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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
MISSOULA DIVISION

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LAURNA CHIEF GOES OUT, LYNDIA

FRENCH, AND BRANDY

BURKOWSKI on behalf of themselves

and all others similarly situated,

Plaintiffs,

vs.

MISSOULA COUNTY, CARL IBSEN,

JASON KOWALSKI, MARK FOSS,

AND MARK HARRIS,

Defendants.

) No.

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)

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CLASS ACTION

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COMPLAINT

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## **INTRODUCTION**

Plaintiffs are prisoners incarcerated at the Missoula County Detention Facility (“MCDF”) in Missoula, Montana. While adult male prisoners are allowed daily outdoor exercise, juvenile and female prisoners at MCDF are denied any fresh air or outdoor exercise, and have spent up to a year with no fresh air, direct sunlight or outdoor exercise. Plaintiffs bring this action on behalf of themselves and all similarly situated prisoners housed in Housing Unit 2 and the Juvenile Detention Center for one month or more who are denied fresh air and outdoor exercise for a prolonged period of time.

Plaintiffs are guaranteed the right to be free from cruel and unusual punishment, and are entitled to the equal protection rights set forth in the U.S. and Montana Constitutions. Defendants have violated both of these rights through prolonged deprivation of fresh air and outdoor exercise for prisoners housed in Housing Unit 2 and the Juvenile Detention Center in MCDF.

Defendants’ prolonged denial of fresh air and outdoor exercise has negatively impacted plaintiffs’ psychological and physical well-being. Prisoners at MCDF uniformly report increased anxiety, depression, panic attacks, sleep problems, skin problems, loss of hair, and vitamin D deficiencies as a result of deprivation of fresh air and outdoor exercise. Defendants have been repeatedly

made aware of these prisoners' suffering, and continue to deny them fresh air and outdoor exercise.

### **NATURE OF THE ACTION**

1. Plaintiffs bring Count I of this action pursuant to 42 U.S.C. §1983 to redress violations of Plaintiffs' rights under the Fourteenth Amendment to the U.S. Constitution to receive equal protection while incarcerated at MCDF. In connection with Count I, Plaintiffs seek injunctive and declaratory relief against Defendants Carl Ibsen, Jason Kowalski, Mark Harris and Mark Foss in their official capacities, as well as attorneys' fees and costs.

2. Plaintiffs bring Count II of this action pursuant to 42 U.S.C. §1983 to redress violations of Plaintiffs' rights under the Eighth Amendment to the U.S. Constitution to be free from cruel and unusual punishment. In connection with Count II, Plaintiffs seek injunctive and declaratory relief against Defendants Carl Ibsen, Jason Kowalski, Mark Harris and Mark Foss in their official capacities, as well as attorneys' fees and costs.

3. Plaintiffs bring Count III of this action to redress violations of Article II, §4 of the Montana Constitution, which guarantees equal protection of the laws, prohibits discrimination on the basis of sex and prohibits violations to human dignity. In connection with Count III, Plaintiffs seek injunctive and declaratory

relief against Defendants Carl Ibsen, Jason Kowalski, Mark Harris and Mark Foss in their official capacities, as well as attorneys' fees and costs.

4. Plaintiffs bring Count IV of this action to redress violations of Article II, §22 of the Montana Constitution which prohibits the infliction of cruel and unusual punishment. In connection with Count IV, Plaintiffs seek injunctive and declaratory relief against Defendants Carl Ibsen, Jason Kowalski, Mark Harris and Mark Foss in their official capacities, as well as attorneys' fees and costs.

### **JURISDICTION AND VENUE**

5. Jurisdiction is conferred upon this Court for Counts I and II pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343 because the matters in controversy arise under the Constitution and the laws of the United States.

6. Supplemental jurisdiction is conferred upon this Court for Counts III and IV pursuant to 28 U.S.C. 1367.

7. Venue is proper in this Court under 28 U.S.C. §1391(b) because a substantial part of the events that give rise to Plaintiffs' claims took place in Missoula, Montana.

8. This Court has authority pursuant to 42 U.S.C. 1983 to order injunctive and declaratory relief, and has authority under 42 U.S.C. §1988 to award attorney fees and costs to successful civil rights plaintiffs.

## **PARTIES**

9. Plaintiff Lurna Chief Goes Out is a female prisoner awaiting trial and sentencing. Ms. Chief Goes Out has been at MCDF with no access to fresh air and outdoor exercise since January 4, 2012. Ms. Chief Goes Out has experienced decreased physical and psychological well-being as a result of being deprived of fresh air and outdoor exercise for over 8 months. Ms. Chief Goes Out has experienced increased depression, a lack of energy and overwhelming feeling of lethargy and despondency, hair loss, skin problems, and a general decline in her sense of physical and psychological well-being as a result of being deprived of fresh air and outdoor exercise.

10. Plaintiff Lynda French is a female prisoner being held in MCDF as a federal prisoner in the custody of the U.S. Marshall awaiting sentencing. Ms. French has been held at MCDF since April 2, 2012. The Federal Performance-Based Detention Standards require non-federal facilities housing federal inmates to provide inmates with daily outdoor exercise. Despite this, Ms. French has not been outside for the entire duration of her incarceration at MCDF, which exceeds five months. Ms. French has experienced depression, panic attacks, increased anxiety, lethargy, difficulty regulating her temperature, weight gain, hair loss, skin problems and a general decline in her sense of physical and psychological well-being as a result of being deprived of fresh air and outdoor exercise.

11. Plaintiff Brandy Burkowski is a female prisoner being held in MCDF as a federal prisoner in the custody of the U.S. Marshall awaiting sentencing. Ms. Burkowski has been held at MCDF since July 10, 2012. The Federal Performance-Based Detention Standards require non-federal facilities housing federal inmates to provide inmates with daily outdoor exercise. Despite this, Ms. Burkowski has not been outside for the entire duration of her incarceration at MCDF, which exceeds two months. Ms. Burkowski has experienced depression, increased anxiety, lethargy, skin problems, hair loss and a general decline in her sense of physical and psychological well-being as a result of being deprived of fresh air and outdoor exercise.

12. Defendant Carl Ibsen is and at all relevant times has been the Missoula County Sheriff responsible for running MCDF.

13. Defendant Jason Kowalski is and at all relevant times has been the Captain of MCDF in charge of overseeing MCDF and the day-to-day operations at MCDF. Captain Kowalski responds to appeals from prisoners whose grievances have been denied. Captain Kowalski has denied multiple appeals from prisoners requesting access to fresh air and outdoor exercise.

14. Defendant Mark Foss is and at all relevant times has been the Chief Detention Officer at MCDF who aids the Captain in overseeing MCDF and the day-to-day operations at MCDF. Sergeant Foss responds to prisoners' kites and

grievances, and has denied kites and grievances from prisoners requesting access to fresh air and outdoor exercise.

15. Defendant Mark Harris is and at all relevant times has been the Sergeant at MCDF who aids the Captain in overseeing MCDF and the day-to-day operations at MCDF. Sergeant Harris responds to prisoners' kites and grievances, and has denied multiple kites and grievances from prisoners requesting access to fresh air and outdoor exercise.

16. It has been well established for many years through federal caselaw and multiple jail and prison standards that prisoners cannot be deprived of fresh air and outdoor exercise. By depriving prisoners at MCDF of fresh air and outdoor exercise for prolonged periods of time, Defendants Ibsen, Kowalski, Foss and Harris have violated this well-established law. Through numerous verbal requests, kites, grievances, appeals, and correspondence between Plaintiffs' counsel and defendants, Defendants Ibsen, Kowalski, Foss and Harris have been made aware of a substantial risk of serious harm to prisoners at MCDF, and have not taken reasonable measures available to them to alleviate that risk.

17. It has been well-established for many years that similarly situated prisoners must receive parity of services and opportunities.

18. Acting under the color of state law, Defendants Ibsen, Kowalski, Foss and Harris have acted with discriminatory intent and taken action they knew or

reasonably should have known would violate plaintiffs' right to equal protection by denying female and juvenile prisoners access to fresh air and outdoor exercise.

19. Defendants Ibsen, Kowalski, Foss and Harris have personally participated in violations of plaintiffs' equal protection rights.

20. Defendants Ibsen, Kowalski, Foss and Harris have aware of prisoners' suffering and symptoms arising from a lack of fresh air and outdoor exercise. For months, juvenile and female prisoners have filed kites, grievances and appeals requesting fresh air and outdoor exercise, which defendants have consistently denied. These kites, grievances and appeals have explained the lack of fresh air and sunlight in the gym, and set forth many symptoms female and juvenile prisoners have suffered from the lack of fresh air and outdoor exercise. Prisoners' symptoms that Defendants Ibsen, Kowalski, Foss and Harris are aware of include increased stress, depression and anxiety, panic attacks, loss of hair, skin problems and vitamin D deficiency.

21. Acting under the color of state law, Defendants Ibsen, Kowalski, Foss and Harris have taken action they knew or reasonably should have known would violate plaintiffs' right to be free from cruel and unusual punishment by denying female and juvenile prisoners access to fresh air and outdoor exercise.



22. Defendants Ibsen, Kowalski, Foss and Harris have personally participated in violations of plaintiffs' right to be free from cruel and unusual punishment.

23. With regard to all counts, Plaintiffs name Defendants Ibsen, Kowalski, Foss and Harris in their official capacity.

24. Defendant Missoula County is the local government entity responsible for maintaining a jail. The housing policy and procedure of MCDF denies prisoners housed in Housing Unit 2 and the Juvenile Detention Center access to fresh air and outdoor exercise. By allowing MCDF to maintain this housing policy and procedure, Defendant Missoula County has violates plaintiffs' constitutional rights.

## **GENERAL ALLEGATIONS**

### **Missoula County Detention Facility Housing Units**

25. The Missoula County Detention Facility ("MCDF") opened in 1999, replacing the previous county jail on the fourth floor of the courthouse annex. MCDF's total capacity is approximately 396.

26. MCDF houses adults in three Housing Units, Housing Unit 1 ("HU1"), Housing Unit 2 ("HU2"), and Housing Unit 3 ("HU3"). MCDF houses juvenile prisoners in a Juvenile Detention Center ("JDC").

27. Each housing unit has 6 pods, A, B, C, D, E & F.

28. HU1 holds only adult males incarcerated in the Missoula Assessment and Sanction Center (“MASC”). Prisoners in HU1 are sentenced to the Department of Corrections (“DOC”), and are in MASC to be “assessed” for appropriate placement in a DOC facility, such as the Montana State Prison, a regional prison, Crossroads Correctional Center, or a community corrections program. If an adult male sentenced to the DOC is on parole violates the parole, he may be sent to MASC for a short “sanction” then go back out on parole.

29. Pods E and F in HU2 house female prisoners sentenced to county jail time, and female prisoners awaiting trial and sentencing for federal and state law charges. HU2 is the only housing unit that holds adult female prisoners. HU1 and HU3 do not hold any adult female prisoners. Pods C and D in HU2 house male and female prisoners in administrative segregation, and can hold female prisoners temporarily when Pods E and F are full. Pods A and B house male prisoners sentenced to county jail time and male prisoners awaiting trial and sentence. Male prisoners in pods A and B in HU2 can also be housed in HU3.

30. HU3 holds only male prisoners sentenced to county jail time and male prisoners awaiting trial and sentence.

31. The JDC holds up to 25 female and male juvenile prisoners.

**Prisoners in HU2 and JDC are denied fresh air and outdoor exercise**

32. Both HU1 and HU3 have a nearly identical outdoor recreation area. Prisoners in HU1 and HU3 have access to this outdoor area five hours each week.

33. Each outdoor area has a mesh grate across the top, but no ceiling. Prisoners in this outdoor area breathe and exercise in fresh air. It rains and snows in this outdoor area. Prisoners in this outdoor area feel direct sunlight. In cold weather, prisoners in HU1 and HU3 are provided jackets to go outside to this outdoor area. In tours of the facility, prison administrators describe this area as the “outdoor rec area”.

34. There is no outdoor recreation area in HU2 or JDC. The only area for recreation in HU2 and JDC is an indoor gym that is similar in both HU2 and JDC. This gym has approximately five windows approximately 20 - 30 feet high. The windows are closed from approximately October through May each year. Prisoners in the gym cannot feel direct sunlight. During certain times of day, sunlight shines through the windows on very small areas of the gym floor. Female prisoners sometimes take turns standing in these small areas to try to feel sunlight through the window glass on a portion of their face or body. Because this area is indoors with a ceiling, it does not rain or snow in the gym. In cold weather, the windows to the gym remain closed, and prisoners in the gym are not provided jackets because there is no fresh air.

35. Many feasible options exist to provide prisoners in HU2 and the JDC access to fresh air and outdoor exercise. MCDF utilizes a large canvas curtain to provide female prisoners with privacy when exercising in the gym. A similar canvas curtain can be utilized to provide female prisoners with access to the outdoor recreation area. In addition, there is a large fenced grass area that is directly accessible from HU2 and the JDC. This area, or a portion of this area, could be used as an outdoor recreation area for HU2 and the JDC.

36. Prisoners in HU2 and the JDC suffer from lack of fresh air and outdoor exercise.

37. Female prisoners can and do spent up to one year at MCDF. For example, Plaintiff Chief Goes Out has been at MCDF with no access to fresh air and outdoor exercise since January 4, 2012. With the exception of an occasional transport to the courthouse, these prisoners are deprived of fresh air and outdoor exercise for their entire period of incarceration at MCDF.

38. Juvenile prisoners can and do spend many months at MCDF. With the exception of an occasional transport to the courthouse, these juvenile prisoners are deprived of fresh air and outdoor exercise for their entire period of incarceration at MCDF.

39. Plaintiffs and other prisoners at MCDF have experienced suffering as a result of being deprived of fresh air, sunlight and outdoor exercise. These

symptoms include increased stress, lack of energy and lethargy, increased feelings of claustrophobia and anxiety, depression, difficulty sleeping, panic attacks, loss of hair and significant skin problems.

40. Defendants are aware of female and juvenile prisoners suffering from lack of fresh air and outdoor exercise. Many prisoners housed in HU2 and the JDC have verbally requested access to fresh air and outdoor exercise, and defendants have consistently denied these requests. Many prisoners in HU2 and the JDC have filed kites, grievances and appeals requesting fresh air and outdoor exercise. All such kites, grievances and appeals have been denied.

#### **The importance of fresh air and outdoor exercise**

41. The importance of fresh air and outdoor exercise to human beings is well-established. As evidenced from the symptoms MCDF female and juvenile prisoners experience, the lack of fresh air and outdoor exercise is detrimental to the psychological and physical well-being of human beings.

42. As such, federal caselaw and federal and corrections organization standards, as well as Montana DOC policy, require that prisons and jails provide daily fresh air and outdoor exercise to prisoners.

43. Existing caselaw has for many years established the constitutional right to fresh air and outdoor exercise. *See e.g., Toussaint v. Yockey*, 722 F.2d

1490 (9th Cir. 1984) (affirming temporary restraining order requiring outdoor exercise after concluding denial of outdoor exercise for administrative segregation inmates raised constitutional questions); *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979) (depriving inmates of outdoor exercise for "period of years" was cruel and unusual punishment); *Johnson v. Woodford*, 336 Fed.Appx. 594, 2009 WL 1452635 (9th Cir. 2009) (holding “because ‘some form of regular outdoor exercise is extremely important to the psychological and physical wellbeing’ of prisoners, this court has repeatedly held that long term deprivation of outdoor exercise can constitute cruel and unusual punishment under the Eighth Amendment” and vacating summary judgment against prisoner for claim that deprivation of outdoor exercise was cruel and unusual); *Frazer v. Ward*, 426 F.Supp. 1354 (N.D.N.Y. 1977) (deprivation of outdoor exercise for more than 14 days is cruel and unusual punishment; indoor area is not sufficient to provide outdoor exercise); *Allen v. Sakai*, 40 F.3d 1001, 1004 opinion amended on denial of reh'g, 48 F.3d 1082 (9th Cir. 1994)(finding six week deprivation of outdoor exercise was unconstitutional, and noting “practical difficulties that arise in administering a prison facility from time to time might justify an **occasional and brief** deprivation of an inmate's opportunity to exercise outside. However, we **cannot** accept the defendants' excuses as justifying, as a matter of law at the summary judgment stage, the deprivation that took place here”) (emphasis added); *Lopez v. Smith*, 203 F.3d

1122, 1133 (9th Cir. 2000)(reversing summary judgment for defendants where plaintiff provided evidence of being deprived of outdoor exercise for six and a half weeks); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (finding inmate plaintiff produced sufficient evidence to go to trial on deprivation of outdoor exercise claim and “a 8' by 21' by 16' space with a roof, three concrete walls, and a fourth wall of perforated steel admitting sunlight through only the top third” does not constitute outdoor exercise area); *Martino v. Carey*, 563 F. Supp. 984, 1001 (D. Or. 1983) (“[i]n the present case expert witnesses testified that the denial of all outdoor exercise endangered the physical and mental health of prisoners and led to physical and mental deterioration. I agree with this testimony and find that the denial of exercise violated the Eighth Amendment as to convicted prisoners and imposed a clearly ‘punitive’ condition upon pre-trial detainees.”); *Franklin v. State of Oregon*, 662 F.2d 1337 (9th Cir. 1981). *See also Anderson v. Colorado*, 10-CV-01005-RBJ-KMT, 2012 WL 3643063, \*4 (D. Colo. Aug. 24, 2012) (“recent panels of the Ninth Circuit have indicated that denial of outdoor exercise for 14 months, . . . and even six weeks . . . can be sufficient to support an Eighth Amendment Claim. Other courts outside the Ninth Circuit [have held] that long term denial of outdoor exercise constitutes cruel and unusual punishment”, and “failure to provide reasonable access to the out of doors and outdoor exercise to [plaintiff] constitutes cruel and unusual punishment in violation of the Eighth Amendment”).

44. Various corrections standards also evidence the well-established constitutional right to fresh air and outdoor exercise. The State of Montana DOC Policy Directive regarding Recreation Activities states “General population inmates shall be granted access to supervised outdoor exercises on a daily basis, weather permitting, using a variety of equipment.” DOC 5.5.3.IV.B.3, *available at* <http://www.cor.mt.gov/content/Resources/Policy/Chapter5/5-5-3.pdf>.

45. Male prisoners sentenced to the DOC are housed solely in HU1. However, DOC Policy 5.5.3.IV.B.3 establishes common practice in the state of Montana. Further, many female pre-trial detainees housed in HU2 ultimately are sentenced DOC. It is not logical that these prisoners can be deprived of outdoor exercise prior to sentencing, but cannot be deprived of outdoor exercise after sentencing. This is particularly true given that they are housed at MCDF as pre-trial detainees awaiting trial and sentencing for many months.

46. The Federal Performance-Based Detention Standards Handbook is designed for use in reviewing non-federal facilities that house federal detainees to ensure these facilities are safe, humane, and protect detainees’ statutory and constitutional rights. Federal Performance-Based Detention Standard G.5 states “[t]he Facility Director ensures that staff permit detainees a minimum of one hour of outdoor recreation five days a week.” These standards are available at <http://www.justice.gov/ofdt/fpbds02232011.pdf>.



47. MCDF houses female and male adult and juvenile federal prisoners pursuant to a contract with the U.S. Marshall. Despite this, federal juvenile and adult prisoners housed in HU2 and the JDC, respectively, are denied outdoor recreation.

48. The American Bar Association Standards for Criminal Justice – Treatment of Prisoners (Third Ed.) state “[e]ach prisoner, including those in segregated housing, should be offered the opportunity for at least one hour per day of exercise, in the open air if the weather permits.” ABA Standard 23-3.6, *available at* [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf).

49. The American Correctional Association’s (“ACA”) Standards for Adult Correctional Institutions (4<sup>th</sup> Ed. 2003) state “both outdoor and covered/enclosed exercise areas for general population inmates are provided in sufficient number to ensure that each inmate is offered at least one hour of access daily. Use of outdoor areas is preferred, but covered/enclosed areas must be available for use in inclement weather.” ACA Standard 4-4154.

**COUNT I – DEFENDANTS’ DEPRIVATION OF FRESH AIR AND OUTDOOR EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION**

50. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 49 as fully restated here.

51. As detailed above, the constitutional right to fresh air and outdoor exercise is well-established and has been for many years. Access to fresh air and outdoor exercise is a basic human need. Deprivation of fresh air and outdoor exercise is a serious deprivation of a human need and amounts to inhumane treatment. Despite this, Plaintiffs and other prisoners housed in HU2 and the JDC regularly go many months without any fresh air, direct sunlight or outdoor exercise.

52. Defendants have been deliberately indifferent to plaintiffs’ deprivation of this well-established constitutional right. Defendants have known that HU2 and JDC prisoners are deprived of fresh air and outdoor exercise. Defendants have known that depriving prisoners of fresh air and outdoor exercise detrimentally affects their psychological and physical well-being and is causing them harm. Defendants received multiple verbal complaints, kites, grievances and appeals requesting access to outdoor recreation and detailing the negative impact on prisoners from deprivation of fresh air and outdoor exercise. Defendants

provide access to fresh air and outdoor exercise for adult male prisoners in HU1 and HU3, thereby understand the importance of providing fresh air and outdoor exercise to prisoners generally. Despite this, defendants continue to deny prisoners in HU2 and the JDC access to fresh air and outdoor exercise.

53. Deprivation of fresh air and outdoor exercise to HU2 and JDC prisoners has no valid penological justification.

**COUNT II – DEFENDANTS HAVE VIOLATED PLAINTIFFS’ RIGHTS PURSUANT TO THE 14TH AMENDMENT TO THE U.S. CONSTITUTION GUARANTEEING EQUAL PROTECTION**

54. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 53 as fully restated here.

55. By their policies and practices described above, Defendants have discriminated against Plaintiffs on the basis of their gender, thereby violating their right to equal protection of the laws. These policies and practices have and continue to be implemented by Defendants and their agents or employees in their official capacities, and are the proximate cause of Plaintiffs’ deprivation of rights secured by the U.S. Constitution under the Fourteenth Amendment.

56. Female prisoners in Housing Unit 2 are similarly situated to male prisoners at MCDF housed in HU1 and HU3. As prisoners incarcerated as both federal and non-federal pre-trial detainees and serving county jail time, female and

juvenile prisoners and male prisoners are sufficiently similar with respect to their conditions of incarceration. As such, female prisoners at MCDF are equivalent to male prisoners at MCDF.

57. Despite the fact that female prisoners at MCDF are similarly situated to male prisoners at MCDF, female prisoners are subject to unequal treatment resulting from gender discrimination. The only housing unit available for female prisoners in HU2, which does not have an attached outdoor recreation yard. Defendants have refused to move female prisoners to another housing unit to exercise, or build an outdoor recreation yard directly accessible to HU2. As a result, while male prisoners are allowed fresh air and outdoor exercise five days a week, female prisoners are denied any fresh air and outdoor exercise for the entire duration of their incarceration. As such, there is a lack of parity between female and male prisoners.

58. Defendants have repeatedly represented to female prisoners that they receive fresh air and sunlight in the gym. These representations are false. The gym is not an outdoor recreation area. Sunlight shining through a window onto tiny areas of a gym floor is not the equivalent of direct sunlight. Open windows approximately 30 feet above the floor is not the equivalent of fresh air. Regardless, common practice at MCDF is to close the gym windows for most of the year. The outdoor recreation yards available to male prisoners in HU1 and

HU3 have rain and snow in the winter and are commonly termed “outdoor recreation yards” by MCDF staff. Prisoners are provided with jackets in the winter to go out into the outdoor recreation yard, and often will shovel snow in the outdoor recreation area. Because they are indoor, there is no rain, snow, or direct sunlight in the indoor recreation gyms in HU2 and the JDC.

The lack of fresh air and outdoor exercise has caused and continues to cause a decrease in prisoners’ well-being. Prisoners suffer from many symptoms arising from the lack of fresh air and outdoor exercise, as described in detail above.

59. Gender-neutral alternatives to the current unequal treatment of female and male prisoners are available, rendering the current lack of parity between female and male prisoners unnecessary. For example, defendants could utilize a canvas curtain to provide privacy to female prisoners to utilize the outdoor areas in HU1 and/or HU3. Defendants could also utilize the large fenced grassy areas with direct access to HU2 and the JDC to provide outdoor recreation for prisoners in HU2 and the JDC.

**COUNT III – DEFENDANTS’ DENIAL OF FRESH AIR AND OUTDOOR EXERCISE FOR PRISONERS IN HOUSING UNIT 2 AND THE JUVENILE DETENTION UNIT VIOLATES ARTICLE II, §4 OF THE MONTANA CONSTITUTION**

60. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 59 as fully restated here.

61. Plaintiffs specifically re-allege the allegations set forth in Count II as fully restated here. Based on these allegations, Plaintiffs assert that defendants have engaged in gender discrimination, violated plaintiffs' human dignity, and denied them equal protection of the laws in violation of Article II, §4 of the Montana Constitution.

**COUNT IV – DEFENDANTS' DEPRIVATION OF FRESH AIR AND OUTDOOR EXERCISE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF ARTICLE II, §22 OF THE MONTANA CONSTITUTION**

62. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 61 as fully restated here.

63. Plaintiffs specifically re-allege the allegations set forth in Count I as fully restated here. Based on these allegations, Plaintiffs assert that defendants have engaged in cruel and unusual punishment and violated plaintiffs' human dignity in violation of Article II, §22 of the Montana Constitution.

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare the suit is maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) and 23(b)(2);
- B. Declare Defendants have engaged in cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution by depriving plaintiffs of fresh air and outdoor exercise;

- C. Declare Defendants have engaged in cruel and unusual punishment in violation of Article II, 22 of the Montana Constitution by depriving plaintiffs of fresh air and outdoor exercise;
- D. Declare Defendants have violated the rights guaranteed to Plaintiffs under the Fourteenth Amendment to the U.S. Constitution by depriving female prisoners of fresh air and outdoor exercise while providing male prisoners access to fresh air and outdoor exercise;
- E. Declare Defendants have violated the rights guaranteed to Plaintiffs under Article II, §4 of the Montana Constitution by depriving female prisoners of fresh air and outdoor exercise while providing male prisoners access to fresh air and outdoor exercise;
- F. Issue an Order: (i) directing Defendants, their successors and other current and future employees of Missoula County to provide prisoners in Housing Unit 2 and the Juvenile Unit with access to fresh air and outdoor exercise for one hour five days per week;
- G. Award Plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. §1988.

Dated this 12th day of September, 2012.

/s/ Anna Conley

ACLU of Montana Foundation

/s/ Greg Munro

Greg Munro, Attorney-at-Law

ATTORNEYS FOR PLAINTIFFS