IN THE SUPREME COURT OF THE STATE OF MONTANA
DA-19-0734

WILLIAM SCOTT ROGERS,
individually and on behalf of all others similarly situated,

Plaintiffs/Appellants

vs.

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 Detention Center, JOHN and JANE DOES 1 through 50, in their capacity as Employees of the Lewis & Clark County Detention Center,

Defendants/Appellees

On Appeal from Montana First Judicial District Court, Lewis and Clark County
Cause No. DV-2018-1332, Hon. Michael McMahon, District Court Judge

---

PLAINTIFFS'/APPELLANTS' REPLY BRIEF

APPEARANCES:

John C. Doubek,
Keif Storrar,
Jonathan King
DOUBEK, PYFER & STORRAR
PO Box 236
Helena, MT 59624
Attorneys for Plaintiffs/Appellants

Mitchell A. Young,
Maureen Lennon
MACo Defense Services
2717 Skyway Drive, Suite F
Helena, MT 59602-1213
Attorneys for Defendants/Appellees

Marty Lambert,
Gallatin County Attorney
1709 West College
Bozeman, MT 59715
Attorney for Amici MCAA and MSPOA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other

Appellants respectfully submit the following reply brief in support of their appeal. This brief responds to the arguments put forth by the Appellees and the *Amici*, Montana Sheriff's and Peace Officers Association (MSPOA) and the Montana County Attorneys' Association (MCAA).

I. The Appellees' constitutional argument undermines this Court's long history of declaring that Article II, Sections 10 and 11 provide greater protections against government searches than the federal Fourth Amendment.

This Court has long held that Montana's constitution affords stronger privacy protections than those under the federal Fourth Amendment.[1] The "reasonable suspicion" called for under the § 46-5-105, MCA, is not "generalized suspicion" as used by the Appellees to engage in wholesale blanket strip searches on misdemeanor offenders. The reasonable suspicion requirement of § 46-5-105, MCA, easily comports with Montana's privacy rights under Article II, Sections 10 and 11 of the Montana Constitution. (App. Br. Sec. I).

The claims in this case were brought under Montana law, the Montana Constitution and Montana common law, not the Fourth Amendment of the U.S. Constitution, which is the legal provision analyzed in *Florence* and the legal provision the defense argues should apply here. The Appellees' constitutional

[1] *A*s cited in Appellant's opening brief, *see*: *State v. Goetz,* 2008 MT 296, ¶ 14; *Gryczan v. State*, 283 Mont. 433, 448-449, 942 P.2d 112, 121, (1997); *State v. Spang*, 2002 MT 120, ¶ 22, 310 Mont. 52, 48 P.3d 727; *State v. Allen*, 2010 MT 214, ¶ 47, 357 Mont. 495, 241 P.3d 1045; *Deserly v. Dept. of Corrections*, 2000 MT 42.

arguments, based solely upon the federal Fourth Amendment, have been rejected by this Court in multiple instances. Moreover, the Appellees failed to refute or discuss the precedent in *Goetz* and *Gryczan,* which discuss in detail the strength of our individual privacy rights afforded by the Montana Constitution.

In addition, the Defendant's federal constitutional arguments attempt to label the Plaintiffs as "prisoners in a cell," when in fact, they were not. They were misdemeanor arrestees in the process of being booked on the booking floor of the detention center with the opportunity for immediate release. They had not yet been assigned a cell or even classified as "general population" at the time of their strip-searches.[2] The Appellees cite to various federal cases[3] and state cases,[4] cherry picking quotes from cases they fail to analyze or apply in any meaningful manner to the facts of this case.[5] Plaintiffs will therefore analyze these cases below.

Hudson v. Palmer, 468 U.S. 517 (1984), involved a convicted prisoner in a state prison whose cell was searched for drugs while some personal items within his cell were destroyed by the prison guards. The U.S. Supreme Court analyzed whether the prisoner had a right of privacy in his prison cell entitling him to

[2] Rather, as admitted by the defendants, all detainees are strip searched regardless of placement because they might have to be moved on a "moment's notice." (App. Br. pp. 10-11). Plaintiff Rogers sat alone in a cell for 7-hours before being moved to "general population." (*Id.* at 43).
[3] *Hudson v. Palmer*, 468 U.S. 517, 527, 104 S. Ct. 3194, 3201, 82 L. Ed. 2d 393 (1984); *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994); *Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016).
[4] *State v. Moody*, 2006 MT 305.
[5] Except for its reliance on *Florence*, which is refuted in Appellants/Plaintiffs opening brief.

the Fourth Amendment's protection against unreasonable searches. *Id. at* 468 U.S. at 522, 104 S. Ct. at 3198, 82 L. Ed. 2d at 400. Importantly, the prisoner had been convicted of a crime and sentenced to prison. As such, the U.S. Supreme Court held that the "Fourth Amendment has no applicability to a prison cell." 468 U.S. 536, 104 S. Ct. 3205, 82 L. Ed. 2d at 409.

Like in *Hudson*, where the facts involved a convicted prisoner serving a prison sentence, in *State v. Moody*, 2006 MT 305, the defendant pleaded guilty to her *felony* crime[6] and was sentenced to probation on the condition that she submit to probationer home visits. This Court found that a convicted felon probationer has no reasonable expectation of privacy under Article II, § 11, and that because there is no actual expectation of privacy, there is no search. *Moody*, ¶ 19.[7]

To distinguish *Hudson* and *Moody* from the case at hand, this Court need only recognize that in *Hudson* the prisoner lived in a prison cell, not a hotel room, after he was found guilty of a crime and sentenced. And *Moody* was a convicted felon probationer with diminished rights under state supervision. In contrast to this case, all misdemeanor arrestees were in the process of being booked on the booking floor, had not been found guilty of any crime, had not been assigned a cell, and per the Appellees' own admission, could post bond or be released to a

[6] Note that § 46-5-105 only applies to non-felony, misdemeanor arrests and detentions.
[7] At the same time the Court that since a home visit is not a search, a probation officer may not open drawers, cabinets, closets or the like; nor may the officer rummage through the probationer's belongings without further evidence of wrongdoing, under the plain view doctrine.

sober person and let out immediately. In *Hudson* and *Moody,* the convicted felons had no such rights.

Next, *Farmer v. Brennan*, 511 U.S. 825 (1994), is inapplicable here because it involves a post-trial prisoner bringing a claim under the Eighth Amendment to the U.S. Constitution. The case at hand involves pre-trial detainees immediately after arrest. Pre-trial excessive force or failure-to-protect claims must be brought under the Fourteenth Amendment's Due Process Clause, not the Eighth Amendment. *Kingsley v. Hendrickson*, 576 U.S. 389, 401, 135 S. Ct. 2466, 2475, 192 L. Ed. 2d 416, 428, (2015). The "Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Kingsley*, 135 S. Ct. 2473. As the 9th Circuit Court of Appeals explained in *Castro v. Cty. of Los Angeles*:

> The underlying federal right, as well as the nature of the harm suffered, is the same for pretrial detainees' excessive force and failure-to-protect claims. Both categories of claims arise under the Fourteenth Amendment's Due Process Clause, rather than under the Eighth Amendment's Cruel and Unusual Punishment Clause. 'The language of the two Clauses differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'

Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1069-1070, (9th Cir. 2016), (internal citations removed).[8]

The *Castro* court distinguished between failure-to-protect and excessive use of force claims: "[A]n excessive force claim requires an affirmative act; a failure-to-protect claim does not require an affirmative act." 833 F.3d at 1069.

> The Supreme Court has instructed that "mere lack of due care by a state official" does not " 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment." Daniels, 474 U.S. at 330-31 (holding that negligent actions or omissions by state officials are not actionable under § 1983); *accord* Davidson v. Cannon, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986) (same).

Id.

To justify their reliance on these above federal cases and to defend the necessity of conducting illegal "general population" strip searches under an illegal generalized suspicion standard, Appellees and the district court speculate, without any evidence, that there would otherwise be a massive influx of prisoner abuse cases. If this was the case, why didn't the *Amici* (MSPOA or MCAA) discuss the massive influx of these Fourteenth Amendment Due Process pre-trial detainee claims throughout the state, over the past seven years since § 46-5-105, MCA, was enacted? Certainly, Montana county attorneys who are members of the MCAA would be knowledgeable of this influx of pre-trial prisoner abuse cases across the

[8] The appellee's brief cites to *Castro* but wrongly argues that the Eighth Amendment applies to challenge the constitutionality and justify its other arguments when it does not.

state. So, where are the statistics, the cases, or any facts supporting this claim? There are none, and there were none presented to the district court either, because this argument is an unsubstantiated red herring. This is yet another exaggerated claim by Appellees to justify their illegal actions. *Florence* at 328 (J. Kennedy concurrence) (explaining an exaggerated response should not justify police actions).

Secondly, *arguendo,* even if there were a massive influx of excessive use of force or failure-to-protect cases, a jail would be able to rely on § 46-5-105, MCA, as a defense to any due process claim. They would be able to justify their actions as reasonable and limit the county jail's liability to excessive use of force or failure-to-protect claims. Indeed, the major underlying reason for violating the statute in the first place is apparently to limit the County's lability for these failure-to-protect claims,[9] so it would be a benefit to rely on the statute as a defense to these claims to defend and justify their actions as objectively reasonable.

Finally, it is not the purpose of this Court (or this case for that matter) to speculate on the elements of any alleged crime and the reasons for the charge (i.e. Unlawful Use of a Motor Vehicle vs. Felony Theft) (Appellee Br. at 9-10). The arresting officer alleges a crime by applying the probable cause standard to the facts and circumstances known at the time. Here, the issues in this case deal with a

[9] Ex. B to App. Br. (Dutton Depo. 10-11; 17, SUF Ex. 005; Grimmis Depo. 36, 42-44, SUF Ex. 007).

class of misdemeanor detainees who never even had reasonable suspicion established prior to being illegally strip searched.

The Fourth Amendment to the U.S. Constitution is a floor not a ceiling of rights and does not have any bearing on what Montana's independent right to privacy means. This is not a Fourth Amendment case and *Florence* and these other cases are totally inapplicable as they apply to Montanan's stronger constitutional rights to privacy.

II. Interpreting § 46-5-105, MCA, to exempt general population detainees from strip searches via a judicial exception to the warrant requirement, as the district court did, required the district court to find the language in the statute ambiguous, and at the same time, the court refused to consider the legislative history, which it should have done having found the statute ambiguous.

a. *"Law-enforcement officials cannot place themselves above the law that they are sworn to defend."*[10]

The commander of the jail, Captain Hughes, testified that the generalized strip search policy employed by the Lewis and Clark County Detention Center violates § 46-5-105, MCA. (App. Br. Appendix, *Ex. B* ¶ 27).

[10] President George H. W. Bush – Commenting on the Rodney King beating by Los Angeles police officers. (Bush Calls Police Beating 'Sickening' The New York Times Archives, March 22, 1991 (https://www.nytimes.com/1991/03/22/us/bush-calls-police-beating-sickening.html, last visited 6/4/2020).

Sheriff Dutton knows he and his underlings must follow the law, except, according to him when it comes to § 46-5-105, MCA. (Appeal Br. Appendix, Ex. B - Dutton Depo. 8:17-10:14; Dutton Depo. 13:20 – 14:6 (SUF Ex. 005)). Yet, Sheriff Dutton affirmed that because *Florence* was the impetus to pass the § 46-5-105, MCA, the county's generalized strip search policy violates the statute. (App. Br. Appendix, *Ex. B* ¶ 27).

These are admissions on the record. These admissions are totally ignored by the district court, the Appellees and the *Amici.* Now, in a post-facto justification for their admittedly illegal actions, this Court is being asked to rectify the mistake by relying on a completely different statute and *Florence* to overcome the County's admitted to violations of citizens constitutional and statutory rights. This is not allowed by the statutory interpretation or the legislative history. This is not the law that these individuals are sworn to uphold. This Court should reverse the district court on these admissions alone.

b. "The liberties of none are safe unless the liberties of all are protected."[11]

The Appellees' brief, in Section II, and *Amici* brief in Section D, arguments undermine the liberties of everyone in this state by asking this Court to undercut the legislative intent that sought to strengthen our constitutional rights by enacting

[11] U.S. Chief Justice William O. Douglas (1898 – 1980), as printed in "*The Little Black Book of Lawyer's Wisdom*, Tony Lyons, Skyhorse Publishing (2010).

a statute with a clear purpose. The Appellees and *Amici* assert an untenable position and argue for an exception to the statute while at the same time arguing that the district court's interpretation of § 46-5-105, MCA, is unambiguous. This argument goes against the fundamental principles of statutory construction and the purpose of the judicial exceptions to the warrant requirement.

This portion of the reply is broken into three parts: (i) the judicial exception to the warrant requirement should not be used to undermine statutory rights that strengthen our constitutional rights; (ii) the plain language of the §46-5-105, MCA, is unambiguous and applies to *everyone* detained and does not exempt those placed in general population; (iii) the legislative history prohibits this Court from affirming the district court's application of the judicial exception to the warrant requirement and requires reversal.

i. The judicial exception to the warrant requirement is used to interpret constitutional rights, not undermine a statute intended to strengthen those same constitutional rights.

The judicial exception to the warrant requirement should not be used to undermine statutory rights that strengthen our constitutional rights. Judicial exceptions to the warrant requirement allow the State to conduct searches in accordance with certain state or federal constitutional provisions. § 46-5-101, MCA. Here, in 2013, the legislature passed a statute to restrict those warrantless searches and to provide our citizens more protections than those base set of rights

granted to us under the constitution. § 46-5-105, MCA. The district court's opinion acts as if this statute doesn't exist and undermines the rule of law.

ii. The plain language of the § 46-5-105, MCA, is unambiguous and applies to everyone detained at the Lewis and Clark County Detention Center, not just those placed in general population.

The terms of the statute are unambiguous, and the plain language applies to *all* alleged traffic and non-felony offenders detained and requires reasonable suspicion to first be established prior to conducting *any* strip search of those alleged offenders. § 46-5-105; App. Br. at 23-25.

Appellees wrongly flip the argument back on itself by claiming this interpretation requires the words "placed in general custody" to be inserted after "arrested and detained." (Appellee's Br. at 16). As argued in Plaintiffs' opening brief, it is the district court that ignored the plain language of the statute and seeks to insert the "except for general population detainees" language into the broadly applied terms of the statute by way of a judicial exception to the warrant requirement. This same exception was unequivocally rejected by the legislature with HB 306 (2019).

Appellees also inarticulately argue that the statute "does not speak to incarceration of those persons following arrest or detention." (Appellee Br. at. 13-14). This argument is a distinction without a difference. First, anyone arrested and detained for the purposes of this lawsuit is held at the "Lewis and Clark County

Detention Center." The term 'detain' is incorporated into the name of the facility itself. The term is defined as holding or confining someone:

> Detention. *n.* The act of holding a person in custody; confinement or compulsory delay. **detain,** *vb.*

Black's Law Dictionary, 514 (Bryan A. Garner ed. 9th ed., West 2009).

> Pretrial detention. The holding of a defendant before trail on criminal charges either because the established bail could not be posted or because release was denied.

Id.

The term "detain" or "detention" is also used throughout the Montana Code and undisputedly means being held in a detention center for both pre-trial and post-trial purposes.[12] Moreover, the term "incarceration" as used in Montana Code refers to a post-sentencing "incarceration," § 46-18-201, MCA, after the person has been convicted of a crime. In this case, everyone detained is still innocent until proven guilty, not convicted of a crime and incarcerated. The term "detained" also does not classify how or where within the facility the detained individual is held as

[12] *See* § 46-9-105. General authority for release and *detention*. (1) An arrested person must be released or *detained* pending judicial proceedings pursuant to Title 46, chapter 9.; § 46-9-106. Before a verdict has been rendered, the court shall: (2) *detain* the defendant when there is probable cause to believe that the defendant committed an offense for which death is a possible punishment and adequate safeguards are not available to ensure the defendant's appearance and the safety of the community.; § 46-9-107. Release or *detention* pending appeal.; 46-9-109. Release or *detention* hearing. (1) The release or detention of the defendant must be determined immediately upon the defendant's initial appearance. (2) In determining whether the defendant should be released or *detained,* the court may …) (emphasis added).

the Appellees argue. This Court should not muddy the waters more and write other judicial definitions into the law to further define the term.

In the context of this case, however, detain means being placed into general population. It is undisputed that the Plaintiffs and potential class of 4,500+ were arrested and detained at the Detention Center, strip-searched and placed into general population. Plaintiffs agree that there are situations where someone can be arrested and detained, strip searched and not placed in general population, indeed four Plaintiffs in this case survived summary judgment for that very reason. However, § 46-5-105, MCA, is unambiguous and applies to *anyone* detained. The detainee cannot be strip searched without reasonable suspicion first established.[13] It does not matter if the detainee is being placed in general population or not; reasonable suspicion must be established prior to a strip search because that's how the statute reads.

In fact, the defendants agree that the four surviving plaintiffs in this case should not have been strip searched per the terms of § 46-5-105, MCA, because they were never placed in general population. This admission alone and the adoption of this reasoning by the district court causes the statute to apply in some situations but not others, thereby creating an ambiguity. To adopt this

[13] The statute applies to both "peace officers" and "law enforcement employees." It is undisputed that a peace officer is a sworn sheriff and/or sheriff's deputy and a "law enforcement employee" refers to a "detention officer." (App. Br. Appendix Ex. B - Dutton Depo. 41:24-42:3 (SUF Ex. 005)).

interpretation this Court would have to make a distinction of how the statute applies at different times to different detainees based on terms not defined in the statute. Thus, to adopt this view, this Court must look to the legislative history, which unambiguously rejects this view.

iii. The legislative history prohibits this Court from affirming the district court's application of the judicial exception to the warrant requirement and requires reversal.

As discussed above, the district court must have decided that the statute was ambiguous. In doing so, the district court forced an interpretation of § 46-5-105, MCA, and inserted terms omitted. By relying on § 46-5-101, § 1-2-101 and *Florence*, the District Court and the Appellees completely ignore the clear purpose, intent and directives of the legislature with its adoption of the statute in 2013 and the legislature's subsequent rejection of the same "general population exception" in 2019.

It is telling that Appellees and the *Amici*, *never discuss or dispute* the lengthy, detailed, and directly on point legislative history of § 46-5-105, MCA.[14] That's because it is abundantly clear that every one of the arguments put forth in this case was rejected by the elected officials of this state TWICE and the entire purpose of the statute was to prohibit the exact conduct that defendants continue to engage in.

[14] *See* App. Br. Appendix Ex. B (SUF ¶ 1-26) discussing SB 194 (2013) and Ex. C rejecting the 'general population' exclusion put forth in HB 306 (2019).

This Court recently held that the intent of the legislature and legislative history should be pursued in statutory construction when there is disagreement on the application and interpretation of the law, as there clearly is in this case. *Nunez and McGowan v. Watchtower Bible and Tract Society,* 2020 MT 3. *See also Hanson v. Edwards*, 2000 MT 221, P19, 301 Mont. 185, 189, 7 P.3d 419, 422 (looking to the legislative history to determine how the legislature intended the unmarked crosswalk at an intersection statute to apply.)

If this Court intends to adopt the judicial exception to the warrant requirement, it also must find the statute ambiguous and then it must look to the legislative history to determine legislative intent. In doing so, this Court will find the legislative history of § 46-5-105, MCA is unambiguous: In 2013 (SB 194) the legislature rejected *Florence* and the general population argument. (App. Br. Appendix Ex. B (SUF ¶ 1-26)). The legislature rejected it again in 2019 (HB 306) when Sheriff Dutton worked with the County's insurance company, MACo, and sought to write in the exception that it was being sued over in this lawsuit, presumably for the insurance carrier to limit future liability.[15] The HB 306 amendment and supportive reasoning, concerning safety of the facility,

[15] *See* Dutton Depo. 35:23-38:1 (App. Br. Appendix Ex. B (SUF Ex. 005)), Sheriff Leo Dutton testified that he worked with MACO to draft HB 306 in an attempt to amend § 46-5-105 to insert the general population exception to the strip search requirement and he did so because of this lawsuit. He also specifically remembered MACo, CEO Eric Bryson testifying: "As part of MACo, we are defending the county that this lawsuit is subject to, and we are continuing to give guidance that law enforcement personnel, as it relates to placement in custody in a detention center, have the ability to conduct these types of searches." *Id.*

overcrowding, etc. was once again resoundingly rejected. *See again,* comments by Chairman Doane and Representative Bishop rejecting the amendment and affirming the intent of the 2013 legislation. (App. Br. Appendix **Ex. D** – pp. 3-4).

As shown, this Court has consistently read the statutory directives §§ 1-2-101 and 102, MCA, together and incorporated the legislative history into its decisions when interpreting both statutory and constitutional provisions. There is no reason to shy away from that precedent here. There is not likely a case where the legislative intent, purpose and history is clearer than here.

If this Court adopts the district court's judicial exception to the statute, it undermines the democratic process and would overrule a law passed with clear legislative intent, history and purpose. The district court, Appellees and the *Amici* all failed to address this legislative intent, and their failure to do so is fatal to their interpretation. Thus, the district court must be reversed.

III. Appellees failed to cross-appeal, failed to provide timely notice of their constitutionality arguments to the attorney general, and wrongly apply the Eighth Amendment to the statute, all of which are fatal to their unconstitutionality defense.

The arguments that § 46-5-105, MCA, is unconstitutional under the Eighth Amendment to the U.S. Constitution must be rejected outright for three reasons:

First, Appellees in this case failed to notify the Attorney General of their decision to challenge the constitutionality of § 46-5-105, MCA within the required time period – 11 days after notice of appeal was filed. M.R.App.P. 27. The failure

to comply with Rule 27 precludes this Court from reaching the constitutional challenge. *Haider v. Frances Mahon Deaconess Hosp*., 2000 MT 32, ¶ 12, 298 Mont. 203, 206, 994 P.2d 1121, 1123, (2000) (citing to Rule 38, which is now Rule 27).

Second, the Appellees also failed to file a cross-appeal within the requisite 15-days after the notice of appeal was filed. M.R.App.P. 4(5)(A)(iii). The district court's final order specifically stated it would not decide Defendants' unconstitutionality argument because it decided the case on statutory grounds. *See* Final Order, App. Br. Appendix Ex. F, p. 20 [FN 7]. Appellees' failure to timely file a cross-appeal as the Rules of Appellate Procedure require is a jurisdictional bar depriving this Court of the ability to decide this issue. *Challinor v. Glacier Nat'l Bank*, 283 Mont. 342, 943 P.2d 83 (Mont. 1997); *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d 71.

Third, and last, the Eighth Amendment challenge is not the proper legal authority or defense to challenge the statute. As discussed in Section 1, *supra*, and incorporated herein, an Eighth Amendment claim only applies to post-trial prisoners, not pre-trial detainees. *Castro and Kingsley, supra.* It is not this Court's job to provide the challenging party with the correct law. Here, the Eighth Amendment is inapplicable and the wrong constitutional provision to challenge the statute.

Thus, for the above three reasons, this Court should reject this last argument as it is based on the wrong law and this Court also lacks jurisdiction.

IV. Additional response to the *Amici* brief.

Appellants hereby incorporate the above brief and the original brief filed in this matter as a response to the *Amici* positions taken. However, select issues are discussed below that are pertinent to some specific *Amici* arguments.

This Court should take note of the fact that MSPOA's own policies require reasonable suspicion prior to conducting a strip search of *any* detainee. This is the same standard as codified by § 46-5-105, MCA. (App. Br. p. 7, 8 and 26; *see also* Appendix Ex. B, SUF ¶ 20). This is the reason that MSPOA lobbyist Jim Smith withdrew MSPOA's objection to SB 194 (2013) at the House Committee Hearing. (Appendix Ex. B, SUF ¶ 20). He believed the MSPOA standards already applied the reasonable suspicion standard prior to a strip search. *Id.*

Additionally, MSPOA's entire argument during the 2013 legislature to initially oppose the bill was based on the reasoning in *Florence*, which it again attempts to rely on in the *Amici.* Sheriff Leo Dutton subsequently tried to introduce his "general population" exception in 2019 with HB 306 and represented that he was a board member of MSPOA at the hearing. It was again explained unequivocally by Chairman Doane that the statute applies to everyone detained at a jail. The amendment was rejected.

Thus, MSPOA is well aware of how this law should be applied but disingenuously argues now that the statute should not apply. This is a hypocritical argument, especially when MSPOA was at the forefront of understanding the intent of the statute. The mere fact that the Montana County Attorneys' Association has joined in the same brief with MSPOA as *Amici* in this matter should impute all past knowledge of the statute and legislative intent to MCAA as well.

Finally, Appellees' reliance on *State v. Pascos*, 269 Mont. 43 (1994), is misplaced and not applicable here. *Pascos* involved the interpretation of the constitutional right to privacy for an inventory search of an arrestee's rucksack, not a highly invasive strip search. While this Court affirmed a compelling interest justifies a routine administrative inventory search of personal property at the station following a lawful arrest, it does not dive into other factors necessary to justify a more intrusive strip search to find those items. *Id*.

As pointed out in *Pascos,* this Court has adopted the "least intrusive means" available to inventory an arrestee's personal property on or in his or her possession. *See also, Deserly*, ¶ 44. *Deserly* goes onto require "reasonable suspicion with consent" of the inmate visitor to conduct the highly intrusive strip search. *Id.* ¶ 28.

In contrast, here, a misdemeanor arrestee can be subject to a strip search under § 46-5-105, MCA, without consent, if the guard can establish reasonable suspicion before conducting an inherently intrusive, humiliating and degrading strip search.

Notably, *Amici* admits that a strip search is highly intrusive, stressful and embarrassing and recognizes that "considerable privacy interests" attach to such searches. This admission clearly recognizes the inherent privacy issues involved in a strip search are more intrusive to the individual than a search of a rucksack.

Reasonable suspicion is not a high bar, but it recognizes our constitutional and statutory rights to privacy provide at least some, even if minimal, higher form of protection when detained for a misdemeanor arrest and strip searched at a jail. Imagine being arrested and subsequently detained at the jail for the <u>first time ever</u> for a misdemeanor traffic violation, a stranger, in a position of authority, requires you to strip naked and forces you to bend over and cough and expose your vagina or penis and scrotum, and rectum.[16] Surely, such an intrusive exposure of our naked bodies deserves more protection than a rucksack. The legislature thought so. It is not the district court's place to override that judgment.

[16] God forbid this happens to the reader, a close family friend, a spouse or a child. Imagine also, as occurred to one class member in this case, driving sober, being pulled over on suspicion of DUI, passing a field sobriety test but refusing the breathalyzer, getting arrested and strip searched at the jail and held in a cell alone for a number of hours before being transferred to 'general population,' only later to have charges dropped because they were unfounded and not supported by probable cause. Is establishing reasonable suspicion prior to conducting the strip search such a high bar?

CONCLUSION:

For the foregoing reasons this Court should find the Detention Center policy of strip searching everyone going into general population without first establishing reasonable suspicion violates Plaintiffs'/Appellants' constitutional rights, statutory rights and common law rights, under § 46-5-105, MCA, Mont. Const. Art. II, §§ 10 and 11. The district court should be reversed in its entirety and the Plaintiffs Summary Judgment Motion summarily granted.

RESPECTFULLY SUBMITTED, this 11th day of June, 2020.

DOUBEK, PYFER & STORRAR, PLLP

By: /s/ Keif Storrar
Keif Storrar
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) and (d), M. R. App. P., I certify that this brief:

(1) is proportionately spaced Times New Roman text typeface of 14 points, except for footnotes which are size 12 font;

(2) is double spaced (except that footnotes and quoted and indented material are single spaced);

(3) has left, right, top and bottom margins of 1 inch;

(4) has a word count calculated by Microsoft Word of **4,976** words (excluding the Table of Contents, Table of Citations, Certificate of Compliance, and Certificate of Service).

DATED this 11th day of June, 2020.

DOUBEK, PYFER & STORRAR, PLLP

By: /s/ Keif Storrar
Keif Storrar
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing PLAINTIFFS'/APPELLANTS' REPLY BRIEF with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Mitchell A. Young
Maureen Lennon
MACo Defense Services
2717 Skyway Drive, Suite F
Helena, MT 59602-1213

Marty Lambert
Gallatin County Attorney
1709 West College
Bozeman, MT 59715

Hon. Michael McMahon
First Judicial District Court
228 E. Broadway St.
Helena, MT 59601

Dated this 11th day of June 2020.

/s/ Keif Storrar

CERTIFICATE OF SERVICE

I, Keif Alexander Storrar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 06-11-2020:

Mitchell A. Young (Attorney)
2717 Skyway Dr., Ste. F
Helena MT 59602
Representing: Leo Dutton, Jason T. Grimmis, Alan R. Hughes
Service Method: eService

Martin D. Lambert (Prosecutor)
1709 W. College
Bozeman MT 59715
Representing: Montana County Attorneys Association, Montana Sheriffs and Peace Officers Association (MSPOA)
Service Method: eService

Electronically signed by Monica Bomgaars on behalf of Keif Alexander Storrar
Dated: 06-11-2020