MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILLIAM SCOTT ROGERS, individually and on behalf of all others similarly situated, including without limitation, the following names plaintiffs, COURTNEY ANN ADORNI, CAROLYN E. ARSENAULT, AMANDA LEE BARABE, BRITTANNY L. BLACK, DAYTON MITCHELL BUXBAUM, ELIZABETH ANN CARRIZALES, SAMUEL JAMES COLLINS, JORDAN MYKELL DAY, RUSSELL JAMES DOBRZYNSKI, NICHOLAS A. FISHER, JAMIE LYNN FLADLAND, GORDON JOHN GRAVELEY, JUSTIN MICHAEL GREVE, JOHN EDWIN HEATH, MARK MICHAEL HERRIN, AUSTIN B. HOUDESHELL, MARK STEPHEN IBSEN, SARA RENEE JACKSON, MARTIN P. KAZMIEROWSKI, ALYSSA LINDAUER, VINCENT PAUL MITCHELL, JOSHUA S. MOORE, MATTHEW JAMES MORROW, JR., ROBERT ALLEN MROCK, JR., TANNER BLAKE NOEL, JOSEPH McCABE PAXON, DEREK MICHAEL REINTJES, KAYLA DAWN PENNINGTON, TAYLOR M. SANDVICK, PAMELA RENÉ SHULTZ, CONNOR WARD SIMS, JUSTIN	Cause No. BDV-2018-1332 **FINAL JUDGMENT ORDER ON PENDING MOTIONS**

ROBERT STEIN, HALEIGH R. THRALL, CAMERON T. THROCKMORTON, CHAD LAWRENCE TRONSTAD, SARA R. WELSH, TREVOR WORTHINGTON, DREW MICHAEL WOOLSEY, YE AN, CHRISTOPHER BUCK, LEVI CARRILLO, HAROLD COLE, AMBER COSTIGAN, JAMIE CREWS, MARLON CRUTCHFIELD, JAMES CURTISS, JASON CYSEWSKI, JOHN DAVIS, SAM EDMINSTER, JAMES ELVERUD, SHAUNA FOLLETTE, CALE FRY, ANTHONY GAVAGHAN, ZACHARY GROBEL, LUKE GUCCIONE, CHRISTOPHER RAYMOND HANSON, JASMINE HART, KEVIN HILL, BARBARA HITZEROTH, AMY JENSEN, SPENCER JOHNSON, CHRISTINA KELLER, ASHLEY KITTSON, JERRY KOLOJAY, KARL KRUGER, NEIL KUNTZ, KRISTOPHER LEHTO, ERICA LEWIS, ALEX MALINAUSKAS, SARAH MARTINIE, ARYEL MEEDS, ERIN MOORE, JAMIE NELSON, THOMAS NORTON, JASON PETTIT, KALLEEN PLETNER, AMANDA REED, CARMEN ROBINSON, CRYSTAL ROWLAND, JAMES SCHILKE, PATRICK SHEEHAN, GABRIELLE SHERIDAN, TERI SKINNER, CHASE SMITH, CARRISA SOLTIS, CONLEY SPURLOCK, TARYN STEWART, ANDREW STOBIE, BRUCE STRANDBERG, TAWNI TWARDOSKI, NASH WALDON, ASHLEY WARD, TIDUS WARREN, CHRIS WASSON, WILLIAM WATTS, JOHN AND JANE DOES, Plaintiffs Nos. 98 through 4,500, i.e., all others similarly situated.

Plaintiffs,

v. LEWIS & CLARK COUNTY, LEWIS & CLARK COUNTY SHERIFF'S OFFICE, LEO C. DUTTON, in his capacity as Lewis & Clark County Sheriff, JASON GRIMMIS, in his capacity as Lewis & Clark County Undersheriff and former Captain for the Lewis & Clark County Detention Center, ALAN HUGHES, in his capacity as Captain for the Lewis & Clark County Detention Center, JOHN and JANE ROES 1 through 50, in their capacity as Employees of the Lewis & Clark County Detention Center, Defendants.	

On September 16, 2019, ninety-six individuals (collectively, "Plaintiffs"), via an Amended Complaint,[1] initiated this putative class action to seek monetary damages for allegedly being subjected to visual strip searches at the Lewis and Clark County Detention Center (Detention Center) after being "arrested or detained by Defendants for a traffic offense or a" non-felony offense between March 2015 and September 2019. They bring seven counts for alleged violations of Article 2, section 10 of the Montana Constitution; Article 2, section 11 of the Montana Constitution, and Montana Code Annotated § 46-5-105, which are captioned, "Constitutional Violations" (Count I), "Negligence" (Count II), "Negligence Per Se" (Count III), "Negligent Supervision" (Count IV), "Intentional Infliction of Emotional Distress" (Count V), "Negligent Infliction of Emotional Distress" (Count VI), and "Invasion of Privacy" (Count VII).

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[1] On October 31, 2018, approximately forty-one of the plaintiffs filed the initial complaint.

Before the Court are the following:

1. Plaintiffs' August 23, 2019 class certification motion;

2. Plaintiffs' August 23, 2019 partial summary judgment motion;

3. Plaintiffs' August 26, 2019 class discovery motion; and

4. Defendants' October 25, 2019 summary judgment motion.[2]

The motions are fully briefed. On December 5, 2019, the Court heard oral argument on the motions. Keif Storrar and Brent Flowers appeared on behalf of Plaintiffs, and Mitch Young appeared on behalf of Defendants.

Based upon the parties' respective briefs, exhibits, argument, and controlling law, the Court, for the reasons stated in this Order, enters the following:

1. Defendants' summary judgment motion is **GRANTED as to all named Plaintiffs and their seven captioned Counts (I-VII) against all the Defendants except as to:**

   (a) Caroline Arsenault;

   (b) Amy Jensen;

   (c) Sarah Martinie; and

   (d) Taylor Sandvick;

2. Plaintiffs' partial summary judgment motion is **DENIED**;

3. Plaintiffs' class certification motion is **STAYED**;

4. Plaintiffs' class discovery motion is **STAYED**;

5. Upon the parties' December 5, 2019 request, at this Court's suggestion, this matter is hereby **CERTIFIED** as a Final Judgment under Montana Rule of Civil Procedure 54 (b) because:

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[2] On October 31, 2019, the Court converted Defendants' dismissal motion to a summary judgment motion.

(a) the ninety-two Plaintiffs whose claims against Defendants were dismissed, with prejudice, may be realigned with the remaining four Plaintiffs if the Montana Supreme Court determines this Court erred in granting Defendants' summary judgment motion as to Plaintiffs' constitutional based claims;

(b) the ninety-two Plaintiffs whose claims against Defendants were dismissed, with prejudice, may be realigned with the remaining four Plaintiffs if the Montana Supreme Court determines this Court erred in granting Defendants' summary judgment motion as to Plaintiffs' statutorily based claims;

(c) Plaintiffs' Class Certification Motion may be largely dependent upon whether the Montana Supreme Court determines this Court erred in granting Defendants' summary judgment motion as to ninety-two Plaintiffs;

(d) the complexity of Plaintiffs' putative class action could be increased and/or lessened depending on whether the Montana Supreme Court determines this Court erred in granting Defendants' summary judgment motion;

(e) Plaintiffs' requested class discovery and resulting discovery plan, if any, could be enlarged as to scope and expense if the Montana Supreme Court determines this Court erred in granting Defendants' summary judgment motion; and

(f) the Montana Supreme Court would not be required to determine *Florence's*[3] application a second time on appeal relative to Plaintiffs' constitutional and statutory based claims. *See Weinstein v. Univ. of Mont.*, 271

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[3] *Forence v. Bd. Of Chosen Freeholders of Cty. Of Burlington, 566 U.S. 318 (2012).*

Mont. 435, 441, 898 P.2d 101 (1995) (*citing Roy v. Neibauer*, 188 Mont. 81, 85-86, 610 P. 2d 1185 (1980)).

UNDISPUTED FACTS

It appears to the Court that the following material facts are undisputed for purposes of the dueling summary judgment motions[4]:

1. The Detention Center houses pretrial inmates charged with both felony and misdemeanor offenses.

2. The Detention Center also houses convicted felons who have been sentenced to the Department of Corrections and are awaiting transport to another facility.

3. The Detention Center has pods designed for long term inmate housing.

4. The Detention Center has housed inmates in areas not designed for long-term housing because of facility overcrowding. Such areas include the library, mop hall, booking cells, solitary cells, and the attorney conference room.

5. Detention Center policy requires inmate strip searches for anyone who will be placed in its general custody.

6. The term "general custody" is defined as any placement in which two or more inmates have the opportunity for physical contact without direct supervision by a detention or law enforcement officer. It can include placement in an area not designed for long-term custody if two or more inmates are placed in that area.

7. A Detention Center visual strip search is to prevent contraband and weapons from being brought into general population and to

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[4] "The facts so specified must be treated as established in the action." Mont. R. Civ. P. 56(d)(1).

identify any wounds, tattoos, or other visible artifacts which might affect individual safe placement.

8. Detention Center policy also requires a strip search based upon reasonable suspicion of any individual who has a history of violent or drug-related offenses or based upon personal observations by an arresting officer or Detention Center officer(s) who admit(s) the individual.

9. The Detention Center does not track the frequency with which contraband is found during strip searches.

10. The Detention Center's records do not show any arrest or criminal history justification for a strip search.

11. There are ninety-six named Plaintiffs in this case.

12. Ninety-two plaintiffs were strip searched at the Detention Center before they were placed in general custody. (Defs.' Hr'g Ex. 1.)

13. Caroline Arsenault was strip searched and placed in an unsecured portion of the Detention Center (library). She was not placed in general custody. It is unknown why she was strip searched. She was charged with a Driving Under the Influence (DUI) offense.

14. Amy Jensen was strip searched and placed in the Detention Center attorney room — one door away from pod inmates. She was not placed in general custody. It is unknown why she was strip searched. She was charged with a DUI offense.

15. Sarah Martinie was strip searched and placed in the Detention Center's attorney room, one door away from pod inmates. She was not placed in general custody. It is unknown why she was strip searched. She was charged with a DUI offense.

16. Taylor Sandvick was strip searched and placed in the Detention Center's attorney room, one door away from pod inmates. She was not placed in general custody. It is unknown why she was strip searched. She was charged with a DUI offense.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). It is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party has met its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.*, ¶ 54 (*citing Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

Summary judgment should never be a substitute for trial when there is an issue of material fact. *McDonald v. Anderson*, 261 Mont. 268, 272, 862 P.2d 402, 404 (1993). "A material fact is a fact that involves the elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact." *Roe v. City of Missoula*, 2009 MT 417, ¶ 14, 354 Mont. 1, 221 P.3d 1200 (citation omitted). Disputed issues of fact are considered material if they concern the elements of the claim or the defenses to such claim to

an extent that requires resolution by the jury. *State Med. Oxygen & Supply v. American Med. Oxygen Co.*, 267 Mont. 340, 344, 883 P.2d 1241, 1243 (1994) (citation omitted). If the trial court determines that no genuine issue of material fact exists, it then must determine whether the moving party is entitled to judgment as a matter of law. *Willden v. Neumann*, 2008 MT 236, ¶ 13, 344 Mont. 407, 189 P.3d 610. It is universally recognized that "[t]he purpose of summary judgment is to encourage judicial economy through the elimination of any unnecessary trial." *Payne Realty & Hous. v. First Sec. Bank*, 256 Mont. 19, 24, 844 P.2d 90, 93 (1992).

"Summary judgment is an extreme remedy and should never be substituted for a trial if a material fact controversy exists." *Clark v. Eagle Sys.*, 279 Mont. 279, 283, 927 P.2d 995, 997 (1996). All reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party opposing summary judgment. *Heiat v. E. Mont. College*, 275 Mont. 322, 327, 912 P.2d 787, 791 (1996). Summary judgment is not to be utilized to deny the parties an opportunity to try their cases before a jury. *Brohman v. State*, 230 Mont. 198, 202, 749 P.2d 67, 70 (1988). If there is any doubt as to the propriety of a motion for summary judgment, it should be denied. *Rogers v. Swingley*, 206 Mont. 306, 670 P.2d 1386 (1983); *Cheyenne W. Bank v. Young*, 179 Mont. 492, 587 P.2d 401 (1978); *Kober v. Stewart*, 148 Mont. 117, 122, 417 P.2d 476, 479 (1966).

ANALYSIS

Plaintiffs' Constitutional Violation Based Claims

The Court agrees with Plaintiffs that Montana adheres to a very stringent privacy protection right. Mont. Const. Art. II, § 10. It provides: "The right of individual privacy is essential to the well-being of a free society and shall

not be infringed without the showing of a compelling state interest." *Id.* "[Article II, section 10] is, perhaps, one of the most important rights guaranteed to the citizens of this State, and its separate textual protection in our Constitution reflects Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan v. State*, 283 Mont. 433, 455, 942 P.2d 112, 125 (1997). In addition, Article II, section 11, safeguards Montanans' rights against unreasonable searches and seizures of their persons, papers, homes, and effects. In this regard, Montana "search" analysis is typically conducted under both Article II, Section 10, and Article II, section 11. See *Deserly v. Dept. of Corr.*, 2000 MT 42, ¶ 29, 298 Mont. 328, 995 P.2d 972. As the *Deserly* Court indicated, to determine whether there has been an unlawful governmental intrusion into one's privacy in search and seizure situations, Montana courts are required to consider: "(1) whether the person has an actual expectation of privacy; (2) whether society is willing to recognize that expectation as objectively reasonable; and (3) the nature of the State's intrusion." *Id.* at ¶ 16 (citing authority).

Whether an individual's right to privacy guaranteed by the Montana Constitution has been infringed by an unlawful search depends on whether there has been a government intrusion into an area subject to a reasonable expectation of privacy. *State v. Scheetz*, 286 Mont. 41, 46, 950 P.2d 722, 724 (1997). A search occurs when the government infringes upon an individual's expectation of privacy that society considers objectively reasonable. *Id.* (*citing United States v. Jacobsen*, 466 U.S. 109 (1984)). Notwithstanding, however, if there is no reasonable expectation of privacy, "there is neither a 'search' nor a 'seizure' within the contemplation of the Fourth Amendment of the United States

Constitution or Article II, Section 11 of the Montana Constitution." *Id.* (*quoting State v. Bennett*, 205 Mont. 117, 121, 666 P.2d 747, 749 (1983), overruled on other grounds by *State v. Bullock*, 272 Mont. 361, 384, 901 P.2d 61 (1995)).

The Montana Supreme Court has not specifically addressed the extent to which a person arrested for a non-felony offense has a reasonable expectation of privacy before they are placed in general custody. The *Deserly* Court recognized in a civil case that "prisons are dangerous places for employees, visitors and inmates" and, as such, there is a "legitimate governmental interest" to searches of inmates and prison visitors which must be balanced with basic constitutional rights. *Deserly*, ¶¶ 21-22. In relying upon federal decisions, the *Deserly* Court concluded, in relevant part, that "a warrantless strip search of a prison visitor is constitutionally permissible as an exception to the warrant requirement of Article II, section 11, and is a permissible intrusion into the visitor's residual right of individual privacy under Article II, section 10, only if the search is supported by 'reasonable suspicion.'" *Id.* ¶ 29.

The Montana Supreme Court has also recognized that "[a] prisoner in a cell has no expectation of privacy." *State v. Moody*, 2006 MT 305, ¶ 27, 334 Mont. 517, 148 P.3d 662 (citing federal authority). The *Moody* Court cited *Hudson v. Palmer*, 468 U.S. 517 (1984) where the United States Supreme Court held that "[t]he recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Hudson* at 526. The *Hudson* Court also observed from *Bell v. Wolfish*, 441 U.S. 520 (1979), that "We believe that it is accepted by our society that '[loss] of freedom of choice and privacy are inherent incidents of confinement.'" *Hudson* at 528. The *Wolfish* Court held that prison officials were

justified in conducting a strip-search of prisoners after contact visits. Later, in *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318 (2012), the United State Supreme Court upheld the constitutionality (Fourth and Fourteenth Amendments) of pretrial detainee visual strip searches before they are placed in general population after being arrested for non-felony violations.

In *Florence*, the petitioner was arrested on an outstanding bench warrant arising from prior minor offenses. *Id.* at 322. After his arrest, the petitioner was brought to a detention center where he was subjected to a strip search upon admission to jail. He claimed he was required to lift his genitals, turn around, and cough while squatting.[5] *Id.* He argued that "there is little benefit to conducting these more invasive steps [such as requiring a detainee to lift their genitals or cough in a squatting position] on a new detainee who has not been arrested for a serious crime or for any offense involving a weapon or drugs." *Id.* at 334. Instead, he claimed that "these detainees should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband." *Id.* The Supreme Court disagreed and declared that:

> "Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in [to the jail] on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population."

Id. at 322.

The *Florence* Court noted that maintaining jail facility safety "can be even more dangerous than prisons because officials there know so little about

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[5] Plaintiff Rogers (proposed Class Representative) claims that a Detention Center employee instructed him to strip naked for a strip search. Thereafter, he was "visually inspected by the Detention Center employee. Rogers then squatted and coughed two times per the Detention Center employee's instructions. The Detention Center employee made Rogers turn around and lift his scrotum and penis to visually inspect underneath."

the people they admit at the outset...." *Id.* at 336. It stated that in implementing strip search policies, correctional officers are afforded considerable deference, because "[t]he task of determining whether a policy is reasonably related to legitimate security interests is 'peculiarly within the province and professional expertise of corrections officials.'" *Id.* at 328 (citing authority). As a result, "courts must defer to the judgment of correctional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security." *Id.* at 322-23. A policy or "regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests." *Id.* at 326 (internal quotation marks and citation omitted).

The *Florence* Court identified three category threats justifying a blanket strip search policy: (1) the danger of introducing health risks; (2) increased gang activities within jails; and (3) the prevention of contraband from entering the general population. *Id.* at 330-34, -336. Based on these risks, the *Florence* Court held that "[t]here is a substantial interest in preventing any new inmate.... from putting all who live or work at these institutions at even greater risk when he is admitted to the general population." *Id.* at 333-34. After deferring to the expertise of correctional officers, the *Florence* Court concluded jails are not required to adopt a policy of exempting detainees charged with minor offenses from a routine, suspicion-less strip search conducted during the intake procedure so long as the detainee is assigned to be housed in the general population at some point. *Id.* at 334-35. It concluded the petitioner's view that detainees should be exempt from a strip search unless there is a reason to suspect the detainee of hiding contraband is "unworkable," since "[t]he record provides evidence that the

seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption." *Id.* at 334.

> People detained for minor offenses can turn out to be the most devious and dangerous criminals. *Cf. Clements v. Logan*, 454 U.S. 1304, 1305, 102 S. Ct. 284, 70 L. Ed. 2d 461 (1981) (Rehnquist, J., in chambers) (deputy at a detention center shot by misdemeanant who had not been strip searched). Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Johnston, *Suspect Won't Answer Any Questions*, N. Y. Times, Apr. 25, 1995, p. A1. Police stopped serial killer Joel Rifkin for the same reason. McQuiston, *Confession Used To Portray Rifkin as Methodical Killer*, N. Y. Times, Apr. 26, 1994, p. B6. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93. The Terrorists: *Hijacker Got a Speeding Ticket*, N. Y. Times, Jan. 8, 2002, p. A12. Reasonable correctional officials could conclude these uncertainties mean they must conduct the same thorough search of everyone who will be admitted to their facilities.
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> Experience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment. They may have some of the same incentives as a serious criminal to hide contraband. A detainee might risk carrying cash, cigarettes, or a penknife to survive in jail. Others may make a quick decision to hide unlawful substances to avoid getting in more trouble at the time of their arrest. This record has concrete examples. Officers at the Atlantic County Correctional Facility, for example, discovered that a man arrested for driving under the influence had "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills" taped under his scrotum. Brief for Atlantic County et al. as *Amici Curiae* 36 (internal quotation marks omitted). A person booked on a misdemeanor charge of disorderly conduct in Washington State managed to hide a lighter, tobacco, tattoo needles, and other prohibited items in his rectal cavity. See United States Brief 25, n. 15. San Francisco

> officials have discovered contraband hidden in body cavities of people arrested for trespassing, public nuisance, and shoplifting. San Francisco Brief 3. There have been similar incidents at jails throughout the country. See United States Brief 25, n. 15.

Florence, at 334-35.

Florence's key question was not whether an arrested person had been charged with a minor, nonviolent offense, but whether they had been classified for general jail population detainment. The Court concluded that requiring individualized suspicion would undermine detention center officials' ability to maintain facility security. *Id.* at 336. "Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility. This is a substantial reason not to mandate the exception petitioner seeks as a matter of constitutional law." *Id.*

Importantly, *Florence's* majority opinion noted that it was not addressing "the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees." *Id.* at 338-39. In this regard, *Florence* did not disturb Ninth Circuit case law that requires officials to have individualized reasonable suspicion to conduct strip searches of individuals charged with minor offenses who are not placed in a jail's general custody. See *Edgerly v. City & Cty. of San Francisco*, 599 F.3d 946, 957 (9th Cir. 2010), *Bull v. City & Cty. of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010).

In this case, at least for ninety-two Plaintiffs, the facts are similar to those in *Florence*. The Detention Center's policy of conducting individual, visual strip searches before a person is placed in general custody is much like the

Florence detention center policy. As Captain Hughes affirmed, Detention Center policy requires inmate strip searches for anyone who will be placed in its general custody. This "penological interest" "is to prevent contraband and weapons from being brought into the jail, as well as to identify any wounds, tattoos, or visible artifacts which might affect safe placement of the individual." Here, Plaintiffs, in their respective template affidavits, affirmed, generally, that they were required to remove their clothing, including their underwear, in front of a correctional officer for a visual inspection, manipulate their genitals while detention officers inspected for contraband or other safety threats, and required to squat and cough.

Importantly, as in *Florence*, Plaintiffs do not dispute by competent evidence that ninety-two of them were placed in general custody sometime after their respective strip search.[6] Moreover, the summary judgment record does not contain substantial evidence that the Detention Center's strip search policy before an individual is placed in general custody is unnecessary or unjustified. As such, the Court will defer to the Detention Center officials' judgment relative to its strip search policy where an individual will be placed in /
general custody based upon the Detention Center's "legitimate penological interests."

Turning to whether any Plaintiff had an expectation of privacy before they were placed in the Detention Center's general custody in light of the countervailing security interests and the inherent danger in a jail or prison environments, this Court holds that Montana has a legitimate and compelling state interest in maintaining institutional security within jails such as the Detention

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[6] On October 21, 2019, the Court indicated that "counsel should be prepared at the hearing set for December 5, 2019, to answer whether there are proposed class members who were strip searched but were not placed in general population." In response, Defendants provided Exhibit 1 to the Court at the hearing relative to the ninety-six named Plaintiffs. Plaintiffs did not produce any evidence to contradict Exhibit 1.

Center in this case. The *Deserly* Court pointedly noted that" the government has a necessary and legitimate need to protect the security of those working, visiting, and residing in the institution from the introduction of contraband" when an individual "seeks to enter the dangerous and controlled environment of a correctional facility." *Deserly*, ¶ 26. The same "necessary and legitimate need" is found in this case. Here, the Detention Center's strip search policy before an individual is placed in general custody is a legitimate, necessary and reasonable tool to maintain security, safety and health within the Detention Center for all who work or reside there.

Moreover, when weighed against the need to maintain institution security, safety and health, this Court is satisfied that society would always insist that an arrestee's Article II, section 10, privacy right must yield when they are placed in a jail, detention center or prison's general custody or general population in order to prevent "any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these institutions at even greater risk when [he/she] is admitted to [general custody] or general population." *Florence*, at 333. Furthermore, in this situation, since there is no reasonable expectation of privacy, there can be no search or seizure that implicates or violates the protections contemplated under Article II, section 11, of the Montana Constitution. *Scheetz*, 286 Mont. at 46, 950 P.2d at 724.

Accordingly, as to the ninety-two Plaintiffs that were placed in the Detention Center's general custody sometime after being strip searched, Defendants' are entitled to summary judgment as a matter of law as to Counts I, II, III, IV, V, VI, and VII of the Amended Complaint. As to Plaintiffs Arsenault, Jensen, Martinie, and Sandvick, Defendants are not entitled to summary judgment

since they were not placed in general custody at any time after being strip searched. In this regard, disputed material facts exist as to whether Defendants had individualized reasonable suspicion to conduct strip searches of these four Plaintiffs who were charged with misdemeanor DUI offenses but were not placed in the Detention Center's general custody.

Plaintiffs' Statutory Violation-Based Claims

In their Amended Complaint, Plaintiffs assert Defendants violated Montana Code Annotated § 46-5-105, which provides:

> A person arrested or detained for a traffic offense or an offense that is not a felony may not be subjected to a strip search or a body cavity search by a peace officer or law enforcement employee unless there is reasonable suspicion to believe the person is concealing a weapon, contraband, or evidence of the commission of a crime.

Mont. Code Ann. § 46-5-105 (2017). Plaintiffs argue, and the Court agrees, that Section 46-5-105 was enacted by the 2013 Montana Legislature in "response" to *Florence*. Plaintiffs maintain, however, that Section 46-5-105 statutorily abrogated *Florence's* decision and the Detention Center's strip search policy relative to strip searching individuals that are "arrested or detained for a traffic offense or an offense that is not a felony," before they are placed in the Detention Center's general custody. Respectfully, the Court disagrees.

As indicated earlier, *Florence* is limited in its application. Its majority did not address "the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees." *Florence*, at 339. Consequently, detention institutions must still have individualized reasonable suspicion to conduct strip searches of individuals

charged with minor offenses who are not placed in a jail's general custody. Section 46-5-105 captures, succinctly, this judicial "reasonable suspicion" mandate for individuals that are "arrested or detained for traffic offenses or an offense that is not a felony" who are not placed in a general population or custody. Plaintiffs argument that Section 46-5-105 is also applicable to such individuals who are placed in general custody is an absurd interpretation of this statute.

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

Mont. Code Ann. § 1-2-101 (2017).

> "We interpret a statute first by looking to its plain language. We construe a statute by reading and interpreting the statute as a whole, 'without isolating specific terms from the context in which they are used by the Legislature.' . . . Statutory construction should not lead to absurd results if a reasonable interpretation can avoid it."

Mont. Sports Shooting Ass'n v. State, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (internal citations omitted).

Under Montana law, courts first interpret a statute by looking at its plain meaning, and, if the language is clear and unambiguous, no further interpretation is required, or legislative intent considered. *Id.* (citing authority). "Statutory construction is a 'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24, 321 Mont. 280, 90 P.3d 426 (internal citation omitted). A court's duty is to "read and construe each statute as a whole" so that it may "give effect to the purpose of the statute." *State v. Triplett*, 2008 MT 360, ¶ 25, 346 Mont. 383, 195 P.3d 819

(internal citations omitted). In addition, the Montana Supreme Court requires district courts to harmonize statutes relating to the same subject, as much as possible, giving effect to each. *Oster v. Valley Cnty.*, 2006 MT 180, ¶ 17, 333 Mont. 76, 140 P.3d 1079. Although more specific statutes prevail over general law provisions. *Id.*

Here, Plaintiffs seek to insert "even if the individual is placed in the institution's general custody," within Section 46-5-105. They are inserting what the Legislature omitted. No where in the statute did the 2013 Legislature provide that the "reasonable suspicion requirement before strip search" be applied before an individual is placed in a Montana's penal institution's general population or general custody. Section 46-5-105's plain meaning is clear and unambiguous. Moreover, the statute's plain language is expressly consistent with *Florence's* limited application of acceptable, warrantless/suspicionless strip searches before an individual is placed in general custody or general population. The *Florence* Court was adamant that its decision did not apply to suspicionless strip searches where the individual would not be placed in the institution's general population. In this regard, Section 46-5-105 is also consistent with controlling Ninth Circuit case law (*Edgerly* and *Bull*) that still require penal institution officials to have individualized reasonable suspicion to conduct strip searches of individuals charged with minor offenses who are not placed in a jail's general custody.[7]

Defendants also maintain, and the Court agrees, that *Florence's* limited holding is a judicially recognized warrantless search exception.

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[7] Defendants argue that Section 46-5-105 is unconstitutional. In this regard, Montana courts are directed that they should decline to rule on the constitutionality of a legislative act if they are able to decide the case without reaching constitutional questions. *State v. Adkins*, 2009 MT 71, ¶ 12, 349 Mont. 444, 204 P.3d 1; *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 338 Mont. 259, 165 P.3d 1079. Here, this Court is able to decide the case without addressing Defendants' constitutional challenge to section 46-5-105.

Specifically, Section 46-5-101 provides: "A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made: (1) by the authority of a search warrant; or (2) in accordance with judicially recognized exceptions to the warrant requirement." *Id.*

Plaintiffs, obviously, disagree with Defendants' reliance on *Florence* as a "judicially recognized" warrantless search exception. As noted earlier, the *Florence* Court held that warrantless strip searches and visual inspection of an individual's genitals and anus without reasonable suspicion of a concealed weapon or contraband before being placed in general population were reasonable. *Florence*, 566 U.S. at 335, 339. It did not, as previously indicated, determine what type of search would be reasonable where an individual was not put into the general jail population. *Id.* at 338. Accordingly, this Court determines that *Florence* is a judicially recognized exception warrantless search exception under Section § 46-5-101(2).

Plaintiffs argue that section 46-5-105 is more specific than Section 46-5-101(2) and thus controls this Court's statutory harmonization. Specifically, Plaintiffs argue that Section 46-5-105 is more specific than Section 46-5-101(2). Again, the Court respectfully disagrees.

Both statutes can easily be harmonized to give effect to each other relative to Detention Center strip searches at issue in this case. Section 46-5-105 is consistent with, and reinforces, *Florence's* limited holding in that individuals arrested for misdemeanor offenses may not be strip searched without reasonable suspicion if they are not placed in general custody. In this regard, Plaintiffs Arsenault, Jensen, Martinie, and Sandvick fall within this statute. Section

46-5-101(2)'s judicially recognized warrantless search exception allows, under *Florence*, strip searches and visual inspection of an individual without reasonable suspicion before being placed in general population/general custody. The remaining ninety-two Plaintiffs fall within Section 46-5-101(2)'s "judicially recognized exception" application.

Plaintiffs' statutorily based claims must fail based upon the Court's interpretation of Section 46-5-105, as well as its application of Section 46-5-101(2). In this regard, as to the ninety-two Plaintiffs that were placed in the Detention Center's general custody sometime after being strip searched, Defendants' are entitled to summary judgment as a matter of law as to Counts I, II, III, IV, V, VI, and VII of the Amended Complaint. As to Plaintiffs Arsenault, Jensen, Martinie and Sandvick, Defendants are not entitled to summary judgment since they were not placed in general custody at any time after being strip searched. As such, disputed material facts exist as to whether Defendants had individualized reasonable suspicion to conduct strip searches of these four Plaintiffs under the provisions of Section 46-5-105 because they were charged with misdemeanor DUI offenses but were not placed in the Detention Center's general custody.

Plaintiffs' Class Certification Motion

Since the Court has granted Defendants' summary judgment motion as to ninety-two Plaintiffs, the fully-briefed class certification motion shall be stayed pending the Montana Supreme Court's review of this decision. During oral argument, Plaintiffs' counsel speculated that there would be at least 200 potential class members similarly situated as to Plaintiffs Arsenault, Jensen, Martinie, and Sandvick. Undoubtedly, the Montana Supreme Court's review of