IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-3399-WJM-KMT

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

Plaintiff,

v.

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

Defendants.

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Ryan Decoteau, Anthony Gomez, and Dominic Duran hereby move for certification of an injunctive-only class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Named Plaintiffs are all inmates in administrative segregation ("Ad. Seg.") at the Colorado State Penitentiary ("CSP") who, by virtue of this status, are denied outdoor exercise. They move for certification of a class of similarly-situated inmates and seek injunctive relief in the form of an order requiring Defendants to provide regular outdoor exercise to all class members.

Plaintiffs are filing this case as a class action because a court in this district has already held that the lack of outdoor exercise at CSP violates the Eighth Amendment, *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1142 (D. Colo. 2012), but the Colorado Department of Corrections ("CDOC") -- rather than remedying this violation -- simply moved Mr. Anderson to a different facility. *Id.*, No. 10-cv-1005-RBJ-KMT, ECF 118 ¶ 3 (D. Colo. Oct. 23, 2012). A

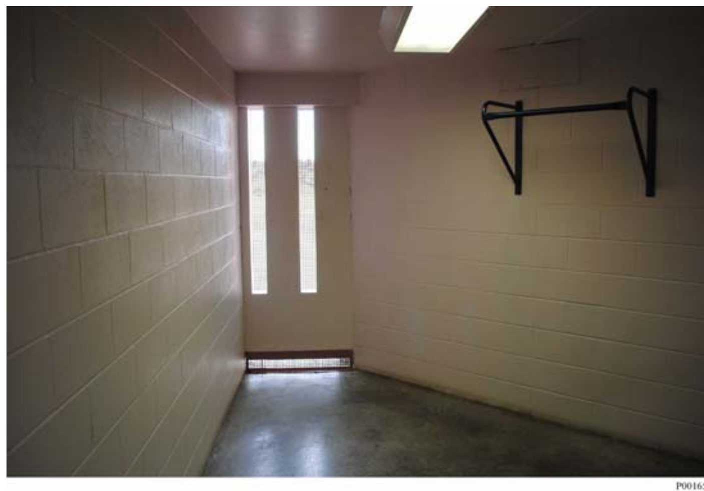
second inmate, whose claim is still pending, was also moved after he filed a complaint challenging the lack of outdoor exercise. *Oakley v. Estate of Tom Clements*, 2013 WL 4229490, at *2 (D. Colo. Aug. 15, 2013). It is apparent that only through a class action can Plaintiffs ensure that CDOC will remedy the Eighth Amendment violation for all Ad. Seg. inmates at CSP.

Plaintiffs are requesting class certification at this early stage of the litigation to ensure that Defendants do not attempt to thwart a facility-wide injunction by continuing the practice of moving out of CSP inmates who challenge the lack of outdoor exercise. *See, e.g., Damasco v. Clearwire Corp.*, 662 F.3d 891, 896 (7th Cir. 2011) (noting that class action plaintiffs can prevent mootness by moving to certify the class at the same time they file their complaint, as "[t]he pendency of that motion protects a putative class from attempts to buy off the named plaintiffs."); *see also* Fed. R. Civ. P. 23(c)(1)(A) ("At an early practicable time after a person sues . . . as a class representative, the court must determine by order whether to certify the action as a class action.")

BACKGROUND

The Colorado State Penitentiary is located in Cañon City, Colorado. It houses over 700 inmates, at least 500 of whom are in Ad. Seg. *See* Colorado Department of Corrections Monthly Population and Capacity Report as of November 30, 2013 at 1-2 (Robertson Decl. Ex. 1). Essentially solitary confinement, Ad. Seg. is Colorado's most restrictive inmate status. Colorado Dep't of Cor., Administrative Regulation 650-03, ¶ III(A) (Robertson Decl. Ex. 2). Inmates in Ad. Seg. are confined to their cells for at least 23 hours per day; for one hour per day five days per week, they are permitted to exercise in a different cell on the same tier that is entirely indoors. *Anderson v. Colorado*, Trial Testimony of Susan Tilton Jones ("Jones Test."), May 3,

2012 at 11:12-20; 72:18 - 73:13; 82:24 - 83:1.[1] The exercise cell is approximately 90 square feet in size and is empty except for a chin-up bar affixed to one wall. Jones Test. May 3, 2012 at 81:19-22; *id.* May 4, 2012 at 142:4 - 143:14; *Anderson* Trial, Plaintiff's Exhibit 253 (Robertson Decl. Ex. 4).



It has a window at one end that is open to the elements, but that is covered with a metal grate with holes the size of a quarter. Jones Test., May 3, 2012 at 74:3-16; 75:19-25.

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[1] All excerpts from *Anderson* trial testimony are attached as Exhibit 3 to the Robertson Decl.

(The two photographs above were taken during the *Anderson* case and admitted, by CDOC, to show the exercise area at CSP. *See* Robertson Decl. Ex. 5.)

All of the exercise cells at CSP are materially the same; because of the design of the facility, some are the mirror image of others. Jones Test., May 3, 2012 at 80:3 - 82:8. Inmates only go outdoors if they go to the hospital or otherwise leave the facility. *See Anderson v. Colorado*, Trial Testimony of Larry Ernest Reid, May 7, 2012 at 66:12-16.

Named Plaintiffs Ryan Decoteau, Anthony Gomez, and Dominic Duran, are all inmates in Ad. Seg. at CSP and all are subject to that facility's exercise policy, described above. Decoteau Decl. ¶¶ 2, 4-6; Gomez Decl. ¶¶ 2, 4-6; Duran Decl. ¶¶ 2, 4-6.

ARGUMENT

"A district court may certify a class if the proposed class satisfies the requirements of Rule 23(a) and the requirements of one of the types of classes in Rule 23(b)." *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1194 (10th Cir. 2010).

Plaintiffs seek to certify a class defined as follows (the "Proposed Class"):

> 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.

This class meets all of the requirements of Rule 23(a):

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The Proposed Class also satisfies the requirements of Rule 23(b)(2) because "the party opposing the class has acted or refused to act on grounds that apply generally

to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

I. The Proposed Class Meets the Requirements of Rule 23(a).

A. The Proposed Class Is So Numerous that Joinder is Impracticable.

The proposed class consists of current and future Ad. Seg. inmates at CSP. There are currently at least 500 such inmates. Robertson Decl. Ex. 1. Although the Tenth Circuit has declined to adopt a standard for presumptive numerosity, a class with over 500 members satisfies Rule 23(a)(1). *See, e.g., Olson v. Brown*, 284 F.R.D. 398, 408 (N.D. Ind. 2012) (holding that a class of 546 inmates satisfied numerosity); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) (holding that a class of approximately 260 inmates "easily" satisfied numerosity, as would a smaller class of 80 inmates); *see also CGC Holding Co. v. Hutchens*, 2013 WL 798242, at *14 (D. Colo. Mar. 4, 2013) (holding, in fraud class action, that class of over 100 members satisfied the numerosity requirement). "Moreover, the fluid nature of a plaintiff class -- as in the prison-litigation context -- counsels in favor of certification of all present and future members." *Henderson*, 289 F.R.D. at 510.

B. Class Members Share Common Issues of Law and Fact.

Rule 23(a)(2) requires that there be questions of law or fact common to the class. Ultimately this requires that "a classwide proceeding [be able] to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original; internal quotations omitted). Here, the Proposed Class consists of present and future inmates who are all subjected to a uniform policy: that they have no opportunity for outdoor exercise. This raises the common question whether this policy violates

the Eighth Amendment which, in turn, is susceptible to a common answer: that it does and that Defendants should thus be ordered to provide regular outdoor exercise to all class members. No individualized analysis will be required.

This class is thus similar, for example, to the ones certified in *Henderson*, which included all HIV-positive inmates who were uniformly subjected to the same prison policy of segregation, 289 F.R.D. at 512, and *Olson*, which included all inmates subjected to several jail-wide policies, 284 F.R.D. at 415. Like the named plaintiffs in those cases, Named Plaintiffs here challenge a uniform prison policy; they have thus satisfied Rule 23(a)(2).

C. The Named Plaintiffs' Claims Are Typical of the Claims of the Class.

As the Supreme Court recently reiterated, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Wal-Mart*, 131 S. Ct. at 2551 n.5 (citation omitted). "[T]ypicality exists where . . . all class members are at risk of being subjected to the same harmful practices, regardless of any class member's individual circumstances." *D.G. ex rel. Stricklin*, 594 F.3d at 1199; *see also CGC Holding Co.*, 2013 WL 798242, at *14 (same). That is the case here: the Proposed Class, defined as all inmates in Ad. Seg. at CSP, are all being subjected to the same harmful practice, denial of outdoor exercise. If they are "entitled to injunctive relief, the entire class will be as well." *Olson*, 284 F.R.D. at 412.

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

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (citation omitted). Two questions underpin the adequacy analysis: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class

members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002) (citations omitted); *see also CGC Holding Co.*, 2013 WL 798242, at *14 (same). Adequate representation is usually presumed in the absence of contrary evidence. *Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 386 (D. Colo. 1993).

Here, there are no conflicts between either the Named Plaintiffs or their counsel and the remainder of the class. Named Plaintiffs seek only an injunction requiring outdoor exercise for all Ad. Seg. inmates at CSP; they seek nothing for themselves individually. Similarly, there is no conflict between Plaintiffs' counsel and the class. Indeed, Plaintiffs' counsel currently represent two other former CSP inmates, Troy Anderson and Jacob Oakley, both of whom continue to seek the same relief the class seeks here. Robertson Decl. ¶ 11; Webb Decl. ¶¶ 6, 8.

The Named Plaintiffs and their counsel will prosecute the action vigorously. Named Plaintiffs have retained counsel well-versed in civil rights, criminal defense, and class action litigation, who have achieved success in the *Anderson* case and are prepared to litigate the present case with the same vigor. *See infra* Section III.

II. Certification is Appropriate Pursuant to Rule 23(b)(2) Because Defendants Have Acted and Refused to Act on Grounds That Apply Generally to the Class, So That Final Injunctive Relief Is Appropriate Respecting the Class as a Whole.

Plaintiffs seek certification pursuant to Rule 23(b)(2) because Defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart*, 131 S.Ct. at 2557. That is the case here.

Plaintiffs seek only injunctive relief: a single injunction requiring Defendants to provide regular outdoor exercise to inmates in Ad. Seg. at CSP.

"Plaintiffs' claims for injunctive relief stemming from allegedly unconstitutional conditions of confinement are the quintessential type of claims that Rule 23(b)(2) was meant to address." *Parsons v. Ryan*, 289 F.R.D. 513, 524 (D. Ariz. 2013); *see also Olson*, 284 F.R.D. at 415 (certification under Rule 23(b)(2) appropriate where the requested relief was an injunction addressing allegedly unconstitutional jail policies); *Henderson*, 289 F.R.D. at 512 (case challenging prison policy "fits squarely within Rule 23(b)(2)'s history"). This case, like these three prison cases, is appropriate for certification pursuant to Rule 23(b)(2).

III. Plaintiffs' Counsel Are Appropriate Class Counsel Pursuant to Rule 23(g).

Rule 23(g)(1) provides that "a court that certifies a class must appoint class counsel," and lists factors to be considered in making such an appointment. Fed. R. Civ. P. 23(g). Plaintiffs' counsel are appropriate class counsel in light of those factors:

The work counsel has done in identifying or investigating potential claims in the action (Rule 23(g)(1)(A)(i)): The students and their supervising professors at the University of Denver Sturm College of Law Civil Rights Clinic (the "Clinic") spent a great deal of time and effort working with inmates at CSP to investigate and draft the complaint in this case, including multiple trips to CSP in Cañon City. Webb Decl. ¶ 7.

Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action and counsel's knowledge of the applicable law (Rules 23(g)(1)(A)(ii) and (iii)): The undersigned attorney with the Civil Rights Education and

Enforcement Center ("CREEC")[2] and attorneys at the Clinic represented Troy Anderson in his challenge to the lack of outdoor exercise at CSP. Robertson Decl. ¶ 11; Webb Decl. ¶ 8. These attorneys litigated that case through a 2012 bench trial that resulted in the holding that the lack of outdoor exercise at CSP violates the Eighth Amendment, and have continued to represent Mr. Anderson during the on-going proceedings to negotiate compliance with Judge Jackson's order, *Anderson*.[3] All three of Plaintiffs' attorneys are experienced civil rights litigators, and the undersigned has extensive experience litigating civil rights class actions. *See generally* Robertson Decl. ¶¶ 10-11; Webb Decl ¶¶ 4-6; Fontana Decl. ¶¶ 4-6.

<u>The resources that counsel will commit to representing the class (Rule 23(g)(1)(A)(iv):</u> As demonstrated by the *Anderson* case and the many class actions that the undersigned has litigated, Plaintiffs' counsel are well-prepared to devote to this case the resources necessary to achieve a successful outcome.

The factors above support appointment of Amy Robertson, of CREEC, and Lindsey Webb and Lauren Fontana, of the Clinic, as Class Counsel. *See, e.g., Richey v. Ells*, 2013 WL 179234, at *2 (D. Colo. Jan. 17, 2013) (holding that appointment as class counsel was appropriate where attorneys had significant experience as counsel for the type of class at issue

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[2] The undersigned and her partner, Timothy Fox, were the principals in the Denver civil rights law firm of Fox & Robertson from 1996 to 2013. Earlier this year, they wrapped up their practice and founded the civil rights nonprofit Civil Rights Education and Enforcement Center. They continue to practice law as attorneys at CREEC. First at F&R and later at CREEC, the undersigned represented and continues to represent Mr. Anderson. Robertson Decl. ¶¶ 8, 11.

[3] Prof. Laura Rovner, director of the Civil Rights Clinic, along with earlier Clinic attorneys and students represented Mr. Anderson through his trial. At the present time, he is represented by Prof. Rovner and Ms. Robertson. Webb Decl. ¶ 8.

"and have a history of obtaining favorable results"). These attorneys will be joined, each year, by a team of student attorneys from the Clinic who will request admission pursuant to this District's Student Practice Rule, General Order 2005-3.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court certify the following class pursuant to Rule 23(b)(2):

> 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.

Plaintiffs further request that this Court appoint as class counsel Amy Robertson, Lindsey Webb, and Lauren Fontana, who may be assisted from time to time by student attorneys and other attorneys affiliated with their respective organizations.

CERTIFICATION PURSUANT TO D.COLO.L.Civ.R. 7.1A

The undersigned certifies that on December 20, 2013, she conferred by phone with James X. Quinn, First Assistant Attorney General, who stated that Defendants oppose this motion.

Respectfully Submitted,

/s/ Amy F. Robertson
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Attorneys for Plaintiffs

Dated: December 23, 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, I electronically filed the foregoing, as well as the declarations of Amy F. Robertson, Lindsey Webb, Lauren Fontana, Ryan Decoteau, Anthony Gomez and Dominic Duran with the Clerk of Court using the CM/ECF system and served these documents by United States Mail, postage prepaid, and email, on:

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