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STATE V. ELLIS: PROTECTING THE RIGHTS OF PARENTS TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES

David Bigger*

I. INTRODUCTION

The Montana Supreme Court's opinion in State v. Ellis protected the rights of parents to be free from unreasonable searches and seizures, even when they are accused of a crime by their own minor children. Ellis solidified the protections of Article II, §§ 10 and 11 of the Montana Constitution by limiting the ability of children to consent to a legal search of their family's home. Most jurisdictions allow law enforcement to look at the totality of the circumstances to determine if the consenting child has sufficient ownership in, or access to, the area to be searched. However, in Ellis, the Montana Supreme Court clarified the per se rule from the Court's prior decision in State v. Schwarz, which denies minor children the authority to consent to a constitutional search of their parents' home. By confirming and clarifying Schwarz, Ellis protected the rights of parents in all areas within their homes, regardless of their relationship to the alleged minor victim, the location in their home of the alleged criminal behavior, and the nature of the alleged crime itself.

This note discusses the Montana Supreme Court's holding in State v. Ellis and the protection it provides parents in Montana. Because the Ellis Court based its holding on Schwarz, and because both parties sought to limit or expand Schwarz, Part II of this note describes Schwarz's factual background and reasoning. Part III sets forth the factual background and procedural posture of Ellis. Part IV describes the parties' appellate arguments, the Court's reasoning and holding, and the dissenting opinions. Part V describes three key reasons why Ellis is correct in limiting a minor child's ability to consent to a search. This essay concludes with a summary of Ellis's relevance, especially considering its protections of Montanans' right to be free from unreasonable warrantless searches and seizures.

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1. State v. Ellis, 210 P.3d 144 (Mont. 2009).
3. Ellis, 210 P.3d at 158-159.
5. Ellis, 210 P.3d at 158.
II. THE FOUNDATION: STATE V. SCHWARZ

In February 2004, Thompson Falls City Police Officer Chris Nichols learned that Jonathan Lowe, who was wanted by the police, was staying at the home of Kerry Schwarz. Officer Nichols and several other police officers drove to the Schwarz home to arrest Lowe. Schwarz was not home, and her 13-year-old daughter, Brittany, answered the door. The record is unclear whether the officers asked to enter the home or were invited in. Regardless, law enforcement entered the home upon Brittany’s consent. Police made no effort to contact Schwarz and did not have a search warrant. While searching for Lowe, Officer Nichols discovered drug paraphernalia inside Schwarz’s home. When Schwarz called to check on Brittany, she learned that police were inside her home. Schwarz rushed home, and upon her arrival, Officer Nichols arrested her and took her to the police station.

Schwarz moved to suppress the evidence obtained in her home, arguing the officers illegally searched her home in violation of Article II, §§ 10 and 11 of the Montana Constitution. The district court denied her motion, noting that the fact Brittany was home without her mother indicated her mother’s confidence in Brittany’s ability to “exercise good judgment.” Schwarz appealed.

The Montana Supreme Court reversed the district court’s denial of Schwarz’s motion to suppress. The Court analyzed Schwarz’s right to be secure against unreasonable searches and seizures using the heightened standard of the right to privacy under Article II, § 10 of the Montana Constitution. The Court reiterated the common law principle that “[w]arrantless searches conducted inside a home are per se unreasonable, subject only to a few specifically established and well-delineated exceptions.” One such exception is voluntary consent from a third party who possesses “common authority over or other sufficient relationship to the

7. Id.
8. Id.
9. Id.
10. Id.
11. Id. at 992.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
19. Id.
20. Id. at 990–991 (quoting State v. McLees, 994 P.2d 683 (Mont. 2000)).
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premises or effects sought to be inspected." However, common authority does not necessarily flow from property interest alone. Adequate consent rests on mutual use of the property by persons "generally having joint access or control for most purposes." For a third party in Montana to validly consent to a search and provide a warrant exception, he or she must have actual authority to consent based upon joint access and control, independent of ownership of the property.

As discussed in Schwarz, in many jurisdictions, the question of whether a third-party youth can provide legal consent is based on many factors, only one of which is age. These jurisdictions consider the totality of the circumstances to determine if a minor can validly consent to a legal search. The factors generally considered include age, common authority over the premises, mental maturity, and the ability to understand the circumstances.

The Schwarz Court, however, decided that although other courts have not adopted a per se rule that minors under 16 years of age lack authority to consent to a search, the Montana Supreme Court would not "march in step with [its] sister states and federal courts on the issue of minor consent." The Court held that a youth does not have authority on par with that of a parent over shared property and consequently does not have a sufficient relationship to the premises to consent to a constitutional search of a parent’s property. The Court agreed with the California Supreme Court that even if parents grant their children joint access and mutual use of the home, "parents normally retain control of the home, as well as the power to rescind the authority they have given." Parents do not surrender their privacy rights within their home to the discretion of their children; rather, "the child has privacy at the discretion of the parent.

The Schwarz Court concluded that Montana’s enhanced privacy rights require any waiver of consent to be narrowly construed and held that a youth under the age of 16 has no authority to relinquish a parent’s privacy.

21. Id. at 991 (emphasis in original) (quoting U.S. v. Matlock, 415 U.S. 164, 171 (1974)).
22. Id.
23. Id. (quoting Matlock, 415 U.S. at 171).
25. Id.
26. Id.
27. Id. (quoting State v. Will, 885 P.2d 715, 720 (Ore. 1994)).
28. Id. (quoting State v. Butz, 584 N.W.2d 449, 458 (Neb. 1998)).
29. Id. (quoting People v. Jacobs, 729 P.2d 757, 764 (Cal. 1987)).
31. Id.
32. Id. at 992 (quoting Jacobs, 729 P.2d at 763).
33. Id.
rights by consenting to a search. The Court thereby abandoned the totality-of-the-circumstances approach to child consent. Furthermore, the Court provided no exceptions to the per se rule. Importantly, Schwarz did not specifically discuss whether the per se rule would apply if the minor were the alleged victim of a crime committed by a parent in the family home. The Montana Supreme Court's holding in State v. Ellis addressed this potential exception and confirmed the per se rule established in Schwarz, applying it unequivocally to all minor children, regardless of the minor's status as an alleged victim.

III. FACTUAL AND PROCEDURAL BACKGROUND: STATE V. ELLIS

In October 2006 (less than five months after the Schwarz holding), S.S., the alleged victim of a sexual assault crime, met Butte police officer Dan Murphy at the door of her family home. Officer Murphy could tell S.S. was a teenager, but he could not determine immediately how old she was; like Brittany in Schwarz, S.S. was only 13 years old. S.S. invited Officer Murphy into the home. Officer Murphy entered, and S.S. told him that her father, Dr. William Ellis, had touched her inappropriately the previous evening. S.S. had been sick much of the prior week, and before she went to bed the night before, Ellis had given her some medication. According to S.S., she fell asleep but awoke when she felt Ellis expose her breasts and pull down her pajama shorts and underwear. S.S. pretended to sleep but opened her eyes slightly to confirm that it was Ellis touching her. S.S. told Officer Murphy that Ellis masturbated while fondling her breasts and vagina. When he was done, Ellis repositioned her clothing and left the room.

While waiting for a detective to arrive, Officer Murphy asked S.S. to show him where the alleged crime had occurred. S.S. took Officer Murphy to her upstairs bedroom. Officer Murphy asked S.S. what she had

34. Id.
35. Id.
36. Ellis, 210 P.3d at 158.
37. Id. at 146.
38. Id.; see also Schwarz, 136 P.3d at 990.
39. Ellis, 210 P.3d at 146.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
45. Ellis, 210 P.3d at 146.
46. Id.
47. Id.
been wearing, and she retrieved her pajamas from the side of her bed.\textsuperscript{48} She was still wearing the same underwear from the night before.\textsuperscript{49}

When Detective George Holland arrived, he guessed that S.S. was probably about 14 years old.\textsuperscript{50} While S.S. remained downstairs, Officer Murphy took Detective Holland upstairs to S.S.'s bedroom and showed him S.S.'s bedding and pajamas.\textsuperscript{51} Officer Murphy and Detective Holland returned to the downstairs living room when they heard a male voice.\textsuperscript{52} Ellis had returned home and was sitting next to S.S. on the couch; she was crying and visibly upset.\textsuperscript{53} Neither Officer Murphy nor Detective Holland asked for Ellis's permission to search the home, and Ellis did not object to the officers' presence in his home.\textsuperscript{54} Detective Holland asked Ellis to go outside with Officer Murphy.\textsuperscript{55} After Ellis had left the home, Detective Holland and another officer who had arrived at the scene took photographs of S.S.'s bedroom and began collecting evidence.\textsuperscript{56} They took possession of the sheets, comforter, and a blanket from S.S.'s bed.\textsuperscript{57} They also took her pajamas and had her change clothes so they could seize her underwear.\textsuperscript{58} The officers took S.S. to the station and gave her a receipt for the items collected.\textsuperscript{59} Detective Holland then had her fill out a form granting permission to search her room and belongings.\textsuperscript{60}

While at the station, Ellis told Officer Holland that he had given S.S. some medication to help her sleep and had gone into her bedroom to check on her; he denied any sexual contact.\textsuperscript{61} Ellis also told Detective Holland that S.S. had been disappearing after school, and he had caught her in numerous lies.\textsuperscript{62} Ellis told Detective Holland that he had grounded S.S. shortly before she called the police to report the alleged sexual assault.\textsuperscript{63} DNA evidence taken from S.S.'s bed revealed multiple semen samples con-
Ellis claimed the sheets must have been taken from the dirty-clothes hamper where they mixed with his own sheets and semen. The State filed an Information charging Ellis with sexual assault, a felony.

Ellis moved to suppress the evidence obtained during the search of his home based upon Schwartz, contending that S.S. lacked the capacity to consent to a search because she was less than 16 years old. Ellis argued the seizure of the items from his home violated both the United States and Montana Constitutions because the search was done without a warrant or a warrant exception. The State conceded that no exigent circumstances existed and that any evidence seized outside S.S.'s bedroom should be suppressed. However, the State maintained that S.S. had actual authority to consent based upon her constitutional right to the sanctity of her private room and, as a child victim, the per se rule set forth in Schwarz did not apply.

The district court determined that Schwarz controlled and therefore granted Ellis’s motion to suppress all evidence seized during the search. The district court held that S.S. did not have actual authority to consent to a search of any part of Ellis’s home and that police were required to obtain a warrant or Ellis’s consent before searching. The State appealed the district court’s order granting Ellis’s motion to suppress.

IV. State v. Ellis and the Application of the Schwarz Rule to a Child-Victim Case

A. The Parties' Appellate Arguments

On appeal, the State argued the present circumstances did not fall within the per se rule set forth in Schwarz. The officers were lawfully in Ellis’s home based on their duty to respond to a victim’s call. Further, the State contended Schwarz did not prevent the Court from holding that S.S. had common authority with Ellis over the personal items in her bedroom.

64. Id.
65. Id.
66. Id.
67. Id. at 147–148.
68. Ellis, 210 P.3d at 148.
69. Id.
70. Id. at 149.
71. Id. at 148.
72. Id.
73. Id.
74. Br. of Appellant at 13, Ellis, 210 P.3d 144.
75. Id.
76. Id. at 14.
The State argued the Schwarz rule was too rigid and should be replaced by a totality-of-the-circumstances approach, advocating for a return to the pre-Schwarz standard that is used by most courts to determine a minor victim's ability to consent. Additionally, the State argued Schwarz was not designed to protect a parent who commits a crime against a child in the child’s own bedroom, and the Court should carve out an exception to the Schwarz rule for child victims.

Ellis argued Schwarz was clear and the State did not provide any legitimate reason to deviate from the per se rule. Additionally, Ellis contended the State's position inherently presumed a defendant's guilt by arguing for the inapplicability of Schwarz when a child alleges his or her parent has committed the crime. Ellis argued children cannot create authority to consent based on varying circumstances and unsubstantiated guilt. Aside from this point, Ellis argued that "children cannot possess [sic] a privacy interest in their parents' home separate from or contrary to the privacy rights of their parents."

B. The Majority's Decision and Reasoning

The majority in Ellis affirmed the district court's order granting Ellis's motion to suppress the evidence retrieved in the search of his home based upon the Schwarz holding and the specific protections of the Montana and United States Constitutions. The Montana Constitution affords Montana citizens express privacy protections exceeding those of the United States Constitution: "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." As the Ellis Court recognized, the Fourth Amendment of the United States Constitution and Article II, § 11 of the Montana Constitution protect the right of Montanans to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

The majority reiterated that warrantless searches in Montana are per se unreasonable when conducted inside a home, "subject only to a few specific-
cally established and well-delineated exceptions." When consent to a search is freely and voluntarily given, the Court noted that Montana recognizes a warrant exception. But consent is not legally valid unless the consenting party has actual legal authority to consent. Following Schwarz, Ellis held that a youth under the age of 16 does not have legal authority equal to that of a parent over shared or common property, and a youth cannot consent to a search of that property.

The Court determined that the State overlooked the underlying principles in Schwarz when arguing for an exception to the per se rule. The Court reaffirmed that "the parent retains control of the home and the right to rescind the authority given to the child." Minor children do not have legal authority to consent to a search, and their own privacy is at the discretion of the parent. The Court reasoned that the focus was not on the broad rights of S.S. but on Ellis's specific, enumerated right to have control and security in his own home. By allowing law enforcement to enter the home and S.S.'s bedroom, "S.S. was not asserting her own constitutional rights; rather, she was attempting to waive her father's constitutional right to privacy."

According to the majority opinion, "the police had every opportunity to obtain a warrant to [search and] seize evidence within Ellis's home; they simply chose not to. . . . [T]hey chose the expedient route over the constitutional one." The Court refused to create "fact-oriented exceptions to the warrant requirement to justify a palatable result in the hard case . . . by refusing to hold the police to the clearly defined rule that, especially in the home, warrantless searches and seizures are per se unreasonable." The majority determined that Ellis's rights were violated when police officers searched Ellis's home without his permission and retrieved items from S.S.'s room. Based upon this reasoning, the Ellis Court reaffirmed the Schwarz holding that children under the age of 16 do not have authority

86. Id. at 149 (quoting State v. Hubbel, 951 P.2d 971, 979 (Mont. 1997)).
87. Id. (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973)).
88. Id. at 150 (quoting McLees, 994 P.2d at 691)).
89. Id.
90. Id. at 151.
91. Ellis, 210 P.3d at 151.
92. Id.
93. Id.
94. Id.
95. Id. at 158.
96. Id. at 159.
97. Ellis, 210 P.3d at 156.
equal to that of a parent regarding their property and, therefore, are incapable of consenting to a search. 98

The majority also determined that any potential child-victim exception to the Schwarz rule had already been addressed. 99 According to the majority, the Court had considered a child-victim exception in the Schwarz opinion when it cited Abdella v. O'Toole 100 and used Abdella to set forth (and counter) the prevailing opinion in most jurisdictions that there is no per se rule that minors lack authority to consent. 101 The Ellis Court determined that because Abdella based its holding on two cases involving child victims, and Schwarz disagreed with the application of the totality-of-the-circumstances approach used in Abdella, the Schwarz Court had addressed a child-victim exception to the per se rule. 102 The Ellis Court refused to readdress the matter and held that Schwarz did not allow for any child-victim exception to the per se rule. 103

C. The Dissenting Opinions

Justice Leaphart, Justice Morris, and Judge Richard Simonton (sitting in for Justice Rice) disagreed with the majority’s decision in Ellis. 104 Justice Leaphart 105 wrote the primary dissent. He argued that while Schwarz found “the child has privacy at the discretion of the parent,” a person who voluntarily relinquishes property also relinquishes any expectation of privacy in that property and abandons his rights to the property. 106 According to Justice Leaphart, Ellis “voluntarily relinquished any expectation of privacy in [the items seized] when he gave them to S.S. to wear and sleep in,” and he could not therefore reasonably expect privacy in those items and had no claim of a constitutional violation. 107

Justice Leaphart also argued that because S.S. enjoyed all fundamental constitutional rights as a minor, the majority chose the rights of Ellis over those of S.S. 108 Justice Leaphart further contended that S.S. was exercising

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98. Id. at 150. The Court found persuasive authority for setting the limit at age 16 in Montana Code Annotated § 41-5-331(2) (2009), which provides that a minor under the age of 16 cannot waive his or her own right against self-incrimination without parental permission or advice of counsel. Id.; see also Schwarz, 136 P.3d at 992.

99. Ellis, 210 P.3d at 152.


101. Ellis, 210 P.3d at 152.

102. Id.

103. Id.

104. Id. at 144.

105. Interestingly, Justice Leaphart also wrote the majority opinion in Schwarz setting forth the per se rule for which he is now seeking an exception. Schwarz, 136 P.3d at 990.

106. Ellis, 210 P.3d at 160 (Leaphart, J., dissenting) (quoting Schwarz, 136 P.3d at 992).

107. Id.

108. Id.
her own right to defend herself and maintain individual dignity.\textsuperscript{109} Based on these reasons, Justice Leaphart believed there should be a victim exception to the \textit{per se} rule in \textit{Schwarz}.\textsuperscript{110} While the majority found that \textit{Schwarz} addressed the issue of a victim exception to the general rule by citing \textit{Abdella}, Justice Leaphart’s dissent argued that \textit{Schwarz} only peripherally mentioned \textit{Abdella} to refute the notion that there is no \textit{per se} rule.\textsuperscript{111} He pointed out that \textit{Schwarz} did not discuss the facts of \textit{Abdella} and there was clearly room to carve out a victim exception to the rule.\textsuperscript{112} Justice Morris joined Justice Leaphart’s dissent.\textsuperscript{113}

District Court Judge Richard Simonton, sitting in for Justice Rice, also dissented. Judge Simonton added to Justice Leaphart’s dissent by arguing that \textit{Schwarz} should be abandoned entirely.\textsuperscript{114} Judge Simonton argued the Court should return to a pre-\textit{Schwarz} totality-of-the-circumstances approach so all Montanans could be afforded equal protection under the law.\textsuperscript{115} The goal of the totality-of-the-circumstances approach, as stated by Judge Simonton, was to “determine whether there is a sufficient relationship between the person providing consent and the area to be searched,” and, therefore, sufficient ownership in the property to create actual authority.\textsuperscript{116} According to Judge Simonton, the \textit{Schwarz} decision was an anomaly that the Court should not further entrench.\textsuperscript{117}

\textbf{V. Analysis}

\textit{State v. Ellis} was correctly decided for three reasons. First, \textit{Schwarz} clearly controlled and S.S. did not have legal authority to consent to a search of Ellis’s home because the Court was unequivocal in creating a \textit{per se} rule. Second, if the Court were to create an exception to the \textit{per se} rule, the exception would invalidate the intent of the rule, and parents would be denied their right to privacy based upon the whims of their minor children or the arbitrary decisions of law enforcement. Finally, the State based its argument on the unproven guilt of Ellis and made no sustainable argument why \textit{Schwarz} should be changed or adapted to the circumstances in \textit{Ellis} for a parent who is presumed innocent.

\begin{itemize}
  \item \textsuperscript{109} \textit{Id.} at 161.
  \item \textsuperscript{110} \textit{Id.}
  \item \textsuperscript{111} \textit{Id.}
  \item \textsuperscript{112} \textit{Ellis}, 210 P.3d at 161 (Leaphart, J., dissenting).
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.} (Simonton, J., dissenting).
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} at 162 (referencing \textit{McLees}, 994 P.2d at 686–687).
  \item \textsuperscript{117} \textit{Id.} at 161–162.
\end{itemize}
A. Schwarz controlled and S.S. did not have authority to consent to a search of Ellis's home.

In light of Montana's enhanced privacy rights and the narrowness by which any exception to a warrant requirement must be construed, Ellis correctly determined that the Schwarz holding controlled in this case and Ellis's rights were violated when law enforcement searched his home at the consent of his minor child. The Schwarz Court did not allow for any exceptions when it specifically held: "[W]e now adopt a per se rule that a youth under the age of 16 lacks the capacity or the authority to consent to a search of her parents' home." The Ellis Court simply reaffirmed this per se rule. The issue in Schwarz was a narrow question of whether a minor had actual authority to consent to a search, and the answer to the question was an unequivocal "no." The Ellis decision, following the reasoning applied in Schwarz, determined it was "obvious" that a youth and a parent do not share mutual use of the property to the same extent as spouses or cohabiting adults. Even though S.S. was the alleged victim of a crime, the same reasoning applied.

One of the weaker aspects of the majority's opinion was the contention that the Schwarz Court considered and rejected a child-victim exception when it cited Abdella. In Abdella, a federal district court in Connecticut addressed the issue of whether a minor can consent to a search of her parents' home. Law enforcement entered the Abdella home after receiving consent from the Abdellas' ten-year-old daughter to search the home for her brother, who had allegedly been involved in an underage beer theft. Law enforcement did not find any evidence of a crime in the home, but the Abdella family claimed they suffered "emotional trauma and social ostracization" because of the event and brought a civil suit against the police officers. The court in Abdella discussed the prevailing rule "that minority does not per se preclude a factual finding of actual or apparent authority." The court briefly mentioned that whether or not a child is a victim of crime may be a factor to be considered in the totality-of-the-circumstances test for whether the child had authority to consent. However, there

118. Ellis, 210 P.3d at 150 (majority).
119. Schwarz, 136 P.3d at 992.
120. Ellis, 210 P.3d at 150.
121. Schwarz, 136 P.3d at 992.
122. Ellis, 210 P.3d at 150 (quoting Schwarz, 136 P.3d at 992).
123. Id. at 152.
125. Id. at 131–133.
126. Id. at 135.
was no child victim in the case and a victim analysis did not factor into the court’s holding.127

The Schwarz Court briefly mentioned Abdella for the general recognition that, in the majority of jurisdictions, there is no per se rule precluding minor authority to consent.128 The Schwarz Court then chose to distinguish Montana law and create a per se rule contrary to the trend in the majority of jurisdictions.129 In Ellis, the majority argued that the child-victim exception was addressed and dismissed in Schwarz by this peripheral reference to Abdella.130 Justice Nelson and the majority believed the State, in arguing for a victim exception, “ignore[d] the multidimensional analysis in Schwarz” because the State did not immediately realize that the peripheral reference to Abdella precluded an argument for such an exception in Montana.131 Justice Leaphart’s dissent in Ellis correctly highlighted the inapplicability of Abdella in reaching the Schwarz Court’s final decision.

It is unreasonable for the Court to believe that simply citing the majority rule from a federal case out of Connecticut and then disagreeing with that majority rule indicates that the Court intended a full consideration of every aspect of the case. While Abdella did tangentially discuss a victim exception, and the Schwarz Court referenced Abdella for the general proposition that many courts have not created a per se rule, the Schwarz Court did not mention any consideration for child victims in its dicta or holding.132 Justice Leaphart rightly pointed out that “to suggest that by citing to Abdella in Schwarz this Court has considered and rejected a victim’s exception to the per se rule, strains the holding in Schwarz beyond recognition.”133

However, even without Abdella and its brief reference to a victim exception, the language of Schwarz clearly did not carve out limitations based upon specific circumstances; Schwarz addressed a simple question of capacity regardless of circumstance.134 The Ellis Court unnecessarily stretched this aspect of Schwarz to find some precedent for its denial of a child-victim exception. Justice Leaphart’s dissent addressing the inapplicability of Abdella was well-reasoned but ultimately immaterial to the final, clear holding of Schwarz.

The Schwarz holding controlled because the rights of minors are not identical to those of adults in all situations. Judge Simonton argued that by

127. Id.
128. Schwarz, 136 P.3d at 991.
129. Id. at 991–992.
130. Ellis, 210 P.3d at 152.
131. Id.
132. Id.
133. Id. at 161 (Leaphart, J., dissenting).
134. Schwarz, 136 P.3d at 992.
following *Schwarz*, the *Ellis* Court perpetuated bad law because "[t]he Montana Constitution demands that all individuals be provided equal protection under the law and secures to them all fundamental rights whether they be thirteen or sixteen years of age." 135 In most jurisdictions, minors have broad constitutional rights136 and are not excluded from constitutional protections merely because they are minors.137 Still, many courts allow for differences in the treatment of minor children with regard to the application of those constitutional rights, reasoning:

The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. . . . The peculiar vulnerability of children, their inability to make critical decisions in an informed and mature manner, and the importance of the parental role in child rearing are all reasons why the constitutional rights cannot be equated to those of adults.138

There is no question the Montana Constitution provides protections to minor children. Article II, § 15 of the Montana Constitution expressly states: "The rights of persons under 18 years of age shall include, but not be limited to, all the fundamental rights of this Article unless specifically precluded by laws which enhance the protection of such persons." Still, there is no constitutional right to waiver under the Montana Constitution, and S.S.’s rights to protection by the State did not conflict with Ellis’s right to privacy. The rights of both parties would have been protected if the police officers had simply obtained a search warrant.

While minority status does not limit constitutional protections, minority is a legal disability that precludes a person (an “infant”) from being fully capable in the eyes of the law.139 Based upon Montana’s heightened right to privacy as set forth in Article II, § 10 of the Montana Constitution, in order for any person to validly consent to a search and waive constitutionally protected rights, that person must possess actual common authority over the items or area to be searched.140 Such authority does not rest upon a mere property interest but upon “joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection *in his own right* and that the others have assumed the risk that one of their number might permit the common area to be searched.”141 The question of a party’s ability to waive a constitutional

141. *Matlock*, 415 U.S. at 172 n. 7 (emphasis added); see also *State v. Lacey*, 204 P.3d 1192, 1203 (Mont. 2009).
protection and allow a warrantless search is one of joint control, and parents retain control of the home with regard to their minor children.\textsuperscript{142} This is not the case in situations with adult roommates or spouses who share control of most areas\textsuperscript{143} who, in Montana, can grant access to areas over which they have actual authority.\textsuperscript{144} The Wisconsin Supreme Court discussed this principle as follows:

A minor child who lives in the same home with his or her parents or guardians obviously shares use of the property with the parents or guardians to some extent. However, it should also be obvious that a child generally does not share mutual use of the property with a parent to the same extent that such use might be shared between spouses or between cohabiting adults. In general, a parent’s interest in the property will be superior to that of the child, and the child will generally not have the equivalent authority of a parent or guardian to consent to a search of the premises.\textsuperscript{145}

The Montana Supreme Court has stated: “[A]llowing warrantless searches of an individual’s home without the consent of someone authorized to give it, absent any exigent circumstances, would fly in the face of [the Montana Constitution’s] protection. . . . [T]he individual’s ‘privacy’ is still invaded when the police search his or her belongings without permission.”\textsuperscript{146} A minor lacks authority to consent and therefore cannot waive a parent’s right to be secure against unreasonable searches and seizures; an adult roommate does not lack such authority.

Judge Simonton’s dissent incorrectly attempts to force a dichotomy between the parties by pitting Ellis’s protections against S.S.’s rights. The Court in Ellis merely required law enforcement to obtain a warrant before searching Ellis’s home at the discretion of a legally incapable 13-year-old, regardless of the truthfulness of her story.\textsuperscript{147} According to Judge Simonton’s reasoning, a minor’s alleged right to waiver should trump the parent’s right to be secure against unreasonable searches and seizures, and therefore, Schwarz should not apply. Ellis’s rights to be free from searches and seizures did not conflict with S.S.’s right to defend herself or seek safety,\textsuperscript{148} as Judge Simonton argues.

The Montana Constitution protects the rights of children from unlawful government intrusion and abuse; it does not create an at-odds relation-

\begin{itemize}
\item \textsuperscript{142} Schwarz, 136 P.3d at 991 (quoting Jacobs, 729 P.2d at 763).
\item \textsuperscript{143} 79 C.J.S. Searches § 154 (2010).
\item \textsuperscript{144} McLees, 994 P.2d at 690–691.
\item \textsuperscript{145} State v. Tomlinson, 648 N.W.2d 367, 376 (Wis. 2002).
\item \textsuperscript{146} McLees, 994 P.2d at 690–691 (quoting State v. Lopez, 896 P.2d 889, 902 (Haw. 1995)) (emphasis added).
\item \textsuperscript{147} Ellis, 210 P.3d at 159.
\item \textsuperscript{148} Mont. Const. art. II, § 3.
\end{itemize}
ship between the rights of children and those of their parents. One of the major concerns behind the creation of § 15 of the Montana Constitution, as Delegate Lyle R. Monroe II mentioned during the Montana Constitutional Convention, was to protect a minor’s right to “constitutional standards of fairness and due process of law, such as the right to counsel, trial by peers or jury, the right against self-incrimination, and the right to know the nature and cause of accusation.” Section 15 of the Montana Constitution was added to enhance a child’s right to protection under the law against government disruption and unfairness. Such a protection from government officials was clearly not at issue in Ellis, and unlike her father, S.S. was not denied any constitutional rights. Ellis had a constitutional protection “against unreasonable searches and seizures” under the Montana and United States Constitutions; S.S had no constitutional right to demand a search and seizure of her family home. This was a case of a minor waiving someone else’s constitutionally protected rights and law enforcement’s unwillingness to obtain a search warrant to preserve the rights of a parent believed to be guilty.

The State argued in its brief that because the items were in S.S’s private bedroom, she had common authority to those items and, as the victim of a crime, she should be allowed to forfeit her privacy protections. In making its case, the State cited precedent the Court used in its reasoning of the Schwarz opinion. The State cited U.S. v. Matlock to support its contention that S.S. had common authority over certain items and the Court should allow a search accordingly, even though S.S. had granted access to the family home in retrieving the shared items. However, the Court in Schwarz specifically rejected the limits created by Matlock when it refused to march “lock step” with the prior rule and extended Montanans’ protections. In Ellis, the State attempted to reinstate a pre-Schwarz holding when it argued for limited applicability for a child victim. The Schwarz Court did not create a common-authority exception for minor children.

150. Id. at 1750–1751.
151. U.S. Const. amend. IV; Mont. Const. art. II, § 11 (emphasis added).
152. Br. of Appellant at 14, Ellis, 210 P.3d 144.
153. Id.
154. Matlock, 415 U.S. at 164.
155. Br. of Appellant at 14, Ellis, 210 P.3d 144.
156. Schwarz, 136 P.3d at 981–992.
157. Id. at 992.
Schwarz was unequivocal, and it clearly controlled in this case. Even though S.S. was the alleged victim of a crime, as a minor, she simply did not have authority to consent to a search of her shared family home or to allow the seizure of items found therein. The rights of children are not equal to those of parents with regard to a search of the home. Protecting Ellis's constitutional rights would not deny S.S. any constitutional rights in this case.

B. A victim exception would invalidate the intent of the per se rule and parents would be denied their right to privacy based upon the whims of their minor children.

A victim exception implementing the totality-of-the-circumstances approach would subordinate the rights of parents to their children and make the Schwarz rule irrelevant. The State and Justice Leaphart argued that if Schwarz does control, the Court should carve out an exception and use the totality-of-the-circumstances approach when determining whether a child victim can consent to a search of certain parts of the family home. This approach is impractical because it subjects a parent's rights to the discretion of minor children and the subjective perceptions of law enforcement.

The State argued the specific location of the alleged crime—S.S.'s bedroom—favored allowing law enforcement to search the room with S.S.'s consent, because, to hold otherwise, would deny S.S. her general constitutional rights (as discussed above). The State's argument would make Ellis's protections against unreasonable searches and seizures vary throughout the house and depend on whether Ellis's daughter enjoyed common ownership of the area to be searched or whether she claimed to be the victim of a crime. This rule would make the Schwarz holding ineffective as a protection of parental rights and inconsistent as a solidification of a minor's authority, thereby swallowing the per se rule entirely. Where would the Court draw the line and allow the rights of Ellis in his home to intervene as the parent and adult with actual authority? How many items must a legally unauthorized minor have in a room before it is considered a "common" or shared room, and therefore, susceptible to this exception? The State's argument failed to consider the possibility that a young child may be lying or misinformed, and the State was willing to sacrifice specific protections to Ellis based upon S.S.'s claims and non-exigent circumstances. Again, parents do not surrender the privacy of their home to the discretion or whims of a child. To hold otherwise would flip the parent-child foun-

159. Br. of Appellant at 15, Ellis, 210 P.3d 144.
160. Schwarz, 136 P.3d at 992.
dation on its head and subordinate a parent’s protections to the actions of an under-aged child.

The totality-of-the-circumstances approach would also relinquish parents’ rights in their home to the discretion of law enforcement. Under this approach, law enforcement would be forced to consider a minor child’s age, mental maturity, common authority over the premises, and ability to understand the circumstances before proceeding with a search. Judge Simonton, in referencing *State v. McLees*, stated the goal of this approach was to determine whether a sufficient relationship existed between the child and the area to be searched, again arguing for an extension of a minor’s authority to consent. This approach forces law enforcement to make arbitrary decisions regarding the “mental maturity” of a 13-year-old before allowing that child to waive a parent’s rights or acquire the authority to consent. How mature must a 13-year-old be before she becomes competent enough to waive her father’s right to be secure in the family home? The totality-of-the-circumstances approach would also subject a person’s right to be free from a search of a private residence not only to the whims of a child, but to law enforcement’s ability to determine common authority, age, maturity, and understanding of the child. This is an untenable position for both courts and law enforcement. The Court in *Ellis* was wise to avoid this pitfall.

When the Court in *Ellis* refused to carve out a victim exception to the *Schwarz* rule, it protected the intent of the rule by securing a parent’s specific, enumerated constitutional right to privacy from the discretion of a minor. Any exception to a warrant requirement should be limited and drawn carefully in light of constitutionally protected rights. Here, law enforcement simply needed to obtain a warrant to proceed with the search. There was no need for a narrowly construed exception, especially in light of the legal precedent such an exception would entail. Parents should not lose their rights because of a minor’s claims or the laziness or oversight of law enforcement. While the facts of this case are understandably difficult, the Court should not “blend the well-delineated exceptions into one that will fit the facts of this case.”

161. *Id.* at 991.
163. *Ellis*, 210 P.3d at 162 (Simonton, J., dissenting).
164. *Schwarz*, 136 P.3d at 992.
165. *State v. Hardaway*, 36 P.3d 900, 910 (Mont. 2001); see also *Schwarz*, 136 P.3d at 992.
C. The State based its argument on the unproven guilt of Ellis and made no sustainable argument why the ruling in Schwarz should be changed or adapted to the circumstances in the present case.

The Court was also correct in extending the Schwarz rule to situations involving child victims because holding otherwise would presume the guilt of the parent at the cost of the parent’s constitutional protections. In Ellis, the State argued that Ellis should neither be allowed to rely upon Article II, § 2 of the Montana Constitution “to protect his criminal conduct,” nor to make it impossible for S.S. to give police any items without his consent.\(^{167}\) The State further contended that the mentality of “a-man’s-home-is-his-castle” interfered with S.S.’s “sanctuary,” and S.S.’s ability to consent to a search was “necessary to elevate this case from the realm of ‘he said, she said.’”\(^{168}\) The State however failed to distinguish how this case justified an intrusion into Ellis’s rights where many alleged criminal acts could similarly result in a “he said, she said” scenario. In making these arguments, the State assumed that all accused parents are guilty as soon as their children claim to be victims of a crime at home, and parents consequently would have no justification for being free from an unconstitutional search. But the believed or even obvious guilt of a defendant does not create a valid warrant exception, “notwithstanding the high social cost of letting obviously guilty persons go unpunished.”\(^{169}\) Courts must protect constitutional protections regardless of the cost.\(^{170}\)

The State also argued that Ellis’s constitutional protections should be curtailed because law enforcement could have obtained the seized materials by another means.\(^{171}\) Under different circumstances, the State argued, S.S. could have simply shown up at the police station with “all sorts of items incriminating Ellis, perhaps even items from his bedroom, and reported her crime there.”\(^{172}\) The State mistakenly argued that based on Schwarz, such items would be suppressed. Again, the State’s argument demonstrates an inaccurate understanding of both Schwarz and prior case law. Schwarz is limited to narrowly construing an exception to the warrant requirement in situations where children grant access to a state actor to search the family home and seize items found therein.\(^{173}\) The scenarios the State presented were not relevant to the question at hand. The Montana Constitution specif-

\(^{167}\) Br. of Appellant at 16–17, Ellis, 210 P.3d 144.

\(^{168}\) Id. at 16.


\(^{170}\) Id.

\(^{171}\) Reply Br. of Appellant at 7, Ellis, 210 P.3d 144.

\(^{172}\) Id.

\(^{173}\) Schwarz, 136 P.3d at 992.
ically protects individuals from government actors intruding into their homes, as happened here. It does not protect individuals from third-party intrusions that do not involve state action.\textsuperscript{174} S.S. could have taken items from the home to the police station without violating the per se rule; she could not grant the police the ability to search her father’s home.

The issue at hand was not whether S.S. or some other third party could enter and search Ellis’s home. The question also was not whether Ellis was guilty based upon the claims of his daughter. The question was whether a state actor could forego Ellis’s rights and protections based upon the consent/waiver of an unauthorized child. The answer should unequivocally be “no.” Contrary to the State’s argument, a person’s appearance of guilt does not preclude the person from constitutional protections, and law enforcement is under the same obligation to legally obtain evidence in a child sexual assault case as it is in another other crime.

VI. Conclusion

The Montana Supreme Court’s opinion in \textit{State v. Ellis} protected the rights of parents to be free from warrantless searches and seizures, even when they are accused by their own children of a crime. Based on the Court’s decisions in \textit{Schwarz} and \textit{Ellis}, a child victim cannot freely give law enforcement access to personal items the child maintains at the discretion of her parents. Once again, while other jurisdictions allow law enforcement to look at the totality of the circumstances to determine if the consenting child has sufficient rights to the area or item to be searched, Montana has offered greater protections to its citizens by solidifying and clarifying the \textit{per se} rule from \textit{Schwarz}. Montana protects the rights of parents in all areas within their homes regardless of whether the child claims to be the victim of criminal behavior.

The Court correctly decided \textit{Ellis} based upon precedent and sound reasoning. A child cannot waive the rights of her parents. The Court’s decision in \textit{Schwarz} clearly controlled and S.S. did not have authority to consent to a search of Ellis’s home. Any victim exception to the \textit{Schwarz} rule would likely deny parents their right to privacy and protection from unreasonable, warrantless searches based upon the statements of their minor children and arbitrary decisions by police officers. The unproven guilt of Ellis was not a sustainable argument why the ruling in \textit{Schwarz} should be changed. Ellis’s rights were protected and S.S. was not denied any opportunity to prove her case.

How far the \textit{Schwarz} rule will extend to additional relationships involving minors and non-parent adults remains unknown. Only time will

clarify the full extent of the Court’s interpretation. The foundation is clear, however. Ellis solidified the per se rule set forth in Schwarz based upon the protections granted to adults within their homes under the United States Constitution and the heightened privacy protections of the Montana Constitution.