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**Balancing Privacy Interests and Investigatory Interests
Legislative Analysis: House Bill 147, Daniel Zolnikov, R (HD 45)**

Hannah Wilson

BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A SEARCH WARRANT IS REQUIRED FOR A GOVERNMENT ENTITY TO ACCESS ANY ELECTRONIC DEVICE UNLESS INFORMED CONSENT IS OBTAINED OR A JUDICIALLY RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT EXISTS; PROVIDING THAT EVIDENCE OBTAINED IN VIOLATION IS NOT ADMISSIBLE; AND PROVIDING DEFINITIONS AND EXCEPTIONS."

I. INTRODUCTION

Privacy has been addressed in a string of United States Supreme Court cases incrementally increasing the scope of warrant-required searching. The Court held in 1969 that warrantless searches of spaces that do not pose a threat to an officer or are susceptible to the destruction of evidence are unjustifiable.¹ This ruling was expanded in 2009 to apply the warrant requirement to vehicle searches.² This string of cases culminated in the unanimous *Riley v. California*³ ruling that police officers generally cannot, without a warrant, search digital information on the cell phones seized from the defendants as incident to the defendants' arrests.⁴ Chief Justice Roberts wrote for the Court: "The answer to the question of what police must do before searching a cell phone seized incident to an arrest is . . . simple — get a warrant."⁵ This landmark decision highlighted the ability of the Fourth Amendment to adjust to the digital age and ushered in an era of "reasonableness balancing" to determine when a defendant's privacy interests are violated.⁶ In all, it is an impressive response to technological development that left the door ajar for state legislatures to expand the ruling as they see fit.⁷

Justice Alito concurred with the majority in *Riley*, but alluded to the expansion of privacy protections beyond those specified for cell phones in the federal system because "the nature of the electronic devices that ordinary Americans carry on their persons [will] continue to change."⁸

¹ *Chimel v. California*, 395 U.S. 752 (1969).

² *Arizona v. Gant*, 556 U.S. 332 (2009).

³ 134 S. Ct. 2473, 2477 (2014).

⁴ *Chimel*, 395 U.S. at 768; *United States v. Robinson*, 414 U.S. 208 (1973); *Arizona*, 556 U.S. at 332.

⁵ *Riley*, 134 S. Ct. at 2495.

⁶ 128 HARV. L. REV. 251 (2014).

⁷ *Riley*, 134 S. Ct. at 2497.

⁸ 134 S. Ct. at 2497.

Increasing numbers of Americans have integrated Fitbits, tablets, smart watches, computers, gaming systems, and smart TVs into their daily lives since the 2014 *Riley* decision.⁹ Have we reached the point in the modern world at which “we should not mechanically apply the rule used in the pre-digital era to the search of a cell phone?”¹⁰

In Montana, further investigation of information held on personal electronic devices is conducted through the use of “investigative subpoenas.”¹¹ Montana's Constitution affords citizens broader protection of their right to privacy than does the federal Constitution.¹² In general, infringement on privacy requires a “compelling state interest.”¹³ House Bill 147 (H.R. 147) of the 65th Montana Legislative Session seeks to heighten the privacy rights of Montanans regarding electronic devices.¹⁴ The bill is carried by third-term Daniel Zolnikov (R) of House District 45 in Billings, whose sponsorships generally tend to promote privacy legislation and policy.¹⁵ H.R. 147 would require search warrants for government entities to access data on electronic devices, rather than investigative subpoenas, on which the State currently relies.¹⁶ The bill allows for the same judicially-recognized exceptions to warrant requirements, and specifies exceptions for informed, affirmative consent, voluntarily disclosed data, life-threatening situations, or emergencies.¹⁷ At first blush, it is difficult to distinguish search warrants from investigative subpoenas, and what they mean for Montanans who increasingly depend on various electronic devices for safekeeping personal information.

II. WHAT’S THE DIFFERENCE? PROCEDURAL DISTINCTIONS BETWEEN WARRANTS AND INVESTIGATIVE SUBPOENAS

The common underlying balance between individual privacy rights and the State’s compelling interest to enforce criminal laws exists beneath both warrants and investigative subpoenas. It can be difficult to separate their functions in practice. The Montana Supreme Court has commented on the similarities between search warrants and investigative

⁹ *Hearing to Require Search Warrant for Government Access to Electronic Devices*, H.R. 147, 2017 Leg., 65th Sess. (Mont. 2008) (sponsorship by Daniel Zolnikov, House District 45) [hereinafter *Hearing*].

¹⁰ *Riley*, 134 S. Ct. at 2496.

¹¹ *Riley*, 134 S. Ct. at 2473.

¹² *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997).

¹³ MONT. CONST. ART. II §§ 10–11.

¹⁴ *Requiring Search Warrant for Government Access to Electronic Devices*, H.R. 147, 65th Leg. (Mont. 2017) [hereinafter H.R. 147].

¹⁵ *Daniel Zolnikov, R, H.D. 45*, THE 65TH MONTANA LEGISLATURE (May 14, 2014) (available at <https://perma.cc/XR8R-KRKF>).

¹⁶ H.R. 147, *supra* note 14.

¹⁷ *Id.*

subpoenas in the past. In *State v. Nelson*,¹⁸ search warrants and investigative subpoenas were nearly indistinguishable:

When an investigative subpoena seeks discovery of protected medical records or information, the subpoena can be likened to a search warrant which must satisfy the strictures of the Fourth Amendment and Article II, Section 11 of the Montana Constitution. A search warrant can only issue upon a showing of "probable cause."¹⁹

Ultimately, investigative subpoenas and search warrants serve the same purpose: they are tools intended to solicit and secure information that can be used as evidence.

A warrant requires probable cause under the Fourth Amendment, and may be applied for in criminal proceedings by peace officers, city or county attorneys, or the attorney general.²⁰ Probable cause requires particularity and a reasonable belief that a crime has been committed coupled with a reasonable belief that evidence of the crime is where the search will occur.²¹ The burden of proof is on the State to prove probable cause prior to the issuance of the warrant.²² Warrants are general investigative tools, allowing the holder to search the entire vicinity of the warrant-authorized area.²³ There is a wide latitude of searchable space for the investigator to explore when using a warrant. Warrants are already required for cell phone searches.²⁴

Unlike search warrants, investigative subpoenas are "animals of statute," and are not anchored in the Montana Constitution.²⁵ Investigative subpoenas may only be applied for by prosecutors.²⁶ They must be issued by a judge.²⁷ Generally, investigative subpoenas may be issued "when it appears upon the affidavit of the prosecutor that the administration of justice requires it to be issued."²⁸ In cases regarding "constitutionally protected material," they require the heightened standard of a "compelling state interest" (referenced in Montana's Constitution), in which the

¹⁸ 941 P.2d 441 at 449.

¹⁹ *Id.*

²⁰ MONT. CONST. ART. II § 10; MONT. CODE ANN. § 46-5-221 (2015).

²¹ *Id.*

²² MONT. CODE ANN. § 46-5-220.

²³ *Gant*, 556 U.S. at 332.

²⁴ *Riley*, 134 S. Ct. at 2477.

²⁵ Symposium: *Privacy in Cyberspace [Transcripts]*, 61 MONT. L. REV. 43, 55 (1999) [hereinafter *Symposium*]; MONT. CODE ANN. § 46-4-301.

²⁶ MONT. CODE ANN. § 46-4-301.

²⁷ *Id.*

²⁸ MONT. CODE ANN. § 46-4-301(2).

prosecutor must essentially demonstrate probable cause.²⁹ Therefore, if the subpoena concerns “constitutionally protected material,” the subpoena and a search warrant would essentially be equivalent tools.³⁰ Subpoenas are used in administrative, civil and criminal settings, therefore their applicability is much more expansive than search warrants, which are limited to criminal proceedings.³¹ They can be used to solicit information from third parties who might not necessarily be suspects in a crime that might be useful for law enforcement.³²

Given these differing procedural characteristics and the standard of proof required, it is well-established that it is more difficult to acquire a search warrant than an investigative subpoena.³³ This means that if both our electronic devices and our cell phones are being held by the State, the government will have easier access to the electronic devices through the use of a subpoena because there is currently no warrant requirement for electronic device searches in Montana. Thus, we arrive at our next questions: whether those electronic devices ought to be given the same privacy protection as cell phones, that is, the protection of a search warrant requirement, and what are the practical ramifications of heightening our privacy?

III. ANALYSIS

Our devices have immense storage capacity to record intimate data about our lives. Whether it’s your GPS location data, browsing history, or you’ve just been dumped by your soulmate,³⁴ Montanans have an ubiquitous interest in keeping private the contents of their electronic devices. Harkening back to the 1969 *Chimel v. California*³⁵ decision, if there is no imminent threat of destruction of evidence or officer safety, there is no basis for warrantless cell phone searches.³⁶ It logically follows that other electronic devices should be protected on the same basis – they are not subject to evidence destruction nor are they a threat to officer safety upon seizure. Whether this will be true in one year or twenty remains to be seen, but there are two sides to every coin.

One concern associated with the use of search warrants is their lack of mobility. Search warrants lose much of their authority if a

²⁹ MONT. CODE ANN. § 46-4-301(3); MONT. CONST. ART. II § 10.

³⁰ *Symposium, supra* note 25, at 57.

³¹ MONT. CODE ANN. § 46-4-301(2).

³² *Symposium, supra* note 25.

³³ *State v. Baldwin*, 789 P.2d 1215, 1220 (Mont. 1990).

³⁴ Madhumita Murgia, *Man Uses Fitbit to Show How a Break-up Affected his Heart Rate*, The Telegraph (Jan. 20, 2016) (*available at* <https://perma.cc/82M4-SQLU>).

³⁵ 395 U.S. 752 (1969).

³⁶ *Id.*

defendant leaves Montana.³⁷ A defendant's departure requires Montana law enforcement to cooperate with law enforcement in other states to gain access to the device of interest.³⁸ This could be a significant disadvantage to the warrant requirement in the eyes of constituents who value government accessibility to a defendant's information. However, this already happens for physical items; if a box, car, or backpack is transported to another state, law enforcement face similar challenges.

Opponents of H.R. 147 also claim that search warrants are more invasive than investigative subpoenas, because a search warrant allows the State to access and search an entire device, while an investigative subpoena's request for information is limited to a specified, narrow set of information that must be relevant or otherwise linked to the investigation.³⁹ Whether this is negated by the ease with which one may acquire an investigative subpoena is up for interpretation. In addition to these practical differences, search warrants and investigative subpoenas do not congruently impose the burden of proof on the parties.⁴⁰ Search warrants put the burden of proof on the State to prove probable cause.⁴¹ They allow the State to gain nearly unrestricted access to property without notice, which is advantageous for the prosecution.⁴² On the other hand, investigative subpoenas generally require the *defendant or suspect* to produce something with notice.⁴³ This means they are characteristically less invasive than search warrants, because they allow the defendant or suspect to object to or limit the scope of the subpoena.⁴⁴

H.R. 147 essentially equates cell phones to other personal electronic devices in terms of how much privacy they are granted.⁴⁵ It would require probable cause for all electronic device searches because the searches would be reliant on the issuance of a search warrant. Probable cause is already required for some forms of subpoenas,⁴⁶ and for those the subpoena functions identically to a search warrant. In passing H.R. 147, "code clutter" would arguably be reduced at the expense of changing the burden of proof only for "administration of justice" subpoenas for electronically stored information.⁴⁷ If the bill fails, prosecutors would benefit from a statute clarifying a more specific understanding of what exactly constitutes "constitutionally protected material,"⁴⁸ or there could

³⁷ *Hearing, supra* note 9 (Testimony by Montana County Attorneys Association).

³⁸ *Id.*

³⁹ MONT. CODE ANN. § 46-4-301(1); *State v. Bilant*, 36 P.3d 883, 889 (Mont. 2001).

⁴⁰ MONT. CODE ANN. § 46-4-301; MONT. CODE ANN. § 46-5-221.

⁴¹ MONT. CODE ANN. § 46-5-221; *Baldwin*, 789 P.2d at 1219.

⁴² *Baldwin*, 789 P.2d at 1219.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ H.R. 147, *supra* note 14.

⁴⁶ MONT. CODE ANN. § 46-4-301(3).

⁴⁷ MONT. CODE ANN. § 46-4-301(2).

⁴⁸ *Id.*

be a trend of law enforcement more frequently meeting the probable cause burden of proof so as to qualify for either a warrant or a subpoena. The Judiciary Committee was reminded that the probable cause burden is already mandated for cell phones, as they are subject to warrants prior to searching.⁴⁹

If electronic device searches become subject to the warrant requirement, the government will be faced with increasingly common warrant requests in criminal trials. Warrants are more time-consuming to issue, and have a higher burden of proof, which would result in fewer searches of electronic devices generally. An interesting implication for law enforcement subject to this bill is that there would no longer be an incentive to solicit information from third party or other non-suspect electronic devices because subpoenas are easier to acquire than warrants. There could be a refocus of information-gathering toward the defendant or suspect and effort directed toward strategically securing search warrants. More fundamentally, sources of information on personal electronic devices would be less desirable for prosecutors because of the warrant requirement and the State may prefer to reallocate its time and resources toward other non-digital sources of information by using investigative subpoenas.

An alternative to requiring probable cause and warrants for searches of electronic devices is to simply limit the scope of the investigative subpoena. If probable cause could be required for investigative subpoenas that do not necessarily concern constitutionally protected material, the goals of the legislation could be achieved without implicating search warrants. This option could potentially be even more advantageous to defendants or suspects because it imposes the higher burden of proof on the State (probable cause), while at the same time allowing the defendant or suspect the autonomy to produce the information with notice, or object to the issuance of the subpoena before the search occurs.⁵⁰

IV. CONCLUSION

Computers and digital devices have weakened the Fourth Amendment. Fitbits and smart TVs were not at the forefront of the minds of the Fourth Amendment drafters, and Justice Alito seemed to anticipate this development, forecasting that state legislatures would draw “reasonable distinctions based on categories of information or perhaps other variables.”⁵¹ He recognized that electronic surveillance has been primarily governed by statute, and legislatures are in the best position to

⁴⁹ *Hearing, supra* note 9 (Testimony by Montana County Attorneys Association).

⁵⁰ *Baldwin*, 789 P.2d at 1219.

⁵¹ *Riley*, 134 S. Ct. at 2497.

adapt rules relating to our changing electronic landscape.⁵² A unanimous United States Supreme Court, Representative Daniel Zolnikov, and H.R. 147 opponents all seem to agree on one thing: protecting the digital privacy rights of constituents is critical in sustaining the power of the Fourth Amendment. The division occurs in the method by which the privacy is protected – through search warrants or investigative subpoenas. The State seeks easier access to electronically stored information while defendants lean on Montana’s robust privacy protections to restrict access to their devices. There is a precarious point at which the investigatory interests of the State must be balanced with the privacy interests of the defendant, and this bill treads the line between those interests.

Which would you rather have standing between the State and your electronic devices? An investigative subpoena, or a search warrant? Phone your legislators and let them know what you think!

⁵² *Id.*