

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

Civil Action No. 09-cv-01196-CMA-MEH

NATHAN JERARD DUNLAP

Plaintiff,

v.

ARISTEDES W. ZAVARAS, in his official capacity as Executive Director of the
Colorado Department of Corrections,

Defendant.

THIRD AMENDED COMPLAINT

INTRODUCTION

For nearly fourteen years, the Colorado Department of Corrections (CDOC) has denied Plaintiff Nathan Jerard Dunlap regular outdoor exercise, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

The CDOC has incarcerated Mr. Dunlap in Colorado's "supermax" prison, the Colorado State Penitentiary (CSP), nearly continuously since Mr. Dunlap was sentenced to death on May 17, 1996. (The only instances when Mr. Dunlap has been allowed outside since May 1996 were when he was transferred from CSP to other detention facilities on a handful of occasions for brief periods of time for medical or legal reasons.) During the lengthy time periods that Mr. Dunlap has been incarcerated at CSP, the

CDOC has not allowed any CSP inmates, including Mr. Dunlap, to exercise outdoors. Instead, CSP provides inmates with the opportunity to exercise only in a “day room” that is part of the CSP building. The CSP “day room” has a floor, a ceiling, and four walls. Inmates placed in the “day room” are not outside.

Defendant Aristedes W. Zavaras, the Executive Director of the Colorado Department of Corrections, has incarcerated and continues to incarcerate Mr. Dunlap at CSP, not due to any conduct by Mr. Dunlap during his incarceration, but instead pursuant to the CDOC’s policy of incarcerating all inmates on Colorado’s “death row” at CSP. Through this policy and practice of depriving Mr. Dunlap of regular outside exercise, Defendant has acted with deliberate indifference to Mr. Dunlap’s physical and mental health. Defendant knew and continues to know that he is consigning Mr. Dunlap to many years as a “death row” inmate incarcerated at CSP without being allowed to exercise outside, and Defendant disregarded and continues to disregard the substantial risks that this long-term deprivation of outdoor exercise poses to human health and well being.

Mr. Dunlap seeks injunctive and declaratory relief for this violation of his Eighth Amendment right to be free from cruel and unusual punishments.

JURISDICTION AND VENUE

1. This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 over Plaintiff’s cause of action arising under the U.S. Constitution and 42 U.S.C. §§ 1983 and 1988, and pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

2. Venue lies in the U.S. District Court for the District of Colorado because a substantial part of the events and omissions giving rise to Mr. Dunlap's claim occurred within the District of Colorado. 28 U.S.C. § 1391(b)(2).

PARTIES

3. Plaintiff Nathan Jerard Dunlap is, and at all times relevant to this action has been, a "death row" inmate incarcerated by the CDOC.

4. Defendant Aristedes W. Zavaras, the Executive Director of the CDOC, operates the State of Colorado's correctional facilities where Mr. Dunlap is, and at all times relevant to this action has been, incarcerated. As the Executive Director of the CDOC, Defendant is responsible for both the policy and the practice that has resulted in Mr. Dunlap being incarcerated at CSP without outdoor exercise for years at a time, as described in this Third Amended Complaint. All of Defendant's acts and omissions alleged in this Third Amended Complaint have been and are being carried out under color of state law. Defendant is sued in his official capacity.

FACTUAL BACKGROUND

5. Mr. Dunlap was sentenced to death by a Colorado court on May 17, 1996.

6. As a matter of policy of the CDOC under Defendant's leadership, all "death row" inmates, regardless of prison conduct, are housed at CSP.

7. Pursuant to this policy, the CDOC sent Mr. Dunlap to CSP on May 22, 1996, with the expectation that Mr. Dunlap would remain at CSP as long as he was on “death row.”

8. When Mr. Dunlap was sent to CSP, the CDOC knew that Mr. Dunlap would likely serve at least ten years of incarceration at CSP, given the protracted process of appeals and postconviction challenges afforded in capital cases.

9. CSP is a Level V security correctional institution, which is the highest security level that exists within the CDOC.

10. CSP is an administrative segregation facility of the CDOC.

11. During all times relevant to this action, the CDOC has not allowed inmates incarcerated at CSP, including Mr. Dunlap, to exercise outside.

12. The CDOC has incarcerated Mr. Dunlap at CSP as a death row inmate nearly continuously since May 22, 1996. Since that date, the only instances when the CDOC has allowed Mr. Dunlap outside were when Mr. Dunlap was transferred from CSP to other detention facilities on a handful of occasions for brief periods of time for medical or legal reasons. On these occasions when Mr. Dunlap was briefly incarcerated at non-CSP facilities, Mr. Dunlap was allowed to exercise outside, without incident.

13. Upon information and belief, Mr. Dunlap has been continuously incarcerated at CSP since September 2007.

14. During all times relevant to this action, instead of allowing inmates incarcerated at CSP, including Mr. Dunlap, to exercise outside, the CDOC has provided CSP inmates the opportunity to exercise only in a “day room” that is part of the CSP building. The CSP “day room” has a floor, a ceiling, and four walls. Mr. Dunlap has not been outside when he has been in the CSP “day room.”

15. During the extended periods of time that the CDOC has incarcerated Mr. Dunlap at CSP, Mr. Dunlap has not received any unfiltered, natural sunlight on his skin, and no unfiltered, natural sunlight has entered his pupils. During these periods of time, Mr. Dunlap has not felt the wind, nor rain, nor snow.

16. Long-term deprivation of the opportunity to be outside such as the CDOC has inflicted on Mr. Dunlap poses a substantial risk of serious harm to mental and physical health.

17. Defendant knew and continues to know that his acts and omissions in preventing Mr. Dunlap from engaging in regular outdoor exercise over extended periods of time pose a substantial risk of serious harm to Mr. Dunlap’s mental and physical health.

18. Absent a change in CDOC policy or an injunction issued by this Court, Defendant will continue to incarcerate Mr. Dunlap at CSP, with exceptions only for brief trips to other detention facilities for medical or legal reasons, for as long as he remains on “death row,” regardless of his prison conduct.

19. Absent a change in CDOC practice or an injunction issued by this Court, Defendant will continue to prevent CSP inmates, including Mr. Dunlap, from exercising outside.

CLAIM FOR RELIEF (42 U.S.C. §§ 1983 and 1988)

20. Plaintiff hereby incorporates paragraphs 1-19 of this Third Amended Complaint.

21. Defendant, through his acts and omissions as set forth in this Third Amended Complaint, has violated and continues to violate Mr. Dunlap's right to be free from cruel and unusual punishments under the Eighth Amendment to the U.S. Constitution. Defendant is the Executive Director of a state agency who has acted under color of state law and knew and continues to know that preventing Mr. Dunlap from engaging in regular outdoor exercise over extended periods of time poses a substantial risk of serious harm to Mr. Dunlap's mental and physical health. Defendant has acted and continues to act with deliberate indifference in denying Mr. Dunlap regular outside exercise for extended periods of time.

22. An actual and immediate controversy exists between Plaintiff and Defendant. Plaintiff contends that the challenged policy and practice violates his constitutional rights. Defendant contends that the challenged policy and practice comply with the law. Plaintiff is therefore entitled to a declaration of rights with respect to this

controversy. Without such a declaration, Plaintiff will be uncertain of his rights and Defendant will be uncertain of his responsibilities under the law.

23. Plaintiff is entitled to injunctive relief. Defendant has enforced and is enforcing the challenged policy and practice against Plaintiff. Defendant has acted and continues to act under color of state law to deprive Plaintiff of his constitutional rights. As a result of the existence, operation, and implementation of the challenged policy and practice, Plaintiff has suffered irreparable injury due to the past violation of his constitutional rights and is suffering a real and immediate threat of continuing irreparable injury due to the ongoing violation of his constitutional rights. Plaintiff has no plain, adequate, or speedy remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court grant him the following relief:

(a) Adjudge and declare that the acts, omissions, policies, and conditions described above are in violation of the Eighth and Fourteenth Amendments, which grant constitutional protection to Plaintiff.

(b) Permanently enjoin Defendant from subjecting Plaintiff to the unconstitutional and unlawful acts, omissions, policies, and conditions described above;

(c) Award Plaintiff the costs of this suit, and reasonable attorneys' fees and litigation expenses pursuant to 42 U.S.C. § 1988;

(d) Retain jurisdiction of this case until Defendant has fully complied with the orders of this Court, and there is a reasonable assurance that Defendant will continue to comply in the future absence continuing jurisdiction; and

(e) Award such other and further relief as the Court deems just and proper.

DATED this 8th day of March, 2010.

Respectfully submitted,

s/ Gail K. Johnson
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ATTORNEYS FOR NATHAN DUNLAP

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2010, I electronically filed the foregoing THIRD AMENDED COMPLAINT with the Clerk of the Court using the ECF system, which will send notification of such filing to the following via email:

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s/Gail K. Johnson