United States Court of Appeals,
Ninth Circuit.

Charles E. BYRD, Plaintiff-Appellant,
v.
MARICOPA COUNTY SHERIFF'S DEPARTMENT, et al., Defendants-Appellees.
No. 07-16640.
January 23, 2008.

Appeal from District of Arizona (Phoenix)

Replacement Opening Brief

Jarrett A. Green (SBN 237443), 300 South Grand Avenue, Suite 3400, Los Angeles, California 90071, Telephone: (213)687-500, Facsimile: (213)687-5600, Attorney for Appellant.

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STATEMENT OF JURISDICTION

The District Court had jurisdiction over Mr. Byrd's § 1983 claim pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Mr. Byrd is appealing from the final judgment of the District Court, which disposed of all of Mr. Byrd's claims and which was entered August 17, 2007. Mr. Byrd filed a timely Notice of Appeal on September 6, 2007.

STATEMENT OF THE ISSUES

The primary issues presented by this appeal are:

(1) Whether the search of Charles E. Byrd, a pretrial detainee, was unreasonable under the Fourth Amendment where he was stripped down to his pink underwear and then subjected to a search by a female in civilian clothing (wearing blue jeans, a white t-shirt and no name badge or any other items indicating that she was not an average civilian) who was a cadet in training to become a prison officer, in which she made intimate contact, through Mr. Byrd's underwear, with Mr. Byrd's testicles, perineum and inner crack of his buttocks, notwithstanding that numerous male officers were standing 10 feet away and perfectly available to conduct the search.

(2) Whether the partial strip search violated Mr. Byrd's substantive due process rights as a pretrial detainee.

(3) Whether the facially discriminatory search policy and resulting search of Mr. Byrd violated Mr. Byrd's right to equal protection.

(4) Whether the jury verdict must be vacated and a new trial granted based on the Appellees' destruction of critical evidence, and the District Court's failure to correct the prejudice to Mr. Byrd.

STATEMENT OF THE CASE

Charles E. Byrd ("Mr. Byrd"), a then-detainee at Durango Jail in Maricopa County, Arizona, originally filed this lawsuit *pro se* on November 26, 2004, in the United States District Court for the District of Arizona. Mr. Byrd's lawsuit challenged the legality of a search he was subjected to at Durango Jail on October 28, 2004, and asserted a claim pursuant to 42 U.S.C. § 1983 based on alleged violations of his constitutional rights (i) to be free from unreasonable searches, (ii) to be free from cruel and unusual punishment (or to be accorded due process of law as a pretrial detainee) and (iii) to be accorded equal protection under the law. Mr. Byrd's lawsuit named Sheriff Joseph Arpaio ("Sheriff Arpaio"), Captain Austin Peterson ("Captain Peterson") and Cadet Kathleen O'Connell ("Cadet O'Connell") as defendants. Mr. Byrd sought compensatory and punitive damages for the alleged violations of his rights.

The case proceeded before District Court Judge Neil V. Wake (the "District Court"). On June 14, 2005, Mr. Byrd filed a First Amended Complaint, which remained the operative complaint throughout the proceedings. (EOR, Tab 28.) The County filed a motion for summary judgment on January 18, 2007.[FN1] (EOR, Tab 25.) On May 30, 2007, the District

Court granted, in part, and denied, in part, the County's motion for summary judgment. (EOR, Tab 6.) The District Court granted the motion with respect to Mr. Byrd's prayer for emotional damages, but denied the motion with respect to the viability of Mr. Byrd's underlying claims for the allegedly unreasonable search and the allegedly cruel and unusual punishment he endured. *(Id.)* In its Order on summary judgment, the District Court *sua sponte* dismissed Mr. Byrd's equal protection claim. *(Id.)* On June 13, 2007, in anticipation of trial, the District Court appointed Louis Daniel Lopez, Jr., and Stephen P. Brower of Fennemore Craig PC as pro bono counsel. (EOR, Tab 22.)

> FN1. It is worth noting that qualified immunity is not at issue in this case, since the County waived that defense below. (Transcript, EOR 106.) Thus, this Court need only determine whether Mr. Byrd's constitutional rights were violated, not whether those rights were "clearly established" at the time of the violation.

The case proceeded to trial. Four witnesses testified during the trial: Mr. Byrd, Cadet O'Connell, Captain Peterson and Sheriff Arpaio.[FN2] At the close of all evidence, both parties verbally moved for a directed verdict regarding the constitutionality of the search. (Transcript, EOR 355:21-406:13.) The District Court ruled that the search at issue was constitutional, as a matter of law, and accordingly granted the County's motion for a directed verdict and denied that of Mr. Byrd. (Transcript, EOR 391:11-406:13.) Three limited questions were presented to the jury, and the jury found against Mr. Byrd on the three issues. (Jury instructions, EOR 80:11-81:4; Jury verdict, EOR 77-78.)[FN3]

> FN2. The District Court denied the County's last-minute attempt to add witnesses that were not disclosed to Mr. Byrd on or before the Magistrate Judge's mandatory deadline for disclosing such witnesses. (*See* Transcript, EOR 731:14-22; 735:9-17.)

> FN3. The manner in which the constitutional questions were resolved below was procedurally unorthodox, but what follows is Mr. Byrd's most succinct summary. The District Court's constitutional holding on the cross-motions for directed verdict basically constituted its ruling on the legality of the search assuming the jury would find against Mr. Byrd on the three limited issues presented to it. Moreover, the District Court believed that if the jury found in favor of Mr. Byrd on any of the three issues, the search would violate Mr. Byrd's constitutional rights (which Mr. Byrd and the County agreed with). However, Mr. Byrd's position below (which did not prevail) and on appeal is that even assuming the facts as resolved by the jury, the search was nonetheless unconstitutional. This is one of the primary issues on appeal.

Judgment was entered against Mr. Byrd on August 17, 2007. (EOR, Tab 8.) Mr. Byrd's pro bono counsel withdrew as counsel-of-record on August 27, 2007. On September 6, 2007, Mr. Byrd filed pro se a Notice of Appeal and an informal opening brief. (EOR, Tab 7.) On October 3, 2007, Jarrett A. Green took on Mr. Byrd's appeal pro bono, and filed a motion to, among other things, have the case placed in the Ninth Circuit Pro Bono Program, which this Court granted on November 16, 2007.[FN4]

> FN4. Because the issues on appeal turn on the specific facts and circumstances developed during trial, as well as on the many oral rulings the District Court issued along the way, Mr. Byrd believed it was necessary to include all four days of transcripts in the Excerpts of Record. Consequently, the Excerpts of Record are rather lengthy.

STATEMENT OF FACTS

Appellant Charles E. Byrd

At the time of the search at issue, Charles E. Byrd ("Mr. Byrd") was a pretrial detainee being temporarily held in Durango Jail in Phoenix, Arizona. Durango Jail is a minimum security jail (not prison) which houses mostly pretrial detainees. (O'Connell, EOR 650:6-8; Byrd, EOR 599:9-15.) Mr. Byrd was being held in Durango Jail for illegally presenting his brother's license, rather than his own, to a police officer when he was pulled over for speeding. (Byrd,

EOR 575:14-576:13.) At the time he was pulled over, Mr. Byrd's license was suspended and, in an attempt to avoid a citation for driving with a suspended license, Mr. Byrd presented his brother's license as his own to the officer. *(Id.)* Mr. Byrd ultimately was charged with and pled guilty to identity theft for this act. (*Id.* After pleading guilty, Mr. Byrd was transferred from Durango Jail to the Arizona State Prison Complex, Alhambra Complex Baker Unit. Mr. Byrd continues to serve time in that prison, and is scheduled to be released in approximately 2010.[FN5]

FN5. Mr. Byrd has no history of violence and has had no disciplinary problems or "write-ups" of any kind while in jail or prison. (Byrd, EOR 598:18-599:8.)

Appellees O'Connell. Peterson and Arpaio

Mr. Byrd filed suit against Cadet O'Connell - the cadet who performed the search on him; Captain Peterson - the Commander of the Durango Jail following the search at issue; and Sheriff Arpaio - the Sheriff of Maricopa County and, by law, the elected official responsible for overseeing the Maricopa County jail and prison system.[FN6] (Arpaio, EOR 206:11-16.) Sheriff Arpaio is the self-proclaimed "toughest sheriff in America" and the infamous author of many of the most controversial jail and prison policies in America.[FN7] The Apellees are collectively referred to as the "County" throughout this brief.

FN6. Although Cadet O'Connell is now an officer, she was a cadet at the time of the search at issue in this lawsuit. Accordingly, she is referred to hereinafter as "Cadet O'Connell."

FN7. For example, Sheriff Arpaio has drawn a great deal of national attention for reinstituting chain gangs, creating the first ever female and juvenile chain gangs, requiring all male detainees and inmates in his jails and prisons to wear pink underwear, banning salt and pepper from his jails and prisons, and reducing the number of meals prisoners receive from three to two per day.

The Search At Issue

The search at issue occurred in Durango Jail on October 28, 2004, when Mr. Byrd was a pretrial detainee.[FN8] On that day, Mr. Byrd was laying on his bed reading a book when numerous Special Response Team ("SRT") officers burst into Mr. Byrd's cell with their laser-directed taser and pepper guns drawn, and demanded that he and the other detainees in his pod strip down to their underwear.[FN9] (Byrd, EOR 580:4-583:14.) The officers' demands that Mr. Byrd remove his clothes were accompanied by continual orders to "shut the fuck up." *(Id.)* Doing as he was told, Mr. Byrd stripped down to his pink underwear (which Defendant Arpairo requires all male detainees and inmates in Maricopa County jails and prisons to wear), and then was ordered to leave his pod and walk into the multipurpose room (aka, the "day room") - a large open common area in the Durango Jail. *(Id.)* Mr. Byrd followed the orders and entered the multipurpose room wearing nothing except his pink underwear. *(Id.)* The underwear he and the other detainees were wearing had an open slit in the front and no buttons. (Byrd, EOR 581:8-11; O'Connell, EOR 657:7-658:2.)

FN8. As explained above, Mr. Byrd's recanting of the facts (and his corresponding legal arguments) assume the accuracy of the jury's findings on the three issues presented to it.

FN9. A "pod" is a collection of small jail cells in a discrete area. The main jail areas included Mr. Byrd's two-man cell, his pod (which included numerous other two-man cells) and the multipurpose room. (Byrd, EOR 576:21-577:8.)

The multipurpose room was populated with approximately 25-35 uniformed prison officers and people in civilian clothing, wearing blue jeans and white t-shirts. (O'Connell, EOR 650:13-651:2; O'Connell, EOR 277:12-16; Byrd, EOR 581:16- 582:15.) None of these civilian-clad individuals wore name badges or any other items indicating they were affiliated with the prison system. (O'Connell, EOR 651:23-652:9.) Mr. Byrd would later find out (after con-

ducting his own inquiry) that the civilian-clad individuals were cadets in training to become prison officers. (Byrd, EOR 597:9-16.) None of these civilian-clad individuals were actual prison officers. *(Id.)* At no time prior to or during the search did anyone explain to Mr. Byrd or to the other detainees who these civilian-clad individuals were, what they were doing there, or that they were in any way affiliated with the Maricopa County prison system. (*Id* 582:11-15; 583:3-584:1.)

At that time, the cadets were at the final stage of their training Academy to become officers. That day the cadets were brought over from their off-site training facility for purposes of conducting these searches. (O'Connell, EOR 639:18-640:3.) As Captain Peterson explained, it is standard practice for a class of cadets to be taken to Durango Jail and given an opportunity to practice this sort of search as a final component of their training at the cadet Academy. (Peterson, EOR 349:15- 20.)[FN10]

> FN10. Far from the an isolated incident, the manner in which Mr. Byrd was searched was consistent with the County's well-established policy and practice of en masse partial strip searches conducted by cadets at the Durango Jail. (Peterson, EOR 344:4-7; 349:15-20; Frye Affidavit, EOR 793-94.)

After entering the multipurpose room, Mr. Byrd lined up as ordered. The taser and pepper guns remained pointed at Mr. Byrd from a very close distance, and the officers controlling these guns repeatedly yelled that he (and the other detainees) better "shut the fuck up" and not move or speak. (Byrd, EOR 580:6-583:14; 585:23-25.) Although adamantly wanting to know what "civilians" were doing there (*id* 581:16-583:14; 608:10-609:1), Mr. Byrd knew that if he asked a question or said a word, he would be shot with a taser gun or pepper spray (as he had seen the officers do in the past to detainees who did not follow similar orders). (*id* 581:3-7.) Fearful of a physical retaliation by the officers, Mr. Byrd remained silent. (*Id.*)

The SRT officers then yelled that he raise his arms above his head and spread his legs. (*Id.* 583:8-14.) Then one of the females in civilian clothing, Cadet O'Connel, approached Mr. Byrd and began searching him - again without identifying herself as a cadet or as someone affiliated with the correctional system. (*Id.* 583:3-585:25.) Cadet O'Connell's search was highly invasive. She positioned herself behind Mr. Byrd and ran her hands up his inner thigh (on top of his underwear, rather than underneath it), until she made contact with the point where Mr. Byrd's thigh met his groin area.[FN11] (O'Connell, EOR 636:20-637:23; 638:20- 639:13; 678:19-682:10; 683:7-684:5; 687:19-688:19.) She then used her hand to lift Mr. Byrd's testicles and move them to the side, at which point she felt the skin underneath the testicles and ran her hand along Mr. Byrd's perineum (i.e., the patch of skin connecting the scrotum and anus) (Id.) She next inserted her hand in between Mr. Byrd's buttocks cheeks, and ran her hand upward along the crack. *(Id.)* Upon reaching the top of Mr. Byrd's buttocks, Cadet O'Connell pulled the waistband of Mr. Byrd's underwear out 3-4 inches from Mr. Byrd's waist, to ensure no contraband was located in that area. (*Id;* Byrd, EOR 585:10-18.) During the search, Cadet O'Connell (and the other cadets) wore white latex gloves (Byrd, EOR 583:12-14; 584:6-11; O'Connell, EOR 698:2-10), a prudent decision considering the intimate contact with Mr. Byrd's (and the other detainees') testicles, perineum and inner buttocks.

> FN11. All of the contact Cadet O'Connell made with Mr. Byrd's genital region was through his underwear, rather than underneath it. As Cadet O'Connell made clear at trial, the underwear fabric was a "very thin material" and, hence, very easy to feel through. (*Id.,* 684:20-23.)

Various other factors further exacerbated the humiliation, anxiety and discomfort Mr. Byrd experienced during this invasive search. The search was performed without any regard for Mr. Byrd's privacy, as the search was conducted in a large open room in view of over 100 people (numerous of whom were women). (Byrd, EOR 596:11-15.) Further, Officer O'Connell - a female *and* non-officer was selected to perform the search, notwithstanding that numerous *male officers* were in the room witnessing the search and perfectly available to conduct the search. (O'Connell, EOR 277:12-16.) Further still, the search of Mr. Byrd and the other detainees was videotaped and an excerpt of the footage from that day (not including Mr. Byrd) was edited into the "Video Yearbook" distributed to the cadets upon completion of the Academy, which served as a memento of their various experiences over the course of the Academy.[FN12]

(Byrd, EOR 602:15-603:4; 605:5- 21.) As will be discussed more thoroughly below, the County failed to produce the unedited footage of the video recordings from that day, claiming that it must have been destroyed pursuant to the County's document "retention" policy.

> FN12. Mr. Byrd testified that the search by Cadet O'Connell was additionally humiliating and offensive because Mr. Byrd was sexually assaulted by women when he was a boy. (*Id.,* EOR 600:9-602:2.)

Ultimately, the search of Mr. Byrd yielded no contraband. (Byrd, EOR 598:18-599:8.) Furthermore, there is no evidence in the record that any contraband was uncovered by any of the searches that day. Nonetheless, Mr. Byrd felt terribly humiliated, degraded and violated by the search and, unfortunately, he continues to struggle with those feelings. (*Id,* EOR 598:7-17; 602:3-10.) Mr. Byrd filed an "Inmate Grievance Form" immediately that very day. (Byrd, EOR 597:14-16.) He then filed additional "Inmate Grievance Forms" in subsequent weeks. (Documents attached to Plaintiffs opposition to motion for summary judgment, EOR 810-818 (copies of all four grievances).) Ultimately, Mr. Byrd filed a *pro se* complaint in the United States District Court for the District of Arizona.

The County's Invocation Of The General "Security" Justification

Considering that all 90 detainees were searched by cadets who were going through training to become officers (O'-Connell, EOR 696:23-697:2), one might have assumed that the justification for the October 28, 2004 searches was to train the cadets. Indeed, in its motion for summary judgment, the County explained, "[Cadet] O'Connell conducted the frisk (body) search of Plaintiff in accordance with MCSO policy DH-3; in the presence of her supervisor, Captain Peterson; and in the process demonstrated and instructed detention officers in the proper manner in which to conduct such a search for contraband." (*Id.,* EOR 833-34.) However, in denying the County's motion for summary judgment on Mr. Byrd's claim under the Fourth Amendment, the District Court held that "[s]earches must be otherwise justified by security needs" (citing Ninth Circuit precedent), and concluded that the County failed to provide evidence that the October 28, 2004 search was justified by security needs, rather than training needs. (Order, EOR 64.)[FN13]

> FN13. Indeed, the notion that an invasive and humiliating search, such as the one endured by Mr. Byrd on October 28, 2004, could have been conducted for purposes of training the cadets would be deeply troublesome. Using a jailed or imprisoned person as the object of an educational exercise reeks of exploitation and degradation. It should be self-evident to all correctional authorities that pretrial detainees and convicted inmates are not guinea pigs to be used for educational exercises. *See* Demery v. Arpaio, 378 F.3d 1020, 1032 (9th Cir. 2004) ("[I]nmates are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others.") (quoting Houchins v. KQED, Inc. 438 U.S. 1, 5 n.2 (1978)).

Interestingly, after the District Court issued its Order stating that searches must be conducted for security purposes, the County quickly changed its tune and for the remainder of the litigation, adamantly asserted that its only justification for the October 28, 2004 search - like every such performed by the County - was to maintain institutional *security* within the Durango Jail. For example, the County filed a motion for reconsideration of the Order on summary judgment, in which the County attempted to prove to the Court that the search was done for security, rather than training, purposes. *(Id.* EOR, Tab 21.) In its motion for reconsideration, the County bluntly stated: "Lt. Frye established that if this [the type of search conducted on October 28, 2004] is done, it is done for security purposes." *(Id.* EOR 800.) In its Addendum to the statement of facts in support of its motion for reconsideration, the County summarized the new affidavits it submitted as establishing that: "The pat search of Mr. Byrd and the cell search performed on October 28, 2004 in Durango Jail was performed for security purposes to search for contraband and/or weapons, as part of the regular pat searches and cell searches for contraband and/or weapons that are performed in the facility when staffing permit it to be done and security interests require it be done." *(Id,* EOR 786.)[FN14] Throughout the remainder of the proceedings before the District Court, including throughout the trial, the County repeatedly and consistently asserted that the sole purpose of the challenged search was to maintain security at Durango Jail. *(See,e.g.,* Final pretrial order, EOR 44:16-26 (County asserts that the search was conducted for purposes of security); Arpaio, EOR 259:17-21;

213:18-22.)

FN14. Incidentally, the County's motion for reconsideration was denied. (Order, EOR, Tab 19.)

SUMMARY OF ARGUMENT

The October 28, 2004 search violated Mr. Byrd's right to be free of unreasonable searches and his right to due process of law. Balancing the scope, manner, location and justification of search distinctly illustrates the unreasonableness of the search. Moreover, the unreasonableness of the search is illuminated by the inescapable conclusion that the manner in which it was performed was wholly unrelated to the asserted governmental interest underlying the search. Furthermore, by acting with deliberate indifference to Mr. Byrd's severe pain and suffering, the County violated Mr. Byrd's right to due process. The District Court's rulings to the contrary must be reversed.

In addition, Mr. Byrd's equal protection rights were violated by the County's search policy, which facially discriminates on the basis of gender. In *sua sponte* dismissing Mr. Byrd's equal protection claim, the District Court erroneously failed to construe Mr. Byrd's *pro se* complaint liberally and inexcusably ignored the facially discriminatory policy that was in the record. The District Court's dismissal of that claim must be reversed.

Lastly, this Court should vacate the jury verdict and order a new trial. The County's patently illegal document "retention" policy caused the destruction of the most critical piece of evidence in this case - *i.e* the unedited video footage of the cadets' October 28, 2004 visit to Durango Jail. The District Court compounded the prejudice to Mr. Byrd by failing to take corrective action and then by permitting the County to introduce the highly prejudicial and misleading "Video Yearbook" into evidence. This District Court's abuse of discretion warrants a new trial.

16ARGUMENT

I. THE SEARCH OF MR. BYRD WAS UNREASONABLE UNDER THE FOURTH AMENDMENT[FN15]

FN15. This Court reviews findings of fact for clear error, but reviews the resolution of constitutional issues *de novo*. *See* Valley Bank of Nev. V. Plus Sys. Inc., 914 F.2d 1186, 1189 (9th Cir. 1990); Michenfelder v. Sumner, 860 F.2d 328, 331 (9th Cir. 1988).

In Turner v. Safley, 482 U.S. 78 (1987), the United States Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.*, 482 U.S. at 89. In an earlier case, Bell v. Wolfish, 441 U.S. 520 (1979), which was cited with approval by *Turner,* the Supreme Court established the test for assessing the reasonableness of a search under the Fourth Amendment in the jail and prison context. In *Bell,* the Court explained:

The test for reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id., 441 U.S. at 559. *Bell's* four-factor test is regularly applied in assessing the reasonableness of searches of pretrial detainees in the jail context and of convicted inmates in the prison context. *See, e.g.,* ***17***Way v. County of Ventura,* 445 F.3d 1157, 1160-62 (9th Cir. 2006) (applying *Bell* in the jail context); Michenfelder v. Sumner, 860 F.2d 328, 332-33 (9th Cir. 1988) (applying *Bell* in prison context).

Applying *Bell's* four-factor test to the search of Mr. Byrd establishes its unreasonableness.

Manner

The manner in which the search was performed on Mr. Byrd clearly favors a holding of unreasonableness. Notwithstanding that numerous male officers were standing 10 feet away during the search of Mr. Byrd (and during the search of the other 90 detainees), the County instead decided to have a female non-officer dressed in blue jeans and a white t-shirt (and no identification whatsoever) approach Mr. Byrd and very intimately search his genitalia. Nobody provided Mr. Byrd (or any other detainee) an explanation of who Cadet O'Connell and the other civilian-clad individuals were, what they were doing there, or that they were in any way affiliated with the Maricopa County prison system. Instead, the SRT officers continually yelled at the detainees to "shut the fuck up" and not ask any questions, while pointing laser-directed taser and pepper spray guns at their bodies.

As Cadet O'Connell openly testified, there were numerous uniformed SRT officers, uniformed academy training officers and other uniformed officers lined up on the wall just 10 feet away, observing the search. The vast majority of these officers were male. Although these male officers were present and perfectly ***18** available to conduct the searches, Cadet O'Connell was selected to conduct the search of Mr. Byrd. In fact, all 90 detainees were searched by civilian-clad cadets. The uniformed officers did nothing except watch the search from the wall.[FN16] Subjecting Mr. Byrd to a search by a female non-officer in civilian clothing, while simultaneously depriving him of an explanation of what was occurring, demanding that he shut up and not ask any questions, and threatening him with taser and pepper guns if he asked any questions, was patently unreasonable. To make matters worse, Mr. Byrd was videotaped during the process, by an individual who videotaped many of the cadet's training experiences for purposes of creating a "Video Yearbook" that was distributed to the cadets upon graduating from the Academy. Being videotaped in one's underwear (for purposes entirely unrelated to security) while a stranger in civilian clothing is intimately touching one's testicles and other private parts is quintessentially offensive and unreasonable. Accordingly, the "manner" factor clearly favors a finding of unreasonableness.

> FN16. The fact that numerous male officers were present and available to conduct the search strongly supports the unreasonableness of the search. *See* *Moore v. Carwell*, 168 F.3d 234, 237(5th Cir. 1999) (denying motion to dismiss Fourth Amendment claim based on strip search conducted by female officer where inmate alleged "male officers were available to conduct the searches").

Scope

The scope of the search was highly invasive. First of all, Mr. Byrd was forced to strip down to his pink underwear. The fact that Sherriff Arpaio requires ***19** all men in the Maricopa County jail and prison system to wear pink underwear is obviously intended to emasculate and humiliate them, and is directly relevant to the constitutionality of the search of Mr. Byrd. Forcing grown men to wear pink underwear, and then forcing them to strip down to that underwear in order to be viewed and intimately searched by women (especially women who appear to be civilians) is simply offensive and unreasonable. Further, the pink underwear worn by the detainees has an opening in the front but no buttons to prevent the risk of exposing their genitalia.

As Cadet O'Connell repeatedly testified, the fabric of the underwear was extremely thin, which allowed her to feel through it with great ease. Through this extremely thin fabric, Cadet O'Connell made intimate contact with Mr. Byrd's genitalia and private parts. She ran her hand up the inside of Mr. Byrd's thighs until she touched the point where his inner thighs met his groin. Next she used her hand to lif Mr. Byrd's testicles and move them to the side, before using her other hand to touch the skin underneath Mr. Byrd's testicles. She then moved her hand along Mr. Byrd's perineum (the patch of skin connecting the scrotum and anus). Then she ran her hand up the inside of his buttocks cheeks, feeling for any possible contraband. Upon reaching the top of his buttocks, Cadet O'Connell pulled the waistband of Mr. Byrd's underwear about three to four inches from his skin, to ensure that no contraband was located in that area. Cadet O'Connell wore white ***20** latex gloves during the search, further evidencing the deeply intimate contact she made with Mr. Byrd's genitalia and private parts.

Simply put, the scope of the search was highly invasive. The invasiveness of this search is not easily distinguishable from a more traditional strip search (where the detainee is fully stripped but never touched). Indeed, there does not appear to be an obvious difference in invasiveness between a search where the detainee is full stripped but not physically touched, and a search in which the detainee is stripped down to his thin underwear and then slowly and methodically touched in his most intimate parts. *See* *Sterling v. Cupp*, 607 P.2d 206, 208 (Or. App. 1980) (describing a traditional strip search and subsequently explaining that a "prisoner is equally entitled to be free from the tactile equivalent of the nude inspection, viz., manual examination of the anal-genital area through clothing"); *Justice v. City of Peachtree*, 961 F.2d 188, 191 (11th Cir. 1992) ("We accept as axiomatic the principle that people harbor a reasonable expectation of privacy in their 'private parts.... [D]eeply imbedded in our culture is the belief that people have a reasonable expectation not to.have their 'private' parts observed or touched by others.") (emphasis added) (citations omitted). An invasion occurs where a detainee is fully stripped and his genitalia is visually inspected, and also ***21** where he is stripped to his underwear and his genitalia is manually inspected. As the expression goes, "there's more than one way to peal an orange."[FN17]

> FN17. This Court has consistently recognized that strip searches devoid of physical contact are deeply intrusive and humiliating - particularly where they are conducted by persons of the opposite sex. *See, e.g.,* *Way v. County of Ventura*, 445 F.3d 1157, 1160 (9th Cir. 2006) ("The scope of the intrusion [with a strip search] is indisputably a frightening and humiliating invasion, even when conducted with all due courtesy. Its intrusiveness cannot be overstated.") (citation omitted); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity."). That recognition should apply with equal force to the search of Mr. Byrd.

In a transparent resort to euphemism, the County - throughout the proceedings below - referred to the search of Mr. Byrd as a "frisk" or "pat-down" search. *(See, e.g.,* Defendants' Motion for summary judgment, EOR, Tab 25; Transcript, 96:19-23.) Of course, the County's false label cannot muddle the undisputed facts. Mr. Byrd was stripped down to his underwear, and his genitalia was slowly and methodically touched. It is not as if he were given a brief "swipe" or "brush" across his groin area while fully clothed.[FN18] The search of Mr. Byrd was fundamentally distinguishable from a routine pat-down search that includes the groin region. *See* *Jordan v. Gardner*, 986 F.2d 1521, 1533 (9th Cir. 1993) (Reinhardt, J., concurring) (rejecting prison's argument that the fully-clothed ***22** searches were "pat searches," since the evidence "reveal [s] that the searches involve nothing so delicate or so tentative as 'patting. Rather, the searches are intimate and deeply invasive."); *Compare with* *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir. 1985) (upholding routine pat-down searches that fundamentally differ from the search of Mr. Byrd: "These searches are done *briefly* and while the inmates are fully clothed, and thus do not involve *intimate contact* with the inmates' bodies."). As Cadet O'Connell acknowledged on the witness stand, "[w]hether you are prepared for it or not, to have somebody search near your genitals is always going to be a shocking feeling." (O'Connell, 634:8-10.)

> FN18. Anybody who has been subjected to a "pat-down" or "frisk" search (whether at the airport, entering a prison or elsewhere) knows that the search of Mr. Byrd was nothing of the sort.

Moreover, this Court (and others) have recognized the invasiveness of searches in which individuals are forced to remove some - but not all - of their clothing, and have suggested that such searches amount to strip searches. *See* *Edgerly v. San Francisco*, 495 F.3d 645, 657 (9th Cir. 2007) (holding that if the detainee was in fact stripped down to his undergarments but not physically touched, the visual inspection would qualify as a "strip search" for purposes of detainee's § 1983 claim); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415-16 (9th Cir. 1992) (stating that officer's inspection of parolee while she was "partially unclothed" on the toilet would clearly violate the California Department of Corrections' prohibition against cross-gender "unclothed" searches); *see also* *Crowe v. County of San Diego*, 359 F. Supp. 2d 994, 1021 (S.D. Cal. 2005) (where plaintiff was ***23** asked to remove all of his clothes other than his underwear, court assumes, without analysis, that search was a "strip search" before analyzing issue of consent).[FN19]

FN19. In its motion for summary judgment, the County cited a Washington statute that defines a "strip search" as a search requiring the detainee to remove "some or all" of his clothing. (*Id.,* EOR 835.) By defining "strip" search to include a search where the detainee removes *"some"* (but not *all*) of his clothing, the County's own authority undermines its argument that the search of Mr. Byrd was a "frisk" search, rather than a "strip" search. Moreover, the search policy at issue in our case (Policy DH-3) is consistent with this definition. Policy DH-3 requires that a "frisk" search be performed on the "clothed body" of the inmate, with the caveat that "[t]he inmate's shoes and socks may be removed during the process." (*Id,* EOR 855.) Thus, Policy DH-3 unambiguously states that if the inmate is required to remove more than just his shoes and socks, the search is *not* a "frisk" search.

The search endured by Mr. Byrd was invasive, regardless of the label ascribed to it. Officer Peterson put it well when asked if he ever walked around in public in just his underwear: "No. I would get arrested." (Peterson, EOR 341:4-6.)[FN20] Mr. Byrd was stripped down to his pink underwear and then intimately touched in his most private parts. The invasive scope of the search weighs in favor of unreasonableness.

FN20. Interestingly, the official policy at Durango Jail prohibits detainees from leaving their cells or entering the common areas unless they are fully clothed. Walking around the common area wearing just their pink underwear would be a clear violation of jail policy. (Byrd, EOR 599:16-25; O'Connell, EOR 656:18- 657:6.)

Place

This factor also favors unreasonableness, since the search of Mr. Byrd was conducted in the least private location possible: A large open area in the presence ***24** of over 100 people - inmates, officers and cadets (numerous of whom were women). *See* *Polk v. Montgomery County,* 782 F.2d 1196, 1201 (4th Cir. 1986) ("The strip search of Polk may nor may not have been conducted in private. This fact is especially relevant in determining whether a strip search is reasonable under the circumstances."); *Craft v. County of San Bernadino,* 468 F. Supp. 2d 1172, 1176 (C.D. Cal. 2006) (granting detainee's motion for summary judgment on his Fourth Amendment claim and finding that the location of the search favored unreasonableness: "[T]he evidence of record reveals that [the jail officials] have taken no steps to conduct the [strip] searches on an individual basis and have instead continued to conduct the searches *en masse* without any attempt to limit the humiliation occasioned by conducting the searches in full view of dozens of other individuals."); *Bacon v. Kolender,* No. 05-0310, 2007 WL 2669541, at *7 (S.D. Cal. Sept. 6, 2007) (holding that the "place" factor "supports the unreasonableness of the searches" in light of the uncontroverted evidence that the strip searches were conducted "in the middle of the floor that was in the sight of female guards").[FN21]

FN21. *See also* *Way v. County of Ventura,* 445 F.3d 1157, 1161 (9th Cir. 2006) (finding jail strip search policy unreasonable under the Fourth Amendment but noting that the "place" factor favored reasonableness because "the search took place in a private room behind closed doors, with no one present but [the detainee] and [the officer]"); *Roberts v. Rhode Island,* 239 F.3d 107, 113 (1st Cir. 2001) (finding that the "place" factor cuts in favor of "reasonableness" because the challenged searches were "generally conducted in private").

***25 Justification**

Ever since its motion for summary judgment was denied, the County has been steadfast in its position that the sole justification for Mr. Byrd's (and similar) searches is jail security. While the goal of maintaining security in the Durango Jail by eliminating the flow of contraband among the detainees is no doubt legitimate in principle, at no point did the County support its general invocation of the "security" justification with specific evidence. For example, there is no evidence in the record indicating that there was a basis for believing that *any* of the detainees (much less Mr. Byrd) possessed contraband on October 28, 2004. Instead, the County cast as wide a net as possible, asserting that the October 28, 2004 search "must have been" justified by an interest in security, since such searches - as a matter of policy - are only conducted to enhance jail security. (Defendants' motion for reconsideration, EOR 800; Arpaio, EOR

259:17-21; Frye Affidavit, EOR 793- 74.)

It is also worth noting that the County's "security" concerns, although legitimate, are somewhat tempered here because: (1) Durango Jail is a *minimum* security jail - not prison - that primarily houses pretrial detainees; and (2) there is no evidence in the record indicating that this minimum security jail had any history ***26** of security problems. Logically, a government's invocation of the goal of maintaining "security" in a facility is more compelling where that particular facility either is a maximum security prison or has a documented history of security problems. Indeed, in analyzing the prison's "security" justification for the strip search in *Michenfelder,* 860 F.2d 328, this Court recognized:
The fact that Unit 7 [the facility at issue] houses the state's most difficult prisoners gives rise to a legitimate governmental security interest in procedures that might be unreasonable elsewhere. In addition, testimony and physical evidence before the district court substantiated several incidents in which contraband and homemade weapons were confiscated from Unit Seven inmates.

Id., 860 F.2d at 333; *see also Roberts,* 239 F.3d at 112 & n.6 ("[A] policy of searching all inmates is more reasonable when the record indicates a lengthy history of contraband problems... The lack of specific instances where a body cavity search was necessary to discover contraband supports a finding that the policy of searching all inmates is an unreasonable one.") (citations omitted). Thus, the "security" interest in this case is less compelling than in cases involving more threatening and dangerous facilities.

Importantly, the County has provided *no evidence* that the cross-gender nature of Mr. Byrd's search was justified by the government's interest in protecting the employment rights of its female officers (or cadets) or in avoiding administrative obstacles (e.g., altering the schedules of its employees in order to prevent cross-gender searches by staffing more males and less females when ***27** searches are to occur). Conversely, *all three* of the County's witnesses testified that they have *never* been involved in or even heard of an incident where a Maricopa County female officer's employment opportunities were hampered or restricted as a result of making accommodations to protect the privacy interests of male detainees or inmates. (O'Connell, EOR 670:17-671:12; Arpaio, EOR 211:1-18; Peterson, EOR 331:19-332:5.) Hence, accommodating Mr. Byrd (and the other detainees) by not subjecting them to cross-gender searches would neither restrict the employment rights of the female jail employees nor create administrative problems at the jail. The justification for the search of Mr. Byrd (and for cross-gender search policy, in general) is plain and simple: To maintain the institutional security of the Durango Jail.

In sum, *Bell's* four-factor test weighs decisively in favor of finding Mr. Byrd's search unreasonable under the Fourth Amendment. The scope, manner and place of the search all unquestionably favor unreasonableness. The final factor, the general "security" justification for the search, is present in the context of *every* jail ***28** and prison search, but often in a far more compelling way than it is here. On the balance, a finding of unreasonableness is clearly warranted.[FN22]

> FN22. While Mr. Byrd has framed the constitutional issue under the right to be free from unreasonable searches pursuant the Fourth Amendment, it can also be framed under the right to privacy imbedded in the Fourteenth Amendment. *See, Grummett,* 779 F.2d at 493-496; *Michenfelder,* 860 F.2d at 332-334.

Furthermore, the constitutionality of the search of Mr. Byrd must be inspected through the lens of *Turner v. Safely,* 482 U.S. 78 (1987), a case decided after Bell that conclusively articulated the test for determining the constitutionality of governmental conduct in the jail and prison context. *Id; see also Michenfelder* (applying *Turner* in analyzing the unreasonableness of a search in the prison context). In *Turner* the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89. In this way, the Supreme Court made clear that in assessing the constitutionality of governmental conduct in the prison context, courts cannot assess either the challenged conduct or the governmental interest in *isolation* instead, courts must analyze the *relationship* between these two components. Only where the two are "reasonably related" may the conduct be deemed constitutional. Where the challenged governmental conduct is not "reasonably related" to the asserted governmental interest, the challenged conduct is unconstitutional.

***29** Because the search of Mr. Byrd falls woefully short of being "reasonably related" to the asserted governmental interest, the search must be deemed unconstitutional. The County's asserted interest in maintaining "security" in the Durango Jail, although legitimate, was not advanced by the manner in which the search was conducted. Simply put, there was absolutely reason to have Mr. Byrd searched by a (i) female (ii) non-officer (iii) in civilian clothing. As the County has unambiguously stated, a plethora of (i) male (ii) officers (iii) in uniform were standing just 10 feet away and were perfectly available to conduct the search of Mr. Byrd (and the other detainees). Had the County elected to have these male officers conduct the search, the County's asserted interest in maintaining "security" within the Durango Jail would have been *equally* advanced. In fact, that interest would almost certainly have been *better* advanced, since actual officers would perform the searches with equal or better quality than would cadets. Moreover, had the male uniformed officers conducted the search, Mr. Byrd would have been spared of the severe humiliation and anxiety he endured as a result of being searched by Cadet O'Connell.[FN23] Therefore, by subjecting Mr. Byrd to a ***30** search by a female, non-officer in civilian clothing, the County simultaneously (1) caused Mr. Byrd severe humiliation and anxiety that could have been instantly avoided without causing the County *any* additional hardship or burden; and (2) failed to advance (and possibly hindered) its interest in maintaining security at Durango Jail. This is the epitome of governmental conduct that is not "reasonably related" to the asserted governmental interest.

> FN23. The County has also clarified that these en masse, cross-gender, underwear searches are only performed when there are a very large number of officers and cadets present in the jail. (Defendants motion for reconsideration, EOR 800; Frye Affidavit, EOR 793), and always with the cadets (not the officers) conducting the searches on the partially stripped detainees. (*Id* Consistent with this practice, Cadet O'Connell testified that all 90 detainees searched on October 28, 2004 were searched by the civilian-clad cadets, despite the presence and availability of the numerous officers.

Judge Reinhardt's concurrence in *Jordan* is instructive.[FN24] In applying *Turner's* "reasonable relation" test to the cross-gender search at issue, Judge Reinhardt explained that courts must consider:

> FN24. The majority held the cross-gender searches violated the Eighth Amendment and, hence, never addressed whether the Fourth Amendment was violated. Judge Reinhardt, although agreeing that the searches violated the Eighth Amendment, concluded that the searches were also violative of the Fourth Amendment. *See id.*, 986 F.2d at 1537.

> [W]hether the prison's actions are *reasonably* related to the interests it advances - to decide whether the connection between the policy and the prison's interests is reasonable or whether, in light of the effect of the policy upon the prisoners' constitutional rights, it reflects an overreaction....While legitimate concerns may justify a restriction, it is the particular restriction that must be justified by the *particular* problem at hand. For example, in Turner, the Court found that there were legitimate security concerns that justified placing reasonable restrictions upon the right to marry. However, it ultimately concluded that the particular regulation represented an exaggerated response to those security objectives. *Turner*, 482 U.S. at 97-98, 107 S.Ct. at 2266. Here, there are legitimate concerns that justify suspicionless searches; the question is whether the specific solution of having *male* guards perform the searches is reasonable... I conclude that the ***31** cross-gender searches and the prison policy authorizing them are clearly 'unreasonable.'

Jordan, 986 F.2d at 1537 (Reinhardt, J., concurring) (emphasis in original). Similarly, in our case, there are legitimate security concerns that justify searches of detainees at the Durango Jail; the question is whether the specific solution of having *female non-officers in civilian clothing* perform the searches is reasonable. Especially considering that numerous male uniformed officers were 10 feet away and perfectly available to perform the search, it was undoubtedly "unreasonable" for the County to respond in this way.[FN25]

> FN25. The *Turner* Court provided four factors that are relevant for determining whether a "reasonable relation" exists between the challenged governmental conduct and the asserted governmental interest: (1)

whether there is a "valid, rational connection" or "logical connection" between the two; (2) whether there are "alternative means" for the inmate to exercise the right that is impinged by the governmental conduct; (3) whether accommodating the asserted constitutional right will have an impact "on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether "ready alternatives" to the challenged governmental conduct exist. Id., 482 U.S. at 89- 90. All four factors support the conclusion that no "reasonable relation" exists here: (1) No "logical connection" exists because the County's security interest would be equally, *if not better,* advanced by a real officer, rather than a cadet, conducting the search; (2) No "alternative means" were available because suspicionless searches "leave[] the inmates no means of protecting their bodies against unreasonable searches" - since an "inmate can do nothing to escape a search" (*Jordan,* 986 F.2d at 1536 (Reinhardt, J., concurring)); (3) Accommodating Mr. Byrd's asserted right will have *no impact* on the guards, other inmates or the allocation of prison resources - since accommodation would only require that the male officers *already present* conduct the search; and (4) There exists a "ready alternative" that is both obvious and easy - i. allow one of the male officers standing 10 feet away to conduct the search.

***32** Although the search of Mr. Byrd presents the novel scenario of a female non-officer in civilian clothing directly performing an intimate search of a detainee's genitalia (despite the undisputed availability of male officers), a review of prior strip search cases magnifies the egregiousness and unconstitutionality of the search of Mr. Byrd. As further explained below, in both cases in which this Court upheld searches or surveillance by female prison officers of male inmates (*Grummett* and *Michenfelder*), the searches or surveillance were far less intrusive than the search of Mr. Byrd and, more importantly, the aspect of the search being challenged (its cross-gender nature) was *reasonably related* to the government's asserted interest. Indeed, in each of those cases, if the aspect of the strip search being challenged (its cross-gender nature) were eliminated, damage would be done to the prison's security, the prison's administrative structure or the female guards' employment rights.

For example, in *Grummett v. Rushen,* 779 F.2d 491 (9th Cir. 1985), this Court held that it was constitutional for female prison officers to (1) conduct routine pat-down searches of male inmates; and (2) provide general prison surveillance, even if that would entail occasional views of naked male inmates. *Id.* at 494-496. In finding the routine pat-down searches constitutional, the Court reasoned that "[t]hese searches are done *briefly* and while the inmates are *fully clothed,* and thus do not involve *intimate contact* with the inmates' bodies." *Id.* at ***33** 496 (emphasis added). The search of Mr. Byrd is, of course, fundamentally different, as Mr. Byrd was stripped down to his thin underwear and then Cadet O'Connell intimately and methodically touched his testicles, perineum and inner buttocks. As discussed *supra,* the search of Mr. Byrd was anything but a routine pat-down search and thus, *Grummett* is easily distinguishable. (Not to mention that the search in *Grummett* was performed by officers in uniform rather than non-officers in blue jeans and white t-shirts.)

With respect to whether it was unconstitutional for female officers to be assigned to surveillance positions at the prison that involved occasional views of naked male inmates, the Court held that it was not, and emphasized that the viewing of naked inmates by female guards was "obscured by the angle and distance of their locations", "restricted by distance and [was] casual in nature" and "infrequent and irregular." *Grummett,* 779 F.2d at 495. Unlike the distant, obscured and infrequent "views" of male inmates in Grummet, which were hardly invasive, the search of Mr. Byrd was up-close and personal, and involved intimate contact with Mr. Byrd's testicles, perineum and inner buttocks. Indeed, the *Grummett* Court questioned whether or not the female guards' conduct even qualified as a "search" under the Fourth Amendment, in light of their distanced and obscured views. *See id.* at 495. The same question does not even arise here, as Cadet O'Connell's intimate contact with Mr. Byrd's genitalia most certainly ***34** amounted to a search and was infinitely more intrusive than the "views" in *Grummett.* See generally *Sepulveda v. Ramirez,* 967 F.2d 1413, 1416 (9th Cir. 1992) (where female parolee was viewed by male officer while providing urine sample, finding conduct unconstitutional because the officer's view "was neither obscured nor distant" and, hence, the "experience was far more degrading to [the parolee] than the situation faced by the inmates in *Grummett"*).

Moreover, the *Grummett* Court explained that if the government were to cease the challenged conduct - by removing female officers from every surveillance position that involves even occasional viewing of naked inmates - it "would

necessitate a tremendous rearrangement of work schedules, and possibly produce a risk to both internal security and equal employment opportunities for female guards." *Id.* at 496. As demonstrated by the unanimous testimony of Cadet O'Connell, Sheriff Arpaio and Captain Peterson (see supra at page 27), the same cannot be said here. Ceasing the challenging conduct in this case would have been effortless (the County simply would have utilized one of the many male officers standing 10 feet away to perform the search of Mr. Byrd), and making this accommodation would not necessitate rearranging work schedules, would not threaten the equal employment opportunities of female guards and would not threaten internal security. The absence of these factors here justifies a contrary ***35** result to Grummett and demonstrates the lack of a "reasonable relation" under *Turner*.

Similarly, *Michenfelder* upheld the constitutionality of assigning female officers to the "lock box" and "control bubble" of the prison - areas which could possibly allow them to oversee strip searches of male inmates.[FN24] *Id,* 860 F.2d 328. The Court applied *Grummett* and concluded that there was no evidence suggesting that the female officer's view of the strip search from the "lock box" was "anything but an isolated incident." *Id.* at 334. The Court also held that the female officer's position in the "control bubble" was not inappropriate because it "would provide at most an indistinct, limited view" of the strip search. *Id* The Court subsequently rejected the inmate's challenge to the occasional assignment of female officers to shower duty, explaining that the evidence "did not establish an inappropriate amount of contact with disrobed prisoners." *Id* While it is not clear from the Michenfelder opinion the exact distance or extent of the female officers' views of the disrobed inmates during shower duty, the Court obviously concluded that the these views were too infrequent or distanced under Grummett to be ***36** "inappropriate." *Id* [FN27] Again, the search of Mr. Byrd by Cadet O'Connell was a far more intimate and direct invasion than the infrequent and distanced "views" at issue in *Michenfelder*.

> FN26. The "lock box" is a surveillance area in the administrative segregation unit that also includes a small window into the hallway where strip searches were conducted by male officers only. *Id* at 329. The "control bubble" is a surveillance room with video screens, which allow monitoring of the same hallways.*Id*

> FN27. It is clear from reading the case that the Court believed the possible views of disrobed inmates from the "lock box" and "control bubble" were more invasive than the possible views from "shower duty." Indeed, the Court spent little time analyzing the inmate's "shower duty" challenge and appeared to conclude that its decision on the "lock box" and "control bubble" challenge would *ipso facto* control the "shower duty" challenge.

But more importantly, the assignment of female officers to the prison positions in *Michenfelder* was reasonably related to the prison's interests in both employment equality for women and security. As the Court explained, "[w]e recognize as legitimate both the interest in providing equal employment opportunities and the security interest in deploying available staff effectively." *Id* at 334. The Court ultimately concluded that these interests would be hampered if the challenged conduct (i.e., assigning female officers to areas with possible views of disrobed inmates) were invalidated by the Court: "[p]rohibiting female employees from working in the control bubble or requiring them to be replaced by males for the duration of strip searches, would displace officers throughout the prison." *Id* at 334. To the contrary, Maricopa County officers would be *displaced* if the County ceased its practice of having searches performed by female non-officers in civilian clothing. All that would occur is that male uniformed ***37** officers (who are always present in these situations) would conduct the searches - rather than watch the searches from 10 feet away. The County's asserted interest in security would be equally advanced, whether or not the challenged search were prohibited.[FN28]

> FN28. To Mr. Byrd's knowledge, the only other Ninth Circuit case involving the constitutionality of searches or surveillance of male inmates by female officers is *Sorners v. Thurman,* 109 F.3d 614 (9th Cir. 1997). But *Somers* merely analyzed whether a male inmate's alleged right to be free from a strip search by a female officer was "clearly established" for purposes of qualified immunity; it never resolved the underlying constitutionality of such searches. *Id* at 6116-622.

Simply put, the County's use of female non-officers in civilian clothing to conduct the partial strip searches of the male detainees (when numerous male officers are readily available) does *nothing* to advance the County's interest in maintaining security at Durango Jail. (Yet this practice causes substantial humiliation and degradation to the male detainees.) Because the manner in which the County conducts these searches is not "reasonably related" to its asserted security interest, this Court should find the searches unconstitutional. *See generally* *Way v. County of Ventura,* 445 F.3d 1157, 1161 (9th Cir. 2006) (stating that strip search policies are not "constitutionally acceptable simply by virtue of jail officials invocation of security concerns" and holding that the strip search policy at issue was unconstitutional because the jail officials "failed to show any link between their blanket strip search policy and legitimate security ***38** concerns"); *Demery v. Arpaio,* 378 F.3d 1020,1032 (9th Cir. 2004) (holding that the Maricopa County Sheriffs Department webcam policy was not rationally related to the Departments asserted governmental interest: "The Sheriffs policy is all the more troubling because displaying images of the County's pretrial detainees to internet users from around the world is not rationally connected to goals associated with educating the citizenry of Maricopa County."); *Moore v. Carwell,* 168 F.3d 234, 237 (5th Cir. 1999) (denying the prison's motion to dismiss a challenge to cross-gender strip searches where a male inmate alleged "male officers were available to conduct the searches").

II THE SEARCH OF MR. BYRD VIOLATED HIS SUBSTANTIVE DUE PROCESS RIGHTS

"[U]nder the due process clause, a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell,* 441 U.S. at 535; *see also* *Demery v. Arpaio,* 378 F.3d 1020, 1029 (9th Cir. 2004).[FN29] For a particular jail action to constitute a violation of a detainee's due process rights, the action must inflict pain or harm on the detainee, and the jail authorities ***39** must act with "deliberate indifference" to the detainee's suffering. *See* *Jordan,* 986 F.2d at 1525; *Redman,* 942 F.2d at 1441.

FN29. Because a pretrial detainee's due process rights under the Fourteenth Amendment are comparable to a convicted prisoner's rights under the Eighth Amendment, this Court applies the same standard. *See* *Frost v. Agnos,* 152 F.3d 1124, 1128 (9th Cir. 1998); *Redman v. County of San Diego,* 942 F.2d 1435,1441 (9th Cir. 1991).

Subjecting Mr. Byrd to the search at issue undoubtedly caused him severe pain and harm. The particular search Mr. Byrd endured was laced with unique characteristics that inflicted a level of pain and suffering that a typical strip search would not. The unique characteristics of this search included the following: (1) The search was conducted by a woman in civilian clothing wearing no identification suggesting she was affiliated with the jail system - and, hence, Mr. Byrd believed she was a typical civilian (which would make any invasive search exponentially more invasive and frightening); (2) Mr. Byrd was not given an explanation that this civilian-clad woman was in any way affiliated with the jail system; (3) The SRT officers pointed laser-directed taser and pepper guns at Mr. Byrd while repeatedly screaming at him to "shut the fuck up" and not ask any questions (thereby making it impossible for Mr. Byrd to eliminate his fear and confusion by asking who these civilian-clad people were); (4) Mr. Byrd, already stripped down to his thin pink underwear, was intimately touched on his testicles, perineum and inner buttocks by this civilian-looking person;[FN30] and (5) Mr. Byrd was videotaped while being subjected to this frightening and degrading conduct -***40** an action that would accentuate anybody's sense of objectification and degradation during such a search.

FN30. Even Cadet O'Connell openly admitted that having a stranger feel around one's private parts is "shocking." (O'Connell, 634:8-10.)

The unique characteristics of the search of Mr. Byrd - which dramatically distinguish this search from a typical strip search in the jail or prison context - are what rendered this search so uniquely painful to Mr. Byrd. Just as the search in *Jordan* rose to the level of "infliction of pain" because the inmates who were searched had unique histories of abuse (*see* *Jordan,* 986 F.2d at 1525-26), the search of Mr. Byrd rose to the level of "infliction of pain" based on the uniquely degrading and offensive manner in which it was conducted. Mr. Byrd testified about the strong feelings of humiliation, degradation and shock he experienced. (Byrd, EOR 598:7-17; 602:3-10.)[FN31]

FN31. Moreover, like many of the inmates in *Jordan,* Mr. Byrd suffers from a history of sexual abuse. (Byrd, EOR 600:9-602:2.)

Although a detainee would experience discomfort during an invasive search by a male officer in uniform, such a search is an unavoidable aspect of the jail experience that can reasonably be anticipated. As the expression goes, "don't do the crime if you can't do the time." It is simply something that must be stomached, considering the context. But no detainee should ever be stripped to his underwear, forced into silence through the threat of laser-directed taser guns, brought into a large room in front of a bunch of civilians, and then intimately touched in his ***41** genitalia by a woman wearing a t-shirt and blue jeans (while being filmed). We must demand more from our jail officials than to treat detainees in this way. Because this sort of treatment severely exceeds the "inherent discomforts of confinement" and would cause any reasonable detainee to feel serious humiliation and anguish, Mr. Byrd has satisfied the "pain" requirement. See Demery, 378 F.3d at 1029-30 (holding that pretrial detainees "were certainly harmed" for purposes of their due process claim because the treatment would cause "almost anyone" a level of humiliation that exceeded the "inherent discomforts of confinement").

Moreover, treating Mr. Byrd in this self-evidently demeaning and degrading manner can reflect nothing other than "deliberate indifference" on the part of the County. A showing of "deliberate indifference" is established where the defendant knew of the risk of a preventable harm, but failed to take steps to prevent it. See Jordan, 986 F.2d at 1529 (citing cases for this proposition). Any thinking person must know that forcing a detainee to strip down to his underwear and then having his genitalia invasively searched by a woman in a white t-shirt and blue jeans would cause that detainee feelings of shock, degradation and pain. Importantly, this severe pain and suffering was easily preventable. All the County had to do to prevent inflicting extreme pain on Mr. Byrd was to have one of the many male officers in uniform - standing just 10 feet away - conduct the search of Mr. Byrd. But the County utterly failed to take this basic step. The County's conduct in this ***42** case was the paradigm of deliberate indifference." See Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998) ("The fact that such basic steps could have better guaranteed Frost's safety provides evidence that Defendants were deliberately indifferent in failing to provide any accommodations whatsoever.").

This Court should reverse the district court and find that Mr. Byrd's due process rights were violated.[FN32]

FN32. To the extent this Court holds that the search of Mr. Byrd was unconstitutional and reverses the District Court's directed verdict, municipal and supervisory liability would be triggered because the search was performed pursuant to the County's well-established policy and practice. *See Karim-Panahi v. Los Angeles Police Dept.,* 839 F.2d 621, 624 (9th Cir. 1988); *Redman v. County of San Diego,* 942 F.2d 1435, 1446-1448 (9th Cir. 1991). Thus, if this Court reverses the constitutional determination below, Sheriff Arpaio should be reinstated as a Defendant in this action.

III. THE COUNTY'S DISCRIMINATORY SEARCH POLICY AND THE RESULTING SEARCH OF MR. BYRD VIOLATED MR. BYRD'S EQUAL PROTECTION RIGHTS

On January 18, 2007, the County filed a Motion for Summary Judgment in which it argued that Mr. Byrd's "unreasonable search" and "cruel and unusual punishment" claims failed as a matter of law. (*Id.,* EOR, Tab 25.) On February 6, 2007, Mr. Byrd filed opposition papers, and on February 20, 2007, the County filed its reply papers. On May 30, 2007, the District Court granted in part and denied in part the County's motion for summary judgment. (Order, EOR, Tab 6.) Although the County made no mention in its summary judgment papers of Mr. ***43** Byrd's equal protection claim (Count II of his First Amended Complaint), the District Court sua sponte dismissed the claim for failure to state a claim.

In its May 30, 2007 Order, the District Court explained that although "[e]qual protection requires that 'all persons similarly situated shall be treated alike,'" Mr. Byrd's equal protection claim must be dismissed because "[f]or purposes

of equal protection, prisoners are not a suspect class." (EOR 60.) Thus, the District Court construed Mr. Byrd's equal protection claim as premised on the dissimilar treatment between prisoners and non-prisoners, rather than between men and women. Considering that courts are required to construe *pro se* complaints liberally (especially in civil rights cases) and considering that the County's gender-based policy was before the District Court on summary judgment, the District Court's construction and consequent dismissal of Mr. Byrd's equal protection claim was improper.[FN33]

> FN33. Mr. Byrd was not appointed *pro bono* counsel until June 13, 2007. (Order, EOR, Tab 22.) Thus, he was still proceeding pro se when he the Motion for Summary Judgment was filed and ruled upon.

Courts are required to construe pro se complaints liberally and afford the plaintiff the benefit of any doubt, particularly in civil rights cases, and should not dismiss claims unless it appears *beyond doubt* that the plaintiff can prove no set of facts entitling him to relief. *See* ***44***Jones v. Community Redev. Agency,* 733 F.2d 646, 649 (9th Cir. 1984) ("We must decide if, even when liberally construed, 'it appears beyond doubt' that [plaintiff] 'can prove no set of facts in support of his claim which would entitle him to relief.'") (quoting *Haines v. Kerner,* 404 U.S. 519, 520 (1972)); *Bretz v. Kelman,* 773 F.2d 1026, 1027 n.l (9th Cir. 1985) ("[W]e have an obligation where the [plaintiff] is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the [plaintiff] the benefit of any doubt."); *Johnson v. Meltzer,* 134 F.3d 1393,1397 (9th Cir. 1998) (reversing dismissal of due process claim brought by pro se plaintiff: "Recognizing [plaintiffs] pro se status, we construe his complaint liberally to state a claim for violation of his constitutionally protected liberty interest in bodily integrity."); *Karim-Panahi,* 839 F.2d 621, 623 (9th Cir. 1988) (same).

The District Court's decision to sua sponte dismiss Mr. Byrd's equal protection claim was improper. The County's strip search policy expressly discriminates against men - by requiring female detainees to be partially strip searched only by female officers, yet allowing male detainees to be partially strip searched by either male or female officers. The County attached its search policy (Policy DH-3) to its motion for summary judgment, and argued in its motion that the search of Mr. Byrd qualified as a "frisk" search. That policy, which was before ***45** the Court on summary judgment, plainly reads: "Male inmates may be frisk searched by either male or female officers. Female inmates will only be searched by female officers, absent exigent circumstances." (Policy DH-3, EOR 855-62.) Under the County's policy, the cross-gender search of Mr. Byrd was permissible, yet an equivalent cross-gender search of a female detainee would be impermissible.

Considering that this facially discriminatory policy was before the District Court and considering the obligation facing the District Court to construe Mr. Byrd's equal protection claim liberally, it was manifestly improper to dismiss that claim. Because the County's search policy expressly treats men differently than women,:it is subject to intermediate scrutiny and, accordingly, is unconstitutional unless it serves an important government interest and is substantially related to achieving that interest. *See Hibbs v. Dept. of Human Res.,* 273 F.3d 844, 855 (9th Cir. 2001); *See also Orr v. Orr,* 440 U.S. 268, 278-79 (1979) ("The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny. To withstand scrutiny under the Equal Protection Clause, a classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.") (citation omitted); *United States v. Virginia,* 518 U.S. 515, 532-33 (1996) (same). Importantly, the burden of demonstrating that the discriminatory conduct is substantially related to an important governmental interest is on the government - and not on the person ***46** challenging the conduct. *See Virginia,* 518 U.S. at 533; *Hibbs,* 273 F.3d at 855; *Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 713 (9th Cir. 1997).

At the time the District Court dismissed the equal protection claim, there was no basis for believing the County could meet its heavy burden. And revealingly, the evidence adduced at trial conclusively demonstrates that the County would *not* have met its burden, as the County's three witnesses *uniformly* admitted that there have been *no* instances of adverse employment ramifications for women resulting from historical attempts at protecting the privacy interests of male detainees and inmates. (*See supra at page 27.*)[FN34]

> FN34. Where the government is unable to provide concrete evidence demonstrating a need to discriminate on the basis of gender, courts invalidate the governmental action as violative of the equal protection clause. *See,*

e.g., Monterey, 123 F.3d at 713; *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151-52(1980); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982). Courts have also invalidated, under the equal protection clause, strip search policies that treat women and men differently. *See, e.g.,Jones v. Murphy,* 470 F. Supp. 2d 537, 549 & n.19 (D. Me. 2007) (holding that prison policy allowing strip searches of all female detainees but not males violated equal protection clause); *Ford v. City of Boston,* 154 F. Supp. 2d 131, 151 (D. Mass. 2001) (same).

By construing Mr. Byrd's equal protection claim strictly, rather than liberally - as it was required, and by *sua sponte* dismissing the claim notwithstanding the County's facially discriminatory policy and utter failure to provide evidence (or even argument) justifying its gender-based discrimination, the District Court clearly erred.

***47 IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING THE COUNTY TO PROSPER FROM ITS ILLEGAL DOCUMENT RETENTION POLICY AND BY COMPOUNDING THE PREJUDICE CAUSED TO MR. BYRD**

Each of the three factual questions that were given to the jury turned on what occurred on October 28, 2004 in the Durango Jail. For example, one of the critical issues in the trial was whether Cadet O'Connell - who was performing her first ever search on a real detainee - improperly touched or squeezed Mr. Byrd's penis. The jury was instructed to automatically find in favor of Mr. Byrd if it determined that Cadet O'Connell squeezed or kneaded Mr. Byrd's penis. (Jury instructions, "First Unreasonable Search Claim," EOR 80; Jury verdict, EOR 77.) Thus, independent of the District Court's ruling that the search was constitutional if the County's version of the search was accurate, Mr. Byrd would have nonetheless prevailed below had the jury believed him that Cadet O'Connell squeezed his penis during the search. Mr. Byrd testified that she did squeeze his penis (*id.,* EOR 586:12-15), and Cadet O'Connell testified that she did not. *(Id,* EOR 637:24- 638:1.) It was a classic case of "he said, she said."

Tragically, the only reason the jury was handed a "he said, she said" scenario is because the County failed to preserve *critical* evidence in this case. Amazingly, the October 28, 2004 underwear searches of the detainees at Durango Jail were videotaped. But proceeding p for the first 2.5 years of this litigation, Mr. Byrd made no discovery requests of any kind. When he was appointed counsel just two ***48** months before trial, he told his counsel that a camera man filmed the search by Cadet O'Connell and that the videotape would support his version of the incident. In response to a request for the videotape by Mr. Byrd's counsel, the County failed to produce the footage of the search of Mr. Byrd - and instead produced the "Video Yearbook" of the cadet's Academy - a highly edited collection of footage that documented each of the stages of training the cadets received during their program. The "Video Yearbook" included a snippet from the October 28,2004 searches of the cells (not detainees) at Durango Jail - thereby confirming Mr. Byrd's assertion that there was videotape evidence of the events that day.

In response to Mr. Byrd's counsel's additional request for the *unedited* video footage from October 28, 2004 (including the footage of the search of Mr. Byrd), the County claimed that no such footage existed at that time. (Defendants' objection to plaintiffs requested negative inference, Tab 15.) But as Cadet O'Connell testified at trial, there *was* additional footage of the searches that day at Durango Jail.[FN35] Consistent with this testimony, Mr. Byrd testified that the video camera filmed him while Cadet O'Connell searched him. (Byrd, EOR 602:15- 603:4; 605:5-21.) Thus, the uncontroverted evidence in the record is that Mr. Byrd was filmed during his search. Furthermore, it is uncontroverted and admitted by ***49** Cadet O'Connell that additional footage existed from the October 28, 2004 underwear searches at Durango Jail that could have been relevant to this lawsuit. (See supra.) But the County did not produce this unedited footage, claiming that if it existed, it was destroyed pursuant to the County's document "retention" policy - which is two years.[FN36] (Defendants' Objection to plaintiffs requested negative inference, EOR 458:11-19; Peterson, 347:2-18.)

FN35. *See* O'Connell, EOR 301:4-8 ("Q: Now that footage that we just saw, it doesn't represent all the footage that was shot on that date, does it? A: As far as I know, no. Q: There was other footage shot as far as you know; yes? A: Yes.").

FN36. That the Maricopa County jail and prison system's document retention policy is two years is hardly coincidental, considering that the statute of limitations for prisoner civil rights actions under § 1983 in Arizona is two years. *See TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999) ("In Arizona, the courts apply a two-year statute of limitations to § 1983 claims."); *see also* Arizona Revised Statute § 12-542 (setting the statute of limitations for injuries "to the person" at two years).

In other words, the County's explanation for not preserving the original footage is that, pursuant to its document retention policy, all documents and other evidence is routinely destroyed two years after it was created. The County claimed that the unedited footage requested by Mr. Byrd was *properly* destroyed pursuant to this policy because Mr. Byrd did not *specifically request* the evidence until over two years after it was created. Explaining why the footage was destroyed, the County stated, "[Mr. Byrd] filed suit, but he did not request the tape" within two years of the incident. (Defendants' Objection to Plaintiffs requested negative inference, EOR 458:11-19.) The testimony of Captain Peterson, who was the Commander of Durango Jail and responsible for overseeing all of the jail's policies, ***50** confirms that this is the policy and practice of the County. When asked by his counsel, Ms. Brandon, whether the County's document retention policy authorizes evidence to be destroyed unless the opposing attorney "specifically requests" a piece of evidence within two years of the document's creation, Captain Peterson answered affirmatively, explaining, "if [the evidence] is still being *retained at the request from an attorney for a particular document,* then yes, we would provide it with a court order." (Peterson, 347:2-18.)

The County's policy is simple: Even if a lawsuit is filed against it, it may destroy evidence two years after that evidence is created, *unless* the opposing attorney specifically requests that particular piece of evidence. Indeed, this is exactly what occurred in this case. Although Mr. Byrd filed his federal lawsuit a mere 30 days after the October 28, 2004 search at Durango Jail, the unedited footage of that search was destroyed because Mr. Byrd did not *specifically request* the footage until after October 28, 2006.

The County's policy is a blatant violation of law. It is universally accepted that:
A litigant is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery. Therefore, once a party reasonably anticipates litigation, *it must suspend its routine document retention/destruction policy* and put in place a 'litigation hold' to ensure the preservation of relevant documents.

***51** *Columbia Pictures Ind. V. Bunnell,* No. CV 06-1093, 2007 WL 2080419, at *14 (C.D. Cal. May 29, 2007) (emphasis added) (citations omitted); *accord In re Napster. Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006); *Samsung Elect. Co., Ltd. V. Rambus, Inc.*, 439 F. Supp. 2d 524, 543 (E.D. Va. 2006).[FN37] When Mr. Byrd filed his lawsuit 30 days after the October 28, 2004 incident, the County not only could "reasonably anticipate" litigation, it actually *knew* that litigation was underway. By failing to place a "litigation hold" on its document retention policy and by permitting relevant evidence to be destroyed on the ground that Mr. Byrd had not specifically requested it, the County patently violated the law and severely prejudiced Mr. Byrd.

FN37. *See also Federal Procedure,* 10A Fed. Proc., L. Ed. § 26:849 (2007) ("Once a party reasonably anticipates litigation, it has a duty to suspend, as to documents that may be relevant to anticipated litigation, any routine document purging system that might be in effect, and the failure to do so constitutes spoliation....A document retention policy adopted or utilized to justify the destruction of relevant evidence is not a valid document retention policy[.]").

The District Court compounded the prejudice to Mr. Byrd by denying Mr. Byrd's requested negative inference instruction and by permitting the County to introduce, over Mr. Byrd's objection, the misleading and prejudicial "Video Yearbook" of the cadet's Academy. In denying Mr. Byrd's requested negative inference instruction,[FN38] the Court incorrectly concluded that the underlying ***52** question of whether the County acted improperly was *for the jury.*

(Transcript, EOR 414:15-17 ("It's up to the jury to decide whether the factual basis for it is satisfied or not.").) But the County had openly acknowledged that it routinely destroys documents even *after* litigation is *commenced,* unless a "specific request" is made for a particular document.*(See supra.)* This policy is illegal, as a matter of law, and the District Court erred by refusing to reach that conclusion on its own.[FN39]

FN38. Mr. Byrd respectfully directs the Court to the full version of the requested instruction. (EOR, Tab 3.)

FN39. Instead, the District Court crafted a vague instruction that made no mention of the lost footage from October 28, 2004 and that remained utterly neutral as to which party possibly breached its obligations under the law: "If a party with such notice [of the assertion of a claim] fails to preserve evidence through some fault of its own, you may draw an inference that the evidence not presented would have been favorable to the opposing party." (Jury instructions, EOR 83:12-15.) This instruction was truly a "bite without teeth." It is vague and esoteric, and by not taking a position on whether the County breached its duties under the law, it frankly does nothing to correct the substantial prejudice Mr. Byrd suffered from the destruction of evidence.

The prejudice to Mr. Byrd was further compounded when the County sought to introduce its highly edited "Video Yearbook" into evidence and the District Court overruled Mr. Byrd's objection that the edited video was unduly prejudicial and misleading (as well as irrelevant) under Federal Rule of Evidence 403. (Transcript, 466:5-468:7; 472:14-22; (objections by Mr. Byrd's counsel); 477:23- 25 (District Court reserves ruling on the issue until later); 251:9-11 (District Court rules that it is admissible).) It is undisputed that the "Video Yearbook" includes no ***53** footage of the search of Mr. Byrd or even of the other searches conducted by Cadet O'Connell that day. To the contrary, the video depicts searches conducted by other cadets on their supervising officers (who were dressed up in prisoner attire). The obvious - and unanswerable - question is: why was the "Video Yearbook" admitted into evidence? The videotape carried probative value towards any of the issues before the jury.

The only role the "Video Yearbook" played was to prejudice Mr. Byrd and mislead the jurors. The "Video Yearbook" captured footage of all of the hard work, dedication, sacrifices and memorable moments tallied during the cadet's Academy, and thereby substantially prejudice Mr. Byrd by depicting the cadets (including Cadet O'Connell) in such a fond and tender light.[FN40] Indeed, "Video Yearbooks" - by their very nature - are designed to leave the viewer with feelings of endearment and warmth towards the featured individuals. The "Video Yearbook" therefore had a significant likelihood of unfairly prejudicing Mr. Byrd by improperly appealing to the emotions of the jurors. *See* Fed. R. Evid. 403, Commentary Note ("Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."); ***54***United States v. Bowen,* 857 F.2d 1337, 1341 (9th Cir. 1988) ("[P]rejudice outweighs probative value where the facts arouse the jury's feelings for one side without regard to the probative value of the evidence").

FN40. The "Video Yearbook" even showed some of the cadets being pepper sprayed in the face - and suffering in pain as a consequence. Counsel for the County went out of her way to ask Cadet O'Connell if she was the first cadet featured in the video to be pepper sprayed. (O'Connell, EOR 285:4-15.) Cadet O'Connell answered that it was, in fact, her. *(Id.)*

Perhaps more significantly, the "Video Yearbook" also created a substantial risk of misleading the jury into believing that the manner in which the searches were conducted on the videotape accurately reflected the manner in which Cadet O'Connell conducted the search of Mr. Byrd. The footage of other cadets performing *full-clothed* searches on their supervisors carried zero probative value about the manner in which *Cadet O'Connell* performed the *underwear search of Mr. Byrd.* It was wholly improper for this self-serving and misleading footage to admitted into evidence. *See United States v. Foster,* 30 F.3d 65, 68 (7th Cir. 1994) (where defendant was charged with a crime, excluding his requested videotaped accounts of other people who were wrongfully accused of the same crime in the past, since the videotape had "little probative value" about his actions, yet had "great potential to prejudice the government's case and mislead the jury").

The "Video Yearbook" therefore carried a strong likelihood of improperly prejudicing Mr. Byrd and misleading the jury, yet carried no probative value as to the manner in which Mr. Byrd was searched by Cadet O'Connell. Because the prejudicial and misleading impact of the video substantially outweighed the probative value (or lack thereof), it was an abuse of discretion for the District ***55** Court to admit it. *See* *United States v. Hitt,* 981 F.2d 422, 424-25 (9th Cir. 1992) (reversing jury verdict based on the district court's improper admission of a photograph: "Where the evidence is of very slight (if any) probative value, it's an abuse of discretion to admit it if there's even a modest likelihood of unfair prejudice or a small risk of misleading the jury."); *United States v. Layton,* 767 F.2d 549, 555-56 (9th Cir. 1985) (holding that the tape recordings probative value was "weak" and therefore outweighed by the risk of potential prejudice and confusion caused by the tape).

In sum, by allowing the County to obtain a windfall gain from its patently illegally document "retention" policy, the District Court abused its discretion. The County improperly destroyed evidence directly relevant to Mr. Byrd's claims (the unedited footage from October 28, 2004), yet managed to not only avoid any negative repercussions (since the District Court denied the requested negative inference instruction and failed to conclude that the County breached its duties), but managed to be affirmatively rewarded by successfully introducing into evidence the highly prejudicial and misleading "Video Yearbook." This sequence of events was a grave miscarriage of justice, and it is hardly surprising that the jury found against Mr. Byrd regarding the manner in which the search was conducted.

This Court should order a new trial based on this miscarriage of justice. A clear message must be sent to the County that it cannot continue to destroy relevant ***56** evidence in federal proceedings under the simplistic guise of a document "retention" policy. The County made no attempt to implement a "litigation hold" in this case and, consequently, crucial evidence was destroyed. This Court should vacate the jury verdict and order a new trial so that the County is not so blatantly rewarded for its illegal policy.

CONCLUSION

For the foregoing reasons, Mr. Byrd respectfully requests this Court to (1) hold that the search of Mr. Byrd was unreasonable under the Fourth Amendment and, hence, reverse the District Court's decision to the contrary; (2) hold that the search of Mr. Byrd violated Mr. Byrd's due process rights and, hence, reverse the District Court's decision to the contrary; (3) hold that the County's facially discriminatory search policy violates the equal protection clause and, hence, reverse the District Court's dismissal of Mr. Byrd's equal protection claim; and (4) vacate the jury verdict and order a new trial based on the severe prejudice Mr. Byrd suffered in this case as a result of the County's patently illegal document retention policy and the District Court's associated evidentiary rulings.

Charles E. BYRD, Plaintiff-Appellant, v. MARICOPA COUNTY SHERIFF'S DEPARTMENT, et al., Defendants-Appellees.
2008 WL 592053 (C.A.9) (Appellate Brief)

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