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.

---

**REPLY BRIEF IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

---

Plaintiffs' Motion for Class Certification requests that this Court use Rule 23 for one of its core purposes: to address, through an injunction, a single violation that similarly affects a large number of people, that is, the lack of outdoor exercise for inmates in administrative segregation ("ad. seg.") at the Colorado State Penitentiary ("CSP"). Defendants oppose class treatment on two primary grounds: that variations in length of stay in ad. seg. and in administrative exhaustion status undermine numerosity and commonality. These arguments have no merit:

- All inmates in ad. seg. at CSP are at risk of harm and thus have colorable Eighth Amendment claims, regardless of length of stay; in any event, 369 inmates have been in ad. seg. for nine months or more and 285 for over one year; and
- Under the vicarious exhaustion doctrine, only the Named Plaintiffs are required to exhaust their administrative remedies; all three have done so.

## I. The Class Of Inmates with Eighth Amendment Claims is Sufficiently Numerous.

Defendants argue that Plaintiffs have not established a sufficiently numerous class of inmates whose length of stay without outdoor exercise violates the Eighth Amendment. Because all inmates in ad. seg. at CSP are at risk of harm and because, in any event, there is a sufficiently numerous set of inmates who have been denied outdoor exercise while in ad. seg. to satisfy the Tenth Circuit's standard for an Eighth Amendment violation, these arguments have no merit.

### A. Inmates who have Gone Nine Months or More Without Outdoor Exercise Have Colorable Eighth Amendment Claims.

The Tenth Circuit has held that an inmate who was denied all outdoor exercise for more than nine months stated a claim under the Eighth Amendment. *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 805 (10th Cir. 1999). Defendants rely on an unpublished case that they assert stands for the proposition that denial of outdoor exercise for one year does not violate the Eighth Amendment. *See* Resp. to Mot. for Class Certification ("Defs.' Resp.," ECF 19) at 5 (citing *Ajaj v. United States*, 293 F. App'x 575, 584 (10th Cir. 2008)). However, the evidence in that case showed that, during that year, the inmate had been offered and refused outdoor exercise, *Ajaj*, 293 F. App'x at 587[1] -- an option not available at CSP. Judge Henry, in his concurrence, noted that fact and observed that *Perkins* was still good law. *Id.* at 590.

Cases from this district and other courts support the claim that periods of less than a year without outdoor exercise constitute violations of the Eighth Amendment. *See, e.g., Kettering v. Chaves*, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008) (holding that denial of outdoor

[1] *See also id.* at 591 (Henry, J, concurring) ("[T]he record generated before the district court . . . demonstrates that Mr. Ajaj was offered, but refused, outdoor exercise on several occasions during his first year at ADX.").

exercise for 90 days satisfied the objective component of an Eighth Amendment violation); *Hebbe v. Pliler*, 627 F.3d 338, 343-44 (9th Cir. 2010) (holding that plaintiff who alleged that prison officials forced him to choose between accessing the law library and accessing outdoor exercise for a period of eight months stated a claim for an Eighth Amendment violation); *Delaney v. DeTella*, 256 F.3d 679, 684 (7th Cir. 2001) (holding that inmate denied yard access for six months suffered sufficient constitutional deprivation); *Pearson v. Ramos*, 237 F.3d 881, 884–85 (7th Cir. 2001) (holding that denial of yard privileges for more than 90 days may be cognizable under Eighth Amendment); *Keenan v. Hall*, 83 F.3d 1083, 1089-90 (9th Cir. 1996) (reversing grant of summary judgment to defendants on plaintiff's claim that six-month deprivation of outdoor exercise violated the Eighth Amendment).

### B. All Inmates in Ad. Seg. Are At Risk of Harm And Therefore The Class Definition is Proper.

An inmate can establish a violation of the Eighth Amendment by demonstrating either actual harm or a risk of future harm. *See, e.g., Farmer v. Brennan,* 511 U.S. 825, 833-34 (1994) (holding that relevant question is whether there is a "substantial risk of serious harm."). Because it takes at least 300 days to progress through ad. seg., *see infra*, inmates assigned to that status will all, by definition, go more than nine months without outdoor exercise, and thus state a claim for violation of the Eighth Amendment under the Tenth Circuit's *Perkins* standard. All of the inmates in the class as defined are thus at risk of harm.

Ad. seg. consists of five levels -- I, II, III, IV A, and IV B. Colorado Department of Corrections Administrative Regulation 650-03 "Offender Group Living - Administrative Segregation," (May 15, 2012) ("AR 650-03") at 7, ¶ IV(G)(1) (Defs.' Resp. Ex. A-3). An inmate must complete at least Level IV A to be eligible for release from ad. seg. *Id.* at 11,

¶ IV(H)(4)(a). It takes a minimum of 30 days to progress through Level I, *id.* at 8, ¶ IV(H)(1)(b), and a minimum of 90 days to progress through each of the remaining levels, *id.* at 9-11, ¶¶ IV(H)(2)(b), (3)(b) & (4)(b). The sum of those minimum stays (30 + 90 + 90 + 90) is 300, or approximately ten months.[2] That is, under the Tenth Circuit's *Perkins* decision, the minimum length of stay in ad. seg. without outdoor exercise violates the Eighth Amendment.

Because inmates who spend ten months without outdoor exercise state claims for violation of the Eighth Amendment and because all of the inmates in the class as defined -- that is, all inmates in ad. seg. at CSP -- are not only at risk but virtually certain to incur this harm, the class definition is proper. Defendants do not dispute that this class contains at least 500 inmates. *See* Decl. of Amy F. Robertson [in support of Motion for Class Certification], ECF 12-1, Ex. 1. Plaintiffs thus satisfy the numerosity prong.

**C. In the Alternative, This Court May Limit the Class to Inmates in Ad. Seg. for More than Nine Months, which Class Would Also Be Sufficiently Numerous.**

This Court has discretion to redefine the class if necessary to bring the action within Rule 23. *See, e.g., Clark v. State Farm Mut. Auto. Ins. Co.*, 245 F.R.D. 478, 481 (D. Colo. 2007). Were the Court to redefine the class to include all inmates who had been in ad. seg. for at least nine months (the Tenth Circuit's standard in *Perkins*), based on data provided by the Colorado Department of Corrections ("CDOC"),[3] it would contain 368 inmates. Decl. of Amy F. Robertson in Supp. of Reply Br. in Supp. of Pls.' Mot. for Class Certification ("Robertson

---

[2] Defendant Raemisch has stated that "inmates who are sent to solitary in Colorado spend an average of 23 months there." Rick Raemisch, Op-Ed, *My Night in Solitary*, N.Y. Times, Feb. 20, 2014, http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html.

[3] *See* Decl. of Rachel Martin in Supp. of Reply Br. in Supp. of Pls.' Mot. for Class Certification, ¶ 4.

Decl.") ¶ 8(a). Redefined to include inmates in ad. seg. for more than one year, which Defendants concede states an Eighth Amendment claim, *see* Defs.' Resp. at 16, it would contain 285 inmates, Robertson Decl. ¶ 8(b). Either of these classes would more than satisfy Rule 23(a)(1)'s requirement that the class be so numerous that joinder would be impracticable. *See* Pls.' Mot. for Class Certification, ECF 12, at 5 and cases cited therein.

**II. This Case Raises a Single Question Capable of Classwide Resolution**.

Plaintiffs satisfy the commonality and typicality[4] prongs of Rule 23(a) because they raise a common question -- does the lack of outdoor exercise for ad. seg. inmates at CSP violate the Eighth Amendment? -- that is capable of classwide resolution. *See Dukes v. Wal-Mart Stores, Inc.*, 131 S. Ct. 2541, 2551 (2011). Furthermore, this violation is the result of a "general policy," *id.* at 2553, in this case, that no inmates in ad. seg. at CSP are permitted to exercise outdoors. To remedy this violation, Plaintiffs seek, on behalf of the proposed class, an injunction requiring that inmates in ad. seg. at CSP be provided regular outdoor exercise. This can be accomplished through a single order requiring construction and/or retrofitting of appropriate facilities and the opportunity for inmates to use them, and does not require any individualized analysis.

Defendants argue that varying lengths of stay in ad. seg. undermine commonality and typicality. This is belied by the fact that the CDOC's current regulation governing exercise for inmates does not make distinctions based on length of stay, and is contained in a single sentence that applies uniformly to all such inmates. AR 650-03 (Defs.' Resp. Ex. A-3) at 7, ¶ IV(F)(1)(q) (inmates in ad. seg. "[s]hall be allowed a minimum of one hour of recreation in a designated

[4] "[T]he commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 131 S. Ct. at 2551 n.5 (internal quotations omitted).

exercise area (5) days per week.").

Whether this Court ultimately determines that the class will consist of all inmates in ad. seg. at CSP, or only those who have been in that status for nine months or a year, the Court can enter a single, uniform order applying to that class. Individual lengths of stay in ad. seg. are not a material difference, and thus do not undermine commonality or typicality.

**III. Only The Named Plaintiffs Are Required to Exhaust Administrative Remedies.**

Defendants argue that the fact that there is no evidence that absent class members have exhausted administrative remedies undermines numerosity, commonality, and typicality. Defs.' Resp. at 8-12, 15. Under the "vicarious exhaustion" doctrine, however, in a class action, only the named plaintiffs need to exhaust administrative remedies to satisfy the exhaustion requirement classwide. In the class action context, "when prospective relief is the primary remedy being sought, a representative who has exhausted all administrative remedies may bring a class suit on behalf of individuals who have not done so." 7AA Charles Alan Wright, *et al*., *Fed. Prac. & Proc. Civ.* § 1776 (3d ed. 2013).

The Prison Litigation Reform Act ("PLRA") requires inmates to exhaust administrative remedies before filing suit in federal court. 42 U.S.C. § 1997e(a). Although this is an affirmative defense, *Jones v. Bock*, 549 U.S. 199, 212 (2007), Named Plaintiffs have pleaded and now demonstrate that they have all exhausted administrative remedies. Compl. ¶ 47; Robertson Decl. Exs. 1-3. In the class action context, under the doctrine of vicarious exhaustion, this is all that is required. Two circuits and a number of district courts have applied the vicarious exhaustion doctrine to the PLRA's exhaustion requirement. *See, e.g., Chandler v. Crosby*, 379 F.3d 1278, 1287 (11th Cir. 2004); *Gates v. Cook*, 376 F.3d 323, 329-30 (5th Cir. 2004); *Butler v.*

*Suffolk Cnty.*, 289 F.R.D. 80, 97 (E.D. N.Y. 2013); *Phipps v. Sheriff of Cook County*, 681 F. Supp. 2d 899, 908 (N.D. Ill. 2009); *Young v. County of Cook*, 2009 WL 2231782, at *4 (N.D. Ill. July 27, 2009); *Richardson v. Monroe County Sheriff*, 2008 WL 3084766, at *6 n.2 (S.D. Ind. Aug. 4, 2008); *Deemer v. Stalder*, 2007 WL 4589799, at *2 n.5 (W.D. La. Nov. 27, 2007); *Meisberger v. Donahue*, 245 F.R.D. 627, 629-30 (S.D. Ind. 2007); *Flynn v. Doyle*, 2007 WL 805788, at *7-8 (E.D. Wis Mar. 14, 2007); *Jones 'El v. Berge*, 172 F. Supp. 2d 1128, 1132-33 (W.D. Wis. 2001). The Tenth Circuit has not ruled on the question; in *McGoldrick v. Werholtz*, it assumed without deciding that the court would adopt that doctrine, but held that it did not apply to a non-class case. 185 F. App'x 741, 743-44 (10th Cir. 2006).

While Defendants acknowledge the *Chandler* and *Gates* cases, they assert -- without explanation of the significance of this assertion -- that they were decided before *Dukes*, 131 S. Ct. 2541, and *Woodford v. Ngo*, 548 U.S. 81 (2006). Defs.' Resp. at 9-10.

*Dukes* was an employment discrimination class action seeking damages for promotional decisions throughout a nationwide chain of retail stores. *Id.*, 131 S. Ct. at 2544. The question of exhaustion did not arise, and Defendants do not explain the relevance of *Dukes* to the question of vicarious exhaustion under the PLRA in a case seeking a uniform injunctive remedy requiring outdoor exercise at a single prison facility.

*Woodford* was a prison case, but it did not address the question of vicarious exhaustion; indeed, it was not even a class action. Rather, it held the PLRA's general exhaustion requirement was not waived if an individual inmate failed to meet the administrative deadlines. *Id.*, 548 U.S. at 105-06. In the course of this analysis, the Supreme Court articulated the goals of the PLRA's exhaustion requirement -- goals that are in harmony with the vicarious exhaustion

doctrine. The PLRA's exhaustion requirement was designed "'to affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.'" *Woodford*, 548 U.S. at 93 (quoting *Porter v. Nussle*, 534 U.S. 516, 525 (2002)). Similarly, vicarious exhaustion "advances the purpose of administrative exhaustion, which . . . 'is to put the [administrative authority] on notice of all issues in contention and to allow the [authority] an opportunity to investigate those issues.'" *Chandler*, 379 F.3d at 1287 (internal citations omitted). "Once the 'prison officials have received a single complaint addressing each claim in a class action, they have the opportunity to resolve disputes internally and to limit judicial intervention in the management of prisons.' . . . [A] different rule, *e.g.*, one requiring all class members to exhaust their administrative remedies, 'could impose an intolerable burden upon the inmate complaint review system.'" *Id.* (quoting *Jones 'El*, 172 F. Supp. 2d at 1131-33). Both the PLRA and the vicarious exhaustion rule advance the goal of permitting the prison administration to solve problems before they become federal cases.

*Woodford* articulated a second goal of the exhaustion requirement: to reduce the quantity and improve the quality of inmate lawsuits. *Id.*, 548 U.S. at 94. Vicarious exhaustion serves these goals, as well. It reduces the quantity of federal court lawsuits by making it simpler for common claims to be combined in a single case. The result of the regime urged by Defendants would be several hundred individual lawsuits alleging violation of the Eighth Amendment through denial of outdoor exercise at CSP, contrary to the goals of the PLRA. And class action cases -- requiring, as they do, that the class be represented by counsel approved by the court[5] --

[5] "[A] court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g). *Pro se* plaintiffs may not represent a class under rule 23. *Fymbo v. State Farm Fire & Cas. Co.*, 213 F.3d 1320, 1321 (10th Cir. 2000).

should have the effect, on balance, of improving the quality of such lawsuits.

Although Defendants cite to two post-*Woodford* cases, Defs.' Resp. at 10, 11, neither is relevant here. *Doss v. Gilkey*, 649 F. Supp. 2d 905 (S.D. Ill. 2009), did not involve a class action. Since the Tenth Circuit has already rejected the vicarious exhaustion doctrine in the non-class context while assuming without deciding that it would apply in the class context, *McGoldrick*, 185 F. App'x at 743-44, *Doss* does not undermine the vicarious exhaustion doctrine in the present, class action, case. Defendants' second post-*Woodford* case is a Louisiana state case that applied neither federal Rule 23 nor the PLRA, and -- in its discussion of state law exhaustion -- noted that "[n]either party has questioned or explained if a class action procedure is applied differently in a prisoner suit in which [exhaustion] is a prerequisite to the filing of suit." *Abouelazm v. Jackson*, 2013 WL 6212033, at *3 (La. App. Nov. 15, 2013).

In contrast, as demonstrated in the string cite above, *see supra* at 7, many federal courts have applied vicarious exhaustion in the PLRA context post-*Woodford*.

**IV. Adequacy of Representation**

Defendants argue that two of the three Named Plaintiffs are eligible for parole in the coming months and that, should this occur, their claims would be moot, creating a conflict between these two Named Plaintiffs and the class. As an initial matter, all three Named Plaintiffs remain in ad. seg at CSP, Robertson Decl. Exs. 4-6, and parole for Mr. Decoteau and Mr. Duran is, at this juncture, speculative. Even if both should be paroled, Mr. Gomez would remain to represent the class. Finally, mooting of the Named Plaintiffs' claims would not defeat class certification. *See, e.g., U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980) (holding that named plaintiff released from prison while a certification motion is pending may

appeal a denial of class certification despite the mootness of his individual claim).

**V. Rule 23(b)(2)**

A class is properly certified under Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Defendants resist (b)(2) certification with the argument that varying lengths of stay in ad. seg. create differences in injunctive relief. Defs.' Resp. at 18. Again, this is belied by the current regulation governing exercise at CSP, which occupies a single sentence in the Administrative Regulation governing ad. seg. And again, should this Court determine on the merits that only those inmates who have been in ad. seg. more than nine months or one year are entitled to relief, the class can be limited accordingly, and a uniform injunction "respecting the class as a whole" can issue.

## CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion for Class Certification, 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 will be assisted by student attorneys and other attorneys affiliated with their respective organizations.

Respectfully Submitted,

/s/ Amy F. Robertson
Amy F. Robertson
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
Phone: (303) 757-7901
arobertson@creeclaw.org

Lindsey Webb
Lauren Fontana
Ryan Burchell
Rachel Martin
Amelia Messegee
Civil Rights Clinic
University of Denver Sturm College of Law
2255 E. Evans Ave., Suite 335
Denver, CO 80208
Phone: (303) 871-6140
Fax: (303) 871-6847
lwebb@law.du.edu

Attorneys for Plaintiffs

Dated: March 20, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2014, I electronically filed the foregoing, as well as the declarations of Amy F. Robertson and Rachel Martin, with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

Chris W. Alber
Chris.Alber@state.co.us

Nicole S. Gellar
Nicole.Gellar@state.co.us

s/ Caitlin Anderson
Caitlin Anderson
Paralegal