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## Lightning v. The Lightning Bug: A Problem of Statutory Interpretation in *State v. Cooksey*

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## NOTES

### LIGHTNING V. THE LIGHTNING BUG: A PROBLEM OF STATUTORY INTERPRETATION IN *STATE V. COOKSEY*

Caitlin Boland\*

#### I. INTRODUCTION

On a summer day in 2009, Bobby Cooksey shot and killed Tracey Beardslee.<sup>1</sup> At trial, Cooksey raised the affirmative defense of justifiable use of force, but a jury found him guilty of deliberate homicide.<sup>2</sup> In the trial court and on appeal, Cooksey tried to avail himself of a newly-enacted statute that he claimed required investigators to search for exculpatory evidence on his behalf.<sup>3</sup> The statute at issue in Cooksey's case, Montana Code Annotated § 45-3-112, became law only months before Cooksey killed Beardslee.<sup>4</sup> When Cooksey appealed his conviction to the Supreme Court, the Court faced a dilemma interpreting the statute: in isolation, the meaning of the statute seemed clear enough, but read in the context of other statutes, the meaning of the law blurred.<sup>5</sup> To add to the Court's interpretive diffi-

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1. *State v. Cooksey*, 286 P.3d 1174, 1176 (Mont. 2012).

2. *Id.* at 1176.

3. Appellant's Br., *State v. Cooksey*, 2011 WL 5294679 at \*38 (Mont. Oct. 27, 2011) (No. DA 11-0165).

4. *Cooksey*, 286 P.3d at 1180.

5. *Id.* at 1181.

culty, the legislative history of the statute revealed that different legislators thought the law they were enacting meant different things.<sup>6</sup>

It is the prerogative of the Court to say what the law *is*; but in saying what the law is, the Court must adhere to what the law *says*. In this case, the majority of the Court knew what it *wanted the law to be*: the Court did not want to help criminals get away with murder. In achieving this end, the majority displayed its mastery of linguistic acrobatics. As the reader will see, it called the confounding statute “plain and clear on its face.”<sup>7</sup> It italicized the word “evidence” instead of the word “disclose” to indicate that the former and not the latter was the word in controversy.<sup>8</sup> And in relation to existing law, it used the word “consistent” to describe the new law, rather than the more accurate “redundant.”<sup>9</sup> In short, the majority based its opinion on its own policy preference and rejected its power of statutory interpretation by offering questionable assurances of clarity.

This note analyzes two different approaches to a fundamental judicial obligation—interpreting statutes—and the linguistic, legal, and policy choices that underlie interpretive decisions. Part II of this note summarizes the development of the law prior to *State v. Cooksey*, from the *Brady* disclosure requirement, “stand your ground” laws, and “the castle doctrine,” to the recent modification of Montana’s justifiable-use-of-force defense. Part III recounts the factual and procedural background of *State v. Cooksey* and Part IV summarizes the majority and dissenting opinions. Part V analyzes both approaches to statutory construction. Part VI concludes the note by offering a policy perspective the Court did not consider.

## II. DEVELOPMENT OF THE LAW PRIOR TO *STATE V. COOKSEY*

### A. *Brady v. Maryland*

In the landmark criminal procedure case *Brady v. Maryland*,<sup>10</sup> the United States Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>11</sup> For half a century, *Brady* has stood for the proposition that the Due Process Clause requires the prosecution to disclose exculpatory and impeachment evidence to the defense.

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6. *Id.* at 1192 (Nelson, J., concurring in part and dissenting in part).

7. *Id.* at 1181.

8. *Id.* at 1181.

9. *Id.*

10. 373 U.S. 83 (1963).

11. *Id.* at 87.

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 151

Following the Supreme Court's ruling, many state legislatures codified the *Brady* requirement in statutes. Montana made the disclosure rule a statutory obligation in the Revised Codes of Montana in 1967.<sup>12</sup> The current version is found at § 46–15–322 of the Montana Code Annotated. Montana's statute requires that the prosecution, and anyone else who participated in the investigation of the offense, disclose to the defense "all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence."<sup>13</sup> In addition to relying on Montana's disclosure statute, the Montana Supreme Court has explicitly adopted the *Brady* rationale and continues to apply it.<sup>14</sup>

B. "The Castle Doctrine" & "Stand Your Ground"

English common law required those who were threatened by violence to attempt retreat before using violence in self-defense.<sup>15</sup> The only recognized exception came to be known as "the castle doctrine."<sup>16</sup> The exception allowed anyone attacked in his or her home to use deadly force to repel the attack, without a preliminary obligation to retreat.<sup>17</sup> The duty to retreat was a recognition of the value of human life; the exception for the home came from the idea that a "man's home is his castle" and is inviolate.<sup>18</sup> Gradually, American law developed to include more exceptions to the retreat requirement than English law.<sup>19</sup> States began to adopt "stand your ground" laws, which permit individuals to use force in self-defense without retreating first, even if they are not in their homes.<sup>20</sup> For example, Florida expanded the concept of the "castle" to include motor vehicles and Colorado granted immunity to anyone acting in self-defense who reasonably believes the use of force is necessary.<sup>21</sup> The National Rifle Association (NRA) has been actively involved in lobbying state legislatures to adopt such changes to self-defense laws, and it has been met with great success.<sup>22</sup>

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12. *Cooksey*, 286 P.3d at 1188 (Nelson, J., concurring in part and dissenting in part).

13. Mont. Code Ann. § 46–15–322(1)(e), (4) (2011).

14. *E.g. State v. St. Denis*, 244 P.3d 292 (Mont. 2010); *State v. Ellison*, 272 P.3d 646 (Mont. 2012).

15. Elizabeth B. Megale, *Deadly Combinations: How Self-Defense Laws Pairing Immunity with a Presumption of Fear Allow Criminals to "Get Away with Murder"*, 34 Am. J. Tr. Advoc. 105, 111 (2010).

16. *Id.* at 111.

17. *Id.* at 111–112.

18. *Id.* at 112 (quoting Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 Rutgers J. L. & Pub. Policy 504, 505 (2007)).

19. *Id.* at 112.

20. *Id.*

21. Megale, *supra* n. 15, at 113–114.

22. *Id.* at 114.

## C. House Bill 228

Gun rights advocates brought their national lobbying efforts<sup>23</sup> to Montana and within three legislative sessions successfully transformed Montana's self-defense laws. Montana's versions of "the castle doctrine" and the "stand your ground" rule are codified in the "Justifiable Use of Force" chapter of Title 45 (Crimes). The "stand your ground" rule states that:

A person is justified in the use of force or threat to use force against another when and to the extent that the person reasonably believes that the conduct is necessary for self-defense or the defense of another against the other person's imminent use of unlawful force. However, the person is justified in the use of force likely to cause death or serious bodily harm only if the person reasonably believes that the force is necessary to prevent imminent death or serious bodily harm to the person or another or to prevent the commission of a forcible felony.<sup>24</sup>

Justifiable use of force under this statute is an affirmative defense.<sup>25</sup> In 2005 and again in 2007 gun rights advocates introduced a bill in the Montana Legislature that would substantially broaden the defense of justifiable use of force.<sup>26</sup> Both sessions saw the bill pass the House and die in the Senate.<sup>27</sup> But in 2009, the gun lobby finally had the votes it needed, and House Bill (H.B.) 228 faced little opposition from legislators.<sup>28</sup>

The bill made several sweeping changes to Montana's self-defense laws.<sup>29</sup> Among them: a person threatened with bodily harm has no duty to summon help or flee; a person may draw or present a firearm and threaten to use it if the person is threatened with bodily harm; and when a defendant in a criminal trial has offered evidence of justifiable use of force, the burden shifts to the State to prove beyond a reasonable doubt that the defendant's actions were not justified.<sup>30</sup> During public testimony on the bill, the bill's sponsor asserted that these changes were necessary because "your castle is actually yourself."<sup>31</sup>

23. Daniel Michael, *Florida's Protection of Persons Bill*, 43 Harv. J. on Legis. 199, 212 (2006).

24. Mont. Code Ann. § 45-3-102.

25. *Id.* at § 45-3-115.

26. Mont. H. Jud. Comm., *Citizen self-defense and firearm rights: Hearing on H.B. 228*, 61st Legis., Reg. Sess. (Jan. 22, 2009) (Testimony at 52:00).

27. Mont. H. 693, 59th Legis., Reg. Sess. (Feb. 14, 2005); Mont. H. 340, 60th Legis., Reg. Sess. (Jan. 16, 2007).

28. H.B. 228 passed the House 85-14 and passed the Senate 40-10 (voting records available at [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P\\_SESS=20091&P\\_BLTP\\_BILL\\_TYP\\_CD=HB&P\\_BILL\\_NO=228&P\\_BILL\\_DFT\\_NO=&P\\_CHPT\\_NO=&Z\\_ACTION=Find&P\\_SBJT\\_SBJ\\_CD=&P\\_ENTY\\_ID\\_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20091&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=228&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=)).

29. Mont. H. 228, 61st Legis., Reg. Sess. (Jan. 9, 2009) (bill available at <http://leg.mt.gov/bills/2009/billhtml/HB0228.htm>).

30. *Id.*

31. Mont. H. Jud. Comm., *supra* n. 26, at 41:45.

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 153

H.B. 228 was written by an affiliate of the NRA,<sup>32</sup> publicly supported by the NRA,<sup>33</sup> and opposed by nearly every law enforcement and prosecutorial agency in the State of Montana.<sup>34</sup> Law enforcement officers opposed the bill because they believed it would encourage rather than discourage gun related violence; many officers and prosecutors testified to that in official and private capacities.<sup>35</sup> A section of the bill that received very little attention, however, was Section Four (Section Three in later versions of the bill). Section Four read:

When an investigation is conducted by a peace officer of an incident that appears to have or is alleged to have involved justifiable use of force, the investigation must be conducted so as to disclose all evidence, including testimony concerning the alleged offense and that might support the apparent or alleged justifiable use of force.<sup>36</sup>

The clause “the investigation must be conducted so as to disclose all evidence” appears to link the defense of justifiable use of force to *Brady* because it uses a well-known *Brady* word to describe the obligation it is imposing: “disclose.”

The primary developer and author of H.B. 228, Gary Marbut,<sup>37</sup> intended that after the bill’s passage, law enforcement officers must not only disclose all exculpatory evidence, pursuant to Montana Code Annotated § 46–15–322 and *Brady*, but they also must actively search for exculpatory evidence when self-defense is alleged. Mr. Marbut testified at each committee hearing on the bill on behalf of the Montana Shooting Sports Association, Gun Owners of America, Citizens Committee for the Right to Bear Arms, Weapons Collectors Society of Montana, and several other gun rights groups.<sup>38</sup> During his testimony, he distributed to the committee members a hardcopy of his explanation of each section of the bill. This document was attached to the committee minutes as Exhibit 3. His explanation of Section Four states, in its entirety:

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32. *Id.* at 2:26:00.

33. *Id.* at 47:30.

34. Associations testifying against the bill included the Montana Sheriffs and Peace Officers Association, the County Attorneys Association, the Montana Association of Chiefs of Police, the Montana Police Protective Association, the Montana Department of Justice, and the Montana Game Warden Association. (see Mont. H., *Minutes of Judiciary Committee Hearing on House Bill 228*, 61st Legis., Reg. Sess. (Jan. 22, 2009) (available at [http://leg.mt.gov/bills/2009/Minutes/House/090122JUH\\_Hm1.pdf](http://leg.mt.gov/bills/2009/Minutes/House/090122JUH_Hm1.pdf)); Mont. Sen., *Minutes of Judiciary Committee Hearing on House Bill 228*, 61st Legis., Reg. Sess. (Mar. 17, 2009) (available at [http://leg.mt.gov/bills/2009/Minutes/Senate/090317JUS\\_Sm1.pdf](http://leg.mt.gov/bills/2009/Minutes/Senate/090317JUS_Sm1.pdf))).

35. Mont. H., *Minutes of Judiciary Committee Hearing on House Bill 228*, 61st Legis., Reg. Sess. (Jan. 22, 2009) (available at [http://leg.mt.gov/bills/2009/Minutes/House/090122JUH\\_Hm1.pdf](http://leg.mt.gov/bills/2009/Minutes/House/090122JUH_Hm1.pdf)).

36. Mont. H. 228, 61st Legis., Reg. Sess. (Jan. 9, 2009).

37. Mont. H. Jud. Comm., *supra* n. 26, at 59:25.

38. Mont. Sen. Jud. Comm., *Hearing on H.B. 228*, 61st Legis., Reg. Sess. (Mar. 20, 2009) (Testimony at 43:44); Mont. H. Jud. Comm., *supra* n. 26, at 55:20.

The mission of police is to enforce the laws. That's exactly why they are called "law enforcement." Understandably, when they investigate the scene where self-defense is utilized, they are focused on determination of what laws may have been violated. Law enforcement personnel have a very understandable bias towards discovering and preserving evidence that supports the contention that laws have been violated—that's simply their mission. In such a situation, it is very possible that investigators will overlook or fail to secure evidence that may tend to support the claim that a defender has used force legally in self-defense. If the defender is charged with a crime, often weeks or months will have elapsed before investigators for the defendant are able to examine the scene for evidence that may support the defender's claim of self-defense. By then, such evidence is usually be gone [sic]. Section Four requires that investigators look for and collect all evidence, including evidence that could exonerate a person claiming self-defense. Investigators say that this need is already included in their professional standards for investigation. If that is so, they shouldn't object to this requirement being placed in statute, another clarification needed in existing law. Further, citizens shouldn't be required to rely on changeable occupational standards drawn by un-elected organizations of public employees in order for citizens to stay out of prison.<sup>39</sup>

The sponsor of the bill, Representative Krayton Kerns, also explained that Section Four "has to do with the investigation of alleged offensive self-defense, requesting that law enforcement disclose and hunt for all evidence that would support the claim of self-defense."<sup>40</sup> Marbut's and Kerns's use of language like "hunt for all evidence" and "look for and collect all evidence" indicates that the bill was designed to impose a new obligation on law enforcement.

As would become clear, some Montana State Senators did not read the language of H.B. 228 to mean what Krayton Kerns and Gary Marbut thought it meant. On March 20, 2009, a three-member subcommittee of the Senate Judiciary Committee convened to discuss H.B. 228 and some proposed amendments. The subcommittee consisted of Chairman Senator Dan McGee, Senator Jim Shockley, and Senator Larry Jent.<sup>41</sup> Both Senators Shockley and Jent are lawyers. Senator Jent introduced an amendment to strike Section Four from H.B. 228 because it "is duplicative of current law *Brady vs. Maryland* and 46-15-323<sup>42</sup> . . . it's duplicative because they already gotta give ya evidence that would get ya off now under the Constitu-

39. Mont. H., *Minutes of Judiciary Committee Hearing on House Bill 228*, 61st Legis., Reg. Sess. (Jan. 22, 2009) (available at [http://leg.mt.gov/bills/2009/Minutes/House/090122JUH\\_Hm1.pdf](http://leg.mt.gov/bills/2009/Minutes/House/090122JUH_Hm1.pdf) Ex. 3).

40. Mont. H. Jud. Comm., *supra* n. 26, at 43:50.

41. Mont. Sen., *Minutes of Judiciary Subcommittee Hearing on House Bill 228*, 61st Legis., Reg. Sess. (Mar. 20, 2009) (available at [http://leg.mt.gov/bills/2009/Minutes/Senate/090320JUS-sub\\_Sm1.pdf](http://leg.mt.gov/bills/2009/Minutes/Senate/090320JUS-sub_Sm1.pdf)).

42. Senator Jent was quickly corrected by someone at the hearing that he meant to refer to § 46-15-322, Disclosure by the prosecution, not § 46-15-323, Disclosure by defendant. Mont. Sen. Jud. Subcomm., *Citizen self-defense and firearm rights: Hearing on H.B. 228*, 61st Legis., Reg. Sess. (Mar. 20, 2009) (Testimony at 24:20).

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 155

tional precedent and under the Code.”<sup>43</sup> During a brief discussion of this amendment, Senator Shockley opined: “Senator Jent is right [about Section Four]. It’s *Brady vs. Maryland* and it’s also what’s in the Code . . . but it doesn’t hurt nothin’. It’s poorly worded and it’s just sayin’ what’s already in the Code.”<sup>44</sup> Mr. Marbut thought the phrase “the investigation must be conducted so as to disclose all evidence” imposed a new duty on law enforcement officers to hunt for exculpatory evidence on behalf of a defendant claiming justifiable use of force. But Senators Jent and Shockley thought the same passage was merely duplicative of existing law; they left the language in the bill because “it doesn’t hurt nothin’.”

In spite of the confusion, House Bill 228, including the disclosure requirement in Section Four, passed the House by a vote of 85–14 and the Senate by a vote of 40–10.<sup>45</sup> It was signed into law on April 27, 2009, and Section Four is now codified at § 45–3–112 of the Montana Code Annotated. Less than three months after § 45–3–112 was enacted, a man named Bobby Cooksey unwittingly put it to the test. Section 45–3–112 featured prominently in his appeal and became the center of a debate on the Montana Supreme Court over statutory construction.

### III. FACTUAL AND PROCEDURAL BACKGROUND OF *STATE V. COOKSEY*

Bobby Cooksey and Tracey Beardslee were unfriendly neighbors in a rural area outside of Roundup, Montana. Beardslee accessed his property by means of a road easement that crossed Cooksey’s property. The two men had been neighbors for several years and had had several verbal confrontations.<sup>46</sup>

On July 7, 2009, Cooksey awoke from a nap to the sound of his dogs barking.<sup>47</sup> He grabbed a rifle on his way out of the house to investigate. As he approached his dogs, he saw that they were barking at Beardslee, who was weed-whacking along the boundary line of the easement. Cooksey asked Beardslee what he was doing on Cooksey’s property. According to Cooksey’s later testimony, Beardslee “went off.” He cussed at Cooksey, threatened to beat him up and finally said that he would kill Cooksey.<sup>48</sup> As

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43. *Id.* at 24:03.

44. *Id.* at 28:50.

45. Mont. H. 228, 61st Legis., Reg. Sess. (Jan. 9, 2009) (voting records available at [http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P\\_SESS=20091&P\\_BLTP\\_BILL\\_TYP\\_CD=HB&P\\_BILL\\_NO=228&P\\_BILL\\_DFT\\_NO=&P\\_CHPT\\_NO=&Z\\_ACTION=Find&P\\_SBJT\\_SBJ\\_CD=&P\\_ENTY\\_ID\\_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20091&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=228&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_SBJT_SBJ_CD=&P_ENTY_ID_SEQ=)).

46. *Cooksey*, 286 P.3d at 1176.

47. Appellant’s Br., *supra* n. 3, at \*2.

48. *Cooksey*, 286 P.3d at 1176.



Beardslee turned to walk away,<sup>49</sup> Cooksey shot him in the chest. The bullet killed him.<sup>50</sup>

Cooksey returned to his house and called 911.<sup>51</sup> He told the dispatcher that, “I just shot a guy out here . . . He threatened my life and I shot him.”<sup>52</sup> When a sheriff’s deputy arrived, Cooksey reiterated that his neighbor “threatened to kill me so I shot him.”<sup>53</sup> As part of the investigation, the responding deputies secured the weapon, obtained a voluntary statement from Cooksey about what had happened, and took a sample of Beardslee’s blood.<sup>54</sup> The blood sample revealed Methadone,<sup>55</sup> a drug known to cause “agitation.”<sup>56</sup> However, the officers made “no effort at all” to investigate whether Cooksey had acted in self-defense.<sup>57</sup>

Cooksey maintained throughout the investigation that he shot Beardslee in self-defense. Cooksey was “a little bitty fellow” and Beardslee was much larger.<sup>58</sup> Cooksey noticed during the confrontation that Beardslee had a knife sheathed on his belt,<sup>59</sup> that he had black rings under his eyes, and that he was acting “crazy.”<sup>60</sup> Cooksey claimed he feared for his life.<sup>61</sup> However, Cooksey admitted that he shot Beardslee as Beardslee was walking away.<sup>62</sup> He also acknowledged that Beardslee never unsheathed his knife.<sup>63</sup> Two fences, one wooden and one barbed wire, separated the two men throughout the encounter.<sup>64</sup>

Cooksey was charged with deliberate homicide.<sup>65</sup> A month before trial, his defense team discovered that a second toxicology screening of Beardslee’s blood and urine revealed traces of the antidepressant drug Paxil.<sup>66</sup> The defense contended that Paxil could have caused Beardslee to act aggressively.<sup>67</sup> Although the district court judge previously had excluded the evidence of Methadone in Beardslee’s blood, Cooksey moved to

49. Appellee’s Br., *State v. Cooksey*, 2012 WL 933836 at \*3 (Mont. Mar. 5, 2012) (No. DA 11-0165).

50. *Cooksey*, 286 P.3d at 1176.

51. *Id.*

52. Appellee’s Br., *supra* n. 49, at \*3.

53. *Id.* at \*4.

54. *Cooksey*, 286 P.3d at 1176.

55. Appellant’s Br., *supra* n. 3, at \*\*4–5.

56. Appellee’s Br., *supra* n. 49, at \*8.

57. *Cooksey*, 286 P.3d at 1193 (Nelson, J., concurring in part and dissenting in part).

58. Appellee’s Br., *supra* n. 49, at \*4.

59. *Id.* at \*5.

60. Appellant’s Br., *supra* n. 3, at \*7.

61. *Id.* at \*3.

62. Appellee’s Br., *supra* n. 49, at \*3.

63. *Id.* at \*5.

64. *Id.*

65. *Cooksey*, 286 P.3d at 1176.

66. *Id.* at 1186 (Nelson, J., concurring in part and dissenting in part).

67. *Id.* at 1179.

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 157

reconsider the exclusion in light of the new evidence of a second drug.<sup>68</sup> Cooksey argued that the “evidence was admissible to show Beardslee was the initial aggressor and to support Cooksey’s testimony that Beardslee was acting ‘crazy, unusual, and extremely unstable.’”<sup>69</sup> The district court excluded the evidence at trial based on unfair surprise to the prosecution.<sup>70</sup> A Musselshell County jury convicted Cooksey in September 2010 and the district court sentenced him to 50 years in prison.

Cooksey raised four issues on appeal to the Montana Supreme Court. The third issue was “whether the State was required to conduct an investigation to discover evidence to support Cooksey’s claim of justifiable use of force.”<sup>71</sup> Cooksey argued that Montana has statutorily added to the investigatory obligations imposed on law enforcement by *Brady*. Under *Brady*, law enforcement is not required to affirmatively investigate exculpatory evidence, only to disclose whatever exculpatory evidence they happen to find. But Cooksey maintained that when justifiable use of force is alleged, § 45–3–112 creates “a duty to investigate that is not otherwise required by due process.”<sup>72</sup> Cooksey believed that the evidence of Beardslee’s drug use was exculpatory and his inability to present it deprived him of a fair trial.<sup>73</sup> He urged the Montana Supreme Court to adopt his interpretation of § 45–3–112 and impose a duty on law enforcement not only to disclose exculpatory evidence, but also to actively search for it.<sup>74</sup>

## IV. THE SUPREME COURT’S REASONING

A. *The Majority Holding*

The majority of the Court was unpersuaded by Cooksey’s argument. In a 5–2 opinion written by Chief Justice McGrath, the Court affirmed Cooksey’s conviction.<sup>75</sup> In affirming, the Court held that the statute governing the investigation of an offense involving a defendant’s claim of justifiable use of force does not require the State to conduct an independent investigation to discover evidence supporting the defendant’s claim.<sup>76</sup>

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68. Appellee’s Br., *supra* n. 49, at \*9.

69. Appellant’s Br., *supra* n. 3, at \*\*6–7.

70. *Id.* at \*11.

71. *Cooksey*, 286 P.3d at 1176.

72. Appellant’s Br., *supra* n. 3, at \*38.

73. *Id.* at \*41.

74. Appellant’s Br., *supra* n. 3, at \*38.

75. *Cooksey*, 286 P.3d at 1183.

76. *Id.* at 1174. There were four issues on appeal: (1) “whether the District Court properly denied Cooksey’s motion for a new trial”; (2) “whether the District Court properly excluded Cooksey’s offered evidence concerning the presence of the drug Paxil in the deceased’s blood”; (3) “whether the State was required to conduct an investigation to discover evidence to support Cooksey’s claim of justifiable use

The majority held that the language of § 45–3–112 “is plain and clear on its face.”<sup>77</sup> The statute “plainly requires that ‘evidence’ that would support the defense of justifiable use of force must be made available for disclosure to the defense.”<sup>78</sup> The Court declined to consider other interpretive approaches because it perceived no ambiguity in the plain language of the statute.<sup>79</sup> Additionally, the Court found “no actual or even potential evidence that was relevant to justifiable use of force that was lost, withheld, or not discovered during the course of the investigation.”<sup>80</sup> The majority seemed to imply that Cooksey’s argument was unpersuasive because his interpretation of the statute would not change the outcome of his own case. In other words, the Court reasoned, somewhat circularly, that Cooksey’s interpretation must be incorrect because it would not have changed the district court’s ruling. The Court concluded that § 45–3–112 merely reflects established obligations requiring the prosecution to disclose any exculpatory evidence in its possession.<sup>81</sup>

### B. *The Dissenting Opinion*

Justice Nelson concurred with the majority’s decision on three of the four issues on appeal—juror misconduct, exclusion of Paxil evidence, and prosecutorial misconduct—but he “strongly dissent[ed]” from the majority’s interpretation of § 45–3–112.<sup>82</sup> Justice Rice joined Justice Nelson in his dissent from the majority’s interpretation of the statute.<sup>83</sup> Justice Nelson began his statutory interpretation with the presumption that “the Legislature does not pass useless or meaningless legislation.”<sup>84</sup> Since the United States Supreme Court decided *Brady* in 1963, prosecutors have had an affirmative duty under the Due Process Clause to disclose exculpatory evidence to the defense. This disclosure obligation has been a statutory requirement in Montana for almost as long.<sup>85</sup> Thus, the dissent argued that “it strains credulity beyond the breaking point to conclude, as the Court does, that the Legislature enacted § 45–3–112, MCA, out of the blue in 2009 merely to ‘reflect’ the disclosure requirements which already existed, and had been in

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of force”; and (4) “whether the prosecutor’s closing argument amounted to prosecutorial misconduct.” *Cooksey*, 286 P.3d at 1176. This article addresses only the third issue.

77. *Id.* at 1181.

78. *Id.*

79. *Id.* at 1180.

80. *Id.* at 1181.

81. *Cooksey*, 286 P.3d at 1181.

82. *Id.* at 1195 (Nelson, J., concurring in part and dissenting in part).

83. *Id.* at 1195–1196 (Nelson, J., concurring in part and dissenting in part).

84. *Id.* at 1186 (Nelson, J., concurring in part and dissenting in part).

85. *Id.* at 1187–1188 (Nelson, J., concurring in part and dissenting in part).

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 159

place for well over 40 years, under *Brady* and § 46–15–322, MCA.”<sup>86</sup> Justice Nelson read § 45–3–112 not as a duplication of the existing disclosure requirement, but as a new duty requiring investigating officers to “uncover evidence which is *not yet* in the possession of law enforcement.”<sup>87</sup> Opponents argue that in practice, laws like this require that officers help “criminals to get away with murder.”<sup>88</sup> The dissent acknowledged that many people might take umbrage at the notion that officers are now required to conduct investigations in a manner designed to uncover evidence that may support a criminal defendant in his or her claim of justifiable use of force.<sup>89</sup> But Justice Nelson reminded the majority that it is not the Court’s job “to protect the people from the consequences of their political choices.”<sup>90</sup>

V. ANALYSIS OF *STATE V. COOKSEY*

In *State v. Cooksey*,<sup>91</sup> the Court was asked to interpret a new statute, § 45–3–112; the crux of the interpretive controversy lay in the word “disclose.” The statute requires:

When an investigation is conducted by a peace officer of an incident that appears to have or is alleged to have involved justifiable use of force, the investigation must be conducted so as to disclose all evidence, including testimony concerning the alleged offense and that might support the apparent or alleged justifiable use of force.<sup>92</sup>

Cooksey shared Gary Marbut’s view and argued that when justifiable use of force is alleged, § 45–3–112 creates “a duty to investigate that is not otherwise required by due process.”<sup>93</sup> The State countered that “this statute imposes on the State no more than the duty to conduct its criminal investigation in a way that will result in full disclosure to the defendant of all ‘evidence’ generated during the investigation and in the State’s possession.”<sup>94</sup> As proof of this contention, the State noted that “[t]he two lawyers on the Senate Subcommittee on H.B. 228, Senators Jent and Shockely, both believed the portion of the bill that later became Mont. Code Ann. § 45–3–112 (Section Four of the original bill) was merely ‘duplicative’ of then-current law.”<sup>95</sup> These contrary assertions illustrate the futility of trying

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86. *Id.* at 1188 (Nelson, J., concurring in part and dissenting in part).

87. *Cooksey*, 286 P.3d at 1188 (Nelson, J., concurring in part and dissenting in part).

88. Megale, *supra* n. 15, at 134.

89. *Cooksey*, 286 P.3d at 1195 (Nelson, J., concurring in part and dissenting in part).

90. *Id.* at 1195 (Nelson, J., concurring in part and dissenting in part).

91. 286 P.3d 1174.

92. Mont. Code Ann. § 45–3–112.

93. Appellant’s Br., *supra* n. 3, at \*38.

94. Appellee’s Br., *supra* n. 49, at \*37.

95. *Id.* at \*\*38–39.

to arrive at some elusive “legislative intent” by grafting the views of one or two individuals onto an entire legislative body. Instead, the Court returned to the language of the statute and used canons of statutory interpretation to resolve the controversy.

#### A. *Statutory Construction in Montana*

Every legislature in the United States has codified to some degree its preferred canons of statutory interpretation.<sup>96</sup> These canons “help extract substantive meaning from, among other things, the language, context, structure, and subject matter of a statute.”<sup>97</sup> States have codified basic grammar and syntax rules,<sup>98</sup> logical canons like *noscitur a sociis* and *ejusdem generis*,<sup>99</sup> and such common law rules as the plain meaning doctrine, the ordinary usage doctrine,<sup>100</sup> and the rule against surplusage.<sup>101</sup>

Montana has codified these basic canons and takes a unique approach to surplusage. The chapter on statutory construction in the Montana Code Annotated begins with a section on the role of the judge: “In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.”<sup>102</sup> Montana also has a distinctive rule against surplusage: “Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.”<sup>103</sup> But perhaps the most exceptional of Montana’s interpretative rules are contained in the chapter entitled “Maxims of Jurisprudence.” The chapter includes separately codified phrases like “[s]uperfluity does not vitiate”<sup>104</sup> and “[a]n interpretation which gives effect is preferred to one which makes void.”<sup>105</sup> These rules, along with common law rules developed by the Montana Supreme Court, guide judicial interpretation of statutes.

The Montana Constitution empowers the legislature to enact laws<sup>106</sup> and the judiciary to interpret laws.<sup>107</sup> “[W]here the language [of a statute] is

96. Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 Geo. L.J. 341, 341 (2010).

97. *Id.* at 344.

98. *Id.* at 357.

99. *Id.* at 354 (“it is known from its associates” and “of the same kind,” respectively).

100. *Id.* at 355.

101. *Id.* at 365–366.

102. Mont. Code Ann. § 1–2–101.

103. *Id.*

104. *Id.* at § 1–3–228.

105. *Id.* at § 1–3–232.

106. Mont. Const. art. V, § 1.

107. *Id.* at art. VII, § 1.

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 161

clear and unambiguous, the statute speaks for itself and [the courts] will not resort to other means of interpretation.”<sup>108</sup> But when words or phrases in a statute are not clear and unambiguous, the courts may turn to legislative intent to aid in interpreting the statute. The Montana Legislature explicitly supports the judiciary’s use of legislative intent and context as interpretative aids.<sup>109</sup> In addition to the problems posed by the interpretation of individual words and phrases in a statute, there is the problem of discerning “legislative intent.” To ascertain the legislature’s intent in enacting a law, the judiciary looks to the legislative history of the law—that is, the public comments made by legislators during hearings or floor debates on a bill. The problem, though, is that “stray snippets of legislative history . . . prove nothing at all about Congress’s purpose in enacting [a law] . . . The Constitution gives legal effect to the “Laws” Congress enacts . . . not the objectives its Members aimed to achieve in voting for them.”<sup>110</sup> So the judiciary is tasked with discovering the intent of a body that has no mind of its own through the words of its 150 members, each with a mind of his or her own.

### B. *The Majority Approach to Statutory Interpretation*

In providing an interpretation of the operative clause of § 45–3–112, the majority of the Court relied upon a single common law maxim: plain meaning. The majority began this portion of its opinion by noting that “legislative intent must first be determined from the plain words used in the statute, and when that is possible no other means of interpretation are proper.”<sup>111</sup> The majority also cited § 1–2–101, which limits the role of the judge to ascertaining and declaring what a statute contains. In a surprisingly brief application paragraph, the Court concluded that “[t]he language of § 45–3–112, MCA, is plain and clear on its face.”<sup>112</sup> It affirmed the district court and “refuse[d] to construe § 45–3–112, MCA, to impose any new and independent duty for law enforcement to investigate cases involving justifiable use of force.”<sup>113</sup> The Court did not delve into the ambiguity of the term “disclose;” did not consider whether the intent of the legislature in enacting the statute was merely to reflect “established obligations;” and did not seem troubled by the statute’s redundancy in the context of the *Brady* requirement and Montana’s disclosure statute.<sup>114</sup>

108. *Cooksey*, 286 P.3d at 1191 (Nelson, J., concurring in part and dissenting in part) (quoting *Rocky Mt. Bank v. Stuart*, 928 P.2d 243, 246 (Mont. 1996)).

109. Mont. Code Ann. §§ 1–2–102, 1–2–106.

110. *Graham Co. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 302 (2010) (Scalia, J., concurring in part and concurring in the judgment).

111. *Cooksey*, 286 P.3d at 1180 (citing *City of Missoula v. Cox*, 196 P.3d 452 (Mont. 2008)).

112. *Id.* at 1180–1181.

113. *Id.* at 1181.

114. *Id.*

The Court also was careless in its representation of Cooksey's argument. It disagreed with Cooksey ostensibly because Cooksey did "little to explain how § 45-3-112, MCA, requires or supports a dismissal of the homicide charge against him."<sup>115</sup> Cooksey did little to explain how the statute requires a dismissal of his homicide charge because that was not, in fact, his argument. Instead, Cooksey read § 45-3-112 in conjunction with the *Brady* requirement and concluded that § 45-3-112 is an expansion of *Brady* that requires law enforcement to affirmatively investigate exculpatory evidence. "Where justifiable use of force is alleged," he argued, "the statute creates a duty to investigate that is not otherwise required by due process."<sup>116</sup> And "[b]ecause this statute does not specify the remedy when law enforcement entirely neglects its duty to investigate, this Court must fashion one, lest the mandatory duty become discretionary. The proper remedy should parallel the *Brady* rule: a new trial."<sup>117</sup> The deputies who investigated the shooting of Beardslee admitted to doing "'absolutely nothing' to investigate the possibility of justifiable use of force."<sup>118</sup> Thus, Cooksey's argument on appeal was that: (1) the statute requires law enforcement to affirmatively investigate the possibility of justifiable use of force;<sup>119</sup> (2) law enforcement did not investigate that possibility;<sup>120</sup> (3) as a result of the failure to investigate, evidence of Paxil in the decedent's blood was not discovered until a month before trial;<sup>121</sup> (4) the district court excluded the evidence of Paxil use on the basis of unfair surprise to the prosecution;<sup>122</sup> (5) the evidence of Paxil use, together with the evidence of Methadone in Beardslee's blood, could have supported Cooksey's argument that Beardslee was the aggressor and was acting "crazy" and the "absence of this evidence tends to 'undermine confidence in the verdict'";<sup>123</sup> and (6) since the statute provides no remedy for a failure to investigate exculpatory evidence, the Court should impose the *Brady* remedy: a new trial.<sup>124</sup> Nowhere did Cooksey maintain that § 45-3-112 requires a dismissal of the homicide charge against him.

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115. *Id.*

116. Appellant's Br., *supra* n. 3, at \*38.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at \*39.

121. *Id.* at \*41.

122. Appellant's Br., *supra* n. 3, at \*41.

123. *Id.*

124. *Id.* at \*38.

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 163

By overstating the clarity of § 45–3–112 and misrepresenting Cooksey’s argument, the majority avoided imposing on law enforcement a distasteful duty: helping criminals get away with murder.<sup>125</sup>

*C. The Dissenting Approach to Statutory Interpretation*

In his dissent, Justice Nelson employed a more rigorous approach to statutory construction than the majority did in its decision. The dissent began not with the plain meaning of the statute—in part because its meaning is not plain—but rather with the presumption that “the Legislature does not pass useless or meaningless legislation.”<sup>126</sup> Justice Nelson also directed the Court’s attention to its own interpretive precedent: “In construing a statute, this Court presumes that the legislature intended to make some change in existing law by passing it”;<sup>127</sup> the Court “reject[s] an interpretation that would render a statute an ‘idle act[ ]’ or that treats a statute ‘as mere surplusage’”;<sup>128</sup> and the Court “harmonize[s] statutes relating to the same subject in order to give effect to each statute.”<sup>129</sup> These canons together comport with the codified legislative preference that “an interpretation which gives effect is preferred to one which makes void.”<sup>130</sup> Only after he took note of these interpretive canons did Justice Nelson address the plain meaning of the statute in question.

Justice Nelson did not think the word “disclose” has a meaning in the statute that is as plain as the majority maintained. In keeping with the ordinary usage doctrine, he cited two common definitions of “disclose”: “to expose to view” and “to make known or public.”<sup>131</sup> The majority implicitly relied on the latter definition. Justice Nelson contended the former was equally plausible and not redundant.<sup>132</sup> Not only must officers “make known” any evidence in their possession, but they also must discover “all of the evidence which may exist.”<sup>133</sup> That is, they must conduct the investigation in a way that will reveal any evidence that might support a defendant’s claim of justifiable use of force.

125. Megale argues that “stand your ground” laws and “the castle doctrine” do, in effect, help criminals get away with murder. Megale, *supra* n. 15, at 133.

126. *Cooksey*, 286 P.3d at 1186 (Nelson, J., concurring in part and dissenting in part).

127. *Id.* at 1186 (Nelson, J., concurring in part and dissenting in part) (citing *Cantwell v. Geiger*, 742 P.2d 468, 470 (Mont. 1987)).

128. *Id.* at 1187 (Nelson, J., concurring in part and dissenting in part) (citing *Formicove Inc. v. Burlington Northern, Inc.*, 673 P.2d 469, 471 (Mont. 1983)).

129. *Id.* at 1186 (Nelson, J., concurring in part and dissenting in part) (citing *State v. Johnson*, 277 P.3d 1232, 1236 (Mont. 2012)).

130. Mont. Code Ann. § 1–3–232.

131. *Cooksey*, 286 P.3d at 1189 (Nelson, J., concurring in part and dissenting in part) (citing *Merriam-Webster’s Collegiate Dictionary* 330 (10th ed., Merriam-Webster 1997)).

132. *Id.* (Nelson, J., concurring in part and dissenting in part).

133. *Id.* (Nelson, J., concurring in part and dissenting in part).



After disagreeing with the majority's contention that § 45–3–112 is plain and clear on its face, the dissent returned to the rule against surplusage. If the Legislature intended “disclose” to mean “to make known,” the statute would only repeat well-settled law.<sup>134</sup> If, on the other hand, “disclose” was intended to mean “to expose to view,” the statute would not be meaningless or redundant.<sup>135</sup> It would instead be an expansion of the duties imposed on investigating officers by *Brady* and Montana's disclosure statute.<sup>136</sup> “It follows, then,” according to Justice Nelson:

that the Legislature intended to change the law . . . such that where police officers *before* did not have a duty to collect exculpatory evidence or assist the defendant with procuring evidence on his own behalf, they *now* have a duty to conduct their investigations (in cases involving justifiable use of force) so as to discover, expose, and make known all such evidence.<sup>137</sup>

At the conclusion of his dissent, Justice Nelson analyzed § 45–3–112 in a context larger than Cooksey's case.<sup>138</sup> He noted one positive effect of the statute might be to place responsibility for evidence gathering on the people who are trained to gather it.<sup>139</sup> Following the majority's decision, the dissent foresaw a situation in which a victim of a violent assault who uses force in self-defense might be required to secure the weapon and other exculpatory evidence in case the investigating officers chose not to do so. “Ordinary citizens are not trained in the technicalities of gathering forensic evidence,” and, Justice Nelson argued, evidence gathering—whether the evidence incriminates or exculpates the defendant—should be left to the professionals.<sup>140</sup> More important, though, was Justice Nelson's exhortation that “[i]t is this Court's solemn obligation to apply the law enacted by the Legislature, not to rewrite the law to suit our ‘better view’ of what we think the law *should* be.”<sup>141</sup>

## VI. CONCLUSION

In a footnote of his dissent, Justice Nelson commented that “‘disclose’ arguably was not the best term for the Legislature to use in § 45–3–112, MCA, given that this is a term of art generally associated with *Brady* and the discovery statutes.”<sup>142</sup> He suggested that a different word, like “expose,” “reveal,” “uncover,” or “discover” may have more accurately con-

134. *Id.* at 1190 (Nelson, J., concurring in part and dissenting in part).

135. *Id.* (Nelson, J., concurring in part and dissenting in part).

136. *Id.* at 1189 (Nelson, J., concurring in part and dissenting in part).

137. *Cooksey*, 286 P.3d at 1190 (Nelson, J., concurring in part and dissenting in part).

138. *Id.* at 1193–1194 (Nelson, J., concurring in part and dissenting in part).

139. *Id.* at 1194 (Nelson, J., concurring in part and dissenting in part).

140. *Id.* at 1193–1194 (Nelson, J., concurring in part and dissenting in part).

141. *Id.* at 1195 (Nelson, J., concurring in part and dissenting in part).

142. *Id.* at 1196 n. 3 (Nelson, J., concurring in part and dissenting in part).

## 2014 STATUTORY INTERPRETATION IN STATE V. COOKSEY 165

veyed the Legislature's meaning and almost certainly would have avoided the interpretive confusion.<sup>143</sup> As Mark Twain once wrote, "the difference between the *almost right* word and the *right* word is really a large matter—'tis the difference between the lightning-bug and the lightning."<sup>144</sup> Because the Montana Legislature used the almost right word instead of the right word, it fell to the Montana Supreme Court to decipher the statute's meaning. But a majority of the Court eschewed that obligation. It seems from their cursory analysis the majority desired a certain outcome—not requiring officers to gather evidence on behalf of criminal defendants who claim self-defense—and read that desire into the language of the statute. Justice Nelson acknowledged the potential benefits of the statute as he construed it—leaving evidence gathering to the professionals—but he did not make his interpretive decision based on the policy outcome he favored. He ended his dissent in deference to the constitutional separation of powers and opined that the Court's power extends to determining what a statute means but stops short of determining whether its enactment was wise.

It seems that the majority in *Cooksey* reached its interpretive decision with a preferred policy in mind; but perhaps a thoughtful analysis of the state of our criminal law might have led it to the opposite conclusion. Seeking to avoid helping criminals get away with murder presupposes that the defendant is a criminal.

Suppose, hypothetically, that Jones is charged with homicide and raises the defense of justifiable use of force at trial, but is convicted and sentenced to life in prison. His rights to appeal and post-conviction proceedings have been exhausted and the parole board refuses to grant him his freedom. The defendant's only hope of relief is to demonstrate his "actual innocence," *i.e.* that he actually did not commit the crime of which he was accused and convicted.<sup>145</sup> This is a very high burden.<sup>146</sup>

143. *Cooksey*, 286 P.3d at 1196 n. 3 (Nelson, J., concurring in part and dissenting in part).

144. George Bainton, *The Art of Authorship: Literary Reminiscences, Methods of Work, and Advice*, 87–88 (D. Appleton & Co. 1891).

145. Jones would have to petition for post-conviction relief, alleging that newly discovered evidence demonstrated his "actual innocence." *State v. Beach*, 302 P.3d 47, 52 (Mont. 2013). He is required to bring this claim within one year of the date that his conviction is final. § 46–21–102 (2013). "While there [is] no statutory exception to this time bar, [the Montana Supreme Court has] recognized an equitable tolling of the time limit when 'strict enforcement would result in a fundamental miscarriage of justice.'" *Beach*, 302 P.3d at 52 (quoting *State v. Perry*, 758 P.2d 268, 273 (Mont. 1988) (overruled on other grounds)). "The 'fundamental miscarriage of justice' exception applies when the petitioner shows he is 'actually innocent' of the crime for which he was convicted." *Beach*, 302 P.3d at 52 (quoting *State v. Pope*, 80 P.3d 1232, 1239–1242 (Mont. 2003)).

146. The defendant "must show by clear and convincing evidence that . . . no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim." *Beach*, 302 P.3d at 53 (internal quotations omitted).

Suppose also that the homicide investigation focused on Jones in 1970. The police used improper practices to extract a confession from Jones, who was a young and troubled man at the time. The police, relying on the confession, failed to gather any evidence of self-defense. Jones's court-appointed lawyer failed to elicit this evidentiary failing at trial.

Now it is 2013. Jones, having exhausted all his legal remedies, seeks a new trial claiming that he did not commit the crime. The law requires Jones prove with competent evidence that he is actually innocent.<sup>147</sup> Jones, of course, cannot. There is no evidence of actual innocence because the evidence that would prove Jones's innocence was never gathered. Such a case is tragically ironic: the defendant has no evidence with which to prove his innocence because his adversary, the State, was responsible for gathering the evidence.

This is precisely the scenario that the Montana Legislature might unwittingly have prevented if the Montana Supreme Court had acquiesced. If law enforcement officers do not affirmatively look for and disclose evidence of self-defense when it is raised in an investigation, they may be preventing the defendant, years later, from being able to meet his actual innocence burden of proof that the State itself has imposed upon him. Justice Nelson hinted at such an outcome in his dissent:

Typically, victims who defend themselves have no more urgent objective than to save themselves from personal harm or death in whatever way they can. If they accomplish that—and live to tell about it—the law should not require that they then gather the evidence which would support their justifiable-use-of-force defense so as to preserve that evidence against loss, alteration, or destruction.<sup>148</sup>

“If we adopt any rule,” Justice Nelson cautioned, “it should be that evidence-gathering should be left to the experts—peace officers and crime scene investigators. The contrary rule suggested by the State, and effectively adopted by the Court, does not even pass the common-sense test.”<sup>149</sup> This is a fundamental policy consideration the majority could have considered in its interpretation of § 45–3–112, but didn't.

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147. The Montana Supreme Court has adopted the United States Supreme Court's test for actual innocence. “Actual innocence ‘does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty.’” *State v. Redcrow*, 980 P.2d 622, 627 (Mont. 1999) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). “A fundamental miscarriage of justice arises only when a jury could find, *in light of new evidence*, that the defendant is actually innocent of the crime.” *Redcrow*, 980 P.2d at 628 (emphasis added).

148. *Cooksey*, 286 P.3d at 1193–1194 (Nelson, J., concurring in part and dissenting in part).

149. *Id.* at 1194 (Nelson, J., concurring in part and dissenting in part). Justice Nelson wrote this sentence in a portion of his dissent addressing a similar case handed down by the Montana Supreme Court on the same day as *Cooksey*, *State v. Mitchell*, 286 P.3d 1196 (Mont. 2012). Both cases required the Court to interpret § 45–3–112 and Justice Nelson dissented from the majority's interpretation of the statute in both cases. *Id.* at 1183.