United States Court of Appeals,
Ninth Circuit.
Charles Edward BYRD, Plaintiff/Appellant,
v.
MARICOPA COUNTY SHERIFF'S DEPARTMENT; Joseph M. Arpaio; O'connell; Peterson; Durango Jail, Defendants/Appellees.
No. 07-16640.
March 7, 2008.

On Appeal from the United States District Court for the District of Arizona

Answering Brief of Defendants/appellees Maricopa County Sheriff's Department, Arpaio, O'connell and Peterson

Eileen Dennis Gilbride, Jones, Skelton & Hochuli, P.L.C., 2901 North Central Avenue, Suite 800, Phoenix, Arizona 85012, (602)263-1700, Attorneys for Defendants/appellees, Maricopa County Sheriffs Department, Arpaio, O'connell, and Peterson.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees certify that they are public entities and employees.

JURISDICTIONAL STATEMENT

Defendants do not disagree with Mr. Byrd's jurisdictional statement.

STATEMENT OF THE ISSUES

Plaintiff and 90 other inmates in his pod were pat searched in their boxer shorts by approximately 25 to 30 detention officer cadets. A third of the cadets were female. Plaintiff happened to be searched by a female, Defendant O'Connell.

1. The district court certified all issues as frivolous for appeal except one, namely, whether a policy allowing routine female searches of male inmates over their boxers violates the Fourteenth or Eighth Amendments. Plaintiff has not argued the Eighth Amendment on appeal. Is the Fourteenth Amendment facial challenge issue the only issue properly on appeal?

2. Does a policy allowing a cross-gender pat search over a male inmate's boxers facially violate either substantive due process, equal protection, or the Fourth Amendment?

3. The only as-applied issues tried to the jury were (1) whether Defendant O'Connell "groped" Plaintiff and thereby violated his Fourth and Fourteenth Amendment rights, and (2) whether the search was conducted solely for training purposes and thereby violated the Fourth Amendment. The jury found for Defendants on all claims and Plaintiff has not argued that the evidence was insufficient to support the verdict. Has Plaintiff waived any other as-applied argument, namely, whether the search violated his Fourth or Fourteenth Amendment rights based on the circumstances of the search, even though he was not groped and the search was for legitimate security reasons?

4. If the argument was not waived, was the search constitutional as applied to Plaintiff?

5. Was the trial court well within its discretion in giving the jury an "adverse inference" instruction (regarding a party's failure to preserve evidence)?

STATEMENT OF THE CASE

Plaintiff's Statement of the Case is incomplete for the following reasons:

1. The district court noted that the case had three parts: (1) the claim that Defendant O'Connell groped Plaintiff's genitalia when conducting her search; (2) the claim that the search was merely a training exercise and not conducted for legitimate security reasons; and (3) the claim that female on male searches violate the Eighth or Fourteenth Amendments. (Supp. ER at p. 2). The court ruled that an appeal would be frivolous on all but the last issue and declined to appoint counsel on all but the last issue. (*Id.*) Arguably, then, the only issue properly before this Court is the last issue - the claim that a policy allowing female on male over-boxers searches facially violates the Eighth or Fourteenth Amendments.[FN1] 28 U.S.C. §1915(a)(3) ("An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith").

FN1. Plaintiff has not raised any Eighth Amendment argument on appeal.

2. The district court did not simply "sua sponte dismiss[ ] Mr. Byrd's equal protection claim," as Plaintiff states. (OB at 3.) The court dismissed it because it recognized that it had an obligation to screen *pro se* complaints under 28 U.S.C. §1915(e)(2) and 42 U.S.C §1997e(c). (*See* ER at p. 59.) The court noted that (a) prisoners are not a suspect class; (b) inmates are not entitled to identical treatment; (c) mere inequality does not violate the equal protection clause; (d) the appropriate test was the rational basis test; and (d) Plaintiff had the burden of showing some invidious discriminatory intent. (*Id.* at p. 60.) It then dismissed the claim "without prejudice," because Plaintiff failed to allege that he was a member of a suspect class, and he failed to allege that Defendants' conduct in searching him was the result of purposeful or invidious discrimination, or that the conduct bore no rational relationship to a legitimate govemmental interest. (*Id.* at p. 61.)

3. After trial, the district court directed a verdict for Defendants on Plaintiffs general challenge to the cross-gender search. (ER at pp. 405-406.) In other words, the court ruled as a matter of law that cross-gender searches of inmates do not violate the Fourteenth Amendment (and perhaps the Fourth Amendment). This is a legal issue on a facial challenge to the policy. The only facial challenge Plaintiff has raised on appeal is under the equal protection clause.

4. At the close of evidence, before the case went to the jury, the district court granted judgment as a matter of law for Captain Peterson, because he was neither the jail commander at the time of the search, nor present when the search was conducted. (ER at p. 404:12-15.) The court also granted judgment as a matter of law for Sheriff Arpaio in his individual capacity because he had no involvement in the search. (ER at p. 416:14-19.)

5. The court had dismissed Plaintiff's claim for damages on summary judgment because Plaintiff had not suffered the physical injury required under the Prison Litigation Reform Act, 42 U.S.C. §1997e(e). (*Id.* at p. 62.) This conclusion

did not bar Plaintiff from proving a claim for compensatory, nominal, and punitive damages not premised on emotional injury. (*Id.*)

6. The claims that survived summary judgment and went to trial were: (a) Plaintiff's claim that Deputy O'Connell violated his Fourth Amendment rights by groping him; (b) Plaintiff's claim that Deputy O'Connell violated his substantive due process rights by groping him (*i.e.* substantial harm without justification); and (c) Plaintiff's claim that Deputy O'Connell violated his Fourth Amendment rights by conducting a search without security reasons for doing so. (ER at p. 80-81.) The two fact issues for the jury were (a) whether Deputy O'Connell groped Mr. Byrd during the search, and (b) whether the search was conducted for other than security reasons. (ER at p. 404:16-21.)

7. The jury found for Deputy O'Connell on all three claims. That is, they found as a matter of fact that Deputy O'Connell did not grope Plaintiff during the search, and the search was conducted for legitimate security reasons and not as a training exercise. (ER at pp. 77-78 and 183-84.) The facts must be viewed in a light most favorable to upholding this verdict. *See* *Muehler v. Mena,* 544 U.S. 93, 111 (2005).

Defendants disagree that the manner in which the issues were decided was "unorthodox," as Plaintiff asserts. (OB at 4, n.3.) Before the case was given to the jury, the court ruled for Defendants as a matter of law on all of Plaintiffs facial challenges to the cross-gender search, and sent to the jury only the as-applied issues, *i.e.,* whether the search as conducted on Mr. Byrd was unconstitutional.

STATEMENT OF RELEVANT FACTS

The following facts are stated in a light most favorable to upholding the jury's verdict. *Muehler v. Mena,* 544 U.S. 93, 111 (2005).

A. Preliminary facts.

Defendants object to the gratuitous, and factually unsupported, comments that Plaintiff's counsel makes about Sheriff Arpaio. (OB at 6.) Gratuitous comments by counsel will not carry the day in this Court when legal arguments fail.

Mr. Byrd was a pretrial detainee being held in the Durango Jail when the search at issue occurred. (ER at p. 42.) It is irrelevant why he was being held in jail. (OB at 5.)

B. Facts regarding the Sheriff's policies on searches.

Sheriff's Office policy DH-3 defines a "frisk (body) search" as "carefully examining an inmate by inspecting his clothing, and feeling the contours of his clothed body." (ER at p. 855.) It defines a "strip search" as "a visual scan of the inmate's skin after all clothing has been removed. A strip search may include a visual body cavity search." (ER at p. 856.) Deputy O'Connell testified that she conducted a pat (frisk) search on Mr. Byrd because he had clothing on. (ER at pp. 291:6-292:1, 655:11-24, 667:9-15.) Captain Peterson confirmed this. (ER at p. 340:8-20.)

Policy DH-3(5)(A) states: "Male inmates may be frisk searched by either male or female officers. Female inmates will only be searched by female officers, absent exigent circumstances." (ER at p. 857.) The jury, finding in favor of Defendant O'Connell on all issues, obviously believed that she appropriately conducted a frisk search on Mr. Byrd as she and Captain Peterson testified.

C. Facts regarding the purpose of the cross-gender policy.

Sheriff Arpaio testified that that the purpose for the policy was security in the jail. (ER at p. 229:18-231:16.) The

Sheriff's Department has 10,000 total inmates, only 300 to 400 of which are female. (ER at p. 209:13-18.) Contraband is a constant problem. (ER at pp. 257:14-258:12.) To maintain a handle on this problem (*Id.*), searches are conducted every time inmates leave their cells, every time they leave their housing unit, and every time they go to or return from visitation, medical, court, activities, or other programs. In fact, inmates are searched at least once daily, and more often several times daily. (ER at p. 290:2-22.) All of these searches are pat searches, except for those conducted after the inmate returns from a contact visit or from outside the facility, which are strip searches. (*Id.*) In addition, pat searches of the inmates and searches of their cells are conducted any time the facility obtains information of something going on, such as reports of contraband, increased fighting, etc. (ER at pp. 349:15-24, 640:17-24.)

Captain Peterson confirmed that there are simply not enough male officers at the facility to conduct all of these searches on the male inmates without the help of the female officers. (ER at pp. 330:19-22; 333:10-334:22.) Especially when 90 inmates are being moved out of a pod so that they and their cells can be searched, the facility needs a lot of manpower to conduct the search. (ER at p. 320:23.)[FN2]

FN2. That is why the facility needs to ask the cadet class to come over and assist in many cases. (ER at pp. 349:15-350:21.) On the date in question, while the cadets were pat searching the inmates, approximately eight Swat officers were searching the pods and the inmates' clothing (ER at p. 697:10-16), and the 10-15 detention officers (ER at p. 18-24) were making sure the searches were within policy (ER at p. 695:8-18) and were there for the cadets' protection. (ER at pp. 304:16-305:15.)

D. Facts regarding the purpose of the search.

Plaintiff grossly misrepresents the record regarding the purpose for the search. (OB at 8-9, 12-14.) He accuses that it is “standard practice” for cadets to go to the jail to “practice” pat down searches as a final component of their training, and he purports to cite to the testimony of Captain Peterson for the proposition. (OB at 8-9.) Yet Captain Peterson never testified to that, and the citation does not support the accusation. (See below.) Furthermore, the assertion rings hollow, given that the jury found as fact that the search was conducted for legitimate security reasons and the facts must be viewed in a light most favorable to upholding that verdict.

Captain Peterson never testified that cadets are brought over to the jails for training searches. He testified that the only time cadets come to the jails for searches is when a search needs to be conducted for security purposes and there is not enough manpower at the jail to accomplish the search. (ER at p. 350:5-21.) He specifically denied that cadets ever show up at the jail without such a request. (ER at p. 350:22-351:3.) There are simply not enough male detention officers to properly conduct searches at the jail. (ER at 333:14-19.) He agreed that it would not be permissible for a sheriff's cadet to search an inmate solely for training purposes. (ER at p. 321:23-322:12; 323:4-7.)

Sheriff Arpaio testified that searches are conducted for security reasons. (ER at p. 259:17-21.) He could not think of any reason to disrupt 93 inmates out of their pods other than for security purposes. (ER at p. 259:24-260:4.)

Despite Plaintiff's counsel's attempt to badger Deputy O'Connell, she also testified repeatedly that the search was not a training exercise. (ER at pp. 659:19-20; 220:1-3; 693:15-17; 306:24-367:3; 299:25-300:2.) She testified that when they went to the jail to perform the search they were told of a suspicion of contraband and of multiple fights in the unit; that they needed manpower and needed them to go over and help with the searches. (ER at p. 640:15-24.) Inmates are searched over their boxers “a couple of times a week.” (ER at pp. 292:15-293:4.)

At the jail, no one instructed the cadets how to properly search inmates. (ER at p. 650:2-5, 304:2-12.) While the cadets were searching the inmates, the Swat team was searching the pods and the inmates' clothing. (ER at p. 697:10-16.)[FN3]

FN3. Plaintiff cites language from Defendants' early motion for summary judgment for the proposition that the search was conducted for training purposes. (OB at 12-13.) But the jury was read the language from the

motion (*see, e.g.,* ER at p. 641:10-20) and found otherwise.

E. Facts regarding the search.

On the day in question, all 90 inmates in Plaintiff's pod were subject to the same search. (ER at pp. 609:22-610:8; 282:16-17.) Defendant O'Connell was a cadet, an officer in training. (ER at pp. 627:19-628:1.) Approximately 25 or 30 cadets, a third of whom were female, went over, to the jail. (ER at p. 650:13-17.) About 10 or 15 officers, a third of them female, were there also. (ER at pp. 650:18-651:2, 582:1-10.)

At the jail, again no one instructed the cadets how to properly search inmates. The academy instructors were there because anyone who is not a full-fledged officer must be accompanied in the jail by officers, for the cadets' protection. (ER at pp. 303:18-305:1.)

The cadets were told that the inmates would be brought out in a line to the multipurpose room in their boxers, that the cadets were to pat search them, and when finished, the inmates would go to the opposite end of the room and sit cross-legged facing the wall. (ER at p. 651:8-14.) The cadets would then go to the back of the line and wait for the next line of inmates to search. (ER at p. 282:10-17.) When the inmates came out of their pod, four to six at a time, they walked in front of the officers and turned so that the officers were already behind them in rows. (ER at p. 653:5-18.) Mr. Byrd confirmed this process in his testimony. (ER at pp. 607:19-608:9, 610:10-18.) The inmates were told to look straight ahead, not to look around, and to face the wall when they were finished and sitting down. (Id.; ER at pp. 611:14-16; 613:7-10; 282:12-15.)[FN4] Mr. Byrd happened to be one of the inmates that Deputy O'Connell searched. (ER at p. 659:11-12.)[FN5] Deputy O'Connell had no idea how many inmates she searched that day. (ER at p. 282:16-19.)

FN4. Thus, while “over 100” people might or might not have been in the room at some point during the search (OB at 11), each search was not witnessed by that many people, because the 90 other inmates were ordered to look straight ahead and when their search was finished, to sit cross-legged across the room facing the wall. (ER at p. 610:10-18, 611:16.) Mr. Byrd did not look around at other inmates while he was being searched. (ER at p. 6137-10.)

FN5. It is therefore inaccurate to state, as Mr. Byrd does, that Defendant O'Connell was “selected” to search him. (OB at 11.)

F. Facts regarding the method of searching.

Deputy O'Connell testified that she has searched a few hundred men during her employment with the Sheriff's Office, and she has never had a complaint from anyone about her searches. (ER at p. 700:4-18.) Mr. Byrd testified that the search took approximately 60 seconds. (ER at p. 617:17-20.) Deputy O'Connell testified that it took 10 to 20 seconds. (ER at pp. 699:25- 700:3.)

Deputy O'Connell described how the pat search is conducted. First, with a pat search, she does not put her hands on any skin she can see. (ER at p. 6611:4-11.) The officer searches from behind the inmate. (ER at p. 6112:10-25.) The boxers waistband is pulled out a couple of inches and the waistband is felt to ensure that no contraband is taped to the inside. The hands do not touch the inmate's body. (ER at p. 678:19-679:8.) Deputy O'Connell did not look inside the boxer shorts when she pulled Mr. Byrd's waistband out and felt it for contraband. (ER at p. 681:4-6.)6 Next, one hand is placed at the lower back on the boxer shorts while the other hand, using slight pressure, pat searches the outer thigh from the bottom of the shorts up. (ER at pp. 681:15-682:7, 683:14-15, 632:9-10.) Deputy O'Connell testified that she has never accidentally touched an inmate's skin as she is searching over the boxer shorts. (ER at p. 682:12-22.) Then, she slides the same hand to the inner thigh over the shorts, searching up to where the groin and leg connect. (ER at p. 683:1-13.) Her hand is flat, with the thumb extended and her fingers straight out pressed together to prevent any

sensation of groping or "fingers everywhere." (ER at p. 701:6- 702:12, 637:7-16.) The back of her flat hand moves the scrotum out of the way so that she can make sure there is nothing taped to or hidden in the groin, inner thigh, or perineum. (ER at pp. 639:2-13, 683:14-684:[FN6], 690:14-17, 691:12-18.)[FN7] Then she switches hands and completes the search on the other thigh in the same way. (ER at pp. 685:17-686:18, 687:10-688:1.) Next she takes her hand to the bottom of the buttocks cheeks where they start and runs the hand up through the crack to make sure nothing is taped, placed or hidden on the inside of the buttocks. (ER at p. 688:2-13.) Her hand is never cupped, and she never gropes or squeezes the testicles, scrotum or penis. (ER at p. 685:5-10, 688:20- 689:1, 632:21-23.) Deputy O'Connell testified that she has never searched an inmate's penis, (ER at pp. 690:1-6, 637:24-638:4) and she has never accidentally touched an inmate's penis. (ER at p. 705:8-11.)

FN6. The trial court held that the search of the waistband was not unconstitutional. (ER at pp. 421:14-422:3.)

FN7. At no time did she testify that she "lift[ed] Mr. Byrd's testicles and moved them to the side." (OB at 10.) In fact, she specifically stated, I'm not cupping [the scrotum], I'm not grabbing it, and I'm not lifting it up to look underneath it." (ER at p. 639:10-13.)

G. Facts regarding the videotape.

Mr. Byrd testified that he saw two people with handheld video cameras during the search. (ER at p. 602:19-25, 605:5-17.) He testified that they were approximately 30 feet away from him. (ER at p. 605:17-21.) He did not testify that the video camera was running the whole time, and he did not testify that his search specifically was videotaped.

Deputy O'Connell testified that there was no stationary surveillance video tape taken in the multipurpose room. (ER at p. 278:12-14.) She testified that one person had been following her academy class from beginning to end to take clips of what they had done in the academy, and made a video of it at the end as a sort of yearbook for the cadets. (ER at p. 278:20-279:4.) She testified that he did not take videos of the entire search; he only took few-second clips of any event. (ER at p. 279:11-18.) The jury was shown that part of the yearbook tape that included the search of Mr. Byrd's pod, but as Deputy O'Connell testified, Mr. Byrd was not visible on the tape. (ER at pp. 286:2-3, 8-13, 287:7- 288:12.)[FN8]

FN8. Thus, Mr. Byrd's assertion that "he and the other inmates" were videotaped (OB at 11) is in error.

Plaintiff's counsel argued that the Sheriff's office failed to preserve evidence (in the form of the "tape of the entire search") and requested an adverse inference instruction. (ER at pp. 466:5-467:1, 468:7-9:21, 471:10-23, 472:14-473:12, 475:9-17.) The district court gave a general adverse inference instruction and allowed the parties to argue its application. (ER at pp. 83, 134, 409:5-414:3.)

SUMMARY OF THE ARGUMENT

1. The only issue properly on appeal is a facial challenge to the constitutionality of the Sheriff's cross-gender search policy under the Fourteenth Amendment. This is the only issue the district court found not frivolous on appeal, and for which counsel was appointed.

2. The policy survives a facial constitutional challenge. On a facial challenge, Plaintiff must demonstrate that there is no set of circumstances under which the policy can be constitutional. Plaintiff does not even make this argument.

3. The Policy does not violate the Fourth or Fourteenth Amendments, because it does not require or allow gratuitous invasions of privacy, and because a policy allowing cross-gender pat searches is reasonable in and of itself. The cross-gender nature of the search policy is necessary for jail security and to ensure equal employment opportunities for female officers. This Court has repeatedly held that searches or surveillance of male prisoners by female detention officers do not violate the constitution. *See, e.g., Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1995); *Michenfelder*

v. Sumner, 860 F.2d 328, 334 (9th Cir. 1988).

4. The Policy does not violate equal protection. Plaintiff has not demonstrated or argued that male and female inmates are similarly situated. Further, the Sheriff's Policy serves the important government objectives of jail security and equal employment opportunities for female officers, and the cross- gender searches are not only substantially related to the achievement of those objectives, but are integrally necessary to achieve them. Cross-gender pat search policies have been repeatedly upheld on equal protection grounds. *Madyun v. Franzen,* 704 F.2d 954, 962 (7th Cir. 1983); *Oliver v. Scott,* 276 F.3d 736, 746-47 (5th Cir. 2002); *Timm v. Gunter,* 917 F.2d 1093, 1102-03 (8th Cir. 1990).

5. Plaintiff's as-applied argument is inappropriate on appeal. The only as-applied arguments that the jury decided were whether Deputy O'Connell groped Plaintiff during the search, which would have violated his Fourth and Fourteenth Amendment rights, or whether the search was conducted for reasons other than legitimate security reasons, which would have violated Plaintiffs Fourth Amendment rights. The jury found against Plaintiff on all these issues and he does not argue the insufficiency of the evidence to support the verdict. Plaintiff cannot raise, for the first time on appeal, a new argument that the legitimate, properly conducted search of him was nevertheless unconstitutional because of the surrounding circumstances or because it constituted “punishment” before adjudication. He did not raise or litigate these issues below.

6. Even if the Court were to consider the as-applied argument, it lacks merit. Nothing about the circumstances of the search made it unreasonable. The fact that the pat search was conducted over Plaintiff's boxers, and in the multipurpose room, does not turn an otherwise constitutional search into an unreasonable one. The evidence showed, and the jury believed, that Deputy O'Connell conducted a reasonable, professional pat search of Plaintiff.

7. The trial court did not abuse its discretion in giving the jury a general adverse inference instruction. Plaintiffs proffered instruction was erroneous. Further, Plaintiff fails to show any abuse of discretion, or harmful error, in the court's decision to admit into evidence a snippet video tape showing the cadets practicing searches. Plaintiff opened the door to admission of the tape, and he affirmatively used it in closing to argue that the search was for training purposes. The jury simply did not believe him.

21LEGAL ARGUMENT

I. THE ONLY ISSUE PROPERLY ON APPEAL IS WHETHER A GENERAL POLICY ALLOWING FEMALE-ON-MALE OVER- BOXERS PAT-DOWN SEARCHES VIOLATES THE FOURTEENTH AMENDMENT

Before the case went to the jury, the district court rejected, as a matter of law, any “general challenge to the validity of female-on-male searches including patdowns in the groin area.” (ER at pp. 392:4-6, 392:21-393:7, 405:5-8, 405:23-406:1.) This is the only issue the court found not frivolous for appeal, and on which counsel was appointed for appeal: namely, whether a general policy that allows cross-gender pat searches (female on male) violates the Eighth or Fourteenth Amendments. (Supp. ER at p. 2.) Plaintiff has not raised the Eighth Amendment issue in his opening brief, so the only issue appropriate for this Court is the Fourteenth Amendment facial challenge.[FN9] [The only facial challenge Plaintiff raises on appeal is under the equal protection clause.] Because counsel was not appointed on any other issue, the Court should decline to consider any other issue. 28 U.S.C. §1915(a)(3).[FN10]

FN9. The only Fourteenth Amendment issue that was tried was whether Defendant O'Connell groped Plaintiff during her search and thereby subjected him to substantive harm without justification. (ER at pp. 404, 80.) The jury found that Defendant O'Connell did not grope Plaintiff and Plaintiff does not contest this finding on appeal.

FN10. The other issues are briefed in the event the Court decides to consider them despite the district court's

ruling of frivolousness.

***22 II. THE POLICY ALLOWING CROSS-GENDER PAT SEARCHES OVER A MALE INMATE'S BOXERS SURVIVES A FACIAL CONSTITUTIONAL CHALLENGE**

A. Standard of Review.

The issue of whether a general policy that allows cross-gender pat searches (female on male) violates the constitution is reviewed de novo. *Horphag Research Ltd. v. Pellegrini,* 337 F.3d 1036, 1040 (9th Cir.2003) ("We review de novo a district court's grant of judgment as a matter of law").[FN11]

FN11. Note: The issue here is not whether the cross-gender search amounted to punishment before conviction. (See OB at p. 38.) The district court held that Plaintiff had waived any such claim by not raising it before trial. (ER at pp. 423:1-424:11.)

B. Plaintiff has neither argued nor demonstrated that the policy is facially unconstitutional.

A facial challenge to a policy is the most difficult challenge to mount successfully, because Plaintiff must establish that "no set of circumstances exists" under which the policy could be valid. *United States v. Salerno,* 481 U.S. 739, 745 (1987); *U.S. v. Dang,* 488 F.3d 1135, 1142 (9th Cir. 2007). Frankly, Plaintiff has not even argued the point. There is no basis for this Court to reverse the district court's ruling that the Sheriffs Office policy is facially constitutional as a matter of law.

The policy survives a facial challenge in any event.

***23 C. The policy is facially constitutional under the Fourteenth Amendment guarantee of substantive due process.**

Substantive Due Process would prohibit a gratuitous invasion of privacy. *See* *Hart v. Sheahan,* 396 F.3d 887, 892 (7th Cir. 2005). The central mission of the substantive component of the due process clause is to provide redress for, and deter, abuse of governmental authority. *Daniels v. Williams,* 474 U.S. 327, 330-32 (1986). But nothing in the policy or in the record demonstrates that cross-gender pat searches of male inmates are done gratuitously or as an abuse of governmental authority. To the contrary, in fact, Sheriff Arpaio testified that that the purpose for this policy was security in the jail. Out of 10,000 total inmates, only 300 to 400 are female. Contraband is a constant problem. To maintain a handle on this problem, searches are conducted every time inmates leave their cells, every time they leave the housing unit, and every time they go to or return from visitation, medical, court, activities, or other programs. In fact, inmates are searched at least once daily, and more often several times daily. All of these searches are pat searches, except for those conducted after the inmate returning from a contact visit or from outside the facility, which are strip searches. In addition, pat searches of the inmates and searches of their cells are conducted any time the facility obtains information of something going on, such as reports of contraband, increased fighting, etc.

***24** There are simply not enough male officers at the facility to conduct all of these searches on the male inmates without the help of the female officers, especially when 90 inmates are being moved out of a pod so that they and their cells can be searched. Based on this evidence, Plaintiff could not succeed in any facial challenge, which requires him to prove that "no set of circumstances exist" under which the policy could be valid. There is no evidence that the cross-gender searches are done gratuitously.

Case law from this Circuit is in accord. This Court has repeatedly held that searches or surveillance of male prisoners by female detention officers do not violate the Constitution. *See, e.g.,* *Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1995) (policy allowing females to conduct pat-down searches including groin area does not violate the Fourteenth

Amendment); *Michenfelder v. Sumner,* 860 F.2d 328, 334 (9th Cir. 1988) (holding that the monitoring of male prisoners by female officers during strip searches or on shower duty does not violate the Fourth Amendment). In *Grummett,* the Court said:

[R]outine pat-down searches, which include the groin area, and which are otherwise justified by security needs,[FN12] do not violate the fourteenth amendment because a correctional officer of the opposite gender conducts such a search.

FN12. The jury here found that the search in question was justified by legitimate security concerns.

***25** 779 F.2d at 495, *citing* *Bagley v. Watson,* 579 F. Supp. 1099 (D. Or. 1983) (upholding opposite-sex pat searches by female guards that includes a search of both the genital and buttock areas) and *Smith v. Fairman,* 678 F.2d 52 (7th Cir. 1982) (upholding a policy permitting female guards to pat search male inmates, excluding the genital area). The Court reasoned that the searches do not involve intimate contact with the inmate's body, that the females conducted themselves in a professional manner (as the jury found Deputy O'Connell did here), and that females cannot conduct or observe strip or body cavity searches (as is true in this case as well). *Id.* and at 496.[FN13] *See also* *Madyun v. Franzen,* 704 F.2d 954 (7th Cir.), *cert denied,* 464 U.S. 996 (1983) (upholding a policy permitting pat searches of males by female guards, even where there might be incidental contact with the genital area); *Timm v. Gunter,* 917 F.2d 1093, 1101 (8th Cir. 1990), *cert denied,* 501 U.S. 1209 (1991) (cross-gender pat-downs, even if they include the groin area, are not per se unconstitutional); *Martin v. Swift,* 781 F. Supp. 1250, 1253 (E.D. Mich. 1992) (there is "no question that ***26** [the pat-down search of a female arrestee by a male officer] would pass constitutional muster. To find otherwise would require every police car to carry two officers, one male and one female, so that misdemeanants would be searched by officers of the same sex.").

FN13. Plaintiff argues that *Grummett* is distinguishable because there, the inmates were "fully clothed." (OB at 32.) But this is of no moment, because *Grummett* was a facial challenge to a policy allowing females to pat search clothed male inmates. Again, in a facial challenge, Plaintiff must demonstrate that there are no circumstances under which the policy can be reasonable, and in light of *Grummet 's* holding he cannot do so. The fact that some of the searches might be conducted over the inmate's boxers does not make the policy facially unconstitutional.

Here, Policy DH-3 allows female officers to pat search male inmates over their clothing. The fact that these pat searches sometimes occur when male inmates are in their boxer shorts does not demonstrate that the policy is facially unconstitutional. Nothing in the record even suggests that the only reason female officers can search male inmates is to inflict gratuitous harm. In short, Plaintiff has not met his burden of demonstrating that there are no circumstances in which cross-gender pat searches are reasonable.

D. The policy is facially valid under the Fourth Amendment.

The only issue that was litigated with respect to the Fourth Amendment was an as-applied issue: whether Defendant O'Connell groped Mr. Byrd during the search and thus conducted an unreasonable search. Plaintiff never argued the general invalidity of cross-gender searches under the Fourth Amendment, and therefore the argument was waived. *O'Guinn v. Lovelock Correctional Center,* 502 F.3d 1056, 1063 n.3 (9th Cir. 2007). For these reasons the Court should not consider this issue. But even if the Court does consider the issue, affirmance is appropriate.

***27 1. Plaintiff has no Fourth Amendment privacy interest.[FN14]**

FN14. *Baker v. McCollan,* 443 U.S. 137, 140 (1979) (stating that the first step in a § 1983 analysis is to identify the specific constitutional right involved).

The Fourth Amendment does not protect privacy interests within prisons. *Johnson v. Phelan,* 69 F.3d 144 (7th Cir. 1995); *Hudson v. Palmer,* 468 U.S. 517, 526-30 (1984).[FN15] *See also* *Somers v. Thurman,* 109 F.3d 614, 622 (9th Cir.

1997) ("it is highly questionable even today whether prison inmates have a Fourth Amendment right to be free from routine unclothed searches by officials of the opposite sex, or from viewing of their unclothed bodies by officials of the opposite sex."). Indeed, while this Court has previously assumed that some vestige of a right exists, *Grummett v. Rushen,* 779 F.2d 491 (9th Cir. 1985), the Court has specifically declined to decide whether prisoners have a Fourth Amendment privacy right that could be infringed by the cross-gender nature of an otherwise proper and legitimate search. *Jordan v. Gardner,* 986 F.2d 1521, 1524-25 (9th Cir. 1993). Nor has Plaintiff established, either below or on appeal, that he has a Fourth Amendment privacy interest in having a pat search conducted only by an officer of his same gender. Since he has not established a Fourth Amendment right, he cannot show any violation of such a right.

FN15. "A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order." 468 U.S. at 527-28, citing *Bell v. Wolfish,* 441 U.S. 520, 537 (1979).

***28 2. Even if Plaintiff had a Fourth Amendment privacy interest, the policy at issue is facially constitutional.**

Plaintiff has not argued that Sheriffs Office policy DH-3 is facially unreasonable under the Fourth Amendment, and for reasons similar to those stated above, such an argument would not succeed. Again, Plaintiff could not demonstrate that under no circumstances can a cross-gender search be reasonable under the policy. Indeed, when faced with the issue, this Court has never held that a female detention officer could not conduct searches of male inmates. *See, e.g., Somers v. Thurman,* 109 F.3d 614, 620-21 (9th Cir. 1997) (a Fourth Amendment privacy right prohibiting cross-gender searches was not clearly established in 1993); *Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1995); *Michenfelder v. Sumner,* 860 F.2d 328, 334 (9th Cir. 1988). *See also Bagley v. Watson,* 579 F. Supp. 1099, 1103 (D. Or. 1983); *Madyun v. Franzen,* 704 F.2d 954 (7th Cir.), cert denied, 464 U.S. 996 (1983); *Timm v. Gunter,* 917 F.2d 1093, 1100-01 (8th Cir. 1990), *cert denied,* 501 U.S. 1209 (1991). This precedent alone is sufficient to affirm the facial constitutionality of Policy DH-3 under the Fourth Amendment.[FN16]

FN16. Indeed, in *Bell v. Wolfish,* 441 U.S. 520 (1979), the Court held that visual body cavity searches do not violate detainees' Fourth Amendment rights; and if visual body cavity searches are constitutional, then clothed "pat-down" frisk searches by officers of the opposite gender are also surely reasonable and therefore facially constitutional. *Bagley v. Watson,* 579 F. Supp. 1099, 1103 (D. Or. 1983).

***29 E. The policy does not violate equal protection.**

Because counsel was not appointed on this issue, and it was not certified as non-frivolous, the Court should decline to consider it. It is briefed in the event the Court decides to consider it.[FN17]

FN17. The district court dismissed this claim under 28 U.S.C. § 1915(e)(2) and 42 U.S.C. §1997e(c). This Court reviews *de novo* a dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii) in the same manner as a dismissal under Federal Rule of civil Procedure 12(b)(6). *Barren v. Harrington,* 152 F.3d 1193, 1194 (9th Cir. 1998).

1. **Policy DH-3 does not implicate equal protection.**

Arguably, Sheriff's Office policy DH-3 does not even implicate the equal protection clause. The equal protection clause ensures that gender classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. *U.S. v. Virginia,* 518 U.S. 515, 534 (1996) (holding that Virginia had shown no exceedingly persuasive justification for excluding all women from the citizen-soldier training afforded by VMI). Policy DH-3 does not even facially deprive either gender of a right or opportunity given to the other gender. As is shown above, no inmate has a constitutional right to be free from cross-gender pat searches. *See Madyun v. Franzen,* 704 F.2d 954, 962 (7th Cir. 1983) (cross-gender search does not violate equal protection; "The right to be searched by a member of one's own sex ... is hardly a right that can be analogized to the educational, recreational ***30** and voca-

tional programs that courts have required prisons to provide on an equal basis").

2. Plaintiff failed to show that male and female inmates are similarly situated.

Plaintiff seems to argue, erroneously, that the Sheriffs Office Policy is "facially discriminatory" simply because it allows female officers to pat search males, but does not allow male officers to pat search females, absent exigent circumstances. (OB at 44-45.) But the equal protection clause does not proscribe gender as a basis for classification when the situations of men and women are different. *Michael M. v. Superior Court of Sonoma County,* 450 U.S. 464 (1981).

Plaintiff was obligated to demonstrate that the male and female inmates are similarly situated, for example, by showing the number of inmates housed, their average length of stay, their security levels, the incidence of violence, and victimhood. *Oliver v. Scott,* 276 F.3d 736, 746 (5th Cir. 2002) (upholding cross- sex monitoring of males but not females against equal protection challenge); *Yates v. Stalder,* 217 F.3d 332, 334 (5th Cir. 2000) (to prove an equal protection violation on the basis of sex, male prisoners must prove male and female prisoners are similarly situated). Here, Plaintiff has never argued or demonstrated that male and female inmates are similarly situated for purposes ***31** of pat searches by officers of the opposite gender. For this reason alone, the claim fails.

Indeed, inmates are not entitled to be treated the same as other inmates simply because they are all inmates. *Norvell v. Illinois,* 373 U.S. 420, 423 (1963) (exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment). The fact that all inmates might feel some discomfort at being pat searched near their groin area by opposite gender officers does not make males and females similarly situated for the purpose of a facial challenge to the policy on equal protection grounds. Male and female inmates are not similarly situated in this case. Pat searches must be conducted often in order to control contraband in the jail. Out of 10,000 inmates, only 300 to 400 are female. There are simply not enough male officers to conduct all of these searches on male inmates without the help of the female officers. Thus, if anything, the record demonstrates that the female inmates at the jail are not similarly situated to the male inmates when it comes to needing officers of the opposite gender to search them. *Timm v. Gunter,* 917 F.2d 1093, 1102-03 (8th Cir. 1990) (upholding sex-neutral visual surveillance of male inmates as against equal protection challenge because male and female inmates not similarly situated).

***32 3. Even if the inmates were similarly situated. Plaintiff fails to demonstrate a constitutional violation.**

Even if the Policy is examined under the equal protection clause, it is constitutional as a matter of law. State-sponsored gender discrimination is subject to "intermediate scrutiny." *United States v. Virginia,* 518 U.S. 515, 533 (1996); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150 (1980). Under this test, a policy must be "substantially related to the achievement of an important governmental interest."[FN18] Prison officials, however, are "accorded wide-ranging deference" in deciding what policies are needed to maintain institutional security. *Bell v. Wolfish,* 441 U.S. 520, 547 (1979). Further, prison administrators enjoy a reasonable degree of flexibility in affording different treatment to male and female inmates in the interest of security or other legitimate penological functions. *Madyun v. Franzen,* 704 F.2d 954, 962 (7th Cir. 1983).

FN18. The district court used the classification of "prisoners" and the rational relationship test. (ER at p. 60.) It dismissed the equal protection claim "without prejudice" because Plaintiff failed to allege that he was a member of a suspect class, that Defendants' conduct was the result of purposeful or invidious discrimination, or that the conduct bore no rational relationship to a legitimate governmental interest. (*Id.* at pp. 60-61.) Plaintiffs complaint did not allege any of these elements. (ER at p. 871.) Further, though the claim was dismissed without prejudice, it was not developed, argued, or instructed at trial.

These precepts themselves demonstrate that the Sheriff's Policy serves important government objectives, and that the means are substantially related to ***33** the achievement of those objectives. Institutional security is of paramount

importance in he jails. As Captain Peterson testified, due to the number of male inmates, and the need to curtail contraband, the jail simply does not have the luxury of having male inmates pat searched by only male officers. Further, a third of the detention officers are women. To prohibit them from conducting the full range of detention officer duties would relegate them to back-office administrative tasks and reduce the security of the jail. As such, allowing cross-gender pat searches of male inmates serves the important government objectives of enhancing security in the jail and ensuring equal employment for female officers; and the policy allowing such is not only substantially related, but it is integrally necessary to achieve those objectives. *Madyun v. Franzen,* 704 F.2d 954, 962 (7th Cir. 1983); *Oliver v. Scott,* 276 F.3d 736, 746-47 (5th Cir. 2002); *Timm v. Gunter,* 917 F.2d 1093, 1102-03 (8th Cir. 1990) (“Although an inmate may very well retain some privacy rights when entering a prison, such rights, when balanced against the legitimate equal employment rights of male and female guards, and against the internal security needs of the prison, must give way to the use of pat searches on a sex-neutral basis...”) .[FN19]

FN19. *Oliver* applied the *Turner v. Safley* test to the equal protection challenge to a policy allowing females to observe male inmates in showers, but not allowing males to observe female inmates. That test requires prison regulations to be “reasonably related to legitimate penological objectives.” 276 F.3d at 747. The Policy at issue here meets both tests.

***34 F. The policy meets the test of Turner v. Safley.**[FN20]

FN20. Plaintiff erroneously analyzes the Turner test in connection with his as-applied argument. (OB at 28-31.) *See* *Michenfelder v. Sumner,* 860 F.2d 328, 334 (9th Cir. 1988) (analyzing the Turner factors in the context of a facial challenge to a policy allowing female officers to observe strip searches and to take shower duty).

When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. This standard is necessary if “prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations.” *Turner v. Safley,* 482 U.S. 78, 89 (1987). As Justice O'Connor stated in *Turner,*

Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby “unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.”

482 U.S. at 89, *quoting* *Procunier v. Martinez,* 416 U.S. 396, 407 (1974).

Under Turner, a jail policy passes constitutional muster when: (1) the regulation is rationally related to a legitimate and neutral governmental objective; (2) there are alternative avenues that remain open to the inmates to ***35** exercise the right; (3) accommodating the asserted right would have a deleterious effect on guards, prisoners, and the allocation of prison resources; and (4) easy and obvious alternatives do not exist that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *Id.* at 89-90. This is not a balancing test. *Turner,* 482 U.S. at 87-90.

Cross-gender pat searches have already been upheld on a *Turner* analysis. *See* *Timm v. Gunter,* 917 F.2d 1093 (8th Cir. 1990). In *Timm,* the court upheld a policy allowing female officers to pat search clothed male inmates, though incidental touching of inmates' genital and anal areas could occur during the search. As the court stated:

The judgment exercised by prison administrators in striking a balance between the rights of prisoners and the demands of institutional security is to be given great deference. Such a balancing act is an exceedingly complex task, and not one easily undertaken by the courts, whose expertise in the imperatives of institutional security is slight and in no way

approaches that of the professional administrators charged with the awesome task of running our prisons.

917 F.2d at 1099 (citations omitted.)

1. There is a "valid, rational connection" between the Policy the legitimate governmental interests that justify It.

Federal courts have already recognized that there is a valid, rational connection between a policy allowing cross-gender pat searches of male ***36** inmates, and the legitimate governmental interests that justify it. Those interests are (1) institutional security; and (2) non-discriminatory employment of female officers. See argument and cases cited above. The institutional security need in this case is manifest in the record. All witnesses testified that there are not enough male officers to pat search 10,000 male inmates without the help of the female officers, who comprise one-third of the officer force. The Policy is reasonably related to legitimate penological objectives.[FN21]

FN21. Plaintiff errs in attempting to argue this factor in the context of his as- applied argument. (OB at 34 et seq.) Because federal case law recognizes the valid, rational connection between a policy allowing cross-gender pat searches of male inmates, and the legitimate governmental interests that justify it, it is irrelevant who was present at Plaintiff's particular search. Thus, the evidence cited above not only supports the facial validity of the Policy, but defeats Plaintiff's conclusory statements that "ceasing the challenging conduct in this case would have been effortless" (OB at 34) and that the use of cross-gender searches "does *nothing* to advance the County's interest in maintaining security at the Durango Jail." (OB at 37.) The same analysis defeats Plaintiff's discussion of the *Michenfelder* case. (OB at 35-37.)

2. Alternative means of exercising the right.

Inmates do not have any constitutional right not to be pat searched by officers of the opposite gender. *Bagley v. Watson,* 579 F. Supp. 1099, 1103 (D.C. Or. 1993). Further, while an inmate might not have an alternative method of exercising a right to privacy during the search (assuming it exists), this is of minimal importance. *Timm, supra,* at 1100. The search is of limited duration and is conducted only over clothing. The genitals and bare buttocks are not ***37** viewed. The fact that sometimes the clothing over which the pat search is conducted constitutes boxer shorts does not make the policy facially unconstitutional.

3. Requiring male-on-male pat searches would have a negative effect on guards and other inmates, and on the allocation of prison resources generally.

When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials. *Turner* at 90. That is the case here, since the testimony was that there are not enough male officers to conduct only male on male pat searches of all the inmates. Further, preventing female officers from conducting the full obligations of their job would cause a significant ripple effect on their ability for employment and advancement. *Timm,* 917 F.2d at 1100. For this reason, the Policy is reasonably related to legitimate penological objectives.

4. The absence of ready alternatives.

Prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. *Turner* at 90-91. Here, Plaintiff has not suggested any alternatives to the facility's need to have the female officers' manpower to assist in conducting the male pat searches. Considering the lack of manpower and the ***38** detrimental effect on the female officers' employment that a male-on-male pat search policy would cause, this factor favors the reasonableness of the Policy.

In short, Plaintiff has not demonstrated any basis for reversal on the only issue the district court found not-frivolous, that is, a facial challenge to the Sheriff's Policy. As the *Timm* court stated,

The administrators have decided that the best balance among the competing concerns is to allow pat searches on a sex-neutral basis; deciding that this is not an unreasonable regulation, we defer to their judgment and expertise.

Timm, 917 F.2d at 1101.

III. THE POLICY IS CONSTITUTIONAL AS APPLIED TO PLAINTIFF

A. Plaintiff's as-applied argument was waived.

Plaintiff's Opening Brief is almost entirely devoted to arguing that the search as applied to him, while conducted professionally by Deputy O'Connell and for legitimate security purposes, was unconstitutional due to the fact that he was in his boxers and the search occurred in the multipurpose room where male officers were present. (OB at 16-42.) This issue was simply not argued or tried to the jury. The as-applied issues tried to the jury were (1) whether Defendant O'Connell groped Plaintiff during the search, which would have violated his Fourth Amendment rights and his Fourteenth Amendment rights against gratuitously wanton harm; and (2) whether the search was conducted for ***39** reasons other than legitimate security reasons, which would have violated Plaintiff's Fourth Amendment rights. The jury found against Plaintiff on both of these issues, and Plaintiff does not challenge those findings or that verdict. The jury was not instructed to consider whether the circumstances of the search, otherwise properly and legitimately conducted, made it unreasonable. The issue has been waived. *O'Guinn v. Lovelock Correctional Center,* 502 F.3d 1056, 1063 n.3 (9th Cir. 2007).

B. The search as applied to Plaintiff was not unreasonable under the Fourth Amendment.

The search at issue survives the *Bell v. Wolfish* test in any event.[FN22]

FN22. This assumes, without conceding, that Plaintiff has a Fourth Amendment right in this circumstance.

1. It survives the Bell test.

Under *Bell v. Wolfish,* 441 U.S. 520 (1979), the Fourth Amendment test of reasonableness balances the need for the search against the invasion of the inmate's personal rights. Courts 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. *Bell,* 441 U.S. at 559 (upholding visual body-cavity searches conducted on less than probable cause).

*40 a. The scope was reasonable.

This case is not about the Sheriffs policy of having all male inmates wear pink boxers, and so Plaintiffs comments about that issue are irrelevant. (OB at 19).[FN23] Nor does this case have anything to do with the fact that the boxers have a hole in front with no button (*id.*), for Plaintiff never complained that Deputy O'Connell or anyone else saw his genitals or searched them through the hole. The issue is the scope of a female officer pat searching over a male inmate's boxers to ensure there is no contraband taped to the inmate's skin. The officer does not touch the inmate's skin that is unclothed. Nor does the officer touch the inmate's skin underneath the boxers or view the inmate's body underneath the boxers.

FN23. They are also inaccurate, since the Sheriff testified that the reason for making the boxers pink is to prevent them from being stolen from the jail (ER at p. 259:2-13), not to “emasculate” the inmates. (OB at 19.)

Plaintiff complains that the scope of the search was unreasonable because it was "highly invasive" (OB at 19-20). He suggests that Plaintiff's genitals were "slowly and methodically touched" by Deputy O'Connell, who made "intimate contact" with his genitals. *(Id.)* Plaintiff is telling his own story, not the story established by the record as found by the jury. Deputy O'Connell testified that the entire search took between 10 and 20 seconds. No one testified that Deputy O'Connell "used her hand to lift Mr. Byrd's testicles and move ***41** them to the side, before using her other hand to touch the skin underneath Mr. Byrd's testicles." (OB at 19.) This wrongly suggests that Deputy O'Connell took hold of Plaintiff's penis and scrotum and lifted them with one hand while searching the perineum with the other hand. Nothing of the sort occurred. Deputy O'Connell testified that while she was pat searching over Plaintiff's boxers, the back of her flat hand moves the scrotum out of the way so that she can determine if there is any contraband taped to the perineum. At no time did she touch the "skin underneath Mr. Byrd's testicles." Further, the officer searches the inmate from behind. When Deputy O'Connell pulled out the waistband a couple of inches to check it for contraband, she did not look inside the boxers.[FN24]

FN24. Plaintiff repeatedly throughout the brief complains that all the cadets were wearing identical jeans and white t-shirts and that the search was unreasonable because he didn't know who they were. (*See e.g.* OB at 17.) No authority supports the precept that this makes a search unreasonable. Further, he never testified that he thought these people were random strangers off the street or otherwise unauthorized to conduct the search. Indeed, their names were stenciled on the back of their t-shirts. (ER at p. 610:19-23.)

Plaintiff tries to equate this pat search with a strip search of a completely naked male inmate. (OB at 20.) They are not the same, either in reality, in the Sheriff's Office policies, or in federal case law. Deputy O'Connell did not ever view Plaintiff's naked private parts. Her search was a brief, professionally conducted pat search over Plaintiff's boxers. She did not touch his skin, and ***42** never cupped her hand, never kneaded, squeezed or did anything except apply light pressure with a flat hand over the boxers to the thigh, perineum and crack between the buttocks. She never viewed Plaintiff's buttocks or genitalia. The fact that Plaintiff was wearing boxers does not turn a decidedly constitutional pat search into a decidedly unconstitutional strip search.

Sheriffs Office policies treat strip searches differently from pat searches as well. A strip search is defined as a visual scan of a *completely unclothed body,* and policy prohibits females from conducting strip searches of male inmates. This recognizes the difference between a female deliberately and carefully viewing a completely naked male inmate's genitalia (and asking him to lift his genitalia so the body underneath it can be viewed) and either only being present at a strip search, or pat searching areas close to the genitalia over clothes. Federal precedent is fully in accord. *Compare* *Moore v. Carwell,* 168 F.3d 234, 236-37 (5th Cir. 1999) (male inmate alleging he was subject to multiple strip and body cavity searches by female officer without exigent circumstances stated Fourth Amendment claim), with *Michenfelder v. Sumner,* 860 F.2d 328, 332-34 (9th Cir. 1988) and *Letcher v. Turner,* 968 F.2d 508 (5th Cir. 1992) (prison officials may conduct strip searches in view of female employees and other inmates) *and with* ***43***Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1995) (policy allowing females to conduct pat-down searches including groin area does not violate inmate's privacy concerns).

Sterling v. Cupp, 607 P.2d 206 (Or. App. 1980), which Plaintiff cites (at 20) did not purport to define a federal constitutional rule equating pat searches over clothed genitalia with strip searches. Had it done so, it would have been contrary to *Grummett v. Rushen,* 779 F.2d 491, 496 (9th Cir. 1995), *Bagley v. Watson,* 579 F. Supp. 1099 (D. Or. 1983), and *Madyun v. Franzen,* 704 F.2d 954 (7th Cir.), cert. denied, 464 U.S. 996 (1983). Plaintiff's other cited case, *Justice v. City of Peachtree City,* 961 F.2d 188 (11th Circ. 1992) (OB at 20), upheld a strip search of a female minor by female officers. It did not involve a cross-gender pat search over clothing. And the case *Justice* cited for the proposition that people have an expectation not to have their private parts "touched," *Doe v. Calumet City, Ill.,* 754 F. Supp. 1211, 1214-15 (N.D. III. 1990), struck down a blanket practice where male police officers would conduct cross-gender strip searches without reasonable suspicion or probable cause and where male officers would actually grope and penetrate the arrestee's naked body. This is far from analogous to this case.[FN25]

FN25. So, too, *Jordan v. Gardner,* 986 F.2d 1521, 1525 (9th Cir. 1993) analyzed whether suspicionless

cross-gender searches during which officers "squeezed, rubbed and kneaded" female inmates' clothed bodies violated the Eighth Amendment. It did not address whether true pat searches, conducted properly and for legitimate penological reasons, violate the Fourth Amendment, since the Court found that no Fourth Amendment right had been judicially recognized. As such, Plaintiff's recitation of Judge Reinhardt's concurrence (joined by only one other judge in an en banc Court), is interesting but not controlling. (OB at 30-31.)

***44** Plaintiff's other cited cases are inapposite as well (OB at 22.) In *Edgerly v. City and County of San Francisco,* 495 F.3d 645, 657 (9th Cir. 2007), the Court simply ruled that a fact question existed on whether the Plaintiff was strip searched based on testimony that the officer "looked inside his boxer shorts." California law expressly defined a strip search to include exposure of undergarments or visual inspection of buttocks or genitalia.[FN26] In *Sepulveda v. Ramirez,* 967 F.2d 1413 (9th Cir. 1992), the male officer walked into the stall while a female parolee was urinating for a drug sample, and while Plaintiff says that the female was "partially unclothed" (OB at 22), unlike here, it was her genitalia that was exposed to the male officer who simply stood there watching as she finished her task. These cases are not analogous or helpful to our analysis.

FN26. This is the reason the California court assumed, in *Crowe v. County of San Diego,* 359 F. Sup. 2d 994 (S.D. Cal. 2005), that an arrestee having to remove his clothes to his underwear was a "strip search." (*See* OB at 22-23.) The court was not likening an over underwear pat search to a strip search, as Plaintiff suggests. (*Id.*)

In short, while a pat search over a male inmate's boxers does, of necessity, require the officer to touch clothed areas that the inmate might find ***45** discomforting, nothing about the search exceeds reasonableness in terms of scope.

b. The manner was reasonable.

Plaintiff suggests that the manner of the search was unreasonable because he was searched by a cadet and officers told him to shut up and follow directions. (OB at 18). He cites no authority for the proposition, and there is none. Nor is there any authority for the proposition that the otherwise reasonable search became unreasonable because a person was there with a small hand-held video camera 30 feet away. (*Id.*) Plaintiff was not even videotaped. There was simply nothing unreasonable about the manner of conducting the search.

c. The place was reasonable.

Plaintiff then complains that the otherwise reasonable search was rendered unreasonable because all the inmates were searched in the multipurpose room instead of somewhere "private." (OB at 23-24.) He cites no case holding so in the circumstance of a pat search. All of his cited cases (OB at p. 24) involved visual strip searches of completely naked inmates. *See* *Polk v. Montgomery County,* 782 F.2d 1196, 1197 (4th Cir. 1986); *Craft v. County of San Bernadino,* 468 F. Supp. 2d 1172, 1174 (C. D. Cal. 2006) (strip searches conducted in groups); *Bacon v. Koldender,* 2007 WL 2669541 (S.D. Cal. 2007) ***46** (plaintiff required to remove all clothes and pull penis up, bend over and pull buttocks apart for inspection in sight of female officers).

The inmates had to be moved out of their cells for the search because their cells and their clothing were being searched at the same time they were. This is so that inmates don't transfer contraband to one another while officers are searching each cell. Further, that the inmates in the multipurpose room were told to look straight ahead, and to sit facing the wall when their search was completed, further demonstrates the reasonableness of the place. If the inmates followed directions, they would not have seen each other's searches (Plaintiff testified that he looked straight ahead during his search).

d. The search was justified.

All that needs to be said about this factor is that the jury found the search justified, and Plaintiff has not argued on appeal that the evidence was insufficient to support that finding. Indeed, there is more than sufficient evidence in the record to support it. He cannot attempt to now complain that the search was unjustified. (OB at 25-27.)

The record also fully supports the conclusion that the cross-gender nature of the search was justified. Both Captain Peterson and Deputy O'Connell testified that given the ratio of 10,000 male inmates to 300 or 400 female inmates, there are not enough male officers to conduct only male-on-male pat ***47** searches, as often as they must be done for security reasons. The reasonable inference is that if a full third of the officer population (which are female) were not allowed to conduct pat searches, security at the jail would indeed be compromised.[FN27]

FN27. Plaintiff offers no support, factual or legal, for his assertion that there was "no reason" to have him searched by a female cadet (OB at 29) and that he could have had a male search him with no additional burden. (OB at 30.) Further, the jury rejected his contention that the search could have been performed with "equal or better quality" by a male officer. (OB at 29, 31 n.25.) There was nothing at all wrong with the search that Deputy O'Connell conducted, as the jury found.

Finally, contrary to Plaintiff's assertion (OB at 26-27) the record does not need to demonstrate that allowing female officers to conduct all the requirements of the deputy's job, including pat searches, is important in avoiding sexual discrimination. Federal case authority supports the proposition. *Bagley v. Watson,* 579 F. Supp. 1099 (D. Or. 1983); *Madyun v. Franzen,* 704 F.2d 954, 962-63 (7th Cir. 1983); *Timm v. Gunter,* 917 F.2d 1093, 1100 (8th Cir. 1990).[FN28]

FN28. Plaintiff argues that no one testified that female officers' employment opportunities were hampered as a result of refusing to pat search a male inmate. (OB at 27.) This is because females are allowed to pat search male inmates, and there was no evidence that any female officer has refused. Indeed, had the policy prohibited female officers from pat searching male inmates, the record might well have shown that female officers' employment opportunities suffered for it.

***48** In short, the search as applied to Plaintiff was not unreasonable under the *Bell v. Wolfish* test. The scope, the mnner, the place, and the justification for the search were all reasonable, especially given the great deference the Court gives to prison administrators to do their jobs. *Turner v. Safley,* 482 U.S. 78, 85 (1987):

Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez,* additional reason to accord deference to the appropriate prison authorities.

See also *Peckham v. Wisconsin Dept. of Corrections,* 141 F.3d 694 (7th Cir. 1998) ("given the considerable deference prison officials enjoy to run their institutions it is difficult to conjure up too many real-life scenarios where prison strip searches of inmates could be said to be unreasonable under the Fourth Amendment.").

C. The search did not violate the Fourteenth Amendment.

Plaintiff argues that the search as applied to him violated his right, as a detainee, to be free from punishment prior to an adjudication of guilt. (OB at 38.) The district court ruled that Plaintiff had waived this argument below by ***49** not raising it before trial (ER at pp. 423:1-424:11) and thus he cannot raise it here for the first time. Indeed, the only as-applied Fourteenth Amendment issue that was tried was whether Deputy O'Connell groped Plaintiff and thereby wantonly inflicted pain on him. (ER at 80). Whether the search was conducted for purposes of punishment before adjudication was never tried, instructed, or argued. He cannot make an as-applied argument of punishment under the Fourteenth Amendment for the first time on appeal. *O'Guinn v. Lovelock Correctional Center,* 502 F.3d 1056, 1063 n.3 (9th Cir. 2007).

In any event, there is no evidence of "deliberate indifference" here, where Plaintiff gave Defendants no reason at all to believe that he had a "history of sexual abuse" (OB at 40, n.31) and Defendants deliberately disregarded that in subjecting him to the cross-gender pat search. (*Id.* at 41.)

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GIVING AN ADVERSE INFERENCE INSTRUCTION

A. Standard of Review

Evidentiary rulings at trial are reviewed for abuse of discretion. *See United States v. Merino-Balderrama,* 146 F.3d 758, 761 (9th Cir. 1998). Such rulings will be reversed only if the error more likely than not affected the verdict. *See United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir.2004).

***50 B. The record shows no abuse of discretion.**

Plaintiff accuses Defendants, as he did below, of failing "to preserve critical evidence" because he saw a person holding a small video camera at the time of the search. (OB at 47-48.) The record is uncontroverted that no one mentioned anything about this hand held video camera until a couple of days before trial. (OB at 48; ER at pp. 407:6-409:4, 468:13-470:7.)[FN29] Thus, the record demonstrates that the person holding the camera was affiliated, if at all, with the training academy, not with the jail, and was taping "snippets" of the cadet class's training as a memento. (*Id.*) The cameraman, whoever it was, was not a witness at trial, and obviously, no one else had the foundation to testify as to what footage was taped the day of the search. What is known is that neither Mr. Byrd nor his search appears on the memento tape.[FN30] By the time the parties found out that there was a video camera at the search, and the tape was requested, the County's retention policy (two years) had already mandated its destruction. (*Id.*) Plaintiff argued that the County should have preserved the tape as soon as he filed his first grievance, but the County does ***51** not preserve evidence just because an inmate has filed a grievance. (ER at pp. 410:5-411:24.)

FN29. When Plaintiff filed his complaint, *pro se,* a routine request for the preservation of evidence was made to the facility. The response came back that there was no video surveillance. (*Id.*)

FN30. The record is not "uncontroverted" that the video camera filmed Plaintiff, as he claims. (OB at 48.) Plaintiff testified only that he saw the camera there during the search (ER at p. 602:15-25), and that the camera man was 30 feet away from him. (ER at p. 605:5-21.)

The court indicated that the video excerpts were consistent with the idea that not everything was taped, and also with the possibility that everything was taped and edited. (ER at pp. 475:18-476:3.) Ultimately, because the trial court believed the issue turned on debated facts, it was persuaded to give a general "adverse inference" instruction and allowed the parties to argue whether it was applicable. (ER at pp. 411:25-414:3; 83, 134.) Indeed, Plaintiff's counsel extensively argued the adverse inference to the jury. (ER at pp. 150:15-152:25.) The jurors simply did not believe his story.

Plaintiff does not argue that the trial court abused its discretion in giving him the adverse inference. He apparently argues that the trial court abused its discretion in denying *his* proposed adverse inference instruction. (OB at 51.) No abuse appears in the record. Plaintiffs proposed instruction was inaccurate. (See ER at p. 27.) It stated that Plaintiff filed a "complaint" on the date of the search (he didn't; he filed a grievance). It stated that the County "erased" the tape, but there was no evidence of this. It intimated that the entire search was taped, for which there was no evidence. It stated that the taped showed that the search was done solely for training purposes and that Deputy O'Connell groped Plaintiff and inserted her finger into his anus. But even **Plaintiff** denied that ***52** Deputy O'Connell penetrated his anus. (ER at p. 595:3-5.) The trial court certainly did not abuse its discretion in rejecting Plaintiff's offered instruction.

Plaintiff then asserts that the County's document retention policy is “illegal.” (OB at 47, 50.) This lawsuit is not about the County's document retention policy; the issue here is not whether it is “illegal,” and in any event, Plaintiff never argued that it was below.[FN31] The issue is whether the trial court abused its discretion in giving the jury the adverse inference instruction it did. As is noted above, nothing in the record shows such an abuse.

FN31. The retention policy is not “illegal” in any event. Plaintiff accuses the County of not placing a litigation hold on its document retention policy when this lawsuit was filed. (OB at 51.) The record is to the contrary. Defendants' trial counsel informed the court that when Plaintiff filed his lawsuit, the County put in a standard evidence hold to the jail, which asks for all videotapes, etc. The jail responded that there was no surveillance tape, which is true. The first Defendants' counsel even heard of a hand-held video camera was a few days before trial, from Plaintiff's counsel who heard it from Plaintiff. By that time, much more than two years had passed and any video that might have been taken would have been destroyed in accordance with the County's policy. (ER at pp. 407:6-409:4. *See also* ER at p. 469:1-470:21.)

Finally, Plaintiff suggests that the court abused its discretion in admitting into evidence the Video Yearbook snippet that showed the search being conducted. (OB at 52-55.) Yet as the district court ruled, Plaintiff's counsel himself opened the door to showing the video tape by asking Sheriff Arpaio if he “ever reviewed the video tape that was made of this search” and whether “the videotape has been erased.” (ER at pp. 250:4-6, 251:3-18, 253:2-16.) At ***53** the time the district court ruled that Plaintiff had opened the door to having the video played, Plaintiff did not make an objection to that ruling. Plaintiff never objected that the footage would prejudice and mislead the jurors by “depicting the cadets in a fond and tender light.” (OB at 53.)

Further, while Plaintiff now complains about the footage showing the cadets practicing searches on fully clothed supervisors (OB at 54), it was Plaintiff's counsel who showed that video during his closing, and used it to argue that the search was conducted as a training exercise. (ER at 143:20- 145:21.) Plaintiff has not shown any abuse of discretion in admitting the video snippets under these circumstances.

Even if admitting the video was error, which it was not, it was harmless. *M2 Software, Inc. v. Madacy Entertainment,* 421 F.3d 1073, 1087 (9th Cir. 2005) (Prejudice must be shown in evidentiary ruling to warrant reversal). Plaintiff cannot demonstrate that the video was so prejudicial as to deny him a fair trial, or that the jury would have found in his favor had the video not been played.

*54CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court to affirm the judgment in their favor.

Charles Edward BYRD, Plaintiff/Appellant, v. MARICOPA COUNTY SHERIFF'S DEPARTMENT; Joseph M. Arpaio; O'connell; Peterson; Durango Jail, Defendants/Appellees.
2008 WL 1723061 (C.A.9) (Appellate Brief)

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