



PC-CA-015-001

FILED

SEP - 9 2002

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK CLEMENT,

No. C 00-1860 CW

Plaintiff,

JUDGMENT

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS,
et al.,

Defendants.

Entered on Civil Docket

9/10/02

For the reasons as set forth in this Court's Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, Denying Plaintiff's Motion for a Preliminary Injunction, and Granting Plaintiff Partial Summary Judgment,

IT IS HEREBY ORDERED AND ADJUDGED:

That Plaintiff Frank Clement take nothing on his claims alleging violation of his Eighth Amendment rights, that those claims be dismissed on the merits, that Defendants also take nothing, that Defendants as well as their officers, directors,

1 employees, agents and those in privity with them are enjoined from
2 enforcing any policy that prohibits California inmates from
3 receiving mail because it contains Internet-generated material, and
4 that each party bear its own costs of action.

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7 Dated: SEP - 9 2002

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11 Copies mailed to counsel
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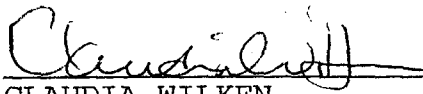
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CLAUDIA WILKEN
United States District Judge

United States District Court
for the
Northern District of California

* * CERTIFICATE OF SERVICE * *

Case Number:4:00-cv-01860

Clement

vs

CDC

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 9-10-00, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK CLEMENT,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS, et al.,

Defendants.

No. C 00-1860 CW

ORDER GRANTING
IN PART AND
DENYING IN PART
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT;
DENYING
PLAINTIFF'S
MOTION FOR A
PRELIMINARY
INJUNCTION;
GRANTING
PLAINTIFF
PARTIAL SUMMARY
JUDGMENT.

Defendant California Department of Corrections (CDC) and the named Defendant employees of the CDC (Individual Defendants) move for summary judgment on Plaintiff Frank Clement's section 1983 claims for damages and injunctive relief. Plaintiff opposes the motion and moves for preliminary injunctive relief with respect to one of his claims. Defendants oppose Plaintiff's request for a preliminary injunction. The matter was heard on August 9, 2002. Having considered all of the papers filed by the parties and oral argument on the motion, the Court grants in part and denies in part Defendants' motion for summary judgment (Docket # 31), denies Plaintiff's request for a preliminary injunction (Docket # 53), and grants partial summary judgment to Plaintiff.

BACKGROUND

At all times relevant to this motion, Plaintiff was a prisoner at Pelican Bay State Prison (Pelican Bay).

A. Delay in Diagnosis and Treatment for Colon Cancer

On April 8, 1999, Plaintiff advised a nurse that he had been experiencing intermittent episodes of diarrhea, with blood and mucus in watery, loose stool. She arranged for him to see a doctor the next day. Declaration of Dwight Winslow (Winslow Dec.), Ex. A. Plaintiff was examined by a doctor at Pelican Bay on April 9, 1999. The doctor ordered a barium enema and ordered that a stool sample be tested. The doctor advised Plaintiff to return in two weeks for follow up. Id., Ex. B. Plaintiff returned to Pelican Bay clinic on April 12 complaining that his symptoms had worsened. He was taken to Sutter Coast Hospital that day. Id., Ex. C. At Sutter Coast Hospital, Plaintiff's abdomen was x-rayed and he was evaluated by Dr. Picone. Dr. Picone recommended that Plaintiff be put on a bland diet and be scheduled for a colonoscopy.¹ Id., Ex. D-E.

The results of the barium enema became available on April 13, 1999. They showed the presence of one small polyp, two small polypoid lesions, and several small scattered diverticula in the sigmoid colon. Id., Ex. F. On April 25, Pelican Bay medical administrative review staff approved the colonoscopy as well as an

¹A colonoscopy is a visual examination of the inner surface of the colon by means of a colonoscope. Stedman's Medical Dictionary at 367 (26th ed. 1995).

1 esophagogastroduodenoscopy (EGD).²

2 Plaintiff saw Dr. White at the Pelican Bay Clinic on May 11,
3 1999 and on May 26, 1999. Dr. White noted that Plaintiff had lost
4 fourteen pounds in the two weeks between visits. Declaration of
5 Frank Clement (Clement Dec.), Exs. 8-9. On May 21, 1999,
6 Plaintiff saw Dr. Picone at Sutter Coast Hospital. Dr. Picone
7 again recommended a colonoscopy. Id., Ex. H. On June 9, 1999,
8 Plaintiff saw Dr. White at the Pelican Bay clinic. Dr. White's
9 notes from that visit indicate that she contacted Dr. Picone's
10 office and was told that Plaintiff's colonoscopy appointment was
11 "pending." Id., Ex. N. On June 22, 1999, Plaintiff returned to
12 the Pelican Bay clinic and again saw Dr. White. Dr. White's notes
13 from that meeting indicate that she again contacted Dr. Picone's
14 office and was told that Plaintiff's surgery would be scheduled.
15 Id., Ex. P. On June 24, 1999, Dr. Picone issued an addendum to
16 his April 12, 1999 patient note. The addendum indicates that
17 Plaintiff had been scheduled for a colonoscopy (though it does not
18 say when), but that a "physical problem at the hospital
19 prevent[ed] surgery on that day." Id., Ex. Q.

20 On July 16, 1999, Plaintiff was taken to Sutter Coast
21 Hospital to have the colonoscopy and the EGD performed. Only the
22 EGD was performed on that day. Id., Ex. R. The parties dispute
23 why the colonoscopy was not performed on July 16. Plaintiff
24 contends that Defendants had not given him medication necessary to
25 prepare him for the procedure. Declaration of Frank Clement
26

27 ²An EGD is an endoscopic examination of the esophagus, stomach
28 and duodenum. Id. at 598.

1 (Clement Dec.) ¶ 5. Defendants contend that there was a
2 "technical problem" at the hospital that prevented the hospital
3 from performing the procedure. Winslow Dec., Ex. R.

4 On July 20, 1999, Plaintiff filed an administrative appeal
5 (602 appeal) because the colonoscopy had not yet been performed.
6 On August 2, 1999, a colonoscopy was performed on Plaintiff and
7 two polyps were removed. Id., Ex. V. The pathology report on the
8 removed polyps revealed that one was benign and the other
9 malignant. Id., Ex. W. The type of carcinoma revealed by the
10 biopsy is a slow growing, non-invasive malignancy. Id. ¶ 29.

11 On August 13, 1999, Plaintiff saw Dr. Picone to follow up on
12 the surgery. Dr. Picone recommended that Plaintiff return for
13 another colonoscopy in six months and that Plaintiff be put on a
14 high fiber, low-fat diet with no red meat. Id., Ex. X. Defendant
15 Winslow, the Chief Medical Officer at Pelican Bay, does not
16 believe that a red meat free diet is medically necessary for
17 Plaintiff. Id. ¶ 32. Plaintiff was not immediately put on the
18 specified diet. On August 25, 1999, Plaintiff filed a 602 appeal
19 complaining that he was not receiving the diet ordered by Dr.
20 Picone. Clement Dec., Ex. 14. On October 17, 1999, Plaintiff's
21 low-fat diet was commenced, but Defendants continued to include
22 red meat in his diet. Clement Dec. ¶ 13. On December 21, 1999,
23 Plaintiff began to receive a second sack lunch along with his low-
24 fat diet so that he could substitute the meat portion of his meal
25 without sacrificing his caloric or nutritional intake. Winslow
26 Dec. ¶ 33.

27 B. Tennis Shoes

28 Plaintiff has calcaneal bone spurs. Plaintiff contends that

1 because of this condition, the Pelican Bay-issued shoes cut into
2 the back of his heels, making walking and exercise uncomfortable
3 and resulting in blisters on his heels. Clement Dec. ¶ 19.
4 Plaintiff contends that he has a medical need for tennis shoes
5 from a vendor other than the one approved by the facility.
6 Although his treating physician has authorized such purchases,
7 that physician was overruled by Pelican Bay's Health Care Manager.
8 Clement Dec. ¶ 34. Plaintiff appealed the Health Care Manager's
9 decision through Pelican Bay's administrative system. The
10 decision not to permit Plaintiff to purchase tennis shoes from an
11 outside vendor was upheld on appeal. Id. ¶¶ 34, 42

12 On March 8, 2001, Plaintiff filed a petition for a writ of
13 habeas corpus in State court seeking an order allowing him to
14 purchase tennis shoes from an outside vendor. That writ was
15 denied on August 20, 2001 on the grounds that "a difference of
16 opinion among staff does not constitute deliberate indifference to
17 petitioner's medical needs." Declaration of Julianne Mossler
18 (Mossler Dec.), Ex. D (Order Denying Petition for Writ of Habeas
19 Corpus and Discharging Order to Show Cause).

20 C. Receipt of Internet Materials

21 In 1998, Pelican Bay adopted a policy that materials printed
22 from the Internet were considered "unauthorized publications" and
23 could not be enclosed in letters sent to prisoners from the
24 outside. The prison changed this policy several times over the
25 next two years and the most recent version was formalized in a
26 memo from the Warden in February, 2001. Declaration of Deirdre K.
27 Mulligan (Mulligan Dec.), Ex. C.

28 Pelican Bay prisoners do not have access to the Internet.

1 Prisoners, therefore, cannot directly access materials on-line.
2 Pelican Bay's policy bans prisoners from receiving through the
3 mail hard copies of material downloaded from the Internet.

4 Plaintiff filed an inmate grievance contesting this policy in
5 January, 1999 when his pen-pal correspondence was returned to the
6 sender due to the new policy. Plaintiff had subscribed to an
7 Internet pen-pal service which allows a prisoner to post a web
8 page and solicit correspondence. Those who would like to
9 communicate with the inmate may send an e-mail to the prisoner's
10 web page. The service provider then downloads the e-mail and
11 sends it via the United States Postal Service to the inmate. On
12 January 10, 1999 and April 6, 1999, the prison mailroom rejected
13 letters sent by the Internet service to Plaintiff because they
14 contained messages downloaded from the Internet. Plaintiff filed
15 a grievance which was ultimately denied by prison authorities.

16 Like Pelican Bay, at least eight other prisons in California
17 also prohibit prisoners from receiving any items downloaded from
18 the Internet. Mulligan Dec. ¶ 6-8. Presently, the majority of
19 California State prisons have no such regulation.

20 LEGAL STANDARD

21 A. Summary Judgment

22 Summary judgment is properly granted when no genuine and
23 disputed issues of material fact remain, and when, viewing the
24 evidence most favorably to the non-moving party, the movant is
25 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
26 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
27 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
28 1987).

1 The moving party bears the burden of showing that there is no
2 material factual dispute. Therefore, the Court must regard as
3 true the opposing party's evidence, if supported by affidavits or
4 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
5 815 F.2d at 1289. The Court must draw all reasonable inferences
6 in favor of the party against whom summary judgment is sought.
7 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
8 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
9 F.2d 1551, 1558 (9th Cir. 1991).

10 Material facts which would preclude entry of summary judgment
11 are those which, under applicable substantive law, may affect the
12 outcome of the case. The substantive law will identify which
13 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
14 242, 248 (1986).

15 Where the moving party does not bear the burden of proof on
16 an issue at trial, the moving party may discharge its burden of
17 showing that no genuine issue of material fact remains by
18 demonstrating that "there is an absence of evidence to support the
19 nonmoving party's case." Celotex, 477 U.S. at 325. The moving
20 party is not required to produce evidence showing the absence of a
21 material fact on such issues, nor must the moving party support
22 its motion with evidence negating the non-moving party's claim.
23 Id.; see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885
24 (1990); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir.
25 1991), cert. denied, 502 U.S. 994 (1991). If the moving party
26 shows an absence of evidence to support the non-moving party's
27 case, the burden then shifts to the opposing party to produce
28 "specific evidence, through affidavits or admissible discovery

1 material, to show that the dispute exists." Bhan, 929 F.2d at
2 1409. A complete failure of proof concerning an essential element
3 of the non-moving party's case necessarily renders all other facts
4 immaterial. Celotex, 477 U.S. at 323.

5 If one party moves for summary judgment and it appears from
6 the oral arguments, records, affidavits, and documents presented
7 to the Court that there is no genuine dispute regarding material
8 facts essential to the movant's case, and that the case cannot be
9 proved at trial, the Court may sua sponte grant summary judgment
10 in favor of the non-moving party. Portsmouth Square, Inc. v.
11 Shareholders Protective Comm., 770 F.2d 866 (9th Cir. 1985)
12 (citing Cool Fuel, Inc. v. Connett, 685 F.2d 309, 311-12 (9th Cir.
13 1982)). The fundamental issue is whether the party against whom
14 summary judgment is rendered had a full and fair opportunity to
15 ventilate the issues involved in the motion. See Cool Fuel, 685
16 F.2d at 312.

17 B. Section 1983

18 Title 42 U.S.C. § 1983 "provides a cause of action for the
19 'deprivation of any rights, privileges, or immunities secured by
20 the Constitution and laws' of the United States." Wilder v.
21 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
22 § 1983). Section 1983 is not itself a source of substantive
23 rights, but merely provides a method for vindicating federal
24 rights elsewhere conferred. See Graham v. Connor, 490 U.S. 386,
25 393-94 (1989). To state a claim under § 1983, a plaintiff must
26 allege two essential elements: (1) that a right secured by the
27 Constitution or laws of the United States was violated and
28 (2) that the alleged violation was committed by a person acting

1 under the color of State law. See West v. Atkins, 487 U.S. 42, 48
2 (1988); Ketchum v. Alameda County, 811 F.2d 1243, 1245 (9th Cir.
3 1987).

4 1. Eighth Amendment Claims

5 A prison official violates the Eighth Amendment when two
6 requirements are met: (1) the deprivation alleged must be,
7 objectively, sufficiently serious, see Farmer, 511 U.S. at 834
8 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)), and (2) the
9 prison official possesses a sufficiently culpable state of mind,
10 see id. (citing Wilson, 501 U.S. at 297).

11 In determining whether a deprivation of a basic necessity is
12 sufficiently serious to satisfy the objective component of an
13 Eighth Amendment claim, a court must consider the circumstances,
14 nature, and duration of the deprivation. The more basic the need,
15 the shorter the time it can be withheld. See Johnson v. Lewis,
16 217 F.3d 726, 731 (9th Cir. 2000). Substantial deprivations of
17 shelter, food, drinking water or sanitation for four days, for
18 example, are sufficiently serious to satisfy the objective
19 component of an Eighth Amendment claim. See id. at 732-733;

20 The requisite state of mind to establish an Eighth Amendment
21 violation depends on the nature of the claim. In prison-
22 conditions cases, the necessary state of mind is one of
23 "deliberate indifference." See, e.g., Farmer, 511 U.S. at 834
24 (inmate safety); Helling, 509 U.S. at 32-33 (inmate health);
25 Wilson, 501 U.S. at 302-03 (general conditions of confinement);
26 Estelle v. Gamble, 429 U.S. 97, 104 (1976) (inmate health).
27 Neither negligence nor gross negligence will constitute deliberate
28 indifference. See Farmer, 511 U.S. at 835-36 & n.4; see also

1 Estelle, 429 U.S. at 106 (establishing that deliberate
2 indifference requires more than negligence).

3 2. First Amendment Claim

4 Prison regulations that infringe a prisoner's constitutional
5 right are valid so long as they are "reasonably related to
6 legitimate penological interests." Turner v. Safely, 482 U.S. 78,
7 89 (1987). But the legitimate penological interest may not be
8 presumed. "[T]he [defendant] must, at the very least, adduce some
9 penological reason for its policy at the relevant stage of the
10 judicial proceedings. '[C]onsiderations advanced to support a
11 restrictive policy [must] be . . . sufficiently articulated to
12 permit . . . meaningful review.' Thus, at a minimum, the reasons
13 must be urged in the district court." Armstrong v. Davis, 275
14 F.3d 849, 874 (9th Cir. 2001) (quoting Walker v. Sumner, 917 F.2d
15 382, 386 (9th Cir. 1990)).

16 DISCUSSION

17 Plaintiff Frank Clement brings claims for damages and
18 injunctive relief pursuant to 42 U.S.C. § 1983. He alleges three
19 separate and distinct constitutional violations. First, he
20 contends that Defendants violated the Eighth Amendment to the
21 United States Constitution by delaying, denying and interfering
22 with his medical treatment for colon cancer. Second, he alleges
23 that Defendants violated his Eighth Amendment rights by refusing
24 his medically necessary request for tennis shoes. Third, he
25 alleges that Defendants violated his First Amendment rights by
26 prohibiting him from receiving materials generated on the Internet
27 and mailed to him at Pelican Bay.
28

1 I. Diagnosis and Treatment

2 A. Exhaustion

3 The Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C.
4 § 1997e(a), requires a prisoner to exhaust such administrative
5 remedies as are available before suing over prison conditions.
6 Defendants contend that Plaintiff's claim for deliberate
7 indifference to his medical needs with respect to the delay in
8 receiving a colonoscopy and the delay in implementing a red meat
9 free diet was not exhausted until after he filed this action. See
10 Declaration of Linda L. Rianda (Rianda Dec.), Ex. B (Director's
11 Level Appeal Decision on Plaintiff's request for a special meal).

12 As noted above, Plaintiff filed two 602 appeals concerning
13 the diagnosis and treatment of his colon cancer. The first was
14 filed on July 20, 1999. That appeal requested that the
15 colonoscopy ordered by his physician be performed. The
16 colonoscopy was performed on August 2, 1999 and the appeal was
17 "granted" on September 8, 1999. Clement Dec., Ex. 6. The second
18 602 appeal, relating to his special diet, was filed on September
19 16, 1999. On October 17, 1999 a special diet for Plaintiff was
20 started and on December 21, 1999 that diet was modified to provide
21 Plaintiff an extra sack lunch so that he could substitute the
22 second lunch for the red meat contained in his "heart healthy
23 diet." By December, 1999, therefore, Plaintiff had received all
24 the relief that the prison administrative appeal system could
25 provide. Under these circumstances, Plaintiff was not required to
26 exhaust further administrative appeals. Gomez v. Wilson, 177 F.
27 Supp. 977, 985 (N.D. Cal. 2001) ("Because [the plaintiff] had, in
28 essence, 'won' his inmate appeal, it would be unreasonable to

1 expect him to appeal that victory before he is allowed to file
2 suit."). Plaintiff, therefore, adequately exhausted his
3 administrative appeals as required by the PLRA.³

4 B. Deliberate Indifference to Serious Medical Needs

5 Plaintiff first brought his symptoms to Defendants' attention
6 on April 8, 1999. A colonoscopy was recommended by his treating
7 physician on April 12, 1999. The colonoscopy was not performed
8 until August 2, 1999. Plaintiff contends that the delay in
9 performing this procedure, which led to the discovery and removal
10 of a malignant polyp, constitutes deliberate indifference to his
11 medical needs.

12 A prisoner who makes a claim of deliberate indifference to
13 serious medical needs premised on delay must show that the delay
14 resulted in substantial harm. Wood v. Housewright, 900 F.2d 1332,
15 1335 (1992). Plaintiff was diagnosed with carcinoma in situ,
16 which is a slow growing, non-invasive malignancy. Winslow Dec.

17 ¶ 29. Three colonoscopies performed on Plaintiff in the fourteen
18 months after the removal of the malignant polyp have not detected
19 any cancer. Id. ¶ 31, Ex. Y. Consequently, the evidence in the
20 record indicates that Plaintiff has suffered no adverse effects
21 from the three month delay in providing a colonoscopy.⁴

22 Plaintiff contends that he need not show harm caused by the
23

24 ³Defendants do not dispute that Plaintiff's Eighth Amendment
25 claim relating to the provision of tennis shoes and his First
26 Amendment claim concerning Internet materials were exhausted under
27 the PLRA.

28 ⁴The fact that Plaintiff lost fourteen pounds while awaiting
surgery is not a sufficient showing of harm because, after an
initial period of weight loss, Plaintiff's weight stabilized.
Moreover, Plaintiff has not presented evidence linking his weight
loss to the delay in receiving the colonoscopy.

1 delay because a "systemic delay" in the provision of medical care
 2 "may be constitutionally unacceptable" even absent a showing of
 3 serious harm. Madrid v. Gomez, 889 F. Supp. 1146, 1257 (N.D. Cal.
 4 1995). However, Plaintiff has not presented evidence that
 5 Defendants "regular[ly] and significant[ly] delay[ed]" the medical
 6 procedure. Id. The undisputed evidence in the record shows that
 7 the colonoscopy was initially delayed because of a problem at the
 8 hospital, not because of Defendants' actions. Winslow Dec., Exs.
 9 N, P, Q. Plaintiff contends that his procedure was subsequently
 10 rescheduled from July 16 to August 2 because of Defendants'
 11 actions. However, throughout the three month period during which
 12 Plaintiff waited to have the procedure performed, Defendants
 13 provided regular medical care, including multiple doctor visits,
 14 examination of stool samples, and a Kidney, Urinary and Bladder
 15 (KUB) x-ray. The regular provision of medical care throughout the
 16 summer of 1999 indicates that Plaintiff was not systemically
 17 denied medical treatment. Even assuming that Defendants caused
 18 the colonoscopy to be delayed from July 16 to August 2, a two week
 19 delay in providing the requested medical care is not a "regular
 20 and significant" delay sufficient to excuse Plaintiff from showing
 21 that the delay was harmful.

22 In short, Plaintiff has not shown that the delay in
 23 diagnosing and treating his colon cancer was sufficiently harmful
 24 to support a claim for deliberate indifference against Defendants.

25 Plaintiff has likewise failed to show harm from any delay in
 26 providing a medically appropriate diet. Plaintiff's treating
 27 physician recommended a high fiber, low fat diet free of red meat
 28 on August 13, 1999. Pelican Bay's Chief Medical Officer

determined that a diet completely free of red meat was not medically necessary. Winslow Dec. ¶ 32.⁵ Plaintiff was given a high fiber, low-fat diet beginning on October 17, 1999. Beginning in December, 1999, Plaintiff's diet was supplemented with an extra sack lunch to permit him to substitute the meat portion of his meal without sacrificing caloric intake. Plaintiff appears to have abandoned his claim that the diet he is currently on reflects deliberate indifference to his medical needs. Rather, he argues that the delay in providing the diet is actionable. See Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Pl. Opp.) at 7-8. However, Plaintiff has not presented any evidence that he suffered any harm from the delay. Therefore, pursuant to Wood, 900 F.2d at 1335, Defendants are entitled to summary judgment on this claim of deliberate indifference to Plaintiff's serious medical needs

II. Tennis Shoes

A federal court must give State court judgments the same preclusive effect those judgments would have in State court. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 84 (1984). Under California law, the doctrine of res judicata will prevent a party from relitigating a claim already decided on the merits if three conditions are met. Panos v. Great Western Packing Co., 21 Cal. 2d 636, 637 (1943). First, "the issues decided in the prior adjudication [were] identical to those

⁵Plaintiff objects to, and moves to strike, paragraph thirty-two of the Winslow Declaration on the grounds that the declarant failed to set forth the reasoning underlying his opinion that a diet free of red meat is not medically necessary. Plaintiff's objection goes to the weight of the evidence, not its admissibility. His objection is, therefore, overruled.

1 presented in the later action." Second, "there was a final
2 judgment on the merits in the prior action." Third, "the party
3 against whom the plea is raised was a party or was in privity with
4 a party to the prior adjudication." Citizens for Open Access to
5 Sand and Tide, Inc. v. Seadrift Ass'n., 60 Cal. App. 4th 1053,
6 1065 (1998).

7 The Ninth Circuit has applied the doctrine of res judicata in
8 circumstances identical to those presented here. In Silverton v.
9 Department of the Treasury, 644 F.2d 1341, 1347 (9th Cir. 1981),
10 the court gave preclusive effect to a State habeas decision in a
11 subsequent section 1983 claim brought in federal court.

12 In sum, we hold that because of the nature of a state
13 habeas proceeding, a decision actually rendered should
14 preclude an identical issue from being relitigated in a
15 subsequent section 1983 action if the State habeas court
afforded a full and fair opportunity for the issue to be
heard and determined under federal standards.

16 In this case, Plaintiff brought the same claim concerning
17 Defendants' refusal to permit him to order medically necessary
18 tennis shoes in a habeas proceeding in State court. That claim
19 was decided on the merits in August, 2001. Plaintiff does not
20 dispute that he brings the same claim in the present action. He
21 argues, however, that his claim is not barred because the State
22 court decided his petition without an evidentiary hearing.
23 Plaintiff cites no authority for the proposition that an
24 evidentiary hearing is necessary before a final judgment may be
25 given preclusive effect. And, in fact, the State court held that
26 Plaintiff's claim of deliberate indifference failed as a matter of
27 law. Thus, no evidentiary hearing was necessary. Consequently,
28 Plaintiff raised the identical claim in a prior adjudication and

1 that decision precludes him from raising it again here.⁶

2 III. Preliminary Injunction

3 Plaintiff has moved for preliminary injunctive relief
4 requiring prison authorities to permit him to purchase shoes from
5 a vendor of his choosing.

6 To establish entitlement to a preliminary injunction,
7 Plaintiff must demonstrate either a combination of probable
8 success on the merits and the possibility of irreparable harm, or
9 that there exist serious questions regarding the merits and the
10 balance of hardships tips sharply in his favor. Rodeo Collection,
11 Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987);
12 California Cooler, Inc. v. Loretto Winery, Ltd., 774 F.2d 1451,
13 1455 (9th Cir. 1985); see also William Inglis & Sons Baking Co. v.
14 ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975);
15 County of Alameda v. Weinberger, 520 F.2d 344, 349 (9th Cir.
16 1975). Because Plaintiff's claim is barred by res judicata, he
17 cannot show that serious questions regarding the merits exist and
18 his motion for a preliminary injunction is denied (Docket # 53).

19 IV. First Amendment Claim

20 A prisoner's constitutional right to receive information by
21 incoming mail is undisputed. See e.g., Prison Legal News v. Cook,
22 238 F.3d 1145, 1149 (9th Cir. 2001). A prison regulation that
23

24 ⁶Plaintiff also argues that the decision of the State court
25 was not final because Plaintiff could have, but did not, appeal
26 that decision. However, Plaintiff may not bootstrap his own
27 failure to appeal a final judgment to circumvent the preclusive
28 effect of that order. Plaine v. McCabe, 797 F.2d 713, 719 n.12
(9th Cir. 1986) ("If an adequate opportunity for review is
available, a losing party cannot obstruct the preclusive use of the
state administrative decision simply by foregoing her right to
appeal.").

1 impinges on this right is valid only if it is reasonably related
2 to the prison's legitimate penological interests. Turner, 482
3 U.S. at 89. Four factors determine the reasonableness of the
4 regulation.

5 First, there must be a valid, rational connection
6 between the prison regulation and the legitimate
governmental interest put forward to justify it . . .

7 A second factor relevant in determining the
8 reasonableness of a prison restriction . . . is whether
9 there are alternative means of exercising the right that
remain open to prison inmates . . .

10 A third consideration is the impact accommodation of the
11 asserted constitutional right will have on guards and
other inmates, and on the allocation of prison resources
generally.

12 Finally, the absence of ready alternatives is evidence
13 of the reasonableness of a prison regulation. By the
14 same token, the existence of obvious, easy alternatives
may be evidence that the regulation is not reasonable,
but is an exaggerated response to prison concerns.

15 Id. at 89-90 (internal citations omitted).

16 The State must satisfy the first factor of the Turner test to
17 succeed on this motion. That is, if the State cannot show a
18 "valid, rational connection" between the policy at issue and a
19 legitimate penological interest, the Court need not address the
20 remaining factors. See Prison Legal News, 238 F.3d at 1151
21 ("Because the Department and its Officials have failed to show
22 that the ban on standard mail is rationally related to a
23 legitimate penological objective, we do not consider the other
24 Turner factors.").

25 The burden of proof in challenges to prison regulations is
26 set forth in Frost v. Symington, 197 F.3d 348 (9th Cir. 1999).
27 The initial burden is on the State to put forth a "common-sense"
28 connection between its policy and a legitimate penal interest. If

1 the State does so, the plaintiff must present evidence that
2 refutes the connection. Id. at 357. The State must then present
3 enough counter-evidence to show that the connection is not so
4 "remote as to render the policy arbitrary or irrational." Id.

5 A. Rational Connection to Legitimate Penological Purpose

6 "All legitimate intrusive prison practices have basically
7 three purposes: 'the preservation of internal order and
8 discipline, the maintenance of institutional security against
9 escape or unauthorized entry, and the rehabilitation of the
10 prisoners.'" United States v. Hearst, 563 F.2d 1331, 1345 (9th
11 Cir. 1977) (citing Procunier v. Martinez, 416 U.S. 396, 412 (1974)
12 rev'd on other grounds Thornburgh v. Abbott, 490 U.S. 401 (1989)).

13 With respect to the rehabilitation of prisoners, the Supreme
14 Court has recognized that "the weight of professional opinion
15 seems to be that inmate freedom to correspond with outsiders
16 advances rather than retards the goal of rehabilitation."
17 Procunier, 416 U.S. at 412-13.

18 Constructive, wholesome contact with the community is a
19 valuable therapeutic tool in the overall correctional
20 process. . . . Correspondence with members of an
21 inmate's family, close friends, associates and
22 organizations is beneficial to the morale of all
23 confined persons and may form the basis for good
24 adjustment in the institution and the community.

25 Id. at 413 n.13 (quoting Policy Statement 7300.1A of the Federal
26 Bureau of Prisons and Policy Guidelines for the Association of
27 State Correctional Administrators).⁷

28 ⁷In striking down a restriction on the receipt of bulk rate
mail, the Ninth Circuit also noted a "correlation between reading,
writing and inmate rehabilitation." Morrison v. Hall, 261 F.3d
896, 904 n.7 (9th Cir. 2001) (citing Willoughby Mariano, Reading
Books Behind Bars Reading Programs for State Prison Inmates and
Juvenile Hall Wards are Critical to Helping Offenders Develop

1 There are, in short, recognized rehabilitative benefits to
2 permitting prisoners to receive educational reading material and
3 maintain contact with the world outside the prison gates.
4 Defendants nevertheless argue that the ban on all Internet-
5 generated material is rationally related to maintaining safety and
6 security in the prison. Defendants contend that Internet-
7 generated information provides a particular danger to prison
8 security because the potential high volume of e-mail, the relative
9 anonymity of the sender, and the ability of senders easily to
10 attach lengthy articles and other publications would greatly
11 increase the risk that prohibited criminal communications would
12 enter the prison undetected and would make tracing their source
13 more difficult. See In re Collins, 86 Cal. App. 4th 1176, 1184
14 (2001) (upholding the regulation challenged here).⁸

15 Defendants' justification for the regulation rests on two
16 premises. The first is that accepting mail that contains material
17 downloaded from the Internet will substantially increase the
18 quantum of mail sent to the facility and that regulating mail
19 based on its origin is a rational approach to regulating excessive
20 quantity. The second premise is that Internet-produced material
21 has unique characteristics that make it susceptible to misuse.
22 Specifically, Internet-produced material is more difficult to

23 _____
24 Literacy and Avoid Return to Crime, Experts Say, L.A. Times, Jan.
25 30, 2000, at B2).

26 ⁸Defendants have not presented any evidence to support their
27 characterization of the effects of Internet-generated material on
28 prison security. The absence of evidence, however, is not fatal to
29 Defendants' motion. The Court's inquiry under Turner is not
30 whether the policy actually serves a penological interest, but
31 rather whether it was rational for prison officials to believe that
32 it would. Mauro v. Arpaio, 188 F.3d 1054, 1060 (9th Cir. 1999).

1 trace and facilitates transmission of hidden impermissible coded
2 messages.

3 1. Volume Control

4 In Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001), the
5 plaintiff challenged a prison regulation that prohibited prisoners
6 from receiving all bulk rate, third class and fourth class mail.
7 Defendants argued that the regulation was rationally related to
8 its legitimate need to "limit the total quantum of mail that
9 enters the state prison system." Id. at 903. The court held that
10 "prohibiting inmates from receiving mail based on the postage rate
11 at which the mail was sent is an arbitrary means of achieving the
12 goal of volume control." Id. at 903-04. Similarly, here,
13 prohibiting all mail produced by a certain medium--downloaded from
14 the Internet--is an equally arbitrary way to achieve a reduction
15 in mail volume.

16 For the reasons identified by the Supreme Court and the Ninth
17 Circuit and discussed above, any negative impact on prison
18 resources created by a supposed increase in prison mail may be
19 outweighed by the penological benefits of inmate correspondence
20 with the outside world. The Court need not make such a
21 determination here, however. If Pelican Bay officials believe
22 that the safety and security of the prison is threatened by an
23 increase in the quantity of mail, they have more direct means at
24 their disposal to address that concern. Specifically, Defendants
25 could limit the number of pages an inmate may receive in each
26 piece of correspondence. Alternatively, they could regulate the
27 number of pieces of correspondence received by each inmate.
28 Because the prison may directly regulate the quantity of pages or

1 the number of pieces of mail received by each prisoner,
2 Defendants' policy of identifying an arbitrary substitute for
3 volume and regulating that substitute lacks any rational basis.

4 2. Susceptibility to Misuse

5 Defendants' second justification for the ban on Internet-
6 produced material is that prohibited communication, such as coded
7 criminal correspondence, is more easily hidden in such material
8 and, moreover, such improper correspondence is harder to trace
9 when found.

10 Defendants have failed to articulate any reason to believe
11 that Internet-produced materials are more likely to contain coded,
12 criminal correspondence than photocopied or handwritten materials.
13 Defendants state that "coded messages [can be] included in e-mail
14 [and] cut and pasted into materials downloaded from the Internet
15 that are not contained in e-mail; for example, in articles
16 downloaded from a medical or legal web site." Defendants' Reply
17 to Plaintiff's Opposition to Defendants' Motion for Summary
18 Judgment (Defendants' Reply) at 8:8-9. There is no dispute,
19 however, that the same information can be sent to prisoners at
20 Pelican Bay if it is photocopied from a book, transcribed by hand,
21 scanned, or produced in word-processed form. Defendants have
22 failed to explain why criminal communications are less likely to
23 be included through these permissible forms of correspondence.

24 Defendants have similarly failed to justify their belief that
25 Internet communications that are sent to Pelican Bay are harder to
26 trace than other, permitted communications. As noted, Pelican Bay
27 prisoners do not have access to the Internet. The correspondence
28 prohibited by the challenged regulation includes any information

1 downloaded from the Internet and sent by regular mail to the
2 facility. Consequently, the prohibited communications are just as
3 likely as regular mail to have a postmark, or to contain
4 fingerprint and DNA evidence. It is true that the author of an e-
5 mail may not provide his identity. However, this fact does not
6 differentiate e-mail correspondence from anonymous typed missives.

7 The evidence in the record suggests that Internet-produced
8 materials are, in fact, easier to trace than anonymous letters
9 because the major e-mail providers include a coded Internet
10 Protocol address (IP address) in the header of every e-mail.
11 Declaration of Mike Godwin (Godwin Dec.) ¶ 12. The IP address
12 allows the recipient of an e-mail to identify the sender by
13 contacting the service provider. Id. at ¶ 13. There are, of
14 course, means available to disguise the origin of an e-mail
15 message. See Declaration of Heather Mackay (Mackay Dec.), Ex. A
16 (Transcript of Proceedings in Collins v. Ayers, No. 98-273-X (June
17 8, 1999)) at 48-9. The relevant question here, however, is
18 whether e-mail and other Internet communications sent through the
19 United States mail are inherently more difficult to trace than
20 permissible, anonymous correspondence. The evidence suggests that
21 the opposite is true.

22 In addition, Defendants primarily screen prisoner mail for
23 content, not for the identity of the sender, so the traceability
24 of Internet-produced information is only marginally relevant to
25 Defendants' penological interests. For example, Pelican Bay does
26 not require that correspondence to prisoners contain a return
27
28

1 address. Mackay Dec., Ex. A at 39.⁹ This fact suggests that the
2 prison has no interest in tracking down those who communicate with
3 prisoners. In fact, the only mail that is banned because of the
4 identity of the sender is correspondence from another prisoner.
5 15 C.C.R. § 3133. Because prisoners do not have access to the
6 Internet, permitting prisoners to receive Internet-produced
7 material would not allow prisoners to circumvent this regulation.

8 In sum, Defendants have not satisfied the first factor of the
9 Turner test because they have not articulated a rational
10 connection between the policy at issue and a legitimate
11 penological interest. This factor, moreover, "is the sine qua
12 non" in determining the constitutionality of a prison regulation.
13 Morrison, 261 F.3d at 901; see also Prison Legal News, 238 F.3d at
14 1151 ("Because the Department and its Officials have failed to
15 show that the ban on standard mail is rationally related to a
16 legitimate penological objective, we do not consider the other
17 Turner factors."). Nevertheless, the other factors enumerated in
18 Turner also support denying Defendants' motion for summary
19 judgment.

20 B. Alternative Means of Exercising First Amendment Rights

21 Plaintiff has presented undisputed evidence that certain
22 information of particular interest to prisoners is only available
23 on the Internet. For example, a non-profit organization devoted
24 to raising awareness of and preventing sexual violence in prison
25 publishes its information only on the Internet. Declaration of
26

27 ⁹Plaintiff's request that the Court take judicial notice of
28 the transcript from this proceeding is unopposed. That request is
granted (Docket # 49).

1 Lara Stemple (Stemple Dec.) ¶¶ 2-3. Other information can be
2 acquired in hard copy only through time-consuming and expensive
3 effort. Declaration of Beverly Lozano (Lozano Dec.) ¶¶ 3-4.

4 Defendants argue that the availability of information in
5 alternative fora is not relevant in the Turner analysis. Rather,
6 Defendants contend that any information that is available only
7 over the Internet can be transcribed or summarized and sent into
8 Pelican Bay. Consequently, the availability of individuals
9 willing to write down information found on the Internet provides a
10 sufficient alternative means for prisoners to exercise their First
11 Amendment rights.

12 Defendants' reliance on individual transcription is an
13 impractical alternative to transmission of Internet-produced
14 materials. Because Pelican Bay bans all materials downloaded from
15 the Internet, not just e-mail, it is not reasonable to expect
16 individuals interested in transmitting information to prisoners to
17 copy verbatim lengthy articles, judicial decisions, and new
18 procedural rules. With respect to graphics and photos,
19 transcription is impossible. Moreover, summarization of
20 information by laypeople could result in incorrect or improperly
21 interpreted information being transmitted. Consequently,
22 transcription and summarization of Internet-produced material is
23 not a viable alternative to downloading and transmitting this
24 information through the United States mail.

25 C. Impact on Prison Resources

26 Defendants argue that the increase in the number of pages of
27 mail that would ensue if prisoners were allowed to receive
28 Internet-generated material would overload the mail room staff,

1 with a consequent adverse impact on the allocation of prison
2 resources. However, as noted above, the prohibition at issue here
3 is an imperfect and arbitrary substitute for regulating quantity
4 of mail. Whatever impact increased mail volume may have on prison
5 resources cannot justify Pelican Bay's ban on materials generated
6 from this particular source.

7 D. Available Alternatives to the Challenged Policy

8 Evidence of an "alternative that fully accommodates the
9 prisoner's rights at de minimis cost to valid penological
10 interest" is evidence that the regulation is unreasonable.

11 Turner, 482 U.S. at 91. Defendants have asserted a penological
12 interest in limiting the overall quantity of mail sent to the
13 prison, but have offered no evidence that they cannot impose
14 limits on the quantity of mail received by individual prisoners
15 either through page limitations or limitations on the number of
16 pieces of mail. For purposes of this motion, the Court assumes
17 that controlling mail quantity serves a valid penological purpose.
18 A volume control policy would address Defendants' proffered
19 concern--the increase in the total quantum of mail--without
20 violating the First Amendment rights of prisoners to receive
21 Internet-generated information. Consequently, the availability of
22 this alternative policy suggests the ban on Internet-generated
23 materials is unreasonable.

24 E. Defendants' Judicial and Statutory Authority

25 Defendants point out that the California Court of Appeal has
26 examined the regulation at issue here and found it constitutional.
27 See In re Collins, 86 Cal. App. 4th 1176, 1186 (2002). However,
28 the Collins decision is not binding authority and it has no

1 preclusive effect in this litigation because Plaintiff was not a
2 party to that case. See Hydranautics v. FilmTec Corp., 204 F.3d
3 880 (9th Cir. 2000).

4 In addition, Collins is distinguishable from this case in one
5 respect. In Collins, the plaintiff did not present any evidence
6 to refute the defendants' showing of a rational connection between
7 the regulation and the asserted penological interest. 86 Cal.
8 App. 4th at 1184. In this case, Plaintiff has submitted numerous
9 declarations relevant to the relative anonymity of Internet-
10 generated material, the availability of alternative sources of
11 information provided on the Internet, and the impact of mailed
12 Internet material on mail volume. This evidence sufficiently
13 "refutes a common-sense connection between a legitimate objective
14 and a prison regulation." Frost, 1197 F.3d at 357.

15 Moreover, the Collins court concluded that California Code of
16 Regulations section 3133 prohibited the defendant prison from
17 imposing limitations on the number of pieces of correspondence a
18 prisoner may receive, or the number of pages a prisoner may
19 receive in each piece of correspondence. Collins, 86 Cal. App.
20 4th at 1186. This regulation states that "there shall be no
21 limitations placed upon the number of persons with whom an inmate
22 may correspond" On its face, this regulation says nothing
23 about the number of pages or the quantity of separate pieces of
24 correspondence a prisoner may receive. Because of the differing
25 procedural posture of Collins and this case and because this Court
26 does not construe C.C.R. § 3133 as prohibiting reasonable
27 limitations on the quantity of prisoner mail, the Court declines
28 to follow Collins here.

In support of the reasonableness of this regulation, Defendants also point to other States that, they contend, have addressed similar penological concerns with substantially similar regulations. Defendants contend that Arizona and Minnesota have each enacted regulations "encompassing the instant issue." Defendants' Reply at 8:12-14. The Minnesota statute relied on by Defendants states, in its entirety,

Subdivision 1. Restrictions on use of online services. No adult inmate in a state correctional facility may use or have access to any Internet service or online service, except for work, educational, and vocational purposes approved by the commissioner.

Subdivision 2. Restrictions on computer use. The commissioner shall restrict inmates' computer use to legitimate work, educational, and vocational purposes.

Subdivision 3. Monitoring of computer use. The commissioner shall monitor all computer use by inmates and perform regular inspections of computer equipment.

Minn. Stat. Ann. § 243.556. This statute regulates Minnesota prisoners' access to "any Internet service." The Arizona statute relied on by Defendants similarly regulates prisoners' "access to the internet through the use of a computer, computer system, network, communication service provider or remote computing service." Ariz. Rev. Stat. §§ 31-235, 31-242.

As noted above, California prisoners do not have access to the Internet. The regulation at issue in this motion prohibits people outside the prison from sending to the prison information published on the Internet. Because neither the Minnesota nor the Arizona statute purports to address prisoners' access to information published on the Internet, these statutes offer no support for Defendants' position that the disputed regulation is

reasonable.

F. Qualified Immunity

Defendants argue that they are immune from liability for any First Amendment violation because the Pelican Bay policy "did 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). Qualified immunity, however, is limited to actions for damages against a government official in his individual capacity. It is not available to a government entity when an official is sued in his official capacity. See Brandon v. Holt, 469 U.S. 464, 472-73 (1985); Owen v. City of Independence, 445 U.S. 622, 651 (1980). Nor is it available when the only relief sought is injunctive. See American Fire, Theft & Collision Managers, Inc. v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff's First Amendment claim is brought against Defendants in their official capacity and seeks only injunctive relief.¹⁰ Therefore, Defendants are not entitled to immunity from suit.

V. Summary Judgment and Prospective Relief

Plaintiff did not move for summary judgment. However, a review of the record and the papers submitted by the parties shows that there are no disputes of material fact for trial. At the hearing on this motion, Defendants stated that they had no

¹⁰Plaintiff sought damages from Defendants on his Eighth Amendment claims. However, because there was no substantive Eighth Amendment violation, the Court need not determine if immunity would apply. See Conn v. Gabbert, 526 U.S. 286, 290 (1999) (a court considering a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right, then proceed to determine if the right was "clearly established").

1 additional evidence to present in response to a contemplated
2 motion for summary judgment from Plaintiff. Consequently, because
3 the parties have had a full opportunity to present the issues and
4 any evidence in support of their respective positions, the Court,
5 on its own motion, grants Plaintiff summary judgment on his claim
6 that Pelican Bay's refusal to allow him to receive Internet-
7 generated material through the United States mail violates his
8 First Amendment rights.

9 Plaintiff seeks injunctive relief precluding Defendants from
10 confiscating or returning mail containing Internet-generated
11 material. A party is entitled to a permanent injunction if it
12 shows actual success on the merits and the likelihood of
13 irreparable harm. Easy Riders Freedom F.I.G.H.T. v. Hannigan, 92
14 F.3d 1486, 1495 (9th Cir. 1996); Sierra Club v. Penfold, 857 F.2d
15 1307, 1318 (9th Cir. 1988). For the reasons already stated,
16 Plaintiff has shown that the prison's policy of prohibiting
17 Internet-produced material from being received by prisoners
18 violates the First Amendment. "[T]he loss of First Amendment
19 freedoms, for even minimal periods of time, unquestionably
20 constitutes irreparable injury." S.O.C., Inc. v. County of Clark,
21 152 F.3d 1136, 1148 (9th Cir.) (quoting Elrod v. Burns, 427 U.S.
22 347, 373 (1976)), amended by 160 F.3d 541 (9th Cir. 1998).
23 Consequently, Plaintiff is entitled to permanent injunctive
24 relief.

25 Injunctive relief, in this case, must comply with the
26 requirements of the PLRA. The PLRA states,

27 Prospective relief in any civil action with respect to
28 prison conditions shall extend no further than necessary
to correct the violation of the Federal right of a

1 particular plaintiff or plaintiffs. The court shall not
2 grant or approve any prospective relief unless the court
3 finds that such relief is narrowly drawn, extends no
4 further than necessary to correct the violation of the
Federal right, and is the least intrusive means
necessary to correct the violation of the Federal right.

5 18 U.S.C. § 3626(a)(1)(A).

6 Plaintiff brings this action solely on his own behalf.
7 However, he has introduced evidence that other prisoners, at other
8 prisons, have been similarly affected by the ban on Internet-
9 generated materials. See Lozano Dec ¶ 6; Declaration of Sheilah
10 Glover (Glover Dec.) ¶ 8. The undisputed evidence shows that the
11 violation of Plaintiff's First Amendment rights is not an
12 "isolated violation" but rather results from "policies or
13 practices pervading the whole system." Armstrong v. Davis, 275
14 F.3d 849, 870 (9th Cir. 2001).

15 In this circumstance, in order to correct the violation, the
16 Court must, at a minimum, enjoin the unconstitutional policy.
17 Such an injunction is the "least intrusive means necessary"
18 because a limited injunction directed only at the unconstitutional
19 policy does not "require the continuous supervision of the court,
20 nor do[es it] require judicial interference in the running of the
21 prison system." Gomez v. Vernon, 255 F.3d 1118, 1130 (9th Cir.
22 2001). Prohibiting Defendants from enforcing a policy of
23 rejecting prisoner mail based solely on the fact that the mail
24 contains information downloaded from the Internet "is not overly
25 intrusive and unworkable and would not require for its enforcement
26 the continuous supervision by the federal court over the conduct
27 of state officers." Armstrong, 275 F.3d at 872. Rather, such an
28 injunction is narrowly tailored to redress the violation

1 established by Plaintiff and is therefore authorized by the PLRA.
2 Id. at 870 ("The scope of injunctive relief is dictated by the
3 extent of the violation established.") (quoting Lewis v. Casey,
4 518 U.S. 343, 359 (1994)); see also Crofton v. Roe, 170 F.3d 957
5 (9th Cir. 1999) (affirming district court's injunction which
6 prohibited, on First Amendment grounds, the defendant prison from
7 enforcing a blanket ban on the receipt of gift publications).

8 VI. Evidentiary Objections

9 In support of their motion for summary judgment, Defendants
10 submitted copies of three abstracts of judgments which show the
11 crimes for which Plaintiff is currently incarcerated. Plaintiff
12 objects to these three exhibits on the grounds that they are
13 "irrelevant and calculated to inflame the court and prejudice it
14 against the plaintiff." Plaintiff's Objections to Defendants'
15 Evidence (Pl. Obj.) at 1. Defendants argue that the abstracts of
16 judgment show Plaintiff's potential for violence and that his
17 violent tendencies are probative of the reasonableness of their
18 policy prohibiting all prisoners at Pelican Bay from receiving
19 Internet-generated information. As discussed above, Defendants
20 argued that Internet-generated material facilitates transmission
21 of criminal communications. Plaintiff's criminal history may be
22 evidence relevant to this contention. The Court does not find
23 that this probative value "is substantially outweighed" by the
24 danger of unfair prejudice. Fed. R. Evid. 403.

25 Plaintiff also objects, pursuant to Federal Rule of Evidence
26 705, to two paragraphs in the Declaration of Dwight Winslow. As
27 noted above, these objections go to the weight of the evidence,
28 not its admissibility. The Winslow Declaration is admissible in

1 its entirety.

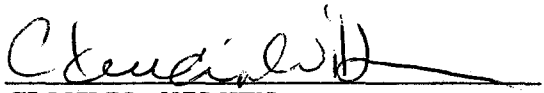
2 CONCLUSION

3 For the foregoing reasons, Defendants' motion for summary
4 judgment is granted in part and denied in part (Docket # 31).
5 Plaintiff's motion for a preliminary injunction is denied (Docket
6 # 53). Plaintiff's objections to evidence are overruled and his
7 request for judicial notice is granted (Docket ## 63, 49).

8 The Court, on its own motion, grants Plaintiff summary
9 judgment on his First Amendment claim. By separate order, the
10 Court will permanently enjoin Defendants from enforcing any policy
11 prohibiting California inmates from receiving mail that contains
12 Internet-generated information. Judgment shall enter accordingly.
13 Each party shall bear its own costs.

14
15
16 DATED:

SEP - 9 2002


CLAUDIA WILKEN
United States District Judge

United States District Court
for the
Northern District of California

SCC

* * CERTIFICATE OF SERVICE * *

Case Number:4:00-cv-01860

Clement

vs

CDC

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 9-10-02, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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