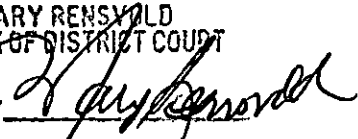


HON. JENNIFER B. LINT
PRESIDING DISTRICT COURT JUDGE
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**MONTANA TWENTIETH JUDICIAL DISTRICT COURT
LAKE COUNTY**

STATE OF MONTANA, Plaintiff, v. KENNETH BRITTON COTTER, Defendant.	Cause No. DC-24-205 The Honorable Jennifer B. Lint ORDER RE: BOOKING PHOTO
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This matter comes before the Court on the State's *Motion to Clarify Order Regarding Public Access to Defendant's Booking Photo*, filed January 10, 2025. This matter is fully briefed and ripe for ruling.

ANALYSIS

A. Constitutional and Statutory Authority

Mont. Const. art. II, § 9, the right to know, provides: "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

Mont. Const. art. II, § 10, the right of privacy, provides: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”

Court review of the right to know involves a three-step analysis of: (1) “whether the provision applies to the particular political subdivision against whom enforcement is sought;” (2) “whether the documents in question are ‘documents of public bodies’ subject to public inspection;” and (3) if the first two elements are met, whether a privacy interest is affected and whether “the demand of individual privacy clearly exceeds the merits of public disclosure.” *Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 18, 333 Mont. 390, 143 P.3d 135 (citations omitted).

“Public disclosure is not required in cases where the demand for individual privacy clearly exceeds the public’s right to know.” *Yellowstone County*, ¶ 19. To determine whether an individual has a protected privacy interest, courts apply a two-part test: (1) whether a person has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. *Id.* at ¶ 20.

Statutes are presumed constitutional, and a party challenging a statute “bears the burden of proving, beyond a reasonable doubt, that the statute is unconstitutional, and any doubt must be resolved in favor of the statute.” *City of Great Falls v. Morris*, 2006 MT 93, ¶ 12, 332 Mont. 85, 134 P.3d 692.

Section 44-5-103(13)(e)(ii), MCA, defines “initial arrest records, including booking photographs” as “public criminal justice information.”

Section 44-5-102, MCA, provides: “The purpose of this chapter is to require the photographing and fingerprinting of persons under certain

circumstances, to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage, and dissemination.”

Section 44-5-104, MCA, provides: “Laws requiring disclosure of public records, writings, or information are not superseded by this chapter unless clearly inconsistent with its specific language. Laws requiring confidentiality of information contained in records or writings are not superseded by this chapter, which applies only when information may be disclosed consistent with such laws.”

Section 44-5-301, MCA, provides:

(1) There are no restrictions on the dissemination of public criminal justice information.

(2)

(a) All public criminal justice information is available from the department or the agency that is the source of the original documents and that is authorized to maintain the documents according to applicable law. These documents must be open, subject to the restrictions in this section, during the normal business hours of the agency. A reasonable charge may be made by a criminal justice agency for providing a copy of public criminal justice information.

(b)

(i) A criminal justice agency shall charge a clerking fee of \$100 for the release of a booking photograph prior to the termination of criminal proceedings against the individual depicted in the photograph. This fee may be waived in the case of extenuating circumstances.

(ii) If a person is convicted of an offense related to the arrest for which the booking photograph was taken, the criminal justice agency may not charge a clerking fee for the release of the booking photograph.”

The legislative hearings for the 2021 revision of § 44-5-301, MCA, indicate that the purpose of subsection (2)(b)(i) requiring the \$100 fee for the photo was to balance the constitutional interests of the public's right to know and the privacy right of the accused. Proponents of the bill explained that previously, most counties treated booking photos as public information. To make the rule uniform across Montana, the proposed (and ultimately implemented) § 44-5-103(13)(e)(ii), MCA, included booking photos in its definition of public criminal justice information. *Hearing on House Bill 665: Generally Revise Criminal Procedure Law Regarding Booking Photos and Public Info*, 67 Legis., Reg. Sess. (9:42:58–9:55:17) (Mar. 31, 2021)¹, (8:35:31–8:47:09) (Apr. 13, 2021)². Proponents also commented on privacy considerations for criminal defendants not yet convicted of a crime, stating that booking photos can be harmful to a person's reputation and livelihood, and that media coverage could potentially influence a jury pool. *Id.* Therefore, the \$100 fee for a non-convicted defendant was an attempt to balance these two conflicting constitutional rights.

B. Defendant's Request to Bar Dissemination of the Booking Photo

The Defendant argues that his privacy and dignity interests, and the privacy interests of his children, are implicated by possible dissemination of the booking photo and outweigh the public's right to know. The Defendant contends that because the disseminated photo would be publicly available on the internet, his "reputation, privacy, and dignity will forever be adversely affected." *Defendant's Response*, 5. The Defendant also argues the photo will

¹ House Judiciary audio available at: <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43188?agendaId=211786>

² Senate Judiciary audio available at: <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/43318?agendaId=215646>

affect the integrity of the jury pool because to laypeople, a booking photo implies a criminal conviction has occurred. *Id.* at 5–6. The Defendant contends that because this is a high-profile case that has garnered “substantial media coverage,” dissemination of the photo “risks inflaming public opinion and compromising the fairness of the judicial process.” *Id.* at 6.

Here, the Defendant has not raised a constitutional challenge to § 44-5-103(13)(e)(ii), MCA, or § 44-5-301(2)(b)(i), MCA. Rather, the Defendant urges the Court to use the “traditional balancing” of his right to privacy against the public’s right to know. *Defendant’s Response*, 2. However, while § 44-5-301, MCA, does not supersede constitutional rights, it does address this particular issue. The legislature attempted to balance the right to know against the right of privacy when it created these statutory provisions. The statute does not provide exceptions for high-profile cases. With regard to § 44-5-104, MCA, the Defendant does not point to a statute inconsistent with § 44-5-103(13)(e)(ii), MCA, or § 44-5-301(2)(b)(i), MCA.

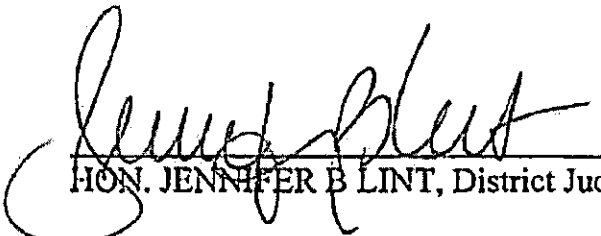
Generally, constitutional rights protect individuals from the actions of the state or its agents, not other individuals. Montana’s right of privacy specifically protects against state infringement of the right. *State v. Long*, 216 Mont. 65, 70, 700 P.2d 153, 156–57 (1985). To challenge the release of the booking photo under this statute on constitutional grounds, the Defendant must challenge the statute controlling the state’s release of information, as the constitution does not protect against concerns related to non-government actors like the media or individuals on the internet.

Furthermore, while the Defendant’s concerns regarding media influence on the jury pool are understandable, such concerns apply to many cases. These concerns are appropriately explored during the jury selection

process. The Defendant cites persuasive authority from other jurisdictions to support his argument. However, these cases are distinguishable from the present situation. In *United States v. McCoy*, mugshots were introduced as evidence during trial. 848 F.2d 743, 746 (6th Cir. 1988). In *In re Search of a Residence in Oakland*, the use of biometric features were at issue, such as fingerprints or a face scan to unlock a phone for government search purposes. 354 F.Supp.3d 1010, 1016–1018 (N.D. Cal. 2019). Montana law does recognize a defendant's privacy interest in a booking photo and balances that against the public right to know, as codified in § 44-5-301(2)(b)(i), MCA.

Therefore, insofar as the Defendant's request for a balancing analysis would circumvent the statute without raising a constitutional challenge, the Defendant's request is denied. Section 44-5-301(2)(b)(i), MCA controls this issue; therefore, the Defendant's booking photo can be disseminated only if a member of the public pays the \$100 booking fee. The Court's prior ruling that the booking photo not be placed on a publicly accessible website by the booking agency and/or State stands.

DATED this 3rd day of March, 2025.


HON. JENNIFER B LINT, District Judge

C: David Ortley and Meghann Paddock, Attorney General's Office
Colin Stephens, Defense Counsel

3/3/25/mx