**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

[filed October 10, 2017]

JONATHAN APODACA, et al.,

Plaintiffs-Appellees,

v. No. 15-1454

RICK RAEMISCH, Executive Director,
Colorado Department of Corrections,
in his individual capacity, et al.,

Defendants-Appellants.

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**ORDER**

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Before **TYMKOVICH**, Chief Judge, **BACHARACH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing en banc is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

**APPENDIX B**

PUBLISH

**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

[filed July 25, 2017]

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| JONATHAN APODACA; JOSHUA VIGIL, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellees,<br><br>v.<br><br>RICK RAEMISCH, Executive Director, Colorado Department of Corrections, in his individual capacity; TRAVIS TRANI, Warden, Colorado State Penitentiary, in his individual capacity,<br><br>Defendants-Appellants. | No. 15-1454 |

**Appeal from the United States District Court**
**for the District of Colorado**
**(D.C. No. 1:15-CV-00845-REB-MJW)**

Chris W. Alber, Senior Assistant Attorney General, Denver, Colorado (Cynthia H. Coffman, Attorney General, with him on the briefs), for Defendants-Appellants.

Elisabeth L. Owen, Prisoners' Justice League of Colorado LLC, Denver, Colorado, for Plaintiffs-Appellees.

Before **TYMKOVICH**, Chief Judge, **BACHARACH**, and **MORITZ**, Circuit Judges.

**BACHARACH**, Circuit Judge.

Two inmates were kept in administrative segregation at a Colorado prison for roughly eleven months. During that time, the inmates were allegedly prohibited from exercising outdoors, although they were brought to a "recreation room" five times each week. The alleged prohibition on outdoor exercise led the two inmates to sue the prison warden and the director of the Colorado Department of Corrections, invoking 42 U.S.C. § 1983 and claiming violation of the Eighth Amendment. For these claims, the inmates relied largely on a published opinion in our court, *Perkins v. Kansas Department of Corrections*, 165 F.3d 803 (10th Cir. 1999).

The warden and director moved to dismiss, arguing that (1) the alleged prohibition on outdoor exercise did not violate the Eighth Amendment and (2) qualified immunity applies. For these arguments, the warden and director distinguish *Perkins*, relying largely on an unpublished opinion in our court, *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008).

The district court denied the motion to dismiss, reasoning that the two inmates had stated a plausible claim for relief. Because the warden and director enjoy qualified immunity, we reverse. We conclude that even if the alleged prohibition on outdoor exercise had violated the Eighth Amendment, the underlying constitutional right would not have been clearly established.

The right would not have been clearly established because existing precedent would have left the constitutional question within the realm of reasonable debate. The underlying right turns on our opinion in *Perkins*. But *Perkins* can be read either expansively or narrowly. Under an expansive reading, *Perkins* would squarely prohibit the alleged denial of outdoor exercise for eleven months. But, under a narrow reading, *Perkins* would apply only to denials of *out-of-cell* exercise—a situation not present here. We need not decide which reading is correct. Because *Perkins* is ambiguous, our opinions do not clearly establish that an eleven-month deprivation of outdoor exercise would violate the Eighth Amendment.

## I. Appellate Jurisdiction

Before addressing the merits, we must ensure our jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). The two inmates challenge jurisdiction based on the absence of certain factual findings in district court. This challenge fails, for we have jurisdiction under the collateral-order doctrine.

In appeals from district court decisions, we generally obtain jurisdiction under 28 U.S.C. § 1291, which creates appellate jurisdiction over "final decisions." In this case, the warden and director are appealing the district court's denial of a motion to dismiss.[1] This denial is not a final judgment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009)

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[1] The defendants' motion was titled "Motion to Dismiss or Motion for Summary Judgment." This motion included arguments for summary judgment that are not presently before us. We therefore consider the motion solely as a motion to dismiss.

(recognizing that a similar denial did not constitute a final judgment). But under the collateral-order doctrine, some rulings are immediately appealable notwithstanding the absence of a final judgment. *Id.*; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). These rulings contain decisions that are collateral to the merits but too important for us to deny review and too independent of the underlying claim for us to postpone review. *Iqbal*, 556 U.S. at 671.

Here the district court denied qualified immunity to the warden and director, reasoning that the underlying constitutional right had been clearly established. This ruling generally falls within the collateral-order doctrine, for qualified immunity serves to protect the defendant not just from personal liability but also from the ordeal of litigation. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014).

The collateral-order doctrine is triggered only if the appeal turns on a "'purely legal issue.'" *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (quoting *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). Thus, we may not reconsider a district court's assessment of which facts could be proven at trial. *Walton v. Powell*, 821 F.3d 1204, 1209-10 (10th Cir. 2016).

The issue here is legal, not factual. Because qualified immunity arises here on a motion to dismiss, we must credit all of the plaintiffs' well-pleaded allegations. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012). Thus, our decision regarding qualified immunity does not hinge on any

factual disputes. *See Iqbal*, 556 U.S. at 678.[2] In the absence of factual disputes, we confront a purely legal issue: whether the underlying constitutional right was clearly established. *Ortiz*, 562 U.S. at 188. Thus, we have appellate jurisdiction under the collateral-order doctrine.

## II. The Standard of Review, the Standard for Qualified Immunity, and the Plaintiffs' Pleading Burden

Qualified immunity protects public officials who are required to exercise their discretion, shielding them from personal liability for civil damages. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Schwartz*, 702 F.3d at 579. This type of immunity applies when a public official's conduct does not violate clearly established rights that a reasonable person would have known about. *Schwartz*, 702 F.3d at 579.

We review de novo the district court's denial of a motion to dismiss based on qualified immunity. *Id.* In conducting this review, we consider whether the plaintiffs have alleged facts showing

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[2] The inmates argue that jurisdiction is absent because the warden and director base their argument on the differences between the facts here and in our prior cases. We disagree. The warden and director are asserting qualified immunity based on the facts alleged in the inmates' complaint. The warden and director refer to the facts in our prior cases only to shed light on whether the underlying constitutional right was clearly established. These so-called arguments about "facts" are, in reality, centered on the abstract legal principle of whether the inmates' alleged facts were governed by our existing precedents. *See Iqbal*, 556 U.S. at 672 (stating that the denial of a motion to dismiss, rejecting a defense of qualified immunity, turned on an issue of law and was therefore immediately appealable).

- that the defendants violated a constitutional right and
- that the right was clearly established.

*See id.* But if the right were not clearly established, we may find qualified immunity without deciding the constitutionality of the conduct. *Pearson v. Callahan*, 555 U.S. 223, 236-42 (2009).

A constitutional right is clearly established when a Tenth Circuit precedent is on point, making the constitutional violation apparent. *Mascorro v. Billings*, 656 F.3d 1198, 1208 (10th Cir. 2011).[3] This precedent cannot define the right at a high level of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Rather, the precedent must be particularized to the facts. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam). But even when such a precedent exists, subsequent Tenth Circuit cases may conflict with or clarify the earlier precedent, rendering the law unclear. *See Lane v. Franks*, 134 S. Ct. 2369, 2382-83 (2014).

A precedent is often particularized when it involves materially similar facts. *See White*, 137 S. Ct. at 552. But the precedent may be adequately

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[3] Alternatively, a right can be clearly established by a Supreme Court precedent or by the weight of authority from case law in other circuits. *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). But the plaintiffs do not rely on Supreme Court precedent or the weight of authority in other circuits; thus, we do not consider these potential sources for a clearly established right. *See Washington v. Unified Gov't of Wyandotte Cty.*, 847 F.3d 1192, 1201 n.3 (10th Cir. 2017) (stating that the plaintiff must identify the authorities that create the clearly established right); *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (noting that we need not consider out-of-circuit authority unless the plaintiff brings this authority to our attention).

particularized even if the facts differ, for general precedents may clearly establish the law when the defendant's conduct "'obvious[ly]'" violates the law. *See id.* (quoting *Brosseau v. Haugen* , 543 U.S. 194, 199 (2004) (per curiam)). Thus, a right is clearly established when a precedent involves "'*materially similar conduct*'" or applies "'with *obvious clarity*'" to the conduct at issue. *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964-65 (10th Cir. 2016) (emphasis in *Estate of Reat*) (quoting *Buck v. City of Albuquerque*, 549 F.3d 1269, 1290 (10th Cir. 2008)), *cert. denied*, ___ U.S.___, 137 S. Ct. 1434 (2017) (Mem.).

By requiring precedents involving materially similar conduct or obvious applicability, we allow personal liability for public officials only when our precedent puts the constitutional violation "'beyond debate.'" *White*, 137 S. Ct. at 551 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)). Thus, qualified immunity protects all officials except those who are "'plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Mullenix*, 136 S. Ct. at 308).

In the present case, we apply this test in light of the plaintiffs' pleading burden for a § 1983 claim based on the Eighth Amendment. *See DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001). To satisfy this burden, the plaintiffs must make two plausible allegations: (1) the conditions were "'sufficiently serious' to implicate constitutional protection" and (2) the warden and director acted with "'deliberate indifference'" to the inmates' health. *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

This appeal focuses on the first requirement, which addresses the seriousness of the deprivation.

*Id.* The plaintiffs allege a deprivation of the right to exercise outdoors for roughly eleven months. For the sake of argument, we may assume that this deprivation would violate the Eighth Amendment. Even with this assumption, the warden and director would enjoy qualified immunity because the underlying constitutional right had not been clearly established.

Roughly three decades ago, we recognized a consensus in the case law regarding the importance of outdoor exercise for prisoners: "There is substantial agreement among the cases . . . that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates…." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam). But we also made clear that a denial of outdoor exercise does not per se violate the Eighth Amendment. *Id.*

In the absence of a per se violation, courts must examine the totality of the circumstances. *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810 n.8 (10th Cir. 1999). These circumstances include the length of the deprivation. *See DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (stating that the length of time that an inmate is exposed to the conditions "is often of prime importance" under the Eighth Amendment); *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998) (stating that the inquiry under the Eighth Amendment turns in part on the duration of the deprivation).

## III. The alleged constitutional right was not clearly established.

The plaintiffs rely on our published opinion in *Perkins v. Kansas Department of Corrections*. In

*Perkins*, a prisoner invoked the Eighth Amendment, alleging a continuing inability to exercise outside of his cell for more than nine months. *Perkins*, 165 F.3d at 806-07, 809. The district court dismissed the claim, and we reversed. *Id.* at 805, 810.

In reversing, we expressed our holding in terms of the denial of "outdoor exercise." *Id.* at 810. But, as noted above, the plaintiff in *Perkins* had alleged the inability to exercise not only outdoors but also anywhere outside of his cell. *Id.* at 806-07. The resulting issue is whether our holding was

- expansive, prohibiting the extended denial of exercise *outdoors* or
- narrow, prohibiting only the extended denial of exercise outside of the *cell*.

The plaintiffs embrace the expansive interpretation of *Perkins*. This interpretation is reasonable based on four facts:

1. Our court referred seven times to the plaintiff's deprivation of "outdoor exercise." *Id.* at 805-06, 810.
2. Our court expressed the holding in terms of the denial of outdoor exercise. *Id.* at 810.
3. Our court relied in part on *Bailey v. Shillinger*, which had held that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates." *Id.* at 810 (quoting *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam)); *see* pp. 8-9, above.
4. A person deprived of out-of-cell exercise is, logically, also deprived of outdoor exercise.

> So, a precedent regarding the denial of "outdoor" exercise could encompass every situation involving the denial of out-of-cell exercise. But the reverse is not true. If the court meant to create a precedent regarding the denial of "out-of-cell" exercise, one might not expect the holding to be framed more broadly in terms of "outdoor" exercise.

The warden and director embrace the narrow interpretation of *Perkins*, insisting that it applies only to deprivations of out-of-cell exercise. This interpretation also appears reasonable based on the content of *Perkins* and the later unpublished opinion in *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008).

*Perkins* contains three features supporting a narrow interpretation:

1. The plaintiff alleged deprivation of exercise anywhere outside of his cell, not just outdoors. *Id.* at 807.
2. The court relied in part on *Housley v. Dodson*, which had involved a deprivation of exercise outside of the prisoner's cell rather than just outdoors. *Id.* at 810 (citing *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994)).
3. The court cited multiple cases from other circuits involving out-of-cell exercise. *Id.*

In addition, a narrow interpretation is supported by our unpublished opinion in *Ajaj*, where we held that a year-long deprivation of outdoor exercise did not violate the Eighth Amendment. *Ajaj v. United*

*States*, 293 F. App'x 575, 584 (10th Cir. 2008); *see Quinn v. Young*, 780 F.3d 998, 1012 n.4 (10th Cir. 2015) ("A recent unpublished opinion . . . further confirms our view that the Officers had no guidance concerning the propriety of the challenged [conduct] from extant clearly established law."). If *Perkins* is read broadly, *Ajaj* might appear to conflict with *Perkins*.[4]

Which reading of *Perkins* is correct? We need not decide that today. For now, it is enough to conclude that the question is within the realm of reasonable debate, for *Perkins* can be read either expansively or narrowly. *See A.M. ex rel. F.M. v. Holmes* , 830 F.3d 1123, 1147 & n.12 (10th Cir. 2016) (concluding that the law was not clearly established when the plaintiff had relied on an opinion that "could be reasonably read" in a way that led the defendant to "reasonably believe[] (even if mistakenly)" that his actions were permissible); *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378-79 (2009) (concluding that the law was not clearly established by a prior Supreme Court opinion because it had been read differently by "well-reasoned" judges in cases that were "numerous enough").

The availability of conflicting interpretations is unsurprising in light of our competing principles

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[4] The *Ajaj* majority did not cite *Perkins*. In a concurrence, then-Chief Judge Henry implied that *Perkins* had established a precedent involving the denial of outdoor exercise. *See Ajaj*, 293 F. App'x at 590 (Henry, C.J., concurring). But Chief Judge Henry then seemed to detract from this approach, concluding that the defendants were entitled to qualified immunity in part because "prison officials [had] afforded [Mr. Ajaj] regular solitary indoor exercise opportunities." *Id.* at 591.

guiding interpretation of precedents like *Perkins*. On the one hand, "[t]he language of a judicial decision must be interpreted with reference to the circumstances of the particular case and the question under consideration." Bryan A. Garner et al., *The Law of Judicial Precedent* 80 (2016). In *Perkins*, these circumstances involved the denial of any exercise opportunities outside of the prisoner's cell. *See* pp. 9-11, above.

But on the other hand, "'[t]he discovery of what facts are material in any decision is by no means easy.'" Bryan A. Garner et al., *The Law of Judicial Precedent* 80 (2016) (citation omitted). Generally, we ascertain the materiality of individual facts based on which ones are emphasized in a given opinion. *See id.* at 81 ("Most cases combine law and fact in ways that emphasize the central role of the facts."). In *Perkins*, the court appeared to emphasize that the plaintiff was prohibited from exercising outdoors. *See* pp. 9-10, above.

At a minimum, *Perkins* would not render the warden and director "plainly incompetent" for failing to recognize a constitutional prohibition against an eleven-month ban on outdoor exercise. *Perkins*'s ambiguity means that our circuit has not clearly established a right to outdoor exercise over an eleven-month period. As a result, the warden and director are entitled to qualified immunity.[5]

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[5] The two inmates also rely on *Fogle v. Pierson*, 435 F.3d 1252, 1260 (10th Cir. 2006) and *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994). But *Fogle*'s discussion of the duration of the deprivation was based on the standard for frivolousness and the subjective prong of the Eighth Amendment. *See Lowe v. Raemisch*, No. 16-1300, slip. op. at 8-10 (10th Cir. July 25,

## IV. The defendants did not knowingly violate the Constitution.

The Supreme Court has recognized that liability extends not only to "'plainly incompetent'" officials but also to officials who "'knowingly violate the law.'" *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)); *see Ziglar v. Abbasi*, 582 U.S.__, 2017 WL 2621317 , slip. op. at 29 (June 19, 2017). Based on this language, the plaintiffs allege that the warden and director knew that they were violating the Constitution in light of a district court opinion addressing similar conditions at the same prison. Appellees' Resp. Br. at 24-25 (citing *Anderson v. Colorado*, 887 F. Supp. 2d 1133 (D. Colo. 2012)).

We reject this argument based on a key factual distinction with the district court case, a conflict with Supreme Court precedent, and the presence of an erroneous assumption.

First, the deprivation in the district court's earlier case spanned twelve *years*. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1138 (D. Colo. 2012). Here the alleged deprivation lasted only about eleven *months*.

Second, the Supreme Court rejected a nearly identical argument in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). There the Court concluded that a district court opinion, which identified the same defendant and said that his actions had been unconstitutional, did not clearly establish the underlying right because

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2017) (to be published). And *Housley* involved the denial of exercise anywhere outside the cell (rather than a ban on outdoor exercise). *See id.* at 10. These differences could reasonably have led the warden and director to question the applicability of *Fogle* and *Housley*.

a district court's holding is not controlling in any jurisdiction. *al-Kidd*, 563 U.S. at 741-42. The same is true here.

Third, the plaintiffs suggest that a defendant's knowledge affects the availability of qualified immunity. We reject this suggestion, for there is a single standard: "whether it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted.'" *Ziglar v. Abbasi*, 582 U.S.___, 2017 WL 2621317 , slip. op. at 29 (June 19, 2017) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2002)). If this standard is met, the defendant would be either plainly incompetent or a knowing violator of the law. *See id.* ("If so, then the defendant officer must have been either incompetent or else a knowing violator of the law, and thus not entitled to qualified immunity.").

For these reasons, the district court's earlier ruling does not preclude qualified immunity. *See Lowe v. Raemisch*, No. 16-1300, slip op. at Part 2(d) (10th Cir. July 25, 2017) (to be published).

## V. Disposition

We conclude that the warden and director did not violate a clearly established constitutional right. Thus, the district court erred in denying the motion to dismiss.

Reversed and remanded with instructions to grant the motion to dismiss the personal-capacity claims based on qualified immunity.

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**
**Judge Robert E. Blackburn**

[filed October 30, 2015]

Civil Action No. 15-cv-00845-REB-MJW

JONATHAN APODACA, and

JOSHUA VIGIL, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RICK RAEMISCH, Executive Director, Colorado Department of Corrections, in his individual capacity, and

TRAVIS TRANI, Warden, Colorado State Penitentiary, in his individual capacity,

Defendants.

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**ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

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**Blackburn, J.**

The matters before me are (1) the recommendation contained in the magistrate judge's **Report and Recommendation on Defendants' Motion To Dismiss or Motion for Summary Judgment** [#64],[1] filed September 8, 2015; and (2)

[1] "[#64]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case

defendants' **Objections to Report and Recommendation on Defendants' Motion To Dismiss or Motion for Summary Judgment** [#67], filed September 25, 2015. I overrule the objections, adopt the recommendation, and deny the apposite motion to dismiss.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed, and have considered carefully the recommendation, the objections, and the applicable caselaw. The recommendation is detailed and well-reasoned. Defendants' objections ultimately are without merit.

Defendants' suggestion that the magistrate judge erred in concluding that Mr. Vigil's claims were not subject to dismissal for failure to exhaust completely elides the actual rationale for that determination, that is, that defendants forfeited[2] any right to object to Mr. Vigil's grievances as untimely by failing to raise timeliness as a basis for denying the grievances in the administrative proceedings. The magistrate judge's analysis of this issue is cogent and belies any suggestion that Mr. Vigil's claims must be dismissed on this basis.

The magistrate judge also recommends rejecting defendants' motion to dismiss the entire action on the ground that plaintiffs' alleged eleven-month

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management and electronic case filing system (CM/ECF). I use this convention throughout this order.

[2] "[F]orfeiture is the failure to make the timely assertion of a right, [while] waiver is the intentional relinquishment or abandonment of a known right." ***United States v. Olano***, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508 (1993) (citation and internal quotation marks omitted).

deprivation of outdoor recreation fails to state a cognizable claim for violation of the Eighth Amendment. Defendants do not object to the determination that a violation occurred, but complain that the magistrate judge failed to address the second prong of their argument for qualified immunity, that is, that the law was not clearly established at the time of the alleged violations. Although the recommendation does not address this prong of the qualified immunity analysis, I find the oversight ultimately harmless because based on the facts pled in the complaint, plaintiffs have adequately alleged the violation of a clearly established right.

To rehearse, state officials are immune from civil liability unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); ***see also Herring v. Keenan***, 218 F.3d 1171, 1175 (10th Cir. 2000), ***cert. denied***, 122 S. Ct. 96 (2001). To overcome this immunity, plaintiffs must establish both that defendants violated their rights under federal law and that such rights were clearly established at the time of the violation. ***Greene v. Barrett***, 174 F.3d 1136, 1142 (10th Cir. 1999).

Here, the magistrate judge's analysis thoroughly addresses the first prong of the qualified immunity test. I concur with his analysis in that regard and defendants do not contest it. They nevertheless insist that the law was not clearly established in May 2013.[3] I disagree. As the magistrate judge

[3] Named plaintiffs seek to represent a putative class of inmates

recounted in his recommendation, the Tenth Circuit's decision in ***Perkins v. Kansas City Department of Corrections***, 165 F.3d 803 (10th Cir. 1999), makes pellucid that there is no bright-line rule tied to the length of the deprivation in this circuit. Regardless whether the deprivation in ***Perkins*** was actually nine months (as alleged by the plaintiff in that case), or twelve months (as suggested elsewhere in the court's opinion), the fact remains that ***Perkins*** established that a prisoner's Eighth Amendment claim for denial of access to outdoor recreation is not automatically barred simply because the deprivation lasts less than a prescribed number of months. Instead, courts in this circuit must inquire into the specific facts and circumstances of each case. ***Id.*** at 809-10. Although the length of the deprivation certainly is a relevant factor in the court's calculus, it is neither dispositive nor necessarily more weighty than other considerations. ***See id.*** at 810 n.8.

Even if ***Perkins*** itself were somehow unclear on this point – which it is not – former Chief Judge Henry's concurring opinion in ***Ajaj v. United States*** should have served to confirm the Circuit's position on this issue. ***See*** 293 Fed. Appx. 575, 587-91 (10th Cir. 2008) (Henry, C.J., concurring), ***cert. denied***, 129 S. Ct. 1600 (2009).[4] It is true that the plaintiff

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who were denied outdoor recreation for a period of nine months or more between May 24, 2013, and April 2014. The starting date of the class period is tied to the district court's decision finding an Eighth Amendment violation in ***Anderson v. State of Colorado***, 887 F.Supp.2d 1133 (D. Colo. 2012).

[4] Although a court may not rely on unpublished decisions to find that a right was clearly established, ***see Green v. Post***, 574 F.3d 1294, 1305 n.10 (10th Cir. 2009), ***Ajaj*** did not break

there, who allegedly had been "denied access to outdoor recreation for his first year" of incarceration, was found to have failed to state an Eighth Amendment claim. ***See id.*** at 584 (majority opinion). Nevertheless, then-Chief Judge Henry took especial care to examine the precedents both in this circuit and others before concluding that "a prisoner who has been deprived of outdoor exercise for one year . . . *could* make out an Eighth Amendment claim under the summary judgment standard of review." ***Id.*** at 588 (emphasis added).[5]

Nor am I persuaded by defendants' suggestion that dismissal is warranted because the complaint fails to allege any facts or circumstances – aside from the length of the named plaintiffs' respective denials of outdoor recreation – that might be relevant to the court's analysis. This is simply not the case. For instance, the complaint alleges that defendants had at least two other readily available and already established avenues by which they could have easily provided plaintiffs with outdoor recreation. (***See*** **Complaint** ¶¶ 44-60 at 9-11 [#1], filed April 22, 2015.) Even more relevant, however, plaintiffs allege that defendants unreasonably and willfully failed to provide outdoor recreation opportunities to all inmates at CSP even after a Colorado district court found that practice violated the Eighth Amendment. ***See Anderson v. Colorado***, 887

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new ground, but merely reaffirmed what should already have been pellucid following ***Perkins***.

[5] Noting that the inmate in ***Ajaj*** had "regularly declined outdoor exercise opportunities" and had been afforded opportunities for indoor recreation, Chief Judge Henry ultimately concurred with the outcome of the court's decision. ***See Ajaj***, 293 Fed. Appx. at 587.

F.Supp.2d 1133, 1142 (D. Colo. 2012). Indeed, the entire reason for this lawsuit is to seek punitive damages for that alleged failure to implement fully the court's mandate in ***Anderson***. Given these circumstances, I find and conclude that plaintiffs' have stated a plausible claim for relief sufficient to survive dismissal under Rule 12.

I thus find and conclude that the arguments advanced, authorities cited, and findings of fact, conclusions of law, and recommendation proposed by the magistrate judge should be approved and adopted.

**THEREFORE, IT IS ORDERED** as follows:

1. That the recommendation contained in the magistrate judge's **Report and Recommendation on Defendants' Motion To Dismiss or Motion for Summary Judgment** [#64], filed September 8, 2015, is approved and adopted as an order of this court;

2. That the objections stated in defendants' **Objections to Report and Recommendation on Defendants' Motion To Dismiss or Motion for Summary Judgment** [#67], filed September 25, 2015. are overruled;

3. That defendants' related **Motion To Dismiss or for Summary Judgment** [#18], filed June 19, 2015, is denied.

Dated October 30, 2015, at Denver, Colorado.

**BY THE COURT:**
/s/ Bob Blackburn
Robert E. Blackburn
United States District Judge

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

[filed September 8, 2015]

Civil Action No. 15-cv-00845-REB-MJW

JONATHAN APODACA, *and*
JOSHUA VIGIL, *on behalf of themselves and all others similarly situated*,
Plaintiffs,

v.

RICK RAEMISCH, *Executive Director, Colorado Department of Corrections, in his individual capacity*, *and*
TRAVIS TRANI, *Warden, Colorado State Penitentiary, in his individual capacity*,
Defendants.

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**REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT (Docket No. 18)**

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**MICHAEL J. WATANABE**
**United States Magistrate Judge**

Plaintiffs are former inmates at Colorado State Penitentiary ("CSP"), a maximum- security prison outside of Canon City, Colorado. They allege that CSP violated the Eighth Amendment by failing to provide them access to outdoor exercise for eleven months—and further, that CSP continues to do so despite this Court's judgment in *Anderson v.*

*Colorado*, 887 F. Supp. 2d 1133, 1142 (D. Colo. 2012) (finding CSP's practices did not constitute adequate outdoor exercise and violated Eighth Amendment where inmate had no other access to outdoor exercise for twelve years). Plaintiffs are members of a class action seeking injunctive relief, pending in this Court under the caption *Decoteau v. Raemisch*, Case No. 13-cv-03399-WJM-KMT. In addition, Plaintiffs bring this separate class action seeking punitive damages.

Defendants move (1) for summary judgment as to Plaintiff Vigil, arguing that he has not exhausted his administrative remedies; and (2) to dismiss the complaint in full, arguing that an eleven-month deprivation fails to state an Eighth Amendment claim. For the following reasons, the Court recommends that Defendants' motion be denied in all respects.

**Failure to Exhaust**

Under the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56.

Defendants argue that they are entitled to judgment as a matter of law as to Plaintiff Vigil's claims because he has not exhausted his administrative remedies as required by 42 U.S.C. § 1997e(a). More specifically, the Colorado Department of Corrections' ("CDOC") formal grievance process requires (1) that "[a]n offender may only pursue a grievance concerning a problem that affects the offender personally" (Docket No. 18-1, p.9); and (2) that the first formal grievance "must be filed no later than 30 calendar days from the date the offender

knew, or should have known, of the facts given rise to the grievance" (Docket No. 18-1, p.12). Plaintiff Vigil alleges in the complaint that he was incarcerated at CSP from May 2013 to April 2014. (Docket No. 1¶ 87.) The affidavit and supporting documents filed by Defendants in support of their motion establish that Plaintiff Vigil did not file a formal grievance until December 2014— a fact that Vigil does not dispute. (Docket No. 18-1, p.23; Docket No. 29-3 ¶ 21.) Because the Plaintiff Vigil's grievance as to CSP's outdoor-exercise practices was not filed until more than 30 days after those practices no longer personally affected him, Defendants argue that he did not timely exhaust his administrative remedies.

Plaintiff Vigil's first two arguments in response are related to each other. First, he argues that Defendants waived their right to assert timeliness by not raising it during the administrative process. Second, he argues that Defendant's position as to the grievance process, if accepted by the Court, would show that the process provides no remedy for this grievance—and thus that he wasn't required to exhaust the process.

The Court agrees with both arguments.

Plaintiff's Step 1 grievance stated:

> I was housed in C.S.P. where I was denied the opportunity for regular outdoor exercise. According to Anderson v. CDOC this is a violation of my 8th amendment rights. I request that I never be subjected to these conditions again.

(Docket No. 18-1, p.23.) A Grievance Coordinator responded by noting that Plaintiff Vigil was provided with "recreational privileges commensurate with [his] custody status," which was "a minimum of one hour

of exercise per day outside their cells, a minimum of five days per week, unless security or safety considerations dictate otherwise." (*Id.*) The same Grievance Coordinator denied Plaintiff Vigil's Step 2 grievance, saying "Mr. Vigil, your assignment to CSP was only temporary, and thus you are no longer temporarily assigned to CSP. Grievance denied, remedy denied." (*Id.* at 24.) Plaintiff Vigil's Step 3 grievance was denied with the notation "Not exhausted," and the further explanation:

> This issue does not affect you personally at this time and therefore this grievance is not a valid method for you to redress this issue. You have not followed the procedures outlined in AR 850-04. You have not exhausted your administrative remedies in this matter. This is the final administrative action in this matter.

(*Id.* at 25–26.)

Despite language that this decision was based on procedural default, there is no language in the denial about timeliness or about missed deadlines. The decision is, rather, based on mootness: that Vigil was no longer subject to the complained-of conditions, and thus no remedy could be provided. CDOC never raised the issue of timeliness during the administrative process, and it has therefore waived its right to raise timeliness in these proceedings. *Jones v. Stewart*, 457 F. Supp. 2d 1131, 1134– 37 (D. Nev. 2006) (deriving waiver theory from *Woodford v. Ngo*, 548 U.S. 81 (2006)); *see also Ross v. Cnty. of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004) *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199 (2007) ("If a prison accepts a belated filing, and considers it on the merits, that step makes the

filing proper for purposes of state law and avoids exhaustion, default, and timeliness hurdles in federal court."); *Jewkes v. Shackleton,* No. 11-cv-00112-REB-RNB, 2012 WL 3028054, at *3 (D. Colo. July 23, 2012) (citing *Ross v. County of Bernalillo* for the proposition that "the prison not only defines the rules, but also can waive the enforcement of them."). Further, setting aside timeliness, Defendants have cited no authority for the proposition that an inmate is procedurally defaulted from seeking monetary damages when the complained-of condition has been mooted. Indeed, even inmates who seek *only* monetary damages are required to exhaust administrative remedies, so long as some other remedy might be available. *Booth v. Churner*, 532 U.S. 731, 741 (2001). And if the administrative process could not afford *any* relief, then Plaintiff Vigil was not required to exhaust it. *Id.* at 736 n.4. Thus, although CDOC could have denied Plaintiff Vigil's claim as untimely, it didn't—and having made that mistake, CDOC cannot now turn to mootness as a procedural default.

Plaintiff Vigil presents two further arguments in response, which the Court will address in the alternative. First, Plaintiff Vigil argues that Defendants prevented him from filing his formal grievance by not timely responding to his informal grievance. The Court disagrees. Plaintiff Vigil's *informal* grievance was not filed until October 2014—making it, too, untimely. (Docket No. 29, p. 5 ¶¶ 9–10; Docket No. 29-3 ¶¶ 9–21 (references in to October 2013, in context, are typos meant to refer to October 2014).) Plaintiff Vigil's affidavit recounts a period of time from September 2014 through November 2014 where Defendants actively obstructed his grievance

rights, but the affidavit provides no explanation as to what prevented him from filing his grievance from April 2014 (when he left CSP) to September 2014 (when the obstructive conduct began).

Finally, Plaintiff Vigil's argues that Defendants prevented him from timely filing his grievances by creating an institution-wide hostile environment of retaliation and of routinely thwarting grievances. "Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust." *Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010). Plaintiff Vigil submits 33 affidavits from fellow inmates in support of this argument, each alleging frustration or fear arising from the grievance process. Defendants argue that these affidavits cannot be considered for purposes of summary judgment—but in so doing, Defendants ignore the express provisions of Federal Rule Civil Procedure 56(c)(4), which provides that affidavits *can* be considered on summary judgment. "While the party opposing summary judgment need not produce evidence in a form that would be admissible at trial, the *content or substance* of the evidence must be admissible." *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268 (10th Cir. 1998) (internal quotation marks and ellipses omitted; emphasis added). The cases cited by Defendants concern affidavits that themselves recount the statements of someone other than the affiant—hearsay within hearsay, in other words. Here, by contrast, the content of inmates' proffered testimony is admissible. And viewed in the light most favorable to Plaintiffs, they create a genuine dispute as to whether CDOC actively

thwarts the administrative-grievance process at CSP—which is a material fact.

For the foregoing reasons, the Court recommends that Defendants' motion for summary judgment as to Plaintiff Vigil be denied.

**Stating a Claim**

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Facts are viewed in the light most favorable to the plaintiff, and all reasonable inferences are drawn in the plaintiff's favor. *Dias v. City & Cnty. of Denver,* 567 F.3d 1169, 1178 (10th Cir. 2009). Here, Defendants argue that, as a matter of law, denial of outdoor exercise for any period of less than a year never states a claim under the Eighth Amendment. Because Plaintiffs allege they were denied outdoor exercise for eleven months, they cannot state a claim if there's a bright-line rule at twelve months.

Defendants' argument requires this Court to resolve two Tenth Circuit cases that seem to conflict, as well as precedent from this Court. In *Perkins v. Kansas Department of Corrections*, 165 F.3d 803, 810 (10th Cir. 1999), the Court held that a prisoner had stated a claim under the Eighth Amendment based on a lack of outdoor exercise. The inmate's legal claim was based on denial of exercise for nine months. *Id.* at 805. But the court also indicated, in discussing the inmate's Due Process claim, that he hadn't had outdoor exercise in "over a year." *Id.* at 809. Regardless of the exact number of months, the court explicitly noted that, under Tenth Circuit

precedent, the appropriate test is a fact-intensive standard rather than a bright-line rule. *Id.* at 810 n.8 ("As in *Housley,* '[w]e recognize . . . that what constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates.'" (quoting *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994)).

Nine years later, the Tenth Circuit decided *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008). There, the inmate had been "denied access to outdoor recreation his first year" at the prison; Judge Baldock, writing for the court, held that this did not state a claim under the Eighth Amendment. *Id.* at 584. Judge Baldock did not cite *Perkins* and did not elucidate any test—neither a rule, nor a standard—other than noting that another case had found a three-year deprivation to state a claim. *Id.* (citing *Fogle v. Pierson,* 435 F.3d 1252, 1260 (10th Cir. 2006)). Then-Chief Judge Henry wrote separately, emphasizing that the inmate had "regularly declined outdoor exercise opportunities" and "was allowed indoor recreation." *Id.* at 587. Judge Henry went on, however, to reject the government's arguments that a bright-line rule existed and that a deprivation of one year or less could never state a claim under the Eighth Amendment—positions Judge Henry found to be at odds with circuit precedent. *Id.* at 588. Judge Henry walked through extended precedent, including a discussion of *Perkins*, establishing a facts-and-circumstances standard and showing that a deprivation of outdoor exercise for one year could, under appropriate circumstances, violate the Constitution. *Id.* at 588–91.

The Court does not write on a blank slate in

attempting to reconcile *Ajaj*—which found no claim at twelve months—with *Perkins*—which found a claim at nine (or perhaps twelve) months. Judge Martinez, denying a motion for summary judgment in *Decoteau* (the injunctive-relief case pending parallel to this one, in which Plaintiffs are represented as class members), discussed both cases and determined (1) that *Ajaj* did not abrogate the Tenth Circuit's previous precedent, and (2) that the plaintiffs' claim could proceed whether it was based on nine months or a year. *Decoteau v. Raemisch*, No. 13-CV-3399-WJM-KMT, 2015 WL 3407232, at *3 (D. Colo. May 27, 2015).

The Court finds Judge Martinez's analysis persuasive. There is no bright-line rule, whether set at twelve months or elsewhere. The Court must look to the facts a circumstances—after all, the Tenth Circuit has found a claim where the inmate alleged less than thirty minutes of out-of-cell exercise in *three months*. *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994), *overruled on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996). As the *Housely* court explained—and as Judge Henry again explained in his concurring opinion in *Ajaj*—"what constitutes adequate exercise will depend on the circumstances of each case, including the physical characteristics of the cell and jail and the average length of stay of the inmates." *Housley*, 41 F.3d at 599. The fact that Plaintiffs were deprived of outdoor exercise for only eleven months does not, without further analysis, establish that they have no claim as a matter of law. Drawing reasonable inferences in Plaintiffs' favor, as the Court must under Rule 12(b)(6), Plaintiffs have stated a claim.

For the foregoing reasons, the Court recommends that Defendants' motion for to dismiss the complaint be denied.

**Recommendation**

For the foregoing reasons, the Court RECOMMENDS that Defendants' Motion to Dismiss or Motion for Summary Judgment (Docket No. 18) be DENIED.

**NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives de novo review of the recommendation by the District Judge, Thomas v. Arn, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions, Makin v. Colo. Dep't of Corr., 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).**

Dated: September 8, 2015
Denver, Colorado

/s/ Michael J. Watanabe
Michael J. Watanabe
United States District Judge

## APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-03399

RYAN DECOTEAU,
ANTHONY GOMEZ, and
DOMINIC DURAN

Plaintiffs,

v.

RICK RAEMISCH, in his official capacity as the Executive Director of the Colorado Department of Corrections, and TRAVIS TRANI, in his official capacity as the Warden of the Colorado State Penitentiary and Centennial Correctional Facility

Defendants.

### Exhibit 9 to Defendants' Motion for Partial Summary Judgment



P001651
Oakley 000090
Plaintiffs' Exhibit 9