

SB 40- STANDING MASTER TO ISSUE SEARCH WARRANTS

Testimonial Outline for Senate Judiciary Committee Hearing on January 20, 2011

Presented by: Larry Carver-Judith Basin County Justice of the Peace-24 years

Representing
Montana Magistrates Association
Central Vice President
Legislative Committee Chairman

Members of the Montana Magistrates Association voted unanimously to oppose HB 40.

Montana Magistrates Association represents all the Limited Court Judges
16 Justice Courts of Record
63 Justice Courts- 37 JP's act as both Justice and City Court Judges
9 Municipal Court Judges
26 City Court Judges-Some JPs act as multiple city court judges

Total Limited Court Judges 114, all of which meet the qualifications and training requirements outlined in 3-10-102 as is required by sb 40 for the proposed standing master.

Although not members of Montana Magistrates Association, District Court has 46 Judges for 22 Judicial Districts in the State of Montana.

160 Total judges with authority to issue search warrants personally and/or telephonic search warrants.

First of all recognize authority to issue search warrants pursuant to 46-5-220, Montana Code annotated which states:

46-5-220. Authority to issue search warrant. (1) A peace officer, the city or county attorney, or the attorney general may apply for a search warrant.

(2) A search warrant may be issued by:

(a) a city or municipal court judge or justice of the peace within the judge's geographical jurisdiction; or

(b) a district court judge within this state.

Authority granted to approximately 160 judges to issue Search Warrants already exists, not considering lawful substitutes or pro temp judges.

All limited court Judges have authority to issue search warrants in both Felony criminal matters and misdemeanor criminal matters within the judges geographical jurisdiction. Majority of search warrants issued in the State are issued by limited court judges.

All of which are allowed to issue warrants by telephone pursuant to 46-5-222, Montana Code Annotated:

Judges are elected and have always been expected to be available 24/7 to make probable cause determinations for issuance of search warrants, to make probable cause determinations to keep violators in jail (48 hour rule) and to issue Temporary Orders of Protection.

Provisions have already been put in place by the legislature to assure a Judge is always available to conduct business. If the local judge is absent or unable to act, statutes allow a Judge from a neighboring jurisdiction or a substitute judge to be appointed. 3-10-231, Montana Code Annotated sub (3) and (5) provides;

3-10-231. Circumstances in which acting justice called in -- by whom. (1) Whenever a justice of the peace is disqualified from acting in any action because of the application of the supreme court's rules on disqualification and substitution of judges, 3-1-803 and 3-1-805, the justice of the peace shall either transfer the action to another justice's court in the same county or call a justice from a neighboring county to preside.

(2) (a) The following requirements must be met to qualify a substitute for a justice of the peace:

(i) Within 30 days of taking office, a justice of the peace shall provide a list of persons who are qualified to hold court in the justice's place during a temporary absence when another justice or city judge is not available. The persons listed must be of good moral character and have community support, a sense of community standards, and a basic knowledge of court procedure.

(ii) The sitting justice of the peace shall request and obtain from the commission on courts of limited jurisdiction established by the supreme court a waiver of training for the substitutes.

(iii) Each person on the list, provided for in subsection (2)(a)(i), shall subscribe to the written oath of office as soon as possible after the person has received a waiver of training from the supreme court. The oath may be subscribed before any member of the board of county commissioners or before any other officer authorized to administer oaths.

(b) The list of qualified substitutes, the written oath, and the commission's written approval and waiver of training for those substitutes, pursuant to subsection (2)(a)(ii), must be filed with the county clerk as provided in 3-10-202.

(c) A county clerk may provide a current list of qualified and sworn substitutes to local law enforcement officers.

(3) Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent justice until the absent justice's return. If the justice is unable to call in a substitute, the county

commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).

(4) During the time when a justice of the peace is on vacation or attending a training session, another justice of the peace of the same county is authorized to handle matters that otherwise would be handled by the absent justice. When there is no other justice of the peace in the county, the justice of the peace may designate another person in the same manner as if the justice were sick or absent.

(5) A justice of the peace of any county may hold the court of any other justice of the peace at that justice's request.

Additionally a procedure is in place for appointing a substitute Judge if one of those neighboring Judges cannot be found under sub (2)(a)(i) of 3-10-231. (see above).

Practicality of a SB 40 does not make sense.

SB 40 bill allows for a special master to review applications in three ways: 1) in person, a procedure not suitable for most counties considering the expenses for travel across the state, 2) by the use of two way audio visual equipment, most counties have audio visual equipment in the District Courtroom in each county seat, however, not accessible by law enforcement when the court is not in session and the special master does not have authority to issue warrants when the court is in session, (section 1 of the bill) and 3) By telephone, the process that the majority of the counties will be limited to for applying for search warrants. Not all Search Warrants are eligible to be issued by telephone. Currently telephonic search warrants are issued on a limited basis as 46-5-222 sub 1 requires a showing of exigent circumstances to justify immediate issuance;

46-5-222. Search warrants issued by telephone. (1) Whenever an application for a search warrant is made by telephone, the applicant shall, in addition to the requirements contained in 46-5-221, state reasons to justify immediate issuance of a search warrant.

(2) All testimony given over the telephone that is intended to support an application for a search warrant must be given on oath or affirmation and must identify the person testifying. For the purpose of this section, the judge is authorized to administer an oath or affirmation by telephone.

(3) (a) Sworn or affirmed testimony given over the telephone must be electronically recorded by the judge or a peace officer on a recording device in the custody of the judge or peace officer when the application is made.

(b) If the recording is made by the judge, the recording must be retained in the court records and must be transcribed verbatim as soon as possible after the application is made. The recording must include the time and date it was recorded.

(c) If the recording is made by a peace officer, the recording must be transcribed verbatim as soon as possible after the application for the warrant is made. The recording must contain the time and date when it was recorded. The peace officer

making the recording shall, as soon as possible, provide the judge with the original recording and a transcription of the recording so that the judge may expeditiously verify the accuracy of the transcription. The original recording must be retained in the court records. The peace officer making the recording shall secure a copy of the recording and transcription of the recording in the same manner as other evidence is secured.

(4) If the judge approves a warrant over the telephone, the peace officer serving the warrant shall sign the search warrant in the officer's own name and in the judge's name. The peace officer signing the judge's name shall initial the judge's name indicating the signature was authorized by the judge but signed by the officer.

(5) Any search warrant issued by telephone must be signed by the issuing judge or the judge's successor as soon as possible after it has been issued.

Next, additional costs will be incurred because the recorded application must be retained in the court record and must be transcribed verbatim. Which court record? The court record in the 1st Judicial District or the court record in the County that the search was performed? Who pays the transcription cost? Expensive. Secondly, the judge still has to sign the original warrant.

Finally, the Fiscal Note indicates a cost of \$203,304.00 per year to be paid by State District Court Assumption funding. This cost divided by 56 counties equals \$3630.43.

This is not an issue of adjudicating a parking ticket or a speeding ticket. This is an issue of citizens being confident in elected officials to assure their constitutional right to be secure in their homes is upheld. Article II section 11 of the Montana Constitution provides,

Section 11. Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

All of the Judges listed under 46-5-220, MCA, who have authority to issue search warrants either have constitutional or statutory provisions to be elected by the citizens they serve.

Senate Bill 40 has no provisions for accountability to the standing master who may be issuing a search warrant. Officials with this type of authority need to be elected by the citizens of the local Judicial District, citizens of the effected counties and/or citizens of the effected cities. Elected Officials know the needs and problems of their communities

and the requirements to address them. Officials who don't will not be re-elected. Standing masters would be appointed by the First Judicial District and are not accountable to local citizens or local governments in the other 21 Judicial Districts or the 55 other counties they would be authorized to serve.

This Bill requires that a standing master meet the qualifications of a Justice of the Peace as is required by 3-10-202 and pursuant to sub (2), the training requirements of 3-1-1502 and 3-1-1503. We already have over 160 Judges that meet or exceed these qualifications that can issue search warrants in person and/or by telephone.

The Montana Magistrates Association requests that SB 40 NOT PASS.