

_____ BILL NO. _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

INTRODUCED BY _____
(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO SEARCHES AND SEIZURES TO REFLECT RULES CONTAINED IN COURT OPINIONS; AND AMENDING SECTIONS 46-5-101, 46-5-102, AND 46-5-402, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Definitions. As used in this chapter, the following definitions apply:

(1) "Common authority" means that a person has authority to consent to a search of property as to which there is joint access and control. Common authority rests on the mutual use of property by persons generally having joint access to and control of the property for most purposes, so that it is reasonable to recognize that any of the persons who have mutual use has the right to permit a search or inspection of the property in that person's own right and that the other persons have assumed the risk that a person with joint access might permit the property to be searched.

(2) "Consent" means a person's knowing and voluntary permission for a search. When the government relies upon consent to justify the lawfulness of a search, it has the burden of proving that the consent was voluntarily given, uncontaminated by any express or implied duress or coercion. In determining whether consent to a search was given voluntarily, the court must review the totality of the circumstances.

(3) "Emergency aid" means a justification for a search in order to protect or preserve life or avoid serious injury.

(4) "Exigent circumstances" means circumstances in which it is not practical to obtain a search warrant. The circumstances must be demonstrated by specific and articulable facts that would cause a reasonable person to believe that prompt action is necessary to prevent physical harm to peace officers or other persons, the destruction of relevant evidence, the escape of a suspect, or some other occurrence improperly frustrating legitimate law enforcement efforts.

(5) "Plain view" means that evidence can be seen by a peace officer who is lawfully located in a place from which evidence can be seen, the incriminating nature of the evidence is immediately apparent, and the officer has a lawful right of access to the evidence.

1 (6) "Privacy" means a person's right to be left alone and be free from government or public intrusion.

2 A violation of that right is determined by the following factors:

3 (a) whether the person has an actual expectation of privacy, as evidenced by the person's act of placing
4 something beyond the purview of the public in a place from which the person has the right to exclude others;

5 (b) whether the state's acknowledged interest in promoting and protecting the welfare of its citizens and
6 resources supports a determination that there is an objectively reasonable expectation of privacy; and

7 (c) whether the nature of the state's intrusion is overly broad, as evidenced by a substantial threat of
8 revealing unnecessary aspects of an individual's private affairs.

9 (7) "Search" means looking for or obtaining evidence in a manner that infringes upon a person's
10 reasonable expectation of privacy.

11 (8) "Seized" or "seizure", in reference to a person, means that, in view of all the circumstances, a
12 reasonable person would believe that the person is not free to leave.

13

14 **NEW SECTION. Section 2. Detention center search of person.** (1) A peace officer may conduct a
15 detention center search incident to a lawful arrest of a person. The search must be:

16 (a) conducted at the detention center pursuant to a standardized procedure adopted by the law
17 enforcement agency and routinely utilized in the booking process; and

18 (b) confined to the person of the arrestee and to closed containers on the person or in the person's
19 immediate possession at the time of the arrest.

20 (2) A detention center search of a person is justified on the basis of the compelling state interest in
21 protecting the person searched, law enforcement officers, other inmates, and persons and property in and about
22 the detention center from the harm and potential for harm posed by weapons, dangerous instrumentalities, and
23 hazardous substances that might be concealed on the person of the arrestee or in closed containers on the
24 person or in the person's possession.

25

26 **NEW SECTION. Section 3. Detention search of vehicle.** (1) A peace officer who has lawfully
27 impounded a vehicle may conduct a detention search of the vehicle.

28 (2) If the sole justification for a detention search of a vehicle is that the search is incident to the lawful
29 custody of a vehicle, the search must be limited in scope to articles in plain view from outside the vehicle.

30 (3) Because the law enforcement agency employing the impounding peace officer becomes the

1 gratuitous depository of the impounded vehicle and therefore only owes a duty of slight care for the preservation
 2 of the property and is liable to the owner only for losses occasioned by gross negligence, there is no compelling
 3 interest in conducting a thorough search to protect the person's property and the peace officer does not have
 4 the right to conduct a thorough search of the vehicle.

5

6 **Section 4.** Section 46-5-101, MCA, is amended to read:

7 **"46-5-101. Searches and seizures -- when authorized.** A search of a person, object, or place may
 8 be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is
 9 made:

10 (1) by the authority of a search warrant; ~~or~~

11 (2) in accordance with judicially recognized exceptions to the warrant requirement, including but not
 12 limited to:

13 (a) plain view;

14 (b) search with consent or by common authority;

15 (c) search incident to arrest with exigent circumstances;

16 (d) search within the scope of lawful inspection;

17 (e) probable cause with exigent circumstances; or

18 (f) stop and frisk; or

19 (3) in the course of administering emergency aid."

20

21 **Section 5.** Section 46-5-102, MCA, is amended to read:

22 **"46-5-102. Scope of search incident to arrest. (1)** When a lawful arrest is effected, a peace officer
 23 may reasonably search the person arrested and the area within ~~such~~ the person's immediate presence without
 24 a warrant for the purpose of:

25 ~~(1)~~(a) protecting the officer from attack;

26 ~~(2)~~(b) preventing the person from escaping;

27 ~~(3)~~(c) discovering and seizing the fruits of the crime; or

28 ~~(4)~~(d) discovering and seizing any persons, instruments, articles, or things which may have been used
 29 in the commission of or which may constitute evidence of the offense.

30 (2) The scope of the warrantless search must be commensurate with its underlying purpose. Expansive

1 searches are prohibited after an arrest has been made and the purpose for the search under subsection (1) has
 2 been satisfied.

3 (3) Specific and articulable exigent circumstances are necessary to justify and make lawful a search
 4 without a warrant under this section."

5
 6 **Section 6.** Section 46-5-402, MCA, is amended to read:

7 **"46-5-402. Stop and frisk.** (1) A peace officer who has lawfully stopped a person under 46-5-401 or
 8 this section:

9 (1)(a) may frisk the person and take other reasonably necessary steps for protection if the officer has
 10 reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person
 11 present;

12 (2)(b) may take possession of any object that is discovered during the course of the frisk if the officer
 13 has probable cause to believe the object is a deadly weapon; and

14 (3)(c) may demand the name and present address of the person; ~~and~~

15 ~~—— (4) shall inform the person, as promptly as possible under the circumstances and in any case before~~
 16 ~~questioning the person, that the officer is a peace officer, that the stop is not an arrest but rather a temporary~~
 17 ~~detention for an investigation, and that upon completion of the investigation, the person will be released if not~~
 18 ~~arrested.~~

19 (2) A peace officer may detain the driver of or a passenger in a lawfully stopped vehicle if infringement
 20 on the person's liberty, in light of the totality of the circumstances, is minimal and the detention is performed in
 21 the interest of:

22 (a) preventing the flight of the person in the event that incriminating evidence is uncovered;

23 (b) minimizing the risk of harm to the officer; or

24 (c) promoting an orderly completion of a frisk or a lawful search."

25
 26 **NEW SECTION. Section 7. Codification instruction.** [Sections 1 through 3] are intended to be

27 codified as an integral part of Title 46, chapter 5, and the provisions of Title 46 apply to [sections 1 through 3].
 28

29 **NEW SECTION. Section 8. Severability.** If a part of [this act] is invalid, all valid parts that are
 30 severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,

1 the part remains in effect in all valid applications that are severable from the invalid applications.

2 - END -