IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 20-0031

ESTATE OF NICHOLAS TYSON FRAZIER; and JEANETTE YOUNG; by and through Personal Representative Brittney King f/k/a Brittney Chatriand;

Plaintiffs and Appellants,

v.

ERIK MILLER and JOHN DOES 1-10,

Defendant and Appellee.

APPELLANTS' OPENING BRIEF

On Appeal from the Montana Third Judicial District Court
Powell County
Cause No. DV-17-97, Honorable Ray J. Dayton

Nathan G. Wagner
Jenna P. Lyons
Datsopoulos, Macdonald & Lind, P.C.
201 West Main Street, Suite 201
Missoula, Montana 59802
Telephone: 406-728-0810
Facsimile: 406-543-0134
nwagner@dmllaw.com
jlyons@dmllaw.com
jkessler@dmllaw.com
Attorneys for Appellants

Cynthia L. Walker
Patrick M. Sullivan
Poore, Roth & Robinson, P.C
1341 Harrison Avenue
Butte, Montana 59701
Telephone: 406-497-1200
clw@prrlaw.com
pss@prrlaw.com
Attorneys for Appellee Erik Miller

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

I. STATEMENT OF THE ISSUES

1. The District Court incorrectly and unconstitutionally ruled as a matter of law that Erik Miller did not commit a violation of Nick Frazier's right to be free from unreasonable searches and seizures or his Right to Privacy under the Montana Constitution.
2. The District Court abused its discretion in giving the Special Verdict Form which did not allow the jury to consider the issue of Miller's negligence prior to determining that Miller's use of force was justified.
3. The District Court's refusal to allow counsel to make a record of their objections constitutes fundamental, structural error which violates the Plaintiffs' substantial rights.

II. STATEMENT OF THE CASE

The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but all his force dares not cross the threshold of the ruined tenement.

~ William Pitt, First Earl of Chatham (speaking to Parliament in opposition to the Cider Bill of 1763)

This appeal asks the Montana Supreme Court to determine whether a Montana citizen has a right to request the assistance of law enforcement, and then revoke the request for assistance if he or she determines he or she does not want law enforcement to enter his or her home. This appeal further asks the Montana Supreme

Court to answer the question of whether an officer's act of pushing a Montana citizen's door open constitutes a violation of the Fourth Amendment of the United States and Montana Constitutions and a violation of a Montana citizen's Right to Privacy under Mont. Const. Art. II, § 17, and is therefore a constitutional violation for which a Montana citizen has a right to legal redress and civil damages. Furthermore, this appeal asks the Montana Supreme Court to reverse the District Court's holding that such a violation was "de minimus," and its subsequent refusal to instruct the jury on constitutional torts asserted by the Plaintiffs/Appellants.

Additionally, this appeal asks the Montana Supreme Court to determine that a verdict form which allows a jury to consider an affirmative defense of justifiable use of force, thereby foreclosing the jury's consideration of whether the defendants were negligent, is an abuse of discretion.

Finally, this appeal asks the Montana Supreme Court to determine that a District Court's refusal to allow counsel to make a record of objections constitutes fundamental, structural error, which affected the fairness of the trial and violated the Plaintiffs'/Appellants' substantial rights.

III. STATEMENT OF THE FACTS

The following facts are salient to the Court's overall understanding of the case, as well as the issues and arguments presented on appeal:

1. On December 19, 2014, Nicholas Frazier was shot and killed by former Deer Lodge Police officer Erik Miller. At the time he was killed, Frazier lived with his parents Jeanette Young and Robert Young at 113 Fourth Street, Deer Lodge Montana ("Frazier's Residence"). *Appendix A*, Excerpts from the Jury Trial Transcript. 51: 5-7.

2. At the time of the shooting, Frazier and his parents were the only people residing in Frazier's Residence.

3. Earlier in the evening of December 19, 2014, Miller and Roselles had responded to a call from Frazier's Residence. Frazier had been attending a Christmas party with his parents at the DeSilva residence in Deer Lodge, and Frazier reported that he was assaulted by a number of guests attending the party at the DeSilva residence. *Appendix A*, Transcript 71-73.71-73.

4. During their interactions with Frazier on the assault call, both Miller and Roselles recognized that Frazier was extremely intoxicated, slurring his words, having difficulty with his balance, and was crying and exhibiting a highly elevated emotional state. *Appendix A*, Transcript 72: 14-17.

5. After speaking with Frazier at his residence, Miller and Roselles went directly to the party at the DeSilva home, where they interviewed a number of witnesses including Jeanette Young and Robert Young who were in attendance at the party. *Appendix A*, Transcript 73: 3-9. Miller and Roselles were aware that Jeanette Young

and Robert Young were at the party, and not at their home, and neither Miller not his partner Gavin Roselles had any reason to believe anyone other than Frazier was in the home.

6. Following the interview of the witnesses regarding the assault call, Miller and Roselles returned to the police station and began writing their reports of the assault call when they received a second call regarding a suicide threat at Frazier's Residence. *Appendix A*, Transcript 73: 9-13.

7. The "only information" provided by dispatch to Miller and Roselles in connection with the second call was that there was a "suicidal male" at the same address as the previous assault complaint. *Appendix A*, Transcript 73: 12-13; 75: 3-4.

8. When Miller and Roselles arrived at Frazier's Residence the second time, Miller went around to the back of the house, while Roselles went up to the front door, at which point they could hear Frazier inside his residence telling Miller and Roselles to go away and leave him alone. *Appendix A*, Transcript 74: 6-14.

9. Both Miller and Roselles testified that when they responded to Frazier's Residence and found Frazier telling them to go away and leave him alone, they lacked any legal basis to enter Frazier's Residence. *Appendix A*, Transcript 75: 4-6.

10. The defense expert, Mark Muir, admitted that at this time, there were no facts justifying exigent circumstances entry into the home. *Appendix A*, Transcript 724: 11-18.

11. Despite having no basis to enter the home, Roselles testified that he opened the screen door, and then he turned the knob in order to open the door to Frazier's Residence. *Appendix A*, Transcript 74: 12-13.

12. After hearing Frazier instructing him to close the door and leave him alone, Roselles retreated from the porch of Frazier's Residence and placed a phone call to dispatch for two reasons: (1) to determine whether they could contact Frazier's parents in order to obtain permission to enter the home; and (2) to see if dispatch had any further information that would justify entry into the home. *Appendix A*, Transcript 74: 11-18.

13. Roselles was not able to obtain any information from dispatch to justify entry into Frazier's Residence. *Tr. Trans*. 75: 3-6. Roselles admitted at trial that at this point in time, he did not believe he had enough exigency to enter the home. *Appendix A*, Transcript 326: 19-23.

14. There was never a warrant issued in this case arising from this incident. *Appendix A*, Transcript 214: 12-14.

15. Nonetheless, Miller then walked up the stairs and onto the porch of the home, where he found the door open about a foot and a half. Despite lacking any grounds

to enter the home, Miller pushed the door, of Frazier's residence, the rest of the way open. *Appendix A*, Transcript 75: 7-9.

16. Erik Miller reached his hand into the home to push the door open. *Appendix A*, Transcript 335: 3-6.

17. Nick Frazier came into Miller's view, and Miller "punched out his pistol," which means he "present[ed] the weapon in front of [him] at full extension" with both hands toward Frazier. *Appendix A*, Transcript 545-56: 23-16.

18. Even at this time, when Miller had unlawfully entered the home and confronted Frazier, and Frazier responded by pointing a gun to his own head, Miller did not believe Frazier posed an imminent threat of danger. *Appendix A*, Transcript pp. 546-547: 17-5.

19. The Special Tactical Situations provision of the Deer Lodge Police Department Policy Manual provides that officers should respond to Special Tactical Situations in a manner that promotes "the minimization of injuries and the preservation of life of all persons involved." *Appendix A*, Transcript 223: 6-14.

20. Pursuant to these objectives, the Special Tactical Situation section of the Policy Manual provides that in a scenario such as an aggravated suicide attempt, "Time is a benefit and shall be made to work to the advantage of the Deer Lodge Police Department." *Tr. Trans*. 227: 9-17.

21. A major component of the Plaintiffs' negligence claim was that Miller failed to comply with this provision of the manual, among others, by engaging in individual action, failing to coordinate a response or requesting additional personnel, and immediately entering the Frazier Residence and confronting Frazier rather than allowing time to work to his benefit and utilizing a thoughtful, coordinated response with his counterpart.

22. Miller shot and killed Frazier inside his residence on December 19, 2014. *Appendix B*, Video of Shooting.

23. Miller testified that Frazier lowered his gun down the side of his face, rocked it towards Miller, and was pointing it right at him, and that he could look down the barrel. *Appendix A*, Transcript 460: 18-23; 559: 2-9.

24. Miller initially told investigators that even after he shot Nick, he could see down the barrel of the gun, but admitted at trial that this would be impossible due to the positioning of Frazier's body after being shot by Miller. *Appendix A*, Transcript 560: 7-20.

25. Miller testified that in less than a second prior to firing the first shot at Frazier, he saw "something fuzzy," including detailed animated images of three of his family members circling the barrel of Frazier's gun. *Appendix A*, Transcript 458: 2-5; 595: 6-23.

26. The Deer Lodge Police Department Policy Manual contains provision governing the use of deadly force, and does not contain a section indicating that a member of law enforcement may shoot a person who is asking to be shot by police. *Appendix A*, Transcript 198: 10-22.

27. The video of the shooting establishes that Frazier survived the shooting for an appreciable period of time, and he can be heard suffering prior to his death. *Appendix B.*

IV. STANDARDS OF REVIEW

A. Judgment as a Matter of Law Reviewed De Novo

The Montana Supreme Court's "standard of review of appeals from district court orders granting or denying motions for judgment as a matter of law is identical to that of the district court." *Johnson v. Costco Wholesale*, 2007 MT 43, ¶ 13, 336 Mont. 105, 152 P.3d 727. The Court has been inconsistent about if this standard of review is de novo or abuse of discretion. *Johnson*, ¶¶ 14–16. The Montana Supreme Court has, however, clarified that "whether a judgment as a matter of law should be granted or denied is a question of law" and therefore the appropriate standard of review is de novo. *Johnson*, ¶ 18.

B. Constitutional Issue Reviewed for Correctness

The Montana Supreme Court will exercise plenary review of constitutional issues, and a district court's decisions on constitutional issues are reviewed for

correctness. *State v. Egdorf*, 2003 MT 264, ¶ 12, 317 Mont. 436, 77 P.3d 517. Legislative enactments are presumed to be constitutional, and the party challenging the provision bears the burden to prove beyond a reasonable doubt that it is unconstitutional. *Egdorf*, ¶ 12.

C. Verdict Form Reviewed for Abuse of Discretion

The use of a special verdict form is left to the discretion of the trial court. While it is within the trial court's discretion to structure the form and frame the questions of a special verdict, the interrogatories must be adequate to enable the jury to determine the factual issues essential to judgment. *Baldauf v. Arrow Tank & Engʹg Co.*, 1999 MT 81, ¶ 49, 294 Mont. 107, 979 P.2d 166 (citations omitted).

D. Jury Instructions Reviewed for Abuse of Discretion

Decisions on jury instructions are within the trial court's discretion, and the Montana Supreme Court will only reverse the decision if the trial court has abused its discretion. *Cechovic v. Hardin & Assocs.*, 273 Mont. 104, 116, 902 P.2d 520, 527 (1995). When reviewing a trial court's decision on jury instructions, we consider the "instructions in their entirety and in connection with other instructions given and the evidence introduced at trial." *Story v. City of Bozeman*, 259 Mont. 207, 222, 856 P.2d 202, 211 (1993) (overruled on other grounds). See also *Busta v. Columbus Hosp*, 276 Mont. 342, 359–60, 916 P.2d 122, 132 (1996).

Although a trial court has broad discretion, the principle that "jury instructions must fully and fairly instruct the jury regarding the applicable law" limits its discretion. *Goles v. Neumann*, 2011 MT 11, ¶ 9, 359 Mont. 132, 247 P.3d 1089. A trial court's refusal to give an offered instruction only constitutes reversible error when "such refusal affects the substantial rights of the party proposing the instruction, thereby prejudicing him." *Busta*, 276 Mont. 359–60, 916 P. 2d 133. The party assigning error must show prejudice. *Tarlton v. Kaufman*, 2008 MT 462, ¶ 19, 348 Mont. 178, 199 P.3d 263. If "the jury instructions in their entirety state the applicable law of the case," we will not find prejudice. *Peterson v. St. Paul Fire & Marine Ins. Co.*, 2010 MT 187, ¶ 22, 357 Mont. 293, 239 P.3d 904.

E. Evidentiary Rulings Reviewed for Abuse of Discretion

The Montana Supreme Court reviews evidentiary rulings, including rulings on motions *in limine*, for an abuse of discretion. *State v. Bonamarte*, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457 (citations omitted).

V. SUMMARY OF THE ARGUMENT

Erik Miller committed a violation of Nick Frazier's constitutional right to privacy and his constitutional right to be free from unreasonable searches and seizures when he pushed Nick Frazier's door open and subsequently engaged him in a confrontation that led to his untimely death. The District Court incorrectly ruled as a matter of law, and contrary to the evidence presented, that pushing the door open

did not constitute a constitutional violation, but allowed the Plaintiffs to present their case as a negligence case.

During trial, the District Court allowed the Defendant to present argument and elicit testimony that Erik Miller was justified in pushing the door open because the community caretaker and exigent circumstances exceptions to the warrant requirement applied. Throughout trial, the District Court conducted around 49 sidebar conferences relating to evidentiary and other trial matters, and refused to allow counsel to make a record of these conferences. Many of the conferences relate to bad character evidence about Nick Frazier, which was admitted over objection, despite the fact that Erik Miller had no knowledge of these facts at the time of the use of force.[1]

The District Court instructed the jury on the community caretaker and exigent circumstances exceptions to the warrant requirement and instructed the jury on the public duty doctrine however then, refused to instruct the jury on constitutional torts. The District Court also gave a special verdict form which allowed the jury to first consider the issue of whether Erik Miller was justified in his use of force without allowing the jury to consider the issue of Miller's negligence.

[1] Some of the conferences also relate to Erik Miller's prior bad conduct, which Plaintiffs attempted to use as impeachment evidence during trial. However, the District Court disproportionately allowed the Defendant to elicit bad character evidence relating to Frazier in comparison with bad character evidence relating to Miller.

The Plaintiffs' position on appeal is that these actions of the District Court constitute incorrect constitutional rulings, abuses of discretion, and fundamental/structural error which impacted the outcome of the trial and affected the Plaintiffs' right to a jury trial and right to full legal redress.

VI. ARGUMENT

A. The District Court Incorrectly and Unconstitutionally Ruled as a Matter of Law That Erik Miller Did Not Commit a Violation of Nick Frazier's Rights Under Mont. Const. Art. II, §§ 10, 11, and 17.

Prior to trial, in considering whether Erik Miller committed a constitutional violation, the District Court ruled as a matter of law that Erik Miller did not violate Nick Frazier's constitutional right to privacy and right to be protected from unreasonable searches and seizures:

> [B]ecause they break the plane with their hand or something, that's as far as they got in going into the house that that's a Constitutional violation of privacy and a Constitutional violation of search and seizure. I don't see it.

Appendix C, Excepts from Motions Hearing July 17, 10: 12-16. At trial, the District Court reiterated that "[b]ut I, I ruled that the Constitutional claims aren't going to be presented to the jury as such and I'm very competent [sic] having heard as much evidence as I have that, that that's a good decision. *Appendix A,* Transcript 837: 3-6.

During the settling of jury instructions, the District Court further articulated that it did not believe that Miller's conduct constituted a constitutional violation:

> [. . .] what the jury does I think is they look at an instruction and they think, I must've been given this for some reason. Why is this important? Uh, and it's not really in this case. Uh, it's *de minimus* if anything compared to the rest of the case uh, uh and therefore strategically I wonder about it.

Appendix A, Transcript 1019-1021: 22-25; 1-2. Ruling that the constitutional violation was "de minimus" and subsequently refusing to let the jury consider an instruction on constitutional torts arising from violations of Article II, § 11 and Article II, § 17 of the Montana Constitution constitute incorrect rulings of law.

a. There is No Such Thing as a "De Minimus" Constitutional Violation.

The United States Supreme Court has repeatedly held that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 586 (1980). The Court held that "the Fourth Amendment has drawn a firm line at the entrance to the house," and subsequent case law clarifies exactly where this line is. *Id.* at 590.

The Montana Constitution affords all Montana citizens protections greater than that which was condoned by the District Court in *Frazier*, and the words "search and seizure" have been more broadly interpreted as a privacy interest; therefore, cases concerning arrests and actual searches, as well as Mont. Const. Art. II, § 17, dovetail with one another and control Frazier's privacy interests, as well as his right to be protected from unreasonable searches and seizures.

i. Erik Miller violated Nick Frazier's Right to Privacy under Mont. Const. Art. II, § 17.

As a citizen of Montana, Frazier enjoys an even higher expectation of privacy than that prescribed by the Fourth Amendment—especially while he is within the confines of his own home.

In *State v. Bullock*, this Court extended the zone of reasonable privacy to include the driveway where an illegal elk carcass was observed by law enforcement, despite the driveway not being in the curtilage of the defendant's cabin. 272 Mont. 361, 374, 901 P.2d 61 (1995). The Court supported its decision by noting that the defendant made their lack of consent known by posting signs on the property. *Id.* at 365. If an unattached driveway is safe from government intrusion, this Court must rule that Frazier's doorway is, too. Frazier's requests that law enforcement should leave him alone is analogous to the "No Trespassing" signs posted on the property at issue in *Bullock*.

Frazier was inside his home with the door decidedly shut, while repeatedly telling officers to leave him alone. Frazier was, therefore, in a zone where he had a reasonable expectation of privacy, which is evinced by his repeated pleas for officers to leave him alone. Citizens in such zones must be afforded with the heightened expectation of privacy under Mont. Const. Art. II, § 17 as well as their right to be free from unreasonable searches and seizures under Mont. Const. Art. II, § 11.

Unlike *Johnson*, Frazier knew it was officers at his door, however, he still firmly did not consent to open the door. He only came to the door once an intrusion already occurred.

ii. Erik Miller violated Nick Frazier's right to be free from unreasonable searches and seizures under Mont. Const. Art. II, § 11.

The Montana Constitution provides that the people shall be free from unreasonable searches and seizures. Mont. Const. Art. II, § 11. Although the language of this provision is nearly identical to that contained in the Fourth Amendment to the United States Constitution, this Court has recognized that such a provision in the Montana Constitution may be interpreted so as to provide a greater amount of rights than that contained in the Federal Constitution. *State v. Elison*, 2000 MT 288, ¶ 45, 302 Mont. 228, 245, 14 P.3d 456 (citing *State v. Johnson* (1986), 221 Mont. 503, 513, 719 P.2d 1248 (1986); *Butte Community Union v. Lewis*, 219 Mont. 426, 433, 712 P.2d 1309, (1986)).

The District Court's ruling in this matter that there was no constitutional violation is fundamentally incorrect, as it has been long-established that any physical invasion of the home, "*even by a fraction of an inch*" is too much. *See, e.g., Silverman v. United States*, 365 U.S. 505, 512 (1961) (italics supplied). The United States Supreme Court explained that it opted for this bright line rule in *Silverman* instead of drawing hairline distinctions because "illegitimate and unconstitutional

practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Id.*

The same vigilant protection of constitutional rights should apply to Frazier. The *Silverman* court called for a strict rule that fosters freedom from harassment in a person's own home. Again, the Court cannot measure by fractions of inches or perhaps a percentage of the officer's body. Admittedly, a hand crossing the doorway is a "mild" intrusion, but that is not the test. The severity of the act is irrelevant, and there is no such thing as a "de minimus" violation, as the District Court ruled as a matter of law, and used to justify his refusal to instruct the jury on a constitutional tort. This Court must safeguard against the slippery slope that could erode Montana citizens' constitutional rights.

iii. No warrant exception applies to the facts of *Frazier.*

Counsel for Erik Miller argued that the community caretaker doctrine and the exigent circumstances exception both justified warrantless entry into Frazier's home. However, both the testimony and the law on both exceptions to the warrant requirement makes it clear that neither exception applies under these circumstances.

Further, the District Court instructed the jury on exigencies and the community caretaker doctrine, which was clearly an abuse of discretion, given that neither exception applies. The jury instructions have been attached hereto as Appendix D.

1. The community caretaker doctrine is inapplicable to the facts of *Frazier*.

The community caretaker doctrine gives license to officers to take appropriate action to mitigate peril. *State v. Smith*, 2004 MT 234, 322 Mont. 466, 471, 97 P.3d 567, 571. In *Smith*, a police officer entered an apartment in response to a noise disturbance. *Id*. ¶15. Hearing vomiting in the bathroom, he opened the door without knocking. *Id.* He found Smith ill and intoxicated and charged her with underage drinking. *Id.* ¶ 4. When Smith fought the charge, the officer invoked the community caretaker doctrine. *Id.* ¶ 15. The Court denied this invocation because the officer did not need to gain immediate entry; he had alternatives, such as knocking or asking other partygoers about the situation. *Id.*

The Court held that the doctrine could be used in the "absence of objective, specific and articulable facts supporting the conclusion that [someone] was in need of officer assistance." *Id.* The Court further clarified that as soon as an officer is assured that assistance is no longer needed, "**then any actions beyond that [constitute] a seizure implicating not only the protections provided by the Fourth Amendment, but also those further guarantees afforded by the Montana Constitution**." *Id*. ¶ 14. Here, where Frazier repeatedly told officers he did not need their assistance, begging them to go away, any possibility of the community caretaker doctrine applying disappeared.

Miller argued at several junctures of the trial that the community caretaker doctrine applied and justified entry into the home. Notably, in opening statements, counsel for Erik Miller stated:

> Both Officers Roselles and Miller will tell you it wasn't an option for them to simply go away when they told them. He had called 9-1-1 threatening self-harm. They have a, what's called a caretaker, it's a Community Caretaker Doctrine.

Appendix A, Transcript 93: 5-9. Plaintiffs' counsel objected, and the District Court conducted an off-the-record discussion at the bench, and allowed counsel to continue arguing that the community caretaker doctrine applied to the case. *Appendix A*, Transcript 93: 14-21.[2] When Plaintiffs' counsel objected and attempted to articulate the objection on the record, the District Court refused to allow counsel to make a record. *Appendix A*, Transcript 143: 11-22.

Even worse, defense counsel stated during closing argument that if the officers had digressed from the porch, and Nick Frazier had shot himself, "they'd [Defendants] more than likely have been sued for failing to fulfill their obligations under the Community Caretaker Doctrine." *Appendix A*, Transcript 1182: 9-15.

Mont. Const. Art. II, § 11 of the Montana Constitution affords Montana citizens protection from unreasonable searches and seizures and provides that:

> [t]he people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any

[2] These off-the-record evidentiary conferences are the subject of another topic of reversible error addressed in this brief.

> place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

State v. Goetz, 2008 MT 296, ¶ 14, 345 Mont. 421, 426, 191 P.3d 489. Mont. Const. Art. II, §10 states that privacy "shall not be infringed without the showing of a compelling state interest."

The Montana Supreme Court has held that "even upon the showing of a compelling state interest… state action which infringes upon an individual's privacy right must be closely tailored to effectuate that compelling interest." *Goetz*, ¶ 14.

Here, the District Court erred in allowing Erik Miller to argue that the community caretaker doctrine applies. Roselles and Miller responded to the house after Frazier's suicidal call, and at this point, they were operating under the doctrine because Frazier's words logically gave them objective, specific, and articulable facts to assume Frazier was in peril and needed assistance. However, the moment Frazier told them he was ok, they lost the ability to invoke the doctrine, and admitted that they had *no basis to enter the home pursuant to that exception. Smith*, ¶ 14. Sherriff Roselles testified, consistently with his testimony during the Coroner's Inquest, that while he and Officer Miller were standing in the doorway, could not see Nick Frazier or a weapon, and Nick Frazier was telling them to leave him alone, they had **no basis to enter the home, not enough information to support probable cause or**

particularized suspicion to conduct a warrantless entry into the home, and no exigency. *Appendix A*, Transcript 221: 5-24.

After that announcement, they were operating under objective, specific, and articulable facts that Frazier did not need help. Miller even admitted to recognizing he was no longer needed.

Like Officer Smith in *Smith*, Miller had alternatives to opening the door, such as knocking or contacting Frazier's mother to obtain additional information to support a basis to enter the home. However, after Frazier's assurance, Miller's decision to enter the home anyway was a violation of the Montana Constitution's prohibition against unreasonable searches and seizures.

2. The exigent circumstances exception to the warrant requirement does not apply to the facts of *Frazier*.

This Court has previously explained that "exigent circumstances are those circumstances that would cause a reasonable person to believe that prompt action was necessary to prevent physical harm to police officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts. *State v. Elison*, 2000 MT 288, ¶ 56, 302 Mont. 228, 249-50, 14 P.3d 456 (citing *State v. Wakeford*, 1998 MT 16, ¶ 24, 287 Mont. 220, 953 P.2d 1065)). The State bears the heavy burden of showing the existence of exigent circumstances and can meet that burden only by demonstrating specific and articulable facts. *Wakeford*, ¶ 24.

Sherriff Roselles testified at trial that when Nick Frazier was inside his home saying everything was fine, and to leave him alone, that he had no basis to enter, and that there were no exigent circumstances to justify warrantless entry into the home. *Tr. Trans*. 221: 12-24. Further, when Sherriff Roselles returned from the phone call to dispatch and found Erik Miller standing in the doorway of Nick's home, he still believed there was no exigency during that timeframe. *Appendix A,* Transcript 222: 1-6.

3. The public duty doctrine does not apply to the facts of *Frazier*.

Throughout trial, the defense argued that the public duty doctrine created an obligation for Erik Miller and Gavin Roselles to enter Nick Frazier's home and ensure that he was okay. However, this interpretation illustrates a gross misunderstanding of the doctrine and interpretive case law in the State of Montana.

This Court has held that the public duty doctrine provides that a law enforcement officer has no duty to protect a particular person absent a special relationship because the officer's duty to protect and preserve the peace is owed to the public at large and not to individual members of the public. *Gonzales v. City of Bozeman*, 2009 MT 277, ¶ 20, 352 Mont. 145, 150, 217 P.3d 487; *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972.

There were no facts introduced at trial to establish that the officers had a special relationship with Nick Frazier, and thus they had no obligation to enter his

home to ensure he was not going to commit suicide. Nonetheless, counsel for the Plaintiffs advocated for an instruction clarifying the public duty doctrine because of insinuations by the defense and by the District Court that (1) there was a special relationship; and (2) that the Frazier family would have sued the City of Deer Lodge if the officers had not entered the home and assisted Nick. *Appendix A*, Transcript 1044-1048. The public duty doctrine, as articulated by this Court, does not apply to *Frazier*.

B. <u>The District Court's refusal to instruct the jury on the constitutional torts committed by Erik Miller constitutes an abuse of discretion stemming from an incorrect ruling of constitutional law.</u>[3]

The Montana Supreme Court has concluded that the rights protected by Article II, Sections 10, 11 and 17 of the Montana Constitution are self-executing and provide Montana citizens with a pathway to redress for constitutional wrongs. *Dorwart v. Caraway*, 2002 MT 240, ¶ 44, 312 Mont. 1, 15-16, 58 P.3d 128. Mont. Code Ann. §§ 1-1-109 and 27-1-202 support this conclusion. Section 1-1-109, MCA, provides that:

> The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of this state, is the rule of decision in all the courts of this state.

[3] There is no reversible error in the giving or refusing of certain instructions if the jury instructions, viewed in their entirety, state the correct law applicable to the case. *Newville v. Dep't of Family Servs.*, 267 Mont. 237, 261, 883 P.2d 793, 807 (1994) (citing *Walden v. State*, 250 Mont. 132, 137, 818 P.2d 1190 (1991)). Here, however, the refusal to instruct on constitutional torts, as well as the instructions which were given and were clearly inapplicable, constitute reversible error because they do not state the correct law applicable to the case.

Dorwart, ¶ 44. Further, Mont. Code Ann. § 27-1-202 provides that:

> Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

Dorwart, ¶ 44. The *Dorwart* opinion noted that when considered together, and with the right found at Article II, Section 16 of the Montana Constitution to a remedy for every injury, this body of statutory and constitutional law permits no other result. *Dorwart* ¶ 45. A similar conclusion is warranted here, where the district court incorrectly ruled that Erik Miller's act of pushing the door open with his hand does not constitute a constitutional violation.

At trial, the District Court reiterated that "[b]ut I, I ruled that the Constitutional claims aren't going to be presented to the jury as such and I'm very competent [sic] having heard as much evidence as I have that, that that's a good decision. *Appendix A*, Transcript 837: 3-6. This ruling and the subsequent refusal to instruct the jury on constitutional torts is a violation of Plaintiffs' right to redress for constitutional wrongs.

a. The legal import of the District Court's ruling is that Montana citizens have no meaningful choice as to when they can determine whether they require the assistance of law enforcement.

In this Court's opinion in *Dorwart v. Caraway*, the Court discussed the gravamen of constitutional violations committed against citizens by police officers:

> The difference in the nature of the harm arising from a beating administered by a police officer or from an officer's unconstitutional invasion of a person's home, on the one hand, and an assault or trespass committed against one private citizen by another, on the other hand, stems from the fundamental difference in the nature of the two sets of relationships. A private citizen generally is obliged only to respect the privacy rights of others and, therefore, to refrain from engaging in assaultive conduct or from intruding, uninvited, into another's residence. A police officer's legal obligation, however, extends far beyond that of his or her fellow citizens: the officer not only is required to respect the rights of other citizens, but is sworn to *protect and defend* those rights. In order to discharge that considerable responsibility, he or she is vested with extraordinary authority. Consequently, when a law enforcement officer, acting with the apparent imprimatur of the state, not only fails to protect a citizen's rights but affirmatively *violates* those rights, it is manifest that such an abuse of authority, with its concomitant breach of trust, is likely to have a different, and even more harmful, emotional and psychological effect on the aggrieved citizen than that resulting from the tortious conduct of a private citizen.

Dorwart v. Caraway, 2002 MT 240, ¶ 43, 312 Mont. 1, 14-15, 58 P.3d 128 (quoting *Binette v. Sabo*, 244 Conn. 23, 710 A.2d 688 (Conn. 1998)).

The outcome of *Frazier* means that for Montana citizens, who enjoy the right to be free from unreasonable searches and seizures, in addition to, the right to privacy, cannot (1) make a meaningful choice as to whether they need or require the assistance of law enforcement; and (2) officers can supplant their own judgment for the judgment of a Montana citizen as to whether that person truly requires law enforcement assistance. Further, the legal import of *Frazier* is that Montana citizens cannot revoke consent given to officers to enter their home.

C. The District Court Abused its Discretion in Giving A Special Verdict Form Which Did Not Allow the Jury To Consider Whether Miller Was Negligent Prior to Determining Whether His Use of Force Was Justified.

The Special Verdict Form is attached hereto as *Appendix E*. Special verdicts are governed by Mont. R. Civ. P. 49(a) which states as follows:

> Special verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. **If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury.** As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Mont. R. Civ. P. 49(a) (bold emphasis supplied). The Special Verdict Form in this matter omitted issues of fact which were raised by the pleadings and the evidence, and did not allow the jury to make findings on the issue of Erik Miller's negligence. The Special Verdict Form is also grossly insufficient under the standard of review articulated by this Court, which requires a Special Verdict Form to enable the jury to make a determination of factual issues essential to the judgment. *Baldauf v. Arrow Tank & Engʹg Co.*, 1999 MT 81, ¶ 49, 294 Mont. 107, 979 P.2d 166 (citations omitted).

D. The District Court's Refusal To Allow Counsel to Make a Record of Their Objections Constitutes Fundamental, Structural Error Which Affects the Plaintiff's Substantial Rights.

Structural error is the type of error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself."*State v. Van Kirk*, 2001 MT 184, ¶¶ 38-39, 306 Mont. 215, 225, 32 P.3d 735 (citing *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265, 113 L. Ed. 2d 302 (1991)(other citations omitted)). Structural error is typically of constitutional dimensions, precedes the trial, and undermines the fairness of the entire trial proceeding. *Id.* Structural error, by nature, cannot be weighed against the admissible evidence introduced at trial. *Id.* Structural error is presumptively prejudicial, automatically reversible, and is not subject to harmless error review jurisprudentially or under Montana's harmless error statute found at Mont. Code Ann. § 46-20-701. *Id.*

Although the structural error analysis is normally applied in the criminal context, the Ninth Circuit has the doctrine in the civil trial court contexts, such as the admission of hearsay evidence in a civil case, under which the Court considered whether the asserted error was highly prejudicial and affected the plaintiff's substantial rights. *See Bird v. Glacier Electric Coop, Inc.,* 255 F.3d 1136 (9th Cir. 2001) (citing *Beachy v. Boise Cascade Corp.,* 191 F.3d 1010 (9th Cir. 1999)). The Ninth Circuit in *Bird* indicated that "fairness to parties and the need for a fair trial

are important not only in criminal but also in civil proceedings, both of which require due process."

In *Kaiser Steel Corp. v. Frank Coluccio Construction, Co.,* the Ninth Circuit considered whether it was plain error for the trial court to allow plaintiff's counsel to make inflammatory statements during closing argument. 785 F.2d 656 (9th Cir. 1986). Although the Court did not grant relief in that matter, the case suggests that relief would have been granted for "fundamental error." *Bird,* 255 F.3d at 1145 (citing *Kaiser,* 785 F.2d 656 (1986)).

a. The District Court committed reversible structural and fundamental error by refusing to allow counsel to voice their objections on the record.

The Montana Supreme Court, after determining that an abuse of discretion has occurred, must determine whether the demonstrated abuse of discretion constitutes a reversible error. *Seltzer v. Morton*, 2007 MT 62, ¶ 65, 336 Mont. 225, 248, 154 P.3d 561. The Montana Supreme Court has held that no reversible error occurs unless a substantial right of the appellant is affected, nor does reversible error occur unless the evidence in question was of such character as to have affected the outcome of the trial. *Id.* Throughout the trial in this matter, the District Court conducted off-the-record conferences on evidentiary objections, during which counsel would approach, and the court reporter would not transcribe the specific objection stated or the District Court's rationale for sustaining or overruling the objection. Plaintiffs' counsel objected and stated that a record needed to be made as

to specific objections and the basis for those objections, preserving the issue for appeal. *Appendix A*, Transcript 134: 16-21.[4] The effect of these off-the-record objections is a transcript seeded with interactions like the following:

Appendix A, Transcript 126:3-8. In total, there were approximately 46 off the record conferences discussing matters related to evidentiary objections or trial administration, with no rationale or legal analysis that this Court can look to in order to determine whether the rulings constituted an abuse of discretion or other legal error.[5] These transcript portions have been attached hereto as *Appendix F*.

Many of these sidebar conferences related to evidentiary matters regarding bar character evidence of Nick Frazier and Erik Miller.[6] Various courts have determined that liability under an objective reasonableness standard must be determined *exclusively* upon an examination and weighing of the information that the officer possessed immediately prior to and at the moment she fired the shot. *See*

[4] However, the holding of *Bird v. Glacier Electric Coop, Inc.,* 255 F.3d 1136 (9th Cir. 2001) indicates that even if counsel had not objected, this type of error is so serious and so fundamental that an appellate court could grant relief even without counsel preserving the issue for appeal by contemporaneously objecting at trial.

[5] See *Appendix F* pages 93, 111, 115-116, 126, 132, 134, 143, 182, 191, 214, 218, 276, 279, 293, 304, 324, 350, 399, 408, 438, 450, 461, 464, 465-466, 509, 541, 545, 557, 558-559, 629, 656, 665, 680, 756, 769, 770, 783, 809, 814, 849, 853, 895, 902, 906, 926, 932.

[6] For instance, Erik Miller pled guilty to obstructing justice for lying in an official investigation related to his own misconduct committed while on duty as a Deer Lodge Police Officer. However, the District Court did not allow this evidence to enter the trial, even as impeachment evidence. The District Court did allow the defense to introduce evidence of Nick Frazier's prior bad acts, and prior uncharged criminal conduct, which was unknown to officers at the time the force was used. However, various courts have determined that liability under an objective reasonableness standard must be determined *exclusively* upon an examination and weighing of the information that the officer possessed immediately prior to and at the moment she fired the shot. *See Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988); *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc); *see also Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120, 117 S. Ct. 2512, 138 L. Ed. 2d 1015 (1997).

Ford v. Childers, 855 F.2d 1271 (7th Cir. 1988); *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988) (en banc); *see also Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996), *cert. denied*, 521 U.S. 1120, 117 S. Ct. 2512, 138 L. Ed. 2d 1015 (1997).

Even though the District Court acknowledged that it should let counsel make objections on the record, and stated that it would make a record of the bench conferences outside the presence of the jury, this never truly occurred. *Appendix A*, Transcript 116: 1-5.

b. The District Court's structural, fundamental error affects the right to a jury trial, right to due process, and the right to full legal redress afforded to the Plaintiffs by Montana Constitution.

All Montana citizens have a right to a jury trial, which shall remain *inviolate.* Mont. Const. Art. II, § 26. The Montana constitutional rights to full legal redress and jury trial are fundamental rights entitled to the highest level of constitutional scrutiny and protection. *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 19, 391 Mont. 84, 94, 414 P.3d 1262 (citing *Kortum-Managhan v. Herbergers NBGL*, 2009 MT 79, ¶¶ 25-26, 349 Mont. 475, 204 P.3d 693). Similarly, the due process clause contains a substantive component which bars arbitrary governmental actions regardless of the procedures used to implement them, and serves as a check on oppressive governmental action. *Newville v. State, Dept. of Family Serv.*, 267 Mont. 237, 249, 883 P.2d 793, 799 (1994).

The Ninth Circuit has also set forth, in *Madera v. Risley*, an appeal from a Montana criminal case, the following test for determining whether the unavailability of a transcript of proceedings violates due process, finding that a court assessing such a claim must measure two criteria: (1) the value of the transcript to the party in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same functions as a transcript. *Madera v. Risley,* 885 F.2d 646, 648 (9th Cir. 1989). Though *Madera* discussed the implications of a court's refusal to record portions of a criminal trial, the magnitude of the constitutional violations in this case warrant similar attention by this Court.

Here, the value of the transcript is great, as Frazier could have had more bases for appeal related to specific evidentiary rulings made by the District Court. There are no alternative devices other than a transcript of the proceedings.

VII. CONCLUSION

The precedent set by the District Court in *Frazier v. Miller* exposes Montana citizens to the chief evils from which Framers of the Montana Constitution were trying to protect. Further, this Court should not condone the administration of trials which promote miscarriages of justice, misinterpretation of Montana law, and erosion of Montana citizens' rights to full legal redress and a jury trial.

For the reasons articulated herein, this Court should respectfully reverse the rulings of the District Court, and remand for further proceedings consistent with the positions articulated by the Appellant herein.

DATED this 10th day of July, 2020.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Nathan G. Wagner
Nathan G. Wagner
Jenna P. Lyons
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to the Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and, the word count calculated by Microsoft Word for Windows is 7,666 words, excluding Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

DATED this 10th day of July, 2020.

DATSOPOULOS, MacDONALD & LIND, P.C.

By: /s/ Nathan G. Wagner
Nathan G. Wagner
Jenna P. Lyons
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I, Nathan G. Wagner, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-10-2020:

Cynthia L. Walker (Attorney)
Poore, Roth & Robinson, P.C.
1341 Harrison Avenue
Butte MT 59701
Representing: Erik Miller
Service Method: eService

Patrick M. Sullivan (Attorney)
1341 Harrison Ave
Butte MT 59701
Representing: Erik Miller
Service Method: eService

Jenna Penielle Lyons (Attorney)
201 West Main Street, Ste 201
Missoula MT 59802
Representing: Nicholas Tyson Frazier, Jeanette Young
Service Method: eService

Electronically signed by Jacqueline Kessler on behalf of Nathan G. Wagner
Dated: 07-10-2020