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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GREGORY A. FRANKLIN,)	Civil No. 07-0438-WVG
)	
Plaintiff,)	ORDER GRANTING DEFENDANTS'
)	MOTION FOR SUMMARY JUDGMENT
v.)	
)	(Doc. # 139)
L. E. SCRIBNER, et al.,)	
)	
Defendants.)	
)	
_____)	

On March 8, 2007, Plaintiff Gregory A. Franklin (hereafter "Plaintiff"), filed a Complaint pursuant to 42 U.S.C. §1983, alleging his civil rights were violated. Following motions to dismiss and amendments made to the Complaint, on June 24, 2008, Plaintiff filed a Second Amended Complaint (hereafter "SAC"), which is the operative pleading in this case.

Plaintiff's SAC names the following Defendants: L.E. Scribner, G.J. Giurbino, J. Ochoa, R. Nelson, M.D. Greenwood, R. Madden, R. Bass, P. Zill, J. Vargas, J. Ortiz, M.E. Bourland, G. Haley, E. Trujillo, S.F. Arias, R. Davis, G. Hopper, and C. Maciel. On March 16, 2009, the District Judge previously assigned to this

1 case issued an Order that dismissed Defendants Madden, Zill, Vargas,
2 Ortiz, Bourland, Haley, Trujillo, Arias, Davis, Hopper and Maciel.
3 Therefore, the Defendants remaining in this action are: Scribner,
4 Giurbino, Ochoa, Nelson, Greenwood, and Bass (hereafter "March 16,
5 2009 Order").

6 The SAC states several causes of action. The March 16, 2009
7 Order dismissed all of the causes of action in the SAC, except the
8 causes of action for (1) denial of outdoor exercise in violation of
9 the Eighth Amendment,^{1/} and, (2) inadequate medical care in violation
10 of the Eighth Amendment.

11 In the SAC, Plaintiff consented to have a Magistrate Judge
12 conduct any and all further proceedings in this case, including
13 trial and the entry of final judgment. (SAC at 28).^{2/} On May 8 and
14 October 29, 2009, Defendants similarly consented. (Doc. ## 111,
15 133).

16 Defendants Scribner, Giurbino, Ochoa, Nelson, Bass and
17 Greenwood filed a Motion for Summary Judgment. Plaintiff filed an
18 Opposition and Supplemental Opposition to the Motion for Summary
19 Judgment. Defendants filed a Reply to Plaintiff's Opposition. The
20 Court, having reviewed the Motion for Summary Judgment, Opposition
21 and Supplemental Opposition to the Motion for Summary Judgment, the
22 Reply to the Opposition, and all the documents attached thereto,
23 hereby ORDERS that Defendants' Motion for Summary Judgment is
24 GRANTED.

25
26
27 ^{1/} The March 16, 2009 Order limited this claim to the time period
before July 13, 2006, but not thereafter. (March 16, 2009 Order at
6).

28 ^{2/} References to page numbers of the SAC are to the ECF pagination.

2 FACTUAL BACKGROUND3 A. Allegations in Second Amended Complaint4 1. Denial of Fresh Air & Recreation

5 On August 18, 2005, a riot occurred at the C-Facility at
6 Calipatria State Prison (hereafter "CSP"). Defendant Warden G.
7 Giurbino (hereafter "Giurbino"), placed CSP on lockdown until
8 January 6, 2006. Plaintiff was housed in the A-Facility at CSP, and
9 was not involved in the riot. From August 18, 2005 to January 6,
10 2006, Plaintiff was denied fresh air and recreation. (SAC at 9).

11 From January 6, 2006 to March 13, 2006, Defendant Warden L.E.
12 Scribner (hereafter "Scribner"), Chief Deputy Warden T. Ochoa
13 (hereafter "Ochoa"), and Captain M. Greenwood (hereafter "Green-
14 wood"), continued to confine Plaintiff and all inmates to their
15 cells due to an assault on an officer by an inmate. (SAC at 9).
16 From March 13, 2006 to July 13, 2006, Scribner, Ochoa and Defendant
17 Captain R. N. Nelson (hereafter "Nelson"), implemented a policy that
18 allowed Plaintiff and other inmates in the A-Facility one-and-one-
19 half hours of fresh air per week.

20 Plaintiff alleges that he was confined to his cell on May 15,
21 16, 18, 21, June 1, 2, 3, 4, 10, 11, 16, 17, 18, 24, 25, 30, July 2,
22 3, 4, 5, 6, 9^{3/}, 16, 23, 26, 29, 2006.^{4/}

26 ^{3/} See footnote 1.

27 ^{4/} Plaintiff also alleges that he was confined to his cell for numerous
28 days in August, September, October, November, December 2006, April
May, June, July, August, September, October, November, December
2007, January, February, March, and April 2008. However, see
footnote 1.

1 2. Inadequate Medical Care in Violation
2 of the Eighth Amendment

3 On September 7, 2005, Defendant Officer R. Bass (hereafter
4 "Bass"), did not allow Plaintiff to wear his "soft shoes" when
5 Plaintiff was leaving his cell, despite the fact that Plaintiff had
6 a "soft shoe chrono."^{5/} Plaintiff suffers from painful callouses on
7 his feet. In February 2007, Plaintiff had surgery on one of his
8 feet. Plaintiff's foot condition requires him to walk on the sides
9 of his feet to alleviate the pain in his feet. (SAC at 12).

10 B. Uncontested Material Facts

11 On August 18, 2005, numerous Hispanic inmates at CSP were
12 involved in multiple assaults or attempted murders of correctional
13 staff, which resulted in a lockdown of the prison, and later, a
14 modified program at the prison. (Declaration of G. Giurbino,
15 hereafter "Giurbino Dec." at 2).

16 The report of the August 18, 2005 incidents contains the
17 following information: (a) An inmate struck a correctional officer
18 on the head in the C-Facility of the prison; (b) ten to twenty
19 inmates then surrounded the officer and began to beat and kick him;
20 (c) four inmates chased another officer who had attempted to assist
21 the first officer. One inmate brandished a weapon. Therefore, the
22 second officer had to retreat for his own safety. (Declaration of J.
23 Bulteman, hereafter "Bulteman Dec.", Exh. A, Amended
24 Crime/Incident Report, August 18, 2005).

25 About thirty minutes later, four inmates followed a correc-
26 tional officer from the dining area, struck her in the facial area,

27 ^{5/} Plaintiff and Defendants do not define the meaning of the word
28 "chrono." However, it is the Court's understanding that a "chrono"
is a recommendation, usually related to an inmate's medical
condition or course of treatment, issued by a prison physician.

1 and picked her up and slammed her to the ground. When correctional
2 staff arrived to assist, the four inmates battered those staff
3 members. (Builteman Dec., Exh. A).

4 As this incident occurred, twenty to thirty inmates refused
5 to return to their cells in Facility-C. The Control Booth Officer
6 in that housing unit noticed several inmates with broken broom
7 handles and activated his alarm. When officers responded to the
8 alarm, the twenty to thirty inmates attacked the responding officers
9 with the broken broom handles, other weapons and their hands and
10 feet. One inmate, who was stabbing a defenseless officer with a
11 broom handle, was shot and killed by another correctional officer.
12 (Builteman Dec., Exh. A). The inmate was a known gang member.
13 (Giurbino Dec. at 6).

14 During the seven day period prior to the August 18, 2005
15 incidents, there were two assaults on staff, a battery of a peace
16 officer, a threat to a staff member, a discovery of a live round of
17 ammunition, two incidents of inmates possessing weapons, a battery
18 on an inmate, an attempted battery on an inmate and two mutual
19 combat incidents. (Builteman Dec., Exh. B, Incident Reports Logs).

20 On August 19, 2005, a State of Emergency^{6/} at CSP was
21 requested and granted by the California Department of Corrections
22 and Rehabilitation (hereafter "CDCR"). A lockdown went into effect
23 which included no outdoor exercise. (Giurbino Dec. at 2). On the
24 same day, Giurbino was called to CSP and became the Interim Warden.
25 As the Interim Warden, Giurbino was to comprehensively evaluate

26 ^{6/} A State of Emergency is declared at a prison to safely control
27 inmate movement, restrict potentially volatile inmates or groups,
28 and afford time to evaluate overall operations in order to regain
control of the prison and establish order for the safety of staff,
inmates and visitors. (Declaration of Robert G. Borg in Support of
Defendants' Motion for Summary Judgment at 3).

1 CSP's operations to restore safety and security. He was to stay at
2 CSP until the CDCR could recruit a warden to continue his tasks.
3 From August 19, 2005 to the first week of January 2006, Giurbino was
4 responsible for making decisions regarding programming at CSP,
5 including the framework for the modified program, as approved by the
6 Associate Director at CDCR. (Giurbino Dec. at 2).

7 In January 2006, Scribner became the Warden of CSP. (Declara-
8 tion of L.E. Scribner, hereafter "Scribner Dec." at 2). At that
9 time, Scribner assumed the responsibility of comprehensively
10 evaluating and establishing prison programming with the purpose of
11 restoring long-term safety and security at CSP. (Scribner Dec. at
12 2).

13 Defendants Nelson, Bass, Greenwood, Ochoa, were subordinates
14 of Giurbino and Scribner. Nelson, Bass, Greenwood and Ochoa did not
15 have authority to deviate from the restrictions imposed as set forth
16 in the program status report matrices developed to restore control
17 over CSP. They could not allow outdoor exercise for general
18 population inmates or allow inmates to wear shoes not authorized by
19 the program status reports. (Giurbino Dec. at 2; Scribner Dec. at 2;
20 Nelson Dec. at 2; Greenwood Dec. at 2; Ochoa Dec. at 2; Bass Dec. at
21 2).

22 Bass denied Plaintiff's request to wear tennis shoes when
23 Plaintiff was outside of his cell during a September 7, 2005 cell
24 search. Bass had asked his supervisor whether Plaintiff's "Accommo-
25 dation Chrono" exempted him from the lockdown status report matrix,
26 which required all inmates to wear shower shoes (flip flops) when
27 they were outside their cells. The requirement that inmates wear
28 shower shoes while they were outside their cells was to minimize the

1 risk that inmates could hide weapons in their shoes and commit
2 violent acts with such weapons. (Bass Dec. at 2, Bulteman Dec.,
3 Exh. C).

4 Giurbino and Scribner made decisions regarding the lockdown
5 and modified program. When they made decisions, they considered the
6 August 18, 2005 incidents, the degree of organization that went into
7 the prison-wide assaults, the violence at CSP which had been ongoing
8 and escalating in the past two years unabated by previous efforts to
9 bring the prison population under control, intelligence gathered
10 from inmate interviews and outside influences which could affect the
11 prison population. (Giurbino Dec. at 2; Scribner Dec. at 2). Their
12 decisions regarding allowable inmate movement and programming were
13 focused on bringing immediate and long-lasting safety to inmates and
14 prison staff. Their decisions involved extensive evaluation of
15 CSP's facilities and procedures with continual dialogue with the
16 Associate Director of CDCR. (Giurbino Dec. at 3; Scribner Dec. at
17 3). Significant information was obtained during initial and
18 subsequent inmate interviews and further investigation of the August
19 18, 2005 assaults. This information included that some inmates were
20 planning future assaults on prison staff members. (Giurbino Dec. at
21 3-4).

22 The high level of violence at CSP prior to and on August 18,
23 2005 called for a drastic reestablishment of order. Otherwise, the
24 level of violence would likely have continued to be more common and
25 more severe. (Declaration of Robert G. Borg, hereafter "Borg Dec.",
26 at 2).

27
28 The purpose of the State of Emergency, lockdown, and modified

1 program at a prison is to safely control inmate movement, restrict
2 potentially volatile inmates or groups, and afford time to evaluate
3 prison operations, in order to regain control of the prison and
4 establish order for the safety of prison staff, inmates and
5 visitors. Activities such as allowing inmates in an open prison
6 yard and meals in dining rooms create the most severe threats to
7 safety because these activities allow large numbers of unrestrained
8 inmates to be in close proximity to each other and staff, in numbers
9 that far outweigh staff, and allow inmates far greater access to
10 items which could be used as weapons. These activities are the last
11 activities to be returned to normalcy. (Borg Dec. at 3, 5).

12 Shortly after August 19, 2005, exhaustive searches of all
13 cells and all areas accessible to inmates were conducted. On
14 September 12, 2005, the searches concluded. (Giurbino Dec. at 3).

15 On September 16, 2005, Giurbino requested from the Director
16 of the Division of Adult Institutions to conclude the declared State
17 of Emergency. At that time, Giurbino advised the Director of the
18 Division of Adult Institutions that CSP would transition to a
19 modified program, which would initially exclude outdoor exercise.
20 The request was granted. (Giurbino Dec. at 3).

21 From August 19, 2005 through January 2006, Giurbino conducted
22 meetings on an almost daily basis to review the modified program,
23 and to evaluate intelligence gathered from cell searches, inmate
24 interviews and other investigative activities. The daily meetings
25 included briefings by facility and operations administrators and
26 intelligence officers who provided information regarding the status
27 of prison operations. During this time, Giurbino consulted with the
28 Associate Director of CDCR two to three times per week to discuss

1 the status of prison operations and the modified program. (Giurbino
2 Dec. at 3; Bulteman Dec., Exh. C, Program and Status Reports and
3 Minutes).

4 When Scribner assumed the position of Warden of CSP, he
5 continued the meetings with the same regularity, purpose and
6 participants from January 2006 to at least July 13, 2006. During
7 this time, Scribner continued to consult with the Associate Director
8 of the CDCR two to three times per week to discuss the status of
9 prison operations and the modified program. His goal was to bring
10 prison activities back to normal programming as soon as possible
11 without sacrificing the safety and security of the prison.
12 Scribner's decisions regarding prison programming were submitted to,
13 and approved by, the Associate Director of the CDCR. (Scribner Dec.
14 at 3).

15 Giurbino believed that it would have been unsafe to expose
16 prison staff to unrestrained general population inmates until those
17 inmates who were planning future assaults were removed from the
18 prison. Therefore, he determined that inmates classified as higher
19 violence "180 design inmates,"^{2/} who were housed in CSP's general
20 population, needed to be identified and transferred to other
21 prisons. Due to the time involved in reviewing files to identify
22 180-design inmates, hold hearings, and securing another prison able
23
24 to accept the inmate, the transfer of all 180-design inmates to
25 other prisons was not complete in January 2006. (Giurbino Dec. at

26
27 ^{2/} Generally, inmates who commit serious offenses while they are housed
28 in lower security prisons become classified as 180-design inmates.
Higher-violence 180-design inmates may be housed at lower security
prisons if they have court appearances in a court near the lower
security prison or while they are awaiting transfer to a higher
security prison.

1 4).

2 As a result of the State of Emergency, 140 inmates had been
3 transferred to other prisons by November 14, 2005. Another 140
4 inmates were awaiting transfer. By December 2, 2005, 236 inmates
5 had been transferred to other prisons. By December 29, 2005, a
6 total of 297 inmates had been transferred to other prisons. (Borg
7 Dec. at 4).^{8/}

8 In November and December 2005, Giurbino was concerned about
9 the potential for further violence due to the fact that the inmate
10 that was killed during the August 18, 2005 incidents was a known
11 gang member. Therefore, Giurbino believed that violent retaliation
12 by the gang to which the inmate belonged might occur. During this
13 time, Giurbino was also concerned about the occurrence of further
14 violence in connection with the then upcoming and well-publicized
15 execution of Stanley "Tookie" Williams, the founder of the Crips
16 gang. The execution was conducted on December 13, 2005. (Giurbino
17 Dec. at 6).

18 By November 8, 2005, Giurbino took steps toward normal
19 programming by allowing unrestrained interaction of prison staff
20 with inmates who had passed a risk assessment. He also allowed these
21 inmates greater access to canteen and vendor packages and limited
22 visitation. Additionally, medical personnel walked through the cell
23 blocks to identify and address inmates' medical needs; inmates who

24

25 ^{8/} Plaintiff disputes that only 180-design inmates were transferred to
26 other prisons, and the actual number of inmates transferred to other
27 prisons by the dates noted. However, Plaintiff does not appear to
28 dispute that inmates were, in fact, transferred to other prisons.
Nonetheless, he insists that some inmates were transferred to other
prisons for improper reasons. The Court does not see how Plaintiff's
evaluations regarding whether an inmate was properly or improperly
transferred to another prison is relevant to any issue presented by
Defendants' Motion for Summary Judgment.

1 required medical, dental, or mental health care were allowed to
2 attend appointments with doctors; inmates identified with legal
3 deadlines were allowed access to the law library and chaplains and
4 religious volunteers were allowed to walk "the tiers." (Giurbino
5 Dec. at 5).

6 By December 2005, critical workers' movement was unre-
7 strained. Immigration and Naturalization Services (hereafter "INS")
8 inmates were allowed unrestrained movement, but only four inmates at
9 a time were permitted for INS interviews at designated tables.
10 Twelve unrestrained inmates escorted by two correctional officers
11 were allowed access to the law library. Eight unrestrained inmates
12 escorted by one correctional officer were allowed to attend medical
13 appointments. Facility D inmates' movements were unrestrained, were
14 "control fed" in the dining room and had normal education programs
15 restored. (Plaintiff's Exh. C, December 19, 2005 Program Status
16 Report, at 2-3).

17 From August 18, 2005 to July 13, 2006, 230 violent incidents
18 occurred at CSP. These incidents included three incidents of
19 attempted murder of a Peace Officer, twenty-four incidents of
20 battery on a Peace Officer, five incidents of attempted battery on
21 a Peace Officer, forty-eight incidents of inmate possession of
22 weapons, and eighty incidents of inmate battery or mutual combat.
23 (Builteman Dec., Exh. B; Borg Dec. at 13).^{2/}

24
25 ^{2/} Plaintiff disputes the actual number of violent incidents that
26 reportedly occurred from August 18, 2005 to July 13, 2006. He
27 asserts that 153 violent incidents occurred during that time frame.
However, even if Plaintiff's number of violent incidents were
accepted, the Court finds that the number of (continued)

28 (continued)
violent incidents at CSP during the noted time period, was excessive.

1 On February 2, 2006, Scribner held a meeting to discuss a
2 comprehensive five-phase plan to discontinue the modified program
3 and to resume normal programs over a five-week period beginning on
4 February 6, 2006. The plan called for the gradual restoration of
5 privileges and programs such as visitation, telephone use, canteen
6 purchases, recreation, and for the implementation of unrestrained
7 inmate movement within housing units. Under this plan, inmates in
8 Facilities A, B and C, including Plaintiff, were allowed to use the
9 prison exercise yard on a modified schedule. The modified schedule
10 allowed each Facility a half-day of use of the prison exercise yard
11 one day per week. (Scribner Dec. at 3).

12 The provision of outdoor exercise to inmates in Administra-
13 tive Segregation involves prison personnel bringing out restrained
14 inmates one-by-one or in small groups, placing them in the prison
15 yard, prison personnel exiting the prison yard, and then removing
16 the inmates' restraints through a port. Providing outdoor exercise
17 to the general prison population on this or a similar basis was not
18 appropriate under the circumstances noted above because, (1) there
19 were 2,500 to 3,000 inmates in Facilities A, B and C; (2) the prison
20 does not have available significant number of inmate restraints to
21 be used at the same time in Facilities A, B, and C; (3) the general
22 prison yard fencing does not have ports through which restraints can
23 be removed once an inmate is placed in the yard; (4) committee
24 meetings would have had to have been held for all inmates to
25 determine which inmates could be released into the prison yard
26 together, which would have taken a prohibitive amount of time; (5)
27 considering the number of prison personnel needed for feeding
28 inmates in their cells, providing canteen items to inmates in their

1 cells, and escorting restrained inmates to showers, medical, dental
2 and mental health appointments, law library, visitation and any
3 other movement outside of the inmates' cells, the prison did not
4 have the sufficient number of personnel to escort inmates to the
5 prison yard; and (6) projects to improve the security of the prison
6 yards were ongoing for at least a couple of months after the August
7 18, 2005 incidents. (Giurbino Dec. at 7, Scribner Dec. at 9-10).

8 The provision of outdoor exercise to only non-Hispanic
9 general population inmates in the way inmates in Administrative
10 Segregation were provided outdoor exercise was not appropriate under
11 the circumstances noted above due to the large number of non-
12 Hispanic inmates at the prison, and for the reasons noted above.
13 (Giurbino Dec. at 7, Scribner Dec. at 10).

14 The provision of outdoor exercise to Plaintiff, or a select
15 group of general prison population inmates was not appropriate
16 because approximately 50 new inmates were admitted to CSP every week
17 beginning on August 19, 2005. The process to allow outdoor exercise
18 to Plaintiff, or to a select group of the general prison population,
19 would have been logistically impossible. In addition, there would
20 have been the potential for more violence due to special treatment
21 afforded certain inmates, but not to others, or from pressure
22 applied on the new inmates by disruptive inmates to engage in
23 violence. (Giurbino Dec. at 7-8, Scribner Dec. at 10).

24 During the lockdown, Plaintiff exercised in his cell.
25 (Deposition of Gregory A. Franklin, attached to the Declaration of
26 Michelle Des Jardins, hereafter "Plaintiff Deposition," at 27:5-10).

27 From March 13, 2006 to July 13, 2006, Plaintiff and other
28 inmates were allowed one and one-half hours of outdoor exercise per

1 week. (Plaintiff's Points and Authorities in Support of Opposition
2 to Defendants' Motion for Summary Judgment at 4; Declaration of
3 Anthony at 2; Declaration of D. Green at 2).^{10/}

4 Plaintiff has callouses on the bottom of his feet. He has had
5 this condition since childhood. (Plaintiff Deposition at 8:6-25 -
6 9:1). In September 2005, Plaintiff had a temporary "Accommodation
7 Chrono," which allowed him to wear soft shoes. (Plaintiff Deposi-
8 tion, Exh. 1). Wearing soft shoes gives Plaintiff ankle support. In
9 order to alleviate the pain in Plaintiff's feet, he has to walk on
10 the sides of his feet because his callouses are in the middle of his
11 feet. Tennis shoes give Plaintiff ankle support. (Plaintiff
12 Deposition at 11:21-25, 12:1-4). Plaintiff requested an "Accommoda-
13 tion Chrono" from a doctor which would have been valid during
14 lockdowns and modified programs. Plaintiff's request was denied.
15 (Plaintiff Deposition at 41:11-21). Plaintiff played basketball
16 until 2004 when he injured his knee. His callous condition did not
17 prevent him from playing basketball. (Plaintiff Deposition at 9:22-
18 25, 10:1-12). Plaintiff no longer has the "Accommodation Chrono,"
19 which allowed him to wear soft shoes. (Plaintiff Deposition at 43:4-
20 17).

21 On September 7, 2005, during the lockdown, Defendant Bass
22 came to search Plaintiff's cell. (SAC at 12). Plaintiff was required
23 to leave his cell for the cell search. (Bass Dec. at 2; Plaintiff
24 Deposition at 13:18-25 - 14:1-13).

25 Under the restrictions imposed by the lockdown program status
26 reports, all inmates were permitted to wear only shower shoes (flip
27

28 ^{10/} Inmates Anthony and Green state that beginning in May 2006, they
were allowed two hours of outdoor exercise for two months.

1 flops) when outside of their cells because of the risk that inmates
2 could secrete weapons in their shoes and commit violent acts. (Bass
3 Dec. at 2). Plaintiff asked Bass if he could wear his tennis shoes
4 outside his cell while the cell was being searched. Bass asked his
5 supervisor if Plaintiff's Accommodation Chrono for soft shoes
6 exempted him from the lockdown restriction. Bass was instructed that
7 the Accommodation Chrono did not overrule custody issues and that
8 for security reasons, Plaintiff could not wear his tennis shoes when
9 he left his cell during the cell search. (Bass Dec. at 2).^{11/}

10 Plaintiff was required to wear his shower shoes when he left
11 his cell for the cell search. He was required to walk to the day
12
13
14 room, which is no more than 150 feet away from any cell. (Bass Dec.
15 at 2).^{12/}

17 ^{11/} Plaintiff disputes that Bass' supervisor told Bass that Plaintiff
18 was not allowed to wear tennis shoes when he exited his cell so it
19 could be searched. Plaintiff cites to the responses to
20 interrogatories by Bass to support this assertion. However, the
21 interrogatory responses to which Plaintiff refers do not support
22 Plaintiff's assertion. Further, Plaintiff admits that he believed
23 that Bass asked his supervisor about allowing Plaintiff to wear
24 tennis shoes when he had to exit his cell for the cell search.
25 (Plaintiff Deposition at 14:23-25, 15:1).

21 Plaintiff argues that if an inmate has a medical chrono to wear
22 tennis shoes when he exits his cell, he could have worn tennis shoes
23 after his shoes and feet were searched. Plaintiff cites to the
24 supplemental interrogatory responses by Giurbino to support this
25 assertion. However, Plaintiff misconstrues Giurbino's supplemental
26 responses. Giurbino objected to responding to Plaintiff's
27 interrogatory seeking this information. After the objections were
28 stated, Giurbino specifically stated: "At Calipatria State Prison,
*during times of modified program, all inmates are required to exit
their cells wearing... shower shoes.* However, regardless of the type
of shoes an inmate is wearing, during searches, inmates are required
to remove their shoes to allow inspection of the foot covering and
the inmate's feet, by custody staff." (emphasis added) (Defendants'
Lodgment No. 1, Giurbino's Supplemental Responses to Plaintiff's
First Set of Interrogatories, at 8). Plaintiff also cites to his own
Declaration to posit the same argument. (Franklin Dec. at 1).

28 ^{12/} Plaintiff states that he had to walk 100 yards to the day room.
(Plaintiff Deposition at 14:4-6).

1 Bass did not know that Plaintiff's walking the short distance
2 from his cell to the day room in shower shoes would cause Plaintiff
3 to suffer cruel and unusual punishment. Bass did not intend to
4 subject Plaintiff to cruel and unusual punishment. Bass was
5 complying with his orders, which he had no discretion to disregard.
6 (Bass Dec. at 2).

7 II

8 ANALYSIS

9 A. Standard of Review for Motion for Summary Judgment

10 Summary judgment is properly granted when "there is no
11 genuine issue as to any material fact and ... the moving party is
12 entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Entry
13 of summary judgment is appropriate "against a party who fails to
14 make a showing sufficient to establish the existence of an element
15 essential to that party's case, and on which that party will bear
16 the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S.
17 317, 322 (1986). The court shall consider all admissible affidavits
18 and supplemental documents submitted on a motion for summary
19 judgment. See Connick v. Teachers Ins. & Annuity Ass'n, 784 F.2d
20 1018, 1020 (9th Cir. 1986). The moving party has the initial burden
21 of demonstrating that summary judgment is proper. Adickes v. S. H.
22 Kress & Co., 398 U.S. 144, 152 (1970). However, to avoid summary
23 judgment, the nonmovant cannot rest solely on conclusory allega-
24 tions. Berg v. Kincheloe, 794 F.2d 457, 459 (9th Cir. 1986). Rather,
25 he must present "specific facts showing there is a genuine issue for
26 trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).
27 The Court may not weigh evidence or make credibility determinations
28 on a motion for summary judgment. Quite the opposite, the inferences

1 to be drawn from the underlying facts must be viewed in the light
2 most favorable to the nonmoving party. Id. at 255; United States v.
3 Diebold, Inc., 369 U.S. 654, 655 (1962). The nonmovant's evidence
4 need only be such that a "fair minded jury could return a verdict
5 for [him] on the evidence presented." Anderson, 477 U.S. at 255.
6 However, in determining whether the nonmovant has met his burden,
7 the Court must consider the evidentiary burden imposed upon him by
8 the applicable substantive law. Id. A verified complaint or motion
9 may be used as an opposing affidavit under Fed.R.Civ.P. 56 to the
10 extent it is based on personal knowledge and sets forth specific
11 facts admissible in evidence. McElyea v. Babbitt, 833 F.2d 196, 197-
12 98 (9th Cir. 1987); Johnson v. Meltzer, 134 F.3d 1393, 1399-1400
13 (9th Cir. 1998) (motion). To "verify" a complaint, the plaintiff
14 must swear or affirm that the facts in the complaint are true "under
15 the pains and penalties of perjury." Schroeder v. McDonald, 55 F.3d
16 454, 460 n.10 (9th Cir. 1995).

17 B. Defendants' Arguments

18 Defendants argue that they are entitled to judgment as a
19 matter of law pursuant to Fed.R.Civ.P. 56 because:

20 1) no genuine issues of material fact exist to show that the
21 restrictions on Plaintiff's access to outdoor exercise deprived him
22 of his Eighth Amendment rights; 2) no genuine issues of material
23 fact exist to show that Defendants acted with deliberate indiffer-
24
25 ence to Plaintiff's health or safety; and 3) Defendants are entitled
26 to qualified immunity.

27 1. 42 U.S.C. § 1983

28 Section 1983 authorizes a "suit in equity, or other proper

1 proceeding for redress" against any person who, under color of state
2 law, "subjects, or causes to be subjected, any citizen of the United
3 States... to the deprivation of any rights, privileges, or immuni-
4 ties secured by the Constitution." Nelson v. Campbell, 541 U.S. 637
5 (2004). Here, there is no dispute that Giurbino and Scribner acted
6 under color of state law when they ordered implementation of
7 lockdown procedures at CSP which limited Plaintiff's access to
8 outdoor exercise from August 19, 2005 through March 13, 2006, and
9 for 22 days in May, June, and July 2006.^{13/} Thus, the resolution of
10 Defendants' Motion for Summary Judgment turns on the second inquiry:
11 whether a genuine issue of material fact exists to show that
12 Defendants' actions constituted cruel and unusual punishment in
13 violation of Plaintiff's Eighth Amendment rights.

14 2. Eighth Amendment's Cruel and Unusual
15 Punishment Clause

16 "Whatever rights one may lose at the prison gates,... the
17 full protections of the eighth amendment most certainly remain in
18 force. The whole point of the amendment is to protect persons
19 convicted of crimes." Spain v. Proconier, 600 F.2d 189, 193-94 (9th
20 Cir. 1979). However, the Eighth Amendment is not a basis for broad
21 prison reform. It requires neither that prisons be comfortable nor
22 that they provide every amenity that one might find desirable.
23 Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981); Hoptowit v. Ray,
24 682 F.2d 1237, 1246 (9th Cir. 1982). Rather, the Eighth Amendment
25 proscribes the "unnecessary and wanton infliction of pain," which
26 includes those sanctions that are "so totally without penological
27 justification that it results in the gratuitous infliction of

28 ^{13/} The period from August 19, 2005 through March 13, 2006 is 6 months
23 days. Also, see footnote 1.

1 suffering." Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976); see
2 also Farmer v. Brennan, 511 U.S. 825, 834 (1994); Rhodes, 452 U.S.
3 at 347. This includes not only physical torture, but any punishment
4 incompatible with "the evolving standards of decency that mark the
5 progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101
6 (1958); see also Estelle v. Gamble, 429 U.S. 97, 102 (1976).
7 Although prison administrators generally have broad discretion in
8 determining whether to declare emergencies and impose "lockdowns" to
9 control institutional disturbances, the conditions imposed during
10 the lockdown may constitute cruel and unusual punishment under the
11 Eighth Amendment. See Hayward v. Procnier, 629 F.2d 599, 603 (9th
12 Cir. 1980) (denial of outdoor exercise may give rise to Eighth
13 Amendment violation even in response to emergency conditions). To
14 assert an Eighth Amendment claim for deprivation of humane condi-
15 tions of confinement, a prisoner must satisfy two requirements: one
16 objective and one subjective. Farmer, 511 U.S. at 834; Allen v.
17 Sakai, 48 F.3d 1082, 1087 (9th Cir. 1994).

18 "Under the objective requirement, the prison official's acts
19 or omissions must deprive an inmate of the minimal civilized measure
20 of life's necessities." Farmer, 511 U.S. at 834. This objective
21 component is satisfied so long as the institution "furnishes
22 sentenced prisoners with adequate food, clothing, shelter, sanita-
23 tion, medical care, and personal safety." Hoptowit, 682 F.2d at
24
25 1246; Farmer, 511 U.S. at 833; Wright v. Rushen, 642 F.2d 1129,
26 1132-33 (9th Cir.1981).

27 The subjective requirement, relating to the defendants' state
28 of mind, requires "deliberate indifference." Allen, 48 F.3d at 1087.

1 "Deliberate indifference" exists when a prison official "knows of
2 and disregards an excessive risk to inmate health and safety; the
3 official must be both aware of facts from which the inference could
4 be drawn that a substantial risk of serious harm exists, and he must
5 also draw the inference." Farmer, 511 U.S. at 835.

6 a. Objective Requirement

7 Plaintiff alleges that the conditions resulting from
8 Giurbino's and Scribner's decision to implement a lockdown and
9 modified lockdown restrictions constituted cruel and unusual
10 punishment because, as a result of those restrictions, he was denied
11 outdoor exercise for over seven months.^{14/} The Ninth Circuit has
12 stated that "regular outdoor exercise is extremely important to the
13 psychological and physical well being of the inmates." Spain, 600
14 F.2d at 199 (holding that prisoners in long-term and continuous
15 segregation must be provided regular outdoor exercise unless
16 "inclement weather, unusual circumstances, or disciplinary needs"
17 make it impossible). However, as the Ninth Circuit further recog-
18 nized in Hayward, when a lockdown is instituted in response to a
19 genuine emergency, the decisions regarding when and how to provide
20 for outdoor exercise "are delicate ones, and those charged with them
21 must be given reasonable leeway." Hayward, 629 F.2d at 603.

22
23 When prison officials balance the obligation to provide
24 safety for inmates and prison staff against the duty to accord
25 inmates the rights and privileges to which they are entitled, prison
26 officials are afforded "wide-ranging deference." Norwood v. Vance,

27
28 ^{14/} See footnote 13. Six months 23 days plus an additional 22 days
totals 7 months 15 days.

1 591 F. 3d 1062, 1069 (9th Cir. 2010), citing Bell v. Wolfish, 441
2 U.S. 520, 547 (1979). When a "lockdown (is) in response to a
3 'genuine emergency,' and restrictions (are) eased as prison
4 (officials) determine in view of the emergency, courts may not...
5 second-guess prison officials' judgments about when outdoor exercise
6 could safely be restored." Norwood, 591 F.3d at 1069.

7 When prison officials have substantial reasons for imposing
8 a lockdown, for example, wide-spread violence and riots, they are
9 tasked with restoring order and safety in the prison. Under these
10 circumstances, the lockdown is not intended to be punitive. Norwood,
11 591 F.3d 1069.

12 Prison officials have the duties to keep inmates safe from
13 each other and to protect prison staff from being attacked. Prison
14 officials must balance these duties against other obligations that
15 the law imposes, such as providing outdoor exercise. When violence
16 at the prison rises to extremely high levels, "prison officials have
17 a right and a duty to take steps to reestablish order in a prison
18 when such order is lost. This is for the benefit of the prisoners
19 as much as for the benefit of the prison officials." Id., at 1069,
20 quoting Farmer, 511 U.S. at 832-833; LeMaire v. Maass, 12 F. 3d
21 1444, 1462 (9th Cir. 1993); Hoptowit, 682 F.2d at 1259.

22 Prison officials may be faulted for erring on the side of
23 caution by maintaining a lockdown for longer than necessary. "But
24
25 when it comes to matters of life and death, erring on the side of
26 caution is a virtue." Norwood, 591 F.3d at 1069.

27 "Although exercise is 'one of the basic human necessities
28 protected by the Eighth Amendment' ... a temporary denial of outdoor

1 exercise with no medical effects is not a substantial deprivation.”
2 May v. Baldwin, 109 F.3d 557, 565 (9th Cir. 1997) (twenty-two days
3 insufficient to establish Eighth Amendment violation) (quoting
4 LeMaire, 12 F.3d at 1457).

5 Here, the record is clear that the initial and later
6 restrictions placed on Plaintiff’s ability to exercise outdoors
7 arose from violent incidents prior to August 18, 2005 and the riot
8 that occurred at CSP on that date. As a result of the pre-riot
9 violence and the riot, Giurbino, and later Scribner, implemented a
10 lockdown the day after the riot. The lockdown provided for the
11 transfer out of the prison of inmates who were deemed to be a higher
12 risk for violence, in-cell feeding, controlled showers, and later,
13 unrestrained prison staff interaction with inmates under certain
14 circumstances, canteen access, library access for inmates with
15 verified court deadlines, limited visitation, and allowance of
16 inmates to attend medical, dental or mental health care appointments
17 with doctors.

18 Although Plaintiff claims he was denied outdoor exercise for
19 over seven months, Defendants argue that he was not denied exercise
20 altogether, but rather, only the opportunity to exercise outdoors.
21 Specifically, Defendant claims the conditions of Plaintiff’s
22 confinement during the lockdown do not satisfy the objective
23 component of an Eighth Amendment violation because Plaintiff was not
24
25 confined to his cell during the entire lockdown period and he
26 exercised in his cell during the lockdown period.

27 Under the circumstances of this case and Ninth Circuit
28 precedent, however, the Court finds evidence in the record suffi-

1 cient to create genuine issues of fact as to whether the denial
2 and/or limitations on Plaintiff's outdoor exercise for a period of
3 over seven months meets the objective standard required to support
4 an Eighth Amendment violation.^{15/} See e.g., Lopez v. Smith, 203 F.3d
5 1122, 1133 (9th Cir. 2000) (finding six and one-half weeks depriva-
6 tion of "all access to outdoor exercise" sufficient to satisfy
7 Eighth Amendment's objective requirements); Keenan v. Hall, 83 F.3d
8 1083, 1089 (9th Cir. 1996), *as amended* 135 F.3d 1318 (finding
9 triable issues of fact existed as to whether a six-month deprivation
10 of outdoor exercise due to Plaintiff's placement in the Intensive
11 Management Unit violated the Eighth Amendment).

12 b. Subjective Requirement

13 However, in order to avoid summary judgment, Plaintiff must
14 also show there are triable issues as to the Eighth Amendment's
15 subjective requirement. Farmer, 511 U.S. at 834. In this regard, the
16 Court finds no evidence in the record to support Plaintiff's claim
17 that the denial of outdoor exercise, which began as a result of
18 violent incidents prior to, and the riot that occurred on, August
19 18, 2005, was the result of Defendant's "deliberate indifference."
20 Farmer, 511 U.S. at 835; Lopez, 203 F.3d at 1133. The evidence
21 before the Court shows that the suspension of outdoor exercise began
22 after a riot occurred on August 18, 2005, in which inmates at CSP
23 were involved in multiple assaults and attempted murders of CSP's
24 correctional staff. One inmate was shot and killed during the riot.

25 ^{15/} Plaintiff argues that other inmates in the general population of CSP
26 were afforded outdoor exercise beginning on August 19, 2005.
27 Plaintiff cites to the Bulteman Dec., and the responses to
28 interrogatories by Giurbino, Scribner, Greenwood and Ochoa to
support his assertion. However, the documents to which Plaintiff
refers do not support Plaintiff's assertion. None of these documents
indicate that general population inmates were afforded outdoor
exercise beginning on August 19, 2005.

1 Giurbino and Scribner indicate that the lockdown was imposed
2 so that they could comprehensively evaluate CSP's operations to
3 restore safety and security at CSP. When Giurbino and Scribner made
4 decisions regarding the lockdown, and later, the modified program,
5 they considered the August 18, 2005 incidents, the degree of
6 organization that went into the prison-wide assaults, the violence
7 at CSP which had been ongoing despite previous efforts to bring the
8 prison population under control, intelligence gathered from inmate
9 interviews, and outside influences which could affect the prison
10 population. Significant information was obtained during inmate
11 interviews and investigation into the events of August 18, 2005.
12 This information included that some inmates were planning future
13 assaults on prison staff members. Plaintiff does not point to any
14 evidence in the record to rebut Giurbino's and Scribner's explana-
15 tions for the lockdown, and later, the modified program.

16 Thus, the record is replete with facts which reveal that
17 restrictions on outdoor exercise were instituted for the primary
18 purpose of preventing further violence, injuries and homicides. In
19 addition, all documentary evidence offered by both Plaintiff and
20 Defendants shows, that the lockdown and later, modified program,
21 were designed to restore safety and security at CSP as soon as
22 reasonably practical. There is simply no evidence before this Court
23 which supports Plaintiff's claims that Defendants' actions were the
24 product of any "deliberate indifference" on their part. Farmer, 511
25 U.S. at 837.^{16/}

26 As noted above, determinations such as how to best protect
27 inmates from violence "are delicate ones, and those charged with

28 ^{16/} See footnote 15.

1 them must be given reasonable leeway." Hayward, 629 F.2d at 602.
2 Therefore, prison officials are afforded wide-ranging deference in
3 making these determinations. Norwood, 591 F.3d at 1069. Defendants
4 have demonstrated as a matter of law that outdoor exercise restric-
5 tions at CSP were imposed as a result of a serious violent incidents
6 and a riot at CSP. Thus, without more, this Court finds no genuine
7 issues of material fact exist to show that Defendants deprived
8 Plaintiff of outdoor exercise with the "deliberate indifference" to
9 his health or safety necessary to support an Eighth Amendment
10 violation. See Farmer, 511 U.S. at 835. Rather, the uncontroverted
11 evidence establishes that the suspension of outdoor exercise was a
12 response to ongoing violence and the riot that occurred on August
13 18, 2005. Plaintiff has come forward with no evidence to support a
14 finding that the initial suspension or delay in restoration of
15 outdoor exercise amounted to a violation of his Eighth Amendment
16 rights.

17 Accordingly, Defendants are entitled to summary judgment as
18 a matter of law. Celotex, 477 U.S. at 322-24; Anderson, 477 U.S. at
19 256; Berg, 794 F.2d at 459.

20 3. Defendants Ochoa, Greenwood, and Nelson
21 Are Not Liable for an Eighth Amendment Violation
22 Plaintiff contends that Defendants Ochoa and Greenwood denied
23 him outdoor exercise from January 6, 2006 to March 13, 2006 and from
24 March 20, 2006 to May 10, 2006. Plaintiff also contends that from
25 March 13, 2006 to July 13, 2006, Defendants Ochoa and Nelson
26 implemented a policy that only allowed inmates in Plaintiff's
27 facility one-and-one-half hours of outdoor exercise per week. (SAC
28 at 9-10).

28 *Respondeat Superior* liability does not exist under § 1983.

1 Monell v. New York Dept. of Soc. Svcs., 436 U.S. 658, 691 (1978);
2 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). "(A) plaintiff
3 must plead that each Government-official defendant, through the
4 official's own individual actions, has violated the Constitution."
5 Ashcroft v. Iqbal, 129 S.Ct. 1937, 1948 (2009). Causation must be
6 established by showing acts and omissions of each defendant. See
7 Rizzo v. Goode, 423 U.S. 362, 370-371 (1976); Leer v. Murphy, 844
8 F.2d 628, 633 (9th Cir. 1988). "The inquiry into causation must be
9 individualized and focus on the duties and responsibilities of each
10 defendant whose acts or omissions are alleged to have set forth a
11 constitutional deprivation." Id. at 633.

12 Here, the undisputed facts presented to the Court show that
13 only the warden had the authority to institute the lockdown and
14 modified program at the prison. The warden's decisions regarding
15 the lockdown and modified program were subject to the approval of
16 the CDCR. Ochoa, Greenwood, and Nelson did not have authority to
17 allow Plaintiff or other inmates outdoor exercise when this activity
18 was not authorized by the warden. Since Ochoa, Greenwood, and Nelson
19 did not have the duties, responsibilities, or authority to institute
20 the lockdown or modified program, nor the restrictions attendant
21 therewith, they can not be held liable for an Eighth Amendment
22 violation under the circumstances presented.

23 As a result, Defendants Ochoa, Greenwood, and Nelson are
24 entitled to summary judgment as a matter of law. Celotex, 477 U.S.
25 at 322-324; Anderson, 477 U.S. at 256; Berg, 794 F.2d at 459.

26 4. Defendant Bass Did Not Violate Plaintiff's Eighth
27 Amendment Rights

27 Plaintiff contends that on September 7, 2010, Defendant Bass
28 did not allow Plaintiff to wear his "soft shoes" when Plaintiff was

1 exiting his cell so his cell could be searched. Therefore, Plaintiff
2 asserts that Bass violated his Eighth Amendment right to be free
3 from cruel and unusual punishment. Defendant Bass argues that when
4 he prohibited Plaintiff from wearing "soft shoes," he was following
5 the orders of his superiors and did not intend to cause Plaintiff to
6 suffer in violation of Plaintiff's Eighth Amendment rights.

7 As previously noted, Plaintiff has callouses on the bottom of
8 his feet. In September 2005, Plaintiff had a temporary "Accommoda-
9 tion Chrono," which allowed him to wear soft shoes. Wearing soft
10 shoes gives Plaintiff ankle support. In order to alleviate the pain
11 in Plaintiff's feet, he has to walk on the sides of his feet because
12 his callouses are in the middle of his feet. Tennis shoes give
13 Plaintiff ankle support. Plaintiff requested an "Accommodation
14 Chrono" from a doctor which would have been valid during lockdowns
15 and modified programs. Plaintiff's request was denied. Plaintiff
16 played basketball until 2004 when he injured his knee. His callous
17 condition did not prevent him from playing basketball. Plaintiff no
18 longer has the "Accommodation Chrono," which allowed him to wear
19 soft shoes. (Plaintiff Deposition at 43:4-17).

20 On September 7, 2005, during the lockdown, Defendant Bass
21 came to search Plaintiff's cell. Plaintiff was required to leave his
22 cell for the cell search.

23 Under the restrictions imposed by the lockdown program status
24 reports, all inmates were permitted to wear only shower shoes (flip
25 flops) when outside of their cells because of the risk that inmates
26 could secrete weapons in their shoes and commit violent acts. (Bass
27 Dec. at 2). Plaintiff asked Bass if he could wear his tennis shoes
28 when he exited his cell while it was being searched. Bass asked his

1 supervisor if Plaintiff's Accommodation Chrono for soft shoes
2 exempted him from the lockdown restriction. Bass was instructed that
3 the Accommodation Chrono did not overrule custody issues and that
4 for security reasons, Plaintiff could not wear his tennis shoes when
5 he left his cell during the cell search.

6 Plaintiff was required to wear his shower shoes when he left
7 his cell for the cell search. He was required to walk to the day
8 room, which is no more than 150 feet or 100 yards away from any
9 cell.

10 Bass did not know that Plaintiff's walking the short distance
11 from his cell to the day room in shower shoes would cause Plaintiff
12 to suffer cruel and unusual punishment. Bass did not intend to
13 subject Plaintiff to cruel and unusual punishment. Bass was
14 complying with his orders, which he had no discretion to disregard.

15 a. Eighth Amendment's Cruel and Unusual
16 Punishment Clause

17 As previously noted, the Eighth Amendment proscribes the
18 "unnecessary and wanton infliction of pain," which includes those
19 sanctions that are "so totally without penalogical justification
20 that it results in the gratuitous infliction of suffering." Gregg,
21 428 U.S. at 173, 183; see also Farmer, 511 U.S. at 834; Rhodes, 452
22 U.S. at 347. Although prison administrators generally have broad
23 discretion in determining whether to declare emergencies and impose
24 "lockdowns" to control institutional disturbances, the conditions
25 imposed during the lockdown may constitute cruel and unusual
26 punishment under the Eighth Amendment. See Hayward v. Proconier, 629
27 F.2d at 603. Deliberate indifference to serious medical needs may
28 support a claim for violation of the Eighth Amendment. Estelle, 429
U.S. at 104.

1 Deliberate indifference must be analyzed in the context of
2 the specific case. In applying the deliberate indifference standard,
3 the trier of fact "must consider whether, in allegedly exposing the
4 prisoner to danger, the defendant prison official was guided by
5 consideration of safety to other inmates... More generally, the
6 legal standard must not be applied to an idealized vision of prison
7 life, but to the prison as it exists, and as prison official(s) are
8 realistically capable of influencing." Berg, 794 F.2d at 462. An
9 analysis of the context in which prison officials act requires the
10 trier of fact to recognize the turbulent environment of a prison.
11 "Prisons by definition, are places of involuntary confinement of
12 persons who have a demonstrated proclivity for antisocial, criminal
13 and often violent conduct." Hudson v. Palmer, 468 U.S. 517, 526
14 (1984).

15 Also, as previously noted, an Eighth Amendment violation
16 requires proof of an objective and subjective requirement. "Under
17 the objective requirement, the prison official's acts or omissions
18 must deprive an inmate of the minimal civilized measure of life's
19 necessities." Farmer, 511 U.S. at 834. This objective component is
20 satisfied so long as the institution "furnishes sentenced prisoners
21 with adequate food, clothing, shelter, sanitation, medical care, and
22
23 personal safety." Hoptowit, 682 F.2d at 1246; Farmer, 511 U.S. at
24 833; Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir.1981).

25 The subjective requirement, relating to the defendants' state
26 of mind, requires "deliberate indifference." Allen, 48 F.3d at 1087.
27 "Deliberate indifference" exists when a prison official "knows of
28 and disregards an excessive risk to inmate health and safety; the

1 official must be both aware of facts from which the inference could
2 be drawn that a substantial risk of serious harm exists, and he must
3 also draw the inference." Farmer, 511 U.S. at 835.

4 1. Objective Requirement

5 Plaintiff alleges that on one occasion, Bass did not allow
6 him to wear his "soft shoes," when he had to exit his cell for a
7 cell search. Plaintiff claims that he needed to wear his tennis
8 shoes instead of his shower shoes so that he could walk on the sides
9 of his feet instead of on the bottoms of his feet because his
10 callouses were on the center-bottoms of his feet. Plaintiff claims
11 that shower shoes did not provide him with enough ankle support to
12 walk on the sides of his feet. Further, Plaintiff states that many
13 times when the prison was on lockdown or modified program, and his
14 cell was searched, he was allowed to wear tennis shoes after a
15 correctional officer searched his tennis shoes. (Dec. of Franklin at
16 1). Plaintiff also offers the Declaration of Darryl Douglas, a
17 fellow inmate, which generally states that Douglas has been subject
18 to lockdowns and modified programs, has a medical chrono, and has
19 been allowed to wear his soft shoes and take other medical equipment
20 with him when a search of his cell was conducted.

21 When prison officials balance the obligation to provide
22 safety for inmates and prison staff against the duty to accord
23 inmates the rights and privileges to which they are entitled, prison
24 official are afforded "wide-ranging deference." Norwood, 591 F. 3d
25 at 1069.

26 When prison officials have substantial reasons for imposing
27 a lockdown, for example, wide-spread violence and riots, they are
28 tasked with restoring order and safety in the prison. Under these

1 circumstances, the lockdown is not intended to be punitive. Norwood,
2 591 F.3d 1069.

3 Prison officials have the duties to keep inmates safe from
4 each other and to protect prison staff from being attacked. Prison
5 officials must balance these duties against other obligations that
6 the law imposes, such as providing outdoor exercise. When violence
7 at the prison rises to extremely high levels, "prison officials have
8 a right and a duty to take steps to reestablish order in a prison
9 when such order is lost. This is for the benefit of the prisoners
10 as much as for the benefit of the prison officials." Id., at 1069,
11 quoting Farmer, 511 U.S. at 832-833; LeMaire, 12 F. 3d at 1462;
12 Hoptowit, 682 F.2d at 1259.

13 Prison officials may be faulted for erring on the side of
14 caution by maintaining a lockdown for longer than necessary. "But
15 when it comes to matters of life and death, erring on the side of
16 caution is a virtue." Norwood, 591 F.3d at 1069.

17 Here, the record is clear that on September 7, 2005,
18 Plaintiff had a temporary "Accommodation Chrono," which allowed him
19 to wear soft shoes, due to his callous condition. It is also clear
20 that under the restrictions imposed by the lockdown, Plaintiff was
21 only permitted to wear shower shoes when he was outside of his cell.
22 This restriction was imposed because inmates could secrete weapons
23 in their shoes. When Plaintiff asked Bass if he could wear his
24 tennis shoes when he exited his cell, Bass asked his supervisor if
25 Plaintiff's Accommodation Chrono exempted him from the lockdown
26 restriction. Bass was told that the Accommodation Chrono did not
27 overrule the lockdown restriction and that for security reasons,
28 Plaintiff could not wear his tennis shoes. Further, the record is

1 clear that on other occasions, Plaintiff and at least one other
2 inmate with an Accommodation Chrono which allowed them to wear soft
3 shoes, were allowed to exit their cells wearing soft shoes, after
4 their shoes were searched.

5 Although Plaintiff claims that he suffered cruel and unusual
6 punishment and deliberate indifference to his medical needs in being
7 prohibited from wearing his soft shoes on one particular day,
8 September 7, 2005, Bass argues that Plaintiff's callous condition
9 was not so severe nor was Plaintiff required to perform activities
10 in which he had to place significant pressure on the center-bottoms
11 of his feet. Specifically, Bass claims that preventing Plaintiff to
12 wear soft shoes on one occasion does not satisfy the objective
13 component of an Eighth Amendment violation.

14 However, under the circumstances of this case and Ninth
15 Circuit precedent, the Court finds evidence in the record sufficient
16 to create genuine issues of fact as to whether disallowing Plaintiff
17 to wear soft shoes during the lockdown, when he had an Accommodation
18 Chrono for soft shoes, and had been allowed to wear soft shoes
19 during other times when the prison was on lockdown, meets the
20 objective standard required to support an Eighth Amendment viola-
21 tion. The Court has not been presented with any explanation why, on
22 September 7, 2005, while Plaintiff's cell was searched, he could not
23 wear his tennis shoes after the shoes were searched by a correc-
24 tional officer.

25 2. Subjective Requirement

26 However, in order to avoid summary judgment, Plaintiff must
27 also show there are triable issues as to the Eighth Amendment's
28 subjective requirement. Farmer, 511 U.S. at 834. In this regard, the

1 Court finds no evidence in the record to support Plaintiff's claim
2 that Bass' refusal to allow Plaintiff to wear his soft shoes while
3 his cell was searched was the result of Bass' "deliberate indiffer-
4 ence." Farmer, 511 U.S. at 835; Lopez, 203 F.3d at 1133. The
5 evidence before the Court shows that Bass did not know that
6 Plaintiff's walking the short distance from his cell to the dayroom
7 would cause Plaintiff to suffer an excessive risk to his health.
8 Further, Bass did not disregard any risk to Plaintiff's health.
9 Instead, the contrary is true. He asked his supervisor whether
10 Plaintiff's Accommodation Chrono exempted Plaintiff from the
11 lockdown restriction that Plaintiff wear shower shoes when he exited
12 his cell. He was instructed that Plaintiff had to wear his shower
13 shoes when he exited his cell. Bass complied with his orders, which
14 he had no discretion to disregard.

15 As noted above, determinations such as how to best protect
16 inmates from violence "are delicate ones, and those charged with
17 them must be given reasonable leeway." Hayward, 629 F.2d at 602.
18 Therefore, prison officials are afforded wide-ranging deference in
19 making these determinations. Norwood, 591 F.3d at 1069.

20 Defendants have demonstrated as a matter of law that Bass did
21 not violate Plaintiff's Eighth Amendment rights. Therefore, the
22 Court finds no genuine issue of material fact to show that Bass
23 acted with "deliberate indifference" to Plaintiff's health in
24 disallowing Plaintiff to wear soft shoes, necessary to support an
25 Eighth Amendment violation. See Farmer, 511 U.S. at 835; Estelle,
26 429 U.S. at 104.

27 Accordingly, Bass is entitled to summary judgment as a matter
28 of law. Celotex, 477 U.S. at 322-324; Anderson, 477 U.S. at 256;

1 Berg, 794 F.2d at 459.

2 5. Qualified Immunity

3 Since the Court has found no violation of Plaintiff's Eighth
4 Amendment rights, the Court need not reach any issues regarding
5 qualified immunity. "The better approach to resolving cases in which
6 the defense of qualified immunity is raised is to determine first
7 whether the plaintiff has alleged the deprivation of a constitu-
8 tional right at all." See County of Sacramento v. Lewis, 523 U.S.
9 833, 841, n. 5 (1998). "If no constitutional right would have been
10 violated were the allegations established, there is no necessity for
11 further inquiries concerning qualified immunity." Saucier v. Katz,
12 533 U.S. 194, 201 (2001).

13 III

14 CONCLUSION AND ORDER

15 For the reasons set forth in this Order, the Court hereby
16 GRANTS Defendants' Motion for Summary Judgment pursuant to Fed. R.

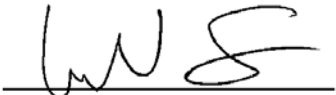
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23 Civ. P. 56.

24 The Clerk shall enter judgment for Defendants and close the
25 file.

26 IT IS SO ORDERED.

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28 DATED: September 29, 2010

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Hon. William V. Gallo
U.S. Magistrate Judge