutional minimal criteria, "may be instructive in certain cases." *Id.* Here, Plaintiff relies upon such standards (and Defendant's willful lack of compliance with them), not in isolation, but rather in conjunction with abundant other undisputed evidence of a national and indeed international consensus requiring regular outdoor exercise for prison inmates, including those in segregation.

Likewise, in *Rhodes v. Chapman*, 452 U.S. 337, 350 n.13 (1981), the Court noted that expert opinions "may be helpful and relevant with respect to some questions" but stated that "generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as 'the public attitude toward a given sanction.'" Again, Plaintiff relies not only upon Mr. Martin's expert opinions but also on the resounding consensus in applicable national and international correctional standards requiring regular outdoor exercise for prisoners as well as the rarity of the lengthy deprivation at issue in this case, neither of which are factually disputed or rebutted by Defendant.

Defendant ignores recent Tenth Circuit precedent holding that a prison inmate stated a claim for violation of the Eighth Amendment by alleging a three-year deprivation of outdoor exercise. *Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2008); *see also Kettering v. Chaves*, No. 07-cv-01575-CMA-KLM, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008) (ruling that an allegation of a 90-day denial of outdoor

exercise states "a sufficiently serious objective deprivation" for purposes of the Eighth Amendment). And Defendant offers no response to the case law from other jurisdictions holding that regular outdoor exercise constitutes a basic life necessity for purposes of the Eighth Amendment. *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) ("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).

(ii) Substantial Risk of Harm to Plaintiff's Health and Well Being.

As set forth in Plaintiff's Motion, 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 v. Kansas Dep't of Corrections*, 165 F.3d 803, 810 (10th Cir. 1999); *Fogle*, 435 F.3d at 1260 (10th Cir. 2006) (same); *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (same); *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), *abrogated on other grounds by Lewis v. Casey,* 518 U.S. 343 (1996); *Bailey*, 828 F.2d at 653. Ignoring this large and consistent body of published Tenth Circuit case law, Defendant instead relies upon two cursory unpublished decisions attached to his Response. (Doc. 83-3; Doc. 83-6.) These opinions were issued a decade before the Federal Rules of Appellate Procedure were amended to prohibit the citation of unpublished opinions. Fed. R. App. P. 32.1. Even under the contemporary Circuit rule applicable here, unpublished decisions are not precedential, but may be cited only for their persuasive value. 10th Cir. R. 32.1(A). For the reasons set forth below, however, these opinions lack any persuasive value,

Pastorius v. Romer, 97 F.3d 1465, 1996 WL 528359 (10th Cir. Sept. 17, 1996) (unpublished), simply does not illuminate the issues in this case at all, since the cursory discussion of the plaintiff's claim in this unpublished opinion does not reveal how long the plaintiff suffered the claimed deprivation nor whether he even claimed that he was deprived of outdoor exercise.

James v. Wiley, 125 F.3d 862, 1997 WL 606985 (10th Cir. Oct. 2, 1997) (unpublished), is likewise unavailing; it rests on a misreading of the Tenth Circuit's (published) decision in *Housley*. *James* cites *Housley* for the proposition that the Tenth Circuit has "held that a prison exercise cell in an administrative segregation unit meets the minimum standards for exposure to fresh air and exercise." 1997 WL 606985, at *2,

citing *Housley*, 41 F.3d at 599; *see also* Defendant's Response at p. 10. In fact, *Housley* held no such thing. The phrase in *Housley* referring to "exposure to exercise and fresh air" occurs as the *Housley* opinion recounts the holding of *Bailey*—which concerned "an outdoor exercise facility" that had been newly constructed—not "a prison exercise cell," as the *James* opinion incorrectly states. *Housley*, 41 F.3d at 599; *Bailey*, 828 F.2d at 653. The nature of the exercise deprivation at issue in *Housley* was a claim that the prisoner in that case had "received only thirty minutes of *out-of-cell* exercise in three months." 41 F.3d at 599. The *Housley* Court held that this allegation stated a claim for relief under 42 U.S.C. § 1983 for violation of the Eighth Amendment. 41 F.3d at 598-99. Nothing about *Housley* supports Defendant's position. To the contrary, as stated previously, the *Housley* Court reiterates the principle that "some form of regular outdoor is extremely important to the psychological and physical well being of inmates." *Id.* at 599, quoting *Bailey*, 828 F.2d at 653.

In any event, the *James* case itself is factually distinguishable concerning the duration of the deprivation at issue; the plaintiff in *James* complained of a lack of outdoor exercise while in administrative segregation that lasted for only forty days. 1997 WL 606985, at **1-2. Here, by contrast, it is undisputed that the CDOC has incarcerated Plaintiff nearly continuously without access to outdoor exercise since he was sentenced to death in May 1996, and continuously now without access to outdoor exercise for more than three years. (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 3, ¶¶ 5-6; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 2, ¶¶ 5-6.)

Defendant's misplaced reliance on *James* is perhaps unsurprising, because there is no other authority for Defendant to rely upon. Notably, Defendant is unable to cite *any* case law from *any* jurisdiction holding that limiting an inmate to exercising in the type of interior exercise room afforded to Plaintiff at CSP for a period of years is adequate to meet the minimum requirements of the Eighth Amendment for outdoor exercise.

To the contrary, courts that have addressed such purportedly ventilated exercise rooms have found them to be constitutionally inadequate. For example, in *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), the Ninth Circuit addressed a situation in which the plaintiff-inmate was allowed to exercise only in an exercise space that had a roof, three concrete walls, and a fourth wall of perforated steel admitting sunlight (and presumably some fresh air) through only the top third. The Ninth Circuit reversed the district court's grant of summary judgment for defendant on plaintiff's claim that a six-month period of being limited to exercising in such a confined space violated the Eighth Amendment. *Id.* at 1088, 1090. Similarly, in *Frazier v. Ward*, 426 F. Supp. 1354, 1368-69 (N.D.N.Y 1977), the court addressed trial evidence that plaintiff had been allowed to exercise in "the back door area of the cell . . . with air able to blow in from the topside to a slight extent." Finding that this "is by no means outdoor exercise because there is no grass, no dirt, no rain," the *Frazier* Court ruled that this "prolonged deprivation for at least one hour per day of outdoor exercise" was an "unreasonable and inhumane condition[] of confinement" that constituted "cruel and unusual punishment violative of the Eighth Amendment." *Id.* at 1369; *cf. Mathis v. Henderson*, 437 N.Y.S.2d

34, 35 (Sup. Ct. 1980) (providing inmate opportunity to exercise in 20' by 40' by 15' exercise rooms that contained "windows in the walls . . ., some which open so as to allow in fresh air" violated New York correctional rule requiring exercise "out of doors").

Defendant argues that the denial of outdoor exercise does not constitute a "per se" Eighth Amendment violation. (Response at p. 9.) While this is a correct statement of the law, this principle simply means that the nature and extent of the deprivation matters in determining whether the deprivation rises to the level of a constitutional violation under a particular set of facts. Deprivation of outdoor exercise for certain limited periods of time have been held not to violate the Eighth Amendment. *See, e.g., Ajaj v. United States*, 293 Fed. App'x 575 (10th Cir. 2008) (one-year deprivation). But the Tenth Circuit has held that the deprivation of all outdoor exercise for three years—less than the length of the deprivation suffered by Plaintiff in this case—is sufficiently serious to meet the objective prong of an Eighth Amendment claim. *Fogle*, 435 F.3d at 1259-60.

Defendant's argument that Mr. Martin "is not qualified as an expert to provide admissible evidence as to whether [Mr.] Dunlap is physically or psychologically being harmed as a result of the denial of outdoor exercise" (Response at p. 8) is beside the point. Mr. Martin does not purport to offer any such opinion, nor is such an expert opinion necessary for Plaintiff to demonstrate his entitlement to summary judgment. A prisoner seeking injunctive relief—such as Plaintiff—does not have to wait until a risk ripens into an injury "before obtaining court-ordered correction of objectively inhumane prison conditions." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

B. Plaintiff Has Demonstrated That Defendant Is Acting With Deliberate Indifference In Depriving Him of A Basic Human Need For Years At A Time.

The subjective prong of an Eighth Amendment claim "requires that a defendant prison official . . . acts or fails to act with deliberate indifference to inmate health and safety." *Shannon v. Graves*, 257 F.3d 1164, 1168 (10th Cir. 2001). "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. 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).

Here, Defendant admits that he and the CDOC are 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. (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 8, ¶ 32; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 3, ¶ 32.) Additionally, Defendant admits his awareness 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 ensuing from the limited exercise opportunities afforded to CSP inmates. (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 8, ¶ 33; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 3, ¶ 33.) *Cf*. *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).

Moreover, Defendant admits that 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. (Plaintiff's Motion for Summary Judgment (Doc. 75) at p. 8, ¶ 34; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 3, ¶ 34.)

Additionally, Defendant admits that CSP is not in compliance with Standards 4-4155 and 4-4270 of the Standards For Adult Correctional Institutions promulgated by the American Correctional Association (ACA Standards) concerning the provision of outdoor exercise to inmates in segregation. (Plaintiff's Motion for Summary Judgment (Doc. 75) at pp. 9-10, ¶¶ 36-42; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at pp. 3-4, ¶¶ 36-43.) It is similarly undisputed 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." (Plaintiff's Motion for Summary Judgment (Doc. 75) at pp. 9-10, ¶¶ 39-40; Response to Plaintiff's Motion for Summary Judgment (Doc. 83) at p. 4, ¶¶ 39-41.) This request for "discrectionary compliance" demonstrates the CDOC's deliberate indifference or conscious disregard for the long-term deprivation of outdoor exercise that Plaintiff has suffered at CSP. The request demonstrates that the CDOC is fully aware of the problem, but has not sought

to remedy the problem because it has not yet been forced to do so by the courts. This is the very type of "obduracy" referenced in Defendant's Response. (Doc. 83, p. 12.)

The obviousness of the risk to Plaintiff arising from the deprivation suffered here, *Farmer*, 511 U.S. at 842, is demonstrated by the legal principle oft-repeated by the Tenth Circuit 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*, 828 F.2d at 653.

Moreover, Defendant's discussion of the subjective component ignores entirely that Plaintiff may establish an Eighth Amendment violation not only by demonstrating a substantial risk to his health and safety but, in the alternative, by demonstrating conditions constituting a deprivation of a basic human need, one of life's basic necessities. The undisputed facts demonstrate that the CDOC has acted with deliberate indifference in depriving Plaintiff of the basic human necessity of outdoor exercise for years at a time.

CONCLUSION

For all the reasons stated above, in Plaintiff's Motion for Summary Judgment (Doc. 75), and in Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 84), Plaintiff Nathan Dunlap respectfully reiterates his request that this Court grant Plaintiff's Motion for Summary Judgment (Doc. 75).

Dated this 16th day of February 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2011, I served the foregoing **REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** via the CM/ECF system, as indicated below:

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