MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

WILLIAM SCOTT ROGERS, et al., Plaintiffs and Appellants, v. LEWIS & CLARK COUNTY, Defendant and Appellee.	Cause No. DDV-2018-1332 **ORDER ON PLAINTIFF'S MOTION TO CERTIFY CLASS ACTION**

Plaintiffs, ninety-six former detainees of the Lewis and Clark County Detention Center (collectively, the "Detainees") represented by Keif Storrar and Lawrence A. Anderson, have moved to certify a class pursuant to Mont. R. Civ. P. 23(b)(2) and (b)(3). Defendant Lewis & Clark County (the "County"), represented by Mitchell A. Young, opposes. The motion is fully briefed and ready for decision. For the reasons that follow, the motion will be granted.

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FACTUAL AND PROCEDURAL BACKGROUND

The Detainees initiated this action alleging constitutional and statutory violations and various torts and seeking injunctive relief and compensatory and punitive damages against Lewis and Clark County. The Detainees all allege they were subjected to suspicionless strip searches[1] at the Lewis & Clark County Detention Center ("Detention Center") pursuant to a uniform policy or practice requiring a strip search of every inmate eligible for placement in general custody. The Detainees claim they were subjected to these searches after being arrested for traffic offenses or misdemeanors. Ninety-two of the Detainees were searched before being placed in general custody; four, however, claim to have been strip searched without ever being placed in general custody.

The Detainees allege that the Detention Center conducted approximately 3,572 strip searches of persons detained for non-felony offenses pursuant to its uniform policy or practice during the three years preceding this lawsuit. The Detainees estimate an additional 977 such searches have occurred since the date of filing.

On August 23, 2019, the Detainees moved for class certification. (Dkt. 21.) This Court subsequently stayed proceedings on the class certification motion pending the Supreme Court's review of the Court's prior order dismissing all but four of the Detainees from the action. On interlocutory appeal, the Supreme Court reversed the Court's dismissal of the Detainees' claims brought under Mont. Code Ann. § 46-5-105 and remanded for further proceedings. *Rogers v. Lewis and Clark County*, 2020 MT 230, 401 Mont. 228, 472 P.3d 171.

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[1] For purposes of the statute, "strip search" includes both "a visual inspection of a naked individual" and a "visual inspection of the anal and genital areas" of an individual. *Rogers*, ¶ 1 n.1.

The Detainees then filed on January 27, 2021, a supplemental motion for class certification. (Dkt. 99.)

APPLICABLE LEGAL STANDARDS

Trial courts "have the broadest discretion when deciding whether to certify a class." *Houser v. City of Billings*, 2020 MT 51, ¶ 4, 399 Mont. 140, 458 P.3d 1031; *Sieglock v. Burlington N. & Santa Fe Ry. Co.*, 2003 MT 355, ¶ 8, 319 Mont. 8, 81 P.3d 495 ("The judgment of the trial court should be accorded the greatest respect because it is in the best position to consider the most fair and efficient procedure for conducting any given litigation."). The burden of proving that the proposed class meets the requirements of Rule 23 is on the party seeking certification. *Houser*, ¶ 4.

Montana Rule of Civil Procedure 23 governs certification of class action litigation in Montana. Because Federal Rules 23(a) and 23(b) are substantively similar to Montana Rule 23(a) and 23(b), federal case law is persuasive when determining whether to certify a class action under Montana Rule 23. *Sieglock*, ¶ 10; *McDonald v. Washington*, 261 Mont. 392, 400, 862 P.2d 1150, 1154 (1993).

DISCUSSION

A class action is an exception to the general rule "that litigation is conducted by and on behalf of the individual named parties." *Mattson v. Mont. Power Co. (Mattson III)*, 2012 MT 318, ¶ 18, 368 Mont. 1, 291 P.3d 1209; *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 155 (1982). The purpose of a class action is to promote "efficiency and economy of litigation" by conserving the "resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion." *Am. Pipe*

& Constr. Co. v. Utah, 414 U.S. 538, 553 (1974). A class action is appropriate where "a multiplicity of small individual suits for damages" cannot provide effective and "economically feasible" legal redress. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

The Court engages in a two-part inquiry when evaluating a request to certify a class. First, the Court determines whether the four prerequisites for a class action set forth in Rule 23(a)—numerosity, commonality, typicality, and adequacy of representation—have been satisfied. *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P.3d 1164. Although courts must avoid determinations on the merits at this preliminary stage, *Mattson v. Montana Power Co. (Mattson II)*, 2009 MT 286, ¶¶ 64–67, 352 Mont. 212, 215 P.3d 675, the Court must nevertheless engage in a "rigorous analysis" to determine whether the Rule 23(a) elements have been met, an analysis that "will entail some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Falcon*, 457 U.S. at 161). A "rigorous" analysis requires specific findings by the Court that each Rule 23(a) requirement has actually been satisfied, and it may require the Court to "probe beyond the pleadings and touch aspects of the merits to make this determination." *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 37, 371 Mont. 393, 310 P.3d 452 (citing *Wal-Mart*, 538 U.S. at 350).

Next, if the four Rule 23(a) criteria have been met, the Court then applies Rule 23(b). Rule 23(b) provides three independent routes to class certification, including classes certified for seeking common injunctive or declaratory relief under Rule 23(b)(2), and classes certified for damages actions under Rule 23(b)(3).

If the class can be certified under any one of the three forms of class action described in Rule 23(b), then the Court may certify the class.

With these principles in mind, the Court applies this framework to the Detainees' request for class certification:

1. Rule 23(a) Threshold Prerequisites

The threshold inquiry into whether a class action is appropriate requires analysis of Rule 23(a)'s four prerequisites:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Mont. R. Civ. P. Rule 23(a). Failure of any one of Rule 23(a)'s prerequisites is fatal to class certification. *Murer v. Mont. St. Comp. Mut. Ins. Fund*, 257 Mont. 434, 437, 849 P.2d 1036, 1037 (1993). Each is discussed in turn.

A. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impractical." *McDonald*, 261 Mont. at 400, 862 P.2d at 1155. "Mere speculation as to satisfaction of the numerosity requirement is not sufficient. Rather, plaintiffs must present some evidence of, or reasonably estimate, the number of class members." *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 31, 363 Mont. 151, 267 P.3d 756 (quoting *Polich v. Burlington Northern, Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987)). In *Diaz*, for example, the

class satisfied the numerosity requirement where testimony established that hundreds of State insureds had been in car crashes over a period of eight years. *Id.*

The Detainees allege that the County engaged in a systematic practice that affected a very large number of people, making joinder impractical. They have supported this claim with evidence drawn from Detention Center records suggesting that the Detention Center conducted over 3,500 suspicionless strip searches of persons detained for non-felony offenses between October 31, 2015, and the date this action was filed, October 31, 2018. Based on Detention Center records, the Detainees estimate over 950 suspicionless strip searches have occurred since the lawsuit was filed.

The County quibbles with the size of the proposed class, arguing that the class of individuals who were subjected to suspicionless searches is likely less than the number stated because at least some searches were supported by reasonable suspicion. That is undoubtedly true, but the Detainees have sufficiently established that a large proportion of these individuals were indeed subjected to suspicionless searches. For instance, Sergeant Scott Ferguson, a supervisor in the Detention Center, appears to have agreed in his deposition that for misdemeanants without past criminal history, violent crime, or weapons or drug offenses, a suspicionless search for facility security was the "go-to" stated basis for the search in Detention Center records. (Dkt. 44, Pls. Statement Undisputed Facts ¶ 137.) Other testimony in the record similarly suggests that searches of misdemeanants on a suspicionless basis were widespread, if not universal. (*E.g.,* Pls. Statement Undisputed Facts ¶ 141–145.) Although the Detainees' estimate is not perfect, they have nevertheless met their burden of

"reasonably estimat[ing]" the number of class members. *See, e.g., Sangwin v. State*, 2013 MT 373, ¶ 17, 373 Mont. 131, 315 P.3d 279 (dispute over size of class did not defeat numerosity where evidence was that the benefit denial at issue had been exercised well over 100 times).

B. Commonality

The commonality requirement does not mandate that the class members claims be identical; rather, it is satisfied if there is either *a* question of fact *or* of law common to all class members. *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 31, 371 Mont. 393, 310 P.3d 452; *Ferguson v. Safeco Ins. Co. of Am.*, 2008 MT 109, ¶ 16, 342 Mont. 380, 180 P.3d 1164 ("We have previously held that, regardless of differences among class members, this element [commonality] is met if a single issue is common to all.").

While commonality has historically placed a relatively low burden on plaintiffs, *Jacobsen*, ¶ 31, the United States Supreme Court significantly tightened the commonality requirement in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). *Sangwin*, ¶ 18. Under the more stringent *Wal-Mart* standard, the claims of class members and class representatives "must depend upon a common contention" that is "of such a nature that it is capable of classwide resolution," meaning "that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Sangwin*, ¶ 18 (quoting *Wal-Mart*, 564 U.S. at 350). While the Montana Supreme Court has not yet decided whether to follow the *Wal-Mart* standard, *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 26, 385 Mont. 396, 384 P.3d 455, that question need not be decided today because, here, the proposed class meets the *Wal-Mart* commonality standard.

Importantly, there is no necessity that the common issue of law or fact dispose of the case: rather, it is enough that the class-action will provide "common answers" to questions of law or fact that will "efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40. The County indisputably engaged in a uniform practice affecting all class members: a policy or practice of conducting strip-searches of newly booked misdemeanor detainees before they could be placed in general population. The alleged injury suffered by each class member—invasion of their statutory privacy rights—is the same. *See Wal-Mart*, 564 U.S. at 350 (requiring plaintiffs "to demonstrate that the class members have suffered the same injury" (internal quotations and citations omitted)). Each class member's challenge to the validity to their search uniformly implicates Mont. Code Ann. § 46-5-105's prohibition on suspicionless strip searches of misdemeanor detainees. Thus, a finding that the Detention Center engaged in a policy or practice that violated § 46-5-105 will "efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40. Even if some cases within the class will require individualized determinations regarding whether the search was supported by reasonable suspicion, or if individualized determinations of damages will be necessary, "at least it [will not] be necessary in each of those [individualized hearings] to determine whether the challenged practices were unlawful." *Jacobsen*, ¶ 42 (quoting *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012)). Moreover, even if there may be individual variation in circumstance, there will likely be broad themes in the fact patterns behind individual searches and the damages suffered, obviating the need to hold individual hearings for each class member.

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As the core of the Detainees' claims—whether the Detention Center's policy or practice of conducting suspicionless searches of misdemeanor arrestees—will be resolved "in one stroke," there are common issues of law or fact even under the more stringent *Wal-Mart* standard. *See Sangwin*, ¶ 18.

C. Typicality

Next is typicality. The claims or defenses of the representative parties must be "typical of the claims or defenses of the class." Mont. R. Civ. P. 23(a)(3). The typicality requirement ensures the named class members' interests align with the interests of absent class members. *Byorth*, ¶ 33. The "difference between typicality and commonality is a matter of perspective: commonality looks to the questions of law or fact common to the class as a whole, while typicality focuses more closely on the named representatives' relationship to the rest of the class." *Byorth*, ¶ 34.

Typicality is met where the named plaintiffs' claim stems from the "same event, practice, or course of conduct" that forms the basis of the class claims and is based upon "the same legal or remedial theory." *Byorth*, ¶ 33. As the Montana Supreme Court has observed:

> The typicality requirement is designed to assure that the named representative's interests are aligned with those of the class. Where there is such an alignment of interests, a named plaintiff who vigorously pursues his or her own interests will necessarily advance the interests of the class....
>
> The named plaintiff's claim will be typical of the class where there is a nexus between the injury suffered by the plaintiff and the injury suffered by the class. Thus, a named plaintiff's claim is typical if it stems from the same event, practice, or course of conduct that forms the basis of the class claims and is based upon the same legal or remedial theory.

McDonald, 261 Mont. at 402, 862 P.2d at 1156 (quoting *Jordan v. County of Los Angeles*, 669 F.2d 1311 (9th Cir. 1982)). The typicality requirement is not demanding, and the relevant event, practice or course of conduct need not be identical. *Diaz*, ¶¶ 35, 36; *Sangwin*, ¶ 21.

The Detainees are all alleged to be individuals arrested for non-felony offenses who were subjected to a strip search without reasonable suspicion to believe that the person was concealing a weapon, contraband, or evidence of a crime. Their claims for relief all stem from the same event, practice, or course of conduct that forms the basis of the class claims.[2]

D. Adequacy of Representation

The final requirement under Rule 23(a) allows certification only where the representative parties will fairly and adequately protect the interests of the class. M. R. Civ. P. 23(a)(4). The named representatives' attorneys must be qualified, competent, able to conduct the litigation, and "the named representative's interests [may] not be antagonistic to the interests of the class," *Diaz*, ¶ 38.

The County does not challenge the competency of the Detainees' counsel. Class counsel attest to experience in complex class action litigation, including multi-district litigation, and to extensive trial experience. The

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[2] The County asserts that during discovery they identified at least two named plaintiffs who were not strip searched in the three years prior to the filing of the Complaint, although they did not cite any record evidence or even supply the names of the two plaintiffs. Named plaintiffs whose claims are time-barred are excluded from the class, and their claims are not typical of the claims of the class; however, the Court currently lacks any basis other than counsel's assertion to conclude that any representatives have failed that standard. As the Court retains discretion to amend its class certification order, claims that one or more individual named plaintiffs are not appropriate class representatives are better addressed in subsequent proceedings. The Court will note that ninety-six plaintiffs are likely more than are necessary to adequately represent the class, and the Detainees may wish to consider reducing the number of class representatives.

Detainees' attorneys are competent to protect the interests of the class fairly and adequately.

2. Rule 23(b) Types of Class Actions

After a court determines the Rule 23(a) prerequisites are satisfied, its analysis shifts to Rule 23(b). The Detainees seek a class for injunctive or declaratory relief under Rule 23(b)(2), and a class for damages under Rule 23(b)(3). With respect to these two types of class actions, Rule 23(b) provides as follows:

> A class action may be maintained if Rule 23(a) is satisfied and if:
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> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
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> (3) the court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include:
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> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
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> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
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> (D) the likely difficulties in managing a class action.

M. R. Civ. P. 23(b).

A. Rule 23(b)(3) Damages Class

A class certified under Rule 23(b)(3) may recover money damages. *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 17, 396 Mont. 443, 445 P.3d 834. A

class certified under Rule 23(b)(3) must satisfy two elements: (1) the questions of law or fact common to the members of the class must predominate over questions of the individual members; and (2) the class action must be superior to other methods of adjudicating the controversy. Mont. R. Civ. P. 23(b)(3). The Detainees have the burden of establishing both elements.

I. Predominance

The most substantial dispute between the parties, centers on the predominance requirement. Rule 23(b)(3) requires that questions of law or fact common to the members of the plaintiff class predominate over any questions affecting only individual members. In other words, "[c]ommon issues must. . . be more prevalent than individual issues." *Sangwin*, ¶ 37. "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 136 S. Ct. 1036, 1045 (2016) (quoting 2 W. Rubenstein, *Newberg on Class Actions* § 4:50, at 196–197 (5th ed. 2012)). A class determination under Rule 23(b)(3) "is appropriate when the class members' claims 'depend on a common contention that is capable of classwide resolution.'" *Sangwin*, ¶ 37 (quoting *Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 48, 366 Mont. 450, 288 P.3d 193).

The Court is persuaded that the common issues predominate over the individual ones in this case. The core liability question is whether the Detention Center's has a policy or practice of routinely conducting suspicionless strip searches on misdemeanor arrestees that violates the arrestees' rights under

Mont. Code Ann. § 46-5-105. This legal question and the factual questions regarding the nature and scope of the Detention Center's policies and practices are common to the entire class, and answering these questions will unquestionably advance the litigation. *See Knudsen*, ¶ 20 (certifying a 23(b)(3) class where "at least one of the common questions. . . is capable of class-wide resolution and will move the litigation forward"); *Houser v. City of Billings*, 2020 MT 51, ¶ 14, 399 Mont. 140, 458 P.3d 1031 (affirming certification of class because "the same legal question common to all class members" predominated over questions affecting individual members).

To be sure, there are two primary areas of individual variation: (1) the degree of damages suffered by individual class members; and (2) whether a search in an individual case was objectively supported by reasonable suspicion, thus taking that search outside the scope of § 46-5-105. As to the former, individual variation in damages does not generally preclude certification of a class under Rule 23(b)(3) where liability can be predominately determined on a class-wide basis. *See Knudsen*, ¶ 22 (affirming class certification for alleged invasion of student privacy and charging of excessive fees despite individual issues about nature of injury to each plaintiff); *McDonald*, 261 Mont. at 403, 862 P.2d at 1157 (lawsuit raising service complaints against water company properly certified despite individual causation and damages issues); 5 Moore's Federal Practice - Civil § 23.45 (2021) ("[I]f common questions predominate over individual questions as to liability..., courts generally find the predominance standard of Rule 23(b)(3) to be satisfied, even if individual damages issues remain.").

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As to the latter—the existence of reasonable suspicion—the County correctly points out that reasonable suspicion is an individualized determination based on the totality of the circumstances and that it is an objective standard. *See City of Helena v. Brown*, 2017 MT 248, ¶¶ 9–10, 389 Mont. 63, 403 P.3d 341. Nevertheless, several factors suggest that the common liability questions predominate over individualized considerations.

First, the proper focus of the class action is on the policy or practice itself of conducting suspicionless strip searches of all misdemeanor[3] arrestees who may be going into general population. The evidence produced by the Detainees to date tends to show that the Detention Center's practice was routine, widespread, and conducted without any regard to individual circumstances in most cases. (Dkt. 44, SUF ¶¶ 54–61, 72–79, 131–148.) Indeed, the evidence produced by the Detainees suggests that prior to a 2010 federal court decision expressly authorizing suspicionless searches, misdemeanor arrestees were searched less often. (*Id.* ¶¶ 107–114.) Thus, even if there is some degree of individual variation on the question of liability, answering the common legal question regarding the validity of this policy or practice will substantially advance the litigation. As the First Circuit explained in rejecting a similar argument:

> If there was in fact a rule, custom or policy of strip searching every arrestee or a substantially overlarge category, then it is a fair guess that most arrestees so classed were strip searched on this basis. There might yet be some number as to whom defensible individual judgments to strip search were actually made or could have been made—two different situations with different legal implications; but

[3] Although the statute speaks to "traffic offense or an offense that is not a felony" all offenses (including traffic offenses) that are not felonies are, by definition, misdemeanors. Mont. Code Ann. §§ 45-2-101(42) (defining misdemeanor), 45-2-101(23) (defining felony), 61-8-711 (violations of traffic code are misdemeanors unless declared to be a felony).

> whoever has the burden of identifying such persons, they may well not be numerous.

Tardiff v. Knox County, 365 F.3d 1, 6 (1st Cir. 2004).

Second, what the County is really arguing is an issue of class definition. *See Sangwin*, ¶¶ 36–38 (remanding to district court to redefine the class because individualized determinations were necessary to determine who was a member of the class). And to be sure, the class definition must be reasonably precise, using objective criteria to establish a membership with definite boundaries. *See, e.g., Wilcox v. Swapp*, 330 F.R.D. 584, 595 (E.D. Wash. 2019). As the Detainees define the class, the Court would likely need to conduct some individualized analysis of putative class members to determine whether they belong to the class—in this case, because their strip search was objectively unsupported by reasonable suspicion. *See Sangwin*, ¶ 37. Indeed, federal courts addressing class actions over strip searches have historically split over whether individual variation over the existence of reasonable suspicion or probable cause precludes predominance or prevents the class from being sufficiently precise. *See Woodall v. County of Wayne*, 2020 U.S. Dist. LEXIS 11116, at *7–*8, 2020 WL 373073 (E.D. Mich. May 11, 2018) (collecting cases).

One solution to this problem—adopted by several courts—is to limit the definition of the class to those who were searched pursuant to the blanket search policy or practice at issue. *See, e.g., Jones v. Murphy*, 256 F.R.D. 519, 524 (D. Md. 2009). In this case, this renders the class easy to define, for the Detention Center kept records—its intake form documents whether a strip search was performed and the reason for the search:

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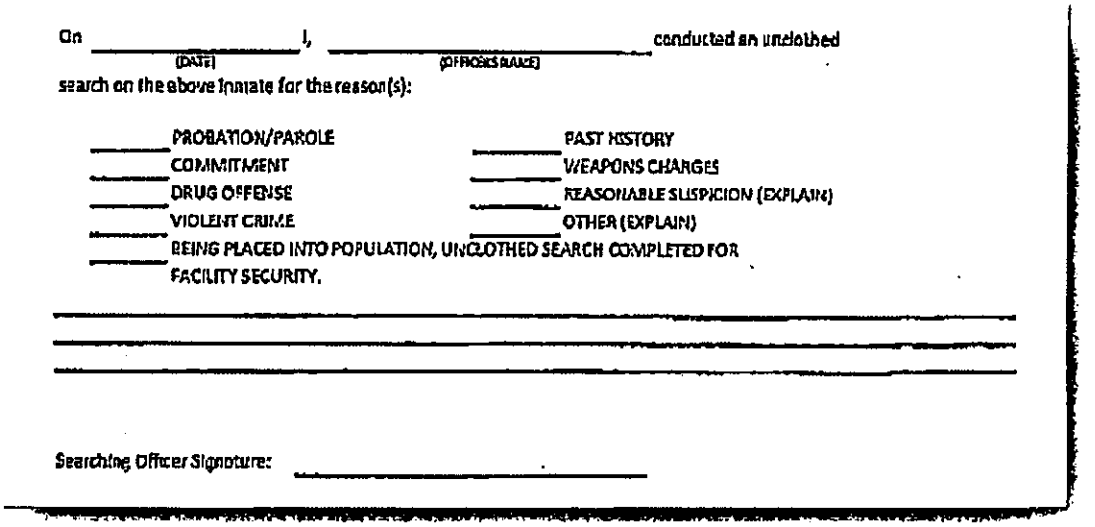

On _____ (DATE) I, _____ (OFFICER'S NAME) conducted an unclothed search on the above inmate for the reason(s):

_____ PROBATION/PAROLE
_____ COMMITMENT
_____ DRUG OFFENSE
_____ VIOLENT CRIME
_____ BEING PLACED INTO POPULATION, UNCLOTHED SEARCH COMPLETED FOR FACILITY SECURITY.
_____ PAST HISTORY
_____ WEAPONS CHARGES
_____ REASONABLE SUSPICION (EXPLAIN)
_____ OTHER (EXPLAIN)

Searching Officer Signature: _____

That final category—"BEING PLACED INTO POPULATION, UNCLOTHED SEARCH COMPLETED FOR FACILITY SECURITY"—denotes that the search was conducted not because of reasonable suspicion, but pursuant to the Detention Center's practice of searching everyone who will be placed into general custody. Thus, the form allows the class to be defined using objective criteria. The cases where the intake form does not reflect a search conducted for reasonable suspicion but for which articulable reasonable suspicion nevertheless exists are likely to be few.

Moreover, the State ordinarily bears the burden of justifying the reasonableness of a warrantless search, *see, e.g., Weer v. State*, 2010 MT 232, ¶ 10, 358 Mont. 130, 244 P.3d 311, and several federal courts confronted by similar cases have held that once the plaintiffs sufficiently demonstrate that class members were searched pursuant to a blanket policy, the defendants then have the burden of demonstrating that reasonable suspicion supported particular searches of individual class members. *See Jones*, 256 F.R.D. at 524; *Macy v.*

Suffolk County, 191 F.R.D. 16, 24 (D. Mass. 2000) ("To require Plaintiff to prove that each individual search was unsupportable, as well as indiscriminate, would be unnecessary and unfair. Given that these women were routinely strip-searched, the burden rests on Defendants to demonstrate that particular searches were reasonable."). This, too, will limit the need for individualized determinations.

Finally, many arrests look alike and will be supported by police reports and similar documentation, and there will likely be broad common thematic elements to arrests that allow grouping of individual disputes over reasonable suspicion. To that end, the Court notably retains discretion to amend the class definition or certify subclasses if further proceedings warrant doing so to preserve judicial economy. *See* Mont. R. Civ. P. 23(c); *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶¶ 27–30, 363 Mont. 151, 267 P.3d 756 (class action certification orders "are not frozen once made," and may be modified as the case proceeds). In short, the individual variation is not so great or so unmanageable that the individual issues can be said to predominate over the common ones.

II. Superiority

Finally, the Court considers whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In determining whether a class action is superior to other available methods, the Court considers the following non-exclusive factors: "(1) class members' interests in individually controlling the prosecution of separate actions; (2) the extent and nature of litigation regarding the issue already begun by class members; (3) the desirability of concentrating the litigation in a particular forum; and (4) the likely difficulties in managing a class action." *Knudsen*, ¶ 17.

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In general, class certification is the best vehicle for litigating disputes where the size of individual claims are small, such that individually litigating those claims is impractical. Thus, in *Ferguson*, the Montana Supreme Court reversed a district court's denial of class certification, concluding, "the efficient remedy of class-wide declaratory relief is appropriate because the size of the average claim is so small that relief for the average class member is not economically available outside class litigation." *Ferguson*, ¶¶ 40–41. Here, individual adjudication of each claim for relief for the average class member would not be economical, and adjudication of these smaller claims via class action is superior to depriving these litigants of the opportunity to litigate their case. As one court, addressing a certification motion in a strip search case, recently explained:

> A class action, though not without problems, is superior to dozens of individual suits that all present the same question. *See Jones*, 256 F.R.D. at 526 (acknowledging that while manageability problems can arise in a strip search class action, they will likely be outweighed by the inherent advantages of class action litigation."). It is also superior to the alternative—dozens of viable suits that are never brought. Many of the potential class members will likely have low damages and limited access to legal services. . . *See Tardiff*, 365 F.3d at 7 ("It is enough for the superiority determination here that for most strip search claimants, class status here is not only the superior means, but probably the only feasible one (one-way collateral estoppel aside), to establish liability and perhaps damages."); *see also Blihovde [v. St. Croix County]*, 219 F.R.D. [607,] 622 [W.D. Wis. 203] (recognizing that since illegal strip searches tend not to leave physical injuries, damages are often low or hard to prove, and the incentive to file suit is correspondingly diminished).

Woodall, 2020 U.S. Dist. LEXIS at *16–*17.

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Further, since all class members' claims involve identical legal issues and nearly identical facts, no factual basis exists for concluding that individual class members have great interest in controlling their own litigation. No evidence of other pending litigation of these claims has been offered. The allegations all occurred in Lewis & Clark County and can be determined under Montana law. Finally, the class is manageable—in the Court's view, given the similarity of the claims; the significant overlap of issues; and the ability to identify categories of individual claims through discovery, motions, practice, redefinition of the class, or certification of subclasses to categories through discovery and motions practice; there would be minimal value to trying each of these cases individually and significant benefits to addressing them collectively.

B. Rule 23(b)(2) Injunction Class

The Detainees also seek certification under Rule 23(b)(2). This type of class action is appropriate where the class representatives are seeking injunctive or declaratory relief because the defendant has acted "on grounds generally applicable to the class." Mont. R. Civ. P. 23(b)(2). A 23(b)(2) class is often invoked by class action litigants alleging civil rights violations. "The key to the [Rule 23](b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Diaz*, ¶ 42 (quoting *Wal-Mart*, 564 U.S. at 360).

Here, the Detainees seek certification under both Rule 23(b)(2) and 23(b)(3). It is not uncommon, however, for a class to seek injunctive relief as well as monetary damages. The court may find that "hybrid certification" is appropriate in such cases. Since the Detainees seek certification to address an

injunction prohibiting the County from continuing its suspicionless strip-search practices, certification under Rule 23(b)(2) is appropriate.

3. Constitutional Claims

Although not addressed extensively in the briefing, the four individual plaintiffs who were never placed in general custody still have live potential constitutional claims. The Court has considered whether to certify a sub-class for similarly situated individuals or whether to include the constitutional claims in the class. The Court concludes that neither is appropriate. As noted above, the Detainees have the burden of demonstrating, among other things, numerosity and typicality. The Detainees have neither alleged nor produced evidence from which the Court can reasonably estimate the size of such a subclass of plaintiffs not placed in general custody pursuing constitutional claims, let alone whether that number is sufficiently great that joinder would be impractical. Nor can the Court determine whether there is sufficient commonality in the circumstances of these individual plaintiffs that their claims are typical of a putative class of detainees searched but not placed in general custody. The Detainees have not met their burden of establishing that a class action is an appropriate vehicle for litigating these remaining constitutional claims.

Based on the foregoing considerations, the Court enters the following:

ORDER

1. The Detainees' Motion and Supplemental Motion for Class Certification (Dkts. 21 and 99) are **GRANTED**.

2. **Class definition.** The Court certifies the following class under Rules 23(b)(2) and 23(b)(3):

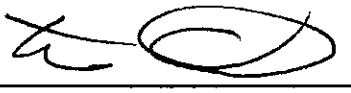
Each person arrested or detained for a non-felony offense from October 31, 2015, to the present who has been subjected to a strip search or visual body cavity search by a law enforcement officer or employee of the Lewis and Clark County Detention Center pursuant to a Detention Center policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general custody.

3. **Class claims, issues, or defenses.** The class claims include the Detainees' cause of action under Mont. Code Ann. § 46-5-105, and any defenses lodged by the County thereto.

4. **Class Counsel**. Keif Storrar and Lawrence A. Anderson are appointed as class counsel.

5. A status hearing will be set for **August 26, 2021 at 2:15 p.m.**, to establish a schedule for the provision of notice to the class and for further proceedings in this matter.

DATED this 5th day of August 2021.



CHRISTOPHER D. ABBOTT
District Court Judge

cc: Keif Storrar / John Doubek / Jonathan King, PO Box 236, Helena, MT 59624-0236
Lawrence A. Anderson, PO Box 2608, Great Falls, MT 59403-2608
Mitchell A. Young, 2717 Skyway Drive, Suite F, Helena, MT 59602-1213

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