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8 Attorneys for Sheriff Joseph Arpaio, Captain Peterson, Officer O'Connell

9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE DISTRICT OF ARIZONA

11 Charles Edward Byrd,

12 Plaintiff,

13 v.

14 Joseph Arpaio, et al.,

15 Defendant.

NO. CV04-2701-PHX-NVW (ECV)

**MARICOPA COUNTY  
DEFENDANTS'  
MOTION TO DISMISS**

17 Defendants Arpaio, O'Connell, and Peterson (hereinafter "Defendants"),  
18 by and through undersigned counsel, hereby submit their Motion to Dismiss all  
19 Plaintiff's claims because Plaintiff has failed to exhaust his administrative  
20 remedies as required under the Prison Litigation Reform Act (PLRA), 42 U.S.C.  
21 §1997e(a). This motion is supported by the following Memorandum of Points  
22 and Authorities and Affidavit.

1 RESPECTFULLY SUBMITTED this 18th day of June 2007.

2 ANDREW P. THOMAS  
3 MARICOPA COUNTY ATTORNEY

4 BY: s/Maria R. Brandon  
5 MARIA R. BRANDON  
6 Deputy County Attorney  
Attorneys for Maricopa County  
Defendants

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. FACTUAL BACKGROUND:**

9 **A. Plaintiff's Complaint.**

10 Plaintiff, Charles E. Byrd, while in the custody at the Maricopa County Jail  
11 System filed his Complaint wherein Plaintiff asserts civil rights claim s against  
12 Defendants for violating his Fourth, Eighth & Fourteenth Amendment rights while  
13 he was incarcerated at the Durango Jail. (Complaint pp. 4,5,6 ¶ 1.) Plaintiff's  
14 complaint names Sheriff Joseph Arpaio, Officer O'Connell, and Capt. Peterson.  
15 Defendants are being sued in their indi vidual and official capa city. (Plaintiff's  
16 Complaint p. 2.) The Complaint was filed on June 14, 2005. Defendants filed a  
17 Motion for Summary Judgment on January 18, 2007, and the Court granted and  
18 denied the motion in part, subsequently di smissing Count II of Plaintiff's First  
19 Amended Complaint. Plaintiff to proce ed as to his cl aims for compensatory,  
20 nominal, and punitive damages based on violations of his Fourth and Eight h  
21 Amendment rights.

22 In Count I, Plaintiff alleges hi s constitutional rights were violated when a

1 female Detention Officer O'Connell conducted a "pat-down" search of his genital  
2 area. The Plaintiff states he was dressed in his "boxer shorts" when the search  
3 was conducted in view of ten male detention officers that he believes should  
4 have performed the search. Plaintiff claims subsequent mental and physical  
5 anguish caused by this incident. (Complaint p. 4, ¶¶ 3, 4.) Plaintiff seeks  
6 compensatory damages.

7 In Count III, Plaintiff asserts that Defendants violated his constitutional  
8 rights when female Detention Officer O'Connell was allowed to engage in  
9 "unwanted, physical contact of a sexual nature" in the course of her duties by  
10 performing an opposite-gender search on his person. Plaintiff claims  
11 subsequent mental and physical anguish caused by this incident. (Complaint p.  
12 6, ¶¶ 3, 4.) Plaintiff seeks compensatory damages.

13 **B. MCSO Administrative Process.**

14 The Maricopa County Sheriff's Office (MCSO) provides inmates with a  
15 system to register valid complaints pertaining to procedures and conditions  
16 within the jail. (See Affidavit of Sgt. Susan Fisher.) The inmate grievance and  
17 administrative appeal process is a three-tier system described in the "*Rules and*  
18 *Regulations for Inmates*" as set forth in Procedure DJ -3 "*Inmate Grievance*  
19 *Procedure.*" (Affidavit of Sergeant Susan Fisher, Exhibit 1.) Each inmate is  
20 provided with a copy of the Rules and Regulations during the booking process.  
21 (Affidavit of Susan Fisher, Exhibit 1.) The three tiered system includes: (1) the  
22 initial grievance and decision by the Bureau Hearing Officer; (2) the Institutional

1 appeal; and (3) the External appeal.

2 **C. Plaintiff's Grievance Record.**

3 The MCSO grievance records maintained for Plaintiff indicate he filed  
 4 seventeen grievances on various jail conditions including three grievance s  
 5 specifically related to the opposite-gender search. (See Attached Exhibit "D")  
 6 Plaintiff alleges that the sexual harassment/assault incident occurred on October  
 7 28, 2004, and that he gri eved the incident on October 28, 2004. There i s no  
 8 record of his filing a grievance regar ding this issue on October 28, 2004. (See  
 9 Grievance Index, Exhi bit "D") The r ecord reflects Plaintiff did not grieve on  
 10 October 28, 2004. Grievances must be file d within twenty-four (24) hours of the  
 11 incident. This was not done. The record reflects three grievances were filed  
 12 regarding the incident involving Officer O'Connell, but not until December, 2004.  
 13 Grievance No. 04-15460 filed on December 19, 2004, was voluntarily withdrawn  
 14 by the Plaintiff on December 20, 2004. (Exhibit 2) Grievance No. 04-15550 filed  
 15 on December 9, 2004 (Exhib it 3) and Gri evance No. 04-15549 (Exhibit 4) filed  
 16 on December 19, 2004, were not exhausted administratively as the Plaintiff was  
 17 released to the Ariz ona Department of Correc tions on December 22, 2004.  
 18 (Exhibit 5)

19 **II. LEGAL ARGUMENT**

20 **A. Motion to Dismiss is Proper Avenue for this Challenge.**

21 The failure of a plaintiff to exhaust administrative remedies pursuant  
 22 to the PLRA is treated as a matter in abatement subject to a non-enumerated,

1 Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9<sup>th</sup> Cir. 2003), *cert.*  
 2 *denied*, 540 U.S. 810, 124 S.Ct. 50 , 157 L.Ed.2d 23 (2003) and *Ritza v. Int'l.*  
 3 *Longshormen's and Warehousemen's Union*, 837 F.2d 365, 369 (9<sup>th</sup> Cir. 1988)  
 4 When the Court is ruling upon a non-enumerated motion such as this one, there  
 5 is no presumption of truthfulness which attaches to the Plaintiff's allegations set  
 6 forth in the Complaint and "the existenc e of a disputed material fact will not  
 7 preclude the trial court from eval uating for itself the merits of the jurisdictional  
 8 claims." *Ritza*, 837 F.2d at 369 *quoting Mortensen v. First Fed. Sav. & Loan*  
 9 *Ass'n.*, 549 F.2d 884, 891 (3d Cir. 1977)(citations omitted).

10 Defendant has the burden of rais ing and prov ing the absence of  
 11 exhaustion. *Id.* If the Court concludes that a prisoner has not exhausted non-  
 12 judicial remedies, the proper remedy is dismissal of the claim without prejudice.  
 13 *Id.* Exhaustion under the PLRA is comparable to a defense of failure to comply  
 14 with the statute of limitations, both are affirmative defenses. *Id.* at 1245. See  
 15 *also Ritza*, 837 F.2d at 368-69 (" Failure to exhaust non judicial remedies is a  
 16 matter in abatement, not goin g to the merits of t he claim, and as such i s not  
 17 properly raised in a motion for summary judgment.")

#### 18 **B. Plaintiff Failed to Exhaust the Administrative Procedure.**

19 The PLRA provides that "[n] o action shall be brought with respect to  
 20 prison conditions under [42 U.S.C. §19 83], or any other F ederal law, by a  
 21 prisoner confined in any jail, prison, or other correctional facility until such  
 22 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

1 Exhaustion is mandated regardless of the relief offered through administrative  
2 procedures. *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825, 149  
3 L.Ed.2d 958 (2001). Exhaustion applies to all inmate suits about prison life.  
4 *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)

5 Plaintiff has failed to exhaust available remedies. (Complaint, pp. 4-5, ¶  
6 5.) Sergeant Fisher avers in her affidavit, all issues pertaining to an inmates  
7 conditions of confinement are grievable.

### 8 **III. CONCLUSION**

9 Plaintiff has not complied with the mandates of the PLRA by failing to  
10 exhaust the grievance process available to him as to all counts. Because of his  
11 failure to exhaust, Defendants respectfully request that the Court dismiss all of  
12 Plaintiff's claims.

13 RESPECTFULLY SUBMITTED this 18th day of June 2007.

14 ANDREW P. THOMAS  
15 MARICOPA COUNTY ATTORNEY

16  
17 BY: s/Maria R. Brandon  
18 MARIA R. BRANDON  
19 Deputy County Attorney  
20 Attorneys for Maricopa County  
21 Defendants  
22

1 ORIGINAL of the foregoing E-FILED  
and copies MAILED this  
2 19th day of June 2007 to:

3 Honorable Neil V. Wake  
United States District Court Judge  
4 UNITED STATES DISTRICT COURT  
District of Arizona  
5 Sandra Day O'Connor U.S. Courthouse, Suite 524  
401 West Washington Street, SPC 52  
6 Phoenix, Arizona 85003

7 Honorable Edward C. Voss  
United States Magistrate Judge  
8 UNITED STATES DISTRICT COURT  
District of Arizona  
9 Sandra Day O'Connor U.S. Courthouse, Suite 324  
401 West Washington Street, SPC 75  
10 Phoenix, Arizona 85003

11 and COPY to;

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16  
17 s/Lea Wink

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