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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

THOMAS BLAKE KENNEDY,

 Plaintiff,

 v.

F. GONZALEZ, et al.,

 Defendants.

Case No. 1:09-cv-01161-AWI-SKO PC

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANTS CATE
AND GONZALEZ’S MOTION FOR
SUMMARY JUDGMENT BE GRANTED IN
PART AND DENIED IN PART

(Doc. 39)

FIFTEEN-DAY OBJECTION DEADLINE

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Findings and Recommendations - Defendants’ Motion for Summary Judgment

I. Background

Plaintiff Thomas Blake Kennedy (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on July 6, 2009. This action is proceeding on Plaintiff’s amended complaint against Defendants Cate and Gonzalez (“Defendants”) for violating Plaintiff’s rights under the Eighth Amendment of the United States Constitution. Plaintiff’s claim arises out of the long term denial of outdoor exercise while he was incarcerated at California Correctional Institution (CCI). (Doc. 9, Amend. Comp.) Plaintiff alleges that he suffered physical, emotional, and mental injuries as a result of inadequate outdoor exercise, and he is seeking damages, injunctive relief, and declaratory relief. (Amend. Comp.; Doc. 47, Pl. Opp.)

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1 On September 19, 2012, Defendants filed a motion for summary judgment. (Doc. 39.)
2 Plaintiff filed an opposition on October 18, 2012, Defendants filed a reply on November 11, 2012,
3 and the motion has been submitted upon the record without oral argument.¹ Local Rule 230(l).
4 (Docs. 47, 52.)

5 **II. Legal Standard**

6 Any party may move for summary judgment, and the Court shall grant summary judgment
7 if the movant shows that there is no genuine dispute as to any material fact and the movant is
8 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted);
9 *Washington Mutual Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position,
10 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular
11 parts of materials in the record, including but not limited to depositions, documents, declarations,
12 or discovery; or (2) showing that the materials cited do not establish the presence or absence of a
13 genuine dispute or that the opposing party cannot produce admissible evidence to support the fact.
14 Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the
15 record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen*
16 *v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v.*
17 *Navajo County, Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

18 Defendants do not bear the burden of proof at trial and in moving for summary judgment,
19 they need only prove an absence of evidence to support Plaintiff’s case. *In re Oracle Corp.*
20 *Securities Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S.
21 317, 323, 106 S.Ct. 2548 (1986)). If Defendants meet their initial burden, the burden then shifts to
22 Plaintiff “to designate specific facts demonstrating the existence of genuine issues for trial.” *In re*
23 *Oracle Corp.*, 627 F.3d at 387 (citing *Celotex Corp.*, 477 U.S. at 323). This requires Plaintiff to
24 “show more than the mere existence of a scintilla of evidence.” *Id.* (citing *Anderson v. Liberty*
25 *Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986)).

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27 _____
28 ¹ Concurrently with their motion for summary judgment, Defendants served Plaintiff with the requisite notice of the requirements for opposing the motion. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d 952, 960-61 (9th Cir. 1998).

1 However, in judging the evidence at the summary judgment stage, the Court may not make
2 credibility determinations or weigh conflicting evidence, *Soremekun v. Thrifty Payless, Inc.*, 509
3 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all
4 inferences in the light most favorable to the nonmoving party and determine whether a genuine
5 issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v.*
6 *City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted),
7 *cert. denied*, 132 S.Ct. 1566 (2012). The Court determines *only* whether there is a genuine issue
8 for trial and in doing so, it must liberally construe Plaintiff’s filings because he is a pro se
9 prisoner. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (quotation marks and citations
10 omitted).

11 **III. Discussion**^{2,3}

12 **A. Eighth Amendment Claim for Denial of Adequate Outdoor Exercise**

13 This action is proceeding on Plaintiff’s claim that he was not provided with adequate
14 outdoor exercise, in violation of the Eighth Amendment. The Eighth Amendment’s prohibition
15 against cruel and unusual punishment protects prisoners not only from inhumane methods of
16 punishment but also from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d
17 1041, 1045 (9th Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994)
18 and *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981)) (quotation marks omitted).
19 While conditions of confinement may be, and often are, restrictive and harsh, they must not
20 involve the wanton and unnecessary infliction of pain. *Morgan*, 465 F.3d at 1045 (citing *Rhodes*,
21 452 U.S. at 347) (quotation marks omitted). Thus, conditions which are devoid of legitimate
22 penological purpose or contrary to evolving standards of decency that mark the progress of a
23 maturing society violate the Eighth Amendment. *Morgan*, 465 F.3d at 1045 (quotation marks and

24 ² In determining whether there exist triable issues of fact, the Court focuses herein on the issues it finds to be material.
25 The parties may object to the Findings and Recommendations, but they should not construe the fact that the Court
26 declines to specifically discuss every argument made and every piece of evidence submitted as an oversight.

27 ³ Plaintiff’s amended complaint and opposition are verified; and contentions set forth in verified pro se pleadings,
28 motions, and/or oppositions constitute evidence where the contentions are based on personal knowledge of facts
admissible in evidence. *Jones v. Blanas*, 393 F.3d 918, 922-23 (9th Cir. 2004).

1 citations omitted); *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S.Ct. 2508 (2002); *Rhodes*, 452 U.S. at
2 346.

3 Prison officials have a duty to ensure that prisoners are provided adequate shelter, food,
4 clothing, sanitation, medical care, and personal safety, *Johnson v. Lewis*, 217 F.3d 726, 731 (9th
5 Cir. 2000) (quotation marks and citations omitted), but not every injury that a prisoner sustains
6 while in prison represents a constitutional violation, *Morgan*, 465 F.3d at 1045 (quotation marks
7 omitted). To maintain an Eighth Amendment claim, a prisoner must show that prison officials
8 were deliberately indifferent to a substantial risk of harm to his health or safety. *E.g.*, *Farmer*, 511
9 U.S. at 847; *Thomas*, 611 F.3d at 1150-51; *Foster v. Runnels*, 554 F.3d 807, 812-14 (9th Cir.
10 2009); *Morgan*, 465 F.3d at 1045; *Johnson*, 217 F.3d at 731; *Frost v. Agnos*, 152 F.3d 1124, 1128
11 (9th Cir. 1998). This requires the prisoner to demonstrate (1) the existence of an objectively
12 serious risk of harm and (2) that, subjectively, prison officials knew of and disregarded that risk.
13 *E.g.*, *Farmer*, 511 U.S. at 834, 847; *Thomas*, 611 F.3d at 1150-51; *Foster*, 554 F.3d at 812.

14 **1. Objective Element – Substantial Risk of Serious Harm**

15 The deprivation of a single identifiable human need such as exercise may violate the
16 Eighth Amendment, *Thomas*, 611 F.3d at 1151 (citation omitted), and in this Circuit, it is well
17 established that prisoners have a constitutional right to outdoor exercise, *Thomas*, 611 F.3d at
18 1051-52; *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010); *Hebbe v. Pliler*, 627 F.3d 338,
19 344 (9th Cir. 2010); *Pierce v. County of Orange*, 526 F.3d 1190, 1211 (9th Cir. 2008); *Hearns v.*
20 *Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir.
21 2000); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997); *Allen v. Sakai*, 48 F.3d 1082, 1087 (9th
22 Cir. 1995); *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993). The right to outdoor exercise
23 is not absolute or infeasible nor does it trump all other considerations, *Norwood v. Vance*, 591
24 F.3d 1062, 1068 (9th Cir. 2010) (quotation marks omitted), but “ordinarily the lack of outside
25 exercise for extended periods is a sufficiently serious deprivation for Eighth Amendment
26 purposes,” *Thomas*, 611 F.3d at 1151 (citation and internal quotation marks omitted); *Hearns*, 413
27 F.3d at 1042.

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1 In this case, Plaintiff was housed in the Security Housing Unit (SHU) on Facility IV-B at
2 CCI from February 25, 2008, to May 10 or 11, 2010. (Doc. 39, Motion, Gonzalez Dec., ¶11 & Ex.
3 A; Doc. 54, Pl. Depo. Tx., 11:23-12:12; Amend. Comp., p. 4.) Plaintiff is a validated associate of
4 the Northern Structure prison gang, and due to his validation, he was assigned to an Individual
5 Exercise Module (IEM) yard rather than a group yard.⁴ (Gonzalez Dec., ¶¶6, 7; Pl. Depo. Tx.,
6 5:18-19 & 12:18-13:3.) During the relevant time period, there were 580-600 inmates in 406 cells,
7 and there were 32 IEMs. (Gonzalez Dec., ¶13; Pl. Depo. Tx., 12:15-17; Amend. Comp., ¶6.) As a
8 result, there were insufficient IEMs to provide the inmates on Facility IV-B with between 5 and 10
9 hours of outdoor exercise, as provided for under the applicable state prison regulations.⁵
10 (Gonzalez Dec., ¶¶12, 13; Amend. Comp., ¶8.) Plaintiff received outdoor exercise sessions in an
11 IEM as available, and while he was at CCI, he had 72 two-hour IEM sessions. (Gonzalez Dec.,
12 ¶23; Pl. Opp., 9:28-10:10.) Thus, over the 115 weeks Plaintiff was at CCI, he had 144 hours of
13 outdoor exercise, which averages to 75 minutes of outdoor exercise per week over a period of 2
14 years and 3 months.

15 While Plaintiff was able to exercise in his cell and he testified that he kept relatively fit by
16 exercising in his cell for approximately one hour a day, performing push-ups, burpees, and various
17 calisthenics such as jumping jacks, Plaintiff has a right to out-of-cell exercise. *E.g., Thomas*, 611
18 F.3d at 1151. (Pl. Depo. Tx., 34:10-35:24.) The Ninth Circuit has long recognized that outdoor
19 exercise is extremely important to the psychological and physical well-being of inmates, *Spain v.*
20 *Procurier*, 600 F.2d 189, 199 (9th Cir. 1979) (citations omitted), and the Court rejects
21 Defendants' argument that because Plaintiff was able to and did exercise in his cell, he fails to
22 meet the objective element of his claim.

23 As a SHU inmate, Plaintiff was confined to his cell 24 hours a day except for showers,
24 medical appointments, and other occasional out-of-cell activities; and his confinement was long
25 term given his indeterminate SHU term. (Amend. Comp., ¶11.) The fact that Plaintiff was
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27 ⁴ Plaintiff disputes that he is an associate, but he does not dispute the fact he was validated as an associate. (Pl. Depo.
Tx., 29:13-32:25.)

28 ⁵ Cal. Code Regs., tit. 15, § 3343(h).

1 periodically released from his cell for other purposes such as showers, church services, medical
2 appointments, law library access, and visitation, as Defendants argue, is immaterial; those out-of-
3 cell activities do not substitute for the fresh air and outdoor exercise to which Plaintiff is entitled
4 under the Constitution.⁶ See *Hebbe*, 627 F.3d at 343-44 (“Forcing a prisoner to choose between
5 using the law library and exercising outdoors is impermissible because an inmate cannot be forced
6 to sacrifice one constitutionally protected right solely because another is respected.”) (internal
7 quotation marks and citation omitted).

8 Similarly unavailing is Defendants’ argument that Plaintiff could have debriefed, which
9 would have made him eligible for group exercise yard. Plaintiff argues that he is not a gang
10 member or associate, making debriefing an unrealistic option.⁷ (Pl. Opp., 21:27-28.)
11 Additionally, Plaintiff has a right to out-of-cell exercise and the placement of an unrelated
12 condition on the ability to enjoy that right was firmly rejected by the Ninth Circuit in the *Thomas*
13 case.⁸ *Thomas*, 611 F.3d at 1153-54.

14 While there is no bright line in terms of how many hours of out-of-cell exercise per week
15 satisfy the Constitution, an average 75 minutes per week is objectively inadequate for inmates who
16 spend the vast majority of their time inside their cells, long term.⁹ *Pierce*, 526 F.3d at 1211-13
17 (holding that 90 minutes of exercise per week is not sufficient for inmates in administrative

18 ⁶ Although Plaintiff’s other out-of-cell activities do not substitute for outdoor exercise, the Court notes that they were
19 minimal in any event. Over the 115 week period Plaintiff was at CCI, he showered every 2 to 3 days on a rotating
20 basis, he attended church services approximately 10 to 15 times, and he had 40 out-of-cell medical appointments, 37
21 law library visits, and visitation 4 times; and Plaintiff attests that he was handcuffed for all out-of-cell movements and
his medical, law library, and chapel visits occurred in a 3 foot by 3 foot cage. (Gonzalez Dec., ¶¶18-21; Pl. Opp.,
17:26-18:20.)

22 ⁷ Debriefing involves admitting gang affiliation and providing information about other prisoners in order to obtain
release from the SHU. (Pl. Opp., 21:19-21.)

23 ⁸ Defendants failed to address *Thomas v. Ponder* in their motion, despite its clear relevance.

24 ⁹ The Court notes that in his opposition, Plaintiff conflates the outdoor exercise to which he is entitled to under the
25 Constitution to that provided for in prison regulations. While the Ninth Circuit has not determined precisely where the
constitutional floor lies, 2 hours of outdoor exercise per week over the course of at least 2 days has passed
26 constitutional muster. *Pierce*, 526 F.3d at 1211-13. Plaintiff argues in part that he has an entitlement of 5 to 10 hours
of outdoor exercise per week. (*E.g.*, Doc. 47, Pl. Opp., 10:1-3, 11:26-27, & 15-20.) However, a violation of prison
27 regulations does not support a claim under section 1983, *Nurre v. Whitehead*, 580 F.3d 1087, 1092 (9th Cir. 2009);
Ove v. Gwinn, 264 F.3d 817, 824-25 (9th Cir. 2001); *Sweaney v. Ada County, Idaho*, 119 F.3d 1385, 1391 (9th Cir.
1997), and the Constitution has not been found to mandate 5 to 10 hours of outdoor exercise per week, *e.g.*, *Pierce*,
28 526 F.3d at 1211-13.

1 segregation who spend the bulk of their time inside their cells, but upholding as corrective of the
2 violation the lower court's order requiring jail officials to allow those inmates to exercise at least 2
3 days a week for at least 2 hours total per week); *Noble v. Adams*, 636 F.3d 525, 527 (9th Cir.
4 2011) (no outdoor exercise or other privileges for approximately 15 months); *Hebbe*, 627 F.3d at
5 343-44 (inmate permitted out of his cell for only 8 hours a week and impermissibly required to
6 choose between exercise and law library access during those hours); *Thomas*, 611 F.3d at 1151-52
7 (no out-of-cell exercise for 13 months was an objectively serious deprivation); *LeMaire*, 12 F.3d
8 at 1457-58 (no out-of-cell exercise for most of a 5-year period met objective element); *Allen*, 48
9 F.3d at 1087 (in-cell confinement for almost 24 hours a day and 45 minutes of outside exercise per
10 week for a 6-week period sufficient to meet objective element); *Spain*, 600 F.2d at 199 (requiring
11 inmates confined for a period of years be provided outdoor exercise 1 hour per day, 5 days a
12 week). Here, except for showers and other occasional appointments, Plaintiff was confined to his
13 cell for 24 hours a day for a period of 27 months and under those circumstances, the provision of
14 only 75 minutes of outdoor exercise per week constituted a sufficiently serious deprivation under
15 the Eighth Amendment. Defendants' arguments to the contrary are simply untenable.

16 **2. Subjective Element – Deliberate Indifference**

17 Having determined that Plaintiff satisfies the objective element of his Eighth Amendment
18 claim, the inquiry turns to whether Defendants were subjectively deliberately indifferent.
19 Deliberate indifference is a two-party inquiry which requires a showing that prison officials were
20 aware of the risk to the inmate's health or safety and that they deliberately disregarded that risk.
21 *Foster*, 554 F.3d at 814 (citing *Johnson*, 217 F.3d at 734). "First, the inmate must show that the
22 prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety."
23 *Thomas*, 611 F.3d at 1150 (quoting *Farmer*, 511 U.S. at 837). "'A factfinder may conclude that a
24 prison official knew of a substantial risk from the very fact that the risk is obvious,'" *Foster*, 554
25 F.3d at 814 (quoting *Farmer*, 511 U.S. at 842), and "'if an inmate presents evidence of very
26 obvious and blatant circumstances indicating that the prison official knew a substantial risk of
27 serious harm existed, then it is proper to infer that the official must have known of the risk,'" *Thomas*,
28 *Thomas*, 611 F.3d at 1152 (quoting *Foster*, 554 F.3d at 814). "Second, the inmate must show that

1 the prison officials had no ‘reasonable’ justification for the deprivation, in spite of that risk.” *Id.* at
2 1150-51 (quoting *Farmer*, 511 U.S. at 844).

3 In this case, there is no dispute that the outdoor exercise schedule at issue was the direct
4 result of an insufficient number of IEMs on Facility IV-B at CCI. Thus, the issue is whether
5 Plaintiff has presented sufficient evidence to raise a triable issue of fact as to Defendants’
6 knowledge of and disregard of that situation.

7 **a. Defendant Cate**

8 Defendant Cate was appointed as Secretary of the California Department of Corrections
9 and Rehabilitation in 2008, and it is his position that he delegated oversight of SHU operations to
10 the Undersecretary of Operations and the Director of Adult Institutions, and that he did not dictate
11 yard groups or take any position on yard assignments for individual institutions. (Motion, Ex. B,
12 Cate ROGs 1, 4, 8.)

13 Liability may not be imposed on supervisory personnel under the theory of *respondeat*
14 *superior*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77, 129 S.Ct. 1937, 1948-49 (2009); *Simmons*, 609
15 F.3d at 1020-21; *Ewing v. City of Stockton*, 588 F.3d 1218, 1235 (9th Cir. 2009); *Jones v.*
16 *Williams*, 297 F.3d 930, 934 (9th Cir. 2002), and as an administrator, Defendant Cate may only be
17 held liable if he “participated in or directed the violations, or knew of the violations and failed to
18 act to prevent them,” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *accord Starr v. Baca*,
19 652 F.3d 1202, 1205-08 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2101 (2012); *Corales v. Bennett*,
20 567 F.3d 554, 570 (9th Cir. 2009); *Preschooler II v. Clark County School Board of Trustees*, 479
21 F.3d 1175, 1182 (9th Cir. 2007); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997). Some
22 culpable action or inaction must be attributable to Defendant Cate with respect to the inability of
23 prison officials at CCI to provide Facility IV-B inmates with adequate outdoor exercise due to the
24 insufficient number of IEMs.

25 Plaintiff holds Defendant Cate responsible for enforcement of the policy which precluded
26 validated prison gang members and associates from using the group exercise yard and required
27 them to be assigned to IEMs. However, the issue is whether Defendant Cate was aware that
28 Facility IV-B inmates were being deprived of adequate outdoor exercise at CCI during the time

1 period in question due to an insufficient number of IEMs. Defendant Cate has met his burden as
2 the moving party by submitting evidence that he delegated oversight of SHU operations and he did
3 not dictate yard groups or take any position on yard assignments for individual institutions. As a
4 result, the burden shifts to Plaintiff and he must “show more than the mere existence of a scintilla
5 of evidence.” *In re Oracle Corp.*, 627 F.3d at 387 (citing *Anderson*, 477 U.S. at 252).

6 In his deposition, Plaintiff testified that he was told by an IGI (Institutional Gang
7 Investigator) Lieutenant that “Sacramento and the warden” would not allow group yard, and it
8 seemed to him that it was common knowledge “Sacramento” meant the Secretary. (Pl. Depo. Tx.,
9 25:15-26:2.) Assuming that the lieutenant’s statement is excluded from the rule against hearsay
10 on the basis that it was made by an agent or employee of Defendant Cate, the statement is
11 nonetheless speculative. Fed. R. Evid. 701, 801(d)(2)(D). Furthermore, the statement pertains to
12 the underlying policy precluding the assignment of gang members and associates to group yard,
13 not to knowledge of the insufficient number of IEMs at CCI.

14 Next, Plaintiff may not cite to the filing of his own complaint as evidence Defendant Cate
15 was aware of the insufficient number of IEMs, and the two memoranda submitted by Plaintiff
16 regarding the lack of sufficient exercise facilities were not written to Defendant Cate and they do
17 not establish he had knowledge of the inadequate number of IEMs.¹⁰ (Pl. Opp., 11:14-16 & Ex.
18 D.) While the memorandum from 2000 refers to legal action by inmate Romero over inadequate
19 exercise, there is no mention of Defendant Cate. The general fact that inmates file suit over prison
20 conditions does not establish that Defendant Cate had the requisite personal knowledge of the
21 violation at issue in this action; and the fact that Defendant Cate was generally aware that inmates
22 file grievances regarding lack of exercise is similarly insufficient to demonstrate Defendant’s
23 knowledge as to the specific conditions at CCI during the time period in question. (Pl. Opp.
24 24:19-22; Ex. G, RFA 20, court record p. 178.)

25 Plaintiff’s submission of documents from another court case also fails to establish that
26 Defendant Cate had personal knowledge that Plaintiff was being afforded minimal exercise at
27 CCI. (Opp., 11:14-18 & 24:12-18; Pl. Ex. F.) While the Court may take judicial notice of other

28 ¹⁰ The memorandum from 2000 is complete while the memorandum from 2010 is incomplete.

1 court cases, it must be supplied with the necessary information by the requesting party and judicial
2 notice may not be taken of the factual findings. Fed. R. Evid. 201; *see Amponsah v. Holder*, 709
3 F.3d 1318, 1327 n.5 (9th Cir. 2013) (“A court in one case may not take judicial notice of the *truth*
4 of judicial findings of fact in another case.”) (emphasis in original); *Wyatt v. Terhune*, 315 F.3d
5 1108, 1114 (9th Cir. 2003) (“[T]aking judicial notice of findings of fact from another case exceeds
6 Rule 201.”).

7 Finally, Plaintiff’s argument that Defendant Cate was responsible for the care, custody, and
8 treatment of inmates, supported by Defendant’s discovery responses, is similarly unavailing. (Pl.
9 Opp., 13:28-16 & 24:4-11.) Liability may not be imposed under section 1983 in the absence of a
10 causal connection between the violation at issue and each named defendant. *Lemire v. California*
11 *Dept. of Corr. & Rehab.*, ___ F.3d ___, ___, No. 11-15475, 2013 WL 4007558, at *7-8 (9th Cir. Aug.
12 7, 2013); *Starr*, 652 F.3d at 1207-08. Plaintiff’s argument, if accepted, would allow for the
13 imposition of liability on Defendant Cate under the theory of *respondeat superior*, which is not
14 permissible.

15 Plaintiff bears the burden of identifying specific evidence from which a reasonable trier of
16 fact could conclude that Defendant Cate was aware that CCI Facility IV-B inmates were being
17 denied adequate outdoor exercise, and the Court finds that Plaintiff has not met this burden. In the
18 absence of any triable issues of fact with respect to whether Defendant Cate knew of the
19 substantial risk of serious harm to Plaintiff’s health arising out of the inadequate number of IEMs
20 at CCI between 2008 and 2010, the Court recommends that Defendant Cate be granted judgment
21 as a matter of law on the Plaintiff’s Eighth Amendment claim against him.

22 **b. Defendant Gonzalez**

23 Defendant Gonzalez argues that Plaintiff is a validated prison gang associate, and the
24 decision to require gang members and associates to exercise in IEMs was made to reduce violence
25 on the group exercise yards. (Gonzalez Dec., ¶¶6, 7, 27; Borg Dec., ¶¶8, 9; Tristan Dec., ¶6.) As
26 a result of the decision, the number of violent incidents dropped from 50 in 2000 to 3 in 2008 and
27 6 in 2009, which represented a 94% decrease in 2008 and an 88% decrease in 2009. (Gonzalez
28 Dec., ¶11; Borg Dec., ¶9.) Defendant argues that according the deference to which prison

1 officials are entitled, he did not act with deliberate indifference, and that the decision to restrict
2 Plaintiff to IEM usage was reasonably related to a legitimate penological purpose. *Turner v.*
3 *Safley*, 482 U.S. 78, 89-91, 107 S.Ct. 2254 (1987). Finally, Defendant argues that the policy was
4 in place prior to his employment as Acting Warden and Warden at CCI, and because he was
5 without the power to change the policy, there is an insufficient causal link between the alleged
6 violation and his actions or omissions. (Gonzalez Dec., ¶¶9, 25.)

7 **1) Knowledge**

8 Turning first to whether Defendant Gonzalez had the requisite knowledge, Defendant held
9 the positions of Acting Warden and then Warden during the time Plaintiff was at CCI, and he
10 concedes the inadequacy of only 32 IEMs on Facility IV-B. (Gonzalez Dec., ¶¶3, 13.) Given that
11 the deprivation of outdoor exercise was objectively sufficiently serious and that Defendant knew
12 prison officials at CCI were unable to provide Facility IV-B inmates the regular outdoor exercise
13 to which they were entitled under the regulations due to inadequate facilities, the Court finds that
14 Defendant was aware of the substantial risk of serious harm to Plaintiff’s health. *Thomas*, 611
15 F.3d at 1151-52; *Richardson*, 594 F.3d at 672.

16 **2) Reasonableness**

17 The inquiry next turns to the reasonableness of Defendant Gonzalez’s response to the
18 known risk. *Thomas*, 611 F.3d at 1152.

19 Turning first to Defendant’s analysis of the IEM policy in light of the *Turner* factors, under
20 the four-factor analysis articulated in *Turner*, a prison regulation which impinges on inmates’
21 constitutional rights will be upheld as “valid if it is reasonably related to legitimate penological
22 interests.” *Turner*, 482 U.S. at 89. However, the deferential *Turner* test applies “only to rights
23 that are ‘inconsistent with proper incarceration.’” *Johnson v. California*, 543 U.S. 499, 509-10,
24 125 S.Ct. 1141 (2005) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131, 123 S.Ct. 2162 (2003))
25 (emphasis in original). Violations of the Eighth Amendment are judged under the deliberate
26 indifference standard rather than the *Turner* test “because the integrity of the criminal justice
27 system depends on full compliance with the Eighth Amendment.” *Johnson*, 543 U.S. at 511.

28 ///

1 Therefore, the Court declines Defendant’s invitation to apply the *Turner* test to Plaintiff’s Eighth
2 Amendment outdoor exercise claim. *Id.*

3 The Ninth Circuit has instructed that prison officials are entitled to wide-ranging deference
4 so long as their judgment does not manifest either deliberate indifference or an intent to inflict
5 harm. *Noble*, 646 F.3d at 1143 (quotation marks omitted) (citing *Bell v. Wolfish*, 441 U.S. 520,
6 547, 99 S.Ct. 1861 (1979)). As such, the broader determination that it was appropriate to assign
7 gang members and associates to IEMs and preclude them from group exercise yard to help reduce
8 violence is precisely the type of determination which is entitled to wide-ranging deference.
9 However, Plaintiff was not denied adequate outdoor exercise due to any an emergency-based
10 lockdown, his own violent behavior, or some other situation requiring prison officials to balance
11 Plaintiff’s right to outdoor exercise with the need to restore or maintain order. *Noble*, 646 F.3d at
12 1147-48 (finding the defendants were entitled to qualified immunity where extended lockdowns
13 were necessary to restore order following violent attacks on staff); *Norwood*, 591 F.3d at 1070
14 (granting the defendants qualified immunity where lockdown was instituted in response to a
15 genuine emergency created by prison violence); *LeMaire*, 12 F.3d at 1458 (curtailment of inmate’s
16 outdoor exercise privileges over a five-year period due directly to his own misbehavior did not
17 support a finding of deliberate indifference). To the contrary, Plaintiff was denied adequate
18 outdoor exercise solely because there were not enough IEMs on the Facility IV-B yard to
19 accommodate the inmates who, pursuant to policy, required use of an IEM.

20 Defendant Gonzalez concedes that he was aware that Facility IV-B inmates were not
21 getting adequate outdoor exercise due to the insufficient number of IEMs, but he argues that his
22 options were limited and there were plans in place at the time to build additional IEMs. (Gonzalez
23 Dec., ¶26.) Defendant presents evidence the process to build additional IEMS typically takes
24 years, and construction of additional IEMs was ultimately completed in 2012. (Tristan Dec.,
25 ¶¶13-15; Borg Dec., Ex. A.)

26 However, “[t]he cost or inconvenience of providing adequate facilities is not a defense to
27 the imposition of a cruel punishment.” *Spain*, 600 F2d at 200. This is not a situation involving a
28 “genuine emergency,” and the deprivation at issue was long term. *Thomas*, 611 F.3d at 1154-55.

1 Whether or not Defendant Gonzalez acted reasonably under the circumstances, which includes an
2 evaluation of whether continued adherence to the underlying policy was reasonable given the lack
3 of sufficient IEMs, is an issue for the trier of fact. *Id.* at 1152-56. With respect to Defendant’s
4 argument that he was not responsible for the enactment of the underlying policy, it is enough that
5 he was the head of the institution during the relevant time period and he knew of the violation. *Id.*
6 at 1150-52. The trier of fact may ultimately determine that Defendant responded reasonably given
7 all the relevant circumstances, but Plaintiff is entitled to have that issue resolved by a jury. *Id.* at
8 1152-56. Accordingly, the Court finds that Defendant Gonzalez is not entitled to judgment as a
9 matter of law on Plaintiff’s Eighth Amendment claim.

10 **3. Qualified Immunity**

11 **a) Two-Part Inquiry**

12 Defendant Gonzalez also argues that he is entitled to qualified immunity, which is
13 “immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is
14 effectively lost if a case is erroneously permitted to go to trial.” *Mueller v. Aufer*, 576 F.3d 979,
15 993 (9th Cir. 2009) (citation and internal quotations omitted). Qualified immunity shields
16 government officials from civil damages unless their conduct violates “clearly established
17 statutory or constitutional rights of which a reasonable person would have known.” *Harlow v.*
18 *Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). “Qualified immunity balances two
19 important interests - the need to hold public officials accountable when they exercise power
20 irresponsibly and the need to shield officials from harassment, distraction, and liability when they
21 perform their duties reasonably,” *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808 (2009),
22 and it protects “all but the plainly incompetent or those who knowingly violate the law,” *Malley v.*
23 *Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

24 In resolving the claim of qualified immunity, the Court must determine whether, taken in
25 the light most favorable to Plaintiff, Defendant’s conduct violated a constitutional right, and if so,
26 whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151
27 (2001); *Mueller*, 576 F.3d at 993. While often beneficial to address in that order, the Court has
28 discretion to address the two-step inquiry in the order it deems most suitable under the

1 circumstances. *Pearson*, 555 U.S. at 236 (overruling holding in *Saucier* that the two-step inquiry
2 must be conducted in that order, and the second step is reached only if the court first finds a
3 constitutional violation); *Mueller*, 576 F.3d at 993-94.

4 In this instance, the evidence viewed in the light most favorable to Plaintiff demonstrates a
5 constitutional violation and there exist triable issues of fact as to whether that right was violated.
6 Therefore, the Court proceeds without further discussion to the second step of the inquiry.

7 **b) Clearly Established Right**

8 “For a constitutional right to be clearly established, its contours must be sufficiently clear
9 that a reasonable officer would understand that what he is doing violates that right.” *Hope v.*
10 *Pelzer*, 536 U.S. at 739. While the reasonableness inquiry may not be undertaken as a broad,
11 general proposition, neither is official action entitled to protection “unless the very action in
12 question has previously been held unlawful.” *Id.* “Specificity only requires that the unlawfulness
13 be apparent under preexisting law,” *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002) (citation
14 omitted), and prison personnel “can still be on notice that their conduct violates established law
15 even in novel factual circumstances,” *Hope*, 536 U.S. at 741.

16 It had long been clear by 2008 that, except for short term deprivations with no medical
17 effects, the Eighth Amendment requires prison officials to provide inmates with regular outdoor
18 exercise, *May*, 109 F.3d at 565; *Keenan v. Hall*, 83 F.3d 1083, 1089-90 (9th Cir. 1996); *Allen*, 48
19 F.3d at 1087-88, and that inadequate facilities do not excuse the failure to do so, *Spain*, 600 F.2d at
20 200. “Qualified immunity gives government officials breathing room to make reasonable but
21 mistaken judgments about open legal questions,” *Ashcroft v. al-Kidd*, __ U.S. __, __, 131 S.Ct.
22 2074, 2085 (2011), and the existence of triable issues of fact as to whether prison officials were
23 deliberately indifferent does not necessarily preclude qualified immunity, *Estate of Ford v.*
24 *Ramirez-Palmer*, 301 F.3d 1043, 1053 (9th Cir. 2002). Here, however, the law was sufficiently
25 clear that a reasonable official would have known that he could not deny regular outdoor exercise
26 on the basis that there were not enough IEMs available. *Keenan*, 83 F.3d at 1089-90; *Allen*, 48
27 F.3d at 1084; *Spain*, 600 F.2d at 200. This situation does not involve a reasonable but mistaken
28 judgment about an open legal question. *See Noble*, 646 F.3d at 1142-43 (how or when to return to

1 normal operations, including outdoor exercise, following a state of emergency caused by a major
2 riot was not clearly established); *Norwood*, 591 F.3d at 1068-70 (reasonable prison officials could
3 have believed that restricting outdoor exercise in an attempt to restore order during a series of
4 brutal attacks was lawful). Therefore, the Court finds that Defendant Gonzalez is not entitled to
5 qualified immunity.

6 **B. Injunctive and Declaratory Relief**

7 Finally, in addition to damages, Plaintiff seeks an injunction mandating that Defendant
8 Gonzalez appropriate necessary funds and implement a viable plan to construct sufficient IEMs to
9 provide Facility IV-B inmates with adequate out-of-cell exercise, and he seeks a declaration that
10 his rights were violated.

11 To obtain a permanent injunction, Plaintiff “must demonstrate: (1) that [he] has suffered an
12 irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to
13 compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and
14 defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved
15 by a permanent injunction.” *Monsanto Co. v. Geerston Seed Farms*, __ U.S. __, __, 130 S.Ct.
16 2743, 2756 (2010) (quoting *eBay, Inc. v. Merceexchange, L.L.C.*, 547 U.S. 388, 391, 126 S.Ct.
17 1837, 1839 (2006)). Additionally, any award of equitable relief is governed by the Prison
18 Litigation Reform Act, which provides in relevant part, “Prospective relief in any civil action with
19 respect to prison conditions shall extend no further than necessary to correct the violation of the
20 Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any
21 prospective relief unless the court finds that such relief is narrowly drawn, extends no further than
22 necessary to correct the violation of the Federal right, and is the least intrusive means necessary to
23 correct the violation of the Federal right.” 18 U.S.C. § 3626(a)(1)(A).

24 The Court previously denied Defendants Cate and Gonzalez’s motion to dismiss Plaintiff’s
25 injunctive relief claim on the ground that his 2010 transfer from CCI to Pelican Bay State Prison
26 did not render the claim moot in light of the capable-of-repetition-yet-evading-review exception to
27 the mootness doctrine. *Alvarez v. Hill*, 667 F.3d 1061, 1063-64 (9th Cir. 2012); *Demery v.*
28 *Arpaio*, 378 F.3d 1020, 1025-26 (9th Cir. 2004). Because Plaintiff was serving an indeterminate

1 SHU term and there are only three SHUs in the state at which he may be housed, the Court
2 declined to find that Plaintiff's claim was so clearly foreclosed that Defendants were entitled to
3 dismissal at the pleading stage.

4 Defendant Gonzalez now submits evidence that additional IEMs have been constructed
5 and Facility IV-B inmates receive the ten hours of outdoor exercise to which they are entitled
6 under state regulations. While Defendant Gonzalez's bare attestation to facts based merely on
7 "information and belief" is not sufficient, the report prepared by expert witness Robert Borg
8 provides that as a result of construction completed in 2012, there are now 105 IEMs on Facility
9 IV-B and SHU inmates receive at least 10 hours of out-of-cell exercise per week.¹¹ (Gonzales
10 Dec., ¶16; Borg Dec., Ex. A.) Plaintiff desires to dispute these facts, but he has not submitted any
11 admissible evidence bringing them into dispute. Neither arguments regarding CCI's past inability
12 to carry out the plans on paper for adequate exercise nor arguments that Defendants have a vested
13 interest at stake and independent verification should be undertaken by the Court constitute
14 evidence.

15 In as much as Plaintiff sought an injunction to build additional IEMs and the number of
16 IEMs subsequently increased from 32 to 105, with evidence that SHU inmates are now getting
17 adequate exercise, Plaintiff's request for this form of relief is moot. *Alvarez*, 667 F.3d at 1063-64.
18 Additionally, "[a] case or controversy exists justifying declaratory relief only when the
19 challenged government activity is not contingent, has not evaporated or disappeared, and, by its
20 continuing and brooding presence, casts what may well be a substantial adverse effect on the
21 interests of the petitioning parties." *Pinnacle Armor, Inc. v. U.S.*, 648 F.3d 708, 715 (9th Cir.
22 2011) (quoting *Headwaters, Inc. v. Bureau of Land Management, Medford Dist.*, 893 F.2d 1012,
23 1015 (9th Cir. 1989)). Plaintiff's claim for damages necessarily entails a determination whether
24 his rights were violated and therefore, his separate request for declaratory relief is subsumed by
25

26 ¹¹ Personal knowledge and competence to testify may be inferred from a declaration itself, *Barthelemy v. Air Line*
27 *Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (per curiam) (quotation marks omitted), but here, Defendant
28 Gonzalez retired on December 31, 2010, and the only basis stated in support of the fact in question is "information
and belief," see *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 944 F.2d 1525, 1529
(9th Cir. 1991) (declaration based not on personal knowledge but on information and belief does not suffice).

1 that claim.¹² *Rhodes v. Robinson*, 408 F.3d 559, 565-66 n.8 (9th Cir. 2005) (quotation marks
2 omitted).

3 **IV. Conclusion and Recommendation**

4 Accordingly, for the reasons set forth above, the Court HEREBY RECOMMENDS that:

5 1. Defendants Cate and Gonzalez’s motion for summary judgment, filed on
6 September 19, 2012, be GRANTED IN PART and DENIED IN PART as follows:

7 a. Defendant Cate’s motion for summary adjudication on Plaintiff’s Eighth
8 Amendment claim be granted;

9 b. Defendant Gonzalez’s motion for summary adjudication on Plaintiff’s
10 Eighth Amendment claim be denied;

11 c. Defendant Gonzalez’s motion for summary adjudication on the ground of
12 qualified immunity be denied; and

13 d. Plaintiff’s claim for injunctive relief be dismissed as moot;

14 2. Plaintiff’s claim for declaratory relief be dismissed as moot; and

15 3. Plaintiff’s Eighth Amendment claim for damages against Defendant Gonzalez be
16 set for jury trial.

17 These Findings and Recommendations will be submitted to the United States District
18 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
19 **fifteen (15) days** after being served with these Findings and Recommendations, the parties may
20 file written objections with the Court. The document should be captioned “Objections to
21 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file
22 objections within the specified time may waive the right to appeal the District Court’s order.
23 *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

24
25 IT IS SO ORDERED.

26 Dated: September 2, 2013

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

28 _____
¹² The Court may *sua sponte* screen out deficient claims. 28 U.S.C. § 1915A.

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