EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 15-cv-01830-RBJ

DONNIE LOWE,

Plaintiff,

v.

RICK RAEMISCH, in his individual and official capacity as Executive Director, Colorado Department of Corrections,
TRAVIS TRANI, Warden, Colorado State Penitentiary, in his individual and official capacities,

Defendants.

ORDER

This order addresses defendants' motion to dismiss under Rules 12(b)(1) and 12(b)(6). The motion is denied.

BACKGROUND

Donnie Lowe was imprisoned in the Colorado State Penitentiary from February 2013 until March 2015 when he was transferred to the Sterling Correctional Facility, both prisons being part of the Colorado Department of Corrections. He alleges that during the two years he was in the Colorado State Penitentiary he was housed in "solitary confinement conditions" and was provided no opportunity for any outdoor exercise. Complaint, ECF No. 1, at ¶¶ 7-8. The Sterling Correctional Facility made some form of outdoor exercise available to inmates, and Mr. Lowe does not complain about his situation there.

Mr. Lowe was released from prison on July 19, 2015. On August 25, 2015 he filed this lawsuit against the Executive Director of the Colorado Department of Corrections and the Warden of the Colorado State Penitentiary, under 28 U.S.C. § 1983. He seeks compensatory and punitive damages based on the two-year deprivation of outdoor exercise which he alleges constituted cruel and unusual punishment in violation of his Eighth Amendment rights.

In their motion to dismiss defendants assert three arguments: (1) the Eleventh Amendment bars damages claims against them in their official capacities; (2) the claims are barred by the statute of limitations; and (3) because it was not clearly established that a two-year deprivation of outdoor exercise is unconstitutional, defendants are entitled to qualified immunity from any personal liability for money damages. ECF No. 10 at 2-3. The motion has been fully briefed.

ANALYSIS

A. Eleventh Amendment Immunity.

Plaintiff responds that he isn't seeking damages against the defendants in their official capacities. The Complaint did not make that clear. In any event, there is now no dispute. Mr. Lowe is not seeking, and cannot obtain, a damages award against the defendants in their official capacities.

B. Statute of Limitations.

Colorado's two-year general limitations statute, C.R.S. § 13-80-102, has been held to be applicable to § 1983 actions. *Workman v. Jordan*, 32 F.3d 475, 482 (10th Cir. 1994). Section 1983 actions "accrue when the plaintiff knows or has reason to know of the injury that is the basis of the action." *Id.* Defendants argue that "the limitations period started in February 2013,

when Lowe arrived at CSP, the location of the at-issue outdoor exercise policies." ECF No. 10 at 4.

There are two problems with this argument. First, the statute of limitations is an affirmative defense that may be decided on a Rule 12 motion to dismiss only "when the dates given in the complaint make clear that the right sued upon has been extinguished." *Aldrich v. McCulloch Props., Inc.,* 627 F.2d 1036, 1041 n.4 (10th Cir. 1980). Plaintiff does not complain that depriving him of outdoor exercise on his first day or during the first month of his incarceration violated the Eighth Amendment. Rather, he alleges that depriving him of outdoor exercise for an extended period of time, here approximately two years, amounts to unconstitutionally cruel and unusual punishment. When Mr. Lowe knew or had reason to know that his deprivation attained constitutional significance is not clear on the face of the complaint and should not be decided on a motion to dismiss.

That conclusion is emphasized by the second problem with defendants' argument. In support of their qualified immunity argument defendants contend that it was not clearly established in 2013, and therefore that a reasonable officer would not have understood, that depriving an inmate of outdoor exercise for two years violated the constitution. How, then, can defendants expect Mr. Lowe to have known that his constitution rights were being violated on the day of his arrival at the Colorado State Penitentiary? The motion to this extent is internally inconsistent, and the inconsistency highlights the inappropriateness of deciding the limitations issue at this juncture.

C. Qualified Immunity.

Government officials are protected from damages suits by the doctrine of "qualified immunity" unless a plaintiff can show that the official (1) violated a constitutional right that (2) was clearly established at the time of the challenged conduct. *See, e.g., Mocek v. City of Albuquerque,* 813 F.3d 912, 922 (10th Cir. 2015). Generally, "clearly established" means that the Supreme Court or the Tenth Circuit or the clearly established weight of authority from other courts "must have found the law to be as the plaintiff maintains." *Mocek,* 813 F.3d at 922 (quoting *Morris v. Noe,* 672 F.3d 1185, 1196 (10th Cir. 2012). The presumption is that such authority would make it clear to a reasonable officer that his conduct violated a constitutional right. *Allstate Sweeping, LLC v. Black,* 706 F.3d 1261, 1265 (10th Cir. 2013).

In their motion to dismiss defendants focus only on the "clearly established" prong, arguing that it was not clearly established during the period of Mr. Lowe's confinement at the Colorado State Penitentiary that deprivation of outdoor exercise for two years would be unconstitutional. I disagree. As early as 1987 the Tenth Circuit recognized that "[t]here is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates, and some courts have held a denial of fresh air and exercise to be cruel and unusual punishment under certain circumstances." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987). There the court held that permitting outdoor exercise for one hour per week did not violate the Eighth Amendment. *Id.* But in *Perkins v. Kansas Department of Corrections,* 165 F.3d 803 (10th Cir. 1999), the court held that the inmate's complaint that he had been denied all outdoor exercise for more than

nine months presented "facts from which a factfinder could infer both that prison officials knew of a substantial risk of harm to plaintiff's well being resulting from the lengthy denial of outdoor exercise and that they disregarded that harm." *Id.* at 810.

In *Ajaj v. United States,* 293 F. App'x 575, 2008 WL 4192738 (10th Cir. 2008) (unpublished) the inmate was denied outdoor exercise for one year but thereafter, when he was provided opportunities for outdoor exercise, he regularly declined to participate.[1] The court repeated its earlier observation that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates." *Id.* at 583. On the facts presented it held that the deprivation of outdoor recreation was not sufficiently serious to implicate the Eighth Amendment. *Id.* at 584. Of particular interest, however, is Chief Judge Henry's concurrence. He agreed that defendants were entitled to qualified immunity "due to Mr. Ajaj's failure to substantiate his claims adequately," but he went on to emphasize that "a prisoner who has been deprived of outdoor exercise for one year -- especially one with health issues whose doctor has recommended outdoor exercise -- *could* make out an Eighth Amendment claim under the summary judgment standard of review." *Id.* at 588 (emphasis in the original). After citing *Perkins* and several other Tenth Circuit cases, Judge Henry concluded, "[o]ur cases suggest that the general rule entitling prisoners to outdoor exercise may not be violated, absent a strong justification." *Id.*at 589-90.[2] "The length of a deprivation of outdoor exercise necessary to trigger an Eighth Amendment violation may vary, depending [on] the government's

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[1] These allegations are spelled out in more detail in the underlying district court opinion, *Ajaj v. United States,* No. 03-cv-1959-MSK, 2006 WL 3797871, at *9 (D. Colo. Dec. 22, 2006).

[2] Judge Henry noted as well that Federal Bureau of Prisons regulations recognize the importance of both indoor and outdoor recreation, and that the American Correctional Association's standards likewise recommend that inmates be provided with ample space for indoor and outdoor recreation. *Id.* at 589.

justifications for the deprivation." *Id.* at 590 (quoting *Perkins'* observation that "'what constitutes adequate exercise will depend on the circumstances of each case' including 'penological considerations.'" In short, a bald assertion that deprivation of outdoor exercise for one year with little factual analysis would not persuade Judge Henry to dismiss a case on qualified immunity grounds. *See id.* at 591.

On August 24, 2012 – six months before Mr. Lowe was incarcerated at the Colorado State Penitentiary – this Court issued its opinion in *Anderson v. Colorado,* 887 F. Supp. 1133 (D. Colo. 2012). That case, like the present case, was brought against the Executive Director of the Colorado Department of Corrections and the Warden of the Colorado State Penitentiary. This Court held that depriving the inmate of outdoor exercise violated the Eighth Amendment.

Defendants distinguish *Anderson* on the length of the deprivation. ECF No. 10 at 2. However, the opinion cited the testimony of three doctors and five psychologists employed by the Colorado Department of Corrections who all agreed with plaintiff's expert, a psychologist and prison consultant, that outdoor exercise is important to inmates' mental health. *Id.* at 1139. It reviewed applicable case law including *Perkins*, all of which dealt with shorter periods of deprivation. *Id.* at 1139-40. It criticized the policies and practices at the Colorado State Penitentiary. *Id.* at 1141. The Court concluded that "CDOC officials know that the CSP is out of step with the rest of the nation. They have been told by the experts whom they hired that access to outdoor recreation at the CSP is deficient. However, so far as the evidence in this case shows, nothing has been done to provide any form of outdoor exercise to Mr. Anderson or to other inmates who have been held in administrative segregation at the CSP for long periods." *Id.* at 1142.

On December 17, 2013 plaintiffs' lawyers from the *Anderson* case, frustrated by the Colorado Department of Corrections' failure to provide or to begin the process of providing outdoor exercise to segregated inmates other than Mr. Anderson, filed a purported class action against the Executive Director of the Colorado Department and the Warden of the Colorado State Penitentiary on behalf of all such inmates under the Eighth and Fourteenth Amendments. *Decoteau v. Raemisch,* No. 13-cv-3399-WJM-KMT (D. Colo.). At that time Mr. Lowe had been without outdoor exercise for approximately 10 months. He remained without outside exercise for approximately an additional 14 months until he was transferred to the Sterling Correctional Facility. I can take judicial notice of the files of cases pending in this district. A class-wide settlement that includes changes that will afford outdoor exercise to essentially all inmates has been negotiated, and it was approved by the court at the conclusion of a fairness hearing on June 29, 2016. *See id.* at ECF Nos. 162 and 180.

In sum, I find that a reasonable official in the position of the Executive Director of the Colorado Department of Corrections or the Warden of the Colorado State Penitentiary almost certainly did know (and Tenth Circuit cases and many other cases clearly established) that, at the time of Mr. Lowe's confinement, depriving him of outdoor exercise for an extended period of time was likely a violation of his constitutional rights. At a minimum there are fact issues concerning whether there might be some unique justification for a two-year deprivation applicable to him. And one must bear in mind that defendants have asserted in support of their statute of limitations argument that Mr. Lowe should have known in February 2013 that his constitutional rights had been violated. Yet they argue that they did not reasonably know that they were violating his rights!

The Court concludes that defendants are not entitled to have their motion to dismiss granted on qualified immunity grounds.

ORDER

Defendants' Motion to Dismiss, ECF No. 10, is DENIED.

DATED this 18th day of July, 2016.

BY THE COURT:

R. Brooke Jackson
United States District Judge