

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

'09 - CV - 01196

Civil Action No. _____

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 26 2009

GREGORY C. LANGHAM
CLERK

NATHAN JERARD DUNLAP,
MATTHEW FRANCISCO ALFARO, and
RYAN MERRITT,

Plaintiffs,

v.

ARISTEDES ZAVARAS, individually, and
in his official capacity as Executive
Director of the Colorado Department of
Corrections,

SUSAN JONES, individually, and in her
official capacity as the Warden of the
Colorado State Penitentiary,

D. COMBS, whose true name is unknown,
individually, and in his official capacity as
a hearing committee member,

K. MOORE, whose true name is unknown
individually, and in her official capacity as
a hearing committee member, and

J. OLSON, whose true name is unknown,
individually, and in his official capacity as
hearing committee chairperson,

RECEIVED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 14 2009

GREGORY C. LANGHAM
CLERK

Defendants.

PRISONERS COMPLAINT

A. PARTIES

1A. Nathan Jerard Dunlap, #89148, Colorado State Penitentiary,
P.O. Box 777, Cañon City, CO 81215-0777

1B. Matthew Francisco Alfaro, #110191, Colorado State Penitentiary,
P.O. Box 777, Cañon City, CO 81215-0777

5. K. Moore, Hearing Committee Member, Colorado State Penitentiary,
P.O. Box 777, Cañon City, CO 81215-0777

At the time the claim(s) alleged in this complaint arose, this defendant was acting under color of state law. She is one of the persons who supposedly conduct adseg classification review hearings and also decides to retain plaintiffs in adseg.

6. J. Olson, Hearing Committee Chairperson, Colorado State Penitentiary, P.O. Box 777, Cañon City, CO 81215-0777

At the time the claim(s) alleged in this complaint arose, this defendant was acting under color of state law. He is one of the persons who supposedly conduct adseg classification review hearings and also decides to retain plaintiffs in adseg.

A. PARTIES (cont)

- 1C. Ryan Merritt, #96531, Colorado State Penitentiary, P.O. Box 777, Cañon City, CO
(Plaintiff's name, prisoner identification number, and complete mailing address)

81215-0777

2. Aristedes Zavaras, Executive Director of the Colorado Department of Corrections,
(Name, title, and address of first defendant)

2862 S. Circle Dr. Ste 148, Colorado Springs, CO 80906-4195

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

He is legally responsible for the overall operation of the Colorado Department of
Corrections and each institution under its jurisdiction including the Colorado
State Penitentiary (hereinafter referred to as "CSP").

3. Susan Jones, Warden of CSP, Colorado State Penitentiary, P.O. Box 777,
(Name, title, and address of second defendant)

Cañon City, CO 81215-0777

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

She is responsible for the operation of CSP and the welfare of all the prisoners
confined in CSP.

4. D. Combs, Hearing Committee Member, Colorado State Penitentiary, P.O. Box 777, Cañon
(Name, title, and address of third defendant)

City, CO 81215-0777

At the time the claim(s) alleged in this complaint arose, was this defendant acting under color of state law? X Yes ___ No (CHECK ONE). Briefly explain your answer:

He is one of the persons who supposedly conducts administrative segregation

(hereinafter referred to as "adseg") classification review hearings and also decides to retain
plaintiffs in adseg.

(If you are suing more than three defendants, use extra paper to provide the information requested above for each additional defendant. The information about additional defendants should be labeled "A. PARTIES.")

B. JURISDICTION

1. I assert jurisdiction over my civil rights claim(s) pursuant to: (check one if applicable)

X 28 U.S.C. § 1343 and 42 U.S.C. § 1983 (state prisoners)

— 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (federal prisoners)

2. I assert jurisdiction pursuant to the following additional or alternative statutes (if any):

28 U.S.C. Section 2201 and 2202; 28 U.S.C. Section 2283 and 2284
and Rule 65 of the Federal Rules of Civil Procedure

C. NATURE OF THE CASE

BRIEFLY state the background of your case. If more space is needed to describe the nature of the case, use extra paper to complete this section. The additional allegations regarding the nature of the case should be labeled "C. NATURE OF THE CASE."

1. CSP is located in Cañon City, CO. Based upon information and belief, it holds approximately 750 prisoners. Prisoners are warehoused in six separate pods: Pods A, B, C, D, E, and F. Each pod contains eight units. Each unit contains 15 to 16 cells. All prisoners confined in CSP are placed in adseg. Adseg is the most restrictive custody level that can be imposed upon a Colorado Department of Corrections (hereinafter referred to as "CDOC") prisoner. It is also the most controlled environment possible through the classification process and is where almost every aspect of a prisoner's life is controlled and monitored.

2. In adseg in CSP, based upon information and belief, each prisoner is confined, by himself, to a cell with no less than 80 square feet of floor space and 35 square feet of unencumbered space almost 23 to 24 hours a day. The cell has a narrow outside window that can't be opened. Although it can be dimmed, the cell light remains on 24 hours a day. The cell door is solid metal with metal straps along the sides and bottom which make it difficult to communicate with others. It also has a small thick

C. NATURE OF THE CASE (cont)

glass window and a "food/cuff" slot that can only be opened or closed by staff.

3. There are strict limits on the types and amount of personal property a prisoner can have in adseg in CSP. The number of phone calls prisoners in adseg in CSP can make to family members, friends, and attorneys is severely limited and opportunities for visitation are rare and always conducted through a glass wall. All prisoners confined in adseg in CSP are denied outdoor exercise and lose the ability to earn good time.

4. As evidenced in part by named plaintiff Nathan Gerard Dunlap's (hereinafter referred to as "Dunlap") almost thirteen, and still counting, years in adseg in CSP, named plaintiff Matthew Francisco Alfaro's (hereinafter referred to as "Alfaro") three plus, and still counting, years in adseg in CSP, named plaintiff Ryan Merritt's (hereinafter referred to as "Merritt") four plus, and still counting, years in adseg, in adseg in CSP beginning and since about the latter year and a half, and other prisoner(s) claim(s), see "Exhibits C thru E", retention in adseg in CSP varies and is for an indefinite period of time that is only limited by a prisoner's life or sentence.

5. Incarceration in adseg in CSP is synonymous with extreme isolation. Prisoners in adseg in CSP are deprived of almost any environmental or sensory stimuli and of almost all human contact. The conditions of confinement that exist in adseg in CSP are not only a behavior modification tool, that is separate from the Code of Penal Discipline process, but they are also more restrictive than any other form of incarceration in the CDOC. Such conditions of confinement impose atypical and significant hardships on a prisoner in relation to the ordinary incidents of prison life.

6. Upon information and belief, per policy, practice, and/or

C. NATURE OF THE CASE (cont)

procedure, prisoners confined in adseg in CSP receive monthly adseg classification review forms indicating the outcome of an adseg classification review hearing. In reality, such monthly adseg classification review forms are perfunctory. Along with those forms, in the event an actual adseg classification review hearing took place, they are a sham.

7. Upon information and belief, per policy, practice, and/or procedure, prisoners confined in adseg in CSP have never been, and aren't, provided with a notice of when the reported adseg classification review would take place prior to it reportedly taking place.

8. Upon information and belief, per policy, practice, and/or procedure, prisoners confined in adseg in CSP have never been, and aren't, allowed to attend any of the reported adseg classification reviews so they could present evidence and/or arguments in their favor or to dispute the info upon which the review committee members rely on to retain them in adseg in CSP.

9. Upon information and belief, per policy, practice, and/or procedure, prisoners confined in adseg in CSP have not been, and aren't, provided with the factual basis for the review committee's decision to retain them in adseg. In fact, the decisions rendered by the hearing committee to retain prisoners in adseg are based on arbitrary, meaningless, capricious, and bias factors. Sometimes, apparently, in accordance with policy, practice and/or procedure.

10. Also, in addition to not truthfully being provided with notice of what conduct is necessary of a prisoner in order to progress out of adseg in CSP, prisoners in adseg in CSP aren't given the opportunity to appeal the adseg classification review hearing committee's decisions, per policy, practice, and/or procedure.

C. NATURE OF THE CASE (cont)

11. The aforementioned policies, practices, and/or procedures were created and/or implemented by defendants Aristedes Zavaras (hereinafter referred to as "Zavaras") and Susan Jones (hereinafter referred to as "Jones"). Defendants D. Combs (hereinafter referred to as "Combs"), K. Moore (hereinafter referred to as "Moore") and J. Olson (hereinafter referred to as "Olson") are some of the reported hearing committee members tasked with, and actually are, conducting adseg classification review hearings and rendering decisions to retain a prisoner in adseg in CSP.

12. Defendants Zavaras and Jones have actual knowledge of the substantial risk of serious harm to prisoners at CSP caused by the complete denial of outdoor exercise over an extended period of time. They know about both the non-existence of outdoor exercise as described above and the resulting risk to a prisoner's health. This risk is longstanding, pervasive, and apparent to any knowledgeable observer.

13. As a result of the substantial risk of serious harm caused by the complete denial of outdoor exercise over an extended period of time, prisoners in adseg in CSP are slowly but surely deteriorating physically and mentally. Without outdoor exercise, prisoners are unable to be exposed to unfiltered sunlight. Such unfiltered sunlight is essential for a person to produce Vitamin D. That vitamin is needed to aid in the absorption of calcium and phosphorus to build bone and avoid the risk of osteoporosis and fractures. Numerous prisoners have suffered from depression due to the lack of outdoor exercise. In at least one case, a prisoner stopped eating for several weeks and tried to starve to death due to the lack of outdoor exercise he had experienced over an approximate twelve year span.

14. Upon information and belief, several prisoners have filed

C. NATURE OF THE CASE (cont)

administrative grievances over the years complaining about the lack of outdoor exercise in CSP. Some of these grievances are included in this complaint. See "Exhibits A and B". Also, at least one other prisoner who was confined at CSP for several years has filed a federal lawsuit in regards to the lack of outdoor exercise at CSP. See Fogle v. Pierson, 435 F.3d 1252, 1259-60 (10th Cir. 2006).

15. Despite the incidents described above, prisoner health at CSP has not improved. Defendants Zavaras and Jones have not created policies, practices, and/or procedures and/or taken the steps necessary to provide prisoners confined in CSP with outdoor exercise. As a result of these failures, prisoners continue to deteriorate physically and mentally, experience depression, and not be exposed to unfiltered sunlight.

D. CAUSE OF ACTION

State concisely every claim that you wish to assert in this action. For each claim, specify the right that allegedly has been violated and state all supporting facts that you consider important, including the date(s) on which the incident(s) occurred, the name(s) of the specific person(s) involved in each claim, and the specific facts that show how each person was involved in each claim. You do not need to cite specific cases to support your claim(s). If additional space is needed to describe any claim or to assert more than three claims, use extra paper to continue that claim or to assert the additional claim(s). The additional pages regarding the cause of action should be labeled "D. CAUSE OF ACTION."

1. Claim One: Plaintiffs' Due Process Rights Are Being Violated

Supporting Facts: Plaintiffs support the following claim by reference to the previous sections and paragraphs of this complaint. The conditions of confinement as previously described give rise to a liberty interest. See Wilkinson v. Austin, 125 S.Ct. 2384, 2395 (2005); Fogle, 435 F.3d at 1259, 1265. Defendants Zavaras and Jones creation and/or implementation of the previously mentioned policies, practices, and/or procedures that fail to comply with the minimum requirements of procedural due process afforded prisoners who are being deprived of a liberty interest, deprived, and continues to deprive, the plaintiffs of their rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Claim Two: Plaintiffs' Due Process Rights Are Being Violated

Supporting Facts: Plaintiffs support the following claim by reference to the previous sections and paragraphs of this complaint. Defendants Combs, Moore, and Olson are the hearing committee members who have conducted, and continue to conduct, what amounts to sham adseg classification reviews and have rendered, and continue to render, decisions to retain the plaintiffs based on arbitrary, meaningless, capricious, and bias grounds in violation of the plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

3. Claim Three: Plaintiffs' Eighth Amendment Rights Are Being Violated

Supporting Facts:

Plaintiffs support the following claim by reference to the previous sections and paragraphs of this complaint. The deliberate indifference of defendants Zavaras and Jones to the substantial risk of harm caused by the denial of all outdoor exercise over an extended period of time has deprived, and continues to deprive, the plaintiffs of their rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. See Spain v. Procunier, 600 F.2d 189, 199-200 (9th Cir. 1979); which was cited by Bailey v. Shillinger, 828 F.2d 651, 653 (10th Cir. 1987); which was cited by Fogle, 435 F.3d at 1260.

E. PREVIOUS LAWSUITS

Have you ever filed a lawsuit, other than this lawsuit, in any federal or state court while you were incarcerated? ☒ Yes ☐ No (CHECK ONE). If your answer is "Yes," complete this section of the form. If you have filed more than one lawsuit in the past, use extra paper to provide the necessary information for each additional lawsuit. The information about additional lawsuits should be labeled "E. PREVIOUS LAWSUITS."

1. Name(s) of defendant(s) in prior lawsuit: I believe I filed 3 or 4 different lawsuits in the past while I don't recall all the named defendants. I can state they were all CDC employees
2. Docket number and court name: I can't recall the docket numbers but all the cases were filed in the Fremont County District Court
3. Claims raised in prior lawsuit: Destruction of personal property and inability to make calls to attorneys.
4. Disposition of prior lawsuit (for example, is the prior lawsuit still pending? Was it dismissed?): All lawsuits were dismissed for varying reasons
5. If the prior lawsuit was dismissed, when was it dismissed and why? All cases had been dismissed several years ago. All but one were dismissed for failure to state a claim. The other was dismissed based upon defendant's rule 12 motion
6. Result(s) of any appeal in the prior lawsuit: Of the two decisions I wound up appealing, both decisions were affirmed on appeal

F. ADMINISTRATIVE RELIEF

1. Is there a formal grievance procedure at the institution in which you are confined?
☒ Yes ☐ No (CHECK ONE).
2. Did you exhaust available administrative remedies? ☒ Yes ☐ No (CHECK ONE).

G. REQUEST FOR RELIEF

State the relief you are requesting. If you need more space to complete this section, use extra paper. The additional requests for relief should be labeled "G. REQUEST FOR RELIEF."

WHEREFORE, plaintiffs respectfully prays that this Court:

1. Declare that the acts and omissions described herein violated the plaintiffs rights under the Constitution and laws of the United States.
2. Enter preliminary and permanent injunctions ordering defendants Zavaras and Jones, their successors, agents, employees, and all persons acting in concert with them, provide the plaintiffs with outdoor exercise.
3. Enter permanent injunctions ordering defendants Zavaras and Jones, their successors, agents, employees, and all persons acting in concert with them, to create and/or implement policies, practices, and/or procedures that will allow the plaintiffs to attend their adseg classification reviews, be provided with a notice of when an adseg classification review will take place

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I am the plaintiff in this action, that I have read this complaint, and that the information in this complaint is true and correct. *See* 28 U.S.C. § 1746; 18 U.S.C. § 1621.

Executed on April 29, 2009
(Date)

P/Nathan Gerard Dunlap
1A (Prisoner's Original Signature)

UHU DIERO
1B (Prisoner's Original Signature)

Ryan Alvarado
1C (Prisoner's Original Signature)

G. REQUEST FOR RELIEF (cont)

at least 24 hours prior to it taking place, be allowed to present evidence and/or arguments in their favor or to dispute the information upon which the review committee are relying on to retain them in adseg, be provided with the factual basis for the review committee's decision to retain them in adseg, be provided with notice of what conduct is necessary of them in order to progress out of adseg and CSP, and be given the ability to appeal the adseg classification review hearing committee's decision.

4. Enter permanent injunctions ordering defendants Combs, Moore, and Olson, their successors, agents, employees, and all persons acting in concert with them, to not render decisions to retain the plaintiffs in adseg on arbitrary, meaningless, capricious, and bias grounds.
5. Enter judgment in favor of the plaintiffs for nominal, compensatory, and punitive damages, as allowed by law, against each defendant, jointly and severally.
6. Enter judgment in favor of the plaintiffs ordering defendants pay the costs in this suit.
7. Order such additional relief as this Court may deem just, proper, and equitable.

CERTIFICATE OF SERVICE

I hereby certify that on 5-12-09, I have mailed or served the foregoing pleading/document to the following person(s):

Clerk of the Court
Alfred A. Arraj United States Courthouse
901 19th Street, Room A105
Denver, CO 80294-3589

/s/ Nathan Gerard Dunlap

FORM 850-4A (10/04)

5/16 5921 DC

COLORADO DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE FORM

5/3/2007 D. Combs

Grievance Number *CS06/07-438*STEP (Circle One) 1ADA? Yes ☐ No ☐

NAME <i>Dunlap, Nathan</i>	DOC NO. <i>89148</i>	FACILITY <i>CSP</i>	D-4-18
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- Instructions:
1. FILL OUT IDENTIFYING DATA LEGIBLY IN SPACE PROVIDED;
 2. CLEARLY STATE BASIS FOR GRIEVANCE OR GRIEVANCE APPEAL;
 3. STATE SPECIFICALLY WHAT REMEDY YOU ARE REQUESTING;
 4. ATTACH A COPY OF PRIOR STEP(S) AND RESPONSES IN GRIEVANCE PROCESS.

Subject of Grievance and Requested Remedy: For over 10 years I've been denied access to outdoor exercise. The

only remedies I'm requesting is access to the outside yard and when the weather isn't permitting, access to the gym.

DATE: <i>5.3.07</i>	OFFENDER SIGNATURE <i>p/Nathan Gerard Dunlap</i>
DATE RECEIVED: <i>05/16/07</i>	RESPONDING STAFF SIGNATURE & ID <i>Jim Gentile #3608</i>

Colorado State Penitentiary is a High Security Management Facility and meets ACA Standards in accordance to recreation activities. All offenders are given the allotted amount of time in the exercise area in their day hall. Grievance denied.

If you are dissatisfied with the response to this grievance, you may obtain further review by submitting the next step to the appropriate individual

DATE: <i>05-16-07</i>	SIGNATURE/PRINT NAME & STAFF ID: <i>Jim Gentile #3608</i>
RECEIPT: I acknowledge receipt this date of a complaint from the above offender in regard to the following subject: <i>Recreation</i>	
DATE: <i>5/4/2007</i>	SIGNATURE/PRINT NAME & STAFF ID: <i>D. Combs #4367</i>
RECEIPT: I acknowledge receipt this date of a response from the Department of Corrections, to this grievance.	
DATE: <i>5-23-07</i>	OFFENDER SIGNATURE/PRINT NAME & DOC #: <i>p/Nathan Gerard Dunlap 89148</i>

Original: Department File/AIC (clinical and ADA only) Copies: Working File, Administrative Head, Offender, Clinical Chart

INMATE COPY

6/9 case
RECEIVED MAY 15 2007
Gentile

Exhibit A

FORM 850-4A (10/04)

R/S 36/6 pc

COLORADO DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE FORM

5/22/2007 D. Combs

Grievance Number CS06/07- 918 STEP (Circle One) 1 (2) 3 ADA? Yes ☐ No ☐

NAME Dunlap, Nathan	DOC NO. 89148	FACILITY: CSP	D-4-18
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Instructions:

1. FILL OUT IDENTIFYING DATA LEGIBLY IN SPACE PROVIDED;
2. CLEARLY STATE BASIS FOR GRIEVANCE OR GRIEVANCE APPEAL;
3. STATE SPECIFICALLY WHAT REMEDY YOU ARE REQUESTING;
4. ATTACH A COPY OF PRIOR STEP(S) AND RESPONSES IN GRIEVANCE PROCESS.

Subject of Grievance and Requested Remedy: For over 10 years, I've been denied access to outdoor exercise. The only remedies requesting is access to the outside yard and access to the gym. I filed this Step 2 Grievance b/c I wasn't satisfied w/ the response to my Step 1 Grievance. I don't have access to any A.C.A. standards but according to the testimony given in LeMaire v. Mauss, 5 F.Supp. 623, the standards developed by the A.C.A. and A.M.A. include regular outdoor exercise. Not exercise in an exercise in a dayhall. But then again, maybe the standards have changed since 1990?? Regardless, of any A.C.A. standards, the courts have been pretty consistent when it comes to providing a person w/ outdoor exercise. Particularly when a person, like myself, has been denied outdoor exercise for the amount of time I've been. For example, see Spain v. Procurier, 600 F.2d 189; Martino v. Ely, 563 F.Supp 984; and the previously mentioned LeMaire v. Mauss, supra. I'm not making this request to have an additional privilege making this request b/c if I'm gonna live another 5 or more years in this environment, I'm gonna need this remedy for my mental well-being and ability.

DATE: 5-27-07	OFFENDER SIGNATURE <i>p/Nathan Gerard Dunlap</i>
DATE RECEIVED: 6-1-07	RESPONDING STAFF SIGNATURE & ID <i>SK Buchanan</i>
RESPONSE	

As stated in your step I grievance, CSP meets ACA standards in accordance to recreation time. Grievance is denied.

If you are dissatisfied with the response to this grievance, you may obtain further review by submitting the next step to the appropriate individual

DATE: 6-5-07	SIGNATURE/PRINT NAME & STAFF ID # <i>SK Buchanan / SK Buchanan 4001</i>
RECEIPT: I acknowledge receipt this date of a complaint from the above offender in regard to the following subject: <u>RECREATION</u>	
DATE: 5/29/2007	SIGNATURE/PRINT NAME & STAFF ID # <i>D. Combs #4367</i>
RECEIPT: I acknowledge receipt this date of a response from the Department of Corrections, to this grievance.	
DATE: 6-11-07	OFFENDER SIGNATURE/PRINT NAME & DOC # <i>p/Nathan Gerard Dunlap 89148</i>

Original: Department File/AIC
(clinical and ADA only)

Copies: Working File, Administrative Head, Offender, Clinical Chart

INMATE COPY

6/25 CE
RECEIVED MAY 31 2007
Buchanan

R/S 5/12/09

COLORADO DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE FORM

OFFENDER MUST COMPLETE: Is this grievance related to your disability/diabetes or other ADA matter? Yes ☐ No ☒

CASE MANAGER MUST COMPLETE: Does the offender have an ADA alert? Yes ☐ No ☒

Is the subject related to the offender's disability/diabetic condition or other ADA matter? Yes ☐ No ☒

Date received by case manager: 11/5/2009 Case Manager: COMBS

Grievance Number CS08/09-0628 STEP (Circle One) 1 2 3

NAME ALFARO, MATT	DOC NO. 110191	FACILITY/UNIT/POD
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- Instructions:
1. FILL OUT IDENTIFYING DATA LEGIBLY IN SPACE PROVIDED;
 2. CLEARLY STATE BASIS FOR GRIEVANCE OR GRIEVANCE APPEAL;
 3. STATE SPECIFICALLY WHAT REMEDY YOU ARE REQUESTING;
 4. ATTACH A COPY OF PRIOR STEP(S) AND RESPONSES IN GRIEVANCE PROCESS.

Subject of Grievance and Requested Meaningful Remedy:

I've been here since April 24th 2006 (CSP) since then I've been denied outdoor recreation/exercise. only remedy in requesting to access to out door recreation/exercise
 Thank you!

TO BE COMPLETED BY OFFENDER:	
DATE: 1-4-09	OFFENDER SIGNATURE: [Signature]
TO BE COMPLETED BY GRIEVANCE COORDINATOR:	
RECEIPT: I acknowledge receipt this date of a complaint from the above offender in regard to the following subject: <u>Living Conditions</u>	
DATE: RECEIVED JAN 05 2009	SIGNATURE/PRINT NAME & DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER ID # Charmaine Ediger Charmaine Ediger #8098
Date ADA grievance sent to AIC:	
RESPONSE Jim Gentile #3608	

According to OM # 650-100 (Conditions of Confinement and Quality of Life), Paragraph IV section A Line 14 states " Shall be allowed a minimum of one hour of recreation in an exercise area or day hall five (5) days per week." [4-4270]

Grievance Denied

Jim Gentile # 3608

TO BE COMPLETED BY RESPONDER		
DATE GRIEVANCE REC'D BY RESPONDER: 01-07-09	RESPONDER: DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER SIGNATURE/PRINT NAME & ID # Jim Gentile / Jim Gentile #3608	RESPONSE DATE: 01-07-09
TO BE COMPLETED BY OFFENDER		
RECEIPT: I acknowledge receipt this date of a response from the Department of Corrections, to this grievance.		
If you are dissatisfied with the response to this grievance, you may obtain further review by submitting the next step to the appropriate individual.		
DATE:	OFFENDER SIGNATURE/PRINT NAME & DOC #	

Original: Department File/AIC

Copies: Working File, Administrative Head, Offender, Clinical Chart (clinical and ADA only)

1/30 Gentile

cc offdr
1/6/09 ce

INMATE COPY

Attachment "A"

Exhibit B-1

DC Form 850-04A (12/01/08)

5/27 DC
A4/20
COLORADO DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE FORM

OFFENDER MUST COMPLETE: Is this grievance related to your disability/diabetes or other ADA matter? Yes ☐ No ☒CASE MANAGER MUST COMPLETE: Does the offender have an ADA alert? Yes ☐ No ☒Is the subject related to the offender's disability/diabetic condition or other ADA matter? Yes ☐ No ☒

Date received by case manager: 1/19/2009 Case Manager: D. Combs#4367

Grievance Number CS08/09-0628

STEP (Circle One) 1 2 3

NAME <u>ALFARO, MATT</u>	DOC NO. <u>110191</u>	FACILITY/UNIT/POD CSP <u>D-418</u>
Instructions: 1. FILL OUT IDENTIFYING DATA LEGIBLY IN SPACE PROVIDED; 2. CLEARLY STATE BASIS FOR GRIEVANCE OR GRIEVANCE APPEAL; 3. STATE SPECIFICALLY WHAT REMEDY YOU ARE REQUESTING; 4. ATTACH A COPY OF PRIOR STEP(S) AND RESPONSES IN GRIEVANCE PROCESS.		

Subject of Grievance and Requested Meaningful Remedy:

I'VE BEEN HERE AT CSP SINCE APRIL 24TH 2004. SINCE THEN I'VE BEEN DENIED OUTDOOR RECREATION/EXERCISE. ONLY REMIDY I'M REQUESTING IS ACCESS TO OUT DOOR RECREATION/EXERCISE. I KNOW WHAT OM #650 -100 SAYS! BUT I FEEL WE SHOULD BE GIVEN OUT DOOR RECREATION/EXERCISE. A BOOK I READ SAYS A HUMAN NEEDS SUN LIGHT TO ABSORBE NOURISH^{MENT} OUR BODY NEEDS! THANK YOU!

TO BE COMPLETED BY OFFENDER:		
DATE: <u>1-16-09</u>	OFFENDER SIGNATURE <u>MATT ALFARO</u>	
TO BE COMPLETED BY GRIEVANCE COORDINATOR:		
RECEIPT: I acknowledge receipt this date of a complaint from the above offender in regard to the following subject: <u>HOUSE CONDITIONS</u>		
DATE: <u>Rec'd 30 JAN 26 2009</u>	SIGNATURE/PRINT NAME & DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER ID # <u>Charmaine Ediger Charmaine Ediger 8098</u>	
Date ADA grievance sent to AIC:		
RESPONSE		

Per AR 600-02 procedure T.4 and AR 1000-01 procedure H states in summary Ad Seg offenders are to be exercised outside their cells and not outside the facility. The CSP program has been approved by the American Correctional Association (ACA) and numerous judicial entities. The program was supported by court ruling when challenged in case no. 93-Z-1976 D. Williams. Outdoor yard is a privilege and as such it is expected that Ad Seg offenders earn (by their conduct) a re-class and then a transfer to a facility with access to outdoor yard in addition to many other privileges. Ad Seg offenders housed at CSP will continue to have access to the current recreational area, no changes will be made. Supporting Regulations: AR 100-01 H.; IA 100-01 H.1; AR 600-02 T.4; IA 650-100 A.14. Applicable ACA Standards: 4-4270; 4-4273; 4-4481.

Carl D. Holditch #2172

TO BE COMPLETED BY RESPONDER		
DATE GRIEVANCE REC'D BY RESPONDER: <u>1-21-09</u>	RESPONDER-DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER SIGNATURE/PRINT NAME & ID # <u>Carl D. Holditch</u>	RESPONSE DATE: <u>1-22-09</u>
TO BE COMPLETED BY OFFENDER		
RECEIPT: I acknowledge receipt this date of a response from the Department of Corrections, to this grievance.		
If you are dissatisfied with the response to this grievance, you may obtain further review by submitting the next step to the appropriate individual.		
DATE:	OFFENDER SIGNATURE/PRINT NAME & DOC #	

Original: Department File/AIC

Copies: Working File, Administrative Head, Offender, Clinical Chart (clinical and ADA only) 2/14 Holditch

Attachment "A"

INMATE COPY

B-2

26 COLORADO DEPARTMENT OF CORRECTIONS OFFENDER GRIEVANCE FORM

OFFENDER MUST COMPLETE: Is this grievance related to your disability/diabetes or other ADA matter? Yes ☐ No ☒

CASE MANAGER MUST COMPLETE: Does the offender have an ADA alert? Yes ☐ No ☒

Is the subject related to the offender's disability/diabetic condition or other ADA matter? Yes ☐ No ☒

Date received by case manager: 2/2/09 Case Manager: D. Combs#4367

Grievance Number CS08/09-0628

STEP (Circle One) 1 2 3

NAME ALFARO, MATT	DOC NO. 110191	FACILITY/UNIT/POD CSP D-413
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- Instructions:
1. FILL OUT IDENTIFYING DATA LEGIBLY IN SPACE PROVIDED;
 2. CLEARLY STATE BASIS FOR GRIEVANCE OR GRIEVANCE APPEAL;
 3. STATE SPECIFICALLY WHAT REMEDY YOU ARE REQUESTING;
 4. ATTACH A COPY OF PRIOR STEP(S) AND RESPONSES IN GRIEVANCE PROCESS.

Subject of Grievance and Requested Meaningful Remedy: IN THE STEP 2 GRIEVANCE RESPONSE, HOLDITCH LIKES TO CITE OFF THAT I HAVE NO REASONABLE WAY OF OBTAINING, ESPECIALLY PRIOR TO HAVING TO FILE THIS GRIEVANCE. NEVERTHELESS, ACCORDING TO THE THINGS I DO HAVE ACCESS TO, SUCH AS LEMIRE V. MAASS, 745 F. SUPP. 623, THE STANDARDS DEVELOPED BY THE A.C.A. INCLUDE REGULAR OUTDOOR EXERCISE. BUT THEN AGAIN, MAYBE THOSE STANDARDS HAVE CHANGED SINCE 1990? REGARDLESS OF ANY A.C.A. STANDARDS, WHICH A COURT HAS YET TO DETERMINE IF THEY'RE CONSTITUTIONAL OR NOT, THE COURTS HAVE BEEN PRETTY CONSISTANT IN THEIR FINDINGS THAT DENYING A PRISONER OUTDOOR EXERCISE/RECREATION OVER A PERIOD OF YEARS IS AND CAN BE UNCONSTITUTIONAL. FOR EXAMPLE, SEE SPAIN V. PROCTOR, 600 F.2D 189; MARTINDALE V. COREY, 563 F. SUPP 984; BAILEY V. SHILLINGER, 82 F.3D 1051; AND EDGIE V. PIERSON, 435 F.3D 1252. EXACTLY WHAT WAS SUPPORTED BY A COURT RULING IN THE CASE CITED BY HOLDITCH IS UNKNOWN TO ME. WHAT I DO KNOW IS THAT WHAT'S WRITTEN IN CDCR/CSP POLICY ISN'T WHAT IS NECESSARILY PRACTICED/FOLLOWED. PLACEMENT/RETENTION IN CSP IS ARBITRARY. THIS IN TURN LEADS TO AN INDEFINITE PLACEMENT IN CSP AND, SUBSEQUENTLY AN INDEFINITE DENIAL OF OUTDOOR RECREATION/EXERCISE. LIKE THE CASE CITED BY HOLDITCH, THE CASES I CITED ARE NOT ONLY PUBLISHED, PRECEDENT AND CONTROLLING, BUT THEY ALSO APPLY TO THE SITUATION SUCH AS MINE. SINCE MY DENIAL OF OUTDOOR RECREATION/EXERCISE IS INDEFINITE AND HAS ALREADY LASTED FOR SEVERAL YEARS.

TO BE COMPLETED BY OFFENDER:

DATE: 2-1-09	OFFENDER SIGNATURE: MATT ALFARO
TO BE COMPLETED BY GRIEVANCE COORDINATOR:	
RECEIPT: I acknowledge receipt this date of a complaint from the above offender in regard to the following subject: HOUSING CONDITIONS	
DATE: FEB 03 2009	SIGNATURE/PRINT NAME & DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER ID # Charmaine Ediger Charmaine Ediger 809

Date ADA grievance sent to AIC:

RESPONSE

TO BE COMPLETED BY RESPONDER

DATE GRIEVANCE REC'D BY RESPONDER:	RESPONDER-DOC EMPLOYEE, CONTRACT WORKER, OR VOLUNTEER SIGNATURE/PRINT NAME & ID #	RESPONSE DATE:
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TO BE COMPLETED BY OFFENDER

RECEIPT: I acknowledge receipt this date of a response from the Department of Corrections, to this grievance. If you are dissatisfied with the response to this grievance, you may obtain further review by submitting the next step to the appropriate individual.

DATE:	OFFENDER SIGNATURE/PRINT NAME & DOC #
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Original: Department File/AIC

Copies: Working File, Administrative Head, Offender, Clinical Chart (clinical and ADA only)

Attachment "A"

STATE OF COLORADO

COLORADO DEPARTMENT OF CORRECTIONS

Office of Step 3 Grievance Officer
2862 South Circle Drive, Suite 148
Colorado Springs, CO 80906-4195
Phone: 719.226.4238
Fax: 719.226.4249

Step 3 Grievance Officer



Bill Ritter, Jr.
Governor

Aristedes W. Zavaras
Executive Director

March 19, 2009

RE: Grievance #CS08/09-0628

Dear Mr. Matthew Alfaro #110191:

I have reviewed your Step 3 grievance that you filed with regard to allegations that your inability to access outdoor recreation is unconstitutional. You requested no remedy in your grievance.

In review of this matter, Administrative Regulation 1000-01 Recreation, states, "H. ***The DOC shall ensure that offenders in segregation receive a minimum of one hour of exercise, per day, outside their cells, five days per week, unless security or safety considerations dictate otherwise. [4-4270]***

1. The DOC shall ensure offenders in administrative segregation have access to recreational programs and services. [4-4273]

The American Correctional Association, Sixth Edition, Standards for Adult Corrections, states in Standard #4-4270, "Written policy, procedure, and practice provide that inmates in segregation receive a minimum of one hour of exercise per day outside their cells, five days per week, unless security or safety considerations dictate otherwise. Inmates in segregation should be provided with the opportunity to exercise in an area designated for this purpose, with opportunities to exercise outdoors, weather permitting, unless security or safety considerations dictate otherwise. A written record should be kept of each inmate's participation in the exercise program. Reasons for the imposition of constraints should be documented." Policy #4-4273 states, "Written policy, procedure, and practice provide that inmates in administrative segregation and protective custody have access to programs and services that include, but are not limited to, the following: educational services, commissary services, library services, social services, counseling services, religious guidance, and recreational programs. Although services and programs cannot be identical to those provided to the general population, there should be no major differences for reasons other than danger to life, health, or safety. Inmates in administrative segregation and protective custody should have the opportunity to receive treatment from professionals such as social workers, psychologists, counselors, and psychiatrists. The standard also applies to inmates held in disciplinary detention for more than 60 days."

As an offender assigned to an Administrative Segregation facility, CSP, you receive the minimum of one hour of exercise per day outside your cell. Outdoor recreation is afforded to offenders not housed in Administrative Segregation at CSP. Your demonstration of appropriate behavior will affect your classification score and earn your placement at a less secure facility where outdoor recreation is available.

It is your burden to prove the allegations stated in your Step 3 grievance. I have reviewed the facts of this case and determined that you did not meet this burden. You claim you are unconstitutionally being denied outdoor recreation, however, there was no corroborating evidence to provide proof of your allegations.

B-4

Page 2

Matthew Alfaro #110191:
Grievance #CS08/09-0628

As you requested no remedy, none can be granted. This is the final administrative response in this matter and you have exhausted your administrative remedies.

Enclosed please find the following copies of all the materials you provided to me in support of the grievance that you filed: Step 1 Grievance, Step 2 Grievance, and Step 3 Grievance.

Sincerely,



Anthony A. DeCesaro
Grievance Officer

Cc: working file
grievance file
Tom Kelle, Offender Records

B-S

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO

Civil Action No. _____

NATHAN DUNLAP, et. al.,

Plaintiffs,

v.

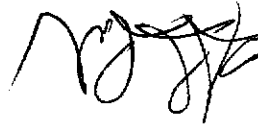
ARI ZAVARAS, individually, and in his official
capacity as Executive Director, et. al.

Defendants.

DECLARATION OF DARNELL LEWIS PRELOW
DARNELL LEWIS PRELOW

DARNELL LEWIS PRELOW hereby declares:

§.SP (Colorado State Penitentiary) is a maximum
Exhibit C-1

Signature: 

I declare under penalty of perjury that the following is true and correct to the best of my knowledge. Executed at Canon City, CO. on December 28th, 2008.

Security prison which houses prisoners for a number of reasons whether lawfully or not. It also controls and monitors every aspect of my life. I have been incarcerated for nearly ten (10) years now, and six of them have been in this facility. I arrived here on the 30th day of April, 2003. Since I have been here, I have not been able to obtain recreation and/or exercise. I have inquired about it several times, but the answer remains the same. "You get what we give you." Why I am denied this privilege, I don't know or understand. Nor why I remain here without any write-ups or complaints of any kind in 4 years? These units / pods are ~~seems~~ so small, that there is no room at all for anything else other than what we are provided, and that is living & existing rather.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. _____

NATHAN JERARD DUNLAP ET AL.

PLAINTIFFS,

V.

ARI ZAVARAS INDIVIDUALLY, AND IN HIS OFFICIAL
CAPACITY AS EXECUTIVE DIRECTOR, ET AL.

DEFENDANTS.

DECLARATION OF MATTHEW FRANCISCO ALFARO

MATTHEW FRANCISCO ALFARO HEREBY DECLARES:

I WAS RECEIVED AT (CSP) COLORADO STATE
PENITENTIARY ON APRIL 24TH 2006. SINCE THEN
I HAVE NOT HAD NO OUTDOOR RECREATION ONCE.
CSP IS A SUPERMAX PRISON IN WHICH EVERY ASPECT
OF MY LIFE IS CONTROLLED AND MONITORED. I WAS
PLACED HERE AT CSP BECAUSE OF BEHAVIOR WHILE
HOUSED IN THE WELD COUNTY JAIL. I WAS TOLD

Exhibit D-1

IF I COMPLETE (4) FOUR CLASSES THEY WOULD ALLOW ME TO PROGRESS TO A LEVEL (4) FACILITY. ON NOVEMBER 3RD 2006 I COMPLETED "THE AWARENESS PROGRAM." ON MARCH 9TH 2007 I COMPLETED "CRIME IMPACT." ON JUNE 15TH 2007 I COMPLETED "ANGER MANAGEMENT." ON JANUARY 25TH 2008 I COMPLETED "PRISON LIFE SKILLS". I STILL HAVE NOT BEEN ALLOWED TO PROGRESS. MY PLACEMENT IS FOR AN INDEFINITE PERIOD OF TIME THAT IS ONLY LIMITED WITH ONES SENTENCE. THE PROBLEM THERE IS I'M SERVING A LIFE SENTENCE WITHOUT THE POSSIBILITY OF PAROLE. WE ARE IN CONDITIONS OF EXTREM ISOLATION. I HAVE NOT HUGED MY MOM ONCE SINCE BEING PLACED HERE. OUR VISITS ARE BEHIND A GLASS WINDOW. I WAS PLACED HERE SOLELY TO BE RETAINED IN AD. SEG. THE LIGHT IN MY CELL REMAINS ON 24 HOURS OF EVERY DAY. WE ARE NOT ALLOWED TO HAVE A ROOMMATE. THEREFORE, WE MUST REMAIN IN OUR ROOMS ALONE FOR 23-24 HOURS A DAY. THE DOORS ARE SOLID METAL, WITH METAL STRIPS ALONG THE SIDES AND BOTTOM OF THE DOOR. WHICH MAKES IT EXTREMELY HARD TO COMMUNICATE WITH OTHER OFFENDERS. WE HAVE TO EAT EVERY MEAL ALONE IN OUR CELL. WE ARE FEED THROUGH A TRAY SLOT IN THE DOOR. WE HAVE A SMALL NARROW WINDOW AT THE BACK OF OUR CELL THAT CAN NOT OPEN. WE ARE LIMITED IN OUR PHONE CALLS WE MAKE. AT ANYTIME WE LEAVE OUR CELL WE ARE HANDCUFFED BEHIND OUR BACK, THEN PAT SEARCHED. I AM DEPRIVED OF ALMOST ALL HUMAN CONTACT, AND ENVIRONMENTAL OR SENSORY STIMULI. ONCE A MONTH I'M GIVEN AN AD. SEG CLASSIFICATION REVIEW. NOT ONCE HAVE I HAD A MEANINGFUL AD. SEG. HEARING. THE ONLY REASON WHY I KNOW WHEN THE HEARING TAKES PLACE IS BECAUSE IT HAS IT ON THE COPY I GET. AT THAT POINT THE REVIEW

AS BEEN OVER FOR WEEKS. SO HOW CAN I
PRESENT ANY EVIDENCE OR ARGUMENTS IN MY
FAVOR. I'M NOT ALLOWED TO DISPUTE THE INFO.
IN WHICH IS KEEPING ME HERE. THEY DO
NOT PROVIDED ME WITH THE FACTUAL BASIS FOR
THE COMMITTEE'S DECISION TO KEEP ME HERE.

I DECLARE UNDER PENALTY OF PERJURY THAT
THE FOREGOING IS TRUE AND CORRECT TO THE
BEST OF MY KNOWLEDGE. EXECUTED AT THE
COLORADO STATE PENITENTIARY ON
NOVEMBER 14TH, 2008. IN CANON CITY, CO.

WILLIAM A. PIERO

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLORADO

Civil Action No. _____

NATHAN DUNLAP, et. al.,

Plaintiffs,

v.

ARI ZAVARAS, individually, and in his official capacity as
Executive Director, et. al.

Defendants.

DECLARATION OF RYAN MERRITT.

Ryan Merritt hereby declares:

Having satisfied the criteria to progress to a level IV facility, it was determined I will be retained at a level IV facility (Administrative Segregation, CSP) indefinitely for suspicion of STG (security Threat Group) involvement, claiming my name was found in the possession of another offender.

I recieved no notice of this allegation, nor was I provided a hearing as required, not only by law, but also by CDC's own Classification procedures. Per A.R. # 600-02 (iv)(I)(1)

Additionally, there is insufficient evidence to support CDC's decision to retain me in Administrative Segregation (Ad. Seg.) See Koch v Lewis, 96 F. Supp 2nd 949 (D. Ariz. 2000) (evidence needed to confine inmates to maximum security prison for gang affiliation must have some indicia of reliability to satisfy due process). Continued placement in Ad. Seg. for current or recent STG activity implicates a need to provide safety and that the prisoner is a "particularly dangerous person." The Supreme court established that when it comes to balancing one's liberty interests within the governments regulatory interest in safety, "proof of dangerousness" must be supported by "clear and convincing evidence." Zadvydas v. Davis, 533 U.S. 678, 690 (2001) See also, Koch v. Lewis 96 F. Supp 2nd at 965-66 (nor is there an explanation as to why the hand-printed list found among the possessions of two fellow inmates are sufficient to raise an inference of Koch's membership in the Aryan Brotherhood given that the list also included the names and phone numbers of women, hispanics, and persons deemed unrelated to STG activity.

STATEMENT OF LIBERTY INTEREST

Detention in CSP imposes atypical and significant hard ship on me in relation to the ordinary incidents of prison life, which rises to a liberty interest. See Wilkinson v. Austin, 125 S.Ct. 2384 (2005) The conditions in CSP are more restrictive than those found to implicate a liberty interest by the court in Austin v. Wilkinson, 187 F. Supp. 2d 719, 741-42 (N.D. Ohio 2002)

At a level IV facility, or less, I could have outdoor recreation for at least two-hours per day. At CSP, I am limited to one-hour 5 times a week of recreation in a 80 sq. foot cell with only a pull up bar. No outdoor recreation is permitted. At a level IV facility, or less, I could spend approximately ten hours a day out of my cell. At CSP I'm confined to my cell at least 23 hours per day. See Austin v. Wilkinson ("deprivation of yard time imposes enough of a hardship to qualify as a constitutionally protected liberty interest"); see also Frazier v. Ward, 426 F. Supp. 1354 (restrictions on outdoor exercise combined with long terms of lock-in times is unconstitutional). Moreover, too little sunshine exposure

And exercise leaves people prone to bone-cracking osteoporosis according to recent medical studies. The body can't absorb calcium and harden bones without vitamin D with exposure to sunlight by a process that can't be accomplished by vitamin D supplements. Additionally prisoners in ad-seg. are not receiving vitamin D supplements in their diets.

At a Level IV facility, or less, I would be eligible for ten days a month earned-time, § 17-225-405; A.R. # 950-07 (I). While at CSP, I don't receive any earned-time which inevitably increases the duration of my sentence. Although the statute gives the casemanager the discretion to grant, with hold, or restore earned-time, that discretion may not be abused nor is it subject to arbitrary and capricious application. The spirit of the statute is if a prisoner progresses, he should be granted the time credit. The erroneous decision that deprives a prisoner of his opportunity to progress affects the decision whether to grant or with hold earned-time.

At a Level IV facility, or less, I could turn my cell-lights off. At CSP I am exposed to lighting in my cell 24 hours per day. See, *LeMaire v. Maase*, 715 F.Supp. 623, 636 (D. CO 1990) (24-hour cell lighting is unconstitutional). It has been reported that melatonin does not produce in the body under such 24-hour lighting conditions. Melatonin is needed to maintain the immune system.

Additionally, classifying me as an STG-offender in of itself creates a liberty interest as much such a classification causes me not to be eligible for progression, programming, and earned-time as other prisoners classified to Ad. Seg. See, A.R. # 600-07 (IV)(B)(2)

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed at Canon City, Colorado on November, 11, 2008



RYAN D. MERRITT