

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 13 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT MCGUIRE,

Plaintiff - Appellee,

v.

CALVIN JOHNSON,

Defendant - Appellant,

and

NEVADA DEPARTMENT OF
CORRECTIONS, WILLIAM GITTERE,

Defendants.

No. 25-1457

D.C. No.

3:23-cv-00165-ART-CLB

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Anne R. Traum, District Judge, Presiding

Submitted March 11, 2026**
Las Vegas, Nevada

Before: BENNETT and SANCHEZ, Circuit Judges, and HOLCOMB, District

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Judge.***

Plaintiff Robert McGuire, a prisoner in the custody of the Nevada Department of Corrections (NDOC), brought this action pursuant to 42 U.S.C. § 1983, alleging that Calvin Johnson, the Warden at High Desert State Prison (HDSPP), denied him outdoor exercise in violation of the Eighth Amendment.¹ At summary judgment, the district court denied Warden Johnson’s assertion of qualified immunity and denied his motion for summary judgment. Warden Johnson timely appealed.²

Because the district court rejected Warden Johnson’s assertion of qualified immunity, we have jurisdiction under the collateral order doctrine. *See Johnson v. Myers*, 129 F.4th 1189, 1193 (9th Cir. 2025). But our jurisdiction “does not extend to claims in which the determination of qualified immunity depends on disputed issues of material fact.” *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) (per curiam). So we “determine whether the denial of qualified immunity was

*** The Honorable John W. Holcomb, United States District Judge for the Central District of California, sitting by designation.

¹ McGuire also brought claims under the Fourteenth Amendment and included as Defendants NDOC, William Gittere, and two unidentified persons. McGuire’s Fourteenth Amendment claim against Warden Johnson and all of his claims against the other Defendants were dismissed at summary judgment and are not at issue on appeal.

² Warden Johnson requests judicial notice of five background documents. Because none of those documents would materially alter our analysis, the motion for judicial notice (Dkt. No. 21) is **denied as moot**.

appropriate by assuming that the version of the material facts asserted by the non-moving party is correct.” *Id.*

“We review de novo a district court’s grant or denial of summary judgment, including officers’ entitlement to qualified immunity.” *Cardenas-Ornelas v. Johnson*, 165 F.4th 1234, 1239 (9th Cir. 2026) (citation modified).

1. Qualified immunity shields government officials performing discretionary functions “from liability for civil damages” when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is clearly established only when “[t]he contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). We must decide “whether ‘the officer’s conduct violated a constitutional right’ and whether ‘the right was clearly established’ at the time of the alleged misconduct.” *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009)). “Our inquiry may proceed in any order.” *Cardenas-Ornelas*, 165 F.4th at 1240.

Exercise is “one of the basic human necessities protected by the Eighth Amendment.” *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993). “By 2020,

our case law had clearly established a prisoner’s Eighth Amendment right to outdoor exercise or otherwise meaningful opportunities for recreation.”

Cardenas-Ornelas, 165 F.4th at 1240. “[W]e had held specifically that prisoners were unconstitutionally denied outdoor exercise when they were confined in small cells around the clock for more than four years.” *Id.* (citing *Spain v. Procunier*, 600 F.2d 189, 199–200 (9th Cir. 1979)). Thus, “at the time of the alleged deprivation”—between 2020 and 2022—McGuire “had a clearly established right to outdoor exercise or meaningful opportunities for recreation.” *Id.*

“The next question is whether a reasonable jury could find that Warden Johnson violated that clearly established right.” *Id.* To violate the Eighth Amendment, the alleged deprivation “must be, objectively, ‘sufficiently serious,’” and the “prison official must have a ‘sufficiently culpable state of mind.’” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 297–98 (1991)). Here, McGuire “presented sufficient evidence which, viewed in the light most favorable to him at summary judgment, raised triable issues on both prongs of his Eighth Amendment claim against Warden Johnson.”

Cardenas-Ornelas, 165 F.4th at 1240.

On the objective prong, McGuire contended in sworn statements that for at least sixty-seven days from August 18 to October 23, 2020, he was not allowed to exercise in the outdoor yard or outdoor cages and was not provided with any other

recreational opportunities. McGuire also contended in sworn statements that for nineteen months from October 23, 2020 through June 9, 2022, he typically got only one hour of outdoor exercise per week, and often went several weeks without the prison providing him any outdoor time. Warden Johnson contests these claims, but in this interlocutory appeal, “we may not consider questions of evidentiary sufficiency, i.e., which facts a party may, or may not, be able to prove at trial.” *George v. Morris*, 736 F.3d 829, 834 (9th Cir. 2013) (citation modified). Instead, we must deal with “disputed facts” by “determin[ing] whether the denial of qualified immunity was appropriate by assuming that the version of the material facts asserted by the non-moving party is correct.” *Jeffers*, 267 F.3d at 903.³

On the subjective prong, viewed in the light most favorable to McGuire, “evidence supported the claim that Warden Johnson was subjectively aware of the alleged risk because Warden Johnson responded to [McGuire’s] first-level grievance.” *Cardenas-Ornelas*, 165 F.4th at 1241. In October 2020, McGuire

³ Warden Johnson argues that he is entitled to qualified immunity because he did not violate the Eighth Amendment. To the extent that Warden Johnson argues McGuire presented insufficient evidence at summary judgment, we generally lack jurisdiction to resolve such a claim on interlocutory appeal. *See George*, 736 F.3d at 834. But viewing the evidence in the light most favorable to the non-moving party, *see Jeffers*, 267 F.3d at 903, McGuire had at most one hour per week of outdoor exercise or otherwise meaningful recreation for twenty-one months. Thus, “there is a genuine factual dispute whether the alleged deprivation of exercise was, objectively, sufficiently serious,” and thus whether Warden Johnson is entitled to qualified immunity. *See Cardenas-Ornelas*, 165 F.4th at 1241.

filed an informal grievance complaining that, in an ongoing deprivation, he had been “locked [down] (w/ other inmates) [without] any access to yard” or “the segregation cages” for “over 45 days.” McGuire’s informal grievance also stated, “Now I’m only receiving only 1 hour per week (starting this week).” McGuire’s first-level grievance, signed in April 2021, in no way indicated that the deprivation alleged in his informal grievance had ended. Instead, McGuire asked about the “procedures to give [prisoners] outdoor rec time—even on lock-down situations,” and pointed out that the prison had “cages [to] use for this purpose.” Because Warden Johnson reviewed these grievances and then denied McGuire’s first-level grievance, evidence supports McGuire’s claim that Warden Johnson was subjectively aware of but deliberately indifferent to his health and safety. *See id.* at 1241. Thus, “the district court properly denied qualified immunity on [McGuire’s] Eighth Amendment claim against Warden Johnson.” *Id.* at 1242. In affirming, however, we “do[] not foreclose the trier of fact from making factual determinations which could result in the post-trial grant of qualified immunity on this claim for Warden Johnson.” *Id.*

2. Warden Johnson’s contrary arguments lack merit. Relying on the sham affidavit rule, Warden Johnson argues that McGuire failed to meet the summary judgment standard because of inconsistencies in McGuire’s sworn statements. In our Circuit, “a party cannot create an issue of fact by an affidavit contradicting his

prior deposition testimony.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (quoting *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009)). But this rule is triggered only when the district court “make[s] a factual determination that the contradiction is a sham, and the ‘inconsistency between a party’s deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.’” *Id.* (quoting *Van Asdale*, 577 F.3d at 998–99). Assuming without deciding that the sham affidavit rule may be invoked in an interlocutory appeal, Warden Johnson’s argument fails because there was no such finding here.

Warden Johnson also argues that the right to outdoor exercise was not clearly established at the time of the alleged violation. But *Cardenas-Ornelas* forecloses this argument. 165 F.4th at 1240 (holding that, by 2020, the plaintiff “had a clearly established right to outdoor exercise or meaningful opportunities for recreation”). And though our cases do not mandate five hours of outdoor exercise weekly, our precedents had clearly established a right to more than the occasional one hour of outdoor exercise or outdoor recreation that McGuire contends he received from August 2020 to June 2020. *Norbert v. City & County of San Francisco*, 10 F.4th 918, 929–31 (9th Cir. 2021); *see also Spain*, 600 F.2d at 199–200 (holding that prisoners were unconstitutionally denied outdoor exercise when they were confined in small cells around the clock for more than four years);

Toussaint v. Yockey, 722 F.2d 1490, 1492–93 (9th Cir. 1984) (holding that the Eighth Amendment was likely violated when “inmates were confined to their cells for as much as 23 ½ hours a day”); *Pierce v. County of Orange*, 526 F.3d 1190, 1208, 1212 (9th Cir. 2008) (holding under the Fourteenth Amendment that “providing inmates only ninety minutes of exercise per week—less than thirteen minutes per day—does not comport with constitutional standards”). By 2020, these precedents had “placed the statutory or constitutional question beyond debate.” *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Warden Johnson further contends that the district court should have granted him summary judgment because McGuire offered no evidence of harm resulting from the alleged Eighth Amendment violation. But “long-term deprivations” of outdoor exercise “are substantial regardless of effects.” *Lopez v. Smith*, 203 F.3d 1122, 1133 n.15 (9th Cir. 2000) (en banc).

AFFIRMED.