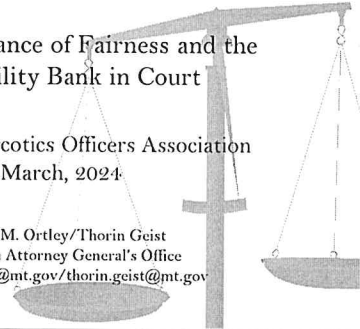


Courtroom Testimony for Peace Officers

The Importance of Fairness and the Credibility Bank in Court

Montana Narcotics Officers Association
March, 2024

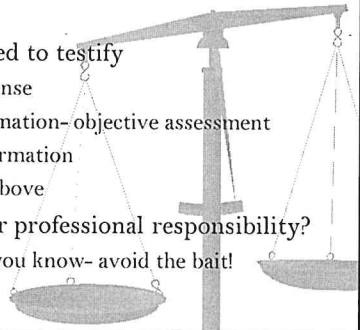
David M. Ortley/Thorin Geist
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1

Practical and Legal Considerations for Effective Testimony

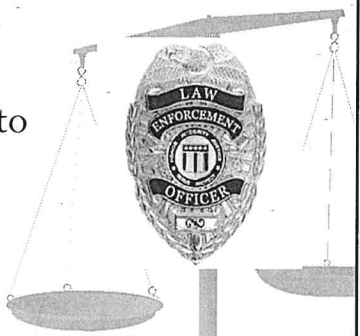
- Avoiding the need to testify
 - Elements of offense
 - Quality of information- objective assessment
 - Quantity of information
 - Content of the above
- Lawyer games or professional responsibility?
 - Focus on what you know- avoid the bait!



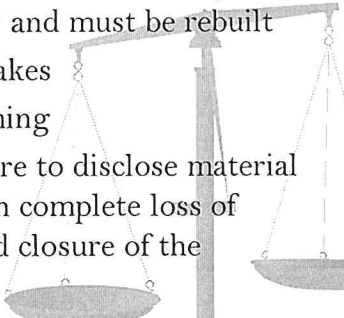
2

The Credibility Bank

Your occupation entitles you to instant credibility!!



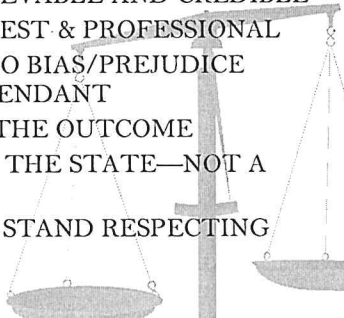
3



- Withdrawals or “debits” cost you professionally and must be rebuilt
 - Admit mistakes
 - Be forthcoming
- Lying or failure to disclose material facts results in complete loss of credibility and closure of the account!!!

4

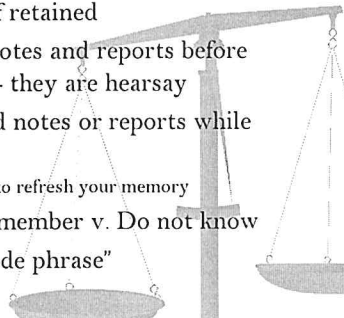
Testimony by All Officers



- MUST BE BELIEVABLE AND CREDIBLE
- MUST BE HONEST & PROFESSIONAL
- MUST HAVE NO BIAS/PREJUDICE AGAINST DEFENDANT
- NO STAKE IN THE OUTCOME
- WITNESS FOR THE STATE—NOT A PARTY
- GET OFF THE STAND RESPECTING YOURSELF

5

TESTIMONY BY OFFICERS



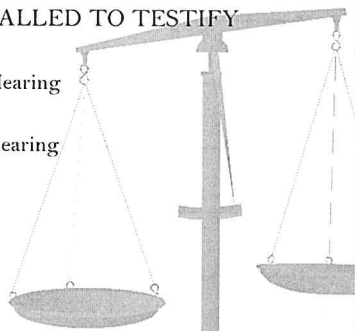
- NOTES/REPORTS
 - Disclose if retained
 - Read all notes and reports before testifying- they are hearsay
 - Don't read notes or reports while testifying
 - Use only to refresh your memory
 - Do not remember v. Do not know
 - Use of “code phrase”

6

HEARING TYPES

■ TIMES WHEN LAW ENFORCEMENT MIGHT BE CALLED TO TESTIFY

- Deposition
- Preliminary Hearing
- Bail Hearing
- Evidentiary Hearing
- Trial
- Sentencing
- Revocation

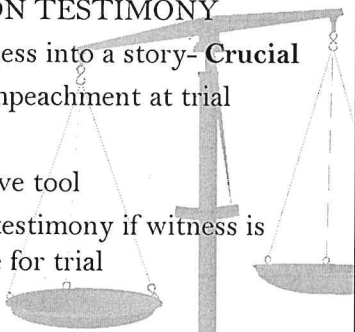


7

TESTIMONY BY OFFICERS

■ DEPOSITION TESTIMONY

- Locks witness into a story- **Crucial**
- Used for impeachment at trial
- Discovery
- Investigative tool
- Preserves testimony if witness is unavailable for trial

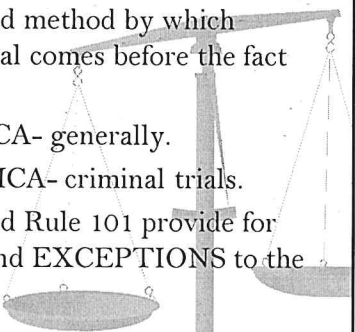


8

Rules of Evidence

■ The manner and method by which relevant material comes before the fact finder.

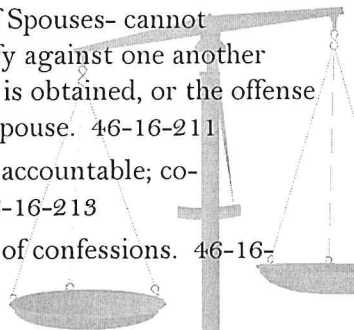
- 26-1-101, MCA- generally.
- 46-16-201, MCA- criminal trials.
- 46-16-201 and Rule 101 provide for application and **EXCEPTIONS** to the rules.



9

Statutory Rules of Importance

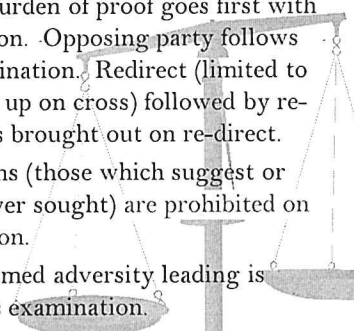
- Competency of Spouses- cannot generally testify against one another unless consent is obtained, or the offense is against the spouse. 46-16-211
- Person legally accountable; co-defendants. 46-16-213
- Corroboration of confessions. 46-16-215.



10

Mechanics of Testimony

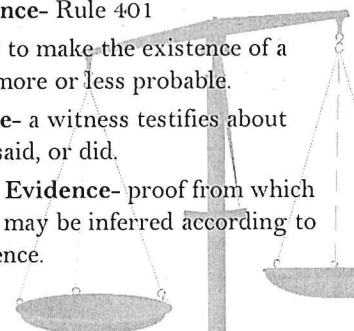
- Party with the burden of proof goes first with direct examination. Opposing party follows with cross-examination. Redirect (limited to matters brought up on cross) followed by re-cross for matters brought out on re-direct.
- Leading questions (those which suggest or contain the answer sought) are prohibited on direct examination.
- Because of presumed adversity leading is allowed on cross examination.



11

Types of Evidence

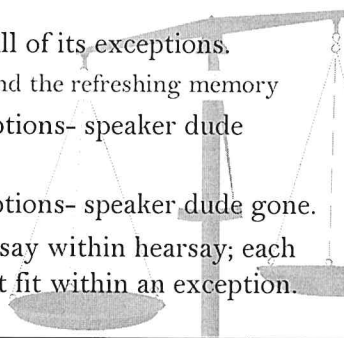
- Relevant Evidence- Rule 401
 - Any tendency to make the existence of a material fact more or less probable.
- Direct Evidence- a witness testifies about what they saw, said, or did.
- Circumstantial Evidence- proof from which connective facts may be inferred according to common experience.



12

The Mystery of the Hearsay Rule (It is a rule of preference)

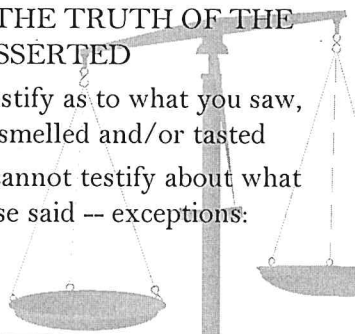
- Rule 801 and all of its exceptions.
 - Your report and the refreshing memory
- Rule 803 exceptions- speaker dude available.
- Rule 804 exceptions- speaker dude gone.
- Rule 805- hearsay within hearsay; each statement must fit within an exception.



13

HEARSAY- Say What??

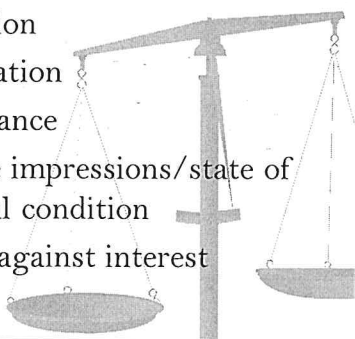
- AN OUT-OF-COURT STATEMENT USED FOR THE TRUTH OF THE MATTER ASSERTED
 - Can only testify as to what you saw, heard, felt, smelled and/or tasted
 - Generally cannot testify about what someone else said -- exceptions:



14

The Exceptions

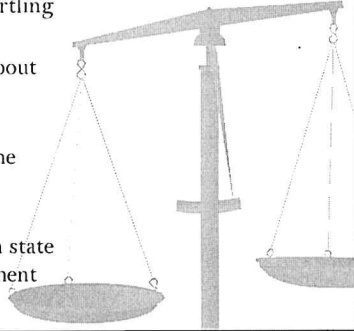
- Party admission
- Dying declaration
- Excited utterance
- Present sense impressions/state of mind/physical condition
- Declarations against interest



15

Excited Utterance:

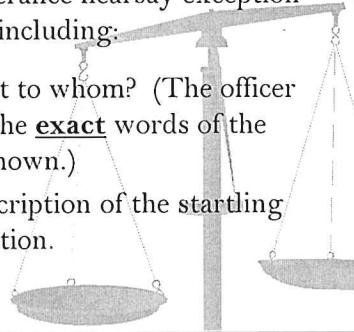
- An event occurred
- The event was startling or stressful
- Declarant knew about the event
- Declarant made a statement about the event
- Declarant made statement while in state of nervous excitement



16

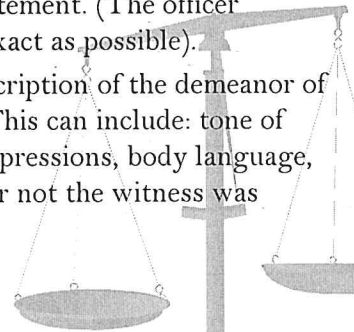
Officers must document important facts to help the prosecutor argue a statement meets the excited utterance hearsay exception including:

- Who said what to whom? (The officer should quote the **exact** words of the statement if known.)
- A detailed description of the startling event or condition.



17

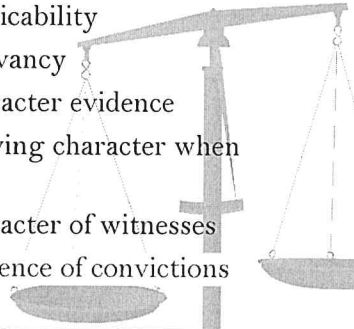
- The time of the startling event and the time of the statement. (The officer should be as exact as possible).
- A detailed description of the demeanor of the witness. This can include: tone of voice, facial expressions, body language, and whether or not the witness was crying.



18

But Do The Rules Apply??

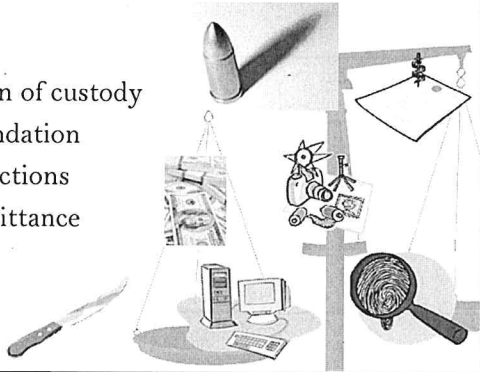
- Rule 101- applicability
- Rule 401- relevancy
- Rule 404- character evidence
- Rule 405- proving character when allowed
- Rule 608- character of witnesses
- Rule 609- evidence of convictions



19

INTRODUCING EVIDENCE AT TRIAL

- Chain of custody
- Foundation
- Objections
- Admittance

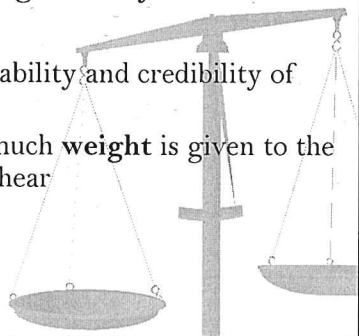


20

RESPONSIBILITY OF FACT FINDER

Judge or Jury

- Decides believability and credibility of witnesses
- Decides how much **weight** is given to the evidence they hear



21

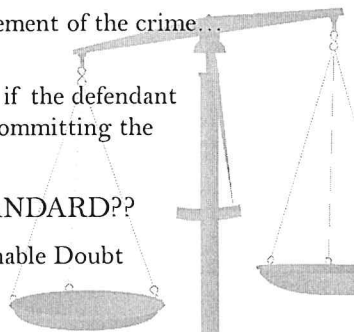
RESPONSIBILITY OF FACT FINDER

■ Must determine if state has proven each element of the crime...

■ Must determine if the defendant is responsible for committing the crime...

TO WHAT STANDARD??

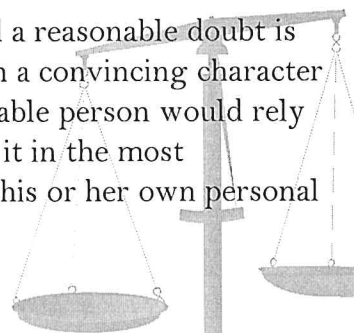
❖ Beyond A Reasonable Doubt



22

The Burden of The Prosecutor In Criminal Trials

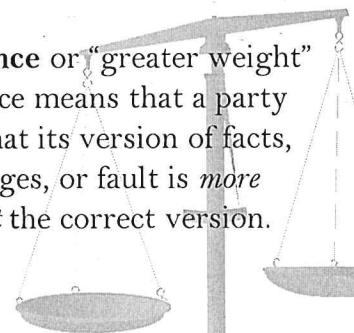
■ Proof beyond a reasonable doubt is “proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his or her own personal affairs.”



23

The Burden In Probation and Parole Proceedings

■ **Preponderance** or “greater weight” of the evidence means that a party has shown that its version of facts, causes, damages, or fault is *more likely than not* the correct version.

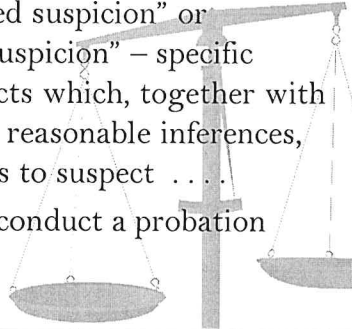


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Other Procedural Hurdles

- “Particularized suspicion” or “reasonable suspicion” – specific articulable facts which, together with objective and reasonable inferences, form the basis to suspect

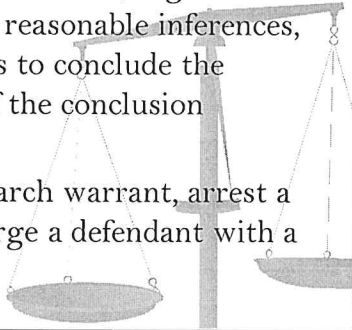
- Stop a car, conduct a probation search!



25

- **“Probable Cause”** specific and articulable facts which, together with objective and reasonable inferences, form the basis to conclude the probability of the conclusion advanced.

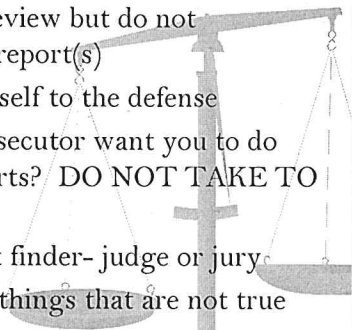
- Obtain a search warrant, arrest a citizen, charge a defendant with a crime.



26

Your Day In Court

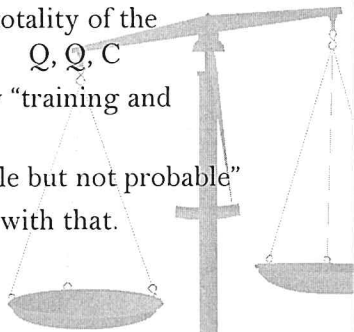
- Be prepared- review but do not memorize you report(s)
- Introduce yourself to the defense
- What does prosecutor want you to do with your reports? **DO NOT TAKE TO STAND!**
- Talk to the fact finder- judge or jury
- Don't agree to things that are not true



27

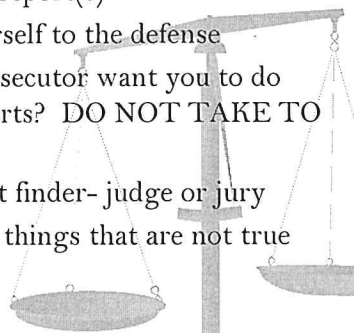
Your Day In Court- Foundation

- Based on the “totality of the circumstances” Q, Q, C
- Based upon my “training and experience.”
- That is “possible but not probable”
- I cannot agree with that.
- No!



28

- Be prepared- review but do not memorize you report(s)
- Introduce yourself to the defense
- What does prosecutor want you to do with your reports? **DO NOT TAKE TO STAND!**
- Talk to the fact finder- judge or jury
- Don't agree to things that are not true



29

Search and Seizure Update Current Trends & Issues

Montana Narcotics Officers Association
March, 2024

David M. Ortley
Deputy Attorney General
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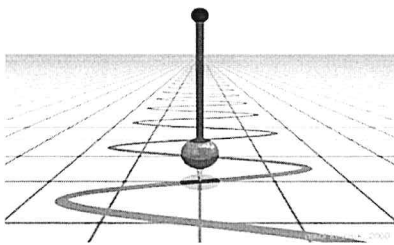
1

Objectives

- Select critical areas in a short time!!
 - Enhanced Right to Privacy
 - Investigative Detention- Living with *Noli*
 - Corroboration- Quality, Quantity, Content
 - Plain View Exception- New Life?
 - Confessions- When to Advise
 - Hot Pursuit: Exigency

2

Tracking the Law



3

The Foundation Is The Same
As That in the Law of Arrest!

- Everything is subject to the rights or interest of the state, and the defendant's rights under the US Constitution and the Montana Constitution.
- The "rights" of the accused are those that we all enjoy, even police officers and judges.
- Everything is a balance of competing rights and reasonableness.

4

Review of Constitutional
Provisions

- Protection under state constitution may be greater, and is under the Montana Constitution.
- Article II- Declaration of Rights
 - Section 10: Right to Privacy- continues to be construed to be more restrictive than the Fourth Amendment under the US Constitution.

5

Montana Constitution

- **Article II, 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.

6

Montana's Right To Privacy

- Article II, Section 10 of the Montana State Constitution: *The right of the 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.*

7

An "Enhanced" Right to Privacy

- Montana's constitution offers more protection than the United States Constitution.
- The Montana Supreme court does not march "lock-step" with the Federal courts.
- Montana protects "reasonable" expectations of privacy- those which society is willing to recognize as reasonable!
- That expectation may extend beyond the "curtilage" of property to those areas where an expectation is evidenced by fences, signs, or some other means.
 - State v. Bullock, 272 Mont. 361 (1995)

8

Is a Protected Interest Implicated?

- What is protected is security in the possession of things
 - "persons, houses, papers, and effects . . ."
- The reasonable expectation of privacy in things and the person.
 - In Montana the "right to individual privacy . . ." balanced against a "compelling state interest."

9

Reasonable Expectation of Privacy

- First, we determine "whether the person challenging the state's action has an actual subjective **expectation** of privacy." Second, we determine "whether **society** is willing to recognize that subjective **expectation** as objectively **reasonable**." If, after the first two steps, we conclude that the defendant did not have a subjective **expectation** of privacy

10

- or that **society** is unwilling to accept the **expectation** as **reasonable**, then no search (as contemplated by the Montana Constitution) has occurred: the police activity in question is not limited by the Montana Constitution, and (absent controlling statute) police may conduct the activity at their discretion, checked only by their own self-restraint.

State v. Allen, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045.

11

Two Step Analysis

- An actual subjective expectation of privacy, and
- Society objectively recognizes the expectation as reasonable;
 - Not the officer's subjective conclusion!

12

• **46-5-101. Searches and seizures -- when authorized.** A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made:

(1) by the authority of a search warrant; or

(2) in accordance with judicially recognized exceptions to the warrant requirement.

13

Statutory Provisions

• Title 46, Chapter 5, MCA reflects legislative enactments governing searches and seizures.

- 46-5-102 Scope of Search Incident to Arrest
- 46-5-103 When Search/Seizure Not Illegal
- 46-5-221 Grounds for Search Warrant
- 46-5-228 Procedures in Executing Warrant

14

An Exception May Apply

• Even if a protected interest is implicated and exception to the Warrant requirement may apply:

- Plain view
- Consent given by one with authority
- Exigent circumstances
- Search incident to an arrest
- Inventory
- Border
- Administrative- Probation and Parole

15

What About Dogs?

- “A carefully drawn exception to the warrant requirement allows law enforcement officers to conduct a canine sniff on an object or an area already exposed to the public **provided particularized suspicion**

exists. *State v. Mercer* 2015 MT 36 N, *State v. Tackett*, 2003 MT 81

16

Developing An Enhanced Right

- *State v. Bullock*, (1995) established the rules for expression of my right to privacy- a clear no trespassing sign and fencing.
- *State v. Smith*, (11-3-2021) expands rules for face-to-face expression of the right to privacy.
 - Extends beyond curtilage if expression is evidenced by fences, signs or “some other means.”
 - Narrow decision required by U.S. Court in *Lange*

17

State v. Honka, 12-6-2022 (non-cite)

- Skirts the expectation of privacy
- Looks to exigency justifying entry
 - Totality of circumstances
 - Probable cause and officer’s “good faith”
 - Personal knowledge of officer or from a “reliable source”
 - Hot pursuit of fleeing felon- called EMS

18

Automobiles

- THERE IS NO general automobile exception to the warrant requirement.
- However, exigency may justify a search but it is VERY narrow.
 - Destruction of evidence or prevention of ongoing criminal activity.
 - *Arizona v. Gant*, 556 U.S. 332 (2009)
 - *State v. Elison*, 2000 MT 288

19

Plain View-Lawfully Present

- *State v. Tenold*, 10-20-2020
 - Resurrect language from *Elison* and plain view in cars
- Fact specific- “lawfully present” at door. This is a vehicle case!!
- “Slight” extension of arm into the vehicle.

20

Exceptions to the Warrant Requirement

- **Plain View:** officer is legally present and can see in plain view an item whose incriminating character is apparent and which can be lawfully seized without further intrusion.

21

- Exigent Circumstances: Existing circumstances reasonably require immediate action on the part of officers to prevent injury or an event which frustrates a legitimate law enforcement interest or effort. The exception lasts only long as the exigency exists.

22

The Timing and Length of Detention



23

State v. Noli, 05-16-23

- The length of the investigative “detention” becomes critical
- Routine and “pat” phrases are scrutinized and rejected
- A ruse is exposed- ends v. means
- Officer credibility is CRUCIAL

24

Takeaways

- Facts or inferences must be objectively indicative of criminal behavior
- Suspicion must be particularized and not general
- The “mission” determines permissible length of detention
 - Authority ends when tasks are –or reasonably should have been- completed.

25

The Fallout of *Noli*

- Prosecutors hesitant to prosecute or risk total loss of case
- Officer’s frustrated & confused by perceived conflict in federal v. state law
- Rejection of concept and business as usual

26

- Time is crucial to justifying the scope and length of the intrusion
- “Measureable” time and a “moderate number of questions” are permitted before the detention becomes an arrest and Miranda applies.

– See *State v. Schlichenmayer*, 05-09-23

- Community caretaker case becomes criminal endangerment and suppression is denied.

27

Montana Federal Cases

- *United States v. Funk*, 06-29-2023 (SPW)
- “Mission” of stop and scope of authority
- Lapse of time unrelated to “Mission”
- Subjective generalities “swept” many citizens into suspicion on a hunch
- Time tainted objectively based suspicion does not cure the earlier violations!

28

United States v. Howard, 01-05-2024 (SPW)

- Informant veracity, reliability, basis of knowledge
- “Vaguely” predictive information must be corroborated
- Distinguish innocuous and legal behavior
- Corroboration- Quality, Quantity, and Content
 - Montana Supreme Court now uses his language!
- The Traffic Violations – fail to signal violations
 - Valid stops so evidence was lawfully seized

29

Totality of the Circumstances

- Facts not examined in isolation- what story do they tell?
 - Objective facts must be corroborated
 - Quality, Quantity and Content of information
- Do the facts and circumstances warrant an honest belief in a reasonable person that an offense has been committed or that the item sought will be found where it is believed to be?

30