DA 21-0442

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 144

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

Plaintiffs and Appellees,

v.

LEWIS & CLARK COUNTY,

Defendant and Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. DDV-2018-1332
Honorable Christopher D. Abbott, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

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Submitted on Briefs: July 7, 2022

Decided: July 19, 2022

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Lewis and Clark County (the County) appeals from the class certification order entered by the First Judicial District Court, Lewis and Clark County, on August 5, 2021. In the order, the court certified a class action suit against the County related to the County's policy or practice of conducting strip searches of detainees arrested for non-felony offenses because they are eligible for housing in the general population of the Lewis and Clark County Detention Center (Detention Center). The restated issues on appeal are:

1. Did the District Court certify an overly broad class?

2. Did the District Court abuse its discretion by finding the proposed class met the requirements of M. R. Civ. P. 23(a)?

3. Did the District Court abuse its discretion by certifying a class action lawsuit under M. R. Civ. P. 23(b)?

The District Court is affirmed.

PROCEDURAL AND FACTUAL BACKGROUND

¶2 William Scott Rogers (Rogers) and 95 other named individuals (collectively, the Plaintiffs) allege they were each arrested for a misdemeanor or traffic offense after October 31, 2015. The Plaintiffs allege each of them were subjected to a strip search[1] as part of the booking process at the Detention Center without reasonable suspicion to believe they were concealing a weapon, contraband, or evidence of the commission of a crime. On

[1] For purposes of § 46-5-105, MCA, "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 v. Lewis & Clark County*, 2020 MT 230, ¶ 1, n.1, 401 Mont. 228, 472 P.3d 171 (*Rogers I)*.

October 31, 2018, the Plaintiffs filed this suit, alleging statutory and constitutional violations and common law tort claims.

¶3 The County admits the Detention Center has a policy and practice of strip searching every detainee eligible for housing in the general population of the Detention Center. The County does not concede the absence of reasonable suspicion to conduct strip searches of the individual Plaintiffs but concedes the Plaintiffs would have been strip searched whether or not reasonable suspicion existed. Detention Center employees acknowledged in their depositions the Detention Center has an unwritten policy and practice of strip searching every detainee eligible for housing in the general population of the Detention Center. Based on a list of all bookings completed at the Detention Center since October 31, 2015, provided by the County to the Plaintiffs in discovery, the Plaintiffs allege the Detention Center may have conducted over 3,500 strip searches of persons detained for non-felony offenses pursuant to its uniform policy and practice in the three years preceding this lawsuit and the Detention Center continues to perform strip searches of non-felony offenders under this policy and practice since the date of filing this suit.

¶4 The Plaintiffs first moved for class certification on August 23, 2019. The District Court stayed proceedings on the class certification motion pending this Court's review of the District Court's order dismissing all but four Plaintiffs from the action. On interlocutory appeal, this Court reversed the District Court's dismissal of the Plaintiffs' claims brought under § 46-5-105, MCA, and remanded the case to the District Court for

further proceedings. *See Rogers v. Lewis & Clark County*, 2020 MT 230, ¶ 34, 401 Mont. 228, 472 P.3d 171 (*Rogers I*).

¶5 The Plaintiffs renewed their motion to certify a class on January 27, 2021. The Plaintiffs alleged the County has a policy or practice of conducting suspicionless strip searches of all arrestees who enter the general population of the Detention Center and proposed a class of all non-felony arrestees strip-searched "without suspicion to believe that the person was concealing a weapon, contraband, or evidence of commission of a crime." The Plaintiffs assert Detention Center officers fill out an "Intake Form" when booking detainees into the jail. On appeal, the Plaintiffs contend these Intake Forms should establish prima facie membership in the class, as the form requires the officer to check the reason for the strip search. The form lists nine reasons for the strip search, including "probation/parole," "commitment," "drug offense," "violent crime," "past history," "weapons charges," "reasonable suspicion," "other," and "being placed into population, unclothed search completed for facility security." The Plaintiffs maintain each misdemeanor arrestee or traffic offense arrestee whose Intake Form shows only a check in the last box—"being placed into population, unclothed search completed for facility security"—should be deemed a class member. The Plaintiffs sought certification under M. R. Civ. P. 23(b)(2) and (b)(3).

¶6 The District Court granted the motion to certify a class but altered the Plaintiffs' proposed class definition to expressly focus on the County's "policy or practice of

conducting strip searches or visual body cavity searches of detainees who may be placed into general custody." The District Court defined the certified class as:

> 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.

The court defined the certified claims as "the [Plaintiffs'] cause of action under Mont. Code Ann. § 46-5-105, and any defenses lodged by the County thereto." In its analysis, the court, quoting from *Jacobsen v. Allstate Ins. Co.*, 2013 MT 244, ¶ 40, 371 Mont. 393, 310 P.3d 452, explained "a finding that the Detention Center engaged in a policy or practice that violated § 45-5-105 will 'efficiently drive the resolution of the litigation.'"

¶7 The County appeals from the order certifying a class.

STANDARD OF REVIEW

¶8 We review a district court order granting class certification for an abuse of discretion. *Kramer v. Fergus Farm Mut. Ins. Co.*, 2020 MT 258, ¶ 11, 401 Mont. 489, 474 P.3d 310; *Knudsen v. Univ. of Mont.*, 2019 MT 175, ¶ 6, 396 Mont. 443, 445 P.3d 834. "A district court abuses its discretion if its certification order is premised on legal error." *Kramer*, ¶ 12. Findings of fact supporting a ruling under M. R. Civ. P. 23 are reviewed under the clearly erroneous standard. *Kramer*, ¶ 12. This Court is reluctant to interfere with discretionary orders in the early stages of litigation, especially as the trial court has flexibility to modify its certification orders as the litigation proceeds. *Kramer*, ¶ 13.

DISCUSSION

¶9 *1. Did the District Court certify an overly broad class?*

¶10 The County first challenges the class definition certified by the District Court. It alleges the District Court defined a class that includes "all misdemeanants booked over a three-year period, regardless of whether the person was searched and regardless of whether reasonable suspicion was indicated." The County contends the class definition includes class members who have no standing to bring a claim because they have no injury under § 46-5-105, MCA.

¶11 A review of the class definition certified by the District Court shows the class is not nearly as broad as the County claims. In general, this Court will read class definitions narrowly. *See Knudsen*, ¶ 20. This makes sense as a district court retains the discretion to alter or amend the class definition to include (or exclude) additional members as litigation proceeds. M. R. Civ. P. 23(c)(1)(C). Here, the District Court specifically limited the class to:

> 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*.

(Emphasis added.) The definition limits class membership to detainees arrested for non-felony offenses who were strip searched and requires the class members to have been strip searched pursuant to the policy or practice of strip-searching detainees because they are eligible to be placed into general custody. These limitations clearly exclude detainees

who were not searched and those whose Intake Forms indicate they were searched for a reason other than "being placed into population, unclothed search completed for facility security."

¶12 Throughout its opening brief, the County argues the District Court erroneously relied on the list of all persons booked into the Detention Center to define an overly broad class. These arguments are based on a misunderstanding of the Plaintiffs' contentions and the District Court's order. While the Plaintiffs did not proffer Intake Forms for every potential class member in support of their motion for certification, they nonetheless offered sufficient evidence to support class certification based on the Intake Form at this early stage in the litigation. Evidence proffered to the District Court included the deposition testimony of Captain Alan Hughes, who explained an Intake Form would be filled out "every time somebody's booked in" the Detention Center. He also acknowledged a check in the last box "does not constitute individualized reasonable suspicion." Deposition testimony from Captain Hughes and other Detention Center officers also confirmed if a detainee is strip searched, the officer marks the reason for the strip search on the Intake Form, including whether the detainee was "being placed into population, unclothed search completed for facility security." Officers testified if a detainee was eligible for housing in the general population a strip search was conducted "automatically" and "simply because they're going into general population." A check only in the last box on the Intake Form indicates the detainee was strip searched pursuant to the County's policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general

custody and not for another reason, such as reasonable suspicion to believe the detainee was concealing contraband.

¶13 The District Court relied on the Intake Form, not the list of all persons booked into the Detention Center, to define the class and explained the final category on the Intake Form "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." All detainees who were arrested for non-felony offenses, were strip searched during the booking process, and whose Intake Forms are marked only in the final box—"being placed into population, unclothed search completed for facility security,"—are members of the class. The class defined by the District Court should be readily identifiable from records that should be in the possession of the County. *See McDonald v. Washington*, 261 Mont. 392, 398, 862 P.3d 1150, 1154 (1993). Based on the record evidence before us, the District Court did not abuse its discretion in defining the class based on the County's policy or practice as indicated on the Intake Forms. As such, the class as certified by the District Court includes each person arrested or detained for a non-felony offense from October 31, 2015, to the present who, as identified on his/her jail Intake Form, 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 solely pursuant to the Detention Center's policy or practice of conducting strip searches or visual body cavity searches of detainees who may be placed into general custody without delineated reasonable suspicion specified by § 46-5-105, MCA. Should this class definition prove

unworkable as discovery proceeds, the District Court retains the ability to alter or amend the class and class claims. M. R. Civ. P. 23(c)(1)(C).

¶14 *2. Did the District Court abuse its discretion by finding the proposed class met the requirements of M. R. Civ. P. 23(a)?*

¶15 A class action claim is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Jacobsen*, ¶ 27 (quoting *Mattson v. Mont. Power Co.*, 2012 MT 318, ¶ 18, 368 Mont. 1, 291 P.3d 1209). A class action suit conserves the judiciary's and similarly situated parties' resources by permitting the litigation of common issues of fact and law in a single case. *Knudsen*, ¶ 7. In order for a class action to proceed, the class representative must demonstrate the four prerequisites of M. R. Civ. P. 23(a) are met and satisfy at least one of the three subsections of Rule 23(b). *Knudsen*, ¶ 7.

¶16 M. R. Civ. P. 23(a) requires:

> 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.

These prerequisites are respectively known as numerosity, commonality, typicality, and adequacy of representation. *Byorth v. USAA Cas. Ins. Co.*, 2016 MT 302, ¶ 15, 385 Mont. 396, 384 P.3d 455. These prerequisites ensure the named plaintiffs are appropriate representatives of the class and limit the class claims to those encompassed in the named

plaintiffs' claims. *Byorth*, ¶ 15. All four of these prerequisites must be met to certify a class action. A district court may certify a class "only if" the court is satisfied the prerequisites of Rule 23(a) have actually been satisfied and "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Jacobsen*, ¶ 37 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551 (2011)). [2]

¶17 The County challenges the District Court's findings on numerosity, commonality, and typicality. We address each in turn.

Numerosity

¶18 The County argues the Plaintiffs proffered insufficient evidence of how many people would be eligible for relief under the statute. The County contends the list of bookings the Plaintiffs relied on does not provide evidence of the actual number of persons searched pursuant to the contested policy or practice of the County and the court erred in relying on numbers from the booking list to determine the numerosity requirement was satisfied.

¶19 The numerosity requirement of Rule 23(a)(1) requires the class be "so numerous that joinder of all members is impractical." *See also McDonald*, 261 Mont. at 400, 862 P.2d at 1155. This requires the party seeking class action certification to "present some evidence

[2] While this Court has never explicitly adopted the United States Supreme Court analysis in *Wal-Mart Stores, Inc. v. Dukes*, we have regularly applied its "more rigorous" standard. *See, e.g.*, *Jacobsen*, ¶ 33. As the parties do not argue the outcome would be different under a more permissive standard, we again apply the "more rigorous" approach here.

of, or reasonably estimate, the number of class members." *Diaz v. Blue Cross & Blue Shield of Mont.*, 2011 MT 322, ¶ 31, 363 Mont. 151, 267 P.3d 756 (quoting *Polich v. Burlington N., Inc.*, 116 F.R.D. 258, 261 (D. Mont. 1987)). "Mere speculation" is not sufficient to satisfy the numerosity requirement. *Diaz*, ¶ 31 (quoting *Polich*, 116 F.R.D. at 261).

¶20 In *Byorth*, we reversed a class certification because the district court lacked sufficient evidence to determine whether the numerosity requirement had been met. The plaintiff contended USAA violated the Unfair Trade Practices Act (UTPA) by sending medical claims to a third party for review. Limited discovery conducted before the certification of the class showed USAA had sent 154 claims to the third party for review. *Byorth*, ¶ 21. There was no evidence of how many of those claims were denied in whole or in part. *Byorth*, ¶ 23. There was also no evidence in the record on how the third party reviewed the claims it received and no evidence the practice of sending the claims to the third party violated UTPA in itself. *Byorth*, ¶ 25. On appeal, this Court held there was insufficient evidence to determine whether the numerosity requirement had been met.

¶21 While we explained in *Byorth* the party proposing a class action must produce some evidence to support a finding on numerosity, this does not require precision, only evidence the size of the potential class is so numerous joinder of all members is impracticable. *See Jacobsen*, ¶ 30. Unlike in *Byorth*, the record here demonstrates sufficient evidence to support the District Court's finding the potential class was so numerous joinder of all members is impracticable. There are already ninety-six named plaintiffs in this case,

alleging they were arrested for non-felony offenses and strip searched without reasonable suspicion pursuant to the policy and practice of the County. Deposition testimony from Detention Center employees confirmed every detainee eligible to be housed in the general population is strip searched whether or not there is reasonable suspicion to do so and suspicionless searching was the "go-to" basis for strip-searching detainees. Plaintiffs' counsel attested the list of bookings shows over 3,500 non-felony offenders were booked into the Detention Center between 2015 and 2018 and the policy and practice of strip searching every detainee eligible for housing in the general population has continued unabated since that time—a number far exceeding the 154 claims at issue in *Byorth*. While the County is correct this booking list does not demonstrate all the persons booked were searched without reasonable suspicion, it, along with the other evidence produced, does evidence the size of the potential class is so numerous joinder of all members is impracticable. This finding is not speculative based on the evidence proffered. Sufficient evidence supported the District Court's determination the size of the potential class is so numerous joinder of all members is impracticable.

Commonality

¶22 The County asserts whether its policy or practice violates § 46-5-105, MCA, cannot be a common question because the question is factual in nature and inquires whether each search at the Detention Center is supported by reasonable suspicion. The County contends whether reasonable suspicion supported a search is necessarily an individual and

particularized determination the District Court will have to evaluate on a case-by-case basis, not a common question susceptible to class-wide resolution.

¶23 To meet the commonality requirement, the Plaintiffs must show "there are questions of law or fact common to the class." M. R. Civ. P. 23(a)(2). An alleged common legal or factual contention must demonstrate "the class members have suffered the same injury" and be "of such a nature that it is capable of class[-]wide resolution—which means 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." *Jacobsen*, ¶ 36 (quoting *Wal-Mart Stores, Inc*, 564 U.S. at 350, 131 S. Ct. at 2551) (internal quotation omitted).

¶24 In *Jacobsen*, the plaintiff submitted evidence of a specific, programmatic, claims handling practice, which the plaintiff alleged violated certain provisions of the UTPA. The insurance company did not dispute the existence of the program. *Jacobsen*, ¶ 40. In affirming certification of a class, this Court explained the question "[w]hether this general practice, as applied to unrepresented claimants, violates [the UTPA] is just the sort of question that may efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40. Even though the facts surrounding each claimant may have differed, answering whether the general claims handling practice violated UTPA "would not turn on the countless discretionary decisions" and "would not be hampered by a variety of unique defenses and circumstances." *Jacobsen*, ¶ 40.

¶25 Similar to the plaintiff in *Jacobsen*, Plaintiffs have submitted evidence of a specific policy or practice of the County to conduct suspicionless strip searches of non-felony

offenders who are eligible to be housed in the general population of the Detention Center and the Plaintiffs allege this policy or practice violates § 46-5-105, MCA. The County does not dispute it has a policy or practice of strip searching every detainee eligible to be housed in the general population of the Detention Center. Whether this policy or practice, as applied to nonfelony offenders included in the class, violated § 46-5-105, MCA, will "efficiently drive the resolution of the litigation." *Jacobsen*, ¶ 40.

¶26 The County's insistence the class will require an individualized determination by the District Court for every potential class member is premised on its misunderstanding of the class definition. The District Court defined the class to include only those detainees (1) who were arrested for a non-felony offense; (2) were subjected to a strip search or visual body cavity search during the booking process; and (3) the search was conducted pursuant to the Detention Center's policy or practice of conducting suspicionless strip searches of detainees being placed into the general population as memorialized by a check on the last box of the Intake Form—"being placed into population, unclothed search completed for facility security." The court will not need to engage in an individual and particularized determination of each class member, because whether the detainee was strip searched pursuant to the County's policy or practice of strip searching every detainee eligible for housing in the general population or for another reason is memorialized on the Intake Forms.

¶27 The District Court order states "[t]he class claims include the [Plaintiffs'] cause of action under Mont. Code Ann. § 46-5-105." The District Court explained "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." (Quotation omitted.) In other words, the common question is whether the County's policy or procedure of conducting suspicionless strip searches on misdemeanor arrestees, as memorialized on the Intake Form, violated the class members' rights under § 46-5-105, MCA. The District Court did not abuse its discretion in finding the Plaintiffs met the commonality requirement.

Typicality

¶28 The County contends the District Court's conclusion on typicality is in error because the certified class includes persons booked into the Detention Center under varied circumstances and any class representative would be far from typical and not representative of the overly broad certified class.

¶29 The typicality requirement "ensures the named class members' interests align with the interests of absent class members." *Byorth*, ¶ 33. Typicality requires the named plaintiff's claim to stem "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." *Jacobsen*, ¶ 51 (internal quotations omitted).

¶30 The County's arguments on typicality fail. All the named Plaintiffs allege they were arrested for non-felony offenses and subjected to a suspicionless strip search when they were booked into the Detention Center. The Plaintiffs presented specific evidence Rogers was arrested for a non-felony offense and was subjected to a strip search pursuant to the policy or practice of the County to strip search every detainee eligible for housing in the

general population of the Detention Center, as memorialized on his Intake Form. These claims are typical of all class members.

¶31 *3. Did the District Court abuse its discretion by certifying a class action lawsuit under M. R. Civ. P. 23(b)?*

¶32 In addition to satisfying the prerequisites of Rule 23(a), the class must satisfy at least one of the provisions of Rule 23(b). The District Court certified the class under Rule 23(b)(2) and 23(b)(3). These provisions provide:

> A class action may be maintained if Rule 23(a) is satisfied and if:
>
> . . .
>
> (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
> (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:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (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
> (D) the likely difficulties in managing a class action.

M. R. Civ. P. 23(b)(2), (3).

¶33 To certify a class under Rule 23(b)(3), the court must find "questions of law or fact common to the class members predominate over any questions affecting only individual members." "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, 453, 136 S. Ct. 1036, 1045 (2016) (quoting 2 William Rubenstein, *Newberg on Class Actions* § 4:50, 196-97 (5th ed. 2012)) (alteration in original). Common questions may predominate "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson Foods, Inc.*, 577 U.S. at 453, 136 S. Ct. at 1045 (quoting 7AA Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1778, 123-24 (3d ed. 2005)). This inquiry focuses on whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Kramer*, ¶ 18 (quoting *Mattson*, ¶ 39). A central concern of the predominance requirement is whether adjudication of common issues will help achieve judicial economy. *Kramer*, ¶ 18.

¶34 The County contends the class cannot meet the predominance or superiority requirements of Rule 23(b)(3) because there is no common question susceptible to class-wide resolution and resolution of Plaintiffs' claims will require individualized determinations from the District Court whether reasonable or particularized suspicion supported each strip search. The County argues the District Court erred because its analysis rests on the "fallacy that the policy violates the statute; rather only a certain fact pattern of the policy's application arguably gives rise to a violation." The County argues mini-trials for each class member will be required to determine whether the County had reasonable suspicion to strip search each individual class member. These individualized issues would

predominate over any common issues and make a class action improper. Further, the County contends no evidence supported the conclusion class certification was the best method because individual claims are small and litigation impractical.

¶35 The District Court did not err in concluding common questions predominate over class members' individual questions. In this case, the common question is whether the policy or practice of the County to conduct strip searches of detainees arrested for non-felony offenses simply because they are eligible for housing in the general population of the Detention Center violates the rights of those detainees under § 46-5-105, MCA. The County's argument the court would be required to conduct an individualized assessment of whether the County had reasonable suspicion to strip search each individual class member in not persuasive, as the District Court fashioned the class around the County's own recorded reasoning for conducting each strip search—the reason provided on the Intake Form.

¶36 Finally, the County argues "[f]or all the stated reasons above, the District Court's certification under Rule 23(b)(2) is also in error and requires reversal." The County's arguments premised on the necessity of individual assessments were not persuasive under Rule 23(b)(3) and remain unpersuasive under Rule 23(b)(2). In addition, the County did not dispute the certification of a class action under M. R. Civ. P. 23(b)(2) in its briefing before the District Court and does not raise any arguments on appeal that could not have been raised before the District Court. Generally, issues that were not properly raised in the

trial court in a civil case are not preserved for appeal. *Nason v. Leistiko*, 1998 MT 217, ¶ 11, 290 Mont. 460, 963 P.2d 1279.

CONCLUSION

¶37 The District Court's order certifying a class action is affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR

Justice Jim Rice, concurring in part and dissenting in part.

¶38 I agree with the Court that the District Court did not abuse its discretion by granting class certification, and thus I concur with Issues 2 and 3. My disagreement is with the District Court's definition of the class, and thus I dissent to resolution of Issue 1.

¶39 In defining the class, the District Court departed from the statutory distinction upon which the Court's decision in the first appeal ("*Rogers I*") was premised, resulting in an overbroad class. In *Rogers I*, the Court first held the County's policy of strip searching detainees arrested for non-felony offenses prior to placement in the general population of the facility, without reasonable suspicion that the detainee was concealing a weapon, contraband, or evidence of the commission of a crime, did not violate the Montana Constitution. *Rogers I*, ¶ 27. Nonetheless, the Court held such a practice violated

§ 46-5-105, MCA, which the Court reasoned "unequivocally prohibits *suspicionless* strip searches of those arrested for minor offenses in any situation." *Rogers I*, ¶ 33 (emphasis added). Thus, while the County was not subjected to potential liability for violating the Constitution, it was exposed to liability for violations of § 46-5-105, MCA, which is titled "Reasonable suspicion required before strip search," and provides:

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

Section 46-5-105, MCA (emphasis added).

¶40 I believe the District Court's class definition erroneously departs from the statute and from the Court's holding in *Rogers I*. The definition fashioned by the District Court is missing the key element—lack of reasonable suspicion—that makes a strip search illegal under the statute and therefore implicates the County's liability. As presently defined, the class potentially includes individuals who were strip searched pursuant to a County policy, but for which the County had reasonable suspicion, and thus were subjected to legal searches for which the County cannot be liable. The District Court's definition is broad enough to include other constitutional claims, despite our ruling in *Rogers I*.

¶41 Indeed, when the District Court analyzed the predominance factor under Rule 23(b)(3)—which is addressed within Issue 3 of the Court's Opinion—it correctly described one of the individual inquiries as "whether a search in an individual case was objectively supported by reasonable suspicion, thus taking that search outside the scope of § 46-5-105."

The District Court clearly understood that reasonable suspicion was an essential part of the inquiry, but nonetheless departed from it and instead focused broadly on County policy when defining the class as "[e]ach person arrested or detained for a non-felony offense . . . who has been subject to a strip search or visual body cavity search . . . 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." The result is an overinclusive class untethered from § 46-5-105, MCA, and from our decision in *Rogers I*.

¶42 I suspect the District Court, to deflect the County's predominance objection, pivoted from the statutory violation to instead embrace an "easy" definition of the class based upon "Detention Center policy," specifically, the Center's Intake Form, reasoning that "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." Certainly, using intake forms as *evidence* is appropriate, but using the form as the basis for the class's *definition* departs from the statutory injury that forms the class, is overinclusive, and is an inappropriately-based classification. Without including the requirement of reasonable suspicion, the class does not correctly identify individuals injured under the statute. Further, when tested, the intake forms may turn out to be inaccurate as evidence. The District Court offered that "[t]he 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," but this assumes the intake forms are accurate

and, in any event, is weak support for departing from the violation that forms the basis for the class.

¶43 While the County argues the statutory claims are "not susceptible to class resolution" because reasonable suspicion is an individual, fact-intensive determination based on the totality of the circumstances, I believe that certification of a class, properly defined, is salvageable. Even with a narrower class definition which tracks the statutory violation, I believe the common issue of whether the County engaged in a practice of conducting suspicionless strip searches of misdemeanor detainees predominates over individual inquiries at this stage of the litigation. It is within this Court's authority to modify the portion of the District Court's order defining the class. Section 3-2-204(1), MCA (this Court may "modify any judgment or order appealed from"); *see also Jacobsen*, ¶ 47 (modifying a certified claim in a class action). To remedy the overbroad class, I would reformulate the class definition as follows:

> 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 without reasonable suspicion to believe the person is concealing a weapon, contraband, or evidence of the commission of a crime, in violation of § 46-5-105, MCA.

¶44 This definition is very similar to the one proposed by Plaintiffs, and I believe it more appropriately reflects the statutory injury identified in *Rogers I*, for which the County may be liable, and for which Plaintiffs seek redress.[1]

[1] Plaintiffs' September 16, 2019 Amended Complaint and their January 27, 2021 Brief in Support of Supplemental Motion to Certify Class Action proposed the class definition as: "Each person

¶45 I concur and dissent.

/S/ JIM RICE

arrested or detained for a traffic offense or an offense that is not a felony who, within the three years preceding the filing of this action and up until the date this case is concluded, has been or will be subjected to a strip search as defined under Montana law,[ ] by a peace officer or law enforcement employee at the Lewis & Clark County Detention Center without reasonable suspicion to believe that the person was concealing a weapon, contraband, or evidence of commission of a crime."