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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

GERALD DEAN de CRUZ,  
Plaintiff,  
v.  
A. PANIZZA,  
Defendant.

Case No. [15-cv-1930-TEH](#)  
  
ORDER TO REOPEN AND FOR  
SERVICE

Plaintiff, an inmate at San Quentin State Prison, filed this pro se civil rights action under 42 U.S.C. § 1983. The case was dismissed and closed at screening, but Plaintiff filed an appeal. The Ninth Circuit affirmed in part, vacated in part, and remanded the case. The Circuit found that the Court properly dismissed the access to courts claim but remanded the case to consider Plaintiff's allegation that Defendant improperly opened and read his legal mail.

I

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a

1 defendant who is immune from such relief." Id. § 1915A(b).  
2 Pleadings filed by pro se litigants, however, must be liberally  
3 construed. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010);  
4 *Balistreri v. Pacifica Police Dep't.*, 901 F.2d 696, 699 (9th Cir.  
5 1990).

6 To state a claim under 42 U.S.C. § 1983, a plaintiff must  
7 allege two essential elements: (1) that a right secured by the  
8 Constitution or laws of the United States was violated, and (2)  
9 that the alleged violation was committed by a person acting under  
10 the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

11 II

12 Plaintiff alleges that his legal mail was opened and  
13 possibly read outside of his presence.

14 "Legal mail" may not be read or copied without the  
15 prisoner's permission. *See Casey v. Lewis*, 43 F.3d 1261, 1269  
16 (9th Cir. 1994), rev'd on other grounds, 518 U.S. 343 (1996).  
17 The Ninth Circuit has emphasized that there is a clear difference  
18 between inspecting outgoing legal mail for contraband and reading  
19 it under *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974), such that  
20 prison officials may not circumvent this prohibition by reading  
21 an inmate's outgoing legal mail in his presence because this  
22 practice does not ameliorate the chilling effect on the inmate's  
23 Sixth Amendment rights. *See Nordstrom v. Ryan*, 762 F.3d 903, 911  
24 (9th Cir. 2014) (reversing district court's dismissal of the  
25 complaint for failure to state a claim after finding complaint  
26 stated a cognizable 6th Amendment claim based on prisoner's  
27 allegations that prison officials read his legal mail, that they  
28 claimed entitlement to do so, and his right to private

1 consultation with counsel was chilled). But again, prison  
2 officials may establish that legitimate penological interests  
3 justify the policy or practice. See O'Keefe v. Van Boening, 82  
4 F.3d 322, 327 (9th Cir. 1996).

5 Plaintiff alleges that one of his legal boxes was delivered  
6 and was nearly empty of its contents in that all of his legal  
7 papers, confidential correspondence from attorneys, and exhibits  
8 were taken out of the envelopes and strewn about. He states that  
9 Defendant may have read the mail and many items were missing.  
10 Liberally construed, these allegations are sufficient to proceed.

11 III

12 For the foregoing reasons, the Court hereby orders as  
13 follows:

14 1. The Order of Dismissal (Docket No. 14) is VACATED and  
15 the case is REOPENED. The action continues on the claim that  
16 Defendant opened and read Plaintiff's confidential legal mail.  
17 All other claims are dismissed.

18 2. The Clerk of the Court shall issue summons and the  
19 United States Marshal shall serve, without prepayment of fees, a  
20 copy of the amended complaint (Docket No. 13), and a copy of this  
21 order upon the following Defendant A. Panizza, a  
22 correctional/property officer at San Quentin State Prison.

23 3. In order to expedite the resolution of this case, the  
24 Court orders as follows:

25 a. No later than 91 days from the date of service,  
26 Defendants shall file a motion for summary judgment or other  
27 dispositive motion. The motion shall be supported by adequate  
28 factual documentation and shall conform in all respects to

1 Federal Rule of Civil Procedure 56, and shall include as exhibits  
2 all records and incident reports stemming from the events at  
3 issue. If Defendant is of the opinion that this case cannot be  
4 resolved by summary judgment, he shall so inform the Court prior  
5 to the date his summary judgment motion is due. All papers filed  
6 with the Court shall be promptly served on the plaintiff.

7 b. At the time the dispositive motion is served,  
8 Defendants shall also serve, on a separate paper, the appropriate  
9 notice or notices required by Rand v. Rowland, 154 F.3d 952, 953-  
10 954 (9th Cir. 1998) (en banc), and Wyatt v. Terhune, 315 F.3d  
11 1108, 1120 n. 4 (9th Cir. 2003). See Woods v. Carey, 684 F.3d  
12 934, 940-941 (9th Cir. 2012) (Rand and Wyatt notices must be  
13 given at the time motion for summary judgment or motion to  
14 dismiss for nonexhaustion is filed, not earlier); Rand at 960  
15 (separate paper requirement).

16 c. Plaintiff's opposition to the dispositive motion,  
17 if any, shall be filed with the Court and served upon Defendants  
18 no later than thirty days from the date the motion was served  
19 upon him. Plaintiff must read the attached page headed "NOTICE -  
20 - WARNING," which is provided to him pursuant to Rand v. Rowland,  
21 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and Klinge v.  
22 Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988).

23 If Defendants file a motion for summary judgment claiming  
24 that Plaintiff failed to exhaust his available administrative  
25 remedies as required by 42 U.S.C. § 1997e(a), plaintiff should  
26 take note of the attached page headed "NOTICE -- WARNING  
27 (EXHAUSTION)," which is provided to him as required by Wyatt v.  
28 Terhune, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).

1           d. If Defendant wishes to file a reply brief, he shall  
2 do so no later than fifteen days after the opposition is served  
3 upon him.

4           e. The motion shall be deemed submitted as of the date  
5 the reply brief is due. No hearing will be held on the motion  
6 unless the court so orders at a later date.

7           4. All communications by Plaintiff with the court must be  
8 served on defendant, or defendant's counsel once counsel has been  
9 designated, by mailing a true copy of the document to defendants  
10 or defendants' counsel.

11           5. Discovery may be taken in accordance with the Federal  
12 Rules of Civil Procedure. No further court order under Federal  
13 Rule of Civil Procedure 30(a)(2) is required before the parties  
14 may conduct discovery.

15           6. It is Plaintiff's responsibility to prosecute this case.  
16 Plaintiff must keep the court informed of any change of address  
17 by filing a separate paper with the clerk headed "Notice of  
18 Change of Address." He also must comply with the court's orders  
19 in a timely fashion. Failure to do so may result in the  
20 dismissal of this action for failure to prosecute pursuant to  
21 Federal Rule of Civil Procedure 41(b).

22           IT IS SO ORDERED.

23           Dated: 2/9/2017

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25           THELTON E. HENDERSON  
26           United States District Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

1 If defendants move for summary judgment, they are seeking to  
2 have your case dismissed. A motion for summary judgment under  
3 Rule 56 of the Federal Rules of Civil Procedure will, if granted,  
4 end your case.

5 Rule 56 tells you what you must do in order to oppose a  
6 motion for summary judgment. Generally, summary judgment must be  
7 granted when there is no genuine issue of material fact--that is,  
8 if there is no real dispute about any fact that would affect the  
9 result of your case, the party who asked for summary judgment is  
10 entitled to judgment as a matter of law, which will end your  
11 case. When a party you are suing makes a motion for summary  
12 judgment that is properly supported by declarations (or other  
13 sworn testimony), you cannot simply rely on what your complaint  
14 says. Instead, you must set out specific facts in declarations,  
15 depositions, answers to interrogatories, or authenticated  
16 documents, as provided in Rule 56(e), that contradict the facts  
17 shown in the defendant's declarations and documents and show that  
18 there is a genuine issue of material fact for trial. If you do  
19 not submit your own evidence in opposition, summary judgment, if  
20 appropriate, may be entered against you. If summary judgment is  
21 granted, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

22 If defendants file a motion for summary judgment for failure  
23 to exhaust, they are seeking to have your case dismissed. If the  
24 motion is granted it will end your case.

25 You have the right to present any evidence you may have  
26 which tends to show that you did exhaust your administrative  
27 remedies. Such evidence may be in the form of declarations  
28 (statements signed under penalty of perjury) or authenticated  
documents, that is, documents accompanied by a declaration  
showing where they came from and why they are authentic, or other  
sworn papers, such as answers to interrogatories or depositions.  
If defendants file a motion for summary judgment for failure to  
exhaust and it is granted, your case will be dismissed and there  
will be no trial.