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11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE DISTRICT OF ARIZONA

13 Charles Edward Byrd,
14 Plaintiff,
15 v.
16 Joseph Arpaio, et al.,
17 Defendant.

NO. CV04-2701-PHX-NVW (ECV)
**MOTION FOR SUMMARY
JUDGMENT**

18
19 Defendants Arpaio, O’Connell, and Peterson (hereinafter “Defendants”),
20 by and through undersigned counsel, pursuant to Rule 56, Arizona Rules of Civil
21 Procedure, respectfully moves this Court for summary judgment in this action for
22 the reason that Plaintiff has failed to show a physical injury suffered as a result

1 of the actions of Defendant s, pursuant to 42 U. S.C. §1997e(e). This Motion is
2 supported by the attac hed Memorandum of Points and Au thorities and the
3 separately filed Statement of Facts.

4 RESPECTFULLY SUBMITTED this 18th day of January 2007.

5 ANDREW P. THOMAS
6 MARICOPA COUNTY ATTORNEY

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11 Attorneys for Maricopa County
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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. Standard of Proof.**

13 Summary judgment is appropriate where “there is no genuine issue as to
14 any material fact, and t he moving party is entitled to judgment as a matter of
15 law.” Rule 56(c), FED. R. CIV. P.; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322,
16 106 S.Ct. 2548, 2552 (1986). Disputes must be material. *Id.* Factual disputes
17 that are irrelevant or unnecessar y will not affect the outcome. *Anderson v.*
18 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

19 In order to establish the existence of a “genuine” issue of material fact,
20 Plaintiff must establish that a reasonable jury could return a verd ict in his favor.
21 *Anderson v. Liberty Lobby*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202
22 (1986). There is no issue for trial unless there is sufficient evidence favoring the

1 non-moving party. If the evidence is merely colorable or is not significantly
2 probative, summary judgment may be granted. *Id* at 249.

3 **II. Plaintiff Fails To Establish He Suffered A Physical Injury While**
4 **Incarcerated As Required By 42 U.S.C. §1997e(e).**

5 Plaintiff filed his original Complaint in District Court on November 26,
6 2004. Plaintiff's Amended Complaint, filed on June 14, 2005, pursuant to the
7 Court's screening order, alleged that Officer O'Connell violated his Eighth and
8 Fourteenth Amendment civil rights by conducting an illegal body "cavity"¹ search
9 which he alleges is sexual assault and sexual harassment. Plaintiff alleges that
10 Captain Peterson supervised Officer O'Connell and therefore, is liable for
11 violating Plaintiff's civil rights. Additionally, Plaintiff claims that Defendant Arpaio,
12 is liable for violation of Plaintiff's civil rights, as the policy maker for the jails.
13 Plaintiff alleges he suffered psychological trauma, emotional distress,
14 impermissible embarrassment, public humiliation, mental anguish and emotional
15 scarring as a result of this incident. All of the injuries alleged are of a mental or
16 emotional nature. Plaintiff has not alleged or shown a physical injury.

17 Pursuant to 42 U. S.C. §1997e(e), a prisoner may not recover in a civil
18 action without a physical injury. Section 1997e(e) specifies:

19 e) Limitation on recovery

20 No Federal civil action may be brought by a prisoner confined in a jail,

21 ¹ Plaintiff uses the term "body cavity search" but specifically describes that she, "grabbed his genitals twice,
22 and then "ramed [sic] her index finger through the crack" of his buttocks (First Amended Complaint at 4).
Plaintiff alleges that he was wearing his boxer shorts at the time of the search.

1 prison, or other correctional facility, for mental or emotional injury suffered
2 while in custody without a prior showing of physical injury.

3 In most body search cases, the court has not been presented with
4 evidence pointing to more than momentary discomfort or emotional
5 embarrassment caused by the search procedures. In *Grummett v. Rushen*, 779
6 F.2d 491 (9th Cir.1985), the Ninth Circuit Court of Appeals considered the
7 constitutionality of pat down body searches performed by female guards on
8 male prisoners and concluded that the inmates had not shown sufficient
9 evidence of pain to make out a cognizable Eighth Amendment claim. *Id.* at 493
10 n. 1. Since Plaintiff has neither alleged nor established any physical injury this
11 Complaint should be dismissed as a matter of law.

12 **III. Frisk, Body or Pat-Down Searches Have been Found to be a**
Legitimate Means of Securing Penal Institutions.

13 The Ninth Circuit in *Grummett* said, “. . . routine pat-down searches, which
14 include the groin area, and which are otherwise justified by security needs, do
15 not violate the Fourteenth Amendment because a correctional officer of the
16 opposite gender conducts such a search. Accord *Bagley v. Watson*, 579
17 F.Supp. 1099 (D.Or.1983); *Smith v. Fairman*, 678 F.2d 52 (7th Cir.1982), *cert.*
18 *denied*, 461 U.S. 907, 103 S.Ct. 1879, 76 L.Ed.2d 810 (1983).” *Grummett v.*
19 *Rushen*, 779 F.2d 491, 495 (9th Cir.1985)

20 Officer O’Connell conducted the frisk (body) search of Plaintiff in
21 accordance with MCSO policy DH-3; in the presence of her supervisor, Captain
22

1 Peterson; and in the process demonstrated and instructed detention officers in
2 the proper manner in which to conduct such a search for contraband. She did
3 so over his clothes, namely his MCSO boxer shorts. Despite Plaintiff's colorful
4 street language in describing the search, the specific conduct is strictly in
5 accordance with the MCSO policy, DH-3.

6 MCSO Policy DH-3 defines a "Frisk (Body) Search" as follows:

7 Carefully examining an inmate by inspecting his clothing, and feeling the
8 contours of his clothed body. The inmate's shoes and socks may be
9 removed during this process. An inmate's ears, nose, hair and throat may
10 be visually checked during this search.

11 The anal cleft or divide between the buttocks sometimes referred to as
12 "buttock cleavage" is not a body cavity. Plaintiff in the Complaint alleges that
13 what Officer O'Connell did was run her hand along the "crack" between his
14 buttocks. This is exactly what is meant by policy DH-3 which permits, "feeling
15 the contours of [an inmate's] clothed body."² It is not a body cavity search any
16 more than a pat-down in the underarm area, in the area of cleavage between or
17 underneath the breasts of a female, or in the area of folds created by layers of
18 fat. All of these areas are known to be potential locations for an individual to
19 carry and conceal items.

20 The commonly understood meaning of "body cavity" in humans includes
21 only the stomach, the rectum, as well as the vagina in females. The State of

22 ² Policy DH-3 also permits Invasive body cavity searches by medical personnel.

1 Washington has articulated the difference between body cavities and strip
2 searches in a statute, RCW 10.79.070:

3 Strip search means having a person remove or arrange some or all of his
4 or her clothing so as to permit an inspection of the genitals, buttocks,
anus, or undergarments of the person or breasts of a female person.

5 (2) 'Body cavity search' means the touching or probing of a person's body
6 cavity, whether or not there is actual penetration of the body cavity.

7 (3) 'Body cavity' means the stomach or rectum of a person and the vagina
of a female person. . . .

8 In State v. Jones, 887 P. 2d 461 (1995), the court determined that a
9 search during which a plastic tube was removed from the anus was a strip
10 search rather than a body cavity search. In State v. Ocain, 118 Wash. App.
11 1043, 2003 WL 22173057 (Wash. App. Div. 1, 2003), the court determined that
12 the mere incidental touching of the outside of Ocain's anus in effectuating a strip
13 search for drugs protruding from his anus did not convert the strip search into a
14 body cavity search.

15 For the foregoing reasons, defendants are entitled to summary judgment
16 as a matter of law.

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1 RESPECTFULLY SUBMITTED this 18th day of January 2007.

2 ANDREW P. THOMAS
3 MARICOPA COUNTY ATTORNEY

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5 BY: s/Maria R. Brandon
6 MARIA R. BRANDON
7 DENNIS D. CARPENTER, JR.
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Defendants

8 ORIGINAL of the foregoing E-FILED
9 and copies MAILED this
18th day of January 2007 to:

10 Honorable Neil V. Wake
11 United States District Court Judge
12 UNITED STATES DISTRICT COURT
13 District of Arizona
Sandra Day O'Connor U.S. Courthouse, Suite 524
401 West Washington Street, SPC 52
Phoenix, AZ 85003

14 Honorable Edward C. Voss
15 United States Magistrate Judge
16 UNITED STATES DISTRICT COURT
17 District of Arizona
Sandra Day O'Connor U.S. Courthouse, Suite 324
401 West Washington Street, SPC 75
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1 and COPY to;

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8 CJ05-059

9 S:\COUNSEL\Civil\Matters\CJ\2005\Byrd v. MCSO CJ05-059\Pleadings\MotionforSummary Judgment.doc

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