

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAY 30 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THOMAS LEE AVERETT,

No. 16-15352

Plaintiff-Appellant,

D.C. No. 2:16-cv-00163-DLR-
MHB

v.

MARICOPA COUNTY SHERIFF'S
DEPARTMENT; PAUL PENZONE,*

MEMORANDUM**

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Submitted May 24, 2017***

Before: THOMAS, Chief Judge, and SILVERMAN and RAWLINSON,
Circuit Judges.

Thomas Lee Averett, an Arizona state prisoner and former pretrial detainee,
appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983

* Paul Penzone has been substituted for his predecessor, Joseph Arpaio,
as Maricopa County Sheriff under Fed. R. App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

*** The panel unanimously concludes this case is suitable for decision
without oral argument. See Fed. R. App. P. 34(a)(2).

action alleging constitutional violations arising from defendants' alleged policy of allowing female guards to observe male pretrial detainees showering and using the bathroom on a daily basis. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under 28 U.S.C. § 1915(A). *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). We vacate and remand.

Averett alleged in his complaint that defendants' policy of allowing female detention officers to view Averett while showering and performing bodily functions violated his Fourteenth Amendment rights. The district court dismissed Averett's deliberate indifference claim at the screening stage. However, the district court did not have the benefit of our recent decision in *Byrd v. Maricopa County Board of Supervisors*, 845 F.3d 919 (9th Cir. 2017), which held that dismissal under § 1915(A) of a pretrial detainee's action alleging constitutional claims arising from a similar policy was premature. We vacate the district court's judgment and remand for further proceedings.

We do not consider allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Averett's request for appointment of counsel, set forth in his opening brief, is denied.

VACATED and REMANDED.