APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[filed October 10, 2017]

DONNIE LOWE,

Plaintiff-Appellee,

v. No. 16-1300

RICK RAEMISCH, in his individual and official capacities as Executive Director of the Colorado Department of Corrections, et al.,

Defendants-Appellants.

ORDER

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

Appellee's 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, the petition for rehearing en banc is 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]

DONNIE LOWE, Plaintiff-Appellee, v. RICK RAEMISCH, in his individual and official capacities as Executive Director of the Colorado Department of Corrections; and TRAVIS TRANI, Warden, Colorado State Penitentiary, in his individual and official capacities, Defendants-Appellants.	No. 16-1300

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:15-CV-01830-RBJ)

Kathryn A. Starnella, Assistant Attorney General, Denver, Colorado (Cynthia H. Coffman, Attorney General, with her on the briefs), for Defendants-Appellants.

Elisabeth L. Owen, Prisoners' Justice League of Colorado LLC, Denver, Colorado, for Plaintiff-Appellee.

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

BACHARACH, Circuit Judge.

This appeal grew out of a state prisoner's alleged deprivation of outdoor exercise for two years and one month. The alleged deprivation led the prisoner (Mr. Donnie Lowe) to sue two senior prison officials, invoking 42 U.S.C. § 1983 and alleging violation of the Eighth Amendment. The district court declined to dismiss the personal liability claims against the two officials, and they appeal.

For the sake of argument, we may assume a violation of the Eighth Amendment. Even with this assumption, the two officials would enjoy qualified immunity unless the denial of outdoor exercise for two years and one month had violated a clearly established constitutional right. In our view, the right was not clearly established. Thus, we reverse.[1]

1. Appellate Jurisdiction

Mr. Lowe moves to dismiss the appeal, arguing that we lack appellate jurisdiction. We disagree and deny Mr. Lowe's motion to dismiss.

Though the district court has not entered a final judgment, the collateral-order doctrine creates appellate jurisdiction over certain intermediate rulings on pure issues of law. *See Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). Denials of qualified immunity ordinarily fall within the collateral-order doctrine. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2019 (2014).

---

[1] Mr. Lowe also sued the defendants in their official capacities, and the district court ruled that these claims were barred by the Eleventh Amendment. The ruling on the Eleventh Amendment is not involved in this appeal.

According to Mr. Lowe, the collateral-order doctrine does not apply because our issue of qualified immunity is fact intensive. We disagree: We are reviewing the sufficiency of a complaint, which involves a pure issue of law. *See Iqbal*, 556 U.S. at 674; *see also Ortiz v. Jordan*, 562 U.S. 180, 188 (2011) (stating that the inquiry regarding what is "clearly established" entails a matter of law).

The district court concluded that the alleged facts precluded qualified immunity. Order at 7, *Lowe v. Raemisch*, No. 15-cv-01830-RBJ (D. Colo. July 18, 2016) (Dkt. No. 35) ("I find that a reasonable official . . . 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."). The correctness of this conclusion involves a pure question of law.[2] *See Iqbal*, 556 U.S. at 672 (stating that denial of a motion to dismiss, which had been based on qualified immunity, was immediately appealable). Thus, we have jurisdiction under the collateral- order doctrine.

---

[2] The district court also remarked that "[a]t a minimum there are fact issues concerning whether there might be some unique justification for a two-year deprivation." Order at 7, *Lowe v. Raemisch*, No. 15-cv-01830-RBJ (D. Colo. July 18, 2016) (Dkt. No. 35). This remark did not suggest factual issues at the present stage. Rather, the court was saying that as the case proceeded to discovery, the defendants might later learn of facts that would trigger qualified immunity. *See Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 868 n.6 (10th Cir. 2016) (noting that even if a court denies qualified immunity on a motion to dismiss, qualified immunity may be invoked again through a motion for summary judgment).

2. Qualified Immunity

The issue of qualified immunity arose in district court, where the court denied the motion to dismiss. For this ruling, we engage in de novo review, viewing the complaint's allegations in the light most favorable to Mr. Lowe. *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012). Viewing the allegations in this light, we conclude that the two officials are entitled to qualified immunity.

a. Qualified immunity protects all officials except those who are plainly incompetent or knowingly violate the law.

The law is clearly established when a Supreme Court or Tenth Circuit precedent is on point or the alleged right is clearly established from case law in other circuits. *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003). The precedent is considered on point if it 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). Because the prior case must involve materially similar conduct or apply with obvious clarity, qualified immunity generally protects all public officials except those who are "'plainly incompetent or those 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)).

b. The alleged deprivation of outdoor exercise for two years and one month did not violate a clearly established constitutional right.

We have acknowledged the absence of any "doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment." *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996), *as recognized in Tucker v. Graves*, 107 F.3d 881, 1997 WL 100884, at *1 n.2 (10th Cir. Mar. 6, 1997) (unpublished). Prison officials sometimes disallow exercise outside an inmate's cell and sometimes disallow exercise outdoors (while still permitting out-of-cell exercise). *See Apodaca v. Raemisch*, No. 15-1454, slip. op. at Part III (10th Cir. July 25, 2017) (to be published). Mr. Lowe's claim involves the disallowance of exercise outdoors rather than outside of his cell.

In precedential opinions,[3] we have reached four conclusions on the constitutionality of denying outdoor exercise to inmates[4]:

---

[3] Mr. Lowe does not allege that Supreme Court precedent or the weight of authority in other circuits has clearly established the law. *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 clearly established law); *Cox v. Glanz*, 800 F.3d 1231, 1247 (10th Cir. 2015) (declining to consider out-of-circuit authority because the plaintiff had not brought this authority to our attention).

[4] As discussed in another opinion released today, our opinion in *Perkins v. Kansas Department of Corrections*, 165 F.3d 803 (10th Cir. 1999), did not clearly establish a constitutional prohibition against a prolonged denial of outdoor exercise. *See*

1. The denial of outdoor exercise could violate the Eighth Amendment "under certain circumstances."[5]
2. The denial of outdoor exercise does not create a per se violation of the Eighth Amendment.[6]
3. Restricting outdoor exercise to one hour per week does not violate the Eighth Amendment.[7]
4. The denial of outdoor exercise for three years could arguably involve deliberate indifference to an inmate's health under the Eighth Amendment.[8]

These conclusions permit reasonable debate on the constitutionality of disallowing outdoor exercise for two years and one month. We have said that denying outdoor exercise could violate the Constitution under some circumstances, but we have not defined those circumstances. Thus, the constitutional inquiry would depend on a case-by-case examination of the totality of circumstances. *See Housley*, 41 F.3d at 599 ("We recognize, of course, that what constitutes adequate exercise will depend on the circumstances of each case . . . .").

Apodaca v. Raemisch , No. 15- 1454, slip. op. at Parts III-IV (10th Cir. July 25, 2017) (to be published).

[5] *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam); *see Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994) ("In *Bailey*, we found that even a convicted murderer . . . was entitled to outdoor exercise.").

[6] *Bailey*, 828 F.2d at 653.

[7] *Id*.

[8] *Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2006).

One critical circumstance is the duration of a prisoner's inability to exercise outdoors. *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). We have sometimes said what is not too long. For example, we have said that limiting outdoor exercise to one hour per week is constitutional. *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam). And today we elsewhere hold that qualified immunity applies when prisoners are denied outdoor exercise for roughly eleven months. *See Apodaca v. Raemisch*, No. 15-1454, slip. op. at Parts III-IV (10th Cir. July 25, 2017) (to be published). But what about a denial exceeding two years? We have not squarely addressed a denial of that duration.

Mr. Lowe disagrees, pointing to *Fogle v. Pierson*, 435 F.3d 1252 (10th Cir. 2006). There, we held that a denial of outdoor exercise for three years could arguably suggest deliberate indifference. *Fogle*, 435 F.3d at 1259-60. But, in specifically discussing the length of the deprivation, we applied the Eighth Amendment's subjective prong, not the objective prong. *Id.* at 1260. The objective prong addresses whether the deprivation is "sufficiently serious," and the subjective prong addresses whether the officials acted with a "sufficiently culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 297-98 (1991).

Here the officials do not challenge the evidence on their state of mind; instead, they argue that the alleged denial of outdoor exercise for two years and

one month is not sufficiently serious to implicate the Eighth Amendment. This argument involves the objective prong, not the subjective prong that *Fogle* addressed with respect to the length of the deprivation.

If "'an issue is not argued, or though argued is ignored by the court, or is reserved, the decision does not constitute a precedent to be followed.'" *United Food & Commercial Workers Union, Local 1564 v. Albertson's, Inc.*, 207 F.3d 1193, 1199 (10th Cir. 2000) (quoting *EEOC v. Trabucco*, 791 F.2d 1, 4 (1st Cir. 1986)). With regard to the length of the deprivation, the *Fogle* court suggested that it was addressing only the issue of deliberate indifference, not the seriousness of a prolonged denial of outdoor exercise. *Fogle*, 435 F.3d at 1260. In light of the court's description of the issue, prison officials could reasonably infer that the *Fogle* court had not decided whether a three-year ban on outdoor exercise is sufficiently serious to violate the Eighth Amendment's objective prong. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1288-89 (10th Cir. 2017) m(collecting cases concerning the principle that appellate courts do not decide issues that are not raised). Therefore, *Fogle* is not necessarily on point for the issue confronting the two officials in our case.[9]

---

[9] We have stated otherwise in unpublished opinions. *See, e.g.*, *Covalt v. Inmate Servs. Corp.*, 658 F. App'x 367, 370 (10th Cir. 2016) (citing *Fogle* as "concluding that denying the plaintiff any outdoor exercise for three years constituted a sufficiently serious deprivation"); *Lewis v. McKinley Cty. Bd. of Cty. Comm'rs*, 425 F. App'x 723, 727 (10th Cir. 2011) ("This court has held that deprivations or conditions were sufficiently serious to state an Eighth Amendment claim in the following

In addition, *Fogle* considered only whether the plaintiff's claim had been "frivolous." *Fogle*, 435 F.3d at 1260. Under the frivolousness standard, the issue is simply whether a point "could even be argued." *Stewart v. Donges*, 915 F.2d 572, 583 n.14 (10th Cir. 1990).

In light of the court's focus on the subjective prong and application of the frivolousness standard, the two officials could reasonably question *Fogle*'s effect on the constitutionality of the deprivation here.

Finally, Mr. Lowe points to our opinion in *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994). But *Housley* differed from our case. There we addressed the denial of any *out-of-cell* exercise rather than *outside* exercise. *Housley*, 41 F.3d at 599. This difference could lead reasonable prison officials to question the applicability of *Housley*. As a result, we lack any on-point precedent regarding the constitutionality of disallowing outdoor exercise for a period approximating two years and one month.

c. The deprivation of outdoor exercise for two years and one month is not so obviously unlawful that a constitutional violation would be undebatable.

Mr. Lowe argues that even if no precedent is on point, our case law provided the two prison officials with "'fair warning'" that their conduct was unconstitutional. Appellee's Resp. Br. at 12-14

---

situations: . . . denying a prisoner all outdoor exercise for three years . . . ." (citing *Fogle*)). But these unpublished opinions "'provide[] little support for the notion that the law [was] clearly established.'" *Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012) (citation omitted).

(quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). We disagree.

Even when no precedent involves facts "materially similar" to ours, the right can be clearly established if a precedent applies with "obvious clarity." *See* Part 2(a), above. When the public official's conduct is egregious, even a general precedent would apply with obvious clarity. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional . . . ."). "After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

Even in the absence of egregious conduct, the constitutional violation may be so obvious that similar conduct seldom arises in our cases. *See Safford*, 557 U.S. at 377-78. "Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Browder*, 787 F.3d at 1082-83. Ultimately, we consider whether our precedents render the legality of the conduct undebatable. *Aldaba v. Pickens*, 844 F.3d 870, 877 (10th Cir. 2016).[10]

---

[10] We have described these principles in terms of a sliding scale. *See Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) ("'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'"

On this record, however, the deprivation of outdoor exercise for two years and one month would not have obviously crossed a constitutional line.[11] Thus, the underlying right was not clearly established and the defendants are entitled to qualified immunity.

d. Qualified immunity is not precluded by the district court's finding in an earlier case.

Qualified immunity is unavailable to officials who "knowingly violate the law." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (internal quotation marks & citation omitted). Mr. Lowe applies this principle, arguing that the two officials knew that they were violating the law because a district court had already found a constitutional violation based on

---

(citation omitted)). But our sliding-scale approach may arguably conflict with recent Supreme Court precedent on qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016). The possibility of a conflict arises because the sliding-scale approach may allow us to find a clearly established right even when a precedent is neither on point nor obviously applicable. *See id.*; *see also Mascorro v. Billings*, 656 F.3d 1198, 1208 n.13 (10th Cir. 2011) (declining to apply the standards of *Hope v. Pelzer* to a situation where the constitutional violation was not obvious).

We need not decide today whether our sliding-scale approach conflicts with Supreme Court precedent. As explained in the text, the defendants lacked clearly applicable precedents showing whether denial of outdoor exercise for two years and one month was sufficiently serious to violate the Eighth Amendment.

[11] We have recognized that denial of outdoor exercise hinders an inmate's psychological and physical health. *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) (per curiam). But Mr. Lowe does not address how long the deprivation must last before the constitutional violation becomes obvious.

similar conditions at the same prison. Appellee's Resp. Br. at 15 (citing *Anderson v. Colorado*, 887 F. Supp. 2d 1133 (D. Colo. 2012)).

We reject this argument based on a key factual distinction with the prior district court case, a conflict with Supreme Court precedent, and the existence 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 was far shorter: *two years and one month*.

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 (Attorney General Ashcroft) and said that his actions were unconstitutional, did not clearly establish the underlying right because a district court's holding is not controlling in any jurisdiction. *al-Kidd*, 563 U.S. at 741.

Third, Mr. Lowe assumes that a defendant's knowledge affects the availability of qualified immunity. We reject that assumption, 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 *Anderson* ruling does not preclude qualified immunity.

3. Conclusion

We must gauge the clarity of the constitutional right based on our precedents' similarity of conditions or obvious applicability. In our view, competent public officials could reasonably have viewed our precedents as inapplicable. As a result, competent officials could reasonably disagree about the constitutionality of disallowing outdoor exercise for two years and one month. In light of this room for reasonable disagreement, the defendants are entitled to qualified immunity.

4. Disposition

We deny Mr. Lowe's appellate motion to dismiss, reverse the district court's denial of the defendants' motion to dismiss, and remand with instructions to grant the defendants' motion to dismiss.

APPENDIX 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

[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)

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 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

---

[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 the indoor and outdoor recreations. *Id.* at 589.

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:

/s/ Brooke Jackson
R. Brooke Jackson
United States District Judge

APPENDIX D

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