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.
April 8, 2008.

Appeal from District of Arizona (Phoenix)

Reply Brief

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INTRODUCTION

I. The County's Bait-and-Switch Technique

In its Answering Brief, Maricopa County (the "County") has attempted to win this appeal by pretending that this case is about routine pat-down searches. It has pretended that Mr. Byrd is challenging the County's practice and policy of subjecting detainees and inmates to fully-clothed, cross-gender, pat-down searches by officers in uniform. Unfortunately for the County, pretending that something is the case does not make it so.

This case is about the October 28, 2004 search of Charles Byrd ("Mr. Byrd"), in which Mr. Byrd was (i) stripped down to his pink *underwear;* (ii) approached by a female in *civilian clothing* (who was not even an officer at the time) wearing blue jeans, a white t-shirt and no name badge indicating she was not an average civilian; and (iii) subjected to a search in which the female cadet made intimate contact, through Mr. Byrd's underwear, with Mr. Byrd's *testicles, perineum* and *inner crack* of his buttocks - all while numerous *male officers* in uniform were standing just 10 feet away and perfectly available to conduct the search. Indeed, this case is about the County's established practice and policy of conducting *en masse* searches at the Durango Jail (whenever a specific security threat arises) in which male detainees are stripped down to their underwear and intimately touched (through their underwear) on their *genitalia* by female cadets, while male officers are present and available to conduct the searches.

In an obvious attempt to distort the issue on appeal, the County argues that the cross-gender nature of the search of Mr. Byrd was necessary to advance jail security and the equal employment rights of the female guards because "searches" are performed with astonishing frequency. In the words of the County,

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 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. 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 additional, 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. 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[.]

(Ans. Br. 23-24 (emphasis added); *see also id.* at 9-10 (same argument).) Thus, the County's argument is simple: "pat searches" are performed with extraordinary frequency *i.e* generally several times per day on each and every detainee; therefore, female officers must perform some of these searches, since there are simply not enough male officers to perform all of them.

This would be a good argument if Mr. Byrd were in fact challenging the fully-clothed, pat-down searches that are performed "several times daily" on each and every detainee.[FN1] But Mr. Byrd is *not* challenging those searches. As the proceedings below and Mr. Byrd's Opening Brief make abundantly clear, Mr. Byrd is challenging the constitutionality of the *en masse* underwear searches conducted by cadets in civilian clothing - and *only* those searches. Those searches are not performed several times daily. The Executive Officer of the Durango Jail, Lieutenant Scott Frye, swore under penalty of perjury that these searches are performed "about four times a month." (*See* Frye Affidavit, EOR 793;*see also* Op. Br. 29 n.23.)[FN2] Lieutenant Frye also swore under penalty of perjury that:

> FN1. Nor is Mr. Byrd challenging the County's practice of "strip" searches, which are performed when a detainee returns from a contact visit or from outside the facility (Ans. Br. 23), since those searches are performed by officers of the same gender as the detainee. (EOR 858.)
>
> FN2. *See also* Peterson, EOR 319:9-13 (stating that the detainees are only stripped down to their underwear during these "group search[es]," since in all other situations the detainees "are required to be fully clothed when they depart their cell"); Byrd, EOR 600:1-8 (the October 28, 2004 incident was the first time Mr. Byrd had been forced to strip down to his underwear in front of a woman).

The searches are *always* performed as follows: The inmates are stripped down to their boxers by the Special Response Team (SRT) in their POD and then SRT brings them to the Day Room. The Academy class lines up and pat searches each inmate.

Id.(emphasis added); *see also* O'Connell, EOR 696:23-697:2 (explaining that all 90 detainees were searched by cadets, rather than officers, on October 28, 2004); Peterson, EOR 319 (explaining that unless an *en masse* underwear search is being performed or some rare exception applies, all detainees "are required to be fully clothed when they depart their cell").) Lieutenant Frye further explained that these searches are only performed "when there is sufficient staff available to search the inmates in the Day Rooms and to search the Pod and all the cells. Sufficient staff includes MCSO Academy students." *(Id.)*[FN3]

> FN3. *See also* County's Motion for reconsideration of summary judgment order, EOR 800 (explaining that these *en masse* searches are "a burden on the staffing and the officers" because "[t]here needs to be adequate staffing, i.e., a large number of officers" for these searches to be conducted).

It is therefore clear that the *en masse* searches at issue in this case, although an established and documented practice, are conducted relatively infrequently and only when additional staff members, including cadets from the academy, are present.[FN4] As Lieutenant Frye stated under oath, these searches are "always" performed by the academy class. *See supra.*

> FN4. The record reveals that unlike the routine fully-clothed pat-down searches that are conducted whenever the detainees leave their cell or do virtually anything, these *en masse* underwear searches by cadets are only performed when the jail authorities receive specific intelligence information about contraband or fights. (Peterson, EOR 349: 15-351:3; O'onnell, EOR 640:17-20; Arpaio, EOR 258:4-12; Frye Affidavit, EOR 793.)

Mr. Byrd demonstrated in his Opening Brief that there were numerous male officers in uniform standing just 10 feet away during his search, yet Mr. Byrd was searched by a female student who was wearing blue jeans and a t-shirt. (Op. Br. 11; O'Connell, EOR 277:12-16; 695:8-18.) The male uniformed officers simply stood there watching, and were perfectly available to conduct the search. (*Id,* EOR 695:8-18.) Importantly, the County does not even attempt to refute that there were numerous male officers in uniform *perfectly available* to conduct the search. (*See* Ans. Br.) Nor does the County attempt to explain why female students conduct these searches when male uniformed officers are present and perfectly available. Clearly unable and unwilling to defend this practice, the County instead performs a subtle (yet critical) sleight-of-hand, and argues that female officers "must" be permitted to perform some of the "pat-down" searches that are conducted "several times daily" on each and every detainee, since these searches occur virtually all day, every day. (Ans. Br. 9-10; 23-24.)

The Court should not be fooled by the County's sleight-of-hand. Those "several times daily" searches are *not* what this case is about. This case is about the *en masse* underwear searches that are conducted approximately four times per month. As Mr. Byrd showed in his Opening Brief, there is absolutely no reason for these searches to be conducted by female students in jeans and t-shirts, when numerous male officers in uniform are available and standing just 10 feet away. (Op. Br. 29-30.) Rather than attempting to address this dispositive issue, the County resorts to the sweeping sleight-of-hand technique outlined above. The Court should reject this transparent ploy. What is apparent from the Opening Brief (and from the Answering Briefs utter silence on the issue) is that the manner in which Mr. Byrd was searched (i.e., by a female student in civilian clothing, when male uniformed officers were present and available) was utterly *unrelated* to the jail's stated goal of ensuring security within the Durango Jail. *See* *Turner v. Safely,* 482 U.S. 78, 89 (1987).

Accordingly, the manner in which Mr. Byrd was searched on October 28, 2004 (and the manner in which the *en masse* underwear searches are performed in the Durango Jail) fails to meet the requirements of our Constitution.

II. The County's Use Of A Deceptive Label

A related ploy advanced by the Answering Brief is the County's decision to continually refer to the search at issue as a "pat-down" or "frisk" search. (*See, e.g.,* Ans. Br. 9,21, 23, 29, 30, 35, 36, 37, 41,46, 47.) Apparently the County believes that if it continually refers to the search technique at issue as a "pat-down" search, nobody will notice that the search at issue was *not* a "pat-down." Unfortunately for the County, giving the same label to two fundamentally different search techniques does not make their differences disappear. This Court rejected a similarly transparent ploy in *Jordan v. Gardner,* 986 F.2d 1521,1522 n.1 (9th Cir. 1993) (rejecting the prison's technique of "euphemistically refer[ing] to these searches as 'pat-down" searches").[FN5] Notwithstanding that Mr. Byrd expressly made this point in his Opening Brief (*see* Op. Br. 21-22), the County completely ignores the point and, instead, continues to parrot its tired euphemism.

> FN5. Unlike our case, the searches in Jordan were performed on fully-clothed inmates, did not involve intimate contact with the inmates' genitalia and inner buttocks cheeks, and were conducted by real officers in uniform, rather than students in street clothes.

III. Other Glaring Errors in the Answering Brief

In addition to the misleading techniques discussed above, the County's Answering Brief is replete with incorrect statements of law, confused legal arguments, misrepresentations of the jury's findings, and mischaracterizations of the arguments made in Mr. Byrd's Opening Brief. Some of the most obvious examples include the following:

1. The County contends that the only issue properly on appeal is whether a "general policy that allows cross-gender pat searches (female on male)" is constitutional. (Ans. Br. 18, 21.) The County argues that this is the only issue properly on appeal because it is "the only issue the court found not frivolous for appeal, and on which counsel was appointed for appeal...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)." (Ans. Br. 21; *see also ii* 27.)

The County misunderstands black letter law. A district court's certification of an appeal as "frivolous" pursuant to 28 U.S.C. §1915(a)(3) determines whether the appellant is entitled to *in forma pauperis* status on appeal; the certification does not determine what issues may be appealed. *See* 28 .U.S.C. § 1915(a)(3). Said differently, Section 1915(a)(3) does not prevent a party from advancing an appeal that is deemed frivolous; it merely prevents the party from advancing such an appeal with the government's resources (*i.e., iforma pauperis*). The County's argument to the contrary reflects a deep confusion (over a rather simple issue).

Moreover, the County misstates the record in stating that this single issue is "the only issue ... on which counsel was appointed for appeal." (Ans. Br. 21; *see also id* at 4.) Counsel for Mr. Byrd (Jarrett A. Green) took on this case pro bono under his own volition. He was not "appointed" by the Court, much less "appointed" to appeal a single issue. (*See* Docket Entry 11, Notice of Appearance of Jarrett A. Green, filed 103/2007.)[FN6]

> FN6. In any event, had Mr. Byrd not obtained pro bono counsel, his entire appeal would have been entitled to informa pauperis status, since the District Court certified one of his claims as non-frivolous, and this Court has expressly held that so long as the district court certifies that one issue is non-frivolous under 28 U.S.C. § 1915(a)(3), then the entire appeal must be permitted to proceed on an in forma pauperis basis. *See Hooker v. Am. Airlines,* 302 F.3d 1091,1092 (9th Cir. 2002).

2. In a related vein, the County argues that Mr. Byrd "waived"' certain of the claims he advances on appeal because the claims were not handed to or resolved by the jury.[FN7] The County is again confused. Whether a claim is "waived" does not turn on whether it was specifically anded to the jury for resolution. Indeed, Mr. Byrd is challenging the

constitutional ruling made by the District Court before any claims were submitted to the jury. It is again elementary law that a claim is preserved for appeal - and not waived - so long as the claim was "raised sufficiently for the trial court to rule on it." *Cornhusker Cas. Ins. Co. v. Kachman,* 514 F.3d 977, 981 (9th Cir. 2008); see also Menken v. Emm, 503 F.3d 1050, 1058 n.4 (9th Cir. 2007) (same).

> FN7. *See, e.g.,* Ans. Br. 39 (arguing that Mr. Byrd waived the claim that the search was unconstitutional as applied to him because the "jury was not instructed to consider" this issue); *id.* at 19 (similar argument).

It is simply beyond dispute that Mr. Byrd (overtly) raised before the District Court each of the three constitutional challenges that he now asserts on appeal. (*See* EOR, Tab 6 (District Court dismisses Mr. Byrd's equal protection claim for failure to state claim, and acknowledges Mr. Byrd's claims under the Fourth Amendment); EOR 736:12-737:17 (District Court acknowledges Mr. Byrd's substantive due process claim); EOR 355:21-406:13 (oral argument by both parties on whether the search violated Mr. Byrd's Fourth Amendment or substantive due process rights, and subsequent ruling by the District Court).)

3. The County misrepresents and exaggerates the findings of the jury. The jury was given three very *limited* questions to answer: (1) whether Cadet O'Connell intentionally squeezed or kneaded Mr. Byrd's penis during the search; (2) whether Cadet O'Connell inflicted wanton pain on Mr. Byrd by intentionally squeezing or kneading his penis or scrotum or improperly touching his anus during the search; and (3) whether the October 28, 2004 search was performed without an identified security need. (*See* Verdict, EOR Tab 9; Jury Instructions, EOR Tab 10.) These were the only questions given to the jury, and the only questions resolved by the jury. Nonetheless, the County represents to this Court that the jury made additional findings. An emblematic but particularly troubling instance is when the County unequivocally states that the jury rejected [Mr. Byrd's] contention that the search could have been performed with 'equal or better quality by a male officer." (Ans. Br. 47 n.27.) *The jury made no such finding.* (Unsurprisingly, the County fails to provide a citation to the record after making this representation.) This type of gross misrepresentation of the record is disturbing.

The County also misrepresents the record on whether Mr. Byrd was videotaped when it says "Plaintiff was not even videotaped." (Ans. Br. 45; 50 n.30.) But it is clear from the transcript that Mr. Byrd was testifying that he was videotaped while being searched, and not merely that men with cameras took snippets when he was not being searched. (EOR 602:17-25.) Neither Cadet O'Connell nor any other witness rebutted Mr. Byrd's testimony that he was taped. (Even the Answering Brief does not assert that anyone disagreed with Mr. Byrd's testimony.) Notwithstanding that Mr. Byrd's testimony that he was videotaped is uncontroverted, the County boldly represents to this Court that he was not videotaped.

4. Notwithstanding its own blatant misrepresentations, the County goes on the offensive and accuses Mr. Byrd of "telling his own story [regarding the scope of the search], not the story established by the record as found by the jury." (Ans. Br. 40.) This accusation is, itself, yet another misrepresentation on the part of the County. A review of Mr. Byrd's Opening Brief and the record in this case demonstrates that Mr. Byrd represented the record with impeccable accuracy. For example, the County accuses Mr. Byrd of suggesting that Cadet O'Connell touched Mr. Byrd's penis or touched Mr. Byrd underneath his underwear, rather than through it. (Ans. Br. 40-41.) But the Opening Brief never states that Mr. Byrd's penis was touched (rather, it was Mr. Byrd's testicles, perineum and inner buttocks cheeks that were touched), and unambiguously states that "all of the contact Cadet O'Connell made with Mr. Byrd's genital region was through his underwear, rather than underneath it." (Op. Br. 10 n.11.) Leveling wild accusations does nothing for the County.

5. The standard of review that the County recites and repeatedly applies throughout the Answering Brief is a red herring and inapplicable to the gravamen of this appeal. At the commencement of its "Statement of Relevant Facts," the County states that "[t]he following facts are stated in a light most favorable to upholding the jury's verdict." (Ans. Br. 8). The County proceeds to interpret all disputed facts that arose during the trial in the County's favor, including the facts relating to the manner in which Mr. Byrd was searched on October 28, 2004. (*See, e.g.,* Ans. Br. 8-17.) But Mr.

Byrd did not appeal any of the three specific findings of the jury. He is not challenging the jury verdict or arguing that it lacked evidentiary support. Instead, he is appealing the ruling made by the District Court, pursuant to Federal Rule of Civil Procedure 50, at the close of all evidence before the three questions were given to the jury.

In reviewing a Rule 50 ruling, this Court "must view the evidence in the light most favorable to the non-moving party and draw every reasonable inference therefrom in the non-moving party's favor." *Howard v. Everex Sys. Inc.*, 228 F.3d 1057, 1060 (9th Cir. 2000); *see also Amarel v. Connell*, 102 F.3d 1494, 1521 (9th Cir. 1996) (same); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (standard on a Rule 50 motion is equivalent to standard on a motion for summary judgment). Therefore, although this Court must assume the truth of the three specific factual findings made by the jury (as Mr. Byrd acknowledges in his Opening Brief), all other factual discrepancies must be resolved and all other inferences must be drawn in *Mr. Byrd's favor* in assessing the constitutionality of the search, since Mr. Byrd was the non-moving party with respect to the District Court's Rule 50 order.[FN8]

> FN8. For example, had Cadet O'Connell testified that Mr. Byrd was not taped (which she did not), the District Court nonetheless would have been required to assume for purposes of its Rule 50 order that Mr. Byrd *was* taped, since there would have been a genuine dispute of material fact on the issue. Also, since Mr. Byrd testified that the search lasted approximately 60 seconds, while O'Connell testified that it lasted approximately 10 to 20 seconds (Ans. Br. 14), the District Court was required to assume it lasted 60 seconds. (It is worth noting that even if the search lasted 20 seconds, having a stranger feel around one's genitalia and buttocks for 20 seconds is not a short time.)

13ARGUMENT

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

It is clear that the search technique challenged by Mr. Byrd, although an established and documented practice, is rather infrequently performed and drastically different in nature from the routine, fully-clothed "pat-down" searches that are performed "several times daily" on each and every detainee. *(See supra.)*

Despite the obvious difference between the two search techniques, the County has deliberately conflated the two techniques, in a transparent ploy to defend the constitutionality of the technique that Mr. Byrd is in fact challenging. The County's ploy is hardly difficult to decipher: If the County successfully creates the impression that the search of Mr. Byrd was akin to a routine "pat-down" search, then Mr. Byrd's challenge would be foreclosed by *Grummett v. Rushen*, 779 F.2d 491, 495-96 (9th Cir. 1985) (upholding "routine" pat-down searches in which the inmates are "fully clothed, and thus do not involve intimate contact with the inmates' bodies"). Of course, the search of Mr. Byrd was not a routine pat- down and was not performed when he was "fully clothed," and it clearly involved ***14** "intimate contact with his body" (Mr. Byrd was touched on his testicles, perineum and inner cheeks of his buttocks).[FN9]

> FN9. Just as it is invasive and humiliating to be stripped naked and visually searched, it is invasive and humiliating to be stripped to one's thin underwear and manually searched on one's testicles, perineum and inner buttocks cheeks. That the County pretends that the search of Mr. Byrd is a routine "pat-down" search is inane, at best.

Moreover, the County clearly believes that if it can convince the Court that the type of search performed on Mr. Byrd is performed "several times daily" on each and every detainee, then the County will prevail in demonstrating that the manner in which Mr. Byrd was searched is "reasonably related" to the jail's interests in security and employment equality. (Since jail security and the employment opportunities of female officers would be impaired if female officers were prohibited from performing searches that occur virtually all day, every day.) The Court should reject the County's obvious ploy.

A. The Search Of Mr. Byrd Is Unconstitutional Under The Turner Test

Mr. Byrd agrees that the jail's interests in security and employment equality for female officers would be impaired if female officers were prohibited from conducting the routine, fully-clothed "pat-down that are performed "several times daily" on each and every detainee. (Indeed, Mr. Byrd has never complained about those searches, nor has he mentioned them during the course of ***15** this lawsuit.) Requiring men to perform all of those searches could impair security (since there are simply not enough male officers to perform all of those searches) and the employment rights of the female officers (since if female officers were prohibited from performing this core responsibility, they might be de facto prevented from serving as detention officers). However, these governmental interests simply would not be impaired if the infrequent *en masse* underwear searches were conducted by the male officers in uniform who are present, rather than the *female students in civilian clothing*. Mr. Byrd thoroughly developed this critical argument in his Opening Brief. (Op. Br. 29-38.)

The jail's interest in security could not conceivably have been hampered had Mr. Byrd been searched by one of the many (i) male (ii) officers (iii) in uniform who were present and readily available, rather than a (i) female (ii) student (iii) in blue jeans and a t-shirt. (Op. Br. 29.) Indeed, if anything, an *actual officer* would conduct the search with equal, if not better, quality than would a student in training to become an officer.

Moreover, it is clear that the jail's interest in protecting the employment rights of women would not be hampered by requiring that male officers in uniform who are standing 10 feet away step up and perform the search of male detainees who have been stripped down to their pink underwear. Because these *en masse* searches are performed infrequently and only when a large amount of staff, ***16** including the cadets from the Academy, are available, it would hardly amount to a deprivation of employment rights for female students to remain present but refrain from actually conducting these intrusive and infrequent searches.[FN10] Just as the jail's interest in employment equality for women is not impaired by the County's current policy of prohibiting women from conducting strip searches of men, the jail's interest in employment equality for women would not be impaired if the *en masse* underwear genitalia searches were conducted by male officers, rather than female students.[FN11]

> FN10. It is worth noting that the jail's asserted interest in employment equality for female officers is arguably not even triggered by the issue before the Court because these *en masse* underwear searches (and the October 28, 2004 search of Mr. Byrd) are "always" performed by *students* in training to become officers - and *not* female officers themselves. (*See* Frye Affidavit, EOR 793; *see also* O'Connell, EOR 696:23-697:2.)

> FN11. The County's written policy requires that male detainees be strip searched by male officers. (Policy DH-3, EOR 858.) Since the employment rights of female officers are not impaired by preventing them from conducting strip searches of male detainees, there is no reason why these employment rights would be impaired by preventing female students from conducting the less frequent, *en masse* underwear searches. Moreover, it makes no sense why the County would prohibit female officers from viewing male detainees naked, yet permit female students to view male detainees in their underwear while intimately touching their testicles, perinea and inner buttocks cheeks.

The search of Mr. Byrd (and the related practice) is therefore the inverse of the searches at issue in *Grummett v. Rushen,* 779 F.2d 491 (9th Cir. 1985), and *Michenfelder v. Sumner,* 860 F.2d 328 (9th Cir. 1988). In both Grummett and ***17** *Michenfelder,* this Court held that if the prison ceased the search or surveillance practices at issue, the prison's interests would have been impaired. (Op. Br. 32-37 (demonstrating that the facts and reasoning of *Grummett* and *Michenfelder* compel the *opposite* result in this case).)

The County's Answering Brief completely fails to rebut the showing made by Mr. Byrd's Opening Brief. By pretending that this case is about routine fully-clothed pat-down searches, the entire analysis and argumentation provided by the County is inapplicable.[FN12]

FN12. The County's continual citation, throughout the Answering Brief, to cases involving routine, fully-clothed pat down searches is an imprudent use of ink, since Mr. Byrd is not challenging such searches. Paradigmatic of its reliance on inapposite authority, the County cites *Timm v. Gunter,* 917 F.2d 1093 (8th Cir. 1990), on four different occasions from pages 35-38 of the Answering Brief. Not only did *Timm* involve fully-clothed searches, but the Eight Circuit emphasized that the female officers "stated that they have never intentionally touched an inmate's genital or anal areas" during the clothed searches and that the plaintiff himself "testified that he never had experienced being touched in those areas by a female guard." *Id,* 917 F.2d at 1100. In fact, *none* of the "pat-search" cases cited by the County involves detainees (i) being stripped to their underwear and (ii) intimately touched on their testicles, perinea and inner buttocks cheeks by (iii) students in street clothes, rather than real officers. The County's authority is simply not relevant to our case.

As shown in footnote 25 of the Opening Brief, each of the four *Turner* factors strongly supports the conclusion that no "reasonable relation" exists between the search practice that Mr. Byrd is actually challenging and the County's asserted interests. (Op. Br. 31 n.25.) Also instructive is the *Turner* analysis found ***18** in Judge Reinhardt's concurring opinion in *Jordan v. Gardner,* 986 F.2d 1521,1537 (9th Cir. 1993). (Op. Br. 30-31 (quoting and applying Judge Reinhardt's reasoning).)[FN13] The manner in which Mr. Byrd was searched (and the underlying practice of *en masse* underwear searches by female cadets) is unconstitutional because it is not "reasonably related" to the County's asserted interests in security and employment equality.

FN13. Although seeking to marginalize Judge Reinhardt's analysis by noting that Reinhardt was "joined by only one other judge in an en bane Court" (Ans. Br. 44 n.25), the County conveniently fails to mention that the en banc opinion, although not reaching the Fourth Amendment issue, emphasized that "Judge Reinhardt's concurring opinion ably articulates the Forth Amendment analysis developed by *Bell v. Wolfish* and *Turner v. Safley.*" *Id.,* 986, F.2d at 1524 (citations omitted).

B. The Search Of Mr. Byrd Is Unconstitutional Under The Bell Test And Well-Established Fourth Amendment Principles

The Opening Brief demonstrated that the search of Mr. Byrd was unreasonable under the four-factor test of *Bell v. Wolfish,* 441 U.S. 520, 559 (1979). (Op. Br. 16-28.) In applying the *Bell* test, Mr. Byrd identified each of the many facts and circumstances that contribute to an overall finding of unreasonableness. (Op. Br. 16-28.)

In response, the County commits the fatal flaws of: (i) arguing that certain circumstances of the search are *irrelevant* to the Fourth Amendment analysis; and (ii) analyzing each of the circumstances of the search (that the County deems ***19** relevant) in *isolation,* rather than in their *totality.* The Answering Brief assumes the constitutionality of the search and then addresses each aggravating circumstance (that it chooses to discuss) separately and concludes that each individual circumstance, in isolation, does not convert an "otherwise constitutional search" into an unconstitutional search. For example, the County argues:

- "[T]he fact that Plaintiff was wearing boxers does not turn a decidedly constitutional pat search into a decidedly unconstitutional strip search." (Ans. Br. 42.)
- "This case is not about the Sheriffs policy of having all male inmates wear pink boxers, and so [Mr. Byrd's] comments about that issue are irrelevant." (Ans. Br. 40.)
- "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." (Ans. Br. 45.)
- "[Mr. Byrd] cites no authority for the proposition" that being yelled to shut the fuck up renders a search unreasonable. (Ans. Br. 45.)
- "Nor does this case have anything to do with the fact that the boxers have a hole in front with no button." (Ans. Br. 40.)
- "Mr. Byrd] then complains that the otherwise reasonable search was rendered unreasonable because all the inmates were searched in the multipurpose room instead of somewhere 'private." (Ans. Br. 45.)

The County's method of isolating each individual circumstance and then labeling it irrelevant or analyzing it separately from all of the other circumstances is plainly inconsistent with the "totality of the circumstances" approach that must ***20** be applied when analyzing whether a search is "unreasonable" under the Fourth Amendment.[FN14]

> FN14. *See U.S. v. Kriesel,* 508 F.3d 941,947 (9th Cir 2007) ("we reaffirm that the touchstone of the Fourth Amendment is reasonableness and adopt the general Fourth Amendment approach, which examines the totality of the circumstances to determine whether a search is reasonable.") (internal citations omitted); *Ohio v. Robinette,* 519 U.S. 33, 39 (1996) (explaining that reasonableness turns on the "totality of the circumstances" and is a highly "fact-specific" inquiry); *Samson v. California,* 547 U.S. 843, 848 (2006) (same); *Sherman v. U.S.P.C.,* 502 F.3d 869, 883 (9th Cir 2007) (same); *U.S. v. Arvizu,* 534 U.S. 266, 273-74 (2002) (rejecting the "divide-and-conquer" method of analyzing each circumstance in isolation).

The County completely deviates from the "totality of circumstances" approach mandated by this Court and the Supreme Court, and instead advances its own "divide-and-conquer" approach-by analyzing each of the aggravating circumstances (that it chooses to address) in isolation. What is more, the County engages in a "ddivide-and-ignore" approach, by discarding as "irrelevant" certain circumstances that undoubtedly contributed to the unreasonableness of the search. That the County believes that it is "irrelevant" that Mr. Byrd's underwear was pink or had an open slit in front of the genitalia is not only a clear departure from the "totality of the circumstances" approach, but it is a clear expression of naivete (as these circumstances would undoubtedly exacerbate the humiliation of such a search). Nor does the County address other aggravating circumstances, such as that even Cadet O'Connell herself described the underwear worn by Mr. Byrd as a "very thin material" (EOR 684:20-23), which obviously rendered the contact with ***21** Mr. Byrd's testicles, perineum and inner buttocks cheeks that much more direct and invasive.[FN15]

> FN15. Also conspicuously missing from the Answering Brief is any mention of the fact that Cadet O'Connell (and the other cadets) wore white latex gloves during the search. (Op. Br. 10.) That Cadet O'Connell wore latex gloves is an obvious reflection of the deeply intimate contact she made with Mr. Byrd's genitalia and buttocks.

Remarkably, in its 54-page brief, the County relegates to a single **footnote** its response to one of the most egregious circumstances of the search of Mr. Byrd (and of the other searches conducted pursuant to this practice): That the cross-gender search was performed by a *student in civilian clothing,* rather than a real officer. (Ans. Br. 41 n.24.) The County abruptly concludes that "[n]o authority supports the precept that this makes a search unreasonable' *(id),* yet the County fails to set forth any of its own authority showing that such searches are reasonable. (Perhaps the lack of case law on this point reflects the abnormal and bizarre nature of the County's policy; indeed, one would suspect that the other jail systems throughout the country would elect to have uniformed professionals, rather than students in street clothes, conduct their most intimate searches.) In any event, the "totality of the circumstances" approach mandates that all circumstances of a search be considered when assessing "reasonableness," whether or not a prior case has expressly addressed each of the circumstances of the search at issue.

Furthermore, the County is again disposing with common sense if it ***22** genuinely believes that the search of Mr. Byrd (and the others) did not become more traumatic and humiliating by virtue of the fact that the search was performed by a student in civilian clothing.[FN16] Indeed, it can be argued that this fact, alone, renders the search of Mr. Byrd unreasonable. The County still has provided no explanation for why a student in street clothes was performing such an important and intrusive undertaking as feeling Mr. Byrd's testicles, perineum and inner crack for the presence of contraband when numerous uniformed professionals were present and available.

> FN16. Rather than address this fact, the County chooses to misrepresent the record by asserting Mr. Byrd "never testified that he thought these people were random strangers off the street or otherwise unauthorized to conduct the search." (Ans. Br. 41 n.24.) Actually, after repeatedly referring to the individuals in street clothes

> as "civilians" during direct examination, Mr. Byrd unequivocally testified on cross- examination that he believed they were civilians. (EOR 608:24-609:1.)

In sum, when all of the circumstances of the search are considered in their totality, the unreasonableness of the search of Mr. Byrd is manifest. As Mr. Byrd demonstrated in the Opening Brief, *Bell's* four-factor test clearly supports a finding of unreasonableness. (Op. Br. 16-28.) The County's responsive strategy of "divide-and-conquer" and "divide-and-ignore" must be rejected.

C. The County's Remaining Arguments Should Be Rejected

The County's argument that the Court should find no Fourth Amendment violation because pretrial detainees possess no privacy interests (Ans. Br. 27) must ***23** fail. First, this Court has stated with unmistakable clarity that "[w]e recognize that incarcerated prisoners retain a limited right to bodily privacy." *Michenfelder,* 860 F.2d at 333. Second, certain of this Court's prior opinions, in which it has found violations of the Fourth Amendment in the jail context, necessarily depend on the existence of a limited right to bodily privacy (since no Fourth Amendment violation can occur without an underlying privacy interest). *See, e.g. Way v. County of Ventura,* 445 F.3d 1157, 1161-62 (9th Cir. 2006). Third, the numerous sister Circuits that have addressed the issue have concluded that individuals maintain a limited right to bodily privacy while in jail or prison. *See Nicholas v. Goord,* 430 F.3d 652, 658 (2d Cir. 2005); *Everson v. Mich. D.O.C.,* 391 F.3d 737, 757 (6th Cir. 2004); *Lyons v. Farrier,* 727 F.2d 766, 769 (8th Cir. 1984); *Cumbey v. Meachum,* 684 F.2d 712, 714 (10th Cir. 1982). Fourth, it would appear to be an extreme result to conclude that pretrial detainees (such as Mr. Byrd at the time of the search in question) forfeit all privacy interests simply because they have been accused of a crime.

Throughout the Answering Brief (despite making no mention of this issue before the District Court), the County harps on the difference between a "facial" or "as-applied" challenge and argues that Mr. Byrd's challenge cannot possibly be a "facial" challenge under the "no set of circumstances test." (*See, e.g.,* Ans. Br. 18, 24, 26.) But Mr. Byrd's argument is simple: he is challenging the specific search ***24** he was subjected to on October 28, 2004 and the County's documented practice of permitting female cadets in civilian clothing to conduct the *en masse* underwear searches of detainees, despite the abundant presence of male uniformed officers. Addressing the constitutionality of the County's documented practice of permitting female cadets to conduct these searches would be perfectly consistent with this Court's approach in prior cases.[FN17]

> FN17. *See, e.g., Jordan,* 986 F.2d at 1524-31 (striking down the prison's policy which permitted male officers to search female inmates, while not disturbing the prison's policy which permitted female officers to conduct these same searches); *Grummett,* 779 F.2d at 494 (addressing constitutionality of prison's practice of permitting searches and surveillance by female officers); *Michenfelder,* 860 F.2d at 334 (similar).

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

Mr. Byrd demonstrated in his Opening Brief that the October 28, 2004 search of Mr. Byrd violated his substantive due process rights because (i) the search caused Mr. Byrd substantial suffering and humiliation that exceeded the "inherent discomforts of confinement" and (ii) the County acted with "deliberate indifference" to Mr. Byrd's suffering and humiliation. (Op. Br. 39-42.)

Each of the County's two counterarguments flatly fails. First, the County argues that the "district court ruled that [Mr. Byrd] had waived this argument below by not raising it before trial" and, thus, Mr. Byrd is precluded from raising it ***25** for the first time on appeal. (Ans. Br. 48-49, citing EOR 423:1-424:11.) Yet again the County is either entirely confused or attempting to mislead this Court regarding the proceedings below.

A simple read of the very transcript cited by the County reveals that the District Court ruled that Mr. Byrd waived his

procedural due process claim by not raising it until after the close of evidence. The Court never ruled that Mr. Byrd's *substantive* due process claim (which is the claim Mr. Byrd is advancing on appeal) was waived.[FN18]

> FN18. To the contrary, the District Court expressly recognized and ruled upon this claim. (*See, e.g.,* 7/27/07 Pretrial Conference Transcript, EOR 736:12-738:14 (court expressly states that it is permitting Mr. Byrd to advance his *substantive* due process claim, although Mr. Byrd incorrectly labeled it an Eighth Amendment claim in his pro se complaint); District Court's Rule 50 Order, EOR 6:21-21:13 (court accepts lengthy oral arguments on whether Mr. Byrd's substantive due process rights were violated, and then rules against Mr. Byrd on the issue).)

Apart from this "waiver" argument, the County devotes only *one sentence* to attempting to rebut Mr. Byrd's substantive due process argument, stating "there is no evidence of 'deliberate indifference' here, where [Mr. Byrd] gave Defendants no reason at all to believe that he had a 'history of sexual abuse' and Defendants deliberately disregarded that in subjecting him to the cross-gender pat search." (Ans. Br. 49.) This one-sentence defense is unresponsive to the argument Mr. Byrd advances. Mr. Byrd's substantive due process claim does not hinge on his history of sexual abuse, as the County suggests, but rather on the extraordinarily ***26** degrading and offensive manner in which he was searched - regardless of his history of sexual abuse. (Op. Br. 38-42.)[FN19] Because the Answering Brief does nothing to counter the substantive due process argument set forth in the Opening Brief, Mr. Byrd respectfully directs the Court to that argument for final consideration. (Op. Br. 38-42.)

> FN19. In fact, Mr. Byrd simply noted his history of sexual abuse in a single- sentence footnote, but devoted over three pages to the actual basis of his substantive due process claim - i - the uniquely humiliating and offensive search performed upon him. (Op. Br. 38-42.)

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

In the Opening Brief, Mr. Byrd demonstrated that the District Court's *sua sponte* dismissal of Mr. Byrd's equal protection claim was improper, particularly considering that the burden of justifying this gender-based classification was on the government and considering that Mr. Byrd's *pro se* claim was entitled to a liberal construction. (Op. Br. 42-46.)

In its Answering Brief, the County improperly attempts to shift the burden by contending that Mr. Byrd was required to "demonstrate" that male and female detainees are "similarly situated" and that Mr. Byrd was obligated to cite "the number of inmates housed, their average length of stay, their security levels, the incidence of violence and victimhood." (Ans. Br. 30.) This argument is silly. Mr. ***27** Byrd's equal protection claim was dismissed at the *pleading stage* for failure to state a claim (before any evidence was adduced on this claim). (EOR 59-60.) In order to plead an equal protection violation, a plaintiff (particularly a pro se plaintiff who is entitled to the "benefit of any doubt" and to a "liberal" construction) is not required to "demonstrate" any of the items listed by the County. The County not only misstates the legal standard on a motion to dismiss, but misapplies the burden applicable to a gender-based equal protection claim.

As Mr. Byrd demonstrated in the Opening Brief, where a plaintiff challenges governmental conduct that treats men and women differently, the burden (of demonstrating that the discriminatory conduct is substantially related to an important government interest) is on the *government* - and not on the person challenging the conduct. (Op. Br. 45-46 (citing cases).) The County's argument that Mr. Byrd was "required to demonstrate" the factual circumstances listed - in order to prove that male and female detainees are "similarly situated" (Ans. Br. 30) is an erroneous attempt to shift the burden away from the County, and is contradicted by the approach repeatedly applied by the United States Supreme Court in equal protection cases brought by men.

Indeed, the Supreme Court has repeatedly found violations of the equal protection clause based on the discriminatory

treatment of men where the government failed to meet *its burden* of showing that the unequal treatment was ***28** justified. See, e Orr v. Orr, 440 U.S. 268, 278-283 (1979); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 727-731 (1982); *Craig v. Boren,* 429 U.S. 190, 197-204 (1976); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 149-152 (1980); *see also Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 712-714 (9th Cir. 1997). Critically, in none of these cases did the Supreme Court initially consider whether the men and women implicated by the challenged conduct were "similarly situated."

The Court in each of these cases could have held that the equal protection clause was not violated because the plaintiff failed to demonstrate that the men and women subject to the governmental conduct were "similarly situated," but the Court did not such thing. Rarely will governmental conduct that treats men and women differently apply to all men and all women. Instead, the governmental conduct tends to treat a subset of men differently than a subset of women, such as husbands and wives in Orr, male nursing applicants and female nursing applicants in *Hogan,* male drinkers ages 18-20 and female drinkers ages 18-20 in *Craig,* male widowers and female widows in *Wengler,* and male subcontractors and female subcontractors in *Wilson. See supra.* In our case, the County treats male detainees and female detainees differently. The County's argument that Mr. Byrd's equal protection claim fails because Mr. Byrd failed to "demonstrate" (at the pleading stage) that male detainees and female detainees are "similarly situated" is ***29** contradicted by a raft of Supreme Court precedent, and should be rejected by this Court.

The County's alternative argument that, assuming the detainees are similarly situated, the County nonetheless met its burden of demonstrating the gender classification is "substantially related" to an "important" government interest (Ans. Br. 32-33) is nonsensical. The District Court *sua sponte* dismissed Mr. Byrd's claim (despite the County's failure to file a motion to dismiss this claim) before trial and before *any evidence* was adduced on whether the government could meet its burden under the intermediate scrutiny test. The County's attempt to cite evidence that was developed at trial (Ans. Br. 33) to demonstrate that Mr. Byrd's equal protection claim was correctly dismissed nearly two months before trial makes no sense.[FN20]

> FN20. Indeed, the County's own case, *Yates v. Stalder,* 217 F.3d 332 (5th Cir. 2000) (Ans. Br. 30), undercuts the County's argument, since the Fifth Circuit *reversed* the district court's *dismissal* of the inmates' equal protection claim, and held that the district court's conclusion that the male and female inmates were not "similarly situated" was premature and unsupported by record evidence. *Id.* at 334-35. Moreover, the small set of out-of-circuit cases cited by the County (Ans. Br. 30-31) is clearly trumped by Mr. Byrd's binding Supreme Court case law and, in any event, each of those out-of-circuit cases, unlike our case, involved rulings after evidence was adduced.

Moreover, and perhaps most importantly, the evidence the County cites does *nothing* to explain why it employs a gender-based search policy. The evidence the County relies upon to justify the discriminatory nature of its search policy (Ans. Br. ***30** 33) is the same evidence it relies upon to argue that its cross-gender search policy is reasonable under the Fourth Amendment.[FN21]

> FN21. *See* Ans. Br. 33 (citing the *same* evidence and repeating the *same* conclusion that "the jail simply does not have the luxury of having male inmates pat searched by only male officers").

The County has entirely missed the point. In order to successfully demonstrate that its gender-based classification is permissible under the equal protection clause, the County must provide evidence showing that there is a reason why female detainees are searched only by female officers (when male detainees may be searched by either gender). In other words, the equal protection analysis does not turn on whether there is a justification for permitting female officers to search male detainees; it turns on whether there is a justification for permitting female officers to search male detainees *while simultaneously* prohibiting male officers from searching *female detainees.* The record is utterly silent on this point, and the County has failed to cite a single piece of evidence showing that the different policy that applies to female detainees is substantially related to an important government interest. Consequently, the County has not met its burden under the intermediate scrutiny test. *See Hogan,* 458 U.S. at 729; *Wilson,* 125 F.3d at 713; *Craig,* 429 U.S.

at 200-04.[FN22]

FN22. That this claim was dismissed without prejudice (when Mr. Byrd was still proceeding pro se) does not alter whether the dismissal is properly on appeal, since the dismissal without prejudice merged into the final judgment that was entered in this case. *See Ash v. Cvetkov,* 739 F.2d 493, 496 (9th Cir. 1984); *De Tie v. Orange County,* 152 F.3d 1109, 1111 (9th Cir. 1998); *Munoz v. Small Bus. Adm.,* 644 F.2d 1361, 1364 (9th Cir. 1981).

***31 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**

The Opening Brief showed that the District Court not only refused to sanction the County for its patently illegal document "retention" policy (since the District Court failed to conclude that the County's conduct or policy were illegal, notwithstanding the uncontroverted evidence in the record, and failed to instruct the jury accordingly), but the District Court affirmatively rewarded the County for its illegal policy by admitting the highly misleading and prejudicial "Video Yearbook." The Answering Brief falls far short of rebutting the Opening Briefs showing.

Critically, the County makes *no mention* of Mr. Byrd's citation to the uncontroverted *evidence* in the record illuminating the County's policy (i.e., the County's *own* written filing and the sworn testimony of the County's own witness, Captain Peterson) and, instead, attempts to prove the tenor and legality of the County's policy by citing the oral arguments and statements made by its *attorney* at the hearing on the parties' motions pursuant to Rule 50. (Ans. Br. 50 & n.29, 52 n.31 (arguing that the "record is uncontroverted" by citing counsel's statements ***32** below, rather than evidence in the record).) As the County should be aware, oral statements by counsel are evidence and, hence, do nothing to rebut the uncontroverted *evidence* cited by Mr. Byrd.[FN23] The record unambiguously demonstrates the illegality of the County's document "retention" policy, since it demonstrates that the County does not retain evidence more than two years after it is created even if a federal lawsuit is filed before the two-year point, unless a "specific request" is made by an attorney.[FN24]

FN23. *See EOTTvv.Winterthur,* 257 F.3d 992, 999 (9th Cir. 2001) (rejecting party's citation to its counsel's statements below because such statements "are not part of the factual record"); *accord Carillo-Gonzalez v. INS,* 353 F.3d 1077, 1079 (9th Cir. 2003); *Las Vegas Nightlife, Inc. v. Clark County,* 38 F.3d 1100,1102(9th Cir. 1994); *Barcamerica Int. v. Tyfield,* 289 F.3d 589, 593 n.4 (9th Cir. 2002).

FN24. The County is misguided in arguing that "[t]his lawsuit is not about the County's document retention policy" or whether it is "illegal" (Ans. Br. 52), since it is well-recognized that because a plaintiff cannot challenge a defendants evidence- related misconduct in a separate lawsuit or by a separate cause of action (since litigation-related misconduct does not give rise to an actionable claim), a plaintiffs only opportunity to remedy such misconduct is through evidentiary rulings in the lawsuit in which the misconduct took place. *See, e.g., Cedars-Sinai Med. Ctr. v. Sup. Ct,* 18 Cal. 4th 1, 8-10 (1998); *Tobel v. Travelers Ins. Co.,* 195 Ariz. 363, 371 (1999). The County is equally misguided in arguing that Mr. Byrd cannot challenge the admission of the tape because after it was admitted over his objection, Mr. Byrd "used it to argue that the search was conducted as a training exercise." (Ans. Br. 53.) This argument is silly and, unsurprisingly, unsupported by a single case. There is no rule stating that if a piece of evidence is admitted over a party's objection, the party forfeits his right to appeal that ruling if he subsequently attempts to use the admitted evidence to support his position on one of the many issues that arises in the case.

***33** Further, the County argues that the "Video Yearbook" was properly admitted into evidence because Mr. Bryd "opened the door" by asking Sheriff Arpaio questions about the unedited footage. (Anss. Br. 52-53.) Contrary to the District Court's ruling below and the County's argument on appell the "opened door" doctrine is not applicable here

because to the extent the door was "opened" regarding whether the search of Mr. Byrd was videotaped, the "Video Yearbook" did *nothing* to rebut Mr. Byrd's claim that he was videotaped.

Importantly, Mr. Byrd testified that he was videotaped during the search (EOR 602:17-25), Cadet O'Connell testified that the cameraman recorded *additional* footage on October 28, 2004 that was *not*included on the "Video Yearbook" (O'Connell, EOR 301:4-8), and the County did not produce a *single witness* (including Cadet O'Connell) who testified that Mr. Byrd was *not* recorded. If the County wanted to rebut Mr. Byrd's sworn testimony that he was recorded that day, it should have put a witness on the stand (such as the cameraman himself) who could affirmatively testify that the search of Mr. Byrd (and the other searches) were *not* recorded.

Having failed to do this, the County instead introduced the "Video Yearbook" in an attempt to prove that Mr. Byrd was not recorded. But Cadet O'Connell *admitted* on the witness stand that the "Video Yearbook" did *not* include all of the footage recorded that day. (Op. Br. 48 n.35; EOR 301:4-8.) Therefore, ***34** to the extent that the "door was opened" regarding whether the search of Mr. Byrd was recorded, it is abundantly clear that the "Video Yearbook" did not rebut Mr. Byrd's testimony on this issue. Accordingly, the "Video Yearbook" was improperly admitted pursuant to the "opened door" doctrine.[FN25]

> FN25. *See* S.M. v. J.K., 262 F.3d 914, 920 (9th Cir. 2001) ("Plaintiff did not open the door to more than rebuttal evidence that she had been assaulted previously. The court appropriately deemed the door open only to the extent of evidence concerning past rape and abuse."); U.S. v. Collicott, 92 F.3d 973, 981 (9th Cir. 1996) (holding "opened door" doctrine did not apply because the evidence sought to be admitted did not rebut the testimony that allegedly opened the door). Thomas v. Hubbard, 273 F.3d 1164,1174 (9th Cir. 2002) (same), *overruled on other grounds by* Payton v. Woodford, 299 F.3d 815, 829 n.11 (9th Cir. 2002).

The County also argues that any error was "harmless." (Ans. Br. 53.) As Mr. Byrd showed on pages 54-55 of the Opening Brief, it is the entire sequence of events pertaining to the video evidence of the search that caused Mr. Byrd exorbitant harm: The District Court not only refused to sanction the County for its patently illegal document "retention" policy, but the District Court affirmatively rewarded the County for its illegal policy by admitting the highly misleading and prejudicial "Video Yearbook" (which depicted *other* cadets performing fully- *clothed* searches on their *supervisors* without intimate contact with the genitalia or inner buttocks). Considering that the jury was asked to determine the manner in ***35** which Mr. Byrd was searched by Cadet O'Connell, it is difficult to imagine a more harmful set of errors.[FN26]

> FN26. The Court should also reject the County's argument that Mr. Byrd waived any challenge to the admission of the "Video Yearbook" because he did not formally object "[a]t the time the district court ruled that Plaintiff had opened the door to having the video played." (Ans. Br. 53) This Court has made clear that in assessing whether a party preserves an objection for appeal, it is not necessary that the party actually object at the time of the ruling, so long as his objection has been clearly made so that the Court is aware of the party's objection. *See* Brownv. Avemco Inv. Corp., 603 F.2d 1367, 1370 (9th Cir. 1979); *see* Palmerin v. City of Riverside, 794 F.2d 1409,1413 (9th Cir. 1986). The record cites in the Opening Brief demonstrate that Mr. Byrd vehemently objected to the admission of the "Video Yearbook" and that the District Court simply disagreed with him. (Op. Br. 52.)

CONCLUSION

Mr. Byrd respectfully requests that this Court reverse the District Court on each of the above grounds, and remand for further proceedings.

Charles E. BYRD, Plaintiff-Appellant, v. MARICOPA COUNTY SHERIFF'S DEPARTMENT, et al., Defendants-Appellees.

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