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**It's Good to be the Game Warden:
State v. Boyer and the Erosion of Privacy
Protection for Montana Sportsmen**

by

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NOTE

IT'S GOOD TO BE THE GAME WARDEN:

STATE V. BOYER AND THE EROSION OF PRIVACY PROTECTION FOR MONTANA SPORTSMEN

Malin J. Stearns*

I. INTRODUCTION

Montana is a land in which environmental protection and individual freedom are among the most cherished of values. The rights of Montanans to privacy and to a clean and healthful environment are considered so essential as to be guaranteed by the Montana Constitution.¹ And Montanans value not just protection, but responsible use of the environment for recreational activities such as hunting and fishing. Although the legislature and judiciary in Montana are constantly charged with the difficult task of invoking and balancing such values, seldom has the Montana Supreme Court so oddly and eagerly

* J.D. Candidate, The University of Montana School of Law, 2004. Special thanks to those who read this note and provided valuable suggestions, particularly Professor Margaret Tonan, Jessica Kobos, Edward LeClaire, and Hillary Wandler.

1. Mont. Const. art. II, § 3 (granting the right to a clean and healthful environment); Mont. Const. art. II, § 10 (granting the right to privacy).

approached these issues as in *State v. Boyer*.² The court was faced with the question of whether a game warden's approach and subsequent search of a fisherman's boat violated the fisherman's right to be free from unlawful searches and seizures.³ In an important decision with far-reaching implications for sportsmen, the legal community, and all Montana citizens, the court determined that Montana's constitution and statutory law allow game wardens almost unlimited power of search over those fishing on Montana's waterways.⁴ Unfortunately, the majority's holding rests upon a flawed and incomplete analysis that misinterprets Montana law and erodes privacy protection in Montana to near nonexistence in the context of boats on public waters.

This note will analyze how, in reviewing a game warden's search of a fisherman's boat, the Montana Supreme Court readjusted the legal interrelationship between wardens and fishermen, scaled back Montana's emerging jurisprudence of privacy protection, and improperly implicated the environmental protections of the Montana Constitution. This note will first provide a background of each major field in the legal landscape from which *Boyer* arose: the stop and search powers of law enforcement in Montana; the legal rights and duties of game wardens and Montana sportsmen; search and seizure issues in hunting and fishing contexts; and the law of environmental protection in Montana. With this background established, this note will describe *Boyer's* factual and procedural history and explain the Montana Supreme Court's holding and reasoning. Finally, the note will analyze the *Boyer* court's reasoning, address its erroneous application of Montana statutory and constitutional law, and explain how the *Boyer* holding may impact the privacy rights of fishermen and of all Montanans.

2. 2002 MT 33, 308 Mont. 276, 42 P.3d 771.

3. *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771; MONT. CONST. art. II, § 11 (granting the right to be free from unreasonable searches and seizures).

4. *Boyer*, ¶¶ 26, 33.

II. LEGAL BACKGROUND

A. Investigatory Stops in Montana

Montana's investigatory stop statute grants law enforcement officers the power to stop an individual for the purpose of investigating his conduct. The statute provides:

In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.⁵

The Montana Supreme Court first attempted to develop the legal requirements for an investigatory stop in *State v. Farabee*.⁶ In *Farabee*, police officers were waiting outside a home where they suspected drug activity was taking place. A person came out of the house, got into a car, and drove away.⁷ The officers noticed the car was missing a headlight and stopped the driver.⁸ In the car, driven by Farabee, the officers found bags of marijuana and drug paraphernalia.⁹ Farabee was charged with felony possession of dangerous drugs with intent to sell and misdemeanor possession of drug paraphernalia.¹⁰ He pled not guilty and moved to suppress evidence seized by the officers.¹¹ The trial court denied Farabee's motion and he subsequently pled guilty to the charges, reserving his right to appeal the denial of his motion to suppress.¹² On appeal, Farabee argued that the officers did not have the particularized suspicion required for an investigatory stop.¹³ The Montana Supreme Court upheld the conviction, holding the officers had the requisite particularized suspicion.¹⁴

In reaching this decision, the *Farabee* court solidified the

5. MONT. CODE ANN. § 46-5-401(1) (2003).

6. 2000 MT 265, 302 Mont. 29, 22 P.3d 175.

7. *Farabee*, ¶ 6.

8. *Id.* ¶ 6-7.

9. *Id.* ¶ 8.

10. *Id.* ¶ 9.

11. *Id.*

12. *State v. Farabee*, 2000 MT 265, ¶¶ 9-10, 302 Mont. 29, ¶¶ 9-10, 22 P.3d 175, ¶¶ 9-10.

13. *Id.* ¶ 13.

14. *Id.* ¶ 19.

investigatory stop requirements. The court held that “[t]o stop a person, an officer must have a particularized and objective basis for suspecting the particular person of criminal activity.”¹⁵ The court stated that to demonstrate particularized suspicion, the State must show: “(1) objective data from which an experienced police officer can make certain inferences; and (2) a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was witness to criminal activity.”¹⁶ Finally, the *Farabee* court held that whether “particularized suspicion exists to justify an investigative stop is a question of fact which is dependent upon the totality of the circumstances.”¹⁷

In *Grinde v. State*, the Montana Supreme Court explained that peace officers are privileged to make noncriminal, non-investigatory “welfare checks” of persons and vehicles, despite having no particularized suspicion of wrongdoing.¹⁸ The *Grinde* court reviewed the stop of a driver whom police thought had revved his engine and squealed his tires, but whom they saw only driving safely.¹⁹ The court found the stop illegal, and described the conditions in which a police officer may stop a vehicle.²⁰ Though this was an investigatory stop case, and stops for safety purposes were not at issue, the court stated that a peace officer can stop a vehicle or a person for safety purposes without particularized suspicion of wrongdoing.²¹

B. Search and Seizure

The Fourth Amendment to the United States Constitution grants the right to be free from unreasonable searches and seizures.²² The same right is provided by Montana's constitution.²³ In *Katz v. United States*, the United States Supreme Court reviewed what areas of interest are considered private, and thus constitutionally protected from illegal searches and seizures.²⁴ The *Katz* Court held that what a person seeks to

15. *Id.* ¶ 14.

16. *Id.*

17. *Id.*

18. 249 Mont. 77, 813 P.2d 473 (1991).

19. *Grinde*, 249 Mont. at 78, 813 P.2d at 474 (1991).

20. *Id.*, 249 Mont. at 81, 813 P.2d at 475-76.

21. *Id.*, 249 Mont. at 81, 813 P.2d at 476.

22. U.S. CONST. amend. IV.

23. MONT. CONST. art. II, § 11.

24. 389 U.S. 347 (1967).

keep private, even if conducted in public places, is protected under the Fourth Amendment.²⁵ The Court laid out what came to be known as the *Katz* test, used to determine whether a law enforcement agent's action was a search in the constitutional sense and therefore constitutionally protected. This test involves two inquiries: 1) does the person have a subjective expectation of privacy; and, 2) is that expectation reasonable?²⁶

Montana citizens are granted enhanced protection from unlawful searches and seizures by the explicit right to privacy in the Montana Constitution. Article II, section 10 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." The Montana Supreme Court has explicitly stated that Montana's right to privacy grants Montana citizens greater privacy rights than does the United States Constitution.²⁷ For example, in *State v. Siegal*, the Montana Supreme Court held that thermal imaging is a search in Montana, even though it was not at that time considered a search for purposes of the United States Constitution.²⁸

Once it is determined that an area of interest is private, constitutional requirements attach and the area cannot be searched without meeting these requirements. The general rule of the United States Constitution and the Montana Constitution is that warrantless searches and seizures are unlawful, but both the United States Supreme Court and the Montana Supreme Court have carved out exceptions to the warrant requirement. The Montana Supreme Court has recognized a "hot pursuit" exception to the warrant requirement,²⁹ a "search incident to arrest" exception,³⁰ and a "stop and frisk" exception, which means that the evidence is admissible if discovered from a protective frisk during a stop based on reasonable suspicion.³¹ Montana also recognizes a "plain view" exception to the warrant

25. *Id.* at 351.

26. *Id.* at 361.

27. *State v. Siegal*, 281 Mont. 250, 263, 934 P.2d 176, 183 (1977), *overruled by State v. Kuneff*, 1998 MT 287, 291 Mont. 474, 970 P.2d 556.

28. *See Siegal*, 281 Mont. at 263, 278, 934 P.2d at 183, 192. *See also Kylo v. United States*, 533 U.S. 27 (2001) (finding thermal imaging violative of the Fourth Amendment to the U.S. Constitution).

29. *State v. Dow*, 256 Mont. 126, 132, 844 P.2d 780, 784 (1992).

30. *State v. Graham*, 271 Mont. 510, 512, 898 P.2d 1206, 1208 (1995).

31. *State v. Dawson*, 1999 MT 171, ¶ 21, 295 Mont. 212, ¶ 21, 983 P.2d 916, ¶ 21.

requirement.³² In a plain view situation, when an officer is in a place where he has a legal right to be and he sees contraband, there is no search in the constitutional sense. Finally, an officer can conduct a warrantless search when presented with both exigent circumstances and probable cause that a crime is being or has been committed.³³

The Montana Supreme Court is frequently called upon to apply and interpret the warrant requirement and its exceptions, particularly under the enhanced privacy rights granted by the Montana Constitution. In *State v. Elison*, the Montana Supreme Court analyzed an automobile stop, originally spurred by a passenger in the officer's car who noticed the defendant, which ultimately resulted in a search of the defendant's car and the discovery of drugs and drug paraphernalia behind the car's seats.³⁴ The *Elison* court rejected an "automobile exception" to the warrant requirement, which would imply exigent circumstances into any search of a car, giving law enforcement officers the power to search a car without a warrant if they had probable cause.³⁵ The *Elison* court also held that individuals have a reasonable expectation of privacy in the items stowed behind their automobile seats.³⁶ The significance of the holding on this issue is that under the *Katz* test, when one has a reasonable expectation of privacy in something, it cannot be searched without either a warrant or a recognized exception. Because the officers in *Elison* had neither a warrant nor a recognized exception to the warrant requirement, the court held that the search was unlawful.³⁷

Elison is one of many Montana cases in which the Montana Supreme Court has demonstrated a proclivity for recognizing increased privacy rights based on the Montana Constitution. Another is *State v. Bullock*, in which the Montana Supreme Court reviewed a conviction for possession of an unlawfully killed elk found on fenced property by game wardens who had entered the property without a warrant or probable cause.³⁸

32. *State v. Loh*, 275 Mont. 460, 468, 914 P.2d 592, 597 (1996).

33. *State v. Wakeford*, 1998 MT 16, ¶ 30, 287 Mont. 220, ¶ 30, 953 P.2d 1065, ¶ 30.

34. *State v. Elison*, 2000 MT 288, ¶¶ 6-10, 302 Mont. 228, ¶¶ 6-10, 14 P.3d 456, ¶¶ 6-10.

35. *Id.* ¶ 54.

36. *Id.* ¶ 49.

37. *Id.* ¶ 58.

38. 272 Mont. 361, 901 P.2d 61 (1995).

Continuing the trend toward broader privacy protection in Montana, the Montana Supreme Court held that the wardens' entry onto the private land was illegal.³⁹ The court found that under the *Katz* test, the defendant had a reasonable expectation of privacy in a fenced yard.⁴⁰ With this holding, the court did away with the open fields doctrine, a former exception to the warrant requirement that allowed law enforcement officers to search in open fields around people's homes.⁴¹

However, the Montana Supreme Court has applied the broad privacy protection of *Bullock* only to areas that are clearly identified as private property by a fence, sign, or other indicator.⁴² In Montana, a homeowner cannot have an objectively reasonable expectation of privacy in unposted and unobstructed property leading to the front door of a home, including the porch.⁴³

C. *Rights and Duties of Game Wardens and Sport Fishermen*

The Montana legislature has explicitly defined the rights of sportsmen and the duties of game wardens. Those who hunt and fish are protected by the same constitutional rights as all Montanans, but the law regulates certain aspects of hunting and fishing. For example, Montana law makes it illegal to possess unlawfully killed game fish or other dead animals.⁴⁴ Montana law also mandates that all persons who hunt or fish have a license and exhibit the license to a game warden upon request.⁴⁵

The role of game wardens is also defined by the Montana legislature. To become a game warden, an individual must pass a test, meet certain departmental requirements, and take an oath to uphold the United States Constitution.⁴⁶ Game wardens are authorized to act as officers in enforcing laws and regulations.⁴⁷ Wardens have the power to arrest upon probable cause and to exercise other powers of peace officers.⁴⁸ Wardens

39. *Bullock*, 272 Mont. at 384-85, 901 P.2d at 75-76.

40. *Id.*

41. *Id.*

42. *Id.*

43. *State v. Hubbel*, 286 Mont. 200, 210, 951 P.2d 971, 977 (1997).

44. MONT. CODE ANN. § 87-3-112(2) (2003).

45. MONT. CODE ANN. § 87-2-109 (2003).

46. MONT. CODE ANN. § 87-1-501 (2003).

47. MONT. CODE ANN. § 23-1-122 (2003).

48. *Id.*

have a statutory duty to enforce laws and rules relating to the "protection, preservation, and propagation of game and fur-bearing animals, fish, and game birds."⁴⁹ Game wardens also have the duty to see that persons who hunt or fish on state lands have the requisite licenses.⁵⁰ Finally, wardens are charged with a duty to "assist in the protection, conservation, and propagation of fish."⁵¹

Game wardens also have unique authority in relation to Montana's search and seizure laws. Like all law enforcement officers, wardens have the power of search, seizure, and arrest.⁵² Montana law gives wardens the authority to inspect fish and game "at reasonable times and at any location other than a residence or dwelling."⁵³ The same section goes on to provide a duty to those who hunt and fish, stating that "[u]pon request therefor, all persons having in their possession any fish [and] game . . . shall exhibit the same and all thereof to the warden for such inspection."⁵⁴ Wardens also have a specific exception to the warrant requirement designed to allow them to search for evidence of fish and game violations.⁵⁵ The statute granting wardens enforcement powers allows a warden to:

. . . search, without a warrant, any tent not used as a residence, any boat, vehicle, box, locker, basket, creel, crate, game bag, or package, or their contents upon probable cause to believe that any fish and game law or department rule for the protection, conservation, or propagation of game, fish, birds, or fur-bearing animals has been violated.⁵⁶

Both wardens and sportsmen in Montana are thoroughly regulated by Montana laws and additional rules promulgated by the Department of Fish, Wildlife, and Parks. The wide scope of this regulation serves to protect Montana's environment and natural resources.

49. MONT. CODE ANN. § 87-1-502(2) (2003).

50. MONT. CODE ANN. § 87-1-502(3) (2003).

51. MONT. CODE ANN. § 87-1-502(4) (2003).

52. MONT. CODE ANN. § 87-1-502(7) (2003).

53. MONT. CODE ANN. § 87-1-502(6) (2003).

54. *Id.*

55. MONT. CODE ANN. § 87-1-506 (2003).

56. *Id.*

D. Search and Seizure Issues in Hunting and Fishing Contexts

1. Montana

The Montana Supreme Court has had limited opportunity to address Montana's laws of hunting and fishing. In *State v. Huebner*, the court held that hunters and anglers in Montana have a responsibility to know the laws pertaining to their sport.⁵⁷ The court addressed game wardens' duties in cases like *Bullock*, discussed above, and *State v. Romain*.⁵⁸ Like *Bullock*, *Romain* involved an illegal elk in a fenced yard. In *Romain*, game wardens received an anonymous tip about an illegally killed elk on defendant's property.⁵⁹ The wardens entered the property, found the elk, and issued citations to the defendant.⁶⁰ Using *Bullock* as authority, the court held that the defendant, whose property was lined with bushes and marked with "No Trespassing" signs, had a reasonable expectation of privacy on his property and that the game wardens had entered illegally.⁶¹ Therefore, the court held that the search in *Romain* was an invalid exercise of the wardens' duties.⁶²

The holdings of the Montana Supreme Court in cases like *Bullock*, *Huebner*, and *Romain* have done little to clarify the laws of hunting and fishing, since they have either addressed the duties of sportsmen, as in *Huebner*, or addressed the narrow issue of the right to privacy in residences and surrounding land. Until *Boyer*, the court had not had an opportunity to distinguish a warden's unique duties in hunting and fishing searches from those of other law enforcement officers in other types of searches. Thus, in *Boyer*, the court could turn only to Montana statutes, Montana cases on related issues, and case law from other jurisdictions.

2. Other Jurisdictions

Outside Montana, a number of courts have addressed issues of search and seizure in hunting and fishing contexts, using a

57. 252 Mont. 184, 188, 827 P.2d 1260, 1263 (1992).

58. 1999 MT 161, 295 Mont. 152, 983 P.2d 322.

59. *Romain*, ¶4.

60. *Id.* ¶¶ 6, 10.

61. *Id.* ¶¶ 18-19.

62. *Id.*

variety of analyses to handle issues like those presented in *Boyer*. In some states, like Tennessee, game wardens have nearly unlimited search rights over those who hunt and fish. In *Monroe v. State*, the Tennessee Supreme Court reviewed a game warden's search of a hunter's car.⁶³ The warden searched the car without the hunter's consent and found an illegal deer.⁶⁴ The Tennessee Supreme Court held that wardens are privileged to make searches without search warrants.⁶⁵ Justifying this conclusion, the *Monroe* court reasoned:

[H]e who undertakes to avail himself of a privilege granted by the State must do so on whatever terms and conditions the State chooses to annex to the exercise of the privilege, including the waiver of constitutional rights [T]he hunting of wild animals is a privilege granted by the State This being true, we see no reason why the state may not annex to this privilege any condition and limitation it sees fit. If the sportsman is unwilling to avail himself of the privilege accorded him, upon the terms and provisions prescribed, he may decline the invitation, but he cannot enjoy the benefits of this act without submitting to its burdens and restrictions.⁶⁶

Other states have a requirement similar to Montana's, that game wardens must have "probable cause" or "reason to believe"⁶⁷ that game laws are being violated before they can search. However, some states have interpreted this statute to require no real probable cause of a violation. Illinois allows warrantless searches when a game warden has reason to believe game laws are being violated. Yet, in *People v. Layton*, the Illinois Court of Appeals held that a warden can find reason to believe simply through evidence that a person is or has been hunting.⁶⁸ The court said probable cause to search derives from "indicia that the person in question is a hunter, immediately or very recently engaged in hunting."⁶⁹ And because hunting and fishing are licensed, the *Layton* court reasoned, warrantless searches of identifiable sportsmen are justified, since

63. 253 S.W.2d 734 (Tenn. 1952).

64. *Id.* at 734-35.

65. *Id.* at 735.

66. *Id.* at 735-36.

67. The phrases "reason to believe" and "probable cause" are synonymous in search contexts. See *People v. Layton*, 552 N.E.2d 1280, 1287 (Ill. App. Ct. 1990).

68. *Id.*

69. *Id.*

“licensing . . . may be deemed consent to some intrusions.”⁷⁰ Despite the stated requirement that a warden have a “reason to believe” game laws are being violated, Illinois effectively provides hunters no greater protection from search than does Tennessee. Illinois essentially grants wardens the right to search during any valid exercise of their duties, since hunting and fishing, rather than suspicious behavior, are the sources of the probable cause.

In Minnesota, which distinguishes between wardens’ search rights over homes and wardens’ rights to search other areas, a recent case clarified the policy that game wardens are indistinguishable from other law enforcement officers and must adhere to the same constitutional search requirements. In *State v. Larsen*, the Minnesota Court of Appeals addressed a conservation officer’s search of a fish house sitting on public waters.⁷¹ The officer’s search revealed both drug and game violations, and the inhabitant of the fish house moved to have the charges dismissed, arguing that the search was constitutionally invalid.⁷² The court held that even though it was on public waters, the fish house was a dwelling, and the defendant had a reasonable expectation of privacy in it; therefore, the search was unlawful.⁷³

Addressing the warden’s power to search, the *Larsen* court held that conservation officers are held to the same constitutional constraints as other law enforcement officers.⁷⁴ The court reasoned:

Nothing sets a violation of the game and fish laws apart from all other crimes. The state cannot argue with logic or reason that conservation officers have more leeway to enter, detain, search, and seize in pursuit of a citizen who may have an extra walleye, duck, pheasant, or extra fishing line than law enforcement officers in pursuit of a citizen alleged to have committed armed robbery or murder!⁷⁵

Based on this reasoning, the *Larsen* court ultimately held: [C]onservation officers have the same range of powers in the performance of their duties as all law enforcement officers, including: relying on personal observations, tips, and confidential

70. *Id.*

71. 637 N.W.2d 315 (Minn. Ct. App. 2001), *aff’d*, 650 N.W.2d 144 (Minn. 2002).

72. *Id.* at 317.

73. *Id.* at 319-21.

74. *Id.* at 325.

75. *Id.* at 322.

informants, stopping and briefly detaining a person because of an objective articulable suspicion of criminal activity, arresting for crimes committed in their visual presence, arresting for probable cause without a warrant, searching based upon a warrant, or searching without a warrant under an enumerated exception, and so on and so forth.⁷⁶

The *Larsen* court declined to read broad search authority into a Minnesota statute authorizing wardens to search "at reasonable times," holding that the word "reasonable" implied the final authority of the Minnesota Constitution and the United States Constitution.⁷⁷ The court concluded the legislature cannot override constitutional guarantees simply because of statutory license requirements.⁷⁸ Minnesota declined to give wardens the broad search powers granted them by states like Tennessee, Illinois, and now Montana, and instead prioritized citizens' privacy rights over game wardens' interests.

E. Constitutional Right to a Clean and Healthful Environment

The Montana Constitution forcefully proclaims Montanans' right to a clean and healthful environment. Article II, section 3 states: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment"⁷⁹ For many years after the adoption of this right with Montana's 1972 constitution, the Montana Supreme Court was reluctant to invoke it.

Recently however, the Montana Supreme Court has begun to address and interpret the right to a clean and healthful environment with increasing frequency. The court's early reluctance to apply constitutional environmental provisions has been overshadowed by more recent decisions implicating and interpreting the right to a clean and healthful environment. The most notable of these was the court's 1999 decision in *Montana Environmental Information Center v. Department of Environmental Quality* (hereinafter *MEIC*).⁸⁰ In *MEIC*, environmental groups challenged a Montana statute⁸¹ exempting

76. *Id.* at 323-24.

77. 637 N.W.2d at 324.

78. *Id.*

79. MONT. CONST. art. II, § 3.

80. 1999 MT 248, 296 Mont. 207, 988 P.2d 1236.

81. MONT. CODE ANN. § 75-5-317(2)(j) (1995).

certain types of water testing from non-degradation review.⁸² In an opinion authored by Justice Trieweiler, the court first determined that environmental groups have standing to challenge decisions that may impact the environment.⁸³

The court found that the right to a clean and healthful environment "is a fundamental right . . . and that any statute *or rule* which implicates that right must be strictly scrutinized . . . [emphasis in original]."⁸⁴ The court further held that the article II, section 3 right to a clean and healthful environment, and the duty to protect and improve the environment described in article IX, section 1 are complementary and must be applied "in tandem."⁸⁵ The plaintiff argued, and the court agreed, that the provisions should be applicable to potential environmental damage, the protections being both "anticipatory and preventative."⁸⁶ The court noted its intention to apply strict scrutiny to "state or private action which implicates either constitutional provision."⁸⁷ Although the court did not discuss whether the rights are self-executing, its interpretation of the constitutional right seems to indicate a belief that the right requires no further legislative action to be judicially enforceable.

In *Cape-France v. Peed*, the Montana Supreme Court built upon its interpretation in *MEIC* and further clarified the Montana Constitution's environmental provisions.⁸⁸ In particular, the *Cape-France* opinion made another clear statement of the court's willingness to invoke the right to a clean and healthful environment and explicitly expanded the mention made in *MEIC* of the private duty to protect and improve the environment.⁸⁹ The *Boyer* decision represents even further movement on the part of the court away from its original reluctance to apply the constitutional right to a clean and healthful environment, as the *Boyer* court invoked the right unnecessarily in order to justify a game warden's search.⁹⁰

82. 1999 MT 248, ¶ 17, 296 Mont. 207, ¶ 17, 988 P.2d 1236, ¶ 17.

83. *Id.* ¶ 45.

84. *Id.* ¶ 63.

85. *Id.* ¶ 65.

86. *Id.* ¶ 77.

87. *Id.* ¶ 64.

88. 2001 MT 139, 305 Mont. 513, 29 P.3d 1011.

89. *Id.* ¶¶ 31-37.

90. *Boyer*, ¶ 39.

III. FACTUAL AND PROCEDURAL HISTORY OF *STATE V. BOYER*

On Sunday, April 18, 1999, Game Warden Steve Jones was patrolling by boat on the Missouri River in Phillips County, Montana, when he observed a boat anchored in the river which appeared unoccupied.⁹¹ Jones approached the boat to determine whether it was unoccupied and to inquire as to the welfare of its possible passenger.⁹² When Jones got closer, he called out to determine whether the boat was occupied and, if so, whether the passenger was okay.⁹³ James William Boyer sat up in the boat and stated that he was okay and was just waking up from a nap.⁹⁴

Jones asked Boyer if he had been fishing and Boyer replied he had been fishing since Friday afternoon.⁹⁵ Jones asked to see Boyer's fishing license, and Boyer produced a valid Montana license.⁹⁶ Jones asked if Boyer had any fish and Boyer responded he did and that they were in the boat's live well.⁹⁷ When Jones asked Boyer to produce the catch, Boyer responded by suggesting that Jones inspect Boyer's catch later in the evening at a boat launch.⁹⁸ Jones rejected this suggestion, stating that he was going to be heading down river and that he needed to inspect the fish immediately.⁹⁹ From where he was sitting in his boat, Jones could not see into Boyer's live well.¹⁰⁰ Boyer removed eight fish from the live well and showed them to Jones.¹⁰¹ Boyer then hesitated and again suggested that Jones

91. Appellant's Brief at 2, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

92. Respondent's Brief at 2, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

93. Appellant's Brief at 3, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

94. *Id.*

95. Respondent's Brief at 4, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

96. *Id.*

97. Appellant's Brief at 5, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

98. Respondent's Brief at 4, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

99. Appellant's Brief at 5-6, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

100. Respondent's Brief at 5, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

101. *Id.* (The combined possession limit for sauger and walleye at this time was ten fish.)

inspect his remaining fish at a later time.¹⁰²

In order to inspect Boyer's catch for himself, Jones tied his boat onto Boyer's and stepped onto the transom, a platform attached to the back of Boyer's boat.¹⁰³ From the transom, Jones could see into Boyer's live well, where he observed additional fish in excess of the legal possession limit.¹⁰⁴ Jones determined that Boyer had a total of nineteen dead sauger and walleye in his possession.¹⁰⁵ Jones confiscated the excess fish and issued Boyer a notice to appear for possession of unlawfully killed game fish.¹⁰⁶

Boyer was convicted in justice court of possession of unlawfully killed game fish.¹⁰⁷ He appealed his conviction to the district court and filed a motion to suppress the evidence on the grounds that Jones had performed an illegal search of his boat.¹⁰⁸ The district court held that no search occurred as Boyer did not have a reasonable expectation of privacy over his boat on a public waterway.¹⁰⁹ The district court denied Boyer's motion to suppress, and Boyer appealed the decision to the Montana Supreme Court.¹¹⁰

IV. THE *BOYER* DECISION

The Montana Supreme Court affirmed the district court's denial of Boyer's motion to suppress, with four justices signing on to the majority opinion written by Justice Regnier. Justice Leaphart filed a specially concurring opinion, joined by Chief Justice Grey. Justices Nelson and Trieweiler each filed separate dissenting opinions.

The sole issue presented to the supreme court on appeal was whether the district court erred in denying Boyer's motion to

102. *Id.*

103. Appellant's Brief at 6, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

104. Respondent's Brief at 6, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

105. *Id.*

106. *Boyer*, ¶ 5.

107. *Id.* ¶ 6. Boyer was convicted of violating MONT. CODE ANN. § 87-3-112(2) (1999).

108. Respondent's Brief at 6, *Boyer*, 2002 MT 33, 308 Mont. 276, 42 P.3d 771 (No. 00-183).

109. *Boyer*, ¶ 6.

110. *Id.*

suppress.¹¹¹ Boyer argued that Jones initiated an illegal investigatory stop, unlawfully compelled production of his fishing license and catch, and performed an illegal search of his boat and live well.¹¹² The majority rejected each of these arguments, holding that the stop and the request to produce a valid fishing license and catch were both within the warden's rights, and that no search occurred.¹¹³

First, the majority held that Jones's stop of Boyer's boat was a legal welfare check rather than an investigatory stop.¹¹⁴ Boyer argued that Montana law requires a peace officer to have a particularized suspicion of wrongdoing before stopping a person or vehicle, and Jones had no particularized suspicion.¹¹⁵ The majority found this statute inapplicable, citing *Grinde v. State* for the proposition that "[a] police officer can legally stop a vehicle for a bona fide reason which is related to functions within his authority and duties."¹¹⁶ The majority reasoned because Jones testified that the boat appeared unoccupied and that he approached the boat to inquire into the safety of the boat's potential occupants, the stop was not really investigatory.¹¹⁷ The majority stated: "We would never seek to discourage wardens or other law enforcement officials from assisting persons in potential distress."¹¹⁸ The majority reasoned that Jones was acting within his authority as a peace officer by attempting to assist a person in potential distress.¹¹⁹ Since, by the court's reasoning, the stop was for safety purposes, it did not fall within the requirements of the investigatory stop statute and therefore the warden was not required to have a particularized suspicion of wrongdoing.¹²⁰

Boyer next contented that even if the court held Jones's initial stop of his boat was a lawful welfare check, his right to detain Boyer for safety reasons ended when he determined that Boyer was safe. Boyer reasoned that after ascertaining his

111. *Id.* ¶ 8.

112. *Id.* ¶ 9.

113. *Id.* ¶ 43.

114. *Id.* ¶ 13.

115. *Id.* ¶ 10; MONT. CODE ANN. § 46-5-401 (1999).

116. *Boyer*, ¶ 11, (citing *Grinde v. State*, 244 Mont. 77, 81, 813 P.3d 473, 476) (1991).

117. *Boyer*, ¶¶ 12-13.

118. *Id.* ¶ 13.

119. *Id.*

120. *Id.* ¶¶ 11-13.

safety, any further detention by Jones was an investigatory stop, so Jones needed a particularized suspicion of wrongdoing before asking Boyer to produce his fishing license.¹²¹ The majority rejected this argument, referring to Montana statutes providing that wardens shall ensure that persons who fish possess the requisite licenses¹²² and that those persons must display the licenses to wardens upon request.¹²³ The court stated: "Clearly, these statutes make no reference to a particularized suspicion requirement prior to requesting production of a game license."¹²⁴ The court declined to read into the statutes a requirement that a warden have a particularized suspicion of wrongdoing before requesting production of a license. Instead, the majority held that a warden may request a hunting or fishing license "when the circumstances reasonably indicate that an individual has been engaged in those activities."¹²⁵

Boyer then argued that Jones performed an illegal search by requesting production of his catch, since Jones did not have probable cause at the time to believe that Boyer had committed a violation.¹²⁶ Boyer's argument rested on the premise that a warden's request of a fisherman to produce a catch, without further physical inspection, constitutes a search. Wardens are granted authority to make such requests by section 87-1-502(6) of the Montana Code, which states:

A warden has the authority to inspect any and all fish, game and nongame birds, waterfowl, game animals, and fur-bearing animals at reasonable times and at any location other than a residence or dwelling. Upon request therefor, all persons having in their possession any fish, game and nongame birds, waterfowl, game animals, and fur-bearing animals shall exhibit the same and all thereof to the warden for such inspection.

Boyer argued the statute must be read in conjunction with section 87-1-506(1)(b) of the Montana Code which provides that a warden may perform a warrantless search of a boat, box, vehicle or other item used to stow game if the warden has probable cause to believe a fish and game law or rule has been

121. *Id.* ¶ 14.

122. *Id.* ¶ 15 (citing MONT. CODE ANN. § 87-1-502(3) (1999)).

123. *Id.* (citing MONT. CODE ANN. § 87-2-109 (1999)).

124. *Id.* ¶ 15.

125. *Id.* ¶ 16

126. *Id.* ¶ 17.

violated.¹²⁷ The court therefore had to determine whether a warden's request to a fisherman to exhibit fish qualified as a "search" of the type contemplated by the legislature in section 87-1-506(1), and thus required either a warrant or probable cause.

To determine whether a request qualifies as a search, the court looked to Montana law. The majority cited *State v. Scheetz* for the proposition that "an impermissible search and seizure only occurs within the meaning of article II, section 10 of the Montana Constitution when a reasonable expectation of privacy has been breached."¹²⁸ Boyer argued that by placing his fish in a closed live well, he demonstrated an actual and reasonable expectation of privacy. However, the majority analyzed neither the potential intrusiveness of such a request, nor whether Boyer had a reasonable expectation of privacy in his live well.

Rather, the majority stated, "[t]he precise inquiry, then, is whether Boyer is entitled to a reasonable expectation of privacy in the game fish he possessed."¹²⁹ The majority cited the Montana Constitution's mandate that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."¹³⁰ It reasoned that Boyer's proposition—that wardens must have probable cause of wrongdoing before requesting production of a fisherman's catch—"would virtually require wardens or third parties to have personal knowledge of fish and game violations prior to conducting the contemplated inspection."¹³¹ The court held that an expectation of privacy in game fish is not one society is willing to recognize as reasonable.¹³² The majority believed "[t]he inevitable result [of a contrary holding] would be the unnecessary depletion of Montana's wildlife and fish which we are all bound to protect and preserve."¹³³ Thus, the court found that since Boyer had no reasonable expectation of privacy

127. *Id.* ¶ 18; MONT. CODE ANN. § 87-1-506(1)(b) (2003).

128. *Boyer*, ¶ 18 (citing *State v. Scheetz*, 286 Mont. 41, 46, 950 P.2d 722, 724-25 (1997)). MONT. CONST. art. II, § 10 states, "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."

129. *Boyer*, ¶ 18.

130. MONT. CONST. art. IX, § 1(1).

131. *Boyer*, ¶ 23.

132. *Id.* ¶ 21.

133. *Id.* ¶ 23.

over his catch, the warden's request of Boyer to produce his catch could not constitute a search subject to constitutional protection, and therefore the probable cause requirement of section 87-1-506(1)(b) would not apply to such a request.¹³⁴

Boyer then argued that even if Jones's request to produce his catch could not be considered a search, Jones initiated an illegal search when he tied onto Boyer's boat and stepped onto the transom. Addressing this issue, the majority first held that since Jones restrained Boyer's freedom of movement when he tied the boats together, that action constituted an investigative stop.¹³⁵ Under Montana law, the warden needed particularized suspicion to conduct such a stop.¹³⁶ Particularized suspicion requires: (1) objective data from which an experienced police officer can make certain inferences; and (2) a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was witness to criminal activity.¹³⁷ The majority held that Boyer's reluctance to present his catch was objective data upon which Jones could reasonably have based a suspicion that Boyer was involved in wrongdoing.¹³⁸

Concluding that the stop was acceptable, the court next looked to whether Jones performed a search when he stepped onto the transom of Boyer's boat.¹³⁹ Comparing the transom of a boat to the porch of a house and the running board of a pickup truck, the majority held that Boyer did not have a reasonable expectation of privacy in the transom of his boat, so this was not a search in the constitutional sense.¹⁴⁰ Finally, the court revisited the discussion of whether an individual has a reasonable expectation of privacy in game fish.¹⁴¹ The court held that because of Montana's constitutional mandate to the state and citizens to preserve and maintain a clean environment, an individual cannot have an objectively reasonable expectation of privacy in game fish.¹⁴²

The majority concluded that the initial stop was a lawful

134. *Id.* ¶ 26.

135. *Id.* ¶ 28.

136. *Id.* ¶ 29; *Farabee*, ¶ 14.

137. *Boyer*, ¶ 29; *Farabee*, ¶ 14.

138. *Boyer*, ¶ 30.

139. *Id.* ¶ 32.

140. *Id.* ¶¶ 33-36.

141. *Id.* ¶ 39.

142. *Id.*

welfare check, that the request to see Boyer's license and catch was a lawful exercise of the warden's duties, and that the warden had particularized suspicion to conduct an investigative stop. The majority reasoned that Boyer had no reasonable expectation of privacy in his fish, so Jones did not conduct a search.¹⁴³ The majority held that since no search occurred, the District Court correctly denied Boyer's motion to suppress.¹⁴⁴

V. ANALYSIS

A. *Problems with the Boyer Court's Reasoning*

Faced with the challenge of balancing Montana's values of privacy and environmental protection, the court in *Boyer* prioritized wardens' inspection duties over the privacy rights of hunters and fishermen. Nonetheless, the holding of this case likely comes as little surprise and as even less of a disappointment to legitimate sportsmen. Wardens have different rights and duties from those of police officers, and they are given specific instructions from the legislature as to what their duties are and how to carry them out.¹⁴⁵ Sportsmen engaged in the acts of hunting and fishing know that licenses are required, that they are required to produce these licenses in certain circumstances, and that by hunting and fishing they subject themselves to the authority of game wardens to inspect and search areas that may be considered private in other contexts.¹⁴⁶ The *Boyer* court's conclusion may well be consistent with both Montana law and the expectations of most Montanans; however, its reasoning is consistent with neither. The court misapplied Montana statutes and misinterpreted its own precedent to reach the holding in *Boyer*.

In analyzing Jones's initial advance on Boyer's boat, the

143. *Id.* ¶ 42.

144. *Id.* ¶ 43.

145. See MONT. CODE ANN. § 23-1-122 (2003) (describing specific enforcement powers of park rangers and game wardens); see also MONT. CODE ANN. § 87-1-502 (2003) (specifying qualifications, powers, and duties of fish and game wardens); MONT. CODE ANN. § 87-1-506 (2003) (elaborating on enforcement powers of wardens).

146. See MONT. CODE ANN. § 87-2-109 (2003) (outlining licensing requirement for fishermen); see also MONT. CODE ANN. § 87-1-502(6) (2003) (requiring those who have fish and game in their possession to exhibit them to wardens for inspection); see also MONT. CODE ANN. § 87-1-506(1)(b) (2003) (authorizing wardens to search with probable cause that a fish and game law or rule has been violated).

majority correctly concluded that a warden has a right to approach boats and inquire after their occupants.¹⁴⁷ Interestingly, the court took great pains in this section to emphasize that Jones did not need particularized suspicion of wrongdoing because he was stopping the boat to inquire after Boyer's safety.¹⁴⁸ Although this reasoning is sound, the majority need not have conducted such a laborious analysis. Doing so overlooks a game warden's legal option to approach a boat simply because it is a boat. The mere appearance of hunting and fishing on state land gives a warden the right to approach a boat or a vehicle to exercise his statutory duties of license check and catch inspection.¹⁴⁹ Implicit in these duties is a game warden's right to approach a boat and inquire after the behavior of its passengers. The court's attempt to justify Jones's stop of Boyer as a welfare stop, though harmless, was thus unnecessary.

The court's analysis of Jones's request to see Boyer's license is a more appropriate application of the duties of game wardens.¹⁵⁰ Wardens have explicit statutory authority to request a fishing license, and Montana law makes it clear that neither probable cause nor particularized suspicion is necessary.¹⁵¹ Although in a different context the detention of a sportsman to check a license could be characterized as either an investigatory stop or a seizure, the majority properly observes that people fishing on state lands consent to such intrusions by virtue of their use of state resources and the license requirement.¹⁵² The exception is not one of policy, but one explicitly authorized by state law.¹⁵³ The holding reached in this section, that Jones had legal authority to request Boyer's license without probable cause or particularized suspicion, is consistent with Montana law and the facts of this case.

The majority's reasoning is more problematic in the next section, which addresses the issue of whether Jones's request to

147. *Boyer*, ¶ 13.

148. *Id.* ¶¶ 10-13.

149. See MONT. CODE ANN. § 87-2-109 (requiring fishermen to exhibit licenses to wardens for inspection). This statute impliedly permits wardens to approach those who appear to be fishing and request their licenses.

150. *Boyer*, ¶¶ 15-16.

151. MONT. CODE ANN. § 87-1-502(3), (6), (7) (2003).

152. MONT. CODE ANN. § 87-2-109 (2003).

153. *Id.*

search Boyer's catch constitutes a search.¹⁵⁴ Again, the majority correctly found that such a request does not qualify as an unlawful search because the request is permitted by state law.¹⁵⁵ Although the holding of this section is legally sound, the majority's analysis mischaracterizes the issue and improperly implicates an important provision of Montana's constitution.

To determine whether a request is a search, the court need only have noted that a simple request is not only authorized by state law, but involves no invasion of a protected area of interest. Not until the warden seeks to inspect a protected physical location do probable cause requirements attach. The plain language of Montana statutes dictates this difference. Section 87-1-502(6) grants wardens the authority to inspect fish and game at any location other than a residence (e.g., a boat).¹⁵⁶ After the warden requests or demands the production of the fish and game, the person possessing it must give it to the warden.¹⁵⁷ Then the warden can inspect what is produced. Section 502(6) grants wardens the authority to inspect the fish and game—not boxes, boats, and other storage areas. If, after this initial inspection, the warden has probable cause to believe that the person is not producing all fish and game, or that another fish and game rule is being violated, section 87-1-506(1) permits the warden to search boats, boxes, and other physical spaces without a warrant.¹⁵⁸ The inspection allowed by section 506(1) is a search that requires probable cause. The preliminary request authorized by section 502(6), and made by Jones of Boyer, is not a search.

Yet, the majority chose to address the issue of whether such a request is a search by mischaracterizing the area of interest that Boyer was seeking to keep private and improperly framing the issue, which resulted in an unnecessary and legally inaccurate analysis of the Montana Constitution. The majority cited the established principle that “[w]here no reasonable expectation of privacy exists, there is neither a ‘search’ nor a ‘seizure’.”¹⁵⁹ The majority did not, however, explain that this principle applies to *areas* in which an individual possesses a

154. *Boyer*, ¶¶ 17-26.

155. MONT. CODE ANN. § 87-1-502(6), (7) (2003).

156. MONT. CODE ANN. § 87-1-502(6) (2003).

157. *Id.*

158. MONT. CODE ANN. § 87-1-506 (1)(b) (2003).

159. *Boyer*, ¶ 20 (citing *State v. Bullock*, 272 Mont. 361, 377, 901 P.2d 61, 71 (1995)).

reasonable expectation of privacy rather than *items* in which a person has an expectation of privacy. Previous cases addressing reasonable expectation of privacy clearly indicate this distinction. The court in *Bullock* analyzed whether one can have a reasonable expectation of privacy in open fields, not whether one can have a reasonable expectation of privacy in elk.¹⁶⁰ In *Elison*, the court discussed whether an individual can have a reasonable expectation of privacy in items stored behind a car seat.¹⁶¹ The *Elison* court did not, of course, analyze whether the defendant had a reasonable expectation of privacy in drugs. If the focus is on *what* is found, rather than *where* it is found, the Montana Supreme Court could not find a reasonable expectation of privacy in any search cases that result in a conviction. One is typically not convicted of a crime in search cases unless the officer finds something illegal, whether it is excess fish, drugs, or a dead body. Fortunately, until *Boyer*, we could rest assured that the validity of a search would be evaluated based upon its process rather than its result.

But in *Boyer*, the court missed an opportunity to clearly hold that a request is not a search based on section 87-1-502(6), and instead framed the issue as “whether Boyer is entitled to a reasonable expectation of privacy in the game fish he possessed.”¹⁶² The court held that he was not, since having a reasonable expectation of privacy over game fish would violate Montana’s constitutional mandate that “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”¹⁶³ As discussed above, this provision was hardly brought up for decades after its adoption. It was unnecessarily implicated here. Improper reliance on a constitution dilutes both the integrity of the document and the power of its provisions. Courts should not implicate constitutional provisions unless necessary. No user of Montana’s land nor legal scholar will dispute that the right to a clean and healthful environment and the mandate to provide for environmental protection are important sections in Montana’s constitution, serving as necessary complements to many land use laws and regulations. But this is just the reason the

160. *Bullock*, 272 Mont. at 384, 901 P.2d at 75-76.

161. *State v. Elison*, 2000 MT 288, ¶ 49, 302 Mont. 228, 247, 14 P.3d 456, 469.

162. *Boyer*, ¶ 18.

163. *Id.* ¶¶ 21-22 (quoting MONT. CONST. art. IX, § 1(1)).

environmental provisions should be used sparingly and with only the greatest care.

The majority went further astray from constitutional principles when analyzing Jones's tying onto and then stepping onto Boyer's boat.¹⁶⁴ The court called this "the most important phase of our inquiry," and indeed it is, since this represented a turning point in the encounter between Jones and Boyer. Following Jones's request to see Boyer's license and catch, Boyer "opened the live well and reluctantly removed eight fish."¹⁶⁵ Boyer then "requested that Jones conduct the inspection at a later time."¹⁶⁶ Based upon these actions, Jones drifted to the end of Boyer's boat, tied on, stepped on Boyer's transom, peered into his live well, and discovered excess fish.¹⁶⁷

Jones's investigatory acts of tying and stepping onto Boyer's boat should have triggered constitutional search protections and the probable cause requirement of section 87-1-502(6) of the Montana Code. After Boyer refused to allow further inspection of his catch and live well, Jones's subsequent actions were investigatory, and therefore subject to constitutional requirements. The majority acknowledged this when analyzing Jones's *tying onto* Boyer's boat, but inappropriately abandoned this reasoning when analyzing Jones's *stepping onto* Boyer's boat. The majority held that tying onto Boyer's boat was an investigatory stop, for which the warden needed particularized suspicion.¹⁶⁸ Reasoning that Boyer's hesitancy and request that Jones inspect his catch at a later time constituted objective evidence to support reasonable suspicion, the majority held the stop permissible.¹⁶⁹

But did the warden have reasonable suspicion—or, as required by statute, probable cause—to then search Boyer? The court could have held that the objective evidence supporting Jones's reasonable suspicion that Boyer had violated game laws also gave Jones probable cause to search Boyer's boat. Or the

164. *Boyer*, ¶¶ 27-37.

165. *Id.* ¶ 27.

166. *Id.*

167. *Id.* ¶¶ 27, 37.

168. *Id.* ¶¶ 28-29 (citing MONT. CODE ANN. § 46-5-401 (2003) (describing particularized suspicion requirement for investigative stops)); *State v. Farabee*, 2000 MT 265, ¶ 14, 302 Mont. 29, ¶ 14, 22 P.3d 175, ¶ 14 (providing required factors for particularized suspicion).

169. *Boyer*, ¶ 30.

court could have followed Jones's own testimony at the suppression hearing that he did not have probable cause to search.¹⁷⁰ But instead, the court excused the warden from the probable cause requirement by reasoning that, following the investigatory stop, Jones's act of stepping from his boat onto Boyer's was just a casual, legal, and non-investigatory visit to an unprotected area of interest, like stepping onto someone's porch.¹⁷¹ The majority reasoned that the transom of a boat is analogous to the porch of a home.¹⁷² It follows that if a transom is like a porch, and there is no reasonable expectation of privacy over a porch, there can be no reasonable expectation of privacy over a transom. Once the warden was on the transom of Boyer's boat, the live well was in plain view, so the court found there was no search of Boyer's boat.¹⁷³

The problem with the court's analysis is that a transom and a porch are not analogous. The majority stated that a transom is an appendage to a boat used to approach the boat, just as a porch is an appendage to a house used to approach the house.¹⁷⁴ Since houses are more private than boats, the majority reasoned, and porches are not protected areas of interest, there can be no reasonable expectation of privacy over transoms. Common sense demonstrates the problems with this analysis. Porches are open to the public. They are visited daily by mail carriers, solicitors, neighbors, and strangers. Transoms on boats serve no such purpose. The door of a home keeps unwanted guests from entering. The water surrounding a boat is the boat's equivalent protection from outsiders. The porch is outside the buffer of the door. A transom is within the buffer of water. According to the majority's reasoning, police officers and strangers can legally step on a boat's transom as though stepping on the porch of a home, with no cause and no permission. The consequence of this error is that the majority makes a part of the boat—and anything that can be seen from that place—open to the public. This is analogous to saying that the front hall of a home is public, and anything that can be seen in plain view from the front hall is public as well. The effect is

170. *Id.* ¶ 31.

171. *Id.* ¶¶ 31-36.

172. *Id.* ¶ 34.

173. *Id.* ¶ 37.

174. *Id.* ¶ 34.

to make the entire boat a public, rather than private, area.

The court went on to make a more appropriate comparison between the transom of a boat and the running board or bumper of a pickup truck.¹⁷⁵ A running board is a much more reasonable analogue to a transom than that of a porch, and the court observed that stepping on running boards and bumpers happens "on numerous occasions throughout hunting season in Montana without hunters thinking that their privacy rights have been invaded."¹⁷⁶ Yet even if the act of stepping on a running board is both common and legal, the warden's authority in this area would still be subject to certain limits. For example, the warden would not have the authority to search for game in the glove compartment of a truck, or under the seats, or in the back of the cab, because probable cause would not extend to such locations. Wardens may have authority to search enclosed locations without warrants, but only in certain contexts and with probable cause.¹⁷⁷

The majority used its misguided attempts to define a transom as a public place to distinguish this case from *State v. Elison*.¹⁷⁸ The court distinguished *Boyer* from *Elison* using the second prong of the *Katz* test, which requires that, for an inspection to qualify as a search, the individual being searched must have an expectation of privacy that society is willing to recognize as objectively reasonable.¹⁷⁹ The *Boyer* court reasoned that the defendant in *Elison* had an objectively reasonable expectation of privacy over items stowed under a car seat, while *Boyer* did not have "an objectively reasonable expectation of privacy in game fish."¹⁸⁰ The true comparison would be between items stowed under a car seat and items stowed in a live well, or between drugs and fish. Were the court to have used one of these comparisons, *Elison* would support a finding that the *Boyer* search was unlawful. However, the court was able to distinguish the two cases because, as discussed above, the *Elison* court defined the reasonable expectation of privacy by the accouterments of place, not by the items found. By resting its

175. *Boyer*, ¶ 35.

176. *Id.* ¶ 41.

177. MONT. CODE ANN. § 87-1-506 (2003).

178. *Boyer*, ¶¶ 38-42.

179. *Id.* ¶ 20 (citing *State v. Bassett*, 1999 MT 109, ¶ 24, 294 Mont. 327, ¶ 24, 982 P.2d 410, ¶ 24). See *supra* text accompanying notes 24-26 for explanation of *Katz* test.

180. *Boyer*, ¶ 39.

holding in *Boyer* on the consistent use of such flawed reasoning, the Montana Supreme Court leaves itself and the property rights of all Montanans vulnerable to attack when closer cases arise.

B. Implications

The holding and reasoning of *Boyer* leave the privacy rights of all Montanans, but particularly those who hunt and fish, in a vulnerable state. Under *Boyer*, wardens have almost unlimited rights to search, since the court has demonstrated a willingness to excuse wardens from the requirement of probable cause, and the searches are justified by what the wardens find, not by where or how they conduct the search. Holding that privacy rights are suspended when a warden is fortunate enough to find illegal game fish opens the door for broad violations of privacy by game wardens. Similarly, opening the transom of a boat up as a public place exposes the boat to unexpected and unwanted intrusions. This should be of immediate concern to all those who hunt and fish on state land, since the privacy protection afforded them by Montana's constitution and statutes have been rendered toothless by the court's reasoning in *Boyer*.

However, this holding should also be of concern to others, since the *Boyer* standards for search and seizure duties of law enforcement officers and the rights of those they search can now be applied by extension into non-sport contexts, creating a slippery slope. In *Boyer*, the court upheld a search based on the legality of the items found, rather than the privacy of the area searched. While this certainly makes police work easier, it could open the door for widespread trampling of civil rights. Under a standard that focuses on the items found, law enforcement would never have to think twice before conducting a search—or at least would have to consider only whether the search was justified enough to avoid a civil lawsuit. If a search yielded nothing illegal, there would be no reason to charge the person with a crime. If a search resulted in a discovery of contraband, the search could be upheld regardless of its compliance with constitutional and statutory guidelines, since the court has now effectively held that one cannot have a legitimate expectation of privacy in contraband. Unconscious of its errors in reasoning, the Montana Supreme Court could easily apply aspects of this holding to other law enforcement officers and other protected areas of interest. In doing so, the court would undermine the privacy rights in the Montana Constitution and reverse the

court's previous tendency toward expanding our rights to privacy.

C. *A Better Standard for Searches by Game Wardens*

The Montana Supreme Court had in *Boyer*, and may have in future cases, an opportunity to clarify the permissible scope of searches by game wardens under Montana fish and game laws. Although the *Boyer* court's reasoning skirted the statutory requirement of probable cause, the Montana Supreme Court may someday revisit this issue and have an opportunity to incorporate the statutory requirement into game warden searches. If the court faces such an issue again, it should allow Montana's clear warden search statutes, requiring probable cause for game warden searches, to inform its decision.

The warden search statute allows a warden to search certain areas, like boats and coolers, upon probable cause that a game law or department rule is being violated.¹⁸¹ A warden's act of tying onto a fisherman's boat, stepping on his transom, and peering into his cooler falls squarely under the warden search statute. If faced again with an issue like that in *Boyer*, the court need only look to this statute to determine the parameters of a warden's search and recognize that inspections of all but the most exposed areas require either a warrant or probable cause.

Montana law has clearly defined the need for probable cause before conducting a search of enclosed areas like coolers on boats. The meaning of "probable cause" under the warden search statute may not be as clear, but the court has ample authority to clarify the meaning of this common term. If the court were inclined to give wardens broad authority, but still wished to acknowledge the probable cause requirement, it could use an analysis like that of the Illinois Supreme Court and hold that probable cause in hunting and fishing contexts is derived simply from evidence that the defendant has been hunting or fishing.¹⁸² The Illinois standard is preferable to the court's analysis in *Boyer*; it at least acknowledges the need for probable cause in this type of search. Yet the Illinois standard ignores the legislative intent to require actual evidence of a game law violation, renders the statutory requirement of probable cause

181. MONT. CODE ANN. § 87-1-506 (2003).

182. *People v. Layton*, 552 N.E.2d 1280, 1287 (Ill. App. 1990). See *supra* text accompanying notes 68-70.

superfluous, and—if used in Montana—would be inconsistent with the enhanced privacy protections ensured to Montana citizens by their state constitution.

An alternative standard, and a more appropriate guide for the Montana Supreme Court under Montana's privacy jurisprudence, would be the Minnesota Supreme Court's reasoning in *State v. Larsen*.¹⁸³ Under the Minnesota standard, licensing requirements do not allow for the suspension of constitutional rights and wardens are held to the same standards as other law enforcement officers. Following Minnesota's example, the Montana Supreme Court could require wardens to have probable cause or a search warrant before searching boats, vehicles, or enclosed spaces. This standard, and the *Larsen* court's reasoning, is more consistent with Montana's warden search statute and the Montana Supreme Court's previous privacy decisions.

If the Montana Supreme Court had followed the plain language of the warden search statute, Jones's inspection of Boyer's catch would qualify as a search. However, using the language of the statute and the Minnesota approach to probable cause, the court still could have found Jones's search to be legal. The court referred to Jones's testimony that he had particularized suspicion to stop Boyer based on his experience and his belief that Boyer was acting in a suspicious manner.¹⁸⁴ Analyzing this testimony, the court could have found that the same evidence supported probable cause to believe that Boyer had violated fish and game laws. If the court found that Jones had probable cause, the search would have been legal under the warden search statute. If there was no probable cause, the search violated Montana law, and any evidence obtained from it should have been suppressed.

VI. CONCLUSION

State v. Boyer is noteworthy to the Montana legal community both for its potential erosion of privacy protection and for its improper interpretation of Montana's constitution and statutes. In deciding *Boyer*, the Montana Supreme Court had a wealth of legal sources to turn to: Montana's ever-

183. 637 N.W.2d 315, 322-25 (Minn. Ct. App. 2001). See *supra* text accompanying notes 71-78.

184. *Boyer*, ¶ 30.

increasing body of case law invoking our constitutional right to privacy; the explicit statutes describing game wardens' rights and responsibilities; and extrajurisdictional case law addressing search issues in sporting situations. Collectively, one would expect these sources to have led the court to mandate suppression of the *Boyer* search. Yet it is possible that the *Boyer* decision was driven not by legal precedent, but by the complicated facts of the case. In the end, the court may have stretched the law to uphold a hard-working game warden's search of a fisherman who showed little respect for Montana's natural resources.

It remains to be seen whether *Boyer* turns out to be an anomalous case of suspended privacy protection in Montana or the start of a slippery slope toward searches justified by their end result and unnecessary implication of the Montana Constitution. Either way, *Boyer* is a classic illustration of the need for careful interpretation of legal precedent and the constitution. We all deserve to have our public lands protected and our law enforcement officers empowered to do their jobs, but we must be vigilant in demanding that protection does not come at the expense of our most vital individual rights.